In a digital age and where significant assets may consist of dematerialised instruments, are our existing rules sufficient to provide a fair and effective regime governing the location of assets?

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Critical Reflection and Reflexivity
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Critical Reflection and Reflexivity: 
A personal critique of my doctoral studies

Introduction

The importance of reflection in learning has been well documented in a number of contexts. Argyris and Schön have, for example, considered its importance in organisational development whilst Moon has considered its place in learning in higher education. More recently, the role of reflection has been explored in both the legal education and the professional legal education contexts through the work of academics such as MacFarlane, Hinett and Leering. The role of reflexivity in social sciences research (most notably used by Bourdieu) has been developed and introduced into a number of other disciplines including education. It is now accepted that reflexivity has a place in professional doctoral research, as is evidenced by the requirement for the Document 6 assignment itself and demonstrated by the work of academics such as Forbes. But what does it mean to be reflective and reflexive and why are these techniques considered to be so important in the learning process? This paper will analyse both terms and then consider the extent to which they can be used as tools with which to examine my own learning during the course of my Professional Doctoral studies. To the extent that they can be so used, this process will assist me in assessing my personal development as a researcher and how far it aligns to the Vitae Researcher Development Framework.

What is reflection and what role does it play in learning?

The starting point in my study on reflection will be the work on reflection in higher education undertaken by Moon as well as the work on “reflection in action” and “reflection on action” undertaken by Schön. The work of Argyris and Schön on single and double

7 Joan Forbes, ‘Reflexivity in Professional Doctoral Research’ (Reflective Practice Vol 9 No.4 2008) 449-460.
8 The professional development framework for researchers. It benchmarks researchers within four domains: A, as to knowledge and intellectual abilities which comprise knowledge base, cognitive abilities and creativity; B, as to personal effectiveness through personal qualities, self-management and professional and career development; C, as to research governance and organisation by demonstrating an understanding of professional conduct, research management as well as finance funding and resources; and D, as to engagement, influence and impact evidenced through working with others, communication and dissemination and, lastly, engagement and impact.
loop learning (first discussed in Document 2) will also require further consideration in this context. Moon’s work will provide the basis of understanding the more specific work of others on reflection in legal education and in professional legal education (the distinction here being made between learning undertaken in the legal higher education sector and learning undertaken by those working in professional legal practice). Both these further contexts of reflection are relevant to this discussion, since my own background is that of a professional practitioner turned academic. In addition, the stated standpoint of the study from Document 2 is that of a legal practitioner. Nor is organisational reflection irrelevant to the discussion; the university I work for has sponsored my studies and that, in itself, is an example of a learning organisation that has seen the benefits of developing staff for its own ends, suggesting (as shall later be demonstrated) an element of organisational reflection.

Moon describes learning as:

“a process with many events influencing and modifying each other simultaneously.”

She goes on to refer to the complexities and inconsistencies which arise in the course of learning and which have to be addressed without the certainty of a clear solution. A learner must construct a frame of reference based on both internal experience (being relevant prior knowledge) and external experience (being information external to the learner) which is constantly evolving. Internal experience is used to assimilate relevant external information which helps the learner to adapt the frame of reference in order to pursue the objective of the learning journey. For Moon, reflective learning is a function of internal experience and it takes place with minimal mediation from a tutor or facilitator; the concept of reflection lying somewhere between “learning and thinking”. As she observes,

“We reflect in order to learn or we learn as a result of reflecting.”

There are a number of terms relating to reflection, including “reflective practice” and “reflective writing”. The expression “reflective practice” is a term ascribed to Schön and

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10 Moon (n 2) 11.
11 Ibid 23.
13 Ibid 71.
14 Ibid 73.
15 Ibid 80.
16 Ibid 14.
describes the use of reflection in a professional arena, to address complex problems. Reflective writing is the process through which a learner reflects upon, then writes about, an activity in such a manner as to demonstrate that they have engaged in deep\textsuperscript{17} (as opposed to surface) learning.\textsuperscript{18}

The value of reflective practice has resonance in the “real world” of my doctrinal study. The world that this study is rooted in, is the world of professional, private legal practice and its interface with the financial markets. During the course of Documents 1 and 2, the frame of reference began to be developed. Based on my own internal experience as a practitioner involved in secured lending transactions and a number of structured finance transactions, I had always had an interest in secured transactions and the conflicts of laws issues that would arise in secured lending transactions involving parties in multiple jurisdictions granting security over their assets. During the course of Documents 3 and 4, I was able to refine and finesse my frame of reference. This was achieved through building as complete an understanding as could be achieved of the English law relating to secured transactions and observing its application in “real world” transactions. My internal experience (relevant prior knowledge) led me to conclude that this was insufficient to explain the effectiveness of secured lending transactions in the global market place where laws other than English law would require to be considered and so Document 4 required a comparative law consideration.

