bileta British and Irish Law Education and Technology Association

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

Our conference theme is a quotation from the French 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 ever more 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, regulators internationally are opening debate on their regulatory regimes – how best can technology be regulated for educational and ethical purposes in learning 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 recommend on the future of legal education, given 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.[1]

The SRA's Expression of Interest drew attention to objective (f), but it is clear that any review of regulation and regulatory activity in any one of 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

[1] 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.

> programme, for example, is not simply a cheap, poor-quality version of a face-to-face, campus-based programme?[2]

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 direction of increasing networked connectivity. 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 stop against innovation, not just within modules, but 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).[3] The pattern is one where the regulator, for any number of reasons, is conservative in its regulation of curriculum structure and content.[4]

But the issue goes deeper. 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, and it is surely one of the duties of a regulatory regime to ensure that such issues as 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

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[2] 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/.

[3] 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.

[4] 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).

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 (Tesco or Sainsbury?), 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 direct action. His passionately logical speeches to the Assembly arguing for the execution of Louis 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[5] (Turpin 2008), as was Seneca, in the field of moral philosophy.[6] 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

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[5] '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)

[6] '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)

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, he also 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).

The key concerns of the civic humanist tradition 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. One of Ferguson's major influences in this regard was the teaching of Adam Smith's predecessor at Glasgow, Francis Hutcheson, and in particular Hutcheson's concept of what he called the 'moral sense' – that is, the means by which we make distinctions between concepts and moral categories. Hutcheson's exposition of the moral sense is complex and sometimes obscure, particularly in its cognitive aspects, and it is not my intention to venture too far into his arguments; but it is necessary to grasp his concept in outline, for it was important to late enlightenment jurisprudential and educational thought. Hutcheson's concept of the moral sense departed from a central tradition in seventeenth century natural law. Stair, for example, could declare authoritatively from a natural law position that 'Law is the dictate of reason, determining every rational being to that which is congruous and convenient for the nature and condition thereof' (Dalrymple, 1981, I,1,1).

Hutcheson disagreed with this view of the moral basis for action. For him, the process of deciding how to act was not so much a matter of comparing notes with Reason as apprehending, at a much deeper cognitive level, what was right or wrong in any situation – hence his concept of a moral sense based on the '*natural Affections* and *kind Passions* '. As he protested in a public letter, '[T]he old Notions of *natural Affections*, and kind *Instincts*; the *Sensus communis,* the *Decorum*, and *Honestum*, are almost banished out of our Books of Morals; we must never hear of them in any of our Lectures for fear of *Innate Ideas;* all must be Interest and some selfish View' (Hutcheson, 1969–70, VII, p. 475). As the last lines indicate, Hutcheson was directly opposed to the view held by Locke in his *Essay* regarding the origins of virtue. He believed, *contra* Hobbes and Mandeville, that the moral motivated us by providing us with self-interested reasons for acting in a moral way.

The concept sounds emotivist, but it is much more complex and subtle than that, especially in the form that Hutcheson presents it in *An Inquiry into the Original of our Ideas of Beauty and Virtue* (1725). In this text Hutcheson's construct of our apprehension of virtue and right conduct is a 'beatific' moral theory, advocating that the happiness of society can be achieved by the beneficence and moral virtue of its agents. Furthermore, because our moral sense is the foundation of natural law, so rights in law derive from this sense too – even the rights which accrue to those for whom there are no corresponding obligations, such as animals and unborn children, for instance.

What was striking about Ferguson's position, in part derived from Hutcheson, was its refusal to dismiss the Stoic position and adopt wholesale a utilitarian displacement; and 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).[7]

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 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? When did the title 'Committee for Public Safety' become an 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. 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).

In the field of legal education and technology, then, the regulation stakes could hardly be higher. It is the case with all aspects of technology governed by regulation. Our conference will focus attention on the issue in all areas of technology practice, policy and governance that BILETA deals with. There are a number of thought-provoking papers on intellectual property, privacy, data protection, censorship, social media and e-commerce that discuss a range of interesting topics arising from the theme. Our two keynote speakers are addressing the issue, as are many of the conference papers. We intend to publish the papers in two journals after the conference: whether or not there are too many laws, we shall at least address their consequences in society and the *exempli* of conduct that might provide alternatives to them.

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

References

Bynum, C. (1998). The role of technology in legal education. *New York State Bar Journal 70*, 34-40.

Dalrymple, J. [Viscount Stair] (1981) *The Institutions of the Law of Scotland: Deduced from its Originals, and Collated with the Civil, Canon and Feudal Laws, and with the Customs of Neighbouring Nations in IV Books* , ed. D.M. Walker. Edinburgh: University Presses of Edinburgh and Glasgow.

Hill, L. (2006) *The Passionate Society. The Social, Political and Moral Thought of Adam Ferguson,* International Archives of the History of Ideas, Dordrecht: Springer.

Hutcheson, F. (1969–90) *Collected Works of Francis Hutcheson,* 7 vols. Hildesheim: Olms.

McLellan, D. (1977). *Karl Marx: Selected Writings.* Oxford: Oxford University Press.

Maharg, P. (2007). *Transforming Legal Education: Learning and Teaching the Law in the Early Twenty-first Century*, Aldershot: Ashgate Publishing.

Martin, P. (2002). Information technology and US legal education: opportunities, challenges, and threats. *Journal of Legal Education, 52*(4), 506-15.

Mason, R.A., Smith, M.S. (2004). *A Dialogue on the Law of Kingship Among the Scots: A Critical Edition and Translation of George Buchanan's* De Jure Regni Apud Scotos Dialogus, Aldershot: Ashgate Publishing.

Morton, L. (1993). Creating a classroom component for field placement programs: enhancing clinical goals with feminist pedagogy. *Maine Law Review*, *45*, 19-52.

Pocock, J.G.A. (1975). *The Machiavellian Moment. Florentine Political Thought and the Atlantic Republican Tradition.* Princeton, NJ: Princeton University Press.

Salzer, R.J. (2004). Juris Doctor.com: Are full-time internet law schools the beginning of the end for traditional legal education? *CommLaw Conspectur: Journal of Communications Law and Policy*, *12*, 101-14.

Sullivan, W.M., Colby, A., Wegner, J.W., Bond, L., Shulman, L.S. (2007). *Educating Lawyers: Preparation for the Profession of Law*. San Francisco: Jossey-Bass, Carnegie Foundation for the Advancement of Teaching.

Rakes, W.R. (2007). From the Chairperson. *Syllabus. American Bar Association section of Legal Education and Admissions to the Bar*, *38*(2), 2-3.

Oeuvres Complètes de Saint-Just, ed Charles Vellay, Librairie Charpentier et Fasquelle, II, 161.

Turpin, W. (2008). Tacitus, Stoic *exempla*, and the *praecipuum munus annalium*, *Classical Antiquity*, 27, 2, 359-404.

Žižek, S. (2009). *In Defense of Lost Causes*. London & New York: Verso.