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# The Unsustainability Of Legal Practice: The Case For Transformation Of Legal Education And Legal Educators

Kate Galloway and Peter Jones

## Abstract

Individualistic, competitive, adversarial...the legal profession faces calls for systemic change as we see an exodus of our brightest minds, high levels of mental distress amongst students and practitioners and a profession that, as a cornerstone of the justice system, is unable to sustain itself let alone deal with global issues of sustainability. The required transformation starts in law school and this paper explores both conceptual approaches in a law curriculum to engender student transformation, and the means by which legal academics' own practice may be transformed within the framework of the law, as well as in terms of practical skills and resultant professional identity.

## Introduction

Regulatory systems worldwide are straining to cope with uncertainty, complexity and change in contemporary society. This includes challenges emerging in the arenas of political, cultural, social and increasingly, environmental systems. Legal practitioners, as the gatekeepers of the law in its formulation and practice, are both part of this problem and potentially, its solution. There are calls internationally for law graduates with relevant skills to accompany their discipline knowledge (Weisbrot, 2004), and at the same time, calls for a more critical, socially and ecologically aware attitude to law as a system and as a vocation (Cullinan, 2002; Thornton, 2001; Cotterrell, 1998).

The legal profession in Australia, for example, is groaning under the weight of its own culture; mired in individualism, competition and adversarialism, it is recognised as self-affirming in a masculinist, heteronormative and culturally homogeneous way (Townes O'Brien, 2011; Thornton, 2001). This is resulting in an exodus of our brightest minds, high levels of mental distress amongst both students and practitioners (Kelk et al, 2009), and ultimately a profession that, as a cornerstone of the justice system, is unable to sustain itself.

Students entering the law school often arrive with an externally driven motivation, arguably predisposing them to replicate the behavioural norms of the legal system, yet simultaneously exposing them to the personal and ultimately professional risks inherent in this type of practice (Kelk et al, 2009; Seligman et al, 2001). Yet the traditional approach to legal education, focussing on abstracted content and devoid of skills (Townes O'Brien, 2011; Owen & Davis, 2009) serves to reinforce such behaviours. A growing body of evidence shows that this is not enough to serve our graduates, the profession or indeed society (Kift et al, 2010; Owen & Davis, 2009).

Furthermore, the struggle to embed critique and alternative perspectives within the law degree has endured now for decades internationally (Thornton, 2001) but arguably with marginal impact. The closed loop logic of legal thinking and the doctrinal focus of the law degree reinforce the existing paradigm (Galloway, 2008; Sugarman, 1986), providing little scope for the generation of creative thinking in terms of ecological literacy (Galloway, forthcoming; Jones and Galloway, 2012a; Orr, 1992), Indigenous perspectives (Falk, 2005; Brennan et al, 2005) and other crucial social issues (Carruthers, Skead and Galloway, 2012a; Thornton, 2001).

It is clear that significant transformation is required if the legal profession is to engage with such issues in a meaningful and effective manner. At both individual and institutional levels, such transformation must involve a dramatic shift in worldview, a perspective transformation (Mezirow, 1978, 2000; Taylor, 1998) which calls into question the very underlying assumptions upon which current values and practices are based (Brookfield, 2000). The central challenge then involves identifying the drivers of such change, given the inherently conservative nature of the profession as it currently exists.

It is easy to say that legal educators need to step up to facilitate the transformation of our graduates into practitioners with the capacity to imagine and implement a more just and sustainable future. However, this fails to recognise that legal educators themselves are of the system, rooted within the existing framework of doctrine and thought. Thus, the transformation required exists within a complex matrix addressing both personal and systemic transformation, for students and academics, supporting and supported by transformation within the profession. This transformation needs to exist both within the conceptual framework of the law, as well as in terms of practical skills and resultant professional identity (Cownie, 2004). It reflects knowledge, skills and attitudes of students, academics and legal practitioners, ultimately transforming the legal system itself.

One explanation for the lack of evidence of such shifts within the profession is that law students are not exposed to the kind of disorienting dilemma described by Mezirow (2000) that might engender not only a change in thinking, but action to agitate for solutions to these pressing issues. Cranton (2002, p. 64) provides

a clear description of the nature of such a disorienting experience and the change it can engender, pointing to a process whereby “through some event ... an individual becomes aware of holding a limiting or distorted view. If the individual critically examines this view, opens herself to alternatives, and consequently changes the way she sees things, she has transformed some part of how she makes meaning out of the world”.

