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IN THIS ISSUE

In this issue, we have focused our attention on the forthcoming Commonwealth Legal Education Association's conferences.

We open this issue with an article that questions whether the doctrine of *pari passu* has been rendered passé in the Commonwealth Caribbean jurisdiction. The article examines the operation of the doctrine, as well as the exceptions to it, and methods that may be employed to bypass the doctrine. It also considers whether any alternatives could be employed to the doctrine and whether this would cause any procedural or substantive difficulties if they were adopted.

The second article in this issue analyses the rights that children have over their bodies, in particular with regard to their bodies and whether children have the right to control what happens to their bodies. The article considers the impact of the United Nations Convention on the Rights of the Child and compares cases in the English and Scottish courts to establish whether children have the legal right to accept or refuse medical treatment.

Conferences can be stimulating and provide an opportunity to discuss and debate ideas and concepts, as well as being a vehicle for social interaction and the opportunity to network and forge new collaborations. It is therefore with pleasure that we present the abstracts from the two Commonwealth Legal Education Association 2013 conferences.

This issue sees the reappearance of books reviews to the *Journal of Commonwealth Law and Legal Education* and we present two reviews at differing ends of the legal knowledge spectrum. We are pleased to accept books for review and these should be sent to:

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Unfortunately, we cannot guarantee that all books received will be reviewed or that reviews will be published in the *Journal of Commonwealth Law and Legal Education*.

As ever, I hope you find the articles in this issue of the *Journal of Commonwealth Law and Legal Education* to be interesting, informative and thought provoking.

We are pleased to accepted contributions to the *Journal of Commonwealth Law and Legal Education* at the following e-mail address: jclle@open.ac.uk. Please see the instructions for authors at the back of this issue regarding contributions.

Dr Marc Cornock
Editor

HAS THE DOCTRINE OF PARI PASSU BEEN RENDERED PASSÉ IN THE COMMONWEALTH CARIBBEAN?

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This article addresses the fundamentally important question of whether the pari passu principle can be said, in light of modern developments in the field of corporate insolvency law in the Commonwealth Caribbean to have been rendered passé. The article questions whether, in light of the many exceptions and modes of by-passing the operation of the pari passu principle, it can be said that the principle is 'unquestioned' or remains all pervasive. Noting the difficulties which may arise in this area, the article goes on to highlight further limitations which arise in so far as defining characteristics such as 'fairness' and 'equality of treatment', qualities which are said to be the 'hallmarks' or 'inherent characteristics' of the pari passu principle. The article makes it clear that the statutory regime in the British Virgin Islands, for example, which reflects the general approach taken in other Commonwealth Caribbean countries, like its counterpart in the United Kingdom, share similar defects which cannot be simply overlooked. Nevertheless, the article also considers the feasibility of alternative approaches and submits that the preponderance of legal scholarship in this field believe in the continued existence of the pari passu principle given the procedural and substantive difficulties which will reasonably arise if these alternative approaches were to be adopted at the expense of the pari passu principle. In sum, the article concludes by asserting that, though serious incursions have been made into the pari passu principle, it cannot be contended with any degree of authority and persuasiveness that the principle has become passé as its significance continues to lie not only in its proven track record of resolving disputes upon liquidation between unsecured creditors but also the practical effectiveness of its inherent characteristics of 'fairness' and 'equality of treatment'.

Keywords: Pari passu; fairness; equality of treatment; unsecured creditors; Commonwealth Caribbean.

Introduction

In the context of the modern law on corporate insolvency, the Latin phrase 'pari passu' (Mokal, 2001) contemplates a situation where 'all unsecured creditors standing in positions of relative equality at the onset of insolvent liquidation are treated equally' (Fidelis, 1992). A by-product of the Cork Review,¹ the pari passu principle, defined as placing all unsecured creditors on an equal footing, has been subject to much growth and clarification over the

¹ Report of the Review Committee on Insolvency Law and Practice (1982) CMND 8558 (hereafter, "Cork Report")

years and is reflected in almost all jurisdictions in the Commonwealth Caribbean which have passed Insolvency Acts to allow for the orderly, fair and efficient distribution of assets upon the liquidation of companies. Indeed, even today, it remains the case that, despite the apparent confusion which seemingly confronts the courts with respect to the distinction between the 'pari passu' principle and the principle of 'collectivity',² a number of scholars have accepted that the pari passu principle is undoubtedly a cardinal concept in the law of corporate insolvency reflecting notions of fundamental fairness and equal treatment. However, to suggest that the hallmarks of fairness and equal treatment are 'unquestioned inherent characteristics' of the pari passu principle is to over simplify the heated debate which has plagued this area of the law over the years.

Scope and application

At the outset, it must be noted that as regards the scope of the pari passu principle, Look Chan Ho (2010) has endorsed a separatist model, arguing that two versions of the par passu principle are clearly discernible in the context of modern insolvency law. On the one hand, he argues that the *orthodox pari passu approach* takes claimants exactly as it finds them, such that the distribution of assets within an insolvency forum (liquidation or administration) is based on the pre-insolvency form of claims,³ while on the other hand, he argues for the existence of a *pro rata distribution approach* within the various classes of claimants established by insolvency law itself, that is, claims subject to the principle are to be met rateably.⁴ Nevertheless, in the context of the Commonwealth Caribbean, these two approaches can be reconciled in the light of statutory provisions, specifically recognized in the British Virgin Islands, for example, under its Insolvency Act 2003.

Under *Section 207 (2)* of the British Virgin Islands Insolvency Act 2003, subject to section 151 of the same, in the context of liquidation proceedings, after preferential claims have been settled, all other claims admitted by the liquidator are ranked equally between themselves, provided that the assets of the company are insufficient to meet the claims in full. In such circumstances, these unsecured creditors are to be paid rateably.⁵ It is submitted that a careful reading of this provision will certainly implicate the existence of the pari passu principle of distribution with underlying notions of fairness and equal treatment at its heart.

² In *Re HIH Casualty and General Insurance* [2005] EWHC 2125 (Ch), the pari passu principle and the principle of collectivity were paraded interchangeably with no apparent appreciation that they are distinct.

³ *Re Smith, Knight & Co, ex p Ashbury* (1868) LR 5 Eq 223, 226

⁴ The principle of ratable distribution within class is value-free, has no substantive content, and is wholly subservient to any insolvency distribution policy.

⁵ Section 207 (1) (c)

Nevertheless, before making the error of over simplifying the scope of the principle in practice, one must bear in mind that certain preconditions also exist, which courts have recognized as being necessary to ensure the preservation of the sanctity of the *pari passu* principle. For example, in the Cayman Islands case of *Wright and Others v Eckhardt Marine GmbH Privy Council*,⁶ the Privy Council explained that in applying the *pari passu* principle, the debt valued at the date of winding up is to be regarded as a pre-condition in liquidation proceedings. Specifically, their Lordships explained that the principle of *pari passu* distribution according to the values of debts at the date of winding up does not necessarily lead to the conclusion that someone who was a creditor at that date must be allowed to participate in the distribution even when he is no longer a creditor at all and that ‘there is nothing unfair, or contrary to principle, in a rule which requires that anyone who claims to participate in a distribution should have the status of a creditor at the time when he makes that claim.’⁷ Suffice it to say, the courts in the region, despite the established pre-conditions for the application of the *pari passu* principle, have indeed recognized that the hallmark of this important principle of corporate insolvency law lies in its inherent characteristics of fairness and equal treatment for all in the corporate world of insolvency distribution. In fact, these characteristics appear to have implicitly influenced the decision of the Privy Council in the Bahamian case of *Lloyds TSB Bank plc v Clarke and Chase Manhattan Bank Luxembourg S.A.*,⁸ in which it was held that there was nothing unconscionable about requiring the Chase Bank, which entered into a pair of interlocking agreements in relation to interest payments and the capital payment with SIBL, to share *pari passu* in the distribution of SIBL's assets like any other unsecured creditor. Nevertheless, it is submitted that despite the aforementioned tacit references to the operation of the *pari passu* principle in the context of modern insolvency law in the Commonwealth Caribbean, the question still arises as to what are the more intricate purposes and benefits served by this supposedly fundamental rule.

Purposes and perceived benefits

The *pari passu* principle is arguably ‘the foremost principle in the law of insolvency’ (Keay and Walton, 1999) in the British Virgin Islands, and by extension, the Commonwealth Caribbean. In fact, some scholars have gone even further than this by regarding the principle as “all-pervasive”, having the effect of literally ‘striking down’ all agreements which have as their ‘object or result the *unfair preference* of a particular creditor by removal from the estate on winding up of an asset that would otherwise have been available for the general

⁶ Privy Council Appeal No. 13 of 2002

⁷ Ibid., para 34.

⁸ Privy Council Appeal No. 41 of 2001

body of creditors' (Goode, 1997). Indeed, this notion has been reaffirmed in a multiplicity of fora with several legal commentators contending that the principle is supported both by the need for an orderly liquidation of insolvents' estates in addition to requirements of fairness (Cork Report, para 1220). In fact, it has been argued that any deviation from the principle is a cause for great concern and that there is indeed a heavy burden of proving that deviation from this pervasive principle is 'warranted' (Keay and Walton, 1999:92). In other words, in liquidation proceedings, the onus of proof is on those supporting differing priorities to justify their claim. Where they fail to do so to the satisfaction of the court, it appears that the 'default principle' of 'equality' will be adhered to in the distribution of assets following liquidation.⁹

The notions of fairness and equal treatment which are said to be inherent characteristics of the *pari passu* principle have been touted by Fidelis Oditah as "fundamental" ingredients of insolvency law; the hallmarks of the modern approach to distribution of assets in liquidation proceedings (Oditah, 1992:463). Indeed, it is these very 'unquestioned intrinsic characteristics' of the *pari passu* principle which have been regarded by Oditah as providing for an orderly liquidation in the vast majority of cases. Goode also supports this assertion by arguing that the equality approach taken by the *pari passu* principle marks off the rights of creditors in a winding up from their pre-liquidation entitlements and that the principle puts an end to the notion of the 'race goes to the swiftest' after insolvency proceedings have commenced. Indeed, the *pari passu* principle supersedes the notion of 'first-come first-served' which in turn allows for 'the orderly realization of assets by the liquidator for the benefit of *all* unsecured creditors and distribution of the net proceeds *pari passu*' (Goode, 1997:142). Furthermore, Keay and Walton (1999) have also emphasized that the *pari passu* principle serves to ensure 'parity of benefit', no matter what resources one has. In fact, they are of the firm belief that if there were no *pari passu* principle of distribution in insolvency law, we would return to the rather mediaeval "first come, first served" policy which entitled those with the greatest resources and power to the debtor's estate.

Suffice it to say, not only does the *pari passu* principle of distribution find solace with Goode (1997) and Keay and Walton (1999), but also Finch who has equally contended that the principle "conduces to an orderly, collective means of dealing with unsecured creditor claims and ... involves lower distributional costs than alternative processes such as 'first come, first served'" (Finch, 2000:194). Finch goes even further to suggest that the *pari passu* principle ably assists the law of insolvency in producing acceptable combinations of efficiency,

⁹ A Review of Company Rescue and Business Reconstruction Mechanisms (DTI, 2000) reiterates the same orthodoxy; see p. 10 para. 24.

fairness, accountability and transparency characteristics (Finch, 1997). This implicates that the devices and processes that make up the regime for *pari passu* distribution offer players in the market-place a low-cost mode of protection against insolvency risks whilst also avoiding allocating risks in a way that produces unfairness or inefficiency. Indeed, it is clear from this perspective that it is simply unsatisfactory to have an approach where ‘free-for-all where weak creditors would inevitably be beaten into last place by better-resourced competitors, and where the advantages associated with an orderly liquidation would be lost (Mokal, 2001:588). In this regard, only the *pari passu* principle is regarded as standing as a ‘bulwark against this’ type of situation from ensuing.

Moreover, it must be noted that the *pari passu* principle serves the important practical purpose of invalidating pre-liquidation transactions by which a creditor hopes to secure an advantage over his competitors, where these are not in accordance with statutory exceptions (Goode, 1997:144). Indeed, the principle can be touted as being very much at the heart of the rationale for the avoidance of pre-liquidation transactions thereby reaffirming ‘insolvency law’s commitment to the principle of equality’ (Oditah, 1992:465). In this regard, given the pervasive nature of the principle, it would appear, as Goode suggests, that ‘in certain conditions adjustments of concluded transactions which but for the winding-up of the company would have remained binding on the company may be required (Goode, 1997:344). Further, the notion of equality of treatment is also a significant inherent characteristic of the *pari passu* principle given that it serves key ‘practical and justificatory purposes which bring social benefits’ (Mokal, 2001:592). This approach should be favored over differential priority which is said to result in a diminution of all those benefits.

Nevertheless, a thought provoking practical application of the *pari passu* principle of distribution can be seen in a situation where, on the eve of insolvency, creditors, aware of the firm’s troubles and able to influence its decisions, try to steal the first portion of assets from the asset pool by getting the debtor to repay them. While they most certainly will gain by their hurried intervention, this is done at the expense of the collective group. It is submitted that this is precisely the reason why the “first-come, first-served” approach, which is in direct contrast to the *pari passu* principle, is not a viable alternative in insolvency law in that it encourages creditors to engage in duplicative, and thus wasteful monitoring, of their debtor in order not to be left behind in any race to the pool. It also adds uncertainty and therefore decreases the utility of risk-averse creditors (Jackson, 1982). Indeed, it has been argued by some commentators that the individualistic pre-insolvency debt-collection regime or the ‘first-come first-served’ approach, in contrast to the *pari passu* principle of distribution, is a ‘mad race to the asset pool (Mokal, 2001:594). This race is clearly undesirable. As such, in an effort to prevent this situation from arising, the *pari passu* regime, provided for under the British Virgin Islands Insolvency Act 2003, forces creditors to *queue*

up in order to have access to the pool of assets. Further, even where methods such as voidable preferences and post-petition dispositions of assets are attempted by some creditors to bypass this queue, the *pari passu* principle operates to avoid such attempts at immunity. In short, it is submitted that, based on the aforementioned, the *pari passu* principle allows for decisions regarding the distribution of assets to be made systematically and with a common interest in mind, in the overall interests of fairness and equality of treatment.

In sum, it is submitted that as the *pari passu* principle requires that all creditors who are in positions of relative equality as determined by pre-insolvency law should be paid back the same proportion of their debt in their debtor's liquidation, fundamental fairness and equality is ensured (Keay and Walton, 1999:93). In this regard, to abolish this principle would seemingly be undesirable to a statutory regime on insolvency which has already been the subject of much unease among commentators over the years.

Statutory exceptions: do they circumvent *pari passu*?

In contrast to the prevailing notion that the *pari passu* principle is sacrosanct and that its inherent characteristics of fairness and equality of treatment are unquestionable, several commentators have over the years expressed a fundamentally different view citing several examples where the doctrine may be considered to be rendered passé. Of importance to this discussion therefore is the extensive scrutiny that the *pari passu* principle has received, in light of its many exception, which are said to be adverse to its proper practical application in distribution claims in the modern law of corporate insolvency.

In the first instance, it must be noted that the set off exception provided for in section 150(1) of the British Virgin Islands Insolvency Act 2003 effectively averts the application of the *pari passu* principle in certain statutorily defined circumstances. In short, the *pari passu* principle will not apply where, before the relevant time of a firm's liquidation, there have been mutual credits, mutual debts or other mutual dealings between a debtor and a creditor claiming or intending to claim in the insolvency proceeding. In such circumstances, the sum due from one party shall be set-off against the sums due from the other party (British Virgin Islands Insolvency Act 2003, section 150(1)(b)). It is submitted that this right of set-off on insolvency represents a major incursion into the *pari passu* principle in that the creditor who is now able to assert set-off rights gets a *pro tanto* priority over others (Goode, 1997:143). This statutory exception operates automatically at the date of the winding up order without

the need for any intervention by either party.¹⁰ In short, parties are compelled to breach the *pari passu* principle. Suffice to say, the courts have had to deal with situations of creditors attempting to exclude the mandatory application of statutory set off, evidenced for example, in *Rolls Razor v. Cox* [1967] 1 Q.B. 552 where the court held that a washing-machine salesman was entitled to set-off £106 of sale proceeds against the £406 of retained commission that the now insolvent company owed him. The set-off in question could not be excluded by the contractual agreement between the parties which had purported to rule it out.¹¹ Nevertheless, it is submitted that the limitations attached to set-off rights cannot be ignored in the context of this discussion. In fact, it must be noted that the *pari passu* principle will continue to apply in circumstances where a creditor, who, at the time of the insolvency, had given credit to the debtor or received credit from the debtor or acquired any claim against the debtor or any part of or interest in such a claim, having actual notice that the debtor was insolvent (British Virgin Islands Insolvency Act 2003, section 150(2)(a & b)). Thus, in *David Hague v Nam Tai Electronics Inc and Others*,¹² which involved an appeal from the Court of Appeal of the British Virgin Islands, the Privy Council re-emphasized that set-off is allowed only in respect of mutual debts which existed before the company went into liquidation and that, on the facts, the attempt to recover the Forfás debt in full by redemption of TAI's shares and set-off against the Redemption Price was ineffective. It held that the scheme failed because Nam Tai was not entitled, after the commencement of the liquidation, to convert TAI's shares into a debt for the purpose of setting it off against the Forfás debt. In short, the court concluded that to allow Nam Tai to create a set-off in this way would infringe the paramount principle of *pari passu* distribution of the insolvent company's assets.

Suffice it to say, another exception which represents a major incursion into the *pari passu* principle is the fact that the costs and expenses properly incurred in the liquidation in accordance with the prescribed priority are paid, in priority to all other claims (British Virgin Islands Insolvency Act 2003, section 207(1)(a)). In other words, creditors whose claims arise after the winding-up order has been handed down are given a privileged position their claims are to be treated as part of the expenses of liquidation, are therefore to be given "pre-preferential" status, that is, ranking ahead of preferential creditors. Furthermore, the *pari passu* principle will not apply in circumstances where, after payment of the costs and expenses of the liquidation, the liquidator resolves to pay the preferential claims admitted by [the liquidator] in accordance with the provisions for the payment of preferential claims as prescribed in the Act (British Virgin Islands Insolvency Act 2003, section 207(1)(b)).

