

TEACHING NOTE

Adventures in Pedagogy: The Trials and Tribulations of Teaching Common Law in China

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Introduction

In international corporate circles, the general impression is that China is the next economic giant of the 21st century.¹ This perception now seems to apply to universities the world over. The Chinese market once closed to the world is now arguably one of the most lucrative opportunities in the global economy.² One area that is increasingly drawing international interest is education.³ China's open door policy since the mid 1980s coupled with its entry into the World Trade Organisation in more recent times has fuelled a demand for higher education in unprecedented proportions. The nation has a significant number of excellent world-class universities. However, it is estimated that by 2010 there will be 17 million excess

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1 In December 2004, the US National Intelligence Council likened China's emergence in the early 21st century to the rise of Germany in the 19th and America in the 20th, with "impacts potentially as dramatic". US National Intelligence Council, *Mapping the Global Future: Report of the National Intelligence Council's 2020 Project - Rising Powers: The Changing Geopolitical Landscape* (Pittsburgh: NIC, 2004) http://www.cia.gov/nic/NIC_globaltrend2020_s2.html (accessed 22 November 2005).

2 J Wu, China Became A Leading Actor in 3rd Global Economic Tidal Wave, paper presented at the Annual Leadership Meeting for Chinese Corporation, 20 September 2002 (Beijing).

3 G Wei & H Zeng, Beijing University's Long March to the World Top Tier University (2003) 3 *China Higher Education Journal* 67.

demands for higher education places that the Chinese tertiary educational system cannot meet. This figure is expected to increase to 25 million by 2020.

The high demand for overseas tertiary qualifications has been matched by an enthusiastic, and in some cases overzealous supply of courses ranging from basic English language programs to postgraduate degrees by academic institutions from Australia, New Zealand, the United Kingdom and the United States. Unfortunately, given the ever tightening budgetary constraints for academic institutions in these countries, and the emergent pervasive philosophy that any credible academic institution must be capable of generating at least a third of its income from its own "entrepreneurial" activities,⁴ the push to meet the demand from China is dictated more by financial considerations than any lofty ideals of the intellectual merits of academic globalisation. The financial imperatives in turn dictate the strategies adopted by the institutions in their effort to meet the demand. The strategies range from the routine "onshore" enrolments in existing courses to "twinning" arrangements and offshore "foundation courses" and "pathway" courses run in China that permit students to commence their studies well before they leave for the overseas institutions. These strategies, which were once very popular with overseas institutions in the Malaysian and Hong Kong market, have now become the main strategies for China. Nonetheless, whatever strategy an institution adopts, the road to the Asian education market in general, and the Chinese, one in particular is one that is fraught with many difficulties especially in techniques of pedagogy and the attendant linguistic protocols. The situation has been exacerbated by the absence of any coherent research that explores the critical issues and the practical problems associated with learning and expected outcomes in an alien cultural context.

4 It has been suggested by Harman that between 1991 through to 2003 the most far-reaching policy change in Australian tertiary education was the growth in self-earned income by universities, which changed the operation of universities and their relationships with government. Department of Education, Science and Training, *National Report on Higher Education in Australia 2001* (Canberra: DEST, 2003) http://www.dest.gov.au/sectors/higher_education/publications_resources/summaries_brochures/national_report_on_higher_education_in_australia_2001_split.pdf.htm (accessed 22 November 2005). See also Department of Education, Science and Training, *Rationalising Responsibility for Higher Education in Australia: Issues paper* (Canberra: DEST, 2005) http://www.dest.gov.au/NR/rdonlyres/C593AB29-F984-4FD4-8CDA-7D6F0965C01C/4046/rationalising_responsibilities.pdf (accessed 22 November 2005).

In the summer of 2000, the Law Faculty of the University of Technology, Sydney (UTS) introduced a new postgraduate program, which specifically targeted the Chinese market. The course comprised internationally focused subjects based on the university's 48 credit points system required for the award of a coursework Master's degree. The development of a Masters program for the Chinese market in itself was not unique. What was unique about the UTS program, however, was the fact that the coursework program in its entirety was designed to be delivered and assessed by Australian lecturers in Mandarin. This paper is a brief assessment of that program. The paper examines general issues in the pedagogical delivery of programs in a "Language Other than English" (LOTE) and the use of "proxies" in the delivery of LOTE programs. The paper seeks to conclude that while the UTS program demonstrates that it is feasible to use proxy lecturers or interpreters in the delivery of programs in LOTE, the exercise entails significant problems that can undermine the integrity of such programs

China's New Trend: The Appetite for International Legal Education

Since China initiated economic reforms in 1978, the country has confronted countless challenges. Transforming a planned economy into a market economy has meant massive industrial re-structuring, reforming the price system, liberalizing trade and creating an appropriate legal and political environment to accommodate the influx of foreign direct investment. A significant imperative of China's "Open Door" policy which is frequently overlooked by commentators is that for a country that closed itself to the rest of the world and fostered a deep-seated Communist political and economic system, the "open door" literally requires an efficient legal key. In other words, all sectors of Chinese life affected by the open door policy require a significant leap in law reform to provide the appropriate infrastructure for community relations. Over the last decade, Chinese reformers have discovered that the transition into a market economy means that several aspects of China's legal system urgently need to be modernised to meet market demands.⁵ This has also led to greater awareness and the need to educate and train Chinese lawyers to be proficient in both domestic and international law.

