DRAFT

EXTRACTS FROM

Reclaiming ancient pedagogies in the information age of learning

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Abstract

This is an extract from a wider paper which argues that consideration of ancient pedagogies is relevant to contemporary infusions of legal education by eLearning. This is partly because learning orthodoxies need re-examination in the context of changing information society paradigms. Thus the paper examines the influence of learning philosophies of Socrates, Confucius, the medieval lecture method and medieval Islamic legal pedagogies.
This extract deals with the ancient philosophies and it is offered to this meeting as a prong to a discussion of the relevance of Islamic pedagogies to contemporary issues in legal education.
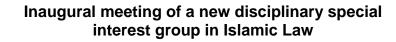
INTRODUCTION: ON OUR PEDAGOGIC ROOTS

The main objective of this chapter is to consider the pedagogic roots of contemporary eLearning, but in a way which illuminates contemporary concerns about the nature and role of eLearning and perhaps of legal education in general.
The desire was to explore connectivities between the Socratic Method as practised in US legal education and eLearning. However, critiques of the Socratic Method led me to alternative frameworks provided by Dewey, which led me to Confucius as the ancestoral pragmatist. Yet, both these contrasted with the current globally dominant medieval lecture method of legal education. The discovery of the integration of dialogical disputations with more orthodox approaches in medieval Islamic legal education seemed to indicate pathways to blended coherence of eLearning.

So we begin with Socrates' contribution to the Case Method. Marshall (2005) suggests:

> Socrates asked a series of related questions and the student answered them. Each question was responsive to the student answer to the preceding question. Most noteworthy…was Socrates' invariant adherence to questions; he rarely made a declarative statement. As to structure, the typical Socratic dialog had four stages. In the first, Socrates asked questions until a student answer contained an assertion which

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Socrates deemed a misconception. In the second, Socrates asked a series of questions designed to lead the student step by step toward realization that his statement was erroneous and why. The third stage was the discovery and acknowledgment by the student that his statement was misconceived. In the fourth, Socrates asked a final series of questions which helped the student discover the relevant valid assertion. As to purpose, Socrates' dialogs were a form of moral education, the purpose being to discover ethical truth and thereby induce virtuous behavior.

Langdell is supposed to have bequeathed the Socratic Case Method to US legal education.[2] However, he was more Protagorian, in that unlike Socrates, he supplemented questions and answers with a feedback mechanism of declaratory statements to develop an argument (Marshall 2005, 1). Also, unlike Socrates, Langdell's epistemology was not really a process of ethical self-discovery but technicist training in argument to discover the structure of law (Marshall 2005).

Two innovations were key to the success of the Langdellian Socratic Case Method. Students had regular seats where they could be recognized for the question. They used the Case Book containing reports of cases, which students read in advance of their interrogation. However, pragmatists and realists suggested that the Case Method, by concentrating on the judicial decision, reified the decision and abstracted it away from the real life of the law (Rubin 2007; Maharg 2007; Twining 1973).

Nevertheless, the Langdellian emphasis on dialogue contrasted remarkably with European doctrinal study in which the central learning activity is the lecture. The lecture was a medieval collective reading of a scarce text which has survived as the contemporary lecture (Bligh 2000; Gayles 1966). The lecturer provides an explanation and analysis of the principles of law from her/his perspective. It is essentially a speech act within a lecture room. The additional technology originally included the text or texts which are the basis for the lecture and the lecturer's notes. Subsequently, chalk/blackboard, pen/whiteboard and overhead projection slides were used for illustration. Once it became possible to hand out the lecture notes or to even to upload them on the website, the value of this form of instruction became questionable. The essential learning principle was that of oral transmission of knowledge and students' passive acquisition through listening, note taking and reading. The occasional opportunity to ask questions was rarely utilised by students.

This method was ameliorated in some institutions by the additional Oxbridge style tutorial (Parry 1954). The student presented an essay on a set question to the tutor. There followed comments and interrogation reminiscent of the Socratic/Protagoran method. As education massified the tutorial evolved to a problem solving exercise involving a larger number of students who would come prepared to discuss issues or solve hypothetical legal problems. On continental Europe, in many countries very large classes in law prevented a similar development of the tutorial system.

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[2]   While Langdell was the inventor of the Case Method, the Socratic approach was an earlier innovation of Dwight of Columbia. Sheppard (1997, 585); Alford (2009, 1274) .

