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Legal Studies: How to narrow the Gap Between Law and Society

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1. Introduction

The inner logic of legal process methods, usually referred to as ‘thinking like a lawyer,’ is the focus of the traditional law degree. Case law, statutory provisions and doctrinal discussion are regarded as if their outcome and conclusions derive solely from a rigorous logical and analytical process labelled ‘legal reasoning.’ This often results in a mystification of law and the legal process. This negative aspect of the traditional mode of teaching law is further accentuated by the isolation of law from other disciplinary influences and the practice of the law itself.

The immediate consequence of the above is that law graduates are disabled from any role in the legal profession unless they join a law firm as a trainee or the bar as a pupil. However, even in both these roles, they learn to draft contracts or to advocate in a depoliticised manner. As a result, this training successfully sustains rather than dissipates the alienation of law from society.

The main thesis of this paper is that the teaching of law should take a different approach to that of the current law degree. Students should be equipped with the various knowledge and competences that make them suitable to appreciate not only the theory of law but the interactions between law and society. This paper will conclude that a law degree that follows the socio-legal approach from a critical legal perspective should be the appropriate methodology because it exposes students to the influences and impacts made on legal theory by the social sciences as well as that made on society by law.

This paper will attempt to show why such a goal is worth achieving and how this is achievable, within the constraints of a law degree. Firstly, it will overview the current goals of a law degree as set out in the Ormrod Report in 1971 and show how and why the current methodology often used in law degree programmes falls short of meeting these goals. Second, it will present a proposal for change.

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1 This paper is based on the work done by the author over 18 months that led to the successful validation of a BA/BSc (Hons) Legal Studies degree for Canterbury Christ Church University.
2. The current law degree programme

The Ormrod Report in 1971 overhauled the methods of training used until then for professional legal qualification. The report stated that legal education:

Should not attempt to equip the lawyer at qualification with a comprehensive knowledge … [but] the objectives of the academic stage should be to provide students with (i) a basic knowledge of the law … (ii) an understanding of the relationship of law to the social and economic environment … (iii) the intellectual training necessary to enable him to handle facts and apply abstract concepts to them... ²

In other words, one can summarize these goals by stating that the role of a law degree is to provide students with a broad understanding of law, how law does and does not work and the way in which law affects everyday society. The proper accomplishment of these goals necessarily requires the study of law on three levels: the micro, the macro and the practical levels of legal process thinking.³ The first implies an understanding of the inner logic of the legal process method. The second implies an understanding of the relevance of the social, political and economic factors that shape societal and legal relations. The latter implies the integration of theory with practice through clinical work.

As mentioned in the Introduction, case law, statutory provisions and doctrinal discussion are studied thoroughly and regarded as if their outcome and conclusions derive solely from a rigorous logical analytical process labelled ‘legal reasoning’ (ie the inner logic of the legal process method). However, the macro and practical level are traditionally overlooked by law degree programmes.

a. Legal education and legal thinking

The negative consequence of legal education focusing mainly on the micro level is twofold. Firstly, it often results in a mystification of law and the legal process. In fact, it develops a senseless reverence for law and legal thinking overlooking the fact that legal thinking ‘can generate equally plausible rights justifications for almost any result.’⁴ Second, this negative aspect of the traditional mode of teaching law further accentuates the isolation of law from other disciplinary influences and society. This is simply because students are forced to memorise

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² Justice Ormrod Report of the Committee on Legal Education: presented to Parliament by the Lord Chancellor (HMSO London 1971) [185].
rules and case law without paying much attention to the policy issues underlying them and the consequence (whether good or bad) for the society of enforcing them. The use of provocation and marital immunity to rape serve as good examples.

The defence of provocation in criminal law has traditionally required ‘sudden and temporary loss of self control.’ Students are likely to be told by a white, male, heterosexual lecturer, that if a man were to surprise his wife having sex with his best friend in the conjugal bed, the instant killing of both of them in the bed is more likely than not, depending of course on the particular circumstances, to meet the requirement of ‘sudden and temporary loss of self control.’ However, if a long term physically and mentally abused woman one day explodes and kills her husband, she would struggle to meet the requirement of ‘sudden and temporary loss of self control.’ This is simply because the reaction is unlikely to be a ‘sudden and temporary loss of self control.’ In other words, the long and repeat abuse allows a rather significant cooling off period between the innumerable abuses and batterings of the wife and of the act of killing by her, which means that in the eyes of the law there is time for ‘passion to cool and for reason to regain dominion over the mind.’ In those circumstances under current law, provocation is unlikely to be successfully invoked unless it is claimed and proved that the sudden loss of control was triggered by a last straw incident.