5 J. Chan, *China: Transition to a Market Economy* (Oxford: Clarendon Press, 1998).

For Chinese lawyers, it would seem that the call has now gone out for a new breed of practitioner. As *Australian Legal Business* notes, "for lawyers in China the job is no longer about simply aiding foreign investment into the country. They are now required to play a multi-directional game of high sophistication and high stakes in which the rules are constantly changing".⁶ Young Chinese lawyers enthusiastically embrace knowledge of foreign legal systems and principles, as foreign investors increasingly move into initial public offerings (IPOs), and mergers and acquisitions with local firms, and demand contracts to be structured in accordance with international standards.

Whilst American and Australian law firms are setting up offices in Beijing, Shanghai and Hong Kong to meet this demand, Chinese law firms have also set up offices in Hong Kong, New York and San Francisco to access foreign capital and legal expertise. In addition, Chinese law firms represent Chinese banks and investments overseas where international legal knowledge is essential.⁷ The need for the "new breed" of lawyer has become more urgent as the profession in China struggles to keep pace with the fast developing economy in China and the insatiable appetite of the West to do business in the country.

The rush for Chinese lawyers to learn about foreign legal systems has led some Chinese universities to introduce courses in Common Law into their curriculum. Many Chinese institutions have also chosen to set up joint programs with universities in the US, UK, and Australia. On the other hand, a number of foreign universities now offer their degrees in China via correspondence or intensive mode courses. Soochow University Law School has recently teamed up with Pacific/McGeorge School of Law to offer a summer program. The program will consist of a workshop in International Business Transactions with Chinese characteristics integrating case study methods of Common Law and the "clinical approach" adopted by American law schools.⁸ Sun Yat-sen University has also invited American academics through the Yale-China Association to teach in their Graduate Student program. In addition, it established an on-campus Clinical Legal Education program in 2001 with the support and assistance of Yale Law

6 See Editorial, Special Report: China 2004, Globalisation and Localisation: China's Two-Way Legal System (2004) 2.4 *Australasian Legal Business* 22.

7 *Id.* at 27-8.

8 F Wang, Rebuilding a Bridge, paper presented at Association of American Law Schools Conference on Educating Lawyers for Transnational Challenges, 26-29 May 2004, at 1, 5-6.

School and New York University School of Law. More recently, Sun Yat-sen University collaborated with Whittier Law School to set up an English language summer program.⁹ Zhongshan University, which has been running an exchange program with Southwestern University Law School since 1985, has recently expanded the program to include McGeorge School of Law and Loyola Law School.¹⁰ Against this background, the UTS opted to run an innovative program in Mandarin. The program was delivered in Sydney, Beijing and Shanghai via "intensive mode".

The UTS Offshore Program in China: The "Nuts and Bolts"

The organisation and delivery by any university of offshore programs is a complex exercise with extensive time-consuming quality assurance implications. The UTS program went through several phases that required careful appraisal at each step of a stringent accreditation process.

The Choice of Host Country Partner

In pursuing an offshore program, an institution has a number of options in terms of strategy. The institution may choose to set up its own recruitment, administrative and course delivery infrastructure in the host country. There are several difficulties with this strategy. For one thing, the laws of the host country (as in the case of China) may not necessarily permit the establishment of a locally based foreign academic institution. Yet, even where the local laws permit the establishment of a foreign institution, this option requires an expensive outlay of capital which very few institutions can afford.

Another option is a partnership arrangement between the institution and a local or host country institution. There are two main variations of such a partnership arrangement. An institution can enter into a capital or joint venture partnership with a local institution and share in the cost of establishing the relevant capital infrastructure. While this is certainly cheaper than going in alone, it still requires a sizeable capital input. It

9 Y Cai, Exploring Constructive Approaches for Educating Law Students to Cope with Transnational Challenges: From Chinese Perspective, paper presented at Association of American Law Schools Conference on Educating Lawyers for Transnational Challenges, 26-29 May 2004, at 2.

10 F Li, Training Law Students to Meet Transnational Challenges, paper presented at Association of American Law Schools Conference on Educating Lawyers for Transnational Challenges, 26-29 May 2004, at 2.

also has the added complexity of the demarcation and sharing problems typically associated with joint venture agreements. On the other hand, an institution can choose to enter into a “non-capital” partnership arrangement with a local institution. This is a much cheaper option and requires the local partner institution to provide the administrative and recruitment infrastructure to assist with the delivery of the program without any capital outlay from the foreign institution.

Whatever the preferred strategy may be for an institution, the choice of a local partner institution is central to the delivery of the program. Apart from the fundamental issues of probity, the choice of a host country partner for a program will depend on the specific degree to be offered, the target market for the degree, the mode of delivery and the administrative and academic infrastructure available in the local institution. In the case of the UTS program, the Beijing Management College of Politics and Law and the Shanghai Justice Bureau were chosen as local institutions in a “non-capital” partnership arrangement. The choice of these institutions rather than established universities in China was deliberate and was determined by a specific recruitment strategy. The target market for the program was senior lawyers with at least five years post-qualification experience. While “normal” universities in China are arguably capable of recruiting students from this pool of lawyers, the available evidence then indicated that most law faculties in China did not have immediate and direct access to the legal profession and were unwilling or unable to commit funds needed for the significant outlay for advertisements. On the other hand, an organisation such as the Shanghai Justice Bureau, the Chinese Law Society (which registers legal practitioners) and the Beijing Management College of Politics and Law (which provides training programs for government officials and party cadres) have direct access to the legal profession and are ideally suited to recruit students from the profession. The strategy was very easily vindicated with the figures on enrolment. The Beijing Management College recruited 56 students, 90 per cent of whom were judges and senior ranking government officials from the Beijing area. The Shanghai Justice Bureau recruited 47 students, 80 per cent of whom were senior private practitioners, with the remaining 20 per cent drawn from senior government service.

