

Teaching and Assessing the “Competing Tensions” in Stage 2 Legal Studies

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A tension is a state that exists between two opposing or balancing forces



Teaching and Assessing the Tensions

1. Explicit teaching - laying the groundwork at the start of the year
 - a. Understanding
 - b. Analysis and Evaluation
 - c. Application
2. Embedding - using the tensions in the Focus Areas
 - a. Inquiry Questions
 - b. Big Questions
3. Assessment

Explicit teaching - Understanding

Students must be able to adequately explain what is meant by these terms:

- Tension
- Competing
- Rights
- Responsibilities
- Fairness
- Efficiency
- Certainty
- Flexibility
- Empowered
- Disempowered

Encourage students to develop their own definition using their own words.
Remind them that using an example to illustrate understanding is always helpful.

Explicit teaching - Evaluation

Students should also be able to explain the importance of each of the components of the competing tensions in the context of the legal system. eg

Why is it important to protect rights?

Why is fairness important?

Why is certainty important? etc

This may occur as a reflection once the tension has been considered in a context.

Application

A range of activities can be used to illustrate the practical application of the tensions.

We should aim to develop an understanding that each side of the tension represents a desirable outcome that cannot be achieved without compromising the other.

In so doing, student begin to appreciate that legal problems are multi-faceted and do not lend themselves to neat solutions.

The tensions provide a reference point and can be used to justify an evaluative statement. For instance, “The adversary system is an effective mechanism to resolve disputes because it strikes an appropriate balance between the competing tensions of fairness and efficiency”.

Competing Rights and Responsibilities

This tension is apparent in a number of contexts and is relevant to lawmaking and dispute resolution. Students should consider:

1. Rights/responsibilities that may conflict. Eg privacy/public safety
2. Groups/individuals that may have opposing views or interests. Eg accused persons/victims
3. Circumstances that may give rise to conflict. Eg rights of people now/rights of future generations

Aim to present a variety of scenarios that enable student to identify and explain what the rights are that are in conflict, who the groups/individuals are that are in conflict or how circumstances have given rise to the conflict.

Possible current examples

Management of Covid-19 Pandemic

<https://indaily.com.au/opinion/2020/11/24/personal-privacy-versus-public-health-in-a-pandemic/>

Religious exemptions to anti discrimination laws

<https://theconversation.com/governments-religious-discrimination-bill-enshrines-the-right-to-harm-others-in-the-name-of-faith-131206>

Global Warming

<https://theconversation.com/the-paris-agreement-at-5-times-running-out-how-to-get-the-world-back-on-track-to-meet-its-climate-goals-151806>

Fairness and Efficiency

This tension is most useful in the context of legal processes.

Student may gain an appreciation of the tension by engaging in classroom activities, for example:

- dividing up a cake or a box of chocolates,
- creating a set of class rules or
- resolving an argument,

where the process is either conducted as FAIRLY as possible or as EFFICIENTLY as possible and then comparing the strengths and weaknesses of each approach.

Possible examples

Emergency evacuation rules

Those with disabilities must wait (less fair) for others to move first (more efficient) (a non legal rule but an interesting example)

Sentencing discounts

Allowing a different punishment to be imposed for the same crime (less fair) in order to encourage guilty pleas (more efficient)

Certainty and Flexibility

One way of looking at this tension that may be useful is to consider the difference between equal treatment and equitable treatment.

Inspiration might be drawn from this post about teaching this concept to primary school students https://www.boredpanda.com/equality-equity-band-aid-student-lesson/?utm_source=google&utm_medium=organic&utm_campaign=organic

This will demonstrate the value of flexibility in the law.

Possible examples

Petition calling for mandatory sentencing for driving offences in SA

<https://www.change.org/p/vickie-chapman-and-kyam-maher-end-unjust-sentencing-for-killer-drivers?recruiter=1129964>

Does the referendum mechanism mean the Australian Constitution is more certain and less flexible? http://classic.austlii.edu.au/au/legis/cth/consol_act/coaca430/s128.html

Laws regulating the Covid-19 pandemic - the requirement for flexibility has caused uncertainty
<https://theconversation.com/struggling-with-the-uncertainty-of-life-under-coronavirus-how-kierkegaards-philosophy-can-help-144671>

The empowered and the disempowered

The exercise of power is an essential component of laws and students should consider how power imbalances impact on groups and individuals within the community.

Inquiry questions such as “How do the institutions of government protect the rights of groups and individuals in the Australian community, including Aboriginal and Torres Strait Islanders?” lend themselves to this tension.

The effectiveness of checks on the exercise of power holding the powerful to account will also be relevant to this tension.

Embedding Tensions in Inquiry Questions

The first inquiry question in the Sources of Law focus area is:

Why is the rule of law important?

Students will need to understand that the rule of law is a principle designed to control the exercise of *power* in order to protect *rights*.

Thus we can invite them to consider the tensions between competing rights and responsibilities and the empowered and the disempowered.

Embedding tensions in Inquiry and Big Questions

- Teacher driven or student driven?
- How many tensions? How to choose?
- Refer to Subject Outline for guidance for Big Questions

Assessing the Tensions

The Assessment Design Criteria requires teachers to consider evidence of student learning regarding:

UA1 Understanding of ways that the legal system balances competing tensions for specific contexts.

This specific feature is included in the design of the external exam.

The inquiry task also requires “the focus of the inquiry [to be] .. related to one of the competing tensions ..”

Task Design?

One approach is to direct students to consider a particular tension when responding to an evaluation question.

It might also be appropriate for students to have opportunities to choose which competing tension/s they think is appropriate to consider in responding to an evaluation question.

Eg Explain how the law relating to the use of illegally obtained evidence balances *competing rights and responsibilities*.

Explain how the penalties in criminal law provide for both *certainty and flexibility*.

Do you believe the judgment of Kourakis CJ struck the appropriate balance between the *power* of the police and the *disempowerment* of the accused in this case?