NOTTINGHAM LAW SCHOOL
The Nottingham Law Journal is a refereed journal, normally published in Spring each year. Contributions of articles, case notes and book reviews to the Journal are welcomed. Intending contributors are invited to contact the Editor for a copy of the style sheet, which gives details of the format which submissions must follow. Submissions and enquiries should be addressed to:

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Intending subscribers should please contact Ms Carole Vaughan at the above address. Intending subscribers in North America are advised to contact Wm W Gaunt & Sons, Inc, Gaunt Building, 3011 Gulf Drive, Holmes Beach, Florida 3417 2199.

The citation for this issue is (2015) 24 Nott L J.

ISSN No. 0965–0660

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Welcome to Volume 24 of the *Nottingham Law Journal*. This year I have invited Professor Janine Griffiths-Baker, Nottingham Law School’s new Dean, to present a guest introduction. Janine recently joined us from the University of South Wales and has a keen interest in teaching and research in the field of legal ethics. Janine has a PhD from the University of Bristol entitled “Fiduciary Duties, Conflicts of Interest and Chinese Walls: The Problems of Modern Legal Practice”. She frequently acts as a consultant on regulatory issues to national associations and prominent City law firms and was one of the research team responsible for the Home Office Report *Experiencing Inquests*. That report had a substantial influence on the Command Paper *Death Certification and Investigation* and was cited in the consultation papers which led to the Coroners Act 2009. On behalf of everyone at Nottingham Law School I would like to welcome Janine and I am confident that legal research will go from strength to strength under her leadership.

Professor Jane Ching introduces a collection of articles on the theme of legal education. Jane is the director of our Centre for Legal Education and these articles were specially selected from contributions to the Centre’s 2014 conference, ‘The Value of Legal Education’. Our articles on contemporary legal significance include analysis of European contract harmonisation rules by Professor Richard Stone and Salewudin Ibrahim and a timely analysis of the role of the legal services ombudsman by a name familiar to readers of the Journal, Professor Mary Seneviratne. Having previously been Head of Department and Associate Dean of Nottingham Law School, Mary retired in 2015. I would like to extend my thanks to Mary for all her hard work over the years and congratulate her on being awarded the title Professor Emerita.

Volume 24 also features two prize-winning essay contributions from law students. The NLS 50th anniversary prize was awarded by Lord Saville to Rhianna Ward for her analysis of the evolution of international criminal justice. The Kevin deSilva memorial competition was won by Nottingham University student Sam Hussaini who analyses the conceptual uncertainty surrounding the crime of rape.

As ever, I would like to take this opportunity to sincerely thank all our contributors, subscribers and reviewers for the vital part they play in supporting the journal. Special thanks are owed to Lord Saville for judging the winning essays in the 50th anniversary competition; to Janice Denoncourt for tirelessly editing all case-notes and book reviews; and to Carole Vaughan, our administrator extraordinaire.

**DR HELEN O’NIONS**

As the newly-appointed Dean of Nottingham Law School, I am particularly pleased to have been invited to introduce this edition of the Journal, with its special focus on legal education. In assuming my new role, I was conscious that I would be leading a School with a long tradition of producing visionaries in this area. It is not a mantle that I take up lightly, especially since the sector is currently facing radical and far-reaching
changes, but I am confident that, by embracing debate and encouraging high-quality scholarly activity, Nottingham Law School will continue to lead in this field for many years to come.

The contributions in this volume raise many questions, one of which is why legal education is so important and why it often poses such challenges for those working in the field. The answer, of course, is closely connected to the subject area in which we function. Law pervades every aspect of life, from social stability, economic prosperity, public policy and civil liberties to the very concept of a fair and just society. Legal education is important because the law itself is important. This produces obvious challenges, not only because addressing legal issues is seldom an easy task, but also because we are responsible for training those who, in many different ways, will shape, administer and interpret future laws and policies.

Such a situation affords considerable opportunities for us, as legal educators, to guide future direction. Yet these opportunities come with heavy responsibilities. As well as remaining the guardians of standards, we must continue to promote equality and progress, and achieve extended access to law and the legal profession.

I look forward to continuing this discussion at the forthcoming Legal Education and Access to Justice Conference to be held by the Centre for Legal Education at Nottingham Law School in June 2015. It is only by fully engaging in debate on such issues that we can properly safeguard legal education for future generations.

PROFESSOR JANINE GRIFFITHS-BAKER
ARTICLES
The address for submission of articles is given at the beginning of this issue.

THE LEGAL OMBUDSMAN – PAST, PRESENT AND FUTURE

MARY SENEVIRATNE*

The Legal Ombudsman was established in 2010 to deal with all consumer complaints about legal services in England and Wales. It replaced both the Legal Services Ombudsman, which had operated since 1990, and the existing complaints mechanisms of the legal professional bodies. This article examines the background to establishing the Legal Ombudsman, describes its work, and assesses what the future holds for complaints in relation to legal services.

THE PAST

Before 2010, complaints about members of the legal profession were dealt with by a mixture of self-regulation, and statutory oversight.1 The relevant legal professional bodies at the time dealt with complaints about their members. If complainants were dissatisfied with the outcome, they could refer the matter to the Office of the Legal Services Ombudsman, which was created by the Courts and Legal Services Act 1990.2 The Legal Services Ombudsman itself was introduced to reform complaint handling by lawyers, bringing in a new approach as the legal profession was no longer to have ultimate control over complaints against its members.3 At that time, the introduction of independent oversight to the internal mechanisms for dealing with complaints presented a challenge to the prevailing assumptions about the proper role of professional regulation.4

As well as marking a new system for complaint handling in the legal profession, it also introduced a new model for ombudsmen, by establishing a ‘hybrid’ ombudsman to deal with complaints. In 1990, the ombudsman model itself was a fairly novel method of dispute resolution, and the Legal Services Ombudsman was a novel

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1 For a discussion of the regulatory mechanisms for dealing with consumer complaints before 2010, see M. Seneviratne, The Legal Profession: Regulation and the Consumer (Sweet & Maxwell, London, 1999).


3 The complaints systems of the professional bodies, particularly the Law Society, had been subject to much criticism for a number of years. See R. James and M. Seneviratne, ‘Solicitors and Client Complaints’ (1996) 6(2) Consumer Policy Review 101–105.

4 See Seneviratne (n 1) chapter 1.
departure from the established demarcation between private and public sector ombudsmen. At that time, ombudsmen with jurisdiction over private sector bodies (for example, banks, building societies, insurance companies) were non-statutory, set up by the relevant industries themselves.\(^5\) Ombudsmen with jurisdiction over public services were creatures of statute, with the Parliamentary Ombudsman, Health Service Ombudsman, and Local Government Ombudsmen established by the Parliamentary Commissioner Act 1967, National Health Services Reorganisation Act 1973, and the Local Government Act 1974 respectively. The Legal Services Ombudsman was a statutory, publicly-funded body sponsored by the (then) Lord Chancellor’s Department, but with jurisdiction over legal professionals, which are private sector bodies.

As well as this novel ‘hybrid’ status, it also departed from the accepted role of ombudsmen. Unlike most ombudsmen schemes, which receive and investigate complaints, and recommend or direct a remedy if the complaint is justified, the main role of the Legal Services Ombudsman was to investigate the way a complaint about a lawyer had been handled by the relevant professional body. Although the Legal Services Ombudsman could also investigate the original complaint against the lawyer as part of this process, in practice in the vast majority of cases, the original complaint was not investigated. The Legal Services Ombudsman would review the professional body’s process and decision, make a judgment about it, and then remit it back for reconsideration if the process was found to be unsatisfactory in some way. There was also the possibility of a financial remedy being paid by the professional body to compensate for the poor way it had handled the complaint, including actual loss, inconvenience and distress. In those cases where the original complaint had been investigated, awards could be made against the individual lawyer. Awards were not binding.

How effective was the Legal Services Ombudsman? It was certainly independent of the legal profession, standing outside of the self-regulatory mechanisms of the professional bodies. Consumers could therefore have some confidence that the system no longer involved lawyers investigating themselves. Indeed, in order to ensure independence from the profession, the Legal Services Ombudsman could not be a lawyer. The process and procedures of the office were judged to be fair and consistent, designed to ensure that the requirements of natural justice were met.\(^6\) Although the awards given were not binding, the professional bodies invariably complied. Sometimes individual lawyers refused to comply, but as investigations of the original complaint were a small part of the workload, and as the vast majority of lawyers accepted the decision and paid up, this was not a major problem. Nevertheless, in those few cases where lawyers did not comply, complainants were left without a remedy, and the credibility of the scheme was diminished. However, the main issue in relation to effectiveness was not how well the office operated, but whether the powers given to it were sufficient to deal with grievances. Given that the Legal Services Ombudsman only dealt with the consumer’s original complaint in a small number of cases\(^7\), it is questionable whether the scheme could ever have been an effective consumer redress mechanism. Most consumers taking their case to the Legal Services Ombudsman presumably wanted a decision on their original complaint, and not a referral back to the professional body for the complaint to be looked at again.

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6 James and Seneviratne (n 2).

7 In the early years, the original complaint was investigated in 10–20% cases; by 1998, it was around 30% (see Seneviratne (n 1) 193.)
Another issue was whether the Legal Services Ombudsman was able to influence good practice in the profession. The office did not solve the problem of poor complaint handling by the Law Society. Indeed, before the office was 10 years old, the Government had decided to take a more interventionist approach, providing, in the Access to Justice Act 1999, for the power to appoint a Legal Services Complaints Commissioner, who would be able to intervene to improve standards of complaint handling by the professional bodies. After various attempts to allow the Law Society to put its house in order, this reserved power was used in February 2004, when the Secretary of State formally appointed the existing Legal Services Ombudsman to act as the Legal Services Complaints Commissioner. The two roles were held concurrently, with the Commissioner’s role being confined to the Law Society, where the remit was to work with the Law Society to improve its complaint handling. To this end, targets were set for the handling of complaints, and recommendations made about the complaints system, with the possibility of financial penalties for failures in performance. The creation of this new office was an acknowledgment that the powers of the Legal Services Ombudsman were not sufficient to ensure that complaints were being handled effectively by the professional bodies. It was not until the end of March 2010, six months before the new Legal Ombudsman began to operate, that the Law Society was judged to have moved its complaints handling from ‘crisis and poor performance’ towards an ‘efficient and effective service’, with improvements to timeliness and quality, and a reduction in the backlog of work.

THE LEGAL SERVICES ACT 2007

By the end of the 1990s, disenchantment with the system was growing. It was clear that the mechanisms operated by the legal profession for handling complaints were failing to inspire public confidence. Moreover, the whole system of professional regulation was being called into question, particularly the fact that the legal professional bodies performed a dual function, that of regulation and representation. In order to address these concerns, the Clementi review was established to consider the whole regulatory framework, and how it could promote competition, innovation, and the public and consumer interest, and create an efficient, effective and independent legal sector. Clementi was charged with recommending a framework that would be ‘independent in representing the public and consumer interest, comprehensive, accountable, consistent, flexible, transparent and no more restrictive or burdensome than is clearly justified’.

11 Seneviratne (n 8) 46.
12 Legal Services Complaints Commissioner (n 10) 9.
Three areas of concern were identified by the Clementi review: the overall regulatory framework for the legal profession, which was outdated, inflexible, over complex and insufficiently accountable or transparent; the business structures within which the legal sector operated; and the complaints system. In relation to the first two concerns, the report recommended a different type of regulatory structure for the profession, which separated the regulatory from the representative functions, and the possibility of Alternative Business Structures, to allow non-lawyers to work with lawyers in new types of businesses. The concerns with the complaints system related to its efficiency, and importantly, whether a system run by lawyers dealing with complaints against lawyers could achieve consumer confidence. It was felt that the system was not sufficiently independent from lawyers, it was not clear and consistent, and it was not sufficiently flexible to include new legal providers or alternative business structures. The conclusion was that a single independent body for all legal complaints should be established. This would have the advantage of being independent from the profession, with one point of entry, providing clarity and consistency for consumers. This conclusion was supported by the Legal Services Ombudsman, the National Consumer Council, and the Consumers’ Association.

The Government White Paper which followed Clementi noted that consumers were demanding more when they had complaints about legal services, needing to be satisfied that complaints were handled ‘efficiently, fairly and quickly’. It was also important that complaints were used ‘to correct faults in the system’. Consumers were to be at the heart of the new system, and the Government was committed to establishing a new approach to complaints handling, by creating a single complaints body. All of Clementi’s recommendations were accepted, forming the basis of the ensuing Legal Services Act, which created a new regulatory structure for the legal profession. The existing professional bodies were to keep their powers, but to separate their regulatory and representative functions. A new organisation was created, the Legal Services Board (LSB), which was a single independent oversight regulator, responsible for ensuring high standards of competence, conduct and service in the legal profession, and which was to supervise the existing regulators of the legal professions. Part of the LSB’s remit was to set up and oversee the new system for dealing with complaints against the legal profession. This new system involved the creation of the Office for Legal Complaints (OLC), a statutory body which is accountable to both the LSB and the Ministry of Justice, with the function of setting up and administering a new ombudsman scheme. It came into existence on 1 July 2009.

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16 See Clementi (n 14) chapter B.
17 Ibid chapter F.
18 Ibid 2.
19 Ibid chapter C.
22 Ibid 23.
23 For example, the Law Society now provides representation for solicitors, with the Solicitors Regulation Authority providing regulation; the Bar Standards Board is now the regulator for barristers, with the General Council of the Bar as the representative body.
THE LEGAL OMBUDSMAN

The scheme established by the OLC became known as the Legal Ombudsman. As required by the Act, the new ombudsman scheme was set up in accordance with ‘the best practice of those who administer ombudsman schemes’.26 It was designed to conform to the Ombudsman Association27 principles of independence, fairness, effectiveness, openness and transparency and public accountability. Its vision is for everyone to be able ‘to access legal services in which they have confidence’ and its values are: ‘open, independent, fair, effective and shrewd’.28 Its aim is to have an ‘independent ombudsman scheme that resolves complaints about lawyers in a fair and effective way’, which is ‘shrewd and decisive’ in tackling complex issues, and ‘open’ in order to give ‘focused feedback to help drive improvements in legal services’.29 The scheme’s purpose is to resolve disputes between lawyers and consumers. Those lawyers within the remit of the Legal Ombudsman are known as ‘authorised persons’, legal professionals regulated by ‘authorised bodies’, the various legal professional bodies within the jurisdiction of the ombudsman. In effect, these are the bodies which regulate solicitors, barristers, legal executives, licensed conveyancers, probate practitioners, law costs draftsmen, notaries, patent attorneys, trade mark attorneys, registered European lawyers, and alternative business structures. Complaints can be made to the ombudsman about acts or omissions by these lawyers, and the complaint must relate to services provided. In other words, the complaint is about poor service, rather than any breach of professional conduct.30 The scheme is designed to deal with complaints from individuals, rather than organisations, although, at the request of the ombudsman, the scheme was expanded to include small businesses, small charities and trustees of small trusts, in order to increase accessibility.31 ‘Small’ in this context means businesses with fewer than 10 employees and assets or turnover below 2 million euros, charities with annual incomes of less than £1 million, and trust funds valued at less than £1 million. Personal representatives or beneficiaries of the estate of a person with a complaint who died before referring it to the ombudsman can also complain.

The office is based in Birmingham, meeting the commitment of Ministers given during the passage of the Legal Services Act, that the new organisation would be based in the West Midlands.32 The organisation consists of a Chief Ombudsman, who, until recently, was also the Chief Executive33 and Accounting Officer, a deputy ombudsman, and a team of ombudsmen, who each have the power to make final decisions, together with around 250 staff. The office began to receive complaints on 6 October 2010. At that time, there was just over 120 staff, many of whom had been in the organisation for just six weeks.34

In the first six months of operation, 38,155 contacts were made to the Legal Ombudsman by potential complainants, with 10% (3,768 complaints) accepted for

26 Ibid s 116(3).
27 The British and Irish Ombudsman Association (now re-badged as the Ombudsman Association) was established in 1993 as a self-regulatory organisation for ombudsman schemes. The Legal Ombudsman is an Ombudsman Member of the association, indicating that it conforms to the necessary criteria for ombudsman schemes.
28 The Office for Legal Complaints Annual report and accounts for the year ending 31 March 2011 (2011, HC 1338) 7.
29 The Office for Legal Complaints Annual report and accounts for the year ending 31 March 2013 (2013, HC 152) 41.
30 Professional misconduct is still dealt with by the relevant professional bodies.
31 The Office for Legal Complaints Annual report and accounts for the year ending 31 March 2010 (2010, HC 171) 4.
32 Ibid 5.
33 The roles of Chief Ombudsman and Chief Executive were recently split, and replaced by an interim chief legal ombudsman and an interim chief executive, following the resignation of the first Chief Ombudsman, Adam Sampson, in November 2014. It is not yet known whether the roles will continue to be split (see Law Society Gazette 28 Jan 2015).
34 OLC 2011 (n 28) 5.
investigation, and 1,450 cases were resolved. In the following year, there were 75,420 contacts, and 8,420 complaints accepted for investigation, of which 7455 were resolved. In 2012–13 the numbers of contacts went down to 71,000, although a few more (8430) were accepted for investigation, and 7,630 cases resolved. The most recent figures show that there were 69,500 contacts, and 8,055 cases resolved in 2013–14. The numbers of complaints made, and the numbers converted into cases investigated turned out to be lower than expected. This is a new scheme, and the estimates for complaints were based on an aggregate of the complaints made to the professional bodies, before these schemes were replaced. On these totals, it might have been expected that there would be around 100,000 contacts each year. The decrease in the numbers complaining to the Legal Ombudsman, compared to the numbers who complained to the professional bodies in the past, illustrate the difficulty of aggregating the statistics, as the previous schemes had different definitions for complaints. There was also the difficulty of predicting the effect of the economic downturn on complaint numbers.

Even taking into account the initial uncertainties about the numbers of complaints, it is not easy to explain why the numbers have declined year on year since the inception of the scheme. One reason could be the difficulties in the housing market, conveyancing transactions traditionally accounting for a large number of complaints. The depressed housing market has resulted in fewer conveyancing transactions, and thus a lower base from which complaints are generated. The general economic downturn may have had a similar effect in other areas of law too. On the other hand, it might be thought that, as general awareness of the existence of the scheme increased, the numbers of complaints would also have increased. It may be that lawyers are getting better at resolving complaints before they reach the Legal Ombudsman. If so, ‘and there is some anecdotal evidence to support the hypothesis’, this is to be welcomed.

The areas of law generating the complaints have been consistent throughout the life of the scheme. Residential conveyancing accounted for 20% of the workload in 2010–2011, 15% in the following two years, and 20% in 2013–14. Family law accounted for 20% of cases in 2010–2011, 18% in the following two years, and 17% in 2013–14. Wills and probate is the next biggest category (12–13% over the three and a half year period, followed by litigation (9%-11%), personal injury (9–10%), employment (5–8%), crime (6–9%), property (3–5%), immigration and asylum (4%). Other case categories include social welfare, commercial conveyancing, and commercial law.

THE COMPLAINTS PROCESS

One of the first tasks for the new scheme was to devise the rules by which it would operate, covering eligibility, remit, and the processes for the reception and investigation of complaints. As in all ombudsman schemes, fairness is a core value of the Legal Ombudsman, and rules had to be devised that were clear, delivered a fair and impartial scheme, ensuring accessibility, and providing for the resolution of complaints in the most appropriate way. The rules were derived from the Legal Services Act 2007, and
before they were finalised there was a wide consultation exercise, which included consultation about the appropriate fee structure for the scheme. The consultation proved valuable for providing engagement with both consumers and the profession ‘on some of the key decisions to be taken by the new organisation’.41

The rules provide that complaints can be made by telephone, email or letter. The office is ‘paperless’, and documents are scanned into the system. In order to ensure accessibility, there is an instant over-the-phone interpreting service to handle calls in languages other than English, a translating service for letters and emails, a textphone service for those with hearing impairments, information leaflets in 11 languages, and information in alternative formats, such as large print, audio CD and easy to read text, on request.42 A complaint can only be made after the complainant has used the lawyer’s internal complaints process. If the complaint has not been resolved to the complainant’s satisfaction within eight weeks of being made to the lawyer, then the matter can be brought to the Legal Ombudsman. The ombudsman can consider cases before eight weeks have expired, in exceptional cases, and can even accept complaints that have not been made to the lawyer in situations where the relationship has broken down irretrievably, and thus would be unlikely to be resolved by the in-house process. Although lawyers are obliged to signpost consumers to the Legal Ombudsman, it appears that only ‘a very small number’ of complainants had been made aware of the Legal Ombudsman by their lawyer.43 There has recently been some improvement here, with 34% of complainants being made aware of the scheme by their lawyers in 2013–14, compared to 27% in the previous year.44

Complaints initially come to the assessment centre, where the decision is made whether to accept a case for investigation or not. Only a small percentage of contacts, around 10–12%, are accepted for investigation. Some complaints can be resolved quickly by the assessors, with one or two phone calls, without the need to investigate further. Some complaints are rejected because they are premature, in that the complainant has not first complained to the lawyer, or has not given the lawyer sufficient time to respond. These complainants are advised to use their lawyer’s in-house complaints scheme. There is concern that some ‘premature’ complainants do not subsequently return to the ombudsman. Research put the figure at around 30% failing to go back to the Legal Ombudsman after complaining to their lawyer, even though they remained dissatisfied with the way the lawyer had dealt with their complaint.45 The ombudsman has now started to follow up premature complaints to try to make it easier for these complainants to access the scheme. Other complaints are rejected because they are not within the ombudsman’s jurisdiction, as the person complained against is not an ‘authorised person’. For example, they may be will writers, or lawyers operating outside England and Wales. If possible and appropriate, complainants are signposted to other agencies or schemes.

Sometimes complaints are rejected because they are outside the time limit for bringing complaints. When the scheme was first set up, complaints had to be brought within one year of the act or omission giving rise to the complaint, although there was provision to allow out-of-time cases to be accepted in exceptional circumstances. However, it was felt that too many cases were being rejected under this rule. Moreover ‘an inordinate amount of effort’ was being spent dealing with appeals against ‘out of

41 OLC 2010 (n 31) 6.
42 OLC 2012 (n 36) 18.
43 OLC 2013 (n 29) 10.
44 OLC 2015 (n 38) 8.
time’ decisions.46 Therefore, it was considered that the rules should be amended, and after wide consultation, the time limit was changed to six years from the date of the act or omission, or three years from when the complainant should have realised there was cause to complain. The six year limit is in accordance with time limits operated by the courts and some other ombudsman schemes. This limit should reduce the numbers of complaints rejected for being out of time.

Cases accepted into the system are passed to the resolution centre, where they are examined in detail by case investigators. The approach taken by the office to resolving complaints depends on the facts, and the level of formality required. The preferred approach is to resolve informally, by getting both sides to agree with the views and analysis of the investigators, and to reach a solution as quickly as possible. In this way an agreement is brokered between the lawyer and the complainant. A large number of cases are resolved in this way; 42% in 2011–12, and 44% in 2012–13, although this decreased to 39% in 2013–14. Nevertheless, the process of resolution can take some time, as the investigators have to examine the files, and allow the parties to put their case. During the process, some (between 8–11%) complaints are withdrawn by complainants, some cases are dismissed or discontinued, or the complainant fails to respond or proceed. Where it is not possible for the investigator to get both sides to agree to a solution, a more formal approach is adopted. Cases are then referred to an ombudsman, who makes a final decision on the matter. There has been a higher than anticipated volume of cases going to an ombudsman, with 35% in 2011–12, rising to 37% in both 2012–13 and 2013–14. The trend for cases to be pursued to an ombudsman decision is driven mainly by complainants, who appear to want to exhaust all options in pursuing their cases.47 Although it is unclear why complainants are increasingly pursuing cases to the ombudsman, this trend is not out of line with other ombudsman schemes, which have seen a ‘propensity to pursue their complaints as far as possible’.48 Interestingly, in 2012–13, of those cases that went to an ombudsman decision, in only one-third of cases was the ombudsman decision accepted by the complainant, with over two-thirds of complainants rejecting the ombudsman’s decision.49

The Legal Ombudsman aims to resolve cases quickly, and has targets for timeliness. Timeliness runs from the point when the complainant agrees what is to be investigated, until the time when the complaint is resolved.50 In the first 6 months of operation, 55% of cases were resolved within three months of the complainant’s first contact with the office, 76% within four months, and 92% within six months.51 In the last quarter of 2011–12, just over half of all complaints were resolved within 3 months, and over 80% were resolved within 6 months. In 2012–13, the target was to resolve at least 55% of cases within 3 months, at least 80% of cases within 6 months, and all cases within a year. All these targets were met, except for one month (March 2013) when only 48% of cases were resolved within 3 months.52 In 2013–14, the Legal Ombudsman met its target of resolving 60% of cases within 3 months, 90% within 6 months, and all cases within a year. There are more taxing targets being set for 2014–15, with the aim to resolve 40% of cases within 8 weeks, 70% within 3 months, and 95% within 6 months.53

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46 Ibid 11.
47 OLC 2015 (n 38) 13.
48 OLC 2013 (n 29) 13.
49 Ibid 47.
50 Ibid 36.
51 OLC 2011 (n 28) 11.
52 OLC 2013 (n 29) 36–37.
53 OLC 2015 (n 38) 17–18.
More than half of complainants were satisfied with the speed of the investigation, with some saying it was quicker than they expected.54

EFFECTIVENESS

In order to be effective, the Legal Ombudsman must provide adequate remedies to complainants. When a case is decided by an ombudsman, the decision is binding on the lawyer. If the ombudsman agrees that that the lawyer’s service is unsatisfactory, the lawyer can be ordered to put things right, including apologising to the complainant, returning documents, doing remedial work, reducing or returning fees, or paying up to £50,000 in compensation. When the scheme was first set up, the financial limit was £30,000. It was only in rare circumstances that this limit was ever reached, or was felt to be inadequate. However, it is considerably less than the £150,000 maximum for the Financial Ombudsman Service, and after consultation, it was decided to increase the amount to £50,000, although such an award is rarely given.55 In 2012–13, just over 55% of cases that went to an ombudsman decision resulted in no financial award to the complainant. Just under 20% of cases resulted in a financial award of up to £299, 15% were between £300-£1,000, 7% were between £5,000-£20,000. Only 17 cases were over £20,000.56 In 2013–14, there were 16 cases that resulted in a remedy of £20,000 or more, with most cases involving remedies of less than £5,000.57 In that year there were 2,400 ‘non-financial’ remedies, for example, ordering lawyers to complete work or return papers. These ‘non-financial’ remedies are important, as the ultimate aim is to put the client back in the position they would have been in if there had not been poor service.58

In order for an ombudsman’s decision to be enforceable and binding on the lawyer, the complainant must accept it. These awards can be enforced through the courts, and the Legal Ombudsman will take enforcement action on behalf of complainants if necessary. Altogether, 43 enforcement cases were started in 2013–14, recovering £70,000 through action or the threat of it.59 The Legal Ombudsman will also help complainants to obtain redress through insurance or compensation schemes, where lawyers do not have the resources to meet their obligations.60 In around 70% of cases where an ombudsman makes a decision, the complainant rejects the decision. Presumably this is because complainants’ expectations about the value of the compensation or redress exceed what the ombudsman thinks is required. If complainants do not accept the ombudsman’s decision, they are free to pursue other remedies, for example, through the courts. In 2013–14, in 48% of cases decided by the ombudsman or resolved informally, no remedy was given, ‘essentially meaning ... no evidence of poor service’ was found.61

An effective service is only possible with adequate funding. The budget for the Legal Ombudsman appears to be sufficient to enable it to carry out its functions. Unlike its predecessor, the Legal Services Ombudsman, the funding for the Legal Ombudsman

54 OLC 2012 (n 36) 11.
55 OLC 2013 (n 29) 12.
57 OLC 2015 (n 38) 12.
58 Ibid 11.
59 Ibid 8.
60 OLC 2012 (n 36) 24.
61 OLC 2015 (n 38) 12.
comes from the legal profession, so there is no cost to the public purse. The funding is met from the levy funds received from the approved regulators, who obtain funding from the professionals they regulate. There is no threat to the independence of the Legal Ombudsman by this funding arrangement, as the legal professions do not set the budget. Moreover, the funding is actually received by the ombudsman from the Treasury, which is then reimbursed by the profession each year. As a result, the budget is treated as public money, and the scheme is subject to audit by the National Audit Office. Thus, although ultimately funded by the legal profession, the scheme is directly accountable to the Ministry of Justice for its financial performance. When the office was first set up, the Ministry of Justice provided Grant in Aid of £4.55 million for the implementation of the scheme. The budget for 2011–12 was £19.4 million, but the actual expenditure was £17.3 million. Year on year, the expenditure has reduced: in 2012–13 the budget was just under £17 million, with the actual expenditure being £16.6 million, with a further reduction in 2013–14, where total expenditure was £15.8 million. The scheme does therefore appear to be achieving a cost effective service, with under-spends against budget, and costs being driven down, demonstrating a service providing value for money.

Although the overall budget has decreased year on year, and is less than the predecessor bodies, the system still has a high unit cost. This is partly a result of the lower than expected number of cases decided, as the unit cost is calculated by dividing the total budget by the total number of investigations undertaken. One of the targets for 2012–13 was to achieve a unit cost of £2,000, which was not achieved, although at £2,168 it was an improvement on 2011–12, when it was £2,281. This was disappointing, as the overall cost base had declined, but it was the result of the reduction in the predicted number of complaints and investigations. There had been ‘tight management’, but without the necessary increase in the number of cases. The scheme continues in its aim to drive down the unit cost, and in 2013–14 achieved its target, with a unit cost of £1,950. As many of the costs are fixed to some extent, irrespective of the number of cases dealt with, the way to achieve a lower unit cost is to increase the case volume, in addition to working more efficiently.

In addition to the levy, a small amount of the budget is made up of case fees. Section 136 of the Legal Services Act 2007 requires the ombudsman to make charges to individual lawyers, in those cases where the complaint is decided by an ombudsman (rather than being resolved informally). A case fee is not chargeable where a complaint is resolved in favour of the lawyer, and an ombudsman is satisfied that the lawyer took all reasonable steps to try to resolve the complaint internally. The case fee is currently £400. Until April 2013, case fees were only charged for the third (and subsequent) complaints that met the chargeable criteria in a financial year. From 1 April 2013, the case fee rules were changed; there are no longer two ‘free’ cases, and firms are charged for all cases, where they have not responded to complaints about their service in an appropriate and reasonable manner.

In order to be effective the scheme must respond to change and keep relevant. There was a commitment when the office was established to re-examine the rules in the light

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62 Concerns about issues around expenses and benefit schemes resulted in the appointment of an official from the Ministry of Justice as Interim Accounting Officer in 2014, who signed off the 2013–14 annual report and accounts (OLC 2015 (n 38) 44–45).

63 OLC 2013 (n 29) 46.

64 OLC 2015 (n 38) 18.

65 OLC 2012 (n 36) 38.

66 OLC 2013 (n 29) 17.

67 OLC 2015 (n 38) 18.
of experience, and to make any necessary changes. The consultation on the scheme rules in 2012 produced ‘general agreement that the broad shape of the rules was appropriate and working well’ and few changes were made. Changes that were made were in order to tidy up anomalies, or as a result of issues raised during the early years of operation. For example, as discussed above, the limit for compensation has been raised from £30,000 to £50,000, and there has been an increase in the timescale for bringing complaints. Some additional categories of those eligible to complain have also been introduced. For example, complaints will now be allowed from prospective customers, although it is not anticipated that this will increase the workload to any great extent, as it will only be in limited circumstances where the ombudsman is likely to take these cases. Despite pressure from consumer groups, it was decided not to change the rules to allow complaints by third parties, that is, those who have not received a service from a lawyer. There are clearly problems with articulating rules to cover circumstances where non-clients should be allowed to complaint about a lawyer. The Legal Ombudsman agreed to keep this under review, and a working party was established to consider the issue. This had reported that it would be helpful in some cases for there to be redress ‘if the circumstances in which the OLC could get involved could be clearly and tightly defined’.  

**OPENESS AND TRANSPARENCY**

For a scheme to be effective there needs to be awareness of its existence, and what it can do. Gaining ‘profile and exposure in professional circles’ and being accessible ‘to a diverse range of the population’ is essential. Awareness about the scheme is improving, with 78% of the users of legal services saying that they had heard of the Legal Ombudsman, and awareness among the general public increasing from 60% in 2012 to 70% in 2013. The ombudsman also gathers information about the users of the scheme on a confidential basis, noting the gender, race, ethnicity, and religion of complainants, and whether they suffer from any disabilities, in order to ‘engage with under-represented groups’.  

User satisfaction surveys are useful for establishing whether the scheme is performing well. Recent surveys show that the majority of users are satisfied with the service they had. However, although lawyer satisfaction has increased in the past year (up from 80% in 2012–13 to 86% in 2013–14), consumer satisfaction has decreased from 72% in 2012–13, to 64% in 2013–14. Of course, satisfaction and perceptions of fairness are often linked to the outcome of the cases, and the rise in satisfaction by lawyers may be a reflection of the fact that the numbers of cases where a remedy was ordered against a lawyer has declined. Similarly, in relation to the reputation of the ombudsman, 93% complainants and 60% of lawyers who are satisfied with outcome of their case would speak highly of the Legal Ombudsman, whereas only 11% of complainants and 12% of lawyers would speak highly of the ombudsman where they

68 OLC 2013 (n 29) 9.
69 Ibid 12.
71 OLC 2013 (n 29) 48.
72 Ibid 42.
73 OLC 2012 (n 36) 20.
74 OLC 2015 (n 38) 14.
are dissatisfied with the outcome.75 The ombudsman is aware that the decline in consumer satisfaction does call for some improvement. Areas of concern relate to how well staff understand the nature of the complaint and the desired outcome, clear explanations of the reasons for recommendations, and the investigation process being perceived as fair and impartial.76

As in all ombudsman schemes, part of the function of the Legal Ombudsman is to feedback to the profession aspects of good practice, and to draw attention to problems and trends, in the hope of improving practice in general. In order to be effective, the Legal Ombudsman must demonstrate improvements in the delivery of legal services and in the handling of complaints by the legal profession. Complaints are rich sources of information about how the legal sector is performing, and whether there are particular areas giving cause for concern. They can highlight where improvements are needed, what constitutes poor and good service, and what people expect or object to when buying legal services. The Legal Ombudsman is also in an ideal position to contribute to policy debates about the broader system of redress and regulation.

The ombudsman has a number of ways to help to improve service levels and complaint handling. For example, in October 2012, a guide for lawyers was published: ‘Listen, Inform, Respond: a revised guide to good complaints handling’. At the same time, a guide was produced for consumers on how to make complaints: ‘Be clear, be bold, be fair’. The ombudsman also produces thematic reports. In March 2012, a thematic report on costs was published, with associated guides for consumers and lawyers: ‘Costs and customer service in a changing legal services market’.77 In December 2012, the second thematic report was published: ‘Losing the plot: Residential conveyancing complaints and their causes’, and a further one on divorce related complaints.78 In 2013, a report was published about conditional fee agreements. The ombudsman runs seminars and workshops for the profession, in order to improve service delivery, offering accredited continuous professional development courses.79 The office also responds to consultations, conducts research, and informs broader policy debates about consumer protection, and regulatory issues.

The Legal Ombudsman publishes a great deal of information about its work, processes, and governance on its website. The rules under which it operates are publicly available, and it consults widely on its work, its strategy and any changes to the rules. The ombudsman routinely publishes details of the numbers and types of cases dealt with in the annual reports and on the website. More controversially is the publication of the names of firms and lawyers in the statistics. The identity of complainants is always kept confidential, but during 2012–13, it was decided to publish the names of lawyers involved in cases where there was an ombudsman decision. This was a departure from the practice under the Legal Services Ombudsman, where the ‘publicity option’ was used only for lawyers who refused to accept the Legal Services Ombudsman’s recommendations. The Legal Ombudsman’s new practice names all lawyers, whether the case is found against them or not. Lawyers’ representatives were strongly opposed to naming lawyers, whereas consumer groups, not surprisingly, argued for as much information as possible about lawyers to be placed in the public domain.

75 Ibid 20.
76 Ibid 15.
77 OLC 2013 (n 29) 15.
78 Ibid 7.
79 Ibid.
The decision to publish names was taken after a lengthy consultation process. Each quarter, all cases decided by an ombudsman are published, including the area of law and nature of the complaint, the outcome of the complaint, and the name of the lawyer or firm involved. When data started to be published in autumn 2012, ‘passions’ were stirred, but all this has now subsided, and it seems to have been accepted that this information should be in the public domain, particularly as the early data ‘indicates a profession that is, on the whole, handling complaints responsibly’. In addition to this routine quarterly publication of data, the OLC has the power to publish the full ombudsman decision, including the name of the lawyer, but redacting the name of the complainant, in individual cases, where it is considered in the public interest to do so. The only publication under this power so far was in September 2014, where a barrister was named after having 25 complaints in the past two years, and where it was felt to be necessary to protect consumers.

INDEPENDENCE AND ACCOUNTABILITY

Independence is a central tenet of the Legal Ombudsman, as it is in all ombudsman schemes. One aspect of independence is that the ombudsman must be visibly and demonstrably independent from those within its remit. As with the Legal Services Ombudsman, the Legal Ombudsman cannot be a member of the legal profession. Moreover, the OLC, which appoints the ombudsman, must be chaired by a non-lawyer, and there must be a majority of non-lawyers on that board. The board presently consists of eight members, including the chair, three of whom are lawyers. The LSB, which appoints the members of the OLC, must also have a lay chair. The Legal Ombudsman is appointed on a permanent basis, but the OLC appointments are fixed at a maximum of five years, with a possibility of re-appointment for one further term. The first board appointments were made for a three-year term. Staff in the office must also be seen to be independent and impartial. When the office was first established, a number of employees from the predecessor bodies applied for posts in the new scheme. However, these staff were appointed only if they met the criteria for the posts. In order to ensure that this scheme truly represented a break with the past, there was an extensive training programme, which together with the entirely new complaints handling processes, introduced a completely new culture to the new scheme.

The complicated governance structure is designed to ensure the independence of the scheme. The OLC sets the strategic direction of the ombudsman scheme, provides governance, and safeguards the independence of the ombudsman in relation to decisions on complaints about legal services. The OLC itself has to report on performance to the LSB, which also agrees the Legal Ombudsman’s budget and performance targets. The relationship between these two bodies is governed by a memorandum of understanding, which ‘reflects the respective bodies’ independence and separate functions’. In addition, the rules of the scheme and any changes must be approved by OLC and then LSB.

80 Ibid 17.
81 OLC 2013 (n 29) 7.
82 Law Society Gazette 9 December 2014.
83 Legal Services Act 2007, s 122.
84 Ibid schedule 15, paras 2(1) and (2).
85 OLC 2013 (n 29) 56.
The OLC meets 11 times a year with the management team, and one of these meetings is dedicated to considering strategy. The OLC is briefed on matters of strategic importance, receives monthly reports on organisational and financial performance, and quarterly reports on risk, human resources and legal challenges. In addition to its responsibilities to the LSB, the OLC has responsibilities to the Ministry of Justice, which exercises financial oversight of the scheme. Members of the OLC and the senior management of the Legal Ombudsman have to abide by the LSB’s code of practice in relation to expenses, gifts and hospitality (which have to be declared), and their interests (which are published on the website). The accounts of the scheme are subject to the National Audit Office, and annual reports are presented to Parliament.

Accountability is also ensured by the fact that the ombudsman is subject to judicial review. Altogether, there have been just over 300 potential judicial review challenges since the scheme began, 130 of which did not progress to the pre-action stage, and 140 of which were resolved at pre-action. In 30 cases proceedings were issued, four of which were lost and two won at hearing, with the remainder either settled by consent or lost at permission stage by the challenger. Cases are brought by both complainants and lawyers on a fairly even split. These cases have confirmed that the ombudsman has ‘considerable latitude of discretion’, can ‘apply his own standards of what he considers to have been good practice at the time’, and that his decision can only be overturned ‘if it is unreasonable in the Wednesbury sense’. It is not for the court ‘to substitute its own view for that of the Legal Ombudsman, but only to decide whether the determination is ‘within a reasonable range of possible conclusions’. It is also accepted that ‘subject to overriding considerations of fairness’ the courts should not adopt ‘too technical an approach’ to how a complaint should be set out, and that there is no conflict between the ombudsman’s scheme rules and the requirements of fairness.

A further accountability mechanism is provided by the Independent Complaints Adjudicator (ICA). Although the ombudsman decision is final, with no further appeal on the substance or merits, the ICA deals with complaints about the level of service provided by the ombudsman. There is a three stage process for these service complaints. First, the matter is referred to the manager of the person complained about. Stage 2 involves a review by a more senior manager, normally an operations manager. Finally, stage 3 involves a referral to the ICA, an independent appointee of the OLC, who carries out a final review of the level of service provided. The ICA can give a financial award, and can also make recommendations for apologies and improvements in service. The ICA provides an annual report, noting that in 2011–12, there were 18 substantive service complaints, 56 in 2012–13, and 18 in 2013–14. Most complaints are from consumers rather than lawyers, and they reveal examples of

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86 Ibid 60.
87 In 2013–14, it was discovered that there had been shortcomings in the procedures for managing public money originating in the early stages of the OLC’s existence (OLC 2015 (n 38) 3–4).
88 OLC 2015 (n 38) 14.
89 R (Crawford) v The Legal Ombudsman [2014] EWHC 182 (Admin), [20]–[21].
90 R (on the application of Rosemarie) v The Office for Legal Complaints [2014] EWHC 61 (Admin), [42].
91 Ibid [70].
92 Ibid [15].
93 OLC 2012 (n 36) 32.
94 Ibid.
95 OLC 2013 (n 29) 64.
96 OLC 2015 (n 38) 73.
poor communications, delays, lack of overall case oversight, system failures, and simple errors. However, the overall conclusion is that the internal review process is thorough, service complaints are taken seriously, the process ‘is working well’,97 and that ICA scheme is valuable, offering an ‘external and independent source of finality and assurance for users’.98

THE FUTURE

Although the Legal Ombudsman became operational less than five years ago, there are already changes for the future of the scheme. One change that has recently occurred is in relation to claims management companies, which were brought into the jurisdiction of the Legal Ombudsman on the 28 January 2015, some two and a half years after the government first announced that the scheme would be extended in this way.99 These companies handle compensation claims on behalf of consumers, either by acting directly for a client or as an intermediary between the claimant and their lawyer.100 They are not regulated by any of the legal professional bodies, but by the Ministry of Justice, through the Claims Management Regulator, and were therefore not within the jurisdiction of the Legal Ombudsman. Before 2015, complaints against these companies were dealt with by the Claims Management Regulator, which had limited powers in this regard, being mainly confined to giving directions about handling the complaint, but with no power to award compensation.101 Section 161 of the Legal Services Act 2007 enabled these companies to be brought within the ombudsman’s jurisdiction. The government, recognising the confusion for consumers, who may believe they are dealing with lawyers, and the detriment caused when they have no satisfactory remedy for complaints, decided to use this provision to bring these companies within the remit of the Legal Ombudsman.102 In addition to protecting consumers, this additional jurisdiction may benefit the scheme overall by reducing the unit cost, the increase in the number of complaints providing economies of scale. The additional costs will be met by the claims management industry.

There are other providers of legal services who are not within the jurisdiction of the Legal Ombudsman. It is only the ‘regulated’ legal profession, those who provide ‘reserved legal activities’ that are within jurisdiction. These reserved legal activities include: exercising rights of audience, conducting litigation, conveyancing, and probate. In the past, most legal work would have been conducted by the regulated profession. However, the market in legal services provided by non-regulated providers has developed rapidly during the years since the passing of the Legal Services Act in 2007. Problems can arise for consumers where they obtain legal services from non-regulated suppliers, as the Legal Ombudsman can offer no redress where there is poor and inadequate service. One particular area of concern is will writing because, although probate is a regulated activity, there are no restrictions on who can write wills. One way to deal with this would be to make will writing a regulated activity, a solution that

97 Ibid.
98 Ibid 74.
100 Department for Constitutional Affairs, Regulation of Claims Management Companies Policy Statement, 2 March 2006, 4.
101 University of Leicester, Centre for Consumers and Essential Services: Mapping potential consumer confusion in the changing legal market: report for the Legal Ombudsman (2011) 22.
102 OLC 2013 (n 29) 5. The Financial Services (Banking Reform) Act 2013 provided the legislative vehicle for this.
was proposed by the Legal Services Board, but which was rejected by the government.

As an alternative, there could be a voluntary scheme for will writers. Under section 164 of the Legal Services Act 2007, the OLC can ask the Lord Chancellor to make an order for a voluntary scheme. Under such a scheme, will writers could voluntarily come within the jurisdiction of the Legal Ombudsman, enabling consumers to have an appropriate redress mechanism. Other areas where voluntary jurisdiction may be appropriate include immigration advice, estate administration, and organisations giving general legal advice, such as Citizens Advice Bureau. For such schemes to be introduced, the relevant organisations must be willing to be involved and to provide the necessary funding. So far, members of the Institute of Chartered Accountants in England and Wales (ICAEW) are the only ones to come within LeO’s legal services jurisdiction in this way. Both the Legal Services Board and the Legal Services Consumer Panel would like to see the remit of the ombudsman extended to cover all users of legal services, as would the Legal Ombudsman, which hopes to expand its services ‘across the whole legal sector (regulated and unregulated)’.

Other issues for the ombudsman in the future relate to the jurisdictional boundaries of the scheme. One area of concern relates to situations where the legal service is part of a bigger transaction, for example in a house purchase, where the transaction involves financial services, as well as legal services, and even estate agency and surveyors. Complaints about the various aspects of this transaction could involve the Property Ombudsman, the Financial Ombudsman Service, Ombudsman Services, as well as the Legal Ombudsman. In addition, as these services can now be offered by a single organisation, consumers may be confused as to which ombudsman is appropriate to deal with their complaint. Legal services may also be given with other professional services, like tax advice and insurance, where accountancy firms provide advice in relation to wills or tax. In these cases, consumers do not have the same access to redress, as they would if the service were provided by a regulated lawyer. The jurisdictional boundaries of the scheme are inadequate to deal with these new business models, just as they are in relation to new legal products which are offered online, which are not regulated in the same way, and which do not provide an avenue of redress for consumers. These situations highlight the fact that regulatory structures need to evolve to keep pace with changing business practice. Other ombudsman schemes in other sectors face similar issues, where the narrow jurisdictional boundaries no longer work, and where individual ombudsman schemes do not ‘add up to a coherent Ombudsman system from a consumer or sectoral perspective’. What is needed in this area is reform and simplification and a strategic look at how ombudsman schemes and alternative dispute resolution schemes in general are developed.

104 Ministry of Justice, Decision Notice Re: extension of the reserved legal activities. 14 May 2013.
105 OLC 2013 (n 29) 32.
106 OLC 2015 (n 38) 3.
107 Legal Services Board, A blueprint for reforming legal services regulation (September 2013).
108 Legal Services Consumer Panel, Legal Ombudsman: Access to redress for legal and other professional services (June 2012).
109 OLC 2015 (n 38) 3.
110 Legal Ombudsman: Response to Public Administration Committee inquiry into ‘Complaints: do they make a difference’ para 5.
One impetus for such a strategic approach is provided by the European Union directive on alternative dispute resolution (ADR). The directive requires member states to ensure that there is access to simple, efficient, fast and low-cost ways of resolving domestic and cross-border disputes arising from the sale of goods or services. It is not prescriptive as to the method of ADR, which could be mediation, arbitration, ombudsmen, or any other non-court mechanism, but all gaps in ADR coverage must be filled. Although ADR schemes must exist, there will be no compulsion for organisations to belong to them, but they will have to explain to consumers why they are not members of such schemes. The directive must become law in the UK by July 2015. Clearly, this directive has consequences for alternative dispute resolution, of which the Legal Ombudsman is a part. One way of implementing the directive is to expand the jurisdiction of existing ombudsman schemes to cover areas where there are presently no alternative redress schemes. For example, the Legal ombudsman scheme could be expanded to cover accountants. The directive may make it more attractive for non-regulated legal services providers to join a voluntary scheme. At present, there is little incentive to do so, given the cost of buying into a redress scheme, that may not give any competitive advantage. There is certainly willingness on the part of the Legal Ombudsman to meet any gap in provision for ADR for those ‘offering broadly described legal services’. The directive also provides an opportunity to reform the alternative redress landscape, which is complex and confusing, and to create a coherent system. In the short term it may result in a move away from an ombudsman for regulated legal services providers to all legal services. In the longer term, if there is rationalisation of the ombudsman system in the UK, it may result in an ombudsman covering all professional services.

CONCLUSION

The Legal Ombudsman is a very different organisation to the Legal Services Ombudsman that it replaced. In keeping with Clementi, it provides one entry point for complainants, with complaints against members of the legal profession being dealt with independently and consistently. The new scheme was delivered ‘within budget and on schedule’ and it has proved to be fair, effective and independent, costing less than the system it replaced. It has achieved high rates of satisfaction among complainants and lawyers, and high levels of awareness of the scheme. It was helpful that the establishment of the scheme was ‘largely welcomed’, and that the predecessor bodies ensured that there was a ‘smooth transition and handover from the old arrangements’. Part of the success of the scheme has been acknowledged to be ‘clearly attributable to the work and commitment’ of these bodies, particularly the Legal Complaints Service which was wound up ‘with extraordinary grace and goodwill’. The scheme has proved to be efficient in its operations, and willing to take on new jurisdictions if

112 OLC 2013 (n 29) 5.
113 OLC 2015 (n 38) 7.
114 OLC 2011 (n 28) 5.
115 Although the satisfaction rates are better among lawyers than complainants (see OLC 2015 (n 38) 15).
116 OLC 2013 (n 29) 6.
117 OLC 2011 (n 28) 5.
118 Ibid 44.
119 Ibid.
necessary. It is flexible, making changes to the rules where necessary, in order to ensure that it 'remains relevant and credible to both consumers of legal services as well as the legal providers'.

Since it began to receive complaints in October 2010, it has received over 250,000 contacts, resolved over 24,000 complaints, and has ‘shed its ‘fledgling’ tag and established itself as a respected feature of the legal world and the wider redress landscape’. Despite these undoubted achievements, there is already change to the system, and new challenges to face. The scheme rules have been changed in the short time since its inception, to take into account the changing environment. There will be more changes as the environment in which the legal profession operates is changing, as is the world of alternative dispute resolution. The consequences of these changes for the Legal Ombudsman may be to bring complaints about all legal services within its remit. It may even result in the end of the Legal Ombudsman, and the creation of a new ombudsman scheme for professional services.

120 OLC 2013 (n 29) 6.
121 Ibid 6.
HARMONISATION OF EUROPEAN CONTRACT LAW THROUGH AN “OPTIONAL INSTRUMENT”: PRINCIPLES AND PRACTICAL IMPLICATIONS

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INTRODUCTION

One of the main objectives of the European Union is to ensure the effective functioning of the internal market. This, in effect, means the “bringing down of barriers and simplifying existing rules to enable everyone in the EU...to make the most of the opportunities offered to them by having direct access to [28] countries...”\(^1\) To this end, the Union has enjoyed some of success in the harmonisation of Member States’ laws, in the areas of equality law, and the implementation of the four principles of the union: namely, the free movement of goods, workers, persons and provision of services. Yet, its attempts to harmonise member states’ private laws have been far more sporadic and drawn-out. In the field of contract law, the approach adopted by the Union has involved issuing directives in specific areas of contract law. These have been predominantly related to consumer contracts. Examples include doorstep\(^2\) and distance selling\(^3\) directives. The reasons for harmonisation are well-rehearsed: divergence in European contract laws creates obstacles for businesses and consumers engaging in cross-border trade.\(^4\)

Nonetheless, harmonisation by directives has been ineffective, and has resulted in market fragmentation within the European Union.\(^5\) Owing to this, the European Parliament has long called on the European Union to take the necessary action needed to ensure greater convergence.\(^6\) In 1999, the Tampere European Council conducted “an overall study on the need to approximate Member State’s legislation in civil matters”.\(^7\) Following this, the European Commission issued a Communication in 2001\(^8\) which aimed at gathering information on whether there was a need for EU action in the area of European contract law. Further action was taken by the Commission in 2010 when it issued a Green Paper on policy options for progress towards a European Contract Law for consumers and businesses, in which it proposed different approaches.\(^9\) This has led some commentators to the view that the Commission clearly favours an optional

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4 McKendrick (n 1) 14.
7 Conclusion of the Conference in Tampere on 15 and 16 October 1999.
contract law instrument.\textsuperscript{10} It is envisaged that the optional instrument would be based on rules of the Draft Common Frame of Reference (DCFR).\textsuperscript{11} The DCFR was the result of work done by networks of academics. It contains principles, definitions and model rules of European Private Law.

In the area of sales of goods and digital content, a similar approach is being taken by means of a proposal of a Regulation setting out a Common European Sales Law (CESL).\textsuperscript{12} This has been approved by the Parliament, and is awaiting consideration by the Council. If approved, the CESL would be available for adoption by the parties to a relevant contract.

The purpose of this article is to critically assess the harmonisation of European contract law through the creation of an optional instrument. Because of the more limited scope of the CESL the focus will be on the DCFR, but some reference will be made to specific provisions of the CESL where these are particularly relevant to the situation being discussed.

This paper will start with an overview of the European Commission’s existing approach to contract law. In doing so, the article will highlight the various problems associated with the harmonisation effort to date. The limitations of minimum and maximum harmonisation by directives are successively taken into account. In the second section of this paper, the various practical and constitutional issues associated with the optional instrument are examined. The third section seeks to analyse, through comparative law (German, English and French laws), the extent to which divergence in general contract law impedes cross-border trade. In addition to this, the viability of the Draft Common Frame Reference (DCFR) as a potential basis for the optional instrument will be assessed. Finally, since the success or failure of the optional instrument may largely depend on businesses willingness to use it, the views of the business community are also noted. The conclusion reached is that whilst divergence in contract laws within the European Union affects cross-border trade, recourse to radical measures are unlikely to solve these obstacles. Coherence and consistency in European contract can only be achieved through ensuring that legislative acts are drafted to the highest standards and that gaps within existing legislation are closed.

HARMONISATION BY DIRECTIVES: PROBLEMS AND THE SEARCH FOR AN ALTERNATIVE SOLUTION

Europeanisation of contract laws has so far been fraught with problems. A notable cause of these problems is minimum harmonisation. This is because minimum harmonisation gives the Member States considerable leeway in selecting the appropriate mechanism necessary to give effect to the objectives of the directive, i.e. by providing for a stricter protection.\textsuperscript{13} In effect, instead of creating a level playing field for businesses, minimum harmonisation has enabled the Member States’ to maintain existing national rules rather than enact new provisions to give proper effect to the

\textsuperscript{10} Walter Doralt, \textit{The Optional European Contract Law and why success or failure may depend on scope rather than substance} (Max Planck Private Law Research Paper No. 11/9).


Consider, for example, the case of the Consumer Sales Directive. In transposing the criteria for presuming conformity with the contract in article 2(2), Schulte-Nölke has noted that the German government did not implement the provisions verbatim but rather that it provided a starting point for establishing conformity. Accordingly, the courts would first have to look for an express agreement as to quality reached between the contracting parties, and then only in the absence of such express agreement between the parties would the criteria corresponding to Art. 2(2) of the Directive apply.

Moreover, it could also be argued that the effect of minimum harmonisation has merely “shifted the degree of diversity between national laws”. An example of this can be seen in the Distance Selling Directive. Article 6 of the directive provided consumers the right to withdraw from a contract, usually without giving any reason, for a period of 7 working days. In practice, the imposition of minimum harmonisation by the directive meant that the Member States could impose higher level of protection by providing for a longer cooling off period. This flexibility had the potential of causing uncertainty for businesses engaging in cross border trade. This is because they might not have been aware of the length of cooling off period in other Member States. For example, a British supplier of goods, who intended to sell throughout the European Union, would have had to be aware of the need to deal with a cooling-off period of seven days when selling to a consumer residing in England, Belgium, Spain and Netherlands, but a period of ten days if the consumer were Italian, and two weeks in regards to German consumers.