The Recruitment Phase

A critical part of any offshore program is the recruitment phase. Pursuant to the terms of the Agreement with the

Chinese partner institutions, it was agreed that the institutions would:

- obtain the necessary (Chinese) government approval for the delivery of the programs;
- market and promote the program; and
- receive applications from students for processing by UTS.

It was a term of the Agreement that all students were to be admitted subject to the normal requirements for the admission of postgraduate students to UTS. Applications were to be received from applicants who met the “required standard”. An applicant must have completed the academic requirements of an undergraduate degree in law and would normally have achieved a Grade Point Average of 5.0 or higher, or hold a qualification deemed to be equivalent by the University Admissions Committee of UTS. All marketing and promotional materials were to be subject to approval by UTS. The University was the sole institution to grant any award based on rules as approved by the UTS Academic Board. This was made clear in all negotiations with the host country partners and incorporated in all promotional and accreditation documents concerning the program.

Curriculum Design

The design of the curriculum was an equally critical part of the process. It was part of the UTS accreditation requirement that any offshore program to be delivered had to meet a “relevancy test”. The course had to be relevant to the national and cultural context within which it was to be delivered. The design of the curriculum therefore had to take account of the expertise of the Faculty and the obvious context of China. Thus, the design of the curriculum became a major issue. To achieve the appropriate balance between relevance and expertise, the curriculum had to be negotiated between the UTS course coordinators and the Chinese partner institutions. A number of meetings were held between UTS course coordinators and their Chinese counterparts in dealing with this issue. The difficulties and the potential for misconceptions in the design of the curriculum were clearly demonstrated when the UTS course coordinators suggested that Anti-Corruption Law be included in the curriculum, given its relevance. This recommendation was originally based on our perception of current problems in Chinese legal and administrative arrangements. Surprisingly, the recommendation was politely, but firmly, turned down.

In the end, eight subjects were chosen as the basis for the "48 credit point" degree. The chosen subjects were:

- Principles of Common Law,
- International Business Law,
- International Banking and Financial Law,
- Corporate Finance and Securities Law,
- Legal Issues in E-Commerce,
- Comparative Studies of Intellectual Property,
- WTO Law, and
- Cyber-crime / Shipping Law.

The design of the curriculum focused on both innovation and relevance in the Chinese context by including subjects such as Cyber Crime and Legal Issues in E-commerce, as well as more international-oriented units such as International Business Law and International Banking and Finance Law. Corporate and Securities Law and Comparative Studies in Intellectual Property proved very popular in the light of developing trends in China in restructuring the country's securities system¹¹ and the efforts to regulate intellectual property protection in China.¹²

The only subject that was not international in the strict sense was "Principles of Common Law for Civil Law Lawyers". This subject is primarily an introductory course on the Common Law designed specifically to familiarise graduates from Civil Law jurisdictions with broad aspects of Anglo American Common Law. The inclusion of the subject was meant to serve two purposes. First, it was meant to assist graduates to understand and appreciate methods and traditions in the Common Law and thereby ensure a better understanding of dealing with counterparts from Common Law jurisdictions in transactions. The subject was included in the basket of offerings because of a perceived demand in China. Second, given the Common Law orientation of the Australian lecturers engaged in the program, the inclusion of introductory elements of the Common Law was meant to facilitate the engagement between lecturers and students in the program. The first subject taught in the program was unsurprisingly, the Principles of Common Law.

11 Morgan economist warns China: Revolution on Securities market must be careful *China Daily* 2 April 2001 <http://101.stock888.net/010402/100,101,54239,00.shtml> (accessed 22 November 2005). (Mandarin only.)

12 Z. Wu, Note on Chinese Intellectual Property Protection (2003) *Beijing University Law Journal* 21.

Some of the subjects included in the curriculum required very specific local Chinese expertise to ensure relevance of content. It was therefore agreed between the UTS and local Chinese partners that Chinese academics would deliver nominated subjects. The agreement to use Chinese academics to deliver aspects of the curriculum had important cost-saving implications. Since the program was to be delivered in Beijing and Shanghai, the cost of flying Australian lecturers to China for all the subjects in the curriculum was potentially prohibitive. The opportunity to rely on local expertise was therefore a significant aspect of the curriculum design.

The curriculum designed for the course was to be delivered in "intensive mode". This required each subject to be taught over a period of 40 mandatory hours concentrated into 7 days. The intensive mode was designed to meet the demands of the "market" and teaching resources.

In designing the curriculum it was envisaged that students who were likely to be attracted to the program would be mainly full-time working solicitors or government officials. The intensive mode was designed to ensure that officials who needed the time off for study could secure the 7 days off work needed to attend classes. The intensive mode curriculum also ensured that it was cost effective for an Australian academic to go to China for the brief duration of the delivery of the subject. The average budget for sending an Australian lecturer to deliver a course of lectures for one subject, inclusive of airfares, was approximately AUD10,000.