¹⁰ *Stein v. Blake* [1996] 1 A.C. 243 (HL); *Gye v. McIntyre* (1991) 171 C.L.R. 609 (High Court of Australia)

¹¹ *National Westminster Bank Ltd v. Halesowen Presswork and Assemblies Ltd* [1972] A.C. 785

¹² Privy Council Appeal No 16 of 2005

Moreover, the application of the *pari passu* principle is also limited by the trust exception provided for under section 207 (4) of the British Virgin Islands Insolvency Act 2003 which stipulates that '*assets held by a company in liquidation on trust for another person are not assets of the company.*' It appears that this exception comes as a backdrop of the Cork Committee report which stressed that property held by an insolvent company on trust for others has never passed to the liquidator representing the general body of the company's creditors because the liquidator takes on the "free assets" of the insolvent company. It is submitted that under this exception, proprietary interests in favour of arising under a properly constituted trust must prevail against the general body of creditors. In a practical sense therefore, if a lender is placed in the position of a beneficiary of a trust imposed on the company, that lender has a claim *in rem* against the money at issue in priority to all others claiming against the company's assets. In effect, this exception avoids *pari passu* distribution by keeping property out of the body of property available for settling the company's debts. In any event, the statutory exception for trusts could be explained in simpler terms, the words of Briggs J in *Lehman Brothers International (Europe) (In Administration) v CRC Credit Fund Limited & Ors* [2009] EWHC 3228 (Ch) 2 being instructive. His Lordship, in examining the nature of the statutory exception, explained that the provision allows for assets held under a trust to be identified and promptly distributed into segregated accounts (from the firm's house accounts). In short, those assets are held on trust, in substance for the clients for whom they are received and held. In the event of the failure of the firm, the exception allows for the pooling of the assets held on trust, thus far segregated, and for its distribution to those entitled to it under that trust. He further explained that upon the firm's insolvency, the clients would receive back their assets in full, (subject only to the proper costs of its distribution) free from the claims of the firm's creditors under the statutory insolvency scheme. This exception ensures that, promptly upon receipt, client money is held by a firm as trustee, separately and distinctly from the firm's own money and other assets, and therefore out of the reach of the firm's administrator or liquidator upon its insolvency (for distribution among its creditors). Nevertheless, it appears that the statutory exception allowing for 'subordination agreements' further erodes the application and pervasiveness of the much lauded *pari passu* principle. It is submitted that subordination agreements¹³ are seemingly allowed under Section 151 of the British Virgin Islands Insolvency Act 2003, which provides that '*where, before the relevant time, a creditor acknowledges or agrees that, in the event of a shortfall of assets, he will accept a lower priority in respect of a debt than that which he would otherwise have under this Act, that acknowledgement or agreement takes effect notwithstanding the*

¹³ It is possible to make an effective agreement that one's own debt will rank behind the other unsecured debts of a company.

provisions of this Act, except to the extent that a creditor of the debtor who was not a party to the agreement is prejudiced.'

Though there was initial unease about the application of subordination agreements, the ground-breaking decision of *Re Maxwell Communications Corporation plc (No. 2)* [1994] 1 BCLC 1 did much to clarify the law in this important area of corporate insolvency. The question before the court was whether the holders of convertible subordinated bonds might effectively contract not to be repaid until after the general unsecured creditors had been satisfied in full--whether, after the onset of insolvency, they were not entitled to a *pari passu* distribution of the assets of the company. Vinelott J. accepted that the bondholders, who had entered into an investment arrangement fully aware of the subordination of their claims, could not then be elevated to the level of the rest of the creditors at the time of insolvency. In this regard, it is submitted that contracting out of the *pari passu* principle is allowed on the basis that a creditor would be permitted to waive a debt in full (or in part) and that this might be agreed in advance of, or after, a liquidation. This decision clearly represents a position that the *pari passu* principle is far from sacrosanct. It is obvious that *Re Maxwell* allows parties to avoid it as, on the facts, the Bondholders, who would have ranked *pari passu* with M plc.'s other creditors, were relegated because of the terms of their agreement with M plc. to a position inferior to those other creditors. Nevertheless, Vinelott J. explained that the earlier case of *British Eagle International Air Lines Ltd v Cie Nationale Air France* [1975] 1 WLR 758 should be read as laying down the rule that "a creditor cannot validly contract with his debtor that he will enjoy some advantage in a bankruptcy or winding-up which is denied to other creditors". However, he held that this did not preclude an agreement between A and B Ltd. for the latter's debt to A to be subordinated in B's insolvency to that owed to B's other unsecured creditors.

Other substantive limitations

Apart from the statutory exceptions referred to above, which admittedly, represent major inroads into the much heralded pervasiveness of the *pari passu* principle, several legal commentators have also expressed the view that the inherent characteristics of this principle, namely, 'fairness' and 'equality of treatment', cannot be regarded in their truest sense as being 'unquestionable'. Principally espousing this point of view is Razwaan Jameel Mokal who argues that the *pari passu* principle is rather less important than it is sometimes made out to be given that, in his estimation, it does not fulfill 'fairness' and 'equality of treatment' which have often been regarded as its inherent characteristics (Mokal, 2001:592). He further contends that the *pari passu* principle does not constitute an accurate description of how the assets of insolvent companies are distributed in the modern law of corporate insolvency. In fact, he goes even further by asserting that the principle has no role to play in ensuring an

orderly winding up of such companies, indicating in no uncertain terms that he could not see why proponents of the principle could possibly argue that it underlies, explains, or justifies distinctive features of the formal insolvency regime, notably, its collectivity. In short, Mokai submits that, in reality, even the case-law said to support the *pari passu* principle serves actually to undermine its importance and that the principle has nothing to do with ‘fairness’ in liquidation.

In any event, Mokai further substantiates his argument in opposition of the *pari passu* principle by using official statistics to empirically show that, in an overwhelming majority of formal insolvency proceedings, *nothing* is distributed to general unsecured creditors. He argues that rather than supporting a pervasive, ‘unquestioned’ or sacrosanct principle of *pari passu*, the statistics show that most types of claim either are or can be exempted from the application of the *pari passu* principle. On the basis of these arguments, it can thus be contended that only unreasonable commentators would conclude that the *pari passu* principle is “the normal rule in a corporate insolvency” (Mokai, 2001). In the distribution of the assets of insolvent estates, the supposed “equality”, an inherent characteristic of the *pari passu* principle between different types of claim, must be very much the exception. Indeed, even if unsecured claims other than preferential claims form the bulk of the *claims* in most liquidations, most of the available assets would not be *distributed* “equally”. The *pari passu* rule is supposed to govern distributions. In reality however, distribution in accordance with this rule is virtually non-existent. In this regard, the current law purporting the notion of *pari passu* is said to leave very little room for anything to be distributed *pari passu* in an overwhelming proportion of insolvencies. The Cork Report supported this position indicating in explicit terms that rateable distribution among creditors is rarely achieved (at para 1396). Keay and Walton endorse also endorse this approach by arguing that the “equality” characteristic of the *pari passu* principle is “nothing more, and has little relevance, other than to act as a convenient default principle” (Keay and Walton 1999:94). It has thus been suggested that insolvency scholarship somehow tear itself away from the false view that the “equality” characteristic of the *pari passu* principle occupies the centre of the insolvency law universe.

Suffice it to say, Mokai contends that the “equality” principle determines who counts as an “equal” by reference to an attribute of the claimants which is irrelevant or trivial or meaningless as regards the appropriateness of any method of distribution of an insolvent's estate. Thus, for example, Mokai argues that the very suggestion that bank-creditors and employee-creditors should both be treated “equally” by being paid back the same proportion of what they are owed, seems absurd. He asserts that to treat these parties as equals in their debtor's insolvency requires that those in a more vulnerable position in their debtor's insolvency be given *greater* protection than those better able to deal with the loss

and that fairness does *not* result from treating the two types of creditor “equally”. In this regard, he argues for the outright rejection of the *pari passu* principle as applied to bank- and employee-creditors with claims similar to each other. Indeed, bank-creditors are very well-placed to deal with being paid back less than they are owed in any individual insolvency whereas employee-creditors might often be dependent solely on their salaries, might be unable to diversify by working for more than one employer, might have no insurance because they are not able to join a trade union which would buy such insurance for its members, might have had no influence over the terms on which they were employed and therefore became creditors, and might be unable quickly to find work on being deprived of a job by virtue of their employer's insolvency (Keay and Walton 1999:100).

In short, it is contended that employees are more deserving of protection in their employer's insolvency but the *pari passu* principle with its crude “equality” is almost entirely unattractive if we wish to treat all the parties as equals. In reality, it is contended that the *pari passu* principle has nothing to do with fairness as fairness demands that each claimant be accorded equal care and concern, looking at the *totality* of the interests and obligations of each, something which the current regime of *pari passu* fails to do. In this regard, it is submitted that assertions that the *pari passu* principle is all-pervasive and unquestioned regime based on inherent characteristics of fairness and equality is a fallacy, which some commentators like Mokal argue, must be abandoned (Mokal, 2001).

The feasibility of alternative approaches

Given the difficulties contended above in respect of the application of the *pari passu* principle, particularly those that arise in relation to notions of ‘fairness’ and ‘equality of treatment’, a number of alternative approaches have been suggested. Vanessa Finch has considered the feasibility of these alternative approaches in detail and contends that when all is said and done, the *pari passu* principle still remains ahead of its alternatives, for several reasons (Finch, 2000:210).

Nevertheless, in the first instance, debts can be ranked in a chronological manner thus requiring that such debts be repaid from the estate with reference to the date of accrual on a first come first served basis. Thus, those who can prove that their debts were established at the earliest dates would, accordingly, be paid first. The requirements of this approach however may mean that recording and disclosure mechanisms would become tools of necessity in that they would allow each creditor to assess the position before entrenching funds. Suffice it to say, this approach is not free from all problems. For example, it has been submitted that as ‘a company enters troubled economic waters it would become

progressively more difficult to raise funds since prospective creditors would know that, arriving “late”, they would rank low in the distributional order’ (Finch, 2000:192). It is further contested that if this approach were to be adopted, there would be an increasing need to resort to security, quasi-security and trust devices thereby leading to very high transaction costs. Further, this approach creates increased uncertainty for other prospective unsecured creditors because assessing their lending risks would demand ever more complex and time consuming analyses of the estate-avoiding measures that have been used in relation to the company. It is submitted that this would involve not only inefficiency but unfairness to the most poorly-placed unsecured creditors since the latter would be in no position to evaluate their loan risks.

Nevertheless, another approach which has been suggested is that debts should be ranked ethically in that there should be a requirement that to pay creditors according to their, or society's needs, so that repayments would be organized in order to maximize the sum of human happiness (Kilpi, 1998). The questions however arise as to ‘how happiness is to be calculated and measured? Whose happiness counts? Does happiness achieved by unethical, even monstrous, means count?’ (Lyons, 1965; Posner, 1979).

It is submitted that if such an ethical approach is adopted, several difficulties will arise including the fact that there would be high levels of creditor uncertainty since predicting priorities would be nearly impossible. In consequence, the system of distribution will become complex, unpredictable and individualistic (Fletcher, 1996:607). In short, it is submitted that if the individual position or worth of a creditor is taken into account in distributing the estate then that individual position will be difficult to assess in advance. Inefficiencies and unfairness would be caused by the inability of creditors to assess present and future risks (Finch, 1997).

Suffice it to say, yet another suggestion is that for the purposes of distribution, debts should be ranked on the basis of their size with small creditors being paid at a higher rate of return than those ordinary unsecured creditors who have loaned troubled firms larger sums. It has been argued that small creditors are more vulnerable and deserve high levels of protection. The problem however with this approach is that it is difficult to correlate the size of the loan with the vulnerability of the creditor. For example, in some instances, small lenders may very well be more energetic risk spreaders than medium or large lenders--their businesses may involve large numbers of small loans rather than fewer loans of greater size. As such, these small lenders may be able to adjust their loan rates quite effectively because the market may offer a range of deals and attendant risks. In short, it is submitted that it simply cannot be assumed that small creditors are necessarily less well-informed, expert or strongly positioned to negotiate than larger creditors (Finch, 2000:208).

Nevertheless, another approach which has been suggested is that of debts paid on policy grounds that is, paying different ordinary creditors at different rates. It appears that the consumer creditor will be ahead of the line for such special treatment as this class of unsecured creditor might be entitled to a higher rate of return as compared to trade creditors because the latter “should be more aware of the risks involved in extending credit to the company” and because “bad debt insurance is increasingly available to trade creditors” (Finnis, 1980:90). However, problems also arise in respect of this approach. It has been argued that adopting this approach will lead to increase transaction cost and creditor vulnerability and that attention should be paid not to consumers as a class but to higher priorities, for individual creditors who are ill-positioned to evaluate risks or sustain economic shocks. In short however, this approach arguably introduces uncertainties and inefficiencies and should not be implemented at the expense of the current regime of *pari passu* distribution.

Conclusion

While the *pari passu* principle, provided for under Section 207 (1) of the British Virgin Islands Insolvency Act 2003, is said to be one of the (if not the most) fundamental principles of the law of insolvency and is at the very heart of the whole statutory schemes of bankruptcy and winding up and that it serves such desirable aims as orderliness in liquidation and fairness to all creditors, the question of whether its inherent characteristics of ‘fairness’ and ‘equality of treatment’ can properly be deemed to be ‘unquestioned’ remains a rather uneasy topic among corporate insolvency lawyers.

Indeed, it remains clear from the case law and commentaries identified above that these inherent characteristics have certainly expanded overtime and have taken on a new focus in modern insolvency law. Nevertheless, the question of whether their implications exist only in a formal sense as opposed a practical sense, remains a much debated matter. Some have argued that the exceptions provided for by statute and the various by passing devices which have developed overtime affect the practical utility of the *pari passu* principle and thus those once ‘unquestioned’ characteristics of ‘fairness’ and ‘equality of opportunity’ have now, ironically, been the subject of questioning. Indeed, it has been contended that to allow the use of such devices is not merely to reduce the role of *pari passu*, but to override the very inherent characteristics by the principle has come to be known globally. Nevertheless, any attempt to provide an alternative approach to that of *pari passu* must seek to re-think how the estate is constructed, what procedural and substantive protections are to be allowed and how these fit into the aim of reducing insolvency in the British Virgin Islands.

Suffice it to say, based on the aforementioned arguments both for and against the notion of *pari passu*, it is indeed difficult under the current statutory regime in the British Virgin Islands to identify a clear role for *pari passu* because of the confusion caused by exceptions and by-passing arrangements but, having considered the alternatives, which admittedly will create even more difficulties than those identified under the current regime, it is submitted that *pari passu* is not *passé* in that it still plays a significant role in insolvency proceedings in the Commonwealth Caribbean, though this role today operates in a limited sense.

Nevertheless, it is submitted that there is further need to clarify the exceptions and by-passes so as to address issues such as the extent to which poorly-placed creditors bear undue risks because of their inability to adjust terms in the light of assessable risks in Commonwealth Caribbean.

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CHILDREN'S BODIES: THE BATTLEGROUND FOR THEIR RIGHTS?

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The UNCRC has changed profoundly ideas about adult/child relationships and there is now an acknowledgment in both law and policy that children have a right to be consulted and to participate in decisions made about their lives. This has been widely discussed and critiqued and one of the most significant battlegrounds for debate has been children's rights to consent or refuse medical treatment and the issue of exactly who has the right to control children's bodies. This article will compare several cases where the English and Scottish courts have made various decisions and rulings about the extent to which children do have rights to control their bodies. It will question why, twenty years after the UK ratified the UNCRC, children are still considered incompetent in matters concerning their own bodies, unless proved otherwise, while adults are automatically considered competent unless shown not to be and will analyse whether this situation is compatible with a children's rights agenda.

Keywords: Children's rights over their bodies; participation; reproductive and sexual health; anorexia; UNCRC

Introduction

While there have been criticisms of the United Nations Convention on the Rights of the Child (UNCRC), it is indisputable that it has profoundly changed ideas about adult/child relationships and about the nature of childhood itself, not least through the acknowledgment in both law and policy that children have a right to be consulted and to participate in decisions made about their lives. Yet this right remains contested and this article will examine one particular area – the right of children to control their own bodies – where implementing this right has caused problems. It will argue that there is still profound unease over children's participation in health care decisions and that law and practice are contradictory and ambivalent. It will compare several cases where this right has been debated in the English courts and the various rulings made. In particular it will examine the decisions made about children's rights to control their sexuality and reproduction with those which have sought to impose unwanted medical treatment or intervention, through force-feeding children suffering from anorexia. While all these cases focus on children's rights to consent to, or refuse treatment, the courts tend to come to very different

judgments, suggesting that children's rights over their bodies remain unresolved. This article will question why, twenty years after the UK ratified the UNCRC, children are still considered incompetent in matters concerning their own bodies, unless proved otherwise, while adults are automatically considered competent unless shown not to be. It will end by analysing whether this situation is compatible with a children's rights agenda.

The battleground of the body

The UNCRC introduced an ideology of childhood based on respect for children's dignity and shifted the emphasis when intervening in children's lives 'from protection to autonomy, from nurturance to self-determination, from welfare to justice' (Freeman 1992: 3). Twenty years later however Childhood Studies scholars have suggested that in the UK this ideal has not filtered down into general discourse and that rather than being empowered and justly treated, children are perceived as being at risk as never before and that the institutions of the state, as well as their own parents, are failing them. Furthermore, there is a sense that childhood is in crisis – children are out of control, unhappy and a risk to themselves and others (Kehily 2010). Furedi (2001) locates the trouble spots of contemporary childhood within the family, arguing that the rise of 'experts' in parenting and child rearing has undermined parents' confidence and lead to a pervasive paranoia about childhood being under threat and out of control. The UNICEF well-being tables which regularly put British children near the bottom in terms of happiness and well being (Adamson et al 2007), the surveys by Barnardo's which suggest that 49% of people believe that children are beginning to behave like animals and are a danger to each other and adults (Barnardo's 2011) and the work by some authors which argues that children are put under too much pressure at school and are being made unhappy by the social expectations placed on them (Palmer 2006), all point to the idea that despite the legal protections and the new emphasis on children's rights in local authority, educational and health settings, children are now fundamentally worse off than they were in the past. As England's Children's Commissioner wrote in the forward to his office's Five Year Plan, 'There is a crisis at the heart of our society' and this crisis is focused on childhood (Aynlsey-Green 2007: 12). In short, not only are individual children stressed, miserable and threatening to themselves and others but childhood itself is under attack, increasingly commercialized and pressurized.

This is not a homogenous view of course. It can be argued that adults have always viewed childhood as being in a permanent state of crisis and that there is always a tendency to look back on childhoods in the past as better, more free and happier (Brockliss and Montgomery, 2010). Morrow and Mayall (2009) have questioned the basis on which the UNICEF well-being tables are compiled and argued that the basis of the questioning may well be flawed and similar criticism can be levelled at the Barnardo's survey. It would be too sweeping a generalisation to claim that childhood *is* in crisis and much worse than ever, but

nevertheless there is a powerful discourse in the media, among politicians, and within Childhood Studies circles that there is an acute problem with today's children in the industrialised West. Furthermore the certainty with which the idealised Western childhood, as modelled in the UNCRC, was once held up as a template for the rest of the world to follow is diminishing. It is coming under attack not only from academics but from parents in the global South who reject what they perceive as the imposition of alien models of childhood. As parents in Ghana told one researcher looking at ideas about children's rights - 'We don't want Western children in Ghana' (Twum-Danso 2009).

Within the UK, many of the fears around childhood revolve around children's bodies and their rights over them. According to Furedi and others, there is an obsessive concern with child safety, from paranoia over child abductions to parents who drive behind the school coach to ensure their children arrive safely at their destination. More recently the fears of early sexualisation have resulted in two government enquiries within 18 months,¹ both of which have looked at, among other issues, appropriate clothing for children and dealt with similar concerns about what rights children have over their own bodies and whether or not it is always parents who have the ultimate say in controlling what happens to them. While these concerns of sexualisation and safety are increasingly debated in the media, other issues, especially around consent to medical treatment, have been dealt with by the courts and the rest of this article will look at how these have played out and what impact the UNCRC has had on these decisions.

Some of the highest profile cases of the last thirty years have focused on the precise issue of who can consent to treatment, and what is in children's best interests; issues central to both the Gillick and Axon rulings discussed below. It is perhaps not surprising that these issues have become so prominent in law – the right to control one's own body is fundamental to many civil and social rights agendas. Many of the great battles fought by second-wave feminists focused on women's rights over their own bodies, particularly on their sexuality and on their reproductive rights (Whelehan 1995). 'My body, my choice' became, and remains, a powerful rallying cry still heard in contemporary debates over abortion and rape. Children's rights, however, has never contained such a manifesto even though many current debates over the role and status of children in society focus on exactly the same issues.

