THE FAIRNESS PROJECT: DOING WHAT WE CAN, WHERE WE ARE

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Abstract: The legal profession, in common with other professions, does not represent the diverse society it serves. In England and Wales, it is significantly more difficult to become a lawyer if you are not white, male, middle class, privately and Oxbridge educated: this is also true for other protected characteristics, such as disability, sexual orientation and age. The students we teach are fundamentally and structurally disadvantaged. This article reports on the aims and objectives of The Fairness Project, and the consequent design of its learning materials. Structural inequalities are all-pervasive and long-standing. No one project, no one generation, will secure equality, more diversity and fairness in the legal profession. But that is not a reason to do nothing. As educators and as human beings, who ourselves are relatively advantaged, we have a moral and pedagogical imperative to do what we can, where we are. That is what The Fairness Project is all about.

Keywords: equality and diversity; access to the legal profession; intersectional disadvantage; curriculum development; student awareness and agency

I. Introduction

There is no doubt that the legal profession, in common with other professions, does not represent the diverse society it serves. It is significantly more difficult to become a lawyer if you are not white, male, middle class, privately and Oxbridge educated than if you are. This is also true for other protected characteristics, such as disability, sexual orientation and age (or at least age on entering the profession). The difficulty gets more intense the further up the “career ladder” one climbs: if we look at the 12 UK Supreme Court judges, 10 are white men and 2 are white women; 9 were privately educated and 9 were Oxbridge educated.

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Therefore, the undergraduate students we encounter in two post-92 universities and (although less so) one Russell Group university in the north of England are fundamentally and structurally disadvantaged when it comes to their stated career aspirations on entering Higher Education. The Fairness Project, designed by McKee and Nir at the University of Central Lancashire (UCLan) in 2015/2016 and adopted with some small modifications in precise mode of delivery by Alexander and Griffiths at the University of Northumbria and Hervey at the University of Sheffield, stems from our reflections and action.

Our focus is not only on how we should educate our students to be realistic about where they stand in the competitive market for jobs in the legal profession, but also to enable them to act on that knowledge, develop their skill sets and profiles and devise personal strategies to overcome barriers, to construct a future career for themselves that brings together their aspirations with reality. In short, we are seeking to ensure our students understand the disadvantages they face, without “crushing their spirits”. Taking this further, for those among our students who do succeed, we are aiming to help them to become reflective lawyers and fairer recruiters or managers in the future, so that they do not contribute to perpetuating the cycles of disadvantage that they currently face.

A. Rationale and initial drivers for the project

The initial driver for The Fairness Project was a sense of moral compunction, arising from McKee and Nir’s observations and reflections as teaching staff at UCLan. They observed that UCLan students were experiencing declining traction in the graduate employment market. The recession, which began in 2008/2009, led to a reduction in the number of training contracts offered by law firms, the traditional route from Higher Education into the profession of solicitor. Instead, law firms recruited increasing number of graduates into posts variously described as: paralegal and senior paralegal, legal assistant, legal support assistant, fee earner and case managers. Graduates reported working in an environment of capped salaries and in posts which were not transparent in terms of possible progression to qualification as a solicitor.

The data on training contract opportunities then, and now, remain stark. In 2015/2016, 15,950 students graduated with degrees in law from universities in England and Wales. However, only 5,728 trainee registrations were recorded.  

1 Dissemination of The Fairness Project outside UCLan began at the Association of Law Teachers conference in 2016. Northumbria and Sheffield Universities expressed interest in sharing the teaching materials, and it was agreed to set up a three-way research project to evaluate the impact on students. Subsequent conference dissemination at the HEA Annual Conference and the SLS Annual Conference in 2017 has led to the sharing of materials with four further universities: Birmingham, Portsmouth, Liverpool and Wolverhampton. We do not have data from those universities at this stage of the project.

2 Britain officially entered recession on 23 January 2009 when the Office for National Statistics reported that the economy had shrunk through the last two quarters of 2008.


