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Journal of Commonwealth Law and Legal Education

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CONTENTS

IN THIS ISSUE	1
ARTICLES	
Teaching Legal Professionalism: A Comparative Study of Teaching Professional Values and Lessons for Legal Education	3
<i>Richard W. Whitehead</i>	
The Superfoods of Online Learning: Threshold Concepts and Threshold Skills	26
<i>Jessica Giles</i>	
Law Student Wellbeing in the UK: A Call for Curriculum Intervention	44
<i>Caroline Strevens and Clare Wilson</i>	
Refining the traditional flipped-classroom model to optimise student performance on undergraduate degree programmes	57
<i>Dan Berger and Charles Wild</i>	
Is development a fundamental right? A critical analysis of structural reform strategies by IFIs in Pakistan	71
<i>Naveed Ahmed</i>	

RECENT DEVELOPMENTS

- James G. Samuels v Guyana Telephone and Telegraph Company Limited (GT&T) [2015] CCJ 8 (AJ)*** 96
Thomas Durbin

- Controlling or Coercive Behaviour in an Intimate or Family Relationship: A New Domestic Abuse Offence in England and Wales** 99
Keren Bright

BOOK REVIEWS

- Lions under the Throne: Essays on the History of English Public Law** 106
Neil Graffin

- Perspectives on Legal Education. Contemporary Responses to the Lord Upjohn Lectures** 110
Emma Jones

- Inside Crown Court: Personal Experiences and Questions of Legitimacy** 112
Francine Ryan

- Understanding Conceptions of Law** 115
Keren Bright

- COMMONWEALTH LEGAL EDUCATION ASSOCIATION CONFERENCE 2017** 119

- INSTRUCTIONS FOR AUTHORS** 120

- ABOUT THE COMMONWEALTH LEGAL EDUCATION ASSOCIATION** 123

IN THIS ISSUE

This edition of the Journal of Commonwealth Law and Legal Education includes a broad range of articles, updates and reviews offering a wide variety of topics, from online learning to professional identity, from family law to structural reform strategies within Pakistan.

The issue opens with an article by Richard W. Whitehead who considers the development of professional identity not only within legal education, but also as a part of medicine and accountancy. He advocates an approach which embeds professional values and ethical issues within core modules on the law degree and uses formative assessment to facilitate deep learning.

Jessica Giles' article on legal education explores the value of threshold concepts and threshold skills as a way in which to enhance the student learning experience and increase retention and pass rates. She draws on the example of her work on a second year undergraduate online module for the Open University in the UK to illustrate the benefits of utilising these concepts within module design and delivery.

Caroline Strevens and Clare Wilson consider the important issue of law student wellbeing and argue that programme learning outcomes should address student resilience and wellbeing, drawing on the principles of positive psychology. Drawing on work done in Australia and the US they call for further research within the UK on effective curriculum interventions.

Dan Berger and Charles Wild propose refinements to the "traditional" flipped-classroom model which are designed to develop law students' critical reasoning skills. They advocate the inclusion of both online lectures and face-to-face workshops, together with a skills-based face-to-face workshop.

The final article, by Naveed Ahmed, moves away from legal education and uses the history of structural reform strategies in Pakistan to consider the issue of whether people living in the member states of IFIs are entitled to an equitable share of development as a fundamental right.

The last two sections of this edition provide a case note, information on a new domestic violence offence introduced in England and Wales and a number of book reviews. We are seeking to develop this section even further and particularly welcome submissions of case notes and comments on cases, new legislation and proposed law reforms likely to be of interest throughout the Commonwealth

We welcome feedback and enquiries from potential authors and peer reviewers by email at JCLLE@open.ac.uk. Full author submission guidelines are given at the back of this edition.

Emma Jones and Francine Ryan
Editors

TEACHING LEGAL PROFESSIONALISM: A COMPARATIVE STUDY OF TEACHING PROFESSIONAL VALUES AND LESSONS FOR LEGAL EDUCATION

Dr Richard W. Whitecross, Lecturer in Law, Edinburgh Napier University

Abstract

The Legal Education and Training Review highlighted concerns across all sectors, from academics to practitioners over a lack of understanding of professionalism and ethics. Building on a review of two other professions, medicine and accountancy, this paper suggests an approach to embedding, through formative assessment, an approach to promote the development of the complex nature of being a professional and of professional ethics in practice.

Introduction

In the UK LLB ...we still, on the whole, relegate ethical inquiry and practice to vocational courses; and we have little impact on and almost no input to professional educational initiatives.

(Maharg, 2007:4)

What does it mean to teach professional conduct, values and ethics? What does it mean in the specific context of legal education? As part of a wider research project on the changing landscape of the legal profession, it became apparent that there is a pressing need to examine how we currently teach the undergraduate LLB in Scotland.¹ Following the recession in 2008, there have been increasing complaints about the lack of responsiveness in law schools to the changes happening in the profession. Maharg writing just before the recession states that “many of our twenty-first century law schools still inhabit an industrial system of education inherited from a twentieth century mired in nineteenth century structures – a system that is entrenched by the massification of higher education” (2007:5).

In June 2013, the Legal Education and Training Review (LETR) was published. LETR focuses on legal education and provision in England and Wales. However, it is relevant and will influence legal education teaching in Scotland. Amongst a range of concerns identified the review raised concern over the lack of educational provision on professional values and ethics in the undergraduate degree (LLB). LETR highlights the emphasis on these areas at the qualification stages of training. The LETR recommended that students would benefit from earlier exposure to ideas of professional conduct, ethics and values. However, no specific

¹ This project is ongoing and seeks to look at how the changing nature of legal practice can be appropriately reflected in the undergraduate degree.

proposals on how to address this concern were offered. At present, the focus of the undergraduate LLB is on the substantial areas of law and the production of legal knowledge.

In Scotland, following a review of legal education, the Diploma in Legal Practice currently provides the main introduction to core professional values. Therefore, there is, following LETR, a similar need to consider how we teach students about professional conduct, ethics and values during the undergraduate LLB. However, what is meant by “professional values, conduct and ethics” in the Scottish legal educational context is open to a range of interpretations and perspectives that impact on the teaching of these core attributes of the “professional” lawyer.

Two professions that focus on professional values as part of their undergraduate teaching are medicine and accountancy. This paper draws on educational literature on teaching values and ethics general and from both of these disciplines to consider what lessons may be learned and applied when developing and embedding teaching on and of professional conduct, values and ethics in the undergraduate LLB. In addition, the paper draws on legal academic writing from the USA where the law degree is a postgraduate degree and arguably a more vocationally orientated qualification than the LLB in the UK. Whilst acknowledging the differences between the UK, Scotland and the USA in terms of the LLB, the sociology of professions and professionalism has been shaped and influenced by research undertaken in the USA since the 1930s.

The paper is set out in four sections. The first briefly considers what is meant by profession or professionalism. The next section focusses on law, medicine and accountancy. Section 3 identifies key lessons that emerge from comparison of the three disciplines. Finally, the conclusion sets out an argument for building into legal education an element of formative assessment that explicitly links an aspect of professionalism with a piece of assessment that provides feedback for the student to reflect on.

Professions and Professionalism

In this section, consideration is given to how “professionalism” and professional work is conceptualised in three professions.

Law

In 1996 a central recommendation of the Lord Chancellor’s Advisory Committee on Legal Education and Conduct’s *First Report on Legal Education and Training* was that LLB should be an independent liberal education rather than as a vocational degree. Seventeen years later the LETR raises deep concerns over professional values. This oscillation in views on the purpose of the law degree is important for our discussion of how to teach professional values. How indeed when there is no agreement, or competing claims, on what the LLB degree should contain, or indeed seek to do, in terms of preparing the student for a life in

the legal profession. This focus on the vocational aspects of the LLB needs to be tempered. In Scotland, the Law Society of Scotland views the LLB degree as providing a liberal education rather than as a vocational degree. Irrespective of whether or not the LLB is either a liberal education or a vocational degree there is a need to consider what is meant by professional values and ethics.

Sullivan (2005) suggests that professional work has several distinguishing characteristics. A core feature, according to Sullivan, is that professionals engage in making complex decisions that draw on their technical knowledge, skills and informed judgement. Typically, professions are largely self-regulated with a system of controlled entry and being licensed or certified to practice. For example, the Law Society of Scotland sets the requirements for benchmarking and approving LLB degrees for authorised law schools, as well as having oversight of the postgraduate training at designated institutions.

In addition to the entry requirements, professional work is usually governed by ethical codes. According to Sullivan, ethical codes together with the process of certification and continuing professional education assure the client that the professionals are held to high ethical and performance standards (Sullivan, 2005:1 – 6). It therefore follows that doctors are obliged to follow ethical codes and processes of certification. The 1992 MacCrate Report in the USA stated that “lawyers should be committed to “contributing to the profession’s fulfilment of its responsibility to enhance the capacity of law and legal institutions to do justice” (MacCrate, 1992:161).

However, whilst the features of “professional work” suggested by Sullivan are recognisable it is worth noting that a standard definition of professionalism does not exist. Terrell and Wildman (1992) note that professionalism is, on the one hand, about how the work is carried out and, on the other, the underlying values and traditions associated with the profession that have shaped its approach to the work.² Nelson and Trubek (1992:17-18) suggest that for lawyers, “professionalism” has been defined as “the set of norms, traditions and practices that lawyers have constructed to establish and maintain their identities as professionals and their jurisdiction over legal work”. This would be recognised by lawyers from a range of jurisdictions.

More recently, LETR noted that professionalism/ethics was one of the two areas “often mentioned as lacking among new recruits”. Professionalism and professional ethics, as well as its regulation, were “seen as a critical defining feature of professional service” (LETR,

² This is an aspect of other research being undertaken by the author on the changing nature of legal practice and implicit within that research are concerns over the meaning of professionalism and professional practice. As familiar practices and models of lawyering are increasingly challenged by new and emerging ways of seeking legal advice, this raises important questions over professional ethics and values. These are beyond the scope of this paper.

2013: 34). Significantly, LETR noted that these concerns were expressed across the legal sector from legal academics to practitioners. One academic stated that "... they need high ethical standards. And I think again the way it is becoming a business and not a profession is meaning that those matters are being neglected" (LETR, 2013: 35). This concern was echoed by a solicitor who commented that "Our concern, I think, is with commercial providers coming into the legal market that they will adopt a very business attitude to the delivery of legal services, just like any other commodity and will lose the professional ethos of really putting your client first" (LETR, 2013: 35). This final comment is important for it highlights wider concerns about the changing nature of legal practice and the delivery of legal services reflecting wider, rapid, changes that present challenges to the legal profession. Susskind and Susskind (2015) present a compelling argument for the future diversification of the legal profession, amongst others, that does have implications for legal education and professional ethics. The implications of their argument are outwith the scope of this paper, however, the changing nature of professions set out by Susskind and Susskind has implications not only for the professions, but how they are taught and how they can effectively ensure that professional ethics and values are not diluted.

Medicine and "Good Medical Practice"

As a profession, medicine is associated with a range of professional and ethical standards. At the core of medical practice is the importance of making medical judgements in the best interest of the patient or "doing no harm". The study of the main descriptive and prescriptive approaches to judgement and decision-making in clinical medicine draws on a range of disciplines and is not confined to the medical practitioners. In this section, recent guidance from the General Medical Council ("GMC") and its associated website and teaching materials are considered.

In March 2013, the GMC issued "*Good Medical Practice*". This guidance sets out the GMC's approach to the professional duties of a doctor. The guidance expressly states that it applies to student doctors. This is important for it builds into the education and socialisation of the student doctor an awareness and deepening (it is to be hoped) understanding of the professional values by which they will be expected to practice. In setting out the guidance's approach to "professionalism in action", the emphasis is on the duty owed by the doctor to his patient (2013: 4). The language used to describe a good doctor is significant. A good doctor is "competent". Competency is achieved by the doctor "keep[ing] their knowledge and skills up to date, establish[ing] and maintain[ing] good relationships with patients and colleagues". In addition, the good doctor must be "honest and trustworthy" (GMC, 2013: 4).

There is not an aspect of that which seems unreasonable or surprising. However, the final paragraph presents these values or features of the good doctor in a different way. "You must use your judgement in applying the principles to the various situations you will face...You must be prepared to explain and justify your decisions and actions". For revalidation, the

good doctor “must demonstrate that [they] work in line with the principles and values set out in this guidance” (2013: 5).

The presentation of the professional values is noteworthy for its framework approach. Four domains are set out as core to the professionalism and values of all medical practitioners. The four domains are:

- Knowledge, skills and performance;
- Safety and quality;
- Communication, partnership and teamwork; and
- Maintaining trust.

As a final comment on the Good Medical Practice guidance, it is evident from the guide and its references that the GMC have spent considerable time, effort and thought on professional practice since 2008. The range of guidance notes prepared by the GMC range from guidance on developing teachers and trainers in undergraduate medical education (2011) to more recent ones on the use of social media (2013). It is important to note the investment by the GMC as a professional regulatory body demonstrates the importance of a planned, reasoned approach to the teaching of professional values.

Accountancy: The Challenge

Unlike medicine or law there is no one governing body that sets standards and regulates professional behaviour. It is partly due to the fragmented nature of the profession that bodies, such as the Royal Institute of Chartered Accountants (Scotland) are held in high regard globally. Although there are standards of conduct that are promulgated by different accountancy bodies, the lack of a single unified professional body makes it difficult to say which code of practice applies across the profession. In discussion with accountancy professionals and academics it quickly became apparent that it would be misguided to focus on one code of practice and use it to set a benchmark for teaching professional values in accountancy. To address this consideration is given to accountancy literature on teaching professional values in the following section.

Professionalism, Values and Ethics Considered

Professionalism, professional values and ethics in legal education, medicine and accountancy are highly contested. This section provides a broad overview of professionalism and the teaching of professional values in law, medicine and accounting drawn from academic and professional reports from beyond the UK and Scotland.

Law

There is a substantial literature that considers the impact on legal professionalism that has highlighted the implication of “billable hours” and the commercialisation of law. One of the

most striking aspects of this literature is the focus on the relationship between legal education and Big Firms. The role of law schools, notably in the US literature, is criticised for their failing to support the development of an “ethos of professionalism among law students” (Montgomery, 2008: 338). It is striking to note how critical the academic literature, notably but not exclusively in the USA, is of legal education and its failure to engage with developing professionalism. It is argued that, in both substance and pedagogy, law schools’ predominant emphasis is on analytical skills and reasoning through broad exposure to a range of legal areas. A survey of law texts aimed at Year 1 law students quickly demonstrates the importance placed on “critical reading” and legal reasoning. However, there is less emphasis on the wider ongoing development of a professional ethos.

A number of authors note the difference between legal and medical education. Acknowledging their different histories, medical students are primarily educated within clinical hospitals combining the academic and scientific with encountering other members of the profession and patients. This process of socialisation or enculturation ensures that medical students begin developing their professional skills before graduation. This is in sharp contrast to law students. Few law students have professional encounters before entering the profession. Only a small percentage will have experience of law clinics or pro bono work. As the LETR (2013) notes there is a gap at present in legal education around developing a professional ethos and understanding among law students.

After over fifty site visits to study how professional schools educate lawyers, doctors, engineers and nurses, the president of the Carnegie Foundation for the Advancement of Teaching, Lee Shulman noted that “the most overlooked aspect of professional preparation was the formation of a professional identity with a moral core of service and responsibility” (Shulman, 2010: ix) around which the student was taught. In 2007, the Carnegie Foundation published *“Educating Lawyers”*. It argues that legal education needs a more integrated, holistic approach towards educating lawyers. To do this there is a need to elevate education for practice and professional identity to the same level as education for legal analysis. In the same year, a report by the Clinical Legal Education Association, *“Best Practices for Legal Education”*, emphasised the importance of teaching practice and professionalism at the centre of legal education.

“Law schools are inadequately developing an ethos of professionalism in law students.” (Montgomery, 2008: 323). In a general review of legal writing on professionalism and legal pedagogy this statement by Montgomery summarises the general view presented by legal writers. Concerns over the lack of legal teaching focussed on legal professionalism appear to be cyclical. In Scotland we can see it in discussions over the Diploma and recent changes to its structure. Yet despite the changes there remain consistent criticisms of the perceived lack of understanding amongst law graduates of the standards expected of them as “young professionals”. During a series of interviews conducted with partners in a number of large

legal firms in Scotland a consistent theme emerged about concerns over the apparent inability of trainee and newly qualified lawyers to understand the interrelationship between their conduct as professionals and professional values.³ In England, there have been a number of major reviews of which the LETR is simply the most recent. Although the LETR was focussed on England and Wales, it is important that law teachers and law schools in Scotland reflect on the LETR and changes introduced because it will impact on legal education in Scotland.

The American Bar Association (ABA) published in 1986 the Stanley Commission on Professionalism. The report documented a perceived decline in professionalism among attorneys. It set out a series of initiatives for laws schools and law firms to address the problem. Six years later improving professionalism was a key concern of the ABA MacCrate Task Force in 1992. Again, the MacCrate Task Force proposed a professional education continuum beginning in law school, and continuing with the profession, to increase important skills and to strengthen professional values. The report suggests that professional values (or legal ethics) encompass three things: a body of (legal) knowledge, a fundamental lawyering skill and a set of values (ABA 1992: 211- 212).

The MacCrate Report influenced legal teaching in the USA throughout the 1990s and into the early twenty first century. In 1995 Duke University Law School hosted a conference focussed on teaching professional values (Symposium, 1995). Bruce Green (1998) noted that whilst there is a large literature on legal ethics there is less focus on what to teach. There is a lack of agreement about the core elements that should be standard across law schools. The MacCrate Report was broad in its approach and thereby created ambiguity over what should be taught. Green notes the emphasis on teaching legal ethics in American law schools and their general failure to engage students. He proposed a more context based approach to learning with professional values and ethics being spread across all core courses. Green is persuasive yet on reviewing later articles it is unclear how far the approach proposed has been adopted by law schools. However, Wilkins highlighted an interesting approach to teaching professional values across two disciplines: medicine and law. In an innovative course that brought together law and medical students to work together at Harvard University, new insights were created for students and staff about the nature of professional decision making and ethics (Wilkins, 1995).

More recent legal education scholarship has highlighted the expansion of law schools, and questioned the motivation of law schools for the steep increase in tuition fees (Tamanaha, 2012). The economic downturn in 2008 impacted heavily on the legal job market and law graduates from outside the Golden Circle of law schools (Yale, Stanford, Harvard, Princeton,

³ A series of ten interviews with lawyers working in Dispute Resolution were conducted by the author as part of an on-going research project looking at the expectations of firms in terms of the knowledge and skills required in new LLB graduates.

Cornell) have found it difficult to find positions in major law firms. As a result, the focus of legal education literature has turned to consider the role and purpose of law degrees. In part this reflects increasing criticism from students over the cost of law degrees against future earnings. However, Hamilton and Monson (2012) have carried out important qualitative work among entering law students, early-career lawyers and acknowledged legal practitioners about their understanding of professionalism. Their analysis of the findings is interesting for illustrating the changing understanding of professionalism across the three groups. Whilst they are cautious about their findings, “stage-appropriate educational engagements” is important (Hamilton and Monson, 2012: 384). For this to work traditional methods of legal pedagogy need to be reconsidered. They argue, convincingly that there needs to be a move towards student centred moral discourse. A key element in their outlined approach was the use of open ended questions that allowed students to discuss practical concerns (a lesson identified from medical teaching).

Medicine

Professional values constitute the social capital of medicine.

(Royal College of Physicians of London, 2005: 43)

Reviewing the medical education literature, it is striking to note how many calls there are for improved teaching of professionalism to medical students, residents and during continuing professional development (Cruess and Cruess, 1997a, 1997b; General Medical Council, 2001; Royal College of Physicians of London, 2005). These calls arise from public dissatisfaction with the performance of the medical profession in areas where they have direct responsibility—such as self-regulation—as well as the public’s perception that members of the profession are less altruistic than in previous times (Starr, 1984).

From the point of view of the medical profession, the entry of the state and the corporate sector into the medical marketplace have significantly changed the social contract, leading to a belief that the traditional values of the profession are under threat and hence must be actively taught and promoted (Cruess and Cruess, 1997a, 1997b; Royal College of Physicians of London, 2005). Professionalism was traditionally transmitted using respected role models. This method depended for its success on the presence of shared values in a relatively homogeneous medical profession serving a similarly homogeneous society, a situation that no longer exists. Thus role modelling, which remains an immensely powerful tool (Wright et al., 1998; Wright and Carrese, 2001), is no longer sufficient. It is now felt that professionalism must also be taught explicitly.

In the decade following 2000, a range of new approaches to teaching medial professionalism were developed. Maudsley and Strivens (2004) have proposed that, of the educational theories available, ‘situated learning’ theory seems to describe the most effective model to assist in the design of programs which have as their objective the transformation of students

from members of the lay public (or non-experts) to expert members of a profession, with both appropriate skills and a commitment to a common set of values. It suggests that learning should be embedded in authentic activities which help to transform knowledge from the abstract and theoretical to the usable and useful. It is argued by its supporters that there should be a balance between explicit teaching of a subject and activities in which the knowledge learned is used in an authentic context (Brown et al., 1989). While the theory is applicable to all forms of learning, it seems particularly appropriate to educating for the professions, which are communities or cultures joined by “intricate, socially constructed webs of belief” (Brown et al., 1989: 33). An individual’s desire to learn is engaged and can be linked to the intention to join the community of medical professionals.

One contemporary school of thought has emphasized that professionalism needs to be taught explicitly, utilizing either definitions or outlining professionalism as a list of traits or characteristics (Cruess and Cruess, 1997a; Swick, 2000). The objective is to ensure that every physician understands the nature of professionalism, its basis in morality, the reasons for its existence, its characteristics, and the obligations necessary to sustain it. This can be termed the cognitive base of professionalism: in terms of the theory, the subject to be learned is first articulated.

Others have stated that the teaching of professionalism should be approached primarily as a moral endeavour of role modelling, efforts to promote self-awareness, community service, and other methods of acquiring experiential knowledge (Coulehan, 2005; Huddle, 2005). Explicit teaching receives less attention. They seek to embed the learning in an authentic activity, emphasizing the usefulness of the knowledge.

Professionalism is fundamental to the process of socialization during which individuals acquire the values, attitudes, interests, skills and knowledge—the culture—of the groups of which they seek to become a member (Hafferty, 2003). As situated learning theory suggests, a balance must be struck between teaching the cognitive base explicitly and providing opportunities where learning can occur in an authentic context (Brown et al., 1989; Ludmerer, 1999; Maudsley and Strivens, 2004). Cruess and Cruess (2006) outline a number of key areas that underpin the new approaches to teaching professional values to doctors. These key areas are: institutional support, cognitive base, experiential learning, role modelling, continuity, faculty development, evaluation and the environment. Each of these key areas are applicable to other professions, highlighting that medical education provides useful and relevant models for legal education because of the shared goals of professional formation or professionalism of students.

Accountancy

A significant number of studies indicate that accountants, as a group, seem to exhibit lower levels of moral reasoning than other professional groups (Eynon et al., 1997). Poneman

(1992), for example, suggest that accountants' moral maturity lags behind that of other professional groups. Other studies investigate the contribution that accounting and business education has made to this worrying observation and in particular the extent to which accounting education inhibits accountants' ethical development (Gray et al., 1994). Mayer (1988) in particular found that business students do not recognize the broader social responsibility issues associated with professionalism.

Loeb goes as far as to suggest that students have been indoctrinated into believing simply that 'the role of business in society is to produce goods and services at a profit' (1991: 78) and that ethics and social responsibility are unimportant considerations in corporate decision-making unless they have a direct impact on production or profits. Merritt implies that the propagation of these kinds of ideas has 'tainted students by making them mercenary in their approach to their craft' (1991:625). She contends there is a clear indication that business degrees are associated with lower ethical standards and he concludes that 'business schools have not done an adequate job of preparing students to respond ethically to the complex issues that arise in the work environment'(1991:625). However, the profession is also to blame for not insisting that ethics forms a greater part of the broader professional curriculum. Hauptman and Hill (1991:38) somewhat scathingly conclude that the professions are operating as 'amoral economic pressure groups immune from ethical concerns'⁴, and as a consequence, public opinion is becoming increasingly characterized by high levels of cynicism.

Taken together, these studies present the somewhat disturbing possibility that conventional accounting education has a negative impact on students' ethical predispositions (Arlow, 1991). Fleming, for example, concludes that 'the tendency of the evidence is to suggest, if anything, that accountants either occupy the middle ground or lean towards an amoral ethical position' (1996: 215). These studies suggest that both qualified accountants and accounting students tend to view the everyday practice of accounting as an amoral activity (McPhail, 2001; 2002). Some researchers argue that poor quality accounting education contributed to scandals such as Enron (Low et al., 2008). The worry over the nature and impact of accounting education persists (Williams, 2003). Low and colleagues (2008), for example, lament the continuing inability of accounting and business education to prepare accountants for the ethical capacities they require to engage with complex ethical issues.