Course Materials

The delivery of the program was to be based on a complete set of relevant "course materials". This presented a complex challenge to the program. Since the course was designed to be delivered in LOTE, it meant that course materials had to be in Chinese. To meet the challenge, there were two options: The first was to translate an entire set of course materials from English into Chinese. This was not considered practical for two reasons: It would be labour intensive and for that matter, very expensive. Another consideration was that even if one could meet the cost associated with the translation, there was the concern that the essence of the intellectual content of the materials could be depreciated in the course of translation.

The second option in trying to meet the challenge regarding course materials was to source relevant readings for the course materials in the Mandarin language with the assistance of reputable academics from China. This was seen as a cheap and

effective way of dealing with the problem. The underlying presumption was that China has published a good body of modern works in journals and monographs in the Mandarin language on the subjects to be offered. It therefore had to be possible to "source" our reading materials in Mandarin. While this presumption is correct, it presented a rather different kind of problem. Materials sourced in Mandarin were obviously accessible to students; but they were not accessible to the Australian lecturers who did not speak Mandarin. To enable the Australian lecturers to know and use the content of the course materials, the lecturers had to be familiar with the content. This in turn meant that the materials had to be translated from Mandarin to English with all the attendant cost implications.

After an agonising consideration of our options, we opted to source the course materials in Mandarin. The learning guide developed for the course included course outlines and selected reading materials. The reading materials were generally selected from authoritative Chinese sources (eg journal articles and monographs) on the subjects in the course. In some instances where we could not find suitable sources in Mandarin, we adopted English sources. In the few instances where the reading materials selected were in English, summaries of such materials were translated into Mandarin. Where selected materials were in Mandarin, we ensured that the materials were both suitable and consistent with the general approach and essence of the subject and the course before they were included in the reading list. The program engaged three staff members who are fluent in Mandarin to assist in the translation of relevant course materials.

Course Delivery

As noted earlier, the entire program was designed for delivery in Mandarin. Australian lecturers on the program thus had to deliver lectures with the aid of interpreters by means of "consecutive" translation or interpretation techniques. This entailed two distinct issues: the delivery time for each lecture session was doubled because the content required repetition in each instance. Second, lectures were delivered by "proxy". The quality of delivery and the content depended not on the knowledge and expertise of the lecturer, but on the expertise of the interpreter (as proxy lecturer,) and the ability of the interpreter to convey concepts from lecturer to students; and questions from students to lecturer. We comment more on lecturing by proxy later in this paper.

Assessment

Assessment is a crucial element in any degree program. Assessments for an offshore program provide challenges that need careful appraisal and resolution if the integrity of the program is to be maintained. However in programs delivered in LOTE, the challenges posed by assessment are compounded and can pose unique problems that can undermine the integrity and question the essence of the programs. The assessment protocol in the UTS program comprised a 5,000 "character" research assignment, and a final examination. Since the course was conducted in Mandarin, all written assessments were in Mandarin. The program was presented with two assessment options: the first was to translate all written assignments from Mandarin into English. However, time and resource constraints meant that this was simply not feasible. Another option was to "moderate" the assessment tasks given to students.

Moderation of the assessment tasks involved three options: The first option was to seek the services of qualified Chinese academics who could grade the assignments and exam papers, and file examination reports with a sample of papers for "moderation" by the Faculty in Australia. While it was easily possible to find Chinese scholars with appropriate expertise, the difficulty was how to convey our "culture of grading" to such scholars to ensure that grading protocols were consistent with UTS onshore requirements. The second option was to look for qualified Chinese speaking practitioners in Australia and engage them to grade the scripts. The difficulty with this option is that while there is a significant number of Chinese Australian lawyers who speak Mandarin fluently, only a handful are comfortable with law in Mandarin as such. In other words, as in other languages, it is one thing to speak the language, but it is another thing to be able to understand and interpret (academic) law in that language effectively. A third option was to engage Mandarin tutors in Australia to grade the exams and assignments and to file reports with a sample of scripts translated for the moderation. The difficulty with this option was that it meant an uncomfortable reliance on the tutors. In any case, since the program had only two tutors in Australia, but offered a range of 8 subjects, it would have meant relying on the two tutors to be familiar with the entire range of subjects offered to assist with the assessment.

To say that the assessment in the course presented the most complex issue is an understatement. To deal with the issue, the Faculty adopted the moderation approach with a mix of all the three options. While it was possible for the program

to rely on its tutors to assist in the assessment of some of the subjects, it was evident that for the integrity of the program, we needed the input of Chinese academics who could credibly assess the scripts to advise whether the scripts were in fact of appropriate standards, based on a marking scheme provided by the UTS Faculty as a guide. In spite of the marking guide to ensure that the “external assessors” were familiar with the UTS grading requirements, in at least one instance, the Chinese assessor awarded almost all students in the subject distinctions to high distinctions. He gave no explanation for his grades; and attempts to secure an explanation failed. Needless to say, the Faculty arranged for all the scripts to be translated into English for grading at considerable cost.

Teaching by Proxy: Education through the use of Intermediaries

Where an institution decides to offer a program in LOTE, it is clear that the language issue is a significant impediment that can threaten the integrity of the program unless the institution has the resources to invest in interpreters, teachers and assessors fluent in the language to be used as the medium for instruction and assessment. It is of course possible to offer a program in LOTE by using translators, interpreters and “external assessors”. However, where this is the case, it literally implies that the program is offered by *proxy*. The question is: can any program be offered credibly by proxy? In the particular case of lecture delivery, how does the use of an interpreter as a proxy lecturer impact on the integrity of the program?

