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Legal Education in Asia: From Imitation to Innovation

Edited by

Andrew Harding
Jiaxiang Hu
Maartje de Visser

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Contents

Preface

This book arises from collaboration between a number of academics associated with law schools that are members of the Asian Law Institute (ASLI), which is a consortium of more than 80 law schools across Asia and beyond, with its secretariat based at the Faculty of Law, National University of Singapore.[1]

In addition to its annual conference, ASLI organizes specialist research colloquia and the present book is based on the best papers presented, and discussion of them, at one of these colloquia, hosted by Shanghai Jiao Tong University in November 2015. That colloquium, whose title was the same as this book, explored how legal education in the East Asian region has begun to chart its own course after decades of path-dependency on conventional models designed in different (Western) settings.

We wish to thank ASLI and the ASLI secretariat, especially Melinda Tan, for their support for this project; Shanghai Jiao Tong University for hosting the seminar which gave rise to the project; Wilson Tay for his work on the copy-editing; the contributors for their excellent work and their forbearance with the editing process; Li Zhenfei for her assistance with the index; and of course the publishers for taking on this project and bringing the book to publication.

Legal education as a topic of inquiry and concern has been thrust into the limelight in East Asia in recent years, with changing expectations of what law graduates can and should be able to do. The pressures and advantages created by globalization, as well as rapid and significant changes in the region's socio-economic-political environment, have been the major catalysts for this turn of events, as Chapter 11 on China discusses, and Chapter 3's case study of the Australian experience poignantly illustrates. Stakeholders are also increasingly interested in, and aware of, the downsides of classic pedagogical techniques such as large-scale lecturing as the principal means of instruction. It seems also a problem that traditional techniques do not sufficiently inculcate ethical norms (see Chapter 4), and lawyers' socialization may encourage group self-serving (see Chapter 8). While the legal changes and competition between law firms spurred by globalization are evident across the globe, this does not, and should not, necessarily entail similarity in approaches to legal education. Yet the tendency has been for the discourse on legal education in Asia to be based on received assumptions from other regions regarding the optimal way in which law students ought to be taught and readied to enter the legal profession; and

1 ASLI's website is at https://law.nus.edu.sg/asli/index.aspx, accessed 3 June 2017.

the focus has mainly been on reporting how Asian systems conform to those assumptions. Legal education systems, like legal systems themselves, were framed across Asia without exception according to foreign models. These reflect the vestiges of colonialism, and can be said to amount to imitating the style and purposes of legal education typical in Western and relatively 'pure' common law and civilian systems. The underlying logic for doing so must be found in a preoccupation with state- and economy-building in the middle of the twentieth century. For 'Asian developmental states' the content and process of legal education were, understandably, at the periphery of the political agenda and, since transplanted models did not appear to be malfunctioning, and might even have contributed in some ways to development, they posed no immediate cause for concern and attention.

This is now clearly changing, and there is a palpable sense that innovation and reform are both needed and possible. Due to growing levels of affluence, expectations on the part of civil society and a sense of the states' own ability (or even pride) in nurturing talent within its domestic schooling system and universities, the future of legal education is becoming more of a priority for Asian nations. Reforms are taking place, old assumptions are crumbling, and new ideas are being discussed. Japan and South Korea have dramatically rethought their legal education systems in line with reforms in legal process and institutions, with interesting and even controversial results. In China's vast tertiary landscape that has grown steadily since the 1980s, elite law schools have positioned themselves at the vanguard. More generally, law schools across East Asia today are better resourced than they were, and many are keenly exploring how best to respond to local and regional imperatives through rethinking how the role of law and lawyers should be conceived, and what this means for legal education strategies.

It is clear, then, that Asian legal education is coming into its own and beginning to accept responsibility for designing curricula and approaches that fit the region's particular needs. This development is to be welcomed, and could even be said to be long overdue. Indeed, the premise underlying the book is that meaningful legal education should not be designed or provided in a vacuum; rather, it must engage with, respond to, and anticipate changes within the wider domestic social and political setting and national legal system. In a related vein, this volume subscribes to the idea that context matters not only when examining the feasibility and desirability of transplanting rules of law; it also matters when it comes to the manner in which those rules are taught in university to the future judges, lawyers, prosecutors, government officials and academics upon whose shoulders rests the task of nurturing and improving Asia's changing legal systems. Since the Asian context differs from

the European or American experience in a variety of ways, as several of the contributors cogently demonstrate, this cannot but have ramifications for the design of legal education.

The collected chapters thus explore how conventional 'transplanted' approaches as regards program design as well as modes of teaching are, or are on the cusp of being, reimagined in Asia, and discern emerging home-grown traces of innovation replacing imitation in countries and universities across the region. From English-language law programmes (as in Thailand – see Chapter 13) to Japan's *Yoken Jijitsu* teaching method (on which see Chapter 7), and the growing attention devoted to neighbouring Asian legal systems in the curriculum (chronicled in Chapter 5), Asian approaches are maturing in a manner that is closely aligned with the conditions of and developments in their regional ecosystem (fleshed out in greater detail in Chapter 1). This ongoing metamorphosis, the book posits, will continue to warrant close observation in the years to come to uncover the factors that help determine successful instances of reform. There is a similar need to (continue to) identify and make sense of the struggles that must inevitably accompany the search for 'better' legal education.

The information and analysis contained in each of the country chapters can be a valuable guide or source of inspiration for governments, bar councils, universities and educators eager to refashion legal education. Whether this will in fact be the case is, of course, in part dependent on the logistics pertaining to the transferability of educational approaches developed in one Asian states to other jurisdictions in the region.

At the outset, it should be acknowledged that any notion of an homogeneous Asia runs the risk of course of being too simplistic and as undervaluing the immense diversity of the continent. At the same time, it should be acknowledged that there are important traits that are shared among nations in this region. The majority of countries in East Asia comprise developing nations with a great hunger and potential for, as well as emphasis on, economic growth. Accepting that the legal-services sector can be one driver of such growth means that there will be a keen interest to ensure that new entrants to the legal profession exhibit the quality, and possess the skills, to capitalise on such potential. Furthermore, since many Asian states have, as mentioned earlier, received their legal systems from different parts of Europe, efforts to change result in a complex tension being created between the status quo and the attempt to forge a new identity that needs to be carefully managed and recalibrated.

These two features can act as impulses to be tapped to drive educational reform. Tailoring a clarion call along the lines of growth and the active creation

of a domestic or regional epistemic legal community for up-and-coming law schools or law schools that are seriously thinking of reforming their curricula should be eminently feasible. Further, given that Asia is likely to remain the most significant market for the foreseeable future, there is a distinct commercial and geographical advantage in this development for law students that is not replicated in the same manner in other parts of the world. Moreover, if the authors of Chapter 2 are correct in concluding that there is a greater emphasis on and attraction to Confucianism and collectivism in Asia than in the West, this could present yet another advantage to many Asian jurisdictions. For example, a strong multi-generational community that internalises the concept of a greater good beyond mere personal advancement can become the cornerstone of a sustainable international moot court programme (see, further, Chapter 6) or other skills-training components, either in law schools or when graduates prepare to take their bar exam (see also Chapter 8, which chronicles efforts undertaken in South Korea to infuse legal education with a strong practical, as opposed to theoretical, slant). Naturally, this advantage is strongest in countries that subscribe more overtly to Confucianism, and reinforced in countries whose governments are prone to use law instrumentally as a driver of change.

The accounts regarding Japan and Indonesia, presented in Chapter 7 and Chapter 14 respectively, illustrate that the quality of law school teaching has, unsurprisingly, a direct impact on the quality of the legal-services sector. What is more, these chapters point out that when the judiciary is weak, the negative ripple-effect on the rest of the legal community is particularly significant. The logic is not difficult to grasp: if judges make sub-par decisions because they lack the ability to critically reflect on the merits of the legal arguments advanced by counsel, the latter have no incentive to invest in formulating cogent, persuasive or innovative reasons in support for their position – and they will induct fresh entrants to the legal profession to do the same. The result is a vicious circle, which carries with it the risk of the legal fraternity losing credibility and State resources being diverted to other sectors or professions. Such a development would endanger the country's rule of law, with negative ramifications for national interests such as foreign investment and international trade. A solid legal education, then, must encompass both doctrinal instruction and skills-training components to ensure that graduates are well-equipped and confident in analysing, researching, writing and discussing legal problems. In addition, the study offered in Chapter 11 of the manner in which China has to date approached legal education suggests that diversification among law schools may need to be pursued to ensure a good fit between the type of legal services that the market demands and the corresponding skills that law graduates can supply, while the author of Chapter 4 makes a persuasive case to

include anti-corruption education as a tool to address the threat that this form of behaviour poses for development of Asian economies and societies.

Furthermore, as noted by the authors of Chapter 5, two interlinked contemporary trends that cannot be ignored by law schools anywhere in the world are that law is no longer coterminous with geographical borders, and that the proliferation of cross-jurisdictional transactions demands of legal professionals new abilities and skills to successfully navigate in a globalised 'law market'. This is certainly true in Asia (though by no means exclusively so, when one considers the extent of EU integration), as exemplified amongst others by the establishment of institutions such as the Singapore International Commercial Court and financial and dispute-resolution hubs in the Middle East and the Pearl River Delta region. The teaching of comparative law thus assumes a pivotal role in helping students prepare for this new reality, even if only at a foundational level, to understand the mechanics and nuances of legal systems outside of those that they are already familiar with. Soft skills pertaining to the appreciation of other types of cultures and philosophies are just as crucial as understanding the law in force in foreign jurisdictions.

Yet, it is not immediately obvious that all law schools may be in a position to implement with the requisite robustness educational strategies, such as an international moots program, with a strong international flavour. There are, first of all, linguistic challenges: it is safe to assume for now that English will remain the lingua franca of cross-border commerce and other types of multilateral interaction in the short to medium term. This in turn may have ramifications with regard to the transmission and communication of legal norms and ideas, including the dominant language of instruction: indeed, in several chapters, mention is made of initiatives to introduce English-language law degrees. In longer run, the authors of Chapter 10 postulate that Western jurisdictions and their legal traditions and rules may no longer dominate cross-border work. It may be prudent for law schools in non-English jurisdictions to anticipate this development and expose students to bilingual degrees and skills clinics, as has for instance happened in Hong Kong as detailed in Chapter 9.

Language aside, the issues of resources and structural inequalities must also be confronted. The authors of Chapter 12 and Chapter 13 suggest that in Thailand and Vietnam at least, reforming legal education can only take place incrementally as there are larger political (even philosophical) obstacles impeding change. Yet, with the digitisation of knowledge and the growing tendency to disseminate academic writings through open-source platforms,[2]

2 Although Myanmar is not covered in this volume, it may be noted that Mandalay University is, as of mid-2017, using open-access material as a method of developing its legal education system.

access to information is no longer the formidable barrier that it once was. To quote the author of Chapter 1, 'it is time for [Asia] to be more ambitious. Our students and our professors are now among the best in the world, operating in its most economically dynamic continent'.

Ultimately, investing in improving the quality of legal education and ensuring that it is reflexive of the particular municipal and regional setting should result in Asia becoming more densely packed with versatile legal talent willing and able to conduct meaningful intra-regional conversations about greater economic and legal convergence and integration. This should in due course make it possible for this region to speak with a stronger voice on the global legal stage.

Maartje de Visser
Hu Jiaxiang
Andrew Harding

List of Contributors

Bui Ngoc Son
is a senior research fellow at the Centre for Asian Legal Studies of the National University of Singapore Faculty of Law, when he was previously a postdoctoral fellow. He holds PhD from The University of Hong Kong. He also studied as a visiting researcher/scholar at Harvard Law School and Tsinghua Law School. He is the author of the book *Confucian Constitutionalism in East Asia* (Routledge, 2016). His articles have been published by journals such as *American Journal of Comparative Law, Law and Social Inquiry, Illinois Law Review, International Law of Law in Context, Washington International Law Journal, Washington University Global Studies Law Review*, among others. His research interests include comparative constitutional law and theory, comparative law, socialist law, Asian legal systems, and Asian legal theories.

Ann Black
is Associate Professor at TC Beirne School of Law, The University of Queensland. She is also the Deputy Director of the Centre for Public International and Comparative Law and has been the Director of the Post-Graduate Course Work Programs. She teaches courses in comparative law including the law and legal systems of Asia and Islamic law in both the undergraduate and postgraduate programs.

Peter Black
is a Senior Lecturer in Law at The Queensland University of Technology. He is a mid-year coordinator for the School of Law and a member of University Academic Board. He teaches courses in media law and Australian constitutional law.

Chen Siyuan
graduated with law degrees from NUS and Harvard. He was a law clerk and assistant registrar with the Supreme Court before joining academia. He specialises in procedure and evidence, having published in journals such as the CJQ and International Journal of Evidence & Proof. He has also published several books such as *The Law of Evidence in Singapore* (Sweet & Maxwell 2016), which has been cited by various courts. He enjoys teaching legal skills and moot court, and has coached coached SMU mooters to championship finals of major competitions such as the Jessup, Vis, Price, and International Criminal Court moots.

Simon Chesterman
is the Dean of the Faculty of Law at the National University of Singapore, Editor of the Asian Journal of International Law and secretary general of the Asian Society of International Law. Previous appointments include positions as Director of the NYU School of Law Singapore Program, at the UN, the International Crisis Group and the International Peace Academy. His widely published studies open up new areas of research on conceptions of public authority, including global governance, state-building and post-conflict reconstruction.

Wilson Chow
is Associate Professor and Head of the Department of Professional Legal Education at the University of Hong Kong Faculty of Law. He has spearheaded the curriculum reform and development proposals in the HKU Postgraduate Certificate in Laws (PCLL) since 2001, including as regards the use of experiential learning tools in professional legal education. His team has presented their empirical works at conferences held in Hong Kong, UK, Australia and the US and published in international refereed journals and edited volumes. The team was shortlisted for the HKU Outstanding Teaching Award (OTA) in 2014 and three members received the Faculty OTA in 2013, 2015 and 2016 respectively.

Ibrahim Hanif
is a research and teaching assistant at the International Law Department UGM Faculty of Law. He read law at UGM, and is finishing studies for a Master of Laws at the University of Cambridge. Hanif is studying the integration of international law into Indonesian law, in the context of human rights and international investment.

Andrew Harding
is a Professor at the National University of Singapore and a leading scholar in the fields of Asian legal studies and comparative constitutional law. He commenced his academic career at NUS before moving to SOAS, University of London, where he became Head of the Law School and Director of the Centre for South East Asian Studies. He joined NUS, as Director of the Centre for Asian Legal Studies and Director of the Asian Law Institute, from the University of Victoria, BC Canada, where he was Professor of Asia-Pacific Legal Relations and Director of the Centre for Asia-Pacific Initiatives. Professor Harding has worked extensively on constitutional law in Malaysia and Thailand, and has made extensive contributions to scholarship in comparative law, and law and

development, having published 15 books as author or editor. He is co-founding-editor of Hart Publishing's book series 'Constitutional Systems of the World', a major resource for constitutional law in context, and has authored the books on Malaysia and Thailand in that series (2011, 2012).

Hu Jiaxiang
is a Professor of International Economic Law and director of the Asian Law Centre at the KuGuan Law School of Shanghai Jiao Tong University, China. He earned a BA degree and a MA degree from Hangzhou University, holds an MPhil degree from Zhejiang University and obtained his PhD from the University of Edinburg. He has been a visiting scholar at International Economic Law Institute of Georgetown University, the East Asian Studies Center of Harvard University and the Asian Law Institute of National University of Singapore. Professor Hu teaches international economic law and WTO law and has received awards recognizing the quality of his teaching from the Ministry of Education, Shanghai Municipality and Shanghai Jiao Tong University. He is the author of seven books and nearly a hundred articles. His research interests include Public International Law, International Economic Law and WTO Law.

Julienne Jen
is a Principal Lecturer at the Department of Professional Legal Education of the Hong Kong University Faculty of Law. She has been engaged in curriculum reform and development for the PCLL. Apart from having spearheaded the "Case File" approach and her active involvement in training and administering the Standardized Clients, Ms Jen has recently undergone teaching exchange at the legal clinics at Monash University with a view to enhancing the Clinical Legal Education programme at HKU.

Souichirou Kozuka
is Professor of Law at Gakushuin University, Tokyo. He specialises in commercial law, corporate law and maritime, air and space law, and his work has a strong comparative slant to it. His recent publications in English include: "The Bifurcated World of Uniform Law: The Uniform law of 'Islands' and of 'The Ocean'" in *Unidroit* (*ed.*)*, Eppur si muove: The Age of Uniform Law – Essays in honour of Michael Joachim Bonell to celebrate his 70th birthday* (2016, Unidroit), "Policy and Politics in Contract Law Reform in Japan" (co-authored with Luke Nottage) in Maurice Adams & Dirk Heirbaut (eds.) *The Method and Culture of Comparative Law* (2014, Hart) and Souichirou Kozuka (ed.), *Implementation of the Cape Town Convention and the Domestic Laws on Secured Transactions*

(2017, Springer). He is a correspondent for the International Institute for the Unification of Private Law (UNIDROIT) and Associate Member of the International Academy of Comparative Law (IACL).

Li Xueyao

is Professor at Shanghai Jiao Tong University and adjunct professor of the Institution of Social Cognitive and Behavior Science. He is the former Dean and professor of law school, Shanghai University of Finance and Economics. He was honored as one of the "Ten Outstanding Chinese Young Legal Scholars", selected by the Law Society of China; "New Century Excellent Talents" selected by the Ministry of Education and conferred the "Dawn Scholar" by the Shanghai Municipal Government. Professor LI visited Cambridge University and Yale Law School as a senior visiting scholar. He also has been a visiting staff at the Supreme People's Court of China. His current research fields include law and cognitive science, legal profession, judicial reform, theory of rights and education law.

Li Yiran

is a Ph.D candidate of sociology of law and research assistant at the Law and Society Centre, KoGuan Law School of Shanghai Jiao Tong University, China. She earned her BA degree in Educational Public Administration from East China Normal University, Shanghai and holds a JM degree from Shanghai Jiao Tong University. She is also a visiting PhD researcher at the University of California, Berkeley. Her research interests include the judicial system and its reform, the social cognition of role of judge, and legal education.

Philip J. McConnaughay

is Dean and Professor of Law of Peking University School of Transnational Law ("STL") and a Vice Chancellor of Peking University's Shenzhen Graduate School. Before joining STL, he was Founding Dean of Penn State University's law school and School of International Affairs, a Professor of Law at the University of Illinois, Urbana-Champaign, and a partner of the international law firm, Morrison & Foerster, resident for almost ten years in Tokyo and Hong Kong. Professor McConnaughay is the author of numerous scholarly articles and edited books concerning international commercial dispute resolution, the regulation of international commerce, and the role of arbitration in economic development.

Michael Ng

joined the Hong Kong University Faculty of Law as Assistant Professor in 2012. An active researcher in experiential legal education, Dr Ng's works on empirical

study of legal education have been published in international refereed journals, edited volumes and presented in international conferences. He is a core member at the HKU Faculty of Law in developing and researching the use of such teaching and assessment tools for experiential legal education as Standardized Clients and SMILE.

Yong-Chul Park
teaches criminal procedure and criminal law at Sogang University, located in Seoul, South Korea. Recently he was a fellow at Asian Law Institute at NUS in Singapore. He also serves as a board member for various criminal law related society in South Korea, in charge of international affairs. He holds Doctor of Juris Science from Cornell University and masters of laws from Cornell as well as from the George Washington University. He was born in South Korea and finished his LL.B in South Korea before departing the Country to study in the United States. As a comparative criminal procedure scholar he has given special lectures around Asia.

Munin Pongsapan
is Assistant Professor, Associate Dean and Director of International Programs at Thammasat University Faculty of Law in Thailand where he teaches contract law, the law of obligations and legal history. He received his LL.B. from Thammasat University, LL.M. from the University of Cambridge and Ph.D. in law from the University of Edinburgh. He is a contributor of Volumes I and III of the Contract Laws of Asia published by OUP and the editor of Thailand's most cited texts on the law on contracts and obligations written by Seni Pramoj.

Colleen B. Toomey
is Vice Dean of Peking University School of Transnational Law. Previously, she served as Associate Dean for Policy and Planning of Penn State University's law school and School of International Affairs, as Associate Dean for Administration of Penn State's Smeal College of Business, and as Administrative Fellow to Penn State's Executive Vice President and Provost. She also served as a Penn State Fellow to the Committee on Institutional Cooperation, or "CIC," which is the administrative entity that oversees collaboration among all Big Ten universities and the University of Chicago.

Maartje de Visser
is Associate Professor of Law at the School of Law, Singapore Management University, where she teaches comparative law. Prior to this, she held appointments at Maastricht University and Tilburg Law School in the Netherlands.

Her main research interests are in the fields of comparative constitutional law and regional integration, and her current work focuses on cross-border judicial networking in Asia and constitutional interpretation by State institutions other than courts. Maartje has published widely in these areas, with her work appearing in peer-reviewed international journals as well as in edited collections by leading publishing houses. Her monograph *Constitutional Review in Europe – A Comparative Analysis* was published by Hart in 2014.

Helena Whalen-Bridge
is an Associate Professor at the National University of Singapore Faculty of Law. She holds a B.A. (University of Connecticut, 1981), J.D. (University of Connecticut, 1985), and LL.M. (National University of Singapore, 2002). Helena teaches legal ethics and common law reasoning and argument. She has received the NUS Teaching Excellence Award and is a longstanding member of the Law Faculty's Teaching Excellence Committee. Helena's research interests include aspects of lawyering such as legal ethics and comparative legal skills, and her publications include "Understanding Lawyers' Ethics in Singapore" with co-author Alvin Chen (Lexis-Nexis, July 2016). She has worked with the UNODC ACAD programme and related projects starting in 2017.

Francis SL Wang
is the President and Chairman of the Board of Governors of the International Association of Law Schools. He is a Professor of Law and Dean Emeritus at the Kenneth Wang School of Law, Soochow University, Suzhou, China. He serves as the Honorary Chair of Soochow University's Board of Regents. He is a member of the Scholastic Council and holds an Honorary Doctorate in Law from the Far Eastern Federal University of Russia. He co-chairs the Chinese Jurisprudence Commission. He is a Fellow of the Nigerian Institute of Advanced Legal Studies, and an Honorary Bencher of the Honorable Society of King's Inns.

Linda Yanti Sulistiawati
is a lecturer at the International Law Department, UGM Faculty of Law; and served as Vice-Dean for the faculty in 2014–2016, in charge of academic affairs and external relations. She received her law degree from UGM. She has an MSc in Environmental Policy from Wageningen University, and a Doctorate in Law from the University of Washington. Linda's research focuses on climate change, forestry, land and environmental policy and customary laws in Indonesia.

Laura WY Young
is a member of the Executive Committee of the UC Berkeley Foundation Board of Trustees, and is Managing Partner of the law firm of Wang & Wang. She has

taught Chinese Law and Legal History, International Business Transactions, and International Intellectual Property at UC Berkeley, Soochow University's Kenneth Wang School of Law in Suzhou China, Cornell University Law School, and Pacific/McGeorge School of Law. She is an editorial advisor, and author of the Taiwan volume of CCH Asia's Employment Law series, the author of the Intellectual Property chapter of Juris Publishing's Doing Business in China, and author of numerous articles on Chinese law and business, and serves as a Patent Law Advisor to the Practicing Law Institute. She is President of the Board of the Phoebe A. Hearst Museum of Anthropology, and a member of the California Bar Association.

CHAPTER 1

The Fall and Rise of Legal Education in Asia: Inhibition, Imitation, Innovation

Simon Chesterman

A Introduction

The history of legal education in Asia bears the scars of colonialism. The most obvious evidence of that today lies in the common law/civil law divide between our various countries, a distinction for which the determining factor was typically the legal system of the European power that happened to exercise colonial power. Hence Singapore, Malaysia, and India are common law countries with nearly identical criminal law codes first drafted by the British, while Indonesia and Vietnam are civil law countries with legal systems heavily influenced by the Dutch and the French respectively. The unique blend of civil and common law to be found in the Philippines was a result of successive colonialism by Spain and then the United States. Other countries, like China, Japan, and Thailand were never colonized, though their legal systems were also influenced by Western norms. 'Influence' is not the same as 'dictate', however. Even in those countries that were colonized, law pre-existed the colonial encounter – for instance *adat* law in Indonesia, customary law in the Chittagong Hill Tracts of Bangladesh, and *Syariah* law in Malaysia and elsewhere.

These pre-existing legal systems and the colonial transplants set the stage for the plural regimes that we see today. But how law actually comes to be understood and practised also depends heavily on how law is taught. In recent years, the rise of Asia and the increased prominence of Asian law schools, as well as greater opportunities for collaboration and learning through networks like the Asian Law Institute (ASLI), have encouraged more confidence and greater independence.

To pick just one crude measure, the number of Asian law schools listed in the top 50 of the QS World University Rankings for law[1] went from three in

1 'QS World University Rankings by Subject 2015 – Law' (Topuniversities.com, 2015), <www.topuniversities.com/university-rankings/university-subject-rankings/2015/law-legal-studies> accessed 5 May 2017.

 | DOI 10.1163/9789004349698_002

2011,[2] when the rankings were first published, to nine in the most recent rankings.[3] Only four years ago, no Asian law school was listed in the top 20; today there are four. To be sure, part of this change is due to a refinement of the methodology in ranking. But one of the most significant components of the QS method is reputation, and there is no question that the reputation of Asian law schools is on the rise.

In such an environment, it is appropriate and expected that Asian law schools should feel free to chart their own path – to innovate, rather than merely imitate, as the title of this book suggests. But before I get to the move from imitation to innovation, I would first like to add another 'i', as imitation itself came after a period of *inhibition*.

This chapter therefore proceeds in three steps. First, I will discuss early efforts seeking to inhibit legal education in Asia, due in part to neglect and in part to the desire to avoid encouraging 'troublemakers'. Secondly, and more briefly, I will consider the manner in which many efforts to encourage imitation, in particular the law and development movement, produced uncertain and sometimes unhelpful results. Thirdly, I will turn to more recent innovation across the region, focusing on three areas in which there is both demand for and supply of innovation: our *responsibility* as national law schools to produce lawyers for our home jurisdictions, our *aspiration* as global law schools to prepare our graduates for global practice, and our *opportunity* as Asian law schools to capitalize on the Asian century.

B Inhibition

Despite the rhetoric of a civilizing mission, the purpose of colonialism was clearly not primarily educational. As Lord Lugard noted with relative candour concerning Africa, there was, at best, a "dual mandate":

> Let it be admitted at the outset that European brains, capital, and energy have not been, and never will be, expended in developing the resources of Africa from motives of pure philanthropy; that Europe is in Africa for the mutual benefit of her own industrial classes, and of the native races in their progress to a higher plane; that the benefit can be made

2 NUS 24th, HKU 31st, Tsinghua 45th.

3 NUS 14th, Peking 18th, HKU 19th, Tokyo 20th, Tsinghua 39th, Seoul 41st, CUHK 42nd, NTU 43rd, Kyoto 48th.

> reciprocal, and that it is the aim and desire of civilised administration to fulfil this dual mandate.[4]

In the colonial context, law was often an important tool used to justify and enforce what was essentially foreign occupation. In such circumstances, it is not surprising that legal education of the local population was not a high priority. This was true even in the British colonies, where law was a vital part of the structures that facilitated colonial rule, with local elites co-opted into those legal structures.

In the early colonial period, education as a whole was often left to missionaries. This meant that secular law – and much else – lost out to religious instruction.[5] Even in countries where education later came to be seen as part of the colonial enterprise, however, law was either not prioritized or actively discouraged.

As Muna Ndulo has written of Africa, this was not an accident or an oversight: it was policy.[6] The reasons given tended to fall into two broad categories. First, it was sometimes suggested that the lack of law schools was simply a question of priorities. It was more important to train 'engineers, doctors, and agriculturalists than lawyers'.[7] But it was obviously not just a question of limited resources. Those 'who wished to read law were regarded as preparing for a career in politics', William Twining wrote, based on his own experience in Tanzania in the 1960s. From the colonial point of view, it would have been self-destructive to encourage the production of such troublemakers.[8]

By the Second World War, the Dominions, British India, and British-administered Egypt had reasonably developed systems of higher education, often including law schools. But for the 66 million people living in the other territories in Africa and Asia controlled by the British Colonial Office, there were only four universities and only one of them – the Royal University of

4 F.D. Lugard, *The Dual Mandate in British Tropical Africa* (3rd edn, W Blackwood & Sons, 1926) 617.

5 Bruce L. Ottley, 'Legal Education in Developing Countries: The Law of the Non-Transferability of Law Revisited' (1979) 2 Loyola of Los Angeles International and Comparative Law Journal 47, 51.

6 Muna Ndulo, 'Legal Education in Africa in the Era of Globalization and Structural Adjustment' (2002) 20 Penn State International Law Review 487, 489.

7 William Twining, 'Legal Education Within East Africa' in British Institute of International and Comparative Law (ed), *East African Law Today* (British Institute of International and Comparative Law, 1966) 116.

8 Ibid; Samuel O. Manteaw, 'Legal Education in Africa: What Type of Lawyer Does Africa Need?' (2008) 39 McGeorge Law Review 903, 912–917.

Malta – had a law school,[9] which in any case had predated Malta's incorporation into the British Empire.[10]

In the period after the Second World War, it became increasingly clear that the self-government and independence of Britain's colonies was inevitable. A series of university colleges were established in Africa, notably in the period 1945 to 1949, with the creation of Ibadan in Nigeria, Khartoum in Sudan, Achimota in what is now Ghana, and Makerere in Uganda.[11]

The same was largely true in Asia.[12] British India had seen the establishment of law schools at the Government Law College, Bombay (now Mumbai) in 1855,[13] the Punjab University Law College[14] in what is now Pakistan in 1870, Rangoon University (now the University of Yangon) in Myanmar in 1920, and the University of Dhaka in what is now Bangladesh in 1921. Lee Kuan Yew, Singapore's founding Prime Minister – and a lawyer – argued in 1959 that, precisely because of their experiences in India, the British were reluctant to establish law schools in other parts of the empire:

> [T]hey knew that large numbers of lawyers meant large numbers of self-employed intellectuals who were well-versed in the mechanics of the colonial system, and who then set out to lead the mass of the local people in breaking down the colonial system.[15]

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9 Assaf Likhovski, 'Colonialism, Nationalism and Legal Education: The Case of Mandatory Palestine' in Ron Harris *et al* (ed), *The History of Law in a Multicultural Society: Israel 1917–1967* (Ashgate, 2002), 76–77.

10 The University of Malta's Faculty of Law dates to 1769. Malta officially became part of the British Empire in 1814 under the Treaty of Paris.

11 Ottley (n 5) 52.

12 See generally Tan Cheng Han and others, 'Legal Education in Asia' (2006) 1 Asian Journal of Comparative Law 1.

13 Arjun P. Aggarwal, 'Legal Education in India' (1959) 12 Journal of Legal Education 231, 232; Arthur Taylor von Mehren, 'Law and Legal Education in India: Some Observations', (1965) 78 Harvard Law Review 1180; Lovely Dasgupta, 'Reforming Indian Legal Education: Linking Research and Teaching' (2010) 59 Journal of Legal Education 432.

14 University of the Punjab, 'History of University Law College' <http://pu.edu.pk/home/department/37/Punjab-University-Law-College> accessed 5 May 2017; Osama Siddique, 'Legal Education in Pakistan: The Domination of Practitioners and the Critically Endangered Academic Symposium: Legal Education and Legal Reform in South Asia' (2014) 63 *Journal of Legal Education* 499.

15 Lee Kuan Yew, 'Text of the Speech by the Prime Minister, Mr Lee Kuan Yew, at the University of Malaya Law Society Dinner' (14 November 1959) <www.nas.gov.sg/archivesonline/data/pdfdoc/lky19591114.pdf> accessed 5 May 2017.

People like him, in other words. And so it went: in the rest of the British Empire in Asia, the creation of law schools tended to take place either just before or sometime after independence.

Sri Lanka's first law school dates back only to 1947 at the University of Ceylon (now the University of Colombo), a year before it achieved Dominion status. In Malaya, the first law school – what is now NUS Law – was established in Singapore in 1956, a year before the Federation of Malaya became independent; when that federation fell apart, Malaysia itself lacked a law school until the University of Malaya established a Faculty of Law in Kuala Lumpur in 1972. The University of Papua New Guinea School of Law was established with six students in 1965 while the territory was under Australian administration, a decade before independence. Hong Kong University launched a Department of Law in 1969. The University of the South Pacific's School of Law was created in 1994.[16] This unusual entity has a main branch in Vanuatu, but is owned by twelve member countries that were former colonies of Britain, Australia, New Zealand, and France (one of them, Tokelau, is still listed by the United Nations as a non-self-governing territory).[17] Brunei, which became independent from Britain in 1984, established the Universiti Brunei Darussalam the following year but does not yet have a law school, though the Sultan Sharif Ali Islamic University began offering a combined law degree with a Bachelor of Shariah in 2007.

In other parts of Asia, law schools also tended to be relatively recent innovations. In China, Peiyang University offered a modern legal education from 1895; by the 1950s there were more than 50 law schools, but in the tumultuous decades that followed that number shrank to only two: at Peking University and Jilin University.[18] In Indonesia, the Dutch colonial government established a secondary school for law in 1909 that was upgraded to a school for higher education in 1924. This became the Faculty of Law at the University of Indonesia in 1950, five years after independence. Legal education in Thailand dates back to 1933;[19] a small law faculty was created in the University of Hanoi in 1976.[20] And so on.

Until local law schools were established, the path to legal practice typically lay through the metropole. For the British Commonwealth, that meant training in London and the Inns of Court. The costs of such an education ensured

16 University of the South Pacific, 'School of Law' (University of the South Pacific, 18 October 2013) <www.usp.ac.fj/index.php?id=518> accessed 5 May 2017.

17 Cook Islands, Fiji Islands, Kiribati, Marshall Islands, Nauru, Niue, Samoa, Solomon Islands, Tonga, Tokelau, Tuvalu and Vanuatu.

18 Tan Cheng Han and others (n 12) at 1–2.

19 Ibid 2.

20 Ibid.

that it was limited both in number and in the class background of the individuals who pursued it. The majority of colonial subjects who trained in London did so through the Inns of Court, enabling them to qualify as barristers but not solicitors. This distinction was of little relevance in the colonies, but sometimes caused problems. As the 1961 Denning Commission recognized of lawyers educated in this way, "Many of the young men [*sic*] coming back can make quite a good show as lawyers, but they have absolutely no knowledge of how to handle their accounts or the desirability of keeping their clients' money separate from their own."[21] Another problem was that although many of the colonies had inherited English law, its application was often different in the various territories.

I have begun with this historical survey not to suggest that Asian law schools started their various projects with a blank slate. On the contrary, the plural legal regime I described earlier defines the complex environment within which those schools now operate. But what the colonial approach to legal education does suggest, and what is borne out in many of the countries from which we come, is that law schools were at least initially regarded as inherently political institutions and therefore seen as potentially destabilizing to the social order.

Another speech from Lee Kuan Yew, this time delivered in 1962, is indicative of the view at the time:

> The rule of law talks of habeas corpus, freedom, the right of association and expression, of assembly, of peaceful demonstration, concepts which first stemmed from the French Revolution and were later refined in Victorian England. But nowhere in the world today are these rights allowed to practice without limitations, for blindly applied these ideals can work towards the undoing of organised society.[22]

Law schools across the region and around the world continue to train people who develop into political actors – both leaders and 'troublemakers'. Indeed, just one indication is that in the elections held in Singapore in September 2015, no fewer than 12 of the 89 seats in Parliament were filled by graduates of NUS Law, representing both the People's Action Party and the opposition Workers' Party.

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21 Report of the Commission on Legal Education for Students from Africa (Cmnd No 1255, 1961) 27 (quoting the Solicitor-General of one of the territories under review).

22 Lee Kuan Yew, 'Singapore Prime Minister's Speech to the University of Singapore Law Society Annual Dinner at Rosee d'Or' (18 January 1962) <www.nas.gov.sg/archivesonline/data/pdfdoc/lky19620118.pdf> accessed 5 May 2017.

The men and women who pass through our hallways are among the brightest and most articulate, and we – hopefully – further strengthen their ability to think critically and communicate effectively. This is a tremendous opportunity for us as educators, but it also imposes a special responsibility on us to ensure that our graduates not only have sharp minds and silver tongues, but also fully-formed consciences and hearts.

C Imitation

So law schools were initially inhibited in many of the former colonies, until it was clear that these colonies were going to develop their own legal systems. As many of the new schools were created somewhat hastily around the time of independence, there was naturally a considerable amount of imitation. As the Committee on Legal Education in the Developing Countries put it in a 1975 report:

> University law schools in Asia, Africa and Latin America have been developed as parts of universities which were significantly patterned after English, French or other European models, and they have been greatly influenced by the 'received' culture of education. In many parts of the world the programs have been significantly shaped – at a formative point – by expatriate staff, and they have, in any event, been controlled by persons who have sought to replicate foreign models rather than build an essentially indigenous institution.[23]

Such mimicry is not unique to Asia or indeed to the colonial experience. Law schools and lawyers tend to be conservative and not a great deal has changed fundamentally in the past hundred years or so. This is true at the macro- as well as the micro-level.

At the macro-level, though Harvard's Christopher Columbus Langdell famously invented the modern common-law curriculum in the 1870s,[24] it was only in 1921 that the American Bar Association recommended that admission to practice be linked to completion of a degree programme.[25] This was distinct

23 International Legal Center, *Legal Education in a Changing World: Report of the Committee on Legal Education in the Developing Countries* (New York, 1975) 26 <http://nai.diva-portal.org/smash/get/diva2:275991/FULLTEXT01.pdf> accessed 5 May 2017.

24 Howard Schweber, 'Langdell, We Hardly Knew Ye' (1999) 17 Law and History Review 145.

25 James P White, 'Rethinking the Program of Legal Education: A New Program for the New Millennium' (2000) 36 Tulsa Law Journal 397, 400.

from the English tradition, according to which lawyers were educated not at university but in court.[26] A different approach had long existed in civil law jurisdictions where Roman Law was taught, beginning with its rediscovery at the University of Bologna in the 11th century.[27] Interestingly, courses in Roman Law were also offered at universities such as Oxford and Cambridge – though they had little practical application.[28] (Following a recent year-long curriculum review at Oxford, it was decided that the curriculum was in no need of change. Roman Law remains compulsory while Company Law remains optional.)

At the micro-level, even within individual subjects one can see resistance to change. Criminal law, for example, is taught throughout most of the common-law world by starting with homicide, perhaps followed by other assaults – in particular sexual assault. Though important, such crimes are relatively rare. As Kris Gledhill has pointed out, it is unlikely that the considered view of every criminal law lecturer around the world is that murder and rape are the best way to teach criminal law. A more probable explanation is that we teach that way because that is how we ourselves were taught.[29]

Mimicry was not simply a matter of domestic institutions blindly following past precedent. There was also support from the outside to make our law schools more like those in the West. There is, of course, value in learning from the experiences of other regions. But there are significant limits to what can be achieved by uncritically exporting mechanisms that work in one region to another, or drawing conclusions based on dubious comparisons between the needs and interests of members. A spectacular example of the limitation of such an approach to reforming institutions was the 'law and development' movement of the 1960s. This was an ambitious programme run by the US Agency for International Development, the Ford Foundation, and other private American donors seeking to reform the laws and judicial institutions of countries in Africa, Asia, and Latin America. The programme generated hundreds of reports and articles. A decade later, however, leading academic participants and a former official at the Ford Foundation declared it a failure. Criticisms included the program's over-reliance on exporting certain aspects

26 Konrad Zweigert & Hein Kötz, *Introduction to Comparative Law*, (3rd ed, OUP 1998).

27 Henry Mather, 'The Medieval Revival of Roman Law: Implications for Contemporary Legal Education' (2002) 41 Catholic Lawyer 323.

28 See further Simon Chesterman, 'The Globalisation of Legal Education' (2008) Singapore Journal of Legal Studies 58.

29 Kris Gledhill, 'The Teaching of Criminal Law: Are We Stuck in a Timewarp?' (Paper presented at National University of Singapore Faculty of Law, 6 September 2011).

of the US legal system – notably strategic litigation and activist judges – that were incompatible with the target countries.[30]

Today there is less pressure to mimic the West; what pressure there is now tends to take the form of carrots rather than sticks. Instead of colonial enforcement we sometimes see development dollars encouraging legal education in a particular direction – or there is the ever-present spectre of rankings, implying that there is some ladder that we are all climbing towards Oxford or Harvard. As a more diverse range of law schools join the Anglo-American oligopoly at the top of such league tables, my hope is that some of the pluralism with which we are all familiar will rub off on them, broadening our conception of excellence in legal education rather than narrowing it into a lonely ivory tower.

D Innovation

As the foregoing discussion has shown, legal education in Asia has moved from a period of inhibition through a period of imitation. Now we have the opportunity – and arguably the responsibility – to innovate. But this should not simply be change for the sake of change, nor does it take place in a vacuum. As we each think about the path we will chart with our own law schools, let me propose three considerations that might be useful when contemplating new strategies for our various law schools. These considerations relate to the three discrete identities that we have as law schools. We are, first and foremost, national schools educating students and producing research within a specific jurisdiction. Secondly, however, we are – or aspire to be – global, preparing our graduates for a globalized profession and participating in global debates. Thirdly, however, and often overlooked, we are *Asian* law schools, giving us and

30 David M Trubek and Marc Galanter, 'Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development', (1974) 4 Wisconsin Law Review 1062; John H Merryman, 'Comparative Law and Social Change: On the Origins, Style, Decline & Revival of the Law and Development Movement', (1977) 25 American Journal of Comparative Law 457; James Gardner, *Legal Imperialism: American Lawyers and Foreign Aid in Latin America* (University of Wisconsin Press 1980). Later assessments have been less negative, however, noting that law reform projects take many years to bear fruit and that the rise and fall of the movement may have been more connected to US domestic political issues in the period 1965–1975 than with programs on the ground in developing countries; Mary McClymont and Stephen Golub (eds), *Many Roads to Justice: The Law-Related Work of Ford Foundation Grantees Around the World* (Ford Foundation, 2000); Brian Z Tamanaha, 'The Lessons of Law-and-Development Studies', (1995) 89 American Journal of International Law 470.

our graduates a unique chance to seize the Asian century and the opportunities that it offers.

Let me consider these in turn.

1 *National*

Despite the best efforts of globalization, the practice of law remains largely jurisdiction-specific. If only as a regulatory matter, then, the vast majority of law schools have a primarily *national* focus. Our graduates get admitted to practice in specific jurisdictions, and we must report to regulators in those jurisdictions.

This is not the only model, of course. There have been some interesting experiments that do not link legal education to practice. Tilburg University's LL.B. in Global Law, for example, does not qualify its graduates to practise law in any jurisdiction. The Tilburg website states that

> you can apply for jobs in international organizations or in the public sector, or you can continue in academia....
>
> Imagine a large international company such as Google ... These companies have legal departments with specialists from all over the world. What they are lacking, however, is someone with the skills of a global lawyer, who is able to tie these different legal systems together.[31]

Another interesting experiment is the Peking University School of Transnational Law, in Shenzhen (on which see further Chapter 10), which in 2008 launched a J.D. programme based on the typical curriculum in US law schools. It also announced that it was seeking ABA accreditation for this programme,[32] which was ultimately rejected in 2012.[33] It subsequently refocused its mission to emphasize genuinely transnational law, expanding its China law curriculum to complement what had essentially been a transplantation of US law.[34]

But for the most part, law schools focus on giving graduates the opportunity to practise law in their home jurisdiction, in many cases with the additional requirement that these graduates sit an additional bar examination. Yet it

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31 Tilburg University, 'Career Perspective After Global Law' (Tilburg University, 2017) <www.tilburguniversity.edu/education/bachelors-programs/global-law/career/> accessed 5 May 2017.

32 Du Guodong, 'Peking University School of Transnational Law Opens', *Xinhua* (23 October 2008).

33 Megan Stride, 'ABA Votes No on Accrediting Foreign Law Schools' (*Law360,* 3 August 2012) <www.law360.com/articles/366928/aba-votes-no-on-accrediting-foreign-law-schools> accessed 5 May 2017.

34 See Chapter 10 in this volume.

would be foolish to suggest that we have done our job if our graduates understand only a single jurisdiction. Even if they do practise only in the jurisdiction in which they qualify, they will frequently interact with lawyers from other jurisdictions, they will have clients who operate in multiple jurisdictions, and they will need to understand the pressures on their home jurisdiction from the globalized economy.

This is something touched on by many of the other chapters in this volume. Souichirou Kozuka, for example, highlights in Chapter 7 the pressures from globalized law firms on the Japanese legal education system. Andrew Harding and Maartje de Visser in Chapter 5 stress that global pressures go both ways, as States seek extraterritorial implementation of certain laws, while also needing to integrate themselves into a global economy. This is particularly important in Singapore, where so much economic activity is tied to cross-border transactions. Similarly, Bui Ngoc Son in Chapter 12 explores the tensions exposed by the "renovation" of legal education in Vietnam between its commitments to socialism and to globalization. China has also been affected by globalization, with its entry into the World Trade Organization in 2001 also requiring a transformation in its legal education regime, as described by Li Xueyao, Li Yiran, and Hu Jiaxiang in Chapter 11. At the global level, Francis Wang, one of the authors of Chapter 2, highlighted at the conference leading to this book what has been achieved by linking law schools through the International Association of Law Schools, establishing among other things some baseline indicators of what we have in common and what common challenges we share.

Specific challenges remain in our roles as national law schools.

One is whether we can and should participate in the protection of specific areas from the external influences of globalization. While it might be natural, for example, for our telecommunications rules to be in harmony with other jurisdictions, many countries balk at exposing public law to such forces. The manner in which human rights and constitutional law is taught can sometimes raise sensitivities among local authorities.[35]

A second question is whether we can and should protect specific constituencies – notably the local bar – from the kind of competition in which most

35 Cf Lee Kuan Yew, 'Speech to the Law Society 1962' (n 22): "A curious position that has arisen in Malaya is that the temporary alliance of the pure academic who talks in terms of the absolute qualities of freedom, liberty and the rights of man, finds himself a strange fellow traveller with the Communist revolutionary, whose whole philosophy is a complete denial of these liberal concepts. The academic liberal may or may not believe in the practicability of his enunciations of absolute ideals. But the Communist revolutionary certainly does not."

other parts of the economy must engage. This is not something that law schools alone can determine, but there is a big difference in our educational mission between seeing the main 'consumers' of our 'product' as being the main street lawyers in our home jurisdiction, or the Magic Circle and white shoe law firms of London and New York.

2 *Global*

The answers to such national questions are often heavily influenced by global trends.

Although the guild-like nature of the profession once encouraged a focus not merely on national but on *sub*-national jurisdictions, that is no longer tenable. In the United States, for example, admission to practice in one state a century ago did not require either familiarity with or the ability to practise in another.[36] As interstate commerce and thus cross-jurisdictional legal practice increased, however, so did the need for lawyers to be familiar with other jurisdictions; with the increased movement of professionals it became necessary to have a means of transferring accreditation.[37]

That is now a global phenomenon. Today, the practice of law has been transformed by new clients, a new operating environment, and new law firms.

This is obvious at the high-end. Commercial giants and the major banks sell products and services across multiple jurisdictions, even as those jurisdictions become more assertive in their regulations. They need law firms that can provide advice across those jurisdictions and help manage the legal risks associated with global commercial activities. In response, a handful of global law firms have emerged, some of which have expanded not only across developed markets but also developing ones.

Globalization affects the main-street lawyer also. A family-law specialist would be negligent if he or she was not able to assist a client whose family straddles more than one nationality. Even small and medium-sized enterprises are now typically part of global supply chains, meaning that they confront regulatory issues and potential disputes in multiple jurisdictions.

In addition, as the market in which we practise law is changing, so are the tools *with* which we practise it. Legal research has been transformed by the Internet. Many of those teaching law today began their own research at a time when loose-leaf services were cutting-edge technology, enabling

36 Colin Croft, 'Reconceptualizing American Legal Professionalism: A Proposal for Deliberative Moral Community' (1992) 67 New York University Law Review 1256, 1296.

37 Cf George A Reimer, 'A State of Flux: Trends in the Regulation of the Multijurisdictional Practice of Law' (2004) 64 Oregon State Bar Bulletin 19.

reference books to have updates inserted into folders. Our students, if they can even recall what a book is, regard such pre-Internet technologies in the same manner we might regard the manuscripts copied out by monks in the days before printing presses.

Writers like Richard Susskind have argued that this is only the tip of the iceberg. Facilitating access to information will be followed by fundamental and irreversible changes in the practice of law. Much of what is now charged for will become free – think of the music industry, or the door-to-door encyclopaedia salesman. More fundamentally, the prospect of online dispute-resolution may take many disputes out of lawyer's hands entirely.[38] This is far from science fiction: eBay presently resolves about 60 million disputes annually through its online Resolution Center.[39]

The market has changed, the tools our students need have changed, but our students themselves have also changed. This is not the place for a long excursus on the phenomenon of so-called "millennials", but there is no question that the manner in which the current generation of students consume and process information is different (see Chapter 2 for further discussion of this in a specifically Asian context). Attention spans are shorter, they are more familiar with and reliant on technology, and they are often more comfortable interacting with the world through virtual means.

Let me stress that this does not mean that we should abandon books and chalkboards to run our law schools through Snapchat™. What our students are comfortable with is different from what is good for them. But it does mean that a legal curriculum based on rote-learning and tested by writing answers in longhand bears less and less connection to the practice of law.

And so we must prepare our students for a globalized market in which technology plays a vital role. Some of the skills required have not changed: critical and analytical skills, and excellence in communication – both oral and written. Perhaps one thing to supplement is that those students more comfortable interacting with their peers through social media need to learn how to interact with clients of flesh and blood.

None of the suggestions offered here are particularly original or groundbreaking. Much of it could be presented at any legal education conference around the world. But the last area of potential innovation I will touch on

38 Richard Susskind, *Tomorrow's Lawyers: An Introduction to Your Future* (OUP, 2013).

39 Online Dispute Resolution Advisory Group, *Online Dispute Resolution for Low Value Civil Claims* (London, February 2015) 5 <www.judiciary.gov.uk/wp-content/uploads/2015/02/Online-Dispute-Resolution-Final-Web-Version1.pdf> accessed 5 May 2017.

concerns whether there is something unique about the situation of Asian law schools.

3 *Asian*

I begin with the usual caveat that 'Asia' is a fairly dubious category. Indeed, the very word derives from a term used in Ancient Greece, rather than any indigenous political or historic roots. Yet there do seem to be some things shared by many of our jurisdictions.

From the perspective of an international lawyer, one of the most interesting aspects is the apparent paradox that Asian states have arguably profited most from the stability and prosperity of a world ordered under international law and institutions – and yet they are the least likely to be parties to those rules or be represented in those organizations. This does not mean that Asian states are wary of law as such, but it is unusual that the most economically dynamic region of the planet, with increasing political power, consists of countries that were not, for the most part, authors of many foundational rules of the game.

Two consequences follow from this situation. The first is domestic. Many of the highly competitive economies of Asia grew extremely quickly in non-liberal regimes for which legitimacy was more closely tied to economic success than to traditional political processes. In recent years there has been a genuine commitment to the rule of law across most countries, but without a tradition of the rule of law, there is a danger that lawyers are seen as instruments of the state rather than servants of the law. This is the modern legacy of the inhibition of legal education, with some states continuing to view lawyers as potential 'troublemakers' – a challenge with which Asia's law schools must continue to grapple.

The second consequence is regional. Asia is unique for not having any meaningful regional organization. There is no continent-wide framework comparable to the African Union, the Organization of American States, or the European Union. Such regional organizations that do exist – such as the South Asian Association for Regional Cooperation (SAARC), the Shanghai Cooperation Organization (SCO), and the Association of Southeast Asian Nations (ASEAN) – have weak mandates and extremely limited resources.[40] This creates an opportunity in the area of legal research. Given the economic dynamism of the region, there is a clear appetite for integration of economies and convergence of legal regimes. The fact that governments are extremely limited in what they can and will do to facilitate integration means that

40 See further Simon Chesterman, *From Community to Compliance? The Evolution of Monitoring Obligations in ASEAN* (Cambridge University Press, 2015).

networks of legal academics can play a role in that process. Initiatives such as the Principles of Asian Contract Law project and the Asian Business Law Institute (ABLI, launched in January 2016), as well as networks such as ASLI and the Asian Society of International Law, thus have the potential to supplement intergovernmental action.

In the coming years, such opportunities are likely to grow. With the Trans-Pacific Partnership (TPP) and China's 'One Belt, One Road' initiatives, there will be growing demand for coherence across Asia, but without a formal intergovernmental framework for delivering it. In such a situation, the role of academics becomes more important in areas from formation of contracts and data-protection rules to enforcement of awards and cross-border insolvencies. We have the opportunity and the responsibility to contribute to these developments through our research, and all the more so through our teaching. A starting point is ensuring that our graduates are 'Asia literate' and able to understand the diverse perspectives across the region. It is unrealistic to expect them to develop a deep knowledge of every jurisdiction, yet awareness of how their own system compares with others and the different forces that have shaped Asia's legal traditions would be a good place to start.

E Conclusion

Let me conclude with some suggestions on what all of this might mean for our educational and research missions. I am acutely conscious that we each operate in a distinct environment and it would be pointless to prescribe one model for each law school. Yet I would also like to be concrete enough to avoid mere platitudes. I also note that I am not addressing the very basics of a legal education, which are well covered in the International Association of Law Schools' Singapore Declaration.[41] My aim, rather, is to suggest three areas in which we can magnify the impact that our law schools have on our students, on the global practice of law, and on our region.

First, in terms of our students, I believe we have a responsibility to educate them not only about their home jurisdiction and the jurisdiction of the former colonial power, but also about their region. It is natural that Singaporean students, for example, read English and Australian cases, but we need to

41 International Association of Law Schools, *Singapore Declaration on Global Standards and Outcomes of a Legal Education* (Singapore, 26 September 2013) <www.ialsnet.org/wordpress/wp-content/uploads/2013/09/Singapore-Declaration-2013.pdf> accessed 5 May 2017.

encourage them to become more familiar with Indonesian and Thai cases also. Students in common law countries need a deeper understanding of the civil law tradition and vice-versa. Our graduates should be known not only for their intellectual abilities, their professional skills, and their ability to analyse problems and communicate answers, but also for their sensitivity to the context within which they operate.

Secondly, and in relation to the global practice of law, it is time for us to be more ambitious. Our students and our professors are now among the best in the world, operating in its most economically dynamic continent. Even as we continue to serve our national and regional missions, we should aim to see our alumni practising at the very highest level. To pick just one area of global practice, investment arbitration: by various counts there are between fifteen and two dozen key individuals who dominate the field – none of them is from Asia.[42] It is merely a question of time before this changes,[43] but our law schools should all be working to ensure that it happens sooner rather than later.

Thirdly, in terms of our region, we have an opportunity to shape the convergence of many of our legal regimes. This has already begun to take place in areas like data protection, where the global imperative is perhaps most obvious, and networks of legal scholars have helped to craft guidelines. But it is also possible in other areas, perhaps most simply in the area of commercial law. For too long, comparative law in Asia has tended to focus on comparing individual Asian jurisdictions with their Anglo-American or continental European counterparts. Moving forward, initiatives like the ABLI will be calling on academics from across the region to explore what commonalities there are across Asian jurisdictions, laying the foundations perhaps for convergence of those laws.[44]

The colonial shadow cast across many of our jurisdictions is long. Yet the days of foreign powers inhibiting legal education are in the past. In the wake of those retreating powers, the rush to develop legal institutions necessarily entailed a degree of imitation. But with the economic and political rise of Asia

42 See eg 'ICSID Arbitrators: The Ultimate Social Network?' (EJIL Talk, Florence, 25 September 2014) <www.ejiltalk.org/icsid-arbitrators-the-ultimate-social-network> accessed 5 May 2017. cf Chiara Giorgetti, 'Who Decides Who Decides In International Investment Arbitration?' (2013) 35 University of Pennsylvania Journal of International Law 431.

43 Kim Joongi, 'International Arbitration in East Asia: From Emulation to Innovation' (2014) 4 The Arbitration Brief 1.

44 Cf. Sundaresh Menon, 'Roadmaps for the Transnational Convergence of Commercial Law: Lessons Learnt from the CISG' (Speech at the 35th Anniversary of the Convention on Contracts for the International Sale of Goods, Singapore, 23 April 2015) <www.supremecourt.gov.sg/data/doc/ManagePage/5941/CISG%20speech%20(Final%20-%20230415).pdf> accessed 5 May 2017.

there is an opportunity and, I would argue, a responsibility to be more bold. This does not mean change for change's sake, but as we each look to be the best national, global, and Asian law schools that we can be, our educational and research mission must evolve. The three fairly modest starting points I have proposed are a recommitment to comparative law that has an emphasis on Asia, the creation of more opportunities for our graduates to practise law at the highest levels, and taking up the mantle of regional convergence of laws so that Asia's influence on economics and politics is matched by its influence on the law.

There is much to be done.

CHAPTER 2

Asian Culture Meets Western Law, the Collective Confronts the Individual: The Necessity and Challenges of a Cross-cultural Legal Education

Francis SL Wang and Laura WY Young[1]

A Introduction

The Asia/Pacific region is home to sixty percent of the world's population and over forty percent of its economic activity.[2] While Western democratic philosophy claims to subscribe to the belief of 'one man – one vote', if that were applied to the world's population, then certainly this region's many perspectives should figure significantly in all discourses including law and legal education. However, Asia's voice in these fields has been a mere whisper. From the chapters presented here,[3] we see how many countries in this region are struggling to accommodate their legal regimes to the realities of an ever-globalizing world. Up to now, the conversation has been dominated by the traditional Euro-American axis of legal scholarship and education. Undisputedly, across the region, the present system of governance, legal institutions, and legal education have been imposed systems generally recognizable by Western imperial powers – either through colonization or adoption under duress.

1 The authors wish to thank the Asian Law Institute for the invitation to participate, and for organizing this thoughtful symposium. This chapter incorporates and builds on earlier writings by the authors, published in 2007: Francis SL Wang and Laura WY Young, 'Enriching the Law School Curriculum in an Increasingly Interrelated World – Learning from Each Other' (2007) 26 Penn State International Law Review 879, and on the first paper in the International Association Law Schools' series on cross cultural legal education: Francis SL Wang, 'Rebuilding a Bridge – Educating Lawyers for Transnational Challenges' (*Association of American Law Schools*) www.aals.org/international2004/Papers/wang.pdf www.aals.org/international2004/Papers/wang.pdf. accessed May 2012.

2 Philip McConnaughay and Colleen Toomey in Chapter 10 discusses the region's growing economic engagement with the rest of the world, and the inevitable influence it has and will continue to have on law and legal education.

3 Munin Pongsapan in Chapter 12, for example, explores the challenges confronting legal education in Thailand as it struggles to adapt its legal education to the realities of a globalizing world.

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Such adaptation was imposed to satisfy the West's demands for access to the natural and human resources of the region. By imposing a governmental and legal template across the region, the western powers created an institutional system of law and governance whose features and methods they understood. Such systems, although imposed, provided predictability and have assisted integration with the global economy, raising the standard of living and health care for hundreds of millions – and perhaps billions – of people. However, if a society's laws are a reflection of its cultural values, such imposed systems may not integrate well with or accurately reflect local values, which may lead to anomalous applications of law.[4]

Globalization has increased the instances of interactions among citizens of different nations, and has challenged legal educators in sensitizing their students to the task of advising and interacting with citizens across nations and cultures. Changing cultural norms within and across borders impels us to reflect on the nature of our own values, and to question their universality when we observe conflicts.[5] It is intellectually insufficient, even if expedient, to simply deem all values equally valid. The question is whether there is a "correct" set of values that are universal, and therefore consistent with modernity. If so, is that what legal educators should teach? Are the values presently embedded in our present concept of the "rule of law" reflective of the diversity inherent in different cultural traditions? Some may argue that the teaching of values may fall within the ambit of other disciplines, eg philosophy or religion; however, such an approach is contrary to the foundation of law. Law reflects and enforces the values, beliefs and perspectives of society. Awareness of the underlying cultural perspectives is essential to educate this new generation of law students who will inherit an extensively interrelated world.

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4 The disconnect between the application of law and local culture may be most evident in certain South Asian nations, such as Pakistan and Myanmar, where the higher courts and/or law schools conduct operations in English, rather than the local language. Local populations may feel disconnected from formal proceedings, and may prefer to refer disputes to local informal organs which enforce traditional customs rather than law.

5 For a good introduction to the factors required in International Legal Competence see Franklin Gevurtz, 'Report Regarding the 2011 Pacific McGeorge Workshop on Promoting Intercultural Legal Competence' (2013) 26 Pacific McGeorge Global Business & Development Law Journal 63. As current events (the British referendum to withdraw from the European Union 'Brexit', the American election of Donald Trump, growing nationalism and right-wing party prominence in France, Italy, and certain Eastern European countries) have shown, the inevitability of globalization and harmonization is now being seriously questioned by significant portions of the electorate in western democracies.

This raises a variety of profound implications for our understanding of law and the way to teach it. Can we assume that we all impart the same significance to the phrase, 'rule of law'? The conflict between local cultural traditions and 'universal values' has been evident ever since the United Nations issued its first Declaration of Universal Human Rights.[6] Many nations had concerns, nevertheless nearly all chose to join in the enterprise. The representative of China, Dr Peng Chung Chang, specifically expressed skepticism that the Declaration represented a single correct view of human relations. He strongly argued against what is called the 'classical standard of civilization' standard, in which certain nations or peoples considered to be 'civilized' or 'uncivilized', and the 'uncivilized' are excluded from international organizations and laws. The Declaration, he said, should reflect more than simply Western ideas as there is more than one kind of ultimate reality. He suggested that the Secretariat might well spend a few months studying the fundamentals of Confucian philosophy. Yet, with the devastation of the Second World War and ongoing civil war, China was in no position to seriously challenge the newly formed United Nations. It signed on despite its reservations.[7]

The traditional Western notion of Asian,[8] and specifically Chinese law, assumes the absence of a legal tradition[9] and lack of the notion of the rule of

6 Adopted 10 December 1948, followed by the Declaration on Universal Child Welfare, and the Declaration on Elimination of Racial Discrimination.

7 Lydia H Liu, 'On Human Rights Pioneer and Columbia Alum, P.C. Chang' (*Columbia University, Weatherhead East Asian Institute*, July 2007) <https://weaicolumbia.wordpress.com/tag/peng-chun-chang/> accessed 10 December 2016. 'Drafting of the Universal Declaration of Human Rights' (*United Nations Dag Hammarskjold Library*) <http://research.un.org/en/undhr/draftingcommittee> accessed 12 March 2016.

8 For the purpose of efficiency, the authors will refer to the Chinese experience and Confucian principles, recognizing that there are other subsets of foundational philosophy in Asia, particularly in Southeast Asia. Certainly, western legal scholars have challenged this notion. However, this traditional and popular western notion of the inferiority of essential commercial and social structures through the 'rule of law', justified the imposition of a western legal framework which persists to this day.

9 For example, the Treaty of Wang Hsia established extraterritorial courts in China. The California Supreme Court, as early as 1859, ruled that contracts assigning personal property between US residents, even if made in China, were under the jurisdiction of the California court system, because the treaty established jurisdiction. The California court system was itself only 9 years old at the time; Forbes v Scannell [1859] 13 Cal. 242. In 1906, further supporting the perceived need for reasonable law to apply to American citizens in China, the US established the Extraterritorial Court in Shanghai. Appeals against the court's decisions were brought to the 9th Circuit Court of Appeals in San Francisco.

law.[10] These characteristics gave rise to the Western notion that Asians are fit for 'Oriental Despotism', and lack the capacity to establish rule of law without major structural and educational reform.[11] It is now time for a re-evaluation. Western values are evolving, and presently include the notion of diversity, and an acceptance that 'difference' no longer indicates 'inferiority'. In addition, advances in social psychology and neuroscience demonstrate measurable differences, psychological perspectives and brain activity of populations from different cultures. These empirically verified differences question the validity of universality.

This chapter approaches the differences mentioned above, and their impact on legal reasoning and education, in three parts. First, it explores the foundational philosophies of China and the West. Traditional Confucian philosophy privileges different values from those of the Western Enlightenment tradition. It is the contrast of privileging the collective over the individual. Second, recent social psychological as well as neuro-biological studies confirm the existence of these alternative mindsets and show that they subconsciously influence legal decision-making. Third, as the necessity to develop cross cultural competencies becomes more evident, new approaches are required to enable students to develop empathetical outcomes with contrasting cultural values. The penultimate section discusses one of the approaches from a five-year study on cross-cultural legal education.

B Foundations of Law in Greece and China: Hierarchical Collectives v the Individual

As this section will highlight, one of the most significant cultural differences between western cultural traditions and those of East Asia is the self-identity

10 However, a detailed review of the position of the US representative who signed the 3 July 1844 Treaty of Wang Hsia, shows he did not claim to find any deficiency in Chinese law. He stated, 'In China I found that Great Britain had stipulated to the absolute exemption of her subjects from the jurisdiction of the Empire … I deemed it, therefore, my duty … to assert a similar exemption on behalf of the citizens of the United States'; Letter from Caleb Cushing to Secretary of State Calhoun (29 September 1844).

11 Modern criticisms of China's legal theory still fall back on the accusation that logic is deficient. For example, when a Chinese Supreme People's Court judge asserted three Supreme Principles of Law, critics responded by questioning which 1 of the 3 is 'the supreme', rejecting the notion that 3 could be supreme. This atomization, considering that the word 'supreme' excludes the possibility of more than one, is partly a translation issue. But it is also a question about whether the law should allow deference to a judge to select from among several primary priorities.

of its participants. Asian cultures share an identity of self which privileges a collective and hierarchical mindset. This is juxtaposed against the western emphasis on individual self-identity. These differing perspectives are deeply embedded in each group's psychological makeup, and have profound implications on their view of the proper ordering of society. This obviously influences each group's view of the role and priorities of legal decisions and the rule of law. If legal education is to develop a common framework whereby differing viewpoints can be thoughtfully integrated in processes and decisions respected by all, then certainly an understanding of disparate approaches to ordering society is critical for a legally educated cohort. This is especially true as our economies, culture, and societies are becoming more and more interrelated.

1 *An Asian Perspective: Collectivist and Hierarchical as the Principles of Social Organization*

The traditional Chinese notion of identity assumes membership in a series of collectives, beginning with the family. One's identity is traditionally defined in the context of relationships in a hierarchical structure: parent – child, husband – wife, elder sibling – younger sibling, ruler – ruled.[12] Confucian values place emphasis on unity in the group, and collective rewards.[13] This acceptance of hierarchies can be justified by reference to the canonical political philosopher from the 4th century BC, Xun Zi: 'Two men of equal eminence cannot govern each other; two men of equally humble station cannot employ each other. This is the rule of Heaven.'[14] He also explained, 'Men, once born, must organize themselves into a society. But if they form a society without hierarchical divisions, then there will be quarrelling.'[15]

The Chinese acceptance of hierarchical order was interpreted by Europeans as the foundation of despotism. However, in the Confucian tradition, each position in a hierarchy owes a duty of care to others below it. The traditional

12 Confucius' five Relationships, four of which are hierarchical, establish a duty of obedience on one side and a duty of care on the other. Only one is an equal relationship (friend to friend) and the other four are all hierarchical (father to son, ruler to subject, husband to wife, elder to younger). However, it is not accurate to say that Western relationships were framed in equality. Plato articulates 7 bases for authority, including parenthood, seniority, strength, wisdom, master over slave, etc.

13 See eg Uichol Kim and Young-Shin Park, 'Confucianism and Family Values: Their Impact on Educational Achievement in Korea' (2000) 3 Zeitschrift für Erziehungswissenschaft 229.

14 Hsün Tzu, *Basic Writings, Book 9, 'The Regulation of a King'* (Burton Watson tr, Columbia University Press 1963) 36.

15 Ibid 46.

justification for devolving power to the ruler is to allow action for the benefit of the ruled, not because the king has a *divine right* to rule. It is true that the Confucian tradition did not articulate any individual right to redress bad governance, but it recognized that the people as a group had the power to unseat the king. As the Confucian philosopher Hsun Tzu stated, 'The ruler is the boat, and the common people are the water. It is the water that bears up the boat and the water that can capsize it.'[16]

To avoid this fate, the earlier Confucian philosopher, Mencius, instructed a ruler in benevolent leadership. Mencius would not have approved of the Greek heroes and their quests for glory. Good governance, he believed, means to avoid war and glory, for they are worse than 'looking for fish by climbing a tree'.[17] 'To punish [the people] after they fall afoul of the laws is to set a trap for the people. How can a benevolent man in authority allow himself to set a trap for the people?'[18] Mencius states that the true measure of a good king is shown when 'the aged wear silk and eat meat, and the masses are neither cold nor hungry'.[19] While the Confucian tradition teaches governance for the benefit of the people, we can also see that the people are treated as a group, and not as individuals with a right of redress.

Chapter 13 in this volume, on Vietnam's experience, is an excellent example of how a traditional Confucian-influenced society has struggled to this day in adapting Western legal concepts – from the French civil law tradition, to Marxist – Leninist Soviet models, to *Doi Moi* ('internal renovation'), to today's necessity of adapting to a more global market-driven world order. While recognizing the necessity of incorporating local context including legal culture, institutional arrangements, political ideology, legal intellectual environment, as well as social and economic conditions, the chapter highlights the difficulties in adapting its educational structure as it is constrained by a Marxist-Leninist legal-political ideology, a dependent judiciary, and the statist career of law graduates. It describes an ongoing process of a search for a system of governance and regulation coherent with a society's underlying cultural norms and expectations.

