USING AUTHENTIC ASSESSMENT TECHNIQUES IN EXTRA AND CO-CURRICULAR ACTIVITIES (ECCAs) TO IMPROVE TEACHING STANDARDS ON ACADEMIC LAW PROGRAMMES

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Authentic assessments are aligned with workplace activities, as opposed to the more artificial, largely exclusively summative and austere, nature of traditional university assessment methods. In this paper, the authors assert that authentic assessments, although traditionally the preserve of extra and co-curricular (ECCA) course delivery, have the crucial benefit of improving teaching standards on academic law degree programmes, through ensuring that the key 'critical reasoning' skill which ensures academic assessment success, has been identified by the assessor and developed by the student throughout the assessment. In this paper, the essential elements of the critical reasoning skill is subdivided into its composite parts, into a simple checklist, for use in legal assessments. This checklist, when applied by the assessor, has two main purposes: (i) to ensure that the student has achieved the appropriate grade for the assessment; and (ii) to ensure consistency and maintenance of quality in the assessment method.

Introduction

Authentic assessments are aligned with workplace activities, as opposed to the more artificial, largely exclusively summative and austere, nature of traditional university assessment methods. Doing more than simply avoiding the saturnine, authentic assessments improve students' academic performance (Berger & Wild, 2015a) and employability rates, (Berger & Wild, 2015d). However, in this paper, the authors assert that authentic assessments have a further benefit – the improving of teaching standards, through ensuring that the key 'critical reasoning' skill which ensures academic assessment success, has been identified by the assessor and developed by the student throughout the assessment.

The nature of critical reasoning in legal assessments require that the student constructs an argument, using authority to support it. The foundation of the argument will be the attempted balance between the guiding master principles of the common law - justice, fairness and the common good, which will naturally lead to consideration of the balance between the rights of individuals in any given society, against that of the welfare of that society itself. We say it is an 'attempt', because, as we establish, there are no 'right' answers in law, as with other cognate disciplines. In essence, that balance will never be struck, but it is in the attempt, that a 'good' rather than a 'right' answer will be found.

We argue that authentic assessment provides an unparalleled opportunity to delve deeper into the psyche of the student, to explore areas of social, political and economic interest which may not have been apparent from the outset. This two-way communicative strategy,

normally delivered as an extra or co-curricular activity (ECCA), such as mooting, allows students to improve or lower their grade mid-assessment as the lines of enquiry are developed. The by-product of this method, is that it ensures that teaching standards are improved, not just in ECCAs, but in academic degree delivery as well. Legal assessors will no longer be able to rely on 'model answers' or 'marking bulletpoints', as no guidance will exist at the heart of the assessment, beyond that of the attempted balance between the guiding master principles of the common law.

In this paper, the essential elements of the critical reasoning skill is subdivided into its composite parts, into a simple checklist, for use in legal assessments. This checklist, when applied by the assessor, has two main purposes: (i) to ensure that the student has achieved the appropriate grade for the assessment, by providing a clear framework which emphasises the development of the key critical reasoning skill, and ensure that it has been rewarded; and (ii) to ensure consistency and maintenance of quality in the assessment method, by providing a clear framework which ensures that the assessor asks the right questions. It is this participle which improves teaching standards.

Authentic assessment

Authentic assessment is a method that presents a task for students to perform and a way to measure their performance on the task. It tests a student's ability to solve hypothetical problems, which then assesses how effectively a student solves a real world problem, and requires students to apply a broad range of knowledge and skills. Authentic assessment: …can raise aspirations and increase intrinsic student motivation through explicit demonstration of career alignment and relevance of curriculum activities' (QUT Office of Teaching Quality, 2009), and are: '…closely aligned with activities that take place in real work settings, as distinct from the often artificial constructs of university courses.' (Boud & Falchikov, 2007).