Yet, as noted, following a number of major scandals (for example, Enron) ethical education of accountants is key to restoring credibility to the profession (McPhail, 2001). In terms of teaching professionalism and ethics, the focus is mainly at the postgraduate and professional qualification stage, rather than during undergraduate studies. At present, according to Accountancy colleagues, professional values and ethics are generally taught through case

⁴ Hauptman and Hill use a phrase from L Newton (1982:37).

studies and peer discussions. Although professional codes are referred to there is, from the available literature, a range of views on how effective the codes are at developing professional values among accountants. Jennings (2004) suggests that the limited research on professional values and ethics training indicates that new approaches are needed in order to integrate a better understanding in students. Jennings notes that her review of the existing literature has identified the following as possible areas for further development in accountancy studies: moral reasoning, virtue ethics, ethical reasoning and codes of conduct. It was recognised that perceptions of accountant integrity affected the profession's integrity, independence and perceived objectivity. For Jennings this presents the profession with a major challenge: how to provide high quality and consistent standards of ethics education to protect the value of the accountancy qualification. A global study into the development and maintenance of ethical standards resulted in the publication by the International Federation of Accountants – International Education Standard (hereafter the IFAC-IES) *“Professional Ethics Values and Standards”* (Jackling et al., 2007).

The *“Professional Ethics Values and Standards”* emphasises developing ethical competence. It sets out two approaches: topic based and stage by stage. The first sets out a number of key topics, for example, an ethical framework, decision making and social issues. The second assesses ethical understanding as an integrated part of the accountancy curriculum. This second approach starts with undergraduate teaching and seeks to assess students through summative and formative methods. However, it is unclear to what extent this report has influenced existing accountancy undergraduate teaching. Of course, the IFAC-IES is just one of many competing international professional bodies with no direct power to make formal requirements on accountancy degree providers.

Drawing the literature together

While the studies discussed above indicate some level of concern over the ethical maturity of accountants in particular, there appears to be similar unease within the other professional bodies under consideration over the level of ethical competence of their members. A review of legal education studies reveals a considerable level of concern over the ethics of lawyers. Kronman (1993) and Webb (1996) have both expressed concern at the unethical behaviour of lawyers and Smith concludes that being a lawyer, ‘inevitably corrupts lawyers’ characters!’ (1990: 70). The medical literature too contains many expressions of concern that doctors’ education may diminish their ethical sensitivity. Miles and colleagues (1989; see also Hafferty and Franks 1994; Parker 1995), for example, blame the scientific and technical focus of the medical degree syllabus for increased cynicism among medical students and declining ‘humanistic sensitivity’ of doctors. Hafferty and Franks (1994) conclude that the professional culture of medics has become ethically compromised.

There appears, therefore, to be a significant level of concern across many of the traditional professions over the ethical characteristics of their members. However, the interesting issue

here is, of course, not which profession is more or less ethical than another. Rather, what lessons can we learn from these professions for the development in undergraduate education of an understanding, appreciation for and embedding of professional values that will be further developed in professional life?

Lessons Learned

Developing an understanding

Learning theorists argue that expertise is best developed through leaning by doing (Green 1998; Hamilton and Monson 2012; Cruess and Cruess, 1997a). Learning by doing is always to some degree formative. Effective learning requires practice, feedback and a response to the feedback on that practice. Importantly, and something that can be easily overlooked in this, is that the lecturer/instructor/tutor should communicate as clearly as possible the aims as well as the content of what is being taught. This clarity of the aims or the goal is essential because it is the process of doing, feedback, reflection, repeating, that constitute the practice being learned. It could be as simple as how to interview a client or more complex such as drafting a letter of advice.

Reviewing the literature, it is clear that the process of assessment is crucial. What is being assessed, and why it is being assessed, conveys to the student what is important about the subject and how to engage with it. What becomes evident is the importance of pedagogy in forming, and shaping the perception, imagination and behaviour of students. The importance of formative assessment as a means of encouraging deeper learning suggests possible approaches to legal education that may enable law students to develop their own understanding of something as complex and integrative as professionalism.

This is reflected in work currently being undertaken at a number of universities. The HEA Strategic Law Summit in January 2014 highlighted a range of innovative projects that seek to incorporate practical legal skills development with professional and ethical considerations. The projects used online scenarios and case management tools to record the student's work. The quality of documents was assessed. However, equally important was the rationale recorded by the student for a particular approach or suggested course of legal action or advice. To capture these important elements, students kept a reflective log throughout the course. Although the ability to be reflective varies from student to student, the reflective logs did provide the module leader with assessable material from which to comment on the professional aspects of the work undertaken. At first students were sceptical of the proposed module structure and this was recorded in their logs. However, towards the end and on reflecting back over the module, a significant number of students commented on their learning.

Moral development models: Kohlberg and its critique

There are two main models of moral development, though they tend not to be fully developed through to how to be put into practice in the educational setting. The two models are Kohlberg and Gilligan. Both are briefly outlined below. It is argued that, rather than one model being simply adopted, good professional values education should reflect a blend of both models. By developing a new professional practice module for accountancy and law students an opportunity arose in which to consider these models and what they suggest may be needed in terms of aligning the course outcomes, assessment and the underlying values that we want to embed in the module.

One of the problems with the studies discussed above is how they determine whether one person or profession is more or less ethical than another. They appear to imply some objective scale of morality. A considerable number of the comparative studies like those above draw on the work of Lawrence Kohlberg and his model of Cognitive Moral Development (CMD) (Hamilton and Monson, 2012; see also Ponemon 1990). Kohlberg's model is used to gauge an individual's moral maturity based on their responses to a series of hypothetical dilemmas. The model itself consists of six discrete predispositions. CMD has been applied to students studying different disciplines and practitioners from different professions. Ponemon (1990), for example, found that accountants' moral reasoning capacity increases until they reach the stage of manager or partner, at which point it decreases.

While Kohlberg's model is prominent within the literature on accounting and law, there is a growing body of work that critiques his position. To begin with, there is some debate as to whether a different level of moral reasoning necessarily results in different types of behaviour (Reiter 1996). However, at a more fundamental level, Reiter (1996) critiques the model itself. She contrasts Kohlberg's conceptualization of moral development with that of Gilligan. Reiter (1996) suggests that, while Kohlberg conceptualizes progress in moral thinking in terms of increased abstraction and autonomy, Gilligan's 'ethics of care' presents a more embedded and empathic view of ethical development. Gilligan was particularly concerned that Kohlberg's model appeared to be developed primarily from studies of male volunteers.

Both Gilligan's and Kohlberg's work is relevant to thinking about how we teach and develop professionalism and professional values. Kohlberg and Gilligan enable us to reflect on how we might conceptualize the professional and ethical development of the individual student. It requires us to consider what we mean by an "ethical" lawyer (accountant, doctor etc)? When we consider the work of the Scottish Solicitors Legal Complaints Commission and public calls by aggrieved members of the public for new codes of practice, Kohlberg's model suggests that simply following ethical codes would represent quite a low level of ethical maturity. Both models provide us with different ways of beginning to think about the kinds

of attributes that could characterize professional and ethical maturity, so the notion of moral development is both complex and contested.

There are also obvious educational implications depending on the type of model espoused by the profession. Reiter (1996) suggests that the majority of ethics education within accounting has been underpinned by the Kohlberg model. Developing an ethics of care, as Reiter rightly points out, requires quite a significantly different form of educational practice. The current approach to teaching professional values and ethics in law schools in Scotland is underpinned by Kohlberg's model. So picking up from Reiter (1996), How do you educate for empathy? In law that should not be a problem we can draw on real cases that raise a range of professional and ethical problems. However, at present, do we link those aspects in to our teaching highlighting professional values and ethics? There lies the challenge for legal education. In the final section initial recommendations for embedding professional values in legal education are set out.

Conclusion - Embedding Professional Values

In the context of legal education this refers to either the Diploma in Legal Practice (in Scotland) or the various postgraduate/vocational law degrees offered in England and Wales. These assumptions appear to contrast with the recent focus by the GMC on embedding professional values into the undergraduate medical curriculum. Yet, there are questions over how well this focus on professional values in undergraduate teaching works or is recognised.

Below, a series of recommendations drawn from the literature and supplemented by interviews with other legal academics and professionals are outlined. The focus of the recommendations highlights the need to consider how ethics and professional values can be incrementally incorporated into the LLB Programme. Through this approach it is suggested that law students will complete the LLB with an understanding of how to approach ethical situations and challenges, recognise the importance of professional values that may at times be in opposition to the commercial drivers of fee income and client retention and provide a strong basis for further learning during the Diploma in Legal Practice.

In setting out the recommendations, three questions suggested by Professor Nigel Duncan at the HEA Strategic Law Summit (2014) have been adapted. The questions are:

- Why do we want to introduce ethics into the undergraduate law curriculum?
- Who should we aim to serve through ethics teaching in legal education?
- What does it mean to be teaching ethics in legal education?

These questions are considered in more depth below.

Why do we want to introduce ethics into the undergraduate law curriculum?

From the readings discussed above, it is clear that our approach to teaching professional values and ethics should seek to enable the student to think, reason, and to feel, as opposed to, “what to think”. This may be to as a minimum make students aware of ethical strains and issues inherent to the materials involved in their study of law. Linking the study of aspects of law to wider social, political and economic issues can both enable students (perhaps encouraging them to volunteer, take part in a law clinic or similar extra-curricular activity). This aspect is important for students have to learn how to connect, to empathise with their clients and a range of other people in their professional working lives. By gradually illustrating the relationship between general ethics and professional ethics and values the students can come to appreciate this aspect of their studies and its relevancy to them in the longer term.

To obtain these aims in practice consideration needs to be given to the following:

- What subject matter (content) is suitable for teaching and learning to think, feel, and act?
- What medium do we use for teaching ethical reasoning, ethical sensitivity, and ethical efficacy?
- How should we assess these learning outcomes?
- Who should we aim to serve through ethics/professional values teaching in legal education?

The first question is less problematic. As with looking at the LLB Programme in terms of the wider capabilities that we expect modules to develop in our students, similarly the ethical/professional aspect can be identified for each module enabling students to reflect on the ethical values and considerations.

It would be all too easy to adopt a “preaching” tone when seeking to educate students about professional values and ethics. Therefore, consideration of how we can prepare suitable tutorial questions that allow the students ownership of their ethical development is important. This will require the developing and sharing of resources and collaboration across modules to enable an incremental understanding of ethical issues. A key aspect will also be the design of a range of assessments which engage and encourage the students to develop their own reflections on their own emerging sense of professional values and approach to ethical issues. Any assessments used should be formative in nature and provide the student with feedback that allows the student to reflect constructively on the assessment.

Can we teach people to act ethically? This question appears constantly in the literature and remains unresolved. However, drawing on Rest and Narvaez (1991) there are four necessary to ethical action:

- Moral Sensitivity – awareness of the moral dimensions of the situation;
- Moral Judgement – ethical reasoning, familiar to us from Kohlberg’s work on the subject;

- Moral Motivation – wanting to act morally - this may involve putting concerns about ethical rectitude above, for example, money, or professional success, or the approval of superiors; and
- Moral Character – the ability to see it through.

Steps (1) – (3) awareness, reasoning, and motivation may all be amenable to teaching and learning and (with careful preparation) assessment. However, on reflection and following discussion with a range of legal academics Step (4) – ethical behaviour in life – presents a range of challenges for assessment.

Building on the discussion set out above, it is suggested that a key recommendation when designing new or revising existing LLB Programme modules is that the following three elements should act as a template.

- Perception or awareness of ethical issues (Sensitivity), what is this about?
- Reasoning in a manner that encourages developmental growth (Judgment), how do we handle this situation?
- Caring about moral (ethical) values (Motivation), why is it important and how does that influence our actions?

Perhaps a fourth, the efficacy in acting upon moral (ethical) values (Character) could be added though again questions of how assessable this aspect would be arise.

In terms of applying these features to the current LLB Programme at the author's own institution should there be a new stand-alone module on ethics? Or should particular modules, for example, Contract Law, Family Law (both Level 7), Human Rights and Business Law (both Level 8) incorporate a theme or an aspect of professional values/ethics. Alternatively, perhaps a more pervasive approach across all modules should be adopted thereby ensuring that all students throughout their four years come across and have to consider professional values and ethics. This approach would build on research undertaken by the Carnegie Foundation that highlighted the effectiveness of curriculums that "map an integrative journey for students" and in which the faculty members "model and coach students" toward a holistic ethical professional identity (Hamilton and Monson, 2012:383).

For the present perhaps a combination of a stand-alone module and selected modules would help address the risk of overlooking professional values or the adoption of a silo approach by students who do not see the applicability across what they learn and achieve a degree of integration. In the longer term the final option may be achievable.

Closing remarks

Reviewing the materials from the two professions identified for comparison in this study, parallels between the UK Professional Standards Framework and the domains identified and set out by the General Medical Council (2013) can be identified.⁵ At present how law schools and law lecturers approach the concept of professionalism will reflect their own learning cultures and environments. As discussed above, there is an unresolved (possibly unresolvable) tension between the academic study of law and the study of law for practice. The academic literature from the USA shows that this is not unique to teaching law in Scotland. However, it is an important discussion that needs to be developed within and between law schools, the professional regulatory bodies and the legal profession.

In the introduction, changes to the contemporary legal landscape were outlined. New challenges and opportunities outlined by Susskind and Susskind (2015) have significant implications for how law is taught and how the teaching of law requires to be kept under review. From reviewing some of the literature across the three professions, it is clear that although there are concerns about how to teach professional values and ethics and debates over how to do so there is consensus that these are, and should, be integral to the development of all students. Singer notes that the “difficulty or strain ought to be welcomed by any properly educated person” (2013: 29). Therefore, the need to integrate the teaching of professional values and ethics into undergraduate education in an explicit way appears to be accepted. Based on a review of the wider literature, this paper outlines a possible approach to developing a new Learning, Teaching and Assessment approach for the LLB Programme that embeds professional values and ethical issues in the core modules.

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⁵ Higher Education Authority – UK Professional Standards Framework.
<https://www.heacademy.ac.uk/recognition-accreditation/uk-professional-standards-framework-ukpsf>

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THE SUPERFOODS OF ONLINE LEARNING: THRESHOLD CONCEPTS AND THRESHOLD SKILLS

Jessica Giles, Lecturer in Law, The Open University, UK

Abstract

This article explains an action research project conducted at The Open University in the UK to assess whether synthesising teaching of threshold concepts with threshold skills could create 'superfoods' of online learning. The aim was to identify study interventions which had a high impact creating maximum benefit for students. The goal was to raise retention and pass rates for and to foster mastery in second year law students. The research was run initially within a tutor group context and ultimately rolled out on two second year LLB modules. The skills training was first trialled in face-to-face tutorials and was then combined with the development of substantive materials for online classrooms.¹

The initial focus was on a constructivist approach to design of materials across the spectrum of study skills. As the project developed it looked in particular at what are termed in this article 'threshold skills', that is skills which students found counter-intuitive and troublesome but which they needed to develop in order to be able to perform well and progress on the LLB. In the final iteration these were synthesized with threshold concepts to facilitate mastery. The sessions aimed to raise standards across the spectrum of student ability.

Introduction

There is now a wealth of study skills literature available to law students, for example, Buzan (2007, 2010), Finch and Fafinski (2012), Cotterell (2013), Haigh (2015), Maughan and Webb (2010), Mc Vea and Cumper (2010). Students, employers and consequently tertiary education institutions are interested in the acquisition of skills that transfer into an employment context. The Quality Assurance Agency subject benchmark statement for law (2015) places the acquisition of skills alongside that of substantive subject matter knowledge². Module materials and assessment have skills written into the learning outcomes.

In the light of the importance now placed on the acquisition of academic and transferable skills as an integral element of the undergraduate study of law, this article explains an action

¹ My thanks go, in particular, to the module teams with whom I worked and continue to work and the leadership and scholarship teams at the Open University together with the academics at the University of Law and the external examiners on both modules.

² See also: Legal and Education Training Review (LETR) <http://letr.org.uk> (accessed 28 May 2015).
LETR report <http://letr.org.uk/the-report/index.html> (accessed 28 May 2015)

research project (the scholarship project) to develop skills training for second year law students to enhance deep learning, retention and pass rates. In the final iteration the scholarship project sought to identify interventions that had maximum benefit for time-poor students – the ‘superfoods’ of online learning.

The skills materials (the essential study skills material) initially covered all the core skills required of second year law students on a qualifying law degree. As the project developed it became evident that some skills were more troublesome for students than others. Accordingly in order to conceptualise the approach taken to skills development certain skills incorporated in the study interventions were considered as “threshold skills”, akin to threshold concepts (Meyer and Land, 2003, 2005, Cousins 2006, Land et al, 2016). Meyer and Land define threshold concepts as those concepts within a subject area that are problematic for students, but once understood transform their understanding. The scholarship project developed this concept for skills, identifying skills that students found troublesome but which they need to acquire in order to progress with their studies. These were skills which transformed them into degree level academic learners. Once acquired these skills transformed the way they approached their legal studies and stayed with them facilitating deeper learning. The project identified a number of threshold skills including legal reasoning (Akerlind et al, 2010); the ability to tolerate ambiguity; understanding an essay/problem question; critical analysis; exams and revision and; timetabling. The project examined whether synthesizing threshold skills with threshold concepts using constructivist learning enhanced students ability to master a subject.

The advantages of skills training

Research undertaken by Christensen (2009) in the United States of America (USA) had demonstrated that integrating skills and legal knowledge maximized law students’ learning. Christensen’s research (2009: 797) demonstrated that students who were willing to develop their skills tended to be ‘mastery-orientated learners’ and were concerned to chart their own progress rather than compete with others and measure their success against others. Those who were mastery-orientated learners tended to remain on the degree and were more successful than those who failed to engage with skills development. The skills grade which students received for skills specific training was the strongest indicator of law student success.

The distinction between the current study and that undertaken by Christensen in the USA was fourfold. First the nature of the students: each cohort in the OU law school study included a substantial number of mature, part-time and open students (no prior qualification required for first year students). Second: the scale of delivery. The Open University law school had 8000 students registered in 2015-2016. During the research project on the modules subject to the action research project there could be between 400 – 1000 students registered on each module. Third the method of delivery: the OU delivered its LLB through

distance learning. Fourth: the scholarship project focused on the delivery of online skills training using online classrooms. The delivery of training sought to optimise flexibility for the students by using prerecorded sessions (asynchronous tuition), combined with some real time (synchronous) sessions where tutor and student were in an online classroom at the same time.

The synchronous use of technology, including online classrooms was well documented in the literature (for example Kirkwood and Price (2011); Brinthaupt et al (2011)): the use of online classrooms using an asynchronous method of delivery was subject to more limited scholarship research.

Action research had been undertaken by Dickie and Van Galen (2016) in Land et al (2016). They assessed students' difficulties in coping with asynchronous online teaching materials. The project explored how to address these issues through module design, in particular how to signpost online content to students.

The scholarship project in its final iteration consisted of 10 prerecorded (asynchronous) study skills sessions, 5 assignment preparation sessions (1 synchronous and 4 asynchronous) and a revision bootcamp (asynchronous). These were interwoven with existing teaching and learning materials. Tutors were able to identify the need for additional skills training to students when marking their assignments. Signposting was therefore undertaken by the tutors. Tutor/student interactivity was also built into the asynchronous materials since the sessions encouraged students to seek further assistance from tutors on study skills if they so desired. The scholarship project went beyond the Dickie and Van Galen study, to consider (1) what was the optimum manner in which to deliver the skills training (2) how to design the content of the sessions by synthesizing skills training with threshold concepts.

The action research project context

The existing module material that students were using took a constructivist approach to teaching and learning and was interspersed with activities. It did not, however, contain in depth teaching on **how** to develop the spectrum of skills required for completion of level two study.

Students submitted 5 assignments during a module presentation and were given detailed feedback on skills development, as well as on their knowledge and understanding. Tutors were required to give guidance on suggested ways to improve, in particular in those areas where students demonstrated gaps in their skills. The main focus for student's analytical skills development was on problem solving and critical analysis in essay writing. Tutors could send students to generic Open University materials, for example on essay writing.

Module results demonstrated that for many students this was not, however, sufficient to enhance their skills to the level required to complete the LLB either at all or in order to

perform to their maximum potential. My experience as a tutor between 2006-2015 demonstrated that students required specific tutoring on their skills development in the context of the module they were studying in order to gain the relevant skills. Skills training needed to be synthesized with module specific content in order to facilitate mastery rather than mimicry in the students.

A trial in 2014 with my own tutor group involved taking the six lowest scoring students for the first assignment and providing an hour tuition per student of synthesised training on skills and module content. All but one of the students saw an increase of 10% in their next assignment. More importantly they appeared to have mastered the skills necessary for ongoing success. This was evident when comparing their results with previous patterns of student behaviour. Those who scored lowest for their first assignment tended to drop out before the final assignment was due. For the students given the one hour of extra training every student stayed with the module during the assignment writing stage and passed that stage of the module.

Students consistently fed-back that they found it helpful to see how the skills were put into practice in relation to the module materials in order to grasp how they were supposed to be developing and applying their academic skills.

In the light of this feedback and in order to add value to existing resources and impact upon students' study experience within the limited amount of time available to part-time distance learning students, the essential study skills material needed to have a high impact. Quantative and qualitative data together with student feedback indicated that tailoring the skills material to threshold concepts and aligning them (Biggs, 1996) with module learning outcomes and assessment created an efficient means of facilitating student mastery. The coherence of the materials was designed to assist the students in making connections necessary for the threshold concept/skills journey.

The methodology

In order to develop and test the effectiveness of skills training it was decided to adopt the action research model developed by Whitehead (1988) and expounded by McNiff (2013, 2014). Both qualitative and quantitative data collected by the Open University Institute of Educational Technology was used to inform the reflection and re-implementation elements of the cyclical action research process. Feedback was taken from tutors and students in the live sessions. In the final iteration of the scholarship project (2015-2016) a survey of both tutors and students was designed to gain feedback on the specific skills interventions implemented in that presentation.

The research was empirical in so far as it implemented a method of skills training for groups of students and measured success using quantitative and qualitative data. The cyclical

method of reflection, adaptation and reimplementation led to the layering of interpretive research over the empirical approach.

The need to understand the development of materials and method in the context of scholarship theory then led to a critical-theoretic approach which was adopted, in particular, during the periods of reflection prior to redesign and reimplementation. It was this element of the research process that led to the development of the concept of threshold skills and the synthesising of threshold concepts and skills. Unlike the strictly critical-theoretic approach the action research method additionally required action to be taken upon the basis of conclusions reached during the period of reflection.

The theory: from threshold concepts to threshold skills

Interaction with students and reflection on assignment and exam performance revealed that students were finding certain skills troublesome – despite detailed feedback on assignments some were not able to grasp legal reasoning, for others critically analysing a statement was a difficult process.

In order to conceptualise a way to approach the development of the skills training the theory of threshold concepts was used. This theory was developed by Meyer and Land within a UK national research project into ‘Enhancing Teaching-Learning Environments in Undergraduate courses’ – <http://www.tlrp.org> (Meyer and Land (2003), (2005), Meyer et al (2016)). Meyer and Land’s work built upon the research of Perkins (1999) looking at ‘troublesome knowledge’. That is knowledge that is ‘alien, or counter-intuitive or even intellectually absurd at face value’ (Meyer and Land (2003:2)). Threshold concept theory has been developed, for the most part, on subject specific material – academics have identified topics within their discipline that fit the threshold concept criteria in order to inform module design: for example Meyer et al (2016).

According to Meyer and Land threshold concepts are:

1. Ideas that are passageways or portals to enlarged understanding of ways of thinking and practicing within a discipline (although attempts have been made to identify threshold concepts that cross disciplines).
2. Transformative: once grasped by a student the potential effect is to facilitate a significant shift in the perception of a subject.
3. Probably irreversible: the change of perspective is unlikely to be forgotten.
4. Integrative: it exposes the previously hidden interrelatedness of something.
5. Potentially troublesome.

A threshold concept is distinct from a core concept. Core concepts are ‘building blocks of the curriculum (Webb, 2008 and Wimshurst, 2011).

