

INTRODUCTION

In 2006, the Schools and Institutes of the University of the South Pacific were re-organised into Faculties. With this restructuring came the requirement that all teaching sections of the University take a more conscious approach to their teaching and produce 5-year teaching plans. USP is also placing more emphasis on the need for quality in both teaching and research.

The School of Law used the opportunity presented by this restructure to produce a teaching plan which encourages staff to increase their training in tertiary teaching and to become more reflective in their teaching. One of the strategies that was implemented was to hold regular teaching seminars. These give staff the opportunity to discuss various issues related to teaching and to share the many good practices that are currently being utilised.

The papers in this edition of *Directions: Journal of Educational Studies* arise from the first teaching seminar that was held by the School of Law in 2006. For some law staff this was the first realisation that what they do every day in the classroom is very valuable to their colleagues and provides a basis for conducting research. Many good ideas were shared at this session, though not all of them generated articles. We hope that as the teaching seminars continue and more staff undertake formal qualifications in teaching, more recording of good practices and publication of research on various aspects of teaching will continue.

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Threshold Concepts in Legal Education

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This paper, which is drawn from the author's MEd research, examines the idea of 'threshold concepts' in relation to legal education. The notion of threshold concepts relates to major concepts that involve a transformation of a student's worldview and that need to be acquired in order to succeed in studying in a particular discipline. This emerging theory has particular relevance for tertiary teachers in all disciplines in the South Pacific region as the nature of this region means that higher education often has a considerable transformative aspect.

Introduction

Recent discussion of the idea of threshold concepts in educational literature has highlighted the importance of understanding the transformative nature of disciplinary learning. So far, research and analysis have been largely confined to disciplines other than law, but an application of the emerging theories reveals some significant educational and ethical challenges for legal education.

The term 'threshold concepts' has been used by researchers Eric Meyer and Ray Land (2003, 2005) to refer to "concepts that bind a subject together, and that are fundamental to ways of thinking and practising in that discipline" (Meyer & Land 2005:1). Whilst the underlying idea of threshold concepts is derivative of a much more obvious and intuitive practice of teachers, that of discerning conceptual 'building blocks' to facilitate student learning, it would be a mistake to assume it was simply a new name for an old approach. The concept casts new light on the internal processes of cognition in students, and seeks to uncover not just cognitive building blocks along a linear trajectory of learning, but particular integrative experiences for students that transform not only their understanding of the subject itself, but potentially a deeper transformation of the student's worldview generally.

The exploration of the idea of threshold concepts was sparked initially by inquiry into those particular points at which students commonly become

‘stuck’ when encountering a new educational discipline or discourse. Earlier descriptions of this process referred to these difficult thresholds as a form of ‘troublesome knowledge’ that represented particular barriers to a student’s further progress in a given subject or discipline (Perkins 1999:10). It has been observed that a failure to deal adequately with these thresholds leaves a student with little option but to attempt to continue to learn in a fragmented fashion (Meyer & Land 2005: 2,3).

All disciplines are likely to present challenges and troublesome and conceptually difficult knowledge to students, particularly in the earlier years of study, but research in this field has so far been limited in its application principally to the fields of maths, economics and accounting, although a wider application is expected to be presented in an upcoming publication on the subject (Meyer & Land 2006). This discussion aims to progress current understandings of this issue by examining some very specific ethical issues that arise in the context of legal education.

Threshold concepts as more than conceptual building blocks

To obtain an understanding of what is new about the theory of threshold concepts it is necessary to first distinguish this idea from more familiar educational notions of core concepts (fundamental concepts or conceptual building blocks). The two are in fact related, but the key difference lies not so much in the content of the concepts identified, but in the understanding of the cognitive responses required of students to successfully integrate a given concept.

Meyer and Land (2003: 4) observe that a “core concept is a conceptual building block that progresses understanding of the subject; it has to be understood but does not necessarily lead to a qualitatively different view of the subject matter.” Conversely, threshold concepts are identified as possessing a transformative character. Until a student successfully ‘grasps’ or passes through the threshold concept, the ongoing accumulation of knowledge may lack context, meaning or significance and may simply be encountered as a bizarre mass of seemingly unrelated information.

Meyer and Land (2003:4,5) list five significant features that exemplify their understanding of threshold concepts, paraphrased as follows.