The other example is marital immunity to rape, a common law creation of eighteenth century. Accordingly, a husband could have had sex with his wife any time it pleases him even without his wife’s consent simply because he could not be guilty of rape. Even the causing of grievous bodily injury as a consequence of marital sex has traditionally escaped criminal liability where there is implicit consent or express consent. This special immunity to criminal liability for criminal offences performed in the conjugal bed is paradoxical in view of *R v Brown* where the House of Lords decided that consent is not a defence to grievous bodily injury (of course in the instant case for sex outside the conjugal bed) even though the recipients of the grievous bodily injury neither suffered any lasting disease (as in *Clarence*) nor suffered permanent wounds (as in *Wilson*) or required medical attention. In fact, rape by a husband of his wife appears not to be considered the cause of any injury in rather recent times. At least, this is the implicit conclusion of the Criminal Law Revision Committee in 1984 whose 15th Report on Sexual Offences recommended to retain the marital immunity to rape arguing, inter alia, that: ‘... the criminal law should keep out of marital relationships – especially the marriage bed – except where injury arises.’ Evidently, the committee members, by

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5 cf *R v Duffy* [1949] 1 All ER 932 and *R v Ahluwalia* [1993] CLR 728
6 On the relevance on race, gender and sexual orientation on teaching the law see Kennedy (n 4) 56 and 69.
8 *R v Duffy* [1949] 1 All ER 932 (Devlin J).
11 (1993) 97 Cr App R 44.
recommending to retain the marital immunity to rape, did not think as a matter of logical necessity that the act of raping on its own was likely to cause any type of injury. The House of Lords finally reversed this old common law immunity from prosecution, but only in 1991.13

The study of when, if at all, provocation or immunity from prosecution is properly invoked is likely to be covered thoroughly in a criminal law course. The use of legal reasoning, the inner logic of the law, is useful to explain to the student whether and how one can apply either of them to particular facts (or in legal jargon to distinguish between cases). For instance, in cases involving married couples, the Court of Appeal has found that Brown does not apply simply because ‘[c]onsensual activity between husband and wife, in the privacy of the matrimonial home, is not, ... a proper matter for criminal investigation, let alone criminal prosecution.’14 In any other circumstance where two or more consenting adults are involved, but not married, Brown appears to apply.15

Legal reasoning is therefore used as an instrumentally powerful tool to justify decisions, yet it is unable to explain the underlying policy or the consequences of such decisions. In the example of provocation, for instance, since ‘men frequently react immediately to insults and violence in a fit of anger,’16 case law has arguably shaped the requirements to allow provocation merely to meet the character of a macho man. This, of course, overlooks the fact that half of the population is constituted by women. Further, it assumes that all men are alike. In the case of the immunity from prosecution, the underlying justification has traditionally been that a wife was deemed an object who passed from the father to the husband in order for the latter to take care of her and to receive in consideration the dot. Further, as part of the agreement, the woman should have consented irrevocably to sexual intercourse with her husband by virtue of the marriage.17 This formality is still mirrored today in the religious marriage where the father walks the daughter to the church in order to deliver her to the groom awaiting inside.

The chauvinism of these rules should not be a surprise if one considers that women did not have political rights in the United Kingdom (as in most parts of the world) until 1918 when the Representation of People Act was passed giving some women over the age of thirty years old the right to vote and to stand for Parliament.18 In other words, the macro level of legal process thinking is either

14 Wilson (n 10) 50. cf the similarity of this wording and argument with the one used by the Criminal Law Revision Committee to retain the marital immunity to rape. cf text to n 12.
15 It is not clear whether sado-masochistic onanism is covered by Brown since the question certified for their Lordships in Brown related only to a ‘sado-masochistic encounter’ Brown (n 11) 46 (emphasis added).
18 7 & 8 Geo 5 c 64
overlooked or poorly taught by conventional law degrees, which focus on the law and miss out the social, political and economic factors that shape statutory and case law.

**b. The failing of legal education**

It is difficult to understand the purpose of employing a methodology that provides such a narrow understanding of law. A possible though nonsensical explanation could be that students reading law want to learn only the law. In fact, one could cynically argue that had they been inclined to learn sociology or psychology, they would be reading those subjects rather than law. This however overlooks the fact that students graduating with non-law backgrounds are often welcomed into the legal profession. A second possible argument could be that in recent times the law society and bar council have set rather stringent requirements that all universities must meet. It is necessary to elaborate further in order to make evident the flaw and danger of this argument.