This disparity was further exacerbated by the fact that the directive imposed on the manufacturer a duty to inform the consumer about his or her right of cancellation. Thus, “any mistake in providing the consumer with correct information on the right of cancellation, including the method of calculation of the period, will result in the cooling-off period never starting”. Crucially, this might result in the consumer having a further three months cooling off period. The supplier in this case might well have found itself incurring huge losses due to the potential returns arising from consumers exercising their right of cancellation. In effect, it might well have been deterred from marketing and selling its products across the European Union. In fact, Vivienne Reding recently suggested that “nearly two of every three consumers trying to buy from another country are turned down because traders refuse to serve the consumer’s country”.

What this brief analysis shows is that legal divergence cannot be addressed through minimum harmonisation. This is why when a proposal for consolidation of the four Directives (Distance Selling, Unfair Contract Terms, Sales of Consumer Goods and

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14 Ibid.
17 Directive 97/7/EC (n 3).
18 The Distance Selling Directive has now been superseded by Directive 2011/83/EU of the European Parliament and of the Council on Consumer Rights [2011] OJ L 304/64 (the ‘Consumer Rights Directive’). This was passed by the EU in October 2011.
19 Gralf-Peter Calliess, ‘Coherence and Consistency in European Consumer Contract Law: a Progress Report’ (2003) 4 German LJ 333. Note that under the Rome I and II Regulations on the applicable law in consumer contracts, the law applying to B2C contracts will normally be that of the consumer, rather than the seller or supplier. See also the later discussion at pp 24–25 below.
20 Ibid 336.
Doorstep Selling Directives\textsuperscript{22} was made by the Commission in 2008, the directive\textsuperscript{23} adopted maximum harmonisation.\textsuperscript{24} As a result, the Member States are now restricted from going beyond, or below, the level of protection which the provision in the Directive aims to ensure.\textsuperscript{25} It therefore follows that by restricting Member States’ ability to vary the provisions of the directive, it is conceivable, at least in theory, for a coherent contract framework to be achieved across the European Union. An example can be found in article 9 of the Consumer Right Directive. This obliges all the Member States to provide a uniform 14 days withdrawal period to consumers in distance selling situations.

On the other hand, the impact of maximum harmonisation should not be exaggerated. Different legal interpretations in the Member States may restrict its effect from being realised.\textsuperscript{26} The reason for this is that each of the Member States’ courts will attempt to interpret European rules through their own culture. In a long run, this may create new disparity of laws. All in all, whether maximum harmonisation will lead to greater convergence in contract law is yet to be seen. What is clear however is that “harmonising the patchwork acquis by means of harmonisation directives amounts to a strategy of replacing one evil with another.”\textsuperscript{27} An alternative solution is therefore needed.

THE OPTIONAL INSTRUMENT: SOLUTION TO LEGAL FRAGMENTATION?

This section will briefly consider the scope of a potential alternative to minimum or maximum harmonisation. As already mentioned above, one of the solutions put forward by the European Commission in response to legal fragmentation relates to the creation of an optional contract instrument. This would not replace national law but rather would sit alongside Member States’ contract law.\textsuperscript{28} Of course, “the big advantage of an optional Code is that it can take into account the present divergence in contract law, while still allowing further unification to take place as far as the market parties’ wish to”.\textsuperscript{29} Nevertheless, concerns have been raised regarding the parameters of the instrument.

Firstly, there is lack of clarity as to whether the optional instrument would be on an opt-in or opt-out basis.\textsuperscript{30} On the one hand, if an opt-in approach is adopted, the principle of freedom of contract will be respected but this may also give rise to conceptual difficulties. For example, it is not clear as to whether the optional instrument could apply by incorporating standard contract terms in the contract between the contractual parties. On the other hand, whilst an opt-out approach may intrude on freedom of contract it may be attractive to small and medium enterprises (SME) since in most cases they “do not make a conscious choice for the applicable

\textsuperscript{23} Directive 2011/83/EU (n 18).
\textsuperscript{24} Ibid.
\textsuperscript{25} Lorraine Conway, EU Consumer Rights Directive - Commons Library Standard Note (UK Parliament, 6 April 2013).
\textsuperscript{26} Schulte-Nölke and Tichy (n 15) 567–572.
\textsuperscript{27} Gralf-Peter Calliess, European Contract Law: Substantive and International (Johann Wolfgang-Goethe Universitat, 2003) 18.
\textsuperscript{30} In relation to the CESL (n 12) it is clear that an ‘opt-in’ process is intended – see Article 3.
and that they “cannot rely on sophisticated legal advisors [to] inform them about the advantages and disadvantages of the different options”.32

Secondly, would the instrument be limited to cross-border transactions or expanded to cover internal contracts? Limiting the optional instrument to cross-border trade only may result in businesses having to trade under two legal regimes i.e. the optional instrument and national laws. Accordingly, those businesses operating or seeking to operate cross-border will be forced to adapt their standard contract terms in order to benefit from the instrument. Surely, this approach would defeat the policy underpinning the instrument i.e. to eliminate barriers to cross border trade. Finally, would the instrument be applicable to both business to business (“B2B”) and business to consumer (“B2C”) contracts? It is clear from the preceding discussions that the impetus behind harmonisation of contract law is to encourage cross border between businesses. The optional instrument would, therefore, certainly cover B2B contracts. In so far as B2C contracts are concerned, the Commission foresees the optional instrument as a complementary tool to the existing “consumer acquis, by integrating its requirements, including progress made on consumer protection in the internal market in the Consumer Rights Directive”.33 It must be stressed, however, that the practical application of the optional instrument on B2C contracts has not yet been explored.34

Furthermore, even if the issues of scope are resolved, creating the optional instrument may still be inhibited by constitutional considerations. Currently, the European Treaties do not lay down specific competences empowering the EU to harmonise private laws.35 However, several possibilities have been ventilated by academics over the years – most notably Articles 114 and 352 of the Treaty on the Functioning of the European Union (TFEU). These articles have previously formed the legal basis for the adoption of consumer protection Directives and legislative acts in the area of contract law.36 Article 114 TFEU allows the European Parliament and the Council to “...adopt measures for the approximation of the provisions laid down by law, regulation or administrative action in a Member States which have as their object the establishment and functioning of the internal market”. It is Article 114 which has been used as the basis for the proposed Regulation on a Common European Sales Law.

In Germany v Parliament and Council37 (a case concerning the validity of a directive on Tobacco Advertisement and Sponsorship), the ECJ held that the threshold for article 114 would be satisfied if the non-approximated status quo impedes cross-border transaction, and that the legislative act being pursued will contribute to the elimination of such impediment. Analysis presented in foregoing sections clearly illustrates that divergence in contract law does indeed obstruct cross-border transaction. On the other hand, the ECJ has emphasised that article 114 does not vest in the EU a general power to regulate the internal market and that a “mere finding of disparities between national rules and of the abstract risk of obstacles to the exercise of fundamental freedoms”38

32 Ibid.
35 Hesselink (n 31).
could not justify the use of article 114. It is therefore imperative for the EU to further carry an objective empirical research to substantiate its case if it is to succeed in meeting the internal market threshold set by the ECJ.

Article 352 TFEU provides the EU with a residual power to “attain one of the objectives set out in the Treaties, and [where] the Treaties have not provided the necessary powers...” To that end, the Union has utilised this article to adopt instruments such as the Societas Europea, and the Community Trade Mark, which exist alongside the many “national forms and which provides the parties with a choice between the two”. From this perspective, it is arguable that Article 352 offers legal backing for the optional instrument. Conversely, the constitutional threshold for measures based on Article 352 TFEU requires the consent of the European Parliament and unanimity in the Council. Whilst it is conceivable that the consent of the European Parliament could be achieved, the likelihood of achieving unanimity in the Council is negligible. The UK government, for example, has repeatedly rejected the optional instrument. This may be one reason why Article 114 has been used for the CESL.

Some of the issues discussed in this article may be affected by the application of the rules of private international law, and in the particular the two Rome Regulations – Rome I applying to contractual obligations, and Rome II to pre-contractual negotiations. But these Regulations will not necessarily provide helpful answers. In B2B contracts, if the standard terms of the two parties are in conflict, then generally the law of the seller or supplier will apply, but this may be overridden in some circumstances. In B2C contracts it will generally be the law of the consumer’s jurisdiction which will apply, so that a seller or service supplier dealing with consumers in a range of member states may have to deal with differing laws, depending on the location of the consumer.

The Commission considered the interrelationship between the optional instrument and private international law in its 2004 Communication – in particular, the techniques that may be adopted in order to give effect to the optional instrument. To this end, several options were submitted. The first concerns article 20 of the Rome Convention (the precursor to Rome I and Rome II). This article gave priority to any future European Union rules “relating to contractual obligations” over those stipulated in the Rome Convention. Whilst this seems to provide a mechanism for which the optional instrument could co-exist with private international law, it is clear that article 20 did not explicitly contemplate the creation of an optional instrument. However, Rome I makes implicit reference to the optional instrument in article 22. It provides that:

42 House of Commons, European Committee B, discussion on Green Paper European Contract Law for Consumers and Businesses (24 May 2011).
45 Rome I (n 43) Article 4.
46 Ibid Article 4.3.
This Regulation shall not prejudice the application ... of acts of the institutions of the European Communities which: ... (b) govern contractual obligations and which, by virtue of the will of the parties, applying conflict of law situations: ... 49

The second option involves the adoption of an optional instrument as an instrument of international uniform substantive law. In practice, this will require the contracting parties to first select the optional instrument as the applicable law to their contract. Thus, the rules of Rome I and II would only apply to those cases that do not fall within the remit of the optional instrument. 50 Whether this would work in practice may largely depend on the scope of the applicability of the optional instrument.

COMPARATIVE CONTRACT AND SUBSTANCE OF THE OPTIONAL INSTRUMENT (DRAFT COMMON FRAME OF REFERENCE)

The analysis has so far illustrated the difficulties associated with the European Commission’s “piecemeal” approach to contract law. It has also demonstrated the practical and constitutional issues that the optional instruments could potentially give rise to. However, in order to fully appreciate the degree of legal divergence of contract law in Europe, a comparative analysis of certain aspects of French, German and English contract law will be conducted. This will be done through three case studies concerning pre-contractual good faith and elements of contract formation. In addition to this, and as already alluded to in the introduction, the European Commission foresees the optional instrument being based on the Draft Common Frame of Reference (DCFR). 51 By reference to these case studies, the section will examine the relevant substantive provisions of the DCFR and ask what, if any, would be their impact on the contracting parties.

The Doctrine of Good Faith
Case Study I
Ittech, a computer manufacturer in Lincoln, began negotiations with a German computer component supplier, with the view to purchasing motherboards for its new computer models. In the course of the negotiation, the parties discussed issues regarding specifications, delivery, price etc. The negotiations continued for a prolonged period of time. It was intended that the outcome of every discussion would be written down in a ‘Memorandum of Understanding’ (MoU), and that on completion of the final MoU, the parties would send copies of all the MoU’s to their respective legal advisors to convert into a contract.

Just before the completion of the final MoU with the German supplier, Itech was approached by another component supplier called Smartbits based in Cambridgeshire. Smartbits proposed terms which Itech found more attractive than those which were proposed by the German supplier. Without informing or affecting the negotiation with the German supplier, Itech started parallel negotiations with Smartbits. The negotiation went so well that Itech agreed to purchase all of its motherboards from Smartbits. Consequently, Itech broke off from the negotiation with the German supplier, despite the supplier incurring some expenses during the negotiation period. Aggrieved by Itech’s behaviour, the German supplier now wishes to claim damages.

50 See Staudenmayer (n 48).
51 COM (2003) 68 final (n 28), para 63.
If an English court were called upon to resolve the above dispute, would Itech's action constitute a breach of a pre-contractual duty to negotiate in good faith? The English legal system recognises the importance of freedom of contract. This provides that parties can "freely and voluntarily enter into any contract they like and do so—at least in principle—without regard for its inherent fairness or social desirability.\textsuperscript{54} Including in this is the ability for the contracting parties to withdraw from contractual negotiations before the contract is concluded. The case of \textit{Walford v Miles}\textsuperscript{55} illustrates the courts approach to pre-contract good faith. In this case, the Court of Appeal had to consider whether a 'lock-in' and 'lock out' agreement to negotiate in good faith was binding. It held that such an agreement was merely an agreement to negotiate and thus unenforceable.

The rationale behind the court's decision was that the concept of good faith lacks certainty and is thus unworkable in practice. More importantly, Lord Ackner stated that the concept of good faith "is inherently repugnant to the adversarial position of the parties when involved in negotiations.\textsuperscript{56} This line of reasoning has been given further support in subsequent cases.\textsuperscript{57} In practice, it seems that the obligations prior to contract remain, as far as English contract law is concerned, limited to those of not deliberately misleading the other party – i.e. through dishonest or negligent misrepresentation.\textsuperscript{58} The dealings between Itech and the German supplier do not fall into this category, and despite the fact that Itech has acted so as to disappoint the supplier's legitimate expectations, its actions have no legal consequences in English law.

However, assuming that the above dispute was subjected to German law, would the outcome be any different? It is a well-established principle of German law that in order to ensure that institution of contract is preserved as an instrument of self-determination (\textit{Grundsatz der Vertragsabschlussfähigkeit}), it is pertinent for parties to be allowed to break free from negotiations without fear of liability.\textsuperscript{59} Notwithstanding this, the doctrine of \textit{culpa in contrahendo}, as developed by the German courts, imposes certain duties on parties conducting negotiation. §311(2) (1) of the German Civil Code (BGB) provides that where a party has entered into negotiation, it is under an obligation "to have regard to the other party's rights, legally protected interests and other interests", particularly the duty to negotiate in good faith.

The scope of such duty has been construed by the German Federal Courts in the \textit{Letter Case} to "include an obligation on each party not to break off the negotiation without good reason once that party has...encouraged in the other party a confident expectation that the contract will definitely come into existence".\textsuperscript{61} In effect, the German supplier could argue that the combination of prolonged negotiations and the mutual agreement to document the outcome of every discussion in a "MoU" with the view to convert them into a contract has created an expectation that the contract with...

\textsuperscript{52} Under Rome II (n 44) the applicable law would probably be German Law in the case of the German supplier and English Law in the case of the English Supplier - see Article 12 and Article 4 of Rome I (n 43).

\textsuperscript{53} See, for example, the comments of Chadwick LJ in \textit{Watford Electronics Ltd v Sanderson CFL Ltd} [2001] EWCA Civ 317, [55].


\textsuperscript{55} [1992] 1 All ER 453.

\textsuperscript{56} \textit{Ibid}.

\textsuperscript{57} See e.g. \textit{Ultraframe v. Tailored Roofing} [2004] 2 All. E.R. (Comm) 692.

\textsuperscript{58} Wholly innocent misrepresentation may, of course, also result in rescission of the contract, but not the award of damages.


\textsuperscript{60} §311(2) BGB.

\textsuperscript{61} \textit{The Letter Case}, BGH, 10 July 1970.
Itch would be concluded. Applying the above case law, it seems likely that the German court would hold Itch liable for breach of the duty of good faith.

Again, if the parties to the negotiations in the above case study were between Itch and a French component supplier, would the outcome of the case differ? In principle, French law supports freedom of negotiation but this is subject to the obligation to negotiate in good faith. Whilst there is no specific provision of pre-contractual liability under French statutory law, issues of good faith are decided by broad application of article 1382 of the Civil Code relating to tortious liability. This requires that the claimant proves fault, harm and causation. In the *Hydrotile Machine* case, the Cour de Cassation had to decide whether the action of a distributor of machines, i.e. by breaking off from an advanced negotiation, constituted bad faith. The court held that delictual liability for pre-contractual bad faith will be imposed where “a party intentionally keeps another in a state of protracted uncertainty and then breaks off advanced negotiations without legitimate reason, knowing that the other has incurred considerable expenses”. This does not require the party breaking off the negotiation to have intended to cause harm to the other. From this point of view, it is not entirely clear as to whether Itch would be held liable under French law for breach of pre-contractual bad faith. On the one hand, a French court might well conclude that Itch’s abrupt departure from the negotiations amounted to *abus de droit*. On the other hand, the court may find that the French supplier had not incurred the “considerable expense” necessary to hold Itch liable.

**Critical Evaluations**

It can be seen from the above discussion that there are indeed variations in the application and interpretation of the doctrine of pre-contractual good faith. Arguably, such divergence does present obstacles to cross border trade. Firstly, the outright dismissal of the doctrine of good faith by English courts may well deter firms in countries such as Germany and France from entering into business negotiations with companies based in England, especially knowing that their counterpart’s legal system allows them to break away from negotiations without due regard to their interests.

Secondly, the uncertainty and lack of clarity regarding the scope of good faith in French law, as demonstrated above, may well have dire consequences for English companies ignorant of French law. As Marsh warned, when carrying out negotiation with continental suppliers for contracts subject to French law, “it would be most unwise for the English buyers [to treat pre-contractual agreements] in the same cavalier way as he would do in England”. In practice, such uncertainty may result in a situation where an English company negotiating in France has to tread carefully, particularly as the potential deal gets nearer to an advanced stage. Consequently, the English company may be left in a heightened state of anxiety, hoping that, in case the negotiations collapse, it will not be held liable to pay compensation for its counterpart’s reliance on pre-contractual good faith. This clearly has the potential of impeding cross-border commerce.

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62 In which case, under Rome I (n 43) or Rome II (n 44) it is likely that French law would apply.
64 In the French text - “faute”, “dommage” and “cause”.
66 *Ibid*.
It should be noted at this stage that that English courts have recently appeared to soften their approach to the doctrine of good faith. In *Yam Seng Pte Limited v International Trade Corporation Limited*, Leggatt J suggested that the “traditional English hostility towards a doctrine of good faith in the performance of contracts...is misplaced” and that contractual obligation of honesty could be implied in the performance of some contracts, particularly those which are of a “relational” character. In such contracts it would be easier imply a term of good faith cooperation in that such contracts will require:

- a high degree of communication, cooperation and predictable performance based on mutual trust and confidence and involve expectations of loyalty which are not legislated for in the express terms of the contract but are implicit in the parties’ understanding and necessary to give business efficacy to the arrangements.

On the facts, the deliberate giving of false information by one party to the other was held to be a breach of the implied term.

This approach to “good faith” is therefore dependent on context, and on implying terms that the parties must have been taken to have intended to underpin their agreement. If they do not wish to have such obligations, then they may specifically exclude them. The *Yam Seng* decision has led some law firms to issue advice on the potential implications of good faith’ in commercial dealings. On the other hand, it is contended that Leggatt’s reasoning should be treated with caution and that *Yam Seng* does not represent English law’s general acceptance of the doctrine of good faith. In *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd*, the contract contained a specific obligation to cooperate in good faith, which the trial judge found had been broken. The Court of Appeal disagreed, with Jackson LJ stating that “there is no general doctrine of ‘good faith’ in English contract law”. More specifically, Beaton, LJ in approving Leggatt J’s emphasis on “context” when interpreting any implied good faith obligation, suggested that this approach should also apply to a specific obligation. In the present case he felt that the trial judge had given insufficient weight to specific provisions in other parts of the contract when finding that there had been a breach of the general good faith obligation. He warned against construing:

- a general and potentially open-ended obligation such as an obligation to “co-operate” or “to act in good faith” as covering the same ground as other, more specific, provisions, lest it cut across those more specific provisions and any limitations in them.

The approach adopted by Leggatt J has, however, subsequently been applied by the High Court in *Bristol Groundschool Limited v Intelligent Data Capture Limited*. The judge noted that this approach had not been disapproved by the Court of Appeal in

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70 Ibid.
71 This refers to MacNeil’s argument that contracts which involve ongoing obligations over a period of time are ‘relational’, and should not be dealt with as if they were one-off discrete events, in which all obligations can be finally determined by the original agreement. For discussion of MacNeil’s approach in this contract see David Campbell, ‘Good Faith and the Ubiquity of the Relational Contract’ (2014) 77 MLR 475.
72 Ibid.
73 e.g. Hannah Brown, ‘The duty of good faith and fair dealing: when it can arise and how to draft for it’ (Olswang Corporate Quarterly, Spring 2013) <http://www.olswang.com/articles/2013/05/ocq-spring-2013-good-faith/> accessed 25 April 2015.
74 [2013] EWCA Civ 200.
75 Ibid [105].
76 Ibid [154].
77 [2014] EWHC 2145 (Ch).
the Mid Essex case, and found that there was on the facts an obligation to act in good faith, at least in terms of acting “honestly”, defined as not engaging in “conduct that would be regarded as ‘commercially unacceptable’ by reasonable and honest people in the particular context involved.” In this case, the unacceptable behaviour involved engaging in “self-help” which included interference with the other party’s computer systems in a manner which may well have constituted a criminal offence.

These cases seem, in effect, simply to be applying to dealings within a contract a standard similar to the prohibition on misrepresentation in relation to pre-contractual negotiations. If that is the limit of their scope, they would not have any effect on the situation between Itech and the German supplier.

Would the position be clarified by the adoption of the provisions of the DCFR? The principle of good faith undoubtedly forms an important part of the concept of contract law in the DCFR. As the drafters explain:

> [T]he value that underlines the notion of [good faith] – for example, the promotion of honest market, practice so that one party should not depart from good commercial practice to take advantage of the other – may be called fundamental.

To this end, Article II.–3:301 DCFR contains provisions addressing issues relating to contract, especially in situation where a party to a negotiation acts contrary to “good faith and fair dealing”. Paragraph 1 of the article provides that a “person is free to negotiate and is not liable for failure to reach an agreement”. Not only does this article recognise the importance of freedom of contract, the explanatory notes also accept the parties’ right to break-off from negotiation. This is crucial, since it is during this period that the negotiating parties express their initial interest to contract, usually in non-binding documents, before completion of the contract at a later date. On this basis, it can be argued that Itech’s action did not breach any duty owed to the German supplier. Nevertheless, it must be emphasised that the freedom of contract envisaged by the DCFR is not absolute, and that it is restricted by the duty of “good faith and fair dealing”.

Accordingly, para 4 stipulates that, “it is contrary to good faith and fair dealing, in particular, for a person to enter into or continue negotiations with no real intention of reaching an agreement with the other party”. Of course, a straightforward application of this provision to the situation between Itech and the German supplier would suggest that Itech had breached the duty of good faith (i.e. by failing to inform the German supplier about the parallel negotiation with Smartbits but still continuing to negotiate with no real intention of completing the agreement). Therefore, in pursuant to para 3 Article II.–3:301 DCFR, Itech will be liable to compensate the German supplier for the costs and expenses arising out of the breach.

In practice, however, determining what constitutes “good faith and fair dealing” is likely to prove difficult. A closer examination of these doctrines reveals some challenges. For example, DCFR defines good faith and fair dealing as a “standard of conduct characterised by honesty, openness and consideration for the interests of the other party to the transaction.” This raises several unanswered questions: how do

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78 Ibid.
79 The CESL (n 12) contains a general ‘good faith’ obligation (Article 2) but no specific provisions relating to pre-contractual negotiations. For this reason the focus here is solely on the DCFR provisions, which are more specific.
you define honesty and openness? Are they to be determined by their ordinary meaning or by a particular legal definition or behaviour? Equally, how far should the parties go in order to take into consideration the other party’s interest? Whilst it is true that the duty to act in good faith and fair dealing is to be judged objectively, others have questioned the extent to which “the identity of the negotiating parties would be relevant”.82

For instance, would the outcome of the case study above be any different if Itech was a small business and the German supplier was a multi-national corporation? Admittedly, the incorporation of vague terms in the DCFR may prove useful in providing judges with some flexibility in resolving disputes on a case by case basis. Nonetheless, the quest for a flexible contract regime should not be pursued at the risk of commercial certainty. If the objective of the DCFR is to ensure legal harmonisation, then, it is imperative for the drafters to do more to ascertain the ambit and meaning of “good faith and fair dealing”. Of course, defining good faith and fair dealing will be difficult. However, failure to do so may result in national courts construing the DCFR in accordance with their own legal traditions. In effect, far from harmonising contract laws, the inconsistent application of the DCFR risks creating new divergence in contract law across the European Union.

Formation of Contract
Case Study II
Nottingham based construction company, Designbricks, won a bid to build four new schools for Nottinghamshire County Council. A provision in the contract stipulated that Designbricks must fit all the school buildings with solar panels. To complete the build on time, Designbricks decided to sub-contract for the installation of the solar panels. Subsequently, it received two offers: one from an English solar panel manufacturer and the other from a German manufacturer. However, soon after making the offers and for reasons unknown to us, both manufacturers now wish to revoke their offers immediately.

Suppose, alternatively, that soon after receiving the two offers, Designbrick quickly responded to the German manufacturer suggesting a variation in the German company’s terms.83 Despite being aware of this, the German manufacturer remained silent.

Case Study III
The manager of a large cosmetic shop in France received a shopping catalogue from an English company with multiple outlets based in London. Included in the catalogues were lists of cosmetic products. Each product had a price clearly written next to it. Desperate to purchase, the manager informed the company in London that it had accepted its offers. However, the English company refused to sell the products at the stated prices arguing that the manager had simply made an offer to buy, and they were not bound by this. The manager now wants to be compensated.

As regards the Case Study II, it is well established in English law that an offer is not binding at all and can be withdrawn by the offeror at any time before it is accepted.84

83 In English law, a ‘counter-offer’ is where the offeree makes an offer in response to the offeror’s previous offer. This automatically rejects the previous offer, and requires an acceptance under the new terms of the counter offer.
84 Under Rome I (n 43) and II (n 44) the negotiations with the English company would by default be governed by English law, those with the German company under German law – see Rome I Article 4 and Rome II Article 12.
This is supported by the case of *Routledge v Grant*.85 In this case, the defendant intended to purchase the claimant’s house but withdrew the offer before the stated expiry date for the offer had elapsed. The court held that his revocation was effective. The rationale behind this is that “before acceptance, there is no contract and that because there is no contract, the offeror cannot be legally bound by the offer”.86 Hence, the English company can withdraw from its offer prior to Designbricks acceptance. On the other hand, section 145–148 of the German Civil Code stipulates that an offer is binding on the offeror and cannot be revoked until a reasonable time has expired. The effect of this is that the German manufacturer would not be able to revoke its offer with immediate effect as it wishes.

Turning to the alternative situation set out in the second part of case study II, it appears that the manufacturer’s failure to respond to Designbricks varied offer means that the German courts would assume that it has accepted the offer. As the *Reichsgericht*87 stated, an offeror who receives a prompt but qualified response to its offer must equally answer promptly irrespective of whether it agrees to the terms of the response or not. Conversely, if one was to compare this to English law, the purported acceptance will be treated as counter offer and thus not legally binding.88

In relation to case study III,89 the French manager will not be entitled to any compensation under English law. This is because, the courts have firmly held that advertisement offering to sell goods at a particular prices do not constitute an offer but rather “an invitation to treat”. As Lord Parker cogently puts it: “I think when one is dealing with advertisements and circulars (. . .) there is business sense in their being construed as invitations to treat and not offers for sale”.90 In contrast, French law generally considers advertisements as offers and thus capable of being accepted. The case of *Maltzkorn v Braquet*91 illustrates this. Here, the defendant advertised a plot of land in a newspaper. Questions then arose as to whether he was legally bound by the advertisement. The Cour de Cassation expressed the view that an advertisement is binding on the offeror as long as there are enough goods in stock to meet the orders. Indeed, this approach is widely reflected in the way in which goods are marketed in France. For example, goods are often accompanied with the slogan “*un prix affiché est un prix tenu*” (we stick to the price we published).92

**Critical Evaluations**

Leaving aside pre-contractual good faith, divergence in the rules regarding offer, withdrawal and acceptance also affects cross-border commerce. As shown above, in the first part of Case Study II Designbricks received two offers. The English offeror can revoke its offer before acceptance whereas the German offeror cannot until a reasonable time has elapsed. As a result, it is likely that Designbricks will consider the English manufacturer’s offer first, and this may well make it more likely that the English manufacturer will succeed in securing the contract. Ultimately, this will distort competition in the European market. Although the concept of *freibleibend* (*without engagement*) allows the German offeror to qualify its offer with a revocation clause, it

85 (1828) 130 ER 920.
87 Third Civil Senate, 28 January 1921, 50, quoted in Marsh (n 68) 63.
88 *Hyde v Wrench* [1840] 3 Beav 334.
89 Under Rome I (n 43) and II (n 44) this would be likely to be dealt with under English law – see Rome I Article 4 and Rome II Article 12.
90 *Partridge v Crittenden* [1968] 1 WLR 1204.
91 Cour de Cassation, Cass Civ 3e, 28 November 1968.
is submitted that sound commercial consideration might well discourage it from doing so.

Regarding revocation of offer under the DCFR, the relevant article that needs consideration is Article II–4:202. This reads:

An offer may be revoked if the revocation reaches the offeree before the offeree has dispatched an acceptance or, in cases of acceptance by conduct, before the contract has been concluded.93

Interestingly, this provision does not give rise to much debate since it adopts an intermediate position between the German and the English contract law system. In fact, it might be said be that its effect has the potential of levelling the competitive field between Designbricks and the German manufacturer in that both parties could easily revoke their offers prior to acceptance.

More contentious, however, is the French manager’s legal position (Case Study III) under the DCFR. By and large the outcome will most likely mirror the approach taken by the French courts. Article II–4:201(3) DCFR states:

A proposal to supply goods from stock, or a service, at a stated price made by a business in a public advertisement or a catalogue, or by a display of goods, is treated, unless the circumstances indicate otherwise, as an offer to supply at that price until the stock of goods, or the business’s capacity to supply the service, is exhausted.94

Of course what this means is that provided the English company has sufficient goods in stock, it is under an obligation to satisfy the orders. What is far from clear, however, is the extent of the scope and meaning of the word “stock” in this article. Neither the articles of the DCFR nor the explanatory notes provide any comprehensive guidance as to its meaning. Arguably, such omission may give rise to unforeseen consequences. For example, as noted in case study II, the London based company has many branches across the UK. This therefore begs the question: would the company be absolved from liability if the stocks held at the London branch were exhausted and yet there were more stocks in other branches? Equally, this also opens the risk of businesses, particularly those advertising in catalogues, newspapers and trading online, being obliged to supply unlimited number of goods at a significantly low price in circumstances where the stated price was the result of a genuine administrative mistake.

At present, the English legal system is able to deal with this type of situation. A classic illustration of this is provided by the situation involving Argos.95 In 1999, a television was advertised on the firm’s website for the sum of £2.99, when in fact the price should have been £299. Subsequent to this, Argos received several orders for the Television. However, despite huge public outcry, the company refused to sell the television at former price on the ground that the advertisement was an invitation to treat and not an offer. Had the DCFR applied at the time, Argos would have been required to honour the orders – an obligation that would have caused it financial loss. Subsequently there have been several instances of similar blunders by retailers.96 Whilst it is plausible to argue that well-resourced businesses may be able to absorb such losses, this cannot be said of small businesses. Such businesses could find themselves financially crippled by this. This, of course, does not mean that there are no merits in the argument advanced by the drafters of the DCFR that article II–4:201(3) will guard

93 A virtually identical provision appears in the CESL (n 12) – Article 32.
94 There is no equivalent provision in the CESL (n 12).
96 For example, in 2012, Tesco mistakenly advertised the iPad 3 on its website for £50.
against the risks of rogue businesses deliberately misleading their customers “into thinking that goods or services are available at prices at which the business has no intention to supply them”.97 What is therefore needed is a coherent clause that strikes the right balance between the interests of both contractual parties.

REACTIONS FROM THE BUSINESS COMMUNITY

Before drawing final conclusions, due regard must be given to the views of the business community. After all, they are the potential end users of the optional instrument. In 2005 a survey conducted by Clifford Chance LLP shows that 82% of the respondents businesses indicated that they would “likely” or “very likely” use an optional instrument if this were created. Remarkably, in countries such as Poland, the figure was 100%. More recently, some UK business organisations have expressed their support for the optional instrument. As the National Chairman of the Federation of Small Businesses puts it, “an optional EU-wide system of contracts is clearly the only way to solve the legal barriers small businesses face when selling within the EU”.98

Nevertheless, the above results should not be taken as conclusive evidence of the wishes of European businesses. One reason is that the samples of business participants were small (175). Indeed, the authors themselves have openly acknowledged these limitations. For example, they have warned that caution must be exercised when interpreting the results from Spain since they were based on 12 respondents. Equally, they also admitted that their sample was not in accordance with the distribution of enterprise by size in Europe. This greatly weakens the significance of the results since “the majority of the respondents were large businesses, whereas within the EU 85% are small, 12% are medium, and only 3% are large businesses”.99

Even if the above survey is reliable, this does not mean that businesses are likely to accept an optional instrument based on the DCFR. Further research is therefore necessary if the views of businesses are to be ascertained on this.

CONCLUSION

Divergence in contract law does hamper cross-border grade. The continued use of minimum and maximum harmonisation has failed to achieve greater convergence. In consequence, proposal for better regulation has been advanced by the European Commission. This was in the form of an optional contract instrument. This would provide businesses with an alternative contract framework to national laws. Owing to its optional nature, businesses may well feel confident when contracting cross-border, particularly knowing that choosing the optional instrument would enable them to circumvent the cost of legal advice.

Notwithstanding the above anticipated advantages, the conclusion of this article is that the optional instrument is unfeasible and unlikely to attain its objectives. The bases of this view are twofold: firstly, the lack of clear guidance as to the scope of the instrument would be inimical to the harmonisation process. Defining the scope will

97 Christian von Bar, Eric Clive, and Hans Schulte-Nölke (n 81) 317.
take considerable time and financial resources. Questions such as whether the instrument would cover both B2B and B2C contracts must be answered. Even if it was to be done satisfactorily, uncertainty would continue to exist, particularly as regards the legal basis for the optional instrument. The arguments advanced in favour of articles 114 and 352 remain unconvincing. A treaty change might be necessary if the optional instrument is to be adopted on a credible and legitimate ground.

Secondly, if the optional instrument is to be based on the DCFR, ascertaining the meaning of key concepts will require cases to be tested in court, due to lack of existing jurisprudence. It will be recalled that the principle of “good faith and fair dealing” has not been adequately defined. Similarly, the wider obligations attaching to an “invitation to treat” in the DCFR may cause considerable difficulties in practice, especially to common law lawyer. Meanwhile, businesses operating under the optional instrument may find themselves entangled in costly litigation: precisely the kind of legal wrangling that the optional instrument seeks to avert.

As to the way forward, the difficulties discussed in the previous section support the view expressed at the start of this article that recourse to radical reforms such as the optional instrument should be avoided. More energy should put into reviewing and improving particular European laws. Finally, the role of the DCFR should be narrowed if it is to serve any meaningful function. Rather than providing the basis for an optional instrument, it should be regarded as a “toolbox” to assist judges and the Member States in making and interpreting the law. An example of this approach is to be found in the judgment of Lord Malcolm in the recent case Scottish case of Phil Wills v Strategic Procurement (UK) Ltd, which raised a question about the law of error.100 Here, “having formulated a view based on the Scottish authorities, his Lordship looked at . . .the relevant provisions of the DCFR to evaluate the decision he had reached”.101 This approach may well indicate the best way of providing a role for the DCFR in the process of achieving greater harmonisation of contract law across Europe.

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THE CENTRE FOR LEGAL EDUCATION AT NOTTINGHAM LAW SCHOOL: A CONFERENCE REPORT

JANE CHING*

This copy of the Nottingham Law Journal marks a watershed in the development of the Centre for Legal Education, from a humble discussion group, first meeting in June 2008 with ambitious aims in terms of publications, income generation and collaborations but initially wishing to do no more than “raise the profile” of legal education both internally and externally. Through the vigorous endeavours of a committed group of colleagues, not least my co-director, Rebecca Huxley-Binns, the group blossomed until it became, in 2012, a fully-fledged research centre, launched on its way by Dame Ruth Deech of the Bar Standards Board. Its members are, simply to take a snapshot, currently working on ethics and values, sustainability, technology, numeracy, advocacy, SCALE-up, student wellness and motivation, mooting, CPD, learning in the workplace and professional regulation.

We were proud to be able to organise our first home-grown conference, with the full scale support of the then dean, Professor Andrea Nollent, and the school, in February 2014. This was a friendly, idiosyncratic, creative event, with participation from academic, vocational and practice education sectors as well as legal services regulation, and with representatives from Vietnam, China, Singapore, and the United States.

This special edition of the Nottingham Law Journal, then, hosts some of the more developed thoughts of participants in that event. My own contribution seeks to engage interest in what happens beyond the legal classroom. Professor Nigel Duncan sets out a challenge for academics, in design, and as responsible teachers, to equip our students with an ethical compass, as a necessary component of a robust legal education for the future. Professor John Flood, noted for his thoughts on global legal education in particular, takes on the baton and issues challenges of his own, and for us all in dealing with competition in legal education, and between educational models, on a global scale. Professor Paul Maharg goes some way into addressing the lack of reliable topic specific bibliography in our field by providing a systematic literature review of PBL in legal education.

Finally, we were delighted, and honoured, to be able to play host to Professor Judith Wegner, a key co-author of the seminal Carnegie Report on legal education in the USA, who here supplements her fascinating discussion of values in legal education with an evaluation of the Legal Education and Training Review for England and Wales. We could not have hoped for a better, more interesting, or more wide-ranging group of contributors, both to our conference and to this special edition.

In 2014/2015, we have said goodbye to both Andrea Nollent and Rebecca Huxley-Binns, en route for new roles at the University of Law. As well as fond thoughts and good memories, the sound basis of the Centre for Legal Education at Nottingham Law School is a testament to their contributions and support, as well as to that of the network of friends and colleagues who now forge on at the Centre in Nottingham, with new ideas, new projects, new members, but the same commitment to creativity and to the breadth of legal education in all its forms and contexts. Our next conference is scheduled for June 2015 and we are excited to see what new challenges and ideas we will discover then, and what new friends we will make.

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1 http://www.ntu.ac.uk/apps/research/groups/3/home.aspx/centre/143243/overview/centre_for_legal_education.
2 The full report and papers can be found at http://www.ntu.ac.uk/apps/research/groups/3/home.aspx/centre/143243/overview /centre_for_legal_education#reports.
MAKING A VIRTUE OF NECESSITY? AN OPPORTUNITY TO HARNES SOLICITORS’ ATTACHMENT TO THE WORKPLACE AS A PLACE FOR LEARNING

JANE CHING*

The intended shift towards outcomes-focussed learning, education and training will require a considerable change of approach among some entities, as systems for determining the impact of learning, education and training or prompting individuals to reflect on its outcomes are relatively uncommon.¹

INTRODUCTION

This article focuses on the learning of members, and aspirant members, of the solicitors' profession (the largest of the many regulated legal professions in England and Wales) as it occurs in the workplace.² It is argued that the profession has a deep-seated cultural attachment to the workplace as a site for learning, and that that attachment can be usefully harnessed to the service of a more distinct collective identity for the solicitors’ profession in comparison with the other regulated legal professions; enshrining a commitment to such learning in pursuit of creativity and responsiveness to change – as a defining attribute of the profession. This also involves acknowledging existing intuitive practice that is not necessarily rewarded by organisations or in the existing regulatory framework. The unique breadth of the regulatory licensure of the solicitors’ profession, when contrasted with that of the other regulated legal professions, when coupled with the changes in that regulatory structure highlighted in the quotation above and described in more detail below, provide not only a clear impetus, but also an opportunity to make this conceptual shift. There are, of course, risks and challenges in learning sited in the workplace, and I discuss in particular the argument that it leads to conservatism and convergence, further below.

The nature of the solicitor’s workplace is increasingly varied, and includes not only the traditional “High Street” firm; but the City or global firm; the “virtual firm”;³ local and national government; as well as non law firm “alternative business structures” (“ABSs”) and multidisciplinary professional services organisations.⁴ Some individuals, probably most, will see themselves as specialists in particular fields of law, others may still conduct a general practice.⁵ They will have followed, or be following, a variety of


³ Francis comments that “Arguably, claims to traditional generalist professional knowledge which would support a range of legal work now appear to reinforce the internal stratification of the profession, with actors claiming generalist expertise located in marginal positions at the edge”: Francis A, At the Edge of Law (Ashgate 2011), p 171.
routes to qualification as solicitors. Only approximately half of them, based on the most recent statistics, will be known to have qualified by virtue of the “traditional” undergraduate law degree.

Nevertheless, all of these individuals, and some of these entities, are regulated by the same Solicitors Regulation Authority (“SRA”) for England and Wales, although, for some of them, other regulators (such as the Financial Conduct Authority) or professional codes (such as the Civil Service Code) may have more day to day impact. In order to explore the relationship between the heterogeneity of the profession and its workplaces, and the homogeneity of its regulation and, arguably, collective identity, it is first necessary not only to examine the regulatory landscape as a whole, but also to consider the impact of the other regulated legal professions.

THE REGULATORY LANDSCAPE

In England and Wales, the Legal Services Act 2007 provides the basis for the regulation of the provision of most legal services within England and Wales. The Act provides for the regulation through professional bodies of some legal professionals, entities and activities. The professional bodies are, in their turn, regulated by the statutory Legal Services Board. The Act also allows overlaps and differentials between providers which are almost certainly invisible to clients, in the name of “promoting competition in the provision of services”. It is not comprehensive: claims management companies and immigration advisors are regulated separately through the Ministry of Justice, some activities are regulated by other legislation and many legal or quasi-legal professions remain self-regulating. The extent to which this complex regulatory matrix will persist for very much longer is, at best, uncertain, but its effect, particularly in terms of permitting substantial new entrants to the market as regulated entities (at present under the aegis of the existing regulators) is unlikely to be easily reversed.

6 In 2012–2013, for example, 48.9% of newly qualified solicitors had an undergraduate law degree; 16.7% had completed the Graduate Diploma in Law conversion course, 9% were overseas transferees, 4.8% had transferred from the barristers’ profession, and 1.8% from the legal executives profession and the route of entry was unknown for the remaining 18.6%. Law Society of England and Wales, ‘Trends in the Solicitors’ Profession Annual Statistics Report 2013’ (Law Society of England and Wales 2014), p 45. Although, of course, the former barristers and legal executives, as well as the overseas lawyers, might hold law or other degrees, the authors note also that “the proportion of [direct entry?] graduates in all those admitted has been falling over the past decade”, Ibid.

7 In the context of the learning of the profession, it is interesting to note that there appear to be no publicly available data about the number of solicitors who have higher degrees (eg LLM, MBA, JD, doctorate), obtained either before or after admission.

8 It is not part of the scope of this article to discuss the potential for conflict between the different statutory regulatory objectives (which include “protecting and promoting the interests of consumers”). For a proposal which seeks to resolve such conflicts, see Mayson S, ‘Review of Legal Services Regulatory Framework Response to Call for Evidence’ (<http://stephenmayson.files.wordpress.com/2013/09/mayson-2013-review-of-legal-services-regulatory-framework.pdf>) accessed 22 August 2014.


11 For example, trading standards officers and local government officers have rights of audience under legislation other than the Legal Services Act.


13 The largest provider of legal services in personal injury cases is now thought to be an SRA-regulated alternative business structure: Rose N, ‘Huge Growth for Quindell’s Legal Services Division’ (<http://www.legalfutures.co.uk/latest-news/huge-growth-quindells-legal-services-division>) accessed 22 August 2014.
A very limited range of “reserved legal activity”\textsuperscript{14} is, however, subject to regulation by section 13 of the Act, whoever performs it. This has the effect that, for example, advocacy in court can be undertaken by barristers, solicitors, legal executives, and, in their specialist fields, costs lawyers, patent and trade mark attorneys.\textsuperscript{15} Conveyancing (transfer of real property) may be carried out by solicitors, legal executives, licensed conveyancers and notaries. Unreserved activity, which includes contract drafting and negotiating and, essentially, advice on the law in any context, is regulated under the Act only if provided by a regulated person,\textsuperscript{16} or through a regulated entity such as a solicitors’ firm or SRA-regulated ABS.\textsuperscript{17} Finally in this context, it should be noted that the role of the legal executive is decreasingly confined to that of an auxiliary to a solicitor. In education, qualification through the Chartered Institute of Legal Executives (“CILEx”) offers an opportunity to achieve the status of a regulated lawyer considerably more cheaply than through a university education\textsuperscript{18} and then, if it is perceived to be desirable, to transfer into the solicitors’ profession.\textsuperscript{19} In the marketplace, the forthcoming right to practise independently in legal executive firms which may be virtually indistinguishable from solicitors’ firms creates very clear additional direct competition.\textsuperscript{20}

All of this places particular pressure on the solicitors’ profession. To the extent that it remains a homogeneous profession, or at least a group of associated professionals with a single regulator, there is a growing challenge in trying to isolate and articulate a distinct solicitor identity. The work and working practices of, say, a solicitor


\textsuperscript{15} Some rights of audience are limited to the specialist field, as for the IP attorneys and the costs lawyers, or may be contingent on obtaining a separate qualification and enhanced licensure.

\textsuperscript{16} A barrister, CILEx member, costs lawyer, licensed conveyancer, notary, patent attorney, registered trade mark attorney or solicitor.

\textsuperscript{17} Indeed, the terms “lawyer” and “law firm” are not restricted titles and, provided this does not involve misrepresentation or fraud, may be used by anyone providing unreserved legal services, including the “paralegal law firm” or “legal consultant”, to the extent that there seems to be some question about the point at which an offence is committed. See, for example, Hyde J, ‘Wonga Threatened Customers with Fake Law Firms’ \textsuperscript{[2014]} \textit{Law Society Gazette} \texttt{<http://www.lawgazette.co.uk/practice/wonga-threatened-customers-with-fake-law-firms/5041843.fullarticle>}, accessed 17 October 2014.

\textsuperscript{18} Such organisations may be in a position to provide legal services more cheaply than solicitors’ firms, as they are spared the professional overheads of regulation, or the – invisible to many clients - protections of legal professional privilege (see \textit{R (on the application of Prudential plc and another) (Appellants) v Special Commissioner of Income Tax and another (Respondents) [2013] UKSC 1 (UK Supreme Court)}. There is also evidence of confusion about the extent to which recourse to the legal ombudsman is available (see Centre for Consumers and Essential Services and University of Leicester, ‘Mapping Potential Consumer Confusion in a Changing Legal Market - Report for the Legal Ombudsman’ \textit{(University of Leicester 2011)} \texttt{<http://www.legalombudsman.org.uk/downloads/documents/publications/Consumer-Confusion-Report.pdf>}, accessed 21 August 2014; Northumbria University School of Law, ‘Redress for ‘Legal Services’ - A Report for the Legal Ombudsman’ \texttt{(Northumbria University 2013)} \texttt{<http://www.legalombudsman.org.uk/downloads/documents/publications/Redress-for-Legal-Services-FINAL-11072013.pdf>}, accessed 21 August 2014. Other organisations, such as some paralegal firms and members of self-regulated professions (such as members of the Society of Trusts and Estate Practitioners (“STEP”) and will writers may on the other hand be providing an equivalent or better service to that offered by solicitors: Legal Services Consumer Panel, ‘Regulating Will-Writing’ \textit{(Legal Services Consumer Panel 2011)} \texttt{<http://www.legalservicesconsumerpanel.org.uk/publications/research_and_reports/documents/ConsumerPanel_WillWritingReport_Final.pdf>}, accessed 5 June 2014.


\textsuperscript{20} See for example Hall K, ‘Number of Legal Executives to Grow 17% in next Decade’ \textit{Law Society Gazette} \texttt{(6 June 2014)} \texttt{<http://www.lawgazette.co.uk/practice/number-of-legal-executives-to-grow-17-in-next-decade/5041562.article>}, accessed 10 June 2014.
specialising in property work, may be more closely aligned to those of a legal executive, licensed conveyancer or notary working in the same field, than they are to those of the immigration specialist solicitor in the next office. The working practices of a solicitor specialising in tax may be more closely aligned to those of the accountant working in the next building. Nevertheless, in what Moorhead has called the “professional paradox”, all of them are “solicitors” and not only entitled to carry out all of those different specialisms, but at least in principle, to move between them. 21 Any cohesive collective identity for solicitors must, therefore, stand up to comparison with those of all the other providers of the same legal services. Until or unless regulation shifts sufficiently to permit a single profession and a single regulator, and as long as the governing legislation endorses “competition in the provision of services”, it will be necessary to consider means of differentiation between providers of legal services. This article imagines this challenge of differentiation as initially one of collective identity, and focuses on one thing that solicitors do seem to share: an attachment, whether sentimental or otherwise, and whether they know it or not, to experiential learning in the workplace. This is not to suggest that the other regulated legal professions ignore it: all of them currently prescribe some form of supervised practice prior to qualification or independent practice, and they recognise forms of workplace-based learning to various extents in their CPD systems. What is different for solicitors is that it may be one of the few things that the profession does genuinely share.

Recently published research with employers in SRA-regulated entities quoted at the head of this article, 22 (“the IFF/Sherr report”) indicates that, whether instinctively or by design, SRA regulated employers are committed to learning in the workplace, even if, at present despite its limited explicit acknowledgement, particularly post-qualification, in the regulatory framework. Not a small part of an exercise in consciously harnessing that commitment could refresh what I suggest may be the somewhat fractured collective identity of solicitors as a group.

THE QUESTION OF IDENTITY

... learning as social participation ...[involves] being active participants in the practices of social communities and constructing identities in relation to these communities. Participating in a ... work team, for instance, is both a kind of action and a form of belonging. Such participation shapes not only what we do, but also who we are and how we interpret what we do. [Italics in original] 23

Wenger’s concept of social learning outlined above, involves four components: i) learning as doing, as establishing a practice; ii) as belonging, becoming a member of a community; iii) of learning as experience leading to the making of meaning and iv) of learning as becoming, as part of the creation of an identity. Clearly, the workplace is a significant site of social learning, including acquisition by individuals of the professional habitus, and of socialisation into the culture and mores of the “community” represented by the law firm or other legal services organisation and, if they exist, those of the profession as a whole:


The third apprenticeship, which we call the apprenticeship of identity and purpose, introduces students to the purposes and attitudes that are guided by the values for which the professional community is responsible. Its lessons are also ideally taught through dramatic pedagogies of simulation and participation. But because it opens the student to the critical public dimension of the professional life, it also shares aspects of liberal education in attempting to provide a wide, ethically sensitive perspective on the technical knowledge and skill that the practice of law requires. The essential goal, however, is to teach the skills and inclinations, along with the ethical standards, social roles, and responsibilities that mark the professional.24

Here, however, I focus on the collective identity of the community, rather than the individual professional identities of individual solicitors. Others have commented on the fact that the solicitor identity has excluding class and gender implications which are not shared by all aspirants;25 that it may be challenged by close identification with clients or their causes26 and create conflicts with personal morality and values.27 In the context of increased opportunities to site the learning of entrants to the profession in and near the workplace through the apprenticeships and bespoke vocational courses discussed below, it is worthy of note that there is some suggestion that the relationship between the “workplace identity” (“I’m a lawyer with Sue Grabbit and Runne LLP”) and the “vocational identity” 28 (“I’m a solicitor”) may be causal. For those who begin their process of professional formation in the workplace, the workplace identity can be stronger at the outset, preceding development of the vocational identity29 which is, I suggest, a correlate of the collective identity. I discuss the problems of convergence and conservativism in the workplace identity, and the significance, and potential role, of at least a sub-category of solicitors who have undertaken at least parts of their education in a different environment – the university – below.

The idea, however, that there is a clear homogenous collective solicitor identity, to be easily contrasted with the collective identities of members of other regulated legal professions, and drawn from a collegial, professional culture is more challenging.30 A collective identity of this kind is not innate and must be acquired (in effect, learned) and is defined in part by “the presence of other in-group members . . . [as] a potent


28 Defined as “how people negotiate their personality with an occupation’s norms and practices or, more precisely, as the fit between an individual’s perception of the occupational world and his or her self-perception”, Klotz VK, Billett S and Winther E, ‘Promoting Workforce Excellence: Formation and Relevance of Vocational Identity for Vocational Educational Training’ (2014) 6 Empirical Research in Vocational Education and Training.


30 See, for example, the discussion of high status firm identity and areas of low status practice in Phillips DJ, Turco Catherine J. and Zuckerman EW, ‘Betrayal as Market Barrier: Identity-Based Limits to Diversification among High-Status Corporate Law Firms’ (2013) 118 American Journal of Sociology 1023 <http://www.jstor.org/stable/10.1086/668412> accessed 9 October 2014.
reminder of someone’s social identity; the more so if the members are aiming at a common goal''.31 The fracturing of the solicitors’ profession into a wide variety of types of organisations and fields of legal activity makes it, I suggest, difficult to see such commonality.

A graduate of the postgraduate Legal Practice Course ("LPC") who has been unable to secure the training contract necessary to complete the qualification process, may desperately want to become a solicitor, rather than work as a paralegal or make a sideways transfer into the legal executive profession, even though both may involve doing exactly the same kind of day to day work. In other respects, however, being a solicitor may at least for some, now resemble a default position akin to being English in the United Kingdom:32 defined rather more clearly by reference to what it is not (one of the specialist legal professions), rather than what it is. A solicitor can still be highly irritated by well-meant enquiries along the lines of "So, you’ve qualified as a solicitor. Congratulations! Are you going to go on and become a barrister?" or "Oh, you’re a solicitor. I thought you were a lawyer". In some areas of practice, for example for some in-house lawyers, a solicitor identity may be largely irrelevant most of the time – no more than a question of which set of CPD regulations to comply with – or closely tied to another organisation such as the Society of Trust and Estate Practitioners or Association of Personal Injury Lawyers.33

What, then, are solicitors, collectively? A loose grouping operating in a variety of contexts, across a wide range of fields, in specialist and non-specialist practice, in private practice and outside it. In fact the solicitors’ profession might already be described as a microcosm of what might be expected should a single regulator be imposed on the sector as a whole. Much practice is indistinguishable from the practice of other regulated legal professionals (solicitor/legal executive, solicitor/barrister, solicitor/trade mark attorney) or of differently regulated (the immigration advisor, the accountant) or unregulated practitioners (the paralegal firm or legal consultant).

The smallest regulated legal professions are, by contrast, regulated by activity; both educated in specialist fields and licensed only to practise within them. A licensed conveyancer is licensed only to provide conveyancing services, and that is what the licensed conveyancer qualification system teaches him or her to do. A licensed conveyancer who wishes to, say, conduct property litigation must either transfer into a different profession, or lobby his or her professional regulator to seek additional rights for the entire profession. From this perspective it is no doubt iniquitous to, for example, a patent attorney, that a solicitor is restrained from dabbling in intellectual property law, in which he or she has not specifically been trained, only, as I describe below, by the regulatory framework.

It is the existence of these other professions in England and Wales which, I suggest, causes the problem: the challenge of saying that there is X which a solicitor does, and which only a solicitor does is insuperable. What therefore remains is what a solicitor is.

33. Francis A, At the Edge of Law (Ashgate 2011), p 151. Francis also identifies, however, individuals with multiple identities, who aligned themselves with STEP but did so “alongside a continuing, almost emotional, connection to the parent discipline. Lawyer is their instinctive and primary professional identity”, Ibid, p 168.
The current remit of the SRA, as regulator, enables it to remain wedded to the idea of the solicitors’ profession as, at least in principle, a generalist profession in which individuals may practise in a wide range of areas of law and move between them.\textsuperscript{34} This provides a notable point of distinction from the approach of the other legal services regulators which broadly either self-define by specialism (costs lawyers, IP attorneys, licensed conveyancers, notaries), or are engaged in incremental extension of their regulatory reach from a position of specialism (barristers, legal executives). The breadth of the solicitors’ licensure is, for the public, the profession, employers and individuals, both a challenge and a strength.

It is a challenge because it is disingenuous.\textsuperscript{35} It is not possible to train an individual to have current and expert knowledge of every conceivable area of law. The practice of a small firm servicing the local Muslim community in Bradford would be unrecognisable by an international arbitration specialist in the City. Even if the licensure permits it, it is unlikely that a criminal legal aid practitioner could easily obtain a new job in property law. For the LPC-graduate unable to obtain the training contract required to qualify, and working as a paralegal in a debt collection call centre, the advantage of a broad licensure is, no doubt, all but invisible.\textsuperscript{36} Proponents of activity based regulation, and members of specialist professions, argue that the public is best served by specialist training\textsuperscript{37} and specialist (activity-based) licensure for all lawyers. This might, therefore, include those working in the defined specialist technician roles currently occupied at least in part by those frustrated in their attempts to qualify into the (currently higher status) broad-based profession. The risk of specialism for the individual, it need hardly be said, is in the possibility that the specialism disappears.\textsuperscript{38} The question for the employer is, then, whether to retrain or to rehire.