Childhood Studies, heavily influenced as it is by the UNCRC, has always placed a great emphasis on children's own understandings of their bodies, their illnesses and on their right to refuse or consent to medical treatment (Christiansen 2000). In one of the first studies carried out on children's own views and understandings of life-shortening illnesses, Myra Bluebond-Langer (1978) showed very clearly how important it was to children to retain some sense of control over what was going on. Her child informants understood very clearly

¹ Sexualisation of Youth People Review and Bailey Review of the Commercialisation and Sexualisation of Childhood, 2011.

that they were dying, even though their parents and doctors had specifically kept the information from them. By looking at the condition of other children and noting the gestures and attitudes of the people caring for them, the children understood that their illnesses were terminal but tended to shield their parents from this knowledge. While children were not always able directly to refuse treatment or make decisions about the remainder of their lives, Bluebond-Langner argued that children were not just the passive recipients of the information that their carers wanted them to have.

Since this groundbreaking study, children's rights to consent or not in certain aspects of their medical treatment have slowly gained ground and have been much discussed in courts and in medical ethics (Miller 2003). From an academic perspective, there is a general presupposition in favour of the view that children can consent and do have the right to refuse treatment. At the far end of the spectrum are those who view all children, whatever their age, as being able to express themselves and able to participate meaningfully in medical treatment. The work of Priscilla Alderson and her colleagues (2005), which looked at premature babies in neo-natal units, claimed that even at this early stage they showed preferences for particular nurses and could communicate their pain and suffering effectively. Some babies, both parents and doctors sometimes believed, decided whether to continue struggling for life or not. Alderson et al argued passionately that for children's rights to be meaningful, even these small babies should be seen as citizens with rights to participation and whose wishes, however they were expressed, should be at least acknowledged in their treatment.

In other cases even those who work for and support children's rights do not see the right to consent as absolute. In Norway in 2001, for example, the then Ombudsman pushed for a legal ban on cosmetic surgery for those under 18, despite protests from girls of 16 who felt fully competent to make decisions about such treatment. The Ombudsman said in an interview:

There was some resistance among girls from sixteen to eighteen when we proposed to higher the age of cosmetic surgery from sixteen to eighteen, and the resistance was about you do not trust us, you don't trust our competence to make a decision about our own lives. And I had to tell them back no, I did not because this industry has an enormous power, and it is defining what is how your body should look like.

(quoted in Montgomery, 2003: 216)

The same children would have the right to consent to sex, be prescribed contraception and also would be able to access abortion on demand but were not deemed competent to decide on cosmetic surgery.²

UNCRC and rights over the body

At first glance it may sound odd to suggest that the UNCRC is silent on the subject of children's bodies – the UNCRC explicitly sets out children's right to bodily freedom in the form of freedom from 'torture or other cruel, inhuman or degrading treatment or punishment' (Article 37) and promotes children's rights to health and access to health care (Articles 6, 17, 23 and 24, among others). Article 12 deals with children's rights to have their views taken into consideration while Article 14 acknowledges that children's capacities for expressing these views evolve throughout childhood and states that the law must take account of these in matters of conscience and freedom of thought. Taken together these Articles suggest a pragmatic approach which assumes that children should be consulted about what happens to them and that they do have rights to bodily autonomy and the freedom to make choices about what happens to their bodies. The UNCRC is, however, silent on the extent of these rights and whether children have the right to make these choices independently, whether parents, guardians, children's commissioners or doctors should overrule them when necessary to ensure other rights and where the balance between protection and participation lies. While the principle of the 'best interest of the child' remains paramount, who has the ultimate right to decide this is left open.

This is not meant as a criticism of the UNCRC. While it has been thoroughly critiqued by many throughout its existence for its ethnocentrism and impracticality, it is important to remember that it was never written as a step by step blueprint of action and many of the details about practical implementation have been written into national country laws after its ratification (the next section will look at this in relation to England, Wales and Scotland in more detail). Indeed in many countries, it is unfortunately true that children's rights to consent and retain control over their bodies are much less important than the fact that healthcare is non-existent, food is scarce and participation rights worth little in contexts where mortality rates remain high and neither children nor adults have basic ontological security. Nevertheless, the rights enshrined in the UNCRC are indivisible and universal and the issue of consent and the underlying philosophy behind who is competent and who is not is central to contemporary studies of childhood, not least because within such discussions we can see how ideas about childhood are worked through in practice. By focusing on cases from the UK it becomes clear that, in this context at least, there is a large gap between the

² In Norway all women over 16 have the right to an abortion up to the 12th week of pregnancy, if they are under 16 parents must be informed (Løkeland 2004).

rhetoric of children's rights and their implementation and that the idea of children as active participants in their own decisions is still a long way from reality.

Position in English law

If the law of England and Wales provides for children to exercise control over their own bodies, it would be expected that this would be expressed in either statute or case law. Looking at these however does not provide definitive answers. The Children Act 1989 provides that anyone under the age of eighteen is a child (section 105) and, as such, has limited rights compared to an adult. At the age of eighteen the right to full autonomy is achieved and, by virtue of the Mental Capacity Act 2005, the presumption is in favour of competence with the onus on proving lack of competence on those who suggest that competence is lacking. One of these limited rights that children have is the right to consent over their own body. Section 8(3) of the Family Law Reform Act 1969 provides that those over the age of sixteen be treated as if they had attained the age of eighteen with regard to their right to consent over matters concerning their own bodies. It is worth noting that this right to consent is exactly as it says: a right to consent. The provision within Section 8 of the Family Law Reform Act 1969 makes no mention of the individual's right to refuse or withhold consent. Indeed if an individual over the age of sixteen but under eighteen refused to consent for a medical procedure, their refusal can be legally overridden by someone with parental responsibility, or by the courts, acting in the individual's best interest.

Thus English law does allow those who have attained the age of sixteen a degree of control over their own bodies, but only where this is in accepting a treatment that is being offered to them. Where they wish to refuse a particular treatment English law does not offer them automatic protection as their refusal can be legally set aside. The provision within the Family Law Reform Act 1969 is a positive step, and should be seen as such. It means that where a sixteen or seventeen year old has provided their consent, there is no legal need to also obtain consent from someone with parental responsibility, allowing the individual the right to be autonomous in this regard and not have their decisions subject to approval from a parent or guardian. However, the provision within Section 8 of the Family Law Reform Act 1969 does not go far enough to be said to meet Article 12 of the UNCRC and allow those who have attained the age of sixteen to be fully autonomous or fully participate in decisions made about their bodies, as any refusal by them is subject to the possibility of being overridden.

There is no such statutory provision or protection for those under sixteen. For this group of individuals, it is case law that has provided legal authority for them to exercise some degree of control over their own bodies. It is no exaggeration to say that the Gillick case (Gillick v.

West Norfolk & Wisbech Area Health Authority [1986] AC 112) is a landmark case in this regard. It is this case that provides the legal basis for children under the age of sixteen to provide a valid consent to medical procedures affecting their bodies.

The Gillick case was concerned with whether a circular issued to Health Authorities by the Department of Health and Social Security was lawful, when it advised that a doctor at a Family Planning Clinic could prescribe contraceptives to a girl under the age of sixteen, provided that he was doing so in order to protect the girl from the harmful effects of sexual intercourse. In deciding the case, the courts considered the nature of parental rights over a child and the rights of a child in making decisions about their bodies. With regard to parental rights, the House of Lords were of the view that as a child developed their independence increased and parental control relaxed. Further, that there was no absolute rule that parents had authority over their children until a fixed age. Lord Fraser stated that 'parental rights to control a child do not exist for the benefit of the parent. They exist for the benefit of the child and they are justified only in so far as they enable the parent to perform his duties towards the child' (at page 170), with Lord Scarman noting that 'parental rights are derived from parental duty and exist only so long as they are needed for the protection of the person and property of the child' (at page 184). Lord Fraser also indicated that he agreed with the words of Lord Denning in *Hewer v Bryant* [1969] 3 All ER 578, when he stated that 'even up till a young person's 18th birthday, the parental right is a dwindling right which the courts will hesitate to enforce against the wishes of the child and the more so the older he is' (at page 582). Thus it is clear that parental rights are not absolute and that as a child develops so does their ability to exercise their autonomy; although, there needs to be some way of determining how and when a child is capable of exercising autonomy.

It was the intellectual and emotional maturity of the child that was crucial in the Gillick case in determining whether the child was able to make a decision regarding their own body, and whether to take contraceptives. In this regard, it was Lord Fraser who outlined five principles that a doctor must follow to have the protection of the law when providing contraception to a child under 16. These principles have subsequently become known as 'Fraser guidelines'. They state:

- (1) that the girl (although under 16 years of age) will understand his advice;
- (2) that he cannot persuade her to inform her parents or to allow him to inform the parents that she is seeking contraceptive advice;
- (3) that she is very likely to begin or to continue having sexual intercourse with or without contraceptive treatment;
- (4) that unless she receives contraceptive advice or treatment her physical or mental health or both are likely to suffer;
- (5) that her best interests require him to give her contraceptive advice, treatment or both without the parental consent.

(per Lord Fraser at page 174)

As a result of the Gillick case, it became legally possible for a child under sixteen to consent to matters concerned with their own bodies, although in the first instance this was only to do with contraceptive matters.

The Gillick case came before the courts prior to the UK ratification of the UNCRC, whilst the Axon case (*R on the application of Axon*) v Secretary of State for Health [2006] EWHC 37 (Admin), was heard after the UK ratification of the UNCRC in November 1989 and, as it deals with many of the same issues of the Gillick case, allows the judgment in Gillick to be read in the light of the UNCRC. In the Axon case, the issue was whether a doctor is under an obligation to keep advice and/or treatment regarding contraception, sexually transmitted infections or abortion in confidence if the patient is less than sixteen years of age. In reaching his judgment, Justice Silber paid attention to articles 5, 12, 16 and 18 of the UNCRC. He noted that the UK ratification of the UNCRC 'was significant as showing a desire to give children greater rights' (at paragraph 64) and that

the UNC provisions provide further support for the general movement towards now giving young people greater rights concerning their own future while reducing the supervisory rights of their parents. In the light of this change in the landscape of family matters, it would be wrong and not acceptable to retreat from Gillick and to impose greater duties on medical professionals to disclose information to parents of their younger patients.

(at paragraph 115)

The judgment in the Axon case reinforced and extended that in Gillick. A child aged less than sixteen is able to provide consent for matters relating to their body in respect of contraception, sexually transmitted infections or abortion, provided that the principles within the Fraser guidelines were followed by the medical practitioner.

Aside from the ability of a child to consent to matters relating to contraception, the Gillick case also provided for a child under sixteen to consent to other matters relating to their bodies and medical treatment. Lord Scarman stated that

I would hold that as a matter of law the parental right to determine whether or not their minor child below the age of sixteen will have medical treatment terminates if and when the child achieves a sufficient understanding and intelligence to enable him or her to understand fully what is proposed.

(Gillick at pages 188 – 189)

This has become known as Gillick competence and it means that once the child has gained the required degree of competence (the sufficient understanding and intelligence referred to by Lord Scarman) the rights of the parents to override the child's wishes cease.

There has been some confusion since the judgment in the Gillick case regarding the difference between Fraser guidelines and Gillick competence, with some commentators using the terms interchangeably. However, 'they are two different concepts: Fraser guidelines referring to specific guidance that must be followed by the health-care professional to provide specific treatment to a child; and Gillick competence referring to the ability of the child to give consent' (Cornock, 2007: 142).

The autonomy for children deemed to be Gillick competent has not been as forthcoming as many have been expected after the judgment in the Gillick case. Firstly there is the fact that Gillick competence itself can be a changing concept. The determination of Gillick competence is undertaken by the healthcare professional who will undertake the proposed medical treatment. Thus, one healthcare professional may deem a particular child to be Gillick competent whilst another may not. In addition, because Gillick competence refers to the understanding and intelligence of the child in relation to a particular medical treatment, it is possible that a child can be deemed to be Gillick competent for one treatment but not seen as being Gillick competent for a more invasive or extensive procedure. It would appear that the more invasive the procedure, the higher that the bar will be set in terms of the child demonstrating their competence. Thus, Gillick competence varies not only with the age and intellectual and emotional maturity of the child but also with the medical treatment involved.

A further obstacle in terms of the autonomy of the child with regard to their own bodies has been the court's acceptance that whilst a child may give their consent when they are Gillick competent, their refusal can be overridden. In the Gillick case it was only the ability of the child to consent that was advanced. There is no right to refuse treatment provided by the Gillick judgment. This has been confirmed in various cases that have come before the courts concerning a child's refusal to accept medical treatment. Lord Donaldson may be said to have been the first to have made the distinction between a competent child's ability to be able to consent to or refuse medical treatment. *Re R (A Minor)(Wardship: Consent to Treatment)* [1992] Fam 11 CA concerned a 15 year 10 month old girl who had been admitted to an adolescent psychiatric unit and, according to the medical staff, needed anti-psychotic medication, which she refused when lucid.

Lord Donaldson made three points in his judgment which can be seen as reducing a child's autonomy over their body:

There can be concurrent powers to consent. If more than one body or person has a power to consent, only a failure to, or refusal of, consent by all having that power will create a veto. A "Gillick competent" child or one over the age of 16 will have a power to consent, but this will be concurrent with that of a parent or guardian. ...The court in the exercise of its wardship

or statutory jurisdiction has power to override the decisions of a "Gillick competent" child as much as those of parents or guardians.

(Re R at page 26)

In *Re W (A Minor)(Medical Treatment)* [1992] 4 All ER 627 this right of the court to overrule a refusal by a competent child was extended to those who are sixteen and in theory protected by Section 8(3) Family Law Reform Act 1969 which, as stated above, provides that those over the age of sixteen be treated as if they had attained the age of eighteen with regard to their right to consent over matters concerning their own bodies. The case concerned a sixteen year old girl who suffered with anorexia nervosa and was refusing necessary treatment. In his judgment Lord Donaldson stated that:

No minor of whatever age has power by refusing consent to treatment to override a consent to treatment by someone who has parental responsibility for the minor and a fortiori a consent by the court. Nevertheless such a refusal is a very important consideration in making clinical judgments and for parents and the court in deciding whether themselves to give consent. Its importance increases with the age and maturity of the minor.

(Re W at pages 639 – 640)

In summary, as to what English law says about a child's right to exercise control over their bodies: the Family Law Reform Act 1969 established the right of those sixteen and over to consent on their own behalf, the Gillick case made a significant step forward as it established that a person under the age of sixteen may consent for a specific medical treatment if they are deemed to be Gillick competent for that specific medical treatment. However, what may be termed a retrograde step, by those advocating a child's right to autonomy over their bodies, was made in the cases of *Re R* & *Re W* where it was decided that the refusal of anyone under the age of eighteen, even if demonstrably competent, can be overridden by someone with parental responsibility or by the courts.

Position in Scottish law

The section above has considered the position of children in England and Wales regarding their legal right to exercise control over their bodies in relation to medical treatment. In Northern Ireland, the law adopts the same position to that of England and Wales. However, in Scotland there is a different approach which may be said, by those wishing to increase a child's autonomy over their own bodies, to be superior to that which exists within the provisions of English law.

The Age of Legal Capacity (Scotland) Act 1991 effectively puts the common law provision of the Gillick case into statutory effect in Scotland. Section 2(4) states that

A person under the age of 16 years shall have legal capacity to consent on his own behalf to any surgical, medical or dental procedure or treatment where, in the opinion of a qualified medical practitioner attending him, he is capable of understanding the nature and possible consequences of the procedure or treatment.

However, in addition to this provision there is a provision within the Children (Scotland) Act 1995 which states that where it is necessary for a child to submit to medical examination or treatment and 'the child has the capacity mentioned in said section 2(4), the examination or treatment shall only be carried out if the child consents' (Section 90). A further section of the Act clarifies that those acting as the child's legal representative, such as those with parental responsibility, may only do so 'where the child is incapable of so acting or consenting on his own behalf' (section 15(5)).

This would appear to go considerably further than English law in that, as well as providing the ability to consent when deemed competent to do so, it provides that a competent child's refusal cannot be overruled as is the case under English law.

It is worth noting that these provisions have not been subject to testing in court and it is always possible that judicial interpretation may be more in line with that existing in English law. However, in the only case to come before the Scottish courts regarding a child's refusal of treatment the judge, Sheriff McGowan made an obiter comment (one which is not legally binding) that supports the proposition that in Scotland, once a child has competence, they are able to consent or refuse medical treatment without either decision being overruled by anyone else. Sheriff McGowan commented that

It seems to me illogical that on the one hand a person under the age of 16 should be granted the power to decide upon medical treatment for himself but his parents have the right to override his decision. I am inclined to the view that the minor's decision is paramount and cannot be overridden. The Act itself does not provide any mechanism for resolving a dispute between minor and guardian but it seems to me that logic demands that the minor's decision is paramount.

(Houston [1996] SCLR 943 at paragraph O)

In whose best interests?

Even allowing for the differences between the English and Scottish legal approach to children's rights to have autonomy over their own bodies, it would appear that these cases represent a move forward in attempts to implement children's rights and enhance their legal position. However, in reading the judgments from cases that consider a child's right to consent over their body, it is tempting to ask whether it is the best interests of the child that are being protected or advanced or those of the adults involved, such as those of the health care professionals?

For instance, in the *Re W* case, Lord Donaldson stated at the end of his judgment that

The effect of consent to treatment by the minor or someone else with authority to give it is limited to protecting the medical or dental practitioner from claims for damages for trespass to the person.

(at page 640)

In the *Gillick* case, Lord Fraser stated that he did not 'doubt that any important medical treatment of a child under 16 would normally only be carried out with the parents' approval' (at page 173), thereby suggesting that consent by a child under sixteen would not be sufficient for certain treatments, even where the child is assessed as being *Gillick* competent.

With a different emphasis Lord Donaldson, in *Re R*, likens the process of obtaining consent to that of a lock and key. He suggests that like the fact that a lock only needs one key to open it, consents only require one person to provide it for it to be legally valid. Furthermore, if one person provides consent and another objects, legally this does not provide any dilemma as one consent is all that is required. This seems to suggest that it does not matter at all where the 'key' comes from as long as one is obtained. If the only reason that those under the age of eighteen were being provided with a mechanism that appears to increase their autonomy with regard to their bodies were to protect others, it would be a very unsatisfactory state of affairs that totally failed to address the provisions of the UNCRC and the needs of children.

Perhaps the issue of consent with regard to medical treatment can be best seen when one considers further comment from Lord Donaldson on the purpose of seeking consent. In *Re W* he stated that

There seems to be some confusion in the minds of some as to the purpose of seeking consent from a patient (whether adult or child) or from someone with authority to give that consent on behalf of the patient. It has

two purposes, the one clinical and the other legal. The clinical purpose stems from the fact that in many instances the co-operation of the patient and the patient's faith or at least confidence in the efficacy of the treatment is a major factor contributing to the treatment's success. Failure to obtain such consent will not only deprive the patient and the medical staff of this advantage, but will usually make it much more difficult to administer the treatment. I appreciate that this purpose may not be served if consent is given on behalf of, rather than by, the patient. However, in the case of young children knowledge of the fact that the parent has consented may help. The legal purpose is quite different. It is to provide those concerned in the treatment with a defence to a criminal charge of assault or battery or a civil claim for damages for trespass to the person. It does not, however, provide them with any defence to a claim that they negligently advised a particular treatment or negligently carried it out.

(at pages 633 – 634)

This at least provides some reassurance as to the purpose of providing children with rights in relation to consenting for medical treatments. The principle is to allow children to participate in the decision making process even where they may not be able to fully participate by having complete autonomy. The current law allows children to have some control and rights over their bodies whilst at the same time providing protection for those who treat them. Children's rights with regard to their bodies remain a very heavily contested area in English law.