Without exposing our students to such a stimulus and guiding their intellectual, emotional (James, 2011) and spiritual development (Easteal, 2008; Cullinan, 2003) within the context of the law, we in the academy are contributing to the ongoing circularity in the modes of thinking and behaving in the profession. This helps to ensure that the problematic frames of reference underpinning the legal profession, which Mezirow would describe as sets of fixed assumptions and expectations (2003, p. 58), remain unchallenged and unchanged. In this way both individual students and the profession as a whole is shielded from recognising a limited and distorted worldview, and are therefore unlikely to take action to produce significant and beneficial change.

This paper explores both the kinds of conceptual approaches required in a law curriculum, and those who teach it, to engender the critical thinking that is likely to result in a shift in how the law can be understood, and the skills that support a transformation in the way a graduate lawyer is likely to perceive themselves.

### **The Traditional Common Law Curriculum**

The success of the common law globally has been its capacity to adapt, but also its capacity for consistency. Adaptation is evidenced by its reception (or imposition) throughout the Empire and the US, where in each jurisdiction the fundamental tenets have taken on their own flavour according to social, cultural and political context.

Consistency of course has been the product of training and perpetuation of a particular culture within the law that preserves modes of thought and discourages deviation from the central tenets of the law (Kennedy, 1982; Twining, 1986; Sugarman, 1986). In the context of legal education in the US, UK, Canada and Australia at the very least, there is evidence that the undergraduate law curriculum retains a particular focus on these central (doctrinal) tenets to the exclusion of what has been termed ‘soft skills’ (Sullivan, Colby, Welch Wegner, Bond, & Shulman, 2007; Bailin, 2012). These are skills recognised as crucial for the making of a successful legal practitioner, and they include ‘the ability to build and sustain interpersonal relationships... across borders and languages and cultures... [as well as] resilience, self-awareness, and the ability to take multiple perspectives.’ (Bailin, 2012) These skills go far beyond the traditional law curriculum, focussing as it does on doctrine through study of appellate decisions, legal problem solving in an adversarial context and legal writing.

In Georgetown University Law School in the US, for example, there has been an extensive survey of the extent to which curriculum not only fails to support the development of soft skills, but how it acts to the detriment of students’ personal and even professional development (Bailin, 2012). The findings here echo other US studies (Sullivan et al, 2007; Schultz and Zedeck, 2009) in that the law curriculum is exposed as inadequate to meet the needs of graduate employers. Despite over a decade of calls for curriculum change in the Australian context (Johnstone and Vignaendra, 2003), it is likely this latter point – engaging with the employability discourse of our market-driven education system – that may finally start to see change in the academy.

In Australia too, ‘soft skills’ are cited amongst the ‘graduate attributes’ expected of those with a tertiary education. This is supported by ‘industry’, which apparently seeks graduates with skills including communication, teamwork, initiative and enterprise, planning and organising, self-management and learning (amongst others) (Precision Consulting, 2007). The recent discipline standards project for law (Kift, Israel and Field, 2010) has identified, amongst other things, the soft skills of communication and self-management as threshold learning outcomes indicative of a graduate of law. These standards were developed following widespread consultation, including the academy, the profession, the admitting boards, the judiciary and the student body – indicating acknowledgement of the importance of such skills. This reflects the US experience cited by Bailin (2012).

In spite of this, there are many indications that the Australian law curriculum, like its US counterpart (Bailin, 2012) has not yet managed to accommodate these skills (Carruthers, Skead and Galloway, 2012b; Boag, Poole, Shannon, Patz, & Cadman, 2010). At best, there is significant activity nationally on curriculum reform, prompted by the new (in 2012) national tertiary regulatory body TEQSA, and its anticipated adoption of the threshold learning outcomes as its own standard.

### **Curriculum Change**

While there is now almost certainly an integration of more critical perspectives within the LLB (Parker and Goldsmith, 1998; James 2000, Cownie, 2004), there is a suggestion that this is done on an intellectual level, rather than through inculcating an alternative mode of thought or personal ethical and moral dimension (Owen and Davies, 2009). That is, whatever the disorienting dilemma presented to students, the approach is to intellectualise the problem and resolve it still within existing discourses of law (Parker and Goldsmith, 1998). The distancing of

emotion in the context of legal education represents a now well-documented issue for law students and the lawyers they become (Jones and Galloway, 2012b; Field and Duffy, 2012; James, 2011; Kelk et al, 2009). This is a reflection of the academy's own struggle to shift modes of thought, and students' lack of opportunity to do so.