The focus in scholarship literature on threshold concepts as subject specific topics, principles or ideas within a discipline had to some extent taken one of the three roads initially set out by Perkins in his research into troublesome knowledge. He identified 'double-trouble', that is the difficulty some students have not only with a substantive concept itself but with 'playing the game' that enabled students to either acquire the knowledge or apply/manipulate that knowledge. This Perkins described as playing the game knowingly (Meyer et al (2006: xvi)). This involves metacognitive knowledge, metacognitive skills and metacognitive experience. It was this trinity of metacognition that the threshold skills materials developed under the scholarship research and sought to harness through design and implementation of the materials.

Research had been undertaken with a focus on skills, rather than the acquisition of knowledge, by Akerlind et al (2010) in Australia. Akerlind's project looked first at whether uncertainty (that there are different ways of considering an issue and different potential answers) was a threshold concept in first year legal education. They ultimately moved on from the ability to manage uncertainty and instead settled on legal reasoning as the threshold concept essential for first year law students. This was because it was transformative – it enabled students to start thinking like lawyers and test issues to the boundaries. It was integrative in that it linked academic study to practice as a lawyer and linked up with the importance of evidence and argument. It was troublesome since it involved students in taking responsibility for their position and forced them to back up their arguments with evidence – for many this was a new experience and changed preconceptions about what the law was. The technique once learnt would remain with students throughout their studies. The research team agreed that mastery would not be achieved in the first year but that teaching the skill up to level two in the first year would undergird further development and study in law generally through the remainder of the students' degree studies. Students would then engage in further mastery as they worked through their degree.

The scholarship project built on the research outlined above by developing a broader spectrum of threshold skills than the Akerlind study. It facilitated the trinity of metacognition identified by Perkins by identifying troublesome skills and synthesising these with threshold concepts. Materials were authored using a constructivist approach to learning which interwove the development of knowledge and understanding of the subject matter with the development of threshold skills.

Synthesising threshold concepts and threshold skills

The threshold skills identified in the action research project included legal reasoning, the ability to tolerate ambiguity, understanding an essay/problem question, exams and revision and timetabling.

Threshold concepts identified in the field of public law included the doctrine of parliamentary sovereignty, the rule of rule, the concept of a constitution and the separation of powers doctrine.

An example of a question used to create the synthesis between threshold skills and threshold concepts was:

“Compare and contrast the manner in which the doctrine of the separation of powers is applied to written and unwritten constitutions”

Students explained that they found it difficult to understand how to break down the question and work out the additional knowledge they were required to demonstrate beyond the self-evident knowledge identified by the wording of the question. They also found it a challenge to work out how to handle the concepts in order to produce the analysis required and how to balance the information to put into the assignments. Time and again assignments would be submitted providing basic knowledge of a topic or part of a topic but failing to address the question. Students did not understand what it was they were supposed to do with the knowledge and how much information to include on a particular topic.

The skills materials were designed to take students step by step through the process of deconstructing a question, identifying relevant knowledge and building analysis round it. Students were encouraged to do this using the ‘analytical’ words indicated in the question. They were given tools for identifying and researching the subject matter. They were then taught how to identify what to do with the knowledge and to do some ‘thinking’ around the knowledge they were required to explain.

In the context of the above question the process was stepped up to give the students confidence by enabling them to identify knowledge on the nature of the constitution and the doctrine of separation of powers. They were also required to think about the interlinking nature of the topics including the additional concepts of parliamentary sovereignty and the rule of law. Some students tried to do all the thinking in one go – rather than breaking down the process - or they failed to provide any analysis at all. Once they understood that the process was a gradual one involving the demonstration of knowledge first they found it easier to start their assignments. They also then took the time to go on to think about the implications of what they learnt.

The process of comparing and contrasting enabled students to start broadening their understanding of these concepts. They were required to identify differences. This enabled them to create the links necessary to start to deepen their understanding. At the same time they were learning to address the question asked.

In the process of providing tools for students to develop the threshold skills of identifying

what a question was asking and to identifying the analysis required in it, students were also getting to grips with threshold concepts. In the above example the threshold concepts incorporated within the question were the doctrine of separation of powers, the concept of a constitution, the rule of law and the doctrine of parliamentary sovereignty. These concepts linked into other threshold concepts and core concepts.

The constructivist and contextual approach to the acquisition of skills enabled students to build up methods of approaching their assignments which they could use as they moved on to other topics. Students' assignments demonstrated that once they had learnt what was meant by 'analysis' by having worked through an example in a context they were currently studying, they then took that skill on with them and applied it to future assignments. They then succeeded in including analysis in future assignments.

Similar stepped, synthesised activities were provided to students in respect of other threshold skills.

The revision bootcamps

In addition to the skills training offered during the module presentation it was decided to provide revision sessions for the students – a 'revision bootcamp'. These were run in the final month before the exam. Students were provided with two prerecorded online sessions suggesting various approaches on how to approach exam questions. They were then given exam questions at the beginning of the week and told to focus on one of the four manuals which formed the basis of the module materials. The following Friday the students could attend a live online classroom session (first iteration of the research project) or prerecorded sessions (second iteration) during which the academic team ran skills sessions to explain approaches to revision and the exam, using the exam questions provided to students. In response to student feedback from the early sessions the students were given information demonstrating what high quality and poor quality answers might look like.

Many students expressed surprise at the depth of knowledge and understanding they were required to obtain in order to be able to address exam questions posed. They also appreciated having a better idea of what was expected of them – having felt somewhat 'in the dark' about what they were required to produce by way of an exam answer.

It was necessary to ensure that the skills training did not encourage mimicry but fostered mastery of both the skills and the threshold and core concepts. The sessions therefore emphasized to students that various approaches could be taken to skills development and to addressing assignments and exam questions. This enabled students to develop skills which best fitted their learning style. The quantitative data indicated that students were starting to master the skills and apply them to new subject areas within their current course of study.

Design of the essential study skills sessions, revision sessions

The essential study skills material took a constructivist approach to student learning by creating a space for transformation to take place. Explanations of concepts were accompanied by activities to engage the students. The learning for the students was experiential since the skills training was interwoven with tutor feedback. Students could practice skills they had learned in their next assignment.

Some students studying the degree were using their legal or academic skills at work and so were gaining transferable workplace skills and undertaking a form of situated learning (Fry et al (2009: 21)). They were given space to reflect on their learning by using a study skills checklist requiring them to review tutor feedback and their own progress.

The checklist was divided into headings as follows:

Core skills (learning how to learn)
Assignment writing (cognitive, key and practical skills)
Digital literacy
Numeracy
Transferable skills and practically using the law
Reviewing and memorizing

Table 1: checklist headings for skills development.

Each study skill was identified under a heading and then classed as either a cognitive skill, practical and professional or key skill. This classification was put in to tie in with tutor feedback under these headings on assignments. This meant that students could easily mark up the self-assessment checklist when they received feedback on assignments. They could identify the skills as already obtained, needing additional independent study or requiring assistance from their tutor. The checklist bore in mind the need for reflective personal development planning (PDP) (Finch and Fafinski (2012: 232-235) and involved students reflecting on skills likely to enable them to meet Susskinds' (2013) prophetic writings for lawyers of the future.

Where study skills gaps were identified in the assignment it was possible to direct the student to the relevant study skills session. The student could use the session to develop the skill through activities in that session and then mark up the study skills checklist.

This method facilitated a cost effective approach to increasing guidance for students and addressed concerns in the higher education sector that opportunities for student/tutor contact was diminishing. These concerns were set out by Hounsell (2008: 2) who described this as 'shrinking opportunities for guidance and interaction'. This was also reflected in the

National Student Survey. Students registered only 72% overall satisfaction with assessment and feedback in the National Student Survey in 2013 and 2014.

<https://www.timeshighereducation.co.uk/news/national-student-survey-2014-results-show-record-levels-of-satisfaction/2015108.article> (accessed 26 January 2015)).

The essential study skills materials addressed these concerns because prerecorded sessions provided targeted guidance on specific areas of concern for the student. It encouraged interaction for distance learning students since the sessions facilitated interaction between the tutors and students. The sessions and checklist encouraged students to contact their tutor if they required further assistance in developing any particular skill. The sessions also facilitated feed forward since students could be sent to resources to develop skills that they could work on between assignments and then practice in the following assignment.

Catering for various learning styles

The materials were designed to cater for various learning styles identified by Wolf and Kolb (Woolf et al (1984)). They were non-prescriptive, setting out a variety of methods for students to work with to enhance mastery rather than foster mimicry. By providing options they encouraged students into the liminal state necessary for transformation in understanding to take place (Meyer, Land, Baillie et al, 2010).

The skills training materials presented students with various methods and ideas leaving them to explore and generate their own style and method if they chose to go beyond established methods. This meant those who enjoyed a divergent learning style could *adapt* the methods by using their imaginative ability and generating their own methods of working.

The sessions proposed frameworks for those who needed them and a jumping off point for those who wanted to adapt them. This also enabled those whose strength was assimilation to pull together a coherent strategy of their own for learning.

In addition the materials played to the strengths of the accommodative learning style by enabling students to plan and engage in voluntary additional activities in ways that were new to them. They were presented with alternative methods, then presented with a problem scenario or essay question. They were then encouraged to try different methods in order to find a method that worked best for them.

The materials provided, for example, various approaches to legal problem solving including mind-maps, the use of lists and flow diagrams. These were to assist students in putting together the steps necessary for problem solving in logical order.

The Kolb-Biglan Classification of Academic Knowledge set out by Becher ((1989), cited in Fry et al (2009: 28)) identifies law as using a particular combined learning style, namely the

combination of (1) concrete experience, learners are involved in new experiences and (2) active experimentation – using theories to make decisions and problem solve, test implications and generate material to re-implement the process. The essential study skills encouraged, in addition, a reflective approach facilitating a rounded learning style by the students and took them outside what might otherwise be the comfort zone for law students.

Students were provided with some abstract conceptualization to assist their understanding. This consisted, for example, of theories of how the memory system and brain works. The materials, in so far as the students chose to engage with any relevant part, therefore had the potential to accommodate the activists, the reflectors, the theorists and the pragmatists – however their effectiveness required a willingness on the part of a student to move outside their core learning style and adopt one of the other learning styles from time to time. The reflectors, for example, could rely on the study skills check list and tutor feedback to reflect on their learning and improvement but needed to respond actively to the learning environment and implement change if the sessions were to be effective for them. There was no assessment of their reflective activity per se – this had to be demonstrated in an improvement of the skill they had reflected upon in assignment and exam performance.

The materials were designed to change student approaches to learning by providing them with the ability to create the tools within themselves to do so. Their journey into the liminal space was encouraged in order to enable them to transform their understanding. This would then enable them to take a deep approach to learning so that their use of academic skills and understanding of the substantive material was transformational. Biggs and Moore see student approaches to learning as modifiable, although Fry et al regard them as difficult to change (Fry et al, 2009: 31). In practice student responses in online sessions and performance in assignments demonstrated that some students adopted new methods and made them their own more easily than others. Once students had experienced transformation in one area, for example, learning how to adopt a method of problem solving, they then became more ready to experience it in another.

The online materials were used strategically at key points in the module presentation: Kirkwood and Price (2011) and Brinthaupt et al (2011) emphasise the need to use technology not only to support and enhance student learning but to transform it in order to enable students to undertake learning activities in ways that had previously been difficult to achieve. They emphasise that the desired educational end, and not technology itself, needs to drive learning design. Dickie and Van Galen (2016) observe that identifying how students are using the technology and whether there are barriers to learning in the use of technology itself is important. They argue that intelligent design can increase students' teaching and learning opportunities through use of technology.

Students feedback that the online sessions were easy to use and that the flexibility of the

sessions was particularly important to them.

Design for deep learning and ongoing mastery of skills

By their very nature the study skills sessions encouraged students into the liminal state described by Meyer, Land and Baillie in Land et al (2010) (for a brief summary of liminality see: <http://www.ee.ucl.ac.uk/~mflanaga/popupLiminality.html> (accessed 16 January 2016)). Liminality is a state where students are prepared and able to accept the unfamiliar, experience uncertainty and transform their understanding so that ultimately they substitute mimicry for ongoing mastery. The mastery was ongoing because students would first grasp a skill at a basic level and as they worked through assignments, received feedback and responded by further developing skills, they re-mastered the skills on an ongoing basis. Students were able to develop integrated understanding, synthesising their skills and substantive knowledge.

Both the prerecorded and live essential study skills sessions provided a safe space for students to develop their skills, a space in which confusion was acceptable and development over time the norm. By rolling the sessions out across a tutor group (and eventually across a module) it became acceptable for students to reveal confusion and they were not made to feel that they were the only one to find skills development a challenge. The study skills checklist enabled students to go back over specific skills training as they worked through their assignments and received feedback. This was because the emphasis was on ongoing skills development rather than single one-off mastery.

Students engaging in the sessions had acknowledged a need to develop their skills, either because they had been made aware of this on assignment feedback or because they themselves had identified this need. There was therefore an awareness on the part of the students that their existing skills development was insufficient for the task they were facing and so they approached the task with a willingness and awareness of the need to transform their understanding. The conditions for them entering the liminal space were therefore set – the challenge was to convince more students of the importance of, need for and benefits of skills training in the first place.

Flexibility

Student feedback during the scholarship project indicated that flexibility was a high priority since the majority were part-time and had work and family commitments. This meant the prerecording of sessions worked well for them. Having sessions that they could listen to at a time convenient to them and which could be taken with them to work, listened to during a commute to and from work or during a lunch break meant they could fit their learning into the gaps they had available. It enabled them to fit the stage of understanding and gaining knowledge into bite sized chunks.

Flexible delivery across a tertiary institution has been evaluated by Nichols and Gardner (2002) at the Universal College of Learning, New Zealand. The project focused on student needs and the use of educational technology. It evaluated the experiences and perceptions of lecturing staff and heads of faculty and assessed student perceptions and acceptance of flexible delivery.

According to Nichols and Gardner (2002: 11) lecturers fed-back that:

“[S]tudents were more able to access learning, enjoyed learning more and were developing a wider range of study skills; however, pass rates and retention rates did not seem to have been significantly affected. Students who were at risk of failing the course and needed to attend face-to-face support sessions were not doing so.”

There was concern amongst those surveyed by Nichols and Gardner that “the less motivated students were struggling” (2002: 11). Lecturers felt their role had become that of a coach or facilitator.

Mindful of the need to engage the students and develop the student tutor relationships the scholarship project combined asynchronous and synchronous learning. The aim of the prerecorded sessions was to give students the opportunity of starting the learning process to encourage them into the liminal space. Or at least set up the conditions for them doing so prior to their face-to-face or live online tutoring. Weaker students were actively encouraged by tutors to engage with the skills training. The stepped approach to developing threshold skills and understanding threshold concepts was important, in particular for those students who were struggling, since they were thereby encourage to stay with the sessions. Students fed-back that the interaction within the sessions was easier than they had anticipated because of the way in which the activities were designed, gradually working through the skills development.

Reflections on the scholarship project.

At tutor group level the action research had a positive effect on performance and retention rates. In 2014B³ all but two of the students who sat the exam at the end of the year passed it. The two students who did not were permitted a resit. In 2014B and 2014J student satisfaction rates went up to 100%. In addition for 2012B and 2013B 100% of students either agreed or mostly agreed that they were satisfied overall with the tutoring.

	2011 B	2012 B	2013 B	2014 B	2014 J
My own	56% strongly agreed	85% strongly agreed	80% strongly agreed	100% strongly agreed	100% strongly agreed

³ The letter indicates the start month of the module: B = February.

tutor group result s	33% mostly agreed	15% mostly agreed	20% mostly agreed		
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Table 2: Student overall satisfaction rates for my tutor group: Response to end of presentation survey to the statement:

“I was satisfied with the support provided by my tutor on this module”.

What is noticeable is the jump in student satisfaction for my own tutor group between 2011B and 2012B. In 2012B the online classroom was used for the full presentation for the first time. By the time the 2014B presentation commenced I had developed a full set of study skills sessions and sessions on the substantive material. It was at this time that overall satisfaction jumped to 100%.

This compares with 86% rating for overall student satisfaction in the National Student Survey 2014: <https://www.timeshighereducation.co.uk/news/national-student-survey-2014-results-show-record-levels-of-satisfaction/2015108.article> (accessed 16 January, 2015). Improvements were evident in assignment standards, with grades at 10% above the average for the whole cohort, and the retention of students during the assignment stage of the presentation was high. The tutor group provision in 2014J had demonstrated that students benefitted from skills training early on, with a 10% or over raise in grades between the first and second assignments after skills training.

When the action project was rolled out at module level the overall pass rate for the module of 60% in 2014B and 57% in 2014J rose to 70% in 2015J. (There were other factors influencing the pass rates during the scholarship project. The impact of the project was assessed as causing a 10% rise in pass rates. Overall student satisfaction rates for the module recorded on the end of module survey remained constant across the two presentations, although student feedback and comments were more positive for the 2015J presentation. The scholarship project saw a rise in scores of +5% at distinction level and +4 at pass level.

Key to the effectiveness of the skills training was that students needed to understand the importance of developing study skills in the first instance. Motivating them to take part was an essential step in the process. Results and feedback demonstrated that the training benefitted students across the skills spectrum, raising standards overall. Encouraging more students to take this up was likely to reap benefits in both the long and short term. It appeared that certain skills acted as threshold skills – once gained they enabled a student to progress through the module and gave them the foundations for moving more confidently on to the next level.

Conclusion: threshold and transferable skills

The scholarship project has demonstrated that synthesizing threshold concepts and threshold skills in online constructivist learning sessions could cause pass rates and student satisfaction to rise. These sessions were the 'superfoods' which demonstrated a high impact on pass rates. Using a combination of synchronous and asynchronous sessions had the advantage of providing flexibility and encouraging students to start the process of entering the liminal space at their own rate. Raising pass rates appeared to require targeted teaching and learning opportunities covering both threshold skills and threshold concepts for assignment and exam preparation. Data from the tutor group research indicated that raising student satisfaction appeared to be achieved by assisting students in their understanding not just of threshold concepts but of all the core concepts and the spectrum of skills on the module.

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LAW STUDENT WELLBEING IN THE UK: A CALL FOR CURRICULUM INTERVENTION

Caroline Strevens, Reader in Legal Education and Head of the Law School, University of Portsmouth and Dr Clare Wilson, Reader in Applied Psychology, University of Portsmouth

Abstract

This paper argues that the design of the law curriculum in England and Wales should be revised to include programme learning outcomes that address the development of the competencies of resilience and management of subjective wellbeing. This need for the curriculum to be underpinned by principles of positive psychology, including self-determination theory, is signalled by the current research from Australia into law student psychological distress and subjective wellbeing and justified by the broad similarities in the context of legal education between Australia and England and Wales. The new 2015 Law benchmark statement provides an ideal opportunity for this to be achieved in the UK.

Introduction

To develop professional students into effective life-long learners is a highly admirable goal. One of the key components to being fully engaged in life-long learning is high levels of subjective wellbeing (Huppert and So, 2013). Yet, this crucial component is often ignored in tertiary education. Indeed, high levels of psychological distress have been reported in many students completing a professional tertiary degree but distress whilst completing a law degree has been the most widely researched (Kelk, Medlow and Hickie, 2010; Larcombe and Feathers 2013; Leahy et al, 2010; Townes O'Brien, Tang and Hall, 2011). This is despite a general belief that students entering University are likely to be embarking on a new stage in their lives and fulfilling desired goals and thus have high motivation and optimism. Indeed, this general belief may enforce the idea that struggling at university is highly 'abnormal' and thereby exacerbate it.

One well-tested route to increasing subjective wellbeing in learners is to utilise Self-Determination Theory (SDT), a theory of motivation and engagement (Deci and Ryan, 2000). The three aspects of psychological functioning that this theory manipulates to increase wellbeing are: autonomy, competency and relatedness (Deci and Ryan, 2000). Sheldon and Krieger (2007) explain SDT in simple terms:

According to SDT, all human beings require regular experiences of autonomy, competence, and relatedness to thrive and maximize their positive motivation. In other words, people need to feel that they are good at what they do or at least can become good at it (competence); that they are doing what they choose and want to be doing, that is, what they enjoy or at least believe in (autonomy); and that they are relating meaningfully to others in the process, that is, connecting with the selves of other people

(relatedness). These needs are considered so fundamental that Ryan (1995) has likened them to a plant's need for sunlight, soil, and water.

(Sheldon and Krieger, 2007, p885)

The main focus of the theory is to explain what is needed for people to be able to motivate themselves to take required actions (that is, to be self-determined). Thus, it is also a theory of self-regulation. The thrust of the theory is that people will regulate themselves most appropriately when they are highly intrinsically motivated to do so (that is, the motivation is the result of psychological factors internal to themselves and thus the task is done for its own reward, such as, 'for the love of it'; Baard, Deci and Ryan, 2004). Indeed, Bailey, and Phillips (2015) confirmed that not only is intrinsic motivation associated with higher wellbeing but also better academic performance and greater student retention. Further, Kanat-Maymon, Benjamin, Stavsky, Shoshani and Roth (2015) found when the three basic 'needs' of SDT were thwarted, students were significantly more likely to cheat. As a full review of SDT is beyond the scope of this paper, please see Hagger, and Chatzisarantis, (2015) for a recent meta-analysis of motivation in education.

Thus, the present paper proposed changing the law curriculum to include information and exercises to enhance resiliency and subjective wellbeing via SDT. Although this will be a radical change in the UK, it is already a reality in Australia (see Field, 2014; Field, Duffy and Huggins, 2014).

Definitions of wellbeing

The World Trade Organisation coined the term 'wellbeing' in 1948 (WHO 1948: 100). According to Fleuret et al 2011 "In Europe, use of the term was found in domains of economy, social welfare or social cohesion, and only penetrated wider policy discussions including health in the 1990s (Perret 2002 in France; Sointu 2005 in the United Kingdom).

Wellbeing is now being discussed in the context of Higher Education, including law (Biswas-Diener et al 2011; Parks 2011). Subjective wellbeing specifically focuses on quality of life from the point of view of emotional reactions and cognitive judgements (sometimes used interchangeably with the term *psychological wellbeing*).

Academics in Europe have turned their attention to the study of subjective wellbeing because it has been correlated with many positive indicators. According to Huppert and So (2013): "In cross-sectional, longitudinal and experimental studies, high levels of well-being have been shown to be associated with a range of positive outcomes, including effective learning, productivity and creativity, good relationships, pro-social behaviour, and good health and life expectancy". For a more extensive review of the literature linking subjective wellbeing with positive outcome indicators, see also reviews by Chida and Steptoe 2008; Diener et al, 2010a; Dolan et al. 2008; Huppert 2009b; Lyubomirsky et al 2005.

Further, Ruff (1989) defined Psychological (subjective) wellbeing as a combination of the following: self-acceptance; the establishment of quality ties to other; a sense of autonomy in thought and action; the ability to manage complex environments to suit personal needs and values; the pursuit of meaningful goals and a sense of purpose in life; and continued growth and development as a person. It is worth noting that the three components of SDT, autonomy, competency and relatedness, were also three aspects of Ryff's definition of psychological wellbeing (Ryff, 1989). Thus, by fostering motivation and engagement in students, their psychological wellbeing should also improve (as the two overlap). Further, student expectations of a course (as discussed below) are likely to also reflect their meanings for doing the course and their values – two other crucial aspects of Ryff's definition of psychological wellbeing. Finally, SDT encourages learners to be proactive in consciously engaging in the learning process (eg. Bailey and Phillips, 2015; Hagger, and Chatzisarantis, 2015).

Why should we aim to develop wellbeing?

Some may be concerned that student wellbeing is seen as an academic concern at all (Escobales, 2004). Why should academics focus on student psychological wellbeing given that it has a complex definition that could be off-putting? One reason is that if students perceive what they are doing as developing their competencies, autonomy, as well as relationships (i.e. it is meaningful in these ways), their motivation and engagement in their course is likely to be high. Indeed, research in two law schools in America (Sheldon and Krieger 2007) demonstrated that by increasing these three factors via curriculum design changes, students showed increased wellbeing, better exam results and higher self-motivation for their first job after graduation.

As mentioned earlier, much of the current research primarily looks at student distress as opposed to wellbeing. This may be problematic for two reasons: First, it looks solely at the emotion and not at what causes it (Verger, et al., 2009). The relevancy of that distress needs to be understood in the context in which it is experienced. For example, a student who may find learning law a struggle, and feel hopeless about their future is in a very different situation to a student who is fully engaged in studying law, finds it very meaningful but also very challenging and time consuming. Both students may report similar levels of distress, despite the fact that the former has very low levels of psychological wellbeing and the latter, high levels of psychological wellbeing. Second, we argue that it may imply academics should be tasked with making students feel comfortable. That is, the "happiness" of the students becomes an academic's responsibility. That has the potential to be patronising to staff and students alike. Indeed, Ecclestone (2014) has expressed similar concerns with focusing on emotional wellbeing:

In my research on the rise of emotional well-being as a focus for educational intervention, I've learned that raising critical questions about these developments leads to allegations of having an elitist disregard for students' needs. I am not suggesting that universities should be indifferent to anxieties, but I believe unchallenged assumptions about vulnerability are damaging the educational relationship between students and academics.