Simultaneous and consecutive translation or interpreting is routinely used at international conferences. However, where translation or interpreting is used as the basis of a normal lecture, it is a different issue. Here, we enter into a complex world and embark on an adventure of trying to create an effective dialogue between lecturer and student who do not only speak different languages, but may also be culturally alien to each other. The imagery and examples employed by the lecturer as part of the pedagogical expedience, and the cultural underpinnings of the intellectual content of the lecture, are all at once put at the mercy of the interpreter who is then charged with the complicated function of conveying the idea of the lecturer to the students and the students’ queries to the lecturer.

Law, particularly the Common Law, is very much culture and language specific. Thus to be able to deliver a lecture to a

“foreign audience” from a culture with a very different legal system (as in the case of China) through an interpreter, the situation requires a “double coincidence of knowledge” on the part of the interpreter if the lecture is to be meaningful. By a double coincidence of knowledge, what we mean is that it is not enough for an interpreter to be fluent in English and Mandarin as may be ordinarily required for interpreting conversations in either language. In the case of interpreting a standard lecture on a topic in the Common Law for instance, the interpreter must be conversant with the nature of the Common Law on the one hand, and the Chinese legal system and thinking on the other hand. An interpreter who is familiar with the Common Law system but unfamiliar with terms and issues in Chinese law will be generally unable to explain concepts of the Common Law in an appropriate language in a law class. Similarly, an interpreter who is familiar with the Chinese legal system, but unfamiliar with the Common Law, can offer very little assistance in conveying the ideas of the lecturer to the students. The difficulty of a course in LOTE, based on interpreting faces, is that in some subject areas it is difficult if not impossible to find an affordable interpreter with the double coincidence of knowledge required for an effective delivery of a lecture by proxy.

For us, our experience in China easily demonstrates that the issue of double coincidence of knowledge is a critical one and largely determines the credibility and success of a program particularly in law. As noted earlier, the course was offered in the “intensive mode”; thus in the case of Principles of Common Law, for instance, the lectures run for up to 8 hours a day and 7 days a week. To ensure ease of translation in the course of the lectures, all the lectures were based on PowerPoint slides which were “pre-translated” in Sydney with Mandarin “subtitles”. We had sufficient resources and adequate control over personnel to ensure the quality of translation. However, host country partners had the responsibility of hiring the translators for the lectures once the lectures commenced in China. This responsibility was left with the host country partner because of practical considerations, since they are better placed to source the appropriate personnel. In any case, from a budget perspective, it also seemed desirable that the host country partners should assume responsibility for translating the lectures.

Shifting translation responsibilities to host country partners came at a significant cost. For one thing, there was usually only one translator for the “lecture day”. Even where partners were generous enough to provide the services of

two translators for the day, the 8-hour schedule presented a considerable burden for the two translators. The schedule was of course excessive for one translator. In any case, since we did not have the responsibility for hiring lecture translators, this undermined our ability to ensure the quality of the translators. This ultimately meant that we could never be sure enough about the quality of the lecture by proxy.

Teaching Common law to non-Common law students is in itself a demanding task. Teaching Common law in LOTE, by proxy, in the context of China, adds to the complications at multiple levels. Quite apart from the question of the double coincidence of knowledge, pedagogy in LOTE by proxy involves two significant problems: linguistic and cultural barriers on the one hand and strong impediments to comprehension on the other.

Impediments to Comprehension

In any environment, pedagogy involves the careful construction of a "bridge of comprehension" between the instructor and the instructed or the teacher and the student. Where a proxy is used in LOTE, the bridge of comprehension becomes rather complicated. The lecturer is removed from "direct" communication with the student. The proxy has to first cope with absorbing the new knowledge conveyed from the lecturer, understand it sufficiently enough, and then decide on how best to convey the content as understood by him or her to the intended student audience. In this process, the proxy ceases to be a translator and takes on the role of an interpreter by explaining and conceptualising his or her understanding of what the lecturer has said. In the process, it is entirely conceivable that knowledge might be distorted or lost, through the proxy who has to interpret both words and context. What is said by the lecturer and what is understood by the proxy, and what is ultimately transmitted to the students, can be miles apart. Of course, the lecturer, not familiar with the LOTE, would then remain oblivious to the nature of the content delivered to the students. In the process, the bridge of comprehension needed for the pedagogical exercise becomes a "bridge of miscomprehension".

Linguistic and Cultural Barriers

Language and context are central in the pedagogy of law. An effective translation, and where necessary interpretation, of the materials presented to the proxy require an understanding of

the context in which the cases and issues are discussed in class. More importantly, they require a certain level of proficiency in the social, political and economic context and settings where the cases occur or the issues arise.¹³ Linguists like Barker and Galasinski argue that language and cultural identities are interwoven.¹⁴ Therefore, translating from one language into another, calls for a cultural translation or orientation. It is therefore the case that where a lecture is delivered on a subject in the Common Law, it requires the translator, as proxy, to be well acquainted with the Anglo-American culture and socio-economic and political environment to fully understand the essence of the content of the lecture before the onward interpretation or delivery to the student audience. The lack of a proxy's familiarity with the cultural context in which the cases arise can undermine the quality of the lecture. We use two examples from the classroom in the UTS program to demonstrate the problems of language and culture:

This exchange occurred between the lecturer and the translator:¹⁵

Lecturer: "...just like in Australia, NRMA is always a party to sue or be sued under... The example of the NRMA case illustrates how shareholders have comparatively little say in management...."