The dilemma of the profession more broadly has engaged the minds though of a number of academics and practitioners (Townes-O'Brien, 2011; James, 2011; Field and Duffy, 2012; Galloway et al, 2010). Together this work provides a spectrum of practices through which both lawyers' mindset and their practice might shift. It is this movement that represents a grassroots transformation in legal education via the beliefs and practice of individual legal academics – and thereby the potential for a transformative learning experience for law students.

What is telling about contemporary innovations in legal education is that many would be wholly unremarkable to many other disciplines, and in particular, to educators engaged in the practice of transformative education (Jones, 2009, 2011). Yet these innovations in the context of legal education represent a response to law and all it represents that fundamentally differs from a centuries-old acceptance of a particular mode of thought and a particular way of teaching it. In the Australian context, these innovations include: teaching meditation (Marychurch, 2011); alternative dispute resolution as a means of presenting law within an alternative context: principles differ from that of appellate court adversarial reasoning techniques (Field and Duffy, 2012); engaging students in reflective practice as a technique to embed personal morality, ethics within the context of the law – evolution of one's own professional and ethical identity and therefore transformation of modes of thought rather than building solely on doctrine (Westcott and Shircore, 2006; Galloway and Bradshaw, 2010; Galloway et al, 2011).

The outcomes so far of such practice indicate the capacity of *even* the law to engage with transformative practice, through a variety of techniques. The question though, is whether this is enough.

### **The Practice of Law**

In both the US and Australia, recent evidence shows the effect of a lack of self-management skills in sustaining personal mental health and professional identity (Kelk et al, 2009; Bailin, 2012). There is also a demonstrated link between professional misconduct (and unprofessional conduct) and practitioners' capacity to engage in a more self-reflective practice. While there is apparently a dearth of study of the link between mental well-being and effective and ethical legal practice, the link between the two has been drawn (Britton, 2009). Capacity for insight and methods of practice that retain a sense of self are well recognised as supporting a healthy personal outlook (Marychurch, 2011) yet what the Brain & Mind Institute Report (2009) reveals is that self-reflection is antithetical to traditional legal modes of thought, and that these modes of thought are inculcated by common law legal education.

High rates of mental distress in the profession, as well as the law school (Kelk et al, 2009; Vines and Tani, 2009), reveal that there is a fundamental problem with the way in which we teach our lawyers but also in the way in which we practise law. This problem manifests in mental distress of lawyers themselves (Kelk et al, 2009; Seligman, Verkuil and Tang, 2005) but also in the capacity of the profession to engage and promote women and others from outside the mainstream masculine, hetero-normative, elite culture from which the legal profession is normally drawn (Thornton, 1998; Cownie, 2004). This culture results in a large exodus of women in particular, who cannot seem to break through the upper echelons of practice – a consequence of entrenched modes of thought and behaviour in a way that is not sustainable. The transformation needs to start in law school, but simultaneously it needs to be supported within the profession itself.

Designing the law curriculum to include development of so-called 'soft skills', including those of 'self-management' and in particular reflective practice, facilitate the capacity of legal practitioners not only to engage in their practice in a way that is responsive to client needs and indeed a creative practice tailored to resolving contemporary issues including meeting social justice objectives, but also in sustaining their own emotional labour (Galloway and Bradshaw, 2010). In doing so, practitioners have the capacity to engage in more rewarding work that is socially useful and which sustains and promotes their own wellbeing. Consequences flow also to family and community (Zwier and Hamric, 1996; Parker, 2004).

### **The Dilemma of Transformation**

While there is ample support for development of strategies to support transformative learning in students, the challenge for the law lies in a widespread cultural transformation of the profession and the academy – not restricted to those educators already engaged in the transformative project. In an instrumentalist mode, insurers and professional bodies are requiring practitioners to engage in regular professional development including personal management – though this seems unlikely to engender the shift in culture, and Mezirow's (2000, 2003) characterisation of transformation that would truly bring change.

Even if there is a sufficiently disorienting dilemma to bring change in the profession, in the meantime academics are not required to engage even at this level. In terms of changes in mindset to engage in other

conceptual endeavours, such as the teaching of law through the lens of sustainability (Jones and Galloway, 2012a; Galloway, forthcoming) or to embed Indigenous perspectives into the law curriculum (Galloway, 2011; Falk, 2005), there appear already to be significant barriers. In light of the challenge of entrenched modes of thinking evident in the history and fabric of the common law, including legal education, generating the disorienting dilemma (Mezirow, 2000) to facilitate transformation is a dilemma of its own.

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