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BILETA2012 Conference 'Too many laws, too few examples.' Regulation, technology, law & legal education

This is a special edition of the journal devoted to the legal educational papers given at or prepared for the 2012 British and Irish Law Education and Technology Association Conference, held in the Centre for Life, Newcastle, hosted by Northumbria University Law School and organized by Paul Maharg and Abhilash Nair. The issue is edited by Paul Maharg and the recent Chair of BILETA, Sefton Bloxham. [1] It is doubly a special issue of the journal, however, because it is also an issue dedicated to Professor Abdul Paliwala, who retired recently from the University of Warwick Law School. In addition to the editorial and conference articles, therefore, there is a brief appreciation describing his work in legal education, followed by a CV and complete bibliography of his academic work.

The BILETA conference theme is a quotation from the French lawyer and revolutionary, Louis Antoine Léon de Saint-Just. It goes to the heart of a long debate about regulation - how best to regulate human activities, and inspire good conduct. Saint-Just was in no doubt: he states the case in words that echo a complex debate about the nature of regulation in human affairs that stretches back over two millennia, and is critical to the technological issues of the twenty-first century. Do too many laws stifle human aspiration and creativity? Or do we have the wrong laws? Is legal regulation the best or only way to achieve justice in our technological societies? Are our lives happier because we have ever more laws governing our use of technology? In relation to legal education, one of the key areas of interest for BILETA as an organization, regulators internationally are opening debate on their regulatory regimes - how best can technology be regulated for educational and ethical purposes? How can it enable our learners to learn justice? In the UK for example the frontline legal regulators have instructed a Review of Legal Education and Training (LETR - http://letr.org.uk). The aim of the review is to make recommendations on the future of legal education, in view of the fact that legal education is subject to significant market, political and regulatory pressures. The *Legal Services Act 2007* requires that both the frontline regulators and the Legal Services Board are satisfied that the regulatory objectives of the Act (set out in s.1) are being and will continue to be met with regard to legal education. [2]

The SRA's Expression of Interest drew attention to objective (f), but it is clear that, in any review of regulation and regulatory activity, any one item on the list must impact on others. Technology was one of the issues upon which regulatory bodies instructing the Review sought comment and analysis, and some of this is provided in the draft literature published recently by LETR. As the draft review points out, the issues faced by regulators are those of quality:

> 'How […] can regulators ensure that extensive multimedia and internetworked applications will enhance the quality of student learning? The issue is a microcosm of the larger dilemma faced by regulators: how can they be sure that a wholly online programme, for example, is not simply a cheap, poor-quality version of a face-to-face, campus-based programme?' [3]

In the US, to take another example, regulation of distance learning by the ABA is also under re-consideration. By 2006, when Standard 306 was formed, there were already online law schools in the US (Concord School of Law graduated its first students in 2002 - Salzer, 2004, 102). For a decade, the Standard prevented dynamic change in law school development. As Martin pointed out:

> 'the longer it is that accreditation standards are used to protect conventional classroom-based instruction from online competitors, the less likely it will be that schools practicing only traditional modes of education will be able to respond to the challenge of online instruction when that barrier is finally lowered.' (2006, 514)

For Martin, and for many other commentators, Standard 306 acted against the grain of increasing networked connectivity, in education as in society. As regulation, it did not ensure quality in face-to-face classes any more than it did in online or distance learning classes, nor did it encourage innovation. On the contrary it acted as a barrier to innovation, not just within modules, but on the very strategic innovation across the curriculum urged by the Carnegie review on US legal education (Sullivan *et al* 2007). The restriction has been heavily criticized in the literature (Rakes, 2007; Bynum, 1998).[4] The pattern is one where the regulator, for any number of reasons, is conservative in its regulation of curriculum structure and content. [5]

But the issue goes deeper: what precisely is conserved? Regulators frequently adduce quality as their fundamental concern. Underlying issues of quality are those issues summarised in points (a)-(c) and (g) & (h) of the Act above - perennial issues of democratic accountability and fundamental rights (all issues that Saint-Just and his contemporaries wrote upon - note the change in terminology from (d) to (g), where consumer becomes a *citoyen*). There is no definition of these terms in the Act, of course. Nor can this be closely legislated for it is a highly contested concept. But it is surely one of the duties of a regulatory regime to ensure that such issues as the quality of legal education, the nature of the public interest, the rule of law and access to justice are interrogated within a system of legal education. If legal education is to be regulated, then regulators need to understand the nature of the educational process, as much as they need to understand the economics of the marketplace or consumer rights or access to justice and

many other critical literatures that impact on their actions. Their actions, after all, crucially limit our actions as educators to carry out that interrogation, as the examples above show.