The necessity for considering the comparative legal position is illustrative of the inherent complexity in this area. In the world of my study, it is perfectly possible for multiple jurisdictions to provide different solutions to the same problem at the same time, rather than all jurisdictions agreeing on the same, or similar approaches. This difficulty has been recognised by Fletcher in his writing on international insolvency and its “continuing challenges” where he explains that:

“private international law ... has itself evolved along lines of diversity and fragmentation, resulting in the paradox of ‘conflicting systems of conflict of laws’.\textsuperscript{19}

The same issue arises in Document 5, which seeks to elicit which law should determine the proprietary effect of a transaction in a world where every jurisdiction applies different property law rules. In the insolvency context, Fletcher sees that the only solution is to have supra-national legislative frameworks. This approach has been largely successful,

\textsuperscript{17} See, for example, John Biggs \textit{Teaching for Quality Learning at University} (2\textsuperscript{nd} Ed Open University Press 1999) 14.
\textsuperscript{18} Moon (n 2) Resource 6.
\textsuperscript{19} Ian F. Fletcher \textit{Insolvency in Private International Law} (2\textsuperscript{nd} Ed Oxford University Press 2005) 495.
following the implementation of the UNCITRAL Model Law on Cross-Border Insolvency\textsuperscript{20} and the EC Regulation on Insolvency Proceedings.\textsuperscript{21} Within the EU, further work has already begun on further harmonisation of the insolvency rules. In the context of dealing with the shortfall and identification problems that may affect intermediated securities, however, the position is far more intractable; despite much work having been undertaken in producing the UNIDROIT Convention, individual states have been reluctant to adopt it. There are no quick fixes to problems like these when issues of state autonomy are at stake.

Reflection in professional practice

Writing in the early 1980s, Schön considered that there was a “crisis of confidence in professional knowledge”,\textsuperscript{22} that had led to

“a disposition to blame the professions for their failures and a loss of faith in professional judgment”.\textsuperscript{23}

One could dismiss this statement as suggesting that, as he approached the end of his writing career, he had started to take the view that the world was going to hell in a handcart particularly because, forty years later, similar conversations are being had without much necessarily having changed in the workplace.\textsuperscript{24} Equally, one could take the view that his thesis remains valid and that this is a serious question that needs to be explored. His solution to the difficulties faced by professionals in trying to come to terms with the complexity of their practice, which often required them to address a number of competing claims simultaneously, was to encourage them to “reflect in action”. Schön contends that the development of the modern professions has been on a positivist basis, whereby rules are learned and then applied and a problem is solved in a “technically rational” manner.\textsuperscript{25} He points out that this traditional approach to learning how to become a professional has led to a “gap”.\textsuperscript{26} This is evidenced in the failure of the positivist analysis

\textsuperscript{22} The title to his first chapter of The Reflective Practitioner: How Professionals Think in Action (1983) Ashgate 3.
\textsuperscript{23} Schön (n 22) 4.
\textsuperscript{24} Lawyer jokes tend to describe lawyers as burning in hell or dragging out cases to ensure that they obtain a fat fee at their client’s expense, albeit that this latter criticism is not a particularly new one. It was manifest in Charles Dickens’ novel “Bleak House” in which the claimants to the inheritance in the Chancery case of Jarndyce v Jarndyce were either ruined by the costs of the litigation or sent mad. Unsurprisingly, at the end of the case, the inheritance had been entirely spent on legal fees. The same theme is manifest in these two modern jokes, first: “What’s the difference between a bad lawyer and good lawyer? A bad lawyer can make a case last for years. A good lawyer can make it last even longer”; and second: A lawyer dies and goes to Heaven. “There must be some mistake,” the lawyer argues. “I’m too young to die. I’m only 55.” “Fifty-five?” says Saint Peter. “No, according to our calculations, you’re 82.” “How’d you get that?” the lawyer asks. Answers St. Peter, “We added up your time sheets.” Cheap jibes, possibly, but nonetheless a reflection of the public perception of the lawyer.
\textsuperscript{25} Schön (n 22) 30-36.
\textsuperscript{26} Ibid 37-49.
to be able to explain and appreciate the value of the skill set of the professional practitioner to the extent that it relies on their intuition, or their ability to apply “rules of thumb”; or their ability to recognise a problem as being similar to something that they have previously seen and adapt their previous knowledge to solve the new problem. 27