(Ecclestone, 2014, p.1)

Thus, we suggest, the goal of legal educators need not be to safeguard their students' emotional wellbeing, nor the students' happiness per se but as Molly Townes O'Brien 2014 has eloquently written:

The goal is not to produce relaxed and superficially happy lawyers, but to produce competent lawyers and problem solvers, who have the skills and the creativity to address legal and social problems and make a positive difference. Legal education should be experientially and emotionally grounded so that lawyers can embrace the idea of struggle and change.

(O'Brien, 2014, p.8)

Student expectations and motivation

Anecdotally, we see that students in the UK and in Australia entering law school choose to do so "with strong altruistic and naïve ambitions to learn the law in order to become good citizens, to help to change the world for a better place and to help those within it suffering injustice" (Coper, 2010). This is a good example of strong intrinsic motivations. Most first year students share a transformative experience as they begin their studies whether in the UK or in Australia (Field 2014b). It is submitted that the competitiveness of the entry process, the approach to teaching black letter law, the change to independent learning, and a growing realisation of the importance of gaining good grades to secure the key training contract or first job are shared contexts in general terms. These factors may all serve to potentially undermine that intrinsic motivation. Further, research undertaken in Australia by Cvetkovski et al (2012) and in Great Britain by Richardson et al (2015) indicate a risk of higher distress as a result of financial pressures common to both jurisdictions, which may also switch the focus away from intrinsically motivating aspects of completing a law degree. However, very little work has been conducted in exploring this issue. We also know that many students in England and Wales also have ambitions to become barristers and solicitors and that fewer than 50% eventually seek that career path. The formation of this ambition may be linked to fulfilling those altruistic ambitions, or it may be linked with extrinsic motivation of achieving status in society and a secure and substantial income.

We know little about how students develop their expectations of law school whether in the UK or elsewhere. They may have been influenced by media portrayal of lawyers and out of

date parental views on the legal profession. There may be a large gulf between the way law is taught in schools in England and Wales and in Further Education colleges and the way it is taught in university or a student may arrive at law school never having studied law before. This is less likely in many other A level subjects and may account for the apparent gulf between expectation and the first year law school experience in the UK. Further, university law school web sites are full of pictures of wigs and gowns and courtroom settings and this may reinforce student expectations of the activities enjoyed during their degree and the career opportunities they can expect upon graduation. Some interesting research has been conducted by Broadbent and Sellman (2013) on the images law schools in the UK use on their web sites. They comment:

Clegg's (2004) study suggested that law students were sometimes dissatisfied with the way law is taught, thinking that they would be arguing on their feet more of the time, a feeling perhaps reinforced by images of students mooting that populate many of the law school web pages.

(Broadbent and Sellman, 2013, p.1)

According to the Hardee Report, the most important reason respondents gave for choosing to study law was interest in the subject matter. This was followed by a desire for intellectual stimulation, and wanting a stable, secure future. The Hardee Report appears to downplay parental and family pressure upon degree choice and career expectation and appears to indicate that students are intrinsically motivated to study law since they find the subject matter of interest.

Nonetheless Larcombe et al (2012) support the notion that expectations are a key concept for those interested in research into student wellbeing:

Overall, this analysis provides tentative insight into the relationship between students' motivations and expectations and the high levels of psychological distress that many law students experience. The findings suggest that further exploration of motivations and goals, informed by SDT [Self-Determination Theory], would be a productive focus for future research into law student wellbeing.

(Larcombe et al, 2012, p74)

Regulation and curriculum design

Regulation of law degrees in the UK follows a two level process mirrored in Australia. At institutional level, the degree program must satisfy national requirements for standards laid down by the Quality Assurance Agency (QAA) for the UK and the Tertiary Education Quality and Standards Agency (TEQSA) in Australia. Although students may opt to study law degrees without going on into legal practice most law degrees are also designed to satisfy requirements established by the professional bodies. In the UK these consist of the Bar

Standards Board (BSB) and the Solicitors Regulation Authority (SRA). Accreditation of Law Schools in Australia is governed by the Admitting Authorities in each Australian jurisdiction.

In the UK pursuant to the Courts and Legal Services Act 1990 the Law Society and Bar Council are required to agree qualification regulations in respect of those looking to qualify as solicitors and barristers and publish requirements that cover knowledge (through what is known as the Foundation Subjects) and general transferable skills. The qualifying law degree (QLD) is controlled in terms of length, number of attempts at Foundation subjects, and content. However, there is no mention of wellbeing, resilience or self-management within the joint statement. An opportunity to influence the curriculum has not been adopted by the professional bodies. In January 2014, the SRA and the BSB moved from institutional visits to a process of self-certification by Universities who offer QLDs. The expressed aim was “to remove the duplication of oversight of academic standards and quality with that of the Quality Assurance Agency (QAA)” (Academic Stage Handbook, 2014, p4).

This might signal a withdrawal of the professional bodies from taking a role in influencing the requirements for preparation for legal practice. It also appears to conflict with the rationale for including questions about mental health in the Practising Certificate Holder’s survey conducted annually by the professional bodies in the UK. If the legal profession is based upon a fiduciary relationship between client and lawyer this provides a compelling reason for individuals to understand and maintain their own psychological wellbeing and resilience to stress. Mental health issues may result in poor decision making, highly experienced lawyers leaving the profession or even suicide (Eaton, Anthony, Mandel and Garrison, 1990; Gatland, 1997; Leignel et al, 2014). This concern about mental health in the legal profession has resulted in the establishment of the Wellbeing at the Bar Programme¹ and the creation of staff programmes to support resilience by number of leading City of London solicitors firms including Clifford Chance and Hogan Lovell. The 2015 UK Health and Safety Executive statistics on work related stress, anxiety and depression in Great Britain reveal that professional occupations report the highest prevalence of work related stress. If wellbeing is a concern for the profession then addressing its development within the education and training of lawyers would be sensible.

For those not familiar with the Australian context the Law Admissions Consultative Committee (LACC) consists of representatives of the Law Admitting Authority in each Australian jurisdiction, the Committee of Australian Law Deans, the Australasian Professional Legal Education Council and the Law Council of Australia. LACC's main role is to forge consensus between the bodies represented by its members on matters relating to the academic and Practical Legal Training requirements for admission to the Australian legal profession. This includes the Priestley 11, the accreditation and appraisal of academic and

¹ See findings of the 2015 survey of the Bar at <http://www.barcouncil.org.uk/media-centre/publications/2015/may/wellbeing-at-the-bar-report/>

Practical Legal Training institutions and courses. Although Australia has largely abolished the training contract, it effectively retains the concept of the QLD with the “Priestley 11” being equivalent to the UK seven foundation subjects (see Table 4.4 LETR section 4).

In 2010, Threshold Learning Outcomes (TLOs) for law were developed by the Australian Learning and Teaching Council (for similar reasons to the UK system of subject benchmarks explained below) and included self-management as TLO 6. This required Australian law graduates to be able to “reflect on and assess their own capabilities and performance, make use of feedback as appropriate, to support personal and professional development.” This was explicitly included to address the issues raised by research findings around of psychological wellbeing in Law students as is evident from the Good Practice Guide published in 2011 by the Australian Learning and Teaching Council. As explained by Huggins (2015), the TLOs for law have been widely supported by professional and academic bodies across Australia.

The UK QAA publish subject benchmarks for a variety of disciplines including Law, and these “define what can be expected of a graduate in terms of the abilities and skills needed to develop understanding or competence in the subject.” The Law benchmark provides guidance for members of the public including specifically students and employers on minimum standards of knowledge and skills that all law graduates with honours degrees will have achieved. The benchmarks inform the drafting of program learning outcomes by Law Schools and in some subject benchmarks examples are given in the Statement of how the outcomes might be demonstrated and assessed. Thus, most Law Schools in the UK work from these benchmarks and the professional requirements to draft their programme specifications and thereafter draft learning outcomes, appropriate to the level of study, for each module or unit that makes up the degree. This well understood process could be used to effect change. As noted above, an opportunity for curriculum review has arisen with the revision of the Law Subject benchmark in 2015 to include the introduction of self-management and personal development.

At the request of the Council of Chief Justices, LACC conducted a limited review of the Academic Requirements for admission to the legal profession in Australia in 2015. This has resulted in a revised set of Model Admission Rules (MAR) which cover all stages of qualification as a legal professional including the Priestley 11 requirements of the academic stage. The MAR explicitly require Practical Legal Training (PLT) and Supervised workplace learning (SWT) to include resilience and wellbeing in their required competencies and are so clear as to be worthy of quoting in full.

“4.6 All PLT providers and SWT providers should: (a) make applicants aware of the importance of personal resilience in dealing with the demands of legal practice; (b) provide applicants with appropriate access to resources that will help them develop such resilience; (c) provide applicants with information about how and

where to seek help in identifying mental health difficulties and in dealing with their effects; (d) make applicants aware of the benefits of developing and maintaining personal well-being in their professional and personal lives; and (e) provide applicants with information about how and where to find resources to help them develop and maintain such well-being.”

(Model Admission Rules 4.6)

Furthermore the entry level competency standards required of Admitting Authorities now includes Self-Management and in particular to demonstrate “an ability to manage work and personal issues consistent with principles of resilience and wellbeing”.

Although they are clearly written they do not go further than the provision of information. If these were to be reworded to ensure there is some measurable engagement by students with the issues of personal resilience and with tools to develop and maintain wellbeing they would form outcomes capable of measurement by formal assessment.

This clear recognition from Australia of the imperative to address wellbeing should be adopted more widely and in particular in England and Wales due to the contextual similarities. Furthermore the opportunity for widespread curriculum review has presented itself in the UK. In July 2015, the QAA published a revised Law benchmark Statement that now includes two relevant skills and qualities of mind:

“self-management, including an ability to reflect on their own learning, make effective use of feedback, a willingness to acknowledge and correct errors and an ability to work collaboratively”; and

“engagement with their own personal and professional development, and academic integrity.”

(Law Benchmark statement 2015 P7 Para 2.4)

The Law Schools across England and Wales as they map their curricula to these new benchmarks, as is required by the QAA as our regulatory body, are now able to address the issue of wellbeing. Thus the UK has been offered a framework that could be adapted and introduced into the undergraduate law curriculum.

Conclusion

This paper argues that academics should be concerned with student subjective wellbeing and that the law curriculum should include basic principles of positive psychology (including SDT). An effective approach has emerged from Australia and an opportunity has arisen in the UK with the introduction, in the QAA Law benchmark statement, of new qualities of mind: ‘self-management’ and ‘engagement with personal development’. The Australian Model Admission Rules describe appropriate competencies that could be adopted in the UK as

programme learning outcomes. Across both Australia and the US further research is being undertaken into levels of psychological distress in law and other students. Research into wellbeing of students is in its infancy in the UK. This paper supports the imperative to address the issue of wellbeing and calls for further research into effective curriculum intervention in Higher Education aimed at the development of the competencies of resilience and of management of subjective wellbeing.

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REFINING THE TRADITIONAL FLIPPED-CLASSROOM MODEL TO OPTIMISE STUDENT PERFORMANCE ON UNDERGRADUATE DEGREE PROGRAMMES

Dr Dan Berger and Professor Charles Wild, The University of Hertfordshire

Abstract

A paper which advocates the use of online lectures and face-to-face workshops, together with an innovative third element – the skills-based face-to-face lecture – which is designed to improve and enhance students' critical reasoning skills. Critical reasoning, in law and beyond, is defined as the combining of qualitative, subjective argument, or hypothesis, with supporting quantitative, objective, authority. The enhancement of this key skill is vital for not only academic success while students are undertaking their undergraduate degree courses, but has value to future employers in legal practice and many cognate fields.

Introduction

Traditional 'flipped-classroom' models invert the student → lecturer face-to-face contact/at home elements, from the standard 'lecture/homework' method, to the 'online lecture/classroom' method. In schools, where content-based learning is an appropriate methodology, this has been proved to be an effective way to improve understanding, increase student engagement and raise academic standards in a way which has proved difficult in standard classroom teaching methods. However, at university level, there is an additional benefit to the refined flipped-classroom which goes beyond that of merely improving efficiency in dissemination and assimilation of information: it allows and encourages students to develop critical reasoning skills in a way which the standard classroom method of delivery does not explicitly provide for, and the traditional flipped classroom has difficulty achieving

In university legal education assessments, students are expected to construct qualitative arguments, supported by quantitative authority. In essence, the symbiosis between quality (subjective argument) and quantity (external authority) is rewarded, where a student has demonstrated that they have considered social, political and economic factors, and then supported their position using appropriate legitimate authority. The crucial difference between university and school, therefore, is that authority can never be used to construct an argument, but merely to support it, as the argument itself must derive from the student. The reason for this, is that states of quality and quantity are not mutually exclusive – meaning that a person's beliefs are informed by the world around him, and a 'leap of faith' is required to believe that the world around him is true. Therefore, at school level, the assumption is that the average pupil does not possess enough 'quantity' to be able to make an unaided qualitative argument, but, at university, a student should have accrued the necessary skills to do so. This stance is supported by the Quality Assurance Agency (QAA) for Higher Education's aims for a law graduate's attributes, which should include the...:

- Ability to produce a synthesis of relevant doctrinal and policy issues, presentations of a reasoned choice between alternative solutions and critical judgment of the merits of particular arguments
- Ability to apply knowledge and understanding to offer evidenced conclusions, addressing complex actual or hypothetical problems (QAA, 2015)

...but not in the English school's statutory national curriculum for key stages 3 and 4 framework document, which merely states as its main aim:

The national curriculum provides pupils with an introduction to the essential knowledge that they need to be educated citizens. It introduces pupils to the best that has been thought and said; and helps engender an appreciation of human creativity and achievement.

(gov.uk, 2014)

But how does the university student derive his own qualitative argument? The authors assert that this must come from the student's own experiences and knowledge of the world. Authority can do no more than resonate with the student, and no authority can ever be considered 'right', which is why content-based learning, which might be useful at school - where a pupil's knowledge and experience is unlikely to be sufficiently fully formed - is not appropriate for undergraduate degree assessment, where the better student is expected to bring a novel contribution.

It is this 'novel' contribution, supported with authority, which the authors assert in this paper is at the heart of critical reasoning - a key skill, which when utilised correctly leads to legal assessment success - and which is best developed in a 'refined' version of the flipped-classroom model. The authors assert that by adding a tutor-led skills lecture element, which acts as a mirror to a student-led workshop, this crucial refinement provides the optimum framework to allow students to increase their critical reasoning skills, and excel in their assessments.

Critical reasoning

Within the sphere of legal education, the student's argument must come from his own experiences of the world and the society in which he lives. It must also be supported by authority. This is not 'authority' in the strict 1651 Hobbesian vernacular (as law emanating from a sovereign), but more as 'authority without an author', which as van Roermund (2000, p.214) argues is '*irreducibly first-person bound*' within a legal system as a '*socio-political institution*' and therefore:

...one can attack and deny legal authority in certain procedures. Legal authority makes itself vulnerable by providing in advance for counter-action. In yet other words: exercising legal authority requires, among other things, arguing, convincing, persuading and, in general, confronting the audience that imputes authority to a certain body.

This first-person argument, using legal authority to support it, provides the perfect balance between qualitative and quantitative studies, and is not only the foundation of legal argument, but that of the common law system itself. For this reason, we can say that the perfect legal essay is one which makes a novel contribution to the legal system and in itself becomes 'authority'.

It is important to appreciate that the student must pick one side of the argument and use the law to support it, not the other way around. It would be poor assessment practice to simply research the available law and to then decide which principle proves to be the best 'fit'. Indeed, if there is no legal authority to support a student's answer, but the student is still able to demonstrate that they have 'left no stone unturned' looking for it, then the assessment piece should be good enough to publish in a highly regarded legal journal.

Each legal problem will have two sides, even if the assessment simply asks the student to 'discuss' or 'explain' an issue. Within legal education, the term 'explain' does not have the same connotations as it might for other disciplines. Rather, it means 'construct an argument'. It is a polite invitation for the student to defend their position. In other words, once the student has looked at the argument from both sides and has done the required research, he/she must decide which side is more compelling and then explain why this is the case. In the words of Thomas Cowan:

The burden of all pragmatic philosophy is that to arrive at final truth is fatal. But equally fatal is failure to know whether our striving brings us nearer or farther from the truth. In a word, our task is to define truth in such a way that, although we must never arrive at it, yet we must be able to approach it indefinitely...We accept then the fundamental tenet of pragmatism. No generalisation or law remains final. It becomes fact or datum in the further pursuit of truth. No fact is final. Its meaning becomes absorbed in law or generalisation. There is no fixed starting point for science.

(Pound, 1999, p.xiv)

In other words, in a legal assessment, as with other disciplines, there can never be a 'right' answer.

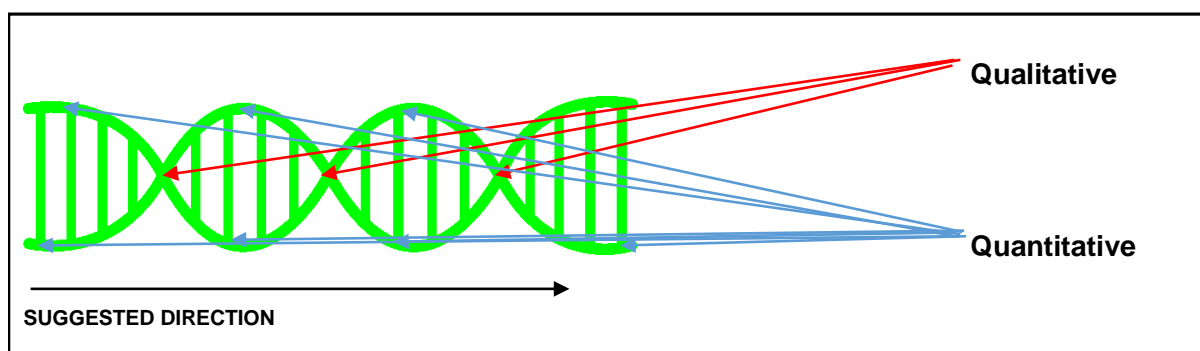
Inevitably, this will entail the student providing an opinion, but not in the sense of it being a rhetoric based on a vague gut feeling. Rather, as noted above, it should be an expert opinion based on research, knowledge of legal principles and an appreciation of policy

considerations. At the very heart of this opinion is the student's own qualitatively constructed argument based on knowledge and balance of the guiding master principles of the common law – justice, fairness and the common good – due to the fact that there is not a legal authority in the world that can provide the perfectly correct answer (Dworkin, 1978). Nevertheless, the student's careful consideration of all of the available source material will ensure that their answer should have both resonance and legitimacy.

In these contexts, qualitative evidence is anecdotal, meaning that it is based on subjective experiences, not being empirically tested or combined in any formal way with other like-for-like evidence to derive a quantitative study. However, as we can appreciate, the more similar qualitative evidence is gathered, the more quantitative it becomes. Likewise, even if a huge quantity of evidence is gathered, a qualitative hypothesis must be derived in order to give the evidence context and to decide its accuracy and validity. Therefore, we can say that qualitative and quantitative states are not mutually exclusive, but are necessary to give each other resonance. It is the symbiosis between these two paradigms which provides 'best' answers to problems, even if not completely 'right' answers.

It is proposed that a 'good' answer is one which follows the double-helix framework for assessments:

Fig. 1:



As we can see from this diagram, qualitative and quantitative study is dependent on, and feeds, each other. If either state is missing or unequally represented, the assessment is either too quantitative ('too descriptive'), or too qualitative ('unsupported by evidence').

By developing the diagram in a double-helix motif, we can see that the process of critical reasoning is an ongoing process without beginning or end, and we can see that qualitative arguments are informed by quantitative knowledge. The corollary, of course, is that quantitative knowledge is set strict parameters by the quality of the context of the initially constructed argument. Lastly, we can see that there are no definitively 'right' answers in academic problem scenarios, as in real life, but that it is the ongoing attempt at the

construction of logically sound arguments, supported by authority, which provides 'good' answers.

Constructing an answer in the common law means balancing the rights of the individuals in the case against the welfare of the wider society that those individuals reside and operate in. As Pound himself argued in his seminal work 'The Spirit of the Common Law' (1921, pp.100-101): '...It follows that, following assertions made in the 1776 Declaration of Independence, the common law was taken to be a system which gives effect to the individual natural rights of man.' However, Pound continues: 'Men are not asking merely to be allowed to achieve welfare; they are asking to have welfare achieved for them through organised society'... which leads naturally to the conclusion: '...although we think socially, we must still think of individual interests'. It is the ongoing attempt at striking a balance between these two seemingly impossible-to-reconcile paradigms, which makes a 'good', if not the 'right', legal answer. Aristotle (1949) accepts that legal decisions must 'best' serve the needs of justice in any society at that specific given time, given that deliberative (policy) arguments and forensic (legal) rhetoric must both be addressed. Making deliberative arguments involves consideration of future society and forensic rhetoric considers today's societal needs (Rieke et al, 1997), and these states are not mutually exclusive. For this reason, 'right' answers, which can never be found or applied, must be eschewed in favour of an ongoing process of critical reasoning.

So, if we were to take the left of the double-helix diagram as a starting point (there is no difference which end is designated the 'start'), we can see that each crossed 'qualitative' point takes us to a new and deeper 'truth'. The further along the double-helix structure the student moves, the deeper the answer provided, until eventually a completely unique answer is formulated. These subjectively constructed answers are, the authors assert, at the very heart of legal critical reasoning.

Flipped v traditional classroom models

Pioneered by Bergmann and Sams in 2008, the traditional flipped-classroom is not a 'model', as such, but a means by which time may be saved (Tucker, 2012). By allowing students to watch instructional videos at home instead of in face-to-face lectures, the student has flexibility when choosing the time they wish to be taught, the lecturer has flexibility when choosing a time to record the lecture, and the student has a cache of stored information to refer back to, when it is time to revise for exams or write coursework.

Of course, it is not enough to simply watch the video and be done with it, as Bergmann and Sams (2012) observes, the tutor must check their notes and requires each student to come to class with a question. This method has proved to be effective in increasing student engagement and academic performance in subjects as diverse as mathematics (Moore et al, 2014), pharmacology (Pierce and Fox, 2012) and multimedia studies (Enfield, 2013).

However, at undergraduate degree level in law, simply checking notes and asking questions of the students would not be sufficient to elicit the required level of critical analysis needed to excel on the course. Since the practice of 'asking questions' is problematic, as it creates arbitrary barriers around the subject area and hinders wider investigation, the authors assert that, at most, '*critical analysis points*' should be embedded into the online part of the model for self-reflection and to explain where the widest parameters of the debate might lie. These points are merely areas for consideration, or perhaps, colloquially, 'something to think about'.

The refined flipped classroom model

The University of Hertfordshire's School of Law has, since 2010, largely adopted the flipped-classroom model, but has added a crucial third part – the Skills Based Lecture (SBL). The 'skill' to be developed, is that of critical reasoning. The three elements therefore are: (i) Knowledge Based Lectures (KBLs) - the online portion of the model to be viewed at home; (ii) the SBL, which is delivered in 40-50 student face-to-face lectures; and (iii) the Workshop, which is delivered in 12-15 student face-to-face groups.

The decision to depart from the standard classroom lecture and seminar method to the traditional flipped classroom model was made following the School's revalidation of the LLB programme after consulting with student representatives, who relayed the message from the student cohort that live lectures were not providing them with the necessary tools to critically analyse. The problem, the authors discovered, was that there was a propensity towards accepting the lecturers' views on the subject matter as qualitative instead of quantitative. At the end of the lecture, when questions would normally be fielded, the problem was that the lecturers' qualitative view was being questioned, rather than the students' own stance. In essence, the opportunity for the student to form their own view was irretrievably lost, and subjugated in favour of the lecturer's, for the reason that the content of the lecture had been arbitrarily drawn at parameters set by the lecturer themselves. No amount of explanation, as to the true nature and value of the lecture, could then be adequately made.