16 Ibid 37.

17 Mencius, *Mencius: Works* (*Classics*) (DC Lau tr, Penguin Books 1970) 57.

18 Ibid 58.

19 Ibid 59. This philosophical tradition of governance in privileging stability, harmony, and material well-being over individual political rights is fundamental to the Confucian perspective on the role of the ruler. In that sense, it serves as the philosophical justification for the current Chinese mode of government.

2 *A Western Perspective: The Individual as the Fundamental Unit of Social Organization*

One of the major underlying assumptions in Western legal philosophy is that the fundamental unit of society is the individual. Aristotle set the expectation, carried along by the Enlightenment philosophers, that 'the state is an aggregate of its citizens.'[20] One of the most famous Western conceptions is that, 'Man is born free'.[21] The fact that Rousseau wrote a good deal more that is actually consistent with the Asian tradition of social obligations, is rarely remembered. The notion of the individual as a single unit, free from social encumbrance, captured popular imagination and proved a useful tool for political and philosophical analysis.[22]

Aristotle asked, 'Who is a citizen?'.[23] While the answer differs somewhat from our concepts of citizenry today, Aristotle characteristically searched for the smallest single unit, atomizing his entire world, leaving an imprint on Western thought up to the present. In Aristotle's time the question could not be answered that everyone was a citizen,[24] because the term applied only to certain propertied men.[25] However, the question was framed in terms of individuals, rather than groups. The modern improvement is that membership in the group is understood to have expanded, to a more general class of qualified individuals. Aristotle's method of atomizing the subject of inquiry leads to the mental habit of treating the fundamental unit of law as the individual. This Western proclivity can also be seen in the Protestant Revolution. The movement made the individual the fundamental unit of religion, by placing God in direct relation with His subjects, rather than them being subjects of an intermediary Church. This atomization leads to one of the fundamental points

20 Aristotle, *The Politics* (Trevor J Saunders ed, rev edn, T.A. Sinclair tr, Penguin Classics 1962) para 1274b32.

21 Jean Jacques Rousseau, 'The Social Contract, or Principles of Political Right' (*Constitution Society*, 18 October 1998) <www.constitution.org/jjr/socon_01.htm#001> accessed 1 October 2015.

22 See eg John Rawls, *A Theory of Justice* (The Belknap Press of Harvard University Press 1971).

23 Aristotle (n 21) para 1274b32.

24 Aristotle replies to his own question with, 'Nor does mere residence confer citizenship'; ibid para 1275a2. When Aristotle and Plato refer to 'all citizens', they did not mean the words as they are now understood, including universal suffrage. The Western notion of government by the people has expanded over time to include the participation by all subjects of a government.

25 Aristotle's answer was, 'Statesmen are fellow citizens, who rule turn and turn about'; ibid para 1287b36.

of 'modern' law: that the state should deal with individuals, rather than social groups.

3 *Western Deification of the "rule of law"*

The notion that the law is superior to the ruler is a key concept to the modern notion of the rule of law. The notion can be traced back to Greece and Rome, although the ideal was rarely, if ever, practiced. Tacitus commended one emperor in particular, for ensuring that law was supreme, 'binding even on kings'.[26] He also condemned another emperor for acting as if he was above the law: 'His cures were worse than the abuses, and he broke his own laws.'[27]

The seminal transformation in the West that is carried through modern legal theory is to deify the law into a fictive ruler, as the final arbiter of all matters of governance and social order. Plato states in *The Laws*, 'Laws themselves will explain the duties we owe'.[28] Plato characterized the mortal best fit to rule as, 'servants of the laws'.[29] Aristotle also said, 'Therefore he who asks law to rule is asking God and intelligence and no others to rule; while he who asks for the rule of a human being is importing a wild beast too; for desire is like a wild beast, and anger perverts rulers and the very best of men. Hence law is intelligence without appetite.'[30] Plato's most important articulation of the concept is, 'if law is the master of the government and the government is its slave, then the situation is full of promise and men enjoy all the blessings that the gods shower on a state.'[31] The Western notion of the law as superior to humanity is an attractive fiction. The deification is implicit in modern international law and politics, as Western nations urge 'developing states' to adopt the rule of law as the means to achieve high levels of public trust and material wealth.[32]

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26 Tacitus, *The Annals of Imperial Rome* (Michael Grant tr, Penguin Classics 1956) 132.

27 Ibid 133.

28 Plato, *The Laws* (Trevor J Saunders tr, Penguin Classics 1970) 178. Note that the statement distinguishes the duties owed to different classes of people, implying that the duties will be different for each.

29 Ibid 174.

30 Aristotle (n 21) para 1287a10.

31 Plato (n 29) 174.

32 However, Aristotle recognized the practical limitations of theorizing the Law as a superior being: 'The laws, if rightly established, ought to be sovereign, and also that officials … ought to have sovereign power to act in all those various matters about which the laws cannot possibly give detailed guidance'; Aristotle (n 21) para 1282a41. He also admitted, 'Where everything is governed by decree, is not a democracy at all in the real sense; for no decree can have general validity', and 'The law ought to rule over all, in general terms, and the officials ought to make rulings in individual cases'; ibid para 1292a31.

While the Chinese Legalist tradition can be compared to this Western notion of rule of law, it differs in that it never deified the Law as a fictive ruler. The presence of a human hand charged with enforcing law and order is not doubted in the Chinese tradition. Even when the so-called opposing school, Legalism, is raised against Confucianism, the law is only a tool of man. For example, when the famous legalist Han Fei raises 'the law' above the ruler, he states, 'A truly enlightened ruler uses the law to select men for him; he does not choose them himself.'[33] However, it is clear that he means that the Law is an instrument of the king, rather than the Platonic formula that the king is a servant of the Law. Western scholars have referred to the Legalist position as 'rule *by* law,' in contrast with the more desired 'rule *of* law'.[34] Certainly the Chinese instrumentalist view of law as a tool rather than a ruling principle must be understood and now reconciled with Western notions of a deified 'rule of law'.

C Scientific Studies Confirm Culturally Based Differences between Asian and Western Populations

Modern science has now effectively proven that such differences exist, and have been able to define and test for these culturally diverse perspectives. In fact, recent neuroscience investigations have demonstrated actual physical variations in brain activity between collectivist East Asians and individualist Westerners. The results of these studies not only confirm the differences, but now show how legal decisions are based upon the underlying social values these differences entail.

1 *Social Psychological Studies of Differing Cultural Perspectives and Influence on Legal Outcomes*

In recent years, psychological studies comparing East Asians and Westerners have revealed, in a variety of ways, a statistically significant difference between the two groups when it comes to perceptions of rules and relationships.[35] For instance, studies have shown that a greater proportion of East Asians tend to organize information about objects by their relationship to each other, rather

33 Han Fei Tzu, *Han Fei Tzu: Basic Writings* (Burton Watson tr, Columbia University Press 1964) 24.

34 See eg Randall Perenboom, *China's Long March Toward Rule of Law* (University of Cambridge Press 2002).

35 Richard E Nisbett, *The Geography of Thought* (Free Press 2003) 141–142.

than by categories devolved from abstract attributes of those objects.[36] These studies point to a divergence on organizing information, developing rules, and interacting with the environment in ways which vary between Western and East Asian cultures. While the perspective from one culture may deem one thinking style to be 'correct' and another 'deviant', or at least non-preferred, the identification of differences between populations challenges the notion that a single thinking style or perspective is correct and universal.

Comparative cultural studies in the field of psychology have demonstrated that there are also measurable differences in patterns of behavior between different cultures.[37] Studies have shown that the populations of some cultures are more comfortable with complex views, while others are less comfortable and prefer consistency.[38] Other studies show that the populations of some cultures are more likely than others to hold to strong notions of group identity, and respond with action to defend the group from perceived threats.[39]

Some have argued that these differences stem from fundamental philosophical differences in the foundational philosophies of East and West.[40] Others believe that these variations stem from differences in language,[41] and that language differences affect conceptualization of abstract concepts.[42] Yet others

36 Liang-hwang Chiu, 'A Cross-Cultural Comparison of Cognitive Styles in Chinese and American Children' (1972) 7 International Journal of Psychology 207, 235–242. This early study showed three objects to the children. The first two were a picture of a chicken and the other grass. Then a third picture was a cow. The children were asked which picture would they put the cow together with – the chicken or the grass. The study results showed a statistically significant portion of the American students preferred to group the objects in a 'taxonomic' category (chicken and cow – animals) whereas Chinese children preferred to group the objects by relationship (cow and grass – cow eats the grass). Also, see Nisbett (n 36) 140–141 for other studies.

37 See eg the works of Richard Nisbett, Kaiping Peng, Joan Y Chiao and Shinobu Kitayama.

38 Julie Spencer-Rogers, Melissa J Williams and Kaiping Peng, 'Cultural Differences in Expectations of Change and Tolerance for Contradiction: A Decade of Empirical Research' (2010) 14 Personality and Social Psychology Review 296.

39 Michele Gelfand and others, 'The Cultural Contagion of Conflict' (2012) 367 Philosophical Transactions of the Royal Society B 692, 692–703.

40 See eg RF Logan, *The Alphabet Effect* (Morrow 1986); Y Lin, *My Country and My People* (W Heinemann 1936).

41 Robert Wardy, *Aristotle in China: Language, Categories and Translation* (Cambridge University Press 2000).

42 See eg Vicky Tzuyin Lai and Lera Boroditsky, 'The Immediate and Chronic Influence of Spatio-temporal Metaphors on the Mental Representations of Time in English, Mandarin, and Mandarin-English Speakers' (2013) 4 Frontiers in Psychology 1.

cite the traditional Confucian cultural emphasis on hierarchy[43] or attribute this collectivist viewpoint to traditional agricultural practices.[44] It is not that all East Asians coming from a traditional Confucian influenced culture think in one way and Westerners think in another[45] – that would be overstating the case. However, the studies do show that between like groups of East Asians and Westerners, a statistically significant difference exists between the way each group thinks about relationships, categories, and rules. The differences reveal tendencies in cultures, not a guarantee of individual characteristics. Regardless, these differences are measurable phenomena.[46]

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43 One example is the Chinese courts' habit of issuing short judicial opinions which completely lack any logically reasoned and persuasive discourse. The lack of discourse is seen as an example of the hierarchical nature of Chinese culture and a tradition in which public persuasion and discourse are unnecessary. However, this distinction is not helpful for an East-West comparison, as Europe is undoubtedly part of the Western tradition, and yet civil law courts, notoriously brief and unpersuasive in their decision making, are the model for Chinese judicial practices. European civil law judgments traditionally exhibit a discursive style limited to a statement of law and principle with a conclusory statement of fact, logically leading inescapably to the opinion's conclusion. As Mitchel Lasser points out, the lack of discourse in the public sphere of a published judicial opinion does signify the absence of a robust discursive sphere within the institution of the French judiciary, only that it is not made publicly known; Mitchel de S-O-I'E Lasser, *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy* (OUP 2004). Similarly, Chinese courts have internal structures for review of all decisions, in which internal committees discuss, and court leaders approve, opinions before they are issued.

44 T Talhelm and others, 'Large Scale Psychological Differences Within China Explained by Rice Versus Wheat Agriculture' (2014) 344 Science 603, 603–608.

45 Some differences in legal discourse can be explained in terms of political dynamics, rather than culture and tradition; see eg Thomas Ginsburg, *Judicial Review in New Democracies* (Cambridge University Press 2003). Ginsburg proposes that the most significant factor in the development of an independent judiciary is a political system in which those in power are not guaranteed to continue in power, and therefore seek a type of political insurance, using judicial power to limit excessive executive power. While political dynamics are still a part of culture, they do not support a simple East vs West comparison.

46 Such tendencies are reinforced by testing, even in what may be believed to be 'culture free' exams. For example, a student wishing to join the Chinese Civil Service must take the Civil Service Examination given at the end of November every year. The following is a sample question in the exam meant to test logic: What is the next number in this sequence?

256, 269, 286, 302, (?)

(a) 254 (b) 307 (c) 294 (d) 316

Typically, a Western reader is trained to look for differences in the values of each number, seeking a pattern like Fibonacci's sequence or prime numbers following mathematical

In his chapter in this volume, Professor Souichirou Kozuka explores the Japanese practice of *Yoken Jijitsu* ('facts to be proven') which outline a highly stylized, formulaic mode of legal argumentation in Japanese courts. This methodology constrains both the advocates and the judiciary's role, adding predictability to legal decisions as they follow a set pattern of argumentation and decision making. It is one of the 'legal formants' which underlie Japan's legal system. It is another example of adaptations made by Confucian-influenced societies to honor their traditions while accepting Western legal structures. As Professor Kozuka points out, this paradigm for legal argumentation is now being challenged as Japan finds itself more pressured by concerns of individual rights, and the necessity of reforming its legal profession and judiciary to be more responsive and flexible in its approach in the administration of law in the 21st century.

2 *Neuroscience Revelations*

Over the past 15 years, functional Magnetic Resonance Imaging (fMRI) has demonstrated consistent variations between members of different cultural groups, such as North Americans compared to East Asians. We can see differences in thinking patterns not only from an individual's responses to tests, but also from actual physical manifestations in the brain. Studies have identified several axes for measurable differences, including collectivist versus individualist cultures, dialectic versus consistent-concept cultures, and object-focus versus context reporting.[47] The research is delving further into cross-cultural variations in memory encoding and recall, finding differences between East Asians and Americans.[48]

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principles. Westerns are less likely to consider the relationships of the digits internally within a number. The correct answer lies in quickly discerning those internal relationships and applying them.

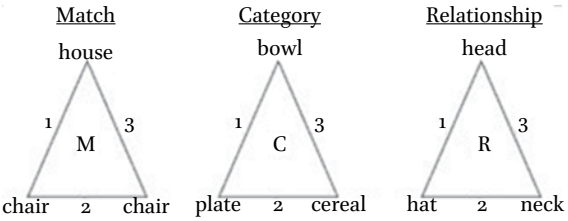
The correct answer is (b). The answer is derived by adding the individual digits of each number to the other digits in that number and then adding that to the number itself to derive the next number in the sequence. Keeping in mind that the exam is both a power and speed test, not much time can be spent on each such question. Success is gauged by quick and accurate responses. See generally Civil Exam Textbook Compilation Group, *Test for Administrative Professionals* (History of Chinese Communist Party Publishing House 2006).

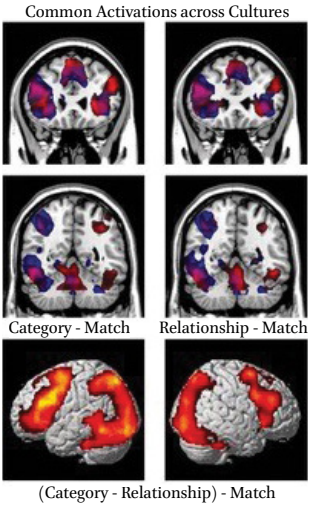
47 See eg Angela H Gutchess and Allie Indeck, 'Cultural influences on memory' (2009) 178 Cultural Neuroscience Cultural Influences on Brain Function 137.

48 See eg Peter R Millar and others, 'Cross Cultural Differences in Memory Specificity' (2013) 1 Culture and Brain 138, 138–157.

We are accustomed to the idea that different individuals may use different cognitive strategies. Think of the unscientific, but popular, metaphor that, 'women are from Venus; men are from Mars'; in addition, most of us accept the notion that engineers, economists, and artists approach a problem in different ways. What should be the approach of someone who has received legal training?

Brain scans of populations from different cultural regions demonstrate different tendencies in thinking and problem solving strategies. For example, when matching items, scientists found a greater tendency for East Asians to match by relationship rather than by category. In contrast, the tendency among North Americans is to match by category. When each population was required to use its non-preferred strategy, each recruited additional brain structures; however, each also deactivated different brain structures to complete the challenge. The contrast can be seen in the composite fMRI images below, showing blue for the Americans' activated areas and red for the East Asians'.[49]





49 Angela H Gutchess and others, 'Neural Differences in the Processing of Semantic Relationships Across Cultures' (2010) 5 Social Cognitive and Affective Neuroscience 254, 254–263.

Brain scans have shown that East Asians' brain activity exhibit a preference for relationship as an organizing principle; in addition, they have shown that East Asians show a much wider self-representation by overlapping brain region activity. These studies have demonstrated that self-image for East Asians is more closely linked to family members than for Americans.[50] There is, "direct evidence that the cultural values of individualism and collectivism influence neural *mechanisms underlying the self*."[51] This has an intriguing correlate in the visual world. In the West, the words for 'our country', 'the UK', or even 'my country' have a separation from the speaker's own self; however, in China, the words 'I nation' are frequently used in place of "China," especially in daily newspapers.

In addition, East Asians have shown greater attention to context than Americans. East Asians used less working memory effort when estimating the size of a frame around a line of changing dimensions. In contrast, Americans of European descent required more brain processing effort for that task, but less for estimating the length of a line while ignoring changes to a context frame around it. Scientists have concluded that, 'attending to information that is object-based or self-referent, rather than context-based or group-referent, reflects the strategic deployment of cognitive resources.'[52] This result appears consistent with the prevalent view that East Asians are more sensitive to context and Westerners are more focused in their perception and memory recall.[53]

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50 'While observing a self-reference effect for both Chinese and Western subjects, we found that personal traits related to self-judgments were remembered better than those associated with mother-judgments for Western but not for Chinese subjects'; Ying Zhu and others, 'Neural Basis of Cultural Influence on Self-Representation' (2007) 34 Neurolmage 1310, 1310–1316.

51 Joan Y Chiao and others, 'Neural Basis of Individualist and Collectivistic Views of Self' (2009) 30 Human Brain Mapping 2813, 2813–2820. (emphasis added).

52 Angela H. Gutchess, Aliza J. Schwartz and Aysecan Boduroğlu, 'The Influence of Culture on Memory' (Foundations of Augmented Cognition. Directing the Future of Adaptive Systems. 6th International Conference, Orlando FL, July 2011); see also Peter R Millar and others (n 50) 139.

53 The apparent binary trend between 'Western' and 'Asian' individuals has been challenged as reflecting cultural biases and essentializing the contrast between European cultures and Asian values, and reinforcing post-colonial, Eurocentric and orientalist constructs. The tendency of published studies to reinforce past studies has been criticized as risking the reproduction of essentialist frameworks of Eurocentrism, post-colonial, orientalist, binary thinking. 'Quoted … studies referring to the self are rooted in a specific context which defines the relevant research questions'; M Martínez Mateo and others, 'Essentializing the Binary Self: Individualism and Collectivism in Cultural Neuroscience' [2013] 7 [289] Frontiers in Human Neuroscience 1, 1–4. Useful as the caution is for all researchers, essentialization is a necessary component of comparison.

3 *Collectivist v Individual Culture Biases and Their Effect on Legal Judgments*

There is a growing scholarship examining the interplay between cultural variations in legal perceptions and judgments. From the early works of Michael Saks and Robert Kidd,[54] building on the Nobel Prize-winning work of Daniel Kahneman and Amos Tversky,[55] the trajectory of this research has been the exploration of a variety of legal subjects employing the schema of heuristics and cognitive biases to challenge the rational actor assumptions of law and economics proponents.[56] These heuristics and cognitive biases prove to be informed by cultural variations affecting the application of law. Such differing perceptions and applications of the law create a disequilibrium in attempts to universalize the concepts of law and the Rule of Law. It seems likely that in the law, it would be wrong to say, 'one size fits all.'[57]

These differences and the implications for the legal principles of causation, foreseeability, and culpability have also been shown to affect legal judgments in tort and contract liability. Cultural psychologists such as Levinson and Peng have shown differences in American and Chinese responses to fact patterns that trigger 'Fundamental Attribution Error' and 'Culpable Causation'.[58]

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54 Michael J Saks and Robert F Kidd, 'Human Information Processing and Adjudication: Trial by Heuristics' (1980) 15 Law & Society Review 123, 123–160.

55 Amos Tversky and Daniel Kahneman, 'Belief in the Law of Small Numbers' (1971) 76 Psychological Bulletin 105, 105–110; Daniel Kahneman & Amos Tversky, 'Subjective Probability: Judgment of Representativeness' (1972) 3 Cognitive Psychology 430, 430–454; Daniel Kahneman, Amos Tversky, Martin Fishbein, 'Casual Schemas in Judgments Under Uncertainty: Heuristics and Biases' (1980) 1 Progress in Social Psychology 49, 49–72.

56 See Jeffrey J Rachlinski, 'New' Law and Psychology: A Reply to Critics, Skeptics, and Cautious Supporters (2000) 85 Cornell Law Review 739, 739–766; Christine Jolls, Cass R Sunstein & Richard Thaler, 'A Behavioral Approach to Law and Economics' (1998) 50 Stanford Law Review 1471, 1471–1545.

57 Even if one wishes to ignore the complexities of global interactions, multi-culturalism raises issues of the applicability of domestic legal assumptions, such as whether the US Model Penal Code accurately reflects a diverse American population's implicit assessments of criminal liability. See eg Justin D Levinson, 'Mentally Misguided: How State of Mind Inquiries Ignore Psychological Reality and Overlook Cultural Differences' (2005) 49 Harvard Law Journal 1, 1–29.

58 Fundamental Attribution Error is the established phenomenon that observers, such as lay jurors, tend to overestimate the effect of a person's personality on their behavior. Culpable Causation is the known effect of a person's culpability on a lay jury's determination of legal liability. For example, a speeding driver is more likely to be found liable in a car accident if he is hiding an illicit cargo than if he is hiding a gift to his parents. See Justin D Levinson & Kaiping Peng, 'Different Torts for Different Cohorts: A Cultural Psychological

Recent studies have established that cultural differences also affect economic, financial and legal reasoning. At least two axes of comparison have been established: the individualism versus collectivism model, and the independent versus inter-dependent self.[59]

Studies have shown that East Asian subjects made judgments of causality and responsibility based less upon the individual intention of the actor, and more upon the consequences of the action (fatal injuries versus superficial injuries), which has been deemed a collectivist perspective. This population's tendency contrasts with those of American subjects, who tend to divine the intentionality of the actor rather than the effects of the action on others (intention versus accidental infliction).[60] Other studies show that East Asians are more likely than Westerners to accept complex notions and tolerate contradictory notions. In contrast, Westerners tend to view the world as fixed, and emphasize identity and consistency.[61] Cultural differences also affect valuations of property and the validity of the 'rational man' theory.[62]

Another effect of culture appears when East Asians and Americans consider the culpability of someone who injured another. Both populations changed their ordinary 'lay perspective' when primed with legal instructions, but in opposite directions. Americans became more focused in considering individual liability in their assessment of the legal context. In contrast, Chinese subjects started out with strict attribution of individual liability based upon the outcome of the action, but gave more benefit of the doubt to an actor when she was cast as a legal defendant.[63] It may be that American subjects began with the perspective of the individual defendant, whereas Chinese subjects began

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Critique of Tort Law's Actual Cause and Foreseeability Inquiries' (2004) 13 Southern California Interdisciplinary Law Journal 195, 195–226.

59 Ibid. While the studies cited involved mostly college students and other 'lay' people, as a representative sampling of a general population, they would be more skewed towards a more homogenous viewpoint, rather than a less educated and poorer sampling who would arguably demonstrate a more pronounced divergence representing the more traditional perspectives of their culture. This is an evolving area of scholarship.

60 Kaiping Peng & Eric D. Knowles, 'Culture, Education, and the Attribution of Physical Causality' (2003) 29 Personality and Social Psychology Bulletin 1272, 1272–1284.

61 Peng & Nesbitt, "Cultural Dialectics, and Reasoning about Contradiction" (1999) 54 American Psychologist 741, 741–754.

62 Justin D. Levinson & Kaiping Peng, 'Valuing Cultural Differences in Behavioral Economics' (2007) 4 The IFCAI Journal of Behavioral Finance 32, 32–47.

63 JD Levinson, 'Suppressing the Expression of Community Values in Juries: How Legal Priming Systematically Alters the Way People Think' (2005) 73 University of Cincinnati Law Review 1059, 1059–1079.

with the perspective of society and the injured victim. The perspective of the individual is a cultural trope in American literature and entertainment.[64]

As studies show that there are differences in perception, judgment, and values among populations from equally functioning cultures, we are required to re-evaluate whether there is one correct or universal modern way of thinking.[65] Now that many other nations have demonstrated that they can produce a material life commensurate with Western standards and expectations, Western values may be challenged as the necessary foundation of modernity.[66]

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64 The popular phrase 'Better that 10 guilty men go free than 1 innocent man be punished' encapsulates this value. Lest we assume that collectivist perspective is a product only of East Asian societies, other studies have noted that Latin American subjects also reflect collectivist cultural values. Another major region of the world which reflects communitarian thinking is Africa. An example of a legal concept arising from traditional southern African culture is *Ubuntu.* Originating from Zulu culture, adopted by several African nations, Ubuntu is playing a role in the South African and Zimbabwean legal and political discourses. It has been defined as human-ness, human kindness, or the recognition of the universal bond of sharing which binds all of humanity. *Ubuntu*'s most prominent use in jurisprudence has been in South Africa's Constitutional Court. In finding a reason to allow squatters to remain on private land belonging to others, the Constitutional Court of South Africa relied on a 1998 statute, the Prevention of Illegal Evictions from and Unlawful Occupation of Land Act, Article 19 and the nation's new constitution: 'PIE (Prevention of Illegal Evictions … Act) expressly requires the court to infuse elements of grace and compassion into the formal structures of the law. It is called upon to balance competing interests in a principled way and to promote the constitutional vision of a caring society based on good neighborliness and shared concern.' The court invoked the traditional notion of *Ubuntu* in order to increase the legitimacy of its decision. 'The spirit of *Ubuntu* … suffuses the whole constitutional order. It combines individual rights with a communitarian philosophy.' Other courts have made use of the concept of *Ubuntu* in other legal fields, from public and criminal law to family and contract law. African customary law, including concepts like *Ubuntu,* is growing in recognition and importance in African legal education. For those steeped in the Western legal tradition, this concept is similar to the notion of equity. However, *Ubuntu* appears to be a much more pervasive concept which serves as one of the fundamental organizing principles for these societies.

65 While a study of world values demonstrates some correlation between education, wealth and individualist values, there is also a significant difference among European, East Asian, African and Muslim cultures, such that education and wealth may not cause rejection of collectivist values; Christian Welzel, 'The Asian Values Thesis Revisited: Evidence from the World Values Surveys' (2011) 12 Japanese Journal of Political Science 1, 1–31.

66 For example, there are movements such as the 'Third World Approach to International Law' and contextualization of African legal education, which seek to recognize cultural traditions in law. Whether such notions will prove to be useful to modern legal systems is still unknown.

D The Challenge to Legal Educators

As legal educators confront an increasingly interrelated social, economic and legal world where inherent legal perspectives differ, we must develop new approaches and tools to sensitize our students to these differing mindsets. We must create opportunities to foster a deeper understanding of their diverse colleagues. To do this law schools and faculties have initiated, for instance, exchange programs, connected classroom settings, introduction of non-domestic law materials in doctrinal subjects, etc.

1 *Developing a Common Foundation*

The challenge confronting legal educators today is put in sharper relief by the emerging science confirming the differences in learning styles, perceptions and reasoning from one culture to another. How can we prepare our students to competently use their legal skills and understanding if thinking styles and approaches differ from culture to culture? How can the glue which law provides bind nations and people together if its practitioners and educators perceive and evaluate differently?

From the emerging scholarship it is apparent that real and significant differences of perspectives determine each society's understanding of the role and rule of law. While the present legal system is indeed an outgrowth of 18th and 19th century Western imposition, it is the institutional framework which this region has inherited. Having a framework steeped in Western cultural values has not hindered the economic progress of the region. Rather, it has helped in creating a common structure and language recognizable worldwide, thereby easing communication and lowering transactions costs both socially and economically.

What will be this region's contribution to a more culturally responsive regime, as it continues its rise in global importance? This is not a question of East versus West. Rather, it is about shaping a new and global perspective for interdependent human beings' interactions with each other within the framework of the law, yet respecting different and evolving cultural priorities.

The composition of a legal education is intimately intertwined with our conception of the role and rule of law. The authors posit that any student having received a legal education should possess a basic knowledge, skills and values shared across the globe as to the law, legal practice and its institutions. While it is not proposed that students should all possess the same cultural perspectives, they should nevertheless understand how these differences come into play. Most importantly they must understand the set of approaches used to define legal reasoning and analysis. In this way, legally trained minds can use a legal

framework to understand and negotiate the differences which will inevitably arise in different cultural contexts. It is the process of reasoning within the legal framework, and on that there should be commonality across all who are educated in the law.

Andrew Harding and Maartje de Visser's chapter in this volume is an excellent example of a thoughtful exploration of the challenges and opportunities that legal educators confront in teaching a specific doctrinal area in an ever-changing environment. Their thesis is that the Western desire of creating a '*jus commune*' among nations greatly influences the way comparative law is taught from that perspective. They contrast this approach with the fact that, 'Asian jurisdictions do not have such a shared degree of legal heritage that they can harken back to'. This insight is indeed important in our approach to teaching any doctrinal subject. We must understand the context in which we find our students.

2 *An Example – Summer Law Institute in China*

This program was developed with several selected law schools[67] and UC Berkeley's Culture and Cognition Laboratory. Its purpose was to specifically afford law students from across the world an opportunity to work with each other, develop lasting relationships, and most importantly, sensitize themselves to differing educational strategies and approaches in learning legal doctrine and skills. The program studied a variety of pedagogies in fostering cross-cultural legal education; in addition, it afforded the investigators an opportunity to observe cultural interactions in a competitive learning environment. We were also able to measure the movement in self-identity of different cultural groups as they worked closely together in the intensive three-week program.

(a) Bringing Student Perspectives Closer

In developing the program at the Kenneth Wang School of Law at Soochow University in Suzhou, China, the investigators studied the influence of a cross-cultural experience among Western (Americans, Italian and Germans) and Chinese law students. The course was a problem-based, problem-solving exercise revolving around a hypothetical international business situation. In the hypothetical, three high-tech companies (Chinese, American and German), each meet at the Shanghai Hi-Tech Trade Show. The students were hired as

67 From the United States: Cornell Law School, and University of Pacific – McGeorge School of Law; from Germany: Bucerius Law School; from Italy: University of Milan Faculty of Law; and from China: Tsing Hua University Law School and Kenneth Wang School of Law, Soochow University.

summer associates to work in the legal counsel's office of their respective companies. The general counsel of each company and the rest of the legal department go on summer vacation. The students receive instructions and materials from their general counsel to assist in a variety of legal issues.

The course is structured to force an interaction among the students. The students are divided into teams, each of which represents one of the three companies in the hypothetical. Each team has approximately one-half Chinese members and one-half Western members. Teams are judged on the effectiveness of their representation of the client. The teams work and compete with each other in negotiations, depth of analysis, client relations, and strategic approaches to issue definition and problem solving.

Working with the UC Berkeley Culture and Cognition Lab and its director, Professor Kaiping Peng, the program tested two sets of inquiry. The first identified cultural differences, eg how members define themselves and their relations with others, and its impact on their understanding of the role and rule of law. It examined whether groups reacted to cultural values and legal judgments in similar and dissimilar ways. This set of questions built upon the existing scholarship in the field, and established the baseline of cultural differences that helped us address the second issue. The second issue tested the effects of cross-cultural interactions and learning: How do culturally diverse people respond to cross-cultural learning? What factors affect the outcomes of cross-cultural learning? Using quantifiable data, the program empirically tested some of the most fundamental questions in cross-cultural education.

Informed by the existing scholarship, the program hypothesized that Westerners would be more individualistic in their values, and therefore more legalistic in their judgments attributing a greater share of responsibility to individual traits, motivation and behavior. Whereas Chinese students had more collectivistic values and make equitable (taking in the entire context) rather than technically correct legal judgments. It also hypothesized that cross-cultural legal education would alter students' value orientations (individual versus collective) and their ways of judging legal questions. The program empirically tested the validity of the hypothesis, as well as the amplitude of the results.[68]

68 A '2x2 Culture by Time Between Subject Design' was utilized in this study. Both groups received the test before and again after, the cultural training.

Subjects were presented with two forms of questionnaires; both forms were matched to test the same psychological variables in questions. Materials were created in English with consideration for cross-cultural understanding of the concepts. The survey was translated into Chinese and translated back into English by separate translators. The authors resolved the few discrepancies that emerged.

For the legal judgment questions, the program presented the students with factual scenarios which represented common examples of legal transactions and disputes. All these questions were tested in a previous cross-cultural study on law and psychology[69] that had shown cross-cultural compatibility and validity. Students were asked to evaluate a variety of situations, and make a legal judgment based upon the facts presented.

Results confirmed the cultural differences found in prior studies, even though the subjects in this study had some legal training. Western law students were more individualistic in their self-image than their Chinese counterparts. The concentration on self-identity revealed itself in legal judgments made by the Western students that tended to assume more individual control of circumstances, and contrasted with the responses of the Chinese students, who tended to assume individuals had less ability to act on individual free will.[70]

We used the most famous individualism-collectivism scale as a measurement of cultural values; see HC Triandis and others, 'Individualism and collectivism: Cross-cultural perspectives on self-ingroup relationships' (1988) 54 Journal of Personality and Social Psychology 323. Individualism, as a psychological concept, is defined by three behavioral components: emotional distance from one's in-group (eg parents, siblings, relatives, etc.), personal goals having primacy over in-group goals, behavior regulation by attitudes and cost-benefit analyses, and little avoidance of confrontation; ibid; see also HC Triandis, C McCusker & CH Hui, 'Multimethod probes of individualism and collectivism' (1990) 59 Journal of Personality and Social Psychology 1006. Collectivism, on the other hand, is defined by family integrity, a homogenous in-group along with strong in-group/out-group distinctions, the self being defined in in-group terms, and regulation of behavior by in-group norms, and hierarchy and harmony within an in-group. Previous research has shown that individualism-collectivism affects people's self-concept (Triandis, McCusker, & Hui, 1990); conflict resolution (Triandis and others, 1988); and attribution; see Michael W Morris & Kaiping Peng, 'Culture and Cause: American and Chinese Attributions for Social and Physical Events' (1994) 67 Journal of Personality and Social Psychology 949.

69 Justin D. Levinson & Kaiping Peng, 'Different Torts for Different Cohorts: A Cultural Psychological Critique of Tort Law's Actual Cause and Foreseeability Inquiries' (2004) 13 Southern California Interdisciplinary Law Journal 195.

70 Once again, we designed two forms for the same kind of legal scenarios. The first kind of scenario involved individual responsibility and the second kind concerned group responsibility. Form A was administrated at Time One before cultural interaction and knowledge training, and Form B was administrated at Time Two after cultural interaction and knowledge training.

The first case in Form A described psychological research indicating that the perceived moral culpability of an actor affects a lay person's casual determination. Mark Alicke conducted studies in order to show that when multiple potential causes are present, people most frequently select the most morally blameworthy cause as the likeliest cause. In Alicke's studies, when presented with a hypothetical fact pattern relating to a

Given that baseline, we looked at the second issue: the effects of cross-cultural training on our students.

In the Suzhou study, we tested the baseline difference between the two cultural groups by examining Chinese students and Western students' responses in a before and after (AB) test. We found that before cultural interaction and training, there were indeed cultural differences on individualism-collectivism, such that the Western students were measurably more individualistic (M = 3.73) than the Chinese students (M = 3.36). We then tested the cultural difference after the cultural interaction and knowledge training. We found not only that there were changes, but that the difference was somewhat reversed. While both groups had moved towards each other, the Western students' responses had become even less individualistic (M = 3.33) than those of the Chinese (M = 3.49). See Figure 2.1.

We noted that the difference between the two groups narrowed by more than 56% (from .37 to .16). This demonstrates a pronounced movement by both groups towards the mean. The most compelling was the movement among the

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car accident, subjects cited the driver (the actor) as the primary cause of the accident more frequently when his reason for speeding was to hide a vial of cocaine than when it was to hide his parents' anniversary gift. Perceivers also consistently selected the actor as the primary cause of the accident despite the presence of other causal factors, such as an oil spill or tree branch blocking a traffic sign. Alicke described this effect as 'culpable causation', or 'the influence of the perceived blameworthiness of an action on judgments of its causal impact.'

The second case in Form A teased out cultural differences in causal explanation. In a series of studies testing cultural differences in attribution, Peng and his colleagues used descriptions of recent mass murders committed by either a Chinese or an American as the stimuli, and asked American and Chinese college students to explain these events. They found that Chinese indeed place more weight on situational, social, and global causes, as compared with American students. Such cultural differences were also shown to exist in people's counterfactual reasoning about the cause and effect relations of mass murders, as well as in the media reports in a Chinese newspaper (*The World Journal*) and an American paper (*The New York Times*). Such findings are significant as well as provocative, because social psychologists and cognitive psychologists have long argued that there is a strong universal tendency for people to attribute behaviors of humans and objects to internal dispositions of an individual or object, which has been called the 'correspondence bias'. It is well documented that such a bias exists even when situational influences are obvious, leading to the so-called 'fundamental attribution error'. See generally Morris & Peng, ibid; Michael W Morris and others, 'Causal attribution across domains and cultures' [1995] Causal cognition: A multidisciplinary debate 577; Kaipeng Peng, Richard E. Nisbett & N Wong, 'Validity problems of cross-cultural value comparison and possible solutions' (1997) 2 Psychological Methods 329.

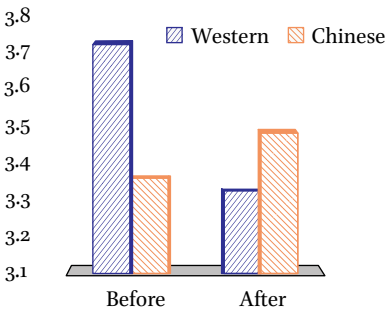

FIGURE 2.1
Effects of cultural knowledge training on Chinese and Western students' beliefs on individualism.

students – Western students' attitudes on individualism moved three times as much as the Chinese students. We theorize that this large movement owes much to removing the Western students from their original environment and placing them in an entirely different cultural setting. The movement of Chinese students to a more individualistic self-perception demonstrates the effects of cross-cultural interactions even when remaining in one's original environment, but interacting with a different population. This measurable change occurred within a three-week period of intense multi-cultural interaction. The investigators hypothesized even greater movement in students who engage in a longer program or have greater opportunities for education abroad programs.[71]

E Conclusion

While fundamental cultural differences exist, education and acculturation begins to minimize them, particularly within a specific field of expertise, such as the law. In many respects the enterprise in which we are engaged is the development of a global legal culture with shared approaches and perspectives as to the role of law, and the approaches used in forming and enforcing legal strictures through the rule of law.

In summary, neuroscience demonstrates that there are clear and provable differences in brain function among people of different cultures when reflecting on notions of identity, values, and time. Given these differences, it is inadequate for legal educators to teach 'universal'; values based only on

71 The investigators did not test the longitudinal effects of such a shift. What they do know is that many of the students still keep in touch through their own (by invitation only) social media site.

Western cultural traditions and models. However, it is not sufficient to argue against universal values. Instead, alternative models should be offered for well-rounded legal education. The study of law in its cultural context using the tools of modern science to confirm theoretical hypotheses is an open and ripe area for intellectual investigation.

This region's economic and political importance has grown exponentially in the past 30 years. With such growth comes responsibility. That responsibility demands a fuller engagement in the development of the law. While the regions' legal regimes are not indigenous, it is not feasible to impose the traditional legal frameworks of Imperial China, Japan or the Kingdoms of Korea or Vietnam. Those days are over, as are the days of colonialism and treaty ports. The world today is a dynamic, multi-polar and evolving one. What will be this region's contribution to the development of law? The time is now for the region to build on what presently exists, and contribute its unique perspectives to this global conversation.

The challenge for Asian legal educators is to robustly engage in the evolving scholarship and science of how we analyze, persuade, and motivate ourselves as human beings. Asian scholars are uniquely qualified to investigate the confluence of indigenous cultures and the western legal tradition. This is where we can be innovative in staking out an emerging field of legal scholarship.

CHAPTER 3

Going Global: Australia Looks to Internationalise Legal Education

Ann Black and Peter Black

A Introduction

Today, it is widely acknowledged that an important part of Australia's future will hinge on its relationship with Asia. A 2012 government White Paper – *Australia in the Asian Century* – called on Australians to develop Asian literacy,[1] which extends to Asian legal literacy. The question for the legal profession was how Australian law schools can best provide a foundation in Asian and international legal literacy, in addition to ensuring competency in domestic Australian law and legal procedure, the traditional bedrock of professional legal practice. The Council of Australian Law Deans (CALD), the apex body in legal education to which all Law School Deans in Australia belong, responded with a direction paper[2] advocating that law schools should develop programs that take 'cognisance of global developments'[3] and increase the emphasis on internationalisation. Internationalisation of law curricula, it was argued, was essential to prepare students for global legal practice because the 'practice of law has changed for many lawyers, and with it the need for their education to change'.[4] In addition to global law firms where legal services are provided across multiple jurisdictions, local law firms cannot be 'entirely immune'[5] from cross-jurisdictional matters, whether it is a family law matter, purchase of goods from an overseas supplier, or investment in a local business or farm by an overseas company. There are several means by which some internationalisation can be

1 'Australia in the Asian Century' (Australian Government White Paper, October 2012) <www.defence.gov.au/whitepaper/2013/docs/australia_in_the_asian_century_white_paper.pdf> accessed 9 June 2016.

2 Council of Australian Law Deans, 'Internationalising the Law Curriculum' (CALD, 2017) <http://curriculum.cald.asn.au/> accessed 9 June 2016.

3 Ibid.

4 Ibid.

5 Joan Squelch and Duncan Bentley, 'Preparing law graduates for a globalisation world' (Paper presented at the 37th Higher Education Research and Development Society of Australasia (HERDSA) Annual International Conference, Hong Kong SAR, 7 July 2014) 293, 294.

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achieved and these will be discussed later in this chapter. Just as Harding and de Visser note in the context of Singapore, if the aim is for law graduates to be able to understand law in a global context and to have the skills to operate across many jurisdictions, then arguably a new focus is required in the law curricula in Australia as well.

This chapter assesses how well Australian law schools are progressing in incorporating global and international dimensions in the study of law. To what extent are Australian law schools modifying programs to reflect the 'changing global reality through the process known as internationalisation'?[6] Globalisation and internationalisation are described as 'different but interrelated processes', in which internationalisation is one of the major components of the multi-faceted phenomenon known as globalisation.[7] The objectives of internationalisation have been promoted by a range of committees and scholars, and were summarised at a National Symposium on internationalising the law curriculum as follows:[8]

> [T]o develop and model the effective integration of international and intercultural dimensions into legal education that will equip Australian legal graduates with the necessary international and intercultural competencies to work in a global legal context.

Certainly the words 'global' and 'international' are populating law school websites; for example, the University of Sydney (USyd) explains how it is 'no longer enough to understand the legal system in your own country' as lawyers need 'international and comparative legal training' to respond to contemporary problems.[9] Murdoch University (Murdoch) describes itself as a global university providing a transnational legal education.[10] Whilst few would reject the desirability of internationalisation, there are many competing demands on

6 Ibid 296.

7 Ibid 295.

8 Chief Justice Robert French AC, 'Horses for Courses' (Opening Address at the National Symposium on 'Internationalising the Australian law curriculum for enhanced global legal education and practice', Canberra, 16 March 2012) <www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj16mar12.pdf> accessed 20 August 2016.

9 Sydney Law School, 'Welcome from the Dean' (University of Sydney, June 2016) <http://sydney.edu.au/law/fstudent/undergrad/> accessed 9 June 2016.

10 Chief Justice Robert French AC, 'Three Virtuous Things – the Charter, the University and the Law School' (Speech at Murdoch University Law School, 15 September 2015). <www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj_15Sep2015.pdf> accessed 26 August 2016.

what legal education should provide for lawyers of the 21st century, and this chapter will reflect on the extent to which it is both feasible and desirable for law curricula to meet the demands placed on them. It seems Australian law schools recognise that it is not possible to offer 'all things to all students' and accordingly seek to distinguish themselves by promoting a particular niche or focus which may be local or global, skills-oriented or theoretical, elitist or inclusive, campus-based or online. Any semblance of a uniform 'one size fits all' approach to legal education has receded as law schools now develop different strengths and foci, in what the Chief Justice of the High Court of Australia calls 'horses for courses'.[11]

This chapter focuses on law qualifying degrees – the ones required for admission to professional legal practice – and does not consider Masters degrees by coursework and research or other higher research degrees in law, whilst acknowledging that these can also be important avenues by which practicing lawyers in Australia gain knowledge and understanding of international and comparative law issues, including ones arising in Asian jurisdictions.

B Defining Features of Legal Education in Australia

1 *The Past Informs the Present*

The British settlement of Australia in 1788 resulted in the adoption of a common law system of law and courts from the late 18th century onwards. No recognition was given to the legal precepts and modes of dispute resolution used by the 500 indigenous cultural and linguistic groups already on the continent. Indigenous Australians were subjected to the laws of their white colonial conquerors. Unlike in its colonies in Asia, the British rejected any semblance of legal pluralism for Australia. Legal education inevitably followed the colonial English model. The colony of New South Wales (NSW) used its Supreme Court as the admitting authority, at first for solicitors[12] and subsequently for barristers.[13] Each of the other five colonies adopted similar institutional arrangements. NSW and Queensland (which separated from NSW in 1859) had a divided profession of separate barristers and solicitors, whereas the other colonies had a fused profession for the purposes of admission, but with separate voluntary bars. When the colonies federated as the Commonwealth of Australia in 1900, the six states and two territories in

11 French (n 8).

12 Attorneys and Solicitors Act 1728 (UK).

13 Third Charter of Justice for New South Wales, Letters Patent, October 1823, cl 10.

the Commonwealth each retained control over legal education. Consequently, a defining feature of legal education in Australia today is that it remains state-based. Each state and territory in Australia has different requirements and processes for admission.[14] Incremental progress has been made towards national admission standards,[15] and also towards the harmonisation of laws in order to reduce differences between the states on substantive and procedural laws. Entry to law school is also by state-based assessment methods, each of which measures students' abilities and knowledge in different ways.[16] Thus far, no nation-wide or state-based entrance examinations are required for law. However, with the introduction of JD programs, some law schools including Melbourne University (Melb U) have adopted a law admission test along American lines. From 2017, the University of New South Wales (UNSW) will also require school leavers seeking entry to the LLB to do an aptitude test, known as LAT (Law Admissions Test)[17] which will be weighted along with the applicant's school results. Monitoring and oversight of the profession remains with the Supreme Court of each jurisdiction, and with state-based boards and law societies.

The federal structure adds a layer of complexity to legal education, and concern over different admission rules in each of the states and territories led to the creation of a Consultative Committee of Admitting Authorities chaired by Justice LJ Priestley.[18] This Committee did not lay down a national curriculum for law schools, but did specify broad areas of legal knowledge as a minimum requirement for all Australian admitting authorities. These eleven

14 Reciprocal admission arrangements allow admission in one state or territory to support admission in another. ACT, NSW, Queensland and the Northern Territory each have their own Legal Practice Admissions Board; Tasmania has a Board of Legal Education; South Australia has a Legal Practitioners Education and Admission Council; Victoria has a Council of Legal Education; and Western Australia has a Legal Practice Board. See eg Supreme Court of the Australian Capital Territory, 'Admissions' (Supreme Court, 24 November 2016) <www.courts.act.gov.au/supreme/practitioners/admissions> 9 June 2016.

15 A Mutual Recognition Scheme supports reciprocal admission arrangements.

16 Queensland has an Overall Position system [OP 1–25] which is not a percentage but a ranking between 1–25, where 1 is the highest position and 25 is the lowest. Other states apply an Australian Tertiary Admission Rank (ATAR) as a percentage relative to their peers, as assessed within the respective state jurisdiction. The highest rank is 99.95 and the lowest is 30.00.

17 UNSW Law, 'Law Admission Test (LAT)' (University of New South Wales, 2016) <www.law.unsw.edu.au/LAT> accessed 21 August 2016.

18 Law Admissions Consultative Committee, Uniform Admission Rules 2008, Sch 1 'Prescribed Areas of Knowledge' 5–11.

areas are known as the 'Priestley Eleven'.[19] Whether the Priestly Eleven is a 'light' touch of regulation which allows for change,[20] or a 'straightjacket'[21] which significantly limits what can be taught in law schools, is contentious. The federal structure does also explain the current variation in the length of legal education programs, where some institutions just require completion of the Priestley courses which means a student can qualify in three years or less, while others require completion of a range of additional elective courses to broaden the experience and knowledge base of their graduates.

2 *Sandstone and the New Law Schools*

Universities did not provide legal education in Australia until the middle of the 19th century. Sydney University, which opened in 1850, established a faculty of law in 1855, and Melb U Law School followed in 1857 with a four year LLB (Bachelor of Laws). The University of Adelaide (U Adel) established its law school in 1883, the University of Tasmania (U Tas) in 1889, and the University of Western Australia (UWA) in 1928. In Queensland law was initially taught as part of the Bachelor of Arts degree and students completed a Bar examination to gain admission to practice. A faculty of law was not established until 1936. Up to the 1960s this handful of law schools, one in each state capital, were colloquially known as the 'Sandstone Universities' and they provided legal education for solicitors and barristers, always supplemented with practical experience through articles of clerkship with a law firm or bar practice requirements. Law was an undergraduate degree and graduands were awarded an LLB, in keeping with the English model. The focus was almost exclusively on training lawyers for professional practice in each of the respective state jurisdictions. Law lecturers were mainly practitioners 'from town' who taught on a part-time basis,[22] little legal research was undertaken and the approach to teaching followed the English pro forma of lectures accompanied by smaller tutorials. In order to

19 Administrative Law, Criminal Law & Procedure, Civil Procedure, Company Law, Evidence, Equity and Trusts. Contract, Constitutional law, Property Law, Professional Conduct (with Trusts Accounting) and Torts. The Law Council of Australia recommends the content which should be covered in each area.

20 Law Admissions Consultative Committee, 'Rethinking Academic Requirements for Admission' (26 February 2010) 21.

21 Leanne Mezzani, 'Priestley 11 should include ADR' (*Lawyers Weekly*, 9 August 2012) <www.lawyersweekly.com.au/news/10551-Priestley-11-should-include-ADR> accessed 9 June 2016.

22 Michael Chesterman and David Weisbrot, 'Legal Scholarship in Australia' (1987) 50 MLR 709, 711.

meet the demands of professional legal practice, the legal profession itself had considerable influence not only on what was taught in law schools, but also on the supply of legal practitioners.[23] Universities competed with state-based barrister and solicitor admission boards, which also undertook the training of lawyers through practitioner-led instruction and examinations set by specific boards.[24] It is still possible in some states, such as NSW, to qualify for admission to practice by enrolling as a student-at-law with a Legal Professional Board. This is offered on a part-time basis and students can attend evening lectures or use external modes of correspondence, sit for Board examinations and assignments, and receive a Board Diploma instead of a University degree.[25]

During the 1960s more law schools were established. The Australian National University (ANU) opened in Canberra in 1961, Monash (Mon U) in 1964 and UNSW in 1971. These and five of the Sandstone Universities[26] comprise what is now known as the 'Group of Eight',[27] described as a 'coalition of the leading Australian universities, intensive in research and comprehensive in general and professional education'.[28] Law Schools in this 'Group of Eight' attract (and only accept) students with the highest entrance scores attained on leaving high school. For example, in Queensland which has an OP ranking system of 1–25, the University of Queensland (UQ) which is a 'Sandstone' and 'Group of Eight' university accepts only students with the highest rank of OP1/Rank 99, and USyd requires an ATAR of 99.5.[29] The Group of Eight law schools attract not only the highest achieving school-leavers but also a high proportion of students who attended private fee-paying schools – a fact that, as former High Court Justice Michael Kirby has noted, means that they 'do not reflect the diversity of the general population'; in fact, Justice Kirby was the only judge

23 Christine Parker and Andrew Goldsmith, '"Failed Sociologists" in the Market Place: Law Schools in Australia' (1998) 25 Journal of Law & Society 33, 34.

24 Justice McHugh and Chief Justice Keifel of the High Court of Australia received their formal legal education through State Barrister's Boards; NSW Bar Association, 'Appointments: The Hon Justice Susan Kiefel' (*Austlii*, 2007) <www.austlii.edu.au/au/journals/NSWBarAssocNews/2007/62.pdf> accessed 9 June 2016.

25 Legal Profession Registration Board NSW, 'Registration as a Student-at-law' (LPAB, 2014) <www.lpab.justice.nsw.gov.au/Documents/Form%201%20SAL%20Registration%204%20Aug%202014.pdf> accessed 9 June 2016.

26 University of Tasmania is not part of the Group of Eight.

27 Group of Eight Australia, 'Australia's Leading Universities: Leading Excellence, Leading Debate' (*Group of Eight*, 2016) <https://go8.edu.au/> accessed 9 June 2016.

28 Ibid.

29 See the outline of OP and ATAR rankings above (n 15).

of the High Court of Australia whose entire education was at public schools.[30] These 'Group of Eight' law schools are generally regarded as prestigious, giving rise to notions of elitism, similar to the American 'Ivy League'. A counterpoint to the 'Group of Eight' is the Australian University Technology Network, which promotes what it describes as a 'real world' approach to legal education claiming to produce graduates who are work-ready and able to think globally.[31]

From the 1970s onwards the number of law schools multiplied from nine to 43;[32] the most recent being the Sydney City Law School (Syd City) which opened its doors in 2016. To put this in a comparative perspective, Singapore has two law schools for a population of 5.7 million, but the state of Queensland with a smaller population of 4.8 million has ten law schools. Harding and de Visser also note that Singapore's two law schools have an annual intake of 240 and 160 students,[33] which is considerably fewer than the annual intake of students at most law schools in Queensland. New South Wales, the most populous state with 7.6 million people, now has 13 law schools. This 'explosion'[34] or an 'avalanche of law schools'[35] commenced in late 1980s when the Commonwealth government structurally reformed the tertiary education sector. It removed the prior distinction between colleges of advanced education and universities by rebranding all colleges as universities, introduced corporate governance to the sector, and replaced free education with student fees[36] known as HECS.[37] These reforms were welcomed for increasing undergraduate student numbers, but also criticised for replacing 'the idea of the

30 Michael Kirby AC, 'Online Legal Education in Australia: the new CQU Law Degree' (2011) 34 ABR 237, 241.

31 See 'Australian Technology Network' (ATN, 2016) <www.atn.edu.au/> accessed 7 August 2016.

32 CALD lists 44 law schools on its website, but the Australian Catholic University (ACU) and Notre Dame University (UNDA) operate at two separately listed campuses in Sydney and Melbourne which could in fact be seen as one entity, thus giving a total of 42 law schools; 'Studying Law in Australia' (CALD, 2016) <www.cald.asn.au/slia/lawschools.cfm> last accessed 20 August 2016. The site does not include the newest addition of Sydney City Law School; 'More law students on horizon as new school opens in Australian Technology Park in Sydney', *Australian Financial Review* (Sydney, 24 September 2015).

33 See Chapter 5.

34 French (n 8).

35 David Barker, 'An Avalanche of Law Schools, 1989–2013' (2013) 6 J ALTA, 1–13.

36 These are known as the Dawkins reforms. John Dawkins was the Education Minister for Employment, Education and Training from 1987 to 1991. See Gwilym Croucherand others, *The Dawkins Revolution* (MUP 2013).

37 HECS is an acronym of the Higher Education Contribution Scheme.

university' with that of 'a business'.[38] Law was an attractive proposition for universities, 'bringing prestige, professional links and excellent students, at a modest cost compared with other professional programs such as medicine, dentistry, veterinary science, architecture or engineering'.[39] Barker noted that many of the newer law schools built on 'existing infrastructure of law academics already employed by the host university, usually in departments of business'.[40] This enabled the relatively easy establishment of a law school. As Barker also notes, law programs are relatively cheap to teach, making it possible for federal funding to be used to cross-subsidise other areas within universities.[41]

3 *Who Can Study Law?*

As each Australian law school determines its own requirements for entry, there is considerable variation in terms of the number of students, prior academic achievement and whether an interview is required. This occurs not only between states, but also within states. In Queensland, as noted above, UQ requires an OP1(ATAR 99.50) which means it gives entry to students in the top one or two percent of high school achievers, whereas James Cook University (JCU) accepts students with OP15 [ATAR 65.00], the University of Central Queensland (UCQ) and the University of Southern Queensland (USQ) accept OP11[ATAR: 74.90], Griffith University (Griff U) accepts OP 9 [ATAR 82.00], and the Queensland University of Technology (QUT) requires an OP5 [ATAR 93.00] or above. Bond University (Bond), which is a private non-government university, does not rely solely on the OP but looks at a range of criteria including extra-curricular activities, personal attributes such as leadership, and community involvement. The same variable pattern is replicated in other states, where the Group of Eight has higher academic entrance requirements than the newer law schools. Lo notes that one consequence of the wide variation in entrance requirements is that except for the ones that only admit the top-performing high school leavers, law schools can find they have cohorts 'who do not know how to spell or have not mastered even basic grammar'.[42] Classes to

38 Margaret Thorton, *Privatising the Public University – the Case of Law* (Routledge 2012) 16.

39 Australian Law Reform Commission, 'Managing Justice – a Review of the Federal Civil Justice System', Report No 89 of 2000, 117 [2.13].

40 Barker (n 35) 12. Also, at p. 7 Baker notes that until 1999, Victoria University offered legal studies through its Faculty of Business. In 2000, the Faculty was renamed the Faculty of Business and Law, and it commenced an LLB program in 2001.

41 Ibid 14.

42 Vai Io Lo, 'Before Competition and Beyond Complacency – The Internationalisation of Legal Education in Australia' (2012) 22 Legal Educ Rev 3, 30.

improve students' written expression therefore need to be incorporated into first year programs.

The number of students granted entry to law also varies. UQ, for example, now has an annual intake of 200, whereas QUT has 800–1,000 students.

The so-called 'explosion'[43] in the number of law schools has made a law degree widely accessible to Australians and to international students. Chief Justice French notes that the growing number of law schools reflects the current demand for legal education from a wider 'geographical, academic and socio-economic catchment'[44] than in the past. Geographically, many of the newer schools were established outside the capital cities, and a Regional Universities Network[45] was formed in 2011 to promote them and raise their profile. The result is that legal education is no longer the preserve of a few. Some law schools accept students who have not completed secondary school, but have attained life skills and competencies that should equip them for tertiary study.[46] Former High Court Justice Michael Kirby welcomes 'the increasing number of law students and legal practitioners from less privileged ethnic, social and educational backgrounds',[47] and whilst the Australian Law Students' Association also supports increased opportunities for students from a variety of socio-economic backgrounds, it does not believe that 'creating more law schools is the answer'.[48] There are concerns that the proliferation of law schools and the commensurate decrease in entrance requirements have created both an oversupply of law graduates and also a diminution of standards, both of which impact on the standing of a law degree.

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43 French (n 8).

44 Ibid.

45 See 'Regional Universities Network' (RUN, 2016) <www.run.edu.au/> accessed 10 August 2016.

46 JCU provides 'pathways' which include completing a JCU Diploma of Higher Education. Deakin University uses a test (the Australian Law Schools Admission Test – ALSAT) to assess 'candidates who have not completed a recent or standard university entrance qualification to demonstrate an ability to cope with tertiary studies'; Australian Council for Educational Research, 'Australian Law Schools Entrance Test (ALSET)' (ACER, 2016) <www.acer.edu.au/alset> accessed 10 August 2016.

47 Kirby (n 30) 237.

48 Felicity Nelson, 'New Law School may leave grads stranded' (*Lawyers Weekly*, 23 September 2015) <www.lawyersweekly.com.au/news/17221-new-law-school-may-leave-grads-stranded#!/>; Marianna Papadakis, 'The depressing truth for law graduates: you may have to be a secretary', *Australian Financial Review* (Sydney, 26 November 2015) <www.afr.com/leadership/careers/the-depressing-truth-for-law-graduates-you-may-have-to-be-a-secretary-20151125-gl70sj> accessed 30 June 2017.

It is reported that over 14,600 students graduated from law schools in 2014,[49] which is a growth of 9 per cent, year-on-year. Graduate Careers Australia also found that almost one in four LLB law graduates is not working full-time four months after graduating, which is the lowest employment rate since data was first collected in 1982.[50] Not only is the general employment rate decreasing, but the NSW Law Society has found that firms use technology to complete work previously done by junior lawyers, such as discovery and document automation; outsource elements of their work to low-cost jurisdictions; and increasingly use alternative dispute resolution.[51] Anecdotal evidence from the media indicates an oversupply of law graduates.[52]

However, the Productivity Commission in 2014 found that: 'While it is clear that graduate numbers are increasing, the Commission does not see that this justifies any constraint on student numbers for law degrees.'[53] This is because a law degree is increasingly seen as a generalist liberal degree leading to employment in a range of areas other than professional legal practice. There is also evidence that the demand for legal services is growing as the same rate as the number of graduates[54] and that legal services are one of Australia's main exports. As it is also difficult to track employment after graduation, the Law Society of NSW has urged that solid data be collected to allow 'a more accurate

49 'Too many law graduates and not enough jobs', *Australian Financial Review* (Sydney, 20 October 2015) <www.afr.com/business/legal/too-many-law-graduates-and-not-enough-jobs-20151020-gkdbyx> 9 June 2016.

50 Law Society of NSW, 'Future Prospects of Law Graduates: Report and Recommendations 2014' (*Law Society*, 2016) <www.lawsociety.com.au/about/StudentHub/LawGraduatesReport/index.htm> accessed 16 August 2016.

51 Ibid.

52 Liz Burke, 'Desperate law graduates are apparently prepared to pay for their jobs' (*Herald Sun*, 3 September 2015) <www.heraldsun.com.au/business/work/desperate-law-graduates-are-apparently-prepared-to-pay-for-their-jobs/news-story/3ec2472a2b4678063206166 4b9491d2e> accessed 30 June 2017; 'Charging $22,000 for a graduate position won't solve the problem of law graduate oversupply', *The Conversation* (28 July 2015); 'Law graduate unemployment hits record high' *Lawyers Weekly* (9 January 2015); 'Glut of lawyers as unis cash in', *The Australian* (Surry Hills, 21 November 2014); 'Call for cap on lawyers to ease strain', *The Australian* (Surry Hills, 4 April 2014).

53 Productivity Commission Access to Justice Report <http://www.pc.gov.au/inquiries/completed/access-justice/report> accessed 25 August 2016.

54 Jill McKeough, 'Graduate Attributes, the Priestley areas of knowledge in the broader educational context' (Paper presented at the National Symposium on 'Internationalising the Australian law curriculum for enhanced global legal education and practice', Canberra, 16 March 2012) 1,7.

snapshot of that state's law graduate employment.'[55] In the absence of reliable reported data, anecdotal evidence dominates.

The extent to which concern about their future prospects may impact on law students' well-being is not easy to measure, but research shows that law students experience stress, anxiety and depression at rates significantly higher than their contemporaries in other fields including medicine, nursing, psychology, and engineering.[56] The Dean of Melb U Law School sees a link between difficulties with gaining employment and increased levels of anxiety and stress.[57] The consequences is that 'wellness programs' are being established in many law schools to bring 'support services, activities, information and resources to students to help bring balance to their lives while in Law School'.[58]

4 *LLB v JD*

A further significant change to legal education was the introduction into some law schools of the American model of legal education, in which law is a post-graduate professional degree. The first Juris Doctor (JD) program commenced at UQ in 1996, but was phased out during the next decade, and today UQ only offers the LLB. Most law schools that introduced the JD for graduates have also retained the LLB for undergraduates.[59] Only Melb U, UWA, and RMIT offer the JD alone. The reasons for the introduction of JD programs were several. First, although both the LLB and the JD provide a pathway to legal practice, the JD was seen as being more career-focused. The LLB was increasingly viewed as a generalist degree which could lead to occupational opportunities in fields other than law,[60] whereas the JD was designed as a purely professional legal degree. Second, as a post-graduate program, the JD had appeal to a new cohort of students. This had marketing potential, and it was also felt that more mature

55 Law Society of NSW (n 50).

56 Natalie Skead and Shane Rogers, 'Stress, Anxiety and Depression in Law Students: How Student Behaviours Affect Student Wellbeing' (2014) 40 Mon U Law R 565–587.

57 Carolyn Evans, cited in Neil McMahon, 'Law of the Jungle: Lawyers now an endangered species' *Sydney Morning Herald* (Sydney, 11 October 2014).

58 At UQ a Wellness program for law students commenced in 2016; see TC Beirne School of Law, 'TCB Wellness' (*University of Queensland*, 2016) <https://law.uq.edu.au/tcb-wellness> accessed 25 August 2016. QUT and Melb U Law Schools have also established a Wellness Network to promote well-being among law students and lawyers.

59 For example ANU, Bond, Deakin, Flinders, La Trobe, Macq, Monash, Murdoch, Canberra (UC), UNSW, Newcastle, USQ, University of Sydney and the University of Technology Sydney (UTS).

60 Donna Cooper, Sheryl Jackson, Rosalind Mason & Mary Toothy, 'The Emergence of the JD in the Australian Legal Education Marketplace and its impact on academic standards' (2011) 21 Legal Education Review 23, 24.

students would bring wider life experiences, abilities and skills to the practice of law. Third, as post-graduate students paid full fees, the JD was seen as a way to increase funding for the university itself. In times of 'chronic under-funding', the JD was seen as offering a 'valuable source of alternative income.'[61] A fourth reason was that the JD had increasing international acceptance, having been exported beyond North America to countries in the Asia-Pacific region. The dual approach of retaining the LLB and introducing a JD was the more popular approach as it maximised the student intake, allowing both school leavers and graduates to study law.

The JD is studied as a single degree program over three years, whereas the LLB is often taken as a dual or combined degree with Bachelors of Arts, Commerce, Business and Science. Therefore an LLB student may spend four to six years at university before they graduate.

5 *Regulation of Legal Education*

The Australian government does not set down a national curriculum for legal education, so law schools have considerable latitude to design a degree program which reflects the philosophy and priorities of the university and the school. The federal government does however try to ensure standards[62] and provides guidelines and frameworks needed for generic learning outcomes at all levels – undergraduate, honours and post-graduate.[63] Since 2011, the vehicle for this is the Tertiary Education Quality and Standards Agency (TEQSA),[64] set up as a statutory authority within the Education portfolio of the Commonwealth. TEQSA registers and evaluates the standards and quality of all education providers including law schools. In doing so it applies the Australian Qualifications Framework (AQF).[65] The AQF lays down six Threshold Learning Outcomes (TLOs)[66] for both the LLB and JD programs.[67] TEQSA audits law

61 Ibid 25.

62 This is done through the Commonwealth Tertiary Education Quality and Standards Agency (TEQSA), which sets out Standards for Providers, Qualifications, Teaching & Learning, Information, and Research.

63 The AQF Council is now part of the Commonwealth Department of Education.

64 Tertiary Education Quality and Standards Agency, 'Welcome to TEQSA' (*Government of Australia*, 2016) <www.teqsa.gov.au/> accessed 9 June 2016.

65 'Australian Qualifications Framework' (AQF, 2016) <www.aqf.edu.au/> accessed 9 June 2016.

66 Anna Huggins, Sally Kift & Rachel Field, 'Implementing the Self-Management Threshold Learning Outcome for Law: Some International Design Strategies from the Current Curriculum Toolbox' (2011) 21 Legal Educ Rev 183.

67 TLO 1: Knowledge; TLO 2: Ethics and professional responsibility; TLO 3: Thinking skills; TLO 4: Research skills; TLO 5: Communication and collaboration; TLO 6: Self-management.

schools for compliance with the six TLOs. These outcomes are designed to recognise the relationship between the degree's academic and professional accreditation requirements, and the reality that many law graduates work in diverse roles beyond professional legal practice.

Approaches to modes and methods of teaching are informed by the Commonwealth Office for Learning and Teaching. In addition, there are state regulatory bodies which set out requirements for admission to practice in each jurisdiction and determine compliance with compulsory areas of study of the 'Priestley Eleven'(as outlined above at II A) and the competencies needed for Practical Legal Training (PLT). To qualify fully for admission to practise, applicants need to satisfy the admitting authority that they have also completed the PLT and are of 'good fame and character'. As noted at the outset, the Council of Australian Law Deans (CALD) is an advisory and representative body that also lays down goals and objectives for legal education. In addition, each law school has to meet the requirements of their University's objectives and their policies for teaching, learning and assessment.

6 *Delivery of Legal Education*

Another feature of legal education in Australia which has been transformed in the last two decades is the mode of delivery. The traditional face-to-face classroom with large lectures and small tutorials was first challenged by the use of face-to-face seminar groups of 25–50 students but both now are being supplemented, and in some law schools, replaced totally by online teaching. Innovation and experimentation in modes of teaching and also of assessment are apparent in every law school. Most are using a variety of online learning tools to complement traditional face-to-face classroom teaching. By adopting blended learning, the teaching and learning experiences for students should be enhanced as they can engage in ways not available in their main learning environment. Importantly, blended learning means that students are able to get the most out of regular face-to-face learning activities, which is critically important in law schools with large cohorts. The reality is that students in Australia today generally want flexibility in their studies to juggle the competing time commitments of study, work and home, which is often incompatible with the traditional format of large group lectures and tutorials.[68]

68 Marie-Pierre Moreau and Carole Leathwood, 'Balancing paid work and studies: working (–class) students and higher education' (2006) 31 Studies in Higher Education 23; John Tarrant, 'Teaching time-savvy law students' (2006) 13 JCUL Rev 64.

