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The importance of teaching dispute resolution in a twenty-first-century law school

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Abstract

Civil justice reviews over the past 20 years have encouraged the use of alternative dispute resolution (ADR) and particularly mediation. Mediation is arguably now becoming more mainstream in terms of dispute resolution process choice. In some instances law changes have been introduced requiring parties in dispute to consider using mediation; similarly, lawyers have an ethical responsibility to provide advice to their clients about the range of dispute resolution processes available. What is lacking however is a corresponding appreciation of the changing attitudes to the teaching of dispute resolution in the majority of UK Law Schools, where the promotion of adversarialism within the curriculum appears to remain the focus as the primary and only method of dispute resolution. The article argues that this is unreflective of current attitudes and thinking towards dispute resolution in most common law countries, where litigation is no longer necessarily the primary dispute resolution process of choice. Whilst there was token appreciation of the importance of mediation advocacy and its inclusion recommended within the Bar Practice Training Course (BPTC), the recent Legal Education Training Review was silent on any suggestions about the inclusion of dispute resolution based curriculum content at any stage of legal education in England and Wales. The article will explore the historical development of lawyers' attitudes to dispute resolution within the civil justice arena and academics' teaching of curriculum associated with it in UK Law Schools. The article will pose questions on why recent legal history suggests that Law Schools should now perhaps take a more socio-legal approach to their curriculum content and embrace the teaching of dispute resolution as a defined subject area for the twenty-first century law school.

Introduction: the traditional law school undergraduate curriculum

Traditionally dispute resolution has never been taught as a stand-alone topic in UK Law Schools. By comparison in the United States there are many examples of taught courses in the sphere of dispute resolution particularly ADR including mediation and negotiation. At undergraduate level, whilst these are some notable exceptions,¹², the teaching of aspects of dispute resolution in UK law schools has tended to be subsumed into areas of the substantive law curriculum and learned about and understood through the consideration of case law in all the foundational subjects, from Equity and Trusts (Chancery decisions dealing with disputes over testators' wishes as to the administration of an estate), to the law of obligations (the areas of negligence for instance within Tort and the vast body of associated case law). The study of law has been required in this way in order to enable law students to appreciate the importance of precedent, judicial law-making and the role of appellate decisions in so doing. Adversarialism has therefore been very much at the heart of our

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¹ For examples see University of West of England and Plymouth University.

approach to the study of law as without the principle of stare decisis and the doctrine of precedent, our common law would not have developed as it has. As such litigation has been the most accessible, popular and best understood way of resolving disputes for students of law.

The “Langdell” method within legal education, so named because the American Professor Christopher Columbus Langdell is credited with popularising this case study learning approach, has been adopted in many law schools within common law jurisdictions. The methodology involves law students spending a significant amount of their time learning cases (mostly appellate decisions), deconstructing them and applying them in given legal contexts. This is an essential part of the doctrinal approach to legal study. It is inherently considered to be the correct approach in common law jurisdictions as case law and judicial decision-making help to shape the law. However given the changes in the way lawyers are expected to operate in the legal services market place today, the twenty first century Law Schools should arguably accept that an emphasis is placed on this approach at the expense of embedding some of the more expansive legal knowledge and understanding that lawyers are now required to have. Similarly the significant number of undergraduate law students who intend to work in other employment sectors will benefit from having a socio-critical understanding of the contextual aspects of legal study, which includes an awareness of the alternative ways in which disputes can be resolved. In this way law students should at least have some awareness of the breadth of the dispute resolution continuum.

In his ‘Blackstone’s Tower’ Hamlyn lecture in 1994, Twining criticised the entrenched tradition of teaching and scholarship that purports to confine itself to the exposition and analysis of posited law, observing that such an approach had been the subject of diverse attacks on such grounds as that it is narrow, reactionary and dull. Twining further argued that one of the main objectives of legal training is to enable intending practitioners to achieve minimum standards of competency in basic skills before being let loose on the public. This is interesting in that the current Training for Tomorrow competency statement places an important emphasis on ensuring ‘day one’ competence for new practitioners.³ Twining argued that the main function of primary legal education and training is to ensure that all entrants to the profession exhibit minimum competence in a range of skills, measured by actual performances which satisfy articulated criteria under specified conditions. Problem-solving is, in his view, seen either as one of the most important basic skills or, as some would have it, the master skill under which all lawyering tasks can be subsumed.⁴ Problem-solving is to a large degree what lawyers are seeking to achieve for their clients when advising on dispute resolution process choice.

If students are to learn about judicial and legislative decision-making, then arguably they should also learn about other forms of decision-making (problem-solving) which currently apply to the world of legal practice; the continuum includes a number of conflict or dispute resolution methods ranging from conflict avoidance, negotiation and mediation through administrative decision-making, arbitration, judicial and legislative decision-making to direct action and in the worst situation, violent conflict which is particularly relevant to the study of international law. The focus on adjudication and, as MacFarlane describes, a single rights-based approach to dispute resolution, fails to encourage creative problem-solving and reflexivity that might be a worthy goal for legal education in and of itself.⁵ Further

³ See the SRA’s website for its programme of education and training reform as articulated in its policy statement “Training for Tomorrow” at <http://www.sra.org.uk/sra/policy/training-for-tomorrow.page> (accessed 2 September 2015).

⁴ W. Twining, *Blackstone’s Tower: The English Law School* (Stevens & Sons /Sweet & Maxwell, 1994).

⁵ See the views of D. Schon, “Educating the Reflective Legal Practitioner” (1995) 2 *Clinical Law Review* 231; A. Lerner, “Law & (and) Lawyering in the Work Place: Building Better Lawyers by Teaching Students to Exercise Critical Judgment as Creative

consideration of the importance of the inclusion of conflict theory within legal education will follow.

There is therefore arguably a perception that law degrees in English and Welsh universities are lacking in breadth of socio-legal or contextual content. Sanders argues that law degrees in England and Wales are too intellectually narrow with the foundational subjects being predominantly taught doctrinally. He suggests that barristers and solicitors in England and Wales need a broad intellectual education to underpin the more technical training they later receive if we wish them to be professional and not merely technicians.⁶

The twenty-first century Law School must now consider the purpose of legal education in a much broader sense. There has been significant change within the legal services sector over the past 20 years; the landscape is very different compared to what it was say 50 years ago. Following the Clementi Review of the Regulatory Framework for Legal Services in 2004, which paved the way for the Legal Services Act 2007, there have been important changes introduced in the way both branches of the UK legal profession are regulated; regulation (or deregulation) has also given rise to alternative business structures (ABSs) which allow non-traditional legal entities to undertake legal work; the further erosion of Legal Aid and replacement fee arrangements, together with the rise of the litigant in person, have all in some measure raised serious questions about access to justice. The IT revolution which has in turn brought about diversification and innovation in the form of online dispute resolution for instance, has by the same token caused disruption to the way in which traditional legal service providers have practised.⁷ The Legal Education and Training Review (LETR) which reported in 2013 raised a number of questions about legal education provision in light of the changing legal services landscape (see further below). It is therefore time that law schools reconsider the curriculum, become less conservative in their approach to what is taught and introduce curriculum content which is more reflective of current legal practice.