But regulators also need to be aware of the wider issues facing any technological implementation: what is best for the profession? What is best for society? If by 'best' we imply some kind of virtuous option, set over against other options, on which criteria do we decide what is 'best'? What is the opposite of best? Is the opposite, as Saint-Just held, not evil but terror: 'The principle of a republican government is virtue; the alternative is terror. What do people want who want neither virtue, nor terror?' The question was posed at a point when the fledgling Revolution was under attack by neighbouring nation-states, when republicanism was perceived to be the only answer to an autocracy overthrown. Writing much later in the nineteenth century Marx was as adamant as Saint-Just about the republican solution, but where Saint-Just defended it passionately in terms of a Stoic republican virtue restored, Marx saw it as no real solution:

> '… in the classically austere traditions of the Roman republic [the Revolution's] gladiators found the ideals and the art forms, the self-deceptions that they needed in order to conceal from themselves the bourgeois limitations of the content of their struggles and to keep their enthusiasm on the high plane of the great historical tragedy.' (McLellan 1977, 302)

Were he alive now, Marx would have answered Saint-Just's question with some confidence: what do the people want, if not virtue or terror? The people want bourgeois consumerism (Sainsbury or Waitrose?), the illusion of choice (iPad or Android?), the dramatic spectacle of political direct action and terror safely enacted somewhere else in the world (Arab Spring), for us to view on our 4G-enabled mobile devices.

Saint-Just meets Marx, of course, in their mutual advocacy of direct action. It was Saint-Just, that chilly revolutionary, who dismissed the aestheticization of politics and insisted on a purity of purpose and the power of such action. His passionately logical speeches to the Assembly arguing for the execution of Louis XVI electrified those who heard them as radically new. And yet even in this radical rupture with the past Saint-Just was only following a Ciceronian doctrine of necessity, revived many times in European thought since then. Surfacing in the Scots political philosopher George Buchanan (*De Jure Regni Apud Scots Dialogus* - Mason and Smith 2004), for instance, it presented an uncomfortable challenge to the absolutism of Jacobean and Stewart/Stuart monarchies. Marx and Saint-Just also met in their mutual scepticism of regulation to achieve much in the way of real social change for the better in society. Again, we need to appreciate that Saint-Just was not the only political figure to ask these questions about the nature of law and ethics. He is one figure in a long Stoic tradition for whom law and regulation alone are insufficient. As important for the well-being of social infrastructure and civic living, he would argue, were *exempla* from history and contemporary society, which were used to help citizens think through the complex moral perplexities of their age and society. Tacitus is one example in the domain of history (Turpin 2008), as was Seneca, in the field of moral philosophy. [6] [7] The critical tradition was taken up by Stoic commentators in the Renaissance and Enlightenment

- Bolingbroke, for instance, and many figures in the Scottish Enlightenment such as Smith and Adam Ferguson (following an earlier seventeenth century Scottish tradition), took up the analysis.

Ferguson's understanding of the tradition is particularly apt (Maharg 2007). A civic humanist by inclination, he attempted to bring together a number of concerns that stemmed not merely from his intellectual background, but from the social and political problems he perceived around him. Many Scottish Enlightenment figures were similarly motivated - Adam Smith, Lord Kames, David Hume, William Robertson. But Ferguson's *Weltanschauung*, distinctive in his own lifetime, differed in a number of important respects from that of other figures. He offers a complex model of historical continuity that challenges both Hume's and Adam Smith's philosophy of history, and the primitivism of Rousseau. Ferguson combines a subtle analysis of the emergence of modern commercial society with a critique of what appeared to him to be its abandonment of civic and communal virtues. Where Smith and Hume generally approved of the economic and material changes wrought in society within recent times (legitimising the rise of the commercial, for example, for its effect of liberating social orders from feudal superstructures), Ferguson was much more critical of the new structures and their effects on society. Where Rousseau and others pointed to the contractarian basis of society, Ferguson drew attention to conflict as an engine of change, and investigated the effects of moral and emotional motives to action. It was on account of this social trajectory that Pocock described Ferguson's account of social becoming as 'perhaps the most Machiavellian of the Scottish disquisitions of this theme' (Pocock, 1975, quoted in Hill, 2006, p. 39).