Both the bar and the law society not only admit but also encourage non-law graduates to join the legal profession provided that they undertake and pass a conversion course. Students with a non-law degree who are willing to follow a legal career must enrol on a one-year crash-course to read law if they want to do so. Not surprisingly, they focus on the inner logic of the legal process methods during this intense year of studies; but contrary to law graduates, they should have acquired by then a broader understanding which would be the consequence of their previous non-law degree. Both law and non-law graduates will have nevertheless to join a law firm as a trainee or the bar as a pupil simply because they are deemed to be incompetent to perform any role in the legal profession, regardless of their university degree, unless they learn still in a depoliticised manner to be a barrister or a solicitor.19

On a closer view of the current situation, it is evident that reading law merely by concentrating on the law foundation courses and peripherally on other areas does not provide any advantage for those willing to follow a career in the legal profession. On the contrary, this road merely provides in three years what other non-law graduates are given in one year: an insight in the micro level of legal thinking. One may well be right in blaming the law society and bar council regulations, but this argument falls short of realizing that focusing on the micro level of legal thinking is in detriment rather than in benefit of the students. The question therefore remains whether a law school should follow absurd regulations or generate room for debating and changing them.

19 This was handsomely put down in writing by the recent consultation document circulated by the Law Society: ‘The proposals are intended to ensure that all who do qualify are competent to practise.’ The Law Society A Consultation Paper: Qualifying as a Solicitor – a Framework for the Future (Law Society London 2005) 28 <http://www.lawsociety.org.uk/documents/downloads/becomingtfr05consultppr.pdf> (10 August 2005).
Another possible explanation that could justify the current situation of teaching law is laziness or fear to the unknown. On the one hand, law teachers are more comfortable focusing on the law rather than opening a Pandora’s box by allowing other social disciplines into the classroom of which they know little or even nothing. Further, they feel like their authority is likely to suffer if students move from the micro to macro level without notice in the latter case.20 One further possible explanation is power and status quo. Law schools are ‘intensive political places.’21 Law students are trained there to become lawyers who may eventually become judges. The judiciary is the third branch of government in modern states. It makes sense that the establishment, which benefits from the status quo, is reluctant to make explicit that ideology exerts its influence on legal outcomes (eg Brown and Wilson) ‘by structuring legal discourse and through strategic choice in interpretation. ... [and that] the denial of [this] leads to political results different from those that would occur in a situation of transparency.’22

If the macro level of legal process thinking is not infused properly at undergraduate level and the postgraduate professional training successfully sustains rather than dissipates the alienation of law from society, the question remains whether students reading law will ever gain an understanding of the micro and macro level of legal process thinking.

3. Bringing about change: legal education beyond legal thinking

The Law Society Council has circulated for a 12-week consultation period, which concluded on 8 July 2005) a proposal entitled ‘Qualifying as a Solicitor – a Framework for the Future’ which, if finally approved, will change the requirements to qualify as a solicitor. This includes eliminating the requirement that non-law graduates complete a conversion course. Instead, all candidates (this includes law and non-law graduates) would complete a series of assessments, including a Law-Society-approved exam, before being able to gain a training contract.23 Isn’t this the time for law schools to revise their role in legal education?

A law degree programme should not attempt to provide a comprehensive knowledge of every subject of law nor to stop the intellectual training where students are able to handle facts and apply abstract concepts to them. Rather it should be designed to use law as a starting point, rather than a goal, from which students will be encouraged to consider other moral, ethical, economic or sociological questions that are incumbent on contemporary societies. In other words, the macro and practical level should be part of the law school curriculum. A way forward to achieve properly this goal is to adopt a socio-legal approach from a critical legal perspective.

20 Klare (n 3) 342.
21 Kennedy (n 4) 54.
23 The Law Society (n 19) [32].
This should involve within individual modules, a critical consideration of the interplay between law and the social sciences in theory and in practice as well as the tools to achieve this successfully. At level 1, the programme should have 3 core courses for all students providing an introduction to basic tools to work with law and other social disciplines, the basic concepts of law and critical legal thinking:

Introduction to Socio-Legal Research Methods
Introduction to Law
Jurisprudence

Introduction to Socio-Legal Research Methods should aim at introducing students to research methods and strategies. It will provide students with basic skills to understand the nature of academic research, the research process and management of research papers and projects. It should cover a wide range of topics (not only law) such as searching for legal and non-legal primary and secondary sources, literature search strategies, effective use of the library and internet for socio-legal research, different methods of obtaining, analysing and interpreting data (e.g. quantitative and qualitative analysis). It should also provide students with the skills to present effectively the results of their research (written and oral presentations).