Schön develops his idea of reflection in action as a mechanism by which practitioners can and do develop. Can develop, if they actively acknowledge that they are reflecting and thinking in the moment (the barrister is often described as “thinking on her feet”); or do in fact develop by unconsciously working with their intuition and previous knowledge to produce a good outcome, which goes on to inform their response to the next problem that they face. There is some blurring between his concept of reflection “in” action and reflection “on” action. He describes reflection “in” action as applying to a situation where a lawyer may have a case lasting several months; during the course of the preparation, the lawyer may refine her arguments and adapt her strategy for the ultimate trial. 28 It is submitted that this could also be seen as reflection “on” action, to the extent that it is informed by developments in other cases in which the lawyer is involved or has learned about.

To an extent then, for Schön, reflection is about personal development; it is about being the best practitioner that you can be by noticing and observing what it is that one does well in one’s daily work and being sufficiently honest to learn from one’s mistakes when one has done something badly. But Schön argues that there is a benefit beyond the personal with this approach. For him, reflection in action provides a solution to the problems of modern society where:

“The scope of technical expertise is limited by situations of uncertainty, instability, uniqueness and conflict.” 29

As has already been discussed, the issues raised in this study have included complex conflicts of laws issues. According to Schön, to the extent that professional legal practitioners engaging with these problems are non-experts, those who will be able to manage them most effectively will be those who are equipped to reflect in action. It is difficult to support or deny his thesis, bearing in mind first, that some of the greatest legal minds of this generation have applied themselves to the problems raised by the Lehman

27 Ibid 63.
28 Ibid 62.
29 Ibid 345.
诉讼和有中介的证券在金融市场中的作用

第二，他们，据称，只能够这样做，因为他们是专家。同样，很可能，作为精通的专业人士，无论在学术或实践领域，他们都在自觉或不自觉地反映自己的行为。确实，然而，在本研究中考虑的问题还没有得到令人满意的解决，这表明它们正在向我们集体研究知识的“边缘”施压，并且要求专业法律实践者和学术界采用一种非研究型的另类方法，其中反思在和实践可能提供唯一合理的方式。

反思的性质及其在学习中的应用

在某种程度上，可以根据Schön的观点，将反思行动的概念视作反思的本质，但在目前的背景下，这种分析是不足的。不足之处在于，到目前为止的讨论忽略了对身份及其可能对任何特定问题的解决方法的影响（如在文献2中讨论的那样）。意识到达成中立立场的内在不可能性，人们选择了专业律师的角度。通过“反思行动”方面，必须审视自己的行为在研究过程中的课程，并确保自己不逃避它所带来的挑战。但更重要的是，对专业博士研究课程的参与者：在进行研究项目时，我们不得不审视自身：我们带来什么负担？我们拥有什么样的文化和智力偏见？了解自己的偏见是确保自己的反思和反思过程尽可能诚实的重要部分。

或许，在学科研究的背景下，反思可以类比于一种对良知的检查，要求研究人员对她的行为进行批判，以确定她的假设是否已经适当挑战，并探索必要的深度，以确保她能够诚实。

Bourdieu反思的概念，如由Deer讨论的，表明这不仅仅是一个检查和反思研究正在执行的对象的问题，也是有必要检查和反思的：

30 As evidenced by the bibliography for Document 5 and particularly in Louise Gullifer and Jennifer Payne (eds) Intermediated Securities; Practical Problems and Legal Issues (Hart Publishing 2010).
“the very elaboration of the research object itself and the conditions of its elaboration.”