After four years, following the adoption of the traditional flipped classroom, the decision to move to the refined flipped classroom was made on the basis the online lectures were being treated similarly to live lectures, by not only the students, but the staff. The students were still being taught quantitative content as if it were qualitative, thereby negating the need for the students to have any qualitative input. In essence, the students were being taught WHAT to think, not HOW to think. When it came to assessment later in the academic year, many students, naturally regurgitating the taught content, were surprised and dismayed to not be awarded marks for critical analysis – a key component of any higher education marking

criteria. The University's benchmark of 20% or fewer fails across the cohort had not been met, so, therefore, the refined flipped classroom was developed.

Since the new KBL element is treated merely as a cache of information, it becomes quantitative information, which when twinned with an SBL, ensures debate is made on the critical analysis points of the topic. The SBL element ensures that students are led by the tutor into qualitative debate, while the Workshop element ensures that the students lead the debate.

Arguably, the time-saving aspect of the flipped-classroom model is compromised by having the SBL delivered in class, but this is (a) necessary, to ensure that the students engage in lively debate of the critical analysis points in order to learn the qualitative aspect of the topic from the tutor and each other; and (b) is mitigated against, by having the SBL and Workshop parts running on alternate weeks, rather than in each week, as a traditional classroom model would likely specify. This allows for students to watch the KBL and have the SBL in 'even' weeks – it does not matter in which order the student engages with each of these two parts – and the Workshop in 'odd' weeks.

(i) Knowledge Based Lectures (KBL):

The content of this element is a combination of critical analysis points, designed to encourage qualitative enquiry and quantitative authority (such as case law principles, statutory provisions and some academic authority), and are delivered online through the medium of lecture slides (PowerPoint, etc.) together with a voice file commentary per slide, allowing students to pause playback at any time and take notes or watch linked resources. The advent of exciting modern technology has allowed hyperlinks to videos, text and picture files, and other resources, to be embedded within the slides themselves, thereby allowing lecturers to post extra required material to be viewed alongside the lectures.

As well as providing flexibility in allowing students to watch lectures at times to suit them, the KBL is accessible by the student for the full term of the course, so that it can be used as a revision aid. In essence, the material in the KBL provides the backbone of the content element of the course, which augments any written materials provided to the student by way of module guides or other written materials.

(i)(a) Module Guides:

Traditionally, these would contain the lecture materials and prescribed questions for students to prepare and answer before classroom sessions. At the School of Law, we have sought to dispense with prescribed questions, as we believe that this promotes a narrow view of the subject area, and discourages further research outside of the parameters of the debate.

The legal content of the module guides has also been refined, but not wholly changed. Instead of disclosing key principles, each topic area commences with a series of critical analysis points, which are areas meriting the deepest discussion. The student is immediately trained to construct arguments, rather than merely learning principles by rote. For example, instead of lecturing the constitutional principle that the '*separation of powers exists to stop corruption and abuse of power*' and citing Aristotle as authority for the statement, it would be preferable to provide the critical analysis point that '*It may be preferable to NOT have a clear separation of powers*'. Taking the latter approach, there is no authority for the statement, it fosters value-led normative enquiry, it engenders debate and it increases engagement.

The problem with providing 'black letter law' principles in lectures, is it does not explain methodology behind their inclusion. Why has the lecturer told us this principle? Is it the most important? Is the principle unchangeable or arguable? Although a content-based approach might be useful to start, and then narrow, the thought process to allow for efficient learning, the problem for the student is that without an explanation as to why the parameters have been arbitrarily drawn at the stated content, the student struggles to understand the relevance of it. Further, when it comes to assessment, the student may misconstrue the relevance and weight of some parts of the course, and apply weak or wholly unsupported quantitative reasoning to their own qualitative argument.

(i)(b) Final examinable topics:

Since the student now has an understanding that quantitative content is arbitrarily drawn at the parameters set by the compiler of the module materials, and there can never be all content in a given topic disseminated (which is why educators who teach unusable, unassessed principles 'for completeness' are, in effect, short-changing students), it is crucial that the module materials set boundaries as to the widest parameters of the debate expected in an assessment. These, we call 'final examinable topics'. These topics explain to a student the questions which *may* arise in an exam. In our Constitutional and Administrative Law module, the final exam contains six questions, with the student expected to answer a prescribed number within – normally a range between two and four. The list of final examinable topics numbers eight to nine in total, which means that the student understands at the outset of the course that they must focus their attention on a limited number of topics.

The effect of this is that the student is: (a) unconcerned that they be caught-out by not having learned enough content for the final exam; and (b) engaged at a deeper level with the topic area. The idea that the final examinable topics list in some way 'gives the game away' as to what may be in the exam, and therefore favours the weaker student, is fallacy. Students regularly create amateurish algorithms, by researching past papers, to attempt to predict which types of questions are likely to come up in the forthcoming paper; so by disseminating the topic list at the beginning of the course, it levels the playing field among

the student cohort, and develops the notion that stronger students will excel by performing strongly in the exam, rather than merely being lucky or vigilant.

(i)(c) No ‘model’ answers

It is our assertion below that there are no ‘right’ answers in law, and for this reason the practice of giving ‘model’ answers – a set of bulletpoints which sets out how a previous or mock question should be answered – is counterproductive and should be eradicated.

In a ‘model answer’, the qualitative argument and quantitative content and structure is dictated by the assessor, which allows no input from the student, and therefore the student does not feature in the piece. The student is tempted to learn the content and structure by rote, which means that the essential skill of critical reasoning is not developed or honed.

In any case, since exam questions are never reused, a model answer can only have limited use, as a way that a past student has answered a past paper – which, in law, means that the answer will not be relevant to the current political, societal and economic considerations, and the balance between the guiding master principles of the common law could not be struck in any case.

(ii) Skills Based Lectures (SBLs) – the vital new element:

The SBL element must be geared towards the academic law degree and assessment strategy, is tutor-led, and has three equally weighted key elements:

- (a) Knowledge element: Tutor-led Q&A and class discussion on the critical analysis points in the correlative KBL(s);
- (b) Research element: The tutor will demonstrate a research pathway to a specified, in the module guide, of a legal or academic source on online search engines such as Google Scholar or Westlaw. The tutor explains in a step-by-step manner how to reach the source, and most importantly, explains why the source is important to the topic – this marries the quantitative aspect of the topic with the student’s qualitative argument;
- (c) Structure element: The tutor will demonstrate how an answer to a specified question, should be structured, but not answered. The tutor will explain that there is no ‘right’ answer or structure, but will explain good and bad practice.

By delivering the SBL in this way, there will never be repetition of the KBL content, which have now become nothing more than an extension of the module materials. The students have been led, through a Socratic Method-style debate through the critical analysis points of the KBL and have had demonstrations of how to research and structure exam answers. There have been no model answers demonstrated, as the students have been encouraged to engage

in critical analysis of the topic. In essence, they have been taught HOW to think, not WHAT to think.

(iii) Workshops:

The Workshop element must be geared towards the academic law degree and assessment strategy, is student-led, and has three equally weighted key elements:

- (a) Knowledge element: Student-led class debate on the critical analysis points of the KBL and the tutor-led discussion in the correlative SBL;
- (b) Research element: Students must bring to class either a newspaper article or other legal / academic source, which is relevant to the critical analysis points in the KBL. They must also be prepared to debate and discuss the material in class;
- (c) Structure element: Class debate on how to structure a 'good' answer to a specified question in the module guide (a different question from the SBL) or an exam/coursework question.

By delivering the programme this way, the students will wish to engage with all three non-repeated parts, which increases student engagement, for the benefit of both students and educators. The KBL is merely a cache of information, while the SBL and Workshops carry the same three elements: knowledge, research, structure. The difference between the SBL and Workshop parts, is who leads the discussions. In SBLs, the tutor leads the discussion, to build confidence and demonstrate 'best practice', but in the Workshops, the students lead the discussion, with the tutor there to simply keep the students on-course to best practice.

A contract law example

The concept of 'consideration' – a vital element in an English contract - in contract law, is not any easy one to grasp. Students must demonstrate that they understand the underlying principles in order to excel in an exam question on the topic. The problem is that there are many rules, but a better student will understand that they amount to the same thing: the law is attempting to balance the guiding master principles of the common law, rather than slavishly adhering to any other 'rule'.

One key rule derived from the ancient Pinnel's case (1602) 5 Co Rep 117a, is that 'part payment of a debt will never be good consideration'. For example, if I agree to pay someone £100 to mow my lawn, then paying £50 will never discharge remainder of the debt. There might arguably be lots of reasons for this rule:

- (i) To satisfy the need for certainty in contracts;
- (ii) To uphold the technical argument that, without the rule, the £50 in the debtor's hands is a windfall profit;

- (iii) To prevent unfairness;
- (iv) To protect vulnerable parties from potential ransom demands;

...and so on.

However, the underlying reason for this rule is that the law has developed the best balance between protecting the rights of individuals in the case (in this case, favouring the person who mowed the lawn) against the wider welfare of society. There are also other consideration 'rules': 'That a pre-existing contract cannot be good consideration', or the notable 'that it must be sufficient but not adequate'. These rules may all seem different, but they all amount to the same rationale as the part payment rule.

However, immediately after the Second World War in the seminal 1947 High Trees House [1947] KB 130 case, Lord Denning allowed the common law rule of consideration to be subverted by the equitable doctrine of promissory estoppel, by ruling that, in some cases, a party may be absolved from paying the remainder of his debt if he can prove that he detrimentally relied on a promise from the creditor that he would not be pursued for it. The underlying reason was that the common law part-payment rule created an imbalance between individual rights and society rights, in some circumstances. How does a student reconcile the common law part payment rule with the promissory estoppel rule? Does simply promising that you will not pursue a debt preclude you from an action? No, of course not, otherwise the part payment rule would have no application.

The answer is in the critical analysis. The student must understand that promissory estoppel was developed to mitigate against the harshness of the common law rule. If a party can demonstrate that they have been lulled into making part payments of their debt on the promise that the remainder would not be pursued, on the basis that they would have chosen forfeiture of the benefits of the contract otherwise, then the debtor wins. Otherwise, the creditor wins. The balance in the guiding master principles of the common law has now been re-struck.

Is this the 'right' answer? No, this is simply an attempt to balance the guiding master principles of the common law. Therefore, for now, until a better balance might be struck elsewhere, it is a good answer. What this example also proves, is that there is no such thing as a 'hierarchy' of legal principles. The principle from *Pinnel's* case was established in 1601, yet it was subverted in 1947 by Lord Denning. Neither case has been overruled, nor have unequal authority. The excellent student will not be bothered by learning these principles by rote, but will merely use the law to support, rather than construct, his own answer.

In this topic area, a provided critical analysis point in the KBL might be: 'The rules of consideration are there to protect some contracting parties, but not others'. This is a better

approach than the more prescriptive, and less useful, prescribed principle: 'Part payment of a debt is not good consideration', or the prescribed, and narrow, question: 'Why is part payment of a debt not good consideration?'

Conclusion and recommendations

The flipped classroom model was adopted in the School of Law, following the revalidation of the School's law programme in 2009-10, and saw a 10% improvement, from 68% to 78%, in terms of student progression, engagement and assessment results, from the previous standard live lecture/seminar university teaching delivery plan.

Starting in the 2014-15 academic year, the refined three-element flipped classroom model (the focus of this paper) was adopted in a pilot module – Constitutional and Administrative Law – chosen as it is a compulsory module in the current qualifying law degree, and therefore contains the largest student cohort. It is also a first year module, allowing the authors to chart the impact that the refined model had on students with no prior university experience or opportunity to accrue the QAA-specified critical reasoning skills elsewhere.

The results in this module in 2014-15 were improved from the previous year, from 78% to 83%, despite there being no alteration year-on-year to the content of the course, assessment strategy or teaching personnel. The university benchmark fail rate for an individual Year 1 module, including Constitutional & Administrative Law, is set at 20% - this indicates that implementation of the refined flipped classroom model has allowed the university to meet this benchmark for the first time.

The final data to note, is that students entering university, in which their graduation year was 2010, 2013 and 2014, entered at the same UCAS tariff rate – 340 – which indicates that despite the improved graduate performance, the student cohorts in each of these years possessed similar incoming educational capability.

Following the success in the pilot module, the refined flipped classroom module is being utilised in all compulsory law modules in 2015-16. However, the authors assert that this model is not tailored towards law academic programmes, despite the current use of it on the LLB degree, but has wider application towards any subject which values developing students' critical reasoning skills. In fact, the university is now seeking to extend and embed the refined flipped classroom model in a number of programmes across the various Schools. The authors hope that this collaborative, cross-disciplinary approach will further enhance the model.

A further benefit of this refined model, as noted by the authors (Berger and Wild, 2015), is that it has the useful by-product of improving teaching standards by ensuring that the essential elements of the critical reasoning skill is subdivided into its composite parts, into a

simple checklist, for use in legal assessments. This checklist, when applied by the assessor, has two main purposes: (i) to ensure that the student has achieved the appropriate grade for the assessment; and (ii) to ensure consistency and maintenance of quality in the assessment method.

Fig. 2:

Year of entry	UCAS entry tariff rate	Standard teaching model	Traditional flipped-classroom model	Refined flipped-classroom model	Pass rate (%)
2010-11	340	✓	X	X	68
2013-14	340	X	✓	X	78
2014-15	340	X	X	✓	83*

(Source data: The University's Academic Registry Department)

*** The university benchmark fail rate for this module, is set at 20%.**

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IS DEVELOPMENT A FUNDAMENTAL RIGHT? A CRITICAL ANALYSIS OF STRUCTURAL REFORM STRATEGIES BY IFIs IN PAKISTAN

**Dr. Naveed Ahmed, Assistant Professor, University Law College, University of
the Punjab**

ABSTRACT

In the post 9/11 era, Pakistan as a non-National Arms Treaty Organisation (NATO) ally has attained a considerable importance in the United States (U.S.)-led war on terror. Yet Pakistan is facing severe threats of growing terrorism, while also confronted with economic crisis. The U.S. and International Financial Institutions (IFIs) have shown interest in helping salvage Pakistan's ailing economy. Pakistan has been involved in a series of Structural Adjustment lendings with the World Bank and International Monetary Fund (IMF) but the economy is still unable to achieve the desired outcomes. However, there are a number of factors responsible for the failure of Structural Reforms of the World Bank and IMF in Pakistan. This article examines the Structural Reform Strategies of the World Bank and IMF, which were introduced in Pakistan during the military and post-military regimes. The central argument of this article is that the geo-strategic position of Pakistan has often served as a site for contestation, which mostly serves the interest of bigger powers such as the U.S. However, it is key question here whether the people living in the member states of IFIs are entitled to an equitable share of development, or not, as their fundamental right?

Key Words: Development, IMF, World Bank, Pakistan, IFIs, SAPs, Structural Reforms, Poverty Reduction.

1. INTRODUCTION

In 1944, a year before the end of Second World War, the Bretton Woods institutions¹ were set up at the Conference in New Hampshire (IMF, homepage). According to Abouharb and Cingranelli, the IMF was set up because of the belief that the international world had been unable to address the financial problems that confronted "Germany during the late 1920s and early 1930s" (Abouharb and Cingranelli, 2007: 57). The major focus of the IMF policies was to ensure global economic stability through balance of payments methods to member countries. However, the World Bank was set up to cope with the economic instability of post-World War II Europe and subsequently, the financial well-being of the developing world. The bank first focused on project lending² until the late 1970s and then shifted from 'project to structural adjustment lending' in the 1980s (Abouharb and Cingranelli, 2007: 58). These

¹ The term is commonly used for the World Bank and IMF.

² The World Bank focused on the support of building public services such as dams and power plants.

lendings were attached with policy conditions proposed to encourage financial development emphasizing macro-economic factors as well as structural factors (Abouharb and Cingranelli, 2007: 57-58).

The Structural Adjustment Programmes (SAPs) have their origins in the 1980s in the aftermath of the debt crisis of the early 1970s and this was the period when the Organization of Petroleum Exporting Countries (OPEC) enhanced the petroleum rates and deposited their profit in western banks. These banks were intended to disburse loans to the developing countries with the understanding that these countries will buy the commodities of industrialised states. The industrialised countries introduced a chain circle to generate more money from these loans as well as to explore markets for their industrial products. George (1995: 21) notes that developing countries borrowed money from these banks for development, sometimes at low interest rates. However, studies have indicated that most of the money has been wasted on useless projects or looted by corrupt elites (Jauch, 1999; Ng'ambi, 2009: 48-49).

In the early 1980s, the U.S. Federal Reserve increased interest rates considerably to reduce inflation and, as a result, the developing countries which borrowed money at cheapest interest rates were compelled to pay back at higher interest rates. The situation led to the debt crisis and pushed these countries to sign up new loans for the payment of old ones. Many paid back monies borrowed but still remained highly indebted. A classic example is Mexico which announced in 1982 that it was unable to pay its debts. This situation created an opportunity for the World Bank and IMF to step in by offering new loans in the shape of SAPs attached with certain conditionalities (Jauch, 1999; Ng'ambi, 2009: 48-49; Bond, 2003: 21-22).

The SAPs³ were introduced by the World Bank and IMF for the improvement of financial stability and speedy economic growth of developing countries. The main purpose of the SAPs was to decrease the monetary inconsistency of the loan receiving countries and ensure that money lent would be utilized for fulfilling the specific purpose of the loan. The proposal for SAPs had its origin in 1981 "when the administration in the U.S. and Thatcher administration in the UK" and their coalition partners suggested that further conditionalities be attached to loans to the developing countries (Abouharb and Cingranelli, 2007: 63). The IFIs insisted on 'neoliberal economic reforms' when providing funding for Structural Adjustment Agreements (SAAs) to the developing countries (Ibid). Some of the economists, international experts and scholars from "Caribbean and Latin America" such as Abugre (2000: 5) and Ikejiaku (2008: 2-3) acknowledge ten financial reforms known as "Washington Consensus",

³ The World Bank and IMF designed SAPs for developing countries with a special focus on "macro-economic conditions" which were declared mandatory before applying for lendings to these financial institutions. The main characteristics of the SAPs were "Privatisation, Liberalisation and Economic Stabilisation measures". Unfortunately, the SAPs failed to achieve the targets and aggravated poverty rather than alleviate it (Abugre, 2000: 5-6).

enforced in 1990 after the debt crisis of early 1980s. These financial improvements for SAAs, included “fiscal discipline, financial liberalization, unified and competitive exchange rates, tax reforms, trade and investment liberalization, deregulation, privatization, macroeconomic stability, and protection of property rights” (Abouharb and Cingranelli, 2007: 63). According to a number of critics, the SAPs have had little success although the World Bank and IMF have claimed a few success stories. Most of the Structural Adjustment Programmes failed to reduce impoverishment and were unable to provide the basic facilities of life especially to the third world (Jauch, 1999; Ikejiaku, 2008: 2-3; Gelinis, 1998: 75; Jones, 2001: 14).

Rittich (2005: 200) suggests that the Comprehensive Development Framework (CDF) is known as the beginning of ‘Second Generation Reforms’ in the World Bank presented by the Bank’s President for discussion (Wolfensohn, 1999). The CDF takes into consideration issues of “social, structural and human” factors. The key areas such as education, health, human rights, rule of law and good governance are highlighted as issues of prime importance in CDF for sustainable development. The World Bank endorsed in a statement that CDF was to be now regarded as a base in development policy for the achievement of sustainable development (World Bank, 1999).

In 1989, following a report on the Sub-Saharan African Crisis, the World Bank concluded that the absence of good governance was central to the African Development Crisis (World Bank, 1989: 60-61). It is pertinent to note that the World Bank was the leading financial institution to realise the importance of good governance. The World Bank replaced its SAPs with Poverty Reduction Strategy Papers (PRSPs), with good governance as a basic condition for the loan receiving countries (Curtin and Wessel, 2005: 81).

The Economic Commission for Africa (ECA) in its report strongly condemned the SAP in Africa (Dibua, 2006: 41). The World Bank administration tried to refute the impression of negative impacts of the SAPs in most of the Sub-Saharan African countries through different speeches and successive reports from time to time. They observes:

Neo-liberal policies, championed by the World Bank and International Monetary Fund (IMF) ...have not secured ‘economic take-off’. Rather there has been growing immiseration through livelihood displacement, physical infrastructural decay, and social service breakdown. In a bid to deflect criticism, the World Bank has co-opted a post-modernist perspective ...documenting the ‘voices of the poor’

(Bryceson and Bank ,2001:5; Dibua, 2006: 41).

In September 1999, the Poverty Reduction and Growth Facility (PRGF) was introduced for the reduction of poverty and enhancement of growth level in low income and highly indebted poor countries (HIPC) by IMF lendings. The IMF introduced PRGF by substituting its Enhanced Structural Adjustment Facility (ESAF) on the same terms and conditions, which

correlated to PRSPs. The PRGF programmes were modelled in such a way that they became the sole responsibility of the IMF. These programs were designed with the help of World Bank Staff and the mechanism of conditionalities attached with loans was the joint effort of the IFIs (IMF, 2007). The PRGF Programmes were intended to focus on three fundamental objectives as explained by the IMF:

First, the principles of broad public participation and country ownership are central to the PRGF" ... Second, PRGF-supported programs reflect closely each country's poverty reduction and growth priorities and, as long as macroeconomic stability is maintained, seek to respond flexibly to changes in country circumstances and pro-poor priorities....Third, PRGF-supported programs focus on strengthening governance, in order to assist countries' efforts to design targeted and well-prioritized spending...

(IMF, 2009a).

The IMF and the Independent Evaluation Office (IEO) received in 2002 and 2004 respectively satisfactory reports about the PRGF noting that it is helpful "to higher public expenditure and Pro-Poor Spending" (IMF, 2007). Although the IMF claimed some success stories there were failures as well. Rustomjee (2004: 21-22) attributes this to the "inadequate level of voice and representation in the IMF" and focussing on "the traditional stabilization objectives of the IMF" as one of the major factors for the failure of the PRGF in the Sub-Saharan African countries.

The late 1990s attracted considerable debate for change in the old international developmental approach of economic governance. The IFI's policies were strongly criticised in the wake of the East Asian Crisis of 1997 and the failure of SAPs in developing countries. As a result, "the 1999 review of the HIPC forced the IFIs to seek a solution to link debt relief to poverty reduction" (UNDP, 2009: 3). All these factors contributed and, in September 1999, the World Bank and IMF in their joint meeting initiated a Poverty Reduction Strategy Paper (PRSP), a new framework for better relations with poor countries, which "centred on the development and implementation of Poverty Reduction Strategies (PRSPs) by recipient countries as a precondition to accessing debt relief and concessional financing" (Christiansen and Hovland, 2003: 4). In 2001, the World Bank initiated Poverty Reduction Strategy Credits (PRSCs) as new framework of funds from the International Development Association (IDA) for recipient countries also related to PRSPs. The PRSPS approach was adopted by these financial institutions with a view to enabling the borrower countries to set their objectives for poverty reduction, as well as to persuade donors to lend according to the circumstances and feasibility of the borrowers. (UNDP, 2009: 3 & 5; Christiansen and Hovland, 2003: 4).

This article is structured in three parts. Part II examines the Structural Adjustment Reforms of the World Bank and IMF, introduced in Pakistan in 1980s and onwards. The aim of this section is to provide a critical analysis of the various policies introduced in Pakistan by the

IFIs. Part III provides the conclusion of this article that a substantial share in development outcomes must be provided to the people of Pakistan as they are the real wealth of nation and hence it must be considered as a fundamental right. The inquiry of this article is confined to the time period from the 1980s to 2009 because during these three decades the democratic governments in Pakistan had almost a decade in which to nurture democracy. Prior to this the two martial law regimes of General Zia (1977-1988) and General Musharraf (1999-2008) derailed democracy as well as destabilizing the economy and indebting the country enormously. The expansion after this period tells another long story of democratic development which may be covered later in another article.

2. STRUCTURAL REFORMS IN PAKISTAN UNDER THE WORLD BANK AND IMF

Pakistan obtained membership of the World Bank/IMF in 1950. The World Bank has been providing financial assistance to Pakistan since 1952. The IMF has also played a decisive role in providing economic stability and structural adjustment lending to Pakistan since 1988. Thus the Bretton Woods institutions are deeply involved in the SAPs and the Structural Reform Strategies (SRSs) adopted by Pakistan after 1988 (Cheema, 2004: 17).

The World Bank's strong support to Pakistan has played a significant role in its economy for the last 57 years. The World Bank has provided about 15% of financing to Pakistan for public investment programs during the past decades. The World Bank sanctioned 242 loans worth 13 billion dollars including 146 interest free IDA⁴ credits⁵ for this period. For example, in 2002 the Bank disbursed up to 860 million U.S. dollars.⁶ The major portion of the World Bank's funds (about 85%) has been spent in some mega projects⁷ for the rehabilitation and expansion of physical infrastructure. The rest "has been used for the balance of payment adjustment loans in support of structural reforms" (World Bank, 2002: 5).