It is possible to argue, however, that there is a strength in and a need for a category of lawyers who have at least a grounding in a wider range of topics, as troubleshooters, able to recognise problems outside their main specialism but which touch on the client’s main problem, and to refer accordingly. This might be envisaged as more closely tied to skills developed in the workplace through Wenger’s learning by doing, than to knowledge, significant as the knowledge base is to the work of solicitors. The knowledge base is, however, constantly changing, rendering the ability to research; to recognise one’s own limitations and to ask the right questions critical skills which transcend distinct fields of practice. Perceived as more than merely nostalgic, a

\begin{itemize}
\item There are limited exceptions, for example, rights of audience in the higher courts can only be obtained by solicitors following additional study and an assessment of their advocacy performance: Solicitors Regulation Authority, ‘Higher Rights of Audience Regulations 2011’ <http://www.sra.org.uk/solicitors/handbook/higherrights/content.page> accessed 5 June 2014. Specialist accreditations are available, but these are intended to recognise and promote specialist practice; they are not licences to practise in that field.
\item There is, however, variation on the point at which it is thought that specialist training should branch off from a more generalist background education.
\item It is difficult to find an example of the complete \textit{disappearance} of a specialism, even in the face of radical legislative shift (eg the removal of the solicitors’ conveyancing monopoly); regulatory change (eg the extension of direct access by clients to the Bar); or funding revolution (eg changes to the availability of criminal legal aid). This is, however, of little comfort to an individual adversely affected by the change and obliged to reinvent themselves.
\end{itemize}
generalist grounding in some form, guaranteeing a range of knowledge areas, even if inchoate, while allowing for the development of more transferable skills might facilitate capability, flexibility and change in the field of practice either in response to changes in the market or, more radically, in order to innovate such change. This could encompass new roles for lawyers, in which, as Susskind speculates, they act as creators and overseers of more routinised or sub-specialist legal services functions outsourced or offered electronically.  

This approach is restated in the July 2014 iteration of the SRA training regulations which continues to demand that a trainee solicitor experience at least three different areas of legal practice, and there is no suggestion of any requirements for formal specialist licensure except in, arguably, sole practice, in rights of audience and outside the technical legal fields (eg financial advice, insolvency practice).  

The consultation paper on a proposed competence framework for solicitors issued in October 2014 is even more explicit about the link between breadth and collective professional identity, highlighting in particular the “troubleshooting” role:

..., a broadly based training and knowledge of the law distinguishes solicitors from other legal professionals who receive training which is more focused on their specific area of practice. ... We have tried to strike a middle ground between the need to spot issues outside a solicitor’s practice area and the recognition that the broad knowledge which solicitors have on qualification will inevitably fade where it is not used. We do not expect practising solicitors to retain active knowledge of all these knowledge areas, or to undertake professional development activities in relation to legal topics which are unlikely ever to have a bearing on their practice area. What we do expect, in line with a broadly based qualification, is that solicitors should be able to recognise possible problems even when these are outside their immediate area of practice.

The capacity for change is not so strongly signalled, but nevertheless appears in the competence statement itself as “adapting practice to address developments in the delivery of legal services”.

It appears, therefore, that the regulatory landscape, of regulation by title and of asserting the rights of solicitors to practise in a broad range of areas, is unlikely to change fundamentally in the near future. Indeed, the SRA’s commitment to enshrining that base by way of competence framework both at qualification and, less clearly, afterwards, reinforces it. I move on, therefore, to a brief description of those parts of the regulatory structure which impact on learning in the workplace.

REGULATORY LANDSCAPE: SOLICITORS’ LEARNING IN THE WORKPLACE

The regulator’s bite on solicitors’ learning in the workplace has, at present, three principal dimensions:

39 See, for example, Susskind R, Tomorrow’s Lawyers: An Introduction to Your Future (OUP Oxford 2013).
1. Regulation of the training contract as a period of pre-qualification supervised practice for the majority of entrants;
2. A mandatory scheme of continuing professional development ("CPD") for all practising solicitors; and
3. Regulation of the competence of the individual solicitor and of the SRA-regulated entity’s workforce as a whole.

Historically at least, the first two have been regulated largely by prescription of inputs: a range of experiences to be undergone during the training contract; a number of hours of activity to be performed for CPD. This was perhaps necessary, but was certainly not sufficient to identify either learning strategies or what had been learned and how that had changed, improved or confirmed the individual’s practice. From 2011, however, the SRA consciously changed its overall regulatory approach to one based on achievement of outcomes. Similarly, in 2013, the overarching research report into the regulation of legal education across the sector in England and Wales ("the LETR research report"), recommended greater flexibility about the processes and structures of legal services education and training, shifting the focus to achievement of agreed competences, which might be agreed or at least harmonised across the sector.

The three dimensions given above, the last of which is more obviously framed as an outcome than the others, are, however, retained in the 2014 iteration of the SRA Handbook and regulations.

Training contract/period of recognised training

Regulation of the training contract has hitherto been governed by rules about the authorisation of a workplace as a training provider, of specifications for training principals and supervisors (which did not then include aptitude in training or supervision) and prescription for the time period and the range of experiences to which a trainee solicitor must be exposed: the processes and structures of education. A set of Practice Skills Standards as at least notional outcomes of the training contract has existed for some years, although comparatively passively stated in some respects, (eg

46 The SRA requires, however, as part of its definition of those “qualified to supervise” “attendance at or participation in any course(s), or programme(s) of learning, on management skills involving attendance or participation for a minimum of 12 hours” “Solicitors Regulation Authority, ‘SRA | SRA Handbook – Practice Framework Rules – SRA Practice Framework Rules 2011 | Solicitors Regulation Authority’ <http://www.sra.org.uk/solicitors/handbook/practising/content.page> accessed 19 October 2014, reg 12.
In addition, the Law Society’s Lexcel practice management standard makes sets benchmarks for the processes involved in supervision:
6.9 Practices will have a procedure to ensure that all personnel, both permanent and temporary, are actively supervised. Such procedures will include:
a: checks on incoming and outgoing correspondence where appropriate
b: departmental, team and office meetings and communication structures
c: reviews of matter details in order to ensure good financial controls and the appropriate allocation of workloads
d: the exercise of devolved powers in publicly funded work
e: the availability of a supervisor
f: allocation of new work and reallocation of existing work, if necessary.
6.10 Practices will have a procedure to ensure that all those doing legal work check their files regularly for inactivity. 6.11 Practices will have a procedure for regular, independent file reviews of either the management of the file or its substantive legal content, or both, . . .
“understand the need to” or “understand the importance of”). Insofar as any there has been any required assessment competence at the point of qualification, this was by sign off from the employer. More recently, following the LETR research report and as part of the SRA’s Training for Tomorrow project, the regulations have been adjusted. The regulations adopted in July 2014, therefore, provide that if you qualify as a solicitor, you:

O(TR1) will have achieved and demonstrated a standard of competence appropriate to the work you are carrying out;
O(TR2) will have had such competence objectively assessed where appropriate;
O(TR3) will have undertaken the appropriate practical training and workplace experience;
O(TR4) are of proper character and suitability;
O(TR5) will have achieved an appropriate standard of written and spoken English; and
O(TR6) act so that clients, and the wider public, have confidence that outcomes TR1-TR5 have been met.

The training contract, as a distinct form of employment arrangement, has been replaced from July 2014 by a “period of recognised training”, albeit still of two years in principle; still tied to achievement of the existing Practice Skills Standards, and prescribing the range of practice areas to which the trainee must be exposed. The period must still be served with an authorised training provider, which is able to offer:

training which:
(a) is supervised by solicitors and other individuals who have the necessary skills and experience to provide effective supervision, to ensure that the trainee has relevant learning and development opportunities and personal support to enable the trainee to meet the Practice Skills Standards;
(b) provides practical experience in at least three distinct areas of English and Welsh law and practice;
(c) provides appropriate training to ensure that the trainee knows the requirements of the Principles and is able to comply with them; and
(d) includes regular review and appraisal of the trainee’s performance and development in respect of the Practice Skills Standards and the Principles, and the trainee’s record of training.

50 Otherwise than by transfer from the Bar or from outside England and Wales. Such entrants are assessed on the basis of parts of a set of “day one outcomes” originally envisaged as a replacement for the Practice Skills Standards but not in fact implemented for domestic entrants.
53 This is a welcome change: previously the qualification to supervise was framed entirely in terms of a prescribed period of post qualification experience, rather than aptitude for the role.
14.1 The trainee must maintain a record of training which:
(a) contains details of the work performed;
(b) records how the trainee has acquired, applied and developed their skills by reference to the Practice Skills Standards and the Principles;
(c) records the trainee’s reflections on his or her performance and development plans; and
(d) is verified by the individual(s) supervising the trainee.
In the light of the SRA’s current consultation on a competence framework, it appears likely that the Practice Skills Standards will be replaced by a competence framework designed to articulate the activities in which a newly qualified solicitor should be competent. This is consistent with approaches adopted in Australia\(^{55}\) and Canada,\(^{56}\) recommended for all European lawyers\(^ {57}\) and, closer to home, for foreign lawyers re-qualifying as solicitors through the Qualified Lawyers’ Transfer Scheme,\(^ {58}\) CILEx members wishing to qualify as Fellows,\(^ {59}\) Queen’s Counsel,\(^ {60}\) legal services apprentices,\(^ {61}\) some paralegals,\(^ {62}\) and in the QASA assessment of criminal advocates.\(^ {63}\) What will be considerably more challenging, and is raised but not resolved in the current consultation, is the method of assessment to be used on qualification, and the extent to which that assessment, or parts of it, might be undertaken centrally under the remit of the SRA (as is the case with the existing QLTS); or by recognition of existing qualifications. The possibility is at least floated, that a training provider, which includes an employer, might be enabled not only to provide the context for pre-qualification learning, but also to participate in its assessment.

**CPD**

The solicitors’ CPD scheme for England and Wales is, historically and for the moment, an inputs based scheme,\(^ {64}\) requiring individuals to record participation in activity, rather than any learning or improvement in practice.\(^ {65}\) Although workplace based activity in, for example, coaching, mentoring and work shadowing is recognised, the effect of the need to record 16 hours of activity in a year, together with the natural tendency of the profession to be acutely conscious of the fluidity of its knowledge base, has tended, I suggest, to elevate the status of classroom or lecture courses, frequently updates on the law and often provided, outside the workplace, by specialist training providers.\(^ {66}\) This is in contrast to the activity within the workplace that individuals may feel more directly linked to improvements in their own practice.


Although consistent in style with the majority of legal CPD/CLE schemes, including those of the other regulated legal professions in England and Wales, the SRA scheme is now out of line with professional CPD schemes as a class, which have tended to move towards either outcome recording, or, as has the CILEx scheme and Law Society of Scotland, cyclical processes involving planning, activity and reflection. An inputs CPD scheme is, necessarily, inconsistent with an approach to regulation that focuses on outcomes in all other respects. In parallel with the LETR investigation, the SRA scheme was separately reviewed in 2012 and, following consultation, will be changed in 2015–2016 to an approach which does not, in principle, prescribe a minimum number of hours but

. . .remove[s] the prescriptive requirement for solicitors to undertake CPD through specific regulations. We would rely instead on existing provisions in the Handbook and Code of Conduct requiring regulated entities and individuals to deliver competent legal services and train and supervise their staff. It would be for regulated entities and individuals to decide how these outcomes are achieved. Implicit in the requirement to deliver competent legal services, is an obligation to reflect on whether the quality of practice is good enough, identify areas for development and ensure appropriate development activity is undertaken.

We would provide non-mandatory guidance for entities and individuals, with suggestions for implementing this reflective cycle. For entities, the guidance could include examples of best practice in training, development and CPD systems.

The SRA’s consultation on the competence framework endorses this approach to CPD as giving “solicitors the freedom and flexibility to decide for themselves what training and development they need to undertake in order to perform their roles effectively”. Nevertheless, and having earlier indicated that the breadth of the proposed competence framework is not intended to constrain the development of post-qualification specialism – no attempt is made to set statements of level of performance for post qualification performance - the competence framework is nevertheless to be available and used in connection with CPD as “a learning tool. Solicitors will be able to use the competence statement to reflect on their competence within the context of their own role and practice”. It is by no means clear how this will work in practice, particularly for extreme specialists, or those who move into

68 Chartered Institute of Legal Executives, ‘Continuing Professional Development (CPD)’ accessed 12 October 2014.
70 Henderson P and others, ‘Solicitors Regulation Authority: CPD Review.’ (Solicitors Regulation Authority 2012) accessed 3 September 2014.
management or other non fee-earning roles, but, as becomes clear in the next section, cannot be ignored.

The competence of the workforce
The training contract and CPD in its historical format are quantitatively small aspects of the learning that goes on in and near the workplace. Both are detached, to some extent from the realities of practice: the training contract as a precursor to it and CPD, at least if envisaged by participants as attendance at courses, alongside fee-earning activity and often away from the office. The third regulatory dimension is the one which is intended to assure overall standards and to prevent the incompetent “dabbling” that puts clients at risk. The following outcomes must be achieved and, if required, demonstrated to the regulator:

O(1.5) the service you provide to clients is competent, delivered in a timely manner and takes account of your clients’ needs and circumstances . . .
O(7.6) you train individuals working in the firm to maintain a level of competence appropriate to their work and level of responsibility; . . .
O(7.8) you have a system for supervising clients’ matters, to include the regular checking of the quality of work by suitably competent and experienced people . . .

This places the regulatory burden clearly on the individual solicitor both for themselves and – because the SRA is one of the legal regulators which regulates entities as well as individuals - for their workforce by prescribing only an outcome. The only current supporting process – itself at odds with the outcomes-led approach - is that those “qualified to supervise” have achieved the “attendance or participation” in 12 hours of training set out in the practice rules. Solicitors with rights of audience in the higher courts, similarly, remain governed by an hours’ based CPD requirement. It is not clear whether this is an oversight or an admission that, in some areas of high status, or high concern, policing by hours is thought to be more practicable than adherence to the principles of outcomes-focussed regulation.

Rather more significantly, in this context, is the indication in the SRA’s competence framework consultation, that “complying with” the competence framework is to be elevated to the status of an ethical requirement, as an aspect of principle 5, which demands that individual solicitors, and SRA-regulated entities “provide a proper

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76 Solicitors Regulation Authority, ‘SRA | SRA Handbook – Code of Conduct – SRA Code of Conduct 2011 | Solicitors Regulation Authority’ <http://www.sra.org.uk/solicitors/handbook/code/content.page> accessed 8 October 2014. Additional requirements are placed on organisations which have the Law Society’s Lexcel Practice Standard, which places operational requirement on accredited organisations, in this context requiring:

5.1 Practices will have a plan for the training and development of personnel, which must include:
   a: the person responsible for the plan
   b: a procedure for an annual review of the plan, to verify it is in effective operation across the practice.
5.2 Practices will list the tasks to be undertaken by all personnel within the practice and document the skills, knowledge and experience required for individuals to fulfil their role satisfactorily, usually in the form of a person specification.
5.6 Practices must have a training and development policy including:
   a: ensuring that appropriate training is provided to personnel within the practice
   b: ensuring that all supervisors and managers receive appropriate training
   c: a procedure to evaluate training
   d: the person responsible for the policy
   e: a procedure for an annual review of the policy, to verify it is in effective operation across the practice.

standard of service to [their] clients”. This demand has two immediate consequences: a need to be able to demonstrate learning within the workforce (including arguably the non-solicitor workforce) by reference to the competences stated in the framework, but also an opportunity to articulate and reinforce commitments and approaches to learning that may already exist, albeit tacitly. Indeed, part of the proposed competence framework adopts such a commitment as a competence in itself.

A2. Maintain the level of competence and legal knowledge needed to practise effectively, taking into account changes in [one’s] role and/or practice context and developments in the law, including:

a) Taking responsibility for personal learning and development
b) Reflecting on and learning from practice and learning form other people
c) Accurately evaluating their strengths and limitations in relation to the demands of their work
d) Maintaining an adequate and up-to-date understanding of relevant law, policy and practice
e) Adapting practice to address developments in the delivery of legal services.78

Together, all three dimensions require attention to the context of what is done in the workplace; the “scope and quality”79 of expected performance and the interactions between the colleagues who are learning, and those who are supporting learning in the workplace. I will return to these three themes shortly. Before doing so, however, it is useful to explore the importance that the profession attaches to the workplace as a place for learning, and has done for a very long time.

THE SOLICITORS’ PROFESSION AND ITS ATTACHMENT TO LEARNING IN THE WORKPLACE

There is a deep attachment in the profession to learning in the workplace as the most legitimate and most grounded means of learning to work as, and to be, a solicitor.80 This is to the extent that the solicitors’ profession always was, and remains, attached to the law degree by absorption, rather than by culture. Flood and others have pointed out that substantial graduatisation of the solicitors and barristers’ professions in this jurisdiction did not occur until the 1970s.81 The phenomenon may, also, be a peculiarly common law feature:

79 Eraut M, Developing Professional Knowledge and Competence (Falmer Press 1994), p 167. It is important to recognise that there are two aspects of measurement: the range of knowledge and skills, and the standard of their understanding or performance.
and the deeply embedded history of the Inns of Court in England, the traditional route into the bar in that country since the Middle Ages, by contrast with continental entry through the university that developed in the same time period. One route lay through practice, the other through theory. Thus, today the common law jurisdictions, which only "recently" (within the last 100 years!) moved into the university, provide a greater array of options for entry, and across widely varying periods of from no formal schooling at all (the reader, or apprentice, in a law firm only -still an option in England,82 and at least in theory, in a few states of the United States); a five year undergraduate career in Australia; the standard Bologna formulation of 3 plus 1-3 in Ireland . . .; and a seven year period of combined undergraduate study (4 years) and graduate study in law (3 years) in the U.S. England too offers law as a form of graduate study, as one of many options.83

There are, even now, non-graduate practising solicitors who qualified by the 5 years’ articles route (finally abolished in this jurisdiction only in the 1980s) or by transfer from the legal executives’ profession, CILEx offering a largely work-based, “earn while you learn” educational structure.84 As a result of more recent development in expanding the government-sponsored apprenticeship scheme into legal services, to the extent that there are proposals for an apprenticeship route extending from the school leaving age to qualification as a solicitor,85 there will soon be solicitors who have qualified largely through study whilst working in a law firm, and without passing through a university, again. The 2014 SRA regulations, in anticipation, explicitly now provide for “equivalent means” of achievement of each of the traditional stages in the route to qualification.86 The competence framework consultation paper canvasses the possibility of “authorising any training pathway . . . which enables a candidate to demonstrate they can perform the activities set out in the competence statement to the standard required. . .”87

The fact that full scale, three year, study of law at a university is not thought to be a necessary preparation for practice as a solicitor is demonstrated, not only by the CILEx route and the developing apprenticeship,88 but also, quite clearly, by the existence of the Graduate Diploma in Law, (“GDL”), the graduate conversion course, as a shortcut for those who have degrees in any other discipline whatsoever.

The idea that the workplace is perceived as the most relevant locus of learning is also demonstrated, perhaps more tangentially, by some attitudes to the mandatory LPC as a necessary (but irrelevant) hurdle; as too broad or too narrow;89 and the extent to

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82 This is probably a reference to the legal executive route, although this does in fact involve “formal schooling” through the qualifications offered by CILEx. None of the legal professions in England and Wales regulated under the Legal Services Act in fact employs a structure that involves no formal study or assessment.
which those larger firms which have the resources are willing to invest in adapting the mandatory course to their own ends, in what has been termed "alliance capitalism". \(^{90}\)

\[\ldots\] The emphasis in these programmes is on the acquisition of firm-specific skills, capabilities and values and on the induction into a specific corporate culture, suggesting that in law, like accountancy, the firm is replacing the professional association as the primary source of socialization and identity formation for many lawyers. \(^{91}\)

Such firms may also invest in developed internal academies and structured scaffolding of workplace learning on a wider, and international scale. \(^{92}\) The traditional model is, however, considerably more humble.

**THE LEGAL SERVICES ORGANISATION AS COMMUNITY OF PRACTICE**

The traditional model, which remains apparent in the training contract, is entirely consistent with the profession’s non graduate, workplace focussed, roots. It is a domestic, craft apprenticeship. Insofar as there is any consensus about what the training contract is for, it appears to lie in a period of working, in a junior and possibly quasi-familial capacity, \(^{93}\) for a master who is assumed to be both an expert and a person of high standing in the craft. Lave and Wenger describe the aspirant as observing the master’s practice and being employed in a series of tasks in practice that are incrementally more complex until he or she achieves an appropriate level of performance for qualification (“legitimate peripheral participation”). \(^{94}\) The environment need not be a dyad, as others, the journeymen approaching expertise, are perceived as contributing to the novice’s learning in a “community of practice”. Fuller et al however, suggest that the concept of legitimate peripheral participation fails to pay sufficient attention to those who have achieved “full membership” but who continue to regard themselves as learners or to learning that takes place across the boundaries of different communities; \(^{95}\) that the concept underplays explicit strategies other than learning by osmosis and that it acknowledges but does not explore the contribution of power to the operation of the community of practice. \(^{96}\) Even the original proponents of the community of practice concept were able to identify examples where the commercial objectives of the employing organisation took priority over what was, ostensibly, a learning environment and where trainees were constantly employed on the same routine tasks, without supervision or support. \(^{97}\)


Within my own working memory, it was possible for a trainee solicitor to progress from observation, note-taking and research, through carefully chosen court appearances to running a small file under close supervision. After qualification, the files would increase in complexity, or in specialisation. The trajectory of legitimate peripheral participation appeared comparatively clean and, for some lawyers, in some organisations, or some departments and practice groups, may continue to do so. When, however, there is pressure on speed and efficiency; where rotations to individual practice groups are short in duration;\(^\text{98}\) where in-house clients refuse to pay for a trainee’s time on a file, and much of the peripheral work is outsourced elsewhere, the spiral of progression may be broken or diverted.\(^\text{99}\) Alternatively, in more commoditised practice, work may be more repetitive, enabling efficiency in performance of routine tasks, but limiting the opportunities to extend the scope and complexity of tasks that are performed, or the ability to respond creatively to problems outside of the norm.

The community of practice concept is charming, and, when it works and is mutually supportive, no doubt highly effective as a form of social learning and cohesive socialisation towards a common identity, for new entrants at least. Wenger, however, suggests that a focus on participation (“learning by doing”) has advantages not only for the individual but also for the surrounding community and organisation:

> For communities, it means that learning is an issue of refining their practice and ensuring new generations of members. For organizations, it means that learning is an issue of sustaining the interconnected communities of practice through which an organization knows what it knows and thus becomes effective and valuable as an organization. [Italics in original]\(^\text{100}\)

It is not, however, particularly when the regulatory stance is that competence must be demonstrated, and potentially by reference both pre and post qualification to a pre-determined set of competences, sufficient to rely on an intuitive model alone. Indeed, Boud and Middleton argue that while the community of practice concept has its utility, it is limited in describing the enormous variety of social networks through which learning occurs in the workplace.\(^\text{101}\) Still less does it articulate the variety of strategies that individuals employ.

**CONTEXT AND STRATEGIES FOR LEARNING IN THE WORKPLACE**

Workplace learning experiences may be seen as *ad hoc* because they are not consistent with practices adopted in educational institutions. Yet, . . . it is imprecise and misleading to describe engagement in work activities as being unplanned or unstructured, as they are intentional . . . these experiences are often central to the continuity of the work practice.\(^\text{102}\)

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\(^\text{98}\) Chambliss, in North America, detected aspects of a cohesive culture within practice group teams of three to 10 as “the most immediate source of lawyer’s day to day practice norms and habits of mind”, Chambliss E, ‘Measuring Law Firm Culture’, *Special Issue Law Firms, Legal Culture, and Legal Practice*, vol 52 (Emerald Group Publishing Limited) <http://www.emeraldinsight.com/doi/abs/10.1108/S1059–4337(2010)0000052004> accessed 17 October 2014, p 21. The modern British practice of rotating trainee solicitors between “seats” which may be as short as three months in duration, militates, I suggest against the effectiveness of even a community of practice of this type.


\(^\text{102}\) Billett in Fuller A, Munro A and Rainbird H (eds), *Workplace Learning in Context* (Routledge 2004), p 118.
Learning in and around the workplace takes a number of forms. Marsick and Watkins, for example, contrast “informal” and “incidental” learning with formal learning in the classroom. “Incidental learning”, a sub-set of informal learning, they then conceptualise as what Eraut calls a “by-product” of work, and Rogers’ calls “task-conscious learning” (to be contrasted with “learning-conscious” activity), in circumstances where those involved are not necessarily conscious that learning is taking place and which therefore may be present in some forms of the community of practice. There is clearly a difficulty, where learning is taking place in this way, in identifying what has been learned, to what level, still more in recording it for regulatory purposes by reference to a competence framework. “Informal learning” in this sense, may, however, extend as far as deliberate mentoring or career development interventions, which are highly learning conscious; more susceptible of having their outcomes measured – including by reference to a competence framework – and, in fact, incorporated into the existing CPD system.

Clearly the context – the nature both of the work provided, and of the working environment – are critical to what can be learned. This creates at least the potential for a significant tension between objectives. It is in the employer’s interests for the employee’s identity to be bound up with that of the firm. It is in the employer’s interests for its employees to work on a certain category of task, in a certain manner, that is consistent with the practices and business objectives of the organisation. Promotion in a law firm may be tied to billable hours, rather than expertise or innovation. The workplace may be, in Fuller’s terms, a “restrictive”, rather than an “expansive” environment.

Eraut and his collaborators conducted a detailed study of accountants, engineers and nurses in their first three years of employment, to identify a triad of learning factors, and a second triad of context factors, which affected learning in the workplace. Learning factors were identified as challenge and value of the work; feedback and support; confidence and commitment and personal agency. Context involves allocation and structuring of the work; encounters and relationships with people at work and individual participation and expectations of performance and progress. I will discuss expectations of performance (i.e. what is to be learned, and to what level) and the contributions of others, further below. The context and learning factors, however, insofar as they do anything other than permit incidental learning, provide a background in which more explicit learning strategies may be permitted or encouraged.

Cheetham and Chivers, include “unconscious absorption or ismosis [sic.]” in their list of 12 informal professional learning strategies, which occupy a spectrum from intuitive strategies such as practice and repetition and unconscious absorption; through a mid-range taking opportunistic advantage of useful opportunities in the workplace such

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as collaboration and liaison, extra-occupational transfer and some aspects of observation and copying and the more crisis-driven stretching, perspective switching (including “Damascus Road experiences”) to the more explicit techniques of reflection; feedback; mentor and coach interaction; psychological and neurological devices (such as deliberate lateral thinking and articulation, frequently by teaching or speaking).\(^{107}\) Eraut employs three categories in a spectrum running from the incidental approaches of, for example, osmosis or observing colleagues (trying things out, working with clients); more deliberate strategies in the median range (asking questions, reflecting, giving and receiving feedback) and at the far end, activities that are distinctly learning conscious (mentoring, being supervised, attending courses).\(^{108}\)

Recently published research with employers in SRA-regulated entities quoted at the head of this article,\(^{109}\) (“the IFF/Sherr report”) examined the frequency of deployment of a number of strategies that are towards this informal learning, learning conscious end of the spectrum.\(^{110}\) These strategies are, of course, those that are more visible, and therefore more susceptible of recording and evaluating for regulatory and organisational purposes. They are also strategies that are available both to those in their early career, and those who are more senior.

**THE “SCOPE AND QUALITY” OF WHAT IS LEARNED IN THE WORKPLACE**

Changes to the SRA’s regulatory framework to focus on outcomes to be demonstrated\(^{111}\) rather than rules to be followed create a particular challenge in capturing the extent of solicitors’ and trainee solicitors’ learning that takes place in the workplace. The proposal to assess the competence statement at the point of qualification is, however, entirely consistent with this end-loaded, outcomes approach. The IFF/Sherr report has indicated that, although a substantial proportion of legal services organisations already employ competence frameworks,\(^{112}\) training needs analyses are not, however, necessarily systematically mapped to achieving the scope and level of performance laid out in the competence framework.\(^{113}\) The competence concept is not itself without difficulty. There are different approaches not only in Anglophone

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110 Internal and external training, workshadowing, role stretching, mentoring, formal check on outputs, discussion of cases, reflective learning, online learning and training, and ongoing supervision.


113 Ibid, figure 4.3.
countries but also within Europe. The SRA’s proposal is for an activity-based,\textsuperscript{114} rather than attribute-based model, an approach which is, however, consistent with the majority of UK models.\textsuperscript{115} There is also difficulty inherent in meaningfully identifying and articulating competences both in scope\textsuperscript{116} and in level, which realistically acknowledge the variety and interconnectedness of practice; are not so static as to quickly become obsolete, so rigid as to be exclusionary or so vague as to be meaningless. There is a risk of defaulting to lip service, just as there is with an inputs-based model of CPD, in which isolated and possibly artificial incidents are treated as complying for the purposes of a rigid regulatory rule regarded as imposed from outside. Some of the challenges of adequate and sustained demonstration of individual competences, in a wide range of legal services organisations, have already been explored in the SRA’s field test of its pre-LETR competence framework at the point of qualification.\textsuperscript{117}

“Full” participation, whatever we define it to be, will be different for different organisations and take different lengths of time to achieve. In this respect it differs from the generic benchmark “safe” standard of performance represented by competence, which in this context is to be determined for regulatory purposes and largely fixed, in terms of level, at the point of qualification. There is no reason why the profession, in parts or as a whole, should not aspire to something more substantial in terms of expected level of performance\textsuperscript{118} and embrace the concept as facilitating the pursuit of new forms of practice and flexibility to change.

To meet the competitive demands of our economy, our view of competence needs to be firmly based on a broad and strategic view of the competent workforce, one which can be converted into practical approaches which will lead to improvement and development – not a replication of a former world and outdated concepts which we already know to be inadequate.\textsuperscript{119}

Even so, aspirations will not be met for scope of performance (range and complexity of tasks) and level (how well those tasks are performed) unless the work is available for entrants in which and by which, they can be learned.\textsuperscript{120}

Different challenges present themselves after qualification. It is proposed that the one currently mandatory course for solicitors in their first three years after qualification be dropped,\textsuperscript{121} leaving the early career practitioner protected only by the regulation that

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they should not practise alone and otherwise at the mercy of the CPD scheme supplemented by such structures and processes - very developed in some cases, absent or tacit in others – as are provided by their employer. Eraut conceives of a trajectory of learning, in which both scope and quality of performance are developed. For solicitors, progression after qualification arguably involves reducing, in objective terms, the scope of activity into the specialist field (but increasing the scope of competence within it), as well as improving the quality (speed, effectiveness, sophistication) of performance. Improvement – or expertise - may involve increasing the repertoire of solutions that the solicitor is able to offer, or the variety of variables which the solicitor takes into account in offering solutions. Because the scope of the SRA’s proposed competence framework is designed to be susceptible of assessment at the point of qualification, no threshold for quality is set for the later stages of the career, and the scope is, necessarily, limited to the kind of activities that a newly qualified solicitor might be expected to perform. Consequently it includes activities that a more senior solicitor may delegate to others (eg research) and does not explicitly acknowledge roles that might be performed by more senior lawyers: marketing, management of others, lobbying, engaging with the profession at a national level and so on. Level, as solicitors become more expert, and as their practice becomes more specialist – as well as more tacit - cannot easily be captured in a profession-wide competence framework.

Learning after qualification is, I suggest, worthy of much greater attention, particularly given the comparatively small number of studies which have explored this in the context of legal practice specifically. This is not to suggest special pleading – understanding other disciplines will be increasingly significant as multidisciplinarity in legal services provision expands – rather to identify how the context differs, and the extent to which that creates specific challenges for lawyers. This may involve further work on concepts of expertise, as comparatively static once a plateau has been reached or as involving the capacity to change acknowledged by the SRA in the


123 Harteis and Billett suggest that the “intuitive” responses of experts are based on recognition of crucial patterns; variety in procedures and solutions “that enable them to solve routine problems spontaneously and with apparently limited cognitive effort” and on not merely conscious knowledge but also “rich sources of the tacit knowledge experts developed across their lives”: Harteis C and Billett S, ‘Intuitive Expertise: Theories and Empirical Evidence’ (2013) 9 Educational Research Review 145 <http://www.sciencedirect.com/science/article/pii/S1747938X13000110> accessed 20 October 2014, p 154.


125 There would be value in considering similarities and differences between the medical ward round, and the solicitors’ file review, as structures facilitating learning. See for example: Bleakley A, ‘Broadening Conceptions of Learning in Medical Education: The Message from Teamworking’ (2006) 40 Medical Education 150; Andrew C, ‘What Is the Educational Value of Ward Rounds? A Learner and Teacher Perspective’ (2011) 11 Clinical Medicine 558. Similarly, the supporting structure of the audit team, identified by Eraut as a positive factor in the learning of junior accountants, might bear some similarities to the corporate transaction department in a law firm.

126 Watson and Harmel-Law, for example, identified influences on and challenges to human resource development in Scottish solicitors’ firms as including “the partnership structure, the pervasiveness of time-billed targets ... and [human resource development’s] profile and acceptance among the solicitor community”: Watson S and Harmel-Law A, ‘Exploring the Contribution of Workplace Learning to an HRD Strategy in the Scottish Legal Profession’ (2010) 34 Journal of European Industrial Training 7, p 18.

127 Bereiter C and Scardamalia M, Surpassing Ourselves: An Inquiry Into the Nature and Implications of Expertise (Open Court Publishing Company 1993). The “technical specialist” who has reached a plateau and is now concerned with
rubric surrounding the proposed competence framework, and to deal with novel situations\textsuperscript{128} so embracing learning at the “growing edge”\textsuperscript{129} of scope and quality of expertise. For those post qualification, the competence quoted in full above, which represents both an outcome and a statement of the means by which it and the other competences might be achieved and maintained, may be the most significant, and the most susceptible of demonstration through the revised approach to CPD.\textsuperscript{130} I return, therefore, to the significance of the workplace and those within it, who may be learning to be experts, or, alternatively, experts who are themselves learning.

THE SIGNIFICANCE OF COLLEAGUES

There is a diverse range of people that we learn from at work, very few of whom are recognised by the employing organisation as people with a role in promoting learning – that is people designated as supervisors or trainers.\textsuperscript{131}

The role of those facilitating learning for solicitors in the workplace is, I argue, not yet entirely understood, largely because the previous regulatory regime focused its energies elsewhere, on the undergraduate law degree (“LLB”), GDL and LPC, on an inputs based model of CPD and on the training contract.

“Learning from other people” now appears in the draft competence framework as an activity which not only supports competence, but is an aspect of competence in itself and also, as I have indicated, to be elevated to an ethical requirement.\textsuperscript{132} Clearly, lawyers of whatever degree of experience, learn from colleagues, either osmotically or more deliberately. More senior lawyers may be adopted as role models, intuitively or deliberately; or their practices absorbed and adopted. Learning also takes place from peers and near-peers, as individuals discuss problems, or seek help from someone less intimidating than the partner in charge of the file in approaches related to what I will discuss below as a form of social learning called “productive reflection”. Some errors will be checked or filtered out by secretarial and other support staff. In international firms, Faulconbridge has identified a use of expatriate lawyers to manage cultural disparities and to reinforce firm cultures.\textsuperscript{133} Where multiple role models are available (in a department, or the journeymen in a community of practice), learning may be synthesised from a variety of sources:

Newcomers use established colleagues as “multiple contingent role models” in organizational socialization. They depend and rely on role models in observations and interactions and learn different qualifications from several role models in the process of learning both

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tacit and explicit knowledge, in order to create their own attitudes, personal style and role behaviour.\textsuperscript{134}

The final report of the LETR research phase recommended to the regulators that there should be distinct support for supervisors of periods of supervised practice across the sector\textsuperscript{135} and the IFF/Sherr Report demonstrates that, not only for trainees, but also for non-partner solicitors, legal executives and paralegals, ongoing supervision is regarded not only as most frequently used but also as amongst the most effective, strategies for learning in the workplace.\textsuperscript{136}

There is a developing literature – albeit not yet including work on supervision within law firms - on the role of the supervisor more generally which is worthy of attention. Nevertheless, the themes identified in this literature have resonance for the legal services organisation. Clearly, for example, there is the potential for a conflict in the role: the supervisor is both supervisor of the work as well as of the person. Supervisors may not, therefore, necessarily be facilitators of learning except where this is mandated by the regulator (ie the training contract/period of recognised training), but may contribute to learning in the context of the allocation of work and feedback on it.\textsuperscript{137}

Intuitively, they may adopt supervisory approaches that are focused on getting the job done.\textsuperscript{138} Alternatively, if they take a more expansive approach, supervisors may take approaches that align with different educational paradigms,\textsuperscript{139} or employ different behaviours,\textsuperscript{140} just as, as expert practitioners, they may practise by reference to different, unspoken, theories of practice. More experienced solicitors may find themselves at moments of transition which may bring with them specific needs for supervisory support of particular kinds.\textsuperscript{141} The supervisor, perhaps even more so than the expansive or restrictive environment of the organisation as a whole, can facilitate or hinder learning:

The first hindrance was when supervisors that did not show any interest in their employees’ learning or ideas and participants felt discouraged from further efforts to attempt transfer [of material from a classroom to a workplace context]. Another hindrance to transfer was where participants felt they were unable to progress change initiatives due to restrictive policies. An unsupportive culture was the final hindrance to transfer. Participants valued


\textsuperscript{136} IFF Research and Sherr A, ‘Workforce Education and Training Arrangements in Regulated Entities’ (Solicitors Regulation Authority 2014) <http://www.sra.org.uk/t4resources/#document-list> accessed 23 September 2014, figure 5.3.


those supervisors that created a positive work culture as it gave them some confidence that implementing a well-considered work practice was possible and would not be punished.\textsuperscript{142}

Webster-Wright identifies the dilemma for the supervisor, therefore, as balancing

... the problematic nature of current workplace and professional cultures, with a focus on supervision of standards rather than support for [learning], where performance rather than understanding in learning is privileged\textsuperscript{143} ... [with] ... the importance of supporting professionals to feel comfortable learning in their own authentic way, yet challenging them to reflect on and question their practice.\textsuperscript{144}

The rhetoric of “reflection” is now ubiquitous in the higher education sector,\textsuperscript{145} and in some professions. It is beginning to manifest itself in the SRA’s language and now in its regulations, including those relating to the training contract/period of recognised training and more obviously, in the new approach to CPD. “Reflecting on and learning from practice” now appears in the draft competence framework as an activity which not only supports competence, but is an aspect of competence in itself and also, as I have indicated, to be elevated to an ethical requirement.\textsuperscript{146} There is at least sufficient consciousness of the term for it to be included in the strategies tested with employers in the IFF/Sherr Report, with 62% of regulated entities having employed it in a 12 month period.\textsuperscript{147} This may, however, represent assumptions about reflective learning as a peculiarly solitary form of introspection. In this sense it is perhaps not surprising – despite the requirement that a trainee’s record of training should contain reflective comments – that although 54% of trainees in the IFF/Sherr sample used reflective learning, less than 1% identified it as most effective.\textsuperscript{148} The ubiquity of the concept, I suggest, also tends to belie its complexity and the conditions necessary for its implementation: “[r]eflection is a complex process which many learners do not find easy, and facilitating learners’ reflection requires a sophisticated pedagogy”\textsuperscript{149} as well as to underplay the potentially disruptive effect (for the employer) of the results of reflection in questioning engrained assumptions and practices.

Other strategies tested in the IFF/Sherr report, including mentoring, discussion of cases, and ongoing supervision may all involve elements of reflection, but reflection in a more collaborative sense. It is almost inevitable, I suggest, that those in the earlier stages of their career find solitary reflection less than productive. In my own experience,

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144 Ibid.


148 Ibid. figure 5.4. For equivalent responses for paralegals and legal executives, see figure 5.5.

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novice practitioners have little difficulty in what Brockbank and McGill\textsuperscript{150} term “evaluative reflection”, a backward looking approach in which the individual evaluates the strengths and weaknesses of performance. What is missing, and what may require a credible, trusted colleague to provide, is means of first, confirming whether the evaluation of strengths and weaknesses is realistic, and second, providing means of addressing the weaknesses. Collaboratively, the strategy then becomes closer to that which might be adopted by more senior colleagues faced with a dilemma, the “critical reflection” which questions assumptions embedded in existing understandings of practice and leads to new learning for the individual:

[anomolies and dilemmas of which old ways of knowing cannot make sense become catalysts or “trigger events” that precipitate critical reflection and transformation]\textsuperscript{151}

Conventional approaches to reflective learning do, however, tend to focus on learning for the individual, rather than for the group, whether or not the strategy is that the reflective activities are conducted in isolation or with others. In either case it requires time and resources, which may not be prioritised if the learning is perceived as being for the individual rather than to the benefit of the employer (to, for example, reduce risk, redeploy staff, correct errors and so on): “dialogic reflective practices rarely occur in work environments, nor does workplace culture typically promote critical reflection”.\textsuperscript{152}

Nevertheless, “organisations learn whenever individuals or teams acquire new insights into their work experiences that change their scope of action. Reflecting about one’s own work experience is thus a major catalyst of organisational learning.”\textsuperscript{153} Boud and his collaborators have, more recently, in effect reimagined a more articulate form of social learning within the community of practice, perhaps more suited to the knowledge economy, in a concept of “productive reflection”:

Reflection occurs in the context of producing a learning outcome that can be applied to a real situation . . . it refers to a link with whatever is the production that occurs in any given workplace. Productive reflection aims to have an impact on both work products as well as on the wider learning that takes place among participants . . . It leads not only to particular work outcomes or actions but also to enabling personnel to be active players in work and learning beyond their immediate situation. Productive reflection aims to feed on itself to create a context that fosters learning, knowledge generation and a congenial workplace.\textsuperscript{154}

which is collective rather than individual; contextualised within work; involves multiple stakeholders, is generative (ie not confined to pre-determined outcomes) and developmental in character and is dynamic and changes over time as an ongoing process of collaborative review which is embedded as a work practice. Spaces identified as suitable for productive reflection include formal group reflections (eg the review of a transaction or case); interstitially in breaks from work, or as part of group problem-solving processes in which individuals work together and seek help from each other. It can

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therefore be contrasted with processes narrowly envisaged as “CPD” where it runs the risk of becoming ritualised and superficial and perceived as dissociated from the workplace.155

Where reflection and what Argyris and Schön have called “double loop learning”,156 which is also adopted as an aspect of productive reflection157 – the questioning of assumptions - provide distinct utility for solicitors in the current market situation, is in re-examining tacitly accepted practices. Without this, the danger is that learning in the workplace, even if framed in the idealistic containment of a community of practice, becomes convergent and conservative, endlessly reproducing (obsolete) practices.

**CONSERVATISM AND CONVERGENCE**

Learning in the workplace is, by definition, learning for the purposes of that workplace and that employer, to the extent that there is an established canon of “organisational learning” in which the collective learning and knowledge is conceived as being that of the organisation itself.158 Wenger’s social learning and Boud et al’s productive reflection include the learning of the group as well as that of the individual. It may not be in the interests of an employer that an employee should aspire beyond their current role; lack of progression routes for some employees (eg paralegals) being in the interests of the organisation.

...it is clear that some forms of practice are likely to be so circumscribed and limited that continuing engagement in them alone will inhibit the broader development of the professional. This implies that CPD requires far greater opportunities to engage in practices that extend the repertoire of practitioners and that the focus needs to move from an analysis of individual knowledge skills and competencies to an analysis of environments and what the practices in them generate in terms of extending practice scope. ...159

For higher status individuals, there may be fears that stretching activities are pejoratively perceived more as enabling the individual to leave the organisation. Even where this is not the case, intuitive practices involving observation and learning by osmosis from a master may nevertheless be problematic. As well as foregrounding the workplace identity over the vocational identity, they tend to reproduce the practices of the person observed. These practices may have been weak in the first place, or become ossified over time.160

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160 “Reliance on informal learning alone can have drawbacks:

- It may be too narrowly based so the employee only learns part of a task or superficial skills which may not be transferable;
- It may be unconscious and not be recognised. This does not build confidence nor lead to development;
- It is not easy to accredit or use for formal qualifications;
The potential for learning in the workplace to be circumscribed and limiting, and to be both convergent towards the employer’s norm and conservative, is a significant challenge. Given the fluidity of the legal services marketplace as it is at present, strategies of learning that result in conservatism and convergence are not sustainable. The employer does, however, need at least some of its employees to develop expertise in their practice (the alternative being to buy in such expertise\textsuperscript{161}), and to innovate in ways that will allow the organisation, assuming it is in the private sector, to maintain a competitive advantage. It is in the regulators’ interest, because it is a statutory objective, for solicitors to be autonomous and independent in judgment. That autonomy and independence is generally taken to be a defining aspect of professionalism.\textsuperscript{162} It is certainly a component of the profession’s public ethical stance\textsuperscript{163} and may, of course, demand a questioning of the practices, business objectives and ethics of the firm. There will be a problem if, having loosened up regulatory processes in some respects (eg in relation to CPD), the use of a competence framework becomes, despite the intentions of its drafters, a means of ossifying practice rather than enhancing it. The inclusion of competence A2 is clearly designed to ameliorate this.

What may be more significant in an individual workplace, and which cannot be accommodated within a competence framework designed to represent the norm, is the presence of those prepared to challenge what is taken for granted or even held very dear. This will be challenging for individuals “brought up in the firm”, whose identity is bound up in the workplace, and who know little outside it. It will be challenging for those who are so embedded in tacit understandings of their practice that they are unable, despite the regulatory urging to reflect on their own practice, to explain why it is they do what they do (what others might call their “theory of practice”), in order to explore the potential for doing it differently. There is, therefore, I suggest, a place for those who have other contexts and other strategies upon which to draw. Pragmatically, they may be drawn from the lateral hires into the organisation, but there is one ready supply: the graduate entrant whose prior education might equip them, in due course, to ask the challenging questions.

There is, I suggest, a place for both the undergraduate law degree, and for the LPC, whatever it evolves into, as a place to initiate a particular kind of resilience into students, to inject them with some robustness before their hearts, minds and bodies are captured by the overwhelming intensity of the culture of the organisations they will join, but may one day need to question, or to leave. Whether or not these are legal services organisations. Even more, if an element of graduateness is a readiness to challenge, then there is and should always be a place for graduates in the solicitors’ professions. Others may share those attributes, but the ability to question assumptions and challenge norms, is, I suggest, an overwhelmingly necessary aspect of the creation

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\item The employee may learn bad habits or the wrong lessons.”
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\textsuperscript{161} Kang, Snell and Swart suggest that “while hiring lawyers from outside increases the learning potential of the practice group, it will create coordination problems, which negatively affect the transformation or institutionalization of individual knowledge into practice group learning”, Kang S-C, Snell SA and Swart J, ‘Options-Based HRM, Intellectual Capital, and Exploratory and Exploitative Learning in Law Firms’ Practice Groups’ (2012) 51 Human Resource Management 461, p 465.


of a culture of workplace learning that is fit for the future and can embrace change rather than merely paying lip service to the expectations of the regulator.

CONCLUSION

... the firm itself is an increasingly important actor in professional projects; thus, its role in shaping the values, practices and ethics of lawyers deserves further attention.¹⁶⁴

The formal regulatory approaches to the extent of licensure, competence frameworks, CPD and commitment to standards and/or learning amongst the regulated legal professions varies (see appendix). The solicitors’ profession possesses, however, a unique combination of attributes. Its licensure has the greatest breadth, and is supported by its regulator as promoting both a distinct role as troubleshooter and as facilitating flexibility and responsiveness to change. That regulator is responsible not only for individuals but for the workforce of SRA-regulated entities. The regulatory changes can be seen as loosening the regulatory hold in some respects whilst retaining or tightening them elsewhere. The loosening is represented by greater responsibility for learning for the individual and the employer; achievement of outcomes rather than compliance with regulations; the possibility of qualification by “equivalent means”. The breadth of the licensure is reinforced by the requirement that a range of areas of law be experienced during the pre-qualification period of recognised training; and traces of the inputs-based CPD scheme remain in isolated areas. The tightening is represented by the prospect of assessment at day one of domestic entrants as well as foreign lawyers transferring in; by provision of a competence statement for all practitioners which it is proposed will be incorporated in some way into the ethical requirement to provide a good standard of work – representing both scope and quality - and to train employees accordingly. That competence framework sets out the scope of competent practice, if not the level for all practitioners, but also – and rather more strongly than the one used for CILEx Fellows – treats a commitment to learning, and to strategies of social and reflective learning in the workplace, as a competence and as an ethical obligation.

This is all to be imposed by the regulator. There will be challenges for the profession, unused to demonstrating outcomes rather than following regulations, or tracking learning rather than hours spent in the CPD classroom, and particularly if employers may ultimately participate in assessment at qualification by reference to the competence framework. History, as well as the recent empirical work reported in the IFF/Sherr Report demonstrates a commitment to learning in the workplace, as well as a number of social learning strategies in use outside - or despite - the existing CPD system. This provides an opportunity for the profession, if it can effectively harness that commitment, not only to achieve the necessity of satisfying its regulator, but also to achieve the virtue of establishing a differentiated collective identity, based at least in part on learning which facilitates the capacity for troubleshooting and for ability to change.

In order to do so, I suggest a number of strategies will be required. The profession will need to be able to treat the regulatory changes as an opportunity rather than a threat. This will involve selling to its members the benefits of a conscious commitment to learning as enabling capacity; avoiding and managing risk; reducing negligence claims; enabling greater degrees of delegation to juniors and as promoting efficiency

rather than taking hours out of the working day. In this it will be assisted by strong examples: the employers of apprentices; the users of competence frameworks; the role models and mentors regarded as liberating and inspiring. It will be assisted by transparency and articulation: acknowledging the commitment to social learning; articulating, evaluating and rewarding effective strategies in use in their own organisations and those of others. This will involve surfacing tacit practices but also identifying actors who may be below the official radar – the informal network of junior lawyers who refer amongst themselves, the mid-career lawyer who gets trainees and juniors out of trouble before that trouble reaches the partners. It will be promoted by permissions and provision of spaces, physical and otherwise, to colleagues to talk about their work. The physical might be a staffroom, a problem solving colloquium or “fish file” exchange, a regular file review process or post case or transaction review. The non physical involves articulation – so that, for example, the trainee or paralegal sees the implications of the isolated task she has been asked to complete in the context of the transaction as a whole – and, again, permission, to question or reframe. “Why?” and “Why not?” are, as law teachers know, highly powerful questions in the classroom and there is no reason to suggest they are any less powerful in the workplace.

Which brings me to a final point. The proposed regulatory changes focus on learning, as an outcome and only to a limited extent on strategies for learning. Where the solicitors’ profession could transcend its regulator would be to articulate and reward, as a component of its own ethical stance, the teachers, mentors, role models and peers, all as “teachers” within its social learning context.166

APPENDIX: APPROACHES OF REGULATED LEGAL PROFESSIONS

<table>
<thead>
<tr>
<th>Use of competence framework</th>
<th>CPD approach</th>
<th>Ethical reference</th>
</tr>
</thead>
<tbody>
<tr>
<td>Barristers</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Used for pupillage, QC competition and for QASA</td>
<td>Input based approach involving a minimum number of hours</td>
<td>Core duty 7 refers to a “competent standard of work”, supplementary notes refer to the individual barristers keeping knowledge and skills up to date and warns that CPD compliance may not be sufficient.169</td>
</tr>
</tbody>
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165 A “fish file” is a file whose lawyer has got stuck and is tempted to procrastinate about to the extent that there is a risk it is beginning to “smell”. The exchange allows a colleague who comes fresh to its problems to take over responsibility for the file.

166 An example of an ethical stance including both teaching and learning is found in medicine “7. You must be competent in all aspects of your work, including management, research and teaching” (my italics); General Medical Council, ‘Good Medical Practice (2013)’ <https://www.gmc-uk.org/guidance/good_medical_practice.asp> accessed 3 September 2014.


<table>
<thead>
<tr>
<th>Use of competence framework</th>
<th>CPD approach</th>
<th>Ethical reference</th>
</tr>
</thead>
<tbody>
<tr>
<td>Costs lawyers</td>
<td>Not used</td>
<td>Principle 4 “Provide a good quality of work and service to each client”, supplementary note requires professional knowledge to be kept up to date.</td>
</tr>
<tr>
<td>Legal executives</td>
<td>Used for applicants for fellowship, an outcome related to self-awareness and development is to be demonstrated once, and for QASA.</td>
<td>Principle 9 “act within your competence” is supplemented by references to CPD, to development of knowledge and skills and to carrying out supervision properly.</td>
</tr>
<tr>
<td>Licensed conveyancers</td>
<td>Not used</td>
<td>Overriding principle 2 on “high standards of work” is supplemented by references to the individual and the workforce.</td>
</tr>
<tr>
<td>Notaries</td>
<td>Not used</td>
<td>Requirements to provide a proper standard of service.</td>
</tr>
<tr>
<td>Patent attorneys and registered trade mark attorneys</td>
<td>Not used</td>
<td>Rule 4, Regulated individuals (including entities) are required to carry out work with “due skill and competence”. CPD compliance is required by rule 16.</td>
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<table>
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<tr>
<th>Solicitors</th>
<th>Use of competence framework</th>
<th>CPD approach</th>
<th>Ethical reference</th>
</tr>
</thead>
<tbody>
<tr>
<td>Used for QLTS entrants, QC competition and for QASA. Practice Skills Standards used for training contract. Proposed for all entrants and as a basis for CPD</td>
<td>Currently input based approach involving a minimum number of hours. Proposal to move to a cyclical approach.</td>
<td>Principle 5 “a proper standard of service”, supplemented by outcomes 1.5, 7.6 and 7.8 referring to the individual and the workforce. Proposal to embed competence framework into principle 5.</td>
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A FUTURE FOR LEGAL EDUCATION: PERSONAL AND PROFESSIONAL DEVELOPMENT AND ETHICS

NIGEL DUNCAN*

INTRODUCTION

Legal education in the university sector faces major challenges as we digest the recommendations of the Legal Education and Training Review and prepare to respond to the changed regulatory environment currently under planning by the Solicitors’ Regulatory Authority (SRA) and the Bar Standards Board (BSB). This paper is developed from one presented at the Nottingham Centre for Legal Education’s first Conference on 7 – 8 February 2014. My starting point is that this challenge provides us with a huge opportunity to approach our goals of designing challenging educational experiences for our students while also contributing in a serious way to the personal development of all and the professional development of those interested in entering legal practice. My focus is on the undergraduate law degree, although some of my proposals will be relevant to the Graduate Diploma in Law. My proposal is that we and our students will benefit from our addressing professional ethics in the undergraduate degree, particularly if we think about how it might inform our overall curriculum and if we develop appropriate learning methods to do so. This development, effectively implemented, will contribute to ensuring a future for academic legal education.

LIBERAL, VOCATIONAL AND PROFESSIONAL LEGAL EDUCATION

Proposing to introduce professional ethics into an academic degree raises hackles in some quarters. It is seen as fundamentally vocational in nature and as such antipathetic to the educational goals of an undergraduate degree. It could certainly be introduced in such a way and I share the view that this would be damaging. I need, therefore to be clear that I am not proposing that we should teach students the contents of the professional Codes of Conduct. This would be narrow vocationalism, pander to the differently narrow mind-set of the black-letter law lecturer and be deadly dull. What is more, the knowledge gained would fade as it would exist outside any context or experience, and by the time those students who made it into legal practice were able to make use of it, would be out of date.

Michael Lower distinguishes between vocational and professional legal education.

Professional education is concerned with a knowledge base, a way of reasoning, and an introduction to relevant theory and ideology. Vocational training builds on this but is concerned with the know-how that can be put to use in the office. A professional legal education is one version of a liberal or academic education.2

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Quoting Bradney, he links this with the purpose of liberal legal education which “involves a search for structures and seeks to inculcate in a student an awareness of the all-pervasive nature of values and questions about values in the world that surrounds them”.3 I share this view and will argue that professional ethics may be an effective vector for achieving these aims.

**THE REGULATORY FRAMEWORK**

In order to place the functions of legal education in their legislative context it is worth going back to the Legal Services Act 2007. This establishes regulatory objectives for the SRA and the BSB and their own regulator, the Legal Services Board (LSB). Amongst those objectives is “encouraging an independent, strong, diverse and effective legal profession”.4 What is more, the LSB has prioritised this amongst its objectives. “Education and training is one of a number of tools available to regulators to manage risk and support the delivery of the regulatory objectives set out in the Act. We consider this has particular relevance to two of the regulatory objectives - protecting and promoting the interests of consumers; and encouraging an independent, strong, diverse and effective legal profession.”5 The profession is made of its members. We should be encouraging their independence of mind as well as their intellectual abilities. We should also be encouraging in those of our students who do not go on into the legal profession an understanding of what is expected of lawyers and the values that underpin their practice so that as engaged citizens they can hold the legal profession to account.