Authentic assessment is supported by the Quality Assurance Agency for Higher Education (QAA)'s aim to ensure that law students graduate with practical skills, as well as the traditional knowledge and understanding of the law. In this regard, the Draft QAA Subject Benchmark Statement for Law (2015) provides that:

> …A law graduate is far more than a sum of their knowledge and understanding, and is a well skilled graduate with considerable transferable generic and subject-knowledge, skills and attributes… We encourage Law Schools to help students to articulate to employers what they can do and what their qualities of mind are by using this statement:
> • Ability to produce a synthesis of relevant doctrinal and policy issues, presentations of a reasoned choice between alternative solutions and critical judgment of the merits of particular arguments

- Ability to apply knowledge and understanding to offer evidenced conclusions, addressing complex actual or hypothetical problems
- Ability to communicate both orally and in writing, in relation to legal matters, including an ability to listen and respond to oral stimuli including questions and instructions.' (QAA, 2015)

Authentic assessment can be incorporated into almost any type of course delivery, including the academic law degree, but its methods have been largely centred on extra and co-curricular courses (ECCAs), as they have largely oral components, and were originally designed to increase student engagement, rather than directly augmenting the academic learning process. However, indirect benefits of student engagement to improve academic performance has been recognised by Hart et al (2011) who state 'through the process of engagement, students are more likely to experience a positive and fulfilling approach to the accumulation of the 'legal content' in their law degree'.

Conversely, it is our assertion that ECCAs do more than simply increase student engagement, which then has an indirect correlation towards improved academic performance. We argue that authentic assessment in ECCAs has a DIRECT impact on law degree performance, and have found that students, who actively participate in University run and accredited ECCAs, excel on the law degree (Berger & Wild, 2015a).

In this paper, we assert that the continuous mid-assessment formative assessment techniques utilised within authentic assessments in ECCA delivery, are perfectly placed to monitor and improve teaching practices by ensuring that the key transferable component to law degree success - critical reasoning skills – remain the key focus of legal teaching delivery. Critical reasoning is the foundation of argument construction in law, and ensures that students take an 'outwards' approach to legal research and assessment, by placing the assessment BEFORE the content; rather than an 'inwards' approach which places the assessment AFTER the content. The outwards approach is optimum, because it preferably allows students to use law to support argument, rather than use law to construct an argument.

Extra and co-curricular activities (ECCAs)

The School of Law delivers various ECCAs, each designed to echo a different area of legal practice, including among others:

- Mooting – legal research and application on technical points of law
- War of Words (WoW) – high pressure emergency applications
- Mock trials – testing of evidence
- Debating – logical reasoning

- Mediation – alternative dispute resolution

Each course incorporates formative and summative assessment methods and is delivered in at least three separate assessment stages and involves an element of public speaking. Each course (apart from mediation) also incorporates an element of competition, to align with the adversarial nature of the UK legal system. In this paper we examine the format of the Mooting and WoW ECCAs to illustrate the different, but equally important, modes of delivery.

To ensure the authenticity of the assessments, there are two settings for the ECCAs: The authentic Crown courtroom; and the bespoke mediation centre. Most law schools deliver practical courses in featureless classrooms, inauthentic to the environments encountered in practice. However, at the School of Law, the Courtroom is an open forum with spectator areas, an authentic distance between Bar and raised bench, authentic and imposing décor. The Mediation Centre has a glass-fronted central meeting room with separate caucus meeting rooms for client instructions/negotiations in private. Students become comfortable with challenging environments and quickly become accustomed to the formality of the settings.

The mooting ECCA format is as follows: At the start of the academic year there are two hour combined lecture/workshops for three consecutive weeks, which explains the basic content of the course, and teaches basic skills. Students then pair-off into teams of two as specified by the ECCA requirements – this is recommended to be outside of their own year/programme groups to encourage peer-led tuition and support. Students prepare written presentations first, with intensive legal research, as it would be in practice. Oral submissions are made in the courtroom with a tutor judging, again as would be found in practice. Post-assessment formative feedback, from the tutor, is provided on: (i) Content; (ii) Presentation. Summative appraisal provided for written and oral elements. Students are encouraged to watch other students mooting/receiving tutor feedback.

The War of Words (WoW) ECCA format is as follows: WoW allows a single student to make a one minute argument on a controversial (not specifically legal) topic, who then faces high pressure rebuttals from the audience. This tests: research skills, critical analysis, resolve under pressure, and public speaking skills. The format is a 'flipped' version of an emergency legal application, with one applicant and many judges, instead of the traditional opposite position of one judge in open court with many applicants. WoW is confrontational, and places the student under immense pressure to react to questions from multiple directions.