Translator: "What is NRMA?"

Lecturer: "...NRMA is the National Road and Motorists Association...."

Translator (question from a student): "Is it an important organisation in Sydney?"

Lecturer: "yes... it is a big company, not only in Sydney, actually, it is Australia's largest co-operative in insurance and road-side assistance" (Without translating the sentence, the translator then asked a further question)

Translator: "What is road-side assistance then?"

Lecturer: "...road-side assistance... is the assistance provided by NRMA to its clients... for example, when your car breaks down on the road... you call them..." (The lecturer used more

¹³ C Barker & D Galasinski, *Cultural Studies and Discourse Analysis: A Dialogue on Language and Identity* (London: Sage Publications Ltd, 2001)

¹⁴ Id

¹⁵ This translator holds a Bachelor Degree in English with first class honours from a Chinese University, and had been working for three years at a radio station as an English news reporter.

than 10 minutes to explain to the translator the importance of NRMA in Australia as a big corporation and its role in insurance and roadside assistance)

Exchanges of this nature that required digression to explain the social and economic context of particular issues to the translator were quite common. Apart from the practical issue of time, such digressions tended to disrupt the flow of the lectures and dampened students' interest in the substantive issues presented. It would of course have assisted the situation if the translator had some understanding of the culture and society in the context of which the lecturer was seeking to present the example in issue. On the other hand, such instances could have been minimised or indeed avoided altogether if lecturers used examples and contextual instances that avoided too many Australian examples to conduct classes.¹⁶

The second example is taken from an exchange between the lecturer and the translators in a class in Cyber Crime. It demonstrates the specific linguistic problems that confront the lecturer and the translator. In this particular instance, in view of the perceived difficulties with the subject area and to ensure quality in delivery, two translators were engaged by the host country partner. Translator "A" was a graduate with a combined Bachelor's degree in Information Technology and English. Translator "B" was a highly recommended and experienced translator.

Lecturer: "Today, we are going to talk about cyber forensics..."

Translator B to Lecturer: (without translating to the students) "What is cyber forensics?"

Lecturer to Translator B: "...cyber forensics...it relates to evidence, the proper way to collect evidence, what type of computer-based evidence is admissible in the courtroom etc... You can just translate the phrase 'cyber forensic' for now, and we will talk about the content later...In fact, this is the whole content for today's lecture..."

Translator B to Translator A: "Do you know a word that could be used to translate Cyber Forensics?"

Translator A to Translator B: "Can we translate it as 'cyber evidence'?"

Translator B: "I think we should translate it as 'the collection of evidence'."

¹⁶ F Cownie, *Legal Academics: Culture and Identities* (Oxford: Hart Publishing, 2004).

Translator B then said: "We can't take any more time to look for a word in Mandarin that we can use for 'forensics', I think we should translate the whole meaning of the content, what do you think?"

The discussion between the two translators went on for about five minutes with the lecturer looking on, unaware of the content of the discussion and the dilemma confronting the translators.

The Chinese-English dictionary defines "forensic" as "belonging to the courts of justice"; "use of legal argumentation"; "medical procedures and scientific testing done for use in court"; and, "the branch of science that employs scientific technology to assist in the determination of facts in the courts of law". The dictionary does not offer a specific equivalent to the English phrase "cyber forensics". The translators subsequently had to employ several sentences to interpret the meaning of "cyber forensics". So whenever the phrase was used in the class, the translators had a gruelling time explaining the content and notion of "forensics". This was confusing for the students. To make matters worse, in the final exam, there was a question about cyber forensics worth 25% of the final mark.

Learning Common Law: Chinese Students' Perspectives and Experience

John Biggs and David Kember are two leading educationists who have written widely about Asian students' learning approaches and study practices.¹⁷ Whilst Biggs surveyed Asian students studying in Melbourne and Sydney, Kember conducted his research in Hong Kong. Kember notes that when he first arrived in Hong Kong to teach, he found many students tended to exhibit the following characteristics: (1) reliant on rote-learning; (2) passive; (3) resistant to teaching innovations and motivated by career prospects; (4) willingness to invest in education; and (5) good at project work.¹⁸ The data collected in this article differs from Biggs's and Kember's works. Biggs's research was about Asian students in a foreign environment, and Kember's work was based on students in Hong Kong, where English language and culture are familiar to many residents.

¹⁷ J Biggs, *Teaching for Quality Learning at University* (Buckingham: SRHE and Open University Press, 1999); D Kember & L Gow, A challenge to the anecdotal stereotype of the Asian Student (1991) 16(2) *Studies in Higher Education* 117.

¹⁸ D Kember, Misconceptions about the learning approaches, motivation and study practices of Asian students, (2000) 40 *Higher Education* 99.

The data collected in this article is unique as it was conducted in China. The survey below was conducted in September 2004. Surprisingly, we found that many of the students' responses were by and large consistent with Kember's research in many respects.