The growth in fully online law degrees, such as the one at the Central Queensland University (CQU) has been both criticized and welcomed.[69] The President of the Australian Law Students Association noted 'some concerns around quality'[70] regarding online offerings, both from students taking such courses and from the face-to-face student cohort 'comparing what their course is with what the online offering is'.[71] Criticisms go to concerns about how an online law degree sustains student engagement with the material and whether it allows the same level of participation and interaction as face-to-face tutorials and seminars. Students may also miss out on the wider university experience. Michael Kirby has noted how 'it is difficult online and at long distance, to replace the vibrant, exciting and often emotional contacts provided by universities through participation in student societies'.[72] Other concerns involve the availability of non-electronic library resources; the selection of legal academics to teach effectively in the digital environment; the authenticity of work submitted and the integrity of grading outcomes. However, the online medium is seen as better able to serve regional and rural students. Given that Queensland is a vast state seven times the size of Britain and two and a half times that of Texas, Michael Kirby believes online instruction will open up the study of law to people in rural areas who would otherwise find it difficult to do so. It allows students to stay with their families and within support systems.[73] This includes indigenous students, for whom the democracy of online communication may be more suitable and less intimidating than face-to-face – interaction. Kirby also argues that 'anything that can contribute to increasing the numbers of law students and legal practitioners from less privileged ethnic, social and educational backgrounds is to be encouraged'.[74] Another consequence may be better retention of qualified lawyers outside the large metropolitan areas, which would be beneficial in the often under-represented large rural and regional parts of Australia.

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69 See Kirby (n 29) in which the author considers both the benefits of online courses and the concerns surrounding them.

70 Paul Melican, cited in Lara Bullock, 'New law schools must have the right intentions' (*Lawyers Weekly,* 15 August, 2016) <www.lawyersweekly.com.au/news/19350-new-law-schools-must-have-right-intentions#!/> accessed 30 June 2017.

71 Ibid.

72 Kirby (n 30).

73 Ibid 10.

74 Ibid 11.

C Internationalisation of Australian Legal Education

A strategy to internationalise legal education conjures different images.[75]

The majority of Australian law schools view internationalisation of legal education as a worthy objective, but as the International Legal Education and Training Committee (ILET Committee) advising the Attorney-General indicated, there are varied understandings of how this objective can best be achieved and what is needed for their cohort of students. As Chief Justice French has noted, 'while the international dimension may penetrate many areas of practice, it is not equally pervasive in all areas. A large range of legal services will not often require the invocation of international legal skills'.[76] However, he also cautioned against the 'balkanisation of legal education by a diversity which enriches some courses with international perspectives and denies them entirely to others'.[77]

Certainly, words such as 'global', 'international', 'comparative', and 'Asian' increasingly appear in program websites and course outlines, but it can be difficult for observers to know how much is marketing spin and what in fact transpires in the classroom and in course assessments. The ILET Committee described some websites as 'superficial and misleading'.[78] The variation ranges from full integration of international and comparative perspectives and transactional skills through all levels of the degree, to discrete courses in international, comparative or foreign law, or merely perfunctory references to anything other than domestic law, also known as 'tokenism'.

1 *Integration*

For over a decade the Australian government has endorsed the concept of global lawyers, achieved by integration of international and comparative perspectives into all law courses. The 2004 Australian government report[79] set out four elements needed for genuine internationalisation of the Australian law curricula:

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75 International Legal Education and Training Committee (ILET Committee) of the Australian Attorney-General's International Services Advisory Council (ILSAC), *Report on Internationalisation of the Australian Law Degree* (June 2004) <http://documents.mx/documents/internationalisationoftheaustralianlawdegree.html> accessed 9 June 2016.

76 French (n 8).

77 Ibid.

78 International Legal Education and Training Committee (n 75) 6.

79 Ibid 5 (emphasis added).

- Curriculum and pedagogy should prepare students with legal skills for transnational transactions;
- Students should understand fundamental principles of law and legal reasoning in international, regional and transnational contexts;
- International materials should be *integrated into the whole legal curriculum* (this goes beyond just adding international and comparative law electives); and
- Overseas students should be able to obtain genuinely internationally focused law degrees in Australia.

The report noted that at the time, most law schools did not consider internationalisation a priority and saw the offering of public and private international law courses, and/or some comparative law electives as sufficient. It concluded that Australia lacked a genuinely international legal education sufficient to equip Australian lawyers for globalisation.

At that time, two law schools – U Tas and QUT were singled out by ILET Committee as 'leaders in the development of an internationalised curriculum'[80] through integration. For example, in the LLB (Hons) program at QUT, international materials are embedded throughout the degree. Two of the five of the outcomes labelled as Core Learning Outcomes (CLO) require an international dimension:

1.1 Essential principles and doctrines of Australian law and the Australian legal system;
1.2 Ethical standards of the legal profession;
1.3 Aboriginal and Torres Strait Islander knowledge and perspectives of law;
1.4 Focus on law in the global or international context; and
1.5 Law in wider cultural, social, theoretical, commercial and international contexts.

Outcomes 1.4 and 1.5 are taught and assessed in several core units throughout the degree.[81] For example, in the first-year course 'Contemporary Law &

80 Ibid 12. Also noted in the report were ANU's well-developed courses in International and Public law, and Monash's pursuit of a range of strategies towards internationalisation.

81 CLO 1.4 is taught and assessed in the following core units: LLB103 Dispute Resolution; LLB104 Contemporary Law & Justice; LLB106 Criminal Law; LLB203 Constitutional Law; LLB204 Commercial and Personal Property Law; LLB205 Equity and Trusts; LLH206 Administrative Law; LLB301 Real Property Law; LLB303 Evidence; LLB304 Commercial Remedies; and LLH305 Corporate Law. CLO 1.5 is taught and assess in the following core

Justice', both globalisation and international human rights are introduced as key concepts, and in 'Dispute Resolution', cultural differences and factors impacting on dispute resolution in a range of contexts are considered. In core substantive units such as Constitutional Law and Equity and Trusts, comparative dimensions are included – especially from the United Kingdom and America. Although international perspectives are embedded throughout the degree, most of the comparative law discussion involves other common law or European jurisdictions, with little drawn from Asian countries.

UNDA also developed a three-level curriculum framework for internationalisation, and details on how this was integrated into Constitutional Law, a core course, demonstrate how international and global perspectives can be incorporated to provide a broader context to the understanding of Australian constitutional law.[82]

As noted at the outset, CALD's approach to internationalisation of the curriculum is less prescriptive than the ILET Committee's as, in addition to integration, CALD endorses strategies of aggregation, segregation and immersion. These were adopted and approved by CALD in 2013. The result is that law schools can choose different paths to deliver global perspectives and transnational skills.

2 *Aggregation*

Aggregation is the most common approach whereby law schools offer a number of internationalised or comparative 'global' courses, usually as electives. CALD notes the limitation of proceeding in this manner; as 'internationalised aspects are limited to certain electives, only a small cohort of law students is likely to be exposed to a globalised learning experience.'[83] Several schools require all students to undertake Public International Law, but only four[84]

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units: LLB104 Contemporary Law & Justice; LLB106 Criminal Law; LLB203 Constitutional Law; LLB204 Commercial and Personal Property Law; LLH206 Administrative Law; LLB301 Real Property Law; LLB303 Evidence; LLB304 Commercial Remedies; and LLH470 Commercial Contracts in Practice.

82 For example, the study materials for the course included the constitutions and case law of the United Kingdom, New Zealand and the USA, as well as Australian law. A case study on Nepal was used in the topic on federalism. As part of the course's assessment, students had to undertake research involving and international and comparative perspective; Squelch & Bentley (n 5) 297.

83 CALD (n 2).

84 These universities and their corresponding courses are as follows: ACU: Comparative Legal Systems; Charles Darwin (CDU): Comparative Legal Systems; Swinburne: Asian Commercial Law; and NDUA: Comparative Law.

make a comparative law course compulsory. In these, an Asian dimension is included, for example in the ACU's core course 'Comparative Legal Systems'*:* 'there will be 'examination of aspects of certain Asian countries, focusing on Australia's principal trading, political and economic partners'.[85] Swinburne University of Technology (Swinburne)'s core course in 'Asian Commercial Law' is designed to give students 'an appreciation of the commercial law regimes of Australia's principal Asian trading partners and a more detailed knowledge and understanding of those in China, India and Indonesia'.[86] The more favoured approach is elective choice. Some schools offer only comparative law as an elective;[87] some have a more 'broad brush' course on Asian legal systems,[88] whilst others such as U Syd, UNSW, Monash and Melb U have a suite of elective courses with either a considerable concentration on particular legal aspects in Asian jurisdictions generally, such as Criminal Justice: Drugs in Asia;[89] Human Rights Law in Asia;[90] Asian Competition Law;[91] Law and Investment in Asia;[92] Land Law and Development in Asia;[93] or a focus on a specific legal system, namely China, Japan, Vietnam, India and Indonesia.

There are six Asian nations in Australia's top ten two-way trading partners: (1) China, (2) Japan, (4) Republic of Korea, (5) Singapore, (8) Malaysia and (9) Thailand.[94] It is not surprising therefore that courses on Chinese law are the mainstay of elective offerings. There are general courses such as Chinese Law and Society,[95] Foundations of Chinese Law,[96] and Law in the People's Republic of China,[97] supplemented by a wide range of courses focusing on specific aspects of Chinese law, such as Chinese Regulation of International

85 ACU: Comparative Legal Systems.

86 Swinburne: Asian Commercial Law.

87 For example, UC and USQ.

88 For example, UQ, Monash, UTS and Victoria University (VU).

89 Melb U.

90 UNSW.

91 UNSW.

92 Usyd.

93 ANU.

94 Department of Foreign Affairs and Trade, 'Australia's Top 10 Two-Way Trading Partners' (*Government of Australia*, 2015) <http://dfat.gov.au/trade/resources/trade-at-a-glance/Pages/default.aspx> accessed 9 June 2016. Also (3) USA, (5) New Zealand, (6) United Kingdom and (10) Germany.

95 ANU.

96 Western Sydney University (WSU).

97 Bond.

Business;[98] Chinese Corporate and Securities Law;[99] Commercial Dispute Resolution in China;[100] Chinese International Taxation;[101] and Law, Justice and Human Rights in China.[102] Sixteen Australian law schools have elective courses on Chinese law, Japanese Law is offered at three,[103] two have courses on the Vietnam's legal system,[104] Indian law[105] and Indonesian law,[106] and Monash is the only school to have a course on Malaysia and Singapore[107] although some electives on law in South East Asia are also available.[108] Given that South Korea is Australia's fourth largest bilateral trading partner, it is surprising there are no courses on Korean law.

The rationale for including courses on Islamic law has been canvassed in the literature[109] and includes both domestic factors (as Australia is home to a significant Muslim population, many of whom apply Islamic law in transactions and in their inter-personal relationships) as well as its relevance to Australia's regional, economic and security imperatives. Ten years ago, six law schools[110] had courses on Islamic law, and currently there are seven in that category,[111] with one of the seven crediting the course from another school within the University.

For law schools which take the aggregated approach, much hinges on ensuring there are academics with the expertise and interest in developing and promoting such courses (bearing in mind that they may also be required to teach other core courses as well), as well as students sufficiently motivated or inspired to take on these electives given the alternative array of relevant domestic electives such as Intellectual Property, Taxation and Competition Law and innovative options such as Entertainment Law and Social Media Law.

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98 UNSW.

99 UNSW.

100 La Trobe University (La Trobe).

101 University of Sydney.

102 University of Adelaide.

103 ANU, Bond and University of Sydney.

104 UNSW and University of Sydney.

105 Deakin and Flinders University.

106 UNSWand Flinders University.

107 Malaysian and Singaporean Constitutional Systems.

108 For example, the University of Sydney has 'Legal Systems of South East Asia'.

109 See Ann Black and Jamila Hussain, 'Responding to the Challenge of Multiculturalism: Islamic Law Courses in Law School Curricula in Australasia' (2006) 9 FJLR 205.

110 UQ, Melbourne University, UNSW, UTS, UOW, and CDU.

111 CDU no longer offers this elective. Monash has an elective course on Islamic law and Griff U credits a course offered by another school.

There is no information on the take-up rate of international and comparative electives although it could be assumed that students considering practicing in an overseas jurisdiction at same stage in their career would gravitate towards such courses. Students setting their sights on local practice would most likely prefer domestic offerings.

3 *Immersion*

Immersion offers what is sometimes referred to as experiential learning, as it provides opportunities to students to study overseas as part of a university exchange program or 'study abroad semesters', in which credit is given towards the student's domestic degree upon successful completion of courses in overseas jurisdictions. The government also supports immersion, especially in Asian jurisdictions, and implemented the 'New Colombo Plan' in 2014.[112] This is a revival of the Colombo Plan of the 1950s and 1960s designed to provide scholarships and mobility grants for Australian students to study either short or long-term, or to complete internships, mentorships, practicums or research in 35 Asian countries. Many universities also have collaborative arrangements with other law schools in Asia, with special accreditation arrangements for courses undertaken whilst also extending teaching and exchange opportunities to academic staff.

Another approach to immersion is when law schools run courses as study tours, or conduct courses in an overseas jurisdiction. UNSW, for example, holds summer schools in China and Vietnam,[113] where students attend intensive classes in Shanghai or Hanoi which are supplemented with local guest lecturers and field trips to legal institutions – courts, law firms and arbitration centres.[114] USyd similarly has a Shanghai Winter School for the intensive teaching of Chinese law and Chinese Legal Systems; Japanese Law is also taught intensively in Kyoto and Tokyo with a preliminary introductory class in Sydney; and a Southeast Asia Winter School has its Indonesian component taught at Yogyakarta and the Malaysian component in Kuala Lumpur. The UOW offers 'Asian Legal Systems' as a field study trip, and ANU has a 'Kyoto Seminar on Japanese Law' which runs as one-week intensive course in conjunction with Ritsumeikan University, Japan.

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112 Department of Foreign Affairs and Trade, 'Scholarship Program Guidelines 2017' (*Government of Australia*, 2016) <http://dfat.gov.au/people-to-people/new-colombo-plan/scholarship-program/Pages/scholarship-program-guidelines-2017.aspx> accessed 9 June 2016.

113 The Vietnam Summer School has two courses: the Vietnamese Legal System and International Economic Law in the Asian Region.

114 The Shanghai Summer School course on the Chinese Legal System.

4 *Segregation*

Segregation uses specialised research Institutes or Centres which bring together academic specialists, who also provide courses informed by their research. This is particularly relevant in post-graduate Masters programmes, and enables students with an LLB or JD to pursue concentrated and more in-depth study in international, comparative and foreign law. It also provides lecturers with specific international and Asian law expertise to teach on the undergraduate programmes.

D Competing Demands within Legal Education

The benefits of an internationalised legal education are generally accepted; however there are also significant demands to strengthen and prioritise other components of legal education including 'core knowledge' in what is described by Wolski as an 'already crowded curriculum'.[115] Determining what is 'core' remains contentious, but in the main it hinges on the Priestley Eleven, together with the inculcation of ethics and values throughout all courses. Interviews conducted with employers of law graduates highlight that their emphasis is on a 'thorough and deep knowledge of the core concepts, principles and doctrines of the core law units',[116] namely the Priestly Eleven, and whilst a level of cultural literacy and awareness of how cultural, international and global issues impact on law was seen as useful, specialist knowledge of international aspects of law was not expected at graduation.[117] It was acceptable for this to develop post-graduation ie in professional practice.

There are competing pressures on law schools to adapt curricula to better equip their students for legal practice in the 21st century. Some of these are briefly considered in order to highlight current trends in legal education, all of which (like internationalisation) require resources, dedicated staff, time and financing.

1 *Alternative Dispute Resolution (ADR)*

There has been ongoing discussion in many Australian law schools about having more courses on alternative dispute resolution (ADR). The Australian

115 Bobette Wolski, 'Continuing the internationalisation debate: Philosophies in legal education: issues in curriculum design and lessons from skills integration' in William Van Caenegem and Mary Hiscock (eds), *The internationalisation of legal education: The future practice of law* (Edward Elgar 2014) 70, 71.

116 Squelch & Bentley (n 5) 297.

117 Ibid.

Government supports this. Its 'Access to Justice Report' recommended that: 'Lawyers being admitted to practice should be equipped with the skills to guide a client through a dispute resolution process and understand the major ADR processes'.[118] To achieve this, 'ADR must be elevated from a mere adjunct to civil procedure or litigation subjects to being taught as a full course. An ADR course should be a compulsory core subject that is a prerequisite for admission.'[119]

The National Alternative Dispute Resolution Advisory Council (NADRAC) endorses the government's view that the teaching of ADR should be a compulsory part of legal education.[120] As was seen with international and comparative law content, NADRAC's survey also found that ADR was mainly taught either as an elective course or cursorily as part of other courses, particularly civil litigation.[121] NADRAC was concerned that it was possible for students to leave law school with no exposure to ADR.[122] As ADR is now less 'alternative', and more mainstream in Australia[123] NADRAC argues that clients expect their lawyer to know how to negotiate and to know of dispute resolution options other than litigation.[124] Accordingly there is a strong case for students to understand the theory of dispute resolution and acquire basic skills in negotiation, mediation and commercial arbitration.

2 *Lawyering Skills*

Previously, skills-training was delayed until university courses were completed. Now, there is a growing trend for the theoretical and the practical to be integrated, and for law schools to take on practical skills training. In addition to ADR, some educators and firms believe drafting contracts, interviewing clients, advocacy, and witness examination should be included in a well-round legal education. These can be either run as single skills courses or be

118 Attorney-General's Department Access to Justice Taskforce, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (2009), 3 (Recommendation 12.1).

119 Ibid 149.

120 NADRAC, 'Teaching Alternative Dispute Resolution in Australian Law Schools' (NADRAC, 2016) <www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Documents/NADRAC%20Publications/teaching-alternative-dispute-resolution-in-australian-law-schools.pdf> accessed 9 June 2016.

121 Ibid.

122 Ibid.

123 Family law, employment law disputes, human rights disputes, industrial disputes, personal injury claims, workers' compensation claims, building disputes, and many other areas of dispute are subject to mandatory ADR processes.

124 Civil Dispute Resolution Act 2011 (Cth).

incorporated into substantive courses[125] especially as modes of assessment. Whether professional skills should be integrated into law degrees or be left to on-the-job-training, professional legal training (PLT) and Bar Practice courses remains unsettled.

There are advocates for inclusion and identification of other generic skills of lawyering,[126] many of which are transferrable to careers other than legal practice, including problem solving, legal analysis and reasoning, legal research (including the use of international legal sources),[127] factual investigation, communication (oral and written), counselling, and the ability to recognise and respond to ethical dilemmas. In addition, Squelch and Bentley found that employers also want graduates to have presentation skills, inter-personal skills, and to be able to work in teams and network.[128] The Business Council of Australia's education taskforce has also called for legal education to focus more on developing leadership, teamwork and communication,[129] as the Council identified these attributes as lacking in many new law graduates. In addition, if the law degree is increasingly used as a pathway for students who do not intend to enter the legal profession[130] but see law as a useful adjunct for their careers in other fields, many of these generic skills and values will be more important than the substantive legal aspects. The Law Council of Australia estimates that only 50–60% of law graduates ultimately remain in practice, and most law graduates are likely to have significant career changes during their working lives.[131] Given this transferability, the importance of embedding generic skills has gained endorsement.[132]

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125 At Bond, for example, 'practical job skills are integrated into all law subjects'; 'About Bond Law' (*Bond University*, 2016) <https://bond.edu.au/about-bond/academia/faculty-law/about-bond-law> 9 June 2016.

126 Australian Law Reform Commission, Discussion Paper 92.

127 Squelch & Bentley (n 5) 297.

128 Ibid.

129 Julie Hare, 'Business Takes A Dim View Of Academe' (The Australian, 30 March 2011) <www.theaustralian.com.au/higher-education/business-takes-dim-view-of-academe/story-e6frgcjx-1226030289897> accessed 9 June 2016.

130 'Law degree the new Arts degree, students warned' *Australian Financial Review* (Sydney, February 14, 2014).

131 Law Admissions Consultative Committee, *Rethinking Academic Requirements for Admission*. (February 2010) <www.lawcouncil.asn.au/LACC/images/pdfs/Re-thinkingAcademicRequirementsforAdmission.pdf> accessed 9 June 2016.

132 Ibid.

3 *Clinical Legal Education* [*CLE*]

CALD has advocated an increase in CLE elements within law school programmes,[133] as have members of the judiciary[134] and legal academics.[135] Chow has reflected on this in the context of Hong Kong's legal education. In Australia, CLE is provided through distinct courses, usually towards the end of a degree program, to replicate what lawyers do in practice when representing clients with legal problems but in a supervised setting that fosters 'critical and analytical consciousness' of law.[136] In CLE courses, students learn how to give legal advice, gather information, prepare legal documents such as contracts and legal briefs, represent clients in hearings, undertake legal research, write policy documents particularly relating to specific legal reform, and to develop and produce materials for community engagement and information. CLE can take several forms including simulations with hypothetical clients, virtual programmes;[137] an externship in a supervised professional setting such as a community legal centre,[138] or an in-house clinic where legal advice and problem-solving take place with the oversight and supervision of law school staff.[139] CLE is recommended as a means of producing graduates who can deal effectively with the modern world, appreciate social justice and ethical behaviour, and work collaboratively. It also allows students to make the important connection between substantive law and practice. More importantly, the CALD report argues that CLE produces socially aware and responsible professionals who will contribute to just and ethical communities, which means CLE

133 CALD, Best Practices for Australian Clinical Legal Education (September 2012) <www.cald.asn.au/assets/lists/Resources/Best_Practices_Australian_Clinical_Legal_Education_Sept_2012.pdf> accessed 9 June 2016.

134 Robert French, 'Legal Education in Australia – a Never Ending Story' (Paper presented at the Australasian Law Teachers' Association Conference, 4 July 2011).

135 Kieran Tranter, 'The Different Side of Society: Street Practice and Australian Clinical Legal Education' (2006) 15 GLR 1; Adrian Evans and Ross Hyams, 'Independent Evaluations of Clinical Legal Education Programs: Appropriate Objectives and Processes in an Australian Setting' (2008) 17 GLR 52.

136 CALD (n 133).

137 CDU has integrated CLE into an online Employment Law course.

138 For Clinical Legal Education at UQ, students spend one day a week on placement at the legal clinics currently being run at of the Queensland Public Interest Law Clearing House (QPILCH), Caxton Legal Centre, the Prisoners' Legal Service, the Refugee and Immigration Legal Service (RAILS), Queensland Advocacy Inc (QAI), the Environmental Defenders Office (EDO) and Tenants Queensland.

139 For example, the Unisa's Legal Advice Clinic.

should occur across Australia, and not just be 'championed at relatively few law schools'.[140] Because it is experiential, CLE is a way to integrate and strengthen the academic phase of legal education including the core knowledge obtained in the Priestley Eleven and other courses, as well as developing lawyering skills for future professional practice.

4 *Community and Justice*

Pro Bono programmes[141] allow students to provide advice and legal services (under supervision) to disadvantaged or marginalised members of the community who are unable, for a range of reasons, to access other legal advice and assistance. It can also include volunteer work for not-for-profit organisations. These programmes differ from CLE because pro bono students work without academic credit (or payment) with the main motivation being concern for justice, not course credit and skills training. The insights and experiences gained from community service will hopefully also foster a pro bono legal culture which continues throughout the students' working life.

5 *Statutory Interpretation*

In recent years, members of the judiciary and the Law Council of Australia have advocated the strengthening of statutory interpretation within law school curricula. Legal education, as Chief Justice French has stressed, fails if the knowledge of legal rules, their 'relationship to each other and the inescapably creative process of their interpretation and application'[142] is insufficient. Justice Leeming of the NSW Court of Appeal wrote that:

> [S]tatutes are an under-appreciated component in the academic literature on the Australian legal system: their role lies not merely in stating norms of law, but in influencing judge-made law and as a critical driver of change and restraint in the Australian legal system. The sooner critical attention is paid to the statutory elephant in the room, the better.[143]

As the Priestley Eleven does not specifically include statutory interpretation as a distinct area of legal knowledge, it is typically subsumed within first-year

140 CALD (n 133) 6.

141 Springvale Legal Service. Monash's centre was one of the first pro bono centres run by students on a voluntary basis. It is now part of the CLE program.

142 French (n 134).

143 Mark Leeming, 'Theories and Principles Underlying the Development of the Common Law – The Statutory Elephant in the Room' (2013) 36 UNSWLJ 1002, 1003. See also Justice Hayne, 'Statutes, Intentions and the Courts: What place does the notion of intention (legislative or parliamentary) have in statutory construction?' (2013) 13 OUCLJ, 271.

introductory courses and legal method courses instead of being developed throughout the whole degree or contained in stand-alone core courses. CALD also sees this as insufficient and has put forward a 'Good Practice Guide to the Teaching of Statutory Interpretation'.[144] Arguably, statute law is fundamental to each of the prescribed areas in the Priestley Eleven, and there is a need to ensure a solid foundation for statutory interpretation, which is vital for all forms of legal practice.

6 *Legal History*

Michael Kirby has made an impassioned appeal for legal history to be reintroduced as a much-needed component of Australian legal education, noting that 40 years ago 'it was a core subject of all Australian law schools and treated as essential for the preparation of a professional lawyer but today two or three schools require the study of legal history.'[145] He argues that legal history allows lawyers to better understand the law, noting that 'even a statute such as the Income Tax Assessment Act cannot be understood without some knowledge of legal history; an appreciation of the property concepts that are expressed or implied; and an understanding of where the very notion of legal rights and property interests derives from.'[146] Importantly, he believes it is impossible to elucidate the meaning of the constitutional text without knowledge of legal history, and asserts that:

> The history of our legal institutions is an essential part of the narrative of liberty. If future lawyers (including those who become judges) have no real grounding in and understanding of that story, how can we expect them to respect, uphold and defend liberty when it comes under the inevitable pressures of the modern state?[147]

Mirroring the decline in the teaching of history in Australian high schools, Prest chartered the contraction in legal history courses in Australian law schools between 1982 and 2005.[148] By 2005, just one third (ten out of 29) law schools offered a stand-alone course on legal history although legal-historical elements would have been contained in some other introductory and substantive

144 Council of Australian Law Deans, 'Resources' (CALD, 2016) <www.cald.asn.au/resources> accessed 9 June 2016.

145 MD Kirby, 'Is Legal History Now Ancient History?' (2009) 83 ALJ 31.

146 Ibid 40.

147 Ibid.

148 Wilfred Prest, 'Legal History in Australian Law Schools: 1982 and 2005' (2006) 27 Adelaide L R, 267–277.

law courses.[149] This decline, Prest postulates, may be due to the increasingly vocational character of legal education since the 1980s, and cultural, social and technological innovations have meant that legal history is viewed as 'mere nostalgic antiquarianism'.[150] Like Kirby, Prest is a passionate advocate for 'legal history' as a vehicle by which students can understand the present and realise 'how and why law has changed over time'.[151] With so many competing demands on what should be taught in law schools, it would seem that legal history may struggle to be revived to its former status.

E Concluding Reflections

Law students cannot be taught everything. Selectivity is required.[152] Each country has a method for deciding who gains entry to study law, what has to be taught and assessed, and whether a student has attained the required knowledge and skills for a licence to practice law. In Australia, essentially each individual law school makes these decisions. There are some qualifiers on this, given the role of the state admission authorities[153] and the supervisory and auditing role of the Commonwealth on tertiary education standards[154] generally, but in the absence of an independent national or state examination for a license to practice, Australian law schools have considerable autonomy over what is taught and how it is taught. Accepting the premise that students can't be taught everything, the question becomes what should be, and in fact is, prioritised at Australian law schools and what can be regarded as 'optional extras'? The first part of the answer is straightforward. The eleven areas of substantive domestic law deemed necessary for Australian legal practice are the priority. Kathy Mack observed that whilst many law students will never practise law, 'virtually all lawyers were once our students'.[155] Despite criticism of the Priestley Eleven as 'outmoded and inflexible',[156] others believe these mandated areas of knowledge have, on the whole, served Australian lawyers well.[157]

149 Ibid 272–273.

150 Ibid 275.

151 Ibid.

152 Kirby (n 145) 39.

153 See Part B5: Legal Regulation.

154 McKeough (n 54) 7.

155 Kathy Mack, 'Bringing Clinical Learning into a Conventional Classroom' (1993) 4 Legal Educ Rev 89, 104.

156 Lo (n 42) 28 citing Andrew Stewart.

157 McKeough (n 54) 6.

With the obligation largely resting on law schools to prepare future lawyers for professional practice, it is unlikely that the eleven knowledge areas will be removed or replaced. There is however a tension between these knowledge areas and what legal educators believe students need in terms of personal qualities, values, moral reasoning, analytical, oral and written communication and inter-personal skills, with each addressed to varying degrees by the AQF's Threshold Learning Objectives. The former gives students their foundation in legal knowledge and the legal problem-solving method, whilst the latter serves to equip them to become principled and ethical contributors in an evolving legal and business environment, and in a rapidly changing world. The former has a local focus and the latter is broader. Given these apposite dimensions it can be argued there is a reasonable balance in the current approach to legal education.

The second part of the question goes to the optional extras that law schools can give their students, either as core or elective components. Given that it is not possible to provide 'all things to all students', schools can therefore differentiate and distinguish themselves in the marketplace and promote a particular strength, niche or focus. Kirby has affirmed that 'diversity should be a feature of the contemporary Australian legal education scene' and embraced 'innovation' in legal education.[158] He welcomed two new models for legal education, the post-graduate JD and the fully online law degree, seeing this greater diversity and choice as desirable especially when it opens up legal education to students from a wider range of backgrounds. The former elitism of law degrees is being replaced with an attitude which is more egalitarian.

In this new marketplace, a law school can promote its philosophy and the advantages it aims to give its students. This could be mastery of traditional 'black-letter law'; commitment to 'social justice'; theoretical and moral reasoning; inclusion of legal skills training; law in context through a variety of inter-disciplinary components such as business, management, economics or criminology; embedding clinical legal education; or alternative dispute resolution. The possibilities and combinations are many. A school can equip students primarily for domestic practice, or look to internationalise the curriculum to produce globally aware students, able to work outside Australia and also to deal with transnational and international matters at home. Both are valid. Chief Justice French observed that although an international dimension is desirable, it is not equally pervasive in all areas of legal practice. 'Rural, regional and remote legal services', which he felt faced 'something of a crisis in Australia at the moment' and 'are unlikely to rank international legal issues

158 Kirby (n 30) 237.

particularly highly.'[159] Not surprisingly, rural CQU offers online distance legal education with a distinctly domestic focus in its elective choices,[160] whilst cosmopolitan U Syd has an international outlook reflecting its aim for students to 'gain international experience and transfer the skills and knowledge they learn at the University of Sydney into an international career'.[161] Both reflect that today 'a one size fits all model is not appropriate'.[162]

Although the importance of internationalisation of legal education is accepted by the government, many academics, the judiciary and a range of employer stakeholders, its implementation has been inconsistent. Wolski concluded that 'to date our scorecard on internationalising the curriculum not good'.[163] Lo ponders whether this could in part be attributed to legal ethnocentrism which makes Australians proud of their existing system,[164] which when coupled with conservatism within the profession generally leads to complacency and resistance to innovation and progress.[165] Another explanation is that the majority of Australian academics specialise in domestic law and may lack interest and expertise in international, comparative or foreign law.[166] Course coordinators may be reluctant to make room for international material given that the core domestic law courses are already 'brimming over with content' they consider essential.[167] One reason given for the content-laden curriculum is that the Priestly Eleven takes up too many teaching hours. Yet, its core knowledge areas are not so prescriptive of domestic content as to prevent the incorporation of international and comparative dimensions. Justice French opined that it was difficult to think of any law subject which could not

159 French (n 8).

160 In addition to the Priestley Eleven, CQU requires students to undertake a compulsory course on Jurisprudence plus five elective courses which, except for International Law and Human Rights, have a distinct domestic focus, such as Family, Conveyancing, Succession, Australian Employment, Revenue, Commercial laws, Advanced Statutory Interpretation, Drafting, and Alternative Dispute Resolution; see 'CQU Handbook – CG98 Bachelor of Laws' (CQ University, 2016) <https://handbook.cqu.edu.au/programs/index?programCode=CG98> accessed 10 August 2016.

161 'Sydney Law School' (*The University of Sydney*, 2016) <http://sydney.edu.au/law/> accessed 10 August 2016.

162 French (n 8).

163 Wolski (n 115) 89.

164 Lo (n 42) 34.

165 Ibid 35.

166 Ibid 31.

167 Wolski (n 115) 71.

accommodate such dimensions,[168] and course designers can effectively use international and comparative components not only to expose students to different ways of thinking about law and legal problems but also to enhance students' understanding of domestic law[169] through the comparative analytical method.

Chen found that 'law schools are largely free to pursue their internationalisation efforts within the general regulatory framework of legal education in Australia.'[170] For many, this is the right path in an era when global law firms and an increasingly globalised legal market are the new norms. Whilst this is tempered with the reality that 'not all law graduates are going to become high flying providers of global legal services',[171] there are few areas of domestic law, as Chief Justice Robert French AC has noted, which do not 'intersect with international laws and the laws of other countries'.[172] For this reason alone, international and comparative law perspectives should, and will, continue to grow in Australia.

168 French (n 8).

169 Ibid.

170 Jianfu Chen, 'What Does Internationalisation of Legal Education Mean in Australian Law Schools? (Paper presented at the 4th Sino-Australian Law Deans' meeting, Zhejiang University Guanghua Law School, Hangzhou, China, 28–29 September 2014).

171 French (n 10).

172 Ibid.

CHAPTER 4

The Rhetoric of Corruption and The Law School Curriculum: Why Aren't Law Schools Teaching About Corruption?

Helena Whalen-Bridge[1]

A Introduction

Corruption is a long-standing problem in the global economy. Corruption reduces economic growth and private investment, and it limits well-being through depressed per capita income, increased child mortality, and illiteracy.[2] One method of addressing the issues raised by corruption would be to teach students about the subject. This approach was advocated in the 2014 Poznan Declaration, a 'formal statement aimed at mainstreaming ethics and anti-corruption in higher education'[3] which was endorsed by 68 universities in an assembly in Poznan, Poland, as well as the World Academy of Art and Science and the World University Consortium.[4] The United Nations Office of Drugs and Crime (UNODC) has also focused on teaching about corruption in higher education, and it identified anti-corruption education in a variety of post-secondary institutions as a primary tool.[5] It seems apparent that law students should be included in this list, given a lawyer's advisory role in the transactions

1 The author would like to thank Professor John Hatchard, Barrister and Professor of Law at the Buckingham Law School, for his scholarship and for his presentation at the 2015 Commonwealth Legal Education Conference, Glasgow Caledonian University, Scotland, which discussed ideas that led to this chapter. The author is also indebted to Olga Shepeleva, and to Olga Shepeleva and Asmik Novikova for their work on legal education in Russia (see below, Part E).

2 See Sharon Eicher, *Corruption in International Business: The Challenge of Cultural and Legal Diversity* (Ashgate Publications 2009) 11–12, and the references cited.

3 Alice Johansson, 'The Poznan declaration featured in Times Higher Education and University World News' (*Quality of Government Institute, University of Gothenburg*, 13 November 2014) <http://qog.pol.gu.se/news/news-detail//the-poznan-declaration-featured-in-times-higher-education-and-university-world-news-.cid1246317> accessed 26 May 2017.

4 'Poznan Declaration' (26 September 2014) <www.qog.pol.gu.se/digitalAssets/1497/1497769_the-poznan-declaration.pdf> accessed 26 May 2017.

5 See eg Margaret Suderman, 'UVic Law Faculty News' (2015) 73 The Advocate Vancouver 385.

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that underpin corruption, and yet, despite a UN project which generated extensive anti-corruption materials relevant to law students,[6] the issue remains largely absent from the law curriculum, in Asia and elsewhere.

Defining corruption has been an ongoing challenge, one that almost every published work on corruption has wrestled with.[7] In order to address the failure of law schools to teach law students about corruption, this chapter will not review that lengthy discussion, and adopts the working definition that corruption involves situations where private gain prevails over the duty to serve other interests.[8]

There are many reasons for the shape of the law curriculum in a given country, but in view of the acknowledged status of corruption as a major issue, particularly in a more globalised context for legal education,[9] why aren't law students taught about corruption? This chapter identifies the roles that lawyers may play in corrupt transactions, and then reviews some possibilities for teaching law students about corruption. In addition to considering how the dynamics at work in legal education have impacted teaching options in sample jurisdictions, this chapter considers some additional reasons for the reluctance to train law students about corruption. This chapter explores how

6 See Anti-Corruption Academic Initiative (ACAD), 'The ACAD Menu of Resources', 'Defining Corruption I and II', 'Sources of Anti-corruption Laws', 'Roles and Obligations of Professions', and three 'Legal Advice and Counsel' concentrations, namely 'Anti-Corruption Laws', 'Enterprise Governance and Compliance', and 'Investigations and Litigation'; (*United Nations Office on Drugs and Crime*, 2014) <www.track.unodc.org/Education/Pages/ACAD.aspx> accessed 26 May 2017.

7 Eicher (n 2) 2.

8 Ibrahim FI Shihata, 'Corruption: A General Review with an Emphasis on the Role of the World Bank' (1997) 5 Journal of Financial Crime 14.

9 In this collection see Chapters 5 (at 103) and 6 (at 126), see also Marium Jabyn and Rogena Sterling, 'Better Lawyers, Better Justice: Introducing Clinical Legal Education in Maldives' in Shuvro Prosun Sarker (ed), *Clinical Legal Education in Asia: Accessing Justice for the Underprivileged* (Palgrave Macmillan 2015) 20–21; Shuvro Prosun Sarker, 'Empowering the Underprivileged: The Social Justice Mission for Clinical Legal Education in India' in Shuvro Prosun Sarker (ed), *Clinical Legal Education in Asia: Accessing Justice for the Underprivileged* (Palgrave Macmillan 2015) 182–183. However, references to the issue of corruption are rare even in discussions of globalised legal education; see eg the compilation of 19 national reports attached to the 2014 Vienna Congress of the International Academy of Comparative Law in Christophe Jamin and William van Caenegem, *The Internationalisation of Legal Education* (Springer International Publishing Switzerland 2016) 315, 317, which mentions corruption twice in the chapter on Uruguay, but not in connection with a law degree. See also Christopher Gane and Robin Hui Huang, *Legal Education in the Global Context: Opportunities and Challenges* (Ashgate 2016) 129, where the index references the Singapore Prevention of Corruption Act.

corruption is understood, not in terms of legal definitions, but in the rhetoric functioning in the public sphere and the legal academy. This chapter considers how this rhetoric could lead to the conclusion that corruption is not a sufficiently serious issue – or that it is so overwhelming that not much can be done. This chapter argues that a country-specific rhetoric regarding corruption has been constructed through the widespread use of corruption indexes. The indexes, discussed in Section D below, support the understanding that countries with developed economies are non-corrupt, despite the involvement of companies in those countries with corrupt payments in cross-border cases. If a country does not view itself as corrupt, then corruption is not sufficiently serious to warrant inclusion in the curriculum. In contrast, in countries with higher perceived levels of corruption, teachers may acknowledge the problematic environment students will enter, but feel unable to discuss effective options. Examining how rhetoric may affect the perception of corruption as an issue in different contexts, and reflecting on how sample jurisdictions in Asia have responded to the challenges, should encourage discussion of a seemingly intractable issue.

B Lawyers and Corruption

Lawyers are not necessarily the prime movers in corrupt transactions, but they merit study, in part because they help define and interpret law, thereby exploiting its indeterminacy.[10] The fundamental connection between lawyers and the law suggests that corruption is more than just an important social issue; it is a perversion of law. In keeping with their general obligation to assist clients with legal compliance, corporate lawyers have an obligation to advise clients about anti-corruption law and point out the dangers of acting without risk assessment and anti-corruption programmes.[11] Unwittingly or otherwise, lawyers may also play a supporting role in corrupt transactions,[12] particularly as intermediaries.

10 Monique Nuijten and Gerhard Anders, 'Corruption and the Secret of Law: An Introduction' in Monique Nuijten and Gerhard Anders (eds), *Corruption and the Secret of Law: A Legal Anthropological Perspective* (Ashgate 2007) 14.

11 Suderman (n 5) 387.

12 See eg Arnold Tsunga and Don Deya, 'Lawyers and Corruption: A View of East and South Africa' in Transparency International, *Global Corruption Report 2007* (Cambridge University Press 2007) 92–95; Barry Rider, *Corruption: The Enemy Within* (Kluwer Law International 1997) 78–81.

The OECD Typologies on the Role of Intermediaries in International Business Transactions defines an intermediary as a person who is put in contact with or in between two or more trading parties.[13] In the business context, an intermediary is frequently understood as a conduit for goods or services.[14] In international business transactions, local intermediaries assist companies to navigate approval and licencing processes as well as cultural differences, but they also carry the potential for illegal payments.

Intermediaries are relevant to lawyers in two ways: lawyers use intermediaries themselves to assist with business transactions, and they are asked to be intermediaries.[15] An International Bar Association survey on corruption and the legal profession stated that

> [a] common international corruption scenario … involves a company approaching a law firm or lawyer to act as agent or middleman in a corrupt transaction that crosses borders in some manner and which directly or indirectly involves government officials. This corruption may take the form of bribery, facilitation payments, fraud, money laundering, among other potentially criminal conduct.[16]

Lawyers are one of the preferred intermediaries in money laundering and facilitation transactions, not only because of their ability to set up corporations, trusts and partnerships, but also because the attorney-client privilege can potentially be used to protect otherwise discoverable evidence. Lawyers' expertise therefore makes them potential partners in corruption,[17] but it also qualifies them as potential actors against corruption. As Kindra Mohr notes,

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13 'Typologies on the Role of Intermediaries in International Business Transactions' (Final Report of the Working Group on Bribery In International Business Transactions) 5, para 7 (*OECD*, 2009) <www.oecd.org/investment/anti-bribery/anti-briberyconvention/43879503.pdf> accessed 10 June 2017.

14 Ibid.

15 International Bar Association, 'Roles and Obligations of the Legal Profession' 8 (*United Nations Office on Drugs and Crime*, 2014) <www.track.unodc.org/Academia/Pages/Topics/RolesAndObligations.aspx> accessed 10 June 2017.

16 '*Risks and threats of corruption and the legal profession: Survey 2010*' (International Bar Association 2010) 8 (n 2).

17 See eg 'Report: Lowering the Bar' (*Global Witness*, January 2016) <www.globalwitness.org/en/reports/loweringthebar/> accessed 26 May 2017, with accompanying videos on the same website at <www.globalwitness.org/en/reports/undercover-new-york-full-length-videos/> accessed 26 May 2017; Rupert Neate, 'Undercover film shows how lawyers could ease flow of "grey money" into US' *The Guardian* (London, 1 February 2016) <www

> [l]awyers … have tremendous influence over their clients' conduct, whether in the public or private sector, and they have the ability to encourage a client to conduct transactions in an ethical manner. In this way, the legal profession is a crucial resource to help deter and combat public – private corruption. On the other hand, lawyers can advise their clients in ways that will allow them to circumvent anticorruption laws and regulations.[18]

In addition to their role as legal advisors, law graduates take up positions as public servants and elected officials. As noted by Mark Levin regarding Japan:

> Graduates of Japanese law schools are destined to become Japan's government, business, and social leaders. How those persons will weigh the moral challenges of their time will create the base for the next generation's social order.[19]

Legal training and influence is therefore significant in both the public and private sectors.[20]

Lawyers potentially play a role in corrupt transactions, but are they knowledgeable about the risks and the applicable law? In April 2010, the International Bar Association (IBA), in cooperation with the Organisation for Economic Co-operation and Development (OECD) and the UNODC, launched the Anti-Corruption Strategy for the Legal Profession, a project focusing on the role

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.theguardian.com/us-news/2016/jan/31/lawyers-grey-money-undercover-video-african-minister> accessed 26 May 2017; on Australia, see Nick McKenzie, Richard Baker and John Garnaut, 'Top lawyers caught in undercover sting; police urged to investigate' (*The Sydney Morning Herald*, 24 June 2015) <www.smh.com.au/national/top-lawyers-caught-in-undercover-sting-police-urged-to-investigate-20150623-ghvbtx.html> accessed 26 May 2017.

18 Kindra Mohr, 'Have You Looked at the Model Rules Lately? Your Ethical Role in the Global Anticorruption Movement' (2013) 42 International Law News <www.americanbar.org/publications/international_law_news/2013/winter/have_you_looked_the_model_rules_lately_your_ethical_role_the_global_anticorruption_movement.html> accessed 26 May 2017.

19 Mark Levin, 'Legal Education for the Next Generation: Ideas from America' (2000) 3 Asian-Pacific Law and Policy Journal 3 <http://blog.hawaii.edu/aplpj/files/2011/11/APLPJ_01.1_levin.pdf> accessed 26 May 2017.

20 Suderman (n 5) 385.

lawyers play in fighting corruption in international business transactions.[21] The Anti-Corruption Strategy came about in part due to a shift in the focus of anti-corruption law and policy that emphasised the role of intermediaries, including lawyers, in international business transactions.[22] The Anti-Corruption Strategy has produced research indicating that lawyers are relatively ignorant of anti-corruption law. Despite the system of national and international laws, 'many lawyers remain unaware of the implications of this international anti-corruption regulatory framework on both their legal practice and on the legal profession.'[23] This is the case despite significant numbers of lawyers reporting involvement with suspicious transactions. In a 2010 IBA survey of 642 professionals from 95 jurisdictions,[24] more than a fifth of respondents said they have or may have been approached to act as an agent or middleman in a transaction that could reasonably be suspected to involve international corruption, and nearly a third of respondents said that a legal professional they know has been involved in international corruption offences.[25] Nearly 30 per cent of respondents said they had lost business to corrupt law firms or individuals who engaged in international bribery and corruption,[26] which suggests that even though lawyers do not necessarily engage in corrupt behaviour, they regularly encounter it.

According to the 2010 IBA survey, younger respondents (aged 20 to 30 years) were generally less aware of international anti-corruption laws and national legislation than older respondents.[27] To the extent that post-graduate professional training is understood to address the subject of corruption,[28] the 2010 IBA survey suggests that the effectiveness of these programmes should be examined. Bar associations and law firms were also reported as not addressing the issue very effectively.[29] Given this level of training in other contexts, and the educational mission of universities, the lack of education regarding corruption in law schools needs to be explained.

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21 'Survey 2010' (n 16) 6.

22 *'Anti-corruption compliance and the legal profession: The client perspective'* (International Bar Association 2013) 4.

23 'Survey 2010' (n 16) 6.

24 Ibid 8.

25 Ibid 6.

26 Ibid.

27 Ibid 6, 25.

28 See Section C(2), below.

29 'Survey 2010' (n 16) 24.

C Sparse Teaching of Legal Ethics, Even Less Teaching about Corruption

1 *Legal Ethics Courses in the Law Degree*

One method of addressing the issue of corruption would be to sensitize law students to the challenges they may encounter. In places where corruption is present in the legal education sector, as noted in the example provided by authors Li, Li and Hu,[30] teaching about it in the law degree presents additional challenges, but its inclusion may be even more important in that context.

The issue of corruption could be inserted into different courses currently in many law degrees, such as corporate law or corporate social responsibility.[31] One logical site in the law degree course for teaching about corruption is legal ethics and professional responsibility, but the difficulty here is that relatively few jurisdictions require students to study professional obligations in their law degree.[32] Information regarding components of the law degree worldwide is not comprehensive, but Maughan and Marhag cite research in jurisdictions such as Japan, Vietnam and Kuwait, where there was no requirement to address legal ethics training.[33] In a presentation at the Institute for Teaching Ethics and Professionalism (NIFTEP) in the summer of 2012, Fernando Dias Simões of the University of Macau Faculty of Law noted that law schools in Macau usually say their role is to graduate jurists, not to create lawyers or judges, and that legal ethics is not taken very seriously.[34] A number of authors in this collection (see, for example Chapters 10, 12, 13, and 14) note that law degrees in their jurisdictions retain a theoretical orientation.

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30 See Chapter 11, at 273.

31 See Adefolake O Adeyeye, *Corporate Social Responsibility of Multinational Corporations in Developing Countries: Perspectives on Anti-Corruption* (Cambridge University Press 2012).

32 See Helena Whalen-Bridge, 'The Lost Narrative: The Connection between Legal Narrative and Legal Ethics' (2010) 7 Journal of the Association of Legal Writing Directors 229, 239–241.

33 Nigel Duncan, 'Addressing Emotions in Preparing Ethical Lawyers' in Paul Maharg and Caroline Maughan (eds), *Affect and legal education: emotion in learning and teaching the law* (Ashgate, 2011) 258.

34 Fernando Dias Simões, 'Teaching Legal Ethics in Macau' (*Institute for Teaching Ethics and Professionalism* (NIFTEP), 2012) <www.academia.edu/1787426/Teaching_Legal_Ethics_in_Macau> accessed 26 May 2017.

The US has one of the most entrenched professional responsibility teaching requirements, with law faculties required by the American Bar Association accreditation standards to teach students professional and ethical responsibilities since the Watergate scandal in 1972.[35] The ABA standards currently require that law schools establish a number of learning outcomes, including Standard 302(c): 'the [e]xercise of proper professional and ethical responsibilities to clients and the legal system.'[36]

Law schools have the discretion to determine what content to teach. A 1994 survey of professional legal education in US law schools noted that 95% of respondent law schools had a required course in professional responsibility,[37] although many courses focused on black letter rules of professional obligations,[38] in part because students need to pass a standardised examination as part of their bar examination, the Multistate Professional Responsibility Examination.[39]

The ABA Model Rules of Professional Conduct, a model code upon which most state codes are based, admonishes lawyers not to engage in crime or fraud,[40] but does not expressly address corruption although the Model Rules apparently apply to such cases.[41] A 2009 survey of US legal ethics

35 Laurel Terry, 'A Survey of Legal Ethics Education in Law Schools' in SK Majumdar (eds), *Ethics in Academia* (Pennsylvania Academy of Science 2000) 65.

36 American Bar Association, '2014–2015 Chapter 3 of ABA Standards and Rules of Procedure for Approval of Law Schools' (ABA, 2014) 15 <www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2014_2015_aba_standards_chapter3.authcheckdam.pdf> accessed 26 May 2017.

37 Terry (n 35) 66–67.

38 Ibid 69.

39 See Christine Mary Venter, 'Encouraging Personal Responsibility-An Alternative Approach to Teaching Legal Ethics' (1996) 58 Law and Contemporary Problems 287, 288.

40 See 'Rule 8.4: Misconduct' (*American Bar Association*, 2017) <www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_8_4_misconduct.html> accessed 26 May 2017. Rule 8.4 states in part that "It is professional misconduct for a lawyer to: …(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects; (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation".

41 Mohr (n 18). See also Juscelino F Colares, 'The Evolving Domestic and International Law Against Foreign Corruption: Some New and Old Dilemmas Facing the International Lawyer' (2006) 5 Washington University Global Studies Law Review 1, 22, who writes that the incentives for going forward with a highly profitable transaction can put enormous pressure on US lawyers to provide 'an unqualified legal opinion that a particular course of action will not lead to violations, despite the ethical caveat that "[a] lawyer shall not

courses indicates that while some courses teach law students about the Sarbanes-Oxley and securities laws, no course teaches law students about corruption.[42] Another indication of the scope of professional obligations teaching would be the Center for Computer-Assisted Legal Instruction (CALI), a non-profit consortium of mostly US law schools that conducts research in computer-based legal education and provides online modules for law schools.[43] CALI offers modules on Professional Responsibility, but none of its courses addresses corruption.[44]

In Canada, the Federation of Law Societies of Canada established a Uniform National Requirement that graduates of Canadian common law programs must meet to enter law society admission programs starting from 2015.[45] The National Requirement includes Competency Requirements in ethics and professionalism, including the fiduciary nature of the lawyer's relationship with the client, conflicts of interest, and confidentiality, but it does not address corruption.[46] In a survey of law schools in 2009, prior to implementation of the National Requirement, it was reported that 11 of the 16 law schools had a compulsory course in legal ethics, though with various descriptions.[47] Similarly, in Australia, law schools offer a law course that satisfies the academic requirements for admission to practice, the so-called 'Priestley 11', contained

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counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent …'".

42 Andrew M Perlman, Margaret Raymond and Laurel S Terry, 'A Survey of Professional Responsibility Courses at American Law Schools in 2009' 4–6 (*Legal Ethics Forum*) <www.legalethicsforum.com/files/pr-survey-results-final.pdf> accessed 26 May 2017.

43 'Center for Computer-Assisted Legal Instruction' (*CALI*, 2013) <www.cali.org> accessed 26 May 2017.

44 'Lessons, Professional Responsibility' (*Center for Computer-Assisted Legal Instruction*, 2013) <www.cali.org/category/2l-3l-upper-level-lesson-topics/professional-responsibility> and <www.cali.org/content/lessons-subject-outline-professional-responsibility> both accessed 26 May 2017.

45 'National Initiatives, Canadian Law School Programs' (*Federation of Law Societies*) <http://flsc.ca/national-initiatives/> accessed 26 May 2017.

46 'National Requirement, B(2), Ethics and Professionalism' (*Federation of Law Societies*) <http://docs.flsc.ca/National-Requirement-ENG.pdf> accessed 26 May 2017.

47 Federation of Law Societies of Canada, 'Final Report of the Task Force on the Canadian Common Law Degree' 32 (*FLSC*, 2009) <http://flsc.ca/wp-content/uploads/2014/10/admission8.pdf> accessed 26 May 2017, citing W. Brent Cotter and Eden Maher, 'Legal Ethics Instruction in Canadian Law Schools: Laying the Foundation for Lifelong Learning in Professionalism' (20 February 2009, publication pending).

in the Uniform Admission Rules.[48] The authors of Chapter 3 assert that the inculcation of ethics and values is considered part of the core curriculum,[49] but courses in this area, on the whole, do not address corruption.

In Asia, Japan offers two types of law degrees. As of 2008, there were nearly 100 undergraduate law faculties, with approximately 200,000 students.[50] However, these undergraduate law faculties have never been considered part of the process of educating future lawyers,[51] and have functioned in post-war Japan as general education programs to produce a workforce in business, government, and other walks of life.[52] The majority of these students did not plan to be lawyers, and the programmes were not designed to prepare students to be practicing attorneys.[53] Although law professors in these programmes share a general, common understanding of the curriculum, there is no defined curriculum for undergraduate programs.[54] Students take a variety of courses,[55] and there is no indication that legal ethics plays a role in these programmes. Reforms in the 2000s produced a number of changes, including new graduate programs, or law schools, to train future lawyers.[56] As Kozuka notes in Chapter 7, one of the educational goals at the new postgraduate law schools was responsibility and ethics as professional lawyers,[57] and these law schools were subject to curriculum requirements, which included legal ethics.[58] However, Japan is widely known for its very small number of attorneys (*bengoshi*),[59] maintained in part

48 Council of Australian Law Deans, 'A Catalogue of the Teaching of Legal Ethics, Professional Responsibility, etc. in Australian Law Courses' (*CALD*, November 2008) 1 <www.cald.asn.au/docs/4.1ethics.pdf> accessed 26 May 2017.

49 Chapter 3, at 65–66 (on ethics in legal clinics) and 66 (on pro bono activities). On joint student pro bono activities in Thailand and Singapore, see Chapter 13, at 316.

50 Setsuo Miyazawa, Kay-Wah Chan, and Ilhyung Lee, 'The Reform of Legal Education in East Asia' (2008) 4 Annual Review of Law and Social Science 333, 340.

51 See Miyazawa Setsuo and Otsuka Hiroshi, 'Legal Education and the Reproduction of the Elite in Japan' (2000) 1 Asian Pacific Law Policy Journal 1.

52 Miyazawa, Chan and Lee (n 50) 340.

53 Hisashi Aizawa, 'Japanese Legal Education in Transition' (2006) 24 Wisconsin International Law Journal 131, 133.

54 Ibid 138.

55 Masako Kamiya, 'Structural and Institutional Arrangements of Legal Education: Japan' (2006) 24 Wisconsin International Law Journal 153, 154–155.

56 Miyazawa, Chan and Lee (n 50) 339–340; Kay-Wah Chan, 'The Emergence of Large Law Firms in Japan: Impact on Legal Professional Ethics' (2008) 11 Legal Ethics 154, 166.

57 See Chapter 7, at 158.

58 Kamiya (n 55) 165 and 194.

59 Kay-Wah Chan, 'Justice System Reform and Legal Ethics in Japan' (2011) 14 Legal Ethics 73.

by a low passing rate for the bar. Because the passing rate has not increased from the reforms as anticipated, students in these programmes appear to be emphasising subjects examinable in the bar examination to the detriment of other courses,[60] including legal ethics.[61] Upon passing the bar examination, candidates then attend the Legal Training and Research Institute (LTRI), a sub-division of the Supreme Court, which includes coursework and apprenticeships.[62] The English language description of the LTRI programme emphasises 'high ethical standards and professionalism' which creates an approach in which 'legal ethics is regarded as one of the priority subjects in the training of legal apprentices',[63] although it is not clear how that teaching is conducted. There are no references on the official LTRI website to training regarding corruption, money-laundering, or anti-terrorism.

In Singapore, the Singapore Management University's School of Law provides an interesting exception to the general lack of instruction about corruption in the course of a law degree. As part of SMU's general university requirements, LLB students are required to take a course entitled 'Ethics and Social Responsibility'.[64] Students in SMU's graduate law degree, the JD, are also required to take the Ethics and Social Responsibility course.[65] Course outlines do not state that corruption or bribery is a required element, but syllabi generated by law professors include the issue.[66] As described in the Academic Year 2016–17 course description:

60 Shigenori Matsui, 'Turbulence Ahead: The Future of Law Schools in Japan' (2012) 62 Journal of Legal Education 3, 28; Chan(n 56) 168; Miyazawa, Chan and Lee (n 50) 348.

61 A bar examination has obvious relevance in ensuring that practitioners meet basic standards, but when it is perceived as unduly restrictive the impact on education is potentially quite negative (see Chapter 7).

62 Aizawa (n 53) 146.

63 'The Legal Training and Research Institute of Japan' (*Supreme Court of Japan*, 2017) <www.courts.go.jp/english/institute_01/institute/index.html> accessed 26 May 2017.

64 The SMU School of Law includes three courses in this category of University Core Courses: Business, Government & Society; Ethics & Social Responsibility; and Leadership & Team Building; see SMU School of Law, 'Curriculum' (*Singapore Management University*, 2017) <http://law.smu.edu.sg/programmes/bachelor-laws/why-smu-law/rigorous-challenging-curriculum/overview> accessed 26 May 2017.

65 SMU School of Law, 'J.D. Programme Brochure' (*Singapore Management University*, 2017) <https://law.smu.edu.sg/sites/law.smu.edu.sg/files/law/pdf/JD/SMU-Law-Brochure%202016%20%28FA-revised%29.pdf> accessed 26 May 2017.

66 See eg Eugene K B Tan, 'LGST 001: Ethics and Social Responsibility Course Outline, AY 2009–10', 4 (*Singapore Management University*, 2009) <https://inet.smu.edu.sg/sites/courses/Documents/Outlines/UGRD/0920/LGST001_EugeneTan.pdf> accessed 26 May

> The objective of the Course is to raise the awareness of students with regard to the multi-faceted ethical and social responsibility issues faced by businesses and corporate executives, whether individuals or organisations. The initial part of the Course will focus on critiquing various ethical and social theories developed by philosophers, economists, sociologists, management theorists and others. Both Western and non-Western theories will be examined. The Course also aims at developing the moral reasoning skills of students and applying them to the specific problems and dilemmas faced by individuals and organisations in the business and corporate world.[67]

As a course that all students are required to take regardless of their field of study,[68] Ethics and Social Responsibility is intended to be an introduction to business ethics generally, not a course in legal ethics. In an address by SMU President Arnoud De Meyer, the President noted that:

2017; Elgin Tay, 'LGST 001: Ethics and Social Responsibility Course Outline, AY 2012–13, Class 12' (*Singapore Management University*, 2012) <https://inet.smu.edu.sg/sites/courses/Documents/Outlines/UGRD/1210/LGST001_ElginTay.pdf> accessed 26 May 2017; Gary Chan, 'LAW001 Ethics and Social Responsibility Course Outline, Topic 4' (copy on file with author); David N Smith, 'LAW 001 Ethics and Social Responsibility Course Outline, AY 2014–15' 4–5 (*Singapore Management University*, 2014) <https://inet.smu.edu.sg/sites/courses/Documents/Outlines/UGRD/1410/LAW001_DavidSmith.pdf> accessed 26 May 2017; S Chandra Mohan, 'LAW 001, Ethics and Social Responsibility Course Outline, AY 2014–15', 4 (*Singapore Management University*, 2014) <https://inet.smu.edu.sg/sites/courses/Documents/Outlines/UGRD/1420/LAW001_ChandraMohan_v2.pdf> accessed 26 May 2017; Ang Su-Lin, 'LGST 001 Course Outline, AY 2014–15, Class 7' (*Singapore Management University*, 2014) <https://inet.smu.edu.sg/sites/courses/Documents/Outlines/UGRD/1410/LGST001_AngSuLin.pdf> accessed 26 May 2017; Andrew White, 'LGST 001 Ethics and Social Responsibility Course Outline, AY 2014–15, Class 10' (*Singapore Management University*, 2014) <https://inet.smu.edu.sg/sites/courses/Documents/Outlines/UGRD/1420/LGST001_AndrewWhite.pdf> accessed 26 May 2017; Tamera A Fillinger, 'LGST 001 Ethics and Social Responsibility Course Outline, AY 2015–16, Class 9' (*Singapore Management University*, 2015) <https://inet.smu.edu.sg/sites/courses/Documents/Outlines/UGRD/1510/LGST001_TameraFillinger.pdf> accessed 26 May 2017.

67 SMU, 'LGST 001 – Ethics and Social Responsibility – Course Detail' (*Singapore Management University*, 2017) <http://eservices.smu.edu.sg/psp/ps/EMPLOYEE/HRMS/c/SIS_CR.SIS_CLASS_SEARCH.GBL> accessed 31 May 2017.

68 Rathna N Koman and Helena Whalen-Bridge, 'Clinical legal education in Singapore' in Shuvro Prosun Sarker (ed), *Clinical Legal Education in Asia: Accessing Justice for the Underprivileged* (Palgrave Macmillan 2015) 140.

> Universities must develop young minds with a strong sense of business ethics, and an appreciation that not all deals should be about maximising profit. At the Singapore Management University, every single one of our students, regardless of their field of study, is required to take a course in 'Ethics and Social Responsibility'.[69]

In its course listings, the School of Law distinguishes between University requirements such as the Ethics and Social Responsibility course, and Law Core Courses, which include typical offerings such as contact, torts, and criminal law.[70] Law students therefore take a general course in ethics as part of the university's mission to teach about business ethics, which explains the inclusion of topics on corruption. Students at SMU are exposed to the issue of commercial corruption, but it is not clear that the course makes the connection between corruption and the role of lawyers.

For faculties that teach a stand-alone ethics course, the SMU model offers an approach that, with slight modifications, would help to bring home the role that lawyers play in either allowing or discouraging corruption. The SMU model would however be a hard sell at faculties that do not already require law students to take a course in ethics. Such a course may also fail to adequately serve a jurisdiction with higher perceived levels of internal corruption. As noted in Chapter 14, corruption and criminal justice routinely capture headlines in Indonesia, and law graduates currently avoid employment with the judiciary or the prosecutor's office partly because of concerns regarding corruption.[71] This context has prompted a completely different approach which focuses directly on corruption. The US Agency for International Development (USAID) established the first anti-corruption legal clinics at Indonesian law faculties.[72] The Indonesian Network for Clinical Education (INCLE), a national

69 Arnoud de Meyer, 'Welcome Address by SMU President Professor Arnoud de Meyer At MOA signing between SMU SKBI and Securities Investors Association (Singapore)' (SIAS) <http://sias.org.sg/index.php?view=article&id=401%3Awelcome-address-by-smu-president-professor-arnoud-de-meyer-at-moa-signing-between-smu-skbi-and-securities-investors-association-singapore&option=com_content&lang=en> accessed 26 May 2017.

70 SMU School of Law, 'Programmes, Bachelor of Laws, Curriculum' (*Singapore Management University*) <http://law.smu.edu.sg/programmes/bachelor-laws/why-smu-law/rigorous-challenging-curriculum/overview> accessed 26 May 2017.

71 See Chapter 14, at 324.

72 USAID, 'Democracy, Rights and Governance' (USAID) <www.usaid.gov/indonesia/democracy-human-rights-and-governance> accessed 26 May 2017.

network launched in 2015 to develop clinical legal education in Indonesia,[73] now lists seven law faculties with legal clinics, five of which have anti-corruption clinics.[74] In a parallel development, the World Justice Project (WJP), a non-governmental organisation that works to advance the rule of law, announced in May 2015 that it would provide seed grants to pilot projects addressing the rule of law in Indonesia, including projects on judicial corruption.[75] One grant focused on monitoring judicial corruption in Indonesia's three largest cities – Jakarta, Bandung, and Surabaya – by partnering with several Indonesian law schools that operate a network of legal clinics.[76] Planned for the period 1 June 1 2015 to 1 June 1 2016, the project proposed four main activities:

1. Developing a judicial corruption monitoring manual for legal clinics, to be disseminated to civil society organizations and legal clinics, with an electronic version to be made available online;
2. Training legal clinics to handle reports of judicial corruption, with each participating clinic to receive 6 judicial corruption cases for analysis and review by the Judicial Commission and Anti-Corruption Commission;
3. Creation of a street law program, using the manual to educate local communities about judicial corruption; and
4. Developing an online complaint mechanism and hotline for confidentially reporting instances of judicial corruption, with the legal clinics working with the Witness Protection Agency to develop the website and hotline in order to ensure that these services protect whistle-blowers' confidentiality.[77]

Both the Indonesian anti-corruption legal clinics and SMU's business ethics course in Singapore offer intriguing possibilities about how to teach law

73 Indonesian Network for Clinical Legal Education, <http://incle.org/#> accessed 26 May 2017.

74 Ibid.

75 World Justice Project, 'Advancing Justice in Indonesia: WJP Announces Five New Grants' (WJP, 27 May 2015) <http://worldjusticeproject.org/blog/advancing-justice-indonesia-wjp-announces-five-new-grants> accessed 26 May 2017.

76 World Justice Project, 'Judicial Corruption Monitoring in Indonesia through Legal Clinics' (WJP) <http://worldjusticeproject.org/opportunity-fund/judicial-corruption-monitoring-indonesia-through-legal-clinics> accessed 26 May 2017.

77 Ibid.

students about corruption. At the moment, however, they are the exception rather than the norm.[78]

2 *Professional Preparation Courses*

In jurisdictions that separate academic from professional or vocational training, professional obligations may be included in a post-graduate, vocational training phase. Nigel Duncan has argued that jurisdictions requiring a course in legal ethics in the law degree do so in order to prepare students specifically for legal practice, and that law schools which do not purport to do this do not have a compulsory course in legal ethics.[79] The Bar Association of England & Wales and the Solicitors Regulation Authority only require professional ethics during their vocational courses, and law degrees in Australia which are not designed to prepare students for legal practice are not required to comply with the 'Priestley 11'.[80]

The UK's separation of academic and vocational training[81] is the template that some common law countries in Asia have followed. For example, Hong Kong does not have a bar examination, and most applicants for admission complete the Postgraduate Certificate in Laws (PCLL).[82] All three law schools in Hong Kong offer this one-year program.[83] Legal Ethics is not a stand-alone course in the PCLL, but both the Bar Association and the Law Society have set benchmarks that include ethical training.[84] The PCLL offered

78 See also Ugljesa Ugi Zvekic, 'Corruption in South Eastern Europe: Teaching Anti-Corruption in The Region' (United Nations Office on Drugs and Crime, Symposium of the Anti – Corruption Academic (ACAD) Initiative, Moscow, 30–31 October 2015) 39–55, 49 <www.track.unodc.org/Education/Pages/ACAD.aspx> accessed 28 May 2017; noting that anti-corruption teaching at the university level is sporadic in South-Eastern Europe, although a few universities teach it in Romania, Greece, Bulgaria, Macedonia, and Serbia.

79 Duncan (n 33) 258.

80 Ibid. See also Chapter 3.

81 In the UK, see Solicitor's Regulation Authority, 'Legal Practice Course Outcomes 2011' (SRA, 2011) <www.sra.org.uk/documents/students/lpc/LPC-Outcomes-Sept2011.pdf> accessed 26 May 2017.

82 Wilson Chow, 'Adding Realism to Professional Legal Education at the University of Hong Kong' in Caroline Strevens, Richard Grimes & Edward Phillips (eds), *Legal Education: Simulation in Theory and Practice* (Ashgate 2014) 231 (n 2).

83 Feng Lin, 'Legal Education at a Turning Point: A Case Study of Hong Kong' in Christophe Jamin and William van Caenegem (eds), *The Internationalisation of Legal Education* (Springer International Publishing 2016) 131, 145.

84 Ibid 131, 146.

by Hong Kong University includes ethics in its courses on Criminal Litigation, Trial Advocacy, Mediation in Chinese, and Professional Practice and Management,[85] and it uses a pervasive teaching method that includes ethics.[86] Authors Chow, Ng and Jen also note that legal ethics are addressed in part in Simulated Client Interviews.[87] In Singapore, all applicants for a Singapore Practicing Certificate must take the Preparatory Course leading to Part B of the Singapore Bar Examinations.[88] This course requires students to take a standalone module in Ethics and Professional Responsibility.[89]

It is reasonable to assume that some jurisdictions with separate vocational training would include instruction on corruption, money laundering, or antiterrorism legislation, but even here there is variation.[90] This variation suggests that while professional training courses are one avenue for teaching law students about corruption, it is not a complete answer. Another difficulty in withholding instruction about corruption until the professional preparation stage is the implicit message of devaluation it sends. In view of the increased scrutiny of lawyers' involvement in corruption, and the suggestion that younger

85 Hong Kong University, 'PCLL, Full-Time Mode: The PCLL Regulations and Syllabuses (2015–16)' (HKU, 2015) <www.law.hku.hk/syllabuses/PCLL%202015_16.pdf> accessed 26 May 2017.

86 W W S Chow and F Tiba, 'Too Many "What's", Too Few "How's"' (2013) 4 European Journal of Law and Technology (n 50) <http://ejlt.org/article/view/183/281#_ednref50> accessed 26 May 2017.