Introduction to Law should develop the students’ knowledge and understanding of key principles and concepts underpinning the study of law. This will involve students becoming acquainted with the basic elements of United Kingdom constitutional law and practice as well as enable them to acquire a relevant knowledge and understanding of the legal framework in which public institutions operate and how cultural and social factors (such as ethics and diversity) affect that operation.

Finally, Jurisprudence should provide students with a knowledge and understanding of legal theory and the fundamental underpinning for understanding modern legal thinking. A fundamental tool to embark in the study of any other area of law.

At levels 2 and 3, the programme should allow for a progressive building of complex and critical knowledge and a sound understanding in socio-legal principles and theories mainly through two further core courses: one dealing with law, state and society and the other dealing with international legal studies.

‘Law, State and Society’ should aim to provide students with an informed understanding of the relationships between the law, political institutions and broader social trends. It will build upon the issues raised in level 1 Jurisprudence course and aim to develop an understanding of the constitutional arrangements of the legal system in the UK and its relationship with the emerging constitutional dimensions of European integration. ‘International Legal Studies’ should examine
the work and achievements of international institutions, such as international
courts, the use and abuse of state power, the political relationship between
developing and developed states and the limitations inherent in the current stage
of development of international law from a critical perspective, focussing on their
reality, impact and effects on national life.

This is an obvious and deliberate ‘pathway’ starting with the foundation
courses in Level 1 (such as Jurisprudence and Introduction to Law) to the study of
fundamental aspects of national laws within the socio-legal milieu in Level 2 (such
as Law, State and Society) ultimately leading onto the wider complexities and
dynamics of law in the international system in International Legal Studies at Level
3.

The remaining courses (such as criminal law, law of obligations, etc., and
non law related courses) should be optional and should aim to complement the
micro and macro level of understanding legal thinking. The programme should
include at all levels observational experience at, for instance, the Houses of
Parliament, police stations, prisons and courts, aimed at enhancing students
understanding of the creation, enforcement and adjudication of law.

Further, at level 2 and 3, a feature of the law degree should be supervised
clinical experience. A clinic for Dispute Resolution will provide the student with an
opportunity to understand better the wide range of alternative possibilities that
may be available when resolving disputes. It will be shown that law is the basic
skeletal framework from which other less litigious species of dispute resolution may
form and evolve (eg ADR).

This clinical work will encourage students to consider moral, ethical,
economic or sociological questions that are incumbent on contemporary societies.
With the use of mediation to solve conflict, for instance, students will learn to solve
the problems that face a community, for the benefit of the community rather than
the advocate and his/her client, just one member of that community. Students will
learn and appreciate how this process can often lead to a more satisfying and
durable solution, where a greater number of individuals feel that they have
benefited from resolution of the relevant dispute.

The study and practice of different methods of dispute resolution will
further advance the common desire to promote justice (inherently built in almost
all law students) in circumstances where there is a considerable imbalance between
the relative bargaining powers of the parties. Weaker parties, such as consumers
or minorities, may lack the necessary resources to provide themselves with
adequate representation or protection; it is here where professional skills are
required to ensure justice is served. A clinic will delve deep into these issues and
related skills by developing creative processes to complement the theory of the law
in building a more egalitarian society, especially where the law does not reach or
pragmatically fails to deliver.
4. Conclusion

The aim of this paper was to make explicit the deficiencies of law degrees and to provide a framework to debate a different approach. The deficiencies highlighted indicate that the emphasis placed by the current methodology on the micro level of legal thinking and the systematic overlooking of the macro and practical level are in detriment of the education of law students. This was shown to be further sustained by the important number of non-law graduates admitted into the legal career by the bar and law firms with a broader macro understanding provided by their undergraduate degree and basic micro understanding provided by the conversion course. The current proposal of the law society to make mandatory a competency assessment for all candidates regardless their background and eliminating the requirement that non-law graduates complete a conversion course will leave non-law graduates and law graduates pari passu in theory, although in practice most law students will lack a macro and practical understanding of how legal thinking works unless the methodology changes.

The framework suggested as a potential way forward is to follow the socio-legal approach from a critical legal perspective. This methodology should arguably expose students to the influences and impacts made on legal theory by the social sciences and social reality. The ultimate challenge of such a law degree programme, therefore, is to give students the confidence that comes with an appropriate level of understanding of the inner logic of the legal process as well as a holistic practical understanding of the interaction between law and social change.