There were 32 responses collected from the LLM class of 40 students in Beijing. The survey was anonymous so as to allow students to openly express their opinions. Our survey focused on four principal issues: (1) objectives and purpose of study; (2) problems encountered in lectures; (3) approach to learning; and (4) assessment. The rationale for our focus was to ascertain the students' motivation for enrolling in the program; whether the differences in legal systems and teaching methods were a major problem; and to ascertain if the students' study habits were inconsistent with our teaching methods.

(1) Objectives and purpose of study

The results from Question One (see Table 1), showed overwhelmingly that students believed that studying Common Law would help their career aspirations. This was very similar to the results in the Kember, Wong and Leung survey, where they found career motivation steered students' interest in subjects studied.¹⁹ Responses to Question One, "I took up learning the Common Law system because it is interesting", approximately 84 per cent of the students strongly agreed. More importantly, the result, while based on a limited survey, is consistent with perceptions underpinning the introduction of courses on foreign legal systems in China by foreign education providers, and the general thrust of the "international education" market in the country.²⁰

(2) Problems encountered in Lectures

Over half of the students (62.5%) agreed that the differences between the Common Law and the Chinese legal systems are too wide to reconcile, and they found the lecturing styles in the program too difficult to accept. The responses of the students concerning "lecturing style" highlight a definite problem in the approach to pedagogy by western educators in the Chinese market. As a postgraduate program, lecturers were encouraged to engage students in class discussions and to challenge conventional wisdom in comparative legal theory (see Table 2).

¹⁹ D Kember, A Wong & D Leung, Reconsidering the dimensions of approaches to learning (1999) 69 *British Journal of Educational Psychology* 323.

²⁰ See Editorial, Foreign Universities Eye on Chinese Market *People's Daily* 20 February 2001.

Table 1

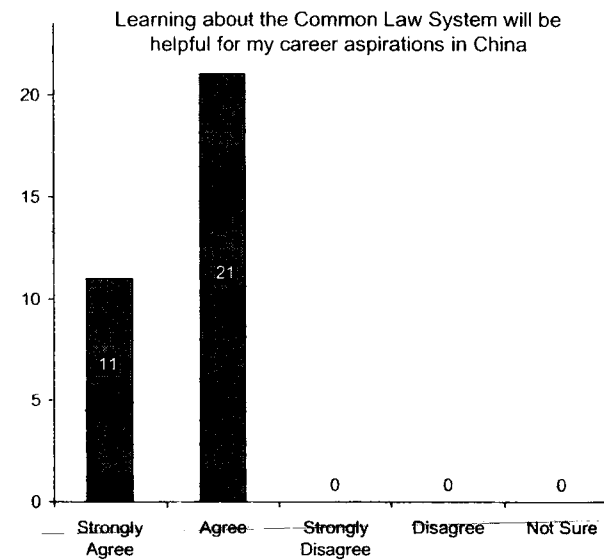
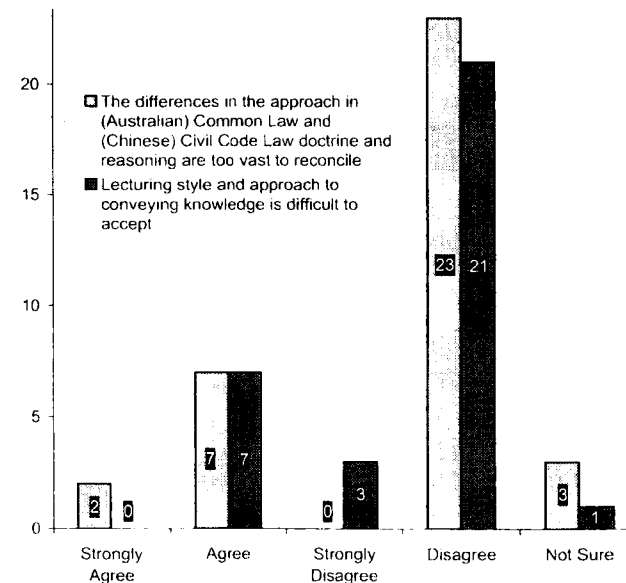


Table 2



For the most part, student participation in class discussions was restricted to questions seeking clarifications, rather than a robust discussion of the issues raised in a particular topic. The results of the survey on the question, *"I try to ask the lecturer to clarify my questions during or after class"*, demonstrate a general reluctance by students to engage lecturers during or after class. The response by the students that they found the lecturing style too difficult to accept thus raises an important question for western educators in China: in the approach to pedagogy in China, should we encourage "western style" teaching and learning methods, or should we conform to the tradition of "note-taking" non-questioning class of students eager to simply accept whatever knowledge the lecturer is able to hand down in the lecture environment? Our survey indicates that to be successful in delivering a beneficial program in China, western educators would need to adopt a style of pedagogy that takes account of the student culture.

Approximately 69 per cent of the students agreed that Common Law textbooks in Chinese are too basic and inadequate. On the other hand, there was an overwhelming agreement that the use of technology (PowerPoint) to deliver lectures assisted with their understanding of the lectures. In spite of the ever-increasing interest in western legal systems in general and in the Common Law in particular, there is a serious lack of literature in Mandarin on western legal systems as such. The result of the survey easily confirms this. The limited range of literature imposes a greater burden on the lecturer in the delivery process. It also reduces the expectation of out-of-class readings by students. The survey also confirms that use of PowerPoint slides with Chinese is an important teaching tool in the Chinese international education market.