87 See Chapter 9, at 198.

88 Singapore Institute of Legal Education, 'Admission to the Singapore Bar' (SILE) <www.sile.edu.sg/admission-to-the-singapore-bar> accessed 26 May 2017.

89 Singapore Institute of Legal Education, 'Preparatory Course leading to Part B of the Singapore Bar Examinations, Course Information, Subject (vi), Ethics & Professional Responsibility' (SILE) <www.sile.edu.sg/part-b> accessed 26 May 2017.

90 Compare eg the Singapore Institute of Legal Education, '2014 Syllabus (Indicative) for the Foreign Practitioners Examination' (SILE, 2013) <www.sile.edu.sg/pdf/FPE_Ethics_(2014_Indicative).pdf> accessed 26 May 2017, which includes 'prevention of money laundering and funding of terrorist activities' in the Ethics and Professional Responsibility course, and the UK, where solicitors must complete the Legal Practice Course as part of their vocational training (see Solicitors Regulation Authority, 'Legal Practice Course' (SRA, 2017) <www.sra.org.uk/students/lpc.page> accessed 26 May 2017, and the 'Legal Practice Course Outcomes 2011' (Version 2, September 2011) 7, which details the requirements for the legal practice course including 'Money Laundering and Financial Services within Professional Conduct and Regulation'), with Hong Kong University's 2015–16 PCLL Syllabus <www.law.hku.hk/syllabuses/PCLL%202015_16.pdf> accessed 26 May 2017, which does not include similar instruction.

lawyers may not be knowledgeable about it, the question of why law students are not taught about corruption remains.

3 *Law School Teaching Materials and the Anti-Corruption Academic Initiative*

A perceived lack of teaching materials could explain the lacklustre interest in teaching about corruption. Unlike some areas of professional obligations,[91] jurisdiction-specific teaching materials regarding lawyers and corruption are not well-developed.[92] Training regarding corruption has been an accepted part of overall anti-corruption efforts,[93] and materials are available for tertiary education generally,[94] but as Nicholls and others note, materials specifically geared toward students of law have been lacking.[95] The Anti-Corruption Academic Initiative (ACAD) has attempted to address this need. ACAD is an academic support tool launched in 2011 by the UNODC and supported by Northeastern University (USA), the Organisation for Economic Cooperation and Development (OECD), and the International Bar Association (IBA).[96] ACAD is a collaborative academic project which has produced detailed academic modules,

91 In the US – one of the larger markets for casebooks on professional obligations – the publisher West Academic listed 73 textbooks in the category of 'Professional Resp/Ethics' as of June 2017 (*West Academic*) <www.westacademic.com/Professors/ProductSearchResults.aspx?searchtypeasstring=BROWSE-BY-ANY&tab=1&subject=167> accessed 26 May 2017.

92 See eg Gary KY Chan and George TL Shenoy, *Ethics and Social Responsibility: Asian and Western Perspectives* (McGraw-Hill Education (Asia) 2016) 273–320, which addresses corruption but does not highlight the role lawyers play.

93 See Colin Nicholls (eds), *Corruption and Misuse of Public Office* (2nd edition, OUP 2011) 695–696.

94 See Peter Hardi, Paul M Heywood, and Davide Torsello, *Debates of Corruption and Integrity: Perspectives from Europe and the US* (Palgrave Macmillan 2015) 1–2, which notes the development, by the Central European University Business School's Centre for Integrity in Business and Government, of teaching materials on integrity and anti-corruption focused on the regional needs of Eastern Europe and former Soviet Union bloc; the materials are geared toward leaders in different market, political and legal environments and intended to teach critical thinking about corruption and integrity in order to prepare students to meet risks and conduct businesses that are sustainable in the long term.

95 Nicholls (n 93) para 20.17.

96 'The Anti-Corruption Academic Initiative (ACAD): An Overview' (*United Nations Office on Drugs and Crime*) <www.track.unodc.org/Academia/Pages/ACADOverview.aspx> accessed 28 May 2017.

case studies and reference materials, which are freely available on the internet to universities and other academic institutions.[97]

At the time this chapter was written, ACAD had developed extensive materials on 21 different topics, including approaches to defining corruption and sources of anti-corruption laws, and a separate section on Teaching Materials.[98] One topic provides an overview of the roles and obligations of the legal profession,[99] and three topics are devoted to legal advice given by counsel regarding corruption: Anti-corruption laws, Enterprise Governance and Compliance, and Investigations and Litigation.[100] ACAD articulates seven distinct reasons why law students should learn about corruption:

> Lawyer as intermediary – lawyers play an important role in ensuring the integrity of internal anti-corruption and anti-money laundering policies, and that appropriate procedures are in place when conducting internal audits or advising companies and organisations. Law students will discover that they play an integral role in educating others about their duties, liability and the importance of ensuring there are checks and balances in place.
>
> Professional liability – Students will become familiar with the sometimes heavy penalties and serious consequences of breaches of professional codes of conduct and attempts to break or circumvent controls and the law.
>
> Firm and Enterprise Anti-corruption Policies – This part will explain how lawyers must ensure that their firm or the organisation they advise in respect to anti-corruption and anti-money laundering policies and legislation should have a robust system of checks, balances and procedures to be transparent and accountable.
>
> Reporting obligations (eg Anti-Money Laundering Officer or AMLO) – As will be explained, many organisations employ an AMLO or another person to ensure that suspicious circumstances or transactions

97 International Bar Association, 'Fifth session of the Conference of the States Parties to the United Nations Convention against Corruption' (*IBA Net*) <www.ibanet.org/Article/Detail.aspx?ArticleUid=d8441bce-0004-4210-b2b1-6aa8ca69fb5d> accessed 26 May 2017.

98 See 'Anti-Corruption Academic Initiative (ACAD)' (*United Nations Office on Drugs and Crime*) <www.track.unodc.org/Education/Pages/ACAD.aspx> accessed 28 May 2017.

99 See 'Roles and Obligations of Professions' (*United Nations Office on Drugs and Crime*) <www.track.unodc.org/Academia/Pages/Topics/RolesAndObligations.aspx> accessed 28 May 2017.

100 'The ACAD Menu of Resources'(*United Nations Office on Drugs and Crime*) <www.track.unodc.org/Education/Pages/ACAD.aspx> accessed 26 May 2017.

are reported to the relevant authorities. In certain jurisdictions, lawyers act as gatekeepers and ensure client due diligence, reporting of suspicious transactions, and protection of DNFBPs (Designated Non-Financial Businesses and Professions) from violations and legal sanctions.

Conflicts of interest – Students will see that many organisations will have procedures in place to assess any transaction or agreement and ensure there are no conflicts of interest within their own firm, and any organisation they represent is protected from legal, regulatory and reputational risk. An unreported or prohibited representation that results in a conflict of interest could result in serious legal consequences.

Code of professional responsibility – The code of ethics and responsibilities governing the legal profession must be adhered to by lawyers, judges and other members of the legal profession in order to avoid disciplinary action by the governing bodies, legal action, or damage to their professional reputation.

Confidentiality – This part of the course covers the special fiduciary duty owed by lawyers to their clients and the importance of confidentiality as well as disclosure of confidential information where compelled by law.[101]

ACAD sought to encourage the teaching of anti-corruption issues as part of courses such as law, business, criminology, and political science. The ACAD materials also sought to provide a basis from which to develop materials and courses suited to particular countries.

Initially there was little evidence regarding their adoption in law schools. For example, the University of Victoria Law School is associated with production of the materials,[102] and while the Law School has an upper class elective in professional obligations, the course summary does not include corruption law.[103] Another potential site for the use of ACAD materials is the International

101 ACAD, 'Roles and Obligations of the Legal Profession' (*United Nations Office on Drugs and Crime*) <www.track.unodc.org/Academia/Pages/Topics/RolesAndObligations.aspx> accessed 26 May 2017.

102 Suderman (n 5) 385–391.

103 The University of Victoria Law School Course Catalogue states: 'LAW 360, Legal Ethics and Professionalism, Units: 1.5, Hours: 30, Examines ethical and professional dimensions of the practice of law in Canada and other jurisdictions including the meanings of ethics and the nature of professionalism. Covers the knowledge and skills needed to identify and address ethical dilemmas arising in a legal context. Considers topics such as the nature and scope of a lawyer's duties; admission to, governance of, and critical issues affecting the legal profession; critical thinking about legal ethics and professionalism';

Anti-Corruption Academy, an international organization with membership open to UN Member States and international organizations, which aims to combat corruption through education, research and cooperation.[104] The Academy offers tailor-made trainings, as well as a Master of Arts in Anti-Corruption Studies (MACS)[105] and an International Masters in Anti-Corruption Compliance and Collective Action (IMACC),[106] but the curricula of these programs do not reference the ACAD materials.[107] A final example might be a March 2015 blog post querying the usefulness of the Poznan Declaration, where Harvard Law Professor Matthew Stephenson asked whether the development of practical tools such as a corruption syllabus would not be a better use of resources, apparently without knowledge of the existence of the ACAD materials.[108] More recently, regional ACAD meetings have produced materials that suggest jurisdictions are becoming knowledgeable about ACAD materials and are beginning to develop their own materials.[109] However, if an extensive, up-to-date collection of relevant materials exists, why isn't there more evidence that they are being used?

4 *Why Law Schools are Not Teaching about Corruption: Rhetoric in Developed Economies*

The earlier sections of this chapter have explored some of the reasons why law students are not taught about corruption. In this and the following section, the

University of Victoria, 'LAW 360 Legal Ethics and Professionalism' (*University of Victoria*, September 2015) <http://web.uvic.ca/calendar2015-09/CDs/LAW/360.html> accessed 26 May 2017.

104 See 'Frequently Asked Questions' (*International Anti-Corruption Academy*) <www.iaca.int/faqs.html> accessed 26 May 2017.

105 See 'Master in Anti-Corruption Studies (MACS)' (*International Anti-Corruption Academy*) <www.iaca.int/general-informaition.html> accessed 28 May 2017.

106 See 'International Master in Anti-Corruption Compliance and Collective Action' (*International Anti-Corruption Academy*) <www.iaca.int/master-programmes/imacc.html> accessed 28 May 2017.

107 For MACS see 'Master in Anti-Corruption Studies' (IACA) <www.iaca.int/structure-and-curriculum.html>, and for IMACC see 'International Master in Anti-Corruption Compliance and Collective Action' (IACA) <www.iaca.int/imacc-structure-curriculum.html> and <www.iaca.int/images/sub/master/IMACC_CURRICULUM.pdf> both accessed 28 May 2017.

108 Matthew Stephenson, 'Can Universities Teach People Not to be Corrupt? Reflections on the Poznan Declaration' (*Global Anti-Corruption Blog*, March 17, 2015) <http://globalanticorruptionblog.com/2015/03/17/can-universities-teach-people-not-to-be-corrupt-reflections-on-the-poznan-declaration/> accessed 26 May 2017.

109 United Nations Office on Drugs and Crime (n 78).

chapter considers a different kind of explanation, based on the rhetoric used to discuss corruption. This section applies a rhetorical approach used by James Boyd White[110] and others[111] to explore the ramifications of thinking about corruption in certain ways. In the context of corporate regulation, for example, White has considered how the statement that 'corporations should maximize profit subject to applicable law' is inconsistent with the idea that the proper aim of corporations is to maintain conditions that make meaningful economic and social activity possible.[112] Framing corporate regulation as a contest between profit and compliance 'invites thought and discussion of an unproductive kind about … important matters,'[113] and it structures the debate on how to regulate corporations in ways that lead to certain discussions while making others irrelevant.

The same can be said about corruption. In general, corruption levels are assessed via commonly-accepted measurement instruments, and these instruments create a 'non-corrupt' rhetoric for some countries. This rhetoric, partially true but somewhat misleading, has arguably resulted in the understanding in these countries that corruption is not a problem that lawyers will deal with, and therefore it need not be addressed in the course of the law degree. In countries with high levels of perceived corruption, a different set of perceptions may affect appetites for instruction in legal ethics and corruption in their own way. This and the following section of the chapter focus on how the understanding of corruption, at a societal level and even among faculty members, may affect curriculum priorities and teaching strategies.

(a) Corruption Measurement Instruments: Transparency International

In discussions of how corrupt countries are, a commonly used source of data is from Transparency International. This part of the chapter considers how the measurement of corruption arising from Transparency International data might shape the rhetoric of corruption, and how other data, such as prosecutions under the US Foreign Corrupt Practices Act (FCPA), tell a different story.

110 James Boyd White, *From Expectations to Experience: Essays on Law & Legal Education* (University of Michigan Press 1999) 111–123.

111 See eg Monique Nuijten and Gerhard Anders (eds), *Corruption and the Secret of Law: A Legal Anthropological Perspective* (Ashgate 2007).

112 White (n 110) 114.

113 Ibid 112–113.

To the extent that there is widespread awareness of corruption, part of that awareness must be attributed to Transparency International, a non-governmental organisation working to eradicate corruption,[114] which has 'spearheaded the fight against corruption' and made it possible to 'gauge and compare corruption across countries'.[115] Transparency International produces a number of different corruption surveys, but states that its Corruption Perceptions Index (CPI) is 'the most widely used indicator of corruption worldwide'.[116]

The CPI scores countries on how corrupt their public sector is perceived to be.[117] The Index relies on perceptions of corruption because, as Transparency International explains:

> Corruption generally comprises illegal activities, which are deliberately hidden and only come to light through scandals, investigations or prosecutions. There is no meaningful way to assess absolute levels of corruption in countries or territories on the basis of hard empirical data. Possible attempts to do so, such as by comparing bribes reported, the number of prosecutions brought or studying court cases directly linked to corruption, cannot be taken as definitive indicators of corruption levels. Instead, they show how effective prosecutors, the courts or the media are in investigating and exposing corruption. Capturing perceptions of corruption of those in a position to offer assessments of public sector corruption is the most reliable method of comparing relative corruption levels across countries.[118]

The 2014 CPI ratings list the following as the 20 least corrupt countries. Countries achieve a rank based on a number of factors, which means that more than one country can hold the same rank:

1 Denmark
2 New Zealand

114 Transparency International, 'Overview' (*Transparency International*) <www.transparency.org/whoweare/organisation/> accessed 26 May 2017.

115 Eicher (n 2) 1.

116 Transparency International, 'Corruption Perceptions Index 2014: In Detail' (*Transparency International*) <www.transparency.org/cpi2014/in_detail> accessed 26 May 2017.

117 Transparency International, 'What is the Corruption Perceptions Index (CPI)?' <www.transparency.org/cpi2014/in_detail#myAnchor1> accessed 26 May 2017.

118 Ibid.

3	Finland
4	Sweden
5	Norway
5	Switzerland
7	Singapore
8	Netherlands
9	Luxembourg
10	Canada
11	Australia
12	Germany
12	Iceland
14	United Kingdom
15	Belgium
15	Japan
17	Barbados
17	Hong Kong
17	Ireland
17	United States[119]

A major difficulty in measuring corruption is the tendency to characterise poor countries, where corruption affects the daily lives of people, as the most corrupt – but wealthier countries also have corruption, merely different types.[120] In particular, the 'perception' approach taken by the CPI has been criticised.[121] Charles Kenny stated that it 'doesn't take a detailed look' at Transparency International's CPI to 'work out which type of countries are viewed as particularly corrupt by the policy risk analysts, aid agency economists, and think-tank staff'; the least corrupt are the rich countries, and the most corrupt at the bottom of the list are the poor countries.[122] Alex Cobham has argued that the technique of aggregating the opinions of 'an internationally focused elite'

119 Transparency International, 'Corruption Perceptions Index 2014: Results' (*Transparency International*) <www.transparency.org/cpi2014/results> accessed 26 May 2017.

120 See Adam Graycar and Olivia Monaghan, 'Rich Country Corruption' (2015) 38 International Journal of Public Administration 586, 586.

121 See 'Is Transparency International's measure of corruption still valid?' *The Guardian* (3 December 2013) <www.theguardian.com/global-development/poverty-matters/2013/dec/03/transparency-international-measure-corruption-valid> accessed 26 May 2017.

122 Charles Kenny, 'Is the US as Corrupt as the Third World?' *Bloomberg Business* (New York, 14 July 2014) <www.bloomberg.com/bw/articles/2014-07-14/corruption-is-perceived-as-greater-where-income-gaps-are-big> accessed 26 May 2017.

does not even produce an accurate picture of perceptions.[123] He asserts that the CPI 'embeds a powerful and misleading elite bias in popular perceptions of corruption.'[124] This chapter does not evaluate whether the rhetoric created by the CPI is elitist, but rather asserts that in the context of illegal payments to public officials, the CPI focuses attention on recipient countries, as opposed to paying countries.[125] While Transparency International acknowledges that the CPI is limited in scope and does not provide information on levels of actual corruption in countries overall,[126] it has become a main proxy for measuring levels of corruption. For more developed countries that are perceived as less corrupt by survey respondents, the CPI strongly suggests that corruption is something that happens elsewhere.

(b) A Different Story: FCPA Prosecutions

The US has been the primary source of international prosecutions for bribery of public officials, and the primary legislative vehicle for prosecutions is the Foreign Corrupt Practices Act (FCPA). Prosecutions under FCPA frequently result in settlements, and as reported in 2011, the largest 10 FCPA settlements all involved companies in countries deemed the least corrupt on the CPI: Germany, the US, the Netherlands, France, Japan, and Switzerland.[127] As of 23 December 2014, the company names on the list had changed slightly, but the country representation from developed countries with non-corrupt reputations remained steady.[128] Comparing CPI data with FCPA prosecutions produces a rather striking comparison: countries rated as the least corrupt according to CPI are at the top of the largest FCPA settlements list. Do countries that perceive themselves as non-corrupt have something to teach students after all?

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123 Alex Cobham, 'Corrupting Perceptions Why Transparency International's flagship corruption index falls short' (*Foreign Policy*, 22 July 2013) <http://foreignpolicy.com/2013/07/22/corrupting-perceptions/> accessed 26 May 2017.

124 Ibid.

125 Nicholls (n 93) 697–698.

126 Transparency International, 'What is the Corruption Perceptions Index (CPI)?' (*Transparency International*) <www.transparency.org/cpi2014/in_detail#myAnchor9> accessed 26 May 2017.

127 Merrill Goozner, 'The Ten Largest Global Business Corruption Cases' (*The Fiscal Times*, 13 December 2011) <www.thefiscaltimes.com/Articles/2011/12/13/The-Ten-Largest-Global-Business-Corruption-Cases> accessed 26 May 2017.

128 Richard L Cassin, 'With Alstom, Three French Companies Are Now in the FCPA Top Ten' (*FCPA Blog*, 23 December 2014) <www.fcpablog.com/blog/2014/12/23/with-alstom-three-french-companies-are-now-in-the-fcpa-top-t.html> accessed 26 May 2017.

The background of some of the FCPA settlements suggests that a lack of oversight, legal and otherwise, was involved. In the $137 million settlement by the French company Alcatel-Lucent in 2011, the SEC alleged that Alcatel's subsidiaries used consultants who performed little or no legitimate work to funnel more than $8 million in bribes to government officials in order to obtain or retain lucrative telecommunications contracts and other contracts. In a press release, Robert Khuzami, Director of the SEC's Division of Enforcement stated that 'Alcatel and its subsidiaries failed to detect or investigate numerous red flags suggesting their employees were directing sham consultants to provide gifts and payments to foreign government officials to illegally win business,' and that 'Alcatel's bribery scheme was the product of a lax corporate control environment at the company.'[129] There is no suggestion that lawyers were the main source of corrupt practices in these cases, but it is difficult to image how the transactions could have proceeded without legal agreements drafted by lawyers, as well as legal advice and supervision from counsel.[130]

Using US prosecutions under FCPA as a proxy for levels of corruption presents problems just as the CPI does, albeit a different set of problems. The FCPA settlements do not represent actual amounts paid by the defendant companies to public officials; the settlements are negotiated agreements for settlement of alleged FCPA violations, and the manner in which the amounts are arrived at differs from case to case and is not necessarily transparent. The negotiated amounts could include a civil penalty, disgorgement and pre-judgment interest.[131] However, the availability of alternative sources of data, flawed as it may be, provides a different picture of whether a country has a corruption problem.

In response to criticism regarding CPI, Transparency International generated a new instrument, the Bribe Payer's Index. The 2011 Bribe Payers Index ranked 28 of the world's largest economies according to 'the perceived likelihood of companies from these countries to pay bribes abroad.'[132] This index

129 US Securities and Exchange Commission, 'SEC Charges Alcatel-Lucent with FCPA Violations' (SEC, 27 December 2010) <www.sec.gov/news/press/2010/2010-258.htm> accessed 26 May 2017.

130 Steptoe & Johnson LLP, 'Lessons from Alcatel-Lucent's $137 million FCPA settlements' (10 March 2011) <http://documents.lexology.com/edac9154-5221-445b-9454-4188428334b5.pdf> accessed 26 May 2017 ('The gravamen of both DOJ's and SEC's internal controls charges was Alcatel-Lucent's inadequate procedures for vetting, contracting with, and overseeing third-party consultants around the world').

131 See the discussion of negotiated settlements at FCPA Professor, 'FCPA 101' (FCPA Professor LLC) <www.fcpaprofessor.com/fcpa-101#q16> accessed 31 May 2017.

132 Transparency International, 'Bribe Payers Index Report 2011' (*Transparency International*) <www.transparency.org/bpi2011/results> accessed 26 May 2017.

would appear to focus on corruption payments from companies in the largest economies. However, if the 2011 BPI is compared with the top ten on the FCPA list from the same year, it produces the same – inverted – list of countries produced by the CPI. The countries that are perceived as unlikely to ever bribe abroad are the countries of origin for the companies engaged in the largest FCPA settlements:

TI BPI Index 2011[a]	**BPI Rating**[b]	**Top Ten FCPA Settlements: By Country**[c]	**FCPA Settlement Amount (in USD)**	**Countries Appearing at the Top of Both Instruments**
Netherlands	8.8	*Germany*	800 million	*Germany*
Switzerland	8.8	*United States*	579 million	*United States*
Belgium	8.7	*United Kingdom*	400 million	*United Kingdom*
Germany	8.6	Holland/Italy	365 million	
Japan	8.6	France	338 million	
Australia	8.5	*Japan*	218.8 million	*Japan*
Canada	8.5	*Germany*	185 million	*Germany*
Singapore	8.3	France	137 million	
United Kingdom	8.3	Hungary/ *Germany*	95 million	*Germany*
United States	8.1	*Switzerland*	81.8 million	*Switzerland*

a Transparency International, 'Bribe Payers Index Report 2011' (*Transparency International*) <www.transparency.org/bpi2011/results> accessed 26 May 2017.

b Ibid, explaining that 'countries are scored on a scale of 0–10, where a maximum score of 10 corresponds with the view that companies from that country never bribe abroad and a 0 corresponds with the view that they always do'.

c As of 29 December 2011; see Richard L Cassin, 'With Magyar In New Top Ten, It's 90% Non-US' (*The FCPA Blog*, 29 December 2011) <www.fcpablog.com/blog/2011/12/29/with-magyar-in-new-top-ten-its-90-non-us.html> accessed 26 May 2017.

The fact that larger payments in corruption cases originate from companies in more developed economies and flow to less developed countries is also apparent from the details of FCPA cases. The largest FCPA settlement at the time this chapter was written concerned a French transportation company, Alstom. Alstom and its subsidiaries admitted to paying bribes to government officials to obtain business in power, grid and transportation projects from state-owned

entities. Part of the US case centred on Indonesia, where Alstom paid bribes to an Indonesian lawmaker and members of Perusahaan Listrik Negara, the state-owned electricity company in Indonesia, to secure $375 million in contracts. Alstom also tried to hide the scheme by hiring consultants, who acted as the conduits to pay the bribes to government officials.[133] In addition to the US prosecution, Alstom was investigated for alleged corruption in the UK, France, Switzerland, and Brazil. The UK Serious Fraud Office charged Alstom's UK unit in 2014 over alleged corruption related to transportation projects in India, Poland and Tunisia.[134]

FCPA settlements indicate significant corrupt behaviour on the part of companies based in developed countries, and yet these are the same countries which multiple Transparency International instruments have rated as non-corrupt. The rhetoric of corruption which characterises these countries as non-corrupt therefore appears to be deep-seated and resistant to alternative sources of data.

D Why Law Schools are Not Teaching about Corruption: Professorial Attitudes in Developing Economies

The foregoing discussion of rhetoric suggests that, in countries perceived as less corrupt, there is no pressing need to educate students about the subject. As yet there is insufficient information about how the rhetoric of corruption functions in legal academia, but it appears relevant to the question of why corruption is not in the law curriculum.

In countries with higher levels of perceived corruption, there are suggestions that a different rhetoric is at play which inhibits appetites for instruction in legal ethics and corruption in its own way. The Public Interest Law Network, or PILnet, conducted a study in 2014 on attitudes towards the quality of legal education in Russia.[135] The survey noted that law schools offer very little in the way of professional ethics so far, despite the fact that instructors recognise

133 Gina Chon, 'Alstom to pay record $772m fine for bribery' (*Financial Times*, 22 December 2014) <www.ft.com/content/0a8989c6-8934-11e4-9b7f-00144feabdc0> accessed 28 May 2017.

134 Jeremy Hodges, 'Ex-Alstom Ethics Official Is Charged in UK Corruption Probe' (*Bloomberg Business*, 12 May 2015).

135 Olga Shepeleva and Asmik Novikova, 'The Quality of Legal Education in Russia: Stereotypes and Real Problems' (PILNet, January 2014) <www.pilnet.org/dmdocuments/The%20Quality%20of%20Legal%20Education%20in%20Russia%20%28English%20Translation%29.pdf> accessed 26 May 2017.

their responsibility to train ethical lawyers.[136] Ethics courses in law school are taught in a sequence of philosophical disciplines and are devoted to abstract examination of morality.[137] Professional ethics are touched upon in courses on specific areas of the law, but there is no detailed consideration of professional rules of conduct.[138]

The survey, conducted via informal interviews with representatives from law schools, employers, and students, did not ask specifically about corruption, but respondents raised the issue themselves in response to questions about legal education. The survey queried the lack of practical training for law students and whether law schools should better prepare students for legal practice. Among a number of obstacles to practical training, respondents noted the common perception that the Russian judicial system is flawed and corrupt. Instructors could not ignore corrupt practices and did not wish to support the reproduction of such practices, leading one respondent to wonder: 'if we're going to prepare an effective lawyer, then we should introduce a new foundations course – giving and receiving bribes.'[139] This understanding has led some in the academic community to reject the very notion that a law school should prepare students for the actual practice of law, opting instead to help students understand what the ideal is.[140] Instructors understood that students could encounter serious pressure from employers and other figures to commit improper acts, but they noted that they might not have the answers on how to stand up to these pressures.[141] In this rhetorical context, there does not appear to be any space in which to conceive how to conduct practical discussions in the classroom.

It is difficult not to sympathize with these views, which are reasonable responses to a highly problematic environment. The ACAD project now contains material that jurisdictions facing these challenges might find helpful, such as 'teaching ethics in highly corrupt societies',[142] and descriptions of different teaching approaches.[143] Individual law schools and professors would need to

136 Ibid 21.

137 Ibid 21–22.

138 Ibid 22.

139 Ibid 14–15.

140 Ibid 15.

141 Ibid 22.

142 Howard Whitton, 'Teaching ethics in highly corrupt societies: Concerns and opportunities' (U4Brief, Bergen: Chr. Michelsen Institute 2009) <www.track.unodc.org/Academia/Pages/Topics/Introduction.aspx> accessed 30 May 2017.

143 See Besa Arifi, 'Corruption and the Environment – The Case of "Jugohrom Feroalloys" in Tetovo, macedonia' 20; Prakas C Bhattarai and Mahesh Nath Parajuli, 'Seminar Methods

develop ACAD material to suit their jurisdictions, but for the time being, that development is also being supported by regional ACAD conferences, such as the one held in Moscow in 2015.[144] The anti-corruption legal clinics in Indonesian law faculties discussed above offer another potential response to the frustration expressed in the research on Russian legal education. However, law schools in all countries will likely have to reckon with how the rhetoric of corruption in their jurisdiction affects whether the subject is in the law curriculum at all, and the challenges to be faced if it is included.

E Conclusion

The issue of corruption has received much international attention, but has yet to acquire much traction in law school curricula. This chapter has reviewed the reasons why students in a law degree should be taught about corruption, but even if change is desired, major issues remain. For some jurisdictions, inserting a legal ethics course in the law degree, which could serve as a platform for teaching about corruption, raises concerns. For example, a US law teacher in Japan noted that

> For many of my colleagues, a frightening legacy remains from the educational indoctrination methods used in Imperial Japan, particularly those relating to the 1890 Imperial Rescript on Education. For others, there appears to be a reluctance to allow faculty members to paternalistically impose their own moral views on university students who have already completed their development into adults.[145]

There is a potential for mindless adoption of an anti-corruption ethic,[146] which would be antithetical to the critical thinking universities try to bring about. The subject matter of corruption also raises political sensitivities and the thicket of cultural differences. In Asia, the issue of *guanxi* – the importance and use of

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of Delivering Anti-Corruption Knowledge in Classroom: A Nepalese Experience' 112; Mirela P Bogdani, 'Challenges of Designing Anticorruption Course: In-Between Public & Criminal Law' 174, in United Nations Office on Drugs and Crime (n 78).

144 United nations office on Drugs and Crime (n 78).

145 Levin (n 19).

146 For the opposite view, see Stephenson (n 108).

personal relationships in deals and dispute resolution – complicates discussions of corruption.[147]

On the other hand, if any institution is suited to challenging established rhetoric and suggesting potential solutions, it is the university. When law students become lawyers, they will be required to participate in systems of internal control that are supposed to guard against corruption and related issues, and they are entitled to frank discussions regarding the dimensions of the problem and how to think about it. As the site of the law degree, the university is also attuned to the challenges posed in its jurisdiction. Authors Wang and Young argue in Chapter 2 that beyond generally accepted cultural differences, neurological differences set Asia apart from other jurisdictions.[148] To the extent that jurisdictions in Asia do pose particular issues, law faculties here should rise to the task, because generic teaching materials do not necessarily address their challenges, and because no one understands the context better than they do. As Chesterman argues in Chapter 1, Asian law schools are in a strong position to innovate.[149] Awareness of the role that corruption plays in all jurisdictions should encourage that innovation, and at a minimum it should prompt needed conversations[150] in the course of the law degree about what is needed to address this complex problem in different environments.

147 See Leland Bento, 'From Socialist Ethics to Legal Ethics: Legal Ethics, Professional Conduct, and the Chinese Legal Profession' (2011) 28 UCLA Pacific Basin Law Journal 210, 231–232; Alan Smart and Carolyn L Hsu, 'Corruption or Social Capital? Tact and the Performance of Guanxi in Market Socialist China' in Monique Nuijten and Gerhard Anders (eds), *Corruption and the Secret of Law: a Legal Anthropological Perspective* (Ashgate 2007) 167–189; Judith Irwin, 'Doing Business in China: An Overview of Ethical Aspects' (Institute of Business Ethics, Occasional Paper 6, July 2012) <www.ibe.org.uk/userfiles/chinaop.pdf> accessed 26 May 2017; see also Chris Provis, 'Guanxi, Relationships and Ethícs' (2004) 6 Australian Journal of Professional and Applied Ethics 47–57, which suggests that *guanxi* should not only be understood as an Asian phenomenon.

148 See Chapter 2, at 29.

149 See Chapter 1, at 16.

150 White (n 110) 113.

CHAPTER 5

Teaching Comparative Law in Singapore: Global and Local Challenges

Andrew Harding and Maartje de Visser

A Introduction

In the 21st century it has become impossible for law schools across the globe to ignore two important, and interrelated, contemporary trends in the law. The first is that law no longer necessarily stops, as it used to, at national borders: many countries contemplate, for example, the extra-territorial application of their regimes governing areas such as competition, corruption or the environment. The second is that legal practice is becoming increasingly globalised as a result of a growing incidence of cross-border transactions, capital flows and migration. It is clear that an overwhelming majority of law schools have been compelled to re-examine their curriculum in light of the new and tight embrace between law and global processes, with a view to preparing their graduates for a world of law that looks increasingly and radically different from the one in which most of their teachers were themselves educated.

In the case of Singapore, this logic of legal globalisation is even more compelling than it might be elsewhere. As a small city-state of less than six million people with no natural resources, and a developed, highly sophisticated, service-driven economy, Singapore is already highly integrated with the rest of Asia and the global economy. It has extensive economic, cultural, and even familial links to most of the surrounding ASEAN countries (especially Malaysia), which themselves are integrating rapidly, and farther afield to China, India, North-East Asia, and other parts of the world. This state of affairs reflects, to a considerable extent, a deliberate policy choice: Singapore has the ambition to be – and already is in many ways – a legal hub for Asia, with expanding arbitration work,[1] and now an international commercial court populated by international judges drawn from foreign common and civil law

1 Singapore International Commercial Court Committee, *Report of the Singapore International Commercial Court Committee* (2013) para 6 <www.mlaw.gov.sg/content/dam/minlaw/corp/News/Annex%20A%20-%20SICC%20Committee%20Report.pdf> accessed 6 May 2017: Singapore is considered among the world's preferred sites for arbitration.

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jurisdictions.[2] Singapore is also served by a large and expanding, but also internationalising, legal profession. Its major law firms already have a string of offices around the Asian region and conversely, many foreign firms have a local presence following the liberalisation of the legal sector from the early 2000s onwards.[3] As the Chief Justice of Singapore has stated:

> [T]he increasingly multi-jurisdictional nature of legal practice makes dialogue amongst stakeholders in the regional and even the global sphere *indispensable* … operating in jurisdictional silos [is] unworkable for the modern commercial lawyer and for that matter for the judiciaries of today[4]

Both of Singapore's law schools – the National University of Singapore (NUS) and the Singapore Management University (SMU)[5] – have accordingly invested effort in ensuring that their graduates are adequately prepared for this new legal reality. They seek to do so, amongst other things, through cultivating an awareness of the operation of other legal systems in the region and beyond by requiring their undergraduate students to take a foundational course in comparative law. It is this educational strategy that we investigate and report on in this chapter, based on our experience as faculty members responsible, along with others,[6] for delivering this part of the LL.B curriculum. In preparing the ground for this analysis Professor Harding visited Dr de Visser's class at SMU to discuss Asian constitutionalism, while Dr de Visser visited Professor Harding's class at NUS to discuss the fundamental features of the civil law system. Each

2 Singapore International Commercial Court, 'Establishment of the SICC' <www.sicc.gov.sg/About.aspx?id=21> accessed 7 May 2017; Constitution of the Republic of Singapore, Art 95(4)(c).

3 For an overview with reference to relevant primary materials see G Low, 'A Globalised Legal Profession' in Gary Chan and Jack Lee (eds), *The Legal System of Singapore – Institutions, Principles and Practices* (Lexis Nexis 2015) 201–211.

4 Sundaresh Menon, 'Transnational Commercial Law: Realities, Challenges and a Call for Meaningful Convergence' [2013] Singapore Journal of Legal Studies 231 (emphasis in original).

5 These are currently the only two law schools offering a Singapore LL.B. degree, with annual undergraduate intakes of about 240 and 150 students respectively. A third law school is in the process of being set up, in line with the recommendation to that effect in the report by the 4th Committee on the Supply of Lawyers; Ministry of Law, 'Steering Committee for Singapore's Third Law School' (press release, 27 November 2013).

6 Teaching of core material in Singapore's law schools is largely done via 'team teaching', in which each professor teaches all classes (around 36 contact hours) for one (or more) section(s) comprising 40 to 50 students.

of us was able to familiarise him- or herself with the relevant issues covered, as well as the style and feel of the class; the content of these two courses are quite similar, some differences in emphasis and material notwithstanding.[7]

Our analysis in this chapter is informed by two questions that reflect the principal theme of this volume. First, to what extent is emulation of the conventional, 'Western' approach to teaching comparative law appropriate in Asian legal education? Second, and relatedly, how should Asia's law schools go about ensuring that such teaching is reflective of, and responsive to, the region's legal idiosyncrasies? For the reasons set out earlier, together with its relatively long history of comparative law teaching, Singapore lends itself well to being used as a case study to address these complex issues. Yet, the reader should not expect to find a prescriptive list of best practices or startling successes in what follows. Our intentions are more modest: in charting Singapore's experience, we seek to draw attention to pertinent challenges that Asian teachers of comparative law will need to confront, and offer some strategies that might be adopted in response, in the hope of contributing to a region-wide – if not global – process of comparing notes about the nature, purposes and methods of teaching comparative law.

B Evolution of Comparative Law Teaching in Singapore

We begin with an historical narrative to expose the major trends that have informed the design of foundational comparative law courses in Singapore from their introduction in the mid-1980s to the present day.

1 *Instrumentalism: From Working with Foreign Law to Competing In the Global 'Law Market'*[8]

We observe that there are, broadly speaking, two types of rationale for teaching comparative law. The first is that comparative law enlivens students' appreciation of the fact that for a given real-world problem, there may be

7 This is no coincidence: as the Committee to Develop the Singapore Legal Sector notes, 'With the advent of the second law school, efforts should be made to ensure that the content of law courses offered by both law schools have a common core.' See *Report of the Committee to Develop the Singapore Legal Sector* (September 2007), para 2.50 <www.mlaw.gov.sg/content/dam/minlaw/corp/assets/documents/linkclicke1d7.pdf> accessed 6 May 2017. Oversight in this regard, and the implementation of recommendations related to legal education, is exercised by the Singapore Institute of Legal Education.

8 Cf L Ribstein and E O'Hara, *The Law Market* (OUP 2009).

different legal solutions. This approach not only creates flexibility in dealing with complex socio-economic problems where the local solution is not automatically assumed to be the best; it also enables the student to understand his or her own legal system at a more profound level. Here nothing is simply 'given'. The other rationale is that knowledge and appreciation of other legal systems, and the skills to procure such information, are simply important in view of the demand of the legal profession for foreign law in the course of litigation or law reform. While Jaako Husa in a challenging article on teaching comparative law[9] favours the pedagogical rationale at the expense of the practical rationale, we argue that in Asia the latter is at least as important as the former, and certainly Singapore has been driving resources and new designs in that direction.

Indeed, the very decision to introduce comparative law teaching in the Singapore law curriculum was justified with reference to the needs of the legal profession. We should note that this sensitivity of undergraduate programs to the expectations of the legal complex and the public service is by no means unique to courses of this nature or to that jurisdiction, as the contributions to this volume clearly indicate.[10] For the first decade-and-a-half following its establishment, NUS' curriculum was devoted exclusively to the study of the national legal system and one would search in vain for a course offered that had the word 'comparative' in its title. The impetus to change this state of affairs came in the form of a 1981 report on the NUS law school and the direction of its curriculum.[11] Its authors noted that:

> Lawyers are also finding it increasingly important to know about the legal systems and laws of the countries their clients have to deal with. In particular, we have in mind the legal systems of the other Asean countries (except Malaysia), Japan and the continental European countries who have a different legal tradition from ours, namely, the 'civil law' tradition. Since our lawyers have largely been trained in the 'common law' tradition, they should also acquire some working knowledge of the 'civil law' legal systems.[12]

9 J Husa, 'Turning the Curriculum Upside Down: Comparative Law as an Educational Tool for Constructing Pluralistic Legal Mind' (2009) 10 German Law Journal 913.

10 Here we leave aside the more normative question of the demands that legal practice should be able to impose on legal education, and the legitimacy or otherwise of requiring law schools to bear (part of) the costs of vocational training of future legal professionals.

11 S Jayakumar and Chin Tet Yung, *Report on the Development of the Faculty of Law – National University of Singapore* (National University of Singapore 1981).

12 Ibid para 8.

This excerpt clearly shows the principal rationale for exposing Singapore students to other legal systems: this was deemed necessary – already 35 years ago – to meet the demands for legal advice on the part of cross-border business ventures. This practice-oriented thinking has remained a constant theme, not least due to successive government reports that reprise the needs of the legal fraternity and the role of legal education in addressing these areas of legal knowledge.[13] Thus, when the government in 2006 decided that the time was ripe for a second law school[14] and SMU in response presented its curriculum proposal, there was a consensus among all those involved that a comparative law course ought to be an integral part of the LLB program, so that the new law school at SMU might meet its goal of producing graduates who are 'able to think across borders'[15] and work in Singapore as well as in the region. Similarly, a noted local legal practitioner, Michael Hwang SC, emphasised the professional relevance of studying other legal systems in his contribution to the 2013 NUS law curriculum review:

> [A]ny lawyer wanting to work in a major law firm with exposure to international transactions will inevitably come across transactions (especially in the business context) with [Singapore's] major trading partners like Indonesia, China, Thailand, Vietnam, Taiwan, Korea and Japan (and in due time, other emerging Asian nations like Mongolia and Laos) all of which have civil law traditions (and not forgetting the Philippines, which has a mixture of legal traditions). There is therefore certainly enough opportunity for Singapore lawyers to come across transactions and disputes where the governing law will be one of these national laws[16]

13 See eg the Report of the Committee to Develop the Singapore Legal Sector (n 7) (also known as the VK Rajah Report after the name of its Chair) and the reports by successive committees on the supply of lawyers.

14 The impetus for the establishment of the country's second law school was the Report by the 3rd Committee on the Supply of Lawyers in 2006, which justified this move with reference to the expected demand for legal services and the beneficial effects that institutional competition would have on the quality and diversity of the local LL.B. degree. See eg Ministry of Law Singapore, 'Government Accepts Key Recommendations of the Third Committee on the Supply of Lawyers' (press release, 17 August 2006) <www.mlaw.gov.sg/news/press-releases/government-accepts-key-recommendations-of-the-third-committee-on-the-supply-of-lawyers-and-.html> accessed 6 May 2017.

15 Singapore Management University, 'Proposed Curriculum of School of Law' of 15 November 2006, para 2.1 (copy on file with the authors).

16 Statement by Michael Hwang in response to the 2013 NUS Law School Curriculum Review (copy on file with the authors and quoted with Mr Hwang's and NUS Faculty of Law's kind permission).

Nonetheless, as the demands and expectations of the legal complex have shifted, so too has the rationale for comparative law teaching. The passages just mentioned emphasise training students in foreign legal systems so that they will be able to discharge their professional responsibilities to their clients when the latter engage in dealings with firms located in, or issues arising in relation to, other jurisdictions. This outward-looking aspect is today complemented by a more introspective stance: knowledge in comparative law is also seen as beneficial for the development of the local legal system. With Singapore law having come into its own,[17] the government has begun to actively promote the Singapore legal system as the natural 'partner for legal solutions in Asia', as the dedicated website puts it.[18] Competing successfully in the international market for laws requires *inter alia* regular adaptation of legal doctrines and institutions to suit commercial demands, and the same website touts Singapore law as '[continuing] to absorb and modify the common law as well as best practices from other mature legal systems'. It should be clear that the identification of legal approaches employed elsewhere that would warrant transplantation and adaptation to the domestic sphere necessitates a comparative exercise between the home legal system and that of the prospective donor.

Accordingly, at present, foreign systems are not only studied for their own sake at NUS and SMU; these also function as a lens to help students uncover the premises of legal rules and think creatively about domestic legal problems. At SMU, this has led one of the authors to require students to write a comparative essay on a topical legal issue. To direct attention to the role that comparative law can play in fashioning arguments to support case briefs before the Singapore courts, students were *inter alia* asked to consider how two high-profile local judgments – dealing respectively with a challenge to the validity of the Penal Code's Section 377a[19] and a claim for damages for wrongful birth – would have been decided under the law of at least two other jurisdictions.[20] Other examples were framed to mirror topics that local agencies tasked with law

17 There have been conscious and concerted efforts to develop an 'autochtonous' legal system, on which see eg Andrew Phang, 'Of Generality and Specificity – A Suggested Approach Toward the Development of an Autochtonous Singapore Legal System' (1989) Singapore Academy of Law Journal 68; TM Yeo & C Bull, 'Autochthony and Authority in the Law of Obligations' in HT Chao and others (eds), *The Law in His Hands: A Tribute to Chief Justice Chan Sek Keong* (Singapore Academy Publishing 2012).

18 Singapore Academy of Law, 'SingaporeLaw.sg' <www.singaporelaw.sg/sglaw/> accessed 6 May 2017.

19 *Tan Eng Hong v Attorney General* [2013] SGHC 199. See also the later ruling by the Singapore Court of Appeal in *Lim Meng Suang and another v Attorney General* [2014] SGCA 53.

20 *ACB v Thomson Medical and Others* [2014] SGHC 36. At the time of writing, the case is on appeal.

reform may have occasion to consider, such as the need for an Ombudsman and revisions to the framework governing parental leave. In a parallel process at NUS, students have discussed comparatively the 'Confucianisation of law' with reference to Singapore's Maintenance of Parents Act 1995[21] and other regional examples pertaining to parent-child relationships.

2 *From South East* England *To South East* Asia

Criticism that the NUS law school behaved as if though it were in South East England rather than South East Asia would not have been too wide of the mark some 20 years ago. The principal foreign jurisdiction studied was England, which, as the country's former colonial master, had left a strong imprint on the origins and contents of Singapore's legal system.[22] By way of example, common law subjects such as contract and tort were taught via a combination of English and local case law.[23] Admittedly, some attention was devoted to regional common law jurisdictions – notably India and Malaysia in the field of public law – based on the logic that in this domain a number of the relevant domestic rules were received from those countries, often pre-independence. In a similar vein, the 1981 report that foreshadowed the introduction of comparative law teaching envisaged room for the study of the civil law tradition – a topic that will be revisited later – and explicitly pointed to the merits of studying *European* continental systems in this regard, following the then-NUS Vice-Chancellor's request that the authors of the report undertake study missions to France and Germany. This, in turn, meant that the NUS comparative law course in its original incarnation was predicated on an examination of 'the European Economic Community (EEC) countries' to uncover the methods and structures of civil law systems.[24] Asian legal systems, including those of fellow ASEAN states, did not otherwise usually feature in the curriculum. Relatedly,

21 Maintenance of Parents Act, Act 35 of 1995 (1996) (Sing.).

22 G Bell, 'The Singapore Legal System in Context – Whither the Concept of a National Legal System', in Kevin YL Tan (ed), The Singapore Legal System (2nd ed, Singapore University Press 1999).

23 'Local' meant Malaysian as well as Singaporean cases (Singapore was part of Malaysia from 1963–5 and shared many legal facets and judicial traditions with Malaysia). This resonance has obviously become less pronounced as the moment of separation – 9 August 1965 – further recedes in time.

24 To be fair, passing reference was also made to the Japanese legal system and those of Indonesia and the Philippines, although none of these featured prominently in the content actually studied.

Islamic law was not taught despite the presence of local *shari'a* courts in charge of applying Islamic law as personal law for Muslims.[25]

Today, the comparative courses at NUS and SMU are firmly Asia-centric at their core, in due recognition of the country's geographic location and the growing practical relevance of familiarity with neighbouring jurisdictions for new entrants to the Singapore legal profession. The 2006 SMU curriculum proposal declared the chief objective of Comparative Legal Systems (CLS) to be making students 'conversant with the legal traditions and cultures within Asia, especially [those] of Southeast Asia, India and China', and this remains the outlook today. At NUS, the decision was taken in 2013 to revise the law curriculum, *inter alia* to enhance students' exposure to other Asian legal systems, especially those belonging to the civil law tradition, over the course of their legal studies. As part of this exercise, its basic comparative law course was rebranded from 'Comparative Legal Traditions' to 'Legal Systems of Asia' (LSA). The significance of this change must primarily be seen in the explicit reference to 'Asia' in its title and the signalling function this may serve for (prospective) students: content-wise, the course as refashioned simply places even greater emphasis than before on the reception of the civil law tradition in the region.

In keeping with the 'Asianisation' of comparative law teaching, we are of the view that a conscious and continuous effort should be made to draw on the law of neighbouring jurisdictions whenever possible in selecting examples and case studies for class discussion. For instance, NUS students are introduced to the comparative law evergreen of the legal transplant by discussing how the English doctrine of undue influence in family guarantees in the law of contract has played out in the local context,[26] while the notion of legal pluralism is taught at SMU by examining how Indonesia, Malaysia, India and Japan have sought to arrange State-religion relationships.[27]

To conclude this narrative of the evolution of the Singapore approach to the teaching of comparative law, we should finally note that when NUS introduced its Comparative Legal Traditions course on the heels of the 1981 report, it was offered as only one of a total of 18 electives. It is a testament to the value

25 As per the Administration of Muslim Law Act, Act No. 27 of 1966, § 39, 145 (2010) (Sing.); see also Ahmad Nizam bin Abbas, 'The Islamic Legal system in Singapore' (2012) 21 Pacific Rim Law and Policy Journal 163.

26 M Chen, 'Legal Transplant and Undue Influence: Lost in Translation or A Working Misunderstanding?' (2013) 62 Int'l Comp L Q 1.

27 The chapter on religion in Wen-Chen Chang and others (eds), *Constitutionalism in Asia* (Hart Publishing 2014) offers an accessible introduction to the salient issues.

attributed to the study of foreign legal systems that both the NUS and SMU courses are today part of the core curriculum[28] and hence mandatory for all law students – this despite a large expansion in the number of available elective courses.

C Some Comments on Context

We have seen that comparative law teaching in Singapore has become more attuned to the country's regional setting over the course of the years, and there is every reason to expect that other Asian law schools will follow suit with a comparative component when deciding on the objectives and design of their courses. This, we argue, requires careful engagement with at least three interrelated characteristics of the Asian region that are not shared, or at least not shared to the same degree, by the legal systems as they operate in Europe and North America.

To start with, the degree and nature of integration in the region where students are educated and prepared to enter practice matters, not least because one of the aims traditionally envisaged for comparative law is as an instrument for legal convergence.[29] A desire to recreate the famous *ius commune* seems to exert a powerful influence over integration endeavours in Europe, with a concomitant central role for comparative law as a methodological tool for legal development. Thus, in fashioning proposals for new EU legislative instruments, the Commission regularly relies on comparative surveys of the laws in place in the various Member States; the Treaties exhort the Court of Justice to devise a regime for the EU's non-contractual liability 'in accordance with the general principles common to the laws of the Member States',[30] and academics in the fields of private law have been active in conducting projects looking for 'common cores'.[31] In addition, the choice of the principle of mutual recognition in lieu of full harmonisation in a number of policy areas – such as that

28 According to the 2007 VK Rajah Report (n 7) at p. 11, para 2.32: 'Subjects should be considered "core" they equip the student with fundamental legal precepts and knowledge that allow the student to progress on to other more specialist subject areas.'

29 Indeed, participants at the first International Congress of Comparative Law, organised on the sidelines of the Paris World Exposition in 1900, emphasised the role of comparative law in preparing 'a common law for the civilised world'.

30 Treaty on the Functioning of the European Union, art 340.

31 See notably M Bussani and U Mattei, 'The Common Core Approach to the European Private Law' (1997) 3 Columbia Journal of European Law 339; 'The Common Core of European Private Law' <www.common-core.org> accessed 7 May 2017.

of justice, freedom and security – means that national enforcement agencies and courts in the EU are increasingly expected to be knowledgeable about the legal systems of other Member States.[32] Given the often symbiotic relationship between law and the legal profession, this reality will in turn impact on the manner in which comparative legal education in Europe is approached. The situation is currently very different in Asia. Countries in that region do not have a shared legal heritage that they can harken back to, and those virtues comparative law professors may otherwise have sought to extoll in class. While there are concerted and intensifying efforts to work towards legal convergence, notably in the commercial domain, these are very much a project for the future rather than an established fact. At the time of this writing there is no evidence of a systematic use of comparative research-based drafting of policy measures, calling for the involvement of academics who specialise in, for instance, comparative contract, tort or property law, and who would in turn be eager to share with their students the experience accumulated as a result of participating in such projects. Similarly, with the ASEAN Economic Community and other transnational trading deals such as the Trans-Pacific Partnership still in their infancy, judges and other legal officers do not face the same sense of urgency to be intimately acquainted with the policies and rules in place in different jurisdictions and hence engage in some form of 'comparative law in practice' on a regular, if not daily, basis.

This brings us to a further consideration: the salience of the common-civil law divide. In Europe, this conventional mainstay of comparative law can be presented as a distinction of declining practical relevance, as the historical differences between the two systems are being gradually ironed out via EU legal instruments and authoritative judicial pronouncements on their correct interpretation and application in all EU member states. Here too, the Asian dynamic is different. The discourse around regionalisation in Asia has emphasised the contemporary *importance, not the marginality* of the common-law/civil-law dichotomy.[33] As Sundaresh Menon has put it, 'While it is possible to speak in terms of European law, it is difficult to speak in terms of an "Asia-Pacific" or "Asian" law. Even [ASEAN] … an established regional body, cannot claim a uniform commercial law. There is as yet no "Southeast Asian" law,

32 See eg Treaty on the Functioning of the European Union, arts 67(3), 67(4), 81(1), 82(1).

33 The balance between civil-law and common-law jurisdictions is also more even in Asia than in Europe, where the number of civil law countries far outweighs the number of common law states.

which perhaps is unsurprising given the lack of common colonial roots and hence the absence of a common legal tradition'.[34]

Paradoxically, one might say, in Asia – with the lack of a natural fit for these two major world systems of law as well as its cultural diversity – the civil-common law divide is regarded as far more significant than in Europe, due to the combination of the state of integration projects and the more even distribution of the two traditions among Asian countries as a result of historical incidents of colonisation. The civil-common law divide was accordingly the main area covered in the NUS course for a number of years, and the SMU version for its part was also organised around this dichotomy when it first ran. The need to keep devoting adequate attention to the civilian tradition has been underscored by Michael Hwang, who continued his observations on the commercial realities that fresh graduate will face as follows:

> Taking my own practice area of international arbitration, cases heard in the SIAC regularly involve the governing laws of China and Indonesia, with Vietnam becoming more popular … We are also not far from the Middle East, with which we are rapidly developing trade and economic relations, and about half of the Gulf countries have civil law traditions as well. Indeed, civil law traditions have become so prevalent in my practice that I am actively taking steps to improve my knowledge of the basic principles of civil law, and I would urge your [NUS] students to undertake that same training both for academic reasons … as well as for practical reasons of equipping them to face the requirements of modern legal practice in Singapore.[35]

At the same time, in teaching the divide, account must be taken of the multiple sources and influences that have shaped Asian legal systems: China and Vietnam, for instance, are informed by socialism, Confucianism, an eclectic policy towards legal transplants, as well as the civil law tradition. This makes the isolation of discussion of the civil law – important as this legal tradition and its concepts are in most private law matters – difficult to achieve when one aims to present an accurate overview of the region's legal systems. In other words, the relative 'messiness' and 'legal melting pot' character of a great many South East Asian systems means that it would be misconceived to pretend during comparative law teaching that a student truly grasps their internal logic if

34 Menon (n 4) 244.

35 Hwang (n 16).

he or she can 'pigeon-hole' Asian countries as belonging to either the civil law or the common law tradition.

In fact – and this is the final contextual feature – comparative law teaching in Asia must confront the difficult question as to the significance and perhaps even the meaning of 'law' in that region, with its 'nomic din'.[36] The challenge here is the very obvious prevalence of a number of pluralisms. As for religious and 'classical' legal pluralism, we note the pervasive co-existence of State law with customary and religious norms that are perceived by some parts of the local communities as amounting to 'law'. In this regard, one can point to the continued practical relevance of *adat* law in Indonesia[37] or the exclusive jurisdiction that Malaysia's *Syariah* courts exercise over Muslims in the personal law domain.[38] Next, Asia exhibits economic pluralism: the region comprises an amalgamation of developed, middle-income, and developing countries. This brings with it an element of diversity that arguably shapes the demand for, and the context of, comparative knowledge on the part of law graduates in ways that differ from what is expected in other parts of the world where 'law and development' or 'law-and-governance' initiatives play a much smaller role, if any. Lastly, this area of the world evinces a dramatic degree of political pluralism, where one can find every type of regime: from an absolute monarchy in Brunei to military rule, as in Thailand and Myanmar; dominant party systems in Singapore, Malaysia, and Japan; stable democracies in India, Indonesia and South Korea; and one-party socialist states in North Korea, China, Laos, and Vietnam. We can again draw a parallel with the state of affairs that prevails in Europe and North America: there, only the first dimension of pluralism seems relevant, and even then, at a marginal level.

Coming to terms with Asia's reality of pluralism partly requires, we believe, expanding the breadth of foundational courses in this area to include public law themes to complement the traditional private law leanings of the common-civil law divide. On the one hand, an awareness of the manner in which constitutionalism is practiced in Southeast Asia is useful in making sense of the prospects and pitfalls for further regional economic integration. On the other hand, there are indications that developed Asian states, like Singapore or Japan, are also interested in becoming a legal donor of (aspects of) rule of law

36 Andrew Harding, 'Comparative Law and Legal Transplantation in South East Asia: Making Sense of the "Nomic Din"' in D Nelken, and J Feest (eds) *Adapting Legal Cultures* (Hart Publishing 2001).

37 For instance in the area of land law, see Daryono, 'The Transformation of Land Law in Indonesia: The Persistence of Pluralism' (2010) 5 Asian J Comp L 1.

38 Federal Constitution of Malaysia, art 121(1A).

models for countries such as Myanmar, Vietnam or China, and they typically present their frameworks as more suitable for transplantation in view of their elaboration with reference to Asian political and economic factors and ideals, in contrast to the Western version of this notion with its liberal-democratic underpinnings. Exposure to foreign public law discourses and arrangements may particularly help those graduates who enter government service, either in realising their country's ambitions as a regional provider of a wide array of legal services, or in evaluating the relative appeal of competing frameworks on offer for transplantation.

By way of example, our students are thus invited to consider Malaysia's struggle to deal with the contradiction between Westminster constitutionalism and Islamic law (at NUS) and to examine the nature of Indonesia's brand of secularism and the impact of that country's blasphemy legislation in fostering religious harmony (at SMU) – an objective that also strongly resonates in multi-religious Singapore.[39] The region's political pluralism is highlighted, *inter alia,* through a debate at NUS on the application of classic notions like the rule of law and separation of powers in societies such as China and Vietnam in the context of LSA, while the SMU course devotes time to reflections on the existence of facets of power (like the military in Myanmar or the monarchy in Thailand) alongside institutions that represent Montesquieu's three branches of government.

The region's rampant pluralism arguably also calls for inquiries that extend beyond a 'simple' comparison of positive laws and invite students to think about legal cultures, with all the methodological challenges and requirements for the background and training of teachers that such an approach entails.

To sum up this discussion, the existence of considerable variations in regional context must be duly reflected in the curriculum and methods employed during comparative law courses, to ensure that students receive knowledge and gain perspective that are genuinely horizon-extending and actually useful in tackling comparative law issues arising in the particular Asian setting.

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39 See eg the Maintenance of Religious Harmony Act, Act No 26 of 1990 (2001) (Sing.), discussed in J Rajah, 'Policing Religion: Discursive Excursions into Singapore's Maintenance of Religious Harmony Act' in P Nicholson, P (ed), *Examining Practice, Interrogating Theory: Comparative Legal Studies in Asia* (Martinis Nijhoff 2008); Thio Li-ann, 'Control, Co-optation and Co-operation: Managing Religious Harmony in Singapore's Multi-Ethnic, Quasi-Secular State' (2006) 33 Hastings Const L Q 197.

D Creating a Conducive Learning Environment

In light of what has been said about the determinants of and influences on undergraduate comparative legal education in Asia, let us now consider some of the didactic approaches that law schools may wish to employ.

1 *Fostering Debate Among Class Participants*

As Ault and Glendon have observed, while comparative law courses in the curriculum may have 'a variety of functions', a goal that seems to be shared among their teachers is to add new dimensions to the way students think about the law.[40] This is also true of the foundational courses that we have taught in Singapore for the past few years: these are conceived as having a 'perspective' character, in that we do not seek to instruct students systematically in the substantive law of particular foreign jurisdictions, except by illustrating how a legal system may respond to a given socio-economic problem. Rather, the approach taken is to explore relevant themes – both general (eg legal transplantation, legal pluralism, constitutionalism) as well as specific (eg Islamic legal traditions, Confucianism, socialist law) – and impart system-specific knowledge in the sense of cultivating an understanding of the history, philosophy, traditional institutions, and legal methods (procedures, reasoning) involved in the legal system under consideration.

We have found that in terms of pedagogical tools, the use of Socratic questioning is particularly suitable to stimulate critical thinking among students about competing legal approaches and to direct their attention to the values and beliefs that underpin both their own and foreign legal systems. To illustrate, when comparing the approaches that civil and common law systems take to tortious liability, students at SMU are quick to recognise that, pursuant to the relevant statutory and judicial authorities, it is generally easier to bring a claim for wrongful conduct in civil law jurisdictions than in those that belong to the common-law tradition, with its insistence on a duty of care that must be present before one can proceed under the quasi-general tort of negligence. They initially decry this (in their view) overly liberal approach and when asked why, proceed to marshal utilitarian arguments that range from the importance of protecting entrepreneurship from excessive liability to the enormous financial burdens that excessive litigation would bring about. When subsequently

40 H Ault and MA Glendon, 'The Importance of Comparative Law in Legal Education: United States Goals and Methods of Legal Comparison' (1975) 27 Journal of Legal Education 599, 600.

challenged to think of rationales for adopting a more generous stance on tortious liability, students are led to consider the value of societal solidarity, with its appeal to a different set of moral beliefs. They are further encouraged to reflect on the role of insurance, including the requirement imposed by some civil law jurisdictions that all residents purchase general liability insurance, in understanding how non-legal mechanisms impact on the use of the legal system. In a comparable vein, students at NUS are asked to think about the merits of studying Japanese law, and whether the Chinese experience demonstrates that rule of law reforms propel economic development. The Japanese legal experience, they discover, indicates that the civil law system as developed in Japan can be beneficial in securing social solidarity and in dispute resolution; and they come to realise that China struggles with competing approaches to the rule of law and judicial independence.

When it comes to the method of instruction, then, emulation of the West, which pioneered Socratic questioning, may offer the most solid foundation for comparative legal education in this region also. To be clear, the virtues of this method in training legally agile minds are not confined to comparative courses: in his contribution to this volume, McConnaughay and Toomey relate how students at Peking University's School of Transnational Law have similarly come to appreciate the merits of Socratic questioning in contrast to being lectured throughout their years in law school.[41] At the same time, we must bear in mind that abandoning the conventional approach practised by many Asian universities of having large-scale lectures where students are assigned a largely passive role requires a change in mind-set that is unlikely to happen overnight. What is more, while it is certainly possible to employ Socratic questioning in classes comprising dozens of students – think for instance of the poignant example set by philosopher Michael Sandel with his "Justice" seminars at Harvard University – fostering a truly inclusive dialogue is made easier as class sizes are reduced. Singapore's two law schools are fortunate to find themselves in a position where they can afford to instruct their students in relatively small groups of around 40 students, and to do so throughout the four-year LLB program for both core and elective courses, including those on comparative law.[42] Whether other law schools in the region can follow suit (assuming that the willingness to do so in principle exists) will depend in large part on resource considerations such as the student-instructor ratio and the

41 See Chapter 10.

42 There are exceptions at NUS in some cases, where the teaching teams feel that the subject is best taught in a 'lecture-tutorial' format, with labour-intensive attention to small-group tutorials of around 10 students.

availability of sufficient classrooms of the requisite size – factors that may well be beyond their exclusive control.

To the extent that the Socratic method is chosen as the preferred pedagogical tool, we suggest extending its reach beyond instructor-led discussion to also encompass student-to-student dialogues. At SMU, one of the authors has done so by designating part of each three-hour seminar as the 'peer teaching segment'. A small group of students – typically around four – is given the task of conveying a clearly defined aspect of the mandatory material to the rest of the class, using Socratic questioning. Topics that have been peer-taught include 'the effect of supervening events for contractual performance', 'the role of judges and the organisation of the judiciary in civil and common law traditions', and 'the use of, and preconditions for, public interest litigation'. This approach is decidedly resource-intensive, since extensive pre-seminar meetings have to be scheduled to discuss both the content and manner of delivery with the students responsible for the peer-teaching segment. Initial experiences have however been very positive. The students in charge of peer teaching are able to practise their skills in creating a captive audience and listening attentively to the points raised by their fellow students – qualities that should stand them in good stead for their future careers in the law. The better sessions were those combining a more explanatory and a more normative/evaluative portion, with students explicitly seeking to make sense of variations in approach and thinking between the jurisdictions covered and encouraging reflection on what insights the Singapore legal system may wish to draw from the experiences elsewhere. Several peer teaching groups also chose to structure their session as a dialogue among their members, with each acting as a fictional representative of a different (Asian) legal system in a debate on the legal techniques employed to address a common social problem. This appears to be a particularly successful strategy in instilling an appreciation for the ethos of that jurisdiction on the part of the fictional 'student-ambassador', with a knock-on effect on the perception of the merits of the legal techniques chosen by the system under consideration on the part of the audience.

At NUS, one of the authors implements a different exercise with a somewhat similar purpose, requiring around five students in each class to prepare 'response pieces' in which they engage with one or more of the prescribed readings. These 'response pieces' must be submitted before class for feedback and then presented at the start of the seminar.[43] During class, the authoring students are called upon to present their understanding of the text(s), together

43 These responses are assessed and weighted at 50% of the final grade. The other 50% is based on a take-home examination with answers submitted online within a few hours.

with any tropes for debate that they have formulated, to their peers. In so doing, they often play a central role in creating traction for discussion. For example, in 2015 one student was asked to discuss whether Myanmar is a common law system and whether it should be a common law system; his presentation led to a discussion embracing close and critical analysis of what we regard as fundamental to a common law system, and in what respects the developmental needs of a country in transition can be served by the common law. Similarly, in another class a student discussed whether socialist law is a separate legal tradition, leading to critical analysis of law in socialist states and discovery of socialist elements in changing legal systems in Vietnam and China.

2 *Selection of Course Materials*

Another issue that must be addressed is the selection of materials: what makes good reading for the Asian student of comparative law? At first blush, teachers are spoilt for choice; recent years have seen a veritable explosion in handbooks, edited volumes and journal articles on comparative law writ large, addressing everything from methodological quandaries to inquiries into the substantive law in a number of jurisdictions. A closer look reveals, however, that most of the leading publications in this field comprise writings that focus on the US and Europe. To illustrate, the *Oxford Handbook of Comparative Law*[44] in its first part purports to give an account of the evolution of comparative law in the world: of the eight chapters, five narrate the development of the discipline in European countries, a sixth describes the United States, while the chapter on "East Asia" is effectively a case study of the Japanese reception of the German Pandectist system in the area of private law. Similarly, a country report on Japanese law is the only Asian element in the *Elgar Encyclopedia of Comparative Law* (which features 19 other such reports, in addition to contributions on a host of other substantive topics)[45] and Zweigert and Kötz, in their classic *An Introduction to Comparative Law* also confine themselves to a discussion of Japanese and Chinese law.[46] One is left with the impression that the chapters on Asia in these and other texts are largely tokenistic. Moreover, comparative writings on Asia often feature the same countries – namely, Japan, India and China (occasionally supplemented by references to legal practices in South Korea, Taiwan and Singapore) – to the exclusion of large swathes of a region that has rightly been

44 M Reimann and R Zimmermann (eds), *The Oxford Handbook of Comparative Law* (OUP 2012).

45 JM Smits (ed), *Elgar Encyclopedia on Comparative Law* (2nd edn, Edward Elgar 2012).

46 K Zweigert and H Kötz, *An Introduction to Comparative Law* (Tony Weir tr, 3rd edn, OUP 1998).

characterised as "extraordinarily diverse".[47] One looks in vain for papers comparing how Indonesia, Vietnam and Thailand deal with problems in the law of contracts – like the possibility of literal enforcement or the interpretation of promises – or the operation of the tort law system in Cambodia, Malaysia and Myanmar. As for accounts that have a more methodological slant, these are frequently prepared by American or European scholars who naturally rely on examples from these parts of the world to illustrate complex notions such as legal culture or convergence.[48] This reduces the educational value of such accounts for Asian students who are not intimately familiar with say, European history or debates on the harmonisation of European private law, and does little to trigger their interest in the study of comparative law more generally.

At both NUS and SMU the strategy has been to mix literature which describes or explains Asian legal systems from the inside, written by scholars trained in the relevant system, with literature written by scholars with an external and more comparative law-oriented approach. That most of the relevant internal literature will be in a language other than English, the medium of instruction in Singapore, presents a missed opportunity if not a downright limitation. We pursue this issue below.

For now, let us make clear that while this 'eclectic' approach to the selection of materials may be largely born of necessity, we in fact consider that there are several good reasons to continue to do so, even if casebooks and textbooks that draw on examples and use primary materials from the region are more widely available. As the very aim of comparative law teaching is to expose students to a range of viewpoints and ways of thinking about the interplay between law and society, it seems preferable to prescribe readings by different authors addressing the same issue. The idea is to create an experience whereby students, when preparing for class, are already challenged to make sense of the different perspectives and think critically about which of these they prefer, and why. This, in our experience, has a positive correlation on the quality and thoughtfulness of the discussion during the actual seminar. We also believe that combining readings from various sources serves as an antidote to the tendency among students to search for the 'right' solution, which we consider anathema to the course's objective of broadening perspectives and making

47 C Saunders, 'The Impact of Internationalisation on National Constitutions' in A Chen (ed), *Constitutionalism in Asia in the Early Twenty-First Century* (Cambridge University Press 2014) 412.

48 See eg J Husa, *A New Introduction to Comparative Law* (Hart Publishing 2015); M Siems, *Comparative Law* (Cambridge University Press 2014) – although to be fair, both authors do make reference to non-Western systems on several occasions.

students more accepting of the merits of solutions adopted by other legal traditions. What is more, using one or two textbooks to structure comparative law seminars undervalues the flexibility inherent in such courses, which do not have a predetermined list of specific topics that must be addressed in contrast to classic law modules such as contract or tort law: the latter would surely be seen as incomplete if they did not feature a discussion of offer and acceptance or the regime governing vicarious liability respectively. As such, and framed in more positive terms, comparative law courses provide ample opportunity for innovation as far as content is concerned. We find ourselves adjusting the selection of materials on a yearly basis in an effort to tailor the course to what might interest students in any given year, also bearing in mind local legal issues and controversies.