Teaching dispute resolution: some historical background

It has been mentioned earlier that ADR, or indeed dispute resolution as a stand-alone academic subject, has not been seen as a key element or component of the general principles of legal education for undergraduate law students in the UK.⁸ This perhaps partly explains why the majority of law schools, certainly at undergraduate level, have historically never taught dispute resolution or aspects of it even as an elective course. Apart from some Law Schools mentioned earlier which do actually teach dispute resolution as a defined subject, there might be mention of these ADR processes in English Legal System type modules, but passing mention is arguably not enough for students studying in the twenty-first century law school. The civil justice landscape has changed significantly over the past 20

Problem Solver" (1999) 32 *Akron Law Review* 107; and J. Reno, "Lawyers as A4Q Problem-Solvers: Keynote Address to the AALS" (1999) 49 *Journal of Legal Education* 5–13 in J. MacFarlane, "The New Advocacy: Implications for Legal Education and Teaching Practice", in R. Burrige, K. Hinett, A. Paliwala and T. Varnava (eds), *Effective Learning and Teaching in Law* (Routledge, 2003), p. 166 *Journal of Legal Education*, 5-13 in MacFarlane J., *The New Advocacy: Implications for Legal Education and Teaching Practice* in Burrige, R., Hinett, K., Paliwala, A., & Varnava, T. (Eds.), *Effective Learning and Teaching in Law*, (Routledge 2003) p.166.

⁶ A. Sanders, in H. Sommerlad, S. Harris-Short, S. Vaughan and R. Young (eds), *The Futures of Legal Education and the Legal Profession* (1st eds., Oxford, Hart Publishing, 2015).

⁷ R. Susskind, *Tomorrow's Lawyers: An Introduction to Your Future* (Oxford, Oxford University Press, 2013), p. 102.

⁸ See the, *Academic Stage Handbook of the Bar Standards Board and the Solicitors Regulation Authority 2014*, which states that the foundations of legal knowledge require study of aspects of Public Law, including Constitutional Law, Administrative Law and Human Rights; Law of the European Union; Criminal Law; Obligations including Contract, Restitution and Tort; Property Law; and Equity and the Law of Trusts. Available at <https://www.sra.org.uk> (accessed 13 December 2014).

years starting with Lord Woolf's Report on the civil justice system in 1996⁹ which led to a wholesale overhaul of the civil justice system through implementation of the Civil Procedure Act 1997¹⁰ and the associated Civil Procedure Rules (CPR). These changes will be examined in more detail below.

There is not one universally accepted definition of alternative dispute resolution or ADR as it is commonly acronymised. Brown & Marriott consider its components and in an attempt to define the word 'alternative' do so by suggesting that it could imply in one sense a dispute resolution process which is alternative to the formal court process or litigation.¹¹ In this sense examples of alternative process might include: negotiation, mediation, early neutral evaluation, arbitration, med-arb or the use of an ombudsman.

It is interesting to note that in their 1971 commentary on the recently published Ormrod Review into legal education in England and Wales, Thomas and Mungham¹² observed that certain historically important courses had become embalmed and were at that time considered fundamental to legal education, while 'the nature of the practitioners work has so altered as to make the very idea of 'core' courses questionable'. Apart from the addition of Equity and Trusts and EU Law, those 'core' courses have remained unchanged in more than 50 years of legal education. The SRA's policy statement, "Training for Tomorrow" and the proposed Competence Statement, may however produce some changes to the way in which a legal education curriculum can be delivered as long as it produces 'day-one' competence in terms of knowledge, attributes and skills.¹³

The "vanishing trial" phenomenon

In common law countries it is evident that for more than 20 years not only is a tiny proportion of all disputes litigated, but also only a very small percentage of litigated cases are 'resolved' by adjudicative decisions (on questions of fact or law).¹⁴ This remains the case today and to a much greater degree. In the UK in excess of 95% of cases which enter the civil justice court system settle before trial, many at the doors of the court. The statistics speak for themselves; there has been a significant drop in the number of litigated cases over the last 20 years; in 1995, 150,000 High Court claims were issued, by 2005 that number had dropped to some 15,000.¹⁵ In the County Court the number of claims issued in the year 2000 was 1,944,812, of which 71,233 were disposed of at trial, the corresponding number of claims issued in 2014 was 1,585,275 of which 44,788 went to trial, some 2.55% of all cases issued in that forum.¹⁶

The situation is no different in other common law jurisdictions; in Australia, of all the civil cases commenced, only 5% require adjudication. The almost exclusive focus by legal educators in that jurisdiction (and others including our own) on adjudication does not therefore present a realistic interpretation of the current situation with regard to dispute resolution to law students, at either undergraduate or postgraduate level and does not

⁹ In 1994 the Master of the Rolls, Lord Woolf, was invited to undertake a review of the civil justice system in England and Wales and in 1996 he produced his report entitled Access to Justice. Available at:

<http://webarchive.nationalarchives.gov.uk/http://www.dca.gov.uk/civil/final/contents.htm> (accessed 13 March 2015).

¹⁰ See <http://www.legislation.gov.uk/ukpga/1997/12/contents> (accessed 13 February 2015).

¹¹ H. Brown and A. Marriott, *ADR Principles & Practice* (Sweet & Maxwell, 2011), p. 2.

¹² Thomas and G. Mungham, "English Legal Education: A Commentary on the Ormrod Report" (1972) 7 *Valparaiso University Law Review* 87.

¹³ See *Training for Tomorrow*, supra n. 2.

¹⁴ W. Twining, "Alternative to What? Theories of Litigation, Procedure and Dispute Settlement in Anglo-American Jurisprudence: Some Neglected Classics" (1993) 56(3) *Modern Law Review* 380–392.

¹⁵ C. Elliott and F. Quinn, *English Legal System* (14th ed., Pearson, 2014), pp. 525–527.

¹⁶ <https://www.gov.uk/government/statistics/civil-justice-statistics-quarterly> (accessed 13 March 2015).

accurately represent the role of the legal practitioner in facilitating the resolution of many disputes.¹⁷

ADR, which in its broadest sense includes arbitration, bi-lateral negotiation and mediation, is now responsible for the majority of dispute settlements. In the early part of the twenty-first-century ADR should therefore not so much be viewed not so much as alternative dispute resolution but as appropriate dispute resolution.¹⁸

The legal practice landscape

In the past 20 years there have been two major civil justice reviews in the UK: Woolf in 1996¹⁹ and Jackson in 2010.²⁰ Lord Woolf, at the time Master of the Rolls, identified many shortcomings with the civil justice system operating in England and Wales following his comprehensive review in the mid-1990s. Many of Woolf's recommendations which emerged from the review of the civil justice system and articulated in his final report *Access to Justice* in July 1996, brought about a wholesale reorganisation of civil procedure through the implementation of a modified and updated civil code (The Woolf Reforms). The Civil Procedure Rules, introduced in April 2000 after the Civil Procedure Act 1997 was passed, not only placed an emphasis not only on ensuring that cases are dealt with justly and at proportionate cost, "the Overriding Objective",²¹ but also encouraged parties in dispute to try to settle their disputes without litigation. This is evidenced through the introduction of a number of pre-action protocols to encourage parties in dispute to be more cooperative once a letter of claim had been written, and to consider options for settlement so as to avoid litigation or at least treat litigation as the dispute resolution option of last resort.