And yet Ferguson was also part of the civic humanist tradition, the key concerns of which lay in citizenship and virtue. For Ferguson, following Seneca, Cicero and the Stoic tradition, it was inconceivable that society could exist at all without the binding qualities innate in civic virtue and benevolence. What was striking about Ferguson's position, in part derived from Hutcheson (Hutcheson, 1969-90), was its refusal to dismiss the Stoic tradition and adopt wholesale a utilitarian displacement, a position which was held in tension with his scepticism of the very concept of society's progress, particularly in a capitalist society. He conceived the use of moral philosophy to lie in the problematic areas of 'choice, practice and conduct' (*Institutes*, 6; Hill, 2006, 207). As these are infinite in the variety presented to us in social interactions so our learning in ethics never ceases. Ferguson thus perceived moral learning as 'a teleology without an attainable telos ', in the neat formulation of Hill. She quotes a range of Ferguson's metaphors: ethics is 'a "baffled project", an infinite "curve", and a perplexing "labyrinth" rather than a precise goal' (Hill, 2006, 207). [8]

Ferguson's appeal lies not only in his refusal to let philosophical systems blind him to the stark realities of capitalist shifts in later-eighteenth-century Scotland, but also in his refusal to admit that a complex and sophisticated philosophical tradition two millennia in the making had little of worth to say to him or his society. Many of the revolutionaries in Paris would have agreed with him regarding the tension, but committed to direct action like Saint-Just they took brutal courses of action to the challenge of resolving the dilemma presented by the Stoic doctrine of necessity. The critical question

they failed to answer regarding the doctrine was not the moral concept itself, but its implementation and continuation in the world: put simply, at which point does necessary action become unnecessary? At which point did the title 'Committee for Public Safety' become a chillingly ironic comment on those issuing its orders? Ferguson was not averse to action - he was Chaplain to the Black Watch regiment, and saw battlefield action in Flanders, and this (together with an understanding of the Highland culture of his birth, based as it was on honour) probably contributed to his understanding of the crucial moral value of 'choice, practice and conduct'. Those qualities lie at the heart of regulation of any activity in our society. Stoic *exempli* are an essential element of them, for such examples inspire us, guide us, give us the moral direction, the moral habit and the moral strength to follow, to innovate, to think critically and not just about regulation and law but about the basis of fairness and unfairness, what the historian E.P. Thompson called the 'moral economy' of our society (Thompson 1971). The Stoic philosophy underlying Saint-Just's words should inspire a new view of regulation. It should inspire us to try again; to fail again; to fail better (Zizek 2009, 7, 361).

Our conference focused attention on the issue in all areas of technology practice, policy and governance that BILETA deals with. In the field of legal education and technology the regulation stakes could hardly be higher. Indeed it could be said that this is the case with all aspects of technology governed by regulation; and the title of one of our conference keynote speakers, addressing technology and legal education, reflected this. Richard Susskind explored the deceptively simple question, 'What are we training young lawyers to become?' His emphasis on metamorphic development and becoming was similarly a theme in many of the conference papers. Thus, Bainbridge *et al* report the findings from a BILETA- and HEA-funded project to develop the use of mobile devices, and iPads in particular, in professional legal education curricula - both primary vocational and CPD. The project was multi-site and multi-jurisdictional, based in Northumbria Law School, Glamorgan Law School and the Law Society of Ireland. Key issues included those of ownership (of the device and the curriculum), the development of professionalism, the changed nature of collaborative activities, given mobile connectivity, and the move from learning *about* to learning *to become*. The regulatory implications that mobile connectivities bring are sketched out in the article.

Information is a key function of regulation. Broadbent and Sellman analyse the operation of law school websites in providing information about legal education and school activities. As they point out, since 'the form and content of information put out by universities tends to make assumptions about the capacity of the audience to understand not only what is being said but also its subliminal meaning', it may well be the case that there are issues of diversity and equality at stake here: 'material that is not explicit about matters such as academic practices privileges those with knowledge of such practices and discriminates against those who do not, thus perpetuating inequalities.' Chow and Firew shift focus to experiential learning on professional programmes. After a brief summary of regulatory reviews of legal education in England and Wales, Australia and Hong Kong, they note the general over-emphasis on content at the expense of method or form in legal curricula. Taking the analysis of a platform called

SIMPLE (SIMulated Professional Learning Environment), they show that experiential learning in the three jurisdictions of Wales, England and Scotland was enhanced through use of the application.

The representation of law and legal culture in film and TV is central to popular understanding of law and lawyerly activity; however that activity might be *mis*represented by such media. As Denoncourt points out, though, use of film is still relatively rare in the law school, beyond niche modules on film and lawyers. Her article describes and analyses the use of a specific film, *The Social Network*, in a specific module, namely IP Law. She shows how it can be used to help students understand basic concepts such as principles of contract, partnership, company, employment and intellectual property law, as well as the principles and operation of intellectual property within social contexts - none more topical than the life-cycle to date of Facebook, one of a number of applications that have come to dominate social interaction on the internet.