4 Ibid., p.53.
81.4 per cent of these training contracts were awarded to graduates from the 24 Russell Group universities.\(^5\) This pattern is not unique to England and Wales. In the United States, it has been argued that the legal profession is in crisis because it fails to prepare law students adequately for the challenges of legal practice.\(^6\) There is also evidence of an oversupply of law graduates in other jurisdictions such as Australia and Japan.\(^7\)

\[\text{B. The broader context}\]

More broadly, despite the professed intentions of the regulatory authority for solicitors in England and Wales (the Solicitors Regulatory Authority (SRA))\(^8\) and for barristers (the Bar Standards Board (BSB)),\(^9\) both the quantitative and the qualitative data on equality and diversity within the legal profession reveal at best a position of stasis and, at worst, a picture of decline.\(^10\)

Data collated by the SRA and the Law Society in autumn 2015\(^11\) reveal the following. Women were awarded 62.8 per cent of new training contracts, accounted for 61.1 per cent of new admissions to the roll (ie, newly qualified solicitors), but

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\(^5\) Chambers and Partners, “Law Firms Preferred Universities” Chambers Student (February 2016), available at http://www.chambersstudent.co.uk/where-to-start/newsletter/law-firms-preferred-universities (visited 23 October 2017). At the same time, Hervey et al at the University of Sheffield became aware of the declining number of students from Sheffield securing training contracts. This was particularly visible when several of the top “magic circle” London-based law firms ceased their recruitment activities in Sheffield. It was discovered, for instance, that one such law firm had not recruited a student from Sheffield to a training contract for over a decade.


\(^10\) SRA and Law Society diversity data for 2014/2015, 2015/2016 and 2016/2017. For example, the Law Society’s Annual Statistics Reports, Diversity Profile Reports and Private Practice Solicitors’ Salaries reports. Data are drawn from a variety of sources including the Business Intelligence team at the SRA and the Law Society’s Research unit and Law Society surveys of practising certificate (PC) holders.

The project encourages students to expand the range of “possible future selves” within their imaginary capacities. Such an imagined future self is essential for the formation of a “habitus”, which enables an individual to function within a particular professional field. Beyond merely imagining such future identities, students are also empowered to “package” that “self”, so that each element of self, and the hard and soft currencies of employability, come together, in the “perfect manifestation” of educational achievement, skills and experience and personal, social and cultural capital which is so valued by employers.

Finally, The Fairness Project seeks to make at least a potential contribution to breaking the cycles of “merit”-based perpetuation of advantage and consequent lack of diversity in the legal profession. The project seeks to inculcate in students an understanding of how recruitment processes operate, to encode advantage and exclude those who do not “fit”, without overtly discriminating on the grounds of gender, ethnicity or indeed other protected characteristics under the Equality Act 2010 or social class. That emergent understanding, especially for those students who access the reflective phases of learning through the project, invites students to seek future professional and personal development that helps them to uncover their own biases. Those of our students who become lawyers might — because they have experienced The Fairness Project — seek to adopt more inclusive practices than those to which they are currently subjected. Our hope is that, in the future, our students will access equality training, embody best practice in recruitment processes, notice and challenge coded notions of “merit” and, above all, continue to develop as reflective practitioners, aware of their own conscious biases and the fact of their unconscious biases, so that they might become fairer employers and managers in the future.

IV. Conclusions

Structural inequalities in the legal profession are all-pervasive and long standing. Of course, no one project, no one generation, will secure equality, more diversity and fairness in the legal profession. But that is not a reason to do nothing. After all, just 100 years ago, not one of us would have had the job that we have within legal education. Societies do change, and they sometimes change towards greater equality, although the pace of change may seem to be glacially slow, and at times it may feel like “two steps forward, one step back”. The law is one vector of such

127 See Brown et al, The Mismanagement of Talent: Employability and Jobs in the Knowledge Economy (n.83).
changes; education is another. Without wanting to overstate the case, as legal educators, we thus stand at a unique vantage point in terms of the possibilities of our contributions.