On a related note, textbooks that offer a comparative examination of an area of substantive law may be out-of-date for at least some of the jurisdictions canvassed within a few years of publication. While change is a feature of all legal systems, the rapid pace and scale of legislative reform in Asia – with many countries having recently experienced or presently going through economic and political transitions[49] – make this risk a particularly real one for teachers of comparative law in this region. Therefore, placing too much faith in a handbook may mean that students are inadvertently exposed to incorrect information, and hence come away with flawed comparative findings.

In contrast, embracing a dynamic approach to the assignment of readings seems to us to be beneficial for students – for the reasons set out earlier – and teachers alike, as the latter are able to adapt a comparative law course to their particular capabilities and interests, which makes for more effective teaching and accords well with the reality in many law schools of having multiple instructors for a single course.

3 *The Personal Dimension*

More so than with other law subjects, the learning experience in a comparative law course also depends – pedagogical tools aside – on the people involved. This applies to both those in front of the classroom as well as the students. A more heterogeneous student body, in terms of socio-economic (and ideally also legal-political) background, views and experiences may impact positively on the nature and quality of debate during comparative law seminars when it comes to canvassing the respective merits of alternative models to social

49 Myanmar offers a good example in this regard. For a good introduction to that country's evolving legal system see M Crouch and T Lindsey (eds), *Law, Society and Transition in Myanmar* (Hart Publishing 2014).

problems. Reality, however, may be quite different, as it also is in Singaporean law schools. Each comparative law class at NUS and SMU comprises about 40 to 50 students, almost entirely Singapore citizens with a similar English-medium educational background, high-grade profiles in secondary school or junior college, and holding similar worldviews.[50] It is no easy feat to alleviate such a situation. It might be possible to use admission processes to bring about (more) variation in the composition of the student cohort, but this may expose Asian law schools – much like their US counterparts – to protracted debates about the desirability of affirmative action preferences and the shape that any such policy ought to take. It also invites reflection on a question raised earlier, that of the role of law schools vis-à-vis the profession and the extent to which the latter should reflect, to a greater or lesser degree, the make-up of society as a whole. While these issues clearly warrant further investigation, space constraints prevent us from doing so at this juncture. Let us instead highlight two alternative strategies that we have experience with, and that might be easier to implement. At SMU, exchange students are allowed to take compulsory undergraduate modules, including the Comparative Legal Systems course, and a growing number make use of this possibility.

Conversely, at NUS, one of the authors has invited visiting young scholars from neighbouring jurisdictions (Thailand, Vietnam and Indonesia) who are at the law school to attend his Legal Systems in Asia seminar on the civil law tradition. The students were asked to cross-examine these visitors and compare their answers with a view to uncovering the practical significance of a country subscribing to the civil law tradition: in relation to which legal issues was it important to resort to knowledge of the civil law system? How does belonging to this tradition affect law reform and the room and choice to engage in legal transplantation? How does the civil law impact on local legal culture or legal consciousness? Such exchanges can be more effective than a mere reading of textbooks and other materials, however comprehensive and well-drafted, in correcting initial – and otherwise enduring – misperceptions on the part of students trained in a common law system as to the functioning of the civil law tradition.

Turning then, briefly, to the profiles of professors teaching basic comparative courses, we observe that the experience in Singapore, as in most parts of the world, is that these do not tend to be scholars who have themselves been educated in the local universities. Indeed, none of the seven professors

50 Men generally have to complete two years of national service before commencing their university studies.

who have taught the NUS course so far are Singaporean nationals;[51] and the same is true for four of the five professors who have offered the SMU module to date.[52] All these scholars, however, share the characteristic of having accumulated substantial cross-systemic legal experience of one kind or another. A provocative question that warrants an inquiry in its own right is whether such a background is simply imperative to provide local students with an effective induction to foreign legal systems.

E Final Thoughts

While there appears to be a natural and obvious fit between the case for teaching comparative law and the phenomenon of globalisation and discourses of transnational or 'world' law, our main conclusion is that it is important for foundational comparative courses to take seriously their local (in our case: Asian) context and embed themselves within that logic and legal setting. This, amongst others, means that one should resist the temptation of effecting a simple transplant of the curricula or educational approaches that have been adopted, and work well, in Europe or North America, even while accepting that the project of deciding on the most suitable approach in the Asian region is still in its infancy. In fact, we may need to accept that definitive structures and approaches, let alone future-proof 'blueprints' for such courses, will continue to elude us. This is partly due to the very nature of comparative law subjects which – unlike, say, tax law or the sale of goods – have a self-defining subject matter. As the needs of graduates change, this too may necessitate changes to

51 Their backgrounds are as follows: British citizen trained in common law but with an LLM from NUS and expertise in Asian comparative law (PhD in law from Australia); Canadian citizen trained in the civil law and having expertise in Asian laws (LLM from the US); Canadian citizen trained in the common law and an expert in Islamic law (PhD from the UK); US citizen trained in the common law system and expert in Chinese and comparative law (degrees from US, but taught in several jurisdictions including China); Chinese citizen trained in Chinese law and expert in corporate law (PhD in law from NUS); Taiwan citizen trained in civil law (PhD from US); Vietnamese citizen trained in civil law and expert in comparative constitutional law (PhD from University of Hong Kong).

52 Their backgrounds are as follows: Dutch citizen trained in civil law, but with an LLM from Oxford and expert in comparative constitutional law (PhD in law from the Netherlands); Indian citizen trained in common law (degrees from India, the UK and the US); American citizen trained in history, economics and law with professional work experience in a civil law jurisdiction; Sri Lankan citizen, trained in common law and with some work experience in civil law jurisdictions.

the selection of topics and course materials covered.[53] Above all, the emphasis should be on cultivating the acquisition of adaptability in the process of legal thought pertaining to topical socio-economic problems, rather than knowledge about the intricacies of different legal systems which may become out of date very quickly. There are several challenges that Asian law schools may need to confront in this regard in the short to medium term.

General-perspective courses of the kind examined in this chapter cannot be the only encounter of students with foreign legal systems and other habits of thought during their undergraduate education. Rather, such courses should be viewed as offering a foundation for further study in specific, substantive areas of law, especially those which students are likely to encounter in practice, such as contract, corporate governance, foreign investment, and dispute resolution systems. This entails, then, the development of substantive comparative law courses – a process that is slowly but surely being embraced at Singapore's law schools. At NUS, a 2013 curriculum review created more opportunities for the study of other legal models that supplement the foundational comparative law course. A first-year compulsory module, 'Singapore Legal System', was replaced by a new first-semester-long module called 'Singapore Law in Context', which introduces the history of the common law and Singapore legal institutions (including Islamic law) and briefly situates Singapore's law and institutions in relation to other legal approaches, notably the civil law tradition. Further, during their third and fourth year of studies, NUS students are required to choose at least one module from a 'basket' of advanced civil law subjects.[54] In a similar vein, from 2016 onwards, upper year students at SMU must take at least one course from the school's 'Asian Studies Cluster' in an effort to boost their knowledge of laws and policies in the region.[55] Developments along these lines may require law schools to hire faculty members who are well-versed in

53 On the US experience in this regard, see U Mattei, 'Some Realism about Comparativism: Comparative Law Teaching in the Hegemonic Jurisdiction' (2002) 50 American Journal of Comparative Law 87.

54 An indicative list of modules presently offered that fall within this cluster includes: Chinese Corporate and Securities Law; Chinese Legal Tradition and Legal Chinese; Contract and Commercial Law in Civil-Law Asia; Foreign Direct Investment Law in Asia; Introduction to Indonesian Law; Japanese Corporate Law & Governance; Islamic Law; Law, Governance and Development in Asia; Law and Development in China; and others. Not all of these modules are taught every year.

55 Electives that are part of this cluster include Chinese Contract Law; Introduction to Chinese History, Culture, Economics and Law; Law and Policy of Ethnic Relations in Singapore; Foundations of ASEAN Law and Policy; and the Law Study Missions to several Asian jurisdictions.

the legal systems deemed relevant for more advanced comparative law courses.[56] The operation of a visiting professor program, where jurists from other countries are asked to teach intensive courses in their area of specialisation, can add a good deal to the available in-house capacity.

Asian law schools in general, and professors in charge of comparative courses in particular, can further benefit from a broader inquiry as to the emerging needs of the region in terms of legal development. Where, for example, do 'Asian values' and international human rights or the rule of law feature? What can individual scholarly communities contribute to these issues in educational terms? Reflections on these, and similar questions, are valuable in designing an educational experience that adequately prepares students for the comparative law queries that await them in their legal careers – be it in practice, government service or academia.

A final challenge is finding ways to create opportunities for exposure to other legal systems by a process of immersion. This conventionally takes the form of having one's own students and faculty spend some time at a foreign university, and we readily subscribe to the benefits of such a practice. In addition, law schools may wish to think about organising study missions, where students visit a range of institutions and people who shape the dynamics of the host jurisdiction over the course of a week or two. Yet another venue for immersion is offered by providing students with the opportunity of providing community services overseas. The point of such exercises, both of which are available to students at SMU, is not so much about cultivating familiarity with a foreign legal system as such, but rather creating appreciation of the societal context in which a legal system operates and, accordingly, expanding students' thinking about the role of law in different societies and the very meaning to be ascribed to 'law'.

In the same way that comparative law courses direct students' attention to other systems to gain new insights, we are convinced that for their teachers too, much may be gained from casting their eyes to how other law schools in the region engage with the challenges of teaching comparative law, notably in ensuring a sufficiently Asian 'flavour'. It is our hope that this chapter may prove to be a source of inspiration for future collaborative efforts in this regard.

56 For instance, NUS and SMU have, over the years, employed full-time faculty with knowledge of many the region's legal systems (China, India, Japan, Malaysia, Indonesia, and Taiwan, and Islamic law experts; but not including, so far, Thailand, Vietnam, Philippines, and some others.).

CHAPTER 6

International Moot Court as Equaliser: An Asian Paradigm

Chen Siyuan

A Introduction

In both civil and common law jurisdictions, participating in international moot court competitions is probably the most effective way to train a law student to critically analyse legal issues, research law or policy, draft written submissions, and make oral submissions. These fundamental skill-sets, honed over years of intense supervision, are applicable in any field of legal practice across the spectrum. As testament to this, the best mooters often go on to become key shapers of the legal landscape; in Singapore for instance, the Chief Justice, Attorney-General, Minister for Law, and most leading lawyers are all former international mooters who have attributed their successes to what they learned as mooters. Mooters are also particularly prized assets for firms engaged in cross-border work. Yet it is only in recent years that international moot court has become an activity truly integrated with school curricula and properly mentored by faculty, a reversal of previous myopic beliefs that law schools only have a role in imparting doctrine and theory but not in vocational instruction, and that universities should richly reward research but invest only perfunctorily in skills. New yet enlightened law schools in Asia have carved out a name for themselves by excelling in an arena once dominated by the same few Western schools via a multi-pronged implementation of strategic measures, elevating their students to unequivocal world-class standards in the process.

The case study here is the International Moots Programme in Singapore Management University School of Law, which was established in 2009, two years after the school's founding. In less than five years, SMU has become one of the most respected names in international moots, winning 20 of the 39 international championship finals it has reached and garnering dozens of awards for written and oral advocacy. SMU also created history by reaching the championship final of the Philip C. Jessup Moot on its international debut in 2013, a feat it repeated in 2014 while besting the likes of Harvard and Oxford. In 2015, SMU became the first ever university to reach the championship final of the Willem C. Vis and Willem C. Vis (East) Moots, winning the latter amidst a

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record field. SMU holds the world records for the most number of international moot titles won in a single academic year and the most number of international moot championship finals reached in a single academic year.[1] Further, all alumni of the programme have secured the top legal jobs in the region. SMU's programme is essentially an aggregate adoption of global best practices from the East and West, augmented by exacting faculty coordination, heavy alumni involvement, and also some innovation. This piece explains some of the 'hows' and 'whys' of the programme.

It should be noted at this juncture that the original version of this work was prepared for the symposium in Shanghai. During the symposium, it became apparent that the subject of this work was at the very intersection of the various themes and conundrums that cut across almost all of the discussions, such as: whether law schools should be imparting doctrine or teaching skills; the purpose of a legal education (given that many law graduates may not practice law and a law degree may not be required for practice); whether there are fundamentally different philosophies underlying civil and common law jurisdictions; what more can be done for students in an increasingly interconnected and competitive global economy; the appropriate language of instruction in Asia; whether certain schools are inherently disadvantaged when it comes to resources; and whether there is indeed anything unique to Asia that can be tapped upon in improving the quality of legal education. For convenience – and to retain the structural integrity of the original work – the updated version of this work will address the bulk of these points towards the end, where references to the works of fellow presenters will also be made.

B The Background to SMU's International Moots Programme

I joined SMU's School of Law in 2009, two years after it transformed from a law department to become only the second law school in Singapore. Together with a small team of like-minded individuals, I conceptualised and created the SMU International Moots Programme that same year as part of an initial five-year mooting blueprint for the school.[2] My main research areas were (and remain)

1 Chen Siyuan, 'Some Thoughts on a Record-Breaking 2014/15 Season for Singapore's International Mooters' (*Singapore Law Gazette*, August 2015) <www.lawgazette.com.sg/2015-08/1370.htm> accessed 25 April 2017; Chen Siyuan, 'More Thoughts on Another Record-Breaking Season for Singapore's International Mooters' (*Singapore Law Gazette*, June 2016) <www.lawgazette.com.sg/2016-06/1601.htm> accessed 25 April 2017.

2 For a brief overview of the programme see 'Faculty Advisor' (*Singapore Management University School of Law*) <http://law.smu.edu.sg/about/faculty-advisor> accessed 25 April 2017.

in evidence and procedure, but being a former mooter I was very much interested in teaching legal skills as well, and I wanted to do so in a highly structured and systematic manner. I also believed that world-class excellence in legal skills had to be part of the identity of a new law school, especially one in Singapore.[3]

Consider what SMU's international mooters have achieved in the competitions they have taken part in within the last three-and-a-half seasons alone:

(1) Ashurst Private Law Moot (15 teams): Finalist in 2016 (debut).[4]
(2) Asia Cup (40 teams): Finalist in 2013 and 2015, Champions in 2014.
(3) Fletcher International Insolvency Moot (14 teams): Champions in 2017.
(4) Frankfurt Investment Arbitration Moot (90 teams): Finalist in 2015 (debut) and champions in 2017.
(5) Hague Choice of Court Convention Moot (12 teams): Champions in 2014 (debut).
(6) International Criminal Court Moot (120 teams): Champions in 2015 (debut) and 2016.[5]
(7) International Maritime Law Arbitration Moot (30 teams): Quarter-finalist in 2013, Finalist in 2016.
(8) LawAsia (40 teams): Champions in 2013, 2014, and 2016, and semi-finalist in 2015.
(9) Philip C Jessup (650 teams): Finalist in 2013 and 2014 (won four of the last five national rounds).
(10) Price Media Law Moot (130 teams): Semi-finalist in 2013, quarter-finalist in 2014, finalist in 2015, champions in 2016 and 2017.[6]

3 Before SMU, there was only one law school in Singapore at the National University of Singapore. For many years it was the undisputed world leader in international moots, but that position is less certain today. The third law school that was launched in 2016 will focus on family and criminal law, and the bulk of its students will be those already working in enforcement and social services who are looking for a career change.

4 The moot has since been rebranded as the Allen & Overy Moot.

5 SMU became the first university in the history of international moots to successfully defend a title in a major international moot (one that attracts at least around a hundred participating teams) when it won back-to-back titles in 2015 and 2016; Chen 2015 and Chen 2016 (n 1). It achieved this feat again when it won back-to-back titles in the Price Moot in 2016 and 2017; 'SMU Defeats Oxford in Final, and Wins Price Media Law Moot Court Competition for the 3rd Time' (*Singapore Management University*, 14 April 2017) <www.smu.edu.sg/news/2017/04/17/smu-defeats-oxford-final-and-wins-price-media-law-moot-court-competition-3rd-time> accessed 25 April 2017.

6 SMU became the first university in this competition to win two championships, after the previous eight editions had yielded eight different winners.

(11) Red Cross International Humanitarian Law Moot (60 teams): Semi-finalist in 2013 and 2014, quarter-finalist in 2015, finalist in 2016.
(12) Willem C. Vis International Arbitration Moot (330 teams): Finalist in 2015 and 2016.[7]
(13) Willem C. Vis (East) Moot (140 teams): Champions in 2015, finalist in 2016, and semi-finalist in 2017.[8]
(14) WTO/FTA Moot (30 teams): Champions in 2015 (debut).

These achievements across the full range of moot competitions are but part of the aggregate 39 championship finals reached and almost a hundred oralist/memorial prizes won since the establishment of the International Moots Programme.[9] SMU is also the youngest ever law school to reach and/or win the aforementioned finals. It will not be fanciful to suggest that SMU's international mooters, despite hailing from a school with a limited intake and a country with a limited population,[10] are now considered to be among the very best in the world as no other law school has come close in terms of international mooting achievements in the last few years.[11] This is consistent with the wider trend of relatively new – and Asian – law schools innovating and excelling in international moots; indeed, the landscape that used to be dominated by vintage 'Western' law schools has now shifted dramatically. There is no question that the last few years have witnessed an Asian renaissance in both minor and major international moot achievements.[12] But is this something of design or coincidence; imitation or innovation?

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7 SMU also holds the tournament record of six Honourable Mentions in a single year; 'Previous Moots' (*Vis Moot*) <https://vismoot.pace.edu/site/previous-moots> accessed 25 April 2017.

8 SMU also holds the tournament record of five Honourable Mentions in a single year; 'About the Vis East Moot' (*Vis East Moot*) <www.cisgmoot.org/en-US/Content/2064> accessed 25 April 2017.

9 For links to the relevant secondary sources see 'SMU School of Law' (*Wikipedia*) <https://en.wikipedia.org/wiki/SMU_School_of_Law> accessed 25 April 2017. In terms of local competitions, SMU has also dominated, winning the majority of head-to-heads.

10 The current annual intake is 150 LLB and 30 JD students. There are around 3 million citizens in Singapore.

11 For reliable records of most major international moot competitions see 'Moot court' (*Wikipedia*) <https://en.wikipedia.org/wiki/Moot_court> accessed 30 April 2017.

12 Other examples include National Law University Delhi, which won the 2013 IP, 2013 Price, 2013 Red Cross, and 2014 ICC moots; National Law School of India University, which won the 2013 Jessup and 2015 IP moots; and Jindal Global Law School, which won the 2014 Price and 2015 Frankfurt moots. Many of these schools have innovated in some form or another, such as converting memorials into publications (for both students and the

Before proceeding further, it is necessary to first appreciate the perplexing paradox that surrounds the treatment of moot court as a legitimate activity in many law schools, whether new or established. On the one hand, it cannot seriously be disputed that excelling in international moot competitions benefits both the students and the school: the former are rigorously trained in the fundamentals of critical lawyering skills, while the latter's global standing is greatly enhanced as competition adjudicators are often leading practitioners and professors from the full gamut of jurisdictions.[13] On the other hand, it has been claimed[14] that an unnecessary emphasis on esoteric pursuits and undue reward for esoteric publications from the top-down have relegated moot court training to a peripheral, extra-curricular activity deprived of proper mentoring and adequate funding in many universities.[15] Weakening these two pillars of any international moots programme will almost certainly lead to a struggle in obtaining results – which in turn causes other problems such as student talent supply and fraternity engagement issues – but in some ways adversity has also prompted innovation on various fronts, from various quarters.

The purpose of this chapter, therefore, is to examine how the SMU International Moots Programme has managed to establish itself as a leading contender in international moots in just five years. The exponential growth of

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coach), waiving exam and assessment requirements, and leveraging decisively on emerging fields.

13 Influential practitioner publications also follow mooting developments closely; for instance, Global Arbitration Review keeps tabs and reports on the Frankfurt, Vis, and Vis East outcomes.

14 For instance, in 1992, the American Bar Association issued the MacCrate Report, which criticised law schools for focusing on impractical scholarly debates that had little relation to the practice of the law, and requested them to devote more resources to the teaching of skills and practical training instead. This was seven years after another of its reports which had criticised law schools for not teaching appellate advocacy skills. To be clear, there may of course be other reasons for an institution (especially a young one) not to devote resources to moot court training, such as there being limited resources to begin with, a lack of qualified moot court coaches, lack of student interest in the activity, and the disproportionate amount of time and money needed for close supervision. There is no necessary mutual exclusivity between research and coaching.

15 Worse, some administrations adopt the highly perverse view that the more successful a project is, the fewer resources should be given to it so that they can claim credit for investment-maximisation. The upshot is that faculty members will not be drawn into moot coaching – in fact its delaying effects against tenure are too palpable. There is yet another mode of thinking, that law school is just not the place for vocational training. This presupposes that modern lawyers still consider lawyering as a craft meant to be painstakingly imparted.

the reputation of the school's international mooters has more than kept pace with the growth in the reputation of the school's highly respectable faculty, with the latter having to depend on the incremental route of publication impact more than anything else for the sake of reputation-building. Put another way, international moot court success can be a great equaliser as regards a law school's world profile, even and especially if that law school does not have the benefit of a pre-existing brand-name brought about by historical and cultural confluences (and funding). There is simply no better objective assessment of a school's reputation, since everyone involved in the competition will be judged using the same rules and indicia. Institutions should therefore not be paralysed by the prospect of failure, or be overly wary of the resources that moot court can take up.[16] What is needed is a well thought-out plan that involves passion and student capital more than anything else.

C Get the Alumni Invested in the Purpose and Future of the Programme

For reasons that will become clear, we begin with the top rather than the bottom, the logically subsequent rather than the logically prior: moot alumni. Alumni are the lifeblood to any university's short- and long-term prosperity – administrations know this, but have always found it hard to appeal to their alumni base on an emotional level since the sales pitch is usually about one-way giving and benefits only remotely connected to the alumni. Of course, getting a school's moot alumni involved in its moot programme is not in and of itself innovative. Most international moot teams today are coached by alumni, and this is the natural consequence of things because such students are the least removed from the competitive environment and are raring to go again, albeit vicariously. However, many of the coaching roles assumed by these alumni are just drive-by in nature, with no overarching plan that binds all the different moot teams or a uniting vision that perpetuates a particular mooting culture and mind-set.

16 There is certainly no lack of good academic literature on how to design moot court curricula; see eg Darby Dickerson, 'In Re Moot Court' (2000) 29 Stetson Law Review 1217; Lewis Ringel, 'Designing a Moot Court: What to Do, What Not to Do, and Suggestions for How to Do It' (2004) 37(3) Political Science and Politics 459; Michael Vitiello, 'Teaching Oral Advocacy: Creating More Opportunities for an Essential Skill' (2015) 45 Seton Hall Law Review 1031. However, such guides tend to focus on the faculty rather than explaining how students themselves make the best moot coaches.

One simple explanation for this is geography: graduating mooters mostly prefer to work in the major cities, but their schools may not be located in or near one. But just as important a factor is that the alumni may not even feel that strongly for the school to want to go out of the way to give back, whether through guest-judging, coaching, or just making a financial contribution. This malaise can afflict institutions young or old, and if unchecked can irreparably set back the school's ambitions for a breakthrough by uncountable years, bearing in mind too that alumni have tremendous influence over their juniors. The corresponding prescription is to immediately create and keep a core of international moot alumni deeply invested in the purpose and future of the programme. Now it is true that SMU, being a law school of only a few years' history, possesses a distinct advantage that few other law schools can have with respect to a transmittable message: a young institution needs all the help it can get, and the pioneering alumni will be the principal generators of a particular narrative. But this message only has a limited temporal arc and resonance, so a more incisive message that could withstand the test of time was needed: treat the activity like a truly competitive sport – so it is not just a game, performance, or worse, just a mere experience to be "enjoyed". And what do people do in a competitive sport?

Such people desire to win, they practice and drill until they are ready to win, and most importantly they learn how to operate as a team and think beyond themselves and their own circumstances. They understand that the value of the learning is very much tied to the extent to which they progress; success and learning are neither opposing nor mutually exclusive ideals. But unlike physical sport where talent and genes are important for the highest level of success, the intellectual playing field of moots is virtually a level one – given the open-textured nature of law, and sheer industry being paramount to achieve success in it,[17] there is no stopping any given law student from being a world-class mooter as long as one possesses determination, diligence, discipline, and a willingness to listen to good advice. So how do the alumni fit in all of this? As students, they desire to create success at the institution that they pledge allegiance to – but even when they are done, they want to perpetuate the success of that institution for as long as they can, for they want to be remembered as being part of the greatest ever institution. This is what true competitors do.

So this essentially became the clarion call for SMU's mooters and moot alumni, and with the broader national subplot operating constantly in the

17 That is, its being an enterprise informed largely by rules, facts, and principles as set out in authorities. As will be seen, it is all about marshalling these elements into coherent, clear, and structured arguments.

backdrop – tiny and unheralded Singapore achieving, against all odds, economic miracles in just a few decades – the call drew many to battle: for Singapore to continue to thrive, the country needed the best young lawyers to stand up and compete for sustained global excellence. There was a national duty to be discharged and a world-class legacy to be created.[18] SMU students wanted to be the principal players in this movement, first as mooters, and later as coaches and judges (all of SMU's teams are now coached by alumni). As the international moot community in SMU grew, so too did the belief in the mission, and success was constantly redefined.

D Recruit the Mooters at an Early Stage and Help Them Plan Their Pathways

But, as mentioned, we have looked at matters in reverse chronology here: the strength of the moot alumni necessarily depends on the strength of the skills programme in the law school across all levels in the first place – that is to say, before the alumni comes the newly minted students in their first year of law school. Most respectable law schools these days would, roughly following the North American model, offer some sort of skills training at least on two fronts: a compulsory core subject, such as Legal Writing and Research in the first year,[19] and an elective subject (with sufficient credit(s)) in the upper years, covering advanced subjects and international applications such as moots, mediation, and drafting.[20] It is of utmost importance for the faculty coordinator for international moots and his coaches to scout for students with the talent, desire, and passion at an early stage. But because it is not always easy even for someone with great experience to assess the upside of a young law student (more so for LLBs than JDs), some over-inclusiveness in the approach is required. It is also important to map out permutations of these students' mooting careers so that they can, in conference with the coaches, plan their pathways at the

18 In 2014, the SMU International Moots Alumni Group was formed, which in turn created the SMU International Moots Alumni Fund; 'School of Law International Moots Alumni Fund' (*Singapore Management University*) <https://giving.smu.edu.sg/give-now/sol-international-moots-alumni-fund> accessed 25 April 2017. Alumni and well-wishers have since contributed tens of thousands of dollars in gifts, enabling even more SMU students to be sent to international moot competitions.

19 Chen Siyuan, 'Advanced Fundamentals of Oral Appellate Advocacy in a Moot Court' (2012) 30 Singapore Law Review 45.

20 Sometimes these courses are offered as multi-day workshops or clinics run by practitioners.

international level accordingly. Here are some possibilities for the various law degree programmes:

	Year 1	Year 2	Year 3	Year 4	Year 5
3-year JD	Regional moot	International moot	International moot	NA	NA
3-year JD	Local moot(s)	Local moot(s)	International moot	NA	NA
4-year LLB	Local moot(s)	Regional moot	International moot	International moot	NA
4-year LLB	Local moot(s)	Regional moot	Exchange	International moot	NA
4-year LLB	Local moot(s)	Local moot(s)	Exchange	International moot	NA
5-year double-degree	Local moot(s)	Regional moot	International moot	International moot	International moot
5-year double-degree	Local moot(s)	Local moot(s)	Exchange	International moot	International moot

Any instinctive assumption that there is "overkill" in the commitment and sacrifice required of the students – and the coaches – in this set-up must be swiftly dispelled if one is anywhere close to serious in pursuing world-class standards.[21] The international mooting scene is now radically different from previous years and demands, without exception, the best from the best. Consider the profiles of four prominent Asia-Pacific mooters in the modern era and the benchmarks they have set:

(1) Jason Chan, National University of Singapore: Asia Cup champion (2001), Philip C Jessup champion (2001), Vis champion (2002)
(2) Lucas Bastin, University of Sydney: ELSA WTO champion (2006), Red Cross champion (2007), Jessup champion (2007)
(3) Eric Ng, City University of Hong Kong: FDI participant (2011), Frankfurt participant (2011), Vis East finalist (2011), Vis participant (2011), Jessup (2012), Vis East champion (2012), Vis champion (2013)

21 It is also not unheard of for high school debaters to be targeted by university recruiters – though debating is a very different art form from mooting, it seldom hurts to have a student with mastery of certain fundamentals of public speaking.

(4) Saw Teng Sheng, Singapore Management University: International Criminal Court champion (2016), Price champion (2017)

Returning, however, to the topic of synergising early: ideally, a foundational skills course such as Legal Writing should be robust, purpose-driven, replete with teacher-student feedback opportunities, and an absolute foremost priority for the school. But one does not always have full control over this as the low teacher-to-student ratio in these courses often necessitates adjunct instructors of unpredictable quality and motivation to be hired – a problem worsened by the fact that adjuncts do not stay for long and therefore cannot truly create any continuity. Nonetheless, as long as there is some form of compulsory appellate advocacy component in these courses, some tweaking can be performed.

For instance, international moot alumni can be hired to teach such courses, or they can volunteer to evaluate some of the course components if they are not permitted to be principal instructors of the said courses. Alternatively, the best-performing students in these courses can be segued onto the local competition belt whereupon coordinator oversight can be re-asserted in the form of arranged judging panels comprising the said alumni – and in the same way that the ground level is the training ground for aspiring mooters before they advance to the regional and international competitions, this is also where budding coaches start earning their mentoring stripes and reinforcing connections with their junior communities. Yet another possibility is to get the alumni to teach relevant substantive topics such as public international law or conflicts of law. This way, the doctrinal learning curve will be more manageable when mooters approach such subject matter in their moot problems. As to the selection criteria for drafting students into teams and team configurations, insofar as the key is experience (in reading people and predicting inter-personnel dynamics) rather than specific expertise and perfect chemistry, there is a fair bit of latitude for different prioritisations here – the lynchpin remains repeat participation.

However, there is still the question of persuading the students to embark on a moot-centred law school journey – getting them to do an international moot is hardly difficult, but anything more than that will cause most of them to start peering over their shoulders and wondering about alternative law school activities such as summer school and exchange programmes. So they need a reference point, and they need to see patently tangible benefits too. For the most academically able students, the reality is that only they will be in a position to command openings in the most prestigious jobs such as court and international clerkships. They need to be reminded that without world-class

differentiations in their CVs,[22] these openings suddenly become low-chance opportunities, and for those who may have valedictory ambitions, these present an additional impulse to tap into. For the next stream of students, international moot competitions present a chance to truly hone their vocational skills to a stratospheric level – they must know with no lingering doubt that this is all they should be focusing on as far as intellectual pursuits go, and that they should not be distracted by meaningless maintenance of GPAs[23] or checklist-ticking summer stints.[24] Having usable skills is the best insurance during weak market conditions. The drive to put the school and the country on the world map then follows quite naturally for both streams of students.

E Introducing the Methodology

Once one has identified how to acquire the two most critical ingredients of an international moots programme – a core of international moot alumni being involved at various levels and having a plan when identifying talent at an early stage – the next thing to consider is the appropriate methodology in training the students and coaches. After all, if a programme has no results, the incentive to be part of it is reduced significantly. Is there one fixed way to approach moots? Of course not. But there are also many different wrong ways to approach moots. Similarly, there is no one right style of writing or speaking, but there are many wrong styles of writing and speaking. The recommended methodology for training to be adopted should, on a particular level bring out

22 They can rely on journal publications, research/teaching assistance positions, and internships to create further differentiation, but in Asia, moot court accolades resonate more. The other kind of journal involvement – being part of a law review editorial team – has not picked up in Asia.

23 To be clear, this does not mean that having good grades is not a pre-requisite for rarer openings such as clerkships. What is being referred to here is that students often are content to 'maintain' their GPA at a good but not necessarily great level. They assume, for instance, that being in the top half of the class gives them a distinct edge over those in the bottom half of the class, without realising that many other factors come into play, such as the strength of their CVs and their performance at internships.

24 Indeed, for the most highly pragmatic – especially given the medium-term oversupply of lawyers in Singapore – being ready-made for lawyering (in terms of vocational skills) can only be an advantage. Looking further down the line, students in either stream may be interested in pursuing an LLM as a form of sabbatical. To get into the top colleges, extreme proficiency in skills must surely be plus points.

the strengths commonly associated with the school or even country, and on a general level be consistent with universally compelling hallmarks of good advocacy based on a proper survey of best practices. This methodology is then implemented progressively through the three to five years of the mooters' training, beginning with a core team of experienced coaches (since there are no alumni in the formative years), and secondarily with the moot alumni when they have been trained and are qualified to coach.

A rigorous methodology also shapes the moot philosophy of the programme: does one go wide or deep, bank on form or content, defend or destroy, advocate or present, pre-empt or interact? In the first year, the focus for oral advocacy would certainly be on basic fundamentals such as road-mapping, signposting, eye contact, gesturing, pace, enunciation and variation, economy and clarity of words, issue identification, using paradigmatic structures of argument,[25] pitching of case, mixing of elements,[26] question-answering, rapport creation, bridging, internal and external consistency, case theory, and alternative submissions. As for written submissions, they cannot be neglected and indeed are important in shaping the eventual oral submissions and providing a preview of the breadth of the argument trajectory for each issue. Some basic fundamentals overlap with oral advocacy, but the main difference lies in the depth and scope of arguments, in that oral arguments tend to canvass only limited aspects of written arguments and new oral arguments may need to be developed in the course of the competition. For the present endeavour, it is the more advanced phase of the methodology that we are concerned with.[27] This advanced phase comprises the following broad categories, all of which require seasoned supervision:

Case theory architecture	– Memorial brainstorming – Issue reverse-engineering – Memorial forensics – Headings and alternatives – Narrative resonance – Dynamic anchoring and bridging

25 For instance CRuPAC or its variants, or IRAC.

26 Basic elements include positive and adverse facts, authorities, and principles.

27 As a preliminary note, it is best to implement this as early as possible so that there is no inconsistency in instruction across the years – doing so only in the second or third years will yield less certain results.

Layering and finessing	– Argumentation paradigm
	– Moving between elements
	– Reasoning by analogy and distinction
	– Running the spectrum and spotlighting
	– List mode
	– Dynamic advocacy
Knowledge management	– Problem dissection
	– FAQs and 5 + 5s
	– Outlines and optional submissions
	– Opening and closing
	– Rebuttals
	– Practice feedback
	– Abridgements
Video forensics and awareness exercises	– Practice round analyses
	– Element punctuation and counts
	– Supporting cast management
	– Best practices emulation and highlight reels
	– Reflections and scoring
	– External awareness
Pre-emptive assaults and legitimisation	– Memorial strikes
	– Weakness neutralisation
	– Repeat participation
	– Validation
	– Using of questions
	– Judge profiling

Once the ins and outs of this advanced methodology are internalised by the reader, it will become apparent why a successful international moots programme requires the efforts and coordination of many. To give meat to the methodology, let us adopt the 2015 Price problem for use here.[28]

K had uploaded a video on social media that caused riots and arson attacks in his country (Lydina). K was part of a minority, non-theistic religion (Saduja)

28 In the Price Moot, a fictitious court is constituted to hear all disputes relating to the Universal Declaration of Human Rights. For the 2015 problem see 'Price Moot Case' (*Price Moot Court*) <http://pricemootcourt.socleg.ox.ac.uk/wp-content/uploads/2013/07/Price-Moot-Case-2015.pdf> accessed 25 April 2017.

that emphasises the value of reasoning. The majority religion (Parduism) in his country and region emphasises the belief in one god, strict religious rituals, and a central scripture (Zofftor). In the video, K questioned the veracity of a portion of the Zofftor by citing scientific discoveries, but he also described Parduists as 'blind and inferior', and called for them to be converted 'by any means' to Saduja. Lydina had been plagued by religious violence between the Sadujists and Parduists for a long time, and social media usage was an exacerbating factor. The video resulted in Parduists attacking Sadujists for a week, leaving hundreds injured and important religious buildings destroyed.

Previously, Lydina had signed a regional treaty that purported to protect the region's 'Malani' values (Malanis formed the majority ethnicity and most of them believed in Parduism) and prohibited blasphemy, provocative speech, and hate speech made on social media. A separate statute was passed, creating strict liability for intermediaries that posted such content. K and the website which hosted his video (DigiTube) were duly fined by the Lydinan courts (amounts not revealed), after they had given special deference to the views of the leader of Parduism who had brought the claims at the urging of the government. But did the speech here constitute hate speech under international standards,[29] or was it made pursuant to freedom of expression and religion? That was the key issue the students had to answer. Pertinent too is that before K's video was uploaded, a viral Facebook meme denigrating the Sadujists led neither to prosecution nor government sanction, and a significant sect of the Parduists were not offended by the video. For present purposes, we will only consider arguments for the applicants.

1 *Case Theory Architecture*

Almost every moot competition preparation is bifurcated into the memorial writing (usually lasting four months) and oral practice phases (usually lasting six months), in that order but with some overlap. While brainstorming over this particular moot problem, one probably has a few reflexive reactions: there appears to be some kind of discrimination being practiced against the Sadujists generally and K specifically; K's video, while potentially offensive, was also an attempt at religious discourse or even proselytism; and imposing strict liability

29 For the purposes of the Price Moot, governmental interference with human rights can only be justified if it fulfils the three-part test established by the European Court of Human Rights (and to a lesser extent the United Nations Human Rights Committee): prescription by law; pursuit of a legitimate aim; and necessity in a democratic society (which is essentially about pressing social need and proportionality).

on intermediaries for content they did not create would likely be an unjustified interference by the state, assuming DigiTube had any actionable rights in this context. The prayers for relief can sometimes be framed very broadly (as was done here), and issue identification in accordance with likely authorial intent can become tricky. Without the requisite background knowledge in this area of the law – or experience in international moots – some unproductive speculation can eventuate.

This is where an adequately invested coach can, through decades of accumulated knowledge of the subject matter, be instrumental in shaping the appropriate pitch of the argument while killing off fringe ideas – considering also that once the research and writing reach a high degree of substantiality, it can be a point of no return.[30] For instance, insofar as the court in the Price Moot is a universal one concerned with international human rights and norms, there will be limited traction in banking solely[31] on First Amendment jurisprudence to argue the nature and limits of free speech. Not only does the Supreme Court of the United States set a very high, *sui generis* threshold for permissible speech,[32] the historical and political circumstances of the United States can often be distinguished from other states.[33] By parity of reasoning, Europe's current approach of political correctness may also be seen as extreme, albeit on the other end of the continuum.[34] The better approach, therefore, would be to consider the most contemporaneous international standards[35] that have also contemplated the effects of speech made on social media – social media

30 This may depend on whether a continuous or mass style of writing is adopted.

31 Not banking on the argument is different from not knowing the argument. The coach therefore needs to remind his team that knowledge of contiguous concepts on the spectrum is crucial, as questions relating to those may be asked.

32 The seminal case that is often referred to even till this day is *Brandenburg v Ohio* 395 US 444 (1969), which held that the state may not proscribe inflammatory speech unless it is likely to incite imminent lawless action.

33 See generally Ivan Hare and James Weinstein, *Extreme Speech and Democracy* (OUP 2010).

34 For instance, the European Court of Human Rights has decided in cases such as *Pavel Ivanov v Russia* App no 35222/04 (ECtHR, 20 February 2007) and *M'Bala M'Bala v France* [2015] ECHR No 25239/13 that works that contain elements of racism but purport to be academic works, satire, or artistic performance would not be protected by the European Convention on Human Rights.

35 Specifically, the UN Rabat Plan of Action identifies a number of factors to determine what may be unprotected speech under international standards; these factors include the status of the speaker, intent of the speaker, medium of expression, and likelihood of causing harm.

being clearly an important theme in the moot problem and a possible angle for the overarching case theory. Strategically, this will pay dividends as well, as many of the Price judges are familiar with wider international human rights standards and practices.

As regards case theory, it will (again) take an experienced hand to captain the ship, to steer the discussion away from conspiracy and absolute bad faith and towards parallel developments in actual life so that the facts of the moot problem can be suitably located in a spectrum of potential illustrations.[36] More precisely, as social media content can be created by anyone, at any time, at any place, and have unknowable reach instantaneously, this has presented unprecedented problems for governments worldwide from a regulatory perspective – moreover, should states go after content creators, facilitators, or both?[37] Combine this conundrum with how religion simply does not lend itself to dispassionate discourse, and one can see how religious expression on the internet can sometimes lead to highly undesirable consequences and complex remedial measures.[38] On the other hand, the purported regulation of religious liberty in the (*de jure* or *de facto*) form of modern blasphemy and defamation of religion laws have been used by governments as a weapon for hegemony, corruption, and oppression – and given that K belongs to a minority group whose purpose is to challenge religious orthodoxy, one can appreciate how regulation can turn into discrimination.[39]

Identifying these competing forces constitutes just one of the steps to tease out a workable case theory that explains the actions of the parties to the dispute. But to give the story a legal framework, headings and sub-headings for the written submissions will need to be re-crafted over and over, and the relationships between arguments – elements, alternatives, augmentations – need to be established. A seasoned coach will give a good helicopter view of things in this respect. Separately, most competitions permit some departure from the written arguments when it comes to the oral phase, but even assuming not much variance is allowed, it is possible to conceptualise at least a workable case theory that cuts across most if not all of the issues, if the brainstorming and research are well-directed with timely feedback. With the

36 In other words, K's video is neither an ISIS-esque recruitment video nor an unprovocative sermon, and DigiTube is neither a corporate giant like YouTube nor a mere website that hosts videos with no oversight.

37 See generally UNESCO, *Countering Online Hate Speech* (UNESCO Publishing 2015).

38 See generally Arthur Hellman, William Araiza, and Thomas Baker, *First Amendment Law: Freedom of Expression & Freedom of Religion* (LexisNexis 2011).

39 See UN Human Rights Committee, General Comment No 34 (2011).

argument architecture in place, the anchor bridging points that will resolve the intuitive, submission-induced questions from the evaluators will need to be developed, and the research needed to reversely formulate the issues performed. Questions such as the following will be considered before the elements of argument are populated in writing or in speech when developing the case theory architecture:[40]

(1) How can there be discrimination when (seemingly) all religious speech is targeted, and what consequences flow from the treaty being discriminatory (either on its face or in application)?
(2) How does one balance the protection of a society's majority culture and the exercise of two fundamental freedoms by a minority group?
(3) What is the most important factor in determining provocative or hate speech?
(4) What is a state to do if social media speech cannot be regulated even though it has caused violence in the past?
(5) Why should an intermediary be allowed to profit from its users' exercise of freedoms but not be given any responsibility?
(6) To what extent are universalised standards being sought for any of the issues?
(7) How should a tribunal decide if this is a test case?
(8) Whether K's liability affects DigiTube's?

2 *Layering and Finessing*

That the elements – or layers – of argument will interact is obvious; the challenge is unpacking and marshalling them while being cognisant of the multiple permutations of sequencing and emphasis, as well as delivering them with finesse when the difficult points are engaged. Consider the argument on whether the video was an attempt at proselytism, hate speech, or something in between. The inexperienced student will simply research the law and draw the conclusions from the law (and the facts). Such a student usually cannot think in a de-compartmentalised way, and develops tunnel vision rapidly. A person with more experience will urge the team to probe deeper into the context and explore contiguous ideas. To this end, two things ought to be considered: why did K make the video, and why did Lydina sue K?

If the idea implanted in the judge's mind is that K is a rabble-rouser using his quasi-religion as an excuse to provoke the majority Sadujists, the law and

40 This list only sets out the substantive questions, and not the technical and peripheral ones.

facts will be looked at in a different light, and the bridges in and out of the hate speech argument shift. Specifically, if K is a rabble-rouser, he must have foreseen the consequences of his actions, and his conscious choice of an unprecedentedly powerful medium dovetails with that. He is not being oppressed but vindicates the government's purported aim to maintain order in the light of prior chaos, and justifies the signing of the regional treaty. DigiTube then becomes complicit in K's misdeeds and should equally be liable. But if the idea implanted in the judge's mind is that the Lydinan government is the pretender here, the arguments on discrimination and treaty invalidity – and making intermediaries an unwilling perpetuator of such discrimination – emerge in stark contrast.

But that is still operating at the rather broad level. Using the right layers to argue, arranging them in the most plausible orders/sequences to bait and knock down predictable questions, and knowing when to finesse over the weak or uncertain spots is the true litmus test for dynamic advocacy. This is how an argument on hate speech (on the part of K) might unfold and dovetail with the case theory on discrimination and the co-agent's argument on intermediary liability, presented in a rudimentary matrix format:

Submission or point to finesse →	**Question or anticipatory acknowledgement →**	**Answer or anticipatory neutralisation →**	**Bridge out**
Interference breaches freedoms of expression and religion under ICCPR	Even ICCPR recognises these freedoms are not absolute	HRC and ECtHR say interference must be justified according to the three-part test	There is no pressing social need to prosecute because video was not hate speech but was proselytism
Recognise that hate speech is a poison to society, but not always easy to distinguish from promotion of one's religion	There was some suggestion of call to violence in the video, and at the very least clear denigration of Parduism	Contrast with cases decided by international tribunals that set a high threshold for violent speech Pivot to historical fact of Parduists being the far greater instigators of violence	Emphasise key features of Saduja and situation in Lydina: reasoning, disbelief in central scripture and deities, and Sadujists being oppressed

Submission or point to finesse →	**Question or anticipatory acknowledgement →**	**Answer or anticipatory neutralisation →**	**Bridge out**
Even if video is not proselytism, there are many factors to consider to determine hate speech as set out by the UN	One key factor is intention. ECtHR recognises that speech that offends but contributes to public debate is protected	UNESCO reports that suppressing social media expression by religious minorities is not the solution In the long term, public order can only be secured through education and dialogue Distinguish recent examples such as Charlie Hebdo	Problem exacerbated by Lydina making DigiTube an accessory to the discrimination visited upon Sadujists Point to flaws in judicial process when K and DigiTube were sued by the religious leader of Parduism
Although violence resulted from the video, this factor is also not dispositive	Not about assessing matter with hindsight, per various ECtHR cases on speech that resulted in negative consequences	Contrast with governmental inaction over Facebook incident	Per various UN reports, social media can amplify the negative effects of supposedly offensive speech, but it can also be a great equaliser for ethical and religious minorities Status (also a factor) as last throw of the die

One immediately notices how the arguments contain the usual breadth and spread of elements (except for anti-sting pre-emptive elements, which will be dealt with later) and is built using a paradigmatic structure of argumentation; and though subtle, one notices too how spectrums are invoked so that

analogies and distinctions can be drawn accordingly for the examples that are spotlighted. To be clear, this is but one possible matrix of argument – and a snapshot skeletal one at that – and obviously the argument may not always pan out the same way as planned. Various matrices of arguments with different strategic approaches thus need to be constructed and refined over discussion and practice, and a seasoned coach is immensely invaluable for this purpose. That coach will also be useful in synthesising and decoupling matrices so that mooters can fluidly move between different strands of argument[41] or go into "list mode" when necessary – that is, running and even finessing a difficult argument by pointing to many different things (or many elements of the same kind), while keeping a pulse on the case theory so that the likely-induced questions will only reinforce the position of the speaker and not detract from it.[42]

Similarly, the coach has a role to play in identifying whether the bridges out reflect a pivot to strength or regression to weakness; as a general rule, one starts with a good argument but bridges out with, or to, an even better-sounding argument. This way, the interaction with the bench happens with a particular orientation and end-game in mind and the peeling of layers of argument are pre-calculated maximally rather than merely randomised, increasing the ability of the team to address different types of judges with different readings of the arguments that can be made. At this juncture, however, one should also be aware that the written arguments are still being researched and developed both internally and externally, and that the oral arguments are being formed in tandem with early practice rounds. The latter give an idea of how much depth should be accorded to the various arguments in written form, and how a coach can be even more instrumental here is to have a good set of lawyers of varying seniorities to vet the memorial drafts at different points. Preferably, these lawyers will help guest-judge the latter oral practice rounds as well.[43]

41 Some guidance is needed to prevent conflation of issues. For instance, raising the examples of seditious or pro-culture laws at the hate speech stage may drag the speaker back to the treaty validity issue.

42 In this moot problem the most usable example for facts would be the apparent lack of separation of powers in Lydina.

43 It is no longer uncommon for teams to have up to 200 practice rounds, and without someone with a good network of contacts, these rounds will have limited value. Students generally experience up to three peaks of performance, and if doubling, more rounds may be necessitated.

3 *Knowledge Management*

With different arguments and even more layers being thrown around and explored, extremely competent knowledge management is crucial. There are many things to keep track of, and feasible cloud storage with versioning and editing history and simultaneous collaborative functions should be used for the maintenance and universal archival of the following documents:

(1) Annotations on the moot problem, clarifications, and corrections
(2) Brainstormed mind-maps and argument trajectories
(3) General research points
(4) Specific research points (such as legislative history and article summaries)
(5) List of FAQs (and answers) for general, procedural, and specific substantive questions
(6) List of 5+5s[44]
(7) Element counts[45]
(8) Outlines (or speeches) of main arguments
(9) Optional, only-if-asked, and alternative arguments
(10) Opening and closing
(11) Abridged arguments for limited-time scenarios
(12) Indexed rebuttals and surrebuttals
(13) Pre-emptive memorial strikes
(14) Practice round scores, comments, and self-evaluations
(15) File drills[46]

Increasingly, moot teams rely on dedicated researchers or supporting cast members to handle all of these data – with some of these members not even given the dignity of official membership of the team but just the illusory honour of being part of one.[47] At any rate, peers simply do not command the same

44 This refers to the five most likely questions that will be asked and the five most dreaded questions – both student and coach should give their input, and five is not a fixed number.

45 This refers to the total number of layers (facts, law, principles, examples, and so forth) for each speaker's arguments. At each practice round, the use of elements will be monitored and charted so that the speaker has a visual picture of what is over-repeated, what is under-used, and what arguments need to be traversed more or quicker.

46 Students must be able to locate in their files any given document that is being relied upon, within seconds.

47 Many students are often more interested in the oralist role as they believe that is the more prestigious role. It is therefore important to impress upon all members of the team that the best mooters are the ones who can analyse, research, write, and speak. This is a case where versatility does not compromise specialisation, because one can only articulate

level of authority and authoritativeness as people who are more senior, be it practicing lawyers or faculty members – and certainly not as much as coaches who have coached across all levels, creating a strong bond with multiple generations of students. So a hierarchal power dynamic needs to be well-established from the outset so that there will be disciplined input, updating, and flagged internalisation of the knowledge painstakingly accumulated, and targeted role assignment can be done.

For instance, the FAQs are the staple of any serious moot team, but if it is just a transcript of every round's questions and answers without thematic organisation, frequency indicators, labelled layers, table generation, timely refinements, and specific follow-up instructions and follow-up reports, it will just be a wall of text of negative utility to all concerned – keeping in mind too that there needs to be sufficient downtime for the speakers' reflection and reaction to content changes. Or, in the case of logging and tracking element counts, if there is no directing mind to make sense of the layer spreads or, even more fundamentally, how the arguments are unpacked, the exercise becomes entirely mechanical without any purpose, and it also becomes counterproductively laborious such that team morale will be drained very quickly. This is true too for outlines and speeches, where identifying whether something is a positive or negative trigger, and whether an authority is of sufficient analogue and pedigree require good judgment and experience. Further, if there is no coercive pressure from the top, abridged arguments will never be prepared and time management will be mangled.

Then there is the question of containing the size of the universe of knowledge. One can generalise quite accurately that certain Asian teams tend to aim for maximum breadth and depth in their argument architecture, but this is really a consequence of seeing argument gaps as being larger than they would be perceived by most evaluators, and looking for on-all-fours authorities that usually do not exist.[48] Many other teams, on the other hand, rely more heavily on flair and finesse and only have superficial mastery of the legal framework (though whether something is superficial comes down to one's worldview of

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arguments well after one has truly wrestled with the problem at the research and writing phases. Moreover, mooters who can both write and speak provide greater strategic flexibility for the coaches when it comes to team configurations, and they can also be contingency speakers.

48 In the context of this moot problem, it will be that neither the international instruments nor international tribunals have said anything meaningful about freedoms exercised on social media and their regulation and consequences. The trick then is to argue on analogy or principle without over-abstracting or over-extrapolating.

what constitutes law). Of course, content and style are not necessarily antithetical to each other, yet the adage of knowing more but understanding less is certainly true in moots. Therefore, if the universe of knowledge is not well-contained, vulnerabilities in the content of the arguments become vulnerabilities in the speakers' confidence. Moreover, the condensation of complex nuances into something digestible and intuitive is actually a carefully arranged marriage of form and substance. Simply put, veteran guidance is a must if the evaluator is to go away thinking that the mooter is more akin to a real advocate than just an earnest student.

4 *Video Forensics and Awareness Exercises*

An obsession with forensics is hardly limited to research knowledge management; dissecting practice round videos with equal forensic fervour consummates the internalisation and pedagogical processes, in ways perhaps not dissimilar to what is done in world-class sports preparation. Given the state of digital technology today,[49] it is no longer uncommon for oral practice rounds to be recorded, edited, uploaded, and be ready for viewing quite soon after, but the irrefutable reality is that when students are given their own videos to watch and their own targets to set, they will not watch the videos for avoidance of cringing – or at best, they will watch them briefly a couple of times and quickly forget about it. Any expectation attached to self-learning in this respect must thus be vaporised, because although they may be tertiary students, as far as legal knowledge and techniques are concerned, mooters are just pure novices (with the attendant law student pride and stubbornness).

If one has access to moot final catalogues, they are an invaluable resource to complement the practice round video reviews. They give a very good idea as to the usual element counts and densities required, the number and type of questions, competition-specific formalities, the possible diverse spread of winnable styles, high-level techniques, and how arguments are navigated within and without each other – essentially, the emulation of best practices. Again, expecting the students to have the self-discipline to watch the videos on an ultra-regular basis is to indulge in massive delusion. There must be near-didactic guidance, no matter the level of experience of the mooter; commenting and annotating technology may also be helpful in ensuring compliance. For greater effectiveness, during the reviews, supporting members should be present in helping to refine answers for the FAQs. When this is done, the increase in the sense of ownership and contribution can only make everyone better. Add in

49 Further, certain competitions permit practice rounds with opposing teams, and it is not uncommon for universities to have sparring sessions using video conference technology.

the fact that the coaches are spending hundreds of hours just to dissect footage, and the team will be taken up to the next level in terms of wanting to do something great collectively.

At various checkpoints of the practice rounds schedule, highlight reels must be made. These can be used to show what are the best aspects of a mooter's presentation, the aspects that need more work, and the worst aspects that absolutely need to be eradicated. Being given this digestible set of visuals allows the mooters to understand criticisms better and compare and contrast performances between rounds, and also helps supplement start-stop workshop practice rounds in which the mooters have to refine their oral submissions on the spot until they are perfected. And where there are multiple rounds a day (to train competitive endurance), video analysis can demonstrate the effects of fatigue, and the necessary modifications to the training schedule can be made.

It cannot be forgotten that mooters have to absorb a lot of feedback after each phase of memorial vetting and each oral practice round. The best way to test what they understand individually, contemporaneous to either of those activities, is to make them do a series of self-awareness exercises, such as listing what their areas of strengths and weaknesses are and how they intend to reinforce and improve respectively. This applies to both stylistic and substantive matters, and mooters and coaches need to convene every week or so to monitor the progress. When developed in conjunction with the database and video forensics, substantive questions that they have problems with become ironed out over time and stylistic modes they aspire to become more attainable.

External awareness is just as important, such as environmental adaptability: if the competition venue changes in dimensions, how does one adjust projection, posture, gesticulation, and even microphone usage accordingly? These things require practice over and over again. External awareness also manifests in the form of practice round score tracking. Practice judges using competition score-sheet rubrics to score the memorials and oral rounds is only the first step; the second step is to make the students predict their performances using the same rubrics. Only a seasoned coach is in a position to explain to the students how scoring is never a perfectly formulaic exercise that slavishly obeys the rubrics – concepts of "overall feel" need to be imparted.

5 *Pre-emptive Assaults and Legitimisation*

It is an empirically observable fact that only a very small percentage of mooters are able to become masters of two extremely advanced techniques in winning advocacy: pre-emptive strikes and the legitimisation or validation of

the bench. The former refers to the attacking of the (supposedly) strongest arguments in the opponent's written submissions prior to these having been delivered by the opponents during the oral rounds. This does a number of things: it pre-emptively neutralises the most adverse elements against your case (which will in turn foreclose the asking of such questions); it demonstrates mastery of the opponent's universe; and it has a psychological impact on the opponent. Better yet, if the strike is done in response to a question and performed with a reverse spectrum,[50] it validates the question, which leads us to the latter point: judges need to be legitimised, all the time. On the perfunctory level, this will be achieved through body language and demeanour. Moving up the rungs, this is about affirming points of view and realising that the judge is almost always approaching the submission with a considered perspective – even if he only read the problem minutes ago. The concern, whether factual, legal, or policy in nature, needs to be properly neutralised, especially if the asker is particularly quiet that round. The hardest part is timing. Students must learn to create the space to launch these strikes for them to be effective, and championship final videos that showcase the execution of these skills are an invaluable resource.

The astute would realise that memorial strikes are generally more possible with applicants than respondents – respondents can make references to the written submissions as well to demonstrate mastery of content, but there are also competitions that treat written and oral submissions separately. In such a situation, respondents are at an advantage because they can use a form of legitimisation that the applicants cannot: reference to the tribunal's questions when the applicants are speaking. If used well and used at the right time, it will be dynamic advocacy at its best. Of course, if the tribunal is weak and asks no questions, then this weapon is lost. But anti-advocacy can be ameliorated by knowing the field well: profiling the quirks and patterns of repeat judges through repeat participation – and who best to do this if not coaches who have covered multiple editions? This technique can also be used when the applicant is making points of rebuttal, and may very well shore up an average score, for even if the applicant had failed to make an impact in the main submissions, conveying to the bench that he remained alert to the bench's concerns when

50 For instance, if the judge points out that there must have been incitement to hatred here because K had used strong language in his video, the student should refer to cases of offensive speech for the content of the video, and parallel developments in modern times to differentiate the consequences of the video, before pivoting to UN statements about the freezing of expression on social media and locating the situation in this entire spectrum, explaining why the judge is correct but not fully correct.

the respondent spoke is always going to be impressive, provided of course it is delivered with some confidence.

F Pulling Some of the Threads of the Other Contributions in This Book Together

Having gone into some of the specifics as to how members of faculty can make the most important difference in the educating and training of international mooters, we turn then to some of the issues that were raised at the symposium (and subsequently in the chapters of this volume), adopting a helicopter view to see how international moots fit in all of this. By now it should be clear that SMU's approach to international moots adopts some of the best practices gathered from various places and attempts to take it up to the next level on its own terms. But the question that remains is whether its approach has any special application in the Asian context, or whether it is just a repackaging of old and tested ideas. Any notion of a homogenous Asia, of course, runs the risk of being too simplistic, given the immense diversity of the continent. Be that as it may, there are some irrefutable historical facts peculiar to Asia, such as: mostly comprising developing nations (and therefore having the greatest hunger and potential for, as well as emphasis on, economic growth), being represented by more languages than any other continent (and therefore making it hardest to find a consensus on the most appropriate common language), and mostly having received its legal systems from different parts of Europe (and therefore creating a tension between the status quo and any attempt to forge a new identity). The point is that some of these facts can act as impulses to be tapped on, in a way not dissimilar to how Singapore is constantly trying to punch above its weight to stay relevant in today's hyper-competitive world. Tailoring a similar clarion call for up-and-coming law schools or law schools that are seriously thinking of reforming their curricula will not be difficult at all.[51] Moreover, if the authors of 'Strengthening Asia's Voice in the Current Discourse in Legal Education Reform' are correct in concluding that there is a greater emphasis on and attraction to Confucianism and collectivism in Asia than in the West, this presents yet another advantage to many Asian jurisdictions, since the cornerstone of a sustainable international moot court programme as

51 Further, given that Asia is going to be the most important market for decades to come, there is a distinct commercial and geographical advantage that is applicable only to Asian law students.

described in the present endeavour is a strong multi-generational community that internalises the concept of a greater good beyond mere personal advancement. Naturally, this advantage is strongest in countries that subscribe more overtly to Confucianism, and reinforced in countries whose governments can see the instrumentality of law as a driver of change. The growing of a sense of community is not as organic as one might imagine – top-down intervention can be a good thing in appropriate situations.

Suppose, however, that one prefers to eschew any sort of ideological preference in deciding whether to integrate international moot court as an activity in Asian law schools and focuses instead on hard-nosed pragmatism – this only makes it clearer why participation in moot court eliminates boundaries rather than reinforcing them. As noted by the authors of 'Teaching Comparative Law in Singapore: Global and Local Challenges', the two contemporary trends in law that cannot be ignored by law schools anywhere in the world today are that law no longer stops at geographical borders, and that legal practice is increasingly globalised due to greater cross-jurisdictional transactions. This is certainly true in this part of the world (though by no means exclusively so, when one considers the extent of EU integration), exemplified by the establishment of institutions such as the Singapore International Commercial Court and various similar financial and dispute resolution hubs in the Middle East and the Pearl River Delta region. Even family law now has its own international mediation framework. The teaching of comparative law thus assumes a pivotal role in helping students, even if only on a foundational level, to understand the mechanics and nuances of legal systems outside of those that they are already familiar with. Soft skills, in relation to the appreciation of other types of cultures and philosophies, are just as crucial. International moots are a critical continuation of such comparative learning, as both civil and common law systems are inexorably involved when researching and making arguments on either private (such as commercial arbitration) or public international law (such as international human rights), not to mention that international moot court panels often comprise civil and common law lawyers. Rather than let comparative knowledge that is acquired in the lower years turn stale, students should be given an opportunity to apply that knowledge in their upper years – and international moots is one powerful means of doing that, especially when practicing lawyers are often engaged to help with the preparations. Add the fact that students should be encouraged to participate in more than one international moot, and what we have as an end product is as close as it gets to a "ready-made" lawyer for practice. To be clear, the point is not to make every student take this route; rather, the point is to create the possibility that this

route even exists, and to ensure that students are aware of how the skills they acquire have greater application than just dispute resolution or even the practice of law itself.

But would all law schools be in a position to implement an international moots programme with the requisite robustness to begin with? For one, there are linguistic challenges, notwithstanding the postulation in 'Preparing for the Sinicisation of the Western Legal Tradition: The Case of Peking University School of Transnational Law' that Western jurisdictions and their legal traditions and rules may no longer dominate cross-border work in the medium-term future, and this in turn may have ramifications in how the law should be transmitted and communicated (including the dominant language of instruction). However, it is safe to assume for now that English will remain the preferred language of commerce for most parts of the world, though being bilingual with another major language such as Mandarin can only be a bonus. But effective bilingualism is not yet a strict requirement to succeed in the global marketplace for lawyers (there are moots held in Mandarin, French, and Spanish, however). Then there is the equally fundamental issue of resources and structural inequalities: for instance, the authors in 'Legal Education in Thailand: Limitation on Innovation' and 'Legal Education in 21st Century Vietnam: From Imitation to Renovation' suggest that in those two ASEAN jurisdictions at least, reforming legal education can only take place incrementally as there are larger political (even philosophical) obstacles impeding change. However, it will be rather defeatist to find as many ways as possible to distinguish the Singapore experience, such as having a government that often acts decisively and being a small jurisdiction that cannot afford not to be nimble – two traits that have no doubt contributed to its relentless commitment to fashion its two law schools a certain way. Recent results in both regional and international moots show that teams from law schools in non-English speaking Asian countries such as Cambodia, Thailand, and Vietnam have done very well, especially in written argument.[52] This is a good start that can be built upon, but it is important to seize the momentum. Indonesia, where the teaching of English is inconsistent at best, has always done well in both written and oral argument in a wide variety of international moots, and China too is beginning to establish itself as a nationwide fervour for moots appears to have swept across all levels of law schools. All of these developments can be attributed to good coaching and proper faculty coordination, but the basic point is that every law school must start somewhere, although it has to bear in mind that any international

52 For instance, Cambodia won one of the top memorial prizes in one of the recent Jessup moot competitions.

moot court programme must be built with sustainability in mind. Many prior barriers such as access to knowledge resources are no longer around due to the digitisation of knowledge, and increasingly, many good sources of information are even free.[53] To quote Simon Chesterman in 'The Fall and Rise of Legal Education in Asia: Inhibition, Imitation, Innovation', 'it is time for [Asia] to be more ambitious. Our students and our professors are now among the best in the world, operating in its most economically dynamic continent'. From that perspective, the threshold question that any developing law school must squarely confront is whether international moot court is a worthwhile activity that can benefit the student population as a whole – if the answer is yes, then steps must be taken to do well in it and the right people have to be hired sooner rather than later. This works on a macro policy level as well.

Specifically, we see in 'Second Fiddle: Why Indonesia's Top Graduates Shy Away from the Judiciary (and the Prosecutor's Office), and What Can We Do About It?' and '"Closing the Gap" between the Legal Education and Courtroom Practice in Japan: Yoken Jijitsu Teaching and the Role of Judiciary' that the quality of law school teaching has, unsurprisingly, a direct impact on the quality of the legal services sector. But more precisely, the authors of these two pieces further point out that when the judiciary is weak, the negative ripple effect on the rest of the legal community is particularly significant. The logic is not difficult to grasp: if judges make bad decisions because they cannot tell what are good or bad arguments, lawyers will tend to make bad arguments because they think these will work, these lawyers will then teach newly graduated law students how to make bad arguments, and the vicious cycle is difficult to break out of. Over time, the legal fraternity loses credibility and resources will invariably be diverted away from it (which in turn will cause the country's rule of law to diminish, and this will certainly affect national interests such as foreign investment and trade). However, the notion put forward by the author of 'Second Fiddle' that the best and brightest law students somehow end up avoiding a judicial (or more broadly, public service) career is not an exclusively civil law phenomenon, nor is there any reason why it should be so.[54] Ultimately, there must be strength in conviction in the belief that a rising tide lifts all boats – what this means in the legal education context is that when a law school is invested in producing versatile students who can analyse,

53 For instance, the jurisprudence of many national and international tribunals are freely available online. What is less freely available is academic literature, but oftentimes primary sources are used in arguments anyway. Many faculty members are also often alumni of leading law schools, which provide alumni life-time access to major legal databases.

54 For instance, in China, great respect is accorded to those who have served on the judiciary.

research, write, and communicate – with participation in international moots as one strategy law schools may wish to pursue to this end – he can do anything and he will be in demand. What international moot court does is not, contrary to certain perceptions, to create pockets of elitism but to encourage as many students as possible to take on one of the best intellectual challenges law school has to offer and to compete on the regional and international stage. If the concern is that only a limited number of students are exposed to international moot competitions – especially if one adopts the strategy of making them do an international competition every year to gain experience – there are more than 50 respectable international competitions are available today, and there are various permutations in which one can design a competition strategy to optimise resources.[55] At bottom, the more law students in a law school who have acquired legal skills, the more options and possibilities open up for the students to pursue careers of excellence, and this will eventually raise the quality of the students who go out to the workplace, including the legal services sector (with the raising of the profile of the school being a bonus). As observed in 'Bridging the Gap between Legal Education and Preparation for a Career in the Legal Profession', there is still a perceived chasm between what is taught in law school and what is expected in practice. I do not think the solution lies in creating a common bar examination, as institutions that administer bar standards are like law firms: they have neither the time nor inclination to teach things properly, let alone run a moots programme of the sort of rigour described here.[56] It is also not very sensible to avoid teaching legal skills just because not everyone will practice law or go into litigation; as mentioned, the ability to communicate effectively (which is what a moot is about, in essence) is a skill of universal application. Rather, the solution has always been in our midst, and the ball has always been in our court. An international moot court programme ticks the relevant boxes: it teaches relevant skills; it engages the wider legal community; it prepares students for cross-border thinking and work; and it is a

55 In SMU, the students started with the smaller regional moots and when they succeeded, this gave them a pathway to training in firms and sponsorships. As these students became more experienced, they took part in the larger competitions, while also helping to coach the younger students. In no time, SMU was participating in almost 20 different competitions. The larger competitions were given priority for resources as they were more difficult to compete in, while for some of the smaller competitions, they were either self-funded or self-coached as the aim was simply to gain experience more than anything else.

56 It should be noted that individuals who have already graduated from law school may still be eligible to participate in international moots – most competitions only exclude individuals who have been called to the bar or who have a practicing certificate from participating.

good complement to law school rankings. Until we find a better alternative to equip our students with the skills they need in this interconnected world, we need to stop finding excuses to hinder its implementation. Indeed, once Asia becomes more densely packed with versatile legal talents, we can have more meaningful conversations about greater economic and legal convergence and integration in the region, and we will have more say on the global stage.

G Concluding Thoughts

In this piece I hope I have demonstrated the extent of the commitment required to start or reboot an international moots programme that can achieve results in the modern era: proper faculty involvement, coupled with alumni cooperation on all fronts, is indispensable from inception to management to execution. In the days of old, moot court was universally regarded as an activity to be left purely on auto-pilot mode: the students will acquire all resources by themselves, do everything by themselves, and receive virtually no guidance or strategic direction in a micro or macro sense. Taking that approach now will only result in abject disappointment for all parties concerned and a waste of (a lot of) time and money.[57] International moot court competitions can be tremendously rewarding but one must be prepared to invest heavily and invest for the long-term if one believes in the benefits.[58] A case may be made that there is no better way for a law school – and an Asian one at that – to stamp its mark on the international arena than to consistently produce world-beaters who are exhibited and compared against on global platforms.[59] Contrary to the odd thinking of some university administrations, the production of world-class students is hardly an impediment to the creation of a world-class standing for the school, and whereas most faculty members identify with various institutions throughout their careers, most students will only identify with their alma mater and for that reason they will give nothing but their very best. At the end

57 It is also observed that the days of close mentorship in the initial years of a young lawyer's practice are, lamentably, over. In a sense, proper moot court training has become a surrogate apprenticeship, and law firms that look beyond the present would do well to leverage on this, for instance through a combination of financial support and supervision.