Bourdieu, Deer explains, cautions against the researcher projecting their own vision of the world on to the object of their studies. This has been particularly important in the comparative law analysis undertaken in Document 4 which has fed into the research undertaken in Document 5. The cross-border nature of the problem explored in this study demands a recognition of the pluralistic and hybrid nature of the legal systems within the global market place; it would be entirely inappropriate to undertake a study as did (allegedly) Sir John Fortescue who used his comparisons of English and French law to support his foregone conclusion that “English law was better than French”. Rather, one must be able to challenge the status quo and recognise the self-referential nature of the legal systems that exist as writers like Teubner and Deakin have done; Deakin suggesting that our legal constructs as currently developed may have caused other, better legal constructs to have been missed along the way as the legal system worked to replicate itself in its own image and likeness through the legal evolutionary process. Without such challenge to the legal system there can be no real development and improvement, as any given situation is simply accepted for what it is. This harks back to the work of Argyris and Schön for whom this critique of the system itself is conceptualised as “double loop” learning, in which “we learn to change the field of constancy itself”.

So much for the application of this philosophy at a macro level (that is, to the system itself); it is also essential to apply it at a micro, or personal level. In the course of writing Document 5, I became aware of an oversight in my own discussion of the creation of English law security interests at an earlier stage in the research process. Goode’s analysis of the steps necessary to establish a valid security interest under English law led him to conclude that there were three elements: “attachment, perfection and priority”. His point on attachment is, however, contentious; many English lawyers would argue that this is not a necessary step, since all that matters in the creation of security is the intention of

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32 Cécile Deer ‘Reflexivity’ Ed Michael Grenfell Pierre Bourdieu: Key Concepts (2nd Ed 2012 Acumen) 196. It is noted that this is technically a secondary source: my French is insufficiently precise to be able to read Bourdieu in the original.
33 Ibid, 197.
38 Argyris and Schön, Theory in Practice (n 1) 19.
the parties at the time.\textsuperscript{40} The point here is less about the legal niceties of this issue than with the danger that one relies on notions of “received opinion”, something Mill railed against in his text “On Liberty”.\textsuperscript{41} After all, how are we ever to get to the truth without debate? As has already been identified, the iterative process of the doctoral study necessarily requires constant challenge to the status quo and refinement of ideas as a consequence of discussion and reflection. It is easy, however, to be overwhelmed by the views of “The Greats” - being those authors whose texts one has read for years as the “definitive” works on a particular area of study - and fail to cast a critical eye. This ties in with the analysis of Webb et al in discussing Bourdieu’s understanding of reflexivity by illustrating:

> “how forces such as social and cultural background, our position within particular fields and intellectual bias shape the way we view the world”.\textsuperscript{42}

If it is accepted that reflexivity plays a role in the quest for truthfulness in the research process, then it can be found in the exercise of will required by the researcher not to cut corners in testing the hypothesis. During the course of Documents 3 and 4, the issues that had been raised in the question for study began to crystallise. The subject of the enquiry, which had initially seemed relatively clear cut, became suddenly “slippery” and it became less obvious that the research method adopted would produce any meaningful outcomes for the question asked. At a personal level, this led to self-doubt; at an academic level this required a re-evaluation of the project. The re-evaluation was not to change the project or even the process, but rather to try to anticipate what the work undertaken would actually show if nothing meaningful was found at the end of the research process and to re-focus the analysis around why the outcomes that might have been anticipated were not, in fact, demonstrated. Having evaluated the English law cases and concluded that they added very little to the conflicts of laws issues that so interested me in the first place, I hypothesised that the US cases were likely to add very little. At that stage, it would have been easy to have glossed over the US cases and taken a broad overview, but I recognised that this would not satisfy my need to produce a truthful response to the question asked. To say that I forced myself to go back and undertake a rigorous case analysis is an exaggeration, as I would have done this anyway; but it was a conscious process.