The Legal Education and Training Review researched the views of practitioners, regulators, academics and other “stakeholders” as to what legal education should address. They found: “The centrality of professional ethics and legal values to practice across the regulated workforce is one of the clearest conclusions to be drawn from the LETR research data.”6 They also said: “The importance of ethics is signalled, to a high degree, throughout the qualitative data. Professional ethics, and its regulation, are seen as a critical defining feature of professional service.”7 This led to two key recommendations:

Recommendation 6: LSET schemes should include appropriate learning outcomes in respect of professional ethics, legal research, and the demonstration of a range of written and oral communication skills.

Recommendation 7: The learning outcomes at initial stages of LSET should include reference (as appropriate to the individual practitioner’s role) to an understanding of the relationship between morality and law, the values underpinning the legal system, and the role of lawyers in relation to those values.

Recommendation 6 refers to the outcomes that entrants to the profession should be able to demonstrate at the time of entering practice. It sets the context for

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4 Legal Services Act 2007, s 1(1)(f).
7 Ibid 2.71.
recommendation 7, which proposes outcomes for the undergraduate or academic stage of legal education. It reminds us that what we should aspire to is not limited to knowledge but must encompass understanding, and not merely understanding of the law but of the nature and values of law. This is a normative and not merely a descriptive analysis. It requires us to test laws against underlying values and to be willing to question those values. The interaction of people and the law is mediated by lawyers and students therefore need to understand something of lawyers’ work and the values that might underpin it. This is both a professional and a liberal legal education.

VALUES IN LEGAL EDUCATION

Francis Bacon famously said “Knowledge itself is power”. He was talking about the knowledge of God, but his words have been used more often to talk about the knowledge of humans. A law degree provides its students with a lot of knowledge, and knowledge of the legal tools for controlling human behaviour may indeed provide those who acquire it with power. Equally famously, power is said to tend to corrupt. We would not consider denying our students knowledge just because of that corrupting tendency. However, we can design our courses so that we provide students with the skills to use that power effectively and the values to use it well.

Carrie Menkel-Meadow has provided guidance on how we might approach this: ‘In my view, what modern legal education should prepare students for is a set of values and skills that are informed by what “legal” values and law offer to deal with what are essentially human needs.’ She identifies these legal values as “Realisation of ‘justice’” and she presents a set of general “problem-solving” skills.

A sensitivity to:

1. Fairness
2. Peace
3. Decision making
4. Leadership, facilitation and management
5. Creativity
6. Counselling and collaboration
7. Governance.

She goes on to apply this by exploring the values of lawyering in terms of “making, not breaking things”. The ensuing discussion explores legal values not only in their own right but through comparisons with those of other professions. This leads to suggestions as to what we need to encourage our students to learn and proposals as to creative outcomes that might be sought from the “crisis in legal education”. These relate particularly to circumstances in the USA but provide a stimulus for our own aspirations.

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10 Carrie Menkel-Meadow, ‘Crisis in Legal Education or the Other Things Law Students should be Learning and Doing’ (2013) 45 McGeorge L Rev 133, 137.
11 Ibid.
12 Ibid 138.
A major recent contribution to this debate is the Carnegie Report, *Educating Lawyers*. Drawing from a wide experience far beyond that of legal educators they identify three apprenticeships of professional education. These are:

1. the intellectual or cognitive apprenticeship, which “focuses the students on the knowledge and way of thinking of the profession”.
2. an apprenticeship “to the forms of expert practice shared by competent practitioners”.
3. “the apprenticeship of identity and purpose introduces students to the purposes and attitudes that are guided by the values for which the professional community is responsible . . . it also shares aspects of liberal education in attempting to provide a wide, ethically sensitive perspective . . . the essential goal . . . is to teach the skills and inclinations, along with the ethical standards, social roles, and responsibilities . . . it is the ethical-social apprenticeship through which the student’s professional self can be . . . explored and developed.”

The Report goes on to argue: “If professional legal education is to introduce students to the full range of professional demands, it has to initiate learners into all three apprenticeships. But it is the ethical-social apprenticeship through which the student’s professional self can be most broadly explored and developed.”

**THERE'S NO ROOM IN THE SYLLABUS**

Academic resistance to the “Foundations of Legal Knowledge” imposed on the qualifying law degree by the professions is understandable and many will welcome it if the results of the SRA’s development of an outcomes approach to regulating legal education include their abandonment. Whether or not this happens, there has been a closely-associated claim that the syllabus is already full and that there is no scope to introduce a new subject such as professional ethics. My response to this is two-fold. The first is that professional ethics is not necessarily best introduced to the LLB degree in the form of a discrete module or subject. I will develop an alternative approach below. My second response is that it is not inherently impossible. This can be demonstrated by the experience of the Graduate Diploma in Law programme at City University London. The professional requirements of this one-year full-time programme include coverage of the Foundations of Legal Knowledge plus one additional Foundation subject at the choice of the course provider. The Director of the GDL at City, David Herling, introduced Legal Ethics as the additional Foundation subject in

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15 Ibid.
17 This is for the positive reasons presented below, and also because of the shift towards an outcomes approach proposed by the Regulators. In 2010 Andy Boon proposed a new Foundation subject in his report for the Law Society, but this was at a time when the Joint Academic Stage Board still controlled the content of the qualifying law degree. His proposals for content are, however, a useful source for anyone considering what an ethics curriculum, however structured, should contain. See <http://www.teachinglegalethics.org/model-ethics-curriculum> accessed 28 May 2015.
order to enable students “to reflect on the ethical challenges that you might face as a lawyer in practice”. An independent evaluation shows that it aims to address, in a thoroughly academic way, the issues raised by Carnegie’s third apprenticeship: “City’s legal ethics course is oriented towards engaging thought-provoking discussion about values, and encourages students to reflect on how their own values will be expressed, tested and developed in legal practice.” If it is possible to achieve this in the constraints of an intensive one-year course which also addresses all the Foundations of Legal Knowledge, this can clearly be achieved in the three years of an undergraduate degree.

AN INTEGRATIVE FUNCTION FOR PROFESSIONAL ETHICS

The Carnegie Report notes that the three apprenticeships they identify tend to be in different hands: “Yet within the professional school, each of these aspects of the whole ensemble tends to be the province of different personnel, who often understand their function differently and may be guided by different, even conflicting goals.” This tendency is exacerbated if professional ethics is placed in one of a number of discrete subjects in a degree course. The traditional model of legal education tends to operate in this way. As Jon Harman observed:

One of the problems with language learning is the way it is taught, very linear and strangely scaffolded. I see similar parallels with legal education in how the foundations are taught, seldom with the relational conceptual elements. I once explained to John Flood that I saw the teaching of legal education akin to teaching the human anatomy without explaining the interconnecting relationships - this week the foot, next week the heart and so forth.

Similar observations have been made about this traditional model in more academic publications. Richard Johnstone describes it as: “Repetitive, incoherent between years and without planned incremental development, and narrowly focused on doctrine rather than skills, theory, values or attitudes . . .”. Earlier, Mary Keyes and Richard Johnstone had identified more related characteristics of the traditional model:

Students are taught the same type of material – a detailed analysis of common law rules – and are given the same kind of assessment – examinations testing mastery of the legal rules and their application to hypothetical problems – semester after semester, in much the same way . . . The only thing that changes between subjects and between semesters in the student’s progression through the degree is the substantive rules which forms the content of the subjects.

Today this rarely represents the totality of a law student’s undergraduate experience. However, in spite of the existence of admirable exceptions, I suggest that most of us will recognise that many of the modules studied by our students share these

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18 City Law School course description at <http://www.city.ac.uk/courses/postgraduate/law#course-detail=1> accessed 7 October 2014.
20 Sullivan and others (n 13) at 27.
21 John Harman, post on Basecamp Legal Education Hub, 19/12/2013. This is a discussion forum for those interested in legal education at <https://basecamp.com> accessed 7 October 2014.
characteristics. This is stultifying. It tends towards teacher-centred module design leading to passive learning by the student whereas modern learning theory consistently stresses the centrality of student learning in course design. “Learning takes place through the active behaviour of the student; it is what [s]he does that [s]he learns, not what the teacher does.”

Johnstone’s proposal to address this dilemma is a “whole of curriculum design”. As he says:

A good law curriculum also needs to be congruent, integrating the teaching of skills, doctrine, theory and ethics and values, and coordinating the curriculum so that students can develop their knowledge, skills and values progressively or incrementally. In other words, the relationship between subjects in the curriculum needs to be congruent – both across the curriculum and through the curriculum.

Johnstone gives two examples of law degrees designed in this way. The first is at the University of Technology Sydney, whose curriculum identifies the attributes the degree seeks to encourage in students and maps them across the stages of the degree. The figure below distinguishes intellectual, professional and personal attributes which to a degree mirror the three apprenticeships identified in the Carnegie Report. You can see how, for example, ethics is mapped across the three years of the programme, with specific responsibility for it being accepted in a number of different modules. This enables both a progressive treatment of students’ learning and an enhancement of those modules in which it is addressed to lessen the extent to which they are as repetitive as in the traditional model (see Fig. 1).

His second example is at Griffith Law School. Here, the same approach was further developed by identifying a series of vertical subjects which were incorporated into a vertical curriculum. This requires students, in each vertical subject:

1. in the early years of the undergraduate program to engage with the basic principles governing its subject matter and skills;
2. in later years to engage with more advanced principles and skills, and the relationship between these principles and skills and other principles and skills;
3. at all stages of the program to use and practice the principles; and
4. at all stages to undertake assessment tasks in relation to the skill and/or subject matter.

Vertical subjects include skills such as group work, and concepts such as legal ethics. The key concept is to identify points at each stage in the curriculum where each may be addressed in a way which allows for coherence and progression. Michael Robertson, writing at the planning stage of the Griffith vertical curriculum, explains:

The vertical subject is a continuing one that would progress throughout the programme in a carefully structured way. It would intersect with and reside within various courses in each semester or year of the programme. The levels of understanding contained in ethics learning objectives would increase in complexity from one host subject to the next. Points of co-existence with other subject areas would be determined by the extent to which practice in those substantive areas unavoidably implicated enquiries about both the role of the lawyer and ethical decision-making in particular. Moreover, in each site in which the

24 Ralph W Tyler, Basic Principles of Curriculum and Instruction (University of Chicago Press, 1949) 63.
vertical subject co-existed with the traditional subject area, ethics learning objectives, teaching and assessment within the host subject would need to be carefully aligned. 28

This requires a degree of control over the curriculum that may be hard to achieve in many law schools. However, it is clearly possible as the experience of law schools at Griffith and UTS show. Moreover, these curricula integrated a number of vertical subjects. My proposal is more modest: that legal ethics be identified as a vertical subject and planned into the curriculum in the way described by Robertson. It would thus meet many of the goals identified by Deborah Rhode in her seminal paper on ethics by the pervasive method 29 and avoid some of the problems she identifies in later writing. 30 Thus, rather than requiring teachers who are uninterested in or antagonistic towards introducing ethics into their classes it should be possible, in a willing faculty, to identify colleagues for whom this will be a worthwhile intellectual and teaching challenge. By providing a coherent, progressive development of students’ understanding we should avoid the risk that ethics be perceived as relatively unimportant by not justifying a subject or module of its own.

Different law schools may, of course, take divergent views as to what is appropriate at the undergraduate stage in terms of coverage and personal development. If the professional regulators do remove content requirements as they shift to an outcomes

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27 Presented in Keyes and Johnstone, ‘Changing Legal Education’ (n. 23) 17.
30 Deborah Rhode, Professional Responsibility: Ethics by the Pervasive Method (Little, Brown & Co 1994) at xxix.
approach there will be considerable scope for such divergence. It may be that one law school would regard their central interest to be to develop students’ understanding of the ways in which lawyers interacted with lay clients in different ways and in different circumstances. This might lead to an identification of at least one module in each year which allowed for this. Criminal law, Obligations and Commercial law spring to mind as a possible set which would be simple to introduce and integrate. Another law school might be more concerned to develop students’ intellectual understanding of the relationship between law and morality. This would be more challenging as a reasonably sophisticated understanding of basic philosophical concepts would be necessary before any exploration of the relationship was possible. If this were built up in selected modules over later years of the programme colleagues would have to devise learning activities which introduced students to progressively challenging concepts. This should be possible. A third law school might be interested in developing the moral character of their students. They would need to design learning experiences combined with reflection on how they were responding to challenges. Here, active use of Rest’s Four Component Model of moral development and the Defining Issues Test would be useful.

Although there is considerable agreement as to ethical actions, this is not true of the justificatory principles, nor of how to identify a hierarchy of ethical understanding. This makes it difficult to agree upon a progressive programme of ethical learning appropriate for a vertical curriculum. The experience of successful “whole of curriculum” designs referred to above suggests that this is not impossible and may indeed provide another vector for individual law schools to develop a distinctive approach.

In order to engage colleagues with varying views it is worth considering the different learning methods that might appeal to people with very different approaches to their students’ learning.

LEARNING METHODS

Student Law Clinic

The most profound learning comes from the experience of working with real or at least realistic cases. This provides a depth of insight into academic study which takes students’ understanding far beyond the skills they are also acquiring. The variety of approaches which may be used include the in-house advice clinic and placements in other organisations providing legal advice and representation including law firms and NGOs. This is not the place for a full discussion of clinical methods. It should, however, be realised that ethical dilemmas are inherent in working with real clients.

33 My thanks to the journal’s anonymous referees for this insight.
34 Johnstone, n 22.
35 For a critical analysis of how these methods may be used, see Jeff Giddings, Promoting Justice through Clinical Legal Education (Justice Press 2013). For proposals as to how they might specifically be used to address legal ethics, see Nigel Duncan and Susan Kay, ‘Addressing lawyer competence, ethics, and professionalism’ in Frank Bloch (ed) The Global Clinical Movement: Educating Lawyers for Social Justice (OUP 2010). For a recent development in Scotland see Donald Nicolson, ‘Calling, character and clinical legal education: a cradle to grave approach to inculcating a love for justice’ (2013) 16 (1) Legal Ethics 36.
Given this, the work at La Trobe in Melbourne in designing a student law clinic especially designed to develop students’ ethical understanding and reflection is worth exploring. They argue:

Clinical method . . . properly implemented, offers unrivalled opportunities for exploring and examining the ethical dimension of legal practice. The key to this . . . is the existence of spontaneity or “randomness” in the clinic environment. This provides a rich and realistic learning opportunity for both individual student practice and group discussion that shares their experiences and application of ethical decision-making strategies.37

It may be objected that the cost of clinical experience puts it beyond the reach of many law schools, especially if it is to be made available to all students. Donald Nicolson has presented low-cost ways of introducing an extra-curricular clinic which nevertheless informs students’ other learning.38 Some of these techniques, such as developing student responsibility for clinic management, may be transferable to the sort of curricular clinic that would meet my proposals for integration, and Nicolson explores these in his 2013 article.39

If real-client clinic is unavailable, much of the value of clinical learning may be achieved through the use of simulation.40 The key achievement of both real-client and simulated clinical approaches is that, instead of students being asked what they would do in a particular situation they are placed in that situation and have to do it, with opportunities of reflection to follow.41 This provides a much better basis for developing a learning spiral42 which can be incorporated into the integral role of legal ethics to meet Bruner’s ideal of a spiral curriculum.43 As a learning design tool it has the further advantage of being able to control students’ experience in ways unavailable in the real-client clinic.

Socio-Legal Studies
Most student learning is likely to take place in the classroom or on-line and with more conventional student activities. This is no obstacle to developing the insights of a critical understanding of the role of lawyers. Indeed, the development of the Law in Context movement44 is premised on this approach and has been enhanced by the development of socio-legal scholarship in the last 40 years. As John Baldwin and Gwynn Davies have argued:

[It] is principally through empirical study of the practice of law . . . and in studying the way legal processes and decisions impact upon the citizen, that the disciplines of sociology and, to a lesser degree, philosophy, psychology, and economics have entered into and enriched the study of law. This multidisciplinary research has, in turn, influenced many aspects of

37 Liz Curran, Judith Dickson and Mary-Anne Noone, ‘Pushing the boundaries or preserving the status quo? Designing clinical programmes to teach law students a deep understanding of ethical practice’ (2005) 8 Int J Clinical Legal Education 104. See also Nicolson ‘Calling, character and clinical legal education’ (n 35).
38 Donald Nicolson, ‘Learning in Justice: ethical education in an extra-curricular law clinic,’ in Michael Robertson, Lillian Corbin, Kieran Tranter, Francesca Bartlett (eds) The Ethics Project in Legal Education (Routledge 2010) and Nicolson ‘Calling, character and clinical legal education’ (n 35).
39 Nicolson (n 35).
44 William Twining, Law in Context: Enlarging a Discipline (Oxford University Press 1997).
legal practice... Even the rules and procedures of the law, which can seem arcane and specialist, reflect this influence.\(^{45}\)

This analytical approach is key to a critical understanding of the values of law and of the role of lawyers in relation to those values. As such it properly lies at the heart of any critical liberal education as well as one which is to meet the requirements of the LETR. One objection should be addressed. Amongst the research findings reported by the LETR is the view of practitioners placing socio-legal studies towards the bottom of a ranking of legal subjects in the minds of practitioners.\(^{46}\) However, it should not be concluded therefore that it is in fact undervalued by practitioners, for there is a methodological flaw here. “Socio-legal studies” is included in a list of knowledge items such as “contract law” and “tort law” into which it simply does not fit. It is a research and learning approach, not a subject. It is no wonder that the practitioners consulted did not know where to place it. It is worth noticing that “professional ethics” appears in one of the two top-ranked positions in each category of practitioners, ahead of the Foundations of Legal Knowledge and other conventional subjects. This, therefore, is not evidence that practitioners do not value socio-legal studies and good arguments are made for their relevance to meeting the requirements of a liberal legal education in the context of the LETR Report by Jessica Guth and Chris Ashford.\(^{47}\) What is more, Andrew Sanders makes a powerful argument that without a socio-legal approach there is a risk that students will only learn about law for the rich and never understand how it impacts upon most members of society.\(^{48}\)

The vibrancy of socio-legal research and its appeal to students also makes it an ideal way of developing research-led teaching. This is not simply to develop thoughtful critical future lawyers but lies at the heart of the liberal project of higher education. As the former Archbishop of Canterbury recently argued:

> ...helping to shape a culture in which it is harder to treat the public as fools, harder to exploit prejudice or fear, and easier to conduct constructive argument in public without the melodrama of extreme polarisation. “The truth will make you free” is a text that as a religious believer I care about deeply. Its application to the life of the university in the wider society is not the least important aspect of what it means.\(^{49}\)

For students of law a critical understanding of the values of law and legal practice is key to this.

**Moral Philosophy**

My proposal for integration of ethics across the undergraduate curriculum will only work if a reasonable proportion of faculty colleagues are supportive. Not all will be keen to be involved in clinical developments, other approaches to active learning or socio-legal approaches. For colleagues whose preference is for theoretical teaching the ethical issues raised by the LETR report may be approached through moral philosophy, either in its purer form or as mediated through the jurisprudence literature.


\(^{46}\) Webb J and others, (n 6) Table 2.4, 34.


\(^{49}\) Rowan Williams, ‘No fooling about impact’, Times Higher Education, April 17, 2014.
Jurisprudence was once seen as core to the undergraduate study of law, with all but two of the 1965 law schools making it compulsory.\(^{50}\) By 1974 this had dropped to 18 out of 25 university law degrees\(^{51}\) and 12 out of 20 polytechnics.\(^{52}\) By 2004 only 34\% of law schools had a compulsory jurisprudence/legal theory module with a further 14\% incorporating it into a compulsory module.\(^{53}\) Moreover, it is only ranked 13th amongst “knowledge subjects” by practitioners.\(^{54}\) However, I would argue that whether as a discrete module or as an intellectual approach to be applied at more than one point during the degree, it has an important role in ensuring the intellectual challenge and critical edge that a liberal legal education should provide.

Martha Nussbaum proposed a variety of approaches to introducing philosophy into legal education some 20 years ago and I can do no better than present her concluding justification for the proposal:

> This world is a philosophical world, whether we like it or not, a world in which philosophical ideas and conceptions are understood or misunderstood, for better or for worse, and action is taken as a result of these understandings. At the same time, for all her weird detachment, and indeed perhaps in part because of that detachment, the philosopher is a contributor to the world. Her thoughts and arguments have pertinence to the world and the potential for leading it to understand itself more fully and clearly. I think that these facts give us some powerful reasons to incorporate the teaching of philosophy into legal education.\(^{55}\)

William Twining has recently presented as one of his four priorities in responding to the LETR: ‘Design modules, courses and materials on ethics and values suitable for each stage of LET.’\(^{56}\) As to teaching jurisprudence he said:

> I teach jurisprudence and throughout my career I have thought that I was dealing with values, ethics and normative questions. Questions about personal and professional integrity are philosophical questions: what is ethical integrity for a lawyer presupposes a view on what it means to have individual integrity as a person. . . . I readily admit that in my teaching of jurisprudence I could have focused more on issues of individual integrity in relation to lawyering and judging. I did once try to use Plato’s Gorgias as a set text, but I could have done much more. Personally, I would have no difficulty in adjusting a jurisprudence course to accommodate such issues. There is a rich treasury of dilemmas and examples, and Dworkin’s Justice for Hedgehogs\(^{57}\) and Kronman’s The Lost Lawyer,\(^{58}\) among others, could serve as admirable and demanding texts. So I see opportunities rather than a threat to making explicit and relevant basic issues about values and ethics in academic curricula - nor do I see any objection to introducing serious philosophical debates into the later stages.\(^{59}\)

There are many starting points and many routes through this rich treasury and many of our students would benefit.

\(^{50}\) John Wilson, ‘A survey of legal education in the United Kingdom’ [1966] JSPTL 1, 44.


\(^{52}\) Ibid 283.


\(^{54}\) Webb J and others (n. 46). This finding is, to a lesser degree susceptible to the same criticism as that of the inclusion of ‘socio-legal studies’ as a subject.


\(^{57}\) Ronald Dworkin, Justice for Hedgehogs (Belknap Press 2011).


\(^{59}\) William Twining, (n. 56) 102.
CONCLUSION

UK higher legal education faces a number of challenges in a world where each law school may wish to develop a distinctive offering. However, the circumstances require sophisticated considerations. Students may join law degrees with aspirations to join the traditional legal professions, but the proportion who maintain that hope declines throughout the degree course. Many will end up in para-legal careers, others doing legal work in commercial or administrative organisations, yet others working in other ways in the economy. It will be hard for a law school to meet all these aspirations with one degree programme. Moreover, the emphasis on “employability” should not be taken to mean that a narrowly vocational approach will be attractive to potential employers. Richard Moorhead explains the experience of Washington & Lee Law School in the USA which found their students’ employability in jobs which required legal qualification declining when they introduced a new curriculum designed to focus on lawyers’ skills. The comparison needs to be made with care. The US JD is (subject to the relevant State Bar exam) the point of qualification, whereas in the UK the professional and apprenticeship stages follow. The fees US law students pay for their JD far exceed those paid by UK students. However, it may be a warning against undergraduate degrees introducing practice skills for their own sake. Experiential and contextual learning should be introduced to develop the person, not to meet narrow vocational objectives.

It is probably the case that the elite sectors of the legal profession, especially when faced with hundreds of well-qualified applicants, see university law school status as a proxy for quality which avoids the need to consider something as complicated and hard to define as a particular approach to learning. Recent research at the Bar shows a strong preference for graduates of high status law schools. 71% of all barristers went to Oxbridge or a Russell Group university. This figure went up to 75% in respect of those called to the Bar under the age of 30. Non-elite law schools will have an uphill struggle to challenge this tendency but their best chance is by developing well-educated critical individuals who have a deep understanding of the system in which they are interested, whether as practitioner or citizen. We can provide opportunities for our students to gain experience through their studies which Gandhi, an alumnus of my own law school, could only obtain through the experience of practice.

My joy was boundless. I had learnt the true practice of law. I had learnt to find the better side of human nature and to enter men’s hearts. I realized the true function of a lawyer was to unite parties riven asunder. The lesson was so indelibly burnt into me, that a large part of my time during the twenty years of my practice as a lawyer was occupied in bringing about private compromises of hundreds of cases. I lost nothing thereby – not even money, certainly not my soul.

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GLOBAL CHALLENGES FOR LEGAL EDUCATION: COMPEETING FOR THE WORLD'S LAW STUDENTS

JOHN FLOOD*

INTRODUCTION

In all parts of the world, legal education is under critical scrutiny as never before. In the US it is facing meltdown, in the UK it is under extensive review by the regulators, and elsewhere there are sustained moves to overthrow conventional wisdom and adopt more-practice-oriented modes of legal education in the face of declining job markets in law. Yet new law schools are opening in many countries such as France, India, China, Australia, and more. We can add to this the growing transnational legal education sector, which is pushing the online and offshore agendas for legal education providers. What is causing legal education to be so enmeshed in contradiction?

In this article I suggest that legal education has always occupied an uneasy position between the theoretical and the vocational. It is redolent in some ways of Twining’s personification of legal education as Pericles versus the plumber.1 While this posits the extremes, the situation is more complex and subtle than that. The pressures on legal education are both endogenous and exogenous. On the one hand the academy is trying to justify a model that it has used for a number of years - indeed since the 19th century - and is comfortable with, while on the other the economy is exerting huge pressures on legal services such that law jobs are no longer as plentiful as they were.2 Yet in many countries law is still considered an elite occupation carrying status and offering possibilities of wealth.3

Various reports and analyses have suggested change. Among them are the Carnegie report,4 the Legal Education and Training Review report,5 and the American Bar Association Section on Legal Education Task Force report.6 None has yet provided a solution that commands wide enthusiasm from either the academy or the profession. The question “what is the purpose of legal education?” remains unanswered. For many in UK style regimes legal education is presumed to have elements of liberal education within it.7 Proponents of US style legal education view legal education as more practice-oriented.8 There is, however, a substantial portion of the world that has a

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2 For example, Yves Dezalay and Bryant Garth, The Internationalization of Palace Wars: Lawyers, Economists, and the Contest to Transform Latin American States (University of Chicago Press 2002).


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more pragmatic attitude to legal education, combining elements of the UK and US approaches with local demands. For example, many countries in southeast Asia and elsewhere are grappling with the form and meaning of legal education: should it include clinical legal education, ethics, or how doctrinal should it be? Will it prepare sufficient numbers for the legal profession and market?\textsuperscript{9} One Indonesian viewpoint says students are alienated by “Eurocentric” methods of lecturing and are bored because course materials are foreign to them difficult to relate to.\textsuperscript{10} Malaysian academics have decried the oversupply of black letter law at the expense of experiential learning.\textsuperscript{11} There is a growing body of scholarship that recognizes clinical legal education is sought after by students as a way of obtaining lawyers’ skills and escaping the doctrinal grip on law.\textsuperscript{12} But as Rosenbaum records, “Change can be impeded by layers of bureaucratic oversight and lack of local autonomy, even at the level of law school departments or individual teaching staff”.\textsuperscript{13} Research in other fields, such as computing, have found that transnational education (TNE) benefits from, for example, project-based, group work even in the face of perceived cultural barriers.\textsuperscript{14} However, it is accepted that research in this area is sparse and ethnocentrism remains a constant threat.\textsuperscript{15} There are hybrids in between and all agree that one significant outcome of legal education is the production of lawyers.

There are three main challenges for legal education: globalization, technology, and regulation.\textsuperscript{16} The academy is only beginning to get to grips with these and although the profession is slightly more advanced it finds itself resisting some changes, especially on the regulatory front. The one apparent effect of these changes and challenges is that they are promoting the reprofessionalization and deprofessionalization of law and its attendant careers. The result is that the 21st century lawyer is confused and in a state of some anxiety and seems ill prepared for the future.

GLOBALIZATION

Globalization impinges on legal education in four ways. One is the content of legal education is becoming increasingly international, transnational and global. Although it is worth noting that the Legal Education and Training Review report made no mention

\textsuperscript{9} Tan Cheng Han, ‘Challenges to Legal Education in a Changing Landscape—A Singapore Perspective’ 7 Singapore Journal of International and Comparative Law 545 (2003).


\textsuperscript{13} Rosenbaum, n 10 above 23.


\textsuperscript{15} Frances Clem, ‘Culture and Motivation in Online Learning Environments’ <http://files.eric.ed.gov/fulltext/ED485100.pdf>.

of globalization - its need or impact - focusing entirely on UK legal education.\textsuperscript{17} The second is that students are increasingly aware of opportunities for engaging in overseas education through vehicles like transnational education where providers move institutions and programmes into host countries and law is a key player in this mode.\textsuperscript{18} This is a complex field because of the lack of reliable data and regulatory complications. According to the British Council some countries and regions such as Malaysia and Hong Kong have facilitative regulatory frameworks whereas others including Indonesia, Nepal and Sri Lanka do not.\textsuperscript{19}

The third is students are more mobile and seek to study outside their home jurisdictions. While we have no specific statistics for law students, we have figures for all students and within them law is one of the key subjects. According to the OECD the numbers of students studying outside their home countries has more than tripled in the last two decades, from 1.3 million in 1990 to 4.3 million in 2011.\textsuperscript{20} The largest numbers of foreign students came from China, India and Korea with Asian students representing 53\% of foreign students engaged in tertiary education. The OECD says that its member states accommodated 77\% of all students registered outside their home states. If we examine their destinations, we see they reflect geopolitical realities combined with a desire to learn English. The US has 17\%, the UK has 13\%, and Australia, Germany, and France have six per cent each. Over 30\% come to study in social sciences, business and law. The traditional recipients of international education cannot be complacent, however, as newcomers are pushing forward. They include Canada,\textsuperscript{21} Japan, Russia, and Spain. In addition, some countries are actively seeking students by balancing their higher tuition fees with more relaxed labour market opportunities. What these figures do show, in combination with the British Council findings, is that overseas students find either topping up a local diploma or gaining a double degree is perceived beneficial along with the expectation of improving their English language skills. The esteem of TNE partners and sending countries is vital to the success of attracting overseas students.

In addition to students’ mobility we have to add the mobility of institutions that are establishing branch campuses in other countries. While this has customarily been a western export to other parts of the world, especially China and Asia, it is changing. Countries that were traditionally recipients are now becoming exporters of education in competition with the west. For example, China has exported branch campuses to Laos, Malaysia, Italy, and Singapore.\textsuperscript{22} According to the \textit{Chronicle of Higher Education} “at least 14 countries outside of Europe, North America, and Australia have exported a total of 38 branch campuses, with at least six more campuses in development”.\textsuperscript{23}

The fourth impact is the change in legal practice and its globalization. This is especially marked in the growth of the large law firm during the late 20th century into the present. We know that in the first half of the 20th century law firms were small

\textsuperscript{17} Yet the LETR report discusses the global nature of the legal services market. See chapters 3 and 4 at n 4 above.
\textsuperscript{19} Id at 6.
\textsuperscript{20} See \textit{<http://www.oecd-ilibrary.org/sites/eag_highlights-2013-en/02/05/index.html?contentType=/ns/Chapter,/ns/Statistical Publication&itemId=/content/chapter/eag_highlights-2013–12-en&containerItemId=/content/serial/2076264x&accessItemIds=&mimeType=text/html>} accessed 17 January 2014.
\textsuperscript{21} Canada is vigorous in its methods of attracting good undergraduate and graduate students and as a result is competing well against the US and the UK. See Anita Gopal, ‘Canada’s Immigration Policies to Attract International Students’ \textit{International Higher Education} No. 75, 19–21.
\textsuperscript{23} Ibid.
organizations with staff in the low hundreds at their biggest. In the 1970s, with restrictions lifted on partner numbers, law firms grew exponentially. 24 Besides growing domestically law firms sought to expand overseas. Asia became the crucial market with Japan and China as the main markets. When the Iron Curtain collapsed Russia and Eastern Europe drew in many of the law firms from the UK and US. All of this was driven by the rise in international trade and the developments of capital markets. The Washington Consensus became the standard development model and law firms and lawyers did their best to help deliver the neoliberal economic message. 25

Growth in law firms meant that the size of the biggest firms came to be measured in thousands rather than hundreds. Law firms were complex institutions that, despite their size, lacked sophisticated management and leadership. 26 They relied on traditional methods of governance, mainly partnership or patriarchal authority, which limited their development compared to the accounting and consulting firms. Even with moves towards more managerial forms of authority law firms remain small compared to other professional service firms. This necessarily placed a restriction on their ability to recruit large numbers of law graduates. And compared to other professional service firms law firms are monocultural in that there is little diversification from their core service.

The large law firm is an agent of globalization. Although at first blush the large law firm may seem of little relevance to the global education market, their impact cannot be overlooked. They are highly visible and desirable if unattainable entities for many law students around the world. I will return to this below. Since much of global work revolves around the banks and capital markets the large law firms have conveyed these institutions into the world through the agreements they draft. In this respect it is not difficult to overestimate the importance of New York State law and English law as these are the basic normative systems that drive the work of the two main global capital markets: London and New York. 27 Globalization in the legal sphere is represented by the export of these two systems by those trained in them. Much of this path dependency reflects mistrust in other systems as well as knowledge of English and New York law. This is made visible in the rise of the international arbitration system as one of the crucial - if not the crucial - forms of dispute resolution. 28 Keen competition among countries to host arbitration centres and establish arbitration-friendly legislative frameworks enhances this. Even the alternative state-based systems appear to adopt the user-friendly style of arbitration. The Commercial Court in London has always been attractive to foreign parties, as evidenced by the number of Russian and CES “oligarch” cases within its docket. 29

The big law firm has an over-reaching impact on legal education. Big law firms recruit large numbers of graduates and engage in a wide range of recruiting activities, including “milk rounds” at universities, social events for students, and internships. This stereotype of the large law firm would be recognized in most countries, but especially in the UK, the US, and Australia. Apart from maverick sole practitioners, e.g. Perry

Mason, Rake, or Rumpole, successful lawyers are usually represented on television in large, corporate law firms, e.g. *The Good Wife*, *Boston Legal*, or *Ally McBeal*. The added allure of large law firms is their sponsorship for taking vocational courses and bar exams, but most of all it is their remuneration system which is generous to incoming lawyers.

The approach of the big law firms to education differs in the US and the UK/Europe. For US law firms the only entry qualification is an American Bar Association accredited law degree followed by success in the appropriate state bar examination. The ABA tightly regulates legal education demanding 58,000 minutes of instruction for the award of the Juris Doctor degree. The JD is a professional degree that generally follows college education in another discipline. The typical route is four years college and three years law school. Disregarding outliers, such as Wisconsin which has diploma privilege and therefore does not require a bar exam pass from its graduates, this monocentric path into law practice is rigid.

Within the UK and parts of continental Europe the route into practice is more fluid or polycentric. For UK students big law firms prefer a student to have either succeeded well in a law degree from a top-ranking university or to have gained a degree in another discipline and then taken a Graduate Diploma in Law (GDL), which typically takes one year to gain. Both of these paths are followed by a Legal Practice Course (LPC), a vocational course that imparts practical skills which takes anywhere between seven and twelve months. UK students recruited into firms then undertake a two-year training contract that gives them opportunities to experience different departments and law within the firm. At this point they become qualified lawyers (solicitors).

A major distinction between big law firms and smaller ones is that big law firms invest heavily in education. Through their recruiting programmes they select their entrants early, usually during the first degree whether law or otherwise. Law students are then funded through their LPC and non-law students are funded through the GDL and LPC. This is enhanced by the prevalence of bespoke LPC courses now run for the benefit of big law firms by some law colleges—especially the University of Law and BPP. These are run on basis that students become familiarized with the firm’s documentation. One senior telecommunications lawyer from Amsterdam at a major City law firm maintained that it mattered little where a lawyer was educated as the prime function of a firm lawyer was to be able to use the firm’s documents: these were the knowledge base of the firm.

Faulconbridge, Cook and Muzio have shown how big international law firms are increasingly involved in education, continuing professional development and knowledge transfer (with clients). The main point here is that global law firms are using education

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33 There is much variation around the world. For example, Malaysia has reduced the number of UK recognised law degrees to 30, which then entitle the graduate to take the Malaysian legal profession’s CLP examination to become an advocate and solicitor there. See http://www.lpqb.org.my/index.php?option=com_content&view=frontpage&Itemid=1.

34 See Flood at n 27 above.

as a resource to intensify and deepen conceptions of professionalism within the firm. It guarantees quality and competency and also ensures everyone hues to common ethical standards. Law firms’ internal regulatory systems mirror and complement the external regulatory structures. In part, this to avoid the kinds of problems that ensued with the collapse of Arthur Andersen following the Enron debacle. Large global law firms with over 4,000 lawyers and many more other kinds of staff are unwieldy and complex organizations to manage, so the role of education, and knowledge management, in inculcating firm-wide mores is vital. These kinds of law firms cross cultures, values, and other social systems that have to be brought into harmony with each other. For example, the use of guanxi may be acceptable in some cultures but in others it could be viewed as antithetical to arms-length dealing.

Globalization and the large law firm go together. Commercial clients are constantly seeking new markets and many countries hitherto “off the radar” are now in their purview. The desire to exploit markets in energy, minerals, mining and telecoms to name a few show how fringe markets are becoming increasingly important, e.g. parts of Africa. There are a number of gateways into these markets - government, agencies, NGOs - but lawyers are vital in easing transitions into these countries. They understand local legal communities, financial and other regulations, and dispute resolution systems. Law firms and lawyers are becoming part of the “supply chain” of global legal business. Despite the fact that in most countries the small law firm sector predominates, it is in greater and more continuous contact with global legal sector than before. Commercial law and its providers are a growing part of developing countries’ legal economies and will continue to be as broadband penetration grows.

The large law firm in combination with globalization is a symbol of the corporate reach around the world, which is being mirrored in the provision and location, but not in curriculum design or content of higher education. As Lane and Kinser point out “countries like Malaysia and Korea are focused on placing universities in Economic Free Zones and foreign investment in education is seen as part of the innovation agenda” and even “Pakistan has announced its intention to build a ‘Knowledge City’”. The general view is that the production of lawyers is a good thing for the economic development of a country. This fits with students’ views on becoming a lawyer. Consider China where students have essentially three motivations for wanting to be a lawyer: lawyers are perceived to be wealthy; lawyers are perceived to be highly independent; and many young people become lawyers out of a sense of patriotism, to contribute to economic development. In the next section I discuss the role of technology as it impacts on legal education.

39 Fields such as immigration law, for example, show how multiculturalism is important. Language, culture, and the sending and host countries’ rules require knowledge at sophisticated levels.
40 Lane and Kinser, n 22 above.
41 Richard Komaiko and Beibei Que, Lawyers in Modern China 93 (Cambria Press 2009).
Technology

We recognize how the internet has altered our systems of thinking and working. It is also affecting our delivery of education, with MOOCs and other online ideas like memrise.com or Mozilla badges. Technology is altering the practice of law although lawyers are probably slower than other professionals to embrace its benefits. The key area where technology has created an impact on legal practice is where practice can be standardized and routinized. Much of legal work can be unbundled and be fitted to algorithms so that it is automated. For example, document review for complex and large litigation is now frequently performed, not by first year associates in New York at $160,000 a year, but by legally trained personnel in legal process outsourcers (LPO) in Mumbai or Cape Town at $30,000 a year. Increasing amounts of legal work such as risk analysis of contracts and patent renewals are being outsourced to LPOs because of the availability of technology and it is predicted that LPO work will move up the “value chain” as well as grow rapidly. Mari Sako speculates LPO work brings benefits to the host countries helping workers moving from low wage-low skilled jobs to high wage-high skilled jobs over time, as long as labour markets are flexible, and that countries can specialise in innovation in the form of the development of new goods, services and processes. In the case of TNE, the fact of increasing LPO work enlarges the market for legal services and offers graduates opportunities that go beyond the conventional legal profession. There are status issues in that LPO work can be perceived as less prestigious than law firm work. Yet as it ties more into consulting and business process outsourcing, its character gains in esteem.

Within law firms, however, technology is mainly used in facilitating document production. There are law firm companies that are exploiting this opportunity to create automated and simplified platforms for document and contract formation. Radiant Law, for example, has built systems to shorten the time it takes to produce contracts and to modify them during their lives. Epoq Legal provides systems for users under ‘white label’ conditions so that banks, insurance companies, and even law firms can offer simplified access to their services. Finally, we are seeing the development of some “intelligent” websites such as roadtrafficrepresentation.com that offer free diagnostic services to customers with the option to take premium services if needed.

Law firms have not yet understood how to make technology pay for them. Since many bill on hourly rates, procedures that reduce time can be seen as undermining their profit targets. Yet we see how Legal Hackathons are becoming more common as ways of providing solutions to legal problems for policy makers, and how events like

47 See <http://www.epoq.co.uk> accessed 3 January 2014.
Reinvent Law are introducing new ways of thinking about legal activities. All of these are sustained by technology.

Technology has not yet permeated legal education in a substantive way. Although virtual learning environments are in use, their role is simple and ephemeral. Some scholars, such as Paul Maharg at Australian National University, have created online experiential programmes but these are in the minority compared to subjects such as technology.  

A brief survey of legal MOOCs among the many thousands of courses available from providers such as Coursera and Udacity showed an increasing number of courses from around the world including the UK, the US, Canada, Switzerland, and China. Law is still largely taught with traditional techniques. Furthermore, MOOCs are orientated to home jurisdictions with little adaptation to local cultures because, by definition, they must have wide appeal.

Law faculty have not fully embraced the varieties of e-learning available to them nor have they been trained in their use. For the TNE market to remain competitive in the face of more private providers, law faculty will have to familiarise themselves more with the technology or providers will have to employ more media and IT support staff to help implement this development. It suggests that this would push up costs. For example, MIT’s OpenCourseWare (OCW) included in 2012 just over 2,000 courses of which 60 had video lectures. The annual cost of OCW is $3.5 million including publishing, licencing and technical support. According to MIT each course requires an average of 100 hours of effort to produce. While the MIT faculty devote 5–10 hours of their own time for each course, it would be impossible for them to produce OCW courses alone. In order to publish materials from 200 courses each year while minimizing impact on MIT faculty time, OCW maintains a publication staff of twelve people who work directly with the faculty to collect and compile course materials, ensure proper licensing for open sharing, and format materials for our site. We also employ two intellectual property staff and four production staff who support our publication team. In addition, OCW has five outreach and administrative staff who manage communications, media relations, outreach, program evaluation, and OCW’s sustainability.

With the furore that surrounded Susskind’s question, is it the end of lawyers?, little has been accomplished in the tech sphere. Indeed Susskind has argued for a new kind of legal professional, a hybrid who would be able to use technology productively and profitably in the legal services market. He draws on views of technology as replacing much of legal services along the lines sketched above: that which can be standardised can be done by computer with little human interaction. As computing power increases, following Moore’s Law, it will exceed the capacity of human brains’ processing power - the point of singularity predicted by Kurzweil. Examples such as IBM’s Watson

50 Paul Maharg, Transforming Legal Education: Learning and Teaching the Law in the Early Twenty-first Century (Ashgate 2007).
53 MITOpenCourseWare <http://ocw.mit.edu/donate/why-donate>.
winning the TV quiz programme, “Jeopardy”, exemplify this approach.57 The preoccupation with technology highlights the tension again of law and practice and the proper role of legal education in them. This is not to deny that technology will not have a profound effect on legal education: it has not occurred yet.58 However, there are some scholars who are thinking about educating digital lawyers and trying to discover what skills and knowledge they will need. Elements like legal research and dispute resolution will alter radically as they move away from text and orality into cyberspace.59 For example, JISC brought experts in digital learning together to consider the students’ world in 2020.60 Institutional technologies would be combined with the personal aspect. University facilities - at home and abroad - would provide full connectivity but students would also be responsible for their own capabilities outside the institution. Nevertheless increased connectivity would mean more collaboration and teamwork and constant peer-to-peer communication. The boundaries between physical plant and cyberspace would be highly permeable. Because of the mix of face to face interaction and that over the net and the acceleration in response times, learning could accommodate more skills and project-based ventures with lectures and classes being much more interactive. Since the relationship between students and institutions would be more contractual, the building of loyalty would be paramount and the degree to which personal attention was provided would be crucial to that end. The demands on educational institutions, but especially TNE institutions, are pronounced and even complex. There is no holy grail in switching entirely to online distribution of materials: the right mix of personal and online would have to be determined, which would vary from market to market.

SHIFTS IN REGULATION IN LAW AND EDUCATION

The regulatory shifts in legal markets in the 21st century are proving tendentious times for legal education. Gone are the certainties of traditional professional boundaries and groups and in come new occupations such as legal apprentice or legal project manager. Australia and England and Wales are the laboratories for this experimentation and we learn most from them. As new legal occupations gain ground, along with new modes of technological delivery, their popularity might rise and hence their training needs will increase, potentially creating new opportunities for legal education and TNE. Australia introduced incorporated legal practices in the early 2000s and in 2007 Slater & Gordon of Melbourne became the first law firm to float on the stock exchange. The year 2007 was an explosive year for legal markets because it was when the Legal Services Act was passed by the British parliament after much debate and controversy. Both countries pushed similar agendas. Self-regulation was to give way to external regulation and the organizational categories that could provide legal services would expand to include Alternative Business Structures (ABS). There are now around 400 ABS in England and Wales providing different services but mostly still requiring

59 Oliver Goodenough and Marc Lauritsen (eds) Educating the Digital Lawyer (LexisNexis 2012).
60 JISC, The student digital experience in 2020—some ideas from staff and students, February 19, 2014.
lawyers to work for them. Having said that the market for paralegals is growing and is prompted in part by the emergence of ABS and the financial tensions within the market. Three kinds have emerged as the dominant forms: Chartered Legal Executives, legal apprenticeships, and ordinary paralegals.61

For the extant legal professions the LSA 2007 forced them to sever their professional bodies into two, one as representative and the other as regulator. The regulator was to be at arms’ length from the representative. Two shifts occurred in regulation to entity regulation and outcomes focused regulation. Along with external regulation of services the regulators investigated the state of legal education in England and Wales setting up the Legal Education and Training Review for this purpose. Its sponsors are still discussing the resulting report although the Solicitors Regulation Authority has begun to indicate it might want to reimagine the way legal education is regulated.62

Despite 400 ABS not much has changed in the delivery of legal services, except for online practice. For example, document assembly, e.g. online wills, is growing in scope and the use of online divorce services has increased because they are perceived quicker and cheaper than lawyers’ services.63 And to date, the introduction of ABS has not had much impact on legal education. However, Cooperative Legal Services runs an academy to train future employees with Manchester Metropolitan University but this remains an outlier in the provision of legal education.

The regulatory push from Australia and the UK seems to have spilled over into other jurisdictions. Countries such as Canada, Singapore and Hong Kong are considering the introduction of new legal enterprises. The efforts of the Troika - the IMF, the European Central Bank, and the European Union - have demanded changes in legal services provision as part of debtor relief to such countries as Ireland,64 Greece and Portugal. Despite these initiatives there is considerable opposition to regulatory change in Europe.65

Despite the push for regulatory liberalization in significant parts of the world, others are trying to resist this move. Brazil, India and others are less enamoured of an open legal world. This closing of the gates is met by reorganizing admission requirements, changing quality assurance schemes for overseas providers, or making it difficult for foreign lawyers to practise and establish. Malaysia is one example of a country that has significantly altered its university recognition procedures. It is indicative of the piecemeal approach to cross-border quality assurance, which as yet does not exist. To begin there is “no globally shared definition of quality... [which is] heightened as institutions and programs increasingly cross borders”.66 Kinser and Lane argue the difficulty is not eased by calling for stricter standards as this means the complexity of standards would become more bewildering. Privatization of higher education places greater burdens on quality assurance as it is primarily concerned with student numbers.

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61 See how CILEx has attempted to map the paralegal landscape as a result of LETR. ‘CILEX launches enquiry into paralegals’ <http://www.legalfutures.co.uk/latest-news/cilex-launches-enquiry-paralegals>; ‘Send in the paras’ <http://www.legalfutures.co.uk/blog/send-paras> accessed 1 July 2014.
63 Some online divorce services have Trustpilot reviews. See <http://www.trustpilot.co.uk/review/www.divorce-online.co.uk>.
and fees, whereas “quality-assurance agencies are intended to support the public good by ensuring legitimate, reliable, and sustainable institutions of higher education.”

Yet TNE is succeeding. Roberts and Stanfield allude to one index where there are “over 200 international branch campuses currently in operation around the world [and] only a few have bit [sic] the dust”. It is likely that the mix of regulatory regimes allied with professional accreditation and admission to legal professions within individual countries will remain complicated and complex for some time to come. As legal professions engage globally, as technology aids convergence of knowledge, and even as regulation changes around the world, there will be moves on the part of governments to respond positively to see their legal professions participate in the global economy. Against that will be resistance from local legal professions (e.g. India) to foreign incursion that will spill over into TNE.

THE EFFECT ON LEGAL EDUCATION

It might be thought from what I have said that legal education is stuck in the doldrums and is not changing. This is not so. We are currently witnessing a global struggle over legal education. It is similar to the one taking place in the teaching of English as a second language where British English and American English are the two main contestants. Through the export of British culture and economy via the British Empire, English law and its education were firmly based in many countries. The Commonwealth countries adhered to British legal education until the late 20th and early 21st centuries when some adopted American JD-type degrees. The fact that the two forms of legal education are still paramount reflects the situation with respect to American and English law in international trade.

The prototypical LLB degree as a precursor to further vocational training has transformed into a second US JD type degree that incorporates forms of practical training within it. It is difficult to determine why this change has occurred but we can see what the results are in some countries. Take, for example, Japan which has persistently kept the numbers of law students passing the Bar examination low and so keeping the legal profession small. Since introducing a JD style programme, the numbers have increased and there are more lawyers, which ought to aid access to justice.

It is worth mentioning three other significant countries that have made this shift: Australia, China, and India. We can argue that economic ties for these countries have veered towards the US and away from the UK with the result that American legal culture is beginning to dominate globally. The US-Australia bilateral free trade agreement included provisions on the mutual acceptability of each other’s legal qualifications. China has received more legal knowledge transfer by way of US law

67 Ibid. But also see Kinser and Lane, ‘Solving the Regulatory Challenges of International Campuses’ The Chronicle of Higher Education < http://chronicle.com/blogs/worldwise/solving-the-regulatory-challenges-of-international-campuses/32515>, where they discuss the reforms developed by the Commission on the Regulation of Postsecondary Distance Education which attempt to tie together ideas of home and host accountability.


firms and export of Chinese students to the US than from any other country. One exemplar of this is the establishment of the Peking University School of Transnational Law, which teaches both a US JD programme and the Chinese JM degree, but the school has yet to be accredited by the American Bar Association.71 India, like China, has many law colleges of which few are considered of appropriate standard. To overcome this India has introduced national law schools to educate a cadre of elite lawyers. This has incorporated a move towards US legal education principles as well in an expectation of producing graduates ready to practise on taking the new India Bar examination. Again we can see this exemplified in new institutions such as the Jindal Global Law School which has followed American styles of legal education.72

It is possible to put forward an explanation for this move in educational outlook and pedagogy. The fundamental philosophical outlooks of American and British legal education are quite distinct. They are underpinned by the distinction between science and humanities. During the late 19th century the US started to change legal education. The dean of Harvard Law School, Christopher Columbus Langdell, introduced ideas from Chemistry—its laboratory—which was transformed into the Socratic case method dialogue of the US law school classroom as epitomised by Professor Kingsfield in The Paperchase. This in conjunction with a system of grades assessed in class and in examinations meant prospective employers could select the best candidates by merit instead of relying on ascriptive methods like family connections.73 Editorial positions on law review and judicial clerkships bolstered the credentialing power of the law school.74 With changes in pedagogical styles over the years the case method has been remarkably resilient. Even though it has been criticised by many law professors it endures.75 There has been change, however, as movements such as the Legal Realists introduced forms of social science analysis into law. The apotheosis of this movement is the rise of law and economics as one of the dominant forms of analysis in the law school, especially through the agency of Judge Richard Posner.76 Many areas of law have accepted economic analysis as the norm including antitrust, contracts, torts, and securities law. The scientific approach to law is deeply embedded in the American academy.

English legal education, although around in some academic institutions, depended more on a craft approach through apprenticeships and pupillages.77 The big law firm was not permitted until the late 1960s so the production of law graduates was low in number. English legal education relied on traditional methods of teaching, the exegetical lecture and the inquisitorial tutorial. There were no cases and materials books rather textbooks were the norm. From an English perspective law fell into the humanities camp of C.P. Snow’s two cultures.78 Its research base was thin and it was

72 These changes are reinforced by the numbers within the OECD statistics I introduced at the start of this paper. The US is still the dominant power in the global educational sphere. It receives more foreign students than any other country.
74 Robert Stevens, Law School: Legal Education in America from the 1850s to the 1980s (University of North Carolina Press 1987).
closely aligned with philosophy. And today as English law has firmly embedded itself in the academy, it hews more towards critique than scientific analysis and law and economics remains a minority interest.

The effect of these two approaches is to raise the impression that American legal education prepares students for practice. Whether it does or not is another question. On the other hand English legal education appears more theoretical and detached from practice. This is not to say one is better than the other, but that there are significant differences which policy makers around the world have utilised in their choice of educational form.

In the last few years both systems have been under intense scrutiny. For the US this has resulted from the crisis in legal education where law school applications have dropped substantially to the detriment of the law school. Henderson and other analysts have shown the bimodal job market means graduates from law schools below the elite group are obtaining jobs at much lower salaries than the big law firms pay. Not only are they greatly dissatisfied, they are hugely in debt, as much as $200,000. Law schools to fund increasingly expensive faculty rely on the scheme of federally funded loans for law students. The US News and World Report law school rankings, however, prevent schools from raising their applicant numbers - indeed they force them to lower numbers - because LSAT scores heavily influence the rankings. The American Bar Association Task Force on Legal Education has produced some mild reforms but nothing that will compel change. It failed to deal with the core problem of the three year curriculum and its contested necessity. American legal education remains in crisis yet its dominion is still an extensive one when we examine global legal education.

English legal education is being examined because of the re-regulation of the legal services market and legal education falls under the remit of the Legal Services Act 2007. The examination has been conducted in a more rigorous way than in the US. The Legal Education and Training Review covered the market, technology, pathways into law and more. The LETR report, while significant in its analysis of the situation, offered less in the way of solutions. The onus has now shifted from the academy to the legal regulators to shape the future configuration of legal education. If anything this shows the tension inherent in English legal education. The legal profession and the academy have had a tense co-existence. This could be the period in which some harmony is achieved as the new arrangements are configured over the next few years.

CONSEQUENCES FOR GLOBALISED LEGAL EDUCATION

The above picture of global legal education tells a story of change and reaction. Some countries are examining themselves thoroughly about the way they educate and train lawyers and raising questions about what they expect from their legal professions. Countries that perceive themselves as part of the global economy see change as necessary in order to bring their legal professions up to speed in size and skill. How they do so varies with some of them focusing on outputs such as competencies while others concentrate on inputs such as length and subject content of degrees.

The shift to US style legal education brings with it many expectations about the form and content of education along with the different types of lawyers who might be expected to emerge from these programmes. The belief that US JD degrees embody


80 See ABA Task Force at n. 6 above.
practical skills as a result of the form of the educational process is fundamentally mistaken. One of the complaints made about American law schools, which are facing a collapse in enrolments of over 50 per cent, is that they are insufficiently practical or oriented to the profession. The main solution to this bias has been the introduction of legal clinics in law schools. While they have great benefits, in the forty or so years they have been in existence the problems with “practice” have persisted. Moreover, the American classroom experience, often based on the Socratic case method, does not translate well into other cultures. The Socratic method requires the ability on the part of students to face up to professors and challenge them. Some cultures, eg, China and Japan, are steeped in respect for elders and therefore do not welcome such behaviour. Both Korea and Japan have reported that educational processes, such as reliance on lectures, have not transformed into the classroom case method approach. In part, this reflects the reluctance of the students and professors to engage in classroom debates and in other part it is a lack of proficiency and training in new methods for faculty who therefore rely on traditional pedagogic methods.