Discussion

The length and complexities of the cases discussed here suggest that there are no easy answers to the questions they raise. It is obvious that while everyone involved was doing what they perceived of as being in the child's best interests, there was no consensus about what this was and how it might be best achieved. From a children's rights perspective, the Gillick and Axon cases are perhaps the easiest to deal with. In many respects the actual children involved were peripheral to these judgements, there is no indication that either Mrs Gillick's or Mrs Axon's daughters had asked their doctors for contraception or sought abortions and they remained the passive subjects of the court cases rather than active participants. Their mothers were fighting to enshrine a principle of parental control/responsibility and were arguing that their own children (or indeed other people's children) were not autonomous individuals who could make decisions to control their own bodies, and specifically, their own sexuality and reproductive health. While the Gillick case occurred before the UK ratified the UNCRC, it would be easy to argue that her stance went against the philosophy of the Convention and that its ideals of autonomy, self-determination and justice suggest that children do have rights to bodily autonomy, even if

these are not specifically mentioned. By the time the Axon case came to court it can be argued that there was a presumption of competence unless shown otherwise and the principle was established that in some aspects of medical treatment, it was children, not parents, who could claim the right to control their bodies, as long as they were 'Gillick competent' and that their capacity to consent and their ability to understand the information given were sufficiently evolved. This may not have been because of the UNCRC, but it was certainly in line with its principles.

In the cases concerning anorexia or the refusal to take anti-psychotic medicine however the reverse is true and while in some respects it might appear obvious that children's rights to protection must override children's rights to have due consideration given to their views, it nevertheless raises troubling issues for a children's rights agenda. It would be easy to claim that it is in the child's best interest to be force-fed and that anorexia is a form of illness which needs invasive treatment. Furthermore, as a form of mental illness, it is arguable that child sufferers are by definition not mentally competent to refuse treatment. Yet as long as adult sufferers of anorexia are not automatically force-fed there remains a fundamental dichotomy between adults and children in this field which assumes that adults are competent unless shown not to be while children are automatically assumed to be incompetent unless shown otherwise. Such a stance sits uneasily alongside the idea of children as individuals and social actors and yet allowing children to starve themselves to death without intervention is equally anathema to the humane premise of the UNCRC which is based on protection and nurturance as well as participation.

Perhaps the only workable compromise is to accept that in decisions about certain forms of medical care, children do not have an automatic right to participate, and that in these cases decisions about care or treatment need to be taken out of the hands of doctors, parents and indeed children themselves and settled in the courts on a case by case basis.

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**LEGAL EDUCATION AND REGIONAL COOPERATION IN THE COMMONWEALTH
AND OTHER COMMON LAW JURISDICTIONS**
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ABSTRACTS

**ENCOURAGING HUMAN RIGHTS TEACHING IN THE COMMONWEALTH AND OTHER
COMMON LAW COUNTRIES**

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Human rights, as universally accepted rights, create accountability against all kinds of *de jure* and *de facto* discrimination. The human development and prosperity are possible only when rights are given its due significance. History shows that the development of human rights is a compromised outcome of the demands of peoples. Therefore, under the circumstance of deficient resources in the society, protection on human rights will reduce. In order to attain the human rights protection, States should abide by the fundamental human rights principles.

The common wealth countries are predominantly the former British colonies that follow common law system. The major personal liberties preserved in its constitutions are, to an extent, derived from common law principles developed in Britain. Therefore some writers and jurists are of the view that the protection of human rights by way of common law rights is guaranteed by the national conscience itself. On the contrary, other jurists' analysis is that there would be a far reaching difficulty if human rights are not incorporated by way of statutes since the human rights have no common standard like Common laws.

However, the generic view is that mere incorporation of legislation is not a reason for states to neglect inhuman practices. It should strive to wipe out barbarism and ensure the full development of the human personality so as to strengthen the respect for marginalized victims and their fundamental freedoms. A dynamic and self-determining civil society is to be moulded for that so as to enable other fellow beings to become agent of change. Most of the countries have failed to fulfil the international human rights norms though they are signatories. Therefore, it can be feasible only by making and developing human rights training and educational resources, such as handbooks for teachers in primary and secondary schools.

**EFFECTIVE CHANGES IN HUMAN RIGHTS: EXPOSING THE REALITY OF HUMAN RIGHTS
WHEN TEACHING IN COMMONWEALTH AND COMMON LAW COUNTRIES**

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Human rights are and have always been a global phenomenon, with many countries being affected by armed conflicts in areas like Africa and the Middle East. It has become more important to ensure that the teachings of human rights become effective not only theoretically but practically given the current challenges faced by the world. There is a duty to ensure that these teachings translate across the world in order to overcome such crisis that is faced by many of the countries that are still in armed conflict. This paper explores three ideas that make teaching human rights more effective and also a fundamental part of any law students' degree. The first idea that the paper explores is of human rights being more than just a legal theory that is taught in law school. Academics and students need to first understand and be taught that human rights are a reality that is too often taken for granted as a pure theoretical subject. In this way we enhance the ability of students to comprehend the study of human rights as being a very important reality. A reality that is threatened, abused and violated every second in every part of the world. Secondly the paper explores developing an interest in the study of human rights through direct and indirect exposure to human rights violation and the threats societies face. Students need to be exposed to how human right violations have a direct effect on them and how these violations are taking place right under their noses' without anyone knowing about them. We need to show students where and how human rights are an issue in order for them to be able to apply themselves in changing those situations. Lastly the paper explores how students need to be taught practical application of the law in order to protect human rights. The aim would be that by the end of a human rights module, students will be able to actually go out and make a valuable contribution in the field rather than being left with many unanswered questions.

CRITICAL PUBLIC UNDERSTANDING OF SEXUAL IDENTITY: CHALLENGING ANTI-HOMOSEXUALITY LAWS IN THE COMMONWEALTH

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This article offers an analysis of the possibilities of achieving critical popular understanding of sexual and gender diversity through legal and policy reform campaigns in Commonwealth countries. I review a sample of pronouncements on, and the applications of, laws derived from colonial penal codification criminalising male homosexuality. I examine contemporary public advocacy against sodomy laws in contexts where homophobic Common Law principles have solidified into social values. Three jurisdictions are considered: activism against the Anti-Homosexuality Bill (2009) in Uganda where non-governmental organisations "promoting homosexuality" and "undermining the national culture" are banned; public response to President Joyce Banda's pronouncement of her government's intention to repeal laws criminalising homosexuals subsequent to the conviction of a couple for "unnatural offenses" and "indecent practices between males" contrary to the Malawi Penal Code; and the role of the United Kingdom-based Human Dignity Trust's challenge of the OAPA (1864) in the Jamaican Criminal Code at the Inter-American Commission on Human Rights on Jamaican Prime Minister Portia Simpson's announcement that "no one should be discriminated against because of their sexual orientation". Eighty percent of Commonwealth countries punish 'homosexual acts' with severe jail terms and customarily death. These laws are supported by widespread conceptions of non-heterosexual identity as a set of behaviours contrary to normative moral values and therefore, subject to legitimate discrimination. I conclude that wholesale statutory repeal of sodomy laws across most Commonwealth countries is not expected soon and advocacy campaigns for LGBTI rights are likely to continue to attract hostility and violence. However, public education campaigns on legal developments on LGBTI rights articulated within postcolonial theory narratives, rather than liberal human rights ideological frameworks, can contribute toward acute public understanding of sexual diversity and discourage political leaders from deploying these laws as reference to deviant sexuality.

STUDY OF INTERNATIONAL LAW IN SOUTH ASIA: A SUCCESS STORY FOR TWAIL

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International Law education in South Asia is hampered on many counts. The current curricula of graduate programmes in South Asia continue to cater to the traditional 'concerns' of international law; neglecting on a larger plane, the emerging facets of the contemporary world. There are very less number of specialized courses in international law. Further, the teaching methods followed in most of the universities are unable to sustain the interest of the students in the subject. Law teachers too lack enthusiasm owing to the highly technical design of the syllabuses. The resultant effect is that the students unconsciously start taking international law in highly technical sense and without paying much attention to the differing policy, practice and concerns of states from this region of the world. The Third World Approaches to International Law (TWAIL) did inspire some progressive ideas towards this line of thought, but that too has remained beyond the reach of the graduate students. The present situation being that the study is often altogether neglected in many traditional universities of the region. The author tries to look into all these situational difficulties paralyzing international law scholarship while also seeing a hope that institutions like the South Asian University would help in solving some of the existing gaps. It is also hoped that the students from the region who graduate from the university would carry the scholarship backwards (in their own states) and then forward. That would produce a more diversified and deeply rooted scholarship; the best possible way to keep the flames of TWAIL burning.

**ENCOURAGING LAW STUDENTS TO REFLECT ON HOW ANTI-CORRUPTION MEASURES CAN
BE TAUGHT IN COMMONWEALTH AND OTHER COMMON LAW COUNTRY LAW SCHOOLS:
VOTE LEGAL EDUCATION FOR ANTI-CORRUPTION**

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The legal academic forum forms the backdrop upon which the 'cancer of corruption' can be diagnosed and practically challenged in commonwealth and other common law countries. Law students and teachers play a pivotal role in what happens in the 'bigger picture'. Since the latter is responsible for equipping the former to be an integral part of the bigger picture, this would require effectively educating the student on anti-corruption at grass roots level. Law students become actively involved in public administrative offices and related fields that deal with issues of corruption.

The methodology that captures this would be the incorporation of courses that deal with anti-corruption measures into the School of Law curriculum either as an integral part of the already existing modules or as an independent module. Another innovation would be the creation of Student Legal societies that focus on anti-corruption activism. These forums are capable of empowering the student at 'grass roots level'. This paper shall trace the roots of corruption using the Root Cause Analysis (RCA) and its negative impact upon the society and focus on how the 'Grass-roots Level Approach' (GLA) can address this situation.

This approach is based on the rationale that schools are the microcosm of the macrocosm, namely public offices where corruption is rife. In light of this, legal education on anti-corruption measures and creation of anti-corruption activist societies at a school level harbour part of the solution to scourge of corruption.

ACCESS TO JUSTICE: NOT YET UHURU

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During the marginalisation of the majority natives Africa endured, society was characterised by racial hatred and discrimination, deep inequality, poverty and strife which were rooted in, and enforced through the laws and policies of the colonialists and erstwhile apartheid government. Oppression was entrenched in every fabric of society and was manifestly inherent in the political life, economy, religion, sports, business, employment, residence, education including access to institution such as universities. The fruits of colonialism and apartheid were the denial of justice. Justice was a commodity which was accessible only to the privileged, the powerful and the rich, to the detriment of poor, the marginalised and the weak.

Today, statistics released by Statistics SA show that 52% of the people in rural areas are unemployed and 32,2% of households in these areas depend on government grants as their main source of income. Many of these people cannot deal with the enormous difficulties they face without access to the legal justice system. Even today, in the second decade of democracy, access to justice remains something that the majority of South Africans cannot even dream about. The reasons include the high level of poverty and associated marginalisation, particularly in the rural areas, lack of infrastructure and State capacity, the scarcity of legal skills in impoverished areas, illiteracy and ignorance of what the Bill of Rights and the Constitution entitles people to.

While injustice is the historic past that we seek to change, justice as its opposite is the ideal society that we seek to build, underpinned by non-racism, non-sexism, equality, unity, prosperity for all and democracy. For as long as there is injustice, invariably that will imply access to justice is inadequate or somehow denied.

LEGAL EDUCATION IN COMMONWEALTH COUNTRIES: PROBLEMS AND SOLUTIONS

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This paper examines the process of Legal Education in Commonwealth countries using Nigeria as a case study. It highlights the problem plaguing this process and proffers solutions to them. Legal Education in Nigeria is not a perfect system; while some Universities still adhere to the traditional teaching method, some have switched to the new clinical Legal Education method. In the traditional method the lecturers are the main actors, they teach the students, give notes and other materials. The clinical method on the other hand, has the students as its major actors; it encourages the students to do the research while the lecturers guide the interaction of the students in the lecture rooms. One way or another has either of these methods succeeded in actualization of ideal and effective legal Education. The questions posed and addressed in this paper include: Is the traditional teaching method in Nigeria effective? Has clinical Legal Education brought about desired changes? What are the problems still affecting the Legal Education process? What are the solutions to these problems? This paper through qualitative and quantitative research would address these questions in 4 sections i) Legal Education in Nigeria: Traditional and Clinical Methods ii) Problems of the Traditional Method and effect of the Clinical Method iii) Issues affecting the Clinical Method iv) Solutions and Recommendations.

**LEGAL EDUCATION AND REGIONAL COOPERATION IN THE COMMONWEALTH AND OTHER
COMMON LAW COUNTRIES**

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There has been an increasing popularity and importance of regional integration of legal services in Southern Africa and such development calls for regional co-operation of legal education in the Commonwealth and other Common Law countries. It has appeared that a substantial number of Law students who come from the SADC region find difficulty practicing elsewhere within the region after getting the LLB degree. The main issue is not whether the legal education attained in the LLB course is inadequate (where it is, only a few differences exist). Rather it is when one wants to make use of such legal education within the region.

This paper looks at the importance of Regional Co-operation through legal education within the commonwealth nations. The jurisdictions of the research will be the Southern African Development Community (SADC) countries. The paper will draw its information from credible internet resources, Law journals around the SADC region, statutes (in particular South African ones), personal views and perceptions of foreign students within the Universities of South Africa and the Deans of the Law schools. The paper will also look at the Laws and reasons in place for making it difficult to use the legal education you have attained from one country within the region. It also assesses the compatibility of the legal education (LLB) within the SADC countries.

Publications by *Nora Dihel, Ana M. Fernandes and Aaditya Mattoo* have shown a great need for a regional integration of professional services in Southern Africa which points to the importance of allowing legal education to be used within the nations of the region. The paper gives examples of how such difficulties have been handled in the past. It goes on to identify any regulation that may allow legal practitioners to use their legal education within the region.

LEGAL EDUCATION, COMPETITION CULTURE & SUICIDES: A CAUTION OF NOTE

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Around the globe, study of medicine and law has one thing in common, rigorous and hard academic study modules followed by a lifelong responsibility of being responsible and sensible in the profession. With the wave of globalization and the ushered economic reforms, there had been calls for new reforms in the legal education, thereby marking pedagogical reforms, curriculum over-hauling, increased modules, stiff course materials, exposures to clinical education, moot courts and various extra-curricular activities. The reforms are focused upon the development of global students with honed analytical skills. Students as an outcome are exposed to public law, transactional work, international law, and interdisciplinary understandings of law and legal problems. They are asked to undergo various workshops, seminars and conferences to expand their understanding of law and to develop wider range of skills. However, the authorities fail to appreciate the fact that in the name of creating “culture of competition”, simultaneously, a “culture of frustration” is being implanted amongst the students. There had been more than two suicides and dozens of attempted suicides in India by law students in the last year. Suicides in other law schools of the commonwealth nations and common law nations are not an alien concept. Studies have shown that students from even the best American law schools, which are known for their rigorous standards, are more prone to psychiatric stress than students from any other discipline. In the light of above discussion, the paper will highlight the reasons for the psychiatric stress and the suicides and the role played by the legal education reforms. It will also suggest for establishment of centre for stress management for law students.

THE IMPERATIVE OF STUDENT HUMAN RIGHTS ACTIVISM

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Education is the most viable empowerment tool. In order to produce effective human rights defenders, it does not have to be just an education. Human rights education is the most viable tool. In this respect, there has to be a move from the traditional human rights education to one that is specifically designed for law students. The traditional models of human rights education have had limited success. Therefore, one that concentrates on advancing law students appreciation of the nature and skills required to be effective human rights defenders is needed. Mandatory human rights student's organisations are imperative to have an effective human rights activism in the regional common wealth countries. Southern Africa is one of the regions where politically motivated human rights abuses are becoming a major concern. Student activism does not have to be confined to politics only, but also needs to be spread to the field of human rights. It is evident, in Southern Africa, that it is the youth that are used as machinery for oppression and intimidation of the electorate especially before elections. It is therefore important to have human rights defenders who are fully equipped with the knowledge and skill. This may be an effective way to address human rights challenges in common wealth countries. This paper seeks to suggest the formation of Human Rights Students' Organisation in order to foster a human rights culture at university level.

**HARMONISED HUMAN RIGHTS EDUCATION IN LAW SCHOOLS: TOWARDS UNIVERSALITY
OF HUMAN RIGHTS PRACTICE IN THE COMMONWEALTH AND COMMON LAW
JURISDICTIONS**

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Human rights has become a fundamental and internationally acclaimed benchmark for good governance, good human-centred corporate practice and sound contemporary legal systems across the globe. Even civil society has taken this to heart and is increasingly centralising human rights in its work. In all this the legal profession takes centre stage – with attorneys, advocates, judges, prosecutors, and many in the legal system being tasked more than anyone else with ensuring that our legal systems become human rights based. It becomes imperative therefore, to look at the teaching of human rights in law schools. Human rights education is a pre-requisite for the effective application of international human rights law, and the education thereof starts with those who are central in the legal field. Using global best practices in human rights education as a barometer, this paper examines the teaching of human rights in the law schools of the Commonwealth and other common law countries.

Of all professionals, lawyers carry the greatest burden in the protection of human rights and in safeguarding constitutional dictates, which are usually human rights-conscious. Therefore due regard should be given to the subject which should be a core subject within the law school curriculum rather than an elective. The paper makes a case for the infusion of human rights components wherever it is possible in other areas of law, both public and private. Furthermore, it argues that a shift is needed from studying human rights purely theoretically to studying the application of human rights both in the domestic jurisdiction for practicality purposes, and in foreign jurisdictions for comparative purposes. As human rights are premised on nothing more save our shared humanity, the teaching and application of human rights calls for sharing of best practices for the purposes of harmonisation. The forward linkage of this is that harmonised human rights practice in turn impacts on legal uniformity, which in turn establishes common ground and becomes a catalyst for regional cooperation within the commonwealth.

Commonwealth Legal Education Association 2013 Conference:
**LEGAL EDUCATION AND REGIONAL COOPERATION IN THE COMMONWEALTH
AND OTHER COMMON LAW JURISDICTIONS**
The School of Law, University of Kwazulu-Natal, South Africa
12-14 APRIL 2013

ABSTRACTS

PANEL DISCUSSION: GLOBALISATION OF LEGAL EDUCATION

Chair: Professor David McQuoid Mason

CLEA President, Centre for Socio-Legal Studies, Howard College, University of KwaZulu-Natal, Durban

Panel Members:

Professor Jenny Hamilton

Director, Undergraduate Laws Programme, University of London, United Kingdom

Professor Nick Johnson, Rector, Institute of Legal Practice and Development, Kigali, Rwanda

Professor Abdul Paliwala, University of Warwick, Coventry, United Kingdom

Professor Avrom Sherr, Director on Sabbatical, Institute of Advanced Legal Studies, University of London, United Kingdom

The growth of improved communications and the internet, the increase in cross border trade and international business and the ease with which individuals can now travel around the world impacts on every aspect of life - legal education and the legal profession are no different. This session will seek to bring together some of the issues surrounding globalisation and the challenges we, as educators, face in developing graduates who are able to meet the new professional demands. In a wide ranging discussion our panel will draw on their considerable experience of legal education to address significant issues which will impact on our practice.

Discussion will cover a wide spectrum of global legal educational issues: Concerns about a "colonisation" approach from some of the larger jurisdictions forcing their own legal systems and training on other jurisdictions; national concerns about being able to compete in a new environment, with the possibilities of "international lawyers"; the need to adopt flexible approaches in a fast changing environment and avoid over regulation. The panel will consider how is transnational legal education contributing to the maintenance of the rule of law, growth of the economy and the development of the legal profession, in both the provider and recipient countries? A key issue will also be how to ensure the quality of transnational legal education. With the growth of technology enhanced learning we need to consider the role of information technology in the development of global legal education. In addition what role is there for external institutions in assisting the expansion of national law schools?