Proportionality continued to be an important consideration and by the end of the last decade concerns remained in this regard. Lord Justice Jackson's terms of reference some 12 years later, required him to review the rules and principles governing the costs of civil litigation and to make recommendations in order to promote access to justice at proportionate cost. Jackson was also required to review case management procedures; to have regard to research into costs and funding; to consult widely; to compare the costs regime in England and Wales with those of other jurisdictions and to prepare a report setting out recommendations with supporting evidence.²² Many of Jackson's recommendations were brought into force through primary legislation and in particular Part 2 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (the LASPO Act) which came into effect on 1 April 2013.²³

¹⁷ J. Duffy, J., & R. Field, *Why ADR Must be a Mandatory Subject in the Law Degree: A Cheat Sheet for the Willing and a Primer for the Non-believer* (2014) 25(1) *Australasian Dispute Resolution Journal* 2.

¹⁸ C. Menkel-Meadow, "Ethics Issues in Arbitration and Related Dispute Resolution Processes: What's Happening and What's Not" (2001) 56 *University of Miami Law Review* 949, and also C. Menkel-Meadow, "Ethics in ADR: The Many 'Cs' of Professional Responsibility and Dispute Resolution" (2001) 28 *Fordham Urban Law Journal* 979-990. See also F.E.A. Sander and S.B. Goldberg, "Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure" (1994) 10 *Negotiation Journal* 49, p. 66 or (2005-2006) 7 *Cardozo Journal of Conflict Resolution* 83.

¹⁹ See the full report available at <http://webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/civil/final/contents.htm> (accessed 6 March 2015).

²⁰ In 2008 the Master of the Rolls Sir Anthony Clarke appointed Senior Justice of Appeal Lord Justice Rupert Jackson to undertake a thorough review of the principles governing costs in relation to civil litigation. His Final Report published on 14 January 2010 made 109 recommendations to tackle the problem of excessive costs. The full report is available at <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf> (accessed 6 March 2015).

²¹ Note 13, *CPR Part 1.1 (1)* defines "the Overriding Objective".

²² See the Executive Summary of the Report, *supra* n. 19, at p. xiv.

²³ The Act is available at <http://www.legislation.gov.uk/ukpga/2012/10/contents/enacted> (accessed on 23 March 2015).

Of particular interest to those who have been observing the evolution and development of the role of ADR in the resolution of civil disputes in the UK, it will be noted that a whole chapter of Jackson's report was reserved for ADR. His recommendations included:

- (1) That there should be a serious campaign (a) to ensure that all litigation lawyers and judges are properly informed about the benefits which ADR can bring and (b) to alert the public and small businesses to the benefits of ADR.
- (2) An authoritative handbook should be prepared, explaining clearly and concisely what ADR is and giving details of all reputable providers of mediation. This should be the standard handbook for use at all JSB seminars and CPD training sessions concerning mediation.²⁴ The Jackson ADR Handbook, a definitive practical guide to the use and operation of ADR, was published in 2013 and has a particular focus on mediation.²⁵

The civil justice reviews have taken place against a backdrop of unprecedented change in the legal services sector over the past 50 years. The *Access to Justice Act 1999* replaced the Legal Aid Board with the Legal Services Commission (LSC). Two schemes were created: Community Legal Service to cover civil cases and the Criminal Defence Service for criminal matters. Contracting was introduced and only solicitors or advice agencies with a LSC contract could provide civil justice-related advice under the scheme. As a result of these changes, certain cases became ineligible for CLS funding overnight: personal injury cases which formed 60% of all cases previously funded by legal aid, cases concerning defamation and malicious falsehood, business disputes including company and partnership, trusts and boundary disputes. Eligibility for public funding as it became known was still based on merits and means, but strict criteria under the new Funding Code replaced the old merits test.²⁶

The reforms continued and in 2005 Lord Carter was asked by the government to review Legal Aid yet again. Carter's findings revealed that:

The cost of legal aid has risen from 1.5 billion in 1997 to 2.1 billion today, an increase of 10% in real terms.....the growth of criminal legal aid (over half the legal aid budget) is putting pressure on vital services for vulnerable people, provided through civil and family legal aid.²⁷

The following year the 'Carter Reforms' were implemented which for the first time created a market-based approach to the reform of the Legal Aid system in the UK; fixed pricing was introduced for criminal work, market management strategies became evident through efficient and good quality suppliers being awarded contracts, and managed price competition became a reality. Latterly the erosion of Legal Aid and arguably access to justice culminated in *the LASPO Act*, which abolished the LSC on 1 April 2013 and replaced it with a Legal Aid Agency administered by the Ministry of Justice. As a result legal aid was further withdrawn and from areas which have attracted real controversy, such as private family law. The only circumstances in which a party involved in a relationship or marriage breakdown might be eligible for Legal Aid assistance now, is where there are inferences of domestic violence or abuse. Legal Aid certificates do however currently remain available for family

²⁴ See Chapter 36 at p. 355 of the Report, *supra* n. 19, where Jackson makes specific recommendations; whilst he did not go as far as to suggest that any rule changes are required to promote ADR, he did accept that ADR brings considerable benefits in many cases and that this facility is currently under-used, especially in AQ10 personal injury and clinical negligence cases (accessed 23 March 2015).

²⁵ Blake, J. Brown e and S. Sime, *The Jackson ADR Handbook* (OUP, 2013).

²⁶ G. Slapper and D. Kelly, *The English Legal System* (Routledge, 2013), pp. 652–667.

²⁷ *Ibid.* p. 684.

mediation. The scope of Legal Aid has been greatly narrowed to the extent that now few areas remain eligible for civil legal aid support.²⁸

The effect of all the changes over the past 20 years or so is disenfranchisement. There is undoubtedly a justice gap; not only has there been significant increase in the level of court fees, there has been a commensurate rise in the number of litigants in person which has placed extreme pressure on the court system. The alternative fee arrangement structures in place for nearly 20 years now, have given lawyers sufficient time to adjust to a new regime and they have now become increasingly discerning about when and for what kind of cases conditional fee agreements (CFAs) are used. A solicitor may now be very circumspect about entering into a CFA with a client to investigate a complaint against the police for instance an area of work which was traditionally supported by legal aid. The rise in the small claims limit to £10,000 and the availability of the small claims mediation scheme suggest that ADR may well be used more widely in the future and therefore the need for ADR and especially mediation has arguably never been greater.

An awareness of this changing landscape is debatably fundamental for law students, even for those not intending to practise law, as it places the teaching of dispute resolution as an academic subject and its socio-legal importance into justifiable and explicable context. Sanders makes the point that law schools have traditionally taught aspects of law within the foundational subjects which tend to serve a particular section of society; contract law, property law, equity and trusts with the doctrinal approach focused on appellate decisions, in other words the law of the wealthy. Cuts to legal will mean that the lower socio-economic groups will not have the availability of legal advice for many areas traditionally covered by legal aid. Sanders argues that lawyers do very little 'poor law' nowadays, there are fewer legal advice centres and further cuts to legal aid will mean lawyers doing even less of this type of work than before²⁹

Challenging legal education convention

Traditional approaches to legal education have been questioned by Duffy and Field who suggest that in Australia (where like in the UK ADR is not widely taught in Law Schools), given the centrality of ADR processes to current legal practice in their jurisdiction, law schools throughout Australia are fundamentally failing future legal practitioners.³⁰ This is a very bold statement as it is predicated on the assumption that such mandatory curriculum content is fundamental to legal education. The argument is that whilst historically there may have been good reason not to teach it, mostly because ADR was less widely used, the teaching of dispute resolution cannot now be ignored due to its current socio-legal importance. The situation in the UK is comparable to Australia and if our twenty-first-century UK law schools are to achieve a better link between theory and practice, the "Langdellian" model need not necessarily be replaced in its entirety (because it undoubtedly has a place for some of the reasons stated earlier), but a much more socio-legal approach to legal education should be adopted alongside it. This will arguably require and allow for the introduction of far less traditional curriculum content including the study of dispute resolution.