⁴ The International Development Association (IDA), established in 1960, is a part of the World Bank and helps the world's poorest countries. The main object of the IDA is to reduce poverty by granting interest free loans and funding for projects that enhance monetary development, decrease inequalities and increase living standards of the peoples. The 78 poorest countries, including 50% of African countries, are receiving funding for primary community welfare from IDA (World Bank, 2009).

⁵ For example less than 1% service charges and 35 years maturity time.

⁶ It was the maximum amount ever sanctioned in the history of World Bank-Pakistan economic relationship on very flexible terms and conditions.

⁷ The major portion of the amount has been invested in major projects such as the Indus Basin Irrigation and Drainage System, Telecommunications network and WAPDA what is this?, basic education and health services all over the country, national highways system and provincial roads, water and sanitation system in major cities, towns and rural areas, Karachi Port, gas production, transmission and supplies, and oil production and refining etc. (World Bank, 2002:5).

2.1 INITIAL STRUCTURAL ADJUSTMENT LOANS (SALs)

The Structural Adjustment Programme (SAP) was first introduced in Pakistan in 1982 during General Zia-ul-Haq Regime. At that time, Pakistan was one of the major loan recipients of the World Bank and IMF. The military government discontinued further instalments⁸ after receiving the first SAP loan. As mentioned earlier, the Soviet invasion of Afghanistan changed the entire situation and, on becoming a frontline ally, Pakistan received financial assistance of 3.2 billion U.S. dollars in 1981. Pakistan's foreign loan liabilities had doubled after the Zia period (GOP, 1996).

Baxter (2004: 137) suggests that due to a crisis in the textile industry, which was a major source of income, "the continued twin fiscal and foreign exchange deficits" coupled with decrease in external aid forced the government of Pakistan to look for the support of Bretton Wood Institutions in the late 1980s. It was the beginning of SAPs and "conditionalities that have accompanied the programmes have included target levels for deficits". The World Bank and IMF emphasised that the government of Pakistan should increase the tax income and decrease monetary discrepancy by way of public spending. However, the government of Pakistan was unable to decrease expenses "on defence and debt servicing" but ultimately extended cuts to certain development projects.

After the first formal lending under the SAP to Pakistan in 1988, a series of continuous lendings were maintained during the successive democratic governments of Benazir Bhutto and Nawaz Sharif. The major emphasis was on "financial & trade liberalization, deregulation, reliance on free market and privatization". Nawaz Sharif launched a policy of privatisation of national assets, deregulation of business and industry and lifted the control over foreign exchange. In more than three years of Sharif's rule, the World Bank and IMF having being satisfied with his economic policies disbursed four hundred million dollars of SAP loans to Pakistan (Gardezi, 2004: 430). However, these 'First Generation Structural Adjustment Reforms' showed poor results in attracting foreign investment in Pakistan (Naseem, 2008: 25).

The World Bank with the help of IFIs started the Social Action Program Project⁹ (SAPP-I) in 1992/1993 for getting better results in basic health care, primary education, building girls schools, family planning, sanitation and availability of safe and clean water to remote areas of Pakistan. In many respects, this was a precursor to the 'Second Generation Reform' discussed below. The education sector, which was a primary focus of the project, produced

⁸ Actually, the Economic Advisors of the military government advised the government to discontinue further instalments after receiving the first of SAP loan instalment, on the basis that the public did not accept these adjustment policies and the government would become unpopular among the masses (Gardezi, 2004).

⁹ SAPPs were planned into two parts with the collective efforts of IFIs and the government of Pakistan to increase expenditure on social services and to decrease poverty. The total amount allocated for SAPP-I was US\$ 4.02 billion comprising 76% share by the GOP what is this? and the remainder by the IFIs. The overall cost for SAPP-II was US\$ 10.561 billion for which GOP had to provide almost 80 % of the total amount (Ali, 2008: 25).

disappointing results. The project failed to achieve the required objectives and the major reasons for its failure were “to fully identify and address the institutional constraints, lack of a widely agreed methodology and format for monitoring and evaluation,” poor quality of education and absence of teachers from the schools (Paul, 2000: 4-5; Easterly, 2001: 15).

In 1996, SAPP-II was started after the failure of SAPP-I. The primary focus of the SAPP-II was also on social reforms like SAPP-I but especially to provide the essential services to women and girls and “generally for the poor” (World Bank, 1999a). The IFIs and Pakistan under the management of the World Bank invested about \$8 billion, inclusive of 25% foreign support, on the Social Action Program Project during 1993-1998. The project turned out to be a failure. Although, there are certain reasons for its failure, a major one could be attributed to the decision by the government of Pakistan to downsize the SAPP especially in the last two years of the programme (Anwar, 2006: 4; Easterly, 2001:15) which is apparent in the table given below:

Table 1.1. Social Action Program Project (SAPP)

Social Action Program Project spending as percent of GDP	
1992/93	1.70
1993/94	1.72
1994/95	1.88
1995/96	2.05
1996/97	2.35
1997/98	1.69
1998/99	1.60

Source: “The Political Economy of Growth without Development: A Case Study of Pakistan”, Easterly, 2001: 16,

<http://www.nyu.edu/fas/institute/dri/Easterly/File/Pakistan.pdf>

In 1993, Moeen Qureshi, a senior World Bank official, was invited and appointed as interim Prime Minister of Pakistan. He enforced Structural Adjustment Policies, in the process devaluing the Rupee by 10%. The people of Pakistan faced rises in the prices of consumer goods and high inflation because of Mr Qureshi’s economic reforms. He was succeeded by a democratically elected Prime Minister, Benazir Bhutto, who during her second tenure negotiated with the World Bank/IMF through the Enhanced Structural Adjustment Facility (ESAF).¹⁰ Under these new arrangements, a loan of one and half billion dollars was provided in instalments. As a pre-condition, Pakistan’s currency was to be devalued again by seven percent, duties on imported items were reduced and the scope of General Sales Tax was extended on more than two hundred and fifty items to fulfil the criterion for getting more

¹⁰ The IMF provided economic support to the poor countries through the ESAF programme from December 1987 to 1999.

instalments of the ESAF loan. In spite of these initiatives the Benazir government was unsuccessful in attaining the conditionality targets set by the donor institutions as more than 80% of the revenue collection was consumed on 'debt servicing and defence expenditure' (Gardezi, 2004: 431). After the first instalment, further disbursements of ESAF were ceased because the Benazir government failed to fulfil the other important conditions of the ESAF loan including the cutting of budget deficit by 5.6% of the Gross National Product to 4.0%. The World Bank/IMF management after having detailed discussions with the representatives of Pakistan's government at their Headquarters decided to replace the ESAF with standby loan of six hundred million dollars at the interest rate of 5% (Gardezi, 2004: 431).

On November 5, 1996, when the people of Pakistan were experiencing Structural Adjustments, the Benazir government was dissolved a second time by a Presidential Order.¹¹ In 1997, Mr. Sharif of the Pakistan Muslim League won the elections after defeating Benazir Bhutto of the Pakistan People's Party (PPP).¹² After taking over the office of Prime Minister, he followed the same policies as the previous government and proceeded further with Structural Reforms. The people of Pakistan were forced to rely on Structural Reforms for economic survival during deteriorating economic conditions. At that moment, Pakistan faced a very hard time when sanctions were imposed because of nuclear explosions. The Sharif government announced a state of emergency in Pakistan by freezing foreign currency accounts worth \$11 billion. The economy of Pakistan was jolted by the threat of default and even the U.S. think tanks portrayed Pakistan as "a failed state" (Haass and Rose, 1997).

On December 1998, a meeting was arranged in Washington DC between the Prime Minister of Pakistan and the U.S. President by which the fate of Pakistan's economy was decided with certain conditions, in other words, 'to observe nuclear non-proliferation' and peace dialogue with India. The IMF promised to provide financial assistance to Pakistan provided these conditions were fulfilled. For this, they had to overcome a reluctance based on the feeling that the democratic governments would find it uncomfortable to comply with conditionalities attached with loans (Gardezi, 2004: 431-432).

In 1997, the World Bank supplied a credit of 250 million U.S. dollars to improve the banking system of Pakistan, which was in a state of crisis. The main purpose of this lending was to make solid efforts for state-owned commercial banks in the achievement of further skills, profitable policies and excellence. (Cheema, 2004: 23). The IMF released about 1.31 billion dollars for Pakistan in its three year period under PRGF from December 6, 2001 to December

¹¹ In 1996, President Farooq Leghari dissolved the government of Benazir Bhutto on the charges of corruption and mismanagement under Article 58(2)b of the Constitution of Pakistan 1973.

¹² It is a common perception that the working class and peasants of PPP had not shown any whole-hearted involvement because of the introduction of unacceptable conditionalities attached with 'Structural Adjustments' by the Benazir Government, which adversely affected the domestic budgets of low-income and poor people of Pakistan.

2004. In return, the government of Pakistan had to implement the IMF-led policies. The government followed the process of privatisation and reorganisation of public assets and banking sector reforms under the conditions of the IMF (IMF, 2004). In June 1999, the World Bank agreed to disburse 90 million U.S. dollars to sustain the Pakistan Poverty Alleviation Fund (PPAF). The main aspiration of the program was to provide access to various facilities and means of communication to the deprived classes of Pakistan (Cheema, 2004: 23).

2.2 SECOND GENERATION REFORMS

On October 12, 1999, General Pervez Musharaf took over the control of government and declared himself Chief Executive of Pakistan. As a result, the international community immediately suspended Pakistan's economic and military assistance programs. The International Community and Financial Institutions demanded the restoration of democratic rule. The military government requested economic assistance with an assurance to fulfil all conditions of the IMF and World Bank attached with loans (Craig and Porter, 2006: 197, Cheema, 2004: 20).

The World Bank considered good governance as an important element in the achievement of sustainable development especially following the publication of the United Nation's Economic Commission for Africa (ECA) in 1989 (World Bank, 1989: 60-61). The Bank has since advocated for and adopted "accountability, government efficiency in terms of planning and social services to the public, the rule of law culture, an independent judicial system, a system of checks and balances, separation of powers and control of corruption" as key new conditionalities (Santiso, 2001: 5; Kaufmann, Kraay and Zoido-Lobaton 1999: 11).

As noted above, the failure of the First Generation Reforms under successive SAPs required a new strategy. Some independent regulatory authorities were set up such as the Print and Electronic Media Regulatory Authority (PEMRA), Oil and Gas Regulatory Authority (OGRA), National Electric Power Regulatory Authority (NEPRA) and Pakistan Telecommunication Authority (PTA) to attract foreign investment in these areas. In August 2000, the 'Second Generation Reforms' were introduced by President General Pervez Musharaf with a slogan of "empower the impoverished" (ICG, 2004: i). The main purpose of the 'Second Generation Reforms' was "high growth and sustainability, building the institutional and governance capacity" and to create a business friendly atmosphere in Pakistan. The major focus of these reforms was on the civil services, decentralization and devolution of local government, the judiciary, and the police, with the belief they could improve good governance. For the promotion of good governance the public and private enterprises in the financial sector, cooperation of the public, a system of checks and balances, accountability, poverty reduction, equality and the culture of rule of law and "World Class" institutions were the issues of prime importance (GOP, 2010).

Naseem (2008: 26) acknowledges that the 'Second Generation Reforms' had impact for a few years but were largely unable to achieve their set objectives. Some of the important reasons were misuse of power, appointments of non-technical persons to technical posts especially army officials and political persecution by the different institutions. For example, Husain is of the opinion that the National Accountability Bureau (NAB) a strong and effective institution to curb corruption was established soon after assumption of power by General Musharraf to promote accountability but appears to have been used for political victimization (Husain, 2007: 7).

On November 1999, Mr. Shaukat Aziz, a Citibank Executive, was appointed as Finance Minister with a team of forty financial professionals. He offered his services free of cost to breathe life into the economy of Pakistan. He was asked to take charge of the Economic Affairs, Finance, Statistics, Planning and Revenue Divisions. He was later offered the seat of Prime Minister of the hybrid government¹³ after the resignation of Mir Zafarullah Khan Jamali in 2004. On August 28, 2004, Mr. Aziz took over as a Prime Minister of Pakistan and retained the functions of Finance Minister (BBC, 2004).

The military government, after a year's efforts, succeeded in getting a stand-by-credit of 596 million U.S. dollars from the IMF. In addition, it had been decided between the IMF and Pakistan that this program would run up to the end of 2001. At that time, Pakistan was on the brink of default. There was an essential need of IMF assistance for rescheduling the Paris Club¹⁴ debt. It demanded some urgent and solid steps to cope with the issue of economic disturbances and to restore reliability before the IFIs. General Musharraf had no alternative but to accept all conditions set out by the IMF to qualify for financial backing. Consequently, the relationship between the IMF and the government of Pakistan improved and it agreed to disburse a PRGF loan to Pakistan for the period of three years. The PRGF was a package of 1.3 billion U.S. dollars that performed well and Pakistan had obtained half of twelve instalments up to September 2003 (Cheema, 2004: 20).

In the meantime, the World Bank's first disbursement of 350 million U.S. dollars was approved for tax reforms and for boosting the confidence of foreign investment. The Bank financed Pakistan under the Structural Adjustment Credit (SAC) scheme. After the end of SAC-I, SAC-II was started in 2002. The World Bank attached some mandatory supplementary conditions to the government with SAC programs, with a focus on monetary improvements and reformation of the government. In December 2003, after the successful completion of SAC programs, the World Bank pledged further lendings to the tune of 368 million U.S. dollars. Moreover, the World Bank supported Pakistan in literacy and health sectors. As a

¹³ A blend of democratic government set up with military dominance.

¹⁴ The Paris Club consists on the United States as its significant member to decide the fate of loan as well as debt relief of loan recipient countries. It includes Austria, Australia, Belgium, Canada, Denmark, Finland, France, Germany, Ireland, Italy, Japan, Netherlands, Norway, Russia, Spain, Sweden, Switzerland, and the United Kingdom as its permanent members (Weiss, 2013:1).

result, for the last few years, the interference of World Bank in the internal affairs of Pakistan has been frequent.

In 2003, the World Bank distributed around 1.226 billion U.S. dollars, which was the biggest amount ever sanctioned for Pakistan. The main aim of the Country Assistance Strategy (CAS) 2003-05 was to restructure the local institutions in the course of programs consisting of a review of critical packages, construction of departmental capability and demand-focused lending.¹⁵ Generally, funding by the World Bank was aimed at structural reforms and improvement of institutions, as well as creating a congenial environment for financial activities. For the last three years, Pakistan made it possible to absorb the monetary shocks due to its organisational, structural, economic and tax restructuring modifications (Cheema, 2004: 23-24). Cheema is of the view that the critics argue that sometimes the conditionalities of the World Bank and IMF are unsympathetic to the borrower countries but in the case of Pakistan, this was not the case as they brought “about macroeconomic stability in the country in the 1990s” (ibid, 24-25).

It is plausible to suggest that the conditionalities worked for a short time in the case of Pakistan but I disagree with this assumption as the problems of Pakistan, as well as other borrower countries, have increased after the introduction of World Bank and IMF-led reform programmes. As indicated in Part I, a number of scholars have observed the remarkable political involvement of the U.S. in the IFIs (Swedberg, 1986; Leaver, 1996; Smit, 2004; Faini and Grilli, 2004; Eldar, 2005: 509, Parenti, 1989 cited in Abouharb and Cingranelli, 2007: 116).

2.3 POVERTY REDUCTION STRATEGY PAPERS (PRSPs)

Pakistan is one of sixty developing countries who took up the Interim Poverty Reduction Strategy Paper (IPRSP) in November 2000 and then PRSP-I in December 31, 2003. As indicated above, the PRSP was intended to signal a shift in the lending relationship with an emphasis on poverty reduction. The nature of PRSP was ‘National Ownership’ or public and private partnership in collaboration with the IFIs or country-driven strategies for poverty reduction in the member states (IMF, 2009). In 2004, an amount of 300 million U.S. dollars was released for Pakistan in its initial phase of three years. It was set up under the supervision of the Ministry of Finance, which was responsible for its smooth running and monitoring. It was decided to initiate PRSP-II after the completion of PRSP-I. According to the Ministry of Finance of the government of Pakistan, the PRSP-II has to be completed in

¹⁵ ‘Demand focused loaning’ means loaning for the achievement of specific developmental targets in the economy.

the period of three years from 2007-09¹⁶ with a possibility of extension in the period (UNDP, 2009: 7).

UNDP has pointed out that the Pakistan government failed to reduce poverty because of unequal distribution of wealth, absence of land reforms, direct taxation, heavy defence budgets, the corruption of ruling class and powerful “feudal industrial interests”. Bad governance, which affects the poor badly, is one of the reasons for deepening poverty in the country (UNDP, 2009: 9-10; Haq, 1997: 69, 244). In one of its poverty assessment reports, the World Bank (2002) pointed out that:

Issues of governance for instance in the form of the lack of accountability, are at the heart of many of the difficulties encountered in mitigating poverty and broadening access to social services in Pakistan. Neither debt reform nor the mere availability of donor funds is likely to dispel these problems (World Bank, 2002c).

However, it is pertinent to note that accountability mechanisms are available in these International financial institutions, but lack of proper implementation is responsible for the failure of structural reform strategies in the loan receiving countries. The Asian Development Bank notes that:

A number of factors explain the existence of an increase in poverty in the last decade. However, poor governance is the key underlying cause of poverty in Pakistan... Governance problems have also resulted in inefficiency in provision of social services, which has had serious implications for human development in the country” (ADB, 2002: 2; UNDP, 2009: 9).

The poor people have never been the priority of the government of Pakistan and this is one of the reasons for the rapidly increasing gap between the poor and the rich. Ishrat Husain, Governor of the State Bank of Pakistan points out that:

Pakistan is facing many difficult challenges. One third of the population still lives below the poverty line. Human Development indicators remain low as almost half of the population is illiterate, infant and maternal mortality rates are high, access to quality education and health care particularly by the poor is limited, income and regional inequalities are widespread, infrastructure shortages and deficiencies persist, skill shortages are taking a toll in the economy’s productivity while at the same time, there is high unemployment and underemployment (Husain, 2005:12; Kiesow et al, 2008: 10).

In the PRSPs of Pakistan, the important and basic issues such as education, health care, food items, living facilities, social security, law and order and good governance have not been

¹⁶ In this report, it was acknowledged that due to non-availability of the final copy of PRSP-II, the entire assessment had been made on the basis of PRSP-I, although the draft summary of PRSP-II was available from April 2007 (UNDP, 2009: 7).

addressed properly. The UNDP concludes that the government of Pakistan has been unable to reduce poverty in both the PRSP-I and PRSP-II. It has been said that the major cause of the ineffective poverty reduction plans is the failure in the delivery system and permanent features of disparity which clearly indicates the deficiency of governance structures in Pakistan (UNDP, 2009: 32). Pakistan is a signatory to the International Covenant on Economic, Social and Cultural Rights as well as the International Covenant on Civil and Political Rights. Moreover, the Constitution of Pakistan guarantees Civil, Political, Economic, Social and Cultural Rights to all citizens. It has been suggested that the issue of poverty should be considered as a rejection of rights and not just a lack of structural inability in the distribution of social services (UNDP, 2009: 25).

In 2004, the economy of Pakistan achieved self-reliance by decreasing its budget deficit, the collection of foreign exchange reserves, sufficient food as per the necessity, mounting manufacturing construction and maintained annual growth of more than five percent. The country attained primary macroeconomic strength accompanied by wide range of development in economic measures. At the same time, the country was fighting with problems of recovering investment, eradication of public sector deficits, better infrastructure and growing public sector improvements. Creation of new jobs and the responsibility for poverty reduction were two major issues before the military government requiring some urgent and solid steps for planning. No doubt, at that time, the economy of Pakistan had achieved self-reliance (Cheema, 2004: 1).

In May 2005, Pakistan received a package of four and a half billion U.S. dollars from the World Bank for a period of three years. Moreover, the World Bank promised to add about 900 million to 1.5 billion U.S. dollars in this package in coming years. The lendings were primarily for restructuring public spending, income tax structure, economic regions and public services in a way to decrease the budget and trade discrepancy (Anwar, 2006: 3-4).

According to the IMF, in 2005-06, the economy of Pakistan had gone through numerous shocks triggered by the disastrous earthquake of October 8, 2005, a considerable increase in the worldwide prices of oil and less favourable climatic conditions, which badly affected the crops. Nevertheless, inflation dropped from 9% to 7.6% by the end of June 2006 (MoF, 2006: 1).

The World Bank disbursed a total amount of 1.5 billion U.S. dollars in its financial year 2006, which meant Pakistan ranked as the fourth largest loan receiving country in the world. Subsequently, in 2006, the Board of Directors of the World Bank approved Country Assistance Strategy (CAS) for Pakistan for a period of three years. It was to help Pakistan to attain the targets of growth for upcoming years. An amount of around one billion U.S. dollars was disbursed to deal with the unpleasant after-effects of the October 2005 earthquake. The money was handed to the government to help with the rebuilding and repairing of houses. The World Bank decided to disburse the total amount of 6.5 billion U.S. dollars in its CAS

2006-09 for Pakistan. In 2006, the economy of Pakistan showed some positive indicators for prosperity. However, one of the biggest challenges was to decrease the poverty level with the help of rapid growth projects so that the poor would be benefited by this progress. The main emphasis of these lendings was on 'SME¹⁷', to improve infrastructure and economic segments (Buckley, 2006; 39-40). Unfortunately, the financial year of 2007-08 came up with some unexpected circumstances for Pakistan which not only left negative impacts on the economy but also gave birth to political instability as well (Chandran, 2008: 1).

The power rivalry¹⁸ among different organs of the state has ruined Pakistan's economy. The people of Pakistan are faced with recurrent problems such as repeated de-valuation of currency, rises in inflation rate of up to 25% per annum, rapid increases in the prices of commodities, a wheat crisis, energy crisis, leadership crisis and the recent crash of Pakistani Stock Markets (The Economist, 2008). In fact, the so-called stable economy was a 'bubble economy¹⁹' based merely on the numbers game, as the ordinary and poor people did not benefit from economic growth. Below are some of the tables showing statistical figures about Pakistan foreign debt liabilities.

Table 1.2 Trends in External Debt and Foreign Exchange Liabilities (US\$ billion)

Year	Total External Debt	Foreign Exchange Liabilities	Total External Debt And Foreign Exchange Liabilities
1989-90	19.2	2.7	21.9
1990-91	20.0	3.2	23.2
1991-92	21.9	4.5	26.4
1992-93	23.9	5.7	29.6
1993-94	26.9	7.1	34.0
1994-95	28.7	7.3	36.0

¹⁷ The term Small and Medium Enterprises (SME) is commonly used in IFIs and its basic function is to promote small businesses.

¹⁸ A clash of power between the different organs of the state and among politicians has been evident and obvious in Pakistan since its creation. There are several examples of the executive's interference in the affairs of judiciary and legislature through a misuse of its powers (Sattar, 2008).

¹⁹ The term 'bubble economy' means the economy, achieved stability for a very short period and then collapsed. It was presumed that in the Musharaf period the economy acquired strength but actually it was based on wrong footing (GoP, 2010: 12)

1995–96	29.8	9.1	38.9
1996–97	29.5	11.0	40.5
1997–98	30.3	12.4	42.7
1998–99	33.5	4.1	37.6
1999–2000	32.2	5.7	37.9
2000–01	32.1	5.0	37.1
2001–02	33.4	3.1	36.5

Source: “Macroeconomic Stability of Pakistan: The Role of World Bank and IMF (1997–2003)”, Cheema, 2004:7, <http://www.acdis.uiuc.edu/Research/OPs/Cheema/CheemaOP.pdf>

Table 1.3 External Debt and Foreign Exchange Liabilities End June (US\$ billion)

Year	Total External Debt	Foreign Exchange Liabilities	Total External Debt And Foreign Exchange Liabilities
2003	33.3	2.1	35.4
2004	33.4	2.0	35.4
2005	34.0	1.4	35.4
2006	35.9	1.3	37.2
2007	39.0	1.3	40.3
2008	44.5	1.7	46.2
2009	50.7	1.3	52.0

Source “Pakistan Economic Survey 2007-08 and 2009-10- EXTERNAL DEBT AND LIABILITIES”, Ministry of Finance, Government of Pakistan, http://www.finance.gov.pk/survey/chapter_10/08_Public_Debt.pdf

Table 1.4 Structure of External Debt and Liabilities (EDL) (End March 08)

COMPONENT	% SHARE
Paris Club	31.6
Multilateral	46.9
Other Bilateral	2.6
Short-Term	1.3
Private Non-Guaranteed	5.4

IMF	3.1
Other	6.2
Forex Liabilities	2.9

Source "Pakistan Economic Survey 2007-2008- EXTERNAL DEBT AND LIABILITIES",
Ministry of Finance, Government of Pakistan,
<http://www.finance.gov.pk/admin/images/survey/chapters/09-External%20debt08.pdf>

Given below is the recent inflation rate, which is not showing any positive indicator in the economy of Pakistan.