The Carnegie Report and LETR suggest that competences and outcomes may be a preferable way to measure the success of a law degree. Without delving too deeply, this approach advocates a more mixed set of techniques, which would include skills training as well as theoretical knowledge. “Skills” is the gap that the private, for profit educational providers will aim to fill ahead of traditional law schools. Schools such as BPP offer a suite of courses from basic law degrees to professional courses. Furthermore, they combine their law programmes with other courses such as business. And being relatively small and market-focused they are able to be nimble in how they respond to the market, which includes the changing requirements of regulators.81 Law TNE programmes will reduce their reliance on parochial English law and move towards a more portfolio approach to legal education that would include elements of English law, domestic local law, customary law perhaps, transnational law,82 international law, regulatory law, and so on.

The adoption of new techniques requires investment to train teachers in activity-based learning and the connected technologies. There are precedents. New programmes such as Law Without Walls (LWOW) show how multidisciplinary programmes can reinvigorate legal education and inspire students.83 LWOW uses technology, activities, projects, teamwork, mentors and much more to create imaginative programmes for students from around the world. Another such course is Reinvent Law that also engages students in projects and cross-disciplinary thinking.84 One benefit flowing from these is the potential increase in students’ employability through their acquisition of multiple skills as a result of their participation.

81 BPP is owned by Apollo Global, which among others owns the University of Phoenix, a management school in India, Open Colleges in Australia, and universities in Chile and Mexico. With the resources Apollo is able to command it is in a strong position to compete with traditional providers and overtake them. Its emphasis on “meeting the evolving needs of millions of nontraditional learners” is provocative. It is now one of the largest online educational providers in the world <http://www.apollo.edu>. Apollo is also becoming a large aggregator of education courses providing an online marketplace of around 15,000 from Microsoft, Adobe, Coursera and Udacity. It is an attempt to match skills with employers’ needs. It suggests how synergies can be obtained by being entrepreneurial. See Caroline Porter and Melissa Korn, “Can this online course get me a job?” <http://online.wsj.com/news/articles/SB10001424052702304585004579417411487177766?mod=WSl_Careers_CareerJournal_A&mg=reno64-wsj&mod=WSJ_Careers_CareerJournal_A&esrc=A&sgid=reno64-wsj>. See also, for a critical view of private educational providers, Stefan Collini, ‘Sold Out’ 35 The London Review of Books 3 <http://www.lrb.co.uk/v35/n20/stefan-collini/sold-out> accessed 1 July 2014.


83 See http://www.lawwithoutwalls.org/.

84 See http://www.reinventlaw.com/.
CONCLUSION

Legal education is at the metaphorical cross roads. In global terms it is successful and in some parts of the world lawyer numbers are set to grow substantially. In others they are likely to shrink. There is great demand for post-graduate legal education and large numbers of students migrate across the globe to attend law schools, especially in the OECD countries. The problems exist in these key host countries. The US legal profession and education is in a highly uncertain position with little prospect of reforming itself. It appears economic forces will compel change. In the UK the legal profession is being restructured through government cutbacks on legal aid and new forms of law practice entering the market. Both solicitors and barristers feel under siege. In some ways the academy has been insulated from this; and that insulation is now wearing thin as the reality of the market enters the consciousness of potential students and faculty. We have not yet worked out the answers, nor have we fully evaluated the scale of the problem. But the problems are no longer merely local ones; they have to be viewed in a global context, which is one of intense competition.
"DEMOCRACY BEGINS IN CONVERSATION":  
THE PHENOMENOLOGY OF PROBLEM-BASED LEARNING AND  
LEGAL EDUCATION  

PAUL MAHARG*  

INTRODUCTION  

Learning is complex for any number of reasons. One of these is that it doesn’t take  
place in a laboratory: it happens in real places, within and between real people, and  
as a consequence it takes place in multi-factorial environments. At every stage of  
learning in Higher Education (HE), from student choice of institution and pro-  
gramme,1 to the transfer of learning from theory to practice,2 to a single institution’s  
or a teacher’s evaluation of teaching and learning,3 there are many causal factors that  
affect educational process and outcome. The complexities and variables created by the  
interaction of such multiple factors, well known in the field of education, make learning  
a highly complex phenomenon to analyse and understand.  

It is complex also because the conceptual and analytical tools that we need to use  
in legal education are developed in disciplines other than legal education. Indeed it  
could be said of education itself that it is inherently an interdisciplinary discipline,  
because it is not possible to analyse many aspects of educational experience without  
straying into or borrowing from another disciplinary domain – educational psychology  
for instance, or communications theory, or economics or the sociology of educational  
practices.  

In this article I argue that the phenomenological complexity, the lived experiences  
of educational practices in legal education is a research field that we still need to  
investigate and explore in much more detail. Such an exploration will not be theoretical  
only, but will fuse theory with an understanding of context and practice. In this, I take  
a Deweyan and Pragmatist view of education, holding that any theory of knowledge  
is also, fundamentally, a theory of inquiry. It is not possible therefore to separate  
educational theory from educational practice. Just as there can be no complete and  
absolutely correct map of the planet, so what we map in education will be contingent,  
local and purposive – and in this lies its explanatory and predictive power for us as  
educators. The process holds larger significances, too, and is important for the  
development of legal education as a juristic as well as a heuristic activity. The  
conversations about theory in practice and practice deriving from theory are essential  
to the development of democratic legal education, and legal education for democracy,  
as we shall see.  

To investigate how the phenomenology of educational practices can be further  
developed in legal education, I shall take Problem-Based Learning (PBL) as a case  
study. PBL is a useful field for a number of reasons. First, it is derived from another  
discipline, namely medical education, and is therefore an interesting study in  
interdisciplinarity. Second, it has generated over half a century of substantial literature  

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describing and analysing both theory and practice. Third, it is to date little used in common law jurisdictions. Fourth, and perhaps most valuable, the adaptation of the heuristic for legal education changes the nature of that education; and the nature and extent of those changes are the focus of the case study.

In the argument that follows, we shall start with a general description of PBL and its origins in the Health Sciences, followed by a summary of the educational advantages and disadvantages of adopting PBL as an educational method, a summary of the brief literature examining the specific application of the method in Law, and a brief overview of the literature on PBL in Law and technology. I shall argue that Law requires the development of a distinctive evaluative approach to PBL, one befitting its role as a Social Science or Arts domain rather than Science; and that the guiding principles of this are available in part within the medical educational literature, but also within the fields of phenomenographical and phenomenological inquiry. Since PBL is interdisciplinary, the case study is too. It involves aspects of literature review, and therefore a general description of the methodology is stated in the footnote below.4

GENERAL DESCRIPTION OF PBL

There have been many varieties of problem-based and solution-based approaches to learning, but PBL is generally acknowledged to have formed as a distinct curriculum framework in medical education at McMaster University, Canada, in the late 1960s.5 It grew from a dissatisfaction with the then current modes of learning and teaching medicine, and the attempt to undertake radical educational change. Since then, it has been employed in a variety of disciplines — in Architecture, Education, Management, Physics and Nursing, for example.6 There are varieties of PBL, and varieties of definition and description. Barrows’ six core characteristics, though, are generally cited as a classic definition:

1. Learning is student-centred;
2. Learning occurs in small student groups;
3. A tutor is present as a facilitator or guide;

4 My review of the literatures draws from the disciplines of Medicine, Engineering, Business and of course Law. It takes account of meta-reviews and systematic reviews in these disciplines, and extends from 1980–2013. Discipline-specific databases were searched (eg Medline) and with the same keywords across disciplines. The initial pass revealed over 400 items, later reduced to 211, which we recorded in a private Zotero Group Library, and which is available should readers wish to consult it (please contact the author at paul.maharg@anu.edu.au). In itself this article is not a systematic review of PBL, which is a considerable review activity, particularly in a discipline where the historical work is considerable, such as medical education. It focuses on the subject of the advantages and disadvantages of PBL as a heuristic, and I focus particularly on the effects that PBL has on knowledge acquisition, on skills development, and on student development. I would claim for it that the article, starts from the review of the literatures on this topic, then develops argument stemming from the literature review.


4. Authentic problems are presented at the beginning of the learning sequence, before any preparation or study has occurred;
5. The problems encountered are tools to achieve the required knowledge and the problem-solving skills necessary to solve the problems;
6. New information is acquired through self-directed learning.⁷

Boud describes its nature in eight characteristics – it is:

1. An acknowledgement of experience of learners.
2. An emphasis on students taking responsibility for and control of their own learning.
3. Interdisciplinary boundary-crossing.
4. The fusion of theory and practice.
5. A focus on processes, not merely the products, of knowledge acquisition.
6. Change in tutor role from instructor or tutor to facilitator.
7. Change in focus from tutor / lecturer assessment of learning outcomes to student self-assessment and peer-assessment.
8. A focus on communication and interpersonal skills.⁸

In more detail on the learning method, Moust et al describe the “Seven Jump” stages of PBL at Maastricht as instructions to students:

**Table 1. Steps involved in PBL**

1. Clarify unclear phrases and concepts in the description of the problem.
2. Define the problem; which means: Describe exactly which phenomena have to be explained or understood.
3. Brainstorm: Using your prior knowledge and common sense, try to produce as many different explanations as possible.
4. Elaborate on the proposed explanations: try to construct a detailed coherent personal “theory” of the processes underlying the phenomena.
6. Try to fill gaps in your knowledge through self-study.
7. Share your findings in the group and try to integrate the acquired knowledge in a suitable explanation for the phenomena. Check whether you know enough. Evaluate the process of knowledge acquisition.⁹

They summarise and acknowledge many other commentators when they write:

PBL seems to be a coherent educational approach. The various underlying principles and factors seem to be influencing each other in subtle and expected ways. Barrows . . . one of the early contributors to the development of PBL, stresses the importance of PBL as a coherent educational approach and warns that changes in one element can seriously damage other elements in the “house” of PBL.¹⁰

In the article they note the effects of changes to the method due to inadequate staff-student ratios (larger PBL groups, leading to loss of student engagement); and changes due to exaggerated fears of staff members that subject matter was not

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⁸ Boud DJ and Higher Education Research and Development Society of Australasia, Problem-Based Learning in Education for the Professions (HERDSA 1985).
¹⁰ Ibid.
sufficiently covered (“pointing” to resources, thus drastically reducing student agency and abilities to become independent learners). They also suggest ways in which, after a period of time using PBL, the method may be revitalized, eg building learning communities, informing students about the educational basis for PBL, helping students to become self-directed learners, offering students more variety in educational formats within the PBL environment, developing computer-supported environments, and adopting new forms of assessment.

Academic staff new to the PBL approach sometimes understand it as a version of project work. Kwan cites Chin and Chia’s useful comparative table on the subject, showing the differences between the two educational approaches:

<table>
<thead>
<tr>
<th>PBL project work</th>
<th>Typical project work</th>
</tr>
</thead>
<tbody>
<tr>
<td>Problems are identified by students themselves, and inspired by real-life experiences.</td>
<td>Problems are identified by students or given by the teacher. Sometimes, problems are contrived.</td>
</tr>
<tr>
<td>Problems are ill structured, with sub-problems embedded in a multifaceted, overarching problem statement that presents a scenario.</td>
<td>Problems may be well defined if given by teacher.</td>
</tr>
<tr>
<td>Questions emerge along the way.</td>
<td>The problem is usually encapsulated in a clear and focused investigative question or topic at the outset.</td>
</tr>
<tr>
<td>Students role-play a character in the problem statement with whom they can identify.</td>
<td>No role-playing is usually involved. If the problem is given, students may feel detached from it, and see their role as merely fulfilling the requirements of a task set by the teacher.</td>
</tr>
<tr>
<td>Students are required to generate questions and identify learning issues (based on the problem statement) which then act as springboards for their inquiry and learning.</td>
<td>Students are usually not explicitly required to pose questions and identify learning issues. However, questions may arise incidentally during the course of the investigation.</td>
</tr>
<tr>
<td>Because students are required to offer a solution to a multifaceted, ill-defined problem, they are unable to use “copy-and-paste” strategies in the written report.</td>
<td>Some projects allow descriptive reporting on specific topics. This may lead students to resort to “copy-and-paste” strategies in the written report.</td>
</tr>
</tbody>
</table>

Table 2: Differences between PBL project and typical project work.\(^{11}\)

Finally, and more generally, Savin-Badin and Major perceptively point out that PBL is less a set of curriculum changes and more in the way of a collection of general characteristics, which they group under three headings:

1. *Curriculum* organised around problems rather than disciplines; an integrated curriculum and an emphasis on cognitive skills.
2. *Conditions* that facilitate PBL such as small groups, resource-based learning and active learning.
3. *Outcomes* that are facilitated by PBL such as development of skills and motivation, and development of life-long learning.\(^{12}\)

**EVALUATION: WE FIND WHAT WE LOOK FOR**

It should be said at the outset that the literature on PBL is dominated by analysis from Medicine and Health domains. The form of the literature is thus that of medical

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science, with scientific, highly statistical reporting of learning outcomes and experiences, and the development of both meta-reviews and systematic reviews on a wide range of PBL issues. This has helped PBL to become one of the most heavily-analysed pedagogies in any discipline in Higher Education. Some of the recent literature has criticised the quality of meta- and systematic review, but it should be admitted from the perspective of legal education that nothing remotely comparable to this body of literature has been developed for any pedagogy in Law.\(^{13}\) As a result we have a large number of studies to draw upon, often different in results, sometimes conflicting directly, particularly on comparative surveys. There are general patterns that can be discerned, however, and in this brief survey of the literature we shall focus on them. In the following subsections we shall focus on the effects that PBL has on knowledge acquisition, on skills development, and on student development generally across a variety of disciplines.

**Knowledge and Skills Acquisition**

McParland et al noted that on assessment of knowledge acquisition, students on a PBL curriculum achieved higher examination scores (clinical and knowledge-based) than students on a conventional curriculum\(^ {14}\). In their controlled experimental/control analysis of an ethics course taken by senior nursing students (N=142), PBL curriculum versus conventional lecture-based methods, Lin et al noted that there was a statistically significant difference between the ethical discrimination scores of the two groups in favour of the experimental group (P<0.05). There were also significant differences in satisfaction with self-motivated learning and critical thinking between the two groups. Lin et al noted that PBL appeared to be useful particularly in situations where there were personnel and resource constraints.\(^ {15}\)

In a study that tracked students in comparative PBL and conventional medical education programmes over a decade through assessments, Hoffman et al noted performance of the PBL cohort as follows:

The PBL curricular changes implemented with the graduating class of 1997 resulted in higher performances on USMLEs [US Medical Licensing Examination] and improved evaluations from residency program directors. These changes better prepare graduates with knowledge and skills needed to practice within a complex health care system. Outcomes reported here support the investment of financial and human resources in our PBL curriculum.\(^ {16}\)

Against this, we should note the findings of Hartling et al who conducted a systematic review of PBL, analysing the findings of 30 studies where the most common evaluative outcome was knowledge acquisition:

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\(^{13}\) Nor should it be assumed that medical education has developed its literature because its methodology is based in science, where systematic review is a common feature of the research landscape; whereas legal research has a different methodological and research basis, anchored as it is in the social sciences. It is also stems, as the Legal Education and Training Report argues, from a historical uninterest by legal academics in organising the body of research pertaining to legal education.


\(^{15}\) Chiou-Fen Lin and others, ‘A Comparison of Problem-Based Learning and Conventional Teaching in Nursing Ethics Education’ (2010) 17 Nursing Ethics 373.

\(^{16}\) Hoffman K and others, ‘Problem-Based Learning Outcomes: Ten Years of Experience at the University of Missouri—Columbia School of Medicine’ (2006) 81 Academic Medicine 617.
Twenty-two years of research shows that PBL does not impact knowledge acquisition; evidence for other outcomes does not provide unequivocal support for enhanced learning.¹⁷

In 1993 two studies appeared with partially-conflicting results on knowledge acquisition by PBL students, but both fairly negative. Investigating the effects of PBL generally on medical graduates, Albanese and Mitchell found that students regarded PBL as more supportive and enjoyable than conventional transmissive approaches; that PBL graduates performed at least as well and sometimes better on clinical examinations, but they performed lower on basic science examinations and thought they were less well prepared in basic science compared to students who had encountered conventional instruction.¹⁸ By contrast, when Vernon and Blake synthesised all research from 1972–1992 that compared PBL with conventional instruction they found no statistical significance in the scores of PBL students compared to the conventional cohort on the National Board of Medical Examiners (NBME) Step 1 assessment.¹⁹ Colliver came to broadly the same conclusions in his review but went further, coming down against PBL on grounds of its cost for so little apparent benefit.²⁰

Analysis, methodology and the results, however, were becoming more sophisticated so that methodology itself, what was measured and how it was measured, became a focus for concern. The methodology by which a curriculum approach is evaluated clearly affects the outcome. If an evaluation framework assesses a curriculum for types of skills or categories of knowledge that are not the purpose of the curriculum design, then clearly there is mis-alignment of evaluation to curriculum aims and student learning outcomes. The question then arose – were researchers testing for the wrong outcomes? Given the claims that PBL makes to be a radical form of curricular intervention, were there educational achievements that were being missed by more conventional forms of educational research analysis?²¹ If this were so, how might a new research approach be designed and applied – and what might be the results?

These were the questions asked by Filip Dochy and his colleagues at Maastricht University. A meta-analysis by Dochy et al addressed the effects of PBL on knowledge acquisition and skills, on an inclusion list of 43 articles. They proved a robust positive effect on skills and noted the effect of the 1993 studies on the literature. Viewing them in context (that is to say, accounting for PBL effects such as expertise levels of students, variation in effect sizes, etc) they declared the earlier 1993 results to be non-robust. Their results showed that the differences in knowledge acquisition between first and second year students on PBL and conventional programmes disappeared later. A significant finding of their study was related to knowledge retention: students in PBL gained slightly less knowledge, but remembered more of the acquired knowledge.²²

This last point is interestingly connected to the form of education that lies at the heart of PBL, and which sets out, transparently, to evaluate students’ problem-solving

¹⁷ Hartling L and others, ‘Problem-Based Learning in Pre-Clinical Medical Education: 22 Years of Outcome Research.’ (2010) 32 Medical Teacher 28. The researchers also noted that “[w]ork is needed to determine the most appropriate outcome measures to capture and quantify the effects of PBL. General conclusions are limited by methodological weaknesses and heterogeneity across studies. The critical appraisal of previous studies, conducted as part of this review, provides direction for future research in this area”.

¹⁸ Albanese and Mitchell (n 5).

¹⁹ Vernon and Blake (n 5).


²¹ A number of studies claim the radical difference that PBL makes. See, for instance, Moore GT and others, ‘The Influence of the New Pathway Curriculum on Harvard Medic...: Academic Medicine’ (1994) 69 Academic Medicine 931; Trappler B, ‘Integrated Problem-Based Learning in the Neuroscience Curriculum – the SUNY Downstate Experience’ (2006) 6 BMC Medical Education 47. Others, as we have seen, remained sceptical.

²² Dochy and others (n 7).
skills in an authentic assessment environment. Students therefore have to transfer acquired knowledge and skills to demonstrate understanding of contextual factors on problem analysis as well as on problem solving itself; and to do this will call upon learned processes and procedures that contextualise knowledge items. PBL test design thus frequently asks learners not for their recall of isolated items or for isolated and contained units of reasoning (as might appear, e.g., on multiple choice question lists), but for the repeated integration of relevant ideas and concepts (hence the gain in retention), and the further exploration of them. Integrative assessment, in other words, is the aim; and it is an aim that can be significantly different from conventional knowledge examination precisely because the integration is more sophisticated and more explorative. Moreover, in PBL students are focused on patterns of engagement with knowledge objects, and therefore “a sufficient level of domain-specific knowledge is a determinant of productive problem solving”. For Dochy and his colleagues such profiles became “the basic determinants of academic achievement” and an important element in a new theoretical framework to describe the process of PBL.

In Law, this is a significant positive advantage, where knowledge of principles and the evidential detail for those principles is required, together with the procedural skills of argumentation or legal reasoning. But what counts as sufficiency, and how can knowledge acquisition be measured in this context, either by individual or group in a PBL curriculum? Dochy developed what he termed “knowledge profiles” – “a plotting as a graph of raw or standardized scores of a group or individual on certain parameters”, which could be used to show development within the PBL environment. What are knowledge profiles, how are they formed and how can they be used? To understand a knowledge profile, one must understand the centrality of prior knowledge and skills to the formation of new knowledge and skill. As Dochy describes it in a review of the educational literature on prior knowledge, “learning can be viewed as a successive transition between knowledge states”. A profile is therefore a snapshot assessment of the state of prior knowledge attained by a student at any particular point in the transition.

This was further developed by others. In a perceptive and more positive study in 2005 Gijbels et al conducted a meta-review of the influence of assessment on the reported effects of PBL. They began by noting the long history of PBL, from Dewey in the early twentieth century, through Piaget, Bruner to Ausubel and others. They defined three levels of the knowledge structure, namely understanding of concepts, understanding of the principles that link concepts, and linking of concepts and principles to conditions and procedures for application. They then applied this to a meta-review of 40 studies. They found that

24 Schmidt et al point out, similarly, how important is the activation of prior knowledge in small-group settings; and PBL works, in their view, because it provides the context for students to elaborate their own knowledge, which in turn facilitates the comprehension of new data related to the problem. Schmidt HG, Rotgans JI and Yew EH, ‘The Process of Problem-Based Learning: What Works and Why’ (2011) 45 Medical Education 792.
26 Ibid.
in general, the effect of PBL differs according to the levels of the knowledge structure being measured. PBL had the most positive effects when the focal constructs being assessed were at the level of understanding the principles that link concepts, the second level of the knowledge structure.29

The results of their meta-analysis suggested that the implications of the types of assessment used to measure knowledge acquisition need to be taken into account more than they have been in review studies, particularly in the early studies.

In those early studies, as Dochy and Gijbels point out, the evaluation of PBL’s effects had been limited and biased by the use of conventional assessment of knowledge that assumed only conventional knowledge acquisition. In addition, comparison of multiple medical schools does not necessarily take into account variations in the type of conventional instruction offered, or indeed the type of PBL that was designed and implemented. This point was also made by the authors of a study of a single medical school, namely Maastricht University Medical School. Schmidt et al summarized the effects of the University’s well-established medical school PBL curriculum against their counterparts educated in conventional curricula (using in total 270 comparisons). The study also analysed skills acquisition alongside knowledge acquisition, rather than as a separate component. As well as knowledge acquisition, therefore, they analysed diagnostic competence, interpersonal and other general professional competences and practical medical skills – as they say in their abstract,

[[the results suggest that students and graduates from the particular curriculum perform much better in the area of interpersonal skills, and with regard to practical medical skills. In addition, they consistently rate the quality of the curriculum as higher. Moreover, fewer students drop out, and those surviving need less time to graduate. Differences with respect to medical knowledge and diagnostic reasoning were on average positive but small. These outcomes are at variance with expectations voiced in recent contributions to the literature. They demonstrate that constructivist curricula can have positive effects on learning even if they deemphasize direct instruction.30

On knowledge acquisition, Schmidt et al noted what many others observed: that PBL students better integrate their knowledge, which resulted in more accurate reasoning; that in the clinical case recall (a measure of expertise) and processing speed (a sign of better understanding) they were superior to the conventionally-educated cohorts.31 In skills acquisition, PBL students demonstrated much better interpersonal skills, and knowledge about skills (a variable closely related to skilled performance).32 Student and expert perceptions of the quality of PBL education were higher than the results for the conventionally-educated cohorts, with students commenting positively in particular on their practices in independent study and critical thinking. In passing, Schmidt et al also noted that PBL schools graduate students faster and in larger numbers and retain students better33 – a positive and sizeable effect, as they note, given that graduation figures for medical school are already high. The authors point to the form of PBL as the cause of this success: in particular the role of problems and the facilitator, the effects of self-directed learning and of small-group learning.34 Their argument is an explicit counter to the research of Kirschner et al, matching their article point for

29 Gijbels and others (n 25).
31 Ibid.
32 Schmidt et al n 30, p 236.
33 Ibid, p 237.
point. 35 A comparative reading of the two articles is instructive not just for the striking differences in educational approach to PBL, but as an illustration of the crucial importance of knowing what one measures and why in education.

Koh et al give a perceptive summary of key studies in their systematic review, where the control group is conventional instruction and the experimental group is PBL. Their findings broadly support the findings of Schmidt and others, and Dochy and Gijbels.36

Several studies have extended analysis of knowledge acquisition beyond HE programmes into the workplace. Kaufman and Mann compared medical student performance in PBL and conventional curricula on basic science knowledge through two pre-clinical years, Parts I and II of the Medical Council of Canada Qualifying Examination, the latter written after 17 months of postgraduate education. They concluded:

the performance of PBL and conventional classes is equivalent after medical school, and during postgraduate education, and [...] knowledge differences found in the first PBL class after two preclinical years have disappeared at the end of fourth year. Basic science knowledge may continue to grow throughout the clinical experience.37

The last point was confirmed in Schmidt et al where, in a similar comparison, the researchers found positive effects: PBL “not only affects the typical PBL-related competencies in the interpersonal and cognitive domains, but also the more general work-related skills that are deemed important for success in professional practice”. 38

On the issue of the effect of PBL on work-related skills Tamblyn et al conducted an interesting study of transition from a conventional curriculum to a community-oriented PBL curriculum. Tracking 751 doctors from four graduation cohorts, three before the transition to PBL and one after, the researchers found a statistically significant improvement in mammography screening rates and continuity of care compared with graduates of the conventional medical curriculum. Indicators of diagnostic and management performance did not show the hypothesised decline. PBL graduates showed a significant fourfold increase in disease-specific prescribing rates compared with prescribing for symptom relief after the transition. The researchers concluded that transition to a community oriented PBL curriculum was associated with significant improvements in preventive care and continuity of care and an improvement in indicators of diagnostic performance.39

Summary: Phenomenology and the Evaluation of PBL

What can we draw from this brief account of the literature on knowledge and skills in PBL? On skilled performance both during the period of HE study and after, PBL seems to improve student and novice skills more effectively than conventional instruction regimes. On knowledge acquisition the picture is more complex because of the nature of knowledge learned via conventional instruction as opposed to the structure of knowledge learned via PBL. As we should expect, the form of the educational intervention affects what is learned: what students learned in conventional

36 These findings, highly detailed and meticulously described, are available at Appendix 3, http://www.cmaj.ca/content/178/1/34/rel-suppl/98e5ad3ce6430528/suppl/DC2.
37 Kaufman DM and Mann KV, ‘Achievement of Students in a Conventional and Problem-Based Learning (PBL) Curriculum’ (1999) 4 Advances in Health Sciences Education 245.
38 Schmidt and others (n 30).
39 Tamblyn R and others, ‘Effect of a Community Oriented Problem Based Learning Curriculum on Quality of Primary Care Delivered by Graduates: Historical Cohort Comparison Study’ (2005) 331 BMJ (Clinical research ed.) 1002.
medical instruction differed significantly from what students learned in PBL. If we accept that, then we need to come to agreement that the forms of integrated skills and knowledge learned and practised by PBL students and novices require different types of evaluation processes and instruments. It also requires a broader view of the evaluative framework, one that includes phenomenological and phenomenographic approaches as well as theories of extended cognition.40

Let me offer some examples of what I mean. In their classic phenomenographical study of learning Entwistle and Marton construct the metaphor of a knowledge object that describes “aspects of memory processes and understanding which [are] not reductionist”.41 As Entwistle and Marton describe it, a knowledge object for students is a form of understanding legitimated within a particular disciplinary domain. It is, they say, “a way of making sense of personal experiences of learning and studying”, where:

The nature of the knowledge object formed will depend crucially on the range of material incorporated, the effort put into thinking about that material, and the frameworks within which the knowledge object is developed.42

What is interesting about this is that, despite their use of the word “object” in their definition Entwistle and Marton do not define a knowledge object as an object at all. Instead it is made up of a number of mental and social processes. According to them there are four characteristics of knowledge objects:

1. A student’s awareness of a closely-integrated body of knowledge.
2. The quasi-sensory representation of this corpus.
3. A movement from unfocused and episodic remembering to much more detailed and coherent knowing.
4. Structure of the knowledge object itself.

There are a number of key questions raised by this research. The characteristics above include those of “awareness”, “representation”, “movement” and “structure”, which are odd if applied to objects, even metaphoric objects. Is the knowledge object really an object, that is, a tool with which one learns; or is the object itself a process, a way of grappling with knowledge that one must learn? Entwistle and Marton’s study is actually part of a tradition that sees the context of learning as profoundly affecting what is learned and how it is learned. John Dewey, for instance expressed a similar notion in his concept of “idea artefacts”. 43 This concept parallels other approaches to learning and the structure of knowledge. Berardi-Coletta et al, for instance, conducted studies on the role of metacognition in problem-solving, and concluded that “process-oriented [ie metacognitive] participants consistently form[ed] more sophisticated problem representations and develop[ed] more complex strategies”.44 For them, the process

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of verbalisation was not the source of better problem-solving: the source was the metacognitive processing involved in the effort to produce explanations.

There are a number of strong parallels between the phenomenographical approach to knowledge objects and the constructionist approaches to learning – Sherry Turkle’s concept of “evocative objects” that we think with is a good example of this. Indeed it might be argued that learning knowledge is neither an object nor a process, but more of a performance, such as in the theatre or in a concert hall, where there is an audience that guides performance, but the performance itself is the reason for the script’s existence. The same applies to reading as performance, for example one’s reading of a poem or a novel that, multi-layered and complex, cannot be fully represented in any way other than the experience of reading, all other interpretive embodiments of the artwork being fragmentary only.

Theories of extensive cognition, or the Extended Mind Hypothesis, take this a step further, and extend cognitive processing into the environment surrounding the human body. For Clark, for instance, cognition “leaks out into body and world”: thinking itself is distributed in our social and personal environment. Clark gives the example of Susan Goldin-Meadow’s work on gesture and thinking. Gesture is not merely the result of thinking: for her, gesture functions “as part of the actual process of thinking”. As Clark summarises her work,

[The physical act of gesturing, . . . plays an active (not merely expressive) role in learning, reasoning, and cognitive change by providing an alternative (analog, motoric, visuo-spatial) representational format.]

The same, Clark argues, extends to other representational formats in the world: paper, pens, pixels. On the subject of writing, he argues:

[The paper provides a medium in which, this time via some kind of coupled neural-scribbling-reading unfolding, we are enabled to explore ways of thinking that might otherwise be unavailable to us.]

What is true of the microcosm of the individual gesture, the knowledge object, the worked-out thought on paper, is true also of the macrocosm of the PBL curriculum. A curriculum, too, is a tool for and of thinking. It is a representational format that profoundly affects what is learned and how, and contains within its structures and spaces distributed thinking. The phenomenology of that construct is something that we have yet to explore in sufficient depth in legal education, and particularly as regards PBL. The evaluation of PBL and the law curriculum, too, has yet to be properly explored; and the following section begins that process.

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45 Turkle’s work on evocative objects stemmed from her work with students at MIT, where she asked them to write on an object encountered during their childhood or adolescence that influenced their path into science. As Harman puts it, these objects have “autonomy, richness and depth”, and in this sense they are closely aligned with the objects/processes that Entwistle and Marton describe and analyze (Harman G, ‘Zeroing in on Evocative Objects’ (2008) 31 Human Studies 443, p 455). See also Ackermann E, ‘Constructing Knowledge and Transforming the World’ in M Tokoro and L Steels (eds), A Learning Zone of One’s Own: Sharing Representations and Flow in Collaborative Learning Environments (IOS Press 2004).


48 Ibid, p 178.

49 Ibid, p 179.
PBL AND LAW

Law school use of PBL

A number of law schools use the methodology, either as a whole-curriculum approach or part-curriculum (i.e., individual modules or syllabi). At the time of writing (January 2015) a representative sample would appear to be as follows: in the Netherlands, the University of Maastricht and Erasmus University (Rotterdam);50 in Sweden, the University of Uppsala and the University of Umeå;51 in Colombia the University of Los Andes;52 in Australia RMIT University;53 and in the UK, Nottingham Trent University and the University of York.54

Literature on PBL in Law Schools

The PBL programme at the Law School of the University of Maastricht has been the focus on considerable research, more than any other law school. Driessen and Van der Vleuten report on successes at Maastricht on assessment of learning—block tests, portfolios, formative computer-based tests. In particular,

the assessment program enhanced skills and changed attitudes that had been opposed to the ideals of life-long and problem-based learning. Empirical data on the quality of the new assessment system reveals that we went a step forward in matching problem-based learning with student assessment.55

In an interesting study Moust et al point to the need to revitalize the PBL curriculum after a period of time.56 Moust, who has been involved with the Dutch law programme since 1985, summarised the Maastricht approach and its achievement, showing how

50 Maastricht’s is one of the oldest PBL Law programmes, and the most thoroughly documented to date. Law is only one programme employing PBL amongst many at the university: starting with a medical school, it was then adopted by Health Sciences, Law, Economics, Psychology and the Liberal Arts, and involves around 12,000 students, 2,500 staff and approximately nine curricula. Almost the entire institution uses the method—see http://bit.ly/1BrP14w which includes a helpful introductory video emphasising PBL key points, including small groups, active learning, facilitation, collaboration, and the like. The descriptive and analytical literature is extensive, and summarised below. For information on Law PBL at Erasmus University, see http://bit.ly/1DaCoLb. At least one Masters programme there (in Public International Law) is moving to PBL—see http://bit.ly/1xYNwR.

51 In the University of Uppsala, the Juridiska fakulteten hosts the PBL undergraduate programme—see http://bit.ly/1oOV98O. The programme appears to be loosely based upon both PBL and case-based approaches. In the Department of Law at UMEA there appears to be no general curriculum statement, but a number of staff state that they teach using PBL. See http://bit.ly/1C7rTLr; see also Bostrom V and others, Developing Legal Education: The Lao Context and a Swedish Approach to Problem-Based Learning (Juridiska institutionen, Umeå universitet, Umeå 2006).


53 In the University of Newcastle, the Juridiska fakulteten hosts the PBL undergraduate programme—see http://bit.ly/1oOV98O. The programme appears to be loosely based upon both PBL and case-based approaches. In the Department of Law at UMEA there appears to be no general curriculum statement, but a number of staff state that they teach using PBL. See http://bit.ly/1C7rTLr; see also Bostrom V and others, Developing Legal Education: The Lao Context and a Swedish Approach to Problem-Based Learning (Juridiska institutionen, Umeå universitet, Umeå 2006).

54 See http://bit.ly/1CIUvd0 and especially http://bit.ly/1uvEP67. York designed a full qualifying undergraduate curriculum in Law, and has given outlines of its approaches to facilitation, teaching, learning and structure at UKCLE events. Very little has been published on the programme. For a general introduction see http://bit.ly/1yWSOxk. For information on how learning takes place within the programme, see http://bit.ly/1H0RRHf. For information on teaching, learning and particularly assessment on the programme, see http://slidesha.re/1yJrJr8.


56 Moust, Berkel and Schmidt (n 9).
students’ general problem-solving skills are enhanced, as well as their “growing content-specific knowledge”.  

While this article demonstrates how students adapt and grow within the PBL learning ecology, Moust and Nuy examine PBL from a staff perspective, analysing some of the reasons why PBL is problematic for staff to implement. These include the shifts that are required in syllabus construction and in assessment practices.

Maria Tzannes outlines some of the benefits of PBL to Australian Law curricula, which include benefits to society, to law schools (movement away from “coverage” in the curriculum and time given to knowledge “which is easily forgotten if not used frequently or which can change through legislative amendment”) and to the professional development of students. Tzannes also summarises well the obstacles to PBL development in Law in Australia, and it is worthwhile summarising her list of 17 obstacles, and placing beside them some strategies that may overcome them.

<table>
<thead>
<tr>
<th>Obstacle</th>
<th>Possible strategies</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 Staff misunderstand the nature of PBL and assume it relates to hypotheticals</td>
<td>Comprehensive structured induction of new staff re facilitation; long lead time and re-orientation of new staff and training of new staff. Sufficient funds should be allocated for course development and ongoing development (MT)</td>
</tr>
<tr>
<td>2 A sense of negativity develops then, about new forms of teaching and learning</td>
<td>Staff need to be informed about the need for change and the prospective outcomes of that change process. They need to develop a sense of ownership of the new curriculum (MT) Course developers should seek political allies within and outside the organisation to support the changes (MT)</td>
</tr>
<tr>
<td>3 No need to be innovative in HE since profitability is not usually at stake</td>
<td>Local conditions of profitability often prevail, and a new programme can be an opportunity for new financial strategies</td>
</tr>
<tr>
<td>4 PBL is seen to be resource-intensive because it involves small-group teaching</td>
<td>Good design mitigates resource costs. Small-group teaching need not imply high-cost – it depends on the context of the small-group teaching, eg other activities staff and students are involved in (PM)</td>
</tr>
<tr>
<td>5 Assessment of performance is difficult when students work in teams</td>
<td>As in medical education, there are plenty of design solutions to this, where teamwork and individual work can be assessment, in tandem, in isolation, or as a combination of the two (PM)</td>
</tr>
<tr>
<td>6 PBL is seen to be time-consuming, difficult to administer, labour-intensive</td>
<td>As with all experiential learning design and resources, there is a spike at the start for design staff; and thereafter their workload tends to decrease (PM)</td>
</tr>
</tbody>
</table>

59 I have tabulated one obstacle and possible response against each other for easier reading. All obstacles are those identified by Tzannes. She does not suggest exact strategies to cope with all these obstacles. Where she does so, the strategies she advises are identified by the letters “MT” in brackets. Those tagged with “PM” in brackets are my own counterarguments.
<table>
<thead>
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<th>Obstacle</th>
<th>Possible strategies</th>
</tr>
</thead>
<tbody>
<tr>
<td>Institutionalised practices militate against the implementation of PBL, notwithstanding permission from senior management</td>
<td>PBL goes beyond mere curriculum tinkering – its effects can be far-reaching since it changes how the work of teaching is conducted (MT)</td>
</tr>
<tr>
<td>Teachers have difficulty moving from a didactic style of teaching</td>
<td>PBL facilitators can be used to teach (and need training for this role). Staff require training in designing resources for PBL. (PM)</td>
</tr>
<tr>
<td>Course coverage or depth is perceived to be sacrificed</td>
<td>Different things are known; knowledge is retained better on PBL; knowledge and skills are better combined (PM)</td>
</tr>
<tr>
<td>Students ask questions of the integrated materials, and beyond them – staff feel they don’t know the subject material well enough to teach</td>
<td>Preparation in collaborative teams by academic design staff; preparation of materials for facilitators, and induction and training for facilitators as well as design staff (PM)</td>
</tr>
<tr>
<td>PBL challenges teaching staff on how we come to know things, the status of knowledge and who / where is the repository of knowledge</td>
<td>Curriculum development and change is not merely logical or rational but also an emotional and political process. Knowledge itself needs to be challenged (MT)</td>
</tr>
<tr>
<td>Teachers feel academic expertise is devalued because teacher-centred formats are de-centred</td>
<td>Not always, but certainly possible. This can be mitigated by inducting staff into new roles – teacher as designer, eg. (PM)</td>
</tr>
<tr>
<td>Teaching staff are uneasy because PBL appears to empower students and dis-empowers staff</td>
<td>PBL also engages students and it is engagement that empowers students, and thus draws in staff. (PM)</td>
</tr>
<tr>
<td>Inter-course integration is seen as problematic</td>
<td>Collaboration between staff should start early and with consensus between design-staff (PM)</td>
</tr>
<tr>
<td>In curricula where there are divisions between PBL and conventional approaches, problems may arise because of the incompatibility of the approaches, with students resenting the independence required of them in PBL</td>
<td>The empowerment of students in groups is a powerful agent for change which may lead to support for PBL; but which in any case requires skilful planning and handling (MT)</td>
</tr>
<tr>
<td>Confusion over the role that students play in student-centred PBL, especially school-leavers</td>
<td>Induction and information is required at every stage. PBL may well be better-suited to more mature students (PM)</td>
</tr>
</tbody>
</table>

In her analysis of PBL in legal curricula in New Zealand, Mackinnon proposes, on a general review of the literature from other disciplines, that PBL promotes the following conceptual elements:

1. Contextualization
2. Interdisciplinarity
3. Integration of prior personal and/or professional knowledge
4. Collaboration
5. Enquiry skills
6. Reflection and transition
7. Self-directed learning and self-assessment
8. Praxis

In spite of this, her research into the “dominant stakeholder analysis” suggested that PBL was unlikely to be strongly “championed by any of the main stakeholder groups in New Zealand, despite evidence that its characteristics have benefits for all of them” because of three factors: “it is misunderstood; it is resource intensive; it is a break with tradition”.\textsuperscript{61}

The first and third points are undeniable. The second is more controversial. Finucane \textit{et al}, analysing a new medical curriculum in the University of Limerick based upon a model developed by Flinders University, is one of the few articles in the literature to cost a PBL programme closely within a single institution.\textsuperscript{62} The implication in the article is that, for the benefits that accrue from PBL, the method is seen as being good value. Mackinnon ends by arguing vigorously against those who have seen the application of PBL to Law as merely the “professionalization” of Law’s intellectual superstructure. Dismissing Drinan’s description of PBL as “shallow pragmatism”, she summarises the role that PBL can play in legal education in words that indicate how PBL can go beyond direct professional preparation:

Problem Based Learning approaches require reflexive participants; those who are sufficiently conceptually literate to read and critique key aspects of the social order and to understand their own and others’ status and role in it (including understanding any conflict between the personal “self” and the professional “self”). Reflexivity contributes to humanist as well as to legal solutions to complex human problems and is essential to professional citizenship participation in the globalising market and society at a time of transition from a work society to a risk society.\textsuperscript{63}

Her broad view of the benefits of PBL is of a piece with the analyses of the achievement of the Maastricht University Law School, which shows no narrowing of the curriculum.

Grimes concurs with Mackinnon on this and many other points in his descriptions of PBL at York University Law School.\textsuperscript{64} He describes the PBL LLB curriculum at York in positive terms, though there is little analysis of empirical data. He acknowledges that “more research [in Law] is needed to obtain conclusive evidence of the impact that PBL and role play has on learning, and to give a deeper insight into the cognitive and emotional effects of small group learning overall”.\textsuperscript{65}

Shirley Lung gives a useful overview of PBL in Law in the US, opposing the problem method to the more conventional signature pedagogy of the case method. In her summary of the literature she makes it clear that the power of the problem method lies in the way that PBL fosters procedural knowledge, where the case method privileges

\textsuperscript{61} Ibid.
\textsuperscript{63} Mackinnon (n 60).
declarative knowledge.\textsuperscript{66} When students develop procedural knowledge they elaborate schemas and scripts around items of declarative knowledge and in doing so engage in self-directive learning. As Lung puts it, “the key to expert problem-solving lies in how knowledge is organized, not the quantity of declarative knowledge acquired”.\textsuperscript{67} In more detail, she describes the process of acquiring procedural knowledge as follows:

This includes grappling with the structure of rules and their interrelationships as well as learning to recognize “multiple uses of a single rule or how a single rule operates under different circumstances”. Equally significant, students are confronted with sorting out the categorizations, characterizations, paths, and choices that arise at each stage of an analysis.\textsuperscript{68}

What Lung describes well here is the process by which, in PBL, students begin to learn legal reasoning. Lung does not pursue the point, but it could perhaps be argued that in PBL what students learn is a \textit{different form of legal reasoning} to that which they learn \textit{via} more conventional educational methods. In saying this I am not making the claim that PBL alters the fundamental \textit{grundnorm} of legal reasoning. As Ian McLean has pointed out, and many since, this is a highly complex issue, and cannot be claimed or proven here.\textsuperscript{69} However it is undeniable that a form of legal education affects what is learned of legal reasoning, and how it is learned.

Lung’s article is also useful because she goes on to identify problems with PBL in legal education – problems of vicarious learning and transfer of learning in particular – and describes these perceptively and in depth. Her solutions include guiding students toward what she calls, in a resonant phrase, “deep problem structures” (to which we will return in the Conclusion); and learning through “metacognitive strategies” by “internalizing habits of self-questioning” and use of visualizations.\textsuperscript{70} She also advocates use of “information processing scripts” that enable students to apply law to facts in a series of “decision points” and which would thus “list or describe each sequential step in the thinking process”.\textsuperscript{71} As she points out, the uses of such a script are rich – students could collaborate in forming them, or a student could lead the PBL group through the formation of the script; or a group could be asked to develop one. It could be used for formative or summative assessment.\textsuperscript{72}


\textsuperscript{67} Lung (n 66), pp 737–8.

\textsuperscript{68} Lung (n 66), p 738, quoting a student, Allie Robbins, in a memo to Lung, on file with Lung. It is worth quoting Lung’s contextual comment here: “Robbins, one of my students, has explained that reading cases, taking notes on cases while reading and during class, and outlining often left her piecing together crucial information about the rules and their application right before exams. The memo offered Robbins’ perspective on how problem-based learning can be an effective methodology for helping students learn to apply rules.” (Lung (n.66), footnote 81, pp 736–7.) The student comment reveals how PBL can facilitate procedural thinking when learning complex legal rules.

\textsuperscript{69} Arguing for continuity between medieval and Renaissance texts, McLean points out with regard to the way that interpretive rules grew up around the glossatorial readings of the \textit{Corpus Iuris Civilis}, “conservative forces were at work to preserve technical vocabulary and the terms of debate from change; and that the realm of law and legal interpretation operated as a coherent and recognizable practice”. Maclean I, \textit{Interpretation and Meaning in the Renaissance} (Cambridge University Press 1992), 139–40, cited in Maharg (n 37).

\textsuperscript{70} Lung (n 66), p748.

\textsuperscript{71} Lung (n 66), p755.

\textsuperscript{72} Lung (n 66), p756–7.
CONCLUSION

As we have seen, the debates regarding the efficacy of PBL as a curriculum approach at first focused on testing students on declarative knowledge and skills, and compared this with student performance in conventional programmes. This has shifted now, and from it has emerged debates about how we evaluate what students learn within PBL programmes. The evidence we have to date is that students learn differently, and they learn different procedural skills on PBL programmes.

More important for our purposes here, we have seen that in the process of re-thinking evaluation, researchers such as Dochy, Gijbels and colleagues have had to re-design evaluation instruments – Dochy’s “knowledge profiles”, Schmidt’s micro-analytical measurement approach are examples. Their work has shaped the direction of evaluative studies in PBL, while remaining within the field of medical educational research.

By contrast with medical education, legal education has only really begun to analyse the effects that PBL has upon legal learning. We need much more analysis along the lines that has been developed for medical education. We need to learn the lessons of designing sensitive evaluation tools, such as those of Dochy and Schmidt.

We also need to design approaches that are sensitive to our discipline, and the requirements of students, universities, regulators and the profession. We require evaluative instruments that can give us insight into how best to help students understand, in Lung’s words, “deep problem structures”, the nature of conflict, how disputes arise and can be resolved (by extra-legal as well as legal means). Throughout, I have argued that phenomenological and phenomenographic approaches would give us instruments by which to understand how learning comes about, its quality and effectiveness in PBL law programmes.

Indeed they already exist in the research literatures. Phenomenography is a well-established approach in Education, with its research methods. As I pointed out in Transforming Legal Education, collaborative and discursive constructions of tasks, so important for professionals and experts, are essential for students as the only alternatives to individualized, competitive mastery of legal knowledge which, for most students most of the time, still represents their predominant experiences of legal education. PBL is a social, collaborative curriculum design: we need tools that investigate the social collaboration that takes place at the micro-level. We could, for instance, look to the work of Edwards on community, practice and participation. Or we could use the extensive research work on conversation analysis, dialogue and learning by Neil Mercer and colleagues. These instances, and many more, show us the richness of evaluative tools that we can bring to bear on the phenomenological task of understanding how and why PBL works in legal education, how we can design it better, and how our students can benefit from it. Nor is this understanding technical merely: it goes to the heart of our understanding of educational dialogue, around which

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73 Micro-analytical measurements evaluated the extent to which students’ “situational interest” was engaged during PBL. They found that “situational interest predicted students' academic achievement with considerable accuracy, demonstrating that it drives learning”. Rotgans JI and Schmidt HG, ‘Situational Interest and Academic Achievement in the Active-Learning Classroom’ (2011) 21 Learning and Instruction 58, p 65.


PBL is based. Indeed it is not too much to claim that it contributes to the wider circles of ethical and democratic encounter in our educational institutions. As Dewey said, “Democracy begins in conversation”.\footnote{According to Steven Fesmire, Dewey said the words at his 90th birthday party; and they characterise much of his approach to both democratic debate and education. Fesmire S, \textit{Dewey} (1st edn, Routledge 2014), p 179.} The quality of that conversation has significant consequences, for it affects all the actions that flow from it, both within Higher Education and beyond.
We live in challenging times for legal education—in the United Kingdom (UK), the United States (US), and elsewhere. Thoughtful scholars, recent graduates, leading lawyers, and policymakers convened at Nottingham Trent University early in 2014 to explore a pressing issue: what is the value of legal education during this time of major social, economic, and professional change? The thinking of many participants was informed by the LETR Report.¹ My contribution to the conference, and here, is to offer an American perspective and a comparative lens.

The core question posed—what is the value of legal education—is a provocative one that could be answered in a number of different ways. In my keynote speech for the conference I argued that legal education does not have a singular “value” but instead encompasses several distinctive sets of values. In evaluating the economic value of a legal education, not only financial factors but personal satisfaction and alternative options should be assessed. Institutional values must also be considered since legal education typically serves both as a mode of liberal education and as a source of professional preparation. Educational values are also served, and become more evident as law programmes become more cognizant of the importance of learning outcomes and alternative modes of assessment. Education that places ethics, professionalism and professional identity at the forefront of students’ minds effectively inculcates ethical values, whether or not graduates practise law or pursue some future course. Finally, legal education can promote social values, if careful attention is paid to preparing students to engage with their obligation to promote access to justice and to craft a fairer society in their future lives. My talk’s ultimate goal was to encourage faculty, lawyers and policymakers to recognize and grapple with these diverse sets of values in determining how best to strengthen legal education in the UK during a time of profound change.

This essay takes a somewhat different tack. It proceeds in four parts. First it asks why we are preoccupied with the value of legal education at this time in history? Second, it considers lessons learned through the Carnegie Foundation for the Advancement of Teaching’s study of legal education, Educating Lawyers, and how those lessons document the educational value associated with law school study (and the gaps that can yet be filled). Third, it considers recent efforts in the United States to push law schools to greater levels of accountability through incorporation of new assessment requirements in accreditation standards. Finally, it responds to several key recommendations of the LETR Report with thoughts about how additional value can be added to the system of legal education training that is now and in the future will characterize practices in the United Kingdom.

WHY VALUE? WHY NOW?

In recent years discussion of the “value of legal education” in the United States has centered in particular on the economic value of legal education. The Oxford English Dictionary (worthy source!) defines “value” in two principal ways: (I) “worth or
quality as measured by a standard of equivalence”; and (II) “Worth based on esteem; quality viewed in terms of importance, usefulness, desirability, etc.”. Recent American conversations seem to have centered on the first of these definitions of “value,” particularly in the face of rising tuitions and declining jobs. The implications of this nuance are important since the framing of the debate suggests both some disdain for lawyers or for those with particular educational pedigrees, and some judgment that the worth of a legal education is not especially related to the costs incurred in its attainment. Where did these judgments come from? A number of factors seem pertinent.

Following World War II, Americans saw higher education as a collective good that benefited society. That was a time in which public higher education expanded and garnered substantial public support. In more recent days, higher education has been justified as a “private good” that will enhance the economic return to individuals. Private education has also achieved a “premier” status based on rankings system geared to privileging high expenditures as indicia of quality. As social inequity has increased and more students attend elite private colleges seen as having superior quality, and as the economic downturn grinds on, the traditional budget and policy support for public higher education has declined.

Law school tuition costs have risen substantially in light of declining public support for public higher education and a desire by law school and university leaders to climb the ladder of prestige. A decline in federal support for significant scientific research and an increase in spending for undergraduates’ student services, academic support, and institutional support are part of the story of costs of higher education more generally. Law school costs themselves have increased as schools engage in the equivalent of a cold war competition to increase rankings in US News and World Report, which gives expenditures great weight and does not reward cost efficiency. For the same reason, many law schools have moved to “buying” high-credentialed students with merit scholarships in order to increase their rankings, even as such moves have

3 See, eg, Tamanaha B, Failing Law Schools (University of Chicago Press 2012).
4 The Serviceman’s Readjustment Act of 1944 (generally referred to as the GI Bill), P.L. 78–346, 58 Stat. 284 m (providing substantial educational benefits for World War II veterans); see Altschuler G and Blumin S, The GI Bill: The New Deal for Veterans (1 edition, OUP USA 2009).
8 Data from the National Science Foundation shows the decline in federal financial support for science and engineering. See National Science Foundation, ‘Federal Budget Authority for R&D Declines in FYs 2012 and 2013: Increase Proposed for 2014’ (National Science Foundation 2014) <http://www.nsf.gov/statistics/infbrief/nsf14306/> accessed 15 December 2014. Information on the increasing cost of student services, academic support, and institutional support is available at Eisenberg, supra note 7, at p 101.
9 Information on the US News ranking formula is available on their website and often changes incrementally from year to year. Briefly, the magazine weighs the following factors in the ways specified: peer assessment score using a 1–5 scale (.25), assessment score by lawyers/judges on 1–5 scale (.15), median LSAT score (.125), median undergraduate GPA (.10), acceptance rate (.025), placement rate (.20, including placement at graduation, 9 months after graduation and bar passage rate), and “faculty” resources (.15, including expenditures per student, student faculty ratio, and library resources). See Flanigan S and Morse R, ‘Methodology: 2015 Best Law Schools Rankings’ (US News 2014) <http://www.usnews.com/education/best-graduate-schools/top-law-schools/articles/2014/03/10/methodology-2015-best-law-schools-rankings> accessed 15 December 2014.
rewarded those with substantial resources and made it more difficult for poor students to attend.\footnote{10}

The job market has declined significantly, particularly in Wall Street firms whose clients are no longer willing to pay the high cost of training first-year associates and who in many cases have moved to lateral hires rather than entry-level hires.\footnote{11} Large firms with demanding billing requirements have also found that they lose many associates just at the point when they might become profitable.\footnote{12}

Cynics have also taken to mass media to discourage prospective law students from enrolling in law school.\footnote{13} Some may have done so because they do not value the range of schools and forms of education that students might pursue, while others seem honestly to wish to save idealistic students from undertaking untenable debt loads. Others have suggested that more subtle analysis is required. For example, what are the alternative options for higher education available to those graduating from college with limited job prospects?\footnote{14} Recent law graduates have also been frank in expressing their disappointment and calling for greater transparency in information about placement rates and pay, compared to tuition costs.\footnote{15} Undoubtedly the economic downturn has curbed meaningful options for entering the middle class, and academically talented students will likely find that pursuing PhDs in hopes of jobs in higher education have even more disappointing results than those evident in the JD market.\footnote{16}

These diverse factors have upped the ante for discussions of the value of legal education in the United States. There has been a marked decline in law school

\footnote{10} ABA Legal Education Task Force, supra note 6, at 22–23 (criticizing increased attention to discounting costs of legal education in order to lure candidates with high scores and undergraduate grades, to the detriment of other students).

\footnote{11} For a discussion of the changing Wall Street job market, see Burk BA, ‘What’s New About the New Normal: The Evolving Market for New Lawyers in the 21st Century’ (2014) 41 Florida St. L. Rev 541; NALP, ‘How Many Legal Services Jobs Are There for New Grads?’ NALP Bulletin (November 2014) \url{http://www.nalp.org/1114research} accessed 16 December 2014; NALP, ‘Lateral Hiring Slows Down for the Second Year in a Row’ NALP Bulletin (March 2014) \url{http://www.nalp.org/0314research?print=Y} accessed 16 December 2014 (discussing different patterns by firm and geography, and noting that more senior lateral hiring was down from its prior two years of increase, while for 2013, associate lateral hiring was up 5%).

\footnote{12} Burk, supra note 11, at 588–589 (tracing dropping numbers of associates).

applications, and schools are competing more than ever for scarcer applicants, increasingly cutting back on tuition and the size of entering classes and attempting to provide more preparation intended to make graduates “practice-ready.” Given the increasing social and economic inequality in the United States, it is perhaps not surprising that schools positioned in the lowest “tier” of US News rankings are feeling economic pressures like never before. State bar examiners and the National Conference of Bar Examiners, responsible for development of many states’ bar admission tests, reported lower bar examination scores and lower rates of state bar admission for the summer 2014 bar examination cycle, perhaps reflecting the legal profession’s concerns to adjust to a shrinking market for paid legal services, assumptions about the capabilities of the smaller and less highly-credentialed graduates, or other factors.