²⁸ The areas which remain broadly supported by civil legal aid are: clinical negligence, debt (regarding a home), education (special educational needs), housing, immigration and asylum and welfare benefits. See e Schedule 1 to LASPO Act available at <http://www.legislation.gov.uk/ukpga/2012/10/schedule/1/enacted> (accessed 25March 2015).

²⁹ Sanders *supra* n.6, p.153

³⁰ Duffy and Field *supra* n. 16, p. 1.

Where ADR is taught substantively in UK Law Schools, it is evident from many prospectuses and law school websites that it tends to be offered as part of postgraduate study.³¹ In Australia ADR is not central to the law school curriculum and where it is taught the courses are 'stand-alone' and more commonly found as final year electives.³² In other common law jurisdictions there is evidence of enlightened liberal education approaches; of the top 10 ranked US Law Schools in 2015, all of them teach stand-alone courses on negotiation, mediation and arbitration and some have live clinics linked with these areas of the taught curriculum.³³ Similarly in Canada the top ranked law schools all offer conflict/dispute resolution, mediation and negotiation courses as part of their curriculum.³⁴ Notwithstanding these notable examples of 'educational liberalism' evident in other jurisdictions, important lessons can be learned from the United States for example, where Webb observes that overall US Law Schools have failed to prioritise teaching and have been unwilling to engage with the need to better prepare students for practice.³⁵

Learning conflict theory

Conflict in some shape or form underpins all disputes and vice versa. Some commentators use the words interchangeably; others suggest that conflict exists when there are two participants and disputes when there are more than two.³⁶ The understanding of conflict theory is by no means a prerequisite for any litigation lawyer but if twenty-first-century law schools are going to accept that dispute resolution should be taught in some measure, then it would be appropriate to provide curriculum content on aspects of conflict theory. The argument put forward for this by Mayer includes the premise that the dimensions of [dispute] resolution run in parallel to the dimensions of conflict; that the process of resolution occurs along cognitive, emotional and behavioural dimensions.³⁷ It is often the dynamics of these dimensions which will commend a particular dispute resolution process approach.

At the writer's institution the dispute resolution pathway for all LLB undergraduate students commences in Year 1 with a 20 credit Introduction to Dispute Resolution module. One of the early lectures entitled 'Understanding Conflict' deals with the reasons why conflict arises; types of conflict and their sources; the different approaches to conflict; the role of ethics (in conflict resolution) and aspects of human rights (in the context of conflict). The module draws upon the work of Mayer and references his 'Wheel of Conflict' theory.³⁸

In 2002 MacFarlane maintained that the law school curriculum reinforced a model of conflict that at that time had remained largely unchanged and that a rights-based model of conflict produces an epistemology that understands knowledge as the power to win.³⁹ MacFarlane argued that there were three core assumptions present which were driving the approach to the law school curriculum design and delivery, namely: first that conflict is always about principle and rights; secondly that knowledge and information is about winning and thirdly

³¹ The University of Strathclyde Law School offers an LLM/MSc in Mediation and Conflict Resolution, see <http://www.strath.ac.uk/humanities/courses/law/courses/mediation/> (accessed 24 March 2015).

³² Duffy and Field *supra* n. 16, p. 1.

³³ The top 10 law schools as listed in the US News and World Report Rankings 2015 were: Yale, Harvard, Stanford, Columbia, The University of Chicago, New York University, The University of Pennsylvania, Duke, The University of California Berkeley and The University of Virginia.

³⁴ The top five Canadian Law Schools 2014 as listed by the QS World University Rankings were: The University of Toronto, McGill, The University of British Columbia, Osgoode Hall and the University of Montreal.

³⁵ See J Webb, in Sommerlad et al., *supra* n. 5, p. 107.

³⁶ D. Ellis and D. Anderson, *Conflict Resolution: An Introductory Text* (Emond Montgomery Publications Limited, 2005), p. 3.

³⁷ B. Mayer, *The Dynamics of Conflict Resolution: A Practitioner's Guide* (John Wiley & Sons, 2010), pp. 98–102.

³⁸ The "wheel of conflict" includes: structure, emotions, history, communication, and values. Central to which are the human needs, wants and requirements; see B. Mayer, *The Dynamics of Conflict: A Guide to Engagement and Intervention* (2nd ed., Jossey-Bass, 2012), Chapter 1, p. 9.

³⁹ MacFarlane *supra* n. 4, p. 167.

that lawyers 'own' the conflict.⁴⁰ This may well be an accurate interpretation of the approach taken by many law schools when delivering the curriculum today. It is arguable therefore that this situation has remained unchanged and that pedagogic practice in law schools continues to focus on a 'rights-based' model of justice which promotes the use of Langdellian type methodology and the inculcation of adversarialism.

The broad study of dispute resolution requires knowledge and understanding of the recognised dispute resolution continuum mentioned earlier. This includes a sound understanding of the principles of a number of dispute resolution processes ranging from negotiation, mediation, arbitration and litigation along with many less well known processes which form components of the continuum. There is a significant body of supportive literature and scholarly work associated with the area which serves to provide a wonderfully rich and fertile academic subject in its own right.⁴¹

Ethical and professional obligations

The ethical responsibilities of lawyers practising in the area of civil justice are now very much shaped by the new civil procedural code as introduced by the CPR following the Woolf Reforms.⁴² Law students aspiring to become practising lawyers need to have a sound awareness of the ethical implications of the CPR⁴³ as well as their professional codes of conduct and this is particularly the case if they are to become solicitors⁴⁴ who are required to provide legal advice in the general area of dispute resolution. Many law firms have rebranded in the last decade and for these firms this has included the creation of 'dispute resolution' rather than litigation departments⁴⁵. This nuanced change is recognition of the fact that for civil disputes, litigation is no longer considered to be the only or primary dispute resolution process available. The CPR were introduced to provide procedural articulation of the *Access to Justice Act 1999* with a view to eliminating the unnecessary cost, delay and complexity present in the civil justice system as exposed by Lord Woolf.⁴⁶ In some respects this aspiration has been achieved through the reduction of the number of cases which are now litigated.

⁴⁰ Ibid., pp.167-179.

⁴¹ See for instance, notably the work of C. Menkel-Meadow, generally, M. Moffitt and R. Bordone, *The Handbook of Dispute Resolution* (John Wiley & Sons, 2005); D. Ellis and D. Anderson, *Conflict Resolution: An Introductory Text* (Emond Montgomery Publications Limited, 2005); B. Mayer, *The Dynamics of Conflict: A Guide to Engagement and Intervention* (2nd ed., Jossey-Bass, 2012); M. Deutsch and P.T. Coleman (eds), *The Handbook of Conflict Resolution* (Jossey-Bass, 2000); H. Brown and A. Marriot, *ADR: Principles and Practice* (3rd ed., Sweet & Maxwell, 2011). There are also a number of peer reviewed journals whose primary focus is dispute resolution, such as: *Conflict Resolution Quarterly*, *the Journal of Conflict Resolution*, *the Journal of Dispute Resolution* and *the Harvard Negotiation Law Review* to name a few.