Finally global legal practice requires fervent imagination, constant inventiveness both spurred by a harsh competitive environment. Many African primary and secondary

educational systems do not value imagination or innovation. The panel will consider how can we weave it into legal education in those systems?

The format of the session will involve each member giving a short opening statement on some of the major issues followed by a question and answer session. Questions submitted beforehand will be discussed before those of the audience.

LEGAL EDUCATION AND REGIONAL COOPERATION IN THE COMMONWEALTH AND OTHER COMMON LAW COUNTRIES

Chair: Professor Abdul Paliwala
University of Warwick, Coventry, United Kingdom

GOING MOBILE: INTERNATIONALISATION OF STAFF, STUDENTS AND SUBJECT

Michael Bromby
Joint CLEA General Secretary, HEA Discipline Lead for Law, The Higher Education Academy,
United Kingdom

In a recent report, The Higher Education Academy has published a review of the opportunities and challenges for internationalisation and mobility in Europe. Internationalisation is a broad term, and frequently used solely to refer to overseas recruitment rather than interpreted as an intercultural dimension of teaching, research and service functions.

This paper will look at the conference theme “Legal Education and Regional Cooperation in the Commonwealth and other common law countries” to review the opportunities and challenges presented by Sweeny as they might apply to legal education and in relation to the Commonwealth rather than discussed purely on a European level. Indeed, the conference theme emphasises the notion of regional cooperation and the report’s focus on Europe is but one region (albeit with a relatively low number of Commonwealth nations), and further thought can be given to both intra- and inter-regional cooperation elsewhere in the commonwealth and common law world.

Finally, this paper will explore further the concept of virtual mobility as a lower -cost alternative to review whether this alternative to physical mobility can amount to an intercultural dimension. The formal taught curriculum and informal, extra-curricular activities will be presented to question the extent to which the internationalisation agenda meets the conceptual target of intercultural teaching for both staff and students.

FOSTERING A MORE CONDUCIVE ENVIRONMENT FOR ECONOMIC DEVELOPMENT THROUGH LEGAL EDUCATION WITHIN AND ACROSS JURISDICTIONAL BORDERS

Dr The Honourable Christopher Malcolm
Attorney-General, British Virgin Islands

The legal framework in any jurisdiction is the most important underlying mechanism for economic growth and development. Accordingly, while approaches may differ, the fulcrum of any system for legal education should properly emphasise the critical link between law and development and should in its curriculum include programmes that are appropriately designed and presented with this in mind. It is also to be recalled that the practice of law in all its facets is about dispute settlement at one level or another. As such, any dialogue in this area will necessarily favour an examination of dispute settlement mechanisms. Accordingly, this presentation will explore the role, function, and range of dispute settlement mechanisms and how they may be leveraged to best secure economic growth and

development. It is important to recognise here, contrary to the perception of many persons, that available mechanisms for dispute settlement are simply back-end devices but are instead possible end-to-end devices, which should be included as critical product and service design features for businesses. Such mechanism should also be viewed, and through legal education presented, as having capacity to promote best practice and ongoing business efficiency. Legal education must therefore then challenge students to consider the implications of a 'new' leveraging for economic development and stability paradigm, having especial regard for what still appears to be an urgent need for more cooperative approaches to doing business in this age of post, if not continuing, economic turmoil. In the final analysis, this presentation will provoke a re-evaluation of what could now be considered an unduly restricted current approach to legal education, certainly in the Commonwealth Caribbean, and will include recommendations for change.

**REVITALIZING LEGAL EDUCATION THROUGH LEGAL OUTREACH: NEED FOR COOPERATION
AND COLLABORATION FOR A PROMISING FUTURE**

Professor S Sivakumar
Indian Law Institute, New Delhi, India

The call for the legal education reform has continued for long and has been the subject matter of discussion between all the stake holders in and around the world. However, till date, the subject is as new as it was from its inception. The demand for quality, contemporary, comparative and critical insights of law has been a serious concern for the academicians calling for over- hauling of higher legal education. In today's world, high quality world class education is the top agenda for all players of education and in this regard, the suggestions for pedagogical reforms, infrastructural enhancements and incubation of matchless law educators has been in air for a quite long time. However, in the global education scenario, to materialise the dreams of a world class legal education, it is much imperative to expose the players in the education sector to the international forefront. There exists much need for collaborative faculty efforts to nurture new innovative approaches to international legal and institutional arrangements, with a focus on issues of jurisdictions, economic policies and developments, transnational trades, inter-governmental arrangements, mutual legal assistances etc. And for such, academic collaboration with the premier institutes abroad assumes importance as it opens avenues for international exposure and experience.

Academic and research collaborations are uniquely advantageous to the educational and research institutes as they strengthen the competency, self sufficiency and expertise of the partners. The respective institutions, with their rich research and academic experience, on collaboration between them can take innovative and demanding research projects and can also arrange residential workshops for teachers and students, thereby paving a platform where in teachers and students can discuss and analyse laws and policies in their respective jurisdictions and thereupon can come up with new policies and laws. No institute can have a global existence in the globalized era without establishing collaborations with institutes abroad. In the light of above discussion, the present paper highlights the need of collaborations among commonwealth nations for promising futures.

LEGAL EDUCATION IN A VIRTUAL WORLD – A VIRTUAL PRESENTATION

Associate Professor Clare Chambers-Jones
Bristol Law School, UWE, Bristol, United Kingdom

A virtual world can be described as a “spatially based depiction of a persistent virtual environment, which can be experienced by numerous participants at once who are represented within the space by avatars”. (Bell 2008) Virtual worlds are not just games, indeed they offer cultural, social and education uses. The education uses will be explored within this paper. Therefore this paper will consider the notion of learning and constructivism in legal education. The paper will provide a unique insight into how the use of virtual worlds such as Second Life can be used to teach law within law schools. The paper will be divided into three main parts. Firstly the paper will examine what virtual worlds are and how they afford the feeling of presence and identify and how this differs from other virtual learning environments (VLE) such as blackboard. The paper will then consider the how virtual worlds can be used within a legal setting, providing a practical demonstration of the world and class simulation for Banking and Finance Law. The paper will then conclude that technology has allowed legal education to be transformed so that legal reality can be brought into the legal curriculum for not just distance learning students but also home students as well.

MOOCS: THE LONDON EXPERIENCE

Professor Jenny Hamilton
Associate Professor Patricia McKellar
and
Pat Lockley, Legal Information Systems Developer
University of London, United Kingdom

‘MOOCs (Massive Open Online Courses) are the educational buzzword of 2012. Media frenzy surrounds them and commercial interests have moved in. Sober analysis is overwhelmed by apocalyptic predictions that ignore the history of earlier educational technology fads’.

The opening words of Sir John Daniel’s paper reveals the conflicting issues which have engulfed the entry of the MOOC to the educational landscape. Even the definition of a MOOC is evolving but most will involve the words ‘large scale participation’ and ‘open access. Courses offered by the increasing number of MOOC Consortiums generally offer short video based learning sessions which may involve interaction with an instructor or other students in online forums. These large scale open access courses offer a number of advantages to the global student: the opportunity to register for a bespoke university course with no fee; the flexibility of being able to study at a time which suits the student; the ability to experience study at an institution not otherwise available to them. There is also the added attraction of some form of future accreditation which may ultimately pose a threat to mainstream University education.

The University of London is one of two UK Universities to join the Coursera MOOC platform and, among the six courses offered, it will deliver a course called: *English Common Law*:

Structure and Principles. Authoring this course and working with the Coursera platform had provided a number of challenges but it has also allowed us to consider alternative delivery methods and to test new pedagogies.

This paper will consider the potential benefits and drawbacks in developing a course of this nature. Essentially a work in progress, we will discuss the methodologies involved and the barriers and drivers to implementation. In a wider context we will consider the changing environment of the MOOC and how these may provide a significant benefit to the delivery of legal education in the Commonwealth.

LEGAL EDUCATION IN THE COMMONWEALTH AND OTHER COMMON LAW COUNTRIES

Chair: Professor Jenny Hamilton

Director, Undergraduate Laws Programme, University of London

BREAKING THE MOULD: DID THE UK'S LEGAL EDUCATION AND TRAINING REVIEW GO FAR ENOUGH?

Deveral Capps

Lead Academic for the Uganda Project, Northumbria University, Newcastle-upon Tyne
and

Gemma Davies

Barrister, United Kingdom

In 2010 the Chairman of the Legal Services Board, a body set up to oversee lawyers in England and Wales, requested a review of legal education and training. This review, intended to be the most significant examination of legal education since Ormrod reported in 1971 - *Report of the Committee on Legal Education*, Cmnd 4595. Backed by the three main professional legal regulators in the UK the Solicitors Regulation Authority, the Bar Standards Board and Institute of Legal Executives Professional Standards, the Legal Education and Training Review started in mid 2011 and was completed early in 2013.

This paper will comment upon the background to the Review and the challenges it faced; examine the Review's composition; summarise the results of each the four stages of the review process; look at the recommendations of the review and see whether the recommendations went far enough; and look to the future to see which of the recommendations are likely to result in implementation. Finally, the paper will ask the question, did the Review go far enough?

MAINTAINING STANDARDS IN LAW SCHOOLS: THE CHALLENGE BEFORE LAW TEACHERS

Rhoda Asikia Ige

and

Andrea Ajibade

Lecturers-in-Law, University of Lagos, Akoka Lagos Nigeria

The study of Law in the 21st century in any region must compete favourably with other regions in our global village; the study of law rest squarely on the student and his teacher; but more importantly on the teacher who will chart the path of sound education. Legal Education in Nigeria today presents complex problems of fundamental socio-political and national interest, given the fact that the future of legal profession itself is related to the quality of legal education today. The paper argues that it is only the Law Teachers that can ensure adequate standards in Legal Education. While the role and function of the Council of Legal Education and National Universities Commission in the development of quality legal education cannot be jettisoned; but it is certain that when policies are formulated. It is the business of Law Teachers to implement the said policies by ensuring that their teaching and research meets International Legal Standards in ensuring quality legal education.

**FACT MANAGEMENT AND DECISION-MAKING SKILLS: ADAPTING THE WIGMOREAN CHART
FOR BUSINESS LAW STUDENTS**

Michael Connolly

Lecturer in Law, School of Law, University of Surrey, Guildford, United Kingdom

Teaching law to business students commonly raises two teaching issues: the tension between what business students require and what law tutors are conditioned to provide, and that business students struggle with the legal problem-solving exercises provided in their assessments. These apparently unrelated needs of business students share common skills: (1) identifying issues, (2) organising and analysing facts, and (3) decision-making. A seemingly unrelated discipline is the science of proof, which was developed most graphically in 1913 by John Henry Wigmore.

Wigmore addressed the science of with his chart method of analysing facts. He presented a visual method of identifying issues, organising and analysing facts accordingly, and consequential decision-making. These skills would provide genuine benefits for business law students. The key is to adapt the Wigmore model for these needs.

The aim of this paper is to explain the Wigmore chart method, derive the essence of the necessary thought processes, and adapt the chart method to suit the needs of business law students, providing basic skills that will enhance work-related decision-making and academic legal problem-solving. This particular project focusses on the (technically difficult) area of employment discrimination.

**INTERDISCIPLINARY EDUCATION FOR CHILD LAW SPECIALISTS: THE CASE FOR, AND A
PROPOSED MODEL**

Professor F Noel Zaal

School of Law, University of KwaZulu-Natal

and

Associate Professor Carmel R Matthias

School of Social Work, University of KwaZulu-Natal, Durban

Most law degree intakes at universities include students who intend to specialise in cases involving children. This group is a potentially important resource. Children in many countries remain vulnerable to discrimination, illnesses, war, abuse, starvation and other dangers. Greater numbers of lawyers who can serve effectively as expert child advocates are therefore needed to assist in the task of implementing children's rights. Internationally approved instruments such as the 1989 UN Convention on the Rights of the Child and 1990 African Charter on the Rights and Welfare of the Child are in place. But there is a need for legal experts to drive an intense campaign of implementation of these. Law schools therefore need to give particular attention to the question of how best to train students who wish to specialise in children's cases.

If law schools are to ensure that aspirant students develop appropriate expertise they must create programs which do more than deliver traditional clinical skills and knowledge of relevant law. They must enable acquisition of appropriate interdisciplinary understanding

and expertise. The nature of that expertise and relevant disciplines to be drawn upon will be briefly explored. It will be shown that undergraduate/primary law degrees do not provide an ideal environment for transmission of the interdisciplinary knowledge required. Thereafter, it will be contended that coursework Masters degrees are a solution worth considering because they can provide an appropriate pedagogic context. Particular attention will be paid to two aspects. The first is utilisation of a child-centred focus. The second is interdisciplinary seminars. Experiences at the University of KwaZulu-Natal will be drawn upon for purposes of illustration.

A TIME FOR CHANGE? DEVELOPING LEGAL EDUCATION IN UGANDA

Deverall Capps

Lead Academic for the Uganda Project, Northumbria University, Newcastle-upon Tyne
and

Gemma Davies

Barrister, United Kingdom

The Law Development Centre (LDC) in Uganda was given statutory authority for the training of lawyers in 1970 by virtue of the Law Development Centre Act. Since then, LDC has been Uganda's sole provider of professional legal education.

In 2012, NUFFIC, the Dutch organisation for international cooperation in higher education, announced that it would provide funding to assist LDC develop its legal education practises. The tender process closed in October 2012 and was won by a joint bid between *Northumbria University*, based in Newcastle upon Tyne in England and the *Center for International Legal Cooperation*, based in The Hague, the Netherlands.

This paper will look at the 4 year project, which started in December 2012 and examine: the landscape of legal education in Uganda and the criticisms it faces; the possible areas and processes to be employed for both curriculum and resource change and development at LDC; and outline the plan for the project's duration.

RESTRUCTURING LEGAL EDUCATION & THE PEDAGOGICAL REFORMS TO PRODUCE LAW GLADIATORS TO FACE GLOBAL COMPETITION

Professor S Sivakumar

Indian Law Institute, New Delhi, India
and

Dr Seeja K R Jamia

Hamdard University, New Delhi, India

We live in an age where in the globalization has transformed and transfigured anything and everything which came into its way. The legal education has not been the exception. Though, the legal education has traversed a journey from internationalisation to transnationalisation and subsequently to the present what is called globalisation, yet the responses of the legal education to the globalised world have come very late and since then has not been very swift. The world is continuously witnessing technological advancement,

economic reforms and heightened competition at a hare footed rate and the reforms in the legal education has never matched it.

Legal education in India as a transplant of the colonial system, did changed with the liberalized policies in 1990s wherein new changes were posed due to the greater interaction between nations, trade in goods and services, information technology and free capital flow across international boundaries. As an outcome the pedagogical changes brought a transformation of the legal education from imparting “knowledge of the black letter law” to cultivation of “science of law”. However, those were the changes which were brought when liberalization in India was at nascent stage.

Today, we as a developing nation act as a doyen in the global market. And with such role of a global player, it is need of the hour that we shall usher new reforms in the legal education and pedagogy. There exists a compelling demand for a better curriculum and approach for subjects like comparative law, public and private international law, technology law, and international commercial law etc. At the same time, there also exists a need of sowing seeds of constitutional ethos and the philosophy of ushering in the socio-economic transformation of the society amongst the young law students. In the changed world economy, the issue of legal education and access to justice also requires a revisit. There is a need for greater research on legal education and access to justice to find out the legal problems, the gaps in service provision, and the cost-effectiveness of possible responses. This paper will try to mark the pedagogical reforms with a vision to produce law gladiators clenched with a better understanding of law to face the global competition.

**CLINICAL LEGAL EDUCATION IN THE COMMONWEALTH AND OTHER
COMMON LAW COUNTRIES**

Chair: Professor Avrom Sherr

Director on Sabbatical, Institute of Advanced Legal Studies, University of London

**ADVOCACY SKILLS AS A PART OF LAW SCHOOL CURRICULUM: TRANSFORMING “RAW LAW
GRADUATE” TO “COURT READY PRACTITIONER”**

Asha Gopalan Nair

Advocate, Supreme Court of India, New Delhi, India

There exist only two improving forces for human nature, one education and another experience. When it comes to law, education of basic principles of law is being given by the law schools and the universities, while on the other hand, the doors of experiences gets opened when a student of law moves into his battle field i.e. the court of law. Though, education and experience both are eternal and endless phenomenon, it can be well said, the sooner you take the first step, and the better it will be for the next. Law in text and law in practice, though not different can never be said to be same, therefore it is much required that the law schools in there law curriculum should promote basic advocacy skills. Such skills, should not merely form part of the ‘textual of curriculum’ but should be adhered to in its ‘true spirit’. The law schools should focus upon the fundamental lawyering skills as negotiation, oral advocacy, and communication, interviewing and counseling, drafting and problem solving. At the same time, it is required that the classes of procedural laws be made more interactive with ‘mock trials’ during the classes, thereby explaining the concepts of evidences and the criminal procedural laws on the basis of such mock trials. Students, should be the participants of such mock trials and the themes of trials can be based upon the various famous trials, be it trial of Socrates, Oscar Wilde or Martin Luther etc. The law schools for such classes may engage law practitioner who can lead class discussions, demonstrate practice situations, share experiences and their views, and serve as resources for student questions on various aspects of law and law practice. The real motto behind such venture should be to minimize the gap between the law school and law practice and to transform a “raw law graduate” a “court ready practitioner”. The paper will explore the various horizons in light of the above discussion.

**FIVE YEARS OF CLINICAL LEGAL EDUCATION IN AMBROSE ALLI UNIVERSITY, EKPOMA,
NIGERIA: ARE WE THERE YET?**

Professor C A Agbebaku

and

Emmanuel Akhigbe

Faculty of Law, Alli University, Ekpoma, Nigeria

As the first set of graduates emerge this academic session, this paper seeks to answer the question posed by way of an examination of the state of clinical legal education in Ambrose Alli University, Ekpoma, Nigeria since its introduction into the curriculum of the Faculty of Law five years ago.

To this end, the paper will discuss the concept of clinical legal education generally but will place special emphasis on its introduction and implementation in the Faculty of Law, Ambrose Alli University, Ekpoma, Nigeria taking into consideration the challenges faced in this regard which ranges from institutional apathy, aversion to change to inadequate funding. These challenges will be examined and measures to overcome them will be suggested.

Clinical legal education was introduced into the curriculum of the Faculty of Law, Ambrose Alli University, Ekpoma, Nigeria in 2007 after extensive deliberations by the Network for Universities Legal Aid Institutions (NULAI) with the relevant university authorities. The Network for Universities Legal Aid Institutions (NULAI) is a nongovernmental organization that is propagating the introduction of clinical legal education into the curriculum of Nigerian law faculties. Consequently, it established a law clinic in the faculty of law to complement the newly introduced system.

Further, the paper will also serve as an assessment of the impact of clinical legal education in the provision of quality legal education in Nigeria, as the view of stakeholders namely the student, faculty members and the community will be considered against the background that the main objective of clinical legal education is to improve the quality of legal education and by implication the legal profession in Nigeria.

In conclusion, the paper will review the enabling legislations relating to legal education in Nigeria with a view to identifying factors militating against clinical legal education and proffering suggestions to how to remedy the identified factors. The paper concludes by answering the question earlier posed with “Not yet but we are on course”, and expects that if the suggestions proffered are implemented then we will get there.