The Lecture (with or without tutorials) has survived as the dominant teaching mode until today with the minor innovation of use of powerpoint. Thomas (2000) suggests that the main advantage of the lecture is economic communication of substantial amounts of information to a large number of students in a very short period with no proprietary or publishing costs. It can also be a powerful vehicle for the charismatic lecturer.

Some time before Socrates, Confucius was developing different but equally innovative principles of learning. Confucianism's reputation for favouring authoritarian patriarchical hierarchy and for rote learning is based on a subversion of Confucian principles in the Han dynasty (Grange 2004; Ng 2000).[3] Key aspects of Confucius's works of which the *Analects* are the most significant include:[4]

− Balance between studying and reflection (self illumination), what we term 'guided independent learning'5.
− Respect for the teacher and self discipline by the teacher (Stanford Encyclopaedia of Philosophy 2009).
− Generation of Inner Strength of students to learn from both good and bad teachers (Stanford Encyclopaedia of Philosophy 2009).
− Teaching without distinction between persons – or 'equal access' (Confucius Analects 7:8)
− Teaching according to each person's gifts or needs (Confucius Analects 16:9; 11:15).
− The use of observation and 'field trips' as learning devices – experiential learning? (Yuet-Koing 2005: 1)
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 Ng (2000) suggests:

Kongzi (Confucius) aimed at producing educated, moral persons who could contribute to the well-being of their society and state. The route he proposed was that of "self-cultivation," a deepening of "personal knowledge" that enables full humanity in relationship.

As with Socrates, the learning method was dialogical, but it was as much the students who asked the question and the sage who elaborated:

Kung: "Is there any one word that could guide a person throughout life?" Confucius: "How about 'shu' [reciprocity]: never impose on others what you would not choose for yourself?" (Confucius Analects XV 23).

Fan Chi'ih: What is Love?

Confucius: To love mankind

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3   A growing number of contemporary Eastern authors including feminists consider that the original Confucian principles were subverted in the post-Confucian power politics (Koh 2008). On the other hand, a considerable amount of literature assumes Confucianism to be hierarchical, authoritarian and based on rote learning. This of course represents the reality of much current learning practice in East Asia. For a recent example see Kim (2009).

4   Confucius Analects or Lun Yu. The main translations are: Waley (1999); Norton (Confucius 1997); Singerland (2003); Brooks, E. & A. (1998).

5   'He who learns but does not think is lost. He who thinks but does not learn is in great danger.' (*Lunyu* 2.15) 'The way of great learning consists in illuminating innate virtues.' Opening Statement of Great Learning; 'Self-illuminative sincerity is called nature. The self-illumination of sincerity is called education.' The Doctrine of the Mean 21.

Fan Chi'ih: What is Wisdom?

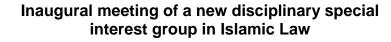Confucius: To Know Mankind (Confucius Analects XII 22).

In the Socaratic method, the teacher asks the question and the student has to respond in terms which might be appreciated by the teacher. In the Confucian method, as in the above example, the student asks the question in terms of their unique search for knowledge and personal strength. The teacher responds in terms of the student's own learning needs and in ways which might create new lines of reflection and inquiry. The learning is student centred and at the same time respectful of the authority of the teacher.

Confucius was the original innovator of learning in the field as part of a method steeped in context. Chinese philosophy also escaped the Platonic (and Descartian) distinction between mind and body. Finally, Confucius' emphasis on creating 'educated moral persons who would contribute to the well being of society and the state' provide the foundation of ethical legal education.

Unlike Socrates and the Case Method, Confucius did not inspire the contemporary alternatives as the original Confucian pedagogy were transformed by the Han dynasty. And yet, Confucian ideas resonated remarkably with Deweyan pragmatism, a pedagogic approach which underlies the opposition to the Case Method. Grange compares Confucius and Dewey:

Both philosophers seek a category which can embrace in the widest possible terms the richest view of human existence. Dewey calls it experience. Confucius calls his fundamental category 'the way' or 'the dao'. It too depends on the act of undergoing experience (Grange 2004, 2).