If academic study is about the search for truth, then it must be observed that the role of emotion cannot be ignored in any discussion of reflexivity in learning. One needs to be

\textsuperscript{40} I am grateful to Richard Calnan for his observations on this point (definitely a Homer Simpson “doh” moment).


aware of one’s emotional state in the course of one’s study to ensure that the frame of reference is not distorted inappropriately. During a three year research project, inevitably one goes through emotional peaks and troughs, influenced by work pressures, family matters and the sheer motivation required to take a project of this nature through to its logical conclusion. One learns that it is sometimes necessary to take a break from the study (often for a period of a few weeks), particularly if one has reached an impasse. My experience has been that such breaks have proved to be an important part of the research process. This has been for two reasons. The first is, I believe down to the subconscious workings of one’s own mind which tend to tick on even whilst one is engaged in other entirely unconnected activities; on returning to the project, it becomes possible to view the problem from a different perspective. The second is that a break just often means that one returns to the project with a renewed enthusiasm for it.

Finally, part of the reflective and reflexive process is about taking feedback from others with a view to improving and refining one’s work and one’s understanding of legal and philosophical concepts and their application to the problem in hand. Dialogue is essential to this iterative process and the regular meetings with my supervisors have been invaluable as an opportunity to air and share views, concerns, ideas and the direction of the study as well as to seek validation that one is not completely off the wall with one’s approach. I have always been at pains to maintain a dialogue with legal practitioners for the same reason. One has to accept that there may, nonetheless, be limitations as to what can be achieved. Despite all this work, truthfully, Teubner’s work is, largely, still inaccessible to me and I cannot pretend to have a definitive understanding of phenomenology or Heidegger; this I must recognise is either due to a lack of application on my part or my own insufficiencies. Equally, I have found some of the legal concepts that I have had to consider a great pleasure to contemplate and discuss with others. The lifetime of the study has been part of the learning process and the study has been all the more valuable for the fact that it has taken three years to complete.

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43 Moon (n 2) 57.
44 I doubt I am alone, though.
Conclusion

At the end of this process, as I look back and ask myself, “what have I learned from it?” a number of things spring to mind. The first is that I can safely say that I have aligned myself effectively to the Vitae Research Development Framework through this study in all of its four domains and each of their subdomains.\(^\text{45}\) Otherwise, overwhelmingly, I fear that I have only scratched the surface in getting to the heart of the issues. My analysis has, at times, seemed to me superficial. This is a product, to a large extent, of the factors that Schön has identified as requiring a push towards reflection in and on action as the only way to address complex problems in the modern world. Schön discusses the competing demands made upon professional practitioners, in whatever sphere they operate, whether education or the law or even that testing hybrid, professional legal education. The institutions that we work for require us to comply with certain bureaucratic activities that fill our time; often these are to satisfy some abstract quality assurance measures against which we are benchmarked to ensure that we are doing our jobs properly. (Ironically, of course, these measures are often a mark of the organisation trying to reflect upon the activities that it undertakes in order to demonstrate that it is a reputable organisation providing equal opportunities to its employees and delivering outputs to its client in the most fair, efficient and cost-effective manner possible). Nevertheless, whether these are right or wrong, they take up valuable time.

As an academic, one is exhorted in doctoral studies to be original and, for the research excellence framework, to write works that are outstanding at an international level. Terms like “ground-breaking” and “re-framing the debate” are used to illustrate the level of achievement that we are all supposed to bring to the table. It is not questioned that these should be the correct aspirations for academic institutions to require of their staff, but it must be noted that these are just that – aspirations. As a society, we have less time than ever to think. The very benchmarks that we have to achieve to identify our institutions as both academically rigorous and as learning organisations themselves are, it is submitted, at the same time serving to prevent the development of original thought. Not because original thought is not possible, but because there is insufficient time in the academic diary to stop and stare at the walls. An obligation to produce a certain number of outputs a year is a tidy and easily measurable objective and a perfectly understandable one for an academic institution. But would one have produced a better and more considered output with a little more time? I doubt that Socrates had as full a diary as the average academic and, rather than tweeting his latest piece of research, he was engaged in active dialogue to test it to destruction. The work of Schön and Bourdieu discussed in this paper illustrate the importance of reflection and reflexivity in the development of the

\(^{45}\) The professional development framework for researchers (n 8).
professional practitioner, whatever their discipline, all of which requires time. So what is the next step? It must be to blot out, wherever possible, the “white noise” that is generated by the institutions for which one works and focus on the things that one does well and, do them to the best of one’s ability.

It only remains for me to acknowledge, as a truly reflective and reflexive practitioner, that my mistakes throughout this Professional Doctorate are entirely my own.

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