Formative v summative assessment

Formative assessment is vital where there is an ongoing assessment, such as in advocacy competition formats – this can be: (i) peer-led and/or tutor-led; and (ii) active and/or

passive (receiving feedback yourself or observing others receiving feedback); whereas summative assessment is vital to determine the winner of a stage of the competition.

> Assessment is formative where it occurs as part of a progressive learning exercise, and where the main purpose is to facilitate student learning…Summative assessment reports on and certifies the "achievement status of a student.
>
> (Sadler, 1989)

Authentic assessment naturally incorporates both methods, as two-way interaction between participants/assessor is encouraged and inevitable - formative and summative assessment methods are not mutually exclusive.

Legal practice incorporates both methods, so it is natural that authentic assessment should too: Formative: The legal community relies largely upon self-regulation, education and improvement, to ensure that practitioners provide clients with exemplary service – without which it cannot be said that the system upholds the Rule of Law. Inns of Court, the Bar Society, the Solicitors' Regulation Authority et al, require practitioners to develop themselves and others throughout their professional careers. The nature of the hierarchical court system and authorship of legal journal articles are a form of peer-led formative assessment of court judgments. Summative: The UK legal system is adversarial in nature and demands a 'winner' and a 'loser' in each case.

Formative assessment techniques in ECCAs

Authentic assessment is normally a two-way communication scenario, which means that students are able to you respond to their assessor mid-assessment and make tweaks and minor adjustments to their performance as familiarise themselves their assessor's demands, personality and character traits. This means that the assessment is within a constant formative framework with a summative assessment at the end, followed by a formative assessment when feedback is provided. A traditional paper-based assessment has only one formative aspect – the feedback at the end – which as Montgomery (2002) notes 'are done after rather than before the writing, so they cannot serve as guidelines, compromising the value of writing comments at all'. Equally, this mode of assessment is primarily used in a summative way 'to differentiate between students and rank them according to their achievement' (Gulikes et al, 2004) – the testing culture - and, as such, does not sit easily with current educational goals which focus to a greater extent on the development of 'competent students and future employees' as opposed to solely on the acquisition of knowledge (Gulikes et al, 2004).

As Garfield (1994) observes though, 'the primary purpose of any student assessment should be to improve student learning' by 'enhancing the problem-solving and critical thinking abilities of students' (Montgomery 2002). It is this formative-rich, authentically assessed

environment which improves student performance in not just ECCAs, but on the law degree and beyond. The student is made to, in effect, constantly review their performance and enter a mind-set which tests flexibility, confidence, critical reasoning, psychological evaluation skills, and response skills. Interestingly, these are all skills which help the student who is studying for a paper-based assessment.

In the traditional 'one-shot', paper-based assessments, a student is able to ask for feedback after the exam has been sat, but how effective will it be? The student will barely remember the assessment questions or what frame of mind they were in on that exam day, and so the feedback will almost feel as if it belongs to someone else. In any case, the next paper-based exams are a whole year away, so the student's implementation of the feedback will not be particularly effective. Consequently, the function of assessment needs to change from being summative to also performing a formative goal of enhancing student learning. Increasing the authenticity of assessment is expected to have a positive influence of student learning and motivation (Herrington & Herrington 1998).

Taking mooting – which has a long standing presence within legal education (Keys & Whincop, 1997) - as an example of continuous mid-assessment formative feedback: There is one thing constructing an argument and giving advice in a paper-based exam scenario, which does not matter which 'side' the student takes as long as they make the soundest argument possible. But when the student is forced to represent a hypothetical client, who will not likely readily accept advice that their case lacks merit, the student starts thinking creatively, and will develop an argument mid- assessment, if the original prepared position does not seem to be effective.

During a moot, the student commences the oral assessment with a prepared skeleton argument, which has been submitted before the moot, to allow the assessor to prepare questions. The timed (usually 10-20 minutes) oral assessment is a 'conversation' between the student and the tutor, designed to test the student's knowledge of not only the relevant law relating to the topic, but also the student's intelligence in understanding why the legal principles exist and how they correlate with other topic areas. Depending on the standard of the student, the tutor is able to tailor the questioning to allow the student to develop the argument well beyond that of the original written skeleton. However, this requires tutors 'to become ever more skilful in their ability to evaluate teaching situations and develop teaching responses that can be effective under different circumstances' (Darling-Hammond & Snyder 2000).