⁴² Implemented by the Civil Procedure Act 1997.

⁴³ Consider the following Rules and associated Practice Directions: Practice Direction (Pre-action Conduct) which promotes pre-issue settlement and requires parties to consider ADR. The Pre-action protocols require parties to consider whether some form of ADR appropriate (there can be later costs sanctions); CPR 1.4 dealing with judicial case management extends to encouraging use of ADR; CPR 26.4 gives the court power to stay cases to enable ADR to take place; the Practice Direction to CPR 29 which provides that the court can give directions regarding ADR on its own initiative without a case management conference (CMC); CPR 44.3 which provides that the court can consider parties' conduct on issues of costs (relating to the Pre-action Protocol period) and CPR 44.5 where the court can consider parties' conduct on issues of costs during the proceedings.

⁴⁴ Pursuant to paragraph 2.02(1)(b) of Solicitors Regulation Authority's (SRA) Code of Conduct, when considering the options available to the client if the matter relates to a dispute between your client and a third party, you should discuss whether mediation or some other alternative dispute resolution (ADR) procedure may be more appropriate than litigation, arbitration or other formal processes.

⁴⁵ Consider the five major so-called 'magic circle' law firms in London which include: Allen & Overy: <http://www.allenoverly.com/expertise/practices/litigation/>; Clifford Chance: http://www.cliffordchance.com/expertise/practice_area/litigation_dispute_resolution.html, Freshfields, Bruckhaus, Deringer: http://www.freshfields.com/en/global/what_we_do/our_services/Disputes,_litigation_and_arbitration/, Linklaters LLP: <http://www.linklaters.com/ClientServices/Practices/DisputeResolution/> and Slaughter & May <https://www.slaughterandmay.com/what-we-do/legal-services/practice-areas/dispute-resolution.aspx> (all accessed 6 November 2015), all of whom have designated dispute resolution departments or teams. A simple internet search reveals that smaller regional firms in other parts of the country now have dispute resolution departments e.g. in the author's area of the country Furlley Page: <http://www.furleypage.co.uk/business/dispute-resolution/> (accessed 6 November 2015).

⁴⁶ See generally Notes 5 and 13.

The 'standard conception' or 'adversary ethic' of lawyering as described by Nicolson and Webb⁴⁷ i.e. that lawyers are required to zealously represent their clients who pay their fees irrespective of the morality of the client's objectives or the most effective means of achieving those objectives, and which according to these authors comprise two closely associated concepts: adversarialism and (neutral) partisanship, is during the post-Woolf era, a wholly outmoded approach for lawyers practising in the jurisdiction of England and Wales to take. Beware the lawyer who blindly follows the litigation pathway on their clients' behalf without giving due consideration to the alternative methods of dispute resolution available.⁴⁸ Solicitors' ethical and professional obligations where the conduct of litigation is concerned are now embedded within and threaded through the Civil Procedure Rules.⁴⁹

Furthermore a solicitor's client care obligations imposed under the *Solicitors Code of Conduct* include under *Rule 2.02 (1)(b)*, the requirement to give the client a clear explanation of the issues involved and the options available. The obligation is further clarified under *Guidance Note 15 to Rule 2.02 (1)(b)*, which states that when considering the options available to the client, if the matter relates to a dispute between the client and a third party, the solicitor should discuss whether mediation or some other ADR procedure may be more appropriate than litigation, arbitration or other formal processes.⁵⁰ There may be costs sanctions if a party refuses ADR as evidenced by a number of decisions in the appellate courts.⁵¹ Gutman et al. have rightly observed that whether advising clients on ADR is based on a lawyer's duty to act in their clients' best interests or on their duty to the legal system, it is clear that negotiating settlements on behalf of clients and advising clients on how to settle matters without resorting to litigation is part of current legal practice.⁵²

The Civil Procedure Rules have undoubtedly influenced the way in which lawyers advise their clients regarding dispute resolution because since their introduction, there are indications that the adversarial vigour with which advocates pursued their clients' interests in the pre-Woolf era is now an unacceptable approach to take with regard to dispute resolution. Not only do the Civil Procedure Rules signal a significant shift in the regulatory framework within which litigation occurs, they also attempt to change the way the process of litigation is viewed.⁵³

More recently there have been important changes in the area of private family law in relation to dispute resolution. The Family Procedure Rules (FPR), as a result of developments in primary legislation, have actually gone further than their civil counterpart to encourage parties to use ADR and specifically mediation. FPR Part 3 deals with Non-Court Dispute

⁴⁷ D Nicolson & J Webb, (2004), "Lawyers' Duties, Adversarialism and Partisanship in UK Legal Ethics.", 2004 7(2) *Legal Ethics* 133-140.

⁴⁸ See the Court of Appeal decisions in: *Dunnett v Railtrack* [2002] EWCA Civ 303 where due to an unreasonable failure to accept an invitation to mediate, the winning party's costs of the appeal hearing were denied; *Halsey v Milton Keynes General NHS Trust*; and *Steel v Joy* [2004] EWCA (Civ) 576, a decision which made clear the principles governing the question of when a litigant's failure to engage in ADR will justify a court imposing costs sanctions and *PGF II SA v OMFS Company Limited* [2002] EWCA Civ 303, where the Court of Appeal delivered a judgment strongly reiterating its support for the role of ADR in civil litigation and further extending support to the *Halsey* principles.

⁴⁹ See the following Civil Procedure Rules CPR 1.4, which states that judicial case management extends to encouraging use of ADR; CPR 26.4(1), where the courts may stay cases to enable ADR to take place; the Practice Direction to CPR 29.5, where the courts can give directions regarding ADR on their own initiative without a CMC (PD para. 29 4.10(9)); under CPR 44.3(5) the court can consider parties' conduct on issues of costs (re Pre-action Protocols) and under CPR 44.5, the court can consider parties' conduct on issues of costs during the proceedings.

⁵⁰ Solicitors Code of Conduct 2007, available at <http://www.sra.org.uk/documents/code/rule-2-client-relationships.pdf> (accessed 23 March 2015).

⁵¹ See *supra* n. 47, notably the appellate decisions in *Dunnett v Railtrack* and *Halsey v Milton Keynes*.

⁵² Gutman, T. Fisher and E. Martens, "Why Teach Alternative Dispute Resolution to Law Students? Part One: Past and Current Practices and Some Unanswered Questions" (2006) 16 *Legal Education Review* 125, at p. 127.

⁵³ D. Webb, "Civil Advocacy and the Dogma of Adversarialism," (2004). *Legal Ethics*, 7, 210.