McKellar & Warburton analyse whether an e-publishing platform, comprising e-content and e-reader, could enhance student learning. In a controlled pilot with four groups of distance learning students they identified four 'dimensions of interest' - device usability and functionality, user context and behaviour, the affordances of epub formats, and the impact on learning and teaching. It is interesting to compare these dimensions with the discussion of iPad use in Bainbridge *et al.*, for there are many points of similarity. However what is unique is their model of rapprochement with legal publishers and with the device manufacturer, Kobo, which gives us an interesting account of how roles can change in the world of academic publishing when new technologies are used.

Muntjewerff takes quite a different approach in her article. She describes an application, CASE, that helps students to model legal thinking in their reading of case decisions. The instructional environment, with its embedded case text, has been designed to help students clarify the rhetorical structure of a decision. Muntjewerff shows how the application has been received by staff and students. While such work is still at an early stage of development, it is increasingly clear that, combined with data from learning analytics, it may prove a useful learning tool for staff and students.

Open access is potentially one of the most exciting areas of legal education development. The article by Leith and Fellows focuses on the use of BAILII (British and Irish Legal Information Institute) cases and legislative materials as learning resources. They describe the work of the JISC funded Open Law project to promote BAILII. They look to reasons why, currently, the field of research 'appears lacking in vitality', and they point to the need for better connections 'between the law school and departments of computer science and librarianship'.

Two commentaries round up this special edition. In the first, Allbon *et al* present a legal skills wiki born out of a desire to see what they termed the 'building blocks of law' given more attention. This involved the development of multimedia resources around mooting, research, legal writing and other skills. The product of a five-month JISC-funded Learnmore app development cycle, their commentary analyses both the practical elements of using technology to aid student learning in law and

the pedagogical pros and cons of such a strategy. In the second commentary Meredith presents a critical review of referencing software used with OSCOLA. She considered the main features of three referencing applications, EndNote, RefWorks and Zotero, and gives a state of the art summary of the functions of bibliographic software. Her summary reveals how little such software is used by staff, and raises the issue that if we want our students to commit to the use of academic referencing software, staff ought to be pointing the way themselves through their own use.

Almost every article and commentary in this issue has regulatory import, not just for professional regulators in England and Wales such as the SRA, the BSB or IPS, but for international regulators as well. In the USA, law school entry figures are diving steeply and show little sign of recovery. The Law Society of Upper Canada has recently introduced a Legal Practice Programme and placement, and will be assessing it against the current regime of articling. The Society's approach is refreshingly open but whether it is sufficiently radical on regulation to tackle issues of professional deficit, ever-rising costs and ever-lengthening programmes remains to be seen. Many of the ideas embodied in the articles and commentaries here show the authors improving how we may think about technology-enhanced learning, and how we may enact improvements to our teaching and learning practices. Whether or not we agree with Saint-Just that there are too many laws, this issue at least addresses their consequences in society and the *exempli* of conduct that might provide alternatives to them.

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[1] Abhilash Nair has edited another set of conference papers for a sister volume of *The International Review of Law Computers and Technology*.

[2] These include:

a. protecting and promoting the public interest;
b. supporting the constitutional principle of the rule of law;
c. improving access to justice;
d. protecting and promoting the interests of consumers;
e. promoting competition in the provision of [legal] services;
f. encouraging an independent, strong, diverse and effective legal profession;
g. increasing public understanding of the citizen's legal rights and duties;
h. promoting and maintaining adherence to the professional principles.

[3] Chapter eight, 'Key regulatory issues: International comparisons of professions and jurisdictions', pp.20-21. Published 9 March 2012, and available at http://letr.org.uk/literature-review/.

[4] Rakes (2007, 2) put it well:

While distance education can be analogized to classroom time, it would seem that a better approach is to think about what we want the education to accomplish - knowledge of subjects needed to be a lawyer, inculcation of skills and values necessary to be a good lawyer, and some experiential component - then set out how any program proves that it does so. The proof may be through bar results, employer surveys, student surveys, observations by site visitors, and review of curriculum.

[5] Technology is not the only curriculum area where this occurs. As Morton (1993) points out with regard to regulations on field placements, the then current regulations 'place unnecessary restrictions on their programs, show insensitivity toward program goals of self-learning, and are an ill-disguised attempt to fit field placement programs into the more traditional models of in-house and simulation clinics' (Morton, 1993, 20).

[6] 'Praecipuum munus annalium reor ne virtutes sileantur utque pravis dictis factisque ex posteritate et infamia metus sit.' The main task of History is to record the acts of good men and ensure that infamous words and deeds fear the bad opinion of posterity. (*Annals,* 3.65)

[7] 'Longum iter est per praecepta, breve et efficax per exempla.' The road is made longer when one gives advice - it's better to give examples (*Epistles to Lucilius*, I. vi. 5)

[8] As Hill points out, such a view of human activity is remarkably close to autopoietic accounts of social activity and organisation (Hill, 103).