In fact, it could be argued that since there are no 'right' answers in law, the assessment is geared towards discovering more than simply a student's legal knowledge – it is also an effective means of testing emotional intelligence and wider knowledge of social and political issues. As Ku (2009) notes assessments which support open-ended responses 'makes it

possible to assess [an] individuals' spontaneous application of thinking skills on top of their ability to recognize a correct response', enabling the tutor to evaluate the critical thinking performance of students.

Further, by developing a student's arguing skills, the tutor is able to demonstrate that the construction of a legal argument is closely aligned with critical reasoning skills – a skill which is not usually expressly taught as a part of the academic degree curriculum, but which is a vital component for optimum law degree performance.

Of course, as noted earlier, it is important that the assessor is trained in asking the right questions, to elicit optimum responses from the student, so ECCAs must be run and accredited by the university, with trained and experienced staff - rather than as a student-led society which cannot guarantee rigour. To ensure assessment standards are maintained, Berger & Wild (2015b) explain how authentic assessment can be used as a teacher-training and monitoring aid.

While the traditional 'paper-based' assessment strategy provides a pragmatic solution to the problem of a general lack of time and resources to grade students en masse, the argument that authentic assessment is too 'resource-hungry' to be used across the assessment framework in academic law degree delivery, is rebutted by the authors (Berger & Wild, 2015c).

Students should be using law to support, rather than construct an argument

Within the sphere of legal education, the student's argument must come from his/her own experiences of the world and the society in which he/she lives. It must also be supported by authority. This is not 'authority' in the strict 1651 Hobbesian vernacular (as law emanating from a sovereign), but more as 'authority without an author', which as van Roermund (2000) argues is 'irreducibly first-person bound' within a legal system as a 'socio-political institution' and therefore, one can attack and deny legal authority in certain procedures. Legal authority makes itself vulnerable by providing in advance for counter-action. In yet other words: exercising legal authority requires, among other things, arguing, convincing, persuading and, in general, confronting the audience that imputes authority to a certain body.

 This first-person argument, using legal authority to support it, provides the perfect balance between qualitative and quantitative studies, and is not only the foundation of legal argument, but that of the common law system itself. For this reason, we can say that the perfect legal essay is one which makes a novel contribution to the legal system and in itself becomes 'authority'.

It is important to appreciate that the student must pick one side of the argument and use the law to support it, not the other way around. It would be poor assessment practice to simply research the available law and to then decide which principle proves to be the best 'fit'. Indeed, if there is no legal authority to support a student's answer, but the student is still able to demonstrate that they have 'left no stone unturned' looking for it, then the assessment piece should be good enough to publish in a highly regarded legal journal.

Each legal problem will have two sides, even if the assessment simply asks the student to 'discuss' or 'explain' an issue. Within legal education, the term 'explain' does not have the same connotations as it might for other disciplines. Rather, it means 'construct an argument'. It is a polite invitation for the student to defend their position. In other words, once the student has looked at the argument from both sides and has done the required research, he/she must decide which side is more compelling and then explain why this is the case. In the words of Thomas Cowan,

> The burden of all pragmatic philosophy is that to arrive at final truth is fatal. But equally fatal is failure to know whether our striving brings us nearer or farther from the truth. In a word, our task is to define truth in such a way that, although we must never arrive at it, yet we must be able to approach it indefinitely…We accept then the fundamental tenet of pragmatism. No generalisation or law remains final. It becomes fact or datum in the further pursuit of truth. No fact is final. Its meaning becomes absorbed in law or generalisation. There is no fixed starting point for science.
>
> (Pound, 1999 ed.)

In other words, in a legal assessment, as with other disciplines, there can never be a 'right' answer.

Inevitably, this will entail the student providing an opinion, but not in the sense of it being a rhetoric based on a vague gut feeling. Rather, as noted above, it should be an expert opinion based on research, knowledge of legal principles and an appreciation of policy considerations. At the very heart of this opinion is the student's own constructed argument based on knowledge of the guiding master principles of the common law – justice, fairness and the common good – due to the fact that there is not a legal authority in the world that can provide the perfectly correct answer (Dworkin, 1978). Nevertheless, the student's careful consideration of all of the available source material will ensure that their answer should have both resonance and legitimacy.