58 In this regard, moot court competitions are distinct from other types of student competitions such as trial advocacy or mediation and negotiation, because for those competitions, the room for repeat participation and a multi-year training programme is very limited for now.

59 See also the Indian Mooting Premier League; 'Mooting Premier League' (*Legally India*) <www.legallyindia.com/mooting/mooting/blog> accessed 25 April 2017.

of the day, those in academia will do well to remember that the primary duty has always been and should always be education, not fanciful and impractical scholarship. With the right leadership, a law school can go from imitation to innovation, and in due course, any inherent limitations it used to think existed can be transcended.

CHAPTER 7

"Closing the Gap" between Legal Education and Courtroom Practice in Japan: *Yôken Jijitsu* Teaching and the Role of the Judiciary

Souichirou Kozuka

A Introduction: The Aim of Legal Education

There is no doubt about the importance of legal education to the legal system. Without eligible lawyers, a legal system can never operate efficiently. When the legal system is faced with a changing environment, such as the enlarged scope of legal services, globalisation of law firms, or the emergence of intensified international legal issues, legal education has to be reshaped and reformed. This is a universal challenge.[1]

Such a statement is, in fact, more nuanced, if one is conscious about the possible varieties in the 'efficient operation of the legal system' as the goal. In order to assess the efficiency of a legal system, the role of the judiciary in society must be defined. The role expected of the judiciary comes into question, in particular, when society experiences big changes. Thus, debates over legal education cannot avoid defining, or redefining, this role.[2]

Japan conducted a significant reform of legal education in 2004, by launching the postgraduate law school and making it a mandatory condition for taking the bar examination. The reform was part of a much broader Judicial System Reform. The Report of the Judicial Reform Council, in its chapter on

1 For example, in the United States, see American Bar Association Section of Legal Education and Admission to the Bar, *Legal Education and Professional Development – An Educational Continuum*, (American Bar Association, 1992) 13–18 <www.americanbar.org/content/dam/aba/publications/misc/legal_education/2013_legal_education_and_professional_development_maccrate_report%29.authcheckdam.pdf > accessed 17 May 2017; Veronica Taylor, 'Zen and the Law School' (2005) 7 Australian Journal of Asian Law 293; Philip Langbroek and Daniela Piana, 'Menu for Justice: Towards a Discussion of Demands on Legal Learning and Judicial Expertise' in Daniela Pianaand others (eds), *Legal Education and Judicial Training in Europe* (Eleven International Publishing 2013) 3–4.

2 The definition of judiciary is closely related to the question about the meaning of law in the society, which is discussed in Chapter 5. This chapter is more focused on what view the judiciary has regarding its own role.

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legal education, states that the goal of education at the newly introduced law schools shall be to enhance (1) a rich sense of humanity to sympathise with people's joy and sorrow as professionals responsible for the 'rule of law'; (2) expert knowledge in law together with the capability to examine the law critically or to solve problems with it; and (3) understanding of cutting-edge legal issues, sensitivity to various problems in society as well as the responsibility and ethics of professional lawyers.[3] Apparently these statements show strong influence of the humanistic tradition of legal education, besides the perceived need to adapt to up-to-date legal services, both trends being commonly shared in other countries.[4]

However, the uniquely Japanese feature of legal education is carefully woven into a more elaborate description of law schools. According to the Report, the education at law schools must 'bridge the gap between doctrine and practice' by offering introduction to education in practice, such as teaching of *yoken jijitsu* and fact finding.[5] After the law schools actually came into operation, the latter two subjects, in particular *yoken jijitsu*, attracted much

3 *Shihô Seido Kaikau Shingikai* (Judicial System Reform Council), '司法制度改革審議会意見書 (Report of the Judicial System Reform Council, 2001)', 63 <www.kantei.go.jp/jp/sihouseido/report/ikensyo/pdf-dex.html> accessed 17 May 2017. For an overview of the Judicial System Reform, see Kahei Rokumoto, 'Overhauling the Judicial System: Japan's Response to the Globalizing World' (2005) 20 *Zeitschrift für Japanisches Recht* (Journal of Japanese Law) 7. There are numerous articles on the reform of legal education, including the launch of law schools, eg Koichiro Fujikura, 'Reform of Legal Education in Japan: The Creation of Law Schools Without a Professional Sense of Mission' (2001) 75 Tulane Law Review 941; Daniel H Foote, 'Forces Driving and Shaping Legal Training Reform in Japan' (2005) 7 Australian Journal of Asian Law 215; Luke Nottage, 'Build Postgraduate Law Schools in Kyoto, and Will They Come – Sonner and Later?' (2005) 7 Australian Journal of Asian Law 241; Stacey Steele, 'Legal Education Reform in Japan: Teachers, Leave Us Kinds Alone?' (2005) 7(3) Australian Journal of Asian Law 264; Taylor (n 1); Masako Kamiya, 'Structural and Institutional Arrangements of Legal Education: Japan' (2006) 24 Wisconsin International Law Journal, 153; Kahei Rokumoto, 'Legal Education' in Daniel H Foote (ed), *Law in Japan: a turning point* (University of Washington Press 2008) 190; Kent Anderson and Trevor Ryan, 'Gatekeepers: A comparative critique of admission to the legal profession and Japan's new law schools' in Stacey Steele and Kathryn Taylor (eds), *Legal Education in Asia: Globalization, change and contexts* (Routledge 2010) 45; Kota Fukui and Stacey Steele, 'Internationalising legal education in Japan as discourse and practice' in Jeremy Breaden, Stacey Steele and Carolyn S Stevens (eds), *Internationalising Japan: Discourse and practice* (Routledge 2014) 32; Andrew RJ Watson, 'Changes in Japanese Legal Education' (2016) 21 *Zeitschrift für Japanisches Recht* 1. On a more recent situation, see Stacey Steele, 'Japan's National Bar Examination: Results from 2015 and Impact of the Preliminary Qualifying Examination' (2016) 41 *Zeitschrift für Japanisches Recht* 55.

4 Taylor (n 1) 294–295.

5 *Shihô Seido Kaikau Shingikai* (n 3) 66.

attention and raised controversies within Japan.[6] Interestingly, the numerous writings about the Japanese reform of legal education in Western languages have entirely ignored it.[7] While the technique of fact finding is universal as an expertise required of lawyers, *yoken jijitsu* teaching is unique to Japan, lacking the exact equivalents in other countries.[8] Such a unique element in the legal education may imply the existence of a uniquely Japanese definition of the role of the judiciary.

The rest of this chapter focuses on *yoken jijitsu* teaching as the unique element of Japanese legal education. First, *yoken jijitsu* teaching is placed in the context of the historical development of legal education in Japan (Section B). Section C analyses the content and function of *yoken jijitsu* teaching. It is followed, in Section D, by an examination of who developed *yoken jijitsu* teaching, and how it was developed. Finally, Section E emphasises the need to consider the role of the judiciary before debating more technical aspects of legal education.

B Innovation and Continuity in Japanese Law Schools

1 *The Launch of Law Schools and Bar Examination Reform*

The introduction of law schools in 2004 was closely connected with the reform of the bar examination. Before that reform, annually about 1000 applicants passed the bar examination. The examination was notoriously competitive, with a pass rate of around 3 percent.[9] The successful applicants used to receive

6 Since the launch of law schools, a number of publications on *yoken jijitsu* have appeared. The Japan Association of Private Law chose "The Conversation between *Yoken Jijitsu* and the Civil Code" as the subject for the main symposium at its annual conference in 2005.

7 The exception is Ichiro Kitamura, 'The Judiciary in Contemporary Society: Japan' (1993) 25 Case Western Reserve Journal of International Law 263, 270–275 (see also Watson (n 3) 44). Rokumoto, 'Legal Education' (n 3) 202 also briefly mentions it. The lack of attention to *yoken jijitsu* may be precisely because there is no equivalent in the Western legal system. An indicative example is the translation of Shunkô Mutô, 'Concerning Trial Leadership in Civil Litigation: Focusing on the Judge's Inquiry and Compromise' (1979) 12 Law in Japan 23, which spared the part that mentioned *yoken jijitsu* approach, which existed in the original in Japanese.

8 The closest to *yoken jijitsu* teaching in Western countries may be *Relationstechnik* developed by German jurists. Still, the focus of *Relationstechnik* appears to be more on the efficiency of the procedure, whereas *yoken jijitsu* teaching in Japan, as detailed in this essay, reflects the definition of the role of judiciary.

9 Rokumoto, 'Legal Education' (n 3) 210–215 elaborates on the situation of, and various reform attempts to, the bar examination prior to the Judicial System Reform.

practical training as trainees of the Legal Training and Research Institute (*Shihô Kenshûjo*), which is an organ attached to the Supreme Court.[10] The training continued for one and a half years, comprising schooling for a few months at the beginning and conclusion of the training, and experiences at district courts, public prosecutors' offices, and law firms, each for a few months. To be fully qualified, the trainees had to pass the concluding examination, known as "the second test."

The Report of the Judicial System Reform Council proposed the reform of the bar examination and indicated a target of 1500 successful applicants in 2004, to be gradually increased to 3000 around 2010.[11] To address the criticism that high competitiveness gives undue incentives to students to focus narrowly on success in the examination, the Report requested that the legal education be offered through the combination of law-school education, the bar examination, and training at the Legal Training and Research Institute, instead of solely focusing on the bar examination. The proposed change was popularly phrased as 'a shift from one-shot to process' (*ten kara purosesu e*).[12]

The phrase curiously conceals the continuity before and after the reform. In particular, the Final Report only briefly mentions the training at the Legal Training and Research Institute. In fact, it was largely maintained as it used to be, though the term of the traineeship was shortened to one year and the payment of salary to the trainees was terminated. Given that a majority of the bar-examination candidates studied at the law faculties of universities before the reform, one may notice that the basic framework of legal education was affected rather subtly. It is, after all, the combination of academic study (of 'doctrines') and training in practice, controlled by examinations twice. The only change is that the period of study at the university (law faculty) before the reform is now replaced by law-school education.[13]

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10 Supreme Court of Japan, 'The Legal Training and Research Institute of Japan – History' (Supreme Court of Japan, 2006) < www.courts.go.jp/english/institute_01/institute/index.html#History> accessed 17 May 2017.

11 *Shiho Seido Kaikau Shingikai* (n 3) 58.

12 Rokumoto, 'Legal Education' (n 3) 216.

13 The Japanese system before the reform, with the strong influence of German system, affected the legal education in Korea until recently. However, as may be seen in Chapter 8, through the reform of legal education in the 21st century, Korea has now made a significant departure from such a system. For example, judges shall now be appointed from among lawyers having practiced for some years, as opposed to being recruited from among trainees that have passed the second examination.

2 *The Origin of the Unchanged Framework*

The framework originates in the Ordinance on the Appointment of Judges in 1885.[14] Before that legal education relied primarily on doctrinal study. In 1872, soon after the transition to the modern regime in 1868 (Meiji Restoration), the Meiji government established a school named *Meihô Ryô* to educate lawyers. The *Meihô Ryô* was succeeded by the Ministry of Justice's Law School (*Shihôshô Hôgakkô*) in 1875. A few years later the Law Faculty of Tokyo University started to offer legal education, and the two schools were finally merged in 1885.[15] The Ordinance of 1885 provided that graduates from the Law Faculty, as well as those who passed the examination of the Ministry of Justice, were qualified to be appointed as judges; and that the appointees had to serve as trainees at the Courts of First Instance for one year or more.[16] The framework was then refined in 1890 by the Act on the Constitution of Courts.[17] Under this Act, to be appointed a judge or prosecutor, one had to take the initial examination, followed by three years of training as a trainee, and then take the second examination. Graduates from the Law School of the Imperial University (renamed from the Law Faculty of Tokyo University) were still exempt from the initial examination. Those who actually took the examination may have come from private law schools, which had come into existence by this time.[18]

The framework seemed to have replicated the *Referendar* system in Prussia, extended to the whole of Germany after the foundation of the German Empire.[19] Interestingly, however, the Law School of the Imperial University (later renamed as the Tokyo Imperial University, currently the University of Tokyo) adopted the French style of law faculty, consolidating around this time courses on political studies with law courses. Until now, undergraduate law faculties of most Japanese universities offer courses in both law and political studies.[20] Against such background, the framework incorporating traineeship with the

14 Rules on the Appointment of Judges, Notice of the *Dajokan* (Great Council of the State) no. 102 of 1884.

15 Tsutomu Arai, Gen Kabuyama and Sun'ichiro Koyanagi,『ブリッジブック近代日本司法制度史』(Bridge Book on the Modern History of Judicial System in Japan) (Shinzansha 2011) 110–112. For the history of law schools in early modern Japan, see also Wilhelm Röhl, 'Legal Education and Legal Profession', in Wilhelm Röhl (ed), *History of Law in Japan since 1868* (Brill 2005) 770, 771–773.

16 Gen Kabuyama,『司法官試補制度沿革』(The History of Trainee Judges) (Jigakusha 2007) 143.

17 Law no 6 of 1890.

18 Rokumoto, 'Legal Education' (n 3) 193.

19 Kabuyama (n 16) 216; Röhl (n 15) 775.

20 See Kamiya (n 3) 154 and Rokumoto 'Legal Education' (n 3) 192.

second examination may have contributed to establishing the professional group of jurists, as distinguished from administrators, who were also required to have legal knowledge.

It must be noted, however, that 'jurists' at this point meant only judges and prosecutors. Private attorneys were qualified by a much more relaxed standard. The Rules on Counsel of 1876 provided for an examination (probably a kind of bar examination) by the local government for the qualification of private attorneys.[21] The Ministry of Justice soon took over the bar examination, but no requirement other than simply passing the bar examination existed for many years (and graduates from the Law Faculty of Tokyo University were exempt from it). By the amendments to the Attorneys Act of 1914,[22] which were implemented in 1923, the separate bar examination was abolished and private attorney candidates were required to take the same examination as candidates for judge and prosecutor. Only as late as 1936, when the new Attorneys Act[23] was implemented, was traineeship introduced for private attorney candidates who had passed the examination. To conclude the traineeship, a trainee had to pass the second test. At this point, the framework consisting of academic study combined with traineeship, controlled twice by examinations, was finally extended to private attorneys.[24]

3 Yoken Jijitsu *Course in the Judicial System Reform*

As elaborated in the next section, *yoken jijitsu* teaching was developed by the Legal Training and Research Institute. After the launch of law schools in 2004, a course on *yoken jijitsu* became mandatory for them. Thus the impact of the 2004 reforms on *yoken jijitsu* teaching was a change in the division of labour between academic study and traineeship. What used to be taught during the traineeship has become part of the academic study. Still, the change is more apparent than actual, because *yoken jijitsu* courses are mostly taught by practitioners teaching as adjunct professors or part-time lecturers.[25] In upper-class law schools, a judge seconded from the courts has served as teacher of *yoken jijitsu*, which makes the impact of reform even more limited.

21 Röhl (n 15) 779; Arai, Kabuyama & Koyanagi (n 15) 66.

22 Law no 7 of 1893, repealed in 1933.

23 Law no 53 of 1933, repealed in 1949.

24 Arai, Kabuyama & Koyanagi (n 15) 202. Separating the legal education of judges and prosecutors and that of private attorneys is common among the civil law countries, at least traditionally. Of course, which of them attracts more talented young people is another question, as Chapter 14 discusses with regard to Indonesia.

25 The ubiquitous employment of practitioners as teachers by law schools is one of the significant impacts that the reform brought to universities; Nottage (n 3) 250.

C *Yoken Jijitsu* Teaching as Legal Formant of Japanese Law

1 *From Burden of Proof to* Yoken Jijitsu *Teaching*

What has been taught in the *yoken jijitsu* course at the Legal Training and Research Institute is a compilation of stylised formula about how to distribute the burden of proof.[26] Based on the understanding that legal norms consist of preconditions (*yoken*; translation of 'Tatbestand' in German[27]) that must be satisfied for the outcome (*kôka*; translation of 'Rechtsfolge' in German[28]) to arise, each precondition is categorised as either the basis of claim, defence or counter-defence. The basic rule is that the categorisation determines which party bears the burden of proving the facts (*jijitsu*) that support satisfaction of the precondition, unless it would be unduly biased against one party. Authors recognise Judge Toshio Muramatsu, who used to be a teacher at the Legal Training and Research Institute from 1947 to 1952, as the founder of *yoken jijitsu* teaching, though Muramatsu himself never used the term.[29] Muramatsu was strongly influenced by the treatise on burden of proof by Leo Rosenberg, a German professor of civil procedure law.

Yoken jijitsu teaching by Muramatsu and his successors at the Legal Training and Research Institute, unlike the original theory on the burden of proof in Germany, had a practical aim. They intended to develop the skills of judges in writing judgments.[30] Already before the end of the Second World War, Muramatsu had published a study on the writing of judgments.[31] In this article, Muramatsu pointed out that judgments in those days often were not sufficiently precise about the subject of dispute, failed to identify the necessary element in the party's arguments, or mentioned unnecessary facts. As the development of such a critical observation, *yoken jijitsu* teaching soon went

26 According to the tradition of the Civil law, Japanese law uses the term 'burden of proof' in the narrow sense of burden to persuade the court, not including the burden of introducing the evidence.

27 Meaning a factual prerequisite for the application of a statutory provision.

28 Meaning legal consequences.

29 Tôji Tao, '要件事実論について—回顧と展望小論— (On *yoken jijitsu* approach: looking back and looking ahead)' (1992) 44(6) *Hôsô Jihô* 1023, 1031; Masaharu Ohashi, '要件事実論略史 (The brief history of *yoken jijitsu* approach)' in Muto Shunkô Sensei Kiju Ronbunshû Henshû I'inkai (ed), 『法曹養成と裁判実務』 (Legal education and practice in the court) (Shin Nihon Hôki Shuppan KK 2006) 413–474, 416–417.

30 Tao (n 29) 1031.

31 Toshio Muramatsu, '民事事件の実務的研究—借地借家事件を中心として— (Practical studies of civil cases: focusing on land and house lease cases)' (1942) 20 (6) *Hosokai Zasshi* 1, 20 (7) *Hosokai Zasshi* 25.

beyond determining the burden of proof as such, and started to emphasise the importance of identifying the facts to satisfy the precondition (*yoken jijitsu*), which either party must prove by evidence, as distinguished from other facts not subject to the parties' burdens of proof. The latter facts were named 'indirect facts' (*kansetsu jijitsu*), which judges were recommended not to mention in the judgment.[32]

If the argument by the party failed to correctly identify necessary elements, it may partly be the responsibility of that party's counsel. Given the delay in introducing the systematic education of private attorneys, as compared with the education of judges and prosecutors, it is plausible that not all the attorneys were sufficiently skilled. The post-war reform has brought a big change in this respect. After the Legal Training and Research Institute was established in 1947, the candidates for attorneys were trained in the Institute together with those for judges (and prosecutors) in the same class. In this context, teaching *yoken jijitsu* courses at the Institute must have contributed to improving the counsels' ability as well. In an article written in 1992, Judge Tôji Tao, one of the early trainees who were taught by Muramatsu himself, noted significant improvements in the skills of the attorneys as compared with 1940s, thanks to *yoken jijitsu* teaching.[33] His evaluation implies that *yoken jijitsu* teaching had the role of providing a common ground of skills to attorneys, contrary to the less systematic education offered to private attorneys before the War.

2 *The Meaning of* Yoken Jijitsu *Teaching*

Confident about the achievements of *yoken jijitsu* teaching, teachers at the Legal Training and Research Institute began to claim that *yoken jijitsu* teaching reveals the structure of 'the Civil Code as norm for adjudication', as opposed to norm for behaviour. According to the claim, the academic works usually describe the Civil Code as the norm that people must comply with in daily life, and lack elaboration about how the Civil Code is applied in the courtroom. One of the problems is attributed to the failure of academic works to

32 Tomokatsu Tsukahara, '民事裁判の運営における要件事実の機能 (The role of *yoken jijitsu* in administering the court procedure in civil cases)', in Muto Shunkô Sensei Kiju Ronbunshû Henshû I'inkai (n 27) 246–267, 248–249 recollects an anecdote from his study in Germany after becoming a judge. He and other German trainees (*Referendare*) were writing a judgment from the records and he omitted to mention the fact that the plaintiff and defendant were neighbours, pursuant to Japan's *yoken jijitsu* approach. However, most of the German trainees mentioned it, and when he argued that whether the parties were neighbours was irrelevant, the German trainees objected by saying that it would do no harm to mention it, even if the fact was not relevant.

33 Tao (n 29) 1044.

mention the burden of proof. By exposing which party owes the burden of proof for elements (preconditions) of the Civil Code's provisions, *yoken jijitsu* teaching transforms the Civil Code into the 'norm for adjudication'. *Yoken jijitsu* teaching does not modify the provisions in the Civil Code itself, but reveals the manner in which the court applies the Civil Code to cases brought before it.

For example, *yoken jijitsu* teaching tells lawyers that the facts that must be proven (*yoken jijitsu*) for a sales contract are the agreement to transfer the right (ownership) in the subject of sales, and the agreement on the purchase money for it, with the specification of the latter either in the amount or the way the amount is determined.[34] As already mentioned, *yoken jijitsu* teaching classifies every element of argument into *basis of claim*, *defence* or *counter-defence*. In the case of *yoken jijitsu* for a sales contract, the above-mentioned elements are all *bases of claim* to be made by a claimant; the claimant must prove them in order to obtain a judgment ordering the other party to perform its obligation. This rule is derived from the text of Article 555 of the Civil Code, which reads 'A sale shall become effective when one of the parties promises to transfer a certain real rights to the other party and the other party promises to pay the purchase money for it.' In such a manner, the provision of the Civil Code, which seemingly is a norm for (intending) parties to a contract of sale, is transformed into a norm that can be relied on before the court. If, for example, the seller requests payment of the purchase money and the buyer argues that the obligation to pay the purchase money has extinguished due to prescription, the latter argument is a defence and facts to support prescription must be proven by the buyer.[35]

Borrowing the term of a well-known comparative law researcher, Rodolfo Sacco, *yoken jijtsu* teaching is a legal formant of the Japanese (private) law.[36] Sacco identifies elements in the law other than the assumedly single source of law, which may be the statutory rule in civil-law countries and case law in common-law countries, and named them as legal formants. Sacco's claim is that there can be multiple legal formants in one legal system and that these legal formants could contradict each other.[37] Therefore, it is no surprise if, despite the claim that *yoken jijitsu* teaching does not modify the provisions of the

34 Shiho Kenshujo,『新問題研究　要件事実』(New Studies of Cases on *Yoken Jijitsu*), (Hosokai 2011) 10.

35 Ibid 23.

36 Rodolfo Sacco, 'Legal Formants: A Dynamic Approach To Comparative Law (Installment I of II)' (1991) 39 The American Journal of Comparative Law 1, 22.

37 Ibid 23–25.

Civil Code, it sometimes conflicts with the rule drawn from the textual reading of the provision.

3 Yoken Jijitsu *Teaching's Solution to the Battle of Forms*

One example of such a conflict between *yoken jijitsu* teaching and the Civil Code is the problem known as the 'battle of forms' in a sales contract.[38] The Japanese Civil Code provides that a contract is formed when a party's offer is met by another party's acceptance, and that an acceptance with modification is treated as a rejection accompanied by a new offer.[39] The textual reading of the latter provision leads to the conclusion that when a standard form contract of one party differs in some respects from the standard-form contract of the other party, however insignificant the difference may be, a contract is not formed yet. Thus, the famous problem of 'battle of forms' is not solved under the Japanese Civil Code. However, according to *yoken jijitsu* teaching's approach, the court will find a contract of sale as validly formed if the claimant succeeds in proving the agreements on the transfer of the subject of sale and payment of purchase money. Even if other clauses in standard forms of both parties are not exactly the same, the court will enforce the obligation under the contract.

It might appear reasonable that the *yoken jijitsu* teaching approach emphasises the essential elements of a contract of sale, just like the generally recognised solution as suggested by the Unidroit Principles of International Commercial Contracts (UPICC)[40] or the European Principles of Contract Law (PECL),[41] to avoid an unsound result.[42] Neither denying a valid agreement nor applying the clause of the standard form sent last (the so-called last shot solution) is considered a sound solution. However, the solution by *yoken jijitsu* teaching's approach is not the same as that under the UPICC or PECL. While the latter focuses on whether one party clearly or explicitly indicates an intention not to be bound by the contract with the modification of a specific clause, the *yoken jijitsu* teaching approach determines from the outset that the essential elements are the agreements on the subject of sale and payment of purchase money. If the solution of UPICC and PECL is based on private autonomy, the

38 The author is grateful to a law school student in his class who made him aware of this issue.

39 Civil Code, Art 528.

40 Unidroit, *Unidroit Principles of International Commercial Contracts, Rome: International Institute for the Unification of Private Law* (Unidroit 2016).

41 Ole Lando and Hugh Beale (eds), *Principles of European Contract Law: Parts I and II* (Kluwer Law International 2000).

42 UPICC (2016 edn), Art 2.1.22; PECL, Art 2:209.

yoken jijitsu approach seems to be more paternalistic and authorises the court to reshape the agreement of the parties.

4 *Breaking Down Negligence*

The derogation from the text of the Civil Code can also be made in a less visible manner. With regard to "negligence" as a precondition for tort liability, for example, *yoken jijitsu* teaching does not lead to a conclusion that contradicts with the textual reading of the Civil Code's provision.[43] However, it requires the court to take steps not easily imaginable from a textual reading of the provision.

The issue derives from the fact that 'negligence' as the precondition is written in an abstract term and seems to demand evaluation of facts. After some controversies, the currently prevailing view holds that the facts to be proven (*yoken jijitsu*) in such a case are not 'negligence' as such but individual facts that support finding of negligence. Rather than deciding whether or not the driver committed 'negligence' when driving his car, the court shall break down 'negligence' into more concrete facts, such as whether the driver failed to look left before making a turn,[44] at what point of time he pulled the brake, or how fast the speed of the car was at the time of the accident. Then the court must examine these individual facts one by one. The advantage of this approach is that the steps to be followed by the court (which in turn will be the steps that the attorneys must follow in making their arguments) are pronounced in a formula, with enhanced transparency and perhaps less variance among different judges in handling similar cases.

D Who Developed *Yoken Jijitsu* Teaching, and How?

1 *The Legal Training and Research Institute as the Cradle of* Yoken Jijitsu *Teaching*

Yoken jijitsu teaching was developed through the training at the Legal Training and Research Institute, in particular its Civil Trial Teachers Section (*minji saiban kyôkanshitsu*). As mentioned above, Judge Muramatsu, who laid the foundations for *yoken jijitsu* teaching, was a teacher in this Section. Since then, the teaching staff of this Section have all been judges, and the debates over

43 Civil Code, Art 709 provides that a person who has intentionally or negligently infringed any right or legally protected interest of others shall be liable to compensate any damages resulting in consequence.

44 In Japan, cars drive on the left side of the road.

various issues of *yoken jijitsu* teaching seemed to have taken place among them.[45] Until law schools took over the primary role of *yoken jijitsu* teaching in mid-2000s, many of the articles on it were written by the staff of the Institute's Civil Trial Teachers Section.

The Legal Training and Research Institute was established in 1947.[46] It was not created from scratch, however, but apparently succeeded the Legal Research Institute of the Ministry of Justice, which existed from 1939 to 1945. The Legal Research Institute before the Second World War consisted of three divisions, responsible for training of trainees, the education of young judges, and the education of middle-ranking judges, respectively. The current Legal Training and Research Institute has two bureaux, the first bureau for training of and research by judges, and the second for the training of trainees, indicating the continuity in the organisation from its predecessor.

This continuity was also apparent in the subject of research. As the outcome of research in 1941, the Legal Research Institute published a collection of 'good judgments on civil cases'[47] as well as a handbook on writing of judgments.[48] The interest in the writing skills and the pursuit of 'good judgements' are common with the above-mentioned focus of Muramatsu, and were succeeded by the founding works on *yoken jijitsu* teaching in the early days of the post-war Legal Training and Research Institute. The preface to the collection of judgments acknowledges Judge Saburo Iwamatsu as mentor of the research group. As Iwamatsu is said to have influenced Muramatsu,[49] a continuity in personal networks may have existed. Further, the handbook on writing of judgments published in 1941 has much in common with the post-war Handbook on Civil Case Judgements published under the name of the Legal Training and Research Institute. The first edition of the post-war handbook was published in 1958, and the current tenth edition of 2006[50] is still widely used in law schools as the textbook for courses on civil litigation practice, most of which are offered by practitioners.

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45 Ohashi (n 29) 419–421.

46 Its establishment is based on the Court Act (Law no.59 of 1947), art 14.

47 *Shiho Kenkyujo Dai-3-bu Dai-3-han Kenkyû'in Minjihan*, 『民事判決集』(Collection of Judgements in Civil Cases), (first published 1941, Shiho Kenshujo 1949).

48 Shiho Kenshujo, 『司法研修所資料第6号・民事判決書に就て』(The Legal Training and Research Institute Materials no 6: On the Judgement in Civil Cases) (first published 1941, Shiho Kenshujo 1952).

49 Tôji Tao, '村松先生と法曹教育 (Judge Muramatsu and legal education)' (1987) 630 *Hanrei Taimuzu* 87, 89.

50 Shiho Kenshujo, 『民事判決起案の手引』(The Handbook of Writing a Judgement) (10th edn, Hosokai 2006).

2 *Social Turmoil since 1920s as Background*

The continued interest in developing the 'skills' in writing judgements may be better understood in light of the fact that the pre-war Legal Research Institute itself was preceded by the Legal Research Committee of the Ministry of Justice since 1926. The committee commissioned research on specific subjects to a volunteer judge or prosecutor, who was given a leave of six months for this research.[51] The outcome of the research was published in the Legal Research Bulletin (*Shihô Kenkyu*), which continued until 1949. These facts reveal that the judges in Japan started to reconsider their role in the middle of the 1920s, and through this research they had by the early 1940s identified the need to improve their working method. These efforts toward improvement were carried over to the post-war period, which produced *yoken jijitsu* teaching.

It cannot be a coincidence that the judges started these activities in the 1920s. After the First World War, the accumulated social changes since the beginning of modernisation under the Meiji government finally reached a point of disruption. Various challenges were raised against what was believed to be the governing regime: by tenants against land and house owners, by factory workers against managers, and by tenant farmers against landowners in the village.[52] Some of the disputes were brought before the court, but the Civil Code was not useful to mitigate those grievances, because the provisions of the Civil Code were transplanted rules from nineteenth-century Europe, unfamiliar as yet with modern social problems. The legislature was reluctant about reform, as the Diet members were mostly from the class that benefited from the existing regime. While the Law on Land Leases and the Law on House Leases were enacted in 1921, the Farm Tenancy Bill was never approved by the Diet.

As a result, even the neutrality of the courts was doubted, and the courts were sometimes criticised by using the Marxist term of "performing the class role."[53] The courts attempted to face the emerging challenges by modernising the court procedures. The amended Civil Procedure Code of 1926 was modelled after the Austrian Civil Procedure Code, which not only was the law of a country regarded as authoritative in the civil law at that time, but one that had

51 Kanji Kondo, 『近藤完爾　民事訴訟論考』(Kanji Kondo's Essays on the Court Procedure in Civil Cases) vol 2 (Hanrei Taimuzusha 1978) 356. See also the Constitution of the Legal Research Committee, reprinted in *Shihosho Chosa-ka* (Ministry of Justice, Division of Research), (1926) 1 司法研究　第一輯 (Legal Research Bulletin, no 1) 1.

52 Dimitri Vanoverbeke, *Community and State in the Japanese Farm Village: Farm Tenancy Conciliation (1924–1938)* (Leuven University Press 2004) 14–15.

53 Ibid 19.

also strengthened the judge's power in administering the procedure.[54] However, the attempts were soon overlaid by the use of conciliation, which appeared to be a more promising solution. First introduced to address the disputes over house and land leases in 1922, the use of conciliation soon spread to various types of disputes, such as tenant farming, and commercial and labour disputes. War-time special legislation of 1942 made conciliation available for any civil dispute, and finally it authorised the court to render a decision as a substitute for an agreed conciliation outcome.[55]

3 *The Quest of Redefining the Role of the Judiciary*

Against these backgrounds, the efforts to improve the skills in writing of judgments can be understood as attempts to redefine the role of the judiciary. Tao recollects that the judgments before the education at the Legal Training and Research Institute bore fruit were chronicle-style 'stories' and often mentioned non-legal elements such as events prior to the dispute, negotiations before the suit was raised, or the personality and behaviour of a party.[56] The goal of Muramatsu, Iwamatsu and their colleagues must have been to distinguish the judiciary from other types of dispute resolution mechanisms (including conciliation) and redefine the judiciary through a conscious pursuit of 'judicial' methods by judges. Although such a goal was never explicitly stated but can only be inferred, the inference is convincing, given the continued emphasis on the syllogism-structure of judgment in *yoken jijitsu* teaching.[57] The court's working method is considered to assume the statutory provision as the major premise and to apply the facts of the case as the minor premise, through which the solution to the case is found as the conclusion. Persistence with such a classical mode of argument, which is often criticised in other countries, is only understood when one sees the desire to maintain the defined role of judiciary. Otherwise, it may have been feared, judges in Japan could easily be reduced to a state organ for resolving disputes for the sake of social stability.

4 *The Refinement of* Yoken Jijitsu *Teaching since 1960s and Its Impact*

Yoken jijitsu teaching was developed over a few decades since the 1960s. Teachers of the Legal Training and Research Institute published a series of

54 See Akira Mikazuki, '民事訴訟法学の出発点に立返って (Returning to the Starting Point of the Civil Procedure Law Studies)', in 『民事訴訟法研究』 (Studies in Civil Procedure Law) vol 10 (Yuhikaku 1989) 156–157.

55 The Special Wartime Law on Civil Matters, Law no 63 of 1942, repealed in 1946.

56 Tao (n 29) 1031.

57 See, for example, Shin'ichi Yoshikawa, '要件事実論序説 (An introduction to *yoken jijitsu* approach)' (2003) 110 *Shihôkenshûjo Ronshû* 129.

articles in the Journal of the Legal Training and Research Institute under the name of the Civil Trial Teachers' Section. The articles later developed into a book published by *Hôsôkai* in 1985.[58] The book includes a theoretical outline of the *yoken jijitsu* teaching approach and the article-by-article analysis of facts to be proven (*yoken jijitsu*) for several Civil Code provisions. The article-by-article analysis covered the provisions on agency, conditions and terms, set-off, contract of sale and contract of lease. Through this process, *yoken jijitsu* teaching's approach was refined and developed into a self-contained theory. The articles and the book were used as materials for the training at the Legal Training and Research Institute.

Sometimes the *yoken jijitsu* teaching approach was criticised as too technical. In the Report of the Ad Hoc Committee for the Investigation into the Judicial System, published in 1964, it was blamed for detracting the trainees from having a broad perspective in the study of law.[59] The apparently functional nature of *yoken jijitsu* teaching, together with its paternalistic nature, may have generated such criticism.

5 *Responding to Post-War Social Changes*

In fact, however, *yoken jijitsu* teaching has not interfered with the courts that attempted to make flexible responses to social changes. During the period when the Legal Training and Research Institute was devoted to developing *yoken jijitsu* teaching, the Japanese economy saw remarkable growth, and society never ceased to change. New social problems arose one after another: car accidents, environmental pollution (such as *Minamata* disease) and incidents of defective products (such as *Kanemi* oil), to name a few. Every time these social issues appeared, progressive lawyers raised lawsuits to seek remedies for the victims, motivated by the desire to bring the issue onto the social agenda.[60]

58 Shiho Kenshujo, 『民事訴訟における要件事実』 (*Yoken jijitsu* in civil cases) (Hosokai 1985).

59 Rinji Shiho Seido Chosakai (Ad Hoc Committee for the Investigation into the Judicial System), '臨時司法制度調査会意見書 (Report of the Ad Hoc Committee for the Investigation into the Judicial System)' (1964) 120. For the general background of this Committee, see Rokumoto, 'Overhauling the Judicial System' (n 3) 14–15.

60 Cf. Frank R Upham, *Law and Social Change in Postwar Japan* (Harvard University Press 1987) 23–24; Joseph Sanders, 'Courts and Law in Japan' in Herbert Jacob, Erhard Blankenburg, Herbert M Kritzer, Doris Marie Provine and Joseph Sanders, *Courts, Law, and Politics in Comparative Perspective* (Yale University Press 1996) 358–365; Souichirou Kozuka, 'Competition law in Japan: the rise of private enforcement by litigious reformers', in Leon Wolff, Luke Nottage and Kent Anderson (eds), *Who Rules Japan? Popular Participation in the Japanese Legal Process*, (Edward Elgar 2015) 164, 177.

The courts seem to have coped with these challenges more successfully than in the 1920s. Most significant were the cases on the liability for defective products. Even prior to the enactment of the Products Liability Act in 1994, the courts often decided favourably to the plaintiffs.[61] However, unlike the case law development in the United States, the Japanese courts never invented a new rule of strict liability for defective products. Rather, the judges focused on facts, often finding the negligence (and causation) to hold the manufacturer liable under the rule of negligence liability under the Civil Code.[62]

The contrast of the US and Japanese case law may be attributed to *yoken jijitsu* teaching. As noted above, *yoken jijitsu* teaching considers that facts to be proven (*yoken jijitsu*) in negligence liability are the individual facts and not negligence as such. This understanding must have enabled the courts to examine the facts of each case closely in affirming negligence of the manufacturer. If American judges have long been recognised as adjudicative law-makers,[63] Japanese judges became adjudicative reformers without becoming a law-maker, thanks to the *yoken jijitsu* teaching approach.

The focus on facts as the feature of judicial decisions is shared by the plaintiff's attorneys as well. The more recent emergence of private anti-monopoly lawsuits on cartel and bid-rigging cases has been led by a group of reformist lawyers, organised as 'Citizen Ombudsmen'. They pronounce their preference for litigation to political activism by emphasising the focus on facts. Instead of advancing ideological arguments, they examine the materials thoroughly and identify such facts as indicating breaches of the Anti-Monopoly Act. In this way, they can claim to be politically neutral, and expect favourable responses by the court.[64]

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61 Luke Nottage, *Product Safety and Liability Law in Japan: From Minamata to Mad Cows* (RoutledgeCurzon 2004) includes a comprehensive study of cases prior to the enactment of the Products Liability Act.

62 Interestingly, Hiroshi Mori, '要件事実論の基礎にあるもの (The basis of *yoken jijitsu* approach)' (2001) 52(5) *Jiyû to Seigi* 150, 162, in discussing the liability of the owner of a defective construct on land, equates the American case law that developed to form a new rule on strict liability and the cases in Japan that applied the law to individual incidents and affirmed the liability in many of them. Mori's argument seems to reflect the average view of Japanese judges.

63 Carlo Guarnieri, 'Social Science and Judicial Studies: Lessons from the US and Europe' in Piana, Langbroek, Berkmanas, Hammerslev and Pacurari (n 1) 7, 7–8.

64 Kozuka (n 60) 177.

6 *Modifications after the Legal Education Reform*

After the reform of legal education in 2004, *yoken jijitsu* teaching was mostly taken over by law schools. Thus, despite repeated criticism,[65] *yoken jijitsu* teaching survived the reform of legal education. With the intention to offer textbooks for the *yoken jijitsu* courses at law schools, the Civil Trial Teachers' Section of the Legal Training and Research Institute published a few books on the *yoken jijitsu* approach. Interestingly, these books have made slight changes in nuance from the 1985 book. The most recent textbook no longer describes *yoken jijitsu* as the 'Civil Code as norm for adjudication'. Perhaps relatedly, the arguments in the textbook have become more modest on some issues, implying that a different view might exist.[66]

The changes can be understood as adjustments to *yoken jijitsu* teaching in view of the grand plan of the Judicial System Reform. The basic goal of the Judicial System Reform was to respond to, and even advance, the juridification of Japanese society. To achieve this goal, it was found necessary to expand the lawyers' field of activity, and improve people's access to legal services. Access to legal services was not only a problem for unsophisticated classes of people. Large companies engaged in more and more globalised business activity also need legal services in larger scope and quantity. Contract-drafting has become more elaborate than before, corporate structures more carefully designed, and financial transactions more technically developed. The size of law firms has accordingly expanded within a short period of time. All these developments implied that, as far as large, sophisticated businesses were concerned, private autonomy and freedom of contract were much more needed than before. The Judicial System Reform responded to these demands, which derived from the Administrative Reform that preceded the Judicial System Reform by a few years, often described as a transformation 'from regulation *ex ante* to control *ex post*.'[67]

It must also be mentioned that, unlike in the 1920s, the Diet in the 1990s has conducted legal reforms frequently, indeed almost constantly, especially with regard to private-law matters. Urged by the protracted economic downturn, the reform of business-related laws has become an unavoidable agenda.

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65 As recent examples of criticism, see Hiroyuki Matsumoto, '要件事実論と法学教育 (*Yoken jijitsu* approach and legal education)' (2003) 54(12) *Jiyû to Seigi* 98, (2004) 55(1) *Jiyû to Seigi* 54, (2004) 55(2) *Jiyû to Seigi* 92; Tetsuro Hirano, '新体系・要件事実論 (New Systematic of yoken jijitsu approach)' (2012) 44(4) *Ryûkoku Hôgaku* 185.

66 Shiho Kenshujo (n 34).

67 *Shiho Seido Kaikau Shingikai* (n 3) 13 mentions the relevance of the administrative reform to the Judicial System Reform by quoting a passage from the final report on the Administrative Reform. See also Fujikura (n 3) 943 and Rokumoto, 'Legal Education' (n 3) 216–218. On the demand from the industry as background, see Kamiya (n 3) 155.

Several amendments to the corporate law (then codified in the Commercial Code) during the 1990s,[68] the entire renewal of the Civil Procedure Code in 1996,[69] the enactment of the Civil Rehabilitation Act of 2001 to substitute for the outdated Composition Act, followed by the total reform of the Corporate Reorganisations Act of 2002,[70] are just some examples.

The demand for greater private autonomy and active law-making by the legislature has forced the judiciary to redefine its role once again, this time to make it more modest than before. Since enhanced access to justice was also on the agenda, the judiciary now had to face two fronts: to actively reach out to unsophisticated potential users of legal services, while modestly respecting sophisticated parties' autonomy. The *yoken jijitsu* textbook for law schools may reflect the outcome of adjustment to such requirements. On the one hand, the identity of the judiciary, as opposed to dispute resolution in general, must be maintained through teaching of *yoken jijitsu* courses at law schools. On the other hand, its paternalistic aspects have had to be moderated so as not to interfere with the development of sophisticated legal services.

E Conclusion: Legal Education and the Role of the Judiciary

This chapter has focused on a specific subject in the legal education of Japan: *yoken jijitsu* teaching. Despite the significant impact it has had on the formation of Japanese lawyers' working methods, it has hardly been introduced in Western languages and almost neglected by Japanese law researchers. This being said, this chapter has not intended simply to add another topic to Japanese law studies. There are a few implications relevant to legal education in general.

The first implication is that the debates on legal education should not be limited to the technical aspects of teaching or training. The design of legal education must reflect the definition of the role of the judiciary in the society. And, if lawyers wish to maintain their autonomy as professionals, this definition must be made by them.[71]

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68 See Souichirou Kozuka and Luke Nottage, 'Japan' in Jean Jacques du Plessis, Anil Hargovan and Jason Harris (eds), *Principles of Corporate Governance*, (4th edn, CUP, forthcoming).

69 Shozo Ota, 'Reform of Civil Procedure in Japan' (2001) 49 American Journal of Comparative Law 561.

70 Souichirou Kozuka, 'Law in a changing economy: law of trade credit and security interests in context' in Dimitri Vanoverbeke and others (eds), *The Changing Role of Law in Japan* (Edward Elgar 2014) 81 with further references.

71 The issue of independence vis-à-vis the State is analysed in Chapter 12 in the context of Vietnam, where the state's control over legal education is still significant, though in the process of being gradually de-centralised.

Secondly, the role of the judiciary needs adjustment when society experiences changes. As social changes will rarely, if ever, cease to occur in this modern world, the judiciary has to redefine its role constantly. This will, in turn, necessitate review and reform of legal education from time to time.

The final, though not explicitly discussed, implication of this chapter is that the relevance of the role of the judiciary to legal education may perhaps be all the more significant in Asia. It is because Asian countries do not share the tradition of Western legal systems dating back to the ancient Roman times, but received the transplanted legal system at some point of history. As a result, one cannot rely on the existence of a tacit understanding about the role of the judiciary and must be conscious of the issue, sometimes discussing it openly. Otherwise the debates on legal education will easily be reduced to the technique of how to grow national elites.

CHAPTER 8

Legal Education in South Korea: Does Continuance of the Old Judicial Examination Style Ruin the Dream of Ideal Legal Education?

Yong Chul Park[1]

A Introduction

In South Korea, law used to be one of the least accessible subjects to the general public partially because an extremely small number of people had the privilege to practice law. Prior to legal education reform starting in 2009, only less than 14,000 people had been admitted to practice, and the number included those who were on the bench as well as prosecutors and those in private practice. In addition, the laws of the land, heavily indebted to civil-law tradition transplanted during the colonial period in the first part of the 20th century, were considered to be at the level of metaphysics because the legal field had been contaminated by archaic legalese and Chinese characters imported from Japan. Many members of new generations had had difficulty digesting the outdated mundane expression in both codes and cases, regardless of deeper understanding of the code and its annotated edition. Leaving the law in the hands of the few who were free to use their knowledge for their own benefit without benefiting the society in general had become too risky for the good of the civil society in South Korea, and people's dissatisfaction with legal practitioners and their strong desire to be directly involved with the making and working of the law brought about some changes since the early 1990s. Presidents Young-Sam Kim and Dae-Jung Kim initiated presidential committees for legal reform including legal education reform; however those committees expired without any meaningful changes.[2] – Even these faced strong opposition from practitioners and lawmakers. All the efforts towards major changes seemed destined to fail. Like a substantial brick house, the lawyers' will to protect their interests was nearly impossible to dismantle.

1 The author would like to thank the Asian Law Institute for the opportunity to organize thoughts on this issue.

2 See generally, M.J. Trebilcock, Ronald J. Daniels, *Rule of Law Reform and Development: Charting the Fragile Path of Progress*, (1st edn, Edward Elgar 2008) 304.

 | DOI 10.1163/9789004349698_009

The late President Roh Moo-hyun, who used to be a famous human rights lawyer before changing his career to be a politician, was brave enough to break the ties with his old profession and embark on a totally new journey to revolutionize the entire legal system in South Korea, and he could not leave legal education out of this revolution. Legal- education reform, as part of the entire overhaul of the legal system in South Korea, fell into the people's lap overnight, since the National Assembly of South Korea passed the law regarding legal-education reform without the necessary discussion in the Legislation and Judiciary Committee and the Assembly Plenary Session, although public discussion of the reform had lasted for a long time without any meaningful results. Actually, the discussion had begun in the early 1990s with the purpose of internationalizing legal education in order to produce more competitive lawyers who would survive fierce competition from global law firms. However, for about 20 years politicians had been extremely hesitant to give any priority to reforming legal education, because it would have been seen as rattling the most privileged monopoly of the few. Also, a lot of scholars had contended that South Korea does not have a large legal market, therefore any dramatic increase in new lawyers would crash the market.

Legal education in South Korea has gone through its biggest changes and challenges with the import of the US-style law-school system starting in 2009. It was expected that the transition of the recipients of legal education, from undergraduate students with high-school diplomas to graduate students with various undergraduate majors, would bring not only a change in institutional structure but also a change in the curriculum and teaching methods.[3] At the inception of the law-school era starting in 2009, so-called Socratic methods and diverse practice-oriented teaching methods were considered as the vital factors to 'produce a professional group of lawyers who can deal with difficult legal problems arising from the globalizing world.'[4] However public confidence in the importance and efficacy of such new teaching methods began to diminish as a result of practical issues regarding preparation for the bar examination, and the criticism that Korean lawyers may have misunderstood the true nature of civil law tradition, which consists in the refined interpretation of codes rather than the development of case-analysis.

3 See generally Jasper Kim, 'Socrates v Confucius: An Analysis of South Korea's Implementation of the American Law School Model' (2009) 10 APLPJ 322.

4 Jae-Hyup Lee, 'Legal Education in Korea – Some Thoughts on Linking the Past and the Future' [2009] 44 Kyung Hee Law Journal 605 <http://ils.khu.ac.kr/ils-khulaw/44-3/44-3-2-7.pdf> accessed 12 December 2016.

First, the bar examination is no different from the decades-old judicial examination, which is about to be phased out in 2017 in terms of content, issues and questions. That is, in the bar examination, what has mattered most is case law, due to the fact that legal theories – even if the majority of scholars agree with certain dominant opinions – cannot be tested for the 'right' answers in multiple choice as well as essay-type questions. Therefore students' preparation for the bar examination hinges on how many important Supreme Court cases they have learnt by heart. This tendency of taking the most serious view of case law leads to the criticism that in South Korea, where the civil law tradition is the firm foundation of the legal system, case law should never take the first priority and the focus of studying law in South Korea has to be to explore in depth theories of law With the continuance of similar questions and contents of the bar examination as compared to the old Judicial Examination, professors as well as students at law schools cannot be free from learning how the Supreme Court sees the legal issues, and this trend of giving too much attention to case law necessarily links to a lack of rich discussion of legal theories because most cases are not detailed enough to grasp the theoretical rationales in order to explain why the Court reached certain conclusions. Also the trend undermines the civil-law tradition where case law only exists as a reference, not as a commanding, because every case is different in terms of facts. There is also a lack of freedom to choose the content of teaching at law schools, due to the fact that the Ministry of Education in South Korea controls even the numbers of required courses in law schools. Also, legal education in South Korea has faced another crisis in that the law schools have become merely 'cram' schools for the bar examination preparation, and not places for innovation of legal discussion.

In this chapter I will lay out the changes and challenges affecting the 25 law schools that exist nationwide in South Korea. Also, I intend to pinpoint the innate contradiction or inconsistency between the nature of the legal system which is based on the civil-law tradition, and the methods and contents being taught at law schools. Part A details the pre-history of professional law schools and in this Part I argue that the law-school system has its 'half-brother' that it cannot get along well with. Part B covers the drive that made the establishment of law schools possible. Part C examines how the law-school system has faced legal and practical challenges in terms of realizing the rationale noted in Part B. Part D criticizes law schools' efforts to be more professionally-oriented. Part E submits that there is a long road ahead for the professional law-school system in South Korea. This system, as one of the greatest experiments happening in South Korea, needs more time and effort on the part of all the people involved in law teaching in this new era.

B The Pre-professional Law School Era in South Korea

It is certain that the professional law-school system in South Korea has been the first historical attempt to widen the opportunity to become a legal professional. However, contrary to the public perception that the system was a direct import from the US, it has some traceable roots in history to look into. That is, there had previously been domestically-run training institutes modelled on Japan. Obviously, the subject and contents of legal education were destined to be different during the pre-law school era.

1 *The Graduate School of Law at Seoul National University (1962–1970)*

As discussed later, in a civil-law jurisdiction such as South Korea, legal education had been heavily focused on the theoretical endeavor of teaching the various legal subjects, mainly because there was an almost religious belief that any code could not be understood without understanding its theoretical framework. At the time, no matter how long the students had studied law, it was admitted that they lacked knowledge of the practical side of the subject because they had none received any. That is why the Graduate School of Law at SNU stepped in.[5] This School conferred graduate-level degrees and at the same time was the official legal-training institute approved by the Supreme Court of Korea. It is worth noting that the School was not for everyone who wanted to have practical knowledge on how law was put into practice. It was the only institute for those who passed the Judicial Examination, which was the predecessor of the National Bar Examination. Therefore, the School more resembled the Judicial Research and Training Institute (JRTI), not because the JRTI took over the Graduate School of Law at SNU, but because the JRTI was the destination for successful candidates who passed the judicial examination. Also, the Graduate School of Law was a provisional institute, because, although it was under the National University, admission to the School was limited to those who had passed the Judicial Examination. This looked very inappropriate and it is presumed that distinguishing the contents and methods used at the School from those of the general college of law as well as the general graduate school of law must have been nearly impossible.

2 *The JRTI (1971–2020)*

As mentioned before, the JRTI has been the legal-training institute for those who have already passed the Judicial Examination. That is, the JRTI has been

5 Lee (n 2) 607.

the place for teaching practical knowledge, because students at the JRTI have been those with passable knowledge on the theoretical side. Also, the JRTI, under the supervision of the Supreme Court, was designed to educate future judges and prosecutors and it has its roots in the Japanese Legal Training and Research Institute (JLTRI)[6] which was established in 1947 under Article 14 of the Japanese Court Act. The Japanese model has also been under the supervision of the Supreme Court of Japan. Anyhow, the JRTI as a two-year training institute, started to accommodate its first group of 81 trainees in 1971. Since then, the yearly number of incoming trainees grew from 300 then to 1,000, although the current number of incoming trainees annually is about 300 due to the establishment of the new professional law schools and the introduction of the new bar examination.

All of the trainees have been successful in the Judicial Examination and one interesting aspect of the incoming trainees was that they did not have to go through formal college education to take and pass the Judicial Examination. The only requirement to take the Examination was to get 35 course credits in law, and the credits do not have to be earned from colleges or universities. There are institutes and self-study programs certified by the Ministry of Education providing opportunities to earn credits. Also, even these requirements were fairly recent measures for the purpose of preventing candidates from taking the Examination only after memorizing content by themselves.

The training at the JRTI has been considered the most practical education there is. Most faculty members are current judges or prosecutors who are experienced in practice. Also, the JRTI has taught a variety of subjects ranging from general contents regarding civil or criminal laws to fairly specific subjects such as witness- interrogation techniques and skills for prosecutors. Since the Judicial Examination is planned to phase out in 2017 as provided in the Act, and the bar examination will be the only way to become a lawyer, the JRTI is expected to accept its last trainees in 2018, and therefore is expected to phase out in early 2020. As mentioned later, the JRTI has been heavily criticized as the cradle of the 'legal mafia' in which students of the JRTI bond together more closely than any group of other professionals.

6 The JLTRI had its own predecessor called the 'Legal Research Institute' which was established in 1939 as an affiliated institute to the Ministry of Justice. Although the Institute was established in 1939, the Institute was not active during World War II. After the War, the 'Legal Research and Training Institute' replaced the 'Legal Research Institute'; see 'The Legal Training and Research Institute of Japan' (Supreme Court of Japan, 2006) <www.courts.go.jp/english/institute_01/institute/index.html> accessed 1 December 2016.

3 *Law Programs Offered as a Bachelor's Degree Programme*

The intended students on law programmes in universities were undergraduates who were planning to take and pass the Judicial Examination, which was considered the most difficult standardized examination that anyone could take.[7] As in most of other parts of the world except the US, Canada and some others, legal education was more of an undergraduate phenomenon in South Korea. Moreover, 'the German conception of legal education serving as a pathway to bureaucracy and to big business' had been widely acknowledged in South Korea.[8] That is, the purpose of legal education was not to raise practising lawyers, but rather to produce bureaucrats and judges. Therefore the undergraduate study of law was supposed to provide the students with the opportunity to equip themselves with necessary knowledge to become successful candidates in the Judicial Examination. However, law colleges throughout South Korea, including the College of Law at Seoul National University had not shown much interest in sharpening their teaching skills in order to raise the pass rate of the Judicial Examination. There were several rationales behind such senseless reality.

First, the subject of law had been perceived as one for self-study, partially because due to the innate nature of law taught and studied in South Korea – extremely difficult to digest without hands-on advice from practitioners or skilled professors – four years of study as an undergraduate student would not be enough to pass the Judicial Examination. Paradoxically this allowed law colleges to desert their students in terms of preparing them to pass the Judicial Examination.[9]

Secondly, many law professors dating back to the 1970s or 1980s showed virtually no interest in teaching important legal concepts and principles written in the law books. They let the students learn by themselves. There were legendary anecdotes that some law professors never showed up in class on time and left shortly after arriving. For many law professors, since the subject of laws was considered as being only about memorizing provisions of the code and getting used to scholarly interpretation of such provisions, cultivating the legal minds

7 Rosa Kim, 'The "Americanization" of Legal Education in South Korea: Challenges and Opportunities' (2012) 38 BJOIL 48, 51.

8 Tom Ginsburg, 'Transforming Legal Education in Japan and Korea' (2004) 22 Penn State International Law Review 433, 435 <http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2435&context=journal_articles> accessed 15 December 2016.

9 It was reported that the average preparation time for passing the Judicial Examination was 5 years and the pass rate was only 2.93%; (*Daily UNN*, 30 November 2016) <http://news.unn.net/news/articleView.html?idxno=166782> accessed 10 November 2016.

of future lawyers by detailing what was already on the books was neither necessary nor desirable. That is, many legal scholars in the past applied the idea of self-study when it came to the study of law.

Thirdly, the relaxed university culture as a whole had great impact on legal education in universities. Although South Korea has been noted as the place for fierce competition 'in the slippery pyramid of education',[10] once the high school students were admitted into universities, virtually all the students would not fail to graduate even with little effort to study. Legal education had not been different from any other subjects taught in universities.

Fourthly, legal education in universities was not practical enough to be helpful in preparing for the Judicial Examination. Law professors used to be a group of people either with a higher purpose of making monumental academic landmarks and teaching their great works,[11] or else with no energy to work with students to enable them to grasp difficult concepts and principles. Therefore a lot of law students who wanted successful results in the Judicial Examination asked for academic help outside of the universities. There had been a flourishing district in Seoul called *Shinsoo-Dong* where a lot of 'cram' schools preparing one to pass the Judicial Examination had very successful business. The successful candidates were committed consumers of those schools heavily focused on passing the Examination, with highly organized sets of teaching skills regarding test subjects. The boom of 'cram' schools had made the situation in universities even worse, because the very existence of these schools helped many law professors engage in highly theoretical work, thinking that elaborating their own works while ignoring the need to combine them with teaching in class would be acceptable. A good legal mind was considered to be one attained via reading a lot of law books, not taking lessons from professors in class.

Many professors never wanted to challenge students in class in order to come up with the best understanding. This was because students were never allowed to do so because it would seem to lack respect for their academic authority. Many law professors in 1980s and 1990s were just high-toned legal scholars chaining themselves in a small box.

For these reasons legal education in universities had been alienated from preparing students for the Judicial Examination and at the same time the practicality of legal education had been in serious doubt because for better or

10 Kyong Whan Ahn, 'Law Reform in Korea and the Agenda of "Graduate Law School"' [2006] 24 WILJ <https://hosted.law.wisc.edu/wordpress/wilj/files/2012/02/ahn.pdf> accessed 30 November 2016.

11 Also, their teaching is irrelevant to preparation for the Judicial Examination.

worse, the Judicial Examination was the compulsory entrance as well as the exit for many law students.

4 *The Launch of Law Schools and beyond*

After nationwide competition to be accredited as law schools by the Ministry of Education and Human Resource Development,[12] the provisional list of 25 law schools was announced by the Ministry in February 2008. The race to the top was run by 41 universities which applied for law-school accreditation, and slots for the law schools were limited because the government announced that the total number of law students per year nationwide would be only 2,000,[13] and the government exercised its full discretion to allocate different numbers of students to each law school based on their capacity. Accordingly, the 25 law schools have 40–150 students per class depending upon capacity as by the government. The law schools' quotas were criticized as an unfair distribution based on biased evaluation, because the evaluation was done by a committee mostly consisting of law professors from big law colleges. Also such small numbers allotted to each law school precluded economy of scale and would therefore bring huge losses to the law schools themselves without any exception.[14]

Most of all, establishing 25 law schools with small numbers of students has turned out to create even bigger challenges, because it was obvious from the start in 2009 that in dividing or distributing such small numbers of students among the vast number of classes offered, some courses with very specific topics such as legal philosophy would not be tested in the bar examination. This was destined to fail in terms of recruiting enough students to maintain a strict university standard of education. Anyhow, new professional law schools with both expected and unexpected problems at hand were launched with the hope that this would revolutionize the legal profession. When one looks at the proposed theme of legal education in law schools: 'educating students with theoretical and practical knowledge', it is noticeable that in the new era professional law schools have as their predecessors the Graduate School at Seoul National University and the JRTI, and the students of those institutes were the ones ready for grasping practical knowledge of the legal profession. That is, the candidates for practical training have been the ones with

12 The present name of the Ministry of Education and Human Resource Development is the Ministry of Education.

13 There were a lot of rationales as to why the number of law school students per class should be limited. Most important of all, the Japanese example of not limiting the number of students was considered as a failure.

14 'Law School Selection Triggers Uproar', *Korea Herald* (Seoul, 31 Jan 2008).

test-proven knowledge of legal theories. The only exception to this tradition are the students at the professional law schools, who are not the ones with necessary legal knowledge to pass the bar examination. However they have to be prepared to take the bar examination after three years of study, with the expectation that they will also be equipped with practical training during their time in law school.

C Rationales for Establishing New Professional Law Schools

1 *Need for More Diversity*

Firmly rooted in the purest idea of producing judges and prosecutors who should not be corrupted by outside influences, the JRTI was established following the model established in Japan as an exclusive training centre for future legal professionals. The JRTI's main purpose was to produce future judges and prosecutors that the Supreme Court and the Supreme Prosecutors' Office would hire. As in other civil law countries, South Korea had retained the idea that judges and prosecutors especially should be the people without any outside influences, and the best way to make that happen was thought to be to pick and choose the ones fresh out of the JRTI. However the very existence of the JRTI was a major roadblock to the idea, because given the low pass rate of less than 3%, most of the successful candidates passing the Judicial Examination and landing in the JRTI have become well-connected to each other both as fellow future comrades in legal profession and as fierce competitors in the Institute. The JRTI has existed as one of the most important bonding places for all future legal professionals because the Institution was the only place for getting a licence to practise law and throughout the two years of training, it has been inevitable that all the people in the Institution willbe networked. Therefore although the JRTI has worked as a place of highly intensive and competitive training and an effective defence mechanism against outside corruption, the seed for internal corruption amongst trainees in the JRTI was also planted.

In addition many outside observers have questioned how it could be a place to raise globally competitive legal professionals given the relative lack of teaching of global subjects. For those observers, the JRTI'S recent effort to include more global subjects such as Introduction to Anglo-American Law and International Trade Laws was only a futile attempt to quieten all the criticism of the heavy emphasis on domestic laws at the Institution. A lot of reformers of legal education have made an outcry for the reform of the Institution and they have

given reasons for legal reform leading to the establishment of new professional law schools.

Prior to the launch of the law schools, the JRTI had been heavily criticized as an organization for those with similar backgrounds. Most of the trainees at the JRTI have been graduates of top law colleges and there are statistics to prove that. According to a survey done of 4,820 graduates of the JRTI from 2002 to 2006, most of the JRTI graduates came from 3 to 5 universities including Seoul National University.[15] According to another statistic analyzing the last 10 years of judge hiring, 77.59% were law majors even though it is not required to major in law as an undergraduate to become a judge.[16] Supporters of professional law schools argued that in this modern age, when other disciplines such as economics would be the most essential tool to understand cases, practitioners with only exposure to legal subjects would not be capable of carrying out the tasks assigned to them. Such strong demand for diversifying legal education by attracting students with various majors as undergraduates was one of the most fundamental arguments why law schools are better than the law colleges.

2 *Globalization in the Legal Field*

In the early 1990s politicians including the late President Kim Young Sam advocated the idea of globalization and argued that the adoption of a US-style law school system would create more competitive lawyers in a global legal market.[17] His first attempt at a professional law school based on his idea of globalization failed miserably because the powerful community of legal professionals opposed any dramatic change. The demand for more globalized lawyers was also noted by the Judicial Reform Committee created by the late President Roh Moo-Hyun in 2003. In its mission statement, it is noted that 'a professional law school … produces qualitative and globally competitive legal professionals,' among others.[18] Many supporters of professional law schools argued that the legal-education system, with law colleges and the JRTI, failed to meet global standards. With the growing demand for the lawyer's role in an

15 See generally Chang Rok Kim, 'The National Bar Examination in Korea' (2012) 24 WILJ <https://hosted.law.wisc.edu/wordpress/wilj/files/2012/02/kim.pdf> accessed 8 June 2017.

16 'Graduates from 6 Major Universities Dominate the Pool of Judges' (*Veritas*, 11 October 2013) <www.veritas-a.com/n+ews/articleView.html?idxno=17603> accessed 10 March 2017.

17 Kim (n 8) 56.

18 Ibid 57.

international setting, legal education in South Korea never satisfied the need to grow internationally-minded lawyers. With the planned scheme of opening its legal market to foreign law firms, it was felt strongly that law schools would help the people move forward with globally-minded lawyers.

3 *Need for More Lawyers*

As noted in this article, prior to the introduction of professional law schools, the number of lawyers was extremely small, mainly because the only way to be licenced to practise law was through the Judicial Examination which only allowed less than 3% of applicants to pass. The number of new lawyers had been tightly controlled by the government although the number was increased incrementally from 30 to 1,000. Even 1,000 new lawyers per year were not considered to be enough to provide effective legal services to those in need. With the introduction of professional law schools the total number of new lawyers per year was expected to become 1,500. Therefore, opening new law schools was viewed as the most effective way to increase the number of legal professionals because during the old Judicial Examination era, increasing even 10 more successful applicants was nearly impossible to achieve. Launching professional law schools succeeded in expanding the number of new lawyers by 500.

D Call for New Teaching at Professional Law School

Supporters of professional law schools boasted that they would be the venue for teaching theories as well as practical knowledge, and it would be totally distant from the old model of just memorizing laws in order to pass the Judicial Examination. In addition, theories without hands-on knowledge were considered as empty slogans. Professor Cheong set an unrealistic ideal by mentioning that 'the law school curricula will be separated completely from preparation for bar examinations' because students at professional law schools are not isolated from bar examinations and they still need to devote most of their time to study core subjects for the purpose of passing the examination. On the dawn of new professional law schools, idealistic thoughts on how and what the law schools were to teach swept throughout the country. Although the introduction of the new law-school system did not change anything in terms of teaching and practising law prior to the year 2012 when the first graduates of the professional law schools entered the legal market, even the National Assembly was filled with hope and this hope was well expressed in the 'Act on the Establishment and Management of Professional Law Schools ('the Act')'.

1 *The Ideal Law School as Provided for in the Act*

Article 1 of the Act provides that the objective is "to train quality legal professionals." Although the English version of the Act I am quoting here is the official version translated by the Ministry of Justice, 'quality' is an understatement of the Korean version of the expression. It is, better, educating 'excellent' lawyers.[19] Article 2 of the Act goes even further by setting an 'educational ideology.'[20] It provides that 'the educational ideology of professional law schools is to train legal professionals who have sound professional ethics based on rich education, a deep understanding of people and society and morals valuing freedom, equality and justice, and who have knowledge and abilities that will allow professional and efficient resolution of diverse legal disputes in order to provide quality legal service responding to the people's diverse expectations and requests.' Basically, Article 2 of the Act supposes that the legal education at law schools should embrace utopian ideals of teaching perfect human beings. The Act also clarifies that law schools should not be the place for theoretical teaching only. For that, Article 4 of the Act provides that 'the main purpose of a professional law school is training [in] legal theories and practice and research, necessary for education of legal professionals.'

2 *Changes in Teaching Methodology and Adoption of Practical Classes*

Prior to 2009 when the professional law schools admitted their first students, there were two conflicting views on how to overhaul legal education at graduate school level – whether the teaching at law schools should be more about grasping the big picture, or about memorizing every detail of the letter of the law. The first view was that students were expected to 'possess more basic knowledge of the core of the Korean legal system' rather than to 'know in detail the substance of many particular laws.'[21] Based upon such an assumption, the various teaching methods under discussion implied condemning

19 In this regard, Professor Kim made a mistake in explaining the true meaning of the Article. It is not to 'create an excellent system in which to educate future lawyers' as she claimed. Article 1 of the Act never talks about creating an excellent system of educating lawyers. It talks about a system in which law schools may raise excellent lawyers. Although it would be a cliché that is often used in any Article similar to this one, the Act expresses its ambition to raise excellent not mediocre lawyers; Kim (n 3) 338.

20 Again, Professor Kim got it wrong by saying that the mission of the new law schools is to educate people of 'various ideologies.' Unfortunately, Article 2 does not talk about people with 'various ideologies.'

21 Young-Cheol K Jeong, 'Korean Legal Education for the Age of Professionalism: Suggestions for More Concerted Curricula' [2010] 5 EALR 155, 156.

'one sided lectures to urge students memorize dogma.' Most attention was given to the so-called 'Socratic method'. Many embraced the idea of the Socratic method arguing that it is a teaching method 'affording the opportunity to ask questions.'[22] However, this method is much more complicated than just giving greater opportunity to allow free exchange of inquiries and responses. Using the Socratic method means that a professor or a teacher is completely on top of the subject of the discussion, 'asking a series of real or hypothetical questions'[23] and ultimately leads the students to be prepared to answer any questions when a similar case arises in reality. The method has been considered as a representative way of teaching in common-law countries. Therefore adopting such a common-law type of teaching method was taken as a move forward; it was admitted without any criticism that the teaching method that was working in common-law systems would work in a civil-law country like South Korea.

In addition, during the period of discussing the new professional law schools, practice-driven courses were at the centre of attention. Professor Cheong even argued that they had to be 'incorporated into the substantive law courses for second-year graduate law students.'[24]

E Damning Reality in Legal Education at Professional Law Schools

It is an undeniable fact that the year 2009 marks the first year that professional law schools opened a new chapter in the field of law in South Korea. However, since then the legal market has objected strongly to the influx of new lawyers (see Figure 8.1) because the market was not ready to accommodate them.[25] No one seems to know how to turn the legal market around to improve matters.