It is also worth considering the bases on which the current generation of students actually make choices about higher education. The current “millennial” generation of applicants has come of age in a time of economic constraint, yet they have been taught by their “helicopter” parents that each one of them is “special.” Many with a range of choices, and few financial constraints, seem to yearn not merely for acceptance at a preferred university, but also for affirmation and recognition of their distinction. They may therefore gravitate toward more expensive schools that cite very high “sticker prices” that are reduced by offering merit scholarships paid for by skimming and redeploying others’ tuition payments. A growing number of applicants also seem unsure of their educational choices until later in the day. For example, they may apply to a number of law schools and make initial payments, only to decide late in the day that they will not pursue legal education at all. Some of this phenomenon may reflect students’ interests in many fields (as evidenced by the increasing tendency to complete double majors as undergraduates). It may also reflect the dearth of desirable jobs for those with only undergraduate degrees and the terrible job market for many PhD graduates.

To make matters even more complex, there is growing evidence that a new life phase (“emerging adulthood”) has developed as a transition between adolescence and full adulthood, delaying maturity that would have come earlier when young people...
were expected to take on full-time adult responsibilities of work and family soon after completing their basic education. 23

These developments suggest the importance of “economic value” and the high value placed on economic concerns in the current educational and social climate, at least in the United States. Unfortunately, economic anxieties have swamped out many other “value” questions that should be taken into account by applicants for legal education and legal educators. While educational structures and financial factors may differ in the United Kingdom, the American experience identifies at least some key questions worthy of reflection in other parts of the world.

EDUCATIONAL VALUES AND STUDENT GAINS: EDUCATING LAWYERS AND ITS LESSONS

Background
If economic value is not to be the “one ring that rules us all,” 24 legal educators need to make a better case for a different approach to valuation. In taking on that challenge, we of course need to appreciate the social and organizational context in law schools operate.

We can learn a good deal from the historical studies of Robert Stevens, a distinguished scholar in the UK and the US. His consummate study, *Law School: Legal Education in American from the 1850s to the 1980s* 25 provided an important context for appreciating the social and economic factors that shaped American legal education from its early stages through the middle of the 20th century. In the years following Stevens’ study, other important developments have occurred. The National Conference of Bar Examiners has pushed for states to adopt a “uniform bar exam” (including essays, multiple choice, and performance components) based on the premise that state-specific doctrine can be learned after licensure. 26 *US News and World Report* has continued to pursue profit motives in publishing its annual “ranking” of law schools, and despite obvious flaws in its methodology, continues to drive law school responses and student choices. 27 The National Association of Law Placement and the American Bar Association have documented a significant downturn in law jobs and have required law schools to make more systematic and accurate information available to prospective students. 28 The American legal education accreditation system (operated within the American Bar Association) has been revised in several important respects. 29

24 Tolkien J, *The Fellowship of the Ring* (George Allen & Unwin 1954). The full quotation is: “One Ring to rule them all/ One Ring to find them,/ One Ring to bring them all/ and in the darkness bind them”. The sentiment expressed seems very pertinent to the position that economic value is the principal way to assess the benefit of legal education.
27 The author of this article has met with editors at US News and given them a copy of Darrell Huff’s book, *How to Lie with Statistics* (WW Norton & Company Inc 1954) since US News repeatedly violates basic statistical principles including those relating to statistical significance, given their desire to rank-order law schools which are not statistically different in the US News ranking scores and their commitment to use methodology that privileges private law schools over public law schools in their financial analysis.
28 For a discussion of why ABA and NALP data vary, see NALP, ‘NALP vs ABA Data: Why Do They Vary?’ (<http://www.nalp.org/nalp_vs_abas_data_why_do_they_vary> accessed 19 December 2014.
states - New York and California - have taken steps to require that those seeking licensure have had significant clinical experience or engaged in substantial pro bono work. They hope in this way to improve access to justice.

These ancillary factors - modifying bar examinations, creating new incentives for allocation of funds, reducing the size of student populations, modifying accreditation requirements, or requiring pro bono efforts by students prior to licensure - in important respects reflect economic realities. The National Conference of Bar Examiners would like to expand the use of its products, US News would like to sell more data, schools would like to keep their rankings, the ABA accreditors would like to maintain their legitimacy and funding streams, and states would like to place the burden of pro bono work on the young rather than on established lawyers. Rather than continuing down these paths, we need to return to first principles and consider the actual educational value of a legal education. One way to do so is to consider the teaching and learning that occurs in law schools, as has recently been attempted the Carnegie Foundation for the Advancement of Teaching. Such an approach should also prove helpful to those in the UK who are seeking to grapple with issues of competence and to bring greater cohesion to the many forms of and forums for legal education in the UK.

The Carnegie Report: Educating Lawyers
The Carnegie Foundation for the Advancement of Teaching (CFAT) sought to provide educators with fresh insights and justifications for reshaping legal education in its 2007 study, *Educating Lawyers: Preparation for the Profession of Law* ("Carnegie Report"). of which I was a co-author. In my view, this effort has done an important job in articulating important educational goals and accomplishments that can provide an underlying claim for the value of legal education, both in the US and in the UK. The Report can also serve as a point of reference going forward.

The Carnegie study was based on field visits to 16 law schools (14 in the United States and two in Canada). Each visit included observations of core classes (first year, professional responsibility, clinics, legal writing), conversations with students, and focus groups with faculty members. The legal education initiative was one of several studies of professional education (engineering, clergy, medicine, nursing, as well as law), conducted during the Foundation’s centennial, under the leadership of President Lee Shulman. These studies built upon the Foundation's work early in the 20th century to study a variety of professional fields including medicine and law among others.

The recent set of CFAT reports differed from studies undertaken by others. These reports carefully focused on teaching and learning (rather than other policy issues), and engaged in comparisons among professions (in order to open doors and windows for those interested in learning from other disciplines). The studies did not attempt to prescribe particular policy solutions, and instead recognized that schools with differing institutional values might benefit from choosing different paths to addressing core values implicated in teaching. Two major areas of attention in the study of legal


education are particularly relevant to readers of this essay, insofar as they may help illuminate key issues such as those highlighted in the *LETR Report*.

\(A\) Commonplaces: Linking Professional Education with the Work of Professionals

First, the CFAT study asserted that there should be and can be a relationship between the central tasks of professionals, operating in professional contexts, and their educational preparation. The study highlighted six “commonplaces” about the work of professionals that have not typically been highlighted before. These six commonplaces emphasize crucial links between professional education and the operation of professions, but as discussed below, could also provide a framework for liberal arts education. The Carnegie commonplaces are as follows:

i. **Fundamental knowledge & skills.** Professional education should instruct students in fundamental knowledge and skills needed for their operation within the profession. This commonplace references not only subject areas, but fundamental ways of thinking and what counts as “knowledge.”

ii. **Capacity to make decisions under uncertain conditions.** Professional education should help navigate the challenge of making decisions under conditions of uncertainty. The practice of law (and legal education) focuses at least as much on what is not known as on what is known. Dealing with uncertainty is often a particularly unsettling dimension for individuals not comfortable with creatively embracing it.

iii. **Capacity to engage in complex practice.** Complex practice typically involves a significant range and combination of subject matter and skills that may not even be envisioned during the course of one’s experience in higher education. Instead, educators addressing this need must encourage attention to possible linkages between seemingly separately cabined areas of inquiry, and lead students to engage actively with material taking differing roles and considering multiple perspectives.

iv. **Capacity to learn from experience.** Learning from experience requires intellectual drive, a commitment to continuous learning, and an ability to engage in self-reflection. Use of instructional strategies that fuel “engagement” (such as clinical, simulation, and internship offerings) as well as forms of instruction that demand that students motivate themselves in a self-directed fashion (tutorials and seminars) can create needed life-long habits of this sort.

v. **Capacity to create & participate in a responsible professional community.** Students often think that “legal ethics” instruction requires them to learn black letter rules about professional performance. True attention to legal ethics and professionalism requires a broader view including a capacity to appreciate the relationship between professional norms and individuals’ commitment to enforce them and support others in achieving them.

vi. **Ability and willingness to provide public service.** Professionals have long been expected to extend their talents to those in need, not simply to make money on their own behalf. This commitment lies at the heart and soul of professional work and serves as an important justification for the opportunities and privileges that professionals enjoy.

As will be discussed below, this effort to frame the obligations of professionals across varying fields may help to ground legal education whether provided in the context of a “professional school” or as part of a “liberal arts” education.

\(B\) Metaphorical Apprenticeships, Teaching and Learning

Second, the CFAT study employed a fresh intellectual framework for thinking about the scope of legal education and its associated teaching and learning practices, setting
the stage for an invigorated approach that better balances competing institutional values and personas.

(i) Metaphorical Apprenticeships. The Carnegie study made the case for thinking about legal education through the lens of three metaphorical “apprenticeships,” those relating to cognition (thinking and content), professional skills (including close reading, writing, research and more), and values (including ethics and “professional identity”). In some respects these “apprenticeships” resonate with and track the six commonplaces just referenced, and thus made the intellectual argument for a broadened curricular focus in a way not done before.

By highlighting these three distinctive dimensions of thinking, acting, and “being” a professional, the CFAT study also brought home the reality that American legal education has traditionally focused most of all on the first (cognition) and has given less systematic and balanced attention to the others.

Over prior decades numerous claims had been made for more clinical instruction, but many law schools often viewed such teaching as a relatively expensive undertaking, focused primarily on providing legal services to the poor, rather than an important form of instruction for all students. The Carnegie call for systematic attention to skills was particularly timely since the Report was published in 2007, just before the financial meltdown of 2008 left schools trying to find ways to make their students more marketable in a down economy. Moreover, the Carnegie analysis was careful to recognize that schools might address skills-development in a variety of ways (including incorporation of skills-instruction into a variety of courses using a range of techniques), rather than demanding “clinical” teaching specifically.

Likewise, CFAT’s call for greater attention to professional values and identity gave a new name and fresh conceptualization to an area often dismissed as someone else’s problem. In the wake of the 1973 Watergate scandal (involving top advisers and President Richard Nixon, all trained as lawyers), the American Bar Association required American law schools to require that all students take a course in legal ethics. Over time, that course devolved into unpopular courses in “the law of lawyering” that focused on preparing students for multiple-choice bar exams, rather than more probing inquiries about how lawyers need to recognize and attend to the relationship between personal and professional values and their overall sense of identity. While many law schools had adopted voluntary “professionalism” initiatives to spur students to probe their own values and appreciate the norms of the legal profession, most such initiatives were not given formal academic status and often reached only a small proportion of students. Moreover, schools that lacked a focus on values and identity left students unsure about how they could and should appreciate the relationship between personal and professional concerns.

In essence, the Carnegie Foundation’s attention to all three metaphoric “apprenticeships” provided an intellectual challenge and framework for legal educators to rebalance their priorities and to recognize their own responsibilities and interests in working with a broader array of educational objectives. By identifying the invisible dimensions of American legal education, when compared with other forms of professional education, the Carnegie Report thus spoke to the conscience of many legal academics and drew them into a new dialogue about how missing pieces in the educational picture needed to be addressed.

(ii) Teaching and Learning. The Carnegie study also argued that more attention should be paid to the role of teaching and learning as part of law schools’ institutional agendas. It opened the eyes of legal educators in several important respects.
(A) Teaching. Although teaching is often thought of as a “private” act (taking place between teachers and their students), it has a profoundly significant impact on what students learn. For example, American legal educators often give particular attention to teaching students to “think like lawyers” during the first year of the students’ three-year post baccalaureate education. “Thinking like a lawyer” is generally not well-defined or at least not well-explained, and students often find it difficult to appreciate or deliver what their professors expect of them. During field work for the study, students and faculty were systematically asked what they meant or understood by this touchstone phrase. Some explained that it meant that “law is gray” (that is, not certain). Others unpacked related notions: “thinking like a lawyer” requires students to learn the legal landscape (a new vocabulary, procedural moves, close reading), and employ standard forms of questioning to probe uncertainty. Teaching students to “think like lawyers” is the predominant focus of the first of three years spent in American JD programs.

Indeed teaching students to “think like lawyers” in the United States typically forces them to engage with each step of Benjamin Bloom’s “taxonomy of educational objectives.” Observation of numerous classes in 16 law schools demonstrated that teachers typically require students to work systematically on key challenges: (a) knowledge (“what did the court say”); (b) comprehension (“explain what the court said in your own words”), (c) analysis (“what are the elements of this doctrine”), (d) application (“how does this doctrine apply in this context”), (e) synthesis (“how does this case relate to this other case reaching a different outcome”) and (f) evaluation (“is this approach just? Does it provide certainty? Is it efficient?”). Strikingly, few American law teachers have heard of Bloom’s taxonomy or recognize that it was developed after World War II as a means of testing cognitive skills of undergraduates at elite universities. Nonetheless, they have found varying ways, working with widely diverse students, to take on the task of teaching students to develop critical thinking skills in a systematic way.

The Carnegie study described the typical strategy employed in teaching first-year law courses as the “case-dialogue” method because this approach typically involves a focus on common law appellate decisions and dialogue between teachers and students (rather than lectures or general discussion). The power of this approach in part relates to its systematic inculcation of key questions to be addressed from one topic or subject to another. The study also recognized that the approach typically used in such settings embodied a powerful method of developing expertise, providing students with “scaffolding” and support early on, then “fading” back and expecting them to stand on their own.

The “case-dialogue” method, like other types of “signature pedagogies,” has significant power. It resonates with and emulates actual practice within the contentious side of the profession (in this instance engaging in dialogue as would occur in court). It is also typically associated with a particular level of “frisson,” insofar as students are expected to perform before their classmates and experience a significant level of uneasiness in doing so (driving lessons home). On the other hand, powerful signature pedagogies have a “dark side,” that is a significant gap or blind-spot that leaves other
issues or considerations behind by virtue of overreliance on such a congenial and common approach. The case-dialogue method is a very powerful means of engaging students in developing their critical thinking capacities and their approach to reconciling case-law. On the other hand, this method is ill-suited to teaching students about statutes and regulations, key professional skills, or professional identity and values. If, however, law teachers are aware of these limitations and implicit assumptions, they may be able to make changes to their instructional objectives and teaching techniques to address implicit limitations.

(B) Learning. A great deal has also been discovered in recent decades about how students learn. It is particularly important to recognize how expertise is developed. Generally, expertise is not something that can be developed over a short interval, but instead requires significant time moving between stages. Thus, students need to progress from the status of “beginners” to “advanced beginners,” “intermediates,” “advanced” and “experts.” This framework of development does not simply reflect content exposure, but rather extended experience with problem-solving. Understanding “situated learning” is particularly important as students first observe the activities of sophisticated craftsmen and craftswomen, and then move into the center and take responsibility for more nuanced tasks and obligations. Developing tacit knowledge with the help of expert mentors is also crucial.

It is likewise important to understand not only how people learn initially, but how learning is transferred. If the ultimate goal is to prepare students to navigate on their own through complex future problems, they must not only learn deeply at the outset, but also learn how to build upon foundational insights to develop deeper and more enduring understanding. Transfer of learning is most effective if students are initially motivated to learn and given opportunities to build upon their initial learning. Learning in multiple contexts and linking learning to everyday life also help. So too does attention to students’ prior cultural practices and an emphasis on metacognition (knowing what you do or do not know).

The Carnegie study also emphasized the importance of assessment in facilitating learning. Many educational institutions and faculty members emphasize “summative assessment” (that is assessment that considers what students have learned at the end of a course), but do not give much attention to “formative assessment” (that is, intermediate “feedback” as students engage with educational tasks throughout a course). Because of the challenges of helping students develop relatively intangible abilities and values (“thinking,” listening, practical judgment, values, identity), formative assessment is especially important in the legal education enterprise. A variety of tools are increasingly used to provide informal feedback throughout courses without adding significantly to the time burdens of teachers.

39 See Lave and Wenger, supra note 35.
40 Sternberg RJ and Horvath JA (eds), Tacit Knowledge in Professional Practice: Researcher and Practitioner Perspectives (Psychology Press 1999).
41 Bransford, supra note 37.
42 Ibid at pp 51–78 (discussing learning and transfer).
43 Ibid.
44 Sullivan et al, supra note 31, at 162 et seq.
In summary, the Carnegie Report, *Educating Lawyers*, maps out and explains key elements of legal education that are likely to be important not only in the US but also in the UK. It frames broad “commonplaces” that are needed by practising professionals in order to help legal educators consider existing and potentially changed curricular frameworks that prepare graduates to respond to related challenges. It also illuminates how teaching affects learning in both obvious and less obvious ways. Finally, it explains important lessons about how people learn that are often unknown to many faculty members.

To the extent that legal educators wish to move the conversation beyond the economic value of legal education and instead focus on educational value, this framework provides a good place to begin. At the same time, we need to be aware that claims of virtue, benefit, or value are likely insufficient in our current social context. That is why greater attention is also needed to strategies for “outcome assessment,” a growing force within higher education and a point of emphasis within the *LET Report*.

**THE ROLE OF LEARNING OUTCOMES AND ASSESSMENT STRATEGIES**

A growing consensus within the higher education community confirms that learning outcomes need to be clearly identified and assessed in order to help guide teaching and learning, and to hold providers of education accountable. Once learning outcomes are identified, they can be used to guide assessment.

Learning outcomes are increasingly used by individual instructors as a means of shaping their courses. The core idea is that by identifying desired outcomes in advance, instructors can engage in “backward design” that shapes the course in ways to assure that students can achieve the desired outcomes. Making students aware of such expected outcomes helps them focus their efforts to study and the way they use their time. Identifying and stating learning outcomes also helps guide the ways that formative and summative assessments are used in the course to guide student learning as it progresses (formative) and to reach ultimate grades (summative).

Recent changes in the “Standards” adopted by the American Bar Association to guide accreditation review for American law schools place greater emphasis on learning outcomes and assessment. Several significant requirements have been added...
that implicate institutional action (rather than focusing on the options available to individual faculty members just described). Attention has now been focused on “outputs” rather than only the traditional inputs (funding, building, student quality, number of faculty and courses). Law schools must now establish and publish “learning outcomes” at the institutional level.\footnote{Standard 301.} The process of framing learning outcomes at an institutional level can be more difficult, as is the process of determining whether such outcomes have been satisfied.\footnote{See Wegner, supra note 46.} The LETR Report made the case for more attention to learning outcomes and assessment within the universe of legal education, including attention to competence (a difficult notion to define).\footnote{LETTR Report, supra note 1, at chapter 4.} Parallel developments in accreditation of American law schools by the American Bar Association in the United States have likewise focused heavily upon assessment mandates,\footnote{See Wegner, supra note 46.} as has likewise been the practice of American regional accreditors.

In particular, the American Bar Association has mandated that law schools adopt institutional learning outcomes. This requirement reflects an important change insofar as it focuses on learning “outputs” as opposed to “inputs.”\footnote{Standard 301.} \footnote{Ibid.} Schools must adopt and publish institutional “learning outcomes” that are to be framed in terms of “competence.”\footnote{Ibid.} Four specific areas must be addressed\footnote{Interpretation 302–1.} including knowledge and understanding of substantive and procedural law; and legal analysis and reasoning, legal research, problem-solving, and written and oral communication. In addition, learning outcomes must address exercise of proper professional and ethical responsibilities, and other professional skills.\footnote{Ibid.}

The ABA Standards also address assessment. Law schools must employ “both formative and summative assessment methods in order to measure and improve student learning and provide meaningful feedback to students.”\footnote{Standard 314.} The formulation of this requirement and an associated interpretation clearly indicates that the ABA views this requirement as one that is applicable to the school as a whole rather than to individual faculty members in any particular classes.\footnote{Interpretation 314–1.} Much more significantly, schools will henceforth be required to engage in ongoing evaluation of their academic programs, learning outcomes and assessment methods.\footnote{Interpretation 315–1 lists a variety of means by which institutional assessment of learning outcomes might be accomplished but gives little indication of which kinds of methods are likely to be best employed in particular contexts. For a more comprehensive discussion of types and uses of institutional assessment tools, see Wegner, supra note 46.} It is not at all clear how these new requirements will play out in the United States. In the first instance, many schools may have difficulty in framing “learning outcomes” across the whole of their programs.\footnote{Ibid.} This reality stems in part from the challenges associated with asking numerous faculty members who would prefer to act independently to work toward a common goal and to be held accountable for its achievement. While it is possible to adopt generic institutional outcomes,\footnote{Ibid.} it will not be easy to carry through in defining responsibilities for their achievement.
This new imperative is also problematic because many law schools have little experience with how accreditation standards should be framed and how resulting student achievements should be measured. Most law schools lack the on-site expertise or the resources available through university institutional research offices. While they may be able to contract with campus offices to provide them with necessary expertise, they may not be familiar with the benefits of doing so and may also lack resources to do so (or campus offices may lack the capacity of providing such services).

Educational accountability systems in the UK are of course different from those in the US. For many programmes, legal education is delivered as part of undergraduate university education. There is not the same linkage with decisions of state supreme courts or federal funding of student aid as a driver for accountability and oversight.

Nonetheless, attention to learning outcomes and assessment is important even when not driven by particular accreditation systems. This essay has made the case that legal education should be valued for the significant educational benefits it bestows. Although legal educators are likely to believe this proposition based on their experience, those outside the legal academy may be less sure. Mapping and assessing learning outcomes provides much more substantial evidence of the truth of the proposition, particularly insofar as it may yield concrete data to counter the tendency to treat economic claims as more concrete and thus more likely to be legitimate.

### LETR AND ITS LESSONS

#### Background

Many readers of this essay may be familiar with the Legal Education and Training Review recently undertaken under the auspices of the Bar Standards Board, Solicitors Regulation Authority, and ILEX Professional Standards Ltd. This undertaking was designed to determine how legal services education and training practices in England and Wales were aligned to meet future challenges, and to weigh the implications of the Legal Services Act of 2007. The sponsoring organizations were therefore quite different from those involved in the Carnegie Report or in the American accreditation process. Nonetheless, the LETR Report raises questions of equally significant import.

The Report focused on three key areas: quality, access, and flexibility. It reached a number of key conclusions that resonate very closely with those on the minds of educators and regulators in the United States.

As to quality, the Report emphasized the need to strengthen requirements for education and training in key areas, including legal ethics, values and professionalism, management skills, communication skills, and equality and diversity. It also stressed the need to enhance consistency through a more robust system of learning outcomes, standards, and increased standardization of assessment. Likewise it urged more emphasis on assuring continuing competence through the imposition of continuing legal education requirements. As to access and mobility, the Report emphasized the need for professional standards for internships and work experience, more information on the range of legal careers, better career progression for paralegals, and support for higher level apprenticeships as a non-graduate pathway into the legal profession. As to

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63 For an example of the experience of one American law school, see Crossley M and Wang L, ‘Learning by Doing: An Experience with Outcomes Assessment’ (2009) 41 University of Toledo Law Review 269 (describing experience of the University of Pittsburgh School of Law).

64 See note 1, supra.

flexibility, the Report urged regulators to cooperate in setting outcomes, clarify systems for accreditation of prior learning and transfer between professional routes, and improvement of requirements in training regulations so as not to restrict more flexible professional pathways. The Report is much richer than these headlines would suggest, for it integrated in-depth observations about such issues as the development of competence and the balance of liberal arts and professional education in England and Wales.66

Observations: The LETR Report and American Experiences

The LETR Report was at least as major an undertaking for England and Wales as was the Carnegie Report and the recent changes in ABA accreditation standards in the US. The perspective has been different because the LETR Report reflected efforts of three oversight bodies to look broadly at the landscape of the regulation of legal education in England and Wales from their regulatory perspectives. The Carnegie Report sought perspective from the bottom up, primarily with the insights of teachers and students about educational issues, rather than from the regulatory vantage. Changes in the ABA Standards reflected insights gained from regulators of other professions,67 but, given the unified character and single licensure practice of the American bar, did not have the breadth or triangulation of perspectives brought by entities overseeing barristers, solicitors, legal executives and other regulated legal professions.

Nonetheless, the American perspective about the value of education may inform the challenges posed by the LETR Report to legal educators and members of the legal profession in England and Wales. Let me conclude this essay by focusing on three areas central to the LETR Report in which American experience may have some helpful resonance: (i) attention to instruction in ethics and professionalism; (ii) the relationship of liberal arts and professional education; and (iii) the spectrum of education and professional roles. Each of these areas relates to the larger issue under examination, namely the value of legal education in whatever form.

(i) Instruction in ethics and professionalism. "Ethics and professionalism" is one of the areas newly recommended for instructional attention in the LETR Report.68 The American context is different, insofar as a mandate for coverage of ethics was issued by the American Bar Association in the aftermath of the Watergate scandal, more than 40 years ago. One of the important contributions of the Carnegie Report was to highlight the importance of taking a broader vantage on such requirements, and to appreciate what lies at the root of learning outcomes in this arena. Attention to "ethics" in the American legal education context has led to considerable attention to the "law of lawyering," including attention to black letter rules embodied in professional codes and standards relating to malpractice.69 As the Carnegie Report explained and as revised ABA Standards now reflect, there is more to be addressed than black-letter standards. Attention to "professionalism" is one way to emphasize a broader perspective, and the LETR Report reflects that emphasis, presumably with the intent to teach students to consider aspirations for embracing values that go beyond the

66 LETR Report, supra note 1, at chapters 4 (competence) and 2 (liberal arts, professional preparation).
68 LETR Report, note 1 supra, at chapter 2.
minimum standards of ethics, which if violated, would give rise to potential liability for malpractice.  

The Carnegie Report went further, however, in explaining that attention to “professional identity” needs to be rooted in both objective and subjective considerations, and needs to attend to values, not just to rules. Legal educators and professionals in the UK may therefore wish to attend to developments in the US that have probed the meaning of professional identity and effective strategies for supporting students in their development of professional identity. There are clearly well-established frameworks within England and Wales to develop beginning lawyers’ professional identities, particularly through the Inns of Court. Indeed, efforts are increasingly common within the US to develop frameworks that emulate the British experience with Inns of Court. Insofar as UK legal educators seek to build a sense of professional identity among students seeking instruction in legal education, they may well wish to try to emulate the extraordinary practices of the Inns of Court in other educational arenas. The ultimate point is that a broader perspective on preparing candidates for the practice of law need to be adopted, and that candidates in whatever level of preparation need to be exposed to mentoring and challenged to explore and engage with their personal and professional values.

(ii) Relationship between liberal arts and professional preparation. One of the major points of inquiry considered by the LETR Report is how lawyers view their preparation for legal practice. Is it more important to be educated within the context of a liberal arts education or a professional education? The LETR Report indicates that by and large, lawyers in England and Wales prefer the system in which they, themselves, were educated. What is the significance or truth of such assertions, and how might these views be reconciled? One of the lessons of the American experience is that, increasingly, public expectations of those graduating from undergraduate programs in many ways parallel expectations of those graduating from professional programs. An important, comprehensive study by the National Academy of Sciences has demonstrated the significant parallels between preparations and outcomes associated with effective performance in the workplace generally, and the standards of critical thinking and professional conduct described in the Carnegie Report. These studies in the US and the standards of performance they articulate offer useful frameworks for consideration in the UK particularly insofar as they offer learning outcomes and frameworks for assessment that

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71 See Educating Lawyers, supra note 31, at p 126 et seq.


73 For information on the American Inns of Court, see ‘American Inns of Court’ (American Inns of Court) <http://home.innsofcourt.org/> accessed 17 December 2014.

74 LETR Report; supra note 1, at Chapter 2.

might be assist educators in considering similarities and contrasts among different educational programs.

(iii) Professionals and spectrum of roles. A particularly important dimension of the LETR Report concerns the range of professional roles envisioned and education offered along a spectrum of preparation. This issue is an especially important and challenging one, because the notion of overcoming barriers between professional niches and regulatory structures has not easily been addressed or not overcome.

Nonetheless, there are some lessons worth sharing. For example, new specialized professional niches can be developed. Washington State has developed a new regulatory structure for “licensed limited legal technicians” as a sort of “super paralegal” framework that allows designation of individuals who have been trained, tested and certified as having a particular limited area of expertise (such as in family law) who are allowed to practice without immediate oversight of an attorney. This approach is intended to provide relatively low-cost services in a much-needed area of professional services that are not being served by traditional attorneys. In addition, many American state bars have developed sophisticated subject matter systems of specialization that encourage lawyers to move beyond basic general competence to demonstrated expertise based on proven experience, written examination, and peer review.

While the American experience by no means should be assumed to completely guide approaches adopted in the UK these lessons may nonetheless help colleagues elsewhere to determine how best to approach the challenges highlighted in the LETR Report.

CONCLUSION

This essay has attempted to engage with key questions about the value of legal education, in ways that the author hopes will be of interest to readers in the UK. It first summarized recent debates about the economic value of law degrees and legal education in general, offering a cautionary tale to those in settings outside the United States who may experience rising costs and resulting student dislocation. Next, it made the case for viewing the value of legal education in terms of the learning that such education instils. It offered insights into the recent Carnegie Foundation report, Educating Lawyers, in hopes that articulating the benefits and failings of legal education in the United States may help those elsewhere justify and improve the educational value associated with their legal education programs. In that regard, it also discussed recent developments regarding accreditation, assessment, and accountability—areas receiving increasing attention in one way or another around the world.

Finally, the essay considered the recent LETR Report, and highlighted key comparisons with American developments in ways the author hopes will interest British readers. In particular, the final section of the essay discusses education relating to legal ethics and professionalism, apparent tensions between liberal arts and professional preparation, and tensions relating to differentiation of various professional roles. I hope these insights prove helpful to those interested in adding value to their own

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systems of education and regulation by exploring models from outside England and Wales. The opportunity to learn about the challenges facing educators and members of the legal profession in your country has in turn been very valuable to me.
CRIMINAL SQUATTING AND ADVERSE POSSESSION: A CASE OF INTERPRETATIVE LOGIC

R (on the application of Best) v Chief Land Registrar [2015] EWCA Civ 17
(Arden, McCombe and Sales LJJ)

INTRODUCTION

The Legal Aid, Sentencing and Punishment of Offenders Act 2012 received Royal Assent on 1 May 2012. Section 144 of the Act creates a new offence of squatting in residential buildings, which came into force on 1 September 2012. Although the offence is not retrospective and does not criminalise any squatting taking place before 1 September 2012 (when the section came into force), the effect of s.144(7) is that later squatting is not prevented from being criminal as a result of having started before this date. This is of particular importance to claims of adverse possession of registered land, as Schedule 6, para 1(1) of the 2012 Act requires the claimant to have been “in adverse possession of the estate for the period of 10 years ending on the date of the application.”

1 Does the criminality of the trespass now preclude a claim to adverse possession? This was the question before the Court of Appeal in R (on the application of Best) v Chief Land Registrar.2

SOME INITIAL THOUGHTS

Unlike acquiring an easement by prescription which is founded on an assumption of right or entitlement to the user, adverse possession does not occur through user as of right but upon “possession as of wrong”.3 The fact that the adverse possessor is occupying contrary to the criminal law does not detract from the fact that he is in possession. The case law on adverse possession simply requires that possession must be “open, not secret; peaceful, not by force; and adverse, not by consent of the true owner”.4 Why then cannot a trespasser acquire title through adverse possession which is not only a tortious wrong but also a criminal offence?

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1 In contrast, where land is unregistered, it would be possible to rely on 12 years of adverse possession before 1 September as the basis for a claim: see, s.15 of the Limitation Act 1980.
2 [2015] EWCA Civ 17.
3 See, Buckinghamshire County Council v Moran [1990] Ch. 623, at 644, per Nourse LJ.
There is also the reasoning of Bakewell Management Ltd v Brandwood 5, where the House of Lords applied the fiction of a presumed grant to a user which, though both criminal and tortious was, nevertheless, a user which the owner (if so minded) could have authorised at any time. Similarly, in adverse possession cases, the paper owner has the power to license (or consent to) the unlawful occupation so the Bakewell principle has the potential for side-stepping the illegality argument based on s.144. The question, however, is whether there is a sufficient public policy interest in extending the principle to cases of residential squatting given that the 2012 Act has created a new offence specifically intended to combat ongoing acts of trespass retrospectively.

There is also the case of R (on the application of Wayne Smith) v Land Registry (Peterborough Office) 6 where the claimant had claimed title by adverse possession on the basis that his caravan had been situated on a public highway for over 12 years. Since the caravan constituted an unlawful obstruction of the highway, under s.137 of the Highways Act 1980, the criminal illegality of the occupation was held to be fatal to the claim. The test, however, was whether the trespasser had used the land in a way which the legal owner might have been able to deal with it.7 This the claimant could not show as the local authority could not itself use the land in this way, nor could it have licensed anyone to do so because any such user would have been an illegal obstruction of the highway. The decision, therefore, does not necessarily conclude the matter so far as any criminal trespass of private residential land is concerned.

**FIRST INSTANCE RULING**

In 1997, the claimant had taken possession of an empty and vandalised three-bedroomed house in Ilford, East London, without the legal owner’s consent. During the next four years, he did significant work to make the house habitable. From 2001, he treated the house as his own. In November 2012, he applied to register his title to the house on the ground that he had been in adverse possession for a period of 10 years since 2001. The Chief Land Registrar rejected the application because, in his view, time could not run for registration in view of the criminality of the trespass (the claimant had been living in the property since January 2012) under s.144(1) of the 2012 Act. On an application for judicial review to the High Court,8 Ouseley J found in favour of the claimant.

Did s.144 preclude the claim to adverse possession?

In his Lordship’s view, the illegality of the trespass did not constitute a bar to a squatter’s claim to a possessory title. The Bakewell decision supported the notion that the public policy interest in not allowing a person to take advantage of his own wrong may have to give way, depending on factual context, to other (countervailing) public policy interests. In short, the public policy advantages of adverse possession, namely, preventing the economic disadvantages of land remaining unused and unclaimed, outweighed the fact that the adverse possession was based on a criminal trespass. To this extent, the Smith decision was unhelpful since it did not address the issue of countervailing policy interests. Moreover, if the crucial factor, expressed in Bakewell, was the capability of the owner to give consent, that same factor would apply not only

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7 *Ibid*, at [42].
8 *Best v Chief Land Registrar* [2014] EWHC 1370 (Admin).
to prescription cases but also claims involving adverse possession. In *Bakewell*, the fictional grant of consent removed the effect of the illegality, so similarly, in the present case, it was within the power of the legal owner (Mrs Curtis) to permit the adverse occupation (although she had, in fact, never done so).9

Quite apart from policy interests, his Lordship felt that s.144 was not intended by Parliament to impact on the law of adverse possession. A squatter with past criminal offences would still remain liable to prosecution under the 2012 Act. No obvious purpose would be served by preventing applications for registration notwithstanding that they were based on criminal trespass. On the other hand, arbitrary consequences would result if s.144 were held to apply to the registration system, given that: (1) the offence of criminal trespass only applies to the “building” and not its curtilage; (2) it is only the “living in” the building that is criminalised; and (3) no distinction is made between recent squatting and more prolonged acts of criminal trespass. These restrictions could potentially have random (and unintended) effects on adverse possession claims. In Ouseley J’s view, therefore, the primary function of s.144 was to assist homeowners to evict squatters swiftly and more forcefully via the help of the criminal law and “not to throw a spanner into the delicate workings of the [Land Registration Act 2002], with random effects on the operation of adverse possession, all without a backward glance.”10

**Did s.144 breach the claimant’s fundamental human rights?**

A related issue was whether a squatter, who is in mid-term of acquiring a possessory title to a residential building, can rely on a human rights argument to successfully resist any refusal to register his title on the ground that s.144 breaches his fundamental rights to respect for his family home and peaceful enjoyment of his possessions under Article 8(1) and Protocol 1 to Article 1 of the European Convention on Human Rights, respectively.

In *Best*, Ouseley J expressed briefly his views on the human rights arguments, although these were purely obiter given his decision in favour of the claimant on the main issue. First, Article 8 was not engaged by a refusal to register title by adverse possession. This was the view taken by Arden LJ in the earlier case of *R (on the application of Wayne Smith) v Land Registry (Peterborough Office).*11 Secondly, the claimant never had possession in the sense protected by the Convention; “he had to have possession sufficiently established to amount to a legitimate expectation of obtaining effective enjoyment of a property right.”12 The difficulty here was that the system of registration of title, under the Land Registration Act 2002, precluded any such legitimate expectation arising simply through the passage of time – the claimant had no immediate right to title even after expiry of the relevant period of adverse possession. Thirdly, any interference with Article 8 rights was reasonable and proportionate. Even if engaged, therefore, there was no incompatibility between s.144 and Article 8.

9 *Ibid*, at [64].
10 *Ibid*, at [85].
11 [2010] EWCA Civ 200, (CA), at [41].
12 *Ibid*, at [103].
COURT OF APPEAL RULING

The central issue on appeal was whether the criminalisation of squatting mean that granting title to a squatter who claimed adverse possession allowed the squatter to improperly benefit from his criminal conduct. The Court of Appeal, not surprisingly, held that the claimant could rely on his adverse possession to claim title to the house even though part of his occupation was a criminal offence under s.144. However, the judgments of Sales and Arden LLJ show a marked divergence of approach in reaching this conclusion.

The judgment of Sales LJ

The reasoning of Sales LJ reflects, in many ways, the view taken by Ouseley J at first instance. According to his Lordship, the law of illegality did not operate to confer a broad discretion on a court to take any illegal action by a claimant into account when deciding the extent to which such illegality impacted on the relief sought by the claimant. In other words, there was no single rule of illegality with “blanket effect” across all areas of law. In the context of the present case, the illegality affected statutory rights and so it was appropriate to consider illegality against the underlying public policy considerations of both the 2002 and 2012 Acts. Balancing those policy considerations, it was clear that Parliament had not intended s.144 to impact on the law on adverse possession. The stated objective of s.144 was to provide “deterrence and practical assistance” for homeowners in removing squatters from their properties. It was not to re-balance the rights of property owners and adverse possessors regarding their respective entitlements to be treated as title holders to property. That applied to both registered and unregistered land. Like Ouseley J, his Lordship also stressed the arbitrary effects that an opposite conclusion would have on the law of adverse possession. First, a “capricious distinction” would need to be drawn between residential buildings (caught by s.144) and other property (that would not). Secondly, it would involve a disproportionate impact for even very limited periods of breach of s.144 (lasting for only a few days) upon periods of adverse possession lasting many years. Thirdly, arbitrary distinctions would have to be drawn depending on how the claimant had manifested his possession of the premises (by living in it or erecting a fence around it) and what parts of the building had been occupied (the grounds of the house as opposed to the house itself).

Apart from policy considerations, Sales LJ also considered that the Bakewell decision strongly supported the inference that Parliament had not intended to produce any impact on the law of adverse possession by enacting s.144. As mentioned earlier, since the owner of the land in that case would have had the power to give his consent for the use in question and thereby prevent any criminal activity from arising, the House of Lords declined to find any public interest that would prevent the doctrine of lost modern grant from operating. Similarly, in the present case, it was important to not

13 The third member of the Court, McCombe LJ gave a brief judgment also dismissing the appeal for the reasons given by Sales LJ and those given by Arden LJ at [106]-[108] only, dealing with her conclusion based on a conventional statutory interpretation of s.144 of the 2012 Act.
15 Ibid, at [70].
16 Ibid, at [71]-[73].
17 Ibid, at [75].
18 Ibid, at [76]-[80].
19 This is to be contrasted with the situation where the relevant legislation prevents the legal owner himself from doing something on the land or giving consent for it to be done. In this scenario, the statute precludes the fiction of a valid grant of an easement: see, Glamorgan County Council v Carter [1963] 1 WLR 1.
lose sight of the fact that the owner of the house could prevent a criminal offence under s.144 by simply consenting to the squatter being in the property. The removal of the squatter’s status as trespasser in this way pointed strongly to the conclusion that there was no overriding public policy concern associated with s.144.  

Although Bakewell concerned the doctrine of lost modern grant, in his Lordship’s view it was decided on broader grounds of overriding public policy which were equally applicable to the facts of the present appeal.

His Lordship turned next to the Smith case, which he felt was unhelpful for two reasons. First, it did not provide any guidance on what Parliament intended should be the effect of s.144 of the 2012 Act. Secondly, the reasoning of the deputy judge in that case was not, in fact, inconsistent with the Bakewell ruling since he was concerned with a statutory provision (s.137 of the Highways Act 1980) which prevented the owner himself from using the land in the way the adverse possessor had used it. Significantly, that was not the position in relation to s.144.

Finally, his Lordship made brief reference to the human rights dimension. On this point, the claimant had placed reliance on s.3 of the Human Rights Act 1998 and the Convention rights under Article 8 (right to respect for the home) and Article 1 of Protocol 1 (right to respect for property). In view of his conclusion on the main ground of appeal, his Lordship felt it unnecessary to dwell on these issues, except to point out that reference to s.3 of the 1998 Act was only necessary if the construction of a statutory provision according to domestic principles of interpretation was inconsistent with the Convention rights – that was not the case here, since the interpretation placed of the Land Registration Act 2002 in the appeal was, clearly, not inconsistent with Convention rights.

The judgment of Arden LJ

The only other substantive judgment was given by Arden LJ, who preferred not to rely on Bakewell but instead to reach the same conclusion by means of statutory interpretation independently of any balancing of competing public policy interests. In so doing, she listed six separate reasons why, in her view, Parliament had not intended the commission of an offence under s.144 to operate as a bar to registration of adverse possession: (1) the provisions for registration of adverse possession appeared in entirely different legislation from s.144 and there was no indication that s.144 should affect the operation of the adverse possession provisions; (2) it was neither essential nor sufficient for an applicant to rely on a breach of s.144 to make out his case of adverse possession and, therefore, to deprive the applicant of title may also deprive him of the benefit of conduct which has not been criminalised; (3) the approach taken by the Registrar was inconsistent with the statutory purpose of adverse possession and also s.144; (4) the Registrar’s approach would deprive the law of adverse possession of the important quality of coherence by introducing strange distinctions and bizarre results; (5) the Registrar’s act of registering the adverse possession did not condone the illegality or assist it since its primary effect was to regularise the legal position for the future: and (6) Parliament had safeguarded the interests of the legal owner by providing that title to the property by adverse possession cannot be registered unless

20 [2015] EWCA Civ 17, at [87]-[88].
21 Ibid, at [89]. This was also the view of McCombe LJ: see, at [100].
22 Ibid, at [91].
23 Ibid, at [92].
24 Ibid, at [97].
25 Ibid, at [108].
he has had an opportunity to file an objection under s.73(1) of the 2002 Act or to serve a counter-notice under paragraph 3 of Schedule 6 to the 2002 Act.

COMMENTARY

The Bakewell decision, as we have seen, featured heavily in both the judgments of Ouseley J at first instance and in the judgment of Sales LJ in the Court of Appeal even though the case did not involve a trespasser who had committed an offence under s.144 but concerned the acquisition of an easement by lost modern grant. The case, therefore merits closer some examination.

In Bakewell, the claimant was the owner of common land that was bordered by houses belonging to the defendants. For many years, the defendants had been driving over the common land to reach their homes. The claimant argued that the defendants could not establish easements of way by prescription because driving on common land without the permission of the landowner was a criminal offence under s.193(4) of the Law of Property Act 1925. The House of Lords, however, held that the easements could be established by prescription if the right claimed (i.e., driving over common land) would be legal with the permission of the owner. In other words, the user could have been the subject of an express grant at any time which (in turn) would have constituted "lawful authority" under s.193(4) of the 1925 Act. Lord Scott makes this clear: "if a grant of the right could have been lawfully made, the grant should be presumed."26 Lord Scott also makes the point that it is the tortious act of trespass (i.e., the illegal conduct in the civil sense) which forms the basis for acquiring a prescriptive right. He then asks why conduct which is illegal in a criminal sense should be treated any differently if it is only criminal because the owner has given no consent to it. In both cases, the "illegality" is entirely dependent on the owner's permission.27 In his view, therefore, prescription applies regardless of whether the use relied on is illegal in a criminal sense or merely unlawful in the tortious sense.28 Lord Walker makes the same point. In his view, the important requirement is that there should be a "competent grantor, rather than any wider principle based on criminality."29

In adverse possession cases, title is acquired by the tortious act of trespass. As in Bakewell, the paper owner does not give consent to the user of the land and his prior permission would provide a complete defence to any criminal charge under s.144 of the 2012 Act. In the words of Lord Walker in Bakewell:30 "it is the landowner’s unfettered power of dispensing from criminal liability, exercisable at his own discretion . . . which is the key.” If that is right, why should the absence of the owner’s permission in an adverse possession claim produce a different result where s.144 applies? Interestingly, in Smith, as we have seen, no valid licence to occupy the public highway could have been granted by the highway authority itself and so the exception recognised in Bakewell could not apply.

There is, however, an obvious difficulty in applying the Bakewell exception to cases of adverse possession. If we assume that the paper owner had given permission to the user of the land, the claimant’s possession would not have been adverse at all and, therefore, no title could have been acquired in the first place. Prescription (at least at

26 [2004] UKHL 14, at [39].
27 Ibid, at [46].
28 Ibid, at [47].
29 Ibid, at [50].
30 Ibid, at [60].
common law, though possibly not under the Prescription Act 1832) is based on presumed consent due to long acquiescence; it is not destructive of the landowner’s title as it is relying on his title to legitimise the use - in effect, the owner is deemed to have granted the easement. Adverse possession, on the other hand, is destructive of title. It must be adverse (in the sense that it is without the landowner’s permission) or it does not destroy his title.\textsuperscript{31} The point here is that the paper owner is in no sense a grantor in adverse possession cases. In unregistered land, it is not his title that the squatter takes, but a new title based on extinction of the old one. Under the Land Registration Act 2002, the squatter applies to be registered “as the proprietor of a registered estate in land if he has been in adverse possession of the estate for the period of 10 years ending on the date of the application.”\textsuperscript{32} He, therefore, becomes the proprietor of the same estate originally held by the former paper owner, but that transfer takes place by operation of law, not by the paper owner. In neither case is there the consent of the paper owner. If, therefore, consent negatives any possibility of adverse possession, it is difficult to see how the court could be persuaded to apply the fiction of consent (successfully applied in Bakewell) so as to avoid the inevitable consequence of criminality under s.144 of the 2012 Act.

This conundrum did not, however, discourage Sales LJ from relying on the Bakewell ruling. In his view, the decision represented the sort of balancing of public policy factors that was crucial in deciding the primary issue in the appeal. The specific features of lost modern grant in Bakewell did not detract from the “main point”\textsuperscript{33} which was that the possibility of consent by a legal owner indicated that there was no overriding public policy reflected in the law which precluded the obtaining of an adverse title to land despite the claimant’s criminal conduct. The analogy, therefore, with the position in Bakewell provided, in his Lordship’s view, “further indication”\textsuperscript{34} that occupation in contravention of s.144 did not impact on the operation of the law of adverse possession. McCombe LJ was of the same view. For the purposes of the appeal, there was “no material distinction between the acquisition of property rights, adverse to the legal title, by prescription and the barring of a previous legal title by limitation or by the analogous provisions of the [Land Registration Act].”\textsuperscript{35} The only material question was whether concepts of illegality should prevent the acquisition of a legal title by a trespasser.

Arden LJ, on the other hand, preferred to reach her decision by applying conventional statutory interpretation. She was clearly not persuaded by the Bakewell analogy. In fact, in her view, the case was “materially different”\textsuperscript{36} from the facts in the appeal:\textsuperscript{37}

“Prescription is different from adverse possession since it provides a different means of acquiring title . . . The person who acquires title does not have to rely on his own wrongful act to obtain title, since after 20 years the owner is presumed to have given permission for the user . . . By contrast, in a case such as the present, the effect of the adverse possession is not that the owner is deemed to have given permission for the user . . . but simply that the adverse possessor is in a position to apply for the land to be registered in his name.

\textsuperscript{31} See, for example, Grantham Christian Fellowship v Scouts [2005] EWHC 209 Ch., where adverse possession could not be claimed because a long-standing informal licence had never been revoked, and Pye v Graham [2002] UKHL 30, where adverse possession could not start until the relevant licence had expired.

\textsuperscript{32} See, Schedule 6, para 1, 2012 Act.

\textsuperscript{33} [2015] EWCA Civ 17, at [89].

\textsuperscript{34} Ibid, at [90].

\textsuperscript{35} Ibid, at [100].

\textsuperscript{36} Ibid, at [109].

\textsuperscript{37} Ibid, at [109].
In making that application, he has to prove possession. In a case such as the present, he
will rely on a breach of s.144.'"

Her Ladyship, however, was able to characterise Bakewell as a case where the
outcome was arrived at by the simpler process of statutory interpretation – since s.193
of the Law of Property Act 1925 criminalised the use of another’s property without
authority but did not prohibit the owner’s grant of authority for the user in question,
the statute (as a matter of construction) did not prevent the operation of lost modern
grant.38 This must clearly be right and, in many ways, the interpretative approach
taken by Arden LJ is to be preferred.

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38 Ibid, at [110].
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GOVERNMENT CHALLENGES TO THE RULES ON STANDING IN JUDICIAL REVIEW MEET STRONG AND EFFECTIVE OPPOSITION

R (on the application of O) v Secretary of State for International Development
[2014] EWHC 2371 (QB)
(Mr Justice Warby)

INTRODUCTION

The issue of standing in judicial review proceedings has been the subject of significant attention over the last few years, both directly from government and the courts. Standing ("locus standi") is concerned with whether or not the individual is entitled to invoke the court’s jurisdiction and, in judicial review proceedings, which involves consideration of matters of government policy and practice, the restrictiveness of such rules is a matter of great constitutional significance. Ever since Lord Diplock’s comments in Inland Revenue Commissioners v National Federation for the Self Employed and Small Business Limited1 ("IRC") that the restrictive approach to standing created a "grave lacuna" which risked undermining the rule of law, the court’s approach, with some notable exceptions, has been largely characterised as relaxed and had generally become viewed as a low threshold test.2

The test for standing is laid down in section 31(3) Senior Courts Act 19813 and requires the applicant to have "sufficient interest" in the matter to which the application for permission to apply for judicial review relates. In the period since Lord Diplock’s comments in IRC, the appellate court’s judgments on standing, with a few notable exceptions, have gone in favour of applicants for judicial review. However, in the last five years, the fundamentally liberal approach characterised by such cases as R v Secretary of State for Foreign and Commonwealth Affairs ex parte World Development Movement ("WDM"),4 has been the subject of scrutiny both in the court itself and in the wider political environment. A recent spate of cases5 and proposed reforms of the judicial review system6 have again brought the issue of standing to the foreground when it could well be argued that was one which rarely raised its head in judicial review proceedings since the decisions in the mid-1990s.

The current government, driven largely by the Lord Chancellor7, is clearly keen to reform the process of judicial review. The Lord Chancellor has expressed the concern that the expansion of judicial review since the 1980s has fuelled unmeritorious claims "which may be brought simply to generate publicity or to delay implementation of a decision that was properly made".8 These cost the country both:

1. A significant proportion of these weak applications are funded by the tax payer – through the expense incurred by the defendant public authority, by the court resource

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3 1981 c54.
4 n2.
5 See R (on the application of Chandler) v Secretary of State for Children, Schools and Families and others [2009] EWHC 219 (Admin); R (on the application of UNISON) v NHS Wiltshire Primary Care Trust and others [2012] EWHC 624 (Admin).
7 The honourable Christopher Stephen Grayling (1 April 1962), is a Conservative Party politician who has been the Lord Chancellor and Secretary of State for Justice since 2012. He is the first non-lawyer to hold the position in four hundred years.
8 Judicial Review – Proposals for Further Reform Cmnd 8703, 3.
entailed, and in some cases by legal aid or by the public authority bearing the claimant’s legal costs. . . \(^9\)

and because of the “impact these judicial reviews are having on the country as a whole”\(^10\).

Specifically, the proposed reforms of the judicial review process included proposals to reform the rules relating to standing. In their most recent consultation paper “Judicial Review - Proposals for Further Reform\(^11\)” (following quickly on from the paper in 2012 entitled “Judicial Review Proposals for Reform”\(^12\)) the Ministry of Justice expressed the concern that:

\[\ldots\text{too wide an approach is taken to who may bring a claim, allowing judicial reviews to be brought by individuals or groups without a direct and tangible interest in the subject matter to which the claim relates, sometimes for reasons only of publicity or to cause delay.}\]

\(^13\)

The proposals were roundly opposed by those who responded to the consultation, citing well-rehearsed arguments that restricting the test would move the focus of judicial review from challenging public wrong to protecting private rights and that many meritorious claims would not otherwise be brought if the liberal rules which allowed representative groups to bring claims were not retained.\(^14\) The powerful judgment of the Court of Appeal in the WDM case\(^15\) was much cited in replies to the consultation which stressed the importance of ensuring that abuses of power by government did not go unchecked because of the lack of someone able to bring a challenge. Notably, the senior judiciary in their response to the second consultation invoked the link, central to the WDM case judgment, that a liberal approach to standing was vital to uphold the rule of law and ensure that abuse of power did not go unchecked:

The test of standing in judicial review must be such as to vindicate the rule of law. Unlawful use of executive power should not persist because of the absence of an available challenger with a sufficient interest. The existing test of standing meets that requirement and we do not consider there to be a problem with it.\(^16\)

The vigour with which the judicial review reform agenda is being pursued elsewhere, for example in the recent debates during the passage of the Criminal Justice and Courts Act\(^17\), may also be reflected in government lawyers’ approach to standing in cases. It could be that recent successes emboldened the government to seek to challenge the approach to standing more generally.

The issue of standing has been complicated by the introduction of differing legal tests (“victim”, “person aggrieved”, “direct and individual concern”) depending on the area of law (respectively, human rights\(^18\), environmental challenges\(^19\), European Union law

\(^9\) _Ibid.,_ 3.

\(^10\) n 8, 3.

\(^11\) Judicial Review – Proposals for Further Reform Cmnd 8703.

\(^12\) Judicial Review – Proposals for Reform 2012 Cmnd 8515.

\(^13\) n 11, 24.


\(^15\) n 2.

\(^16\) n 10, para 15.

\(^17\) 2015 c 2.

\(^18\) Section 7 (1) Human Rights Act 1998 c 42.

\(^19\) UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (‘Aarhus Convention’).
challenge\(^\text{20}\)). Notably, within the context of public procurement and privatisation of government services, applicants in recent cases have found themselves successfully thwarted by arguments on standing. In *R (on the application of Gillian Chandler) v Secretary of State for Children, Schools & Families and others*\(^\text{21}\), for example, the court held that a parent of a child in a local authority area had no standing to challenge a decision to grant a local school academy status. Similarly, in *R (on the application of Unison) v NHS Wiltshire Primary Care Trust and others*\(^\text{22}\), the trade union Unison had its standing successfully challenged when it attempted to challenge an NHS Primary Care Trust’s decision to outsource NHS services to private providers. Both judgments were referred to in the case discussed here.

The case of *R (on the application of O) v Secretary of State for International Development* may have seemed to the government’s lawyers like a case in which standing could easily be challenged, especially as it was brought by a non-UK national from outside of the jurisdiction. However, the argument that O, as a non-national should not be granted standing to challenge a decision of the UK government was one which Mr Justice Warby was reluctant to accept.

THE FACTS

O is Ethiopian. He claimed he was subject to human rights abuses in the course of the Ethiopian government’s programme of resettlement of villagers under the “Commune Development Programme”, described in court as a process of “villagisation”. Because of the brutal way in which this policy was applied, the claimant fled to Kenya. The claimant alleged that the Ethiopian government’s programme was in fact funded by the Department for International Development’s “Promotion of Basic Service” programme, a fund of some £510 million which is to be spent by 2018. The grant of development funding (under section 1 of the International Development Act 2002) has to take place in accordance with departmental policy as set out in “Partnerships for Poverty Reduction: Rethinking Conditionality”. That required, amongst other things, that the UK government reconsiders finance where donee governments are found to be in significant violation of human rights.

THE ISSUES ARISING

The claimant’s application to challenge the funding was based on two grounds. The first was that the Secretary of State had failed to put in place any process by which Ethiopia’s compliance could be assessed. The second was that the Secretary of State had refused to make any assessment public. The claimant sought permission for judicial review and the Secretary of State raised the issue of standing at the application for permission.