THE IMPACT OF STREET LAW ON LAW STUDENTS AS LEARNERS IN THE LLB COURSE AT THE UNIVERSITY OF KWAZULU-NATAL AND AS EDUCATORS OF LAW AND HUMAN RIGHTS OF HIGH SCHOOL CHILDREN IN DURBAN, SOUTH AFRICA. SOME LESSONS FROM STUDENT EXPERIENCES IN RECENT YEARS

Lloyd Lotz

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The Street law programme is designed to make people aware of their legal rights and where to obtain assistance. It also makes them understand how laws work and how the present legal system can protect them. Street law also tells people about the laws that affect them in their everyday life and seeks to explain what the law expects people to do in certain situations. The Street law programme requires participation of law students who must be properly trained so that they can go to schools and community groups and teach effectively and confidently.

The Faculty of Law, University of KwaZulu-Natal, Howard College campus has conducted a Street Law LLB course since 1987. The course focuses on the substantive content of certain aspects of the law, (e.g. introduction to law, criminal law, consumer law, family law, socio-economic rights, employment law, human rights and democracy, and HIV/AIDS and the

law), and the teaching methodologies that assist law students to effectively communicate the law to ordinary people – particularly high school children.

This paper deals with the impact Street Law has made on law students as learners in the Street Law course and law students as teachers of law and human rights to high school learners from diverse backgrounds. It will draw on the experiences of law students as recorded in the reflective journals they are required to maintain during the Street Law course.

**THE ROLE OF THE AFRICA JUSTICE FOUNDATION IN BUILDING THE CAPACITY OF
GOVERNMENT LAWYERS TO PROMOTE JUSTICE IN AFRICA THROUGH EDUCATION, SKILLS
TRAINING AND WORK PLACEMENTS**

Chris Lane

Africa Justice Foundation, London, United Kingdom

Sub-Saharan Africa has witnessed a current of almost perpetual change in countries' political and economic systems over the past half-century. However, historically, little interest has been devoted to the legal systems upon which those political and economic systems depend. This is changing. The law is the 'invisible' infrastructure, as important as energy, transport and security infrastructure. Evidence clearly suggests that legal infrastructure is connected to economic growth.

A system of just laws is also a key requirement to achieving true access to justice. There is no one-size-fits-all concept of a system of just laws, but it suggests a system based on principles of legal certainty, fairness and equal treatment. This is critical, not just in terms of the state-citizen relationship, but also in the spheres of government-to-business, business-to-business and business-to-citizen relations. A system of just laws is the foundation upon which prosperity is built and shared. It plays a key role in both the attraction of foreign investment and also the promotion of a fair, rational space for domestic entrepreneurs and businesses.

However, good laws do not write themselves. The world over, governments rely on lawyers to advise on, draft and interpret legislation, but African governments often face challenges in recruiting, retaining and training effective legal support. The proportion of national resources available for legal capacity is much smaller than in industrialised countries.

AJF works with government partners to improve the capacity of government lawyers, through education, skills training and work placements. This makes a difference. It improves technical knowledge and drafting skills, enhances commercial awareness, and helps build confidence for negotiations with international investors and diplomats. The medium-term aim must be to develop education and skills training opportunities in-country.

Public legal capacity matters, makes a difference and represents an innovative and value for money investment for Africa's development.

ASSESSING THE IMPORTANCE OF SCHOOL CLINICS TO REALIZING ACCESS TO JUSTICE FOR THE POOR IN AFRICA

Ebenezer Durojaye

University of the Western Cape, Cape Town, South Africa

In recent times Universities legal aid clinics are becoming very relevant in providing legal support services for the poor in society. This development has led to a situation where more and more poor people are made to seek redress for the violation of their rights. It is a common saying that the court of law is the refuge of the poor and disadvantaged in the society. However, in many African countries realizing justice for the poor remains a great challenge due to a number of factors. First, the justice system is structured in such a way that only the rich and the well-to-do can truly access justice due to high cost of obtaining the services of a lawyer or filing court papers. It is incontestable that legal fees in many African countries remain excessively high for the poor to afford. Second, the poor and disadvantaged are often ignorant about their rights and are unable to seek redress when their rights are violated. Third, the legal aid services provided by governments in most of African countries are poorly funded and are therefore unable to meet the needs of the vulnerable and marginalized groups in society. The emergence of Universities legal aid clinics have suddenly become a light in the tunnel for poor and disadvantaged people. They are able to provide free or highly subsidized legal services for the most disadvantaged, provide counseling and education on human rights and render effective services for the poor. The result has been that thousands of poor and disadvantaged people who would have been without any hope of seeking redress for human rights violations are now able to effectively access the justice system. Although while one recognizes that these legal aid clinics face some challenges, it is not in doubt that they have contributed greatly to bringing justice to poor in Africa.

BEYOND THE DISSERTATION TO COMMUNITY PROJECTS FOR LLB STUDENTS: A LAW STUDENT'S REPORT ON A COMMUNITY-BASED PROJECT DONE AS A FORM OF A FINAL ASSESSMENT FOR COMPLETION OF UNIVERSITY STUDIES

Chiedza Simbo

Lecturer, North West University, Potchestroom, South Africa

With rampant poverty in South Africa and the developing world, access to health care is beyond the reach of many, leading to massive dependence on community based care. With such situation, education and training for care givers is one way to ensure access to health care services for the poor. This project aimed to make a difference in the Hawston community by promoting access to health care services through the provision of palliative care training for care givers at Overstrand Care Centre. It used methods of meetings, job shadowing, interviews, research, questioners, e-mails, telephone calls and a workshop to identify the need and ensure a support network for the Centre. The result was palliative training for care givers. The project was coordinated by a law student as part of completing her masters in Social Justice Law at the University of Cape Town. The idea behind this paper is to show that instead of writing dissertations, community based initiatives can stand as part of a final assessment for the completion of an undergraduate law degree. From the perspective of a lecturer some law students have shown that they are incapable of and have

no interest in academic writing or writing court submissions choosing and excelling in politics or project management with various organisations. An initiative to make community based projects a form of assessment also breeds a new generation of lawyers sensitive to the needs of the community and have rewarding careers which will be a by-product of the many skills they acquire whilst initiating, managing and finalising a community based project.

HUMAN RIGHTS IN THE COMMONWEALTH AND OTHER COMMON LAW COUNTRIES

Chair: Professor Managay Reddi
Dean of Law, University of KwaZulu-Natal

ARE HUMAN RIGHTS ENOUGH? THE CLEA HUMAN RIGHTS CURRICULUM AND THE ISSUE OF ANIMAL WELFARE/RIGHTS

Associate Professor Steve Pete
and

Angela Crocker, Lecturer

School of Law, Howard College, University of KwaZulu-Natal, Durban

The model CLEA Human Rights Curriculum is silent on issues of animal rights and animal welfare. In light of the extent to which the lives of humans and animals are inextricably intertwined, this silence is, perhaps, to be regretted. The authors of this paper seek to explore the manner in which human rights are often interlinked with issues of animal rights and/or animal welfare. As a specific case study, the paper examines the public furore surrounding the ritual bull killing which forms part of the Ukweshwama ceremony held each year in KwaZulu-Natal. During this ceremony, which is held in honour of the "first fruits", a bull is killed by a group of young Zulu warriors using their bare hands. The ritual is opposed by certain animal rights/animal welfare campaigners, who believe it is cruel to the animal which is sacrificed. A highly polarised debate has arisen between those opposed to any form of cruelty to animals on the one hand, and those seeking to defend ancient cultural practices on the other. With this as a lens, the paper examines the wide range of positions adopted by philosophers and legal scholars vis-a-vis difficult questions of animal rights and cruelty to animals. Tentative conclusions are drawn on the broad question of whether or not it is sufficient simply to promote 'human' rights, while remaining silent on the issue of animal welfare/rights.

THE STATE'S DUTY TO PROSECUTE UNDER THE PRINCIPLES OF INTERNATIONAL LAW AND HUMAN RIGHTS

Jumoke Adegbonmire

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The expectation that States have a duty under international law to investigate, prosecute and punish perpetrators for core international crimes are of major concern to the international community. The same duty is also required for serious human rights violations such as torture, cruel and inhuman or degrading treatment; extra-judicial, summary or arbitrary executions, enforced disappearances and gender-specific offences such as rape. The development of international law and the need to protect human rights are closely related to States' obligations under customary international law to criminalize, prosecute and punish those responsible for international crimes. According to Article 38 (1) of the ICJ Statute, International Customary law is an evidence of general practice accepted as law and any breach inconsistent with the State practice should not be recognized. Despite States'

obligations a customary rule reflecting *the duty to prosecute* has not fully crystallized within the general principle of international law and human rights field.

Considering a document such as the Rome Statute the preamble to the document affirms that State parties need to ensure that the most serious crimes do not go unpunished by taking measures at the national and international levels. But the Statute fails to impose the *duty to prosecute* in any of its subsequent articles. Secondly, the same preamble lays down the need for State inter-cooperation to submit alleged perpetrators to the ICC or competent authorities for prosecution without including it in any of its articles. Thirdly, another gap is the lack of an article which stipulates that States domesticate and criminalize the crimes contained in the Rome Statute in their national legislations.

It is clear that crimes that are considered peremptory international law norms have *erga omnes* obligations such as the prohibition of torture and are intransgressible principles of customary international law.

LOOKING BEYOND BOUNDARIES – DEVELOPING A MODEL COMPARATIVE CONSTITUTIONAL LAW CURRICULUM FOR INDIA & SOUTH AFRICA

Ravi Prakash

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‘Legal pedagogy’ across the globe is going under a profound ‘change’; a change ‘in continuum’ due to the forces which have shaped and alter the very discourse of governance. Although, the realm of ‘comparative law’ is above a century old, the vast scholarship which has been accumulated over a period of time reflects the need, importance and relevance of the subject matter. However, in last two decades there have been more writings, scholarships on particular stream of law like Comparative Constitutional Law, Comparative Judicial Process, etc. Consequentially, the courses like ‘Comparative Constitutional Law’ has been actively pushed in the law school curriculum to equip the young law graduates as a ‘global legal professional’ to face the global challenges in the global society; of which the essential characteristics are - “a shrinking world with enlarged interconnectedness, facilitating a sense of dialogue among people, institutions and organizations leading to a universalisation of pattern of governance & liberal values, transcending cultural, social & economic ideas affecting the life and living of individuals in a cosmopolitan world weaving altogether a new society”.

The debate surrounding use of comparative resources by the courts is quite old. The South African Constitution authorizes courts to ‘consider foreign law’ while interpreting provisions of constitution whereas the Indian Supreme Court often resorts to comparative resources without any such express authorization. The plethora of scholarships on the subject matter of use and misuse of comparative resources by the courts has triggered a kind of debate and has leveled serious allegations like ‘Cherry- picking use of comparative resources’. In absence of a concrete theory and uniform practices/ guidelines of using comparative resources while interpreting the Constitutional texts – has always painted a picture of chaos rather than clarity. Present paper proposes to delve upon this subject matter as how the constitutional experience of each other, which has similar socio- economic problem, a

diverse society to govern through a basic document upholding Rule and principle of constitutionalism. Having said so, this paper limits itself to two important aspects i.e. 'socio-economic rights' and 'basic structure theory'. With this analysis, it also aims to evolve a kind of working mechanism to be incorporated in the course curriculum of Law Schools of both countries which can usher a new vista of constitutional interaction (in academics as well as in practice).

LEARNING AND TEACHING ABOUT REALIZING HUMAN RIGHTS: LESSONS FROM SOUTH AFRICA'S CONSTITUTION, COMMONS AND CLASSROOM

Nathan Cooper

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The right to water has been incorporated in to national law and explicitly articulated in the South African Constitution. But many citizens continue to face challenges in fulfilling this most basic of rights and necessities. This paper focuses on two approaches to realising the human right to water in South Africa. The first approach explores the role of the South African Constitution and the Constitutional Court in declaring and interpreting the 'right to sufficient water'. The second approach considers a 'commons' approach to natural resource allocation.

A commons approach (or approaches – given their variety of forms) emphasises the importance of shared community involvement in questions of resource allocation and is founded on the premise that decisions should be in touch with (and where appropriate, generated by) those people directly affected by them. It is contested that such close-quarter management can produce tailored and responsive solutions best suited to realising people's rights (to sufficient water in this case) as well as enfranchising and empowering people to be agents of their own rights-realisation.

The rise of commons approaches can be understood as a response to the perceived limitations of 'top-down' rights realisation. But commons approaches are more than reactionary. They may offer locally sensitive and environmentally sustainable ways for communities to directly manage resources.

The extent to which these two approaches are distinct, complementary or conflicting, and the impact of these approaches for teaching human rights are then explored.

This discussion of the pedagogical implications of understanding alternative approaches to human rights draws on my doctrinal and empirical research in this area, as well as reflections from my experiences of teaching human rights in the UK and South Africa. Of particular importance is an understanding of, and response to, the variety of ways human rights are conceptualised, their normative functions and how these effect expectations and presumptions about relations between citizens and the State.

**FEMINIST LITIGATION AS A STRATEGIC TOOL FOR ADVANCING GENDER JUSTICE:
TEACHING GENDER AND THE LAW AT UKZN – A REFLECTIVE DISCOURSE**

Advocate Devina Perumal

Senior Lecturer, School of Law, University of KwaZulu-Natal, Durban

Historically, in South Africa, feminist policy advocates utilized political processes to defend and secure rights for women. However, the decline in the opportunities for change through political means was marked by a retreat from the political arena towards an increasing reliance on the courts. The advent of the Constitution in 1994, with its justiciable Bill of Rights provided a significant opportunity for using litigation as a transformative strategy. Most feminist legal scholars agree that the law is both responsive and resistant to feminist approaches and perspectives (Mossman:1998). It is for this reason that the law and legal struggles cannot be ignored.

Drawing on feminist theory of law, this article examines and highlights the teaching approach adopted in an elective course, Gender & The Law, with specific reference to the South African Constitutional Court's responsiveness and resistance to women's rights claims. Although the Constitutional Court has, through some transformative judgments, dislodged some traditional understandings of gender relations, it has at the same time given judgments which ultimately reinforce traditional gender relations. The Court may be accused, in this regard, of having fallen short in its application of key aspects of feminist legal reasoning in a number of respects, rendering aspects of women's lives at times, immune to legal intervention. For example, the adoption of formalistic reasoning with little or no regard for substantive equality, a lack of contextual understandings, failing to acknowledge the relationship between legal rules and stereotypes, failing to apply the concept of intersectionality especially in socio-economic rights cases which have had a particularly detrimental impact on black and poor women, to name but a few.

Despite this, the article concludes that litigation remains a significant space as a strategy for change, but that the need for mainstreaming gender sensitivity training in the core law curriculum is urgent.

COMMONWEALTH LECTURE

Chair: Professor David McQuoid-Mason

President, CLEA, Centre for Socio-Legal Studies, University of KwaZulu-Natal, Durban

THE ROLE OF LAW TEACHERS IN COMBATING CORRUPTION AND THE MISUSE OF PUBLIC OFFICE: A COMMONWEALTH PERSPECTIVE

Professor Richard Nzerem

Secretary, CSAT

Commonwealth Secretariat Arbitral Tribunal, London, United Kingdom

There can be no doubt that corruption, in its many manifestations, is now universally acknowledged to be a virus that afflicts the global society. If there was any doubt about this, it is unlikely that the subject would attract as much attention as it does in the international community. Among many countries, whether rich or poor, developed or developing, it has become the practice for the executive authorities of the state to proclaim their dedication to fighting corruption as an article of faith. This is especially so among countries that claim to possess or aspire to be recognised as possessing good governance credentials. Are such proclamations alone enough or are they merely self-serving proclamations? Are individual countries and the international community doing enough to address the virus of corruption effectively? More specifically, does the academic lawyer owe a special duty to his or her charges and to society generally to lead the campaign against what is acknowledged essentially as a 'social virus'?

In this lecture, I put forward the view that the law teacher does indeed have, and can play, a serious role in this regard. What is more, it is an especially important role. I argue that the position of a law teacher is essentially a public office and I therefore do not treat the two as separate and distinct one from the other. As a professional group, law teachers have benefited from the shared Commonwealth legal traditions that we all hold dearly and they owe a special duty to society to contribute both individually and collectively to the maintenance of those traditions.

PREVENTING CORRUPTION AND THE MISUSE OF PUBLIC OFFICE: HOW CAN LAW TEACHERS ASSIST IN FIGHTING THE SCOURGE OF CORRUPTION IN THE COMMONWEALTH AND OTHER COMMON LAW COUNTRIES?

Chair: Professor David McQuoid-Mason

President, CLEA, Centre for Socio-Legal Studies, University of KwaZulu-Natal, Durban

PREVENTING CORRUPTION AND THE MISUSE OF PUBLIC OFFICE: HOW CAN LAW TEACHERS ASSIST IN FIGHTING THE SCOURGE OF CORRUPTION IN THE COMMONWEALTH AND OTHER COMMON LAW COUNTRIES?

Professor George Devenish

Senior Research Associate, School of Law, University of KwaZulu-Natal, Durban

I teach public law subjects, such as Constitutional law, Human Rights, Administrative law and Interpretation of Statutes. I use these subjects as a vehicle for the dissemination of values. These are the values found in the South African Constitution, such as human dignity, freedom, equality, non-sexism, non-racism and the rule of law. These are also the values common to the great philosophies and religions of the world, including Ubuntu, the philosophy of African people. A summary of which is set out below. Any discourse on corruption must attempt to assess the situation from an African perspective.

On the issue of corruption, good governance and related issues, I write letters and op-eds for the press. Most of these are published. These I then furnish to students as part of their resource material for the subjects I teach referred to above. These letters and op-eds allow me to participate in a public discourse on corruption and related issues.

My paper will deal with the issues that form the substance of my discourse in the media dealing with corruption, such as: (a) moral regeneration; (b) cadre deployment; (c) corruption and maladministration in the civil service; (d) the independence of the judiciary; (e) the merit of a basic income grant; (f) accountability in the electoral system; (g) political violence; (h) funding of political parties; (i) freedom of expression; and (j) separation of church and state.

Although I am critical of the government of the day I encourage loyalty to the SA state and the Constitution. South Africa is a great country and it has infinite potential. Many good things are happening in South Africa. It is necessary that these should be acknowledged and the government given credit where credit is due. This attitude informs my discourse on values and corruption as well the concept of loyal opposition. Criticism must therefore be constructive.

**PREVENTING CORRUPTION AND THE MISUSE OF PUBLIC OFFICE: HOW CAN LAW
TEACHERS ASSIST IN FIGHTING THE SCOURGE OF CORRUPTION IN THE COMMONWEALTH
AND OTHER COMMON LAW COUNTRIES?**

Dr Surender S Jaswal

Indian Law Institute, New Delhi, India

Corruption is a world-wide phenomenon. It is like cancer in public life, which has not become so rampant and perpetuated overnight, but in course of time. A person who is indulged in the corruption is termed immoral, dishonest and unrealisable in his conduct and behaviour. His disregard for honesty, integrity and truth results in his alienation from society. Corruption starts at the top and infract to the whole society. It is not confined to the towns alone. It is as widespread in the villages where the dishonest officials and the traders carry the germs of the disease.

So far as the corruption in public life is concerned, it covers corruption in politics life, social life, state governments, central governments, business, industry etc. Most affected areas of the corruption are the all government offices. If anybody who does not pay for the works there are chances that is work may not be done. Root cause of the corruption is the greed of the people. Money power, mussel power and mafia power are the some of the modes of the corruption.

There is hardly any area in which charges of corruption are not there. Even the judiciary that is looked into great expectation by the common people is not able to maintain its clean image among the people. Right from the appointment to the disposal of cases there are allegations of corruption.