Constructing an answer in the common law means balancing the rights of individuals against the welfare of wider society, which will naturally entail ensuring that principles of justice,

fairness and the common good are adhered to. As Pound himself argued in his seminal work *'The Spirit of the Common Law'*):

> …It follows that, following assertions made in the 1776 Declaration of Independence, the common law was taken to be a system which gives effect to the individual natural rights of man.' However, Pound continues: 'Men are not asking merely to be allowed to achieve welfare; they are asking to have welfare achieved for them through organised society'… which leads naturally to the conclusion: 'Although we think socially, we must still think of individual interests.

<div align="right">(Pound, 1999)</div>

 For the law academic assessor, authentic assessment is the most effective means of eliciting an answer which examines this key balancing act. In a traditional paper-based assessment, the content of the piece is dictated by the student, and there is no opportunity, mid-assessment, to enquire whether the student has considered the wider picture.

In authentic assessment, the student is available for further testing – at whichever standard they have entered the assessment on. Since there are no absolutely correct answers in law, there will always be scope for further testing – and authentic assessment is the only effective forum for this to take place. Of course, this means that the assessor must be experienced and trained to elicit the optimum responses to allow students to properly fulfil their potential, and so authentic assessment methods offer the most effective environment to improve and monitor teaching practices (Darling-Hammond & Snyder, 2000).

Improving and monitoring teaching practices

Let us take a question on the constitutional law topic of 'the UK doctrine of parliamentary supremacy,' to examine the approach needed for an optimal answer:

Question (a):

To what extent, if any, has the United Kingdom's traditional parliamentary supremacy doctrine been affected by its membership of the European Union?

The key case in this area of law, is the House of Lords decision in *Factortame No.2* [1991] 1 AC 603, in which a 1988 UK was seemingly dis-applied in favour of an impending conflicting EU decision, which would seem an infraction of the UK's traditional doctrine of parliamentary supremacy.

So with this issue in mind, the answer might be to examine the judgement in *Factortame*, investigate the key reasons for the decision, and then comment on whether the decision

struck the correct balance between the guiding master principles of the common law –
justice, fairness and the common good. On investigation through the body of UK and EU
case law, it might be noted that the House of Lords decision was based on the following
three factors that:

- Lord Denning had set a 1980 precedent that because of the UK's voluntary
  acceptance of Treaty law, EU law was supreme in certain limited areas, and that only
  express repudiation of the Treaty was likely to redress the balance back in favour of
  UK supremacy;
- The European Court of Justice was likely to find in favour of the individual against the
  UK, and that the UK had accepted ECJ jurisprudence as binding on UK courts; and
- Since there was no express provision in the 1988 Act denying the application of EU
  law in this matter, it should not stand.

Therefore, the House of Lords in *Factortame* had given effect to:

- Stare decisis of the previous UK court's decisions;
- The will of the 1972 Parliament, who had voluntarily ceded some powers to the EU
  and had done nothing to overturn the UK courts' decisions; and
- The will of the 1972 Parliament, over that of the 1988 Parliament.

Was this balance correct? Some students might argue yes, and some no. If the court had not
found for the individuals, the EU would likely have pressed for sanctions against the UK,
which the UK public would not likely have deemed for the common good at that time. Yes,
we are in a political climate today in which a significant proportion of the populace consider
the UK's membership of the EU as less beneficial than it did in the 1990's, but that is within
a different financial and social climate.

By adhering to stare decisis, the courts justified their decision to protect the individuals; by
giving effect to the will of the 1972 Parliament, the court upheld the doctrine of
parliamentary supremacy after a fashion (it was simply the wrong Parliament), even if not
strictly adhering to the Doctrine of Implied Repeal; by giving effect to the will of the EU
Parliament, the court acted in the common good. This is not to say that it would have easily
justified a departure from the EU via a 1988 parliamentary express repeal of the 1972 Act,
but this did not happen, not even after the 1991 House of Lords decision. To answer the
question optimally, the student must argue not only how the balance was struck by the
courts in 1991, but what the effect of the decision has had on the modern UK.