Resolution and is implemented through Family Practice Direction 3A, which in April 2011 introduced the Mediation Information and Assessment Meeting, or MIAM for short. Initially introduced as being an expectation for parties in marriage or relationship breakdown seeking a court order (to deal with the financial and/or children arrangements) to meet with a trained family mediator, first to learn about mediation, and secondly to see if they are suitable for it, the MIAM has since April 2014 become a requirement.⁵⁴ In the area of employment law, updated Tribunal Rules introduced recently as a result of secondary legislation set out a new duty for the Employment Tribunal to encourage the use of ADR, including ACAS conciliation, mediation and judicial mediation.⁵⁵

Findings from two small-scale research studies undertaken at the author's institution into solicitors' attitudes to mediation and its use for civil, family and workplace disputes in Kent, however revealed that whilst lawyers still tended to view litigation as the more traditional and effective way of responding to their clients' needs, in recommending litigation they would be acting in their clients' best interests. The studies did however reveal evidence suggestive of a general acceptance that there has been an increase in the uptake of civil/commercial and family mediation work and this increase may well be due to developments in the law which promote and encourage the use of mediation.⁵⁶

With regard to civil litigation in particular the recent High Court decision in *Bradley v Heslin* demonstrates the general approach taken by the courts to cases which in the view of the judiciary should not have been the subject of litigation. In his judgment in that case, Norris J made some pertinent comments about the use of mediation for such neighbour/boundary dispute type cases including the following:

It depresses me that solicitors cannot at the very first interview persuade their clients to put their faith in the hands of an experienced mediator, a dispassionate third party, to guide them to a fair and sensible compromise of an unseemly battle which will otherwise blight their lives for months and months to come.

I do not see why ... directing the parties to take (over a short defined period) all reasonable steps to resolve the dispute by mediation before preparing for a trial should be regarded as an unacceptable obstruction on the right of access to justice.⁵⁷

In light of such appellate decisions and the emphasis now being placed on embedding 'dispute resolution' within the CPR, lawyers' roles are having to change. Nagorcka et al. make the point in relation to Australia that whereas in the past within their jurisdiction lawyers may have been retained to 'win a case', now they may be required to provide legal services to clients to 'help resolve a dispute'.⁵⁸ This statement is as equally applicable to the

⁵⁴ Under section 10(1) of the *Children and Families Act 2014*, it is now a requirement for a person to attend a MIAM before making certain kinds of applications to obtain a court order. (A list of these applications is set out in *Rule 3.6* and in paragraphs 12 and 13 of the Act) The person who would be the respondent to the application is expected to attend the MIAM. The court has a general power to adjourn proceedings in order for non-court dispute resolution to be attempted, including attendance at a MIAM to consider family mediation and other options. See https://www.justice.gov.uk/courts/procedure-rules/family/practice_directions/pd_part_03a#para1 (accessed 26 March 2015).

⁵⁵ The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Note 3 to Schedule 1 deals with Alternative Dispute Resolution and states that; "a Tribunal shall wherever practicable and appropriate encourage the use by the parties of the services of ACAS, judicial or other mediation, or other means of resolving their disputes by agreement". Available at <http://www.legislation.gov.uk/ukxi/2013/1237/made> (accessed 26 March 2013).

⁵⁶ The Research Reports; *Local Solicitors' (Canterbury) Attitudes to Mediation and its Use and Regional (Kent) Attitudes to Mediation and its Use*, obtained responses from 27 solicitors' firms across the Kent region. The studies were made possible through research funding and whilst the reports are unpublished they are available upon request from the author.

⁵⁷ *Bradley & Anr v Heslin & Anr* [2014] EWHC 3267.

⁵⁸ Nagorcka, M. Stanton and M. Wilson, "Stranded Between Partisanship and Truth? A Comparative Analysis of Legal Ethics in the Adversarial and Inquisitorial Systems of Justice" (2005) 29(2) *Melbourne University Law Review* 14.

UK and it is hard to see in the face of this kind of attitudinal change and growing judicial interest in the use and encouragement of ADR, that dispute resolution as an academic subject will not attract more attention in UK Law Schools in the future. With increased judicial intervention and commentary on the subject of mediation in particular, the attitudes of legal educators must start to change and a more socio-critical curriculum approach be taken by law schools.

It should be noted that access to ADR is not necessarily any easier than access to the civil courts. In fact now that claims can be issued online the process of commencing court proceedings is simplified. Access to some forms of ADR is straightforward, for instance it is easy to find a family mediator who can undertake the MIAM if you first approach a solicitor; an internet search will also list local Family Mediation Council accredited family mediators in any given region, and the family mediator can then discuss with the parties their suitability for mediation.

Skills acquisition

Drawing on previous research undertaken by the writer into the benefits of both simulation and live clinic experiences using a dispute resolution focused module as the subject, it is evident that graduate and other useful transferable skills can be acquired through the study of dispute resolution and specific aspects of it as an academic subject. This is articulated in the author's research into the efficacy and value of role-play simulation in undergraduate legal education, situated in a final year law ADR module Civil and Commercial Mediation. Findings from the small-scale qualitative research study using questionnaires and focus groups revealed that situational learning within the context of a dispute resolution-based module (in this case it happened to be mediation) enabled the participating students, through engagement with aspects of simulated role-play activity, i.e. playing the roles of mediators and parties, to develop important key graduate skills, particularly organisational management, team-working and communication skills.⁵⁹ It is acknowledged that a significant amount of clinical legal education in Law schools worldwide is undertaken through ADR.

The writer also spent a semester at the University of Pennsylvania's Law School (Penn), which has a number of experiential clinics which are specifically designed to help students develop core lawyering skills and competencies. The clinics are varied and students are able to draw from challenging experiential learning opportunities in civil litigation, business transactions, child advocacy, mediation, legislation, interdisciplinary practice, international lawyering, appellate lawyering, intellectual property and technology law.⁶⁰

Of particular interest at Penn is the Mediation Clinic. This elective module, open to second and third year law students, enables them to act as frontline mediators in a wide range of 'real time' disputes. With faculty supervisors present, students co-mediate an average of four to five cases per semester at local courts, government agencies and at the law school in areas that include civil litigation, criminal, domestic, campus student discipline, international child custody disputes and employment discrimination matters. To complete the learning experience, students debrief with their faculty supervisor after the conclusion of each mediation. This clinic is a commendable vehicle for students to learn some core lawyering

⁵⁹ The research was part of a study was entitled "*An Investigation into Law Students' Perceptions of the Efficacy of Role-play Simulation as a Means of Studying Mediation*", submitted by the author as a dissertation for the final stage of a Master's Degree in Education.

⁶⁰ See <https://www.law.upenn.edu/clinic/> for more information about the Law clinics and externships that are offered by the Gittis Center for Clinical Legal Education at the University of Pennsylvania's Law School. See also the Mediation Clinic course at Columbia University Law School at <http://web.law.columbia.edu/alternative-dispute-resolution/mediation-clinic> (accessed 24 June 2014).

skills and competencies whilst at the same time appreciating the importance of having a flexible approach to dispute resolution.