Table 1.5 Inflation Situation in Pakistan (July 2008-February 2009)

Month	Consumer Price Index (CPI)	Wholesale Price Index (WPI)	Sensitive Price Indicator (SPI)	Core Inflation (%)
July	24.3	34.0	33.9	14.7
August	25.3	35.7	33.0	16.4
September	23.9	33.2	31.1	17.3
October	25.0	28.4	32.7	18.3
November	24.7	19.9	29.8	18.9
December	23.3	17.6	25.8	18.8
January	20.5	15.7	20.8	18.91
February	21.1	15.0	23.4	18.85

Source: "Review of Economic Survey of Situation: (July-February 2008-09)", (Economic Advisor Wing) Finance Division, Government of Pakistan,
<http://www.finance.gov.pk/admin/images/ecoSituation/ReviewEconomy-Jul-Feb.pdf>

The World Bank has recently informed the government of Pakistan that almost half of the Pakistani population will be unable to buy food if the situation remains the same in the coming years. In the same report, it is further advised to withdraw the subsidies immediately on food items. The World Bank further warned that the prices of wheat in Pakistan are relatively low compared to the international market, which is one of the basic reasons of wheat smuggling to the neighbouring states (Iqbal, 2008). Goncalves (1996: 6) argues that SAPs causes ruthless sufferings to the peoples of Zimbabwe and Zambia. According to Goncalves the word ESAP, which means "Economic Structural Adjustment Programmes" has now been changed with "Ever Suffering African People". The people protested against the unsympathetic conditionalities imposed by the IMF under which certain subsidies were withdrawn by the government of Pakistan on basic food items after food insurrection started. (Jauch, 1999: 6).

In the case of Pakistan, however, it is the responsibility of the Pakistan government to control smuggling rather than to withdraw subsidies on food items in these circumstances. At present, Pakistan is facing a serious food crisis but withdrawal of subsidies is not the only solution to this problem, as the poor are already unable to buy food easily due to the growing rise in the prices of food items. For Pakistan, the “fight against terrorism” is also a big challenge that the government of Pakistan accepted after becoming a major ally of the U.S. President John F. Kennedy observed many years ago that “the only thing worse than being an enemy of the United States is being an ally” (The Atlantic Council, 2009: 1). The economic condition of the so-called emerging ‘Asian Tiger’ is vulnerable and needs some urgent cooperation from the ‘Friends of Pakistan’ for its deteriorating economy as well as to combat the growing dangers of terrorism. Below are some statistical data about the World Bank lendings to Pakistan from 1999 to 2006.

Table 1.6 Pakistan: World Bank Lending FY1999–2005

(In millions of U.S. dollar, as of September 30, 2004)

Project Name	Fiscal year Approved	Amount	Disbursed
Structural Adjustment Loan	1999	350.0	350.0
Poverty Alleviation Fund	1999	90.0	90.0
Trade & Transport	2001	3.0	2.3
NWFP On-Farm Water Management Project	2001	21.4	3.7
Structural Adjustment Credit	2001	350.0	343.9
Banking Sector Restructuring and Privatization Project	2002	300.0	211.2
Structural Adjustment Credit II	2002	500.0	510.3
Community Infrastructure & Services	2003	20.0	8.2
Banking Sector Technical Assistance	2003	26.5	14.2
Sindh Structural Adjustment Credit	2003	100.0	106.4
NWFP Structural Adjustment Credit	2003	90.0	95.8
Partnership for Polio Eradication	2003	20.0	20.0
HIV/AIDS Prevention Project	2003	37.1	8.2
National Education Assessment System	2003	3.6	0.5
Highways Rehabilitation	2004	200.0	25.2
Poverty Alleviation Fund II'	2004	238.0	84.1
Punjab Education Reform Program	2004	100.0	100.6
Sindh On-Farm Water Management Project	2004	61.1	2.9
NWFP Community Infrastructure II (CIP2)	2004	37.1	2.1

PK Public Sector Capacity Building Project	2004	55.0	10.5
NWFP SAC II	2004	90.0	90.0
Poverty Reduction Support Credit I	2005	300.0	300.0
Tax Administration Reform Project	2005	102.9	3.1
Banking Sector Development Policy Credit	2005	300.0	300.0

Source: "IMF Country Report No. 04/411-Pakistan: 2004 Article IV Consultation,...". IMF, 2004:51, <http://www.imf.org/external/pubs/ft/scr/2004/cr04411.pdf>

Table 1.7 Pakistan: World Bank Lending FY 2003–05

(In millions of U.S. dollar, as of Sep 30, 2005)

Project Name	Fiscal year Approved	Amount	Disbursed
Taunsa Barrage Emergency Rehabilitation	2005	123.0	3.1
Punjab Education Reform II	2006	100.0	100.0
Improving Financial Reporting and Auditing II	2006	84.0	0.0

Source : "Pakistan : 2005 Article IV Consultation... IMF Country Report No. 05/409", IMF, 2005:51, <http://www.imf.org/external/pubs/ft/scr/2005/cr05409.pdf>

These programs have been started by the World Bank to facilitate economic stabilization, reduce literacy, alleviate poverty etc. Funds were therefore provided for better infrastructure and good governance. According to critics, the World Bank programs in some of the cases caused inconvenience rather than support to the economy of Pakistan. The attachment of tough conditionalities with loans by the World Bank and IMF places political pressure on the loan recipient countries (Cheema, 2004: 23-24; Swedberg, 1986: 383-384).

Currently, the newly appointed Government of President Zardari is facing one of the toughest times in Pakistan's history. On the one hand, they are fighting against terrorism as a frontline ally of the U.S. and on the other hand, there exists a very poor economic condition which is aggravating the situation of unemployment and poverty in Pakistan. However, the government of Pakistan has shown some interest in dealing with these issues whilst also being desirous of closer collaboration with the U.S.

3. CONCLUSION

This article set out to argue that the geo-strategic position of Pakistan has largely been used for the advancement of U.S. interests in the region. It has demonstrated that the World Bank and the International Monetary Fund were created by the Bretton Woods Agreements and the purpose of their creation was to provide financial and economic support to war-torn

Europe after World War II. The focus of the Bretton Wood institutions later shifted towards developing countries to help with balance of payment adjustments, poverty related programmes, structural reforms, reconstruction and growth plans in the developing countries.

The experience of developing countries with World Bank and IMF participation in their economies has been mixed. Supporters of these institutions argue that their assistance is necessary in solving the economic problems of the member countries. However, opponents of the World Bank and IMF roles in the economies of developing countries make a case that these institutions have created myriad problems for the member countries. They argue that these institutions are highly politicised and in turn make decisions based on political considerations, rather than being mindful of the economic realities of a particular member country. The major criticism is on “conditionalities” attached to the loans, which cause complications for the achievement of sustainable economic development in the member countries. It is evident that internal factors are also responsible for the failure of Structural Reform Strategies but most of the policies of IFIs are aggravating the situation because of the political involvement of the U.S in their decisions.

As far as Pakistan is concerned, poverty reduction has been the major focus of both IFIs. There is a contradiction in the policy framework of the programmes introduced by the World Bank and IMF as, on the one hand, these institutions are interested in the efforts to reduce poverty and are ready to provide funding but, on the other hand, emphasise the privatization of public institutions, withdrawal of subsidies and deep cuts in public expenditure. Pakistan is facing serious problems of increasing poverty, heavy burden of external debts and the soaring inflation rate since the introduction of World Bank and IMF Structural Reforms in its economy. Therefore, there is a notable question here whether the people of Pakistan are part of the development introduced by the IFIs? The above discussion showed that the people living in member states of IFIs are far away from the outcomes or benefits of these structural reform strategies for which they are legally entitle. A Nobel laureate Amartya Sen suggests in Human Development Report 2010 (HDR) that the people are the real wealth of nations and must be provided a substantial share in the development of a country. Therefore, it is fundamental right of the people to share benefits of the development projects introduced by the IFIs, which are often compromised by the vested interests of the U.S as well as policies introduced by the government of Pakistan.

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CASE NOTE***James G. Samuels v Guyana Telephone and Telegraph Company Limited
(GT&T) [2015] CCJ 8 (AJ)*****Thomas Durbin, Lecturer, Faculty of Law, The University of the West Indies, Barbados**

Restrictive terms governing use of VoIP telecommunications technology are not implied into contracts or are they a breach of the Telecommunications Act¹ according to the Caribbean Court of Justice.

CASE: *James G. Samuels v Guyana Telephone and Telegraph Company Limited (GT&T)*

CITATION: [2015] CCJ 8 (AJ)

PARTIES: James G. Samuels [Appellant]

Guyana Telephone and Telegraph Company Limited [Respondent]

PROCEDURAL HISTORY: Samuels entered into a contract for DSL (Broadband) Services with the Respondent company in 2006. GT&T disrupted the Appellants internet service in 2009 alleging breach of contractual terms for the use of internet telephony. Samuels commenced proceedings at the Commercial Court of Guyana claiming the contractual term relied upon by GT&T was not provided with sufficient notice. At first instance, Persaud, J. upheld Samuels' claim that the term was not made available at the time of contract formation. GT&T appealed the decision and it was set aside by the Court of Appeal. The reasoning of the Court of Appeal being that the term in itself should have been implied into the contract in the interests of business efficacy. Samuels now appeals to the Caribbean Court of Justice in their Appellate jurisdiction.

FACTS: The Appellant applied for, and was granted, the DSL service following the completion of a standard application form at one of the Respondent's outlets. It was factually disputed as to whether a signed copy of a separate document (The DSL Agreement), was provided at this time, containing additional acceptable use clauses. Shortly thereafter DSL service was initiated which the Appellant used for, amongst other purposes, Broadband telephony (VoIP) connectivity through a U.S firm, Vonage. Upon discovery of the use of Vonage by the Appellant, the Respondents severed the DSL connection in May 2009.

ISSUE(S):

- (1) Whether a restrictive use term could be implied into a contract for DSL services and if so in what circumstances;

¹ CAP 47: 02.

- (2) Whether the Appellant's use of the VoIP amounted to the operation of an unlicensed telecommunications system for the purposes of the Guyana Telecommunications Act.²

RULE(S):

- (1) A term can be introduced to a contractual instrument. It can only be implied if that term would be conveyed to any reasonable persons having all the background knowledge when interpreting the contract;
- (2) Expert evidence must be adduced to decide if VoIP systems amount to the use of a telecommunications system.

REASONING:

(1) The Caribbean Court of Justice reviewed the first instance judgement of Persaud, J. which favoured the oral evidence given by the Appellant and Defence witness over the written pleadings at first instance. The pleadings were determined to be contradictory and confused due to their development over the course of the litigation and at no point had the Respondents requested to have those anomalies struck out, as was their right. The oral evidence showed that no party could be sure that the restrictive terms relied upon by the Respondent were made available in good time. The terms in question, which prohibited VoIP use, were available through the separate DSL Agreement document. Without said agreement, the only terms applicable to the contract were those available on the original application form. Based on this reasoning Persaud, J. found the way that he did. The Court of Appeal, however, overturned his decision on the basis that Persaud, J. did not consider implied terms. The Court of Appeal found that a term restricting VoIP use was necessary as an implied term of fact for reasons of business efficacy. That business efficacy being that the Respondents would have suffered a financial detriment had their monopoly on international telephone calls been hindered by such technologies. The Caribbean Court of Justice did not agree with the Court of Appeal's reasoning on the grounds that the common law rules governing implied terms were clarified in *AG of Belize and others v Belize Telecom Ltd* [2009] 1 WLR 1988 (P.C.)

. These rules state that a term can only be implied if such a term would be obvious to the reasonable person with all background knowledge. A reiteration of the *Moorcock* (1889) 14 PD 64 test, some 100+ years ago.

(2) The trial court reviewed as to whether a VoIP system as used by Mr Samuels constituted a 'telecommunications system' for the purposes of the Telecommunications Act and Persaud, J. found that it did not. Persaud, J. provided a caveat to his findings however, that he had no technical assistance presented to him which would have aided his decision making. The Court of Appeal, through Cummings-Edwards JA (at para. 45), agreed that the lack of expert witness placed the competence to make the determination outside the domain of the trial judge and in such an instance, normal rules for expert witnesses should

² *Ibid* n.1.

apply. Furthermore, the Court of Appeal concluded they could not make such a determination, as neither could the CCJ without such expert evidence. The Caribbean Court of Justice reasoned that a ruling on a contemporary and significant technology such as VoIP could not go ahead without expert evidence and were not minded to provide a decision. The court finally reasoned that, with responsibility for enforcement of the Telecommunications Act being the Director of Telecommunications, the Director's inaction would be pivotal to such a determination by the court.

IMPACT AND ANALYSIS:

(1) The decision of the court on the implied term brings Caribbean jurisprudence in line with the common law. *Belize* is the leading case which has been approved by the UK Supreme Court. Interestingly much of the judicial discussion was based around a potential mutual agreement of the parties which would never have been the case for Mr. Samuels. Even without this requirement, the case for business efficacy requires 'strict necessity' which would be difficult for GT&T to show. Loss of revenue from international telephony would not be sufficiently necessary. Furthermore, the Court of Appeal diluted the test for implied terms and this restores the centrality of the original decision in *Belize*. Potential claimants and applicants will now have to consider the stringent test before hoping to imply terms into contracts, even if both parties arguably anticipated them. The Caribbean Court of Justice perhaps failed to look at alternative judicial reasoning when dealing with timing and location of additional terms. Internet cases in the United States and the UK have acknowledged that many terms and conditions reside in different locations to the original application forms, especially for distance based services. Consider *Greer v. 1-800-Flowers.com, Inc.*³ where terms and conditions resided on a website which were enforceable when an order was made over the telephone. Should the application form for DSL Service by GT&T have made reference to a website including the terms and conditions, including restrictive clauses, perhaps Mr. Samuels would not have had the outcome he did.

(2) It is important to note the impact of this case on future use of advanced communication technologies and its relation to older telecommunications statutes. The current reliance and significance of VoIP, being both video and voice, on the region is beneficial to consumers and companies and requires traditional telecoms firms to evolve with the technologies. Traditional jurisdiction based monopolies will start to make way for global and internet based competition. The Caribbean Court of Justice was right to refuse to be held to such an advance technological ruling without the benefit of expert evidence. There is no lack of technical experts in the Caribbean and claimants and defendants will be urged to use such in future cases.

³ 7 2007 WL 3102178, 2007 US Dist. LEXIS 73961 (S.D. Tex. Oct. 03, 2007).

**Controlling or coercive behaviour in an intimate or family relationship:
A new domestic abuse offence in England and Wales**

Keren Lloyd Bright, Senior Lecturer in Law, The Open University

Introduction

A new criminal offence recognising that domestic abuse can take a variety forms, has been brought onto the statute book of England and Wales by the Serious Crime Act 2015. The new offence of controlling or coercive behaviour in an intimate or family relationship is set out in Section 76. The section has been in force since 29th December 2015.

Alison Saunders, the Director of Public Prosecutions for England and Wales, has said:

‘Controlling or coercive behaviour can limit victims’ basic human rights, such as their freedom of movement and their independence. This behaviour can be incredibly harmful in an abusive relationship where one person holds more power than the other, even if on the face of it this behaviour might seem playful, innocuous or loving. Victims can be frightened of the repercussions of not abiding by someone else’s rules. Often they fear that violence will be used against them, or suffer from extreme psychological and emotional abuse. Being subjected to repeated humiliation, intimidation or subordination can be as harmful as physical abuse, with many victims stating that trauma from psychological abuse had a more lasting impact than physical abuse.’

(CPS, 2015)

Section 76 provides statutory recognition that serious emotional and psychological harm may be caused to an intimate partner or family member by a perpetrator, through extreme abuse which stops short of actual physical and sexual violence. It also recognises that domestic abuse is not confined to isolated violent events, but may consist of a pattern of behaviour taking place over a period of time which may encompass many separate incidents. Taken by themselves, the separate incidents may appear fairly harmless; but it is the overall cumulative effect of the abuse which can have serious consequences. While controlling or coercive behaviour is not the sole province of either gender, the perpetrators are disproportionately male and the victims are disproportionately female. The statutory guidance provided by the UK Home Office makes plain that ‘Controlling or coercive behaviour is primarily a form of violence against women and girls and is underpinned by wider societal gender inequality’ (Home Office, 2015, p.7).

The historical context for the new domestic abuse offence

The section 76 offence of controlling or coercive behaviour can be seen as one of a number of developments in England and Wales over the last quarter of a century which seek to protect women in an intimate or family relationship.

Particular milestones include the case of *R v R* [1992] 1 A.C. 599 and 'Clare's law'. The case of *R v R* [1992] is widely known. For 250 years prior to the decision in this case, there had been a marital exemption for rape or attempted rape on the presumption that the state of matrimony implied irrevocable consent to sexual intercourse. This case ended the marital rape exception: where there is no consent, the perpetrator may be charged and convicted of the offences of rape or attempted rape.

In 2011, the UK coalition government introduced a policy paper entitled 'Call to End Violence against Women and Girls: Action Plan'. The action plan set out a cross-governmental strategic framework – as a response to the UN declaration on the Elimination of Violence against Women (1993). In 2013, the cross-government non-legal definition of domestic violence and abuse was published:

Any incident or pattern of incidents of controlling, coercive or threatening behaviour, violence or abuse between those aged 16 or over who are or have been intimate partners or family members regardless of gender or sexual orientation. This can encompass, but is not limited to, the following types of abuse: psychological; physical; sexual; financial; emotional

(Home Office, 2013)

In 2014, the Domestic Violence Disclosure Scheme was rolled out nationally across the UK. This scheme allows potential victims of domestic abuse (or their friends or relatives) to apply to the police for any available information about their partner's previous history of violence. The Domestic Violence Disclosure Scheme is also known as 'Clare's Law'. Clare Wood was killed by her ex-boyfriend in 2009 - he, unbeknown to her, had a history of violence against previous partners.

The section 76 domestic abuse offence in more detail

The section 76 offence extends the criminal consequences of domestic abuse to include emotional, financial and psychological abuse. The offence is set out in s76(1) Serious Crime Act 2015.

Section 76 Controlling or coercive behaviour in an intimate or family relationship

(1) A person (A) commits an offence if—

(a) A repeatedly or continuously engages in behaviour towards another person (B) that is controlling or coercive,

(b) at the time of the behaviour, A and B are personally connected,

(c) the behaviour has a serious effect on B, and

(d) A knows or ought to know that the behaviour will have a serious effect on B.

A detailed statutory guidance framework has been issued about the ambit of the offence, pursuant to s77 of the 2015 Act (Home Office, 2015). The victim and perpetrator must be 'personally connected'. This element is defined in s76(2) and includes situations where two people are in an intimate personal relationship, or they live together and are either members of the same family or have previously been in an intimate personal relationship with each other. 'Members of the same family' include situations where the victim and perpetrator have agreed to marry or are married or are divorced; have agreed to be civil partners or are civil partners; are relatives; are parents of the same child; have or have had parental responsibility for the same child (s76(6)).

The s76 offence does not apply where the victim and perpetrator neither live together nor are in an intimate personal relationship. Instead, stalking and harassment legislation should be used where appropriate – such as where a perpetrator is monitoring, stalking or intimidating a victim (Home Office, 2015, p.6). Neither does the s76 offence apply where the victim is under the age of 16 and the perpetrator is aged 16 or over and has responsibility for the victim (s76(3)) – as there is already provision for this in the criminal law (see s1 of the Children and Young Persons Act 1933, as amended by s66 of the 2015 Act).

After establishing that the victim and perpetrator are 'personally connected', the courts will look for a continuous pattern of controlling and coercive behaviour and thus one or two isolated incidents, particularly if they take place over a protracted period of time, will not suffice. The statutory guidance framework sets out a non-exhaustive list of the types of behaviour that may come under the s76 offence:

'The types of behaviour associated with coercion or control may or may not constitute a criminal offence in their own right. It is important to remember that the presence of controlling or coercive behaviour does not mean that no other offence has been committed or cannot be charged. However, the perpetrator may limit space for action and exhibit a story of ownership and entitlement over the victim. Such behaviours might include:

- isolating a person from their friends and family;
- depriving them of their basic needs;
- monitoring their time;
- monitoring a person via online communication tools or using spyware;
- taking control over aspects of their everyday life, such as where they can go, who they can see, what to wear and when they can sleep;
- depriving them of access to support services, such as specialist support or medical services;

- repeatedly putting them down such as telling them they are worthless;
- enforcing rules and activity which humiliate, degrade or dehumanise the victim;
- forcing the victim to take part in criminal activity such as shoplifting, neglect or abuse of children to encourage self-blame and prevent disclosure to authorities;
- financial abuse including control of finances, such as only allowing a person a punitive allowance;
- threats to hurt or kill;
- threats to a child;
- threats to reveal or publish private information (e.g. threatening to 'out' someone).
- assault;
- criminal damage (such as destruction of household goods);
- rape;
- preventing a person from having access to transport or from working.

(Home Office, 2015, p.4)

The next step is to determine whether the perpetrator's continuous pattern of behaviour has had a 'serious effect' on the victim (s76(1)(c)) – for which s76(4) sets out two alternative tests. The first is whether the behaviour has caused the victim to fear on at least two occasions that violence will be used against them. The second of the alternative tests is whether the behaviour has caused the victim serious alarm or distress which has a substantial adverse effect on the victim's usual day-to-day activities. Finally, the perpetrator must know or ought to know that the behaviour will have a serious effect on the victim (s76(1)(d)).

The defence to proceedings brought under s76 in a magistrates court or crown court is set out in subsections (8) to (10) of s76 of the Act. The perpetrator must show that they believed they were acting in the victim's best interests when they engaged in the behaviour in question. The perpetrator must also show that the behaviour was objectively reasonable in all the circumstances. Accordingly, the magistrates or crown court jury will not accept the defence where they find that the behaviour was not reasonable in all the circumstances. The defence is in any event unavailable where the behaviour has caused the victim to fear that violence will be used against them (s76(10)).

A perpetrator found guilty of the offence is liable to a term of imprisonment, or a fine, or both. The maximum prison sentence that can be imposed by a magistrates court is 12 months, and by a crown court, five years.

Early prosecutions of the new domestic abuse offence

The Crown Prosecution Service report published in September 2016 indicated that there had been five prosecutions of the offence by the end of March 2016, following the coming into force of section 76 in December 2015 (CPS, 2016).

One of these prosecutions was reported nationally. The defendant, Mohammed Anwaar, pleaded guilty to the section 76 offence of coercive and controlling behaviour (in addition to other offences of assault and criminal damage) and was given a prison sentence of 28 months. The behaviour had taken place over a two year period and included controlling his partner as to what she should eat and wear and by restricting her access to her friends and family (BBC, 2016). The defendant also assaulted his partner on multiple occasions when she disobeyed his instructions. The tabloid newspapers reported on the more lurid aspects of the case – which did attract public attention and served to increase public awareness of the scope of the offence.

Fostering public awareness of the new offence

Another way of fostering public awareness about the new offence beyond media reports and announcements on government websites, is by way of drama on television and radio networks.

The new offence has featured as a storyline in the long-running BBC Radio 4 soap opera 'The Archers'. This radio programme has been broadcast since 1950 and was originally conceived as a vehicle for education about rural affairs - with information supplied by the Ministry of Agriculture - in a post war Britain struggling with food shortages and rationing. 'The Archers' currently has weekly listening figures of over 5 million. In the best tradition of public service broadcasting, scriptwriters for 'The Archers' have used dramatic narrative to increase public awareness and understanding of the section 76 offence.

The story was developed slowly over a real time period of two and a half years – which reflects the imperceptible 'drip drip' cumulative effect that is so typical of the controlling and coercive pattern of behaviour. The script was imbued with authenticity as the writers were advised by the charities Women's Aid and Refuge. Listeners witnessed week by week the insidious emotional abuse wrought by the perpetrator Rob Titchener on his wife Helen Titchener. The victim was prevented from driving and working; her movements were monitored by software installed on her mobile phone; she was isolated from family and friends and finally became a virtual prisoner in her own home. The perpetrator was, however, outwardly charming, caring and plausible.