Now here comes the role of the law teachers in eradicating the problem of corruption. In fact law teachers are associated with the section of the students who own more responsibility in the overall development of the society. They can promote the moral value among the students that is important for the development of the personality of the individual. Through students law teachers can reach to the common man who are motivating corruption in the day-to-day life. It is the common people who support the corruption not by way of choice but by way of compulsion.

**THE WAR AGAINST CORRUPTION AND ANTI-CORRUPTION STRATEGIES IN NIGERIA: A
CLINICIAN'S PERSPECTIVE**

Advocate Victoria Balogun-Fatokun

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To date, research and legal writers on corruption activities in organisations and developing countries focused primarily on problem antecedent of corruption. This article will examine the background of corruption activities in developing countries, particularly Nigeria and its impact on both the social and economic identity of the country. A legal clinic identity theory will be used to explain the mechanism that can be adopted by Commonwealth clinicians in Nigeria and beyond to teach learners about how to curb and thereby mitigate the spiral norm of corruption in Nigeria. The author will rely on both legal and social theories where

permissible to pave a promising avenue for combatting corruption in developing countries including Nigeria. The question however is, how can law clinicians help combat corruption in countries and organisation that have been marred by corruption and corrupt officials?

PREVENTING CORRUPTION AND MISUSE OF PUBLIC OFFICE: ROLE OF LAW TEACHERS

Dr Ifidon Oyakhiromen

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Corruption and abuse of office are not recent phenomena in Nigeria. They constitute the offering or receiving of money or gifts illegally to gain some benefits, or advantage either personally, or for someone else, contrary to the rights of others or inconsistently with ones official duty. The perception is such that corruption, has reached an epidemic proportion, having eaten deep into the fabric of the Nigerian society. The Transparency Corruption Perception Index rated Nigeria the second most corrupt country in 2001, and 139th out of 176 world countries in 2012. Conversely, the Official Statistics of Crimes shows that bribery and corruption are little known in Nigeria. For example, in Lagos State, Nigeria's Centre of Excellence and Commercial hub, which contributes largest to the national annual crime budget, the twin multi-faceted offences is 1 (one) in every 1000 (or more precisely 6 in every 5000) crimes (1967-2011). In fact, the yearly average raw figure of cases of corruption has been 49 during the military regimes (1967-1999) and 17 in the democratic dispensation (2000-2011). Yet corruption as early as 1972 had begun to breed violence and acquire international or transnational dimension especially in the petroleum and natural gas sector. Revolutionary regimes terminated civil administration and over other revolutionary regime on allegations of corruption. The result is a waning enthusiasm and faith in the state and no solution in sight. The disparity between perception, Official Crime Statistics, and reality is extreme and its abridgement lies on Legal Education and the legal profession. The thrust of this paper therefore is to locate the mean or scientific explanation, without which ones knowledge of the problem and by implication the diagnosis and prognosis could be of a meagre and unsatisfactory kind.

LESSONS FROM HISTORY: WHY DO CERTAIN EMERGING DEMOCRACIES PROVIDE PARTICULARLY FERTILE GROUND FOR THE ABUSE OF OFFICE BY PUBLIC OFFICIALS AND OTHER FORMS OF CORRUPTION?

Professor Steve Pete

and

David Hulme, Senior Lecturer

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Certain developing democracies appear to be particularly prone to the abuse of office by public officials, as well as other forms of corruption. It is the contention of this paper that one reason for this state of affairs may be general confusion surrounding the very nature of 'democracy' itself. In general terms, what is meant by 'constitutional democracy' is often confused in the public mind with simple 'majoritarian democracy'. A failure to consolidate the principles of 'constitutional democracy', in the true sense of the term, provides fertile ground for corruption and other forms of abuse. In order to illustrate this point, this paper

adopts as a 'case study' a controversy which has arisen around a proposed assessment by the government of South Africa, of the decisions of the country's Constitutional Court. Certain members of South Africa's legal fraternity are concerned that the 'assessment' will constitute undue interference with the independence of the judiciary. The paper traces and analyses the developing controversy, and then attempts to draw lessons from history by comparing the current clash between the South African Executive and Judiciary to a similar clash which took place in seventeenth century England. The paper concludes that such clashes appear to be fairly common, particularly in young democracies in which democratic institutions are yet to be properly consolidated. The implications for developing democracies within the Commonwealth are discussed.

THE ROLE OF LAW TEACHERS IN PREVENTING CORRUPTION AND MISUSE OF PUBLIC OFFICE

Jean Chrysostome Kanamugire

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Corruption and misuse of public office have created outcry in society. The Prevention and Combating of Corrupt Activities Act of 2004 creates a general offence of corruption and various corrupt activities relating to specific persons and specific matters. Corruption affects both officials and individuals in the performance of their functions. It undermines development and weakens the hard won values of democracy. Corruption is found in all countries although there are tough measures to prevent it in all areas of life.

Law teachers play a significant impact in the life of students who, in future, will occupy top posts in the government. They shape behaviours and impact on ethical values for individuals. Law teachers can inform the students the impact of corruption on society and its severe consequences for persons convicted of such heinous crime. Perception about public offices must be changed or adjusted in order to prevent corrupt activities. Public and private officials need to be guaranteed that their basic needs will be assured even if they leave power or office. This can encourage them to avoid corruption in all their activities and functions. The law teachers have to inspire students to always act ethically while they are still with them. The students often contact with members of the communities and they can make a significant change in society as they may stimulate people not to be involved in corrupt activities.

POLICE CORRUPTION IN SOUTH AFRICA

Shaka Yesufu

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In South Africa today, there is no single agreed definition of corruption. However, as researchers we do know that some definitions of corruption are available, enabling us to put police corruption into context. It is disappointing enough to find out that police officers who have been entrusted by the laws of the Republic of South Africa to protect and serve us are the same people who are now being investigated for corruption. The image of the South African police has been severely damaged due to the reporting of rampant and reckless

corruption amongst its rank and file. The presenter argues that if nothing is done to address the level of police institutionalised corruption our democracy may suffer as a consequence. First, this presentation is very important to all South African citizens as policing affects their everyday life. With crime like rape, murder, house breaking, assault, drugs on the increase. South Africans are very much concerned about their safety and security.

Second, it is designed to give a voice to citizens of South Africa ensuring that the responsibility of policing is left in hands of trustworthy and accountable officials.

Third, it is to identify different types of corruption and to find some solutions to it. Fourth, my presentation is designed to provide a basis for other researchers into police corruption to develop and build upon it. The presenter relies on extensive literature review, media reports, and police practical experiences and the researcher's role and involvement being a member of the Civilian Oversight Committee dealing with issues around police accountability in South Africa.

ACCESS TO JUSTICE

Chair: Professor Richard Nzerem

Director, Sir William Dale Centre for Legislative Studies, Institute of Advanced Legal Studies,
London, UK

A CRITICAL ANALYSIS OF CIVIL LEGAL AID IN SOUTH AFRICA

Dave Holness

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Our legal system should be a vehicle through which the lives of all those resident in South Africa are enhanced through the protection and promotion of the rights guaranteed in the Bill of Rights. This paper will focus on civil legal service delivery for the indigent by private attorneys acting *pro bono*. There continue to be considerable gaps between the proper access to civil justice imperatives of constitutional South Africa and the status quo since the advent of a democratic South Africa.

A significant problem facing South Africa's legal system is the fact that indigent persons cannot afford the prohibitive costs of legal services. This effectively constitutes a barrier to access to justice. In the light of the relatively wide net of legal aid in criminal matters provided by Legal Aid South Africa, this has greatest application to civil cases. The legal community needs to commit itself to making sure that vulnerable, indigent members of society will have some redress through legal representation. Law as a vehicle for necessary positive change in the daily lives of South African residents is pertinently considered within the country's woefully unequal socio-economic climate.

This paper considers the role which *pro bono* work by private attorneys is playing and should play in promoting a more just and equitable society through proper access to justice. Having defined *pro bono* work, the practical need for civil *pro bono* work by lawyers in private practice will be highlighted. Whether *pro bono* work should be voluntary or mandatory will be considered. It will then point out possible constitutional imperatives for the provision of free legal services in civil matters. The paper considers some of the *pro bono* work being conducted by private firms of attorneys and concludes with suggestions on means for a (more) effective *pro bono* system in South Africa.

CHALLENGES IN DRAFTING LEGAL AID LEGISLATION FOR DEVELOPING COUNTRIES WITH LIMITED NUMBERS OF LAWYERS AND HOW TO DEAL WITH THEM

Professor David McQuoid-Mason

President of CLEA, Centre for Socio-Legal Studies, University of KwaZulu-Natal, Durban

I have experienced a number of challenges when drafting legal aid legislation for developing Commonwealth countries with small numbers of lawyers. I use the following principles for developing effective and legitimate legal aid schemes in developing countries: accessibility, affordability, accountability, sustainability and credibility. These principles are often accepted during legal aid round-table discussions and validation workshops involving the relevant role players in the administration of justice - but once the agreed draft policies and

bills are sent to the administrators, judiciary and legal profession for approval and fine tuning they tend to be undermined. This is usually due to: (a) the 'colonial mentality' of the judiciary and practising lawyers; (b) lack of confidence in traditional dispute resolution mechanisms; (c) scepticism regarding the use of paralegals; (d) failure to recognize the value of self-help mechanisms; (d) over-bureaucratization of the legal aid scheme; and (e) lack of provision of the necessary resources by the state. The challenges regarding these obstacles will be discussed and suggestions made on how to deal with them.

ISLAMIC LAW IN THE CURRICULA OF COMMONWEALTH AND OTHER COMMON LAW COUNTRY LAW SCHOOLS

Chair: Professor CA Agbebaku
Faculty of Law, Alli University, Ekpoma, Nigeria

ISLAMIC LEGAL EDUCATION IN NIGERIA AND MALYSIA: CHALLENGES AND PROSPECTS

Dr Abdulmumini Adebayo Oba
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Nigeria and Malaysia are multi-ethnic, multi-religious, Muslim-majority federal states with mixed legal systems inherited from the colonial era. While colonialism established the common law system as the dominant legal system in both countries, their Islamic courts continue to administer some aspects of Islamic law. However, colonialism disrupted both countries' pre-colonial Islamic legal education systems. After independence, Islamic law (*al-Fiqh*) was taught in Departments of Islamic Studies (and later in Faculties of *Shariah*) in some of their universities. Subsequently, both countries introduced combined Islamic and Common law degree programs of five years duration but their curriculums are varied. In Nigeria, three patterns are discernible: the BUK model where all the courses include both common law and Islamic law components; the Ilorin model where there are separate (and largely parallel) common law and Islamic law courses; and the UDUS model which had a strong Arabic and Islamic studies content but was discontinued shortly after it commenced due to stiff opposition from lawyers and (common) law teachers. In Malaysia, the IIUM model is the only model: the first four years is for the LLB degree program (that includes courses in Islamic law) for all law students while students interested in the Shariah degree (LLB (S)) spend another year fully devoted to the study of Islamic law. Graduates of these programs are awarded both LL.B and LL.B (S). The objectives of the combined law programs are similar: to ensure that Islamic law graduates have adequate expertise in both Islamic law and common law. The challenges are also similar: how to achieve these goals without incurring the displeasure of regulatory bodies of the legal profession and how to strike a balance between teaching Islamic law as a religious science (as done in the Faculties of *Shariah*) and teaching Islamic law as 'law' in the common law tradition of Faculties of Law. This paper examines the relative strengths and weaknesses of the four combine law degree models, the challenges and competition posed by graduates of Faculties of *Shariah* and makes suggestions for the way forward.

CLINICAL LEGAL EDUCATION AND ISLAMIC LAW IN COMMONWEALTH JURISDICTIONS: PROSPECTS FOR NIGERIA

Abduallah Saliu Ishola
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The Nigerian legal system represents a typical mixed legal system where Common Law, Customary Law and Islamic Law interact and co-exist. However, the legal education in the country is essentially designed to cater for the training of Common law lawyers. Similarly, Clinical Legal Education (CLE), which is now widely accepted in the country, with fifteen Legal Clinics on the campuses of various Universities and the Nigerian Law School, is also

designed mainly for common law students. Since 1999, Islamic law has undergone a revival in some states in the Northern part of the country and the lawyer that would be relevant in those states must be practically equipped in the workings, law and practice of Islamic law. In addition, the Islamic financial system which has become a global phenomenon has also been embraced in the country and the lawyer would need to be trained in the operation of the new financial system. Also, Shariah Courts and Muslims in the country inevitably require the services of Islamic law (Shari'ah) lawyers to meet up with their legal needs, such as in matters of contracts; distribution of estates; matrimonial causes; banking transactions; legal representation; etc. Interestingly, there are foundations for the CLE scheme in the classical Islamic law. The scheme can thus be reorganised to meet the challenges. This study therefore looks into the prospects for CLE in a mixed legal system operating in Nigeria and sets out to show that CLE is also relevant to Islamic legal education in the country. The paper also presents a prototype curriculum that may be adopted for Islamic CLE in a typical mixed legal system in Nigeria.

ISLAMIC LAW IN THE CURRICULUM OF UKZN SCHOOL OF LAW: CHALLENGES AND SOLUTIONS

Munirah Osman-Hyder

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The aim of legal education, and hence law school curricula, is to produce lawyers that will provide relevant, effective and efficient legal services to the communities in need of such service. In order to produce the quality legal professionals, the curricula have to be relevant and supply the necessary knowledge, values and skills required by the aspiring professional.

Post-democracy, the higher education sector in South Africa has been undergoing a steady transformation related to the need to widen access and to redress past imbalances in the provision of education. Part of the challenges in this transformation process is to develop curricula that both recognise the diversity of the positive ideals, beliefs, and faith while remaining impartial toward any one belief and to contribute to the development of a new shared identity. UKZN School of law responded to this challenge by the creation of the "Legal Diversity" module. Legal Diversity covers different legal systems with a focus on family law. Currently the systems covered are: African Customary Law; Islamic law; Hindu law; and Jewish law.

Islamic Law is therefore taught through a small window created in the Legal Diversity module. This poses many challenges in respect of curriculum. Firstly, the time or lecture periods allocated for the Islamic law section is a small fraction of the module. Secondly, the subjects are covered in a very basic and introductory manner. Thirdly, students find it difficult to grasp the linguistic terminology and concepts and finally it is challenging for them to shift from one legal system to another, especially since each of these systems are so varied and different in their approaches.

This presentation seeks to define and analyse the challenges faced regarding the Islamic law curriculum at UKZN School of Law with a view to offering some suggestions for Islamic Law curriculum development.

GENERAL TOPICS – PART 1

Chair: Associate Professor Patricia McKellar
University of London, United Kingdom

THE CRIME OF DEFAMATION – IS IT STILL DEFENSIBLE IN A MODERN CONSTITUTIONAL DEMOCRACY?

Professor Shannon Hoor
School of Law, University of KwaZulu-Natal, Pietermaritzburg

The common-law crime of defamation has attracted criticism in South Africa for a number of reasons. It has been argued that the basis for using a criminal sanction to deal with what is ordinarily a delict (tort) – the need to prevent disturbances of the public peace – is of limited utility in a modern society. Moreover, since defamation constitutes a basis for a delictual claim, this is the appropriate means of resolving such a dispute. By involving the might of the state in such a matter, the practical effect is to unduly inhibit freedom of expression and media freedom. This concern is all the more pertinent in the context of the constitutional democracy, based on a justiciable Bill of Rights, that South Africa has become. Thus the rights to freedom of expression and media freedom are enshrined in s 16 of the Constitution. Furthermore, prosecutions for this crime are infrequent. It has consequently been argued that the common-law crime of criminal defamation should be decriminalised.

In the recent Supreme Court of Appeal case of *S v Hoho* [2009] 1 All SA 103 (SCA) the court was not however persuaded by the arguments for abolishing this crime. It was held that the crime had not been abrogated by disuse, that the crime did not infringe the right to a fair trial (since the burden of proof of such crime remained on the State), and that there was no reason in principle why the State should prosecute assault (bodily injury) and not defamation (injury to one's reputation). In finding that the crime of defamation is not inconsistent with the Constitution, the court adverted to the Privy Council case of *Worme and another v Commissioner of Police of Grenada* [2004] UKPC 8, where the statutory crime of intentional libel was held to be constitutional, despite the protection of the right to freedom of expression in the Grenada Constitution.

In this paper the arguments for the retention and abolition of the crime of defamation will be considered, in the light of the approach adopted in other Commonwealth jurisdictions, and in particular taking into account the ambit of the right to freedom of expression.

JUDICIAL INDEPENDENCE: BEYOND THE HORIZON

Thushara Rajasinghe
Resident Magistrate of the High Court of Fiji Islands, Suva, Fiji

Independency of the Judiciary guarantees the rights of the people through an independent, impartial, competence adjudicating mechanism. Judiciary stands amidst the powers of the state and subjects of the state to shape, establish, and regulate the relationship between them. The significance of the existence of the judicial independence is indisputably

accepted. Nevertheless the precise nature and extent of its scope though often discourses and debated is not yet fully understood.

Justice C.W. Vigneshwaran depicted the main apparatus of the concept of Judicial Independence as “Independence of the Judiciary has two facets – extrinsic and intrinsic or the outside and the inside. The extrinsic component is made up of the structural, systemic and environmental factors that form the set up within which Judges function. The intrinsic component includes how Judges think, react and behave. This component is what is truly within our power. However, even the most altruistic would agree that the extrinsic component greatly shapes the intrinsic”. This elaborative description heartened to navigate further into this intrinsic component which is solely secluded to the inner judicial mind of the judge. This area of the judicial independence is traditionally less inhabited with many legal literatures and trainings.

This is a modest endeavor to sail into the sphere of inner thinking pattern of a judge and its functional and positional interaction with the external factors. In view of the speech of Isaiah Berlin’s “two concepts of Liberty” which is quite useful to define judicial independence as not only independence from the external factors, but also independence from judge’s own reflective consciousness on the external factors. This paper tries to identify the consciousness behavior of the judge based on the philosopher Jean Paul Sartre’s concepts of “pre reflective and reflective consciousness and its influence in the judges’ decision. It will then discuss the subjective test of the judicial officer to deviate from his reflective prejudice and the objective test of the judicial officer’s such subjective test.

STRICT LIABILITY FOR ‘HOME-GROWN’ CANNABIS (DAGGA): IS IT CONSTITUTIONAL?

Dumile Baqwa

Lecturer, School of Law, University of KwaZulu-Natal, Durban

Section 5 of the Drugs and Drug Trafficking Act 140 of 1992 prohibits drug dealing in South Africa. Section 13 of the Act provides that it is a criminal offence to contravene the provisions section 5. Section 13(1)(f) provides that it is an offence to deal in any undesirable dependence-producing substance. Part 3 of Schedule 2 of the Act identifies the prohibited undesirable dependence-producing substances. The list of prohibited substances includes cannabis (dagga), the whole plant or any portion or product thereof. The statutory definition of the term ‘deal in’ includes the cultivation of prohibited substances within its ambit. Consequently, the cultivation of dagga may be punished as drug dealing.

The starting point will be an explanation of the *actus reus* requirements for the offence of dagga dealing. Particular attention will be focused on the process of differentiating between dagga dealing and dagga possession. However most of the attention must focus on the *mens rea* requirements for the offence of being a dagga dealer.

The most significant issue is whether the private consumers of home-grown dagga are strictly liable as drug dealers. Is the prosecutor required to prove that the accused had the intention to deal in dagga, if the dagga was cultivated for private consumption? If the

cultivation of dagga is a strict liability offence, then its compatibility with the provisions of the South African Constitution must be confirmed.