Research

The area of dispute resolution and particularly ADR provides a research rich landscape and it is therefore somewhat surprising that such little research has actually been undertaken in this area, particularly in the UK, let alone in its context within the legal education field. Such university-led research may not only encourage outreach into the legal services community and assist the knowledge exchange agenda, but also inform and enrich the curriculum as well as even making an impact on a macro level by influencing policy-makers.⁶¹

An ongoing study in the area of dispute resolution undertaken by The School of Law at Canterbury Christ Church University (CCCU) into solicitors views and attitudes to the use of mediation mentioned briefly above, has given researchers the opportunity to make some useful comparisons with Professor Dame Hazel Genn's research in 2007.⁶² Professor Genn's research, now quite dated, looked at a voluntary mediation scheme run by Central London County Court established in 1996. The research undertaken by CCCU through its research and enterprise development internship scheme has, with academic staff direction, given the opportunity to final year undergraduate law students to engage in empirical qualitative research by using participants from the local and regional legal services community in Kent. The sample includes family, civil/commercial and employment law practitioners. Whilst the findings of the study so far undertaken are beyond the scope of this article, the research being conducted provides a wonderfully rewarding opportunity for undergraduate students to engage in research which has also served to inform and enrich the undergraduate curriculum. Such research provides an opportunity for research informed teaching and the findings of the Christ Church Study is useful evidence based research to support the dispute resolution curriculum, a pathway which is central to the LLB at CCCU.

Writing in 2002, MacFarlane acknowledged the existence of a significant cultural change taking place as a result of the widespread introduction of court-connected and private ADR programmes in the United States.⁶³ Some 13 years on the momentum continues in the US. For example in Philadelphia the Municipal Court (Civil Division) through its Dispute Resolution Program works closely with Penn Law School which provides student mediators to act as mediators in a wide array of cases. Clinical programmes such as the one at Penn can also support the notion that clinic can be used more widely within legal education. It works well and has done so effectively for years. Today such clinical programmes are playing a much more central role in the administration of justice as evidenced by the partnership developed between the University of Pennsylvania and the Municipal Court in Philadelphia for instance.

LETR

The debate about what ought to be taught within the law school curriculum either at undergraduate or postgraduate level is one which traverses world-wide jurisdictions. Such discourse with regard to UK Law Schools as part of legal services education and training (LSET) cannot however be considered without at least some passing reference to the recent

⁶¹ See n.55 for evidence of this.

⁶² Dame Hazel Genn & Others: *"Twisting Arms: Court Referred & Court Linked Mediation under Judicial Pressure"*. https://www.ucl.ac.uk/laws/judicial-institute/files/Twisting_arms_mediation_report_Genn_et_al_1.pdf (accessed 13 February 2015).

⁶³ MacFarlane *supra* n. 4, pp. 167–179. See also J. MacFarlane (ed.), *Rethinking Disputes: The Mediation Alternative* (Cavendish and Emond Montgomery, 1997), and F. Sander, "The Future of ADR" (2000) *Journal of Dispute Resolution* n 3–10.

Legal Education and Training Review (LETR) Report published in June 2013.⁶⁴ Despite the fact that undergraduate law degrees were generally outside the scope of the review, other than when there is a direct impact on the provision of legal services, there is however mention of the Foundations of Legal Knowledge in the report and whilst the review committee made no suggestions as to whether or not these should be changed, there is recommendation in the report that there should be a review to ensure that the foundational subjects remain relevant.⁶⁵ This included the suggestion that a broad content specification should be introduced for the foundational subjects.

Perhaps therefore as part of the recommended discourse it is time to consider the mandatory inclusion of socio-legalism within undergraduate legal education in the UK, otherwise there is a danger (if not already the case) that law students will exist in something of a vacuum and have little appreciation of law in context. Whilst it is accepted that not all law graduates will enter the legal profession, those however that do will have much more vocational and 'practice preparation' related curriculum when they study for the LPC or BPTC within which there is generally some inclusion of ADR for instance. One failure of the LETR Report as identified by Sanders was perhaps the fact that it does not distinguish socio-legal studies as a discrete subject from socio-legal approaches to substantive subjects.⁶⁶

One of the recommendations made by the Ormrod Review in 1971⁶⁷ concerned the objectives of the academic stage of legal education (training) which the committee considered should include a basic knowledge of the law, the intellectual training necessary to apply abstract concepts to case facts and an understanding "of the relationship of law to the social and economic environment in which it operates". These were highly sensible recommendations, the third of which suggested that an element of socio-legal studies should be made compulsory in some shape or form. This aspiration obviously never became a reality; however the LETR does provide a glimmer of hope for the future by suggesting that:

The balance between Foundations of Legal Knowledge in the Qualifying Law Degree and Graduate Diploma in Law should be reviewed and that a broad content specification should be introduced for the Foundation subjects.⁶⁸

It is encouraging also that the LETR does at least make passing mention of ADR, indeed Recommendation 13 states:

On the Bar Professional Training Course (for intending barristers), Resolution of Disputes out of Court should be reviewed to place greater practical emphasis on the skills required by Alternative Dispute Resolution, particularly with regard to mediation advocacy.⁶⁹

⁶⁴ J Webb, J. Ching, P. Maharg and A. Sherr, *Setting Standards: The Future of Legal Services Education and Training Regulation in England and Wales* (London, Legal Education and Training Review, 2013) (LETR Report). Available at: <http://letr.org.uk/the-report/index.html>.

⁶⁵ *Ibid.*, p.xiv; Recommendation 10 states that: "The balance between Foundations of Legal Knowledge in the Qualifying Law Degree and Graduate Diploma in Law should be reviewed, and the statement of knowledge and skills within the Joint Statement should be reconsidered with particular regard to its consistency with the Law Benchmark statement and in the light of the other recommendations in this report. A broad content specification should be introduced for the Foundation subjects. The revised requirements should, as at present, not exceed 180 credits within a standard three-year Qualifying Law Degree course."

⁶⁶ Sanders *supra* n.5, p.157.

⁶⁷ *Report of the Committee on Legal Education* Cmnd. 4595, (London, H.M.S.O, 1971), (Ormrod Report), para 185(5) (ii).

⁶⁸ See Webb *et al.*, *supra*, n. 63, LETR Recommendation 10.

⁶⁹ *Ibid.*, LETR Recommendation 13.

But this is the extent to which the committee's report ventures in providing any specific mention about legal education and the teaching of dispute resolution as an academic subject in any form and in doing so confines its discussion to advocacy and legal representation. However as the Executive Summary of the report states, the aims of the review are: "to ensure that England and Wales have a system of legal services education and training that is fit for the future...", and that the first element of the committee's remit is; [to ensure] that the individual legal services providers of the future have the knowledge, skills and professional attributes to meet present and future needs of business, consumers and public interest".⁷⁰ In her observations on LETR and LSET, Patricia Leighton makes the point that LSET must equip people for the future not just today.⁷¹ It is therefore argued here that part of equipping future legal practitioners with the appropriate skills and knowledge for practice, is the embedding of commercial awareness and social justice elements within LSET which include sound knowledge and understanding of recognised approaches to dispute resolution.