As can be seen in the chart, the total number of lawyers in 2016 is more than 22,000, which is more than double compared to less than 10,000 in 2006. This is a dramatic increase, since law schools have become another way to become licensed as lawyers, starting in 2012 when their first graduates reached the legal market. With a dramatic change in the legal market, many law-school graduates have been experiencing difficulty finding a job, because they have

22 Kim (n 3) 338.

23 Ibid 339.

24 Jeong, (n 22) 163.

25 Song Min-kyung, 'Young Lawyers' Working Conditions Are Also Poor' (*The L*, 18 February 2017) <http://thel.mt.co.kr/newsView.html?no=2017021610118247535> accessed 21 March 2017.

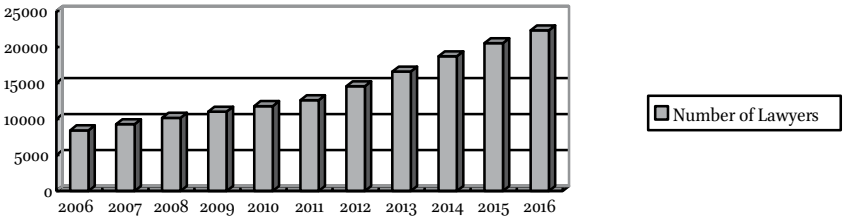

FIGURE 8.1 *Increase of number of lawyers in South Korea (2006–2016)*[26]

had to compete with JRTI graduates. As has been mentioned, supporters of professional law schools turned out to be at fault in decorating their ideas with the idea that a law school has to be the place for free exchange of ideas, regardless what kind of bar examination the students have to pass upon graduation. Obviously, the reality has told a different story, opposite to all the hopeful proposals that the professional law school would be totally different from the old law colleges during the Judicial Examination period. In one sense, such rosy prediction was found to be quite accurate because many law schools have in fact tried new teaching methods. However many of them found themselves competing against new 'cram' schools preparing students for the bar examination. Since all the 'cram' schools cannot confer a degree to any student to take the bar examination, all the law schools have tried to satisfy their students' need to prepare for the examination. Some law schools started to hire 'famous teachers at cram schools' for a special program for their own students.[27] In other words, most law schools do not have the luxury to think outside of the box. Their prime goal is to produce more lawyers with excellent scores in the bar examination, not to produce fewer lawyers with great ideas about laws. In addition, most law schools have been under enormous financial pressure to sustain themselves without extraordinary help from the universities. Many law schools are on the brink of financial collapse.

1 *Declining Bar Examination Pass Rate Affects Legal Education*

As noted earlier, at its inception the law schools were filled with hope that diverse classes could be offered, mainly because due to the high pass rate, law students did not need to worry too much about the bar examination. However,

26 Song Min-kyung, 'Young Lawyers' Working Conditions Are Also Poor' (*The L*, 18 February 2017) <http://thel.mt.co.kr/newsView.html?no=2017021610118247535> accessed 21 March 2017.

27 'Law Schools on the edge : Law Schools are becoming Cram Schools' (*Law Times*, 7 November 2014) <www.lawtimes.co.kr/Legal-News/Legal-News-View?serial=88473> accessed 20 March 2017.

TABLE 8.1 *Statistics regarding pass rate of bar examination*[a]

	Law School Capacity	# of Applicants	# of Examinees	Rate of Taking	# of Passes	Pass Rate per Examiees	Pass Rate per Capacity
1st (2012)	2,000	1,698	1,663	97.9	1,451	87.25	72.55
2nd (2013)	2,000	2,095	2,046	97.7	1,538	75.17	76.9
3rd (2014)	2,000	2,432	2,292	94.2	1,550	67.63	77.5
4th (2015)	2,000	2,704	2,561	94.71	1,565	61.11	78.25
5th (2016)	2,000	3,115	2,864	91.94	1,581	55.2	79.05
6th (2017)	2,000	3,306	3,110	94.1	?	?	?

a 'The 6th Lawyer Examination – Would pass rate be below 50%?' (*The Law Journal*, 28 November 2016) <www.lec.co.kr/news/articleView.html?idxno=42714> accessed 20 March 2017. The pass rate for the 1st examination was exceptionally high because the number of candidates was only less than 1,700.

the declining pass rate, as can be seen in Table 8.1, has become the biggest issue changing the dynamics of legal education in law schools.

Law-school students have argued that pass rate of the bar examination should be set at 75%; however the Ministry of Justice, which manages the examination, persistently stated that what has to be fixed is not the pass rate but the numbers of passes – around 1,500 per year. The number of 1,500 was not a random number that the Ministry chose. Originally, it was perceived that the number of new lawyers produced every year had to be less than 2,000, which was double the number of successful candidates in the Judicial Examination. Since law schools began producing graduates, the number of passes in the Judicial Examination was decreased to 500, 300 and then 100. Therefore in 2012 successful candidates for the bar examination and the Judicial Examination peaked at about 2,000, but the number has declined to less than 2,000 in the year 2016. Graduates of law schools have five chances to take and pass the bar examination, and if they use up all five opportunities they will be thrown out of the legal market without any official measure to accommodate them.

In terms of pass rate per capacity, the number does not seem threatening for law students, however students have worried that the pass rate per eligible examinees would be less than 50% this year, because the number of passes cannot be greater than 1,600. Such declining pass rate has affected the law school curriculum dramatically. Many classes unrelated with the bar examination subjects such as M&A have been ostracized by law school students.

2 *Has the Civil Law become a Barrier to Effective Law-School Teaching?*

Law is one of the most practical disciplines amongst the various subjects taught and studied in universities and graduate schools. It is thus reasonable to argue that that a graduate school is the better setting because students with different backgrounds in other majors would be able to practise law with more understanding of the world around us. This is valid regardless of whether a particular country has adopted the common law or the civil law. However, students in civil-law countries are expected to learn by rote. They do not just have to memorize every article of every code, but when it comes to preparing for any exam offered in law schools and ultimately the bar examination, they are supposed to know every corner of important articles, not to mention the exact number of those article. It puts a heavier burden on the shoulder of students compared to common-law jurisdictions where students are expected to understand the main holdings of some important cases.

It has been admitted that almost every multiple-choice question tested in the bar examination in South Korea is on the case law rendered by Supreme Court. It is not because the case law is the most authoritative source of law in South Korea, but because the case law is easy to test students on. Case law, although it is terribly important in even a civil-law country, contrary to a common view of the definition of civil law, cannot hold the status as the most authoritative voice of law. A civil-law country, by definition, treats every case differently. Every case must have a *res judicata*, a doctrine that precludes continued litigation of a case on the same issues between the same parties. Testing students with case law only in a civil-law country is a grotesque distortion of its legal tradition. However, it is happening in South Korea.

Many law-school classes, including the classes the author has taught, do not have enough hours to teach code and cases. In order to make the most effective 'cram'-school type class, important case law has to be covered in class. Critics have complained that there has been a lack of teaching due to law schools being too ambitious to produce new lawyers with enough practical experience, and their slanted ambition or survival skill is undermining the need to delve into the essence of law. As in common-law jurisdictions, at the end of the day professors and students alike go through case-law files in order for students to excel in the bar examination.

3 *Extra Training-Period is Required for Law-School Graduates*

Since the first graduates of law schools hit the legal market in 2012 the market has not been in their favour, because even if they did go through practical-training courses offered by the 25 accredited law schools, three years of legal study was

not considered enough time to get into the market as practitioners. Although as in the United States, law-school graduates are often called to work as interns for law firms, courts and various governmental agencies during their summer or winter breaks, those extra miles run by the graduates themselves do not count as practical job-training periods. Many people in the field assume that those internships are either too short or too inadequate. For that reason, to be able to work as a lawyer every single successful candidate for the bar examination has to be 'engaged in legal affairs or … completed training in an agency engaging in legal affairs for not less than six months in total', pursuant to Article 21-2 of the Attorney-At-Law Act.[28] The extra training period outside law school does not stop there. The Supreme Court as well as the Supreme Prosecutors' Office requires extra practice training from seven months to one year for new judges or prosecutors who were law-school graduates. In particular, the selection of new judges is troublesome, because even three years' practice, would not be sufficient for them to work as judges immediately upon being selected. Those new judges have to go through seven months' training if they are law-school graduates.

These extra training requirements prove that the legal market sees that any practice-related course or practice training offered in and outside law schools would not be enough to qualify graduates of law schools to engage in work as judges and prosecutors. Considering the two-year practice training offered at the JRTI, there must be some practical need to equip law school graduates with skills that can be used in reality. However the current trend of extra training for law school graduates makes one doubtful of the utility of practice-related courses offered at law schools. Such skepticism gets even more stronger when one considers that courts, the prosecutors' office and even the police have sent their own judges, prosecutors and policemen as adjunct professors to law schools to teach practice-related courses such as 'Practice in Civil Procedure', 'Practice in Criminal Procedure', 'Prosecution Practice' and 'Police Practice'. Although it needs to be admitted that teaching practice at law school by full-time faculty members must have its limits, having outside help does not seem to be positive. It has to be acknowledged that the main teaching of law school is not to give students hands-on practice experience but to give theoretical lessons.

4 *The Latest Attempt to Curtail the Number of Law Schools*

In March 2017 Kim Hyun, the newly-elected President of the Korean Bar Association, announced his plan to take away five law schools' accreditation based

28 Attorney-At-Law Act 2014 (Korea Legislation Research Institute, 2017) <http://elaw.klri.re.kr/kor_service/lawView.do?hseq=33344&lang=ENG> accessed 19 March 2017.

upon their poor performance in terms of producing capable lawyers, although the Korean Bar Association does not have authority to do so.[29] The Korean Bar Association only has authority to oversee law schools regularly and it may report some irregularities to the Ministry of Education. Actually 2017 is the year of a formal audit which will be done by committee members chosen by the Bar Association. The President's comment on eliminating poorly-performing law schools is going to incite anxiety among some under-performing law schools.

F Reasons of Disappointment or Room for Future Progress

It has been only less than 10 years since the new professional law-school system was instituted in 2009. Therefore, it might be too early to assess the future of law schools. However, it needs to be analyzed why people have shown such bitter disappointment with this new institution. In this regard, there are some problems that time and the experience earned by law schools would help solve.

1 *Diversity is in the Eye of the Beholder*

In the old era when the JRTI was the only way to get into the legal market, the criticism was made that law was not to be handled by close-minded people who just devoted their entire lives to the study of law. The future success of legal professionals hinges on the flexibility which has been cultivated naturally within themselves by exposing them to various majors other than law. Law schools were established to have diverse student bodies.

Recently the Korean Association of Law Schools announced a meaningful statistic that the incoming students at 25 law schools in the year 2017 consist of 28% law majors and 72% non-law majors.[30] The trend of admitting more non-law majors is a steady phenomenon and it is inevitable because most reputable universities with law-school programs are not allowed to offer law-major programs for undergraduate students. Therefore on the surface the goal of creating diversity seems to have been realized. However, there is another side to the coin. Although incoming students' majors have become more diverse, the universities they graduated from seem to have become more homogenous because these law schools tend to accept only or primarily students

29 Interview (*Law Issue*, 6 March 2017) <www.lawissue.co.kr/news/articleView.html?idxno=2017030613240461113100l_12> accessed 19 March 2017.

30 'Law School Graduate Council Announces Statistics Of Successful Applicants For 2017 School Year' (*Law Issue*, 17 March 2017) <www.lawissue.co.kr/view.php?ud=2017031713375274033960l_12> accessed 20 Mar 2017.

from the same elite universities. That is, any late bloomer who decides to go for law school must face failure since it is more likely that s/he would not be a graduate from a top university. Such embedded discrimination regarding the university each applicant for law schools has graduated from will not be easily dissipated.

2 *Expensive Education*

The strongest criticism that has been built up over the past years about law schools is that law schools are a lot more expensive than law colleges, not to mention the extra three years necessary for obtaining a graduate degree in law.[31] Some professors argued that law school itself is designed to be a high-cost and low-efficiency system.[32] The high cost of studying in law schools is proven by numbers. The yearly tuition for national universities ranges from 9,820,000 won (equivalent to US$8,761) to 13,298,000 won (equivalent to $11,864.74). Students at private law schools should pay a lot more tuition ranging from 16,970,000 won (equivalent to $15,140.97) to 21,892,000 won (equivalent to $19,532.48). Although every law school is required to give back more than 30% of tuition they are getting from students in the form of scholarships, it is certain that going to law schools would be financially burdensome to law students, because even with full scholarship, living costs have to be supplied during three years of full-time study. Therefore law school has been criticized in that it has instituted a place or an illusion of a place which the general public feels is burdensome financially, no matter what the truth is.

3 *Specialization at Law Schools Turned Out to be Futile*

One of the most important criteria to be chosen as a law school by the Ministry of Education is the kind of specialized courses of law each law school provides. Every law school is boasting that it has some sort of specialized courses focusing on specific subjects. Many law schools chose different aspects of commercial law, others tried to stand out by selecting more distinct legal subjects such as environmental law and human rights law. Regardless of what specific legal subject a particular law school has chosen at its inception, law schools now do not have enough room to encourage students to focus on specialized courses because the pressure of passing the bar examination is getting more

31 Special Reporting Team, 'Concerns Rise Over New Law School System' (*Korea Joongang Daily*, 28 August 2014) <http://mengnews.joins.com/view.aspx?aId=2994143> accessed 20 Mar 2017.

32 Gunshik Kim, 'Law School: How To Make It Survive?' [2008] Law School And Legal Education (Arcanet) 25.

intense. As a result, students tend to flock only to the courses related to the bar examination.

G Conclusion

Looking back almost 20 years, studying law in the United States was an eye-opening experience for me, given my background of graduating from a Korean law college during the pre-law school period. Preparing for the New York Bar Examination and passing it was an even more interesting opportunity because I was able to compare the amount of study needed to pass the bar examination in the United States with the amount needed to pass the Judicial Examination in South Korea. The volume of work required of a candidate for the Judicial Examination was a lot more than that needed in order to pass the New York State Bar Examination. I do not intend in any way to underestimate the difficulty of the bar examination in a common-law country such as the United States. What I want to point out is the specificity and accuracy the latter asks of candidates cannot be compared with that which is necessary for passing the former. The difference comes from the vastly different legal culture that has existed in the civil-law tradition. Of course, many scholars in South Korea have argued that the most bar examination questions centre around case law, therefore there is no meaningful difference in terms of bar examinations in both countries. Also, it is a given that the bar examination in South Korea is modeled after the bar examination in the United States, although it did not discard the tradition of the Judicial Examination. The argument that the bar examinations of both countries are quite the same might be worth pondering; however turning their backs on the civil-law tradition, where theories and dogmatic studies are a premise, in order to take further steps to study case law, is not the most convincing argument for the law- school system. Professional law schools with idealistic ideas on how legal education were started with scarcely a reality-check that civil law requires more in-depth study in order to fully understand the subject of law. Three-year study of law might not be enough for some students who had never studied a letter of the law before getting admitted into law school. Nonetheless South Korea is in a transitional period in terms of changing the people's perception about law; they believe that all the information about law is easily accessible and three years' study of law would be enough time to be prepared for the practice of law.

Meanwhile there has been a revolutionary change in the post-modern society where the Internet has become a general source of every kind of information, and artificial intelligence has started to invade the legal profession. Law

has become an easily accessible subject for most South Koreans, thanks to the Internet where people are able to find too much information on anything. Now the job for lawyers is not to teach ignorant clients on the contents of law, but to guide them not to encounter misunderstanding in terms of comprehending the language of the law. Even one of the most conservative organizations, the Supreme Court of Korea, has been talking about artificial intelligence taking over the legal field. Obviously laws have become common property that everyone needs to share.

Also, law schools are not the ideal place to teach theories alongside practical training. Practical knowledge regarding how law is being operated in reality can be attained in the field, not in law schools. With a more realistic view on what position law schools need to take in South Korean society, law schools could secure a better place within the desirable legal culture. In a civil-law society like South Korea, law schools have to remain as the venue for theoretical teaching. As the law students do have opportunities for internship to learn from practice during their summer or winter break, those actual experiences in the real world have to be developed as a necessity for all law school students. Otherwise law schools in South Korea are destined to be a place for juggling between 'cram' schools for the bar examination and learning practice.

CHAPTER 9

Experientialization of Legal Education in Hong Kong: Adoption and Adaptation

Wilson Chow, Michael Ng and Julienne Jen

A Experientialization of Global Legal Education

As a former British colony, the legal system in Hong Kong is deeply rooted in and influenced by the common law tradition and culture of England and Wales. Even its model of legal education and training was first guided by the English Report of the Committee on Legal Education, under the chairmanship of Sir Roger Ormrod, in 1971.[1] Hence a vocational year, the Postgraduate Certificate in Laws (PCLL), following the three-year undergraduate law curriculum that was to be recommended in England and Wales was also implemented in the first law school in Hong Kong – the University of Hong Kong (HKU) – in 1972.[2] The larger picture has not changed much despite the handover of Hong Kong in 1997 to the People's Republic of China, which is a civil law jurisdiction. Nevertheless, like every other legal transplant which typically starts with the adoption of legal rules which work elsewhere and often continues to modify, develop and evolve in order to suit the particular jurisdictional social and cultural context,[3] Hong Kong has also seen an extended four-year, instead of three-year, LLB,[4] joint degree programmes with

1 Peter Willoughby, 'The Postgraduate Certificate in Laws: Some Reminiscences' in Peter Wesley-Smith (ed), *Thirty Years: The HKU Law School 1969–1999* (University of Hong Kong 1999) 42–43. On the common law influence in other Asian jurisdictions, see generally Chapters 1, 3, 5, and 11.

2 Prior to that, Hong Kong youngsters aspiring to read and practise law had to go abroad in order to fulfil their dream.

3 On the legal transplant discourse, see Alan Watson, *Legal Transplants: An Approach to Comparative Law* (University of Georgia Press 1974) and Otto Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37 Modern Law Review 1. For a more comprehensive review of the literature, see e.g. Margit Cohn, 'Legal Transplant Chronicles: The Evolution of Unreasonableness and Proportionality Review of the Administration in the United Kingdom' (2010) 58 The American Journal of Comparative Law 583.

4 For the rationale of extending the LLB from three years to four years at HKU, see Faculty of Law, 'Undergraduate Degrees – Bachelor of Laws (LLB)' (*The University of Hong Kong*, 2016) <www.law.hku.hk/programmes/llb.php> accessed 22 August 2016.

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law,[5] and the degree of Juris Doctor (JD),[6] all of which are not typical features of the traditional English common law educational framework and, with the exception of the lengthened LLB, are just other examples of legal transfer from outside Hong Kong.[7]

In legal education, particularly at the vocational stage, increasing emphasis on practical skill-based training over the traditional didactic method was first advocated in the Marre Report in England and Wales in 1988.[8] Since then, some of the law schools there have experimented with ways, with or without technology, to enhance the interactivity and the degree of realism in students' learning. The Simulated Professional Learning Environment (SIMPLE), an open-source platform serving as a virtual workplace for transactional learning, is one of those examples;[9] another being the use of standardized clients (SCs) who are people from the street recruited and trained by the faculty to present to and interact with students in simulated interviews and assess their

5 Until recently, only HKU offered joint degree programmes with the LLB: Bachelor of Business Administration (Law), Bachelor of Social Sciences (Government & Laws) and Bachelor of Arts (Literary Studies). For the rationale of these mixed degree programmes at HKU, see generally, 'About the Programme – BBA' (*University of Hong Kong*, 2016) <www.law.hku.hk/programmes/bba.php>, 'About the Programme – BSocSc' (*University of Hong Kong*, 2016) <www.law.hku.hk/programmes/bsocsc.php> and 'Programme Information – BA' (*University of Hong Kong*, 2016) <http://arts.hku.hk/current-students/undergraduate/BALLB> all accessed 22 August 2016. The PCLL also admits qualified law graduates from overseas including those complete the studies of the two-year part time Common Professional Examination (CPE) and one-year full-time Graduate Diploma in Law (GDL).

6 For an overview of the JD programme at HKU, see 'HKU Law Juris Doctor' (*University of Hong Kong*, 2017) <www.law.hku.hk/postgrad/jurisdoctor> accessed 22 August 2016.

7 Joint degrees with law have been common in Australian law schools for years while the JD originates from the US. For a comparison between Australia and Hong Kong, and between the LLB and the JD, see Black & Black (n 1) ss B(1) and B(4). On the development of the JD/JM in China, see further Chapter 10.

8 Committee on the Future of the Legal Profession, *A Time for Change: Report of the Committee on the Future of the Legal Profession* (London 1988). See further Wilson Chow and Firew Tiba, 'Too Many "What"s, Too Few "How"s' (2013) 4 European Journal of Law and Technology 1; Legal Education and Training Review 'Literature Review' (LETR, 2013) Ch 2 <http://letr.org.uk/wp-content/uploads/LR-chapter-2.pdf> accessed 7 June 2016. The emphasis on lawyering skills is also highlighted in some of the other chapters in this volume, in particular Black & Black, (n 1) s D(2).

9 SIMPLE is a transactional e-learning platform first trialled in 2008 by a consortium of five UK law schools namely Glasgow Graduate School of Law, University of Glamorgan, University of Warwick, University of Stirling and University of the West of England.

communicative competence in a standardized way.[10] Both of these initiatives aim at contriving the experience of 'doing the real thing' for students who are still undergoing their legal studies and training.

Even more concrete learning experience can be gained by 'doing the real thing' in real life, typically through internships in law firms or barristers' chambers, and a clinical education component within a law programme. While these options for 'direct purposeful experience' have been in place for quite some time,[11] it was probably not until the US' Carnegie Report was published in 2007 that experiential learning clearly became an irreversible and irresistible global trend.[12] The requirement that clinical learning experience be provided to students in order to receive accreditation by the American Bar Association[13] has led to a rise in the number and the specialization of law clinics in the US.[14] Apart from witnessing a similar increase in the number of clinics, albeit at a relatively slower pace,[15] there is now a clinical law programme in the UK.[16]

Such shock waves of different forms of experiential learning have been powerful enough to cross the continents, causing significant changes to legal

10 Karen Barton and others, 'Valuing What Clients Think: Standardized Clients and the Assessment of Communicative Competence' (2006) 13 Clinical Law Review 1.

11 For example, clinical legal education has a long history in the US, Britain, Canada and Australia; Jeff Giddings and others, 'The First Wave of Modern Clinical Legal Education' in Frank Bloch (ed), *Global Clinical Movement; Educating Lawyers for Social Justice* (OUP 2011) 3; even in the PRC, the first law clinic was set up more than 20 years ago; Yanmin Cai and J L Pottenger Jr, 'The "Chinese Characteristics" of Clinical Legal Education' (2011) Global Clinical Movement: Educating Lawyers for Social Justice 87. Also see Black & Black (n 1) ss D(3) and D(4) (on clinical education programmes and pro bono work experience in Australia). The term 'direct purposeful experience' is adopted from Edgar Dale, Audio-visual methods in Teaching (3rd ed)(Holt, Rinehart and Winston 1969).

12 The Carnegie Report referred to clinical training in the United States as 'the underdeveloped area of legal pedagogy.'; WM Sullivan and others, Educating Lawyers: Preparation For The Profession Of Law (Jossey-Bass 2007) 24; Giddings and others, ibid. Experiential learning by way of immersion is also discussed in Black & Black's chapter in this volume(n 1) s C(3).

13 'ABA Standards and Rules of Procedure for Approval of Law Schools 2015–2016' (ABA, 2015) <www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2015_2016_chapter_3.authcheckdam.pdf> accessed 31 May 2016. In particular note Standard 303(b).

14 Giddings and others (n 11).

15 Ibid.

16 The current structure of the English Legal Practice Course gives students flexibility to complete their vocational electives during the course; see Solicitors Regulation Authority 'Legal Practice Course Information Pack' (SRA, 2014) <http://www.sra.org.uk/students/resources/legal-practice-course-information-pack.page>, accessed 7 June 2016.

education in Asia in the past decade.[17] Hong Kong is no exception. Indeed, since early 1990s there has been increasing emphasis on practical legal training within the PCLL when Hong Kong had its second law school which sought to adopt a more problem-based approach.[18] Meanwhile, the HKU Faculty of Law (HKU Law) has also devoted much of its efforts towards developing its various new undergraduate and postgraduate curricula, rationalising and reforming its PCLL curriculum. Riding on the international tide of experiential learning as described above, HKU Law has been catching up at a quicker pace over the last five years or so by an 'adoption and adaptation' strategy which involves: (a) searching for good models and adopting them; (b) pilot testing; (c) collecting and reflecting on students' feedback; and (d) modification in order to adapt to the Hong Kong circumstances. This has resulted in the implementation of the following initiatives: (a) a clinical legal education (CLE) elective available to the LLB students since 2010; and (b) implementation in the PCLL since February 2013 of other pedagogical practices for experiential learning in law namely: (i) SIMPLE; and (ii) the SC interviews. All these initiatives have been proven successful outside Hong Kong.[19]

This chapter discusses the experience of HKU Law in this still on-going journey of experientialization of legal education in Hong Kong.[20] The next section will feature the birth, the constraints and the challenges of the CLE programme at HKU, followed by showcasing the two simulation projects: SIMPLE and the SC interviews. Through an empirical study of these two simulations in Hong Kong, we argue that any sustainable transplant of pedagogical practices for legal education needs substantial adaptation to the societal needs of lawyering

17 See e.g. Giddings and others (n 11) Chs 3, 6 and 7; Wilson Chow and Michael Ng, 'Legal Education Without the Law – Lay Clients as Teachers and Assessors in Communication Skills' (2015) 22 International Journal of the Legal Profession 103; Karen Counsell, 'Virtual Learning for the Real World: Using Simulation with Non-law Students' in Caroline Strevens, Richard Grimes and Edward Phillips (eds), *Legal Education: Simulation in Theory and Practice* (Ashgate 2014) 151; Wilson Chow and Michael Ng, 'Disintermediator or Another Intermediary? E-simulation Platform for Professional Legal Education at University of Hong Kong' (2016) 7 European Journal of Law and Technology 1.

18 Neil Gold, 'Professional Legal Education for Tomorrow's Lawyers: The Evolution of the Postgraduate Certificate in Laws at the City Polytechnic of Hong Kong' (1991) 9 Journal of Professional Legal Education 45.

19 In addition to n 17 above, see Michael Hughes and others, 'SIMulated Professional Learning Environment (SIMPLE) Programme Final Report' (University of Strathclyde 2008) <http://simplecommunity.org/wp-content/uploads/2010/11/SIMPLE-FINAL-report.pdf.> accessed 7 June 2016.

20 The authors have direct personal experience in teaching and being involved in at least one of the simulation projects and the CLE elective.

in a specific jurisdiction together with a very close fit with the prevailing behaviour of students in their learning and social life. This chapter will conclude by highlighting the challenges that this 'adoption and adaptation' strategy has faced and is facing in Hong Kong, which we argue can be equally applicable to any other jurisdiction in the region.

B Adapting Clinical Legal Education Within a More Constrained Regulatory Regime

The benefits of clinical legal education have been widely documented, and need no repetition.[21] Unlike the US developments in legal clinics, HKU Law started off with a specialised clinic in 2007, partnering with the Justice Centre Hong Kong Limited to offer assistance to refugees seeking protection in Hong Kong. This initial programme was run on a relatively small scale, with an intake of only 6 students per semester. Under the programme at that time, students worked in pairs, underwent some skills training and were supervised by qualified lawyers specializing in human rights law in providing advice to those real clients. Students were taught the substantive law on the relevant human rights issues and, at the same time, worked with claimants seeking non-refoulement protection in Hong Kong and practised lawyering skills such as interviewing clients, conducting fact investigations, carrying out legal research and drafting legal documents. They also had the opportunity to work on campaigns to promote awareness of human rights issues in Hong Kong. Not too long afterwards, HKU Law planned to offer a more extensive and comprehensive clinical programme covering a wider spectrum of cases similar to counterparts in other jurisdictions such as the US. However, before such a programme could be successfully launched, adaptation to the local regulatory framework was necessary. This also has an impact on how it can be, and is being, run.[22]

In Hong Kong, only qualified legal practitioners can give legal advice, and unqualified persons cannot act as a solicitor or barrister.[23] As such, students

21 See e.g. James Marson, Adam Wilson and Mark Van Hoorebeer, 'The Necessity of Clinical Legal Education in University Law Schools: A UK Perspective' (2005) 7 International Journal of Clinical Legal Education 29; Lydia Bleasdale-Hill and Paul Wragg, 'Models of Clinic and Their Value to Students, Universities and the Community in the Post-2012 Fees Era' (2013) 19 International Journal of Clinical Legal Education 257.

22 See further Eric Cheung, 'Setting up a Legal Clinic in Hong Kong: Progress and Challenges' (*University of Hong Kong,* 2010) <https://hub.hku.hk/bitstream/10722/132235/1/Content.pdf> accessed 7 June 2016.

23 Legal Practitioners Ordinance (Hong Kong) Cap 159, ss 44, 45.

are restricted to only obtaining factual information from a client at the initial interview. Thereafter, it is the duty lawyer – either a qualified solicitor or a barrister – who gives the legal advice to the client, although the students can be present at the subsequent advice session. Further, as a result of the legal representation system in Hong Kong, since a legal clinic is not a law firm,[24] the clinic cannot go on the courts' records to act on behalf of a client and hence it does not take on any ongoing cases. As a result, the legal clinic in Hong Kong cannot resemble its counterparts in other jurisdictions, for example the US where, under their legal representation rules, students can advise clients directly under supervision (but not necessarily in the presence) of their clinical supervisors, handle on-going cases, and sometimes even represent their clients in courts.[25]

Against such constraints, a 'legal clinic' under the CLE programme was established. The CLE programme was introduced as an elective subject at HKU in 2010 under the auspices of the Free Legal Advice Scheme[26] to undergraduate LLB, mixed degree and JD students, being the first of its kind in Hong Kong. To date, over 400 students have participated in this CLE programme for credit, with a number of students returning as volunteers, and more than 1,000 cases have been handled.

From the clients' perspective, the HKU 'legal clinic' operates like this: Potential clients who present with legal problems in various areas such as contractual disputes, criminal convictions, personal injuries, medical negligence and matrimonial disputes approach the clinic requesting assistance. The Director of the CLE programme, in consultation with two other full-time clinical teachers,[27] decide whether assistance would be rendered based on the client's

24 If a law firm is to be set up for this purpose, compulsory (unless exempted) professional indemnity insurance becomes an issue. See generally Solicitors' (Professional Indemnity) Rules (Hong Kong), Cap. 159M r 6 and 7; Cheung (n 22).

25 See e.g. the Rules of the District of Columbia Courts, DC App Rule 48 (US), allowing (as part of a clinical programme) eligible law students to engage in limited practice of law in the District of Columbia; Rules of the Supreme Court of the State of New Hampshire, Administrative Rule 36 (US), allowing eligible law students and graduates to appear in court.

26 The Free Legal Advice Scheme provides preliminary legal advice to members of the public regarding their legal position in genuine cases, in line with its objective. The Scheme, however, does not offer any follow-up service or representation to the applicants. There is no means test and the service is free of charge; see 'Free Legal Advice Scheme' (*The Duty Lawyer Service*, 2017) <www.dutylawyer.org.hk/en/free/free.asp> accessed 7 June 2016.

27 All three of them are practising lawyers in Hong Kong.

needs and most importantly, the educational value of the case presented.[28] Each case is then allocated to a duty lawyer with expertise in the area of the law relevant to the client's case. An appointment will be made with the client for the students, who work in pairs, to interview the client. After the interview, students prepare a case summary and identify the issues relevant to the client's case. Students render the case summary to the assigned duty lawyer, who will also discuss the case with the students. Students will then conduct research and prepare a research memo for the duty lawyer. The client then returns to the clinic and the duty lawyer provides oral legal advice to the client in the students' presence. Written legal advice will not be offered. After the advice session, students prepare an attendance note, summarising the issues discussed and advice offered, which has to be approved by the duty lawyer. Under normal circumstances, the clinic only offers one-off legal advice sessions to clients. However, in exceptional circumstances, further advice sessions may be offered and in some cases, legal representation has subsequently been offered by duty lawyers where the facts warranted doing so, for example in cases of wrongful convictions.[29]

From the students' perspective, the CLE programme is structured like this: They are required to attend weekly seminars led by course coordinators, besides working with the client and the duty lawyer. At the beginning of the programme, students are taught skills such as client interviewing, fact and document analysis, problem solving and case management at the weekly seminars. As their experience develops, students also discuss cases with the Director and the clinical teachers at these weekly seminars. Discussions range from the problems presented, case tactics, and ethical issues, to interviewing and client management skills. This allows students who have dealt with different cases to brainstorm with each other and to share each other's experience. Each pair of students usually handles around 3–4 cases each semester, subject to client demand. At the conclusion of each advice session, the duty lawyer working with the pair of students will evaluate the students' performance, on a 'pass/fail' basis, with reference to their competence in identifying the relevant issues, their research skills, the quality of their written work, as well as their attitude throughout the process. In addition, at the end of the advice session, the client is also asked to fill in a questionnaire to rate his/her experience and level

28 In other words, a decision is made on whether the client is able to seek assistance elsewhere and whether students will be able to learn anything from the case, such as an interesting point of the law or procedure.

29 A recent example is *HKSAR v Law Yat Ting* [2015] 18 HKCFAR 420.

of satisfaction with, *inter alia*, the students' performance[30] (which in practice clients never do).

In a nutshell, the HKU CLE programme allows students to work on real life cases and deal with real clients. Students come across different subject matters which they have not encountered before, and the real life issues encourage them to resolve clients' problems with a practical approach and to understand clients' needs – something which cannot be learnt from a textbook and yet is transferrable to the rest of their legal education. The clinical experience also gives students an insight into their future practice of the law.

C Adapting SIMPLE to Changing E-Behaviour of Students

The local circumstances make it difficult for all law students in Hong Kong to acquire direct experience by learning in real life with real clients through internships or a CLE programme. For the academic year 2015/16, around 230 students were admitted as freshmen to read the 4-year LLB in Hong Kong. Approximately another 160 students joined the joint-degree programmes at HKU. The number of newly-admitted JD students at the three providers amounted to over 310. The total number of PCLL places available on a competitive basis each year to local and international law graduates interested in practising in Hong Kong is normally in the range of 650 and 660,[31] and there has never been any shortage of applicants. On the other hand, as of 31 December 2015, 406 out of 854 registered law firms in Hong Kong were run by sole practitioners and of all those sole proprietorships, 44% did not even employ any other legally qualified persons.[32] It is unrealistic to expect a sufficient number of internships for law students. At the moment, only HKU Law runs a CLE programme as an elective course, which cannot even meet the demand of its own students. For the past five years, therefore, HKU Law has also embarked on a number of

30 Faculty of Law, 'Customer Satisfaction Reports' (*The University of Hong Kong*, 2016) <www.law.hku.hk/cle/?page_id=203> accessed 7 June 2016.

31 The Standing Committee on Legal Education and Training in Hong Kong, a statutory body, collects and publishes the statistics each year in its annual report; see The Standing Committee on Legal Education and Training, 'Annual Reports' (SCLET, 2014) <www.sclet.gov.hk/eng/pub.htm> accessed 23 August 2016.

32 See 'Profile of the Profession' (*The Law Society of Hong Kong*, 2015) <www.hklawsoc.org.hk/pub_e/about> accessed 6 June 2016. The percentage is even higher if we include law firms with no more than two partners; see also Chow and Tiba (n 8) and Chow and Ng, 'Legal Education Without The Law' (n 17).

other experiential initiatives to bring real life and realistic practice experience to its students.

With advancing information technology, HKU Law tapped on innovative on-line teaching tools to simulate the team working experience of lawyers in a law office. Specifically, SIMPLE, a simulation platform developed by legal educators in Scotland was chosen to be adopted in the HKU PCLL programme. SIMPLE is an e-simulation platform to facilitate active learning by students through conducting legal transactions and performing professional lawyering tasks. It allows law students to deal with simulated legal transactions in a virtual learning environment similar to the office of a law firm. Through legal transactions designed by teachers, students learn from both applying the legal principles and procedural rules to meet clients' instructions in a virtual law firm environment. Students also work and communicate with members of the same virtual firm (or with the counter-party) in a timely and diligent way via this electronic platform, as if they are working in a real law office.[33]

Prior to adopting SIMPLE at HKU Law, an investigative study on its effectiveness was conducted by visiting three UK universities in March 2012 to observe their students' learning experience in using SIMPLE there. Students were required to fill in a survey questionnaire about their learning experience with the use of this e-simulation platform. The questionnaire is reproduced in Appendix A. Respondents were asked to express their view on various questions by choosing from a five-point Likert scale: (1) Strongly disagree; (2) Disagree; (3) Neutral; (4) Agree; and (5) Strongly agree.[34] Overall feedback from UK students on the use of SIMPLE was remarkably positive (see the column marked M(UK) in Table 9.1).

The satisfactory result in the UK survey encouraged HKU Law to pilot-test SIMPLE in four of its PCLL electives in the spring semester of the academic year 2012/13, during which a total of more than 200 full-time students that year experienced it.[35] Students in the Wills Trusts and Estate Planning elective (WTEP), for instance, worked in teams and underwent a SIMPLE transaction.

33 For an overview of the background to the creation of SIMPLE and transactional learning in law, see Paul Maharg and Martin Owen, 'Simulations, Learning and the Metaverse: Changing Cultures in Legal Education' (2007) 1 Journal of Information, Law, Technology 1 <www2.warwick.ac.uk/fac/soc/law/elj/jilt/2007_1/maharg_owen> accessed 7 June 2016.

34 See also Chow and Tiba (n 8), App II.

35 See further Wilson Chow, 'Adding Realism to Professional Legal Education at the University of Hong Kong' in Caroline Strevens, Richard Grimes and Edward Phillips (eds), *Legal Education: Simulation in Theory and Practice* (Ashgate 2014) 236. The four electives were: Wills Trusts and Estate Planning, Personal Injuries, Matrimonial Practice and Procedure, and Commercial Dispute Resolution. These elective courses were chosen because the

TABLE 9.1 *Evaluation of learning experience in using SIMPLE in Hong Kong compared with the results of the UK survey*

Individual experience	**M(HK) (N=43)**	**M(UK) (N=26)**
1. Increased interaction with teachers	2.907	3.808
2. Increased interaction and collaboration with peers in learning	3.070	4.615
3. Facilitated timely feedback from teachers	3.023	4.038
4. Increased interest in the subject	2.744	4.269
5. Made it more enjoyable to learn	2.674	4.385
6. Helped learn better	2.674	4.615

Note. N=Sample size. M(HK)=Mean in HK Survey. M(UK)=Mean in the UK survey.

They were instructed to find out information about the assets and liabilities of a deceased person by making appropriate inquiries and searches. They were thereafter required to prepare a short advice explaining to whom the assets under the estate would be distributed. This task was assessed as 5% of the students' final grade in this WTEP course.

To evaluate the adoption of SIMPLE, a survey was carried out based on a questionnaire similar to the UK survey. To our disappointment, SIMPLE was evaluated much more poorly by HK law students as compared to their UK counterparts. Table 9.1 shows the survey results from the WTEP elective, which were the best among the four sets of data from the four courses involved in this pilot project (see column marked M(HK), in comparison with the column marked M(UK) in Table 9.1).[36]

In comparison with the UK survey results, we noted that the highest scored items in the UK survey, ie 'Increased interaction and collaboration with peers in learning' and 'Helped learn better', were scored significantly lower by the HKU PCLL students. In fact, the personal experience of a HKU PCLL student on whether SIMPLE helped him/her learn better was given the lowest score among all items.

course co-ordinators, including two of the authors, expressed enthusiasm and interest in the pedagogy and the technology.

36 Among all four electives involved in this initial stage of the project and subjected to the same evaluation, WTEP had the highest scores.

Further enquiry into this significantly less satisfactory learning experience was carried out through subsequent focus group discussion.[37] A lot of students found that the interface of SIMPLE, an e-platform that was designed in 2007, did not match in terms of functionalities and user-friendliness with the popular online communication tools (such as Google Docs, Gmail and WhatsApp) that students have gotten used to in communicating and collaborating with one another. For example, they found SIMPLE not user-friendly for discussion among peers because they could not just send in questions or responses like sending email, but had to first type onto a Microsoft Word document and upload it to the e-platform. Similar problems arose with collaborative drafting of documents, which the students found to be time-consuming to use on the platform. Many versions of their collaborative drafting work were generated, which students found unnecessary as they could have used 'track changes' on one single Word document. They also referred to the convenience of using one username in accessing different communicative services with Google, and complained about the necessity of remembering an additional login name and password to use SIMPLE. In short, SIMPLE unintentionally imposed extra learning curves and efforts on students who come from a generation accustomed to the spontaneity and mobility of communication and hence considered those as burdensome.

Despite criticism from students regarding the use of SIMPLE, it was decided to continue the use of that e-simulation platform in the academic year 2013/14 by distilling SIMPLE's genesis in encouraging transactional learning and integrating it with the HKU campus-wide MOODLE platform. It was also decided to scale down the use of e-simulation platform to only one PCLL elective subject, WTEP, so that students' feedback could be carefully considered before further expanding the initiative to other subjects. This new integrated learning environment is named SMILE in which the first two letters 'S' and 'M' acknowledge the use of SIMPLE and MOODLE upon which it is constructed, with the hope that this e-learning platform would help students 'learn with smiles' and make their learning more enjoyable. In particular, the login page of the SMILE site was deliberately programmed to have a brighter and cheerful colour tone with a smiling face logo at the top left corner of the page. Features on the new platform better accommodate students' 'e-habits', such that a simpler interface is being used where students can use the same login account for both the university portal and SMILE – a habit largely driven by the trend of simplicity and 'one-stop solution' set by communication and social media tools such as Google and Facebook. Furthermore, each team of students can come up

37 Chow and Tiba (n 8) app III.

with a name of their own, subject to the approval of the course co-ordinator with reference to the relevant professional conduct rules on naming a law firm. SMILE also has a Google Map of part of Hong Kong, with three special icons representing the Law Society of Hong Kong (for conducting a will search), the Lands Registry (for conducting a land/real property search) and the Companies Registry (for conducting a company search) respectively. By clicking the relevant icon on the map, students will be directed to a mock-up application form for the corresponding search.[38]

Another round of students' evaluation using the same survey instrument was conducted at the end of the semester to assess HKU's efforts in adapting a transplanted e-simulation platform to Hong Kong law students' e-behaviour through the use of SMILE. Table 9.2 shows an extract from the survey results, compared with previous Hong Kong survey on SIMPLE.

After attempts to remove some of the undesirable blocks, and taking into account students' 'e-behaviour', the evaluation results were much improved. While the improved appreciation from students showed that the HKU PCLL is on the right track in fixing the mismatch with students' expectation of technological tools, it cannot be taken too lightly that legal educators are facing increasing challenges in designing effective e-simulation platforms. This is particularly true if they fail to respond swiftly enough to the fast-changing

TABLE 9.2 *Self-assessment on the personal experience of using SMILE compared with result of the HK survey on SIMPLE*

Individual experience	**M(SMILE) (N=48)**	**M(SIMPLE) (N=43)**
1. Increased interaction with teachers	4.00	2.907
2. Increased interaction and collaboration with peers in learning	3.73	3.070
3. Facilitated timely feedback from teachers	3.87	3.023
4. Increased interest in the subject	3.21	2.744
5. Made it more enjoyable to learn	3.31	2.674
6. Helped learn better	3.35	2.674

Note. N=Sample size. M(SMILE)=Mean in the SMILE survey.
M(SIMPLE)=Mean in the SIMPLE survey.

38 For details of these and other features of SMILE, see Chow and Ng 'Disintermediator or Another Intermediary?' (n 17).

'e-habits' and preferences of communication and information sharing in real life, driven by the rapid evolution of mobile internet technology nowadays.

D Adapting Standardized Client Interviews to Legal Practice in Cantonese

As seen above, internships and a CLE programme are not feasible options for direct experiential learning in the Hong Kong context. In terms of acquiring effective communication skills which in turn help build up rapport with clients and trust from them, the conventional way of training through simulated interviews with legally qualified tutors or classmates playing the role of a client is quite different from 'doing the real thing' with real clients.[39] More often than not, legally qualified tutors may, albeit unintentionally, appear more knowledgeable in law than a real lay client would be. In order to test students beyond their limits, tutors often over-react and create unrealistic scenarios for students to handle. Students interviewing familiar tutors and classmates may feel less anxious than they would be when dealing with a client who is a stranger. All of these tend to undermine the effect of the training and the reliability of assessment. There was thus a need to think about an alternative, and the US medical schools' experience appeared instructive.

Medical schools in US have been providing training in patient-communication skills to medical students via the use of acting patients, known as Standardized Patient, for over four decades.[40] Actors were trained to assume the role of a patient, incorporating a patient's physical and mental profile to be interviewed by medical students.[41] Using lay persons to assess the professional communication skills of medical students was adapted in legal education since 1998 in the Effective Lawyer-Client Communication (ELCC) project collaborated on by four law school clinics from the US and Australia, and it was eventually devised into a training programme for law students by Glasgow Graduate School of Law (GGSL) in Scotland in 2006.[42] The SC programme

39 Chow and Tiba (n 8).

40 Peggy Wallace, *Coaching Standardized Patients: For Use in the Assessment of Clinical Competence* (Springer 2007) xxiii.

41 Clark Cunningham, 'Evaluating Effective Lawyer-Client Communication: An International Project Moving from Research to Reform'(1999) 67 Fordham Law Review 1960–1961; Barton and others (n 10) 2–3; Eileen Fry, Jenny Crewe and Richard Wakeford, 'The Qualifying Lawyers Transfer Scheme: Innovative Assessment Methodology and Practice in a High Stakes Professional Exam'(2012) 46 The Law Teachers 138.

42 Barton and others (n 10) 10.

involves training lay persons to portray legal clients in assessing the interviewing skills of law students. Law schools in the US such as New York Law School and Kaplan Law School also commenced their own SC projects around the same time.[43]

HKU Law has adopted the use of SCs to train and assess students' communicative competence in the English language since February 2013. It was first tested out in the WTEP course in which the SC came to the student to prepare a will. The subject teacher, who is a faculty member, formulates the scenario and gives the SCs instructions. The SCs have to undergo an intensive training programme to achieve standardization in playing dual roles of the client and the assessor.[44] Adopted basically from the refined GGSL assessment form which resembled that used in medical education by standardized patients in the US,[45] the competence of the students in the following eight aspects was assessed by the SC:

1. The greeting and introduction by the student was appropriate;
2. I felt the student listened to me;
3. The student approach to questioning was helpful;
4. The student accurately summarised my situation;
5. I understood what the student was saying;
6. I felt comfortable with the student;
7. I would feel confident with the student dealing with my situation; and
8. If I had a new legal problem I would come back to this student.

A sample of the assessment form is shown in Appendix B. Items 1, 6 and 7 relate to the general rapport of the interviewing session; Items 2 to 5 concern the information exchange that took place during the interview; and the last item represents an overall customer's satisfaction level on the service provided. The SCs are required, in the absence of a teacher, not only to act out the pre-set scripted instructions and responses during the client interview with law students, but also to assign a positive score (1–5, adding up to a maximum of 40) according to each of these items, following a tested set of detailed rubrics in an ascending

43 Lawrence Grosberg, 'Medical Education Again Provides a Model for Law Schools: The Standardized Patient Become Standardized Client' (2001) 51 Journal of Legal Education 212; Fry and others (n 41).

44 For details of the SCs' training programme see Wilson Chow and Michael Ng 'Standardized Clients in Asia – University of Hong Kong's Experience' in Fiona Westwood and Karen Barton (eds) *The Calling of Law: The Pivotal Role of Vocational Legal Education* (Ashgate 2014) 165.

45 Barton and others (n 10).

order corresponding to the level of competence. The higher the score achieved by the student, the higher the level of communicative competence the law student has attained.[46] The SCs are also expected to give brief written feedback on the assessment form, which will be handed back to students a day or two after the session. Students are also given the opportunity to review their recorded performance on their own, side-by-side with the assessment form filled out by the SC and, hopefully, the rubrics. A large group review session, summarising various aspects of performance and highlighting common errors is conducted by the faculty member before the assessment takes place. Prior to the review session, the faculty member needs go through the assessment forms and review the recorded performances with an overall score below 20 to ensure consistency and reliability of grading by the SCs.[47]

In contrast with the experience with the e-simulation platform mentioned above, the use of SCs was highly welcomed by students as shown by their evaluation of this experiential initiative since its inception.[48] The SC programme has now been extended to one compulsory subject (Civil Litigation, where the SC comes to the student to prepare, for instance, a witness statement) and two other electives (Employment Law and Practice, where the SC is involved in an employment-related dispute and, more recently, Use of Chinese in Legal Practice (UCLP) where, for example, the SC is a victim of a traffic accident) in addition to WTEP. More than 400 one-on-one interviews of SCs by law students are held each year.[49]

Despite the high level of receptiveness of students, more thoughts were put into this SC programme for its second round of operation. The objective was to further and better adapt it to the local practice environment. Such a need for adaptation arises from one of the particularities of legal practice in Hong Kong, relating to the use of language in daily oral communication. Although English is the medium of instruction in the law schools and is mostly used in written communication within legal practice, the Cantonese dialect, an indigenous dialect, remains the most commonly spoken language in client-lawyer communication. Therefore, it was decided that from the academic year of 2013/14

46 Ibid.

47 Statistically it has been found that the SCs are reliable in their assessments on students; see Chow and Ng, 'Legal Education Without The Law' (n 17).

48 Ibid.

49 At the same time, HKU Law's pool of SCs has expanded from 10 at the initial stage to 40, and many of them have been serving in numerous rounds of SC interviews. Most of the SCs are housewives with previous working experience and who speak fluent English, recruited through HKU Law faculty members' own network. Most of them speak Cantonese as their daily dialect.

onwards, SC interviews would be conducted in English in the compulsory Civil Litigation course, while Cantonese would be used in the SC interviews in WTEP (and most recently in UCLP), so that students would have a more realistic experience that mimics what they would encounter in their daily real-life legal practice in Hong Kong.

Statistical analysis of the scores and opinions of 29 students under this enhanced SC programme, who interviewed an SC in English in the Civil Litigation course and also interviewed another SC in Cantonese in WTEP in the academic year of 2014/15, was conducted to understand the effect of such language adaptation. In terms of the scores, analysis results based on paired samples t-test, as shown in Table 9.3, reveal that the students achieved a significantly higher score in the Cantonese interview in two aspects of the SC interview assessment: Item 4 – The student lawyer accurately summarised my situation; and Item 5 – I understood what the student lawyer was saying. In terms of the perceived learning benefit reported by these students in an anonymous

TABLE 9.3 *Comparison between the performance of the same group of students conducting interview in the Civil Litigation (CL) course in English and the WTEP course in Cantonese (2014/15)*

		N	M
Pair 1	WTEP_Greeting appropriate		2.4138
	CL_Greeting appropriate		2.3793
Pair 2	WTEP_Listen to me		2.9655
	CL_Listen to me		3.1034
Pair 3	WTEP_Helpful questioning approach		2.8621
	CL_Helpful questioning approach		2.8966
Pair 4	WTEP_Accurately summarised my situation		3.0000
	CL_Accurately summarised my situation#	29	2.2759
Pair 5	WTEP_Understood what the lawyer saying		3.0690
	CL_Understood what the lawyer saying		2.7586
Pair 6	WTEP_Comfortable with the lawyer		2.5862
	CL_Comfortable with the lawyer		2.5862
Pair 7	WTEP_Feel confident		2.6552
	CL_Feel confident		2.4828
Pair 8	WTEP_Would come back with new prob		2.3793
	CL_Would come back with new prob		2.1724

Note. N=Sample size. M=Mean.

survey – a copy of survey instrument is shown in Appendix C – students evaluated their learning experience in the Cantonese interviews, using the Likert Scale, much higher than their experience in the English interviews, especially in their opinion of the extent to which the SC helped them develop rapport and trust with the client. The results based on independent sample t-tests are shown in Table 9.4.

TABLE 9.4 *Comparison of the evaluation of learning experience over the use of SCs in WTEP reported by students conducting English (2012/13) and Cantonese (2014/15) interviews*

	Interview language	**N**	**M**
listening	English	41	3.90
	Cantonese	35	4.11
questioning	English	41	4.07
	Cantonese	35	4.17
summarising	English	41	3.95
	Cantonese	35	4.14
explanation	English	41	3.85
	Cantonese	35	4.11
problem-solving	English	41	3.71
	Cantonese	35	4.00
communicative competence	English	41	3.88
	Cantonese	35	4.09
rapport and trust	English	41	3.68
	Cantonese	35	4.29
understand feel and think	English	41	3.83
	Cantonese	35	4.06
empathy	English	41	3.88
	Cantonese	35	4.20
respect	English	41	3.85
	Cantonese	35	4.11
teacher's feedback	English	41	3.59
	Cantonese	35	3.40
SC's feedback	English	41	3.44
	Cantonese	35	3.60

TABLE 9.4 *Comparison of the evaluation of learning experience over the use of SCs in WTEP reported by students conducting English (2012/13) and Cantonese (2014/15) interviews* (cont.)

	Interview language	**N**	**M**
apply knowledge	English	41	3.73
	Cantonese	35	3.97
reflect good lawyer	English	41	3.80
	Cantonese	35	3.97
practicing lawyer	English	41	3.93
	Cantonese	35	4.00
strengths and weaknesses	English	41	3.93
	Cantonese	35	4.00
confidence	English	41	3.88
	Cantonese	35	3.86
ethics and responsibilities	English	41	3.71
	Cantonese	35	3.77
increase interest	English	41	3.73
	Cantonese	35	3.74
enjoyable	English	41	3.63
	Cantonese	35	3.86
learn better	English	41	3.80
	Cantonese	35	4.06

Note. N=Sample size. M=Mean.

Local adaptation in the use of language in SC interviews has been shown to enhance both the interview performance and the learning experience of the HKU PCLL students. Further adaptation will be conducted by taking into account feedback from students to further improve this experiential learning program. One such new adaptation, carried out recently, was to ask the SCs – on top of grading and writing down comments wherever appropriate – to give brief oral feedback on the performance to each student right after the interview. The effect of this new adaptation is yet to be studied.

E Conclusion: A Royal Road to Further Adaptation?

The ordinary process of getting qualified to practise law in Hong Kong means that students are required to complete the one-year transactional and skill-based PCLL after their legal studies, which can be as long as five years, before progressing to two years' training at a law firm to qualify as a solicitor or one year's pupillage to qualify as a barrister. This elaborate regime of education and training within the universities should have allowed much room for enhancing students' learning experience. As the first law school in Hong Kong and one of the earliest law schools among the former British colonies in the Far East, HKU Law adopted the liberal studies approach of British universities in studying law but had not done much on experiential learning, whether technology-aided or otherwise, until fairly recently. In the last decade, it has caught up at a fast pace by establishing the CLE elective and introducing a number of other initiatives, the SC programme and the use of an e-learning platform for transactional learning being two of them. The prospects for further adaptation in order to sustain these efforts in the years to come, however, may not be as auspicious as one would hope.

There exist a lot of possibilities which the young HKU 'legal clinic' could explore with a view to broadening the scope of experiential learning for law students in Hong Kong. Currently, the clinic is able to offer clinical experience to only around 80 students per academic year, as compared to over 300 students admitted to read the undergraduate LLB, mixed degrees and the JD programme at HKU Law each year (without taking into account the annual PCLL intake and the number of students already in the pipeline). Initiatives that could be put in place to expand the programme include expanding the course itself to at least allow more students to enrol on it, and partnering with law firms, barristers' chambers or other community or private organizations to provide placement opportunities for students. Furthermore, the CLE programme at HKU Law could also explore other forms of experience useful to students, like street law which would entail law students providing legal education to lay persons, outreach to community organisations, or advocacy campaigns and programmes to raise the awareness of legal rights in society.[50] All these, however, will require much more additional resources, both human resources and space, as well as time. While it might be possible to benefit more students, the

50 The 'Street Law' approach first began in Georgetown University; see 'About Our Programme' (*Georgetown Law*, 2017) <www.law.georgetown.edu/academics/academic-programs/clinical-programs/our-clinics/DC-Street-Law-Program/about-our-clinic.cfm> accessed 23 August 2016.

breadth and depth of the work that students would be allowed to engage themselves in would remain by and large the same, unless the hurdles caused by the existing regulatory regime as described above can somehow be removed.

In a shortage of sufficient opportunity for 'direct purposeful experience' through internships and clinical work, realistic simulations – with or without the use of information technology – can make up part of the deficiency.

Building upon the experience in the UK, the HKU PCLL transplanted the SIMPLE platform which has subsequently been adapted and evolved to become SMILE. The improvement in students' evaluation on SMILE confirms that effective and sustainable adoption of an e-learning platform for legal education and training requires not only substantial adaptation to the practical needs in a specific jurisdiction, but also a very close fit with the prevailing 'e-behaviour' and expectations of students. The use of technology in promoting students' learning can only be said to be effective if the process can be shown to have brought about enablement or advancement in students' experience and vice versa. The challenge remains, as always, to what extent development in e-simulation can match the evolution of technology. Students and various business sectors have been moving away from computer-based to mobile means of communication and the use of cloud-based tools such as Google Docs and Dropbox for group work, a trend that is driven by speedy development of smart phones, web-based applications and cloud technology.[51]

On the other hand, MOODLE has its own built-in functions such as 'Discussion Forum' and 'Wiki'. While those names can be modified, making the 'Forum' resemble an email account or having an add-on or hyperlink to another web-based application, it is impossible to create an e-mail system or another 'Google Docs' within SMILE. Even more fundamentally, assuming MOODLE could be further enhanced and significantly improved or a new e-learning platform was to be created, it remains to be seen whether such improvement or innovation would always lag behind the fast-changing trends and habits of communication in real life.[52] From an educators' perspective, the role of law teachers has evolved due to this process of technology advancement, from teaching transactional knowledge and legal experience *per se* to facilitating students to reach this experience themselves through continuous improvement in the design of the simulated transactions, taking into account the latest technological tools and software being used in legal practice. Students

51 Students need be made aware of the risks associated with cloud computing.

52 In addition to the risks associated with cloud computing, students also need to be made aware of the fact that they will have to be adaptive and ready to engage with any system used by the firms or chambers they eventually work in, as well as the system used by the courts that may not always fully reflect the latest technological developments.

would also look to their teachers more for mentoring than for instructions. Educators may not have to be tech-savvy but, in terms of simulation design, open-ended transactions or problems which allow several correct answers and several ways to the correct answers[53] will have to be provided for in addition to the conventional type of close-ended questions. This will require educators to be flexible and sensitive to students' diverse responses, approaches and needs, guiding them through the learning process instead of being instructive in telling them what should be done. The process inevitably takes time, calling not only for updates in one's teaching practices but also stepping out of one's comfort zone. It begs the question of how far educators are ready and adaptive to this change in their role.

Relying on previous scholarship on the first SC programme in GGSL which has proven that SCs are as reliable and valid as tutors, and yet less costly, in assessing the communicative competence of law students, the HKU PCLL imported the programme and has since then run more than 1,500 SC interviews for more than 1,000 students. The promising results of the transplantation prove that this innovative approach to legal education and training can be successfully transferred across continents and institutions, and students can benefit from interviewing an SC and even perform better when they meet another SC on a subsequent occasion. This enhancement in communicative competence has been proven not only in students who interviewed SCs twice in the same course under a similar factual scenario, but also in those who interviewed different SCs in two different courses under totally different sets of facts. This shows that communication skills learnt by students from interviewing an SC can be successfully transferred and applied across different areas of legal practice. The SCs' role as teachers of communicative competence through this experiential learning environment should be emphasized as importantly as, if not more than, their ability and role as assessors. In these ways, the SC programme fills an important gap in legal education and training where client communication competence has not been satisfactorily and effectively learnt.

However, as a long-term solution in teaching communication skills to students in an Asian common law jurisdiction like Hong Kong where English remains as a second language to most but yet the primary medium of instruction in legal education, the scheme needs to be adapted and contextualized against possible cultural and linguistic particularities. The introduction of interviews in Cantonese for students was the first step taken. The statistical analyses shown above tend to suggest that the move was appropriately made. Expanding Cantonese

53 This approach seems to have stemmed from mathematics teaching: see e.g. Jerry Becker and Shigeru Shimada, *The Open-ended Approach* (NCTM 1997); Alan Schoenfeld, *Mathematical Problem Solving* (Academic Press 1985).

interviews to a core subject, however, would encounter the challenge of how the needs of English-speaking students who do not or cannot speak Cantonese can be accommodated. Further, the growth of the Mandarin-speaking population in Hong Kong and the influx of capital and investment from Mainland China to the local market, together with increasing opportunities to render legal services across the border in Mainland China, prompt the rising need for client communication competence in Mandarin. More fundamentally, do we see the assessment criteria on communicative competence devised overseas as reasonable criteria for client-lawyer communication in Hong Kong? Do the scoring rubrics devised from and originally for a Scottish legal education and training program represent what clients in Hong Kong, from a different culture with a different code of etiquette and perhaps lifestyle, expect from a lawyer?[54]

Enhancing students' learning is an issue common to contemporary legal educators globally. As seen above, experiential learning is a highly contextualized discourse that is inevitably shaped by cultural and jurisdictional particularities. Therefore, framing a jurisdiction-specific scheme adapted to the language and cultural particularities of students seems to be of the utmost importance for the reliable and sustainable operation of any innovation, adaptation and expansion of pedagogical tools for experiential learning, apart from securing indispensable institutional support in terms of both manpower and finance.

54 For example, while it would be a friendly gesture for a lawyer in the US to start a conversation with client by talking about baseball games for a few minutes, this may not seem appropriate in Hong Kong where clients expect lawyers to get to the topic more quickly. This baseball example was given by the overseas trainer during the inaugural SC training workshop at HKU in February 2013 and was based on the trainers' observation of SC training in the US. See also Chow and Ng (n 44).

Appendix A

Self-Assessment Questionnaire

Which one of the following is true for you? Put a cross under (a), (b), (c), (d) or (e) for each question/row.

The simulation platform used in this elective has:

	(a) Strongly Disagree	(b) Disagree	(c) Neutral	(d) Agree	(e) Strongly Agree
1. Increased my interaction with teachers in class and online					
2. Increased my interaction and collaboration with my peers in learning in class and online					
3. Facilitated timely feedback from teachers					
4. Increased my interest in the subject					
5. Made it more enjoyable for me to learn					
6. Helped me learn better					

Peer-Assessment Questionnaire

Which one of the following do you think is true for your group? Put a cross under (a), (b), (c), (d) or (e) for each question/row.

The simulation platform in this elective has:

	(a) Strongly Disagree	(b) Disagree	(c) Neutral	(d) Agree	(e) Strongly Agree
1. Increased our interaction with teachers					
2. Increased our interaction and collaboration in learning within the group					
3. Facilitated timely feedback from teachers					

	(a) Strongly Disagree	(b) Disagree	(c) Neutral	(d) Agree	(e) Strongly Agree
4. Increased our interest in the subject					
5. Made it more enjoyable for us to learn as a group					
6. Helped us as a group to learn better					

Appendix B

1. The greeting and introduction by the student lawyer was appropriate 1 2 3 4 5

Comments _____

_____

2. I felt the student lawyer listened to me 1 2 3 4 5

Comments _____

_____

3. The student lawyer approach to questioning was helpful 1 2 3 4 5

Comments _____

_____

4. The student lawyer accurately summarised my situation 1 2 3 4 5

Comments _____

_____

5. I understood what the student lawyer was saying 1 2 3 4 5

Comments _____

_____

6. I felt comfortable with the student lawyer 1 2 3 4 5

Comments _____

_____

7. I would feel confident with the student lawyer dealing with my situation 1 2 3 4 5

Comments _____

_____

8. If I had a new legal problem I would come back to this student lawyer 1 2 3 4 5

Comments _____

_____

Appendix C

Regarding your experience with SCs, which one of the following is true for YOU? (Please circle the best option.)

The interviews with SCs have enhanced my skills/ abilities in:

No.	Skills/ Abilities	Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
1	Attentive listening	1	2	3	4	5
2	Questioning clients	1	2	3	4	5
3	Summarizing information	1	2	3	4	5
4	Clear explanation	1	2	3	4	5
5	Problem-solving	1	2	3	4	5
6	Communicative competence with clients	1	2	3	4	5
7	Establishing rapport and trust with clients	1	2	3	4	5
8	Understanding how clients feel and think	1	2	3	4	5

No.	Skills/ Abilities	Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
9	Demonstrating more empathy towards clients	1	2	3	4	5
10	Demonstrating more respect towards clients	1	2	3	4	5

The interviews with SCs has:

No.	Questions	Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
1	Provided me with useful feedback from teachers	1	2	3	4	5
2	Provided me with useful feedback from the standard clients	1	2	3	4	5
3	Provided me with an opportunity to apply legal knowledge into practice	1	2	3	4	5
4	Helped me reflect on what is important to be a good lawyer	1	2	3	4	5
5	Gave me a clearer understanding of what a practicing lawyer does	1	2	3	4	5
6	Helped me identify my strengths and weaknesses	1	2	3	4	5
7	Helped me build my confidence in interviewing clients	1	2	3	4	5
8	Increased my awareness of important professional ethics and responsibilities	1	2	3	4	5
9	Increased my interest in the subject	1	2	3	4	5
10	Made it more enjoyable for me to learn	1	2	3	4	5
11	Helped me learn better	1	2	3	4	5

CHAPTER 10

Preparing for the Sinicization of the Western Legal Tradition: The Case of Peking University School of Transnational Law

Philip J. McConnaughay and Colleen B. Toomey

This chapter is about a law school whose mission presumes that (i) the US and UK law firms that dominate the worldwide market for complex cross-border legal services today are subject to being displaced; (ii) the prevailing view of the inevitable worldwide harmonization of law around Anglo-American principles and the Western legal tradition is mistaken; and (iii) the world is only now beginning to experience the growing influence of China and other non-Western traditions in multinational business transactions and disputes and in shaping the practices, laws and principles by which they will be governed going forward.

The mission of the law school is to contribute to the growth of a *Chinese* legal profession capable of supplying the sophisticated legal services and leadership essential to the advanced, internationalized economy and civil society emerging in China, and of competing ably and successfully with the foreign-based multinational law firms that currently dominate this work. The key to the law school's success is a combined post-baccalaureate Juris Doctor/Juris Master program taught by a distinguished multinational faculty that blends American and Chinese law curricula and meaningful exposure to EU law with rigorous case study and interactive Socratic questioning.

The law school is Peking University's School of Transnational Law (STL) in Shenzhen, China. The authors are the Dean and Vice-Dean of STL.

The popular perception of STL upon its establishment in 2008 was essentially the opposite of what we just have described: STL was seen as an elite *American* law school *in* China whose faculty was composed largely of visiting American scholars and practitioners and whose singular ambition, apart from the placement of its graduates in leading American law firms, was full accreditation by the American Bar Association (ABA). As STL itself stated in its submission to the ABA in support of ABA accreditation of foreign law schools, one of its principal goals was to prepare Chinese law students 'to be *American* lawyers.'[1]

1 STL Submission to the Council of the ABA Section of Legal Education and Admissions to the Bar, 27 July 2012, 20 (emphasis added).

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This is the story of how this unique law school *in* China evolved into a leading law school *for* China, establishing *new* standards for global legal education rather than simply following old ones.[2] Part I discusses the early years of STL and its pursuit of ABA accreditation. Part II explores the realignment of STL's priorities in the aftermath of the ABA's decision not to accredit foreign law schools and in light of legal and economic developments under way in Shenzhen, the Pearl River Delta, China and the rest of the non-West. Part III examines the implications of the realignment for STL's China law Juris Master curriculum; Part IV the growing synergies between STL's China law and American law curriculums; and Part V the expanded notion of 'lawyering skills' required by STL's innovative curriculum. Part VI concludes with an explanation of why ABA accreditation of STL isn't necessary after all.

A The Early Years of STL: Pursuit of ABA Accreditation

In 2007, China's State Council formally authorized Peking University (PKU) to offer a Juris Doctor (JD) degree.[3] The following year, PKU established STL, the 'School of Transnational Law', as part of its Shenzhen Graduate School. PKU Shenzhen Graduate School Chancellor and University Vice President at the time, Professor Hai Wen, recruited Jeffrey Lehman, a former president of Cornell University and dean of the University of Michigan Law School, to serve as STL's Chancellor and Founding Dean.

The original idea for STL was Hai Wen's, one of China's leading developmental economists. His objective for the law school was simple: to provide an American JD curriculum in China, in English, that would be competitive with the best in the US but at a much lower cost than the exorbitant tuition a growing number of Chinese law students were paying for a US-based legal education.[4] He also was impressed by the signature pedagogy of American JD

2 We have borrowed the phrase 'changed from a law school in China to a law school for China' from Nigel Nianyi Xu, 'Rise and Demise of The Comparative Law School in China' (paper on file with author, 2013), discussing the history of Soochow University Law School in Shanghai, 1915–1952.

3 Technically, the State Council authorized Peking University to establish and award an 'International *Fa Lv Shuo Shi*', or literally, an 'international Juris Master degree'; State Council Circular X.W.B. [2007] No 46. The Juris Master, or JM, is a recognized post-baccalaureate professional degree in law in China. The authorization of an 'International *Fa Lv Shuo Shi*' was understood to mean an American-style Juris Doctor degree.