It is interesting to pause at this point and reflect on the landmark decision in *WDM*; again, the central issue was standing and the subject matter the issue of statutory overseas aid. In that case, a pressure group, the World Development Movement, successfully challenged the then government’s decision to grant aid to Malaysia to construct the Pergau Dam. Though the issue of standing was central, what was very

\(^{20}\) TFEU Article 263.

\(^{21}\) n 5.

\(^{22}\) Ibid.
different in WDM was the status of the applicant. In WDM, the entity challenging had no direct connection with the country in which the aid was being spent. It gained its standing, according to the court, as a body with a legitimate concern in the issues given its expertise in overseas development issues. It was not directly affected, in the normal sense of the words, but the matter was one of legitimate public concern and it was not that most reviled of judicial review participants, the notorious “busybody”.

The argument on standing put forward by the government was that O had to show either that he had himself been “affected in some identifiable way” by the decisions challenged, or that the claim involved issues of real and significant public interest which would not otherwise be raised, such that the rule of law required the challenge to proceed.

The first of these tests derived from dicta of Arden LJ in Chandler (cited and applied by Eady J in Unison)\(^\text{23}\). The second derived from the judgment of Lord Reed in Walton v The Scottish Ministers\(^\text{24}\) which, quoting Lord Hope in AXA General Insurance v Lord Advocate\(^\text{25}\), states that a personal interest need not be shown if the individual is acting in the public interest and can genuinely say that the issue directly affects the section of the public that he seeks to represent.

The government, as well as arguing that O had not shown a personal interest, (which itself seems a difficult line of argument in the circumstances) submitted that the requirement of a significant public interest was not met and that the rule of law did not require this challenge to proceed.

For O, it was argued that the test of standing derived from Chandler was specific to its context, and narrower than the general test. Standing, it was argued, had to be treated “in the overall legal and factual context of the case”. As the claim raised serious public interest issues arising from the acknowledged need to ensure that development aid does not go to governments involved in grave human rights breaches, O could not be categorised as a mere busybody. He had a credible basis for arguing that UK aid had contributed to the human rights violations of which he complained.

THE JUDGMENT

Mr Justice Warby granted permission for the claimant’s application to proceed to a full hearing, accepting that there were arguable grounds that the Secretary of State had failed to put into place a process by which Ethiopia’s compliance could be assessed while rejecting the second ground of challenge. He accepted that the applicant, clearly, had standing to bring the claim and accepted that neither Chandler nor Unison should be treated as providing authoritative guidance on the right approach to standing in O’s case. Echoing both Lord Reed in Walton and Lord Justice Rose in WDM, he stressed the significance of and sensitivity to context in a decision on standing. Rejecting the government’s two pronged approach outlined in submissions he stated:

1. the court should avoid an unduly restrictive approach, which treats judicial review exclusively as a means of redressing individual grievances;

\(^\text{24}\) [2012] UKSC 44.
2. the concept of a “sufficient interest” is not one that lends itself to exhaustive definition, but is inherently elastic depending on the particular context and circumstances;
3. a person will not have standing if they are a mere busybody in the sense that they are interfering in a matter in which they have no personal interest and no reasonable or legitimate concern;
4. it is not necessary to demonstrate a personal interest if the individual is acting in the public interest and can genuinely say that the issue directly affects the section of the public that he seeks to represent.

COMMENT

To some extent, the decision clarifies rather than develops the law on standing, stressing the importance of context, reiterating that judicial review is not simply a means of dealing with specific individual grievances and emphasising the vital role it plays in holding government to account through the rule of law.

It also, though, acts as a very clear indication that holding government to account through the courts is not something of peculiar concern to those who can argue a direct and tangible interest (ironically, perhaps, in a case where the applicant, albeit not a citizen, had a very direct tangible concern as to the impact of a government policy).

The cases of Chandler and Unison both involve specifically the process of public procurement and outsourcing; as such, they should be viewed as judgments largely limited to cases involving such issues. The expansive approach to standing envisaged by Lord Diplock and asserted over the last 30 years or so seems likely to remain, despite restrictions in particular areas of policy.

CONCLUDING REMARKS

By allowing standing in this case, the Court is recognising both the crucial importance of a liberal approach to standing to ensure that abuses of power do not go unchecked and that such challenges need not come from citizens but are an available method for anyone affected by UK government policy to challenge government action.

Despite the politicians’ rhetoric and their obvious and perhaps inevitable dislike of a judicial process which is open to both pressure groups and foreigners, the judiciary seems implacably opposed, both within the courts and through responses to consultation to see judicial review significantly limited. The government, however, as evidenced by the recent attempts to reform judicial review, seems intent on trying to curb its use.

The collision between elected politicians and former judges has been played out most recently in the House of Lords in recent debates over proposed reforms in the Criminal Justice and Courts Act which, amongst other things, attempts to make financial contributors to a judicial review action and interveners potentially liable for costs. The forcefulness with which the Coalition government has pursued its objective to restrain judicial review is also evident in the approach taken by the government’s lawyers over the issue of standing, though in this case, those attempts were unsuccessful. Now the Criminal Justice and Courts Act has received Royal Assent, it is likely that the conflict

27 n 26.
over the use of judicial review will continue in the courts. Indeed, it will be interesting
to see if the scenario envisaged by Lord Steyn in *Jackson*,\textsuperscript{28} in which access to the
courts is significantly restricted, may well see the court being asked to consider whether
or not the principle of Parliamentary Sovereignty should be revisited in the name of
upholding the Rule of Law.

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\textsuperscript{28} UKHL [2005] 56 at para 102.
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SALE AND RENT BACK, VENDOR-PURCHASER CONSTRUCTIVE TRUST AND SCINTILLA TEMPORIS

Scott v Southern Pacific Mortgages Ltd [2014] UKSC 52
(Lady Hale, Lord Wilson, Lord Sumption, Lord Reed and Lord Collins)

INTRODUCTION

In Scott v Southern Pacific Mortgages Ltd, the Supreme Court examined (1) whether the purchaser’s interest under the vendor-purchaser constructive trust, arising on exchange of contracts, could feed an estoppel created by the purchaser in favour of the vendor; and (2) if yes, whether the contract, conveyance and mortgage were one indivisible transaction, such that there was no scintilla temporis during which the estoppel could be fed in priority to the mortgage.

THE FACTS

Scott concerned a “sale and rent back” transaction. Mrs Scott sold her property to the purchaser who (during the negotiation) promised her that she could rent the property at a discounted rent indefinitely. The purchase was financed by the mortgage loan provided by Southern Pacific Mortgages Ltd, although the tenancy promised by the purchaser to Mrs Scott was not permitted by the terms of the mortgage.

Exchange of contracts, the completion and the execution of the mortgage happened on the same day. In breach of the mortgage terms, the purchaser granted a tenancy to Mrs Scott. The purchaser later defaulted, and Mrs. Scott, in face of the possession proceedings initiated by the mortgagee, argued that she had an overriding interest under the Land Registration Act 2002 that took priority to the mortgage.

Two issues arose. First, the purchaser had no interest in the property at all when the promise to Mrs Scott was made. When was the estoppel arising from the promise in favour of Mrs Scott “fed”? Mrs Scott argued that it was fed when the contracts were exchanged. This was because a vendor-purchaser constructive trust arose at that point, and the purchaser’s interest under the trust could feed the estoppel. The mortgagee in contrast argued that it was only fed when the purchaser acquired the estate on completion. Since Abbey National Building Society v Cann decided that completion and mortgage were one indivisible transaction, the mortgage would take priority over the estoppel. On this issue the Supreme Court (Lady Hale, Lord Wilson, Lord Sumption, Lord Reed and Lord Collins) unanimously held in favour of the mortgagee. In so deciding, the Court downplayed the significance of the vendor-purchaser constructive trust.

Second, had the estoppel been fed by the vendor-purchaser constructive trust on exchange of contracts, the issue of whether the contract, the completion and the mortgage were one indivisible transaction under Cann (such that the mortgage took priority over the estoppel that was fed on exchange of contracts) would have been relevant. Lady Hale (with whom Lord Wilson and Lord Reed agreed) would have answered the question in the negative, while Lord Collins (with whom Lord Sumption agreed) would have held in favour of the mortgagee.

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1 [2014] UKSC 52.
This note focuses on two issues: (1) whether the estoppel could be fed by the purchaser’s interest under the vendor-purchaser constructive trust arising on exchange of contracts; and (2) whether the contract, the completion and the mortgage were one indivisible transaction. It is submitted that (1) while the Court rightly concluded that the estoppel could only be fed on completion, the criticism on the vendor-purchaser constructive trust doctrine was unnecessary and unjustified; and (2) the minority was right in holding that the contract, conveyance and mortgage were one indivisible transaction.

Could the vendor-purchaser constructive trust feed the estoppel?
In deciding that the estoppel could only be fed on completion, the Supreme Court sought to downplay the significance of the vendor-purchaser constructive trust. Thus, Lord Collins (delivering the main judgment on this point) suggested that the trust did not have “a proprietary effect on parties other than the parties to the contract”, and relied on Australian authority for the proposition that the trust concealed “the essentially contractual relationship” between the parties.

With respect, both arguments were misconceived. As to the proprietary effect of the trust, it was established in Shaw v Foster that the purchaser can “assign the benefit of his contract, or to charge his equitable interest in the property in favour of another person”. The purchaser can also register the contract to gain priority over third parties, as Lord Collins himself recognized. The potential proprietary effect of the trust against third parties can be illustrated by Lloyds Bank Plc v Carrick, where the proprietary interest under a contract was rendered void against a mortgagee for non-registration. In light of the transferability and exclusivity of the purchaser’s interest, Lord Collins’ suggestion that the trust had no proprietary effect was unjustified.

Lord Collins relied on Lindley L.J.’s observation in Inland Revenue Commissioners v G Angus & Co that the trust had no proprietary effect on third parties. Nonetheless, that case could arguably be distinguished, as it concerned the meaning of the phrase “conveyance on sale” as defined by s.70 of the Stamp Act 1870. Under that section, the phrase “includes every instrument... whereby any property upon the sale thereof is legally or equitably transferred to or vested in the purchaser”. More importantly, Lord Esher M.R. reasoned that an equitable transfer of legal title fell outside the scope of the section:

“I take the real meaning of the section to be this—When the property to be conveyed is a property known to the common law, then the conveyance, if there be one, will be a legal conveyance; and when the property to be conveyed is an equitable property or interest, the conveyance, if there be one, will be an equitable conveyance. It does not mean an equitable conveyance of a common law property, or a legal conveyance of an equitable

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3 [2014] UKSC 52 at [65]
5 (1872) L.R. 5 H.L. 321.
6 (1872) L.R. 5 H.L. 321, at 333.
7 [2014] UKSC 52 at [65]
9 (1889) 23 Q.B.D. 579.
10 (1889) 23 Q.B.D. 579, at 590.
property, but the two kinds of conveyances are distributed each to that kind of property which it has to convey."

His Lordship reiterated his conclusion at the end of his judgment: 11

"The construction which I have put on s.70 will, I think, give a distinct and clear meaning to the words which for some time puzzled me, "legally or equitably transferred;"—the word "legally" applies to a legal transfer of a legal right, and the word "equitably" applies to an equitable transfer of an equitable interest."

Thus, on Lord Esher M.R.'s reasoning, a vendor-purchaser constructive trust, which effected an equitable transfer of legal title, could not be a "conveyance" as defined by the Stamp Act 1870. Whether the trust had proprietary effect was therefore irrelevant. This arguably diminished the significance of Lindley L.J.'s observation, and in any event, the case concerned statutory interpretation and could not be conclusive on the proprietary effect of the vendor-purchaser constructive trust.

Lord Collins' second argument was that describing the vendor as a trustee was misleading. His Lordship cited Chang v Registrar of Titles12 and Tanwar Enterprises Pty Ltd v Cauchi13 to the effect that the vendor-purchaser relationship should be more accurately described as contractual. Nonetheless, as Professor Robert Chambers demonstrated, the contract-trust divide is "a false dichotomy",14 in that the two are not mutually exclusive. The argument that trust and contract cannot co-exist was authoritatively dismissed by Lord Wilberforce in Barclays Bank Ltd v Quistclose Investments Ltd.15 As his Lordship categorically stated, "I should be surprised if an argument of this kind—so conceptualist in character—had ever been accepted . . . There is surely no difficulty in recognising the co-existence in one transaction of legal and equitable rights and remedies".16 Lord Wilberforce had no difficulty in holding that a trust and a contract co-existed in Quistclose, and it is difficult to see the force of Lord Collins' argument.

In the same vein, it may be suggested that labelling the vendor as a trustee is inappropriate, because (1) the vendor retains an interest in the property prior to completion, and (2) the vendor owes no or limited fiduciary duties. The first objection was rejected by the very case of Lysaght v Edwards.17 There, Sir George Jessel M.R. unequivocally dismissed the objection based on the fact that the vendor retained certain rights: "is the vendor less a trustee because he has the rights which I have mentioned? I do not see how it is possible to say so".18 Likewise, Professor Chambers argued that a trust can exist even if the trustee has an interest in the assets: for example, a trustee can be a beneficiary of his own trust.19 That the vendor retains an interest in the property is not an objection to the existence of a trust.

The second objection raises a point on taxonomy. Are trustees necessarily fiduciaries? Lord Collins cited Stamp L.J.'s observation in Berkley v Poulett that the vendor-purchaser trust did not have "all the incidents of the relationship of trustee and cestui

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11 (1889) 23 Q.B.D. 579, at 594.
12 (1976) 137 C.L.R. 177, cited in [2014] UKSC 52, at [64]
17 (1875–76) L.R. 2 Ch D 499.
18 (1875–76) L.R. 2 Ch D 499, at 507.
This objection assumes that all trustees are fiduciaries. This proposition was authoritatively rejected by Sir Peter Millett in his celebrated article “Restitution and Constructive Trusts”. His Lordship stated that (1) a trust arises as long as the legal and equitable titles are separated, and (2) in some trusts (e.g. a constructive trust) the trustee may owe no fiduciary duties. Therefore, not all trustees are fiduciaries. The absence of fiduciary duties is not fatal to the existence of a trust; in contrast, the separation of legal and equitable ownership is sufficient to give rise to one. Given the purchaser’s equitable proprietary interest under the vendor-purchaser trust, it is perfectly sensible to describe the vendor as a trustee, even if the vendor owes no fiduciary duties.

This is not to say that Scott was wrongly decided. On the contrary, the Supreme Court was right in holding that the purchaser’s interest under the vendor-purchaser trust arising on exchange of contracts could not feed the estoppel. Nevertheless, the Court went too far in criticising the vendor-purchaser constructive trust doctrine, and as we have seen the criticism was unjustified. A better approach would be to examine the quantum of the purchaser’s interest before the vendor is paid. The purchaser has no right to evict the unpaid vendor, who is entitled to remain in possession and has no duty to convey the legal title. It would be absurd to say that the purchaser could grant a tenancy out of his limited interest arising on exchange of contracts. As the transaction proceeds, the purchaser’s interest enlarges, and it is submitted that the purchaser’s interest will be strong enough to feed the tenancy by estoppel only when the vendor is paid. This is borne out by Lord Walker’s analysis of the uncompleted estate contract in Jerome v Kelly:

“Neither the seller nor the buyer has unqualified beneficial ownership. Beneficial ownership of the land is in a sense split between the seller and buyer on the provisional assumptions that specific performance is available and that the contract will in due course be completed, if necessary by the Court ordering specific performance. In the meantime, the seller is entitled to enjoyment of the land or its rental income . . . If the contract proceeds to completion the equitable interest can be viewed as passing to the buyer in stages, as title is made and accepted and as the purchase price is paid in full.”

On this analysis, the estoppel in favour of Mrs Scott could only be fed on completion, and as the purchase was financed by the loan provided by the mortgagee, Cann dictated that the completion and the mortgage was one indivisible transaction, meaning that the mortgage took priority over the estoppel. The Supreme Court thus arrived at the right conclusion, although its criticism on the vendor-purchaser trust doctrine was unnecessary and misplaced.

Contract, completion and mortgage: one indivisible transaction?
Had the estoppel been fed on exchange of contracts, the issue of whether the contract, conveyance and mortgage were one indivisible transaction under the rule in Cann would have been determinative. The Court of Appeal decided that they were one indivisible transaction, but the Supreme Court, by a majority (Lady Hale, Lord Wilson and Lord Reed, Lord Sumption and Lord Collins dissenting), disagreed. It is submitted that the minority’s approach is to be preferred.

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The rationale underlying Cann is that the purchaser could not have purchased the property without the mortgage loan. As Lord Oliver explained, “[t]he acquisition of the legal estate is entirely dependent upon the provision of funds”.24 Lord Jauncey similarly reasoned that “[i]t would be quite unrealistic to assume that the money was made available unconditionally”.25 This rationale applied equally to exchange of contracts, which was a necessary step towards completion, which was in turn dependent on the loan provided by the mortgagee. In light of the economic reality in Scott, Lord Collins (with whom Lord Sumption agreed) was right in holding that the contract, conveyance and mortgage were one indivisible transaction.

In particular, in Scott the contract, conveyance and mortgage were all executed on the same day. The Court of Appeal, facing exactly the same facts in Nationwide Anglia Building Society v Ahmed and Balakrishnan,26 decided that Cann applied, and Lord Collins was right in applying the same principle to the facts in Scott.

Lady Hale’s judgment (with whom Lord Wilson and Lord Reed agreed) is, with respect, difficult to understand. Her Ladyship placed significant emphasis on the fact that the mortgagee was not a party to the estate contract, and that the vendor was not aware of the terms of the mortgage loan. Her Ladyship thus felt that the contract, conveyance and mortgage were not a tripartite or indivisible transaction: “to talk of an indivisible transaction will not only fly in the face of the facts but also create confusion”.27

It is respectfully submitted that Lady Hale failed to appreciate the underlying justification of Cann. The rationale underpinning Cann was that the purchase would have been impossible without the mortgage. Whether the lender knew the terms of the estate contract and whether the vendor knew the terms of the mortgage were irrelevant. Nothing in Cann suggested that the operation of the rule depended on whether the parties were aware of the terms of the contract or the mortgage. In the same vein, Lady Hale sought to distinguish Ahmed on the ground that in that case “the transactions all took place on the same day and each of the participants knew what the terms of the arrangement were”.28 Nonetheless, knowledge played no part in the Court of Appeal’s judgment in Ahmed, which focused exclusively on the timing of the transaction:

“The same reasoning [in Cann] is applicable to the facts of this case. On June 1, the contract, the transfer and the legal charges were completed. They formed an indivisible transaction and there was no scintilla temporis during which any right to occupation under clause 6 of the agreement vested in the appellant which was free of the respondent’s charge. Thus, the right given by clause 6 did not provide an overriding interest under section 70(1)(g) of the 1925 Act, even if the right was a proprietary right.”

Given that the contract, conveyance and mortgage also took place on the same day in Scott, and that the transaction was in essence financed by the mortgage loan, Lord Collins’ approach is to be preferred.

27 [2014] UKSC 52, at [120]
28 [2014] UKSC 52, at [121]
CONCLUSION

The Supreme Court was right in holding that the estoppel in favour of the vendor could only be fed on completion, in which case Cann applied to give priority to the mortgage. Nevertheless, the Court went too far in criticising the vendor-purchaser constructive trust doctrine. Contrary to the Supreme Court’s judgment, the purchaser acquired a proprietary interest on exchange of contracts, and it was sensible to describe Mrs Scott as a trustee although she owed no fiduciary duties. As regards whether the contract, conveyance and mortgage were one indivisible transaction, the minority was right in answering the question in the affirmative. The rationale underlying Cann was that the transaction would have been impossible without the mortgage, and the same could also be said of Scott. The minority was therefore right in applying Cann to the facts in Scott.

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THE ROLE OF THE JURY IN RELATION TO CLAIMS OF INSANITY

R v. Oye
[2014] 1 Cr App R 11 (Lord Justice Davis)

INTRODUCTION

People suffering from mental delusions will invariably run the perpetual risk of acting irrationally in their daily encounters. Common sense would therefore suggest that such people should not be punished for their crimes due to their impaired mental capacities. However, the recent decision of R v Oye, while in itself decided correctly, exposes cracks in the insanity defence which may not be resolved in the absence of wholesale reform. The appellate history of Oye shows that the deficiencies in the insanity defence may well lead to verdicts which appear inconsistent with the most intuitive outcomes. In this regard, the current practice of leaving the insanity defence as a question of law for the jury increases the likelihood that defendants will be convicted on arbitrary bases, for extraneous or improper reasons.

While the Oye decision has attracted critical comment in academic circles, the discussion has largely centred on the issue of self-defence, with little attention being paid to how insanity was dealt with at first instance. This case note seeks to add to the debate by explaining why, in light of Oye, the jury should have no role to play in cases involving insanity. Rather, it is argued that the judge’s determination on the medical evidence supplied should be viewed as decisive. While a more principled approach should be taken vis-à-vis the admissibility of characteristics in self-defence, insanity should be the only appropriate defence for defendants suffering from mental delusions.

Set out below is a brief summary of the facts; an analysis of the appellate history and the reasoning of the Court of Appeal; and commentary on (i) the scope of self-defence and the insanity defence, and (ii) the reasons for removing the jury in cases involving insanity.

THE FACTS

The defendant (‘D’) was found hiding in a void in the ceiling of a coffee shop in the Westfield Shopping Centre. After the manager had been called to the scene, the police entered and asked D to come down. However, D refused and threw some crockery at the police, citing his selfishness as a reason for staying in the void. At one point he said he was reading a book. D was eventually arrested and taken to the local police station.

When interviewed D claimed he did not know what was wrong with him. Mr. Giacalone, who examined D, said D’s answers to his questions made no sense at all. D appeared tense throughout the session, and because Mr. Giacalone did not feel comfortable being in the same cell as D, he stopped the assessment and asked D to sit in the custody suite.

As D walked towards the exit of the custody suite, he was approached by Sergeant Watts, with no apparent hostility. D punched Watts in the face, knocking him on the ground. D then attacked a female police officer, PC Thompson, who attempted to...
restrain him. In an apparent frenzy D hit Thompson in the face, fracturing her jaw and displacing her teeth. Whilst attacking other police officers, D shouted and screamed, with one police officer describing the incidence as a ‘most violent outburst’. 3

D was charged with two counts of affray and one count of inflicting grievous bodily harm contrary to s.20 of the Offences Against the Person Act 1861 respectively. 4 On the same day, he was sectioned under the relevant provisions of the Mental Health legislation. The evidence showed that while in hospital, he was lying in his bed humming and acting strangely. 5

In the defence statement, it was stated that D woke up feeling paranoid on the day of the incident. He thought he was being watched and pursued by evil spirits, and that the police officers were in fact their agents. At the police station, D thought he had acquired supernatural powers, which he used against the police officers.

The reports supplied by the two psychiatrists, Dr. Adegoke and Dr. Walsh, confirm that D was suffering from ‘mental and behavioural disorders’. 6 Dr. Walsh reported that D ‘had no idea what had happened’. 7 Further, D was struck by a ‘florid psychotic episode which took some months fully to resolve’, and was in fact laboring under ‘an increasingly paranoid mental state’. 8 Her conclusions on the matter of insanity were clear and unequivocal: D was ‘labouring under such a defect of reason from disease of the mind as not to know the nature and quality of the acts he was doing’. 9 Dr. Adegoke concurred in this regard.

The psychiatrists’ reports were not disputed at trial. D gave evidence describing how he was being consumed by an ‘evil energy’ 10 when he woke up. He claimed that he was trapped by evil spirits which had entered and controlled the police, and that at some point he had acquired supernatural powers. At all stages in cross-examination, he maintained that his entire purpose was to protect himself from the evil spirits. While conceding that he had acted aggressively, D maintained that he genuinely thought the police officers had evil faces.

It transpired that there were various discrepancies between his evidence and the defence statement. D remained unmoved and said that his account would be different each time he said it.

THE JUDGMENT

At trial, D sought to rely on self-defence, and failing that, insanity. It was held that D could not rely on either defence. Particularly, despite unchallenged medical evidence suggesting that D was legally insane, the jury was of the opinion that the insanity defence was not made out. 11

On appeal, it was held that although D could not rely on self-defence, he could rely on insanity. As the court was of the view that there appeared no rational basis to

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3 Oye, at [9].
4 Ibid, at [4].
5 Ibid, at [10].
6 Ibid, at [13].
7 Ibid, at [15].
8 Ibid, at [16].
9 Ibid, at [16].
10 Ibid, at [19].
11 Ibid, at [26].
‘depart from the unchallenged psychiatric evidence’, a special verdict was substituted pursuant to s.6 of the Criminal Appeal Act 1968.

On the issue of self-defence, Lord Justice Davis reasoned at [45]-[46] that a defendant suffering from mental delusions cannot take his very delusions into account to fully exculpate himself. At [45] his Lordship explains the various implications of the contrary position being adopted, mainly acquitting a defendant who in substance should be undergoing hospital treatment, thus potentially causing chaos to society.

**COMMENTARY**

Despite the first instance ruling being reversed, absolving D of criminal responsibility, the *Oye* decision gives rise to two important issues which warrant consideration:

1. Why are insane delusions inadmissible in considering the proportionality limb of self-defence, but somehow admissible in the necessity limb? Is self-defence even the appropriate defence for delusional defendants?; and
2. Why must the issue of legal insanity be left to the jury?

The following sections will take issue with (i), and criticize the current approach adopted by the courts in relation to (ii). In consonance with our main argument, it is suggested that leaving the issue of legal insanity to the jury would lead to unjust outcomes. These two issues will be considered in turn.

**Self-Defence**

To successfully prove self-defence, it must be established that (a) D genuinely believed that the circumstances rendered it necessary to defend himself against an unjustified threat (‘the necessity limb’), and (b) given that belief, his response was reasonable (‘the proportionality limb’). Insofar as the judgment of *Oye* is concerned, it was conceded by the Crown that the necessity limb of self-defence was made out.

The main issue arises in relation to the scope of admissible characteristics in the proportionality limb. At [45]-[46], the judge rejected the appellant’s submission that D’s delusional thoughts were to be taken into account in the proportionality limb, stating that such an approach is ‘not right’. It is submitted that the judge’s reasoning is normatively compelling, and persons suffering from delusional beliefs in the absence of any external stimuli should not be acquitted. Such defendants should not be let free to society but should instead be subject to a hospital order for rehabilitative purposes.

However, while the judge came to the right conclusion based on policy, his Lordship’s decision to exclude the admissibility of insane delusions in the proportionality limb but not the necessity limb is questionable. Why should a defendant be allowed to rely on his insane delusions in construing his honest beliefs, but be prohibited from doing so in assessing the reasonableness of his response? This, as noted by Leigh, produces a ‘paradoxical’ outcome. He advocates an approach by which if public policy underlies the partial inadmissibility of delusional thoughts, the law should

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12 Ibid, at [63].
13 Ibid, at [63].
15 *Oye*, at [33].
16 Ibid, at [46].
17 Ibid, at [44]-[46]
be made clearer and more certain by barring delusional defendants from relying on their delusions in self-defence altogether. Indeed, this correctly brings the law in line with the court’s approach towards relying on self-induced intoxication in a claim of self-defence, namely that self-induced intoxication is to be excluded from both limbs of the defence for policy reasons.

Nevertheless, some may argue that these two situations cannot be properly analogized, because a legally insane person is regarded not to be as culpable as a person who voluntarily intoxicates himself before committing a crime; in the latter case the defendant generally should not be convicted. However, as the effect of self-defence is to provide a full acquittal, reliance on self-defence should be prevented as long as the defendant concerned ought not to be acquitted. It is immaterial that in the former situation a special verdict should be given, but in the latter situation there should be a conviction. The common feature is that both types of defendants should not be acquitted, and thus should be brought in line with each other.

It seems logical for defendants suffering from delusional thoughts to plead insanity as they pose a danger to society and ought not to be acquitted. Therefore, any potentially unjust outcomes from the perspective of the delusional defendant coming within the M’Naghten Rules, such as a conviction, should not be blamed on the confines of self-defence. Notably, Lord Justice Davis at [47] remarked that ‘an insane person cannot set the standards of reasonableness as to the degree of force used by reference to his own insanity’. It is additionally submitted that the reference to ‘insanity’ above does not denote legal insanity, but a misperception of the physical world. His Lordship’s emphasis on policy considerations at [45] would corroborate the above interpretation.

Thus, another potential injustice arising from the Oye judgment is that all delusions are to be excluded from the assessment of the proportionality limb. Hence if one commits a crime in alleged self-defence, solely due to a delusional belief which falls slightly short of satisfying the M’Naghten Rules, he is likely to be left with no defence as the very reason inducing his mistaken belief is to be excluded from the assessment of the proportionality limb. This predicament should not be blamed on the alleged restrictiveness of self-defence, as such persons should not as a matter of normative principle be entitled to a full acquittal. Such problems are attributable to the inherent confines of the insanity defence.

As the narrowness of the insanity defence has been the subject of extensive commentary elsewhere, the remaining analysis concerns the reasons why the jury should be removed in cases involving insanity. The retention of the jury not only raises theoretical difficulties relating to the underlying rationale of individual defences, but

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19 Ibid, 5.
20 R v O’Grady [1987] QB 995, 1001CD: ‘We have therefore come to the conclusion that a defendant is not entitled to rely, so far as self-defence is concerned, upon a mistake of fact which has been induced by voluntary intoxication’.
21 M’Naghten’s Case (1843) 8 ER 718, 719: ‘To establish a defence on the ground of insanity, it must be clearly proved that at the time of committing (sic) the act the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or as not to know that what he was doing was wrong’.
22 Oye, at [47]: ‘If this is right, the potential implications for other cases are most disconcerting. It could mean that the more insanely deluded a person may be in using violence in purported self-defence the more likely that an entire acquittal may result. It could mean that such an individual who for his own benefit and protection may require hospital treatment or supervision gets none. It could mean that the public is exposed to possible further violence from an individual with a propensity for suffering insane delusions, without any intervening preventative remedies being available to the courts in the form of hospital or supervision orders. Thus, whatever the purist force in the argument, there are strong policy objections to the approach advocated on behalf of the appellant’.
also highlights the arbitrariness of jury verdicts in considering the claims of the mentally abnormal.

**Why the jury should have no role to play in relation to the insanity defence**

The jury reflects the logic of reason in that the defendant is expected to offer a rational explanation for his actions at trial. In the normal course of events this should be unproblematic for the defendant, who is a reasoning person of normal capacity. If successful the explanation offered will cohere with reason, and thus be readily understandable to the jury. The defences of self-defence and duress are paradigmatic examples of this sort of explanation at work. When advancing a claim of self-defence, the defendant is accepting responsibility for his actions, but also arguing that he had acted for ‘undefeated reasons’. This is to say that on balance, as a reasoning person he had acted for the right reasons, and justifiably so. Similar observations can be made of duress, as the defendant is also affirming his capacity as a rational person. But in such a case he is instead claiming he had acted for defeated reasons - reasons which are flawed, but which in the circumstances are acceptable to a normal person. In all these cases, which accord a central role to reason, it makes sense for a defendant of normal capacity to testify in court and explain to the jury why he should be allowed to rely on the defence. As jurors and the defendant have comparable mental capabilities, it is relatively straightforward for jurors to put themselves in the defendant’s perspective and make an informed judgment of whether his actions were reasonable in the circumstances.

However, this arrangement gives rise to theoretical difficulties if applied to the mentally abnormal, due to the contrasting natures of the insanity plea and the above defences. A plea of insanity is different in that reason plays a negative or non-existent role. When claiming insanity the defendant is denying responsibility, in the sense that he lacked the capacity for reason to take full responsibility for his actions. The defendant is claiming that he is not a reasoning person, and is thus unable to respond to the law’s normative demands. However, the current law on insanity does not reflect this philosophy. The current law requires the defendant to discharge the legal burden of proof in order to show he is legally insane. In so doing the defendant is required to testify in court and offer justifications or excuses for his actions. But by their very nature the actions of the mentally abnormal are not explicable on the basis of reason. It is therefore difficult for jurors to compartmentalize or dissect the reasoning of the mentally abnormal defendant, as they cannot conceivably put themselves in his shoes and understand his thinking process. This disconnect is liable to leave a large margin for error, increasing the likelihood of perverse verdicts. Therefore, there is a logical inconsistency in saying that the defendant should rationalize with reasons why he acted as he did.

One might object that the defendant should claim unfitness to plead instead if he has difficulties explaining to the jury. As the argument goes, the defendant should claim he is unfit at the outset rather than struggle to offer a rational explanation at trial. However, this argument is not free from difficulties, as both the purpose and scope of the rules on unfitness to plead do not deal with the nature of the explanation the defendant will be offering. Unfitness to plead only comes into play if the defendant meets the criteria set out in *R v Pritchard*, showing he is unable either: (i) to

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25 Ibid, 133.
26 Ibid, 83.
27 *R v Pritchard* (1836) 7 Car. & P. 303.
comprehend the course of the proceedings; (i) to know that he might challenge any juror; (ii) to comprehend the evidence; or (iv) to give proper instructions to his legal representatives. However, all these criteria merely deal with the defendant’s inability to plead but do not address the fact that his explanation is unlikely to be a rational one. Thus, a defendant who fails to bring himself outside the criminal trial will still have to wrestle with the potentially formidable task of rationalizing the inexplicable.

However, the difficulties outlined above are immaterial in the majority of cases, as it is common practice for all parties to agree on whether the defendant should be issued an NGRI verdict. Nevertheless, we submit the theoretical and practical issues are serious enough to warrant legislative consideration. The retention of the jury in insanity cases renders it difficult for the insanity defence to be reconciled with the tenets of criminal responsibility, and furthermore gives rise to the occasional miscarriages of justice such as the first instance verdict in Oye.

At first instance Oye provides the classic illustration of a jury trial gone wrong. The jury rejected the plea of insanity, despite unchallenged evidence supplied by two psychiatrists, who were unequivocal in their assessment that the defendant was ‘labouring under such a defect of reason from disease of the mind as not to know the nature and quality of the acts he was doing’. In view of this, Lord Justice Davis expressed ‘the greatest unease at the verdict reached’, noting various facts in the evidence and the appellate history which confirmed the abnormality of the defendant. His Lordship therefore concluded that the court could not see a safe or rational basis for allowing the matter to stand.

Although the verdict was eventually set aside by the court, it is submitted that Oye does raise serious concerns about the role of the jury, specifically its arbitrariness in determining the defendant’s liability. The fact that the verdict was reversed on appeal does not detract from this criticism, as the law ought to get the matter right at first instance and avoid the need for costly and time-consuming appeals. Of course, there is no way of knowing for certain why the jury in Oye rejected the defence, and one can only make an educated guess as to why they thought it appropriate. One possible reason was that there were discrepancies between the defence statement and what the defendant said at trial. When these discrepancies were placed before the defendant, he claimed his account would be different every time he said it. The jury might have interpreted this to mean that the defendant was not being entirely truthful, and hence the inconsistencies between the various accounts. However, it is also possible that these very inconsistencies were symptomatic manifestations of D’s psychotic behaviour, which the jury at trial failed to detect and erroneously interpreted as dishonesty. In any event, given the court’s suggestion that the verdict had no rational basis, it is highly likely that the jury rejected the defence for improper or extraneous reasons.

Moreover, in practice there is a strong argument for saying that the jury is redundant and should thus be removed in cases involving insanity. Empirical evidence supplied by Ronnie Mackay shows that the jury has ‘no real deliberative role’ to play in the majority of cases. One must therefore ask whether the jury is serving any meaningful purpose in relation to insanity.


Oye, at [16].

Ibid, at [62].

Ibid, at [31].

Ibid, at [19].

In light of *Oye*, we submit that the case for reform is compelling. While *Oye* is certainly an anomaly, and is unlikely to happen in the normal course of events, the law has no reason to tolerate convictions of the mentally handicapped secured through the whims of the jury. Moreover, in the majority of instances, the parties to a case involving insanity usually agree on the result to be reached before the matter goes to the jury, thus reducing the latter’s deliberative role to vanishing point. In view of this, we submit that Parliament should abolish the *M’Naghten* direction and introduce criteria for the recognition of medical evidence. While the details of reform are beyond the scope of this paper, it is critical that Parliament reconsider the matter, particularly in view of the problems highlighted above.

**CONCLUSION**

The *Oye* decision *per se* produced the correct outcome for the defendant. However, aspects of the judgment in the Court of Appeal and at first instance give rise to issues necessitating careful consideration. Of such issues, as discussed above, the two salient concerns we have highlighted pertain to the admissibility of characteristics in self-defence, and the use of the jury in deciding the issue of legal insanity. What the first issue reveals is that the insanity defence is too narrow, thus forcing defendants to raise self-defence instead, which is unlikely to be successful in light of, *inter alia*, *Oye*. The second issue is more pressing, as the current arrangements pertaining to jury trials increase the likelihood of bias and arbitrariness. Thus, it is submitted that removing the issue of insanity from the jury and giving decisive weight to medical opinion are essential to modernizing the insanity defence.

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ALLEN SHOENBERGER*

INTRODUCTION

In this year celebrating the 800th anniversary of the enactment of the Great Charter, Magna Carta,1 it is worth examining the document itself and its accompanying charter, the Charter of the Forest. Many persons are aware that the first Charter, Magna Carta (dated 1215), established the belief of a right to a trial by one's peers, i.e. the petit jury.2 The Forest Charter (dated 1217) is a document few have heard about, although to Englishmen of the era, it was far more important to daily life. In truth, the two Charters jointly established limitation on the powers of the King, firmly grounding the idea of the rule of law in English jurisprudence.

By King John's time the evils of the forest laws, the exactions and hardships of the feudal system resulted in many insurrections of the barons. The interests of the people and the barons were drawn into the closest harmony. Both, Hodgson3 says, suffered from arbitrary and excessive taxation, from delay of justice, exactions of military service, and outrages of every kind, both public and domestic.

"Magna Carta was wrested from a King who was a craven and a dastard as well as a tyrant, by his nobles and barons".4 Writers of the period denounced King John. For example, Green introduces the story of his treachery, ingratitude and perfidy, of his cruelties and of his cowardice and superstition, with the words, "Foul as it is, Hell is defiled by the fouler presence of John."5

Nor can much good be said about the nobles either. The ultimate property of all lands and a considerable share of the present profits were vested in the King or by him granted out to his Norman favorites, who by a gradual progression of slavery were absolute vassals to the Crown and as absolute tyrants to the commons. Forfeitures, talliages, aids and fines were frequently extorted from pillaged landholders.6

THE SUBJECTS OF THE CHARTERS

At that time "The nation consisted of... clergy, the lawyers, the barons, the knights or soldiery, and the burg hers or inferior tradesmen, who, from their insignificance, retained some points... of their ancient freedom. All the rest were villeins or bondmen".7 One estimate is that about half of the individuals in England at the time were serfs who were not covered by the Charter at all.

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1 Neither words, Magna Carta or Magna Charta (an older spelling, pronounced the same) appear in the Magna Carta. It appears that these words were first used by a scrivener trying to describe the two Charters. The scrivener used the term to distinguish the large Charter (Magna) from the shorter Charter of the Forest. The first royal use of the term was by Henry III when he reconfirmed Magna Charta in 1225. Both Charters were written in Latin.

2 Thornton M. Hinkle, 'Magna Carta' (1899) Yale L. J. 262, 265.

3 Clergyman and Court Historian of Northumberland (1779–1845).

4 Thornton (n2) at 267.

5 Ibid., 271.

6 Ibid., 265 quoting Blackstone.

7 Ibid.
How then did a Great Charter emerge from such a collectivity? King John, was certainly coerced into signing the Magna Carta by force of arms. However, threats from the clergy of eternal damnation also played a part in his eventual agreement. Both King John and the nobles appealed for aid from the Pope during the course of the dispute.

It would seem that the barons who impelled John to come to Runnymede were by no means ‘disinterested protectors of the common good.’ They had a great number of grievances with both King John and his predecessors. Blackstone indicates that the barons assembled with “a numerous army of their dependents, among whom were reckoned no less than two thousand knights. . .”.11

Magna Carta must be seen as an attempt at a peace treaty between the barons and the crown, but a peace treaty that was quickly repudiated by the king for within ten weeks King John had persuaded the Pope to declare the Charter null and void, threatening to excommunicate anyone who observed it or attempted to enforce its provisions. Civil war broke out once again, only culminating after King John died and the subsequent defeat of the rebels. That happened, however, after the new King’s guardians took the unexpected move of reissuing the Charter, wrong-footing the barons, some of whom crossed over to the King’s side. This civil war culminated in the siege and battle of Lincoln in May 1217 when many of the rebels were captured.

It is the frequent reissuing of Magna Carta and its companion Charter of the Forest that established its importance as a document curtailing the power of the King. The reissuances of Magna Carta occurred in 1216, 1217, 1225, and 1297 when it was first made into a statute.12 Subsequently Sir Edward Coke indicates it was reconfirmed at least 32 times and possibly as many as 45 times.13

The short Charter of the Forest has the distinction of being the longest-lived English Statute, only ceasing to be effective in 1971.14 However, both of these Charters were formed by the will of the King, not the King in Parliament. As such, they emphasize the power of the King, both to do good, and evil as well. In one sense the Charter of the Forest is similarly placed in relationship to Magna Carta as the first ten amendments of the American Constitution.15 Both of the original documents contained

9 Hugh of Avalon, Bishop of Lincoln is alleged to have drawn King John’s attention to a scene from the law Judgment. Hugh is believed to have recommended the king to “fix your mind on their perpetual torment and let your heart dwell on their ceaseless punishment. Thus will you understand the great dangers incurred by those for a short time are set over others as rulers, but who by not ruling themselves are tormented by devils forever.”
11 The Great Charter and Charter of the Forest, with other authentic instruments; to which is prefixed an introductory discourse containing the history of the charters. Forward, by William Blackstone, Oxford at the Clarendon Press, M.DCC, LIX. Reproduction from the British Library, ECCO eighteenth Century Collections Online, Print Editions at xi.
12 Magraw (n10), Chapter 1, 5.
14 Magna Carta was sealed June 15, 1215. The Charter of the Forest dates to 1217. Neither charter was signed by either King John or the barons, although both were sealed by the great seal of King John. The 1971 Wild Creatures and Forest Laws Act The Charter of the Forest formally abolished the prerogative rights of Her Majesty to wild creatures. Magna Carta 2015 Canada at<www.magnacartacanada.ca/the-charter-of-the-forest/> accessed 19 February 2015.
15 Failure of the draft constitution to contain sufficient limitations on the newly proposed national government was seriously criticized by opponents of ratification of the new constitution. In the Virginia ratifying convention a motion to condition ratification on a draft Virginia bill of rights failed by a single vote. Had Virginia conditioned ratification upon its draft additions, the national ratification process would certainly have been delayed if not defeated. James Madison, a member of the first Congress from Virginia was the primary force between the first Congress proposing 12 amendments to the Constitution, of which amendments 3 through 12 were ratified by the requisite number of states. These amendments are known as the U.S. bill of rights and became the basis for the International Bill of Rights adopted by the United Nations.
limitations on the government or King, but were considered inadequate and both were supplemented. Thus Magna Carta included limitations of the King’s power relating to the Forests, including in particular restoring all land that John had turned into official Forest during his kingship, but the Charter of the Forest went further; including an extension of the restoration of Forests including land that had been declared Forest by the two predecessor Kings.16 The Bill of Rights similarly went further than the original United States Constitution by creating various individual rights, including the right to jury trial, against the newly created federal government of the United States.

Collectively both Charters stand firmly for the proposition that the King is subject to the law, and not above it. Perhaps the best characterization of the charters is that their history “is the story of advocacy of what turned out to be powerful ideas (such as requirement of a trial by jury and due process of law) regardless of whether those ideas were precisely embodied in, or originated with, the text of Magna Carta...”17

THE EFFECT OF THE GREAT CHARTER

A summary of the Charter published at the end of the nineteenth century stated: The charter established testamentary power over part of the personal estate and provided that the rest of it should go to the wife and children; established dower; uniformity of weights and measures; gave encouragement to commerce by protecting strangers; protected tenants and subtenants from illegal distresses by the Crown; limited the right of the King’s officers to take necessaries for his household; fixed the Court of Common Pleas at Westminster in order that suitors should not be compelled to follow the King’s person on his course through the island and France; directed trial to be had in the proper counties, thus bringing justice home to the people; corrected some abuses of trial by wager of law and of battle; fixed a definite time and place for holding courts; put an end to the curious system of corruption by which litigants were compelled to pay to the King large sums of money to procure a hearing in his courts; confirmed the liberties of London and all other cities; and, lastly, protected every free person in the free enjoyment of life, liberty, and property, unless declared to be forfeited by judgment of his peers or the law of the land.18

That summation may reveal the nineteenth century American view of Magna Carta, but it is hardly correct. In 1898 Justice John Harlan determined that the right to a jury trial meant what it meant at common law, a right to a jury of twelve men.19 Justice Harlan states that this is what Magna Carta meant when it declared that no freeman should be deprived of life, etc., “but by the judgment of his peers or by the law of the land.” This misunderstanding of its importance may be unusually precise, but it exemplifies the various misunderstandings surrounding the Magna Carta over the centuries. The myths about the Magna Carta are plentiful. One classic treatment of its history makes the point that by the 13th century the myth appeared that it had been a “statement of good and lawful custom” when all parties new differently20. Similarly,

16 Magraw (n 10), 335.
17 Ibid., at 6.
18 Hinkle (n 2), 264.
19 Thompson v. Utah 170 U.S. 343 (1898).
Edward Coke, a member of parliament and former Chief Justice of the Court of Common Pleas, resorted to the Magna Carta in 1621 to fence in the prerogative of King James I, by means of a fictional past to redress the imbalance between king and Parliament in the present. The effort earned Coke seven months in the Tower of London charged with treason.\(^{21}\)

Not only did Justice Harlan but many other people believe that the jury emerged from Magna Carta. In fact, the jury did not evolve until more than a century later. Magna Carta provided for trial by peers, which meant barons by barons, etc. Since no judges were barons, trials of a baron could not be in a court as we understand it. Moreover, it was later that same year during a church conclave that trial by ordeal was ended. Priestly cooperation in trials by fire and water was forbidden by Pope Innocent III at the Fourth Lateran Council of 1215.\(^{22}\) Priests presided over such trials, where either a person sank into water or floated, or the accused’s wounds festered or not, evidencing guilt (sinking or festering) or the opposite. Unless trial by combat was substituted the legal system of England was faced with a serious difficulty. Some alternative method of determining guilt had to be determined. One method was by compurgation where a specified number of witnesses swore to the guilt of the defendant. Another was inquisition. The only “jury” existent contemporaneous with Magna Carta was a “jury of presentment” (a kind of grand jury) that did not determine guilt or innocence.

The jury as we understand it today, developed over a period of centuries in England. For many years after it became a place for trying offences, the accused had to consent to being tried by a jury. A refusal of consent could result in coercive methods, including the loading of heavy stones onto the accused’s chest. Many chose to die by this method rather than be tried by jury since one consequence of a guilty verdict was confiscation of the entire estate. If there was no trial there would be no forfeiture.

Most importantly, Magna Carta contains serious limitations upon the ability of the King to raise taxes.\(^{23}\) With three exceptions, ransoming the King, making the King’s eldest son a knight, or for once marrying the king’s eldest daughter, the King promised to summon “for obtaining the common counsel” archbishops, bishops, abbots, earls and greater barons to a meeting for a fixed date, at least 40 days hence, to consider a request for taxes.\(^{24}\) This assembly later morphed into the English parliament.

In various provisions, Magna Carta restricted the level of punishments that could be inflicted for various offenses. For example a freeman could not be amerced for a slight offense except in accordance with the degree of the offense, and for a grave offense he shall be amerced in accordance with the gravity of the offense.\(^{25}\) Thus one could point to Magna Carta as a source of the principle of proportional punishment.

Only a few provisions of the original Magna Carta continue in existence. Those include:

1) a guarantee to the Church of England of its liberties forever;\(^{26}\)

\(^{21}\) Michael Dillon, ‘Magna Carta and the US Constitution: an Exercise in Building Fences’ in Magraw (n20), 98
\(^{22}\) David Clark ‘Magna Carta, Civil Law and Canon Law’ in Magraw (n 10), 308.
\(^{23}\) These were not strictly speaking taxes, but “feudal aids.” The King was generally expected to “live of his own”.
\(^{25}\) Ibid., clause 20. Similarly Earls and Barons were not to be amerced except through their peers and only in accordance with the degree of the offense: clause 21.
\(^{26}\) Ibid., clause 1.
2) a guarantee to the City of London of all of its old liberties and customs, as well as to other cities, boroughs, towns and the barons of the five ports as with all other Ports;\(^\text{27}\)

3) a guarantee that no freeman shall be taken and imprisoned ... but by lawful judgment of his peers, or by the law of the land, as well as a guarantee that the King will sell to no man nor deny or defer to any man either justice or right.\(^\text{28}\)

The primary value of these provisions is best seen as symbolic, not immediately practical. It is the struggle to force the King to obey these provisions that is the important lesson from history about the impact of the two charters.

Many of the provisions of Magna Carta dealt with taxes and inheritances, including a guarantee that widows were entitled to their marriage portion should their husband die, and the right of a widow not to remarry, if she wished.\(^\text{29}\)

On the other hand, another provision of the charter provided that no one shall be arrested or imprisoned upon the appeal of a woman, for the death of any other than her husband.\(^\text{30}\) Thus the charter did not benefit everyone equally in the realm.

THE EFFECT OF THE CHARTER OF THE FOREST

This Charter regulated the use of the Forests of England. However, the Forests were not what we would call Forests. Cultivated fields and houses often were considered part of Forest land. Forest land was land appropriated by the King for his own hunting monopoly, as well as the preservation and management of this valuable resource. Kings repeatedly employed the forest revenue and land itself to facilitate their actions. It is estimated that in 1066, nearly fifteen percent of all land in England was forest land, land owned by the King. By the time of the Charters over a third of all land in England was forest land.\(^\text{31}\)

The Charter of the Forest amplified provisions in Magna Carta. Extreme punishments were no longer permitted for poaching the King’s animals (death or blinding were frequently employed).\(^\text{32}\) The forest was treated as common land which permitted ordinary Englishmen to use it to graze pigs (one of the most important source of meat for English of the time), to grow crops and to build trenches to protect those crops, so long as the use was not excessive.\(^\text{33}\) In many ways the Charter of the Forest was the first statute to protect the environment and to provide for wise use of the land. Courts of the Forest were established, Courts that persist today even after the 1971 Parliamentary repeal of most of the Charter of the Forest.\(^\text{34}\)

The Charter of the Forest also proclaimed that any land that had been afforested by Henry III’s grandfather (Henry II) shall be disafforested.\(^\text{35}\) Large swaths of land that was previously forest was now declared to belong to the King as afforested land.\(^\text{36}\)

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\(^{27}\) Ibid., clause 13.

\(^{28}\) Ibid., clause 39.

\(^{29}\) Ibid., clauses 2–8.

\(^{30}\) Ibid., clause 54.


\(^{33}\) Ibid., clauses 9, 12, 13.

\(^{34}\) Ibid., n14.

\(^{35}\) Charter of the Forest (n32), clause 1.

\(^{36}\) Ibid., clause 3.
One of the most important provisions is the Charter of the Forest forbade the imposition of penalties such as blinding for poaching the King’s venison. Instead, either a fine or a period of confinement for a year and a day, plus possible banishment from the realm if no one would stand surety for such persons.\(^\text{37}\) Likewise, serious penalties were prohibited for allowing one’s pigs to go into forest land, and indeed, the customary right of “pannage” (grazing pigs in the forest) was recognized.\(^\text{38}\) One was permitted to conduct pigs through the forest freely and without impediment. If pigs spend a night in the forest, one could neither be prosecuted nor fined. The right of a free man to make in his wood or in land he has in the forest a mill, a preserve, a pond, a marl-pit (fertilizer pit) a ditch (to protect crops from grazing animals), “on condition that it does not harm any neighbor.”\(^\text{39}\)

These rights to use forest land as had been customary were vital to many an Englishman of the period. While Magna Carta included a few provisions about the forests, the Charter of the Forest was far more explicit, and thus, as stated earlier, probably far more important to the daily life of an Englishman living in rural areas. The Charter of the Forest moreover, was frequently employed by commoners as Robinson states:

“Adjudicating the pleas of the forest bred respect for the commoner’s rights and forged foundations of the rule of law. The provisions of both the Forest Charter and the Magna Carta were well known, since both were repeatedly copied, sent throughout the realm, and read aloud together.”\(^\text{40}\)

Another set of provisions in the Charter of the Forest allowed foresters to regulate and permit merchants to buy wood, timber, bark or charcoal and take them elsewhere to sell, while taxes (called chiminage) on carts was prohibited.\(^\text{41}\)

Nor did the provisions of the Charter of the Forest apply only to commoners, for a specific portion permits any archbishop, bishop, earl, or baron, whenever they pass through a forest to take one or two beasts under the supervision of a forester, and if a forester not be present, a horn shall be blown to demonstrate that it was not being done furtively.\(^\text{42}\)

Indeed, the Charter of the Forest is one of the first (and thereby oldest) statutes in environmental law of any nation as: “Organically, over some 30 generations, humans evolved English law to conserve the oldest national system of protected natural areas in the world.”\(^\text{43}\) It proclaimed the ‘liberties of the forest’ which shaped the foundations for what has become sustainable natural resources law and regimes for protection of natural areas.

Thus the two Charters collectively provided for a system of fair justice, introduced the idea of trial by peers, and constituted the first environmental reform law in English (indeed world) history. Most importantly, both Charters were checks on the power of the king. As a practical matter, the Charter of the Forest was the more important Charter for the first several centuries after adoption. The King was required to reconfirm the Charter of the Forest 32 times after 1217.\(^\text{44}\)
Indeed, the King’s guardian’s first reconfirming of the Magna Carta in 1216 had omitted the three sections of Magna Carta that related to the forests.\textsuperscript{45} When that was understood to be a mistake, the separate Charter of the Forest was adopted in 1217, and at the same time the Magna Carta was once again reconfirmed.\textsuperscript{46} Repeated demands for deforestation were one of the main reasons for the periodic reconfirmation of the Charters from 1225 on to the end of the reign of Edward I.\textsuperscript{47} The Charter of the Forest and deforestation disputes helped to keep the Magna Carta alive.\textsuperscript{48} Robinson asserts that it was principally the struggle for deforestation which connected the history of the Forest with the history of the English constitution. “In the first 200 years of life, the Forest Charter provided the principal legal framework in which rule of law principles would take shape in practice. In this early period, Magna Carta provided only incidental support for the Forest Charter. Centuries later the relationship of each Charter would reverse.”\textsuperscript{49}

\textsuperscript{45} Ibid., 336.

\textsuperscript{46} Ibid 337. William Marshall, guardian of the king consolidated support for the regency by both reconfirming the Magna Carta in 1217 and issuing the new Charter of the Forest. An effigy of William Marshall is on the floor of the Temple Church in London, and was one of the items mentioned in the movie, the Da Vinci Code. That movie made the Temple Church into a major London tourist attraction.

\textsuperscript{47} Ibid., 339.

\textsuperscript{48} Ibid.

\textsuperscript{49} Ibid.
EU SECURITIES AND FINANCIAL MARKETS REGULATION

*EU Securities and Financial Markets Regulation* by NIAMH MOLONEY
United Kingdom, Oxford University Press, 2014, 3rd edition, lxvi + 1044,
Hardback, £145.00, ISBN 978-0-19-966434-4

INTRODUCTION

This is the keenly awaited third edition of this established and authoritative treatise by Professor Moloney, and at just over a thousand pages of substantive text it is a substantial and weighty tome. In these respects it follows the second edition (published in 2008 and covering developments to 31 March of that year), which provided an invaluable, comprehensive, and detailed guide to the development of EC securities regulation following the Financial Services Action Plan and its implementation pursuant to the Lamfalussy Process (named after the chair of the EU advisory committee). The timing of the second edition seemed apposite, as after a period of intense activity the Financial Services Action Plan regulatory architecture was in place and the European Commission was seeking a ‘regulatory pause’ in order to enable the new structures to establish themselves.