The Future

The changes in the legal services sector mentioned earlier, including those concerned with the legal profession's regulation, have started to have a major impact on many aspects of social justice. These changes together with the development of an increasingly globalised market place have required the legal profession in England and Wales to adapt to the requirements of a changing landscape. This has had a bearing on the way in which legal services are delivered and in this regard information technology will have an ever more important role to play in the development of legal services in the future. According to Susskind only 5% of the UK [adult] population do not have access to the internet. Given what is mentioned earlier about the justice gap, those who do not have access to justice are the majority. Online legal services could well form an important part of the future: these include free web-based services, subscription-based services for law firms, chargeable services for alternative business structures and publishers, the effect of which will arguably be both liberating (for the consumer of legal services) and disruptive (for those providing legal services).⁷²

Current and future lawyers cannot therefore ignore what is happening around them. The use of IT will bring about changes to the way in which lawyers operate and this applies to those practising in the broad area of dispute resolution. Future lawyers need to know how the landscape is changing in the UK as this includes proposals such as those recently announced by the Civil Justice Council and supported by the Master of the Rolls, to introduce Online Dispute Resolution (ODR) for certain types of claim. The recent Civil Justice Council's report recommends an Online Dispute Resolution system for fast track value claims. Under the proposals, tier one would be "dispute avoidance", helping people diagnose their issues and identify the best way of resolving them. Tier two would be labelled "dispute containment" using facilitators to help the parties reach agreement on resolving the issue. Finally, tier three would be "dispute resolution", employing the use of 'online judges' to consider cases online, largely on the basis of papers received electronically, but with an option of telephone hearings.⁷³ If the lawyers of tomorrow are to be adequately prepared for legal practice, the reality of such changes and what they mean to those wishing to enter

⁷⁰ Ibid., Executive Summary, p. ix.

⁷¹ P. Leighton, "Back from the Future: Did The LETR Really Prepare Us for The Future?" *The Law Teacher* 48.1 (2014) 48(1): 79-93.

⁷² Susskind *supra*, n. 6, pp.84-91.

⁷³ See the BBC online report entitled: "eBay-style Online Courts Could Resolve Smaller Claims" available at: <http://www.bbc.co.uk/news/uk-31483099> (accessed on 23 February 2015).

the legal profession cannot be ignored and omitted from inclusion somewhere within legal education.

The indications suggest that ADR, particularly mediation, is likely to become more mainstream in the future. Twenty years ago speculation about the potential for institutionalisation of mediation was being discussed however from the government's standpoint, the provision of a general network of mediation agencies, parallel to the courts, was thought to be almost unimaginable on grounds of cost.⁷⁴ The lack of government intervention has however allowed the growth and establishment of private (unregulated) mediation services which are frequently being used to assist parties in dispute to resolve a whole range of civil and commercial disputes.

What is certain is the fact that the approach to how those in dispute will access legal advice and the methods by which they will resolve their civil disputes will undoubtedly alter over the course of the next 20 years. Legal educators have a duty to keep pace with these developments.

Conclusion

The case which has been put forward in this article suggests that there is a need to teach aspects of dispute resolution as part of the socio-legal education agenda at some stage of the legal education process as part of LSET in UK Law Schools. In doing so it will reflect the prevailing attitudes to dispute resolution and the prominent place it occupies within the field of legal practice. The inclusion of this within the curriculum as an academic subject is arguably essential and will provide an opportunity for Law Schools to adopt a 'law in context' approach to legal education, something that was suggested almost 50 years ago by Sir Roger Ormrod. If aspects of dispute resolution are not taught within the law degree at undergraduate level for instance and Law Schools continue to rely largely on the Langdellian (predominantly appellate) case study and rote learning approach to the study of law, then law students will have an unrepresentative and unrealistic view of the world of legal practice and those entering the legal profession will not be prepared for the realities with which they will be confronted. As Sanders puts it the socio-legal approach to legal education is one way of saying that students should do subjects that are about 'law' as well as subjects that are 'law', and one way of looking critically at how law works.⁷⁵

If the debate is one which is considered worth having, and the arguments put forward in this article suggest that it is, then questions as to where, when and how dispute resolution as an academic subject should be taught must be considered. Is it appropriate to have stand-alone modules centred on aspects of dispute resolution if so should those modules be core even foundational to the study of law at undergraduate level or should aspects of dispute resolution be included by 'proxy' within the substantive core law subjects like Tort, Contract, Equity & Trusts, Property Law and EU Law or within an English Legal System type module? It might be appropriate to offer optional modules at higher levels of undergraduate study which focus on either dispute resolution or ADR, although some students not choosing those options would not be exposed to what are arguably very important aspects of current legal practice approaches.

⁷⁴ S. Roberts, "Alternative Dispute Resolution and Civil Justice: An Unresolved Relationship" (1993) 56(3) *Modern Law Review* 452-470.

⁷⁵ Sanders, *supra*. n.5, p.168

Perhaps the place for including dispute resolution within legal education should be within postgraduate study on the LPC or BPTC this would make sense from the perspective of understanding lawyerly ethics for those postgraduate law students wishing to become practising lawyers. On the other hand, if that approach were adopted those students not going on to practise law will probably never have knowledge of the dispute resolution continuum due to there having been no such inclusion within their law degree curriculum. Alternatively the topic could be included pervasively throughout the levels of both undergraduate and postgraduate study.

Whatever the considered approach, it is strongly argued that somewhere within the law curriculum at either undergraduate or postgraduate study of law in the UK, students must be exposed to, and gain some understanding and appreciation of, dispute resolution. Whilst Duffy and Field in their article “Why ADR must be a mandatory subject in the law degree: *A Cheat Sheet for the Willing and a Primer for the Non-Believer*”, have put forward 10 strong arguments as to why ADR should be a compulsory subject in the Australian law degree (as it is within the law degree at QUT),⁷⁶ this article suggests that the approach for a UK law degree in terms of curriculum content should actually be all-encompassing and incorporate all major forms of dispute resolution commonly used, including litigation. There is a good case for making the teaching of this subject compulsory at the undergraduate stage of legal education in the UK. Duffy and Field have invited those who accept their arguments, to add to them and much support has been given to most of those authors’ 10 arguments in this article. Beyond arguing for a more holistic approach to the teaching of the subject matter in UK Law Schools, it is proposed here that the inclusion of dispute resolution as a compulsory academic subject would also be justified on grounds of research opportunities, its socio-legal significance and the opportunity that such an academic subject presents in terms of skills acquisition.

The stand-alone academic subject model approach is the one which is strongly argued for here as being the most all-embracing and is what is embedded within the curriculum at Canterbury Christ Church University where there is a defined ‘dispute resolution’ pathway through the levels of study of the undergraduate law degree. The pathway includes aspects of basic conceptual understanding of conflict through to more in depth study of principles associated with the dispute resolution continuum, coupled with the opportunity to specialise in a particular process where practical skills can be acquired.⁷⁷ Whilst generally under-explored in UK Law Schools this is not a unique approach; there are developments afoot elsewhere, such as the core LLB Year 2 dispute resolution skills module at Plymouth University’s Law School, the optional Year 2 dispute resolution skills module within the LLB at the University of the West of England in Bristol and the final year optional dispute resolution module at Kingston University for instance.

The Foundations of Legal Knowledge are due for review. The Legal Education and Training Review Committee recognised that in 2013, but so did the Ormrod Committee when reviewing legal education provision in the early 1970s. Are we to wait until the next legal education review before the issue is properly addressed? There is now a real opportunity for the policy makers, with assistance from legal education regulators,⁷⁸ to at least consider the arguments for including a more socio-legal approach within the Law School curriculum and

⁷⁶ Duffy and Field *supra* n 16, p.12.

⁷⁷ At Year 1 undergraduate Law students take Introduction to Dispute Resolution as a compulsory module at Year 2 they take the compulsory module Theory of Dispute Resolution (TDR) and then may opt to take the Civil & Commercial Mediation elective module at Year 2 after completing TDR.

⁷⁸ The Solicitors Regulation Authority, the Bar Standards Board and the Chartered Institute of Legal Executives.

include the teaching of dispute resolution as a defined academic subject area for the twenty-first-century law school.