Threshold concepts are:

- *Transformative*, in that, once understood, the potential effect on student learning is to occasion a shift in the perception of the subject, or part thereof and at times possibly also a shift in personal worldview or personal identity.
- *Irreversible* (probably) in that the new perspective is unlikely to be forgotten, or unlearned, but the previous perspective itself is quite likely to be forgotten. They point to studies that show the difficulty that expert practitioners have in looking back across thresholds they have long since crossed and attempting to understand (untransformed) student perspectives.
- *Integrative*, in that they expose the previously hidden interrelatedness of material.
- *Bounded*, (possibly) in the sense that any one threshold concept will have terminal frontiers bordering with thresholds to other ideas or other distinct disciplines.
- Potentially *troublesome*, in that they represent those very barriers, or 'brick walls' that students reach in learning that can become 'make or break' moments.

Troublesomeness is a key feature of threshold concepts. Precisely because of their transformative and irreversible effects upon student world views, students can be expected to experience quite a lot of resistance. This resistance may vary in intensity, depending on whether the transformation contradicts deeply held or even cherished belief systems of the student or is merely counter-intuitive in a surprising but not specifically threatening way.

Perkins (1999:8-10) identifies four forms of troublesome knowledge, all of which assume some significance in relation to legal education, but of which his descriptions of 'conceptually difficult knowledge' (counter-intuitive knowledge), and 'foreign knowledge' (knowledge representing perspectives foreign to the student's worldview) are the most significant

for legal education. Meyer and Land (2003: 7) add a further category useful in relation to legal education, that of 'tacit knowledge' to refer to complex knowledge that contains paradoxes, seeming inconsistencies or at least subtle distinctions, particularly where these are based upon unstated assumptions within the discourse.

These forms of troublesome knowledge give rise to the presence of difficult-to-traverse threshold issues within a subject, discipline or discourse. The term 'threshold issues' describes a step prior to the formation of a threshold concept. The threshold issue represents the resistance of the student to the troublesome knowledge being presented, and the threshold concept represents the eventual resolution of that issue through a conceptual understanding that breaks through the prior resistance. In this sense, successful threshold experiences represent a particularly powerful form of what Gibbs (1992) refers to as 'deep learning'.

An alertness to the presence of potential threshold issues, to the need for students to traverse these issues as threshold concepts and a willingness to explore techniques to facilitate this transformative process holds great promise for improving the effectiveness of legal education. There is, however, a corresponding need to be cautious. The potential ethical dilemmas in designing curricula to inculcate students to new worldviews should not be approached lightly. Meyer and Land (2003: 10) refer to the potential danger of threshold concepts having a 'colonising' effect on student thinking as significant, but have not so far further explored it in their published work on the issue.

Threshold concepts in legal education: 'Thinking like a lawyer'

The idea that law is a discipline that is beset with 'conceptually difficult knowledge' is not unfamiliar. Law is famous for its specialised language (jargon) and for the peculiar forms of reasoning (legal reasoning) that are routinely employed.

A term often used by legal educators that aptly describes the transformations required of aspiring law students is that of training students to 'think like a lawyer'. This idea is pervasive, particularly in first year text and materials,

although this quotation takes it a little further than most by explicitly linking this 'transformed thinking' to academic success: "The sooner you learn the intellectual skill of legal analysis, the sooner you will start to 'think like a lawyer'. Thinking like a lawyer is a guarantee of good marks..." (Brognan and Spencer 2004: 3).

The very idea of teaching students to think like a lawyer invokes the idea that students need to transform their thought processes, and it is strongly suggestive of a counter-intuitive form of discourse that is central to the discipline's self image. Specifically 'legal' forms of thinking and analysis become not only essential tools of practice, but key and often exalted aspects of professional identity for the trained (and transformed) legal thinker.

It can be difficult for experienced legal scholars to appreciate and even remember how counter-intuitive much of the discipline is, as they have long since internalised their own excursion through the thresholds. This in itself is evidence of the transformative and irreversible nature of threshold concepts.

The counter-intuitive nature of legal knowledge

As previously transformed legal thinkers we can so easily forget just how counter-intuitive established common law ideas actually are. Examples could include the duality of control and obligation that persists in the law of trusts (legal and beneficial ownership, fiduciary duties), the rather bizarre metaphor of the business corporation as a type of legal person, or the almost self-contradictory duplicity of English constitutionalism (the monarch has powers that the monarch never uses). These ideas are certainly not forgotten; they are in fact internalised, rendered normal, natural and largely unquestioned for the legal thinker and, as already observed, can even become the very form of abstraction upon which we quietly boast the intellectual integrity of our discipline. To the neophyte, however, they can be bizarre and counter-intuitive, if not just plain repugnant.