(3) Approach to learning

Kember's study found a consistent pattern of didactic learning by Asian students.²¹ Our survey result found similar results as 62.5 per cent of the students agreed that critical analysis is alien in their studies. Kember argued that courses for Asian students have to be redesigned in such a way as to allow the students to become familiar with these vital skills.²² The results of our survey confirm this view.

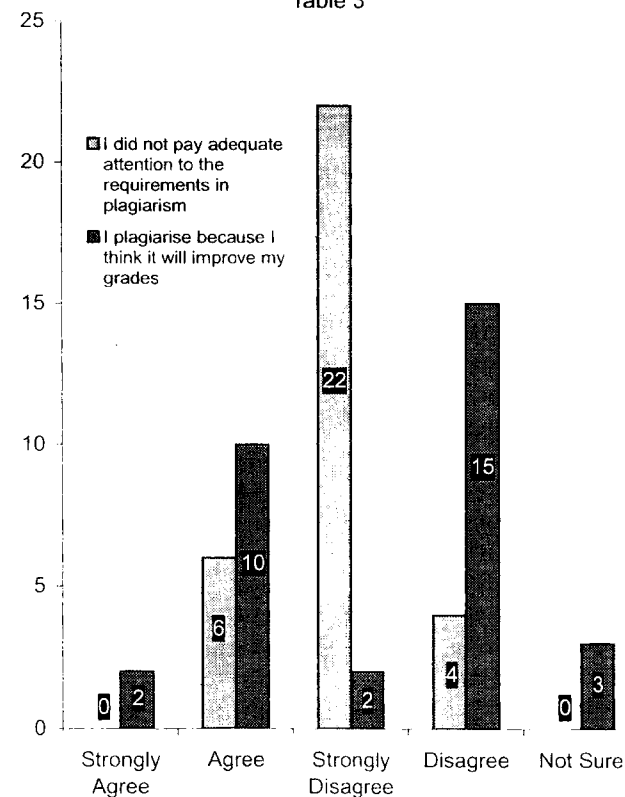
²¹ Kember, *supra* note 18, at 111.

²² *Id.* at 112.

(4) Assessment methods

Even though students wrote their essays in Mandarin, approximately 81 per cent of them agreed that they required more assistance in essay writing. Plagiarism was a central issue in the program. All students in the survey indicated that they understood what plagiarism is (see Table 3). However students' assignments were replete with several instances of work copied from Internet sources without adequate referencing. This was symptomatic of a general problem with the program. Students consistently indicated that they were not sure what was required of them in terms of research referencing to acknowledge sources. It confirms an important issue: the delivery of any offshore program in China must be based on a firm clarification of what is expected of students in terms of research techniques and methodology.

Table 3



Conclusions

Pedagogy in any environment is complex and requires a clearly defined normative framework designed to ensure that the pedagogical objective is achievable. In dealing with China, the reality is that even though the country presents some very excellent opportunities, it is also the case that competition among Western education providers is very intense. To get the appropriate competitive edge, institutions need to be innovative in the design of their curriculum and their style of pedagogy. Overall, whatever technique is adopted to secure the competitive edge, it is critical for the long term benefit of the program to ensure that the pedagogical imperative of imparting valuable knowledge and intellectual excellence is not compromised in the pursuit of financial gains.

For us, the idea of teaching by proxy was as innovative as it was an adventure in pedagogy. Proxy-based pedagogy is inherently problematic and it is certainly not for the faint-hearted conservative academic. Even though the UTS program may have only lasted for a year before the university decided to end it for a variety of reasons beyond the scope of this paper, it was nevertheless a ground-breaking initiative. The first and only students from the program graduated in 2004. The graduation was easily indicative of the simple fact that whatever the inherent problems, the program was feasible. Perhaps more importantly, the graduation was also a call to look carefully at how educational institutions can devise innovative mechanisms in engaging with China. It is good to know that after UTS, at least one institution in Australia has taken up the call and has successfully developed an excellent offshore program in China using largely the proxy system of pedagogy.

TEACHING NOTE

The Design and Implementation of Criterion-referenced Assessment in a First Year Undergraduate Core Law Unit

*Kelley Burton and Natalie Cuffe**

Introduction

The University Academic Board at the Queensland University of Technology (QUT) approved a new QUT Assessment Policy¹ in September 2003, which requires a criterion-referenced approach as opposed to a norm-referenced approach to assessment. In 2004, in accordance with the QUT Implementation Plan, the QUT School of Law raised an awareness of criterion-referenced assessment and implemented criterion-referenced assessment in first year core undergraduate law units. The Implementation Plan anticipates that all law units across all year levels will implement criterion-referenced assessment between 2005 and 2007. This teaching note will distinguish norm-referenced assessment from criterion-referenced assessment and justify why QUT is implementing criterion-referenced assessment. It will focus on how the authors of this article designed, implemented and evaluated criterion-referenced assessment in a first year core undergraduate law unit, *LWB143 Legal Research and Writing*, in 2004. In 2004, the unit had a cohort of approximately 600 students and 12 members in the teaching team. Ten members of the teaching team were involved in marking the items of assessment and eight of them were casual academics. In light of the experience in 2004, the authors provide some insight into the way forward.

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¹ QUT, *Manual of Policies and Procedures* (2003) cl 9.1.3 http://www.qut.edu.au/admin/mopp/C/C_09_01.html (accessed 13 October 2005).