'The Archers' storyline often made for difficult listening and generated a great deal of comment on social media, print media and broadcast media in the UK – as any internet search will reveal. The storyline has undoubtedly served to increase public awareness of the nature of controlling and coercive behaviour. Between February 2015 and February 2016,

there was a 20% increase in telephone calls to the National Domestic Abuse Helpline and it is believed 'The Archers' storyline was in part responsible for this (Kerley and Bates, 2016). The women's charity Refuge has also experienced a significant increase in donations (BBCb, 2016).

Conclusion

As was indicated above, the highest levels of the UK government and the Crown Prosecution Service of England and Wales are strongly committed to combating violence against women and girls. The most recent CPS report 'Violence against Women and Girls Crime Report 2015-16' published in September 2016, states that:

'The Crown Prosecution Service is prosecuting and convicting a record number of rape, domestic abuse, sexual offences and child abuse cases ... The CPS's annual Violence against Women and Girls report shows that rape, domestic abuse and sexual offences now account for 18.6 per cent of the CPS's total caseload and this figure has been increasing year-on-year. In 2015/16, the CPS prosecuted 117,568 defendants for all crimes grouped together as Violence against Women and Girls (VaWG). More than 100,000 defendants were prosecuted for domestic abuse, with over 75,000 convicted - the highest volumes ever recorded, also reaching the highest ever conviction rate of 75.4 per cent by March 2016.' (CPS, 2016)

However, as against this high-level commitment and these statistics, an article published in a national newspaper in August 2016, using information obtained under a freedom of information request, reported that the section 76 offence had been used just 62 times to charge perpetrators in the first six months since coming into force in December 2015. According to the article, eight out of 22 police forces in England and Wales were yet to charge anyone with the offence (Hill, 2016).

The article also reported that in 2014, the charitable organisation 'Citizens Advice' had helped approximately 3,000 victims of emotional abuse and 900 victims of financial abuse. So at present there is a substantial numerical gap between those approaching charitable organisations with complaints of controlling and coercive behaviour and the progress of prosecutions through the criminal courts.

There are a number of issues which need to be addressed. The first is the need for increased specialist training for police officers, as they need to develop awareness that domestic abuse is not confined to actual physical and sexual violence and that they should be alert to the signs of controlling and coercive behaviour and the risks these pose to victims – as often victims do not recognise themselves as victims as such (Home Office, 2015, p.10). Some police services have currently done much more than others with respect to specialist training, Humberside, for example.

Secondly, those subjected to domestic abuse in the form of controlling and coercive behaviour need to have the confidence to come forward not just to charities, but to the police - and have trust that the police will take their complaints seriously.

A third issue is that of police and CPS resources in times of budget cuts and constraints on the public purse. The police services are already operating under severe workload pressures with respect to the volume of child abuse and domestic abuse cases in recent years. The section 76 offence could potentially result in a very large number of prosecutions. In a BBC news item, one police officer was reported as saying that he had a backlog of 170 domestic abuse cases, any of which could result in a murder (BBC, 2016b).

However, notwithstanding the current position with regard to the undoubted obstacles, the new section 76 offence is undeniably a landmark moment in the history of relationships law in England and Wales and a highly significant step forward in the protection of victims from the variety of forms in which domestic abuse manifests itself.

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BOOK REVIEW

Neil Graffin, Lecturer in Law, The Open University

Sedley, S. (2015) Lions under the Throne: Essays on the History of English Public Law, Cambridge University Press, ISBN 978-1-107-55976-9

The public law of England and Wales, as comprising constitutional and administrative law, according to Sir Stephen Sedley, does not have a panoptic history. Through a collection of 14 essays, delivered for the most part at Oxford University, Sedley seeks to address, in part, some of that deficit.

As a collection of essays, initially delivered as lectures, the book is not written in a conventional style. The chapters are of varying lengths and there is a use of multiple headings. Sometimes a section may seem slightly irrelevant to the one preceding because it does not lead into it in a way anticipated. However, this does not detract from the overall readability of the book, which remains very accessible throughout. Sedley manages to consistently interest the reader, weaving into the text points of legal interest not commonly discussed, for example, on the origin of the concept of *ultra vires* or on the use of royal prerogative to grant or rescind monopolies in Tudor times. The text is replete with interesting quotations from various legal actors throughout history, the title of the book itself emanating from a quote from Francis Bacon in 1625. This quote is used regularly throughout the text to describe the relationship between the judiciary, Parliament, and executive.

The book is structured into two parts. Part I contains a series of 'Histories' of public law from different eras. In this part, Sedley discusses the development of public law, from its genesis, through to its period of 'sleep' in the early 20th century and its rebirth in modern times. He also dedicates time to discuss the conditions through which the public law gained strength in its ability to curtail the abuse of power. Of particular interest is the chapter 'The dark satanic mills: the Victorian state' where Sedley discusses the growth of the regulatory state as a response to public health issues of the time, including discussions on the use of child labour in factories and in sweeping chimneys.

In 'New corn from old fields: the Hanoverian harvest', Sedley outlines a series of attempts in the 18th century by government to halt public criticism and the subsequent backlash from the courts. His discussions of the *North Briton* cases of *Wilkes* and *Entick and Carrington* [1765] EWHC KB J98, which include informative historical and contextual content, breathe new life into the already well-examined cases. Chapter 4 contains an exploration of the Interregnum years, between the execution of Charles I in 1649 and the start of the reign of Charles II in 1660. This is an area often overlooked within legal history, but Sedley provides interesting commentary on the importance of this period for legislative reform, before the revocation of this reform during the Restoration. It includes an evocative exploration of the

first law commission, as well as a discussion of the introduction of the Instrument of Government – the country's first and only written constitution which appointed Cromwell as Lord Protector and had influence on the creation of the Bill of Rights 1689.

Part II is broken down into a series of themes each looking at a different legal facets, concepts, or principles. In 'The royal prerogative', Sedley interrogates the use of the prerogative powers of the Crown from historical to modern times. He notes with criticism its potential to be used where democratic decisions should be made, for example, in committing the state to an act of aggression, or allowing ministers to make decisions without any legislative control – such as Jack Straw's decision to take away the right of exiled Chagos islanders to return to their home. In Chapter 8, Sedley discusses the historical evolution of the right to be heard, illustrating its origins not only in public law, but in private law, before turning to explain the development of the concept of due process. The chapter 'Public law and human rights' is of particular interest - in it Sedley argues that the landmark privacy cases of *Douglas v Hello! Ltd* [2001] 2 AC 127 and *Campbell v MGN* [2004] 2 AC 457 could have been decided as they were without the introduction of the Human Rights Act 1998 (HRA). He argues this is because the law of confidence and privacy had developed in the law of England and Wales prior the introduction of the HRA. Sedley contends that this is demonstrative of the historical development of human rights and civil liberties in the United Kingdom prior to the HRA, and this has implications for a future where the HRA could be repealed (p. 205). Whether this is true or not is arguable, but his confidence in the judiciary in protecting human rights in a post-HRA world is uplifting.

In 'Law without courts: the tribunal system', Sedley considers whether other methods of resolving legal disputes are second-class to ordinary courts. In this chapter he notes with approval how tribunals enable expertise to be used in resolving specialist cases, while helping to alleviate the pressure on the ordinary courts. Time is given to evaluating the substantial overhaul of the tribunal system following the Leggatt Report and the impact that this has had on public law cases. In the last chapter in the book, Sedley discusses the rule of law, providing critique of not only Dicey's articulation of what the rule of law means, but Bingham's also, arguing that Bingham's contribution could have included references to democratic polity, the separation of a state's powers and an independent judiciary.

This book covers a vast array of topics – this review can only but provide a flavour of its content. It is an enjoyable book to read, well-researched, and stimulating. It undoubtedly provides some much needed commentary on the history of public law in England and Wales. There is much to recommend for his intended audience of judges, practitioners and students, and academics, all of whom will undoubtedly find interest in his essays.

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BOOK REVIEW

Emma Jones, Lecturer in Law, The Open University

Ashford, C., Duncan, N. and Guth, J. (eds) (2016) *Perspectives on Legal Education. Contemporary Responses to the Lord Upjohn Lectures*, London and New York, Routledge, ISBN 978-1-138-81258-1

Named in honour of the inaugural president of the UK's Association of Law Teachers, since 1971 the Lord Upjohn lectures have seen a series of distinguished academics, practitioners and others reflecting on the state of legal education in England and Wales and various related topics. This edited collection takes 11 of these lectures and pairs each of them with a contemporary commentary by a legal academic.

Taken as pairings, each lecture and its response has something of interest within it. Perhaps most memorable is the strident and unapologetic 1980 call of the late Sir Frederick Lawton P.C. to law schools to do more to meet the needs of the legal profession (chapter 17). In which he wonders whether "the present system of legal education is not over-elaborate" and "wasteful" of "time and money" (p.171). Chris Ashford's response to this provides not only brief but fascinating biographical detail but also a thoughtful analysis of the tensions which still exist within law schools between arguably conflicting vocational and liberal agendas (chapter 18).

Another strong pairing is that of Wes Streeting (chapter 5) and Graeme Broadbent (chapter 6). Streeting's 2011 lecture deals with issues of social mobility and widening participation in higher education generally. Broadbent's response links these issues more clearly to the law degree itself, but deftly avoids focussing solely on this. By doing so he provides an interesting overview of the broader structural and policy issues within universities and their impact on the law school, whilst avoiding discussing law students in splendid isolation.

In addition, there are some individual contributions which contain particularly interesting arguments or responses. Of particular note is Julian Webb's discussion of the "'stages and fiefdom' thinking" (p.33) which has characterised the development of the English and Welsh law schools, in particular their separation of the academic and vocational stages of an education in law. His discussion of the various committees and policies which have shaped this approach is also arguably one of the most accessible parts of the collection for those with more of an emergent or passing interest in legal education in England and Wales (chapter 4).

Although chapters by Ashford and Webb (and others) reflect the perennial themes in UK legal education of vocational versus liberal and doctrinal versus socio-legal, often centring

around what the relationship between the law schools and the legal profession was, is and should be, there are also many less well-trodden paths explored here. For example, in the discussion of the relationship between law and politics in teaching terms (chapters 21 and 22) and the conjuncture between research and teaching (chapters 23 and 24).

What this collection does not do (and does not pretend to do) is offer an easy introduction to the intricacies of legal education in England and Wales. The lectures are not sequenced in chronological order, meaning that analysis of the various reviews that have punctuated the last century of legal education is somewhat scattered throughout. For example, in chapter 1, Lord Neuberger's lecture is delivered in 2012, prior to the publication of the Legal Education and Training Review's final report ("LETR"). It is not until chapter 19 that Lord Griffiths of Govilon M. C. deals with the Lord Chancellor's Advisory Committee on Legal Education and the Legal Profession (although largely focused on the legal profession aspect).

There are also some frustrations. For example, it is interesting to read the then-chair of the Legal Services Board, David Edmonds, 2010 reflections on the changing legal landscape (chapter 7). However, one can't help but feel it would be even more compelling to read a post-LETR analysis of the same. Similarly, whilst Lord Justice Ormrod's 1974 reflections on judicial fact-finding remain relevant today, reading a discussion which gave an insight into the workings and thought-processes of his 1970 report into legal education would have much more direct interest in relation to the shaping of today's law schools. Whilst the responses to both of these do place them within the contemporary context, these are from an academic perspective and therefore can only reflect the views of one set of stakeholders within legal education.

Overall, this book makes an interesting companion to dip in and out of for often fascinating, occasionally slightly obscure, nuggets of insight into legal education and the wider context of legal practice within England and Wales. The reader is, overall, assumed to already have some knowledge and understanding of the historical, chronological and political background to its development, as well as an awareness of contemporary debates within it. This may perhaps limit its audience in some respects, but the collection does counter-balance this with a range and depth which accurately reflects the status of legal education scholarship in England and Wales today.

BOOK REVIEW

Francine Ryan, Lecturer in Law, The Open University

Jacobson, J., Hunter, G., Kirby, A, (2015) Inside Crown Court, Cambridge Policy Press, ISBN 978-1-44731-705

This book provides a fascinating insight into the Crown Court and the criminal justice system. The Crown Court prosecutes the most serious criminal cases in England and Wales and is at the heart of its criminal justice system. The book gives the reader a real understanding of the workings and processes of the court from the perspective of the many different players who either participate or work in the court room. The book is based on testimonials from victims, witnesses, defendants, practitioners and professionals who work within the court, and observations of the court process. The reader is transported into the court room through the detailed accounts given by those interviewed.

Each chapter explores a dimension of the court process and the reader gains an understanding of the experiences of all the different participants in the criminal justice system. The empirical findings of the study are not just presented but also reflections on how the process needs to change and adapt. Although this is a study of the Crown Court, this book will be of interest to the readers of the Journal of Commonwealth Law and Legal Education who have common law legal systems and offers an interesting comparative to their own criminal justice system. The experiences of court users in England and Wales mirrors those in many other jurisdictions. What sets this book apart from other research in this area is that you hear the voices of the court users, which is critical to our understanding of how we ensure effective participation in the criminal justice system.

Chapter 1 is an introduction to the book, chapter 2 details what is the Crown Court and what its role is, chapters 3 to 7 each examine an aspect of the court process and then all of the discussion is drawn together in chapter 8 in conclusions. There is a very comprehensive list of references which will be of great value to those researching in this area. The Appendix contains details of court user respondents and an outline of observed cases. This is fascinating information as it highlights the variety of cases that are tried in the Crown Court, the socio-demographic characteristics of the court users and the outcomes of the cases.

The introduction in chapter 1 sets out details of the study and the questions it is intending to address. The book is based on interviews and observations over a 20 month period of the Crown Court. This book addresses a gap in the research because criminal courts have not been the subject of much research in comparison with other elements of the criminal justice

system. Throughout the book the analogy of a performance is used which perfectly captures the court trial process.

Chapter 2 provides the reader with an understanding of the court structure, how cases arrive in the Crown Court and the 'key players'. It then provides a commentary on access to justice and how the criminal justice system is seeking to support vulnerable individuals who are required to participate in the process such as victims and witnesses. What is particularly interesting is the way the authors' highlight the issues and concerns around vulnerable defendants'. The book later on demonstrates that the issue of vulnerability is a complex one as being able to effectively participate in the court process extends beyond defining an individual as vulnerable.

In chapter 3 it explores the adversarial system, considering why it is not a process about finding out the truth. It then draws on the analogy of the court process as a form of theatre to explore the public nature of the court process, and its rituals and formalities. It does this by reference to the interviews from witnesses, which provide a fascinating first hand insight into their perceptions and their perspectives of the court room.

Chapter 4 explores 'them and us: the divide between court users and professionals'. The interviews with victims and witnesses reveals their frustration of the process of giving evidence and describes how they felt hampered in trying to tell their story. Often, they did not feel they had a 'voice' or that their 'voice' was being listened to- the interviews support previous research where victims describe feeling peripheral within the court system. This is then contrasted with the role of the professional players in the court room or the main actors in the performance, this serves to create a dividing line between the 'them' and 'us'.

Chapter 5 is entitled 'structured mayhem: the organised yet chaotic nature of court proceedings'. At the end of the chapter is a case summary which illustrates the organised chaos of the trial process. The funding cuts that have been applied to the justice system also manifest themselves in the operation of the courts and impact on perhaps the increasingly chaotic nature of the court process, for example the reduction in the number of clerks and ushers has ramifications for the efficiency of court proceedings. This highlights the continued tension of how we deliver justice at a price.

What is interesting about chapter 6 is that the reader is provided with an explanation of the conformity of court users even though at times the trial process can be challenging, frustrating and sometimes hostile. Conformity is described as reluctant but there is something about the nature of the court room that creates an expectation of compliance.

The reader gains a real understanding of how anxious victims and witnesses are about giving evidence and in particular the impact of cross examination. Any reader who has an interest

in how the criminal justice system deals with victims and specifically vulnerable victims will find this chapter particularly interesting. It discusses the measures that have been introduced to support vulnerable witnesses and victims and highlights how those measures are often only provided at the last moment but are critical to the recipients, having a positive impact on their ability to give their evidence.

The legitimacy of the court process is explored in chapter 7. It identifies five aspects of legitimacy; 'moral alignment', 'positive outcomes', 'fair decision making', 'respectful treatment' and 'passive acceptance'. Each of those aspects is considered. The research demonstrated that different court users attach different weight to those aspects. 'Positive outcomes', 'fair decision making', and 'respectful treatment' underpinned the court users' experience. What is interesting is that the discussions with the court users indicated that 'positive outcomes' is often more important than the process.

Chapter 8 is the conclusion, which draws together the themes discussed in the book and includes a section on implications for policy and practice. The book acknowledges the progress that has been made in the treatment of particularly victim and witnesses in the criminal justice system but does consider that there are ways in which the court users' experiences could be improved following the findings from this research.

This book succeeds in integrating clear explanations of the court process with observations and interviews therefore the book is relevant to an array of different readers. The book will be of interest to anyone who wants to gain a greater understanding of the experiences of court users. The consideration of the court room and the criminal justice system will be of particular relevance to law and criminology students. Policy makers can draw on the experiences of victims and witnesses to consider how improvement and change could be effected in their court rooms. The diverse nature of this book will inform those researching in this area.

The writing style is clear and accessible. One of the strengths of this book is that it draws upon research and evidence to illustrate the workings of the criminal justice system. It has very clear explanations and descriptions. The book provides a real insight into the workings of the Crown Court and the construction and accessibility of this book will undoubtedly engage a variety of readers.

BOOK REVIEW

Keren Lloyd Bright, Senior Lecturer in Law, The Open University

Silva, H.J.F. (2015) *Understanding Conceptions of Law*, Colombo, Royal Institute of Colombo ISBN 978-955-42312-0-7

Joe Silva sets out the purpose of his book in the opening sentences of the preface:

This book is an introduction to the understanding of Professor H.L.A. Hart's *Concept of Law*. It also aims at explaining other jurisprudential theories discussed or mentioned in brief by Hart.

(Silva, 2015, p.ix)

It is then crystal clear from the start that this is a book designed to introduce the novice, typically an undergraduate law student, to jurisprudence or legal philosophy through the lens of Hart's treatise – and it does 'what it says on the tin'. Jurisprudence is in essence a discourse on the question: 'What is law?'. Professor H. L. A. Hart's *Concept of Law*, which was first published in 1961, is widely regarded as one of the most important and influential works in the English speaking world on legal philosophy in the twentieth century – and this is why Hart's work forms the basis for Silva's book.

It has no doubt been observed that, in their respective book titles, Hart uses the word 'concept', while Silva uses 'conceptions'. This was not by happenstance, but by the delicate exercise of semantics. In his first chapter, Silva explores the distinction between the two words, drawing on the work of the prominent jurists Neil MacCormick and Ronald Dworkin. Silva describes 'concept' as a commonly accepted idea or principle, and 'conception' as an understanding of how or what something is – which is invariably more controversial. Hart in his work was searching for concepts, while Silva is instead seeking to set out the different contesting theories and debates in jurisprudence.

Another way in which Hart's *Concept of Law* and Silva's *Understanding Conceptions of Law* may be contrasted is in their pedagogic aim. In the preface to his book, Hart states that he hopes the mode in which he has chosen to write his book 'may discourage the belief that a book on legal theory is primarily a book from which one learns what other books contain' (Hart, 1997, p. vii). Silva, in order to encourage and enthuse the novice, has written a book on legal theory which does precisely that.

The treatment of the Command Theory in each respective book provides an illustration of this. Hart, in a little under ten pages, sets out an analysis and critique of varieties of imperatives and law as coercive orders, referring primarily to Austin but also in passing to Kelsen. Hart either assumes his readers come to his book with an extensive knowledge of jurisprudence – or, if they do not have it, has the expectation that his readers will go away and acquire this knowledge if they wish to comprehend the full weight of scholarship which sits behind his analysis (and indeed Hart points the way in his detailed ‘Notes’ at the end of his book). Silva, by contrast, first lays out the stall of the Command Theory with a chapter on the thinking of Hobbes, Bentham and Austin (the latter in some detail as much of Hart’s *Concept of Law* is concerned with ‘the deficiencies of a simple model of a legal system, constructed along the lines of Austin’s imperative theory’, as Hart states at the start (Hart, 1997, p.vii)). This chapter in Silva’s book is then followed by another on Hart’s critique of the Command Theory, which includes an analysis of the ‘Orders backed by threats’ model, ‘Duty imposing rules’, ‘Power conferring rules’ and the likely influence on Hart of the Hohfeldian analysis of rights. Kelsen’s theory of law is the subject of another chapter still.

Thus Silva in part adopts the role of Hart’s translator and abridger in setting out Hart’s critical thinking, but he also provides considerable context for Hart: those philosophers who came before, his contemporaries and those who came after – and so he covers a lot of ground. Moreover, he interweaves other philosophical ideas, including Hindu and Buddhist, and commentary from other sources, to produce a richer whole.

Silva’s many years spent teaching law at universities in Sri Lanka and the UK is highly evident in this book: the language used is simple and accessible; the reader is led step by step through subtle ideas; and the chapter and section headings clearly mark the route through the subject. This is the work of someone who is fascinated by the subject; who has reflected upon it at length; who has taught it to undergraduate students; and who now wishes to communicate his accumulated learning and teaching experience via the medium of a book. Silva aims to make jurisprudence comprehensible by establishing a firm foundation of knowledge and understanding upon which further studies can rest - and he particularly has international students for whom English is a second language in mind.

There are a number of chapters in Silva’s book which are directly comparable in content to Hart’s, only the relative weighting of the subject matter is different owing to Silva’s decisions concerning what to explain, what to contract and what to expand. These directly comparable chapters include those on the theory of rules, the rule of recognition, the open texture of law, the concept of justice, law and morals, and international law.

Other chapters in Silva’s book aim to chart the evolution in jurisprudence since the first publication of Hart’s book in 1961 in order to provide his readers with a more complete understanding of the subject discipline. One example is the chapter entitled ‘Hart’s

postscript and Ronald Dworkin'. Silva introduces the relationship between the two as follows:

After a brilliant studentship, both at Harvard and Oxford, Hart himself recommended Dworkin to be his successor as the Professor of Jurisprudence at Oxford. However, he later turned out to be a leading critic of the works of his former Professor.

(Silva, 2015, p.239)

In this chapter, Silva charts the battle of ideas between these two heavyweights of jurisprudence. Dworkin concurred with certain elements of Hart's analysis, but attacked many of Hart's distinctive theses.

Another chapter which charts developments in jurisprudence post-Hart is that concerned with feminist legal theory. In this chapter Silva outlines the political, social and economic circumstances in Western Europe which created the environment in which feminist scholarship and feminist jurisprudence would flourish. He defines four types of feminist thought (liberal, socialist, radical and cultural), before discussing key areas of concern for feminist jurists: domestic violence and rape, including marital rape.

In his final chapter, 'Some concluding thoughts', Silva assesses the extent to which Hart was successful in achieving his aims and purposes in *The Concept of Law* by drawing together the points and arguments from earlier chapters. After indicating various innovations and shortcomings - and the critique of Hart's treatise by other jurists - Silva concludes:

Hart's work is a masterpiece, as it cleverly opens the door to all the major strands in jurisprudential thought. As seen from this text, Hart has subtly introduced the reader to the works of legal positivists, natural law thinkers, realists, sociological perspective of law, and anthropologists ...This text while introducing the salient features of Hart's work, has also attempted to present in outline the major doctrines of these schools, in order to forward a better understanding of Hart's ideas.

(Silva, 2015, p.349)

Silva serves to remind us, should reminder be necessary, that law degrees which focus solely on the 'black letter law' and the technician's approach to legal study, to the exclusion of jurisprudence and discursive approaches to law and law-making, are much the poorer for it. Those coming to the study of jurisprudence for the first time should find Silva's book an accessible, clear and thought-provoking introduction. The next step, as Silva himself suggests, is to read Professor H.L.A. Hart's *Concept of Law*. A possibly better alternative would be for both books to be read side by side, in much the same way as a commentary on a Shakespearian play or other work of literature.

References

Hart, H. L. A. (1997) *The Concept of Law*, 3rd edn. (paperback), Oxford, Oxford University Press, ISBN 0-19-876123-6

THE COMMONWEALTH LEGAL EDUCATION ASSOCIATION

www.clea-web.com

Educating the Commonwealth Lawyers of the Future

Melbourne, Australia March 2017

The Commonwealth Legal Education Association invites law teachers and practitioners from around the Commonwealth and other Common law jurisdictions to submit abstracts of papers (of not more than 500 words) for this forthcoming conference. In this first call for papers, abstracts should be submitted by 28th October 2016. Acceptances will be intimated within three weeks of receipt subject to the availability of spaces within the conference programme. The CLEA Conference will take place alongside the Commonwealth Lawyers Conference in Melbourne from 21st-24th March 2017, exact dates to be confirmed.

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