Others have investigated and reported on the phenomena we describe above: access to the legal profession is no longer based on overt discriminatory practice, but structural disadvantages persist. We seek to go further than investigating the ways in which this is the case: we want to do something. Here, of course, as relatively powerful individuals within the university, we need to be careful not to participate in the very structures which we seek to challenge. The Fairness Project is based on our acute awareness that curriculum interventions which are insufficiently attentive to the ways in which gender, ethnicity and social class inform and interact with notions of legal “employability”, “merit” and “fit” will be ineffective in helping our students realise their ambitions, supporting social mobility or enhancing diversity. The project’s design begins from that realisation, and above all, it seeks to ensure that our students understand it too. If our students learn one thing from The Fairness Project, it is that the legal labour market is not a neutral sphere in which individuals succeed by virtue of their own inherent (academic and other) merits and efforts. Rather, gender, ethnicity, social and educational background play a key role in what appear to be neutral hiring and promotion decisions in the legal profession. Further, our students are in effect asked to think about how their gender, ethnicity, social and educational background might influence their life chances and how that might affect their future career destinations. Armed with that critical awareness, we offer a number of positive strategies, which we seek to tailor to each student individually, recognising that accessing such strategies in itself is easier for some students than for others. Our hope is that these strategies better equip our students to compete in the market for legal professional employment. In a small way, therefore, The Fairness Project pursues a grand ambition. It is seeking to intervene in and disrupt the perpetuation of unfair practices in the legal profession.

There are obviously some drawbacks of seeking to pursue such an ambition. The challenges of including equality and diversity in course content and of effectively delivering this kind of educational experience are well documented. Any counter-cultural teaching and learning practices presents challenges. Most learning and teaching activity in law schools is firmly situated in the cognitive domain. The majority of law school staff thus tend to feel most comfortable in that world of clearly defined, articulated and assessable objectives. In contrast, the affective domain, with its non-linear, messy processes and unpredictable outcomes, may leave educators feeling at least somewhat exposed as they navigate their way through the more contentious world of feelings, attitudes and values. This may

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be felt particularly keenly by academic staff within this inherently difficult and potentially divisive subject area of diversity and equality, fairness and justice. That discomfort is shared by staff and students alike. We have certainly experienced it in our law schools, as we have used The Fairness Project in our respective curricular contexts.

However, teacher or learner discomfort in itself is not sufficient reason to avoid operating within the affective domain, particularly when its objectives so clearly align with this project and its aims and underlying ethos. As educators and as human beings, who ourselves are relatively advantaged, we feel a moral and pedagogical imperative to do what we can, where we are. That is what The Fairness Project is all about.

Appendices

Table 1: Initial Research Questions
Are there more women or men in the legal profession at the current time (excluding partners and other members of staff in law firms)?

What percentage of partners or managers in law firms are women?

What is the gender pay gap for solicitors?

If 17 per cent of all solicitors in the biggest firms (ie, firms with 50 or more partners) are from black Asian and minority ethnic (BAME) backgrounds, what percentage of partners or managers in these firms are from BAME backgrounds?

What is the ethnicity pay gap for solicitors?

7 per cent of the UK population have had a private school education. What is the percentage of lawyers who have had a private school education?

What is the percentage of partners or managers in the top commercial firms who have had a fee-paying education?

What is the percentage of senior judges who have had a fee-paying education?

Table 2a: A Role Play Recruitment Exercise: Person Specification University of Central Lancashire
You are the recruitment partners in a rural Cumbrian law firm. It is a large and longstanding high street practice with a number of local branches: it specialises in property, private client and commercial/agricultural law. The firm is involved in a lot of local events such as agricultural fairs and National Union of Farmers events.

You are making the final decision with regards to the recruitment of a new trainee lawyer.