Though Dewey spent two years in China and was called the Second Confucius, he makes no mention of Confucius (Wang 2008, 14). In many respects, Dewey's pragmatism is the counterpoint to Langdell's positivism and inspired key realist figures such as Llwellyn and Patterson. Dewey was at Columbia during the Columbia curriculum reform project (Twining 1985, 423). William Twining, suggests that Llewellyn's ambition was "to perform the role of Dewey in jurisprudence trying to do for law what the great man had done for other subjects" by taking "a fresh look, look to see what is there, and what it is about and re-pose your issues in those terms" (Twining 1985, 423). The ambition of the realists was to attack the formalism of the Harvard approach because it both ignored the social reality of the law and the role for social policy in interpretation. Such an approach enabled the opening up of the law curriculum and legal research to a wide variety of influences from the social sciences, including as Llewellyn and Hoebel's (1941) *Cheyenne Way* would demonstrate, social anthropology. However, the emphasis was on the policy role of appellate judges. Maharg (2007, 88) attributes Columbia's reform failure not to Deweyan pragmatism but to the wrong focus: on curriculum content rather than teaching method. Nevertheless, over the years the realist approach has formed the counterpoint to the Case Method, resulting in reforms of curriculum content and teaching methods, and in this sense laying the ideational foundation for transformation of legal education. The growth of law in context approaches which initially incorporated diverse disciplines such as anthropology, sociology and economics, and these days includes even literature. While the method of teaching remained orthodox on the whole, it soon became apparent that the way of learning in the field was for the student to experience the field. The tool for achieving this became the student dissertation. Such a

dissertation opened the student not merely to the field but also to a world in which she was free of the lecturer's prescribed texts and delivery systems and became an independent learner who could explore the world of law as it operated in society. This emphasis on independent learning coincided with general changes in academic pedagogy partly inspired by Freire (Le Brun and Johnson1994) Such changes towards independent learning were supplemented by marginal changes in assessment systems which reduced the overall emphasis on the terminal examination and provided increased room for coursework and dissertation.

Realism and pragmatism inspired clinical legal education (Frank 1933), problem-based learning, mooting and role-play (Sheppard 1997) and student research projects together with a wider study of law in its political, economic and sociological context. If Socrates and Protagoras were through Langdell the progenitors of the Case Method, then Confucius and Dewey have the closest links to the counterpoint.

Both methods can be contrasted with the Lecture method. The Lecture Method does not demand an engagement from the student, the student can be passive, although the supplementary tutorial ameliorates this passivity especially when used with problem solving. The Case Method involves interrogation of the student with the potential for ritual humiliation of the passive student. The Confucian method also demands that the student asks questions and the teacher has to be able to respond. The difference between the Lecture and Case Methods on the one hand and the Confucian method on the other is that whereas in the former it is the teacher who sets the agenda and transmits the knowledge, in the latter it is the student who defines her learning needs. Confucian method is also different in being more holistic in engaging with the nature of both the actual student and the real world of consequences.

It is therefore interesting, though not surprising, to find that the medieval Islamic method of legal education provides a synthesis between these various approaches. Scholarly work by George Makdisi and others have provided insights into the nature of Islamic legal method and their links to the Greek scholars as well as the role of the Islamic legal tradition in the development of Western academic and legal institutions including the common law (Makdisi 1981, 1991, Hallaq 2002-3, Afsaruddin 2005). In contradiction to assumption of orientalist scholars that Islamic law was largely borrowed from Roman Law, Islamic scholarship looked far and wide for inspiration including to Judaism, Persia and India. One may also surmise that Qur'an and Prophet Muhammad's glorification of the search of knowledge that led to the tremendous flowering of Islamic scholarship, also included an awareness of Chinese philosophies. After all, Prophet Mohamed advised "Seek knowledge even unto China," (Afsaruddin 2007)[6]. The student was literally a "seeker of knowledge" *talib al 'ilm*. Islamic learning institutions early developed the principle of educational freedom (Makdisi 1991).

> The system of education was characterised by freedom: freedom of the professor, and freedom of the student…The student could pursue studies of his choice, and in the order of his choice; he could concentrate on any number of subjects, in any order he desired….The professor was likewise free to teach a method all his own, profess his own opinions, choose his own graduates as his fellows, and set his own standards for

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[6] I have not come across specific evidence of the influence of Confucius on Islam. However, one of Prophet Muhammad's companions, Saad ibn Abi Waqqas visited China as early as 650 AD and the Emperor Yung Wei considered that there was no incompatibility between Confucius' teachings and Islam. Abdul Rahman (1997).

the granting of the license to teach and issue fatwas, completely independent and free of any outside force.(Makdisi 1991, 83).