A powerful demonstration of the capacity for legal thinkers to operate almost unconsciously from within learned (but clearly counter-intuitive)

paradigms is provided by cases where the courts have approved the extension of traditional human rights and privileges to corporations. In some cases this has been done in the absence of serious empiric argument about the obvious differences between humans and corporations and has proceeded instead on the basis of syllogistic and metaphoric 'legal' reasoning. For example the English Court of Appeal in 1939 justified the extension of the privilege against self-incrimination to a corporation as follows:

We can see no ground for depriving a juristic person (corporation) of those safeguards which the law of England accords to even the least deserving of natural persons (*Triplex Safety Glass Co v Lancegaye Safety Glass Ltd* [1939] 2 KB 395 at 409).

This case was followed in 1978 by the House of Lords (*Westinghouse Uranium Contract case*), again without any empiric re-examination of why a privilege that was originally designed to try to discourage the use of torture to obtain confessions should be applicable to private bureaucracy. Whilst the English courts may 'see no reason' to distinguish humans from corporations, most lay people would be likely to find it unusual if not bizarre to even make the comparison (Ricketts 2001: 62-63).

The challenge for legal educators is to discover again what these troublesome moments were for us, what they may yet be for our students and to design curricula that identifies them, exposes them and offers students the opportunity to move through them. Such a process has great potential to improve legal education but, as observed earlier, also involves some serious ethical issues.

Legal knowledge as a colonising world view

In maths or science there is a mostly comfortable (although contestable) assumption that what is taught is empiric physical knowledge and that educators can safely assume that students must and *should* internalise these threshold concepts in order to progress in their discipline. The assumption is made that the thresholds and the knowledge are essentially neutral in nature (Palmer 2001: 4 noted in Meyer 2003).

Legal educators have no such luxury. Even a shallow analysis will reveal that law is about power and politics, and that the assumptions upon which legal truths are built are culturally and politically contingent. Students may have very good reason to resist inculcation into such belief systems. The category of troublesome knowledge identified as 'foreign knowledge' assumes a much greater significance when the subject matter of the discipline deals with legal rules built around particular political, economic and philosophical world views.

The examples of arcane legal knowledge referred to above, drawn from equity, constitutional law and corporations law, are arguably only fairly surface manifestations of the deeper threshold concepts inherent in the legal discipline. Lying beneath these are even more deeply embedded and even more unconscious assumptions about the ordering of the universe. The assumption of individual volition; the commodification of land and intellectual property; even assumptions about the legitimacy of centralised authority so often become unconscious belief systems that are demanded as the price of entry to the knowledge (and power) of the discipline.

Harvard law professor, Duncan Kennedy, aptly described this process when he wrote (Kennedy 1982: 42...45):

[A] lot of what happens [at law school] is the inculcation through a formal curriculum and the classroom experience of a set of political attitudes toward the economy and society in general... law school teaching makes the choice of hierarchy and domination, which is implicit in the adoption of the rules of property, contract, and tort, look as though it flows from and is required by legal reasoning rather than being a matter of politics and economics.

The colonising character of legal knowledge that is counter-intuitive, tacit or foreign is of especial concern when 'thinking like a lawyer' amounts to a demand that a student jettison personal political, social or even cultural values and internalise a new world view.

Kennedy (1982: 45) observed that students who approach legal study from an alternative understanding will in many cases become incapacitated from succeeding within a traditional legal curriculum unless they either

abandon their own values (and learn to think like a lawyer) or somehow manage to critique and resolve the contradictions on their own. “It would be an extraordinary first year student who could, on his own, develop a theoretically critical attitude toward this system” (Kennedy 1982: 45).

Challenges for curriculum design: a sceptical approach

Legal educators, at least those who are conscious of the politically normative nature of legal education, are faced with a dilemma. Should curricula simply aim to progress students unconsciously through these thresholds, or should they be designed to expose the assumptions that have for so long been the secret initiations into the discipline?