CONTENT

However, the commencement of the credit crunch in 2007 had already caused considerable concern most notably in the European context in relation to the role of ratings agencies and, indeed, the second edition was able to pick up on the initial consultation to regulatory reform in this field that occurred immediately prior to publication. In retrospect, of course, even as the second edition was published it is now clear that the global financial markets were about to enter into a period of considerable turbulence as the initial credit crunch was the harbinger of a succession of severe financial shocks that was triggered by the bankruptcy of Lehman Brothers in September 2008, the repercussions of which continue at the time of writing this review with the ongoing negotiations surrounding Greek membership of the Eurozone. Such calamities and the regulatory response to them as future events were obviously unable to be treated in the second edition but inevitably form the principal context and substantive analysis of the third edition. It is hardly surprising, therefore, that as well as being keenly awaited, the text not only remains substantial in length but also has been largely re-written in order to provide a comprehensive mapping of the detailed
contours of the immense and expanded EU regulatory regime that has been put in place in response to the crises.

Indeed, given the specific origins of the 2008 financial crisis in the banking sector, one of the key issues that Moloney had to determine at the outset was the scope of the EU reforms that would fall within the ambit of the book. Given the complex inter-relationship of financial products, institutional structure and the underlying policy concern with systemic risks this is very far from being a straightforward task. The solution that Moloney adopts is to exclude detailed analysis of rules primarily addressed at bank-based finance (i.e. deposit-based and loan-based financial intermediation) and deposit-taking institutions in their unique capacity as such and to focus upon, “. . . market-based financial intermediation between suppliers of capital and firms seeking capital, and . . . the wide range of relationships and related risks which this form of financial intermediation produces” (p. 1). This definition permits the exclusion of the specific responses to the moral hazards and systemic risks which the 2008 financial crisis highlighted in relation to the specific institutional roles and properties of deposit-taking institutions (though still allowing for analysis of the regulation pertinent to the market-based financial intermediation undertaken by such bodies) whilst enabling focus upon the traditional core area of securities market activities and gatekeepers (e.g. investment analysts and especially rating agencies) together with the activities of wider financial markets now brought within the regulatory perimeter as a result of the 2008 financial crisis (most notably derivatives trading traditionally undertaken on over-the-counter markets). It is as a result of the regulatory response to key policy concerns in these latter broad substantive areas that the title of the third edition is no longer EC Securities Regulation but the broader EU Securities and Financial Markets Regulation.

Correspondingly, and in order to reflect the widening of the EU regulatory perimeter, the structure of the third edition, though recognizably based on the foundations provided by the second edition, has accordingly been modified. There are now eleven principal sections, viz: an introduction; capital-raising; asset management; investment firms and investment services; trading venues; trading; gatekeepers; market abuse; the retail markets; law-making and supervision; and enforcement. As might be expected given the size and scope of the new EU single rule book, a meaningful summary of the content of the third edition is not feasible within the context of a short review. However, by way of example of new material outside the traditional core areas of policy and illustrating the EU’s need to be seen to be responding to the crisis in order to promote market stability, there is a welcome and extended discussion of both the new short selling regime and also the new regulatory regime for rating agencies under the auspices of the new European Securities and Markets Authority. As is necessary given the intricacy and volume of the detailed materials surveyed, the organisation of the subject matter is very clear and allows for rapid navigation through the text. This is assisted by very helpful internal cross-referencing, a good index and a very useful list of abbreviations (the subject area is notorious for its plethora of acronyms).

Given the daunting bulk of the materials, the care taken by Moloney in its organisation as well as in its exposition, is particularly welcome to the reader. The way in which each major theme is contextualised by reference to its particular theoretical and regulatory trajectory enables a nuanced exposition of the reform process pertinent to the theme to be developed with reference to both aspects of continuity and change within the overall regime. The theoretical literatures in finance and regulation are handled with a light and assured touch and supported with judicious reference to the
seminal sources. The combination of detailed analysis of the substantive regulatory materials and the accompanying theoretical debates within their specific historical evolution is adroitly managed by Moloney to produce an excellent critical account of the emerging regime and the tensions both inherent in it and created by it due to its direction of travel.

Taking the considerable knowledge and erudition underpinning the substantive regulatory aspects of the text as a given (and without in any way detracting from the immense achievement thereby represented) one of the other key virtues of the book is to place the regulation of securities and financial markets by the EU in the wider institutional context of that body. The book opens with an excellent introductory chapter in which, inter alia, Moloney characterises four broad phases of activity at EU level prior to the 2008 financial crisis. Whilst the second edition of the work was primarily engaged with the third of these phases (i.e. the implementation of the Financial Services Action Plan and the recommendations of the Lamfalussy Committee) it is the labour of the third edition to deal with the fifth phase, being the response to the 2008 financial crisis. The report of the de Larosière Group (2009) provides a central roadmap to this endeavour as it both called for the generation of a single EU rulebook and recommended the adoption of a new regulatory institutional structure.

In the above light Moloney views the fifth broad phase as having two “distinct waves”: first, the initial response to the crisis which generated the new institutional structure (in particular, in the context the European Securities and Markets Authority) and widened the regulatory perimeter (especially, as aforementioned, broadly to catch derivatives trading); and secondly, subsequent reforms to core existing securities market regulations pursuant to the ongoing obligation to review such regulations (e.g. in the fields of prospectus regulation, transparency and to a more significant extent market abuse). Whilst in the second wave there was a high degree of underlying continuity in regulation, the relevant change was inevitably coloured by the financial crisis as well as reflecting incremental improvements in the regulation consequent to the normal review process.

The interplay between continuity and change is also evident at a more fundamental policy level in terms of the location of the site of regulatory power and the principal rationale leading to regulatory action. In the former case, as Moloney notes, the direction of change remains the same:

Over the FSAP era, liberalization-driven regulatory reform in support of cross-border activity saw the location of securities and markets regulation shift to the EU from the Member States. The crisis era has led to the almost complete ascendancy of the EU (p. 39).

However, as regards the rationale for regulatory intervention the 2008 financial crisis clearly had a more radical effect:

The preoccupation with financial stability over the financial crisis, and the recharacterization of the single market in terms of risk, has led to the regulatory function of EU securities and markets regulation trumping the liberalization function (p. 40).

In Moloney’s view the combination of the two tendencies has undoubtedly been to introduce a more intrusive and more intensive substantive regulation.

In the concluding part of the book Moloney gives a very thorough analysis of the role and powers of the new European Securities and Markets Authority which arguably lies at the heart of the new institutional matrix and will be a key body in implementing
the new regulatory ambition. That very power has, of course, led to profound EU constitutional issues centring on the scope and application of the Meroni decision (1958) to the European Securities and Markets Authority, which as Moloney ably demonstrates are far from clearly resolved as a matter of general principle in the recent challenge by the UK to the legality of aspects of the new short selling regime in the Short Selling Case (2014). With its ability to create soft law and to propose binding technical standards the European Securities and Markets Authority has the potential to both create but also to diffuse the inevitable tensions arising from the new more comprehensive regime for regulating EU securities and financial markets and Moloney is surely absolutely correct to make its role and potential central to her analysis of the new post-crisis regime.

CONCLUSION

In sum, this is a very clearly written book which admirably succeeds in marshalling the vast and diverse substantive materials comprising the EU’s regulatory response to the events unfolding from the 2008 financial crisis as relevant to securities and financial markets within a clear analytical framework that both contextualises the regulatory trajectory of specific regimes and provides a critical survey of the available theoretical underpinnings. Within this framework the elements of continuity and change in the field are discussed in a nuanced manner and Moloney’s emphasis on the growing importance of the European Securities and Markets Authority and the constitutional tensions generated by both widening the regulatory perimeter and locating regulation at the EU level is surely prescient. For her third edition Moloney has again chosen an optimum moment for publication as the text incorporates the core regulatory response of the EU in terms of securities and financial markets as finalised by the raft of measures approved by the European Parliament on 15 April 2014 (‘Super Tuesday’). Whilst this should ensure that the book has good longevity in a notoriously fast moving field, the wider picture remains fraught with instability especially in terms of the institutional trajectory of the EU and the Eurozone and the inherent structural tensions in the contemporary neo-liberal order. Nevertheless, the third edition of this text is an exceedingly fine piece of scholarship which provides a lucid, cogent and comprehensive review of this vast body of highly complex regulation, and, as such, it will doubtless ensure that the work deservedly remains one of the key points of reference in the field.

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SHINING A LIGHT ON CHINA’S INNOVATION ECOYSYSTEM

Innovation and Intellectual Property in China: Strategies, Contexts and Challenges
by KEN SHAO (Ed.) and XIAOQING FENG (Ed.), Edward Elgar Publishing, 2014,
eBook eISBN: 9781781001608

The generosity of China’s incentives for patent-filing may make it worthwhile...to
patent even worthless ideas... Patents are easy to file...but gems are hard to find
in a mountain of junk.

‘Patents, yes; ideas, maybe?’
(14 October 2010) The Economist

INTRODUCTION

Innovation can be defined as the process of translating an idea or an invention into a
product or service that creates value. It has been less than three decades since the
People’s Republic of China (PRC) developed its first modern patent law yet in that
time the country has developed an exceedingly robust patent landscape. In 2013 the
country was responsible for approximately one third of global patent filings.1 This
means that the PRC eclipses former innovation heavyweights Japan and the United
States in terms of volume of patent applications. However, many remain unconvinced
of the quality of the patents and utility models2 being granted in that jurisdiction and
hold the view that the PRC patent applications are not subject to rigorous examination
(in respect of novelty and inventive step). They also point out that only a small
percentage of Chinese patents are filed overseas3 and the bulk of patent applications
are being filed by local enterprises rather than high tech R & D intensive divisions of
multinational firms. There is debate about whether the increase in patent filings in the
PRC is due to prolific Chinese inventors or simply a disciplined response on the part
of local business to Beijing’s order?4 A new report by Thomson Reuters entitled,
‘China’s IQ – Innovation Quotient’5 sheds light on the answer to this question stating,
‘...the growth in output is driven by the 12th Five-Year Plan and the associated
Chinese National Patent Development Strategy’ which announced that local businesses
will apply for two million patents by 2015 supported by a program of government
subsidies and tax incentives, fuelling the debate on the merit of patent subsidies.6 It is
argued that:

2 In some countries, including the PRC, inventions may also be protected by utility models (also known as ‘petty patents’).
The registration criteria for utility models are usually less strict (since no or a lesser degree of inventive step is required),
the procedure for registration is quicker (since novelty and inventive step are not usually examined by the national patent
office eg GIPO, before registrations).
patent overseas this typically indicates that it believes the invention has great commercial potential.
4 ‘Patent Fiction? Are ambitious bureaucrats fomenting or feigning innovation’ (13 December 2014) The Economist,
Shanghai, at http://www.economist.com/news/finance-and-economics/21636100-are-ambitious-bureaucrats-fomenting-or-
feigning-innovation-patent-fiction.
5 n 2.
...patent subsidies incentivize applicants to file opportunistic applications for inventions of low patentability or low value that would have not been filed without those subsidies. Thus they claim that most filings in this China patent boom are so-called “junk inventions”.7

Nonetheless, the PRC government is on target to meet its objective to transform the country’s economy from a manufacturing base to a knowledge and innovation base, across a full range of technology sectors. The State Intellectual Property Office (SIPO)8 is delegated with responsibility for patent matters nationally and internationally and is central to carrying out the strategic Five Year Plan. There is growing international concern that foreign enterprises face increasing risks from Chinese firms who may strategically patent foreign technology, which is then asserted in patent infringement actions against international firms that establish businesses in China.9

CONTENT

Against this background, Innovation and Intellectual Property in China offers a deeper insight and understanding of the PRC as an emerging innovation economy and how it is attempting to strategize and harness the global patenting system to its advantage. The editor, Ken Shao, is Professor of law at the University of Western Australia with an extensive research profile in the field of Chinese innovation.10 His co-editor, Dr Xiaoqing Feng is Professor of Law at the China University of Political Science and Law. He is also Deputy Director of the Center for IP Studies (CIPL) and Attorney at Law & Senior Consultant at Beijing Global Law Firm.11 The book contains a foreword by Professor Graham Dutfield12 that sets the optimistic tone for the challenges faced by the PRC stating that,

China is increasingly innovative and is putting in place sound legal and regulatory institutions to replace yesterday’s knock-off economy with tomorrow’s innovation-based economy.13

Ten chapters follow written by over a dozen international contributors from a mix of mainly Chinese, with European and Australian perspectives. Each contribution stands alone and explores and critically analyses an aspect of the innovation in China. Professor Shao contributes the first chapter, entitled ‘The cores and contexts of China’s 21st – century national innovation’ which introduces the core components of the legal and political framework and the remaining chapters of the book. Shao writes that the purpose of this book is to, “create a platform for a number of Chinese IP authors to introduce to an English-speaking audience a variety of ‘insiders’ perspectives giving

7 Ibid, p 2.
8 The State Intellectual Property Office (SIPO) is the Patent Office the PRC founded in 1980. See the English language SIPO website at http://english.sipo.gov.cn/
  Apple, Inc. has faced several patent infringement claims in the PRC in relation to its Siri voice recognition technology, the iPhone, iPod and the iPad. Other international corporations found to have infringed PRC issued patents include Schneider Electric, Samsung.
10 Email: ken.shao@uwa.edu.au. See Professor Shao’s publications as listed at https://www.socrates.uwa.edu.au/Staff/StaffProfile.aspx?Person=KenShao&tab=publications.
11 Email: fengxiaoqingipr@sina.com, see http://www.fengxiaoqingip.com/english/University.htm.
12 Professor of International Governance, University of Leeds. Professor Dutfield’s interdisciplinary research in the intellectual property field crosses many disciplines and he has been research active in Canada, Australia and China.
context to the materials. 14 His chapter then turns to vital question of the PRC’s ‘talent strategy’ as he seeks to answer the question, ‘Who is going to innovate in China?’

Chapter Two, contributed by Dr Zhang Zhicheng, Deputy Director of SIPO 15 focuses on the ‘roadmaps’ of China’s National IP Strategy Outline 2008.

Chapter Three by Associate Professor Yang Lihua provides an overview of post-1949 China political discourse on science, education and intellectual property adopting a rather Marxist approach.

Chapter Four is the work of Professor Feng Xiaoqing who identifies the important institutional and legal challenges face by the PRC in implementing its innovation objectives.

Chapter Five offers a judicial perspective and is contributed by Dr Kong Xiangjun, President of the IP Tribunal, the Supreme People’s Court of China and his colleague Du Weike.

In Chapter Six Professor Michael Keane, the first non-Chinese scholar, writes about China’s creative industries clusters involving the arts and media.

Chapter Seven is co-authored by Dr Peter S. Hofman, Dr Alexander Newman and Dr Ziliang Deng who rely on data drawn from local company annual reports to provide an understanding of how foreign investment in China influences local innovation by SMEs. 16

Chapter Eight is written by Emeritus Professor Seamus Grimes who examines recent levels of R&D activity of multi-nationals based in China. He considers whether the multi-nationals will permit China to access to their valuable ‘know how’ 17 as a condition of basing their operation in such a politically sensitive, yet potentially commercially lucrative jurisdiction.

Finally, Chapters Nine and Ten, contributed by Professor Wei Shi and Professor Peter Yu respectively, consider the nature and likelihood of success of the PRC’s intellectual property and innovation strategies within the global innovation village.

CONCLUSION

With scholars being pressed to publish more and more, there is potential for the publication of a hastily prepared edited collection that does little to further academic debate. On the other hand, a well-targeted and concisely edited collection can become a useful a reference point for future developments for years to come. That is the case with Innovation and Intellectual Property in China. This work is also important due to the academic calibre of the contributors whose positions enable them to access and draw on the micro-level IP and innovation, political and legal environments that currently exist within the PRC. Through its discussion of micro-level aspects of Chinese innovation, and armed with this knowledge, this edited collection then invites readers to consider the ‘big picture’ with respect to China’s striking innovation phenomenon.

A local innovation ecosystem in the PRC is beginning to emerge, but it is not yet at the same stage of development as Silicon Valley (US), Tokyo (Japan) or even the high tech hub in Tel Aviv (Israel) especially in terms of attracting talent and investment. 18

14 Ibid, 2.
15 n.6.
16 Small and medium-sized enterprises.
17 In the context of intellectual property, know how is an economic asset and a key component in technology transfer in national and international environments which co-exist with other registered IP rights such as patents.
Nevertheless, the Chinese have a strong entrepreneurial spirit and family dynamic, both of which are cultural characteristics conducive to creating centres of innovation, so it really is only a matter of time before the ratio between quantity over quality patents begins to change as China reaches full maturity as an innovation nation. For China to achieve full membership in the global innovation community, beyond its flourishing patent landscape, it must look past its national borders and continue to educate and develop the talent it needs in order to file high quality patents that can compete on a global scale with other countries.

_Innovation and Intellectual Property in China_ will be of interest to those who study the global innovation community, policy makers, economists and IP academics. This publication is well-edited and each chapter is clear and concise. It gets the fundamentals right in terms of quality of content, thematic unity, tight editing and high production values. When these factors come together the resultant collection becomes more than the sum of its parts. China has come a long way since the Office of the United States Trade Representative placed the country on its 'priority watch list' for IP right infringements in 2007.\(^\text{19}\) To continue to progress its innovation strategy aimed at promoting economic growth, China must find ways to continue to support its inventors and entrepreneurs yet aim for quality patents which create real value. This book will be worthwhile for those who study China’s development in order to predict how the country’s Five-Year Plan and National Patent Development Strategy will pan out.

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\(^\text{19}\) China was noted in the US priority watch list for IP rights violations in the *United States Trade Representative Special 301 Report* (2007) along with eleven other nations.
A TALE OF TWO STRAUSSES

Leo Strauss: Man of Peace by ROBERT HOWSE

INTRODUCTION

Leo Strauss (20 September 1899 – 18 October 1973) has long been a controversial political-legal philosopher. Strauss reputedly promoted ‘the art of tyrannical rule, deception in politics, the merits of a bellicose foreign policy’, and endorsed ‘the natural right of the stronger’, such that he was allegedly co-opted as the intellectual inspiration of the George W. Bush administration for its 2003 invasion of Iraq. Strauss and his followers have thus acquired a reputation as ‘prononets of war without limits’.

CONTENT

Robert Howse, the Lloyd C. Nelson Professor of International Law at New York University Law School, has now produced a monograph, Leo Strauss: Man of Peace, which challenges this view. He analyses Strauss’s writings on political and legal violence, and international law, reconsidering Strauss’s political philosophy by reference not only to Strauss’s publications, but also his lectures and seminars. In making a convincing case that Strauss was indeed a friend of liberal democracy, Howse lays the blame for perverting the true character of Strauss squarely on a ‘Straussian cult’, which Howse argues has arisen in American liberal arts colleges and state universities.

Strauss was a German Jewish political philosopher and classicist who had been taught by Martin Heidegger, among other eminent German scholars. Born and educated in Germany, Strauss was a contemporary of Carl Schmitt, Hannah Arendt and Walter Benjamin. In 1932, he emigrated from Berlin (where he held a position at the Academy of Jewish Research) to Paris, where he lived several years. Ultimately, he emigrated to the USA (after also living in England) where his first regular faculty position post was obtained in 1941, teaching philosophy at the New School of Social Research in New York. Subsequently, he accepted a professorship at the University of Chicago, where he remained until his death. Strauss would return to Germany only once, briefly, after the Second World War.

In maintaining the requisite critical distance from his subject, Howse in effect pens ‘A Tale of Two Strausses’. Howse variously depicts Strauss as a defender of Western liberal democracy, as a supporter of ‘bellicose imperialism’, as a promoter of freedom of the
mind strongly opposed to a world government (although he gave grudging support for the European Union later in life), and/or as a fellow traveller with Schmitt (11 July 1888 – 7 April 1985), the German philosopher, jurist and political theorist who supported and justified the Nazi ideology in terms of legal philosophy, and German Nihilism. In so doing, Howse characterises Strauss both as the victim of an insular ‘Straussian cult’ in US academic circles ‘which is fed by noisy right-wing public intellectuals’,9 and as the misplaced intellectual inspiration for contemporary neo-conservatism. In turn, Howse accomplishes his re-interpretation by incorporating for the first time and making reference to audio recordings and written transcripts of Strauss’s classroom lectures and seminars, which have recently been made available either on the website of the Strauss Center in Chicago10 or more generally, on the Web. These documentary sources thus enable Howse to supplement the existing literature on Strauss’s thinking and to clarify a number of misunderstandings arising from his published works.

Indeed, Strauss’s reputation for imperialist bellicosity is swiftly contrasted with the content of a lecture he delivered at the New School in 1941 (before the attack on Pearl Harbor), on the topic of ‘German Nihilism’. In it, Strauss makes clear that the many high-minded young Germans who have been seduced by those ‘thinkers who knowingly or ignorantly paved the way for Hitler’11 have in reality been misguided by their inadequate educations. As a result, Howse notes at various points Strauss’s lifelong ambition to facilitate a different kind of education:

_Those young men had come to doubt… seriously the principles of modern civilization. The great authorities of that civilization did no longer impress them; it is evident that only those opponents would have been listened to who know that doubt from their own experience, who from years of hard and independent thinking had overcome it._12

Howse speculates that Strauss’s viewpoint in this regard arises autobiographically – that, when an impressionable young man, Strauss had himself experienced a degree of sympathy with the rejection by German Nihilism of liberal modernity for its general moral decline. On this basis, Strauss would undertake his lifelong philosophical mission.

Howse’s explanation in Chapter 2 of Strauss’s thoughts on the attractions of German Nihilism for the young is thus particularly revealing of Strauss’s overall attitude to the events unfolding in Nazi Germany, and to the reactions of his contemporaries to same. In brief, as Strauss delivers his German Nihilism seminar to his students in New York, he is able to explain how deeply-anchored German Nihilism was in German thought, producing a fundamental protest against liberal modernity due to the responsibility of that modernity for endangering societal morality. Essentially, the German nihilists were revolted by the falseness of a world in which everyone must be satisfied and happy ‘enough’.13 In its place, however, the German nihilists went too far, beyond even traditional German militarism, which admires military courage as one virtue among

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8 Regarding which see below nn. 11–15.
9 Howse (1), 4.
10 See https://leostrasscenter.uchicago.edu.
11 Ibid., 14, citing GN, 362, including Nietzsche, Schmitt, and Heidegger, Ibid., 15.
12 Ibid., 15, citing GN, 362.
13 Regarding which see, e.g., Yevgeny Zamyatin, _We_ (New York, E. P. Dutton 1924 (trans.)), describing a dystopian, modern industrial society of extreme totalitarianism, much of the detail of which was taken almost directly from the works of H.G. Wells, the scientific socialist utopian writer whose works Zamyatin had edited in Russian. Aldous Huxley’s _Brave New World_ (1932) and George Orwell’s _Nineteen Eighty-Four_ (1949) were also partly derived (allegedly) from _We_. Of interest, cf. Lassa Oppenheim, _The League of Nations and Its Problems: Three Lectures_ (London: Longmans, Green and Co. 1919).
others. The German nihilists, more extremely, consider war itself to be desirable, and military courage, to be the only virtue left. As such, Strauss notes that:

> German philosophy created a peculiarly German tradition of contempt for common-sense and the aims of human life, as they are visualized by common sense.\(^{14}\)

Therefore, by reference to what Howse terms Strauss’s ‘deepening disenchantment with Weimar anti-liberal polemics’,\(^{15}\) Strauss emerges as a highly complicated figure, who, despite his long philosophical journey away from anti-liberalism and towards liberal democracy, continues to engage in his mature writings throughout the 1950s and 1960s with the perpetuating cycle of conflict, enmity, and permanent war so characteristic of the Schmittian approach and political nihilism. In turn, Strauss’s strong Jewish identity, Howse speculates, led Strauss towards the moderation which Strauss admired so greatly. In particular, Strauss relied on the Jewish concept of t’shuva to help him to re-discover and re-establish both moral-political limits and limits to legality. The ordinary sense of t’shuva denotes a pulling back from the extreme through critique (often internal) of the extreme, while its emphatic sense denotes ‘repentence’ in the sense of the return from the wrong way to the right one.\(^{16}\)

Howse follows Strauss’s search for a concept of civilisation which ‘is inseparable from learning, from the desire to learn from anyone who can teach us something worthwhile’.\(^{17}\) The specific approach adopted by Strauss is comparative and anti-historical, and his point of reference is the classical, to pursue the insights of a number of pre-modern thinkers by first seeking out the underlying logic in their individual approaches, after which Strauss assumed the contemporary vantage point to construct and engage in imaginary conversations between and with them. Strauss’s inter-temporal dialogues with and among philosophical thinkers thus stretch across the centuries. Not only does this methodology enable Strauss to explain discrepancies in attitude between the ages as regards the connection of ‘warrior morality’ to civilisation, the relationship of the norm to the exception, and/or the proper boundaries between legitimate and illegitimate violence, but further, to critique conservatism and liberalism: the former, for its refusal to consider justified alternative visions of the future; the latter, for its inability to guarantee individual human liberty.

As Howse emphasises throughout, a moderating, critical distance was vital to Strauss – attributes which help to explain Strauss’s general ambivalence regarding the possibility of human progress, whilst enabling him to seek an understanding of the true nature of war and peace, of international law and legality, and of law’s proper place within a broader moral-political horizon. Howse accomplishes his project as follows. After a very useful Introduction, including a helpful ‘roadmap’, Chapter 2 describes Strauss ‘self-overcoming’ his early Nihilist orientation towards the Schmittian ‘warrior mentality’ when a young man in the Weimar Republic.\(^{18}\) Chapter 3 explores Strauss’s famous debate with Alexandre Kojeve,\(^{19}\) a Marxist-Hegelian philosopher who not only

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14 Howse (1), 32, citing GN, p. 371.
15 Ibid., 25.
16 Ibid., 16 n. 39.
17 Ibid., 31, citing GN, 366.
18 See also Jochen von Bernstorff, ‘German International Law Scholarship and the postcolonial Turn’, Opinio Juris, 7 January 2015, <http://www.ejiltalk.org/german-international-law-scholarship-and-the-postcolonial-turn/> (last accessed 2 February 2015): ‘Nineteenth century German positivism centring on the will of the state as the formal basis of law (Jellinek and Triepel) made a lasting impression on modern Western international law scholarship and also induced two highly influential in depth critiques of Staatswillenspositivismus just after the First World War, those of Kelsen and Schmitt’.
19 A debate which, according to Howse, was popularised (yet distorted) in Francis Fukuyama’s The End of History and the Last Man (1992). Howse (1), 51.
influenced the French post-war Left, but assisted in designing the European Community (now Union). The debate between Strauss and Kojeve concerned an essay by Strauss, penned shortly before his move from New York to Chicago. In it, the ancient political writer Xenophon (a follower of Socrates) has the poet, Simonides, advise the tyrant, Hiero, regarding how best to avoid the detrimental aspects of tyranny (constant fear, need for a bodyguard, etc.).

Strauss then engages with Niccolò Machiavelli (3 May 1469 – 21 Jun 1527), the Florentine diplomat and political philosopher, and author of the masterpiece, *The Prince* in Chapter 4. Strauss considered Machiavelli to be more of a ‘fallen angel’ than a teacher of evil, although Strauss purports to ‘agree with Machiavelli that human society and certainly political community are not possible without some degree of injustice in the sense of some violence, including at the limit extra-legal violence, used by some men against others’. Nonetheless, Strauss feels that Machiavelli ‘has given up more of humanity than is justified’ – a theme developed further in Chapter 5, in which Machiavelli’s ‘realist’ disregard of legality is contrasted with the thinking of Thucydides (c. 460–395 B.C.) who places legality in a broader, moral-political horizon more capable of accommodating the limits of law both in war and emergency and meaningful normative constraints during such situations.

Chapter 6 builds upon the earlier chapters by providing a fascinating account for international lawyers in particular of Strauss’s assessment of modern international law. Strauss’s thoughts range, *inter alia*, from Grotius (the father of international law), Rousseau, and Kant (particularly the latter’s project for perpetual peace and his liberal pacifism). In describing his position, Howse underlines Strauss’s general scepticism of mankind’s ability to foreswear war, as he gallops through such themes as the limits of law in wartime, international law as a law of humanity, International Humanitarian Law, modern weaponry, humanitarian intervention, the self-determination of peoples, natural law, and even human reason. Chapter 7 concludes the monograph by suggesting that Strauss remains a particularly relevant force in contemporary debates on political and legal violence due to his strong advocacy of a moral and political responsibility somehow to make sense of it all. Indeed, Leo Strauss emerges not only as a ‘man of peace’, but also, as one who understood all too well mankind’s propensity to seek ‘the extreme or the temptation to the extreme’.

CONCLUSION

This small monograph packs a big punch, and conveys something of interest for many academic disciplines. It is certainly well worth the time to consider the views aired in it, and this reader cannot recommend it enough if only for an enlightening account of one man’s lifelong intellectual journey in pursuit of truth.

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21 Strauss also taught a seminar on Xenophon, in which he quotes the latter’s elegant phrase rejecting a closed political community, instead choosing ‘horses which are best, not those born in the fatherland’. Howse (1), 69 n. 25.

22 Ibid., 114.

23 Ibid., 116.

24 An Athenian historian, political philosopher, and famous today, *inter alia*, for recording the Fifth Century B.C. war between Athens and Sparta in the *History of the Peloponnesian War*.

25 Ibid., 175.
AN OVERVIEW OF THE EVOLUTION OF INTERNATIONAL CRIMINAL JUSTICE SINCE 1964

Rhianna Ward*

International criminal justice is the application of international criminal law to crimes committed by individuals. Traditional international law applies to the actions of states, whereas international criminal justice concerns the actions of individuals. The application to individuals is a revolution resulting from the Nuremberg and Tokyo trials which followed the cessation of World War Two. Crucially, at the opening of the Nuremberg trials the American prosecutor Robert Jackson highlighted that it was the individuals who were on trial, not the German people.¹ Although facing criticism for essentially being a trial of ‘victors’ justice’,² the Nuremberg trials paved the way for the future application of international criminal justice and reinforced the ideal that State and military leaders are not immune to prosecution. Over the last fifty years, atrocious crimes, deserving international revulsion and punishment, have not ceased to occur, but efforts have continued to hold those responsible for the worst crimes accountable. International criminal justice is applicable in both times of conflict and of peace. However, acts considered to be international crimes are often present within conflict, as they can be used as a means of warfare. For example, genocide is oft used to target certain ethnic groups within conflict, as was the case during the Bosnian war.³ Certain changes within international criminal justice have been present, but overall, changes have been slow and reactive, rather than proactive.

The fundamental aspect of international criminal justice is the ability to hold individuals accountable in a court of law. An evolution in this regard has been the creation of ad hoc tribunals, created to investigate specific events. In the 1990s, tensions led to civil war in the Balkans, including the killing of approximately 100,000 people in Bosnia and Herzegovina from 1992 to 1995, with atrocities including systematic rape of women and genocide.⁴ An ad hoc court was created to hold those responsible accountable. The International Criminal Tribunal of Yugoslavia (ICTY) was established by the UN Security Council (UNSC) under Chapter VII of the UN Charter in 1993.⁵ Its purpose was to prosecute those responsible for serious crimes committed during wars in the former Yugoslavia. The ICTY was the first international war crimes tribunal since Nuremberg and Tokyo, and demonstrated how the international community, in the form of the UN, responded to events and worked to establish a medium through which international criminal justice could be applied. The ICTY was

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the first court to prosecute individuals for rape as a crime against humanity.\textsuperscript{6} This was
ground breaking, as mass rape was widespread within the Balkans wars. Whilst the
ICTY succeeded in bringing this act under the terms of international criminal law,
despite being established in 1993, it did not prevent the Srebrenica massacre of 1995.
Given that the first trial was not held by the ICTY until 1996,\textsuperscript{7} it is unsurprising that
the ICTY’s remit and powers were not fully appreciated at that point in time.

In 2013, an email written by ICTY Judge Harhoff was leaked, in which he criticised
the tribunal’s acquittals of certain Serbian and Croatian wartime commanders,
suggesting this was potentially due to political pressure. An accused, Šešelj, filed the
motion that Judge Harhoff was biased, leading the ICTY to remove him from the trial
due to a demonstrable ‘bias in favour of conviction such that a reasonable observer
properly informed would reasonably apprehend bias’.\textsuperscript{8} It is contended that whilst this
was necessary to avoid bias within the ICTY, the allegations made by Judge Harhoff
have huge ramifications if true. It is argued that removing a judge who ‘whistle blew’
on bias within the tribunal, on the grounds that he demonstrated bias, is surely
counterintuitive. If Judge Harhoff’s speculations were true, then political bias appears
to have had an effect on international criminal justice. Political bias is, potentially,
an inherent risk of the prosecution of senior officials.

The International Criminal Tribunal for Rwanda (ICTR) was established by the
UNSC under Chapter VII of the UN Charter in 1994,\textsuperscript{9} following a request from the
Rwandan government, in response to the intense and ferocious Rwandan genocide.
This genocide led to the mass killing of an estimated 800,000 Tutsis in just 100 days,
in 1994. Whilst the ICTR is criticised for convicting only 71 people for these crimes and
taking nearly 20 years and around £1 billion to do so,\textsuperscript{10} an estimated two million
Rwandans were tried in local courts for their participation in the genocide.\textsuperscript{11} These
local courts, referred to as ‘Gacaca’ trials, were utilised to speed up the application of
justice. Gacacases were local hearings, involving the meeting of the community to discuss
the crimes, under the guidance of ‘judges’ elected from the community, who were lay
people, given judicial training specifically for the Gacacas.\textsuperscript{12} Whilst Gacaca trials
demonstrated merits, such as being able to work at a much quicker rate, being more
suitable for local communities and leading to the ‘healing of wounds’,\textsuperscript{13} they faced
criticism from Amnesty International for not reaching international fair trial stan-
dards.\textsuperscript{14} Whilst the ICTR worked at a much slower, and more costly, pace than the
Gacacas, the guarantee of a fair trial should always be the foundation of any legal trial,
therefore the Gacacas were not necessarily superior to the ICTR in their application of
justice following the Rwandan genocide.

An evolution within international criminal justice is the appearance of ‘hybrid
tribunals’, also referred to as mixed tribunals or internationalised courts. Hybrid


\textsuperscript{8} \textit{Prosecutor v. Vojislav Šešelj} (Decision) ICTY-03–67-T (28 August 2013), 5.

\textsuperscript{9} UNSC Res 955 (8 November 1994) UN Doc S/RES/955.


tribunals combine both domestic and international justice elements in the same setting, being ‘characterised by a mix of national and international components’. The Special Court for Sierra Leone, the East Timor Panels, the Regulation 64 Panels in the courts of Kosovo, the Extraordinary Chambers in the courts of Cambodia and the Special Tribunal for Lebanon have all been categorised as hybrid tribunals by The Oxford Companion on International Criminal Justice. Hybrid tribunals combine the positive aspects of both international and local justice and Dickinson argues that hybrid tribunals ‘hold a good deal of promise and actually offer an approach that may address some of the concerns about purely international justice, on the one hand, and purely local justice, on the other’. Whilst the period between the creation of the Rome Statute in 1998 and the ICC becoming fully functional in 2002 necessitated hybrid tribunals, Holvoet and de Hert argue that hybrid courts will continue to be necessary for situations when crimes are beyond the remit of the ICC. This is accurate, as should a situation arise in which international crimes cannot be prosecuted by the ICC, due to a lack of jurisdiction in that State for example, they will need to be prosecuted by a court which does have the remit to do so. Having an international judicial system which has no gaps in coverage indicates an effective justice system. Until the ICC has an unbroken global jurisdiction, hybrid courts will enable the application of international criminal justice to continue effectively. The Rome Statute also highlights that the ICC is complementary to national criminal jurisdictions, meaning the ICC is not superior to national justice. Knowles provides further justification for the continuation of the use of hybrid courts, suggesting that hybrid courts fill the ‘cavity between wholly local courts, often corrupt and politicised, and wholly international justice’.

The East Timor Special Panels were established in 2000 in response to the atrocities in East Timor. A key parallel between the legal framework of the Special Panels and the ICC was that their definitions of genocide, crimes against humanity and war crimes are the same, allowing for consistency. However, this tribunal faced several problems, due to its ‘hybrid’ nature, which led to confusion over the division of power between the UN and the Timorese government. Practical elements of the court were compromised, such as electricity and security. Cohesion was needed between the UN and the Timorese government; as this was not present, the application of international criminal justice suffered. The Special Panels came to a close in 2005, following convictions of 84 people. Skinnider contends that the Special Panels faced criticism for concerning primarily ‘low-level’ defendants; it also suffered from the refusal of the Indonesian government to recognise the Special Panel and in turn the refusal to extradite Indonesian military officers.

Sierra Leone endured civil war from 1991 to 2002, leaving over 50,000 people dead. The Government of Sierra Leone and the United Nations established the Special Court for Sierra Leone (SCSL) in January 2002, with jurisdiction to prosecute those who committed crimes against humanity from 1996 onwards during the civil war. The SCSL could also prosecute those who violated the 1949 Geneva Conventions. The first indictment was issued in March 2003. The SCSL made its final decision on 26 September 2013, following which the Residual Special Court for Sierra Leone, which is much smaller than the SCSL, was established by an agreement between the UN and the Sierra Leone government, and is responsible for overseeing remaining legal obligations of the SCSL, such as witness protection and supervising prison sentences.23

A crucial change instigated by the SCSL was that for the first time, forced marriage was ruled to be an international crime under ‘crimes against humanity’ as an ‘other inhumane act’.24 Given that forced marriage is an issue throughout conflict25 this was revolutionary. A report carried out by the SCSL and the international committee No Peace Without Justice has found that the general feeling towards the SCSL of the majority of people in Sierra Leone and Liberia is that it has been successful and has achieved what was intended.26 The SCSL thus is a potential model of a successful “hybrid” model, compared to the East Timor Special Panels.

The Special Tribunal for Lebanon (STL) opened in March 2009, to prosecute those responsible for the explosion which killed former Prime Minister of Lebanon Rafic Haririri and 22 others in 2005. The STL ruled that a definition of terrorism, in terms of customary international law, has emerged, in contrast to the long held view of the international community.27 Ruling that terrorism is an international crime, for the first time, is a significant development within international criminal justice, as terror tactics are often used as an effective method of violence within the types of atrocities that demand the attention of international criminal justice.

Whilst hybrid tribunals have their benefits, the Extraordinary Chambers in the Courts of Cambodia (ECCC) demonstrate how they do not resolve the issue of international criminal justice being relatively slow paced. The Khmer Rouge exercised control over Cambodia for just under 4 years, from 1975 to 1979. During that time, at least 1.7 million people died from starvation, torture, execution and forced labour under the Khmer Rouge rule. The Cambodian government did not request the United Nation’s assistance in organising the process for the Khmer Rouge trials until 1997 and the ECCC became fully functional a decade later in 2007.28 The leaders of the Khmer Rouge remained free and unpunished for over 25 years, before being arrested and placed in detention. That they remained free for such a long period of time is a flagrant failure of international criminal justice, and is an insult to the victims. The delay in the application of justice has been partially apportioned to US support of the Khmer Rouge in the United Nations,29 which demonstrates how international criminal justice,

26 Special Court of Sierra Leone and No Peace Without Justice, ‘Making Justice Count: Assessing the impact and legacy of the Special Court for Sierra Leone in Sierra Leone and Liberia’ (Special Court of Sierra Leone and No Peace Without Justice, 2012).
even in hybrid tribunals which could perhaps be expected to apply a higher level of justice and equality due to their international elements, is not immune to political influence.

An issue arising from the attempted cooperation between international and domestic institutions is the possibility of lack of agreement causing delays. For example, in the Extraordinary Chambers of Cambodia the inability of international and national judges to come to agreement on the Rule of Procedures led to delays.\footnote{Agence France Presse, 'Row Over Foreign Lawyers' (Global Policy Forum, 24 November 2006)<https://www.globalpolicy.org/component/content/article/163/28917.html> accessed 8 March 2015.} A feature of hybrid tribunals is that they oft arise in times where the existing infrastructure in the country is not able to work effectively to prosecute those who have committed these crimes, thus they allow the international assistance to assist with this whilst ensuring ‘local participation and influence’ continues.\footnote{Eileen Skinnider, ‘Experiences and Lessons from “Hybrid” Tribunals: Sierra Leone, East Timor and Cambodia’ (2007) 3 Asia-Pacific Yearbook of International Humanitarian Law 243, 269.} Therefore, whilst international involvement in a State’s affairs can cause some delays, it is crucial for international criminal justice to operate effectively in countries where their domestic courts are not in a position to administer justice.

Differences within the creation of hybrid tribunals are present. For example, the Regulation 64 Panels in Kosovo were established in 2000 by the UN Interim Administration Mission in Kosovo (UNMIK) to try those responsible for international crimes during the armed conflict in 1999. Similarly, the UN Transitional Authority in East Timor (UN TAET) was also the operating administration in East Timor, and created the East Timor special panels within its mandate to restore the rule of law in the period between the end of Indonesian occupation of East Timor in 1999 and East Timor gaining independence in 2002. Conversely, in the cases of the Extraordinary Chambers in Cambodia, the Special Court for Sierra Leone and the Special Tribunal for Lebanon, the hybrid tribunals resulted from requests from the States’ governments to the United Nations for assistance. It remains to be seen what would occur should the United Nations refuse a request for assistance, but it is likely that refusal would impact greatly on the ability of many countries to apply international criminal justice.

A major development was progress towards the creation of a permanent international criminal court. The Rome Statute, adopted by the international community at a diplomatic conference in Rome on 17th July 1998, provided for the establishment of the very first permanent court for prosecuting the crimes considered most atrocious by the international community. The Rome Statute was a result of a long period of planning, as the suggestion of inviting the International Law Commission to consider establishing a permanent court was first vocalised by the UN General Assembly in 1948.\footnote{UNG A Res 260 (III) (9 December 1948).} The Rome Statute was important because, for the first time, more “comprehensive rules on general principles of criminal responsibility specifically appeared for the first time with the adoption of the ICC Statute”.\footnote{Hiromi Satō, ‘Modes of International Criminal Justice and General Principles of Criminal Responsibility’ (2012) 4 Goettingen Journal of International Law 765, 768.}

The ICC became operational in 2002, delivering its first sentence in 2012 against Thomas Lubanga,\footnote{Prosecutor v. Thomas Lubanga Dyilo (Judgment) ICC-01/04–01/06 (14 March 2012).} charged with recruiting child soldiers. The ICC’s creation was a major development within international criminal justice. Satō argues that the ICC developed the direct application of international criminal law by international tribunals, building upon the progress of the Nuremberg and Tokyo Trials, and the
ICTY and ICTR. An evident theme throughout the last 50 years has been the reaction of international criminal justice to global, political events, with the creation of various ad hoc courts, as the situation dictates. A permanent international criminal court is beneficial to international criminal justice, as it takes away the reliance on a state to create a tribunal to administer justice, which has the potential to lead to some international crimes facing punishment, and others not. A permanent international criminal court removes the reliance on intermittent ad hoc tribunals, which have a limited mandate and jurisdiction. For a case to commence in the ICC, either a State which is party to the Rome Statute can request that the Prosecutor opens an investigation or a non-state party can request an investigation by accepting the jurisdiction of the ICC. Alternatively, the Prosecutor can open an investigation if it receives reliable information about alleged crimes committed in a State which has accepted the jurisdiction of the ICC or by a State Party national.

An aspect of international criminal justice which has stagnated in recent years is the lack of diversification of indictments by the ICC. The court has faced criticism for only indicting black Africans, with suggestions that the court is racist and solely targeting Africans. However, it is contended that this is a product of the location of the most severe crises, and that as situations develop in other parts of the globe, there will be an increased diversity of the ethnicities of those indicted by the ICC.

The recent global political environment has been tumultuous, with multiple alleged war crimes committed in Gaza by Hamas and the Israel Defence Forces, yet the ICC has not launched an investigation into this, with suggestions that this is due to political pressure. However the prosecutor of the ICC, Fatou Bensouda, has stated that this is not the case, and that under the Rome statute, the ICC is only able to investigate alleged war crimes if that State accepts the ICC’s jurisdiction. As Palestine has not joined or accepted the Rome statute, the ICC is unable to investigate. This highlights how despite international outrage, prosecutions cannot always be launched, and that the application of justice by the ICC is dependent upon a State’s acceptance of the Rome Statute. A UN report has stated that both the Islamic State (IS) terror group and the Syrian government are committing war crimes and crimes against humanity in the developing situation in Syria; the commission publishing the report has recommended that the UN Security Council refers the situation to the ICC or an ad-hoc international tribunal.

International criminal justice has evolved, to a certain extent, since 1964. A crucial change has been the introduction of the International Criminal Court. More change in that respect is to follow, as from 2017 the ICC’s jurisdiction will extend to include the

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crime of aggression. 41 The ability to prosecute individuals for the crime of aggression is likely to bring change to the dynamics of international criminal law, as aggression is a far reaching crime. As political situations alter around the globe, this will alter the operations of international criminal justice, as it has been demonstrated how international criminal justice is a reflection of the surrounding circumstances. It could be said that international criminal justice is reactive rather than proactive, and whilst this may frustrate the potential advancement of international criminal justice, it is a necessity. Whether international criminal justice will change in form over the next half-century is to be seen. As a dynamic function within international law, it is likely to carry on as it has done for the last 50 years, by responding to changes as required and evolving organically.

KEVIN DE SILVA MEMORIAL
ESSAY WINNER 2015

RAPE IS RAPE – OR IS IT?

SAM HUSSAINI*

The conception of rape in English law has evolved from a crime against property, to a crime of violence, to one in which the complainant’s non-consent is the central focus. The offence finds its current formulation in the Sexual Offences Act 2003 (“the Act”). Reflecting the government’s view that “rape is rape”, the Act was designed to precisely delineate the boundaries of consent, and therefore of rape. However, conceptual uncertainty persists. This uncertainty is most striking in the context of cases where the defendant has induced the complainant’s consent using deception. Judges and scholars struggle for a coherent explanation of whether and why any given set of facts constitute rape. It will be argued that the courts fill the definitional vacuum by applying political and social preferences and prejudices to decide hard cases. Therefore, rape is not rape as defined by statute or jurisprudential theory, but is a projection of the values imposed upon it.

Rape has been recognised as a crime since at least the 6th century, but rape law evolved continuously as contemporary views of human sexuality changed. Consistent with the contemporary view of women as property, rape was elided with theft in the medieval era. Blackstone’s 18th century formulation conceptualised rape as a crime of violence. In 19th century cases such as Camplin and Fletcher however, the focus switched from the exertion of force to the complainants’ incapacity to consent. From this emerged the modern law of rape in which non-consent is the central focus.

By section 1 of the Act, rape is the intentional penile penetration by A of B’s mouth, vagina or anus, to which B does not consent and A does not reasonably believe B consents. Section 74 provides that “a person consents if he agrees by choice, and has the freedom and capacity to make that choice”. In recommending a statutory definition of consent, the Home Office had stressed the importance of “setting clear boundaries for society as to what is acceptable and unacceptable behaviour”. In relation to behaviour that falls outside the boundaries of acceptableness, the Home Office confidently asserted that “rape is rape”. However, the precise nature of the interest that rape law seeks to protect continues to be disputed by scholars. Herring detailed how rape is variously explained as an act

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1 Home Office, Protecting the Public: Strengthening Protection Against Sex Offenders and Reforming the Law on Sexual Offences (Cm 5668, 2002) para 41.
3 Ibid.
5 (1845) 174 ER 1016.
6 (1859) 169 ER 1168.
7 David Selfe and Vincent Burke, Perspectives on Sex, Crime and Society (Cavendish 1998) ch 3, para 3.3.2; Home Office, Setting the Boundaries: Reforming the Law on Sex Offences (Home Office 2000) para 2.10.1; Home Office, Protecting the Public (n 1) para 28.
8 For convenience, “A” and “B” will be used hereinafter to identify the defendant and complainant respectively.
9 Home Office, Setting the Boundaries (n 7) para 2.10.6.
10 Home Office, Protecting the Public (n 1) para 41.
of violence, a violation of sexual autonomy or of bodily integrity, and a manifestation of hegemonic patriarchy. Asking “why is rape wrong?” might appear to be an archetypal academic question. Rape appears, Herring said, “so manifestly wrong that there is hardly a need to justify it”.

Yet the uncertainty at the heart of rape is revealed to be of acute practical importance in cases where A obtains B’s consent by deception, especially since the Act’s abolition of the offence of procuring sex using false pretences.

At common law, deception vitiated consent only in very limited circumstances. These were where the deceit went to the nature of the act, for example where A convinced B that the penetration was a medical procedure that would improve B’s singing, or where A impersonated B’s husband or long-term partner. Only slightly enlarging upon the common law position, section 76 of the Act provides that it will be conclusively presumed that B did not consent to penetration, and that A did not reasonably believe B so consented where either (a) A intentionally deceived B as to the nature or purpose of the penetration or (b) A intentionally induced B’s consent by impersonating someone known personally to B.

Subsequent case law has held that whilst section 76 is to be construed narrowly, deceptions that fall outside its scope might nevertheless be incompatible with the definition of consent under section 74. Thus in Jheeta, where A used the personas of fictional police officers to persuade B to have intercourse with A, it was held that B’s purported consent was not the result of a free choice. In B, A’s non-disclosure of his HIV-positive status did not vitiate B’s consent, but the court left open the question of whether an active deception about that status would have vitiated consent.

In Assange and, it was held that it would be rape if A procured B’s consent using the deceit that he (A) would wear a condom or would withdraw before ejaculating respectively, knowing that B had expressed her consent to be conditional upon those factors. In McNally, A was a transgender man who, with B’s purported consent, orally and digitally penetrated B. The court found that A had deceived B as to his (A’s) “true” gender; but for that deception, B would not have consented. B’s consent was therefore vitiated, and A’s conviction for assault by penetration, an offence also covered by section 74, was upheld.

The philosophical rationale in these cases is readily identifiable. If B is mistaken about material facts – scilicet facts that are sine qua non to their choice – they have not the freedom and capacity to validly consent. According to Herring, a mistake by B about a material fact, whether or not induced by A’s deception, is always incompatible

12 Herring, Great Debates in Criminal Law (n 11) 91–92.
13 Sexual Offences Act 1956, s 3.
15 Criminal Law Amendment Act 1885, s 4; R v Dee (1884) 15 Cox CC 579.
18 Assange (n 17) [88]-[90] (Sir John Thomas P).
19 R v Jheeta (n 17) [29] (Sir Igor Judge P).
22 Assange (n 17).
24 McNally (n 21).
with valid consent.26 Thus if A obtains B’s consent by deceitfully expressing their love for B, A is guilty of rape.27 For Herring, rape law is concerned with the protection of B’s sexual autonomy, and sex obtained using deceit about material facts violates that autonomy.28

As Temkin and Ashworth noted however, no choice is made entirely free of external influences.29 Perhaps in recognition of this difficulty, the law stops short of Herring’s position that all material deceptions vitiate consent. In McNally, Leveson LJ thought it “obvious” that, for example, a deception by A as to their wealth would not vitiate B’s consent.30 His Lordship’s dictum may have been driven by a belief that some deceptions, although subjectively material in inducing B’s consent, are objectively unworthy of criminal sanction of the severity attached to rape. In other words, “seduction through lies”31 or “disingenuous blandishments”32 ought not to equate to rape.

Whatever the merits of this belief, once one departs from Herring’s self-admittedly “extreme”33 position, it becomes desirable to identify a rational basis for distinguishing material deceptions that vitiate consent from those that do not.34 Counsel in McNally relied on Assange and F to argue that deceptions as to the features of the penetration would vitiate consent, whereas deceptions as to A’s qualities or attributes would not.35 However, the court found no support for this distinction in the Act.36 Instead, the judges in F and McNally appealed to “common sense” to guide their findings that AA’s deceits vitiated BB’s consent.37 This is a regrettably imprecise principle upon which to place such a burden.38 The judges’ resort to common sense can be seen as tacit admission of the difficulty in identifying what exactly rape is, notwithstanding the Home Office’s clarificatory ambitions.

Nor is assistance found in recourse to jurisprudential theory. Rogers agreed with Herring that rape law is concerned with the protection of sexual autonomy.39 Yet despite recognising that the complainants in Assange were subjected to an unwanted risk of disease or pregnancy when A deceived them about his wearing a condom, Rogers rejected the characterisation of that deceit as a violation of sexual autonomy.40

It is submitted that the question of whether a given sets of facts constitute rape cannot always be answered solely by reference to established statutory or jurisprudential definitions. Such an approach is futile because it is based on the conceit that rape is rape; that there is an immutable truth about rape from which can be divined the solutions to hard cases. In reality, the law merely traces (imperfectly) the contours of prevailing opinion about the types of situation in which a complainant’s interests have been violated so severely as to warrant the label “rape”. At the frontiers of legal

27 Ibid 519.
28 Ibid 517.
30 McNally (n 21) [25] (Leveson LJ).
32 Jheeta (n 17) [24] (Sir Igor Judge P).
33 Herring, Great Debates in Criminal Law (n 11) 107.
35 McNally (n 24) [23] (Leveson LJ).
37 F (n 23) [25] (Lord Judge CJ); McNally (n 24) [25]-[26] (Leveson LJ).
38 Nicholas Rescher, Common-sense: A New Look at an Old Philosophical Tradition (Marquette University Press 2005) 64.
40 Ibid 7.
development, the solution necessarily relies on an application of social and political preferences and prejudices, what can for convenience be labelled “policy”, to decide whether the law ought to protect the purported conditionality of a given complainant’s consent. As Williams argued, sensitivity to policy concerns drives the position adopted by English law that some but not all material deceptions vitiate consent.41

The centrality of policy as opposed to law was recognised explicitly in B. Remarking that the legal consequence of a deception by A as to their sexual health would be unfit for judicial resolution, the court treated the issue as “a matter of public and social policy”.42 Even where it goes unacknowledged, policy animates the courts’ thinking about what rape is. In Assange and F, the policy of enabling women to control their reproductive health lurked beneath the surface.43 Sharpe cogently argued that the court’s “common sense” in McNally was in fact an application of heteronormative values that vindicated B’s disgust at sexual intimacy with a transgender man and rejected A’s self-identification as male.44 Sharpe would instead have prioritised the policy of protecting A’s privacy.45

McCartney and Wortley noted that McNally left open the possibility that a material deception as to A’s religion would vitiate B’s consent.46 In 2010 an Israeli court convicted an Arab man of rape, apparently on the basis that he had induced B’s consent by deceiving her into believing that he was Jewish.47 Given the opprobrium that resulted, perhaps an English court faced with similar facts would hold that the policy of not validating racist attitudes trumps the policy of protecting B’s ability to choose who they have sex with. Unsurprisingly, academic opinion is divided.48

The thesis advanced here is agnostic about the relative merits of these policies. It is merely argued that the resort to policy to resolve hard cases is inconsistent with the overarching doctrinal coherence suggested by the notion that “rape is rape”. It may be entirely proper to hold, for example, that deception as to wealth does not vitiate consent, but deception as to the wearing of a condom does. However, these propositions do not depend on what rape is; the policy concerns that motivate them define what rape is. Moreover, as the gradual erosion and eventual abolition of the marital rape exemption demonstrates, policy is wont to be stretched and moulded over time to accommodate the prevailing social attitudes.

Rape is a crime of ancient heritage, but its substance has never been settled. It has been variously defined as a crime against property, a crime of violence, and latterly a crime of non-consent. In devising its current statutory definition, the government sought to clarify exactly what constitutes consent. Its statement that “rape is rape” betrayed a belief in the existence of single, identifiable “wrong” at the heart of rape, capable of being illuminated given sufficiently precise language. However, the conceptual underpinning of rape continues to be contested. This problem is revealed most strikingly in cases where the defendant has induced the complainant’s consent using

42 B (n 20) [20] (Latham LJ).
43 Rogers (n 39) 8.
48 Cf. JR Spencer, ‘Sex by Deception’ [2013] 9 Arch Rev 6, 8; Sharpe (n 44) 221–222.
deception. The Act provides that deceptions of certain types will be conclusive proof of non-consent. Outside these narrowly-construed provisions, the courts have held that certain other deceptions will vitiate a complainant’s consent, on the basis that they deprive the complainant of the ability to make a free choice.

However, not all deceptions are incompatible with consent, even where material to the complainant’s choice. The courts appeal to “common sense” to guide their distinction of deceits that vitiate consent from those that do not. In truth, common sense is used to disguise the definitional ambiguity that deceit cases reveal. Instead of being resolved by reference to what rape is, hard cases are decided using political and social policies that define what rape is. These policies sometimes conflict and are prone to change. Despite the Sexual Offences Act’s high-minded ambitions, there is no immutable truth about the nature of rape. The reality is that rape is whatever it is deemed to be when a given set of facts are viewed through the lens of the prevailing societal mores.