Now let us take an authentic assessment question on the same topic, covering similar
content:

Question (b):

The town of St Albans has a market in its centre, running six days a week.

Every Wednesday, a special market is set up, with stalls owned by French nationals selling various authentic French foods, clothes and collectibles.

At the end of each market day, the town centre is covered in rubbish from the stallholders. St Albans County Council demand that the French stallholders should pay extra to clear the rubbish on Wednesdays, since they do not pay council tax.

In response to St Albans County Council's lobbying of Parliament, the (fictitious) Special Refuse Tax Act 2015 ('the Act') has come into force, stating that all non-UK residents who trade on UK soil must pay £100 per trading day for refuse collection.

Pierre and Yves, from Calais in France, run a bakery stall on Wednesdays in St Albans market, and have just received a payment demand under the new Act. They argue that the Act contravenes European law, and are refusing to pay.

Advise Pierre and Yves.

We can see that questions (a) and (b) will cover similar content, except that with (b), the student has been asked to represent a specific (albeit hypothetical) client, much as they might encounter in a problem-style paper-based assessment. However, the difference between (b) in a paper-based assessment, and the same question used as an authentic assessment in, say, a moot ECCA, is that the assessor in the ECCA is involved with the assessment process, which allows further and deeper testing to take place mid-assessment.

For this further mid-assessment testing to take place, the assessor must be skilled and experienced in assessing authentically, which means being highly knowledgeable on not only the subject matter of the assessment, but also the guiding master principles of the common law.

Interactive questionnaire

The following simple checklist that an assessor needs, to establish a student's critical reasoning skills, has only four components:

1. Has the student constructed an argument (van Roermund, 2000)?
2. Has the student considered the guiding master principles of the common law – justice, fairness and the common good (Pound, 1921)?

3. In considering (2) above, has the student sought to balance the rights of the individuals against the welfare of society as a whole, in line with Cowan's (1999) views on Pound's (1921) stance?
4. Has the student supported their answer with legitimate authority (van Roermund, 2000)?

By answering these questions in the affirmative, the student has used the law to support their answer, not to construct it - in line with van Roermund's, Pound's and Cowan's views - and by doing so, has demonstrated critical reasoning skills. Conversely, and importantly for the focus of this paper, by asking these questions and eliciting the student's answers, the assessor must demonstrate that they have been able to confirm the legitimacy of the student's answer.

Conclusion and recommendations

It is our conclusion in this paper, that authentic assessment in ECCA delivery is a vital component in improving and monitoring teaching practice - which then has a direct correlation with improved student academic performance on the law degree. Key critical reasoning skills are accrued by demonstrating an ability to construct an answer qualitatively, and then quantitatively supporting it with authority. Law educators, who set assessments with instructions to students to 'explain' or discuss' areas of law are really, in effect, asking students to construct arguments. This paper ensures that the best law student critical reasoners are rewarded accordingly. An inevitable by-product of this identification and testing of the key critical reasoning skill, is that law teaching practice improves, as long as the simple four-point checklist is satisfied.

As far as augmenting academic law degree delivery is concerned, Berger & Wild (2015a) note that the School of Law awarded 35 students with a Certificate or Diploma in Professional Development, in the academic year 2014-15. These students all participated in ECCAs with an authentic assessment delivery method. Out of the these students, 34 received a 1st Class or Upper Second Class (2;1) grade on their law degree. This figure of 98% receiving the highest awards, compares with 48% across the entire cohort – doubling the academic law degree performance of the ECCA students.

The starting cohort on the law degree entered university on an average UCAS (or equivalent) tariff of 340 points, while the ECCA cohort entered on an average 307 points, which places them at their entry point at a lower-than-average starting band. This large swing from below-average, to top achieving cohort, is attributed to the 35 students accruing crucial transferable critical reasoning skills, developed through continuous mid-assessment formative feedback on ECCAs, which then improved their law degree academic performances.

Berger & Wild (2015c) investigate how perceived resource restrictions may be overcome, to allow authentic assessment techniques to be used in the law degree, and not solely in ECCA delivery.

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