DO SOUTH AFRICA'S SMOKING LAWS GO FAR ENOUGH TO PROTECT THE RIGHT OF CHILDREN TO A HEALTHY ENVIRONMENT? A CRITICAL REVIEW OF THE LAW REGULATING SMOKING IN SOUTH AFRICA

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There is strong evidence to the effect that children are at risk from parents who smoke during their children's early years of life. The risks include respiratory diseases, such as lower respiratory tract illnesses, asthma, and respiratory symptoms such as wheezing, coughing, breathlessness, and phlegm. They are also more likely to suffer from lung infections, and middle-ear disease. Thus in 1997, when the international community came together to fight against the tobacco use pandemic, the leaders of the G-Eight (G-8), plus Russia signed a Declaration on Children's Environmental Health. The Declaration led to the convening of an international consultation on issues of Environmental Tobacco Smoke (ETS) in general, and Child Care, in particular. The consultation acknowledged that ETS has serious adverse effects on children's health. In 1999 under the stewardship of its then Director-General, Dr Gro Harlem Brundtland, the World Health Organization began work in earnest on the WHO Framework Convention on Tobacco Control. From then on global tobacco control was made an WHO priority. The Tobacco Control Framework Convention (TCFC) was ready for signing and for ratification in 2003. South Africa was among the first Member States to adopt the Convention, even though it did not ratify it until April 2005. It amended the 1993 Tobacco Products Control Act (in 1996) with ambitious provision aimed at protecting the most vulnerable against secondary smoke. Recently, in 2008, the Act underwent further amendments to tighten the loopholes. This paper, reviews South Africa's tobacco control legislation, in light of recent amendments, the extent to which the Act has protected children's right to an environment free from tobacco pollution and the challenges of enforcement. The paper begins by tracing the international background to South Africa's tobacco legislation, followed by a critical review and the recommendations as well as a conclusion.

GENERAL TOPICS – PART 2

Chair: Dr Ifidon Oyakhiromen

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CORRUPTION AND ETHICAL ISSUES IN LEGAL EDUCATION: THE NEED FOR A GLOBAL WATCHDOG

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Transparency International defined corruption as the abuse of public office for private gain. The anti-corruption statute /law of various nations define the limit of this broad definition. Today corruption is endemically and universally present in every strata of the society of the global divide. The worst hit is the legal profession in every jurisdiction-common law, civil law and the mixed breed. Education corruption exists in every culture. It often implies degradation due to violation of certain ethical standards (at school and outside school of study).

Within the ambits of the above definition legal education corruption is the abuse of ethical rules and regulations prevalent in legal education. This is an archetype of corruption that obstructs and erodes robust legal education and practice for global benefit. Although corruption and ethical issues are not synonymous they correlate. In this paper, therefore, the two issues are discussed as a global legal education problem that deserves a commensurate solution. The foremost suggestion proffered in this paper is the need for a legal watchdog of universal nature to curb the two menaces. By this the many benefits of the service branch of globalisation tree will spread more and better to the global community.

TACKLING CORRUPTION IN NIGERIA: LEGAL EDUCATION IN FOCUS

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Corruption is a global problem. In Nigeria however, corruption is endemic and has become a ready excuse for lack of productivity or leakages in the system. It is therefore not surprising that Nigeria is ranked amongst the world's most corrupt nations and has been subject of various international initiatives to tackle corruption. In the past, internal efforts at fighting corruption were made by the anti-corruption agencies or government bodies created for or directly involved in the fight against corruption. More recently, private initiatives at highlighting the problem have positive results. The academia seems far removed from such initiatives with little effort being made to proffer a solution. Such inaction would suggest that the educational sector is not affected by corruption. However, it is trite that corruption is a clear and present danger even in the educational sector.

The focus of this paper is the place of law faculties in tackling corruption. We shall take the approach of examining the functions of law in the society and how this can be reinforced in the education of Nigerian law students. Drawing an example from the Nigerian law school

where the curriculum was reviewed to better prepare law graduates for legal practice in present times, we shall make a case for the inclusion of a course on corruption in the law curriculum. It will also be suggested that each law faculty be taken as a microcosm of the Nigerian society and corruption actively tackled as an example to others and a means of training law students who will invariably affect the Nigerian society.

RECENT DEVELOPMENTS IN THE SOUTH AFRICAN MAINTENANCE LAWS: A COMPARATIVE DISCUSSION THROUGH THE PRISM OF THE AUSTRALIAN EXPERIENCE

Professor Marita Carnelley

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The duty to maintain another has undergone subtle changes over the past few years in South Africa. The first development relates to the parties involved in the maintenance dispute of a dependent adult 'child'; the second, to the possible extension of the maintenance duty to include stepparents and unmarried cohabitants; and third, the duty of parties to mediate maintenance disputes rather than to resort to litigation. The recent decisions of the South African courts concerning each of these issues will be compared to the Australian legal experience.

The South African courts have noted that to demand that the dependent adult 'child' be the litigant against a parent would put him/her in an invidious position. The courts have allowed the primary residence parent to include the costs of the adult dependent 'child' in their claim. These decisions will be compared to the provisions of the Family Law Act, 1975 of Australia and its application in the courts.

Traditionally the duty to maintain a child rested only on the biological parents. However the South African courts have recognised the obligation of a husband (stepfather) to contribute to the schooling of the wife's minor child from previous marriage. This obligation will be compared to the provisions of the Family Law Act of Australia as applied by their courts.

The South African courts have recognised that there could be a duty of support between unmarried cohabitants. Although such a duty does not arise by operation of law, it may arise by agreement between parties. These decisions will be compared to the position of unmarried cohabitants in Australia before and after the implementation of the Family Law Amendment (De Facto Financial Matters and Other Measures) Act, 2008.

Both the Children's Act and a number of South African court cases have stressed the importance of mediation in settling disputes relating to children. The emphasis on mediation in Australia is set out in the Family Law Act and the obligations in Australia will be compared to the new focus in South Africa.

**THE DUTY ON REGIONAL COURT MAGISTRATES TO CONDUCT PROCEEDINGS
INQUISITORIALLY WHEN PRESIDING OVER UNDEFENDED AND UNOPPOSED DIVORCE
MATTERS**

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And

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The North Eastern Divorce Court, (deemed to be an inferior court) was originally established to cater for the “black people” of South Africa. Since the advent of a constitutional and democratic South Africa, the services of the court were made available to all race groups in South Africa. The court at present, mainly caters for the needs of financially disadvantaged people who cannot afford the services of legal representation. In a recent appeal from NE Divorce Court, the High Court of KwaZulu-Natal recently considered whether there was a duty on a Magistrate presiding over an undefended/and opposed divorce matter to conduct the proceedings in an inquisitorial manner. The court made the following comment: “People approaching the North Eastern divorce court were not people of substantial means or education, and in those circumstances there was a particular duty on presiding officers, indeed on those who represent them, to ensure that sufficient and proper to evidence was elicited and present it”. This statement seems to it impose an inquisitorial duty on a Presiding Officer, presiding over an undefended/and opposed divorce matter. Most of the literature dealing with adversarial and inquisitorial approaches, deal with civil trials. A cogent argument can be made for extending the principle set out in this case for the argument that a “less adversarial trial” would be in the interests of all concerned in litigation involving family law. Several countries have adopted a less adversarial approach to family law matters. This paper will advance the argument that in all matters, concerning family law, a less adversarial approach will enhance the service to members of public involving in family law disputes.

BOOK REVIEW

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Corruption and Misuse of Public Office, 2nd Edition

Colin Nicholls QC, Tim Daniel, Alan Bacarese & John Hatchard

Oxford University Press, £136, ISBN 978-0-19-957727-9

Corruption and other similar types of offences are pernicious in nature. In the present poor socio-economic climate, the emergence of resources to help in the fight against such types of actions is to be appreciated even more. This book is one of such resources. Its contribution to the legal understanding of corruption/bribery is immense.

The outstanding feature of this book is that it collates in a single asset, a wide range of legislation and legal mechanisms available for tackling corruption and related offences. The book's content is not limited to a commentary of the criminal law applicable to this area but also contains an analysis of civil actions for recovering assets lost and civil remedies available for the redress of wrongs committed. However the authors have not stopped there; they have also included a discussion of international approaches to combatting the crimes, including approaches adopted by the UN, EU, OECD and the Commonwealth. This publication's substantial coverage of such international efforts provides invaluable guidance to any international lawyer handling a case involving foreign individuals, in particular, foreign officials.

Corruption is endemic to a variety of factual situations and the consequences of such an offence in various aspects of everyday life are becoming more apparent. With this knowledge, one can appreciate the authors' focus of addressing a variety of factual scenarios in their approach to drafting this book. Some of these scenarios include bribery/corruption involving elections, public officers, crown servants, civil servants, corporations, peerages and foreign officials.

The structure of the book caters for readers who are looking for an introduction into the legal principles surrounding corruption and misuse of public office as well as those experienced with the law in this area. Chapters 2-7 give a great discussion of the UK criminal law relating to the prosecution of corruption offences under the old law and the new Bribery Act 2010. Chapters 8 and 9 present a compendium of

mechanisms available in criminal law and civil law for the confiscation and recovery of assets. Chapter 10 focuses on the regulation of conduct of public life in the UK. Chapters 11-15 give a description of regional and international conventions, instruments and initiatives while Chapters 16-19 examine the corruption laws of other jurisdictions including US legislation and practice. Chapter 20 ends the book with a discussion of the role of civil society organisations in the fight against corruption.

Of particular interest to readers in the UK would be the extensive discussion of the Bribery Act 2010 (the Act), which forms a core part of this text. The authors' approach of outlining the pre-2011 position on corruption and related offences in Chapter 2 provides a suitable informative basis for the following discussion of the Act and caters for readers from a wide range of jurisdictions who may wish for a basic outline of what the law was, and in some aspects, still is in this area.

A useful tool for anyone trying to understand the implications of any new legislation is a set of clear guidelines as to how the terms of that legislation may be interpreted by the courts. This book provides such clear guidelines for the terms of the Act. The authors approach the Act by succinctly setting out the relevant sections followed by a description of each section's effect. The authors offer definitions for terms used in the Act and give a brief but useful history of the enactment of the sections. Nicholas Phillips in his forward to this edition of the book (p.vii) notes that Section 7 of the Act on the failure of commercial organisations to prevent bribery is the most far-reaching of provisions. Despite the novelty of this section, the authors attempt to define and clarify section 7's ambit by reference to conclusions from Joint Committee Reports, Law Commission Reports, similar terms in other statutes and case law. The authors' contribution to this section's understanding is of a high quality and gives some reassurance to those concerned about the path the courts may take towards the interpretation of the Bribery Act's provisions.

The book does not stop there with its approach to the Act. Coupled with an outline of the reform steps taken prior to the Act's passage in Parliament, including tracing the various suggestions of the Law Commission and Joint Committee of Houses of Parliament, the publication gives an in-depth examination of the Ministry of Justice's guidance on the procedures commercial organisations can put in place so as to prevent persons associated to them bribing. This approach to the Act ensures that this book becomes a one-stop shop for any person looking for guidance on the application and interpretation of this statute.

Beyond the discussion of the Act, the publication gives more to the reader. The structure and presentation of analysis of legislation in this area in a variety of

common law and civil law jurisdictions enhances its appeal and quality. The commentary on the approaches taken by the US towards corruption, in particular, Dr. Rachel Barnes' analysis and discussion of the complex Foreign Corrupt Practices Act (FCPA) in Chapter 16, is well structured, apt and clear. Dr. Barnes' discussion and navigation of the FCPA brings a degree of clarity to what is, at times, a confusing piece of legislation. In their discussion of the approaches taken by other jurisdictions, the authors select the most pertinent of content and get straight to the point, often focussing their discussion to a concise outline of the law relating to corruption offences, bribery of public officials, defences and penalties. The quality of analysis and discussion of the laws of these jurisdictions gives any international law practitioner the ability to use the information provided without any insecurities.

An additional advantage of this book is that it can also be used as a manual for handling cases relating to corruption and the misuse of public office. Chapters 7 and 8 critically explore a range of legal and practical issues relating to the investigation and prosecution of such crimes. Chapter 8 in particular gives an invaluable summary of a variety of legal mechanisms one can use to aid in his/her management of a case involving corruption. An outstanding quality of the discussion in these chapters is the examination of steps that can be taken to minimise/prevent errors during investigation or trial and to improve the strength of one's case.

As part of the core focus of this publication includes the misuse of public office, extensive coverage is given of existing regulatory regimes for the conduct in public life of holders of Public Office. The examination of various regulatory schemes such as codes of conduct goes a long way in reminding the reader of the utility of non-legal regimes in the prevention of corruption. The publication's balance of legal and non-legal methods is further improved by the overview of work undertaken by an array of civil society Organisations (CSO's) such as Transparency International in the development of good practice initiatives for commercial organisations. Such an addition to this publication's already vast content increases its appeal to a diverse readership and improves its status as a main resource for the rules on fighting corruption.

On its face, this book is most relevant to readers who are legal practitioners. Its discussion of approaches in a variety of common law and civil law jurisdictions makes it an ideal resource to add to the libraries of international law firms whose practice may involve dealing with issues in this area. Despite its obvious appeal to the legal practitioner, the book is not written in a manner so as to be obtuse or to confuse readers without a familiarity of reading law. The writing style makes the book easily readable and understandable for research students, civil servants,

members of governmental organisations, members of the general public interested in this area, corporation directors and, most importantly, holders of Public Office.

Unfortunately, a drawback of this book is that it is priced so as to make it difficult to access by students who may wish to pursue further study in this area.

BOOK REVIEW

Marc Cornock

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An Introduction to the Study of Law

Simon Halliday (Editor)

W. Green, £12.50, ISBN 978-0-414-01869-3

At 96 pages, and approximately 40,000 words, this may appear to a small book. Yet its subject matter is vast. As the book says, it is concerned with 'the different ways in which law is studied'.

Studying for a law degree does not necessarily mean that the student is intending a career in law or the legal professions. Rather, legal study is more than an academic subject in its own right and many students now study law as an adjunct to their main discipline area. Doing so enriches their learning by exposing those to different ways of considering issues and different analytical techniques as well as expanding the parameters of their subject. For instance, health care professionals who study law can develop different perspectives on their interaction with patients as well as understanding the foundation of health service delivery and practice. In the same way, the study of law can be expanded and enriched by the incorporation of the philosophies, scholarship and techniques of other disciplines into the legal curriculum.

As an academic, I have witnessed this change in the demographic of law students and, on many postgraduate courses, the students who are studying law have no prior legal education or experience. This presents many challenges, both for the students who have to get up to speed with legal writing, reasoning and techniques, and for their lecturers who have to ensure that they have the necessary skill to be able to fully engage with all aspects of legal scholarship.

Many institutions provide foundation, or introductory, modules for students who are new to legal study. The quality of these is variable, as is their content. However, in the main, they can be said to concentrate upon the key legal skills that are necessary for studying law such as locating and reading legislation and case judgments. Depending upon the methods being employed, students can be provided with extensive reading lists with encyclopaedic textbooks and pages of cases to digest.

This book does not fit into that category of legal study. It is introductory in two senses. Firstly, it is an introductory text that leads the student into the more encyclopaedic textbooks on its subject matter. Secondly, it is introductory in that it introduces students into the study of law.

The study of law can be a nebulous concept. What does it mean to study law? How can students be prepared for their introduction to law? As this book posits, it is more than learning legal concepts, legal reasoning and legal interpretation.

‘The aim of the book is to offer ... a map of legal scholarship’. It provides an introduction to the different ways in which law can be explored. By understanding how law can be explored, students can understand the meaning that law can bring to a given issue.

The book is based around a collection of essays, all written by Professors of Law and Jurisprudence. There are seven chapters or essays and these are:

- (1) doctrinal approaches - Jenny Steele, University of York
- (2) law and philosophy - John Gardner, Oxford University
- (3) empirical approaches - Simon Halliday, University of York
- (4) critical approaches - Donald Nicolson, University of Strathclyde
- (5) law and popular culture - Peter Robson, University of Strathclyde
- (6) historical approaches - TT Arvind, University of Newcastle
- (7) comparative approaches - Prue Vines, University of New South Wales

The chapters are accessible and straightforward to read. Each is self-contained, dealing with one specific approach to legal study, although, as might be expected in any book on legal study, there is some overlap between them. All have recommended further reading that allows the student to pursue further study on that approach should they so wish. Although the introduction to the book recommends that readers ‘should start that process only once [they] have grasped the basic ideas in the first place’. I found that the chapters were engaging and provided sufficient explanation of the basic concepts in their respective approaches as well as any related terminology.

Book Review

As a whole the book provides a firm grounding in the different approaches to the study of law. It achieves its aim of 'providing a map ... of legal scholarship', thereby delivering a foundation upon which students can base their legal study.

This is an ideal book for all those new to legal study, whether at undergraduate or postgraduate level. Indeed, this should be the first book that students read, to allow them to understand the fascinating and complex discipline that they are about to study and also allow them to navigate a way through the mountain of information to which they are going to be exposed.



The Commonwealth Legal Education Association

The CLEA fosters and promotes high standards of legal education in the Commonwealth. Founded in 1971, it is a Commonwealth-wide body with regional Chapters in South Asia, Southern Africa, West Africa, the Caribbean and Europe and numerous country committees. Its work is overseen by an Executive Committee whose members represent: Australasia, Europe, The Caribbean, East Africa, West Africa, North America, Southern Africa, South Asia (Bangladesh, Pakistan and Sri Lanka), South Asia (India), and South East Asia.

Membership is open to individuals, schools of law and other institutions concerned with legal education and research.

The Association's *Programme of Action* is based on the need to make legal education socially relevant and professionally useful, particularly through:

- the development of law curricula and teaching methodology;
- assisting law schools to prepare themselves for the demands of the profession in the context of the information revolution and other global challenges; and
- supporting continuing legal education and distance learning programmes.

PUBLICATIONS

- *Commonwealth Legal Education*, the Newsletter of the Association, is published three times per year
- The *CLEA Directory of Commonwealth Law Schools* is published biennially

- The *Journal of Commonwealth Law and Legal Education* is the official journal of CLEA and is published in association with the Open University School of Law. It is published online twice a year and is subscription free.

The Association's website www.clea-web.com provides access to a wide range of Commonwealth legal materials, model curricula and some publications.

CONFERENCES

The Association organises regular international and regional conferences and seminars. Recently, it has organised/co-sponsored conferences on topics such as law and development, human rights and just and honest government, as well as on legal education. Venues have included Australia, Nigeria, Cayman Islands, UK, Jamaica, Sri Lanka and Malaysia.

Details about all CLEA events can be found on the Association's website: www.clea-web.com

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Two curricula are currently available:

- Model human rights curriculum for the Commonwealth;
- International co-operation in criminal matters

Two further curricula are in preparation

- Tackling corruption and the misuse of public office
- Islamic law

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The Association organises a number of activities of law students. These include

- The Commonwealth Law Moot (held biennially)
- The Commonwealth Students' Essay Competition
- Justice VR Krishna Iyer Essay Competition
- Conferences for Commonwealth law students

LINKS WITH THE COMMONWEALTH

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For further information on the work of the Association and details of membership, please contact:

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-

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Journal of Commonwealth Law and Legal Education

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Only electronic submissions will be accepted, unless the author has previously had agreement from the editorial team for another method of submission.

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References should be incorporated into the text using the Harvard system showing author and date of publication (e.g. Bloggs (2000)) and page numbers if appropriate (e.g. Bloggs (2000: 26)).

A list of references cited should appear at the end of the text arranged alphabetically by author and in chronological order for each author.

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Books should be listed as follows:

Bloggs, J (2000) *Law in the Commonwealth*, London: Smith and Jones.

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Bloggs, J (2002) 'Law in the Commonwealth', *Commonwealth Law and Legal Education* 1: 1–10.

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