To put it another way, an understanding of the theory of threshold concepts, when applied to legal educations, presents us with a choice—whether to construct covertly a normative curriculum or to attempt to construct an overtly sceptical one. To use the example of corporate ‘personality’; a curriculum could be designed that simply helped students to ‘grasp’ (and internalise as natural) the concept of the corporation as a legal person, or it could be designed to transform students’ understanding of judicial reasoning so that they are capable of unravelling its hidden political assumptions. The former approach offers students little critical choice and arguably amounts to a form of implicit indoctrination. The latter is at least an attempt to offer students an Archimedean place to stand as they encounter troublesome, counter-intuitive and politically loaded concepts.

A sceptical approach to legal knowledge (and to the assumptions that traditionally accompany it) is consistent with rigorous academic practice. It is also more equitable in that students (particularly those from minority backgrounds) are less likely to be alienated by foreign knowledge. Most of all it offers greater value for legal education generally. Whether the mission of legal education is understood as primarily academic or practical in nature, an understanding of underlying and otherwise tacit assumptions is likely to improve a graduate’s ability to predict legal outcomes, as well as to design persuasive legal arguments.

An interesting side-effect of designing a sceptical legal curriculum that observes rather than inculcates dominant values is that the threshold experience of 'foreignness' becomes ubiquitous for students, in the sense that not only those with alternative worldviews but also those with more mainstream worldviews are likely to find the curriculum confronting and provocative.

In a study conducted by the author at an Australian regional university in 2005, first year students recorded a surprisingly high level of responsiveness to a curriculum that utilised the theory of threshold concepts to design an introductory law subject that was overtly sceptical of mainstream values and assumptions. In that study 84.3% of students reported that studying the subjects had changed the way they looked at the world in 'significant' ways (51.5%) or 'fundamental' ways (32.8%). Qualitatively, the survey found that students reported "a new-found scepticism in relation to what they see, hear and read about the world and an increased tendency to ask further questions about issues" (Ricketts 2005).

Ironically, adopting the sceptical approach meant that for some students the troublesome issue was the questioning of mainstream values, rather than the need to internalise legal truisms.

The idea of law as a colonising influence has thus far been explored in this paper and by writers such as Kennedy as colonising even in the context of relatively homogenous cohorts of students within English, American or Australian law schools. The significance of foreign knowledge as troublesome becomes even more pressing when dealing with students from diverse cultural backgrounds

Insights for legal education in the Pacific

Troublesome knowledge and the resultant threshold issues for students arise from the students' own experience and interaction with the material, not from inherent features of the knowledge itself. That is to say, they arise intersubjectively rather than being objectively definable. For this reason, forms of knowledge that are troublesome to one group of students may not have the same characteristics for another group of students. Observations

about what aspects of legal education create threshold issues and how best to design curricula will not be readily transferable from a cohort of students in Australia, for example, to a cohort of students in the Pacific. Educators need to learn from the students' experiences and feedback in order to uncover the troublesome knowledge for any particular group. Nonetheless, in the context of this discussion about the potentially colonising nature of legal education, some cautious speculation about teaching law in the Pacific context may be possible.

Most obviously the issue of 'foreign knowledge' takes on a deeper meaning where the legal system has been introduced from another culture. Whilst students are likely to experience more conceptual difficulty accepting and understanding introduced legal doctrines, (counter-intuitive knowledge) they are probably less likely to have difficulty maintaining a sceptical or outsider's perspective, particularly if this is presented as a viable option. Experimentation and research are needed to uncover whether a sceptical portrayal of legal doctrine would be less alienating for such students, and could have the effect of reducing the likely level of resistance.

Conclusion

The emerging research and theoretical framework of troublesome knowledge and threshold concepts has much to offer in terms of helping educators respond to those areas where students reach barriers in understanding. In relation to legal education, the challenges are more complex than perhaps they are in the physical sciences. Legal educators cannot assume that the knowledge being presented is politically or culturally neutral. It is still necessary to equip graduates with the intellectual skills that they need to effectively use and manipulate legal knowledge in a professional manner, but there is a need to consider the ethical nature of that process.

Unless educators are happy to be complicit in a form of professional and academic education that demands obedience to a very narrow political and cultural norm as the price of success, we will be challenged to design curricula that can move students through troublesome frontiers of understanding in a way that remains open-ended, sceptical and encourages students to view legal knowledge from a distance.

Threshold concept theory can be utilised in either covert or expository forms. The field of enquiry is relatively new and to date not a great deal of empiric research has been conducted, particularly in relation to legal education. The aim of this paper has been to encourage reflection and debate at the very least, but more optimistically to stimulate experimentation and empiric study of legal education as an intersubjective journey.

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