Such freedom led to a toleration of diversity of approaches to learning as well as the development of a form of "blended learning" in legal education- a synthesis of traditional learning methods and reflexive and active learning. Thus the reading and memorisation of texts was considered very important, but it was not *rote* learning because memorisation was useless without understanding. Similarly lectures were very important, but so equally was the encouragement of students to ask questions. Note making was encouraged to such an extent that student notes subsequently became works of scholarship. Finally, disputation *al munazara* became a key legal methodology especially at the advanced stages of legal education (Makdisi 1981, 1991; Miller 1984).

For the disputation the su'al or mas'ala became the question, problem to be solved, as well as the objection to be answered. The sa'il became the questioner, objector, the opponent to the thesis; and the mujib, the answerer, respondent, proponent of the thesis. The taqrir 'settling' the question became the determination, solution. When the determination achieved consensus, it became the madhab, 'the way to go' the objections being resolved; failing solution, it remained in the realm of khilaf…of problems still in dispute (Makdisi 1981, 116).

Thus controversy, argument and debate, supplemented by creative note taking of observed disputation made the law classroom an exciting experience (Makdisi 1981, 116). Equally significantly, professors developed treatises on the methodology of learning known as ta'liqa or tariqa which consisted of the disputed questions, methods of argumentation used and solutions (Makdisi 1981, 116).

Thus, in the role given to memorisation together with reflection and understanding, Islamic learning has similarities to Confucianism. In the role of lectures in the early stages of study, there is a similarity to the Lecture Method. In the emphasis given to questions and the right questions to ask, there is similarity with Confucian disciple asking questions of the Master. In the use of dialectics in disputation, there is similarity to Socratic dialogue.

However, Islamic disputation was different from both Socratic and Confucian approaches. Unlike the emphasis on Master-Student discourse in both traditions, Islamic disputation often involved a less authoritarian disputation between students. While each party tried to convince the other of their argument, the intention was to come to an agreement. Also significant was the role of the note takers as participant observers of the dispute. Disputations had an element of realism about them because they enacted processes similar to what happened in the case of real disputes. However, in the emphasis on the *moot* of the legal question to be resolved, they lacked the wider sociological and realist dimension of field research suggested by Confucius and subsequent sociological and clinical approaches to learning. Medieval memorisation skills crucial in an era of limited access to written work may not be so significant in network information society. Nevertheless, medieval Islamic legal education methods were a holistic or blended phenomenon.

TRANSLATING PEDAGOGIES IN INFORMATION SOCIETY

Modern legal education therefore has three main tendencies. The Langdellian Case Method prevails in the US, but is ameliorated by pragmatism/realism, with the latter's most prominent representation being in the Clinical legal method. Law in Context and Socio-Legal approaches have also influenced legal education in the US and UK. Generally, however, in the UK and rest of Europe, the Lecture method has been dominant.

In this section we consider the ways in which digitalisation has affected these modes of learning. Contemporary analysts of digitalisation suggest that rather than constituting a single Information Age, Society or Economy, there have been two distinct phases of digitalisation – the Industrial Information Society/Economy and the Network Information Society/Economy (Castells 2000, Benkler 2003, 2006). While the epochal significance of these phases may be contested, in the first phase information technology transformed industrial and military production and communication. Hardware and software corporations enabled large enterprises to create and control information for production processes and for delivery to passive consumers either as industrial goods or information. The second phase has been one of convergence of information and communication systems resulting in the integration of information and delivery mechanisms. Thus vast range of text, sound, picture and video-based information can be delivered through a diversity of desktops, laptops, TV sets, palmtops, phones and MP3s and a variety of communication forms including email, voicemail, videomail, SMS text, face-book, twitter, audio and video-conferencing, webcasts etc. The internet has been pre-eminent in transforming communication into a popular participatory medium blurring the boundaries between the producer-author, communicator-broadcaster and consumer-reader of information (Benkler 2003, 2006) or resulting in collaborative authoring and reading (Coombe 1998).

These two phases have affected legal education in a variety of ways. In particular, information technology has been used to adapt to the three modern legal education tendencies of the Socratic Case Method, the Pragmatist/Realist approach and the Lecture Method. However, until now there has been insufficient emphasis on the democratising potential of the internet, although some aspects of this transformation potential are already being taken on board.

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