4 Jeffrey S Lehman, 'The Peking University School of Transnational Law: What? Where? Why?' (Address to The Council of International Affairs of the New York City Bar Association, 31 January 2012, on file with author), 3.

programs: serious, reflective study of actual cases accompanied by intensely interactive class sessions in which professors question and challenge students, day after day, about the cases they read. The skills that emerge – rigorous analytical thinking, the ability to see all sides of an issue, the ability to solve complex problems creatively, and the ability to persuade – are keys to elite law practice. The goal was for STL graduates to 'walk out and work for Paul Hastings, Akin Gump and other similar firms.'[5]

This objective was consistent, then and now, with the growing 'Americanization' of legal education worldwide, largely in response to the globalization of commerce, the dominance of US and UK law firms in the market for cross-border legal services, the growing currency of the JD degree as a preferred credential for elite levels of law practice, and the need to increase the domestic supply of highly-skilled lawyers. Japan and South Korea had recently announced the establishment of post-baccalaureate JD degrees, as had universities in Australia, Canada, Hong Kong, Singapore, India and the Philippines, with other nations contemplating similar moves.[6] US, UK and other Western law firms were rapidly expanding globally and dominating both established and emerging markets for cross-border legal services, where domestic legal services were largely unavailable.[7] The global expansion of US and UK law firms was accompanied by a similarly wide diffusion of Anglo-American legal

5 Remarks of STL Founding Dean Jeffrey Lehman; see Leigh Jones, 'Foreign Law Schools Follow US Playbook' *The American Lawyer* (New York, 8 September 2008).

6 See e.g. Jeffrey S Lubbers, 'Japan's Legal Education Reforms from an American Law Professor's Perspective' (2010), 15–18 <http://ssrn.com/abstract=1552094> accessed 29 May 2017; Rosa Kim, 'The "Americanization" of Legal Education in South Korea: Challenges and Opportunities' (*Social Science Research Network*, 2012), <http://ssrn.com/abstract=2012667> accessed 29 May 2017; Carole Silver, 'Globalization and the Monopoly of ABA-Approved Law Schools: Missed Opportunities or Dodged Bullets', (2014) 82 Fordham L Rev 2869, 2871, 2878–2879.

7 See e.g. James R Faulconbridge, Jonathan V Beaverstock and Daniel Muzio, 'Global Law Firms: Globalization and Organizational Spaces of Cross-Border Legal Work', (2008) 28 Nw J Int'l L & Bus 455, 458. With respect to the shortage of legal services in emerging markets, consider that China has a population of 1.3 billion but only 250,000 lawyers (one lawyer for every 5,600 people); The Statistics Portal, 'Number of lawyers in China between 2005 and 2015' <www.statista.com/statistics/224787/number-of-lawyers-in-china/> accessed 29 May 2017. In contrast, the United States has a population of just over 300 million, but over 1.3 *million* American lawyers (one lawyer for every 230 people); American Bar Association, 'ABA National Lawyer Population Survey' ≤www.americanbar.org/content/dam/aba/administrative/market_research/total-national-lawyer-population-1878-2015.authcheckdam.pdf> accessed 29 May 2017.

and dispute resolution conventions,[8] facilitated by the fact that so many non-Western nations had adopted Western codes and laws during periods of colonization or modernization,[9] and reflected in the outcomes of multinational law harmonization efforts.[10]

In this context, seeking ABA accreditation made sense. What better confirmation could there be for elite prospective employers that STL graduates had succeeded in a program every bit as rigorous and demanding as those of the best American law schools? In order to prepare the necessary proof for the ABA, Founding Dean Lehman built a JD curriculum taught largely by visiting scholars recruited from the very best US law schools – Harvard, Stanford, NYU, Chicago, Michigan – together with US practitioners who were among the profession's most esteemed, including two former ABA presidents. STL created an academic year calendar composed of six five-week modules specially designed to accommodate the periodic short-term visits that were the only visits feasible for these groups. The law school added a small number of full-time resident faculty, including the ABA's former Deputy Director for accreditation matters,[11] two of the world's most renowned scholars of cross-border trade and dispute

8 Faulconridge et al., ibid 465; Silver, (n 6), 2879. See also STL's Submission to the ABA (n 1), 5: 'American law firms have [come] … to dominate the ranks of firms with offices in multiple jurisdictions,' and a goal of ABA approval of law schools outside the United States should be '[h]aving American Law … become a de facto international standard' for cross-border transactions.

9 For example, Germany's civil code was adopted in large part by China, Japan, Korea and Taiwan; Dutch provisions prevail in Indonesia, South Africa, Sri Lanka and elsewhere; English common law prevails in India, Singapore, Bahrain, Kenya and many other non-Western nations; and the codes of France, Belgium and Portugal are similarly evident throughout the non-Western world; See e.g. Central Intelligence Agency, 'The World Factbook' <www.cia.gov/library/publications/the-world-factbook/fields/2100.html> accessed 29 May 2017.

10 Paul B Stephan, 'The Futility of Unification and Harmonization in International Commercial Law' University of Virginia School of Law Working Paper No. 99-10 (1999), 2–7; Jurgen Basedow, 'The Europeanization of Private Law and its Progress and Significance for China', (2013) 1 The Chinese Journal of Comparative Law 49; Duncan Alford, 'A Guide on the Harmonization of International Commercial Law' (2012), compiling a list of law harmonization efforts and resources <www.nyulawglobal.org/globalex/Unification_Harmonization1.htm> accessed 29 May 2017..

11 Stephen Yandle; see Peking University School of Transnational Law, 'Stephen Yandle' (*Peking University*, 2017) <http://stl.pku.edu.cn/faculty/resident-faculty/stephen-yandle/> accessed 29 May 2017.

resolution,[12] and two leading scholar-practitioners with previous prestigious clerkships on the United States Supreme Court.[13] STL supplemented the JD curriculum with regular guest lectures by leading US jurists and government officials in order to ensure a sufficient 'acculturation' of STL students to the actual workings of the US government and judiciary.[14]

Recruiting top Chinese students with sufficient English proficiency was (and remains) less of a challenge for STL than one might expect. Peking University, or 'Bei-da', as it is known in Chinese, is China's first and most renowned comprehensive research university, commonly regarded as one of the leading universities in the world.[15] Becoming a PKU student is the aspiration of millions of young Chinese, whose English proficiency has risen steadily with mandatory English language study in elementary and secondary school, and with greater access to television and the Internet. Consequently, STL is fortunate in its ability to attract students with the capacity to meet the demands of an intensive JD curriculum taught in English.

The combination of leading US professors and practitioners teaching top Chinese law students worked exactly as planned. Visiting US professors spoke willingly and compellingly of the comparability of STL to their home law schools, and leading US practitioners expressed similar enthusiasm when comparing STL students to their young American associates. One Harvard professor observed that, 'The students [at STL] are absolutely remarkable.... I am convinced that the young people I taught there would be exceptional American lawyers.'[16] A United States District Judge reported, 'I found that the

12 Francis Snyder; see Peking University School of Transnational Law, 'Francis Snyder' (*Peking University*, 2017) <http://stl.pku.edu.cn/faculty/francis-snyder/> accessed 29 May 2017; and Peter Malanczuk; see 'Professor Peter Malanczuk' <http://www.malanczuk.com> accessed 29 May 2017.

13 Douglas Levene, see Peking University School of Transnational Law, 'Douglas Levene' (*Peking University*, 2017) <http://stl.pku.edu.cn/faculty/resident-faculty/douglas-levene/> accessed 29 May 2017; and Ray Campbell, see Peking University School of Transnational Law, 'Ray Campbell' (*Peking University*, 2017) <http://stl.pku.edu.cn/faculty/resident-faculty/ray-campbell/> accessed 29 May 2017.

14 Guest lecturers included a United States Supreme Court Justice, several United States Courts of Appeal judges, US ambassadors, presidents of leading US universities, and many other similarly distinguished guests.

15 Peking University, 'History' (*Peking University*, 2013) ≤http://english.pku.edu.cn/About PKU/History/> accessed 29 May 2017. 'Beida' is colloquial for Peking University, representing the combination of the first syllables of 'Beijing' (Bei) and 'Daxue', or university, (da).

16 Letter from Charles J Ogletree, Jr, Jesse Climinko Professor of Law at Harvard Law School (2 December 2010) ≤http://apps.americanbar.org/legaled/accreditation/Comments%20on%20Accreditation%20of%20Foreign%20Schools.html> accessed 29 May 2017.

students at STL demonstrated a keen appreciation for and understanding of the culture, values and ethics of the American legal system. If anything, they demonstrated far more enthusiasm for embracing our legal system than US law students exhibit.'[17] A past president of the ABA said, 'The STL students [I teach] discuss the same hypotheticals and read the same course book as students at the University of Michigan and University of Virginia. I can state … without reservation that the students I teach at STL have a similar level of appreciation and understanding of the culture, values and ethics of the American legal system as [the] foreign [law] students I teach in the United States.'[18] The Government of Shenzhen contributed to the enthusiasm by agreeing to fund a new signature building for the law school, designed by the leading architectural firm Kohn Pederson Fox ('KPF') of New York.

Lehman took full advantage of the momentum and on 15 October 2010 wrote to the ABA to announce that, if the ABA were to adopt the recommendation of a Special ABA Committee barely two months earlier that the ABA extend its accreditation process to law schools located outside of the United States, STL would seek ABA accreditation.[19] Support soared among the American scholars, practitioners and jurists who taught at STL, and among the US law firms and legal services companies operating in China. 'I'm very confident STL will get ABA accreditation,' declared the global legal strategist for Thompson West, which is responsible for the worldwide marketing of the legal database *Westlaw*. 'The Chinese students specializing in American law will help maintain the growth of international trade…. This means more jobs, transactions and

17 Letter from United States District Court for the District of Columbia Judge Ellen Segal Huvelle (6 July 2012) <http://apps.americanbar.org/legaled/accreditation/Comments%20on%20Accreditation%20of%20Foreign%20Schools.html> accessed 29 May 2017.

18 Letter from Robert E Hirshon (10 July 2012) <http://apps.americanbar.org/legaled/accreditation/Comments%20on%20Accreditation%20of%20Foreign%20Schools.html> accessed 29 May 2017.

19 Throughout this essay, we use 'ABA' to mean The Council of the Section of Legal Education and Admissions to the Bar of the American Bar Association, which is authorized by the US Department of Education to serve as the national accreditation authority for law schools; American Bar Association, 'Section of Legal Education and Admissions to the Bar' (2017) <http://www.americanbar.org/groups/legal_education.html> accessed 29 May 2017. On 10 June 2010, the Council appointed a 'Special Committee on Foreign Law Schools Seeking Approval under ABA Standards', whose Report recommended, inter alia, that the Council proceed with the accreditation of law schools outside US borders that meet ABA Standards provided 'that the curriculum is primarily focused on US law, the instruction is primarily in English, and the faculty are primarily JD graduates of ABA approved law schools.' See Report of Special Committee on Foreign Law Schools Seeking Approval under ABA Standards (19 July 2010).

opportunities.'[20] The head of Akin Gump's Beijing office explained that, 'For us it is important because we depend on Chinese lawyers, most of whom have had to go to the US and get a graduate law degree.'[21]

Unfortunately for STL, the Special Committee's recommendation coincided with an unprecedented downturn in the US markets for legal services and legal education.[22] As a result, barely a month following the recommendation that the ABA begin accrediting foreign law schools, US lawyers and law deans began writing to the ABA to express their strong opposition. One practitioner wrote: 'This is an absurd inquiry that I adamantly oppose. … [t]he American market already is saturated with lawyers. … [w]e don't need more lawyers, we need less.'[23] Deans, faculty and students of US law schools objected to the potential impact of foreign law school accreditation on US-based LLM programs, on the US legal services job market, and on the perceived value of a JD degree.[24] To be sure, these groups also expressed concerns that transcended rank protectionism – for example, about foreign law schools being unable to 'acculturate' students to 'American values' and about the potential dilution of ABA accreditation resources – but protectionism seemed at the core of opposition that was growing almost as rapidly as the US markets for legal services and legal education at the time were shrinking.

The overwhelming perception in the US seemed to be that STL's mission was (i) to flood the American market for legal services with US bar-eligible Chinese lawyers while (ii) depriving American law schools of foreign applicants by educating them in China at far less cost than they would have paid to attend law school in the United States. Lost in all the protectionist noise was the more realistic probability that STL would *expand* the worldwide market for American legal services by promoting the adoption of American conventions of law practice abroad.

Almost two years to the day following the Special Committee's recommendation, the Council of the ABA Section of Legal Education and Admissions to the Bar voted 15 to 0, with two abstentions, *not* to proceed with the

20 Jaime Mendoza, 'China Legal', *US-China Today* (University of Southern California, July 31, 2009) quoting Chang Wang.

21 Ibid quoting Elliott Cutler.

22 See e.g. Eli Wald, 'The Economic Downturn and the Legal Profession, Foreword: The Great Recession and the Legal Profession'(2010) 78 Fordham L. Rev. 2051 <http://ir.lawnet.fordham.edu/flr/vol78/iss5/1> accessed 29 May 2017.

23 Letter from William Grogin (20 August 2010) <http://apps.americanbar.org/legaled/accreditation/Comments%200n%20Accreditation%200f%20Foreign%20Schools.html> accessed 29 May 2017.

24 Ibid.

accreditation of foreign law schools.[25] Professor John Flood of the University of Westminster (London) expressed the prevailing view: '[the] decision was driven by … practitioners in the US who are intimidated by foreigners taking American jobs against a backdrop of a shrinking legal market.'[26]

Most observers, including many within Peking University, viewed the Council's decision as the death knell for the School of Transnational Law. Founding Dean Jeffrey Lehman did not: 'Freed from any need to worry about the American Bar Association,' he declared, 'STL [would] now be able to focus in a more single-minded manner on the ultimate question: what kinds of education will best prepare professionals to serve a world in which the processes of globalization – economic, social and political – are likely to continue accelerating in the decades to come?'[27]

B STL Without the ABA: The Influence of Shenzhen and Hong Kong, China, and the Rest of the World

We joined STL in the aftermath of the ABA's decision.[28] We did so because we share Founding Dean Lehman's belief that everything STL had hoped to achieve through ABA approval – including access to the US bar and placement of STL graduates in leading international law firms – remains available to STL *without* ABA approval. We also believe, as does Lehman, in the intrinsic importance of offering STL's unique JD/JM program to top Chinese students who clearly are destined for positions of future leadership. The potential contribution of STL to China, to the rule of law, to transnational law, and to China's international relationships, including China's relationship with the United States, is huge.

25 Sam Favate, 'ABA Council Votes Against Accrediting Foreign Law Schools' (*The Wall Street Journal Law Blog*, 7 August 2012) <http://blogs.wsj.com/law/2012/08/07/aba-council-votes-against-accrediting-foreign-law-schools/> accessed 29 May 2017.

26 Ibid.

27 Jeffrey S Lehman, 'Transnational Legal Education in the 21st Century: Two Steps Forward, One Step Back' (The Senobu Foundation Distinguished Lecture, Tokyo, Japan, 16 March 2014, on file with author), 15.

28 Founding Dean Jeffrey Lehman left STL in 2012 to become the first CEO and Vice-Chancellor of New York University's new Shanghai campus; see NYU, 'Jeffrey S. Lehman, Former Cornell President, to Lead NYU Shanghai' (*NYU*, 5 April 2012)<http://www.nyu.edu/about/news-publications/news/2012/04/05/jeffrey-s-lehman-former-cornell-president-to-lead-nyu-shanghai.html> accessed 29 May 2017. We had been serving previously as dean and associate dean of Penn State University's School of Law and School of International Affairs.

The ABA's decision provided occasion for a fresh assessment of STL's strategic direction.

Clearly, for all of the reasons that animated STL's founding, STL's American law JD curriculum remains fundamentally important to its mission, even if ABA accreditation of STL does not. The influence of American/Western law and legal practices in worldwide cross-border trade, economic development, rule of law initiatives, and law harmonization efforts continues to be profound.

But the influence of China and other non-Western legal traditions in international trade and development is growing. The expanding integration of Shenzhen's and Hong Kong's economies and the blending of their very different legal systems and traditions likely offers a preview of China's willingness to accommodate similar adjustments throughout China as international investment throughout China's grows. The developments in Shenzhen and Hong Kong also may preview *the West's* willingness to adapt to new and different legal and commercial practices as China's global economic influence grows. As Martin Jacques predicts in his epic study, *When China Rules the World*, 'With the rise of China, Western universalism will cease to be universal – and its values and outlook will become steadily less influential. [T]he West will be obliged to learn from and incorporate some of [China's] insights and features. ... [a global] Western-style rule of law ... is by no means proven.'[29]

1 *Shenzhen and Hong Kong*

The modern history of Shenzhen is as remarkable as it is short; it grew from a fishing village of 30,000 not even four decades ago to a metropolis of almost 15 million with China's most advanced economy and highest per capita income today.[30] Shenzhen is home to world-leading innovators such as Huawei Technology, Tencent, BYD, Foxconn Technology, ZTE, Ping An, DJI and BGI ('Beijing Genomics Institute'). It is renowned as 'China's Silicon Valley' with a growing 'International Biotech Valley'; it is home to new universities and branch campuses of China's and Hong Kong's leading research universities; it is a regional and growing international transportation hub; and it is rapidly becoming one of the world's leading financial centers.[31]

29 Martin Jacques, *When China Rules The World* (Penguin Books 2009, 2012) 560..

30 Horace Yeung, 'A Tale of Two Cities: Shenzhen and Shanghai – Rivalry or Division of Role?' University of Leicester School of Law Research Paper No. 15–03 (2015), 10–12.

31 Ibid; see also Mayor Xu Qin, *Report of the Work of Government, Sixth Session of the Fifth People's Congress of Shenzhen Municipality* (Shenzhen, 23 January 2014, on file with author).

Shenzhen also is one of China's most international cities, a trend that began shortly following its 1978 designation as one of China's first 'Special Economic Zones' ('SEZs'). By 1981, Shenzhen accounted for over fifty percent of the total foreign direct investment in China.[32] It was deemed the 'most special' of China's early SEZs, with the greatest freedom to innovate and no hesitancy about doing so.[33] As Deng Xiaoping urged the nation in 1992, 'We should be bolder than before in conducting reform and opening to the outside. ... [o]nce we are sure that something should be done, we should dare to experiment and break a new path. That is the important lesson to be learned from Shenzhen.'[34]

Perhaps the most remarkable aspect of Shenzhen's economic ascendancy is that it has occurred despite the absence of a well-developed legal infrastructure – a fully articulated body of commercial law, reliable legal institutions, and an experienced legal profession. In its place, commercial affairs in Shenzhen, like in the rest of China, have depended upon a mix of traditional Chinese commercial and legal customs, imported civil law codes, administrative fiat, judicial and regulatory institutions that only recently have begun to modernize, and a small but growing legal profession that barely existed as recently as 1990.[35] But as Shenzhen and the region advance from an agriculture and manufacturing-based economy into one based increasingly on technological innovation and services, with increasing numbers of investors and participants from around the world, there is widespread recognition that a stable and reliable legal infrastructure is essential to sustainable growth.[36]

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32 Yueng(n 30) 9.

33 Ibid 12.

34 Ibid, citing Robert Coase and N Wang, *How China Became Capitalist* (Palgrave Macmillon 2012) 116.

35 The Statistics Portal (n 7). China's system of legal education is similarly embryonic; revived only since the 1980s, it still is in the process of modernizing; Ji Wiedong, 'Legal Education in China: A Great Leap Forward in Professionalism', (2004) 39 Kobe U. L. Rev. 1, 15.

36 Former Shenzhen Mayor Xu Qin, for example, has observed that, 'The earlier the city improves its legal environment, the more likely it is we will secure a sustained competitive advantage.' See 'History of STL' (*Peking University*, 2017) <http://stl.pku.edu.cn/about-stl/history-of-stl/> accessed 29 May 2017. This observation is not new. The mutual dependence of economic modernization and legal modernization was a cornerstone of Deng Xiaoping's vision for Shenzhen when the city was designated China's first Special Economic Zone; Mareille Delmas-Marty, 'Present Day China and the Rule of Law' 2003 Chinese Journal of International Law 11 ≤http://chinesejil.oxfordjournals.org/content/2/1/11.full.pdf> accessed 29 May 2917, noting Deng Xiaoping's 1978 Speech to the 3rd Plenary Session of the 11th Central Committee of the Communist Party of China, in which he called for 'a complete set of authoritative, constantly applied laws.' The work of economic historian and Nobel Laureate Douglass North supports these sentiments: 'How

The restoration to Chinese sovereignty of Shenzhen's neighbor immediately to the south, Hong Kong, has added an interesting dimension to this challenge. The eventual integration of Shenzhen's and Hong Kong's economies seems inevitable, as does the economic integration of the entire Pearl River Delta, of which they are both part.[37] Unlike Shenzhen and the rest of the Delta, however, Hong Kong has deeply embedded common law and rule of law traditions, a reliable independent judiciary, mature regulatory institutions, and an established legal profession. What the inevitable economic integration and internationalization of the Delta will mean for the region's legal institutions is not clear; what is clear is that the choice of legal infrastructure will be China's.

China's openness to experimenting with laws and legal institutions in the Shenzhen Special Economic Zone suggests that the region's eventual legal infrastructure likely will blend Chinese and Western components. This is perhaps best illustrated by developments in the joint Shenzhen-Hong Kong multitrillion dollar financial services modernization area known as 'Qianhai', touted as China's answer to Wall Street.[38]

For example, the 'Lanhai Modern Legal Services Development Center' of Qianhai, which is supported by Shenzhen's Justice Bureau, is charged with identifying foreign laws that might be instructive for the future legal framework of Qianhai and the Pearl River Delta.[39] The new Shenzhen-based First Circuit of the Supreme People's Court is exploring the implications of using Hong Kong commercial law as the applicable law for contracts made in Qianhai.[40] The Shenzhen Intermediate People's Court for Qianhai will include

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effectively agreements are enforced is the single most important determinant of economic performance'; Douglass North, *Institutions, Ideology and Economic Performance*, (1991) 11 Cato J. 477–487, at 477.

37 According to the World Bank, the Pearl River Delta is the world's most populous single metropolitan area – a 'megacity' with a population expected to reach 80 million; The World Bank, 'World Bank Report Provides New Data to Help Ensure Urban Growth Benefits the Poor' (*World Bank*, 26 January 2015) <www.worldbank.org/en/news/press-release/2015/01/26/world-bank-report-provides-new-data-to-help-ensure-urban-growth-benefits-the-poor≥ accessed 29 May 2017.

38 Neil Gough, 'A Muddy Tract Now, but by 2020, China's Answer to Wall St.' *New York Times* (New York, 2 April 2014) <http://dealbook.nytimes.com/2014/04/02/a-financial-center-is-envisioned-on-a-muddy-tract-in-southern-china/?_r=0≥ accessed 29 May 2017.

39 'Center Set Up in City to Help Identify Foreign Laws' *Shenzhen Daily* (Shenzhen, 22 May 2014).

40 Shenzhen Daily, 'Hong Kong Laws May Apply To Qianhai Contracts' (*Shenzhen Government Online*, 8 September 2015) <http://english.sz.gov.cn/ln/201509/t20150908_3206037.htm> accessed 29 May 2017.

Hong Kong citizens on the panels of judges ('juries') hearing Hong Kong-related cases.[41] Shenzhen's South China International Economic Trade and Arbitration Commission has split from CIETAC, in part, to ensure its flexibility and responsiveness to the unique legal environment and multinational disputes characteristic of Qianhai and the rest of the Pearl River Delta.[42] Guangdong Province has received special dispensation from the national government to permit Mainland and Hong Kong law firms and lawyers to form partnerships that are not permitted elsewhere in China,[43] and the Hong Kong Law Society has published a study pertaining to the role of Hong Kong solicitors in the development of the legal profession in Qianhai.[44]

2 *China and the Rest of the Non-West*

China's burgeoning trade with Africa, the Middle East, Latin America and other non-Western nations, as well as growing cross-border trade generally among parties exclusively from non-Western legal traditions, also challenge conventional assumptions about the law and practice of international trade converging around American law and the Western legal tradition.[45] China is now Africa's largest trading partner, with the annual value of China–Africa trade growing by a remarkable 700 percent between 2001 and 2009 alone, and

41 Laura Zhou, 'Circuit Court, Jury Break New Ground' (South China Morning Post, 29 January 2015) A5.

42 See South China International Economic and Trade Arbitration Commission (2017) ≤www.sccietac.org/web/index.html;jsessionid=6094BBB15AF621867D0B8B09C0574DFA> accessed 29 May 2017.

43 Guangdong Provincial Department of Justice Pilot Scheme on Affiliation Between Hong Kong Law Firm and Mainland Law Firm which Organize as Joint Venture Partnership (Guangdong Provisional Government).

44 The Law Society of Hong Kong, 'Study Report on the Development of the Legal Profession in Qianhai' (Law Society of Hong Kong, November 2012) <www.legco.gov.hk/yr12-13/english/panels/ajls/papers/aj0326cb4-540-1-e.pdf> accessed 29 May 2017.

45 Although it is true that most non-Western nations have adopted Continental or common law codes as 'official' law, it also is true that most of these nations, in fact, have 'mixed' legal traditions, with customary and religious traditions remaining influential. As Simon Chesterman notes in Chapter 1, the combination of 'pre-existing legal systems and … colonial transplants set the stage for the plural regimes that we see today.' See also Won Kidane, 'The China-Africa Factor in the Contemporary ICSID Legitimacy Debate' (2014) 35 U Pa J Int'l L 559, 583–585, and sources cited in Philip J McConnaughay, 'Rethinking the Role of Law and Contracts in East–West Commercial Relationships', (2001) 41 Va J Int'l L 427, 447. As Professor William Shaw has noted, 'work is only now beginning on the study of how traditional legal systems met and often persisted under the "Westernizing" reforms of [colonial and imperial influences];' William Shaw, *Legal Norms In A Confucian State* (University of California 1981).

now exceeding USD $200 billion.[46] Trade between China and the Middle East increased by more than 600 percent during the last decade, to USD $230 billion in 2014.[47] China has promised to invest USD $250 billion in Latin America during the next decade.[48] China's enormous 'Silk Road Project' for re-establishing land and maritime routes for trade within East, Central and South Asia, the Middle East, Russia and Europe raises a similar prospect of legal and business practices influenced heavily by non-Western traditions.[49]

Cross-border trade within worldwide non-Western diasporas also casts doubt on the American law/Western legal tradition harmonization thesis. *The Economist* reports that there are more Chinese living outside China than French living in France. There are 22 million ethnic Indians scattered across every continent. Smaller diasporas tie West Africa to Lebanon, and Brazil and Peru to Japan. The world has 40 percent more first generation migrants today than in 1990. If migrants were a nation, they would be the world's fifth largest. Commercial ties within these worldwide diaspora communities are a growing and highly lucrative means of cross-border business. The communities operate largely according to non-Western relational principles, not according to the formalistic Western legal mechanisms that have proved so helpful in fostering economic exchange between parties of different nationalities *within* the Western legal tradition.[50]

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46 See e.g. Xiaxue Weng, 'China-Africa Trade and Investment: Benefiting Africa's Rural Economy' (*International Institute for Environment and Development*, 31 March 2015) <www.iied.org/china-africa-trade-investment-benefiting-africas-rural-informal-economy> accessed 29 May 2017; 'China in Africa: One Among Many' (*The Economist*, 17 January 2015) <www.economist.com/news/middle-east-and-africa/21639554-china-has-become-big-africa-now-backlash-one-among-many> accessed 29 May 2017; Christopher Alessi and Beina Xu, 'China in Africa' (*Council on Foreign Relations Backgrounder*, 27 April 2015) <www.cfr.org/china/china-africa/p9557> accessed 29 May 2017.

47 'China and the Arab World: The Great *Well* of China' (*The Economist*, 20 June 2015) <www.economist.com/news/middle-east-and-africa/21654655-oil-bringing-china-and-arab-world-closer-economically-politics-will> accessed 29 May 2017.

48 'The Dragon and the Gringo' (*The Economist*, 17 January 2015)<www.economist.com/news/americas/21639549-latin-americas-shifting-geopolitics-dragon-and-gringo> accessed 29 May 2017.

49 Denise Tang, '"Belt and Road" Architect Urges HK to Seize the Day' *South China Morning Post* (Hong Kong, 3 November 2015) A1, quoting PRC official Ou Xiaoli as advising Hong Kong 'not [to] go solo in its "One Belt, One Road" developments,' because 'The ways of doing business and [the legal] systems in many of the countries along "One Belt, One Road" are more similar to the mainland and Russia' than to Hong Kong's Western legal tradition.

50 'The Magic of Diasporas' (*The Economist*, 19 November 2011) <www.economist.com/node/21538742> accessed 29 May 2017. The statistics we report in this paragraph, large as they are, do not take account of the current migration from Syria, Afghanistan and

The continuing relevance of *non*-Western practices and preferences in cross-border commercial relationships is reflected in a 2010 study by Hong Kong University Professor Shahla Ali. Professor Ali surveyed parties, lawyers and arbitrators involved in international arbitrations in the principal North American, European and Asian arbitral institutions. The results suggested preferences among Western commercial parties for dispute resolution mechanisms that are transparent, highly procedural and adversarial, and that yield strictly 'legal' outcomes according to established principles of Western contract law. The results suggested preferences among Asian parties for mechanisms that are far more flexible procedurally, far less adversarial, far more protective of confidentiality, and that yield outcomes that focus on future relations rather than on past facts, breaches and blame.[51]

Leading Western law firms seem to be anticipating the growing worldwide need for China-related legal services and services that blend legal traditions, as reflected in the recent affiliations between Baker & McKenzie and FenXun Partners,[52] Dentons and Dacheng,[53] Mayer Brown JSM and Jingtian & Gongcheng,[54] Mallesons Stephens Jacques and King & Wood,[55] and McGuireWoods and Fu Jae Partners.[56]

Northern Africa. See e.g. 'Why is EU Struggling with Migrants and Asylum?' (BBC World News, 21 September 2015) <www.bbc.com/news/world-europe-24583286≥ accessed 19 May 2017.

51 Shahla F Ali, *Resolving Disputes In The Asia-Pacific Region: International Arbitration and Mediation In East Asia and the West* (Routledge 2010).

52 Toh Han Shih, 'Baker & McKenzie and FenXun Partners Launch First Joint FTZ Law Venture' *South China Morning Post* (Hong Kong, 16 April 2015), <www.scmp.com/business/china-business/article/1767906/baker-mckenzie-and-fenxun-partners-launch-first-joint-ftz≥ accessed 29 May 2017.

53 Neil Gough, 'Dentons to Merge with Dacheng of China to Create World's Largest Law Firm' *New York Times* (New York, 28 January 2015) B7 <http://dealbook.nytimes.com/2015/01/27/dentons-to-merge-with-dacheng-of-china-to-create-worlds-largest-law-firm/> accessed 29 May 2017.

54 Shangjing Li, 'Mayer Brown JSM, Jingtian & Gongcheng to Form HK Alliance' (*Asia Legal Business*, 8 July 2015) <www.legalbusinessonline.com/news/mayer-brown-jsm-jingtian-gongcheng-form-hk-alliance/69203> accessed 29 May 2017.

55 See 'King & Wood Mallesons' (*The Lawyer*, 2017) <www.thelawyer.com/king-wood-mallesons/> accessed 29 May 2017.

56 *The American Lawyer*, 2 December 2015. Other recent affiliations include Memery Crystal and Yingke, Stephenson Harwood and Wei Tu, Kennedys and Yingke (*The Lawyer Asia*, November 24, 2015), and China's Ke Jie's new global network arrangement with thirteen foreign law firms; Shangjing Li, 'China's Ke Jie forms global legal network with 13 foreign law firms' (*Asian Legal Business*, 7 September 2015) <www.legalbusinessonline.com/

STL believes that legal education must prepare for the same. For STL, this means (i) enhancing the substance and teaching methodology of our China law program so that it includes interactive case study and skills-based learning; (ii) emphasizing the relationship between our JD and JM curriculums by increasing the comparative dimension of both, focusing on exchange between parties from different legal traditions, and exploring the interdisciplinary and science-based inquires of both; (iii) expanding the notion of 'skills education' in both curriculums to include linguistic support for achieving legal literacy in English; and (iv) focusing more instrumentally on professional licensing objectives for STL graduates in multiple jurisdictions, rather than on ABA accreditation of the law school.

C Elevating the Imporance of STL's China Law Curriculum

STL began as a JD-only law school; it initially did not offer a Chinese law Juris Master curriculum. As early news reports about the school observed:

> STL remains an outlier in Chinese legal education. STL's curriculum lacks the staple [China law] criminal, civil law and administrative rules courses that are found in Chinese law schools – the school's aim is not to produce lawyers for the domestic market, but for an international one.... [T]he degree offers a quality legal education inside China and possible career advancement for Chinese lawyers working in a foreign law firm based in China.[57]

Although STL did commence a Chinese law Juris Master program shortly following its establishment, this was due to a regulatory complication that jeopardized the award of a JD degree without an accompanying JM, rather than a desire to offer a JM curriculum.[58] STL's start-up priority remained a superior JD

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news/china's-ke-jie-forms-global-legal-network-13-foreign-law-firms/70448> accessed 29 May 2017.

57 Jaime Mendoza, 'China Legal: Peking University's new School of Transnational Law has the Potential to Bring a New Dimension to the Chinese Legal System – the American J.D.' *US-China Today* (USC US-China Institute, University of Southern California, 31 July 2009).

58 See n 3. China's State Council authorized Peking University to establish and award an 'International *Fa Lv Shuo Shi* (i.e. JM)' rather than a 'JD' degree, per se. Even though the authorization was understood to refer to an American-style JD, there was some concern within PKU that a JD could not awarded without an accompanying,

program. The JM curriculum was of secondary importance, scheduled largely in hours-long classes over weekends taught by visiting professors, with only one Chinese professor in residence.[59]

This is no longer the case. One of STL's strategic priorities is enriching our China law curriculum with resident professors and with the goal of professional skill acquisition on a level comparable to STL's JD program. STL's faculty believe that STL students should acquire, with respect to Chinese law practice, the same skills that the JD program undertakes to instill: rigorous analytical thinking, the ability to see all sides of an issue, the ability to solve complex problems creatively, and the ability to persuade, both orally and in writing. Legal education at other Chinese law schools, however, does not yet provide a model to which STL might aspire in this regard; legal education in China still is largely theoretical and provided via one-way lecturing to large numbers of students, often hundreds at a time. The study of law is not based on the case method, classes are not interactive, the acquisition of professional skills is not a priority, and the overall academic rigor of many law programs is not high.[60] Consequently, STL is attempting to create a new model of JM legal education for China.

To be sure, there are intrinsic obstacles to achieving learning outcomes in Chinese law JM curriculums that are similar to the intended outcomes of the American law JD curriculums. Most Chinese codes are of Germanic origin, and the different objectives of German and common law legal education are well known.

> [T]he basic approach of modern German legal science [is] seeking to arrange all legal material of a given branch of law in the form of a logically consistent system which is organized around a few key … general principles of law, from which all concrete legal norms can be logically deduced.[61]

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officially recognized, JM. STL's Mainland Chinese students are required to take both curriculums.

59 STL since has moved to a resident faculty supplemented by select visitors, and changed its academic calendar from short-term modules designed to accommodate visiting faculty to much longer 'quarters' better suited to reflective and experiential learning, comparable to the academic calendars of the University of Chicago and Stanford Law Schools.

60 See e.g. Wiedong (n 35) 12–13.

61 Rainer Grote, 'Comparative Law and Teaching Law Through the Case Method in the Civil Law Tradition – A German Perspective', (2005) 82 U Det Mercy L Rev 163, 167.

'[T]he ideal remains that of a rational, complete, logical system of rule.'[62] 'In Germany, the statute – *des Gesetz* – is *the* fundamental concept of all law.'[63] Legal problem solving in a private law context proceeds according to a highly prescribed, logical, step-by-step methodology,[64] rarely influenced by political, economic and social considerations.[65] 'This ideal of neutral application of legal principles is intimately linked to a certain concept of law – i.e. the idea of law as a science, in opposition to the idea of law as a political instrument.'[66]

'Lawyers [educated] in a common law tradition,' in contrast, '[are] much more skeptical of the idea of law as an internally consistent system of rules.'[67] American law students may:

> enter law school committed to the concept that law schools will teach them the discrete guiding principles that resolve all disputes, … [but] common law legal education … [is] a process of teaching students to 'unlearn' this approach when thinking of legal issues, to re-conceptualize law as a process of argumentation, as a body of cases which form a point of departure for reasoning by analogy and distinction.[68]

Moreover, 'United States [statutory] legislation is rarely [as] comprehensive or systematic [as in civil law countries]. Nor is the theory of statutory interpretation [as] refined [or as prescriptive].'[69] Political, economic and social considerations often are central to arguments seeking to influence, in one way or another, the judicial interpretation of law.

Consequently, simply transplanting to a Chinese law JM curriculum the methods of instruction that have been so successful in American law JD curriculums – the case study method; smaller, interactive class sessions with

62 Ibid 164.

63 James R Maxeiner, 'Legal Uncertainty: A European Alternative to American Legal Indeterminacy?' (2007) 15 Tul J Int'l & Comp L 541, 556.

64 Lutz-Christian Wolff, 'Structural Problem Solving: German Methodology from a Comparative Perspective' (2004) 14 Legal Educ Rev 19, 22–23.

65 Grote (n 61) 177–78.

66 Ibid 177, citing Juergnage R Ostertag, 'Legal Education in Germany and the United States – A Structural Comparison' (1993) 26 Vand J Transnat'l L 301, 331.

67 Grote (n 61) 164.

68 Maxeiner (n 63) n 97, 557, citing Vivia Grosswald Curran, 'Romantic Common Law, Enlightened Civil Law: Legal Uniformity and the Homogenization of the European Union' (2001) 7 Colum J Eur L 63, 82.

69 Grote(n 61) 180.

Socratic questioning of students; and an increased emphasis on experiential learning – is hardly automatic. Nonetheless, we are learning at STL that transference is possible in modified form.

Even though most Chinese codes are of Germanic origin, much Chinese legislation, in fact, lies in between German 'legal certainty' and American 'legal indeterminacy'.[70] Chinese legislation reflects 'the influence of different legal traditions and cannot simply be regarded as belonging to any of the "traditional" legal families; [China is a] "mixed jurisdiction".'[71] Moreover, 'mainland Chinese statutory law is not always as clear as one would wish and particular areas of law are not yet codified at all.'[72]

As a result, Germany's precise 'step-by-step' methodology for solving private law problems is not by itself sufficient for Chinese legal education and law practice. China's statutes, jurisprudence and legal scholarship are far less developed than Germany's; interpretation and argument are critical to the development of Chinese law.[73] At the same time, because China is a comprehensive code-based system and not a common law system of judge-made law in combination with statutes, a methodology for the proper application of statutes clearly is critical for Chinese legal education and law practice.

STL Chinese law professors attempt to achieve both of these pedagogical objectives by *combining* (i) a German-style case study method that insists upon a rigorous step-by-step methodology of statutory application with (ii) intense interpersonal classroom exchange and Socratic questioning designed to expose ambiguities and omissions in statutory language, elicit alternative interpretations, and identify possible economic, social and policy bases of various interpretations. Case study represents a departure from traditional Chinese legal education (although this is changing[74]); interactive classes represent a departure from conventional German legal education.[75] As one STL professor explains:

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70 Maxeiner(n 63).

71 See Chapter 11; and Wolff(n 64) 38.

72 Wolff, ibid 47.

73 E-mail from PKU Law Professor Ge Yunsong to P McConnaughay (9 September 2015, copy on file with author).

74 See e.g. Wolff(n 64) 46; Deng Jinting, 'The Guiding Case System of Mainland China' (2015) 10 Frontiers of Law in China 1; Xinhua News Agency, 'Chinese Courts to Publish Judgments Online' (*China Daily*, 28 November 2013) <www.chinadaily.com.cn/xinhua/2013-11-28/content_10693660.html> accessed 29 May 2017.

75 Grote (n 61) 174–75.

> The case method necessitates the transition of classroom teaching from traditional knowledge-based lecturing to more interactive teaching. Interactive teaching sometimes seems less efficient, but it can be more effective in terms of helping students understand the complexity and subtlety of legal issues and legal thinking. [In this way], case study urges the students to focus on developing fundamental skills of critical reading and writing and professional skills of analyzing facts and interpreting rules.[76]

Of course, interactive classes based on the case method function well only up to a certain size, and they consequently tend to be appreciably more expensive for a university to provide compared to classes of one-way lectures to hundreds of students. But the return for students is high. Students appreciate the difference early on:

> The study of … law is something new and unfamiliar to me, unlike any schooling I've ever been through before. The professors use the Socratic method here; they call on you, ask you a question, and you answer it. At first, I thought it was inefficient – why didn't they just give a lecture? But I soon learned that it was not just a matter of efficiency, but a way to educate yourself. Through professors' questions, you learn to teach yourself. And through this method of questioning, answering, questioning, answering, they seek to develop in you the ability to analyze…. [STL] professors train the mind.
>
> The most attractive part of STL for me is [the] teaching method, which is concentrated on motivated thinking instead of forced feeding…. Professors will not say yes or no to any answer; they ask students to think in wider and deeper ways.
>
> [T]he Socratic Method … left me with the deepest impression. I got a better understanding of the differences between STL and traditional Chinese law schools – initiative [and] critical thinking are greatly emphasized at STL. Although it is true that the four years of learning at STL will be challenging and demanding, [I have learned] that studying law can be interesting and thrilling.[77]

76 E-mail from STL Professor Mao Shaowei to P McConnaughay (9 September 2015, on file with author).

77 These quotations are from student essays on file with the author.

STL graduates have enjoyed exceptionally high placement and salary success with China's and the world's leading law firms, companies and government agencies precisely because of the special value employers place on STL's dual JD/JM program and the powerful analytical, problem-solving and advocacy skills that accompany its successful completion.[78] Notably, the demand for STL graduates by leading Chinese law firms is growing at an especially high rate. Although the number of Chinese lawyers remains dramatically lower in relation to China's population than the number of lawyers in other nations,[79] and although China's legal profession, by and large, does not yet possess the level of skill and experience characteristic of the legal professions of other developed nations, several Chinese law firms have advanced so significantly in the last several years that they now represent increasingly fierce competition for major multinational firms with respect to sophisticated transnational work.

The head of Pillsbury Winthrop's China practice put it this way in a recent interview with *The American Lawyer*: 'Chinese firms are hundreds of times better at [sophisticated transnational] work than they were five years ago. The Chinese, as a rule, get up a learning curve really, really fast.'[80] A veteran international law firm consultant added, 'China has always been a hard market, and with local firms getting much stronger and starting to capture the lion's share, it's not getting any easier.'[81] Another senior China-based lawyer explained to the journal, *The Lawyer,* that '[T]he main trend in the last decade has been the migration of inbound work from international firms to Chinese firms, with their coming of age.'[82] The article concluded, 'In a way, Chinese firms' success has come at the expense of foreign firms.'[83]

STL's overarching goal is to contribute to the growing capacity and excellence of China's legal profession; this includes producing lawyers who are just as capable of displacing as joining dominant US and UK law firms.

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78 For STL's placement statistics and graduate salaries see Peking University School of Transnational Law, 'Employment Placement' (*Peking University*, 2017) <http://stl.pku.edu.cn/careers/employment-placement/> accessed 29 May 2017.

79 The Statistics Portal (n 7).

80 Susan Beck, 'Law Firms Eye Global Market Turmoil, China Plunge', *The American Lawyer* (New York, 24 August 2015), quoting Thomas Shoesmith.

81 Ibid (quoting Peter Zeughauser); see also Yun Kriegler, 'Market Report: China Elite 2015' (*The Lawyer*, 28 September 2015) <www.thelawyer.com/analysis/intelligence/china-elite-2015/china-elite-2015-the-executive-summary/3039072.article?cmpid=tlasia_1617032>accessed 29 May 2017.

82 Yun Kriegler, 'The China Paradox' (The Lawyer, 30 September 2013), 8–9.

83 Ibid 9.

D JD-JM Synergies: Building an Integrated Program of Legal Education

As noted, STL is unique in the world in offering a dual degree program that includes a full Chinese law JM curriculum along with a full common law JD curriculum. Even though the courses of each curriculum address similar subjects, the content of a course in one curriculum is largely distinct from the counterpart course in the other, reflecting the national, territorial scope of most law-making.

At STL, nonetheless, we consider our two curriculums as a unified whole, looking for similarities, synergies and overlaps across both Chinese law and American common law that help prepare lawyers for multinational transactions and disputes in the context of advanced economies based on technological innovation and services. Our goal is to create value from the *combination* of our two degrees that exceeds the value of their acquisition independently of one another. A few guiding principles have emerged from this effort that influence the content of both curriculums.

The first is to give expression in all courses to our mission as a School of *Transnational* Law. This typically means including an ongoing comparative element in each course that examines differences and similarities between the law being studied and approaches of other national jurisdictions to the same topic. Occasionally, we schedule the same topic simultaneously in both curriculums (e.g. Chinese Criminal Law and US Criminal Law), thereby facilitating the comparative examination of each. As the number of resident professors in each curriculum increases, we plan to explore the possibility of the collaborative team-teaching of certain subjects, with new textbooks and course packs designed for this purpose. Andrew Harding and Maartje de Visser in Chapter 5 describe similar initiatives to achieve 'Asia-centric' comparative law courses. The ultimate purpose of comparative study in all STL courses is to contribute to a deep student awareness of different legal traditions, different commercial practices and expectations, different cultures, different notions of truth and justice, and the different rules, practices and outcomes likely to emerge from their interaction. As the late Patrick Glenn once observed, 'the object of transnational legal education is not legal unification, or even facilitating convergence, but rather, [the] understanding of difference, and the underlying reasons for difference.'[84]

84 H Patrick Glenn, 'Integrating Civil and Common Law Teaching Throughout the Curriculum: The Canadian Experience', (2009) 21 Penn State Int'l L Rev 69, 74.

A second guiding principle that influences both of STL's curriculums is to prepare students for the interdisciplinary nature of legal inquiry and law practice, and for the science-based questions that increasingly affect law and policy in advanced economies. Like most law curriculums, STL's curriculums tend to be organized by broadly defined societal problems. For example, STL offers courses in corporate governance, intellectual property, law and biotechnology, Internet law, dispute resolution, competition law, and so on. This problem-based organization draws naturally and heavily on other disciplines. Many courses are enriched by economics-based inquiries, others by applied sciences, others by cultural or area studies, others by psychology and industrial behavior, and so on.

At the same time, law and legal inquiry in the Pearl River Delta and China, as elsewhere, are becoming increasingly science-dependent. Dispute resolution increasingly involves scientific proof and expert analysis. Regulatory and policy decisions of great importance to the environment, health, and security hinge more and more on questions of cutting-edge science and technology. Industries unknown to the region only a decade ago today exploit advances in the biological and information sciences, and this development, in turn, has given a new dimension to the law of intellectual property. The US National Academy of Sciences has noted 'A Convergence of Science and Law',[85] a description that increasingly applies to the intermingling of these fields in the Pearl River Delta and China's other industrial centers.

STL emphasizes the interdisciplinarity of legal inquiry in several ways, including (i) the appointment of law faculty with multidisciplinary expertise; (ii) visiting lectures and appointments of faculty from other disciplines; (iii) the admission of students with a variety of undergraduate and graduate degrees and professional experiences; (iv) the use of the case study method and interactive classes in Chinese law courses; (v) the addition to the law curriculum of courses such as Analytical Methods, Innovation Policy, Food Safety Law & Policy, Energy Law & Policy, Economic Analysis, and others;[86] and (vi) allowing students to take a limited number of courses in disciplines outside of law for credit toward their law degrees.

STL's dual Chinese law-American law curriculums, interactive case study method of teaching, and overarching transnational, multidisciplinary and

85 United States National Academy of Sciences, *A Convergence of Science and Law: A Summary Report of the First Meeting of the Science, Technology and Law Panel* (National Academy Press 2001).

86 Notably, Tsinghua University Law School has long required law students to take one or more courses in mathematics or the natural sciences. See Ji Wiedong(n 35) 11.

science-based perspectives, provide a program of legal education designed to supply the legal services upon which China's economy increasingly depends: (i) complex problem-solving across disciplines; (ii) sophisticated legal services for emerging industries based on advanced technologies and services; and (iii) lawyers capable of contending knowledgably with the growing internationalization of economic exchange across all legal traditions.

E Skills Education in an Integrated Curriculum

Teaching 'lawyering skills' is a topic about which a vast literature has developed, especially in the United States.[87] In this category of pedagogy, STL clearly lies within the American tradition, offering novel legal services clinics, highly supervised for-credit externship opportunities for students, multiple moot court activities, and curriculums rich with courses that focus as much on skills as theory. The goal is to produce graduates equipped for the practical as well as the analytical demands of complex cross-border practice.

For example, students in STL's Public Interest Advocacy Clinic work remotely via audiovisual connection, but in real-time, with experienced public interest lawyers in the United States on major social change initiatives and litigation there. The clinic overcomes the limitations of distance and time zones with supplemental simulations designed to teach and evaluate litigation and advocacy skills. Another STL clinic focuses on the legal needs of start-up companies in Shenzhen's 'incubator', advising entrepreneurs on the multitude of legal issues that accompany new business ventures.

Similarly, externships in which STL students earn academic credit are evaluated and approved beforehand by faculty based on ABA Standards, which require, among other things, adequate and meaningful on-site legal work and supervision, and regular opportunities with full-time STL faculty for reflection and discussion about the work.[88] Our JM and JD curriculums include several podium courses that also focus on skills development through simulation exercises or other devices. A year-long first-year course in Transnational Legal Practice (TNLP) focuses on research, writing and advocacy skills. Additional upper-level skills-oriented courses include Global Corporate Compliance,

87 See e.g. William Sullivan and others, *Educating Lawyers: Preparation For The Profession Of Law* (Jossey-Bass 2007); Brian Z Tamanaha, *Failing Law Schools* (The University of Chicago Press 2012). See also Chapter 6.

88 'Externships' are fundamentally different from the student-directed 'internships' at outside employers, which is common at other law schools in China.

Cross-Cultural Negotiations, Deal Documentation, Client-Lawyer Interactions, Advanced Chinese Legal Research, and Law & Practice of China-Foreign Business Transactions.

But there is one 'lawyering skill' for STL students that has priority above all others, and in this respect STL perhaps is unique: the skill is English proficiency, or more precisely, 'legal literacy' in English. English proficiency commands our attention because it is essential to the successful completion of STL's English language JD curriculum, and because an exceptional level of English proficiency is necessary to enable STL graduates to compete for positions at the world's leading law firms, companies, NGOs, and governmental offices, including those Chinese firms and offices increasingly involved in transnational work.[89]

STL addresses this objective in several ways. Our year-long TNLP course, for example, includes progressively difficult assignments intended to identify aspects of English proficiency in which a student may need assistance, which our writing instructors then use to help the student with techniques for addressing the deficiency. These efforts are supplemented by voluntary weekly conversation sessions with visiting instructors of English as a second language ('ESL instructors'), and by an English assistance 'Help Center' – staffed by writing faculty and upper-level students – to address individual questions. Our first-year writing instructors also employ upper-level students as 'Teaching Fellows' in our low-ratio writing courses (usually no more than 13:1) to assist with individual attention during the course. We have developed a remedial language assistance course in the second-year curriculum for students in need of ongoing assistance, and created a summer 'Legal English Boot Camp' for incoming 1L students that is staffed, in part, by ESL graduate students from the United States.

We also are working with a professor of applied linguistics to conduct an overall evaluation of our academic program to determine if there are additional or better ways in which the law school might assist students with English proficiency generally, and with 'legal literacy' in particular. Portland State University (US) Professor Alissa Hartig has spent considerable time interviewing STL students, faculty and staff and visiting STL classes as part of her ongoing research into 'legal literacy development in a second language and legal culture,'[90] and she has presented and continues to present her findings and

89 Even though all STL students enter with a reasonable degree of English proficiency, many still experience challenges studying law in a second language and adjusting to the rigor of intense, interactive class sessions conducted in English.

90 Professor Hartig's PhD thesis examined legal literacy development among foreign students in Penn State Law's LLM program; Alissa Hartig, 'Connecting Disciplinary Concepts

recommendations in workshops with STL faculty. Professor Hartig's work has been especially helpful in appreciating both the relationship and the differences between struggling with concept development when learning a new legal system (which is challenging for all JD students, even those whose first language is English), and struggling with concept development because of a language deficit.

Finally, in addition to assisting with English proficiency, STL attempts to address legal issues arising from language differences in its substantive curriculum. A prime example is STL's course in 'Drafting Bilingual Contracts', taught by the former head of Baker & McKenzie's China practice.[91] The course focuses on anticipating and avoiding ambiguities when drafting dual language contracts, and is based on the professor's career of over thirty years of helping clients avoid and contend with the consequences of language ambiguities in bilingual contracts. Examples of other STL courses that address the risks of language differences include Law & Practice of China-Foreign Business Transactions, Cross-Cultural Negotiations, The WTO and China, and most of our dispute resolution courses.

F ABA Accreditation Isn't Necessary after All: Paths to US and Other Foreign Professional Licenses for STL Graduates

We will conclude this essay where we began – with the question of ABA accreditation of law schools outside the United States. At its inception, STL pursued ABA accreditation; today, we likely would decline the opportunity even if it were available. Hindsight has made clear that ABA accreditation of law schools outside the United States would be a double-edged sword, at best.

On the positive side of the ledger, ABA accreditation would facilitate recognition among top employers that STL's (or any other foreign) program of legal education measures up to American standards of preparation for law practice. Several ABA Standards clearly are designed to promote educational

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and Language: A Study of Legal Literacy Development in a Second Language and Legal Culture' (PhD thesis, Penn State University 2014). Professor Hartig will be publishing a book in 2016 about her work. Additional approaches to challenges of studying law in a second language are described in Chapter 9.

91 Preston M Torbert, see Peking University of Transnational Law, 'Visiting Faculty' (*Peking University*, 2017) <www.stl.pku.edu.cn/faculty/visiting-faculty/> accessed 29 May 2017. See also Preston M Torbert, 'A Study of the Risks of Contract Ambiguity' (2014) 2 Peking U Transnat'l L Rev 1.

program excellence (e.g. the Standards pertaining to learning outcomes (302), curriculum and experiential learning (303, 304 and 305), academic support and advising (309), determining credits (310), etc), and official certification of the law school's compliance presumably would reassure prospective employers.[92] Further, ABA accreditation would help ensure the eligibility of STL graduates for all US bar exams, thus providing STL graduates with the maximum possible opportunity to pursue professional legal positions in the United States for which a specific state bar admission is required.[93]

But the disadvantages of ABA accreditation are significant as well. Several ABA Standards, for example, are cost-escalating without an appreciable corresponding benefit to a law school's program of legal education: e.g. the Standards pertaining to completing an annual questionnaire (104), faculty security of position (405, 407), the library director and collection (603, 606), facilities (702), and others. Other Standards are intrusive on university administrative discretion in ways that almost certainly would be objectionable to Peking University – or any other foreign university – and perhaps as well to China's Ministries of Education and Justice, both of which exercise significant influence over legal education in China: e.g. the Standards pertaining to law school governance (201(a)), university policies in conflict with ABA Standards (201(d)), resources and university accountings available to the law school (202(b)), security of position for various categories of faculty (405), autonomy of library management (602), attributes of facilities (702), and others.

Further, most STL graduates do not want or need bar exam eligibility in most US States; nor do most STL graduates desire to practice in the United States. Instead, STL graduates generally desire US bar admission only to the extent necessary for eligibility for partner-track lawyer positions in US-based firms with offices in China or Hong Kong. This objective can be satisfied by eligibility for bar admission in a single US jurisdiction, and eligibility for admission to several important US jurisdictions is available to STL graduates *without* ABA approval.

For example, if an STL student visits abroad for two semesters at an ABA-approved law school and earns a specified number of credits (e.g. 20 or 26) in subjects tested on the bar exam and graded on the law school's JD grading scale, those credits alone (which STL counts toward the award of STL's JD

92 ABA Standards and Rules of Procedure for Approval of Law Schools 2015–2016 (American Bar Association, 2016) <www.americanbar.org/groups/legal_education/resources/standards.html> accessed 29 May 2017.

93 All US jurisdictions permit graduates of ABA-approved law schools to sit for the jurisdiction's bar exam, assuming other qualifications are met.

degree), together with an STL JD (or other qualifying first degree in law), are sufficient to create eligibility to sit for the general bar examinations in California, Washington, DC, and perhaps other US jurisdictions.[94] Similarly, for those STL graduates who obtain a license to practice law in China (as many STL graduates do), that license alone (without a years of practice requirement) creates eligibility to sit for the California and perhaps other US bar exams, as well as for the UK's Qualified Lawyer Transfer Scheme (QLTS) Solicitors Exam.[95] STL's common law JD program prepares students for these exams just as reliably as the JD programs of the best US law schools.

A third path to eligibility for a US bar exam is the bar examination and licensing in the island nation of Palau. Palau is a former US territory and administers the US National Conference of Bar Examiners multistate bar examinations (including the MBE and MPE). Eligibility for the Palau exam turns on graduation from an ABA-approved law school *or* a law school accredited *where located*.[96] An STL graduate who passes Palau's Bar Exam may apply for the California exam as a foreign licensed lawyer once she or he obtains a license to practice law in Palau. Several STL graduates have pursued this path to US bar admission.

Thus, STL graduates currently enjoy viable paths to China, US and UK law licenses, for which their education at STL prepares them well. This positions STL graduates uniquely among all law graduates.

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94 State Bar of California Rule 4.30(A); District of Columbia Court of Appeals Rule 46(b)(4); Laurel S Terry, 'Transnational Legal Practice', (2013) 47 The Year In Review 499, 507–508; American Bar Association, 'Jurisdictions With Rules Regarding Foreign Lawyer Practice' (*American Bar Association*, 14 October 2016) <www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mjp_8_9_status_chart.authcheckdam.pdf> accessed 29 May 2017. The California Rule requires that, if the applicant is *not* admitted to practice in a foreign jurisdiction, the degree earned outside of the United States must be the equivalent of a JD degree from an ABA-approved law school, which is true of STL's JD degree.

95 State Bar of California Rule 4.3(B); The State Bar of California, 'Bulletin re Admission to Practice Law in California by Attorneys Admitted to Practice in Jurisdictions Outside of the United States' (*State Bar of California*, 2017)<http://admissions.calbar.ca.gov/LinkClick.aspx?fileticket=MKp_BBvcAE%3D&tabid=265> accessed 29 May 2017. Either a California or a China law license would enable an STL graduate to sit for the UK's new Qualified Lawyer Transfer Scheme (QTLS) Solicitors Exam. See Solicitors Regulation Authority, 'Qualified Lawyers Transfer Scheme' (*Solicitors Regulation Authority*, 21 July 2015) <www.sra.org.uk/solicitors/qlts.page> accessed 29 May 2017.

96 Supreme Court of the Republic of Palau, 'Rules of Admission for Attorneys and Trial Counselors' (Palau Supreme Court, 12 December 12 2001 as amended 2003–2009), r 2 ≤www.palausupremecourt.net/upload/P1408/1213072319501.pdf> accessed 29 May 2017.

G Conclusion

The world is preparing for China's growing global influence; legal education must do the same. It no longer is reasonable to assume that cross-border economic exchange will remain dominated by Anglo-American legal and commercial practices and the Western legal tradition. Adjustments are inevitable in response to China's growing influence. Leading law firms are preparing for this eventuality through cross-border mergers and affiliations with Chinese and other non-Western firms. Law schools must prepare by refocusing their curriculums and methods of instruction in ways that anticipate the new and different legal services likely to be required by these changes. This is the mission of Peking University School of Transnational Law.

CHAPTER 11

Globalisation and Innovative Study: Legal Education in China

Li Xueyao, Li Yiran and Hu Jiaxiang

A Historical Origins: The Three Genes of Legal Education in China

Based on foreign legal traditions, legal education in modern China started at the end of the Qing Dynasty and the beginning of the Republic of China. Since then, it has been influenced by the civil-law system, the former Soviet Union and the common-law system, which formed the three 'genes' of legal education in contemporary China.

1 *Civil-Law Tradition*

From the end of the nineteenth century to the 1920s legal education in China to a large extent imitated legal education in civil-law systems, especially those of Germany and Japan. In the middle of the nineteenth century, while China imported advanced technology and equipment from western countries, it became acquainted with the political ideologies and legal systems of these countries, introduced by foreign missionaries and Chinese industrialists. Nevertheless, formal legal education had not been established in China by then. In the words of Hou Qiang of Ning Bo University Law School, the legal education of western countries began to permeate in modern China's westernisation movement accompanied by those studies and introductions.[1]

Formal legal education in China started with the opening of the Public International Law course in 1867 by Beijing *Tong Wen Guan* (School of Combined Learning), the first school to teach English in China.[2] From then on, the teaching and study of public law began to be popular in Shanghai *Guang Fang Yan Guan* (English Promoting School), Guangzhou *Shui Lu Shi School* (Ocean and Land Learning School), and at other schools established by the advocates of

* The authors would like to express their sincere thanks to Miss SONG Jie for her professional help in the preparation of this chapter. Nevertheless, all mistakes still belong to the authors.

1 Hou Qiang, Study on the Transition of Modern China's Legal Education and Vicissitudes of Society (China Social Science Press 2008) 33–34.

2 By a coincidence, the *Elements of International Law* written by Henry Wheaton was then introduced into China as the textbook used in Tong Wen Guan.

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westernisation in China. Until then, however, no fundamental changes ever happened to China's basic national education policy.[3]

After the Sino-Japanese War of 1894–1895, some civilised Chinese began to realise that the cause of the backwardness of China was its outdated legal system. This awareness prompted the inception of formal legal education in modern China. One of the promoters was Sheng Xuan Huai, a successful industrialist. He set up the Decree Learning Class and Special Class for Law in establishing *Zhong Xi Xue Tang* (Chinese and Western Learning School) in Tianjin, and Shang Yuan of *Nan Yang Gong Xue* (High School of Nan Yang Public School) in Shanghai. The legal curriculum during the period of the westernisation movement (1860s–1890s), including that of *Bei Yang Da Xue Tang* (Bei Yang High School – the predecessor of Tianjin University), mainly transplanted the legal education system of common-law countries due to the fact that the first returned overseas students were from the United Kingdom and the United States. Except for Roman law, the curriculum in high schools was based on English contract law, English criminal law and others.

China's defeat in the Sino-Japanese War stimulated much thought among the Chinese ruling class, since Japan had long been regarded as a pupil of China, and Japan had even been looked down upon by some Chinese as an uncivilised nation. They began to learn from Japan's success. From then on, the government of the Qing Dynasty decided to reform China's education system by copying the Japanese model. In 1895, Emperor Guang Xu (1875–1904) stated clearly in his official written reply to the Charter of Nan Yang Public School that '(we should) base our learning on the understanding of Chinese history and decrees, and focus on the Japanese legal system and the French administration.' He gave the order to design the curriculum for Chinese high schools by imitating the Japanese legal education. In 1896, the governor-general of Jiangsu and Zhejiang, Zhang Zhi Dong also advocated, in establishing *Jiang Nan Chu Cai Xue Tang* (Jiang Nan Training School), that 'in regard to the teachings of law and agricultural administration, we should learn from France and Germany.'[4] Since China was historically more influenced by written law rather than case law, the earlier transplantation of the legal system and the legal education system of common law countries were not deemed to have met the needs of Chinese society. The legal education system of Japan and other civil law countries, under the permission of the ruling class then, formed and influenced the vast majority of legal education in China from the last years of the Qing Dynasty to the first years of the Republic of China. Because of the similarities of its

3 Hou Qiang, above n.1.

4 Ibid 23–26.

culture, the Japanese model in particular influenced all aspects of legal education in China including the designing of curricula, the editing of textbooks and the hiring of lecturers.

After the Hundred Days of Reform (1898), law reform came to be one of the principal topics in China's overarching political reform. Japan, due to its increasing influence, was closely studied by the Chinese. Under these circumstances, it was only natural that Japanese law and Japan's legal education system became the main source of external influence upon China. For example, the Charter of *Jing Shi Da Xue Tang* (Jing Shi High School – the predecessor of Beijing University) made by imperial order stated clearly: 'The classification of subjects in the university…will basically copy the model of Japan.' By the end of the Qing Dynasty, such was the influence of Japan that everything from the classification of subjects in the university, to the designing of curricula, the editing of textbooks and even the contents of lectures in the high school was based on the imitation of Japan. Aside from the Decree of the Qing Dynasty and the Combined Decree of the Qing Dynasty, the courses taught in all high schools in China at that time almost imitated the Japanese ones with no difference in the methodology of teaching. It is no exaggeration to say that the legal education in China then was merely a copy of that of Japan. In terms of teachers, China also relied heavily upon Japan. For example, in 1909 there were 443 Japanese teachers in China and 19 of them majored in law. From 1897 to 1909, law schools in China altogether hired 58 Japanese law professors. Some Japanese law professors even took part in Chinese law-making as the legal counsels to the Qing Dynasty. For example, the two Japanese law professors Yoshimasa Matsuoka and Kotaro Shida helped the government of the Qing Dynasty to draft the Civil Law of the Qing Dynasty.[5]

During the reign of the Beiyang Government (1912–1928, the government having Northern China under its control), Chinese higher education, on the whole, imitated that of the United States, but this did not change the trend of learning from Germany and Japan in the sphere of legal education. For example, the departments of politics, law, sociology and economics were all put together in law schools. Since graduates from law schools would have more opportunities to work as government officials, more young people chose to study in the law school than in other schools. During the period of the Republic of China (1912–1949), the subject of law continued to develop quickly. From August 1916 to July 1917, for example, there were altogether 65 professional schools, and 32 of them had either law schools or law departments. This is

5 Wang Jian, *Legal Education in Modern China* (China University of Political Science and Law Press 2001) 121.

49.2% of the total figure. The Ministry of Education had to issue decrees in 1917 and 1922 respectively, prohibiting the opening of new law schools. This helped to regulate legal education in a more orderly way during the period of the Republic of China.

After the Chinese government decided to send young people to study abroad, Japan became the first choice for many. In 1915, the number of the Chinese students in Japan exceeded 4000. Most of them chose the majors of law, politics and economics. Although there were a comparatively high number of students who chose to study in the United States at the same time, few of them chose to study law. According to the statistics of 1918, there were only 61 Chinese students who studied law in the United States. After 1921, the number of Chinese students who chose to study law and economics in European countries began to increase.[6]

After the change of governments in 1949, legal education in China experienced ten years of prosperity with the help of the former Soviet Union. With the breaking of the Sino-Soviet relationship and due to the control of ideology by the ruling party, legal education in China was abolished for two decades. It was not until the 1980s that legal education in China began to recover. As Japan was then at the apogee of its economic development, there again appeared fervour in China to learn from the Japanese. Meanwhile, the study of law and legal education in Taiwan began to influence mainland China with the end of the hostile relationship across the strait. This contributed to China remaining predominantly influenced by the civil law tradition (especially Germany and Japan) in respect of curriculum design, teaching methodology and theoretical sources. For example, the research achievements of Taiwanese civil law by mainland scholars such as Liang Hui Xing and Wang Li Ming has had a pronounced effect on the design of the civil law curriculum and the editing of textbooks in China, which were therefore indirectly influenced by Germany and Japan via Taiwan. In areas of public law, the return of some scholars from Japan brought influences from the legal education systems of civil-law countries together with the introduction of monographs in administrative law written by Taiwanese scholars and translations of American administrative law and French administrative law by Professor Wang Ming Yang. By the end of the 20th century, almost all the law courses in China imitated the legal education system of civil-law countries, with law schools having a particular focus on the education of undergraduates.

6 n 1.

2 *The Soviet Union Tradition*

The change of government in China in 1949 led to the policy of 'learning all from the Soviet Union.' Law was regarded by the ruling party of China as an important instrument to realise its socialist modernisation. Therefore, the Communist government decided to redesign its legal education based on the former Soviet Union model and to reconstruct its law schools and departments. Under the leadership of the Ministry of Justice, a large proportion of law faculty staff was transferred to those newly set-up law institutes. For example, the whole law department of Beijing University was moved to Beijing Institute of Politics and Law in 1952. According to the directions of the leadership then, these institutes of politics and law would aim to train the government and judicial officials.[7] The law teaching staff in other universities were transferred to these newly-reorganised law departments.

Teachers and students of the law departments and institutes put forward law-making proposals by translating the law of the former Soviet Union and developing China-oriented Marxist philosophy of law, which contributed to the establishment of the socialist legal system from the very beginning of the People's Republic of China. The Law Department of Renmin University of China was the most prominent one in this respect. It was divided into four teaching units: the Unit of State and Legal Rights Theory, the Unit of State Law, the Unit of Criminal Law, and the Unit of Civil Law. Each unit consisted of Russian experts, translators and Chinese teachers. The Russian experts, with the help of translators, taught the Chinese teachers Russian law. The Chinese teachers kept taking notes while listening. They edited the notes with the translators after class and used them as the teaching materials for the Chinese students later.[8] In the words of the former Chinese leader Dong Bi Wu, the teachings of the Law Department of Renmin University of China relied heavily on the Russian experts.[9]

It can be concluded that there were two principal contributions made by the Law Department of Renmin University of China towards promoting Russian legal philosophy and legal education. First, its graduates were the main source of teaching and research staff in all other universities and research institutes. While the Russian experts were holding two-year training classes at the Law

7 Luke Lee, 'Chinese Communist Law: Its Background and Development' (1962) 60 Michigan Law Review 439, 462–466.

8 Fang Liu Fang, *Observation in China's Legal Education*, in *The Road for China's Legal Education* (China University of Political Science and Law Press 1997) 18.

9 Dong Bi Wu, 'Opinions on Strengthening the Work of Law Departments and Institutes', in Dong Bi Wu (ed), *Collected Papers on Politics and Law* (Law Press 1986) 159.

Department of Renmin University of China, the graduates from these classes were constantly sent to other universities, thereby ensuring the dissemination of Russian legal thinking throughout the entire country. Second, since 1954, the textbooks used in all Chinese law departments and institutes were edited by the teaching staff of the Law Department of Renmin University of China for a relatively long time.[10] Even from the 1980s onwards, the Russian influence could still be noticed in China's legal-education system.

As a university student during these times, it was not unusual that the viewpoints of different textbooks were contradictory to each other. Some of the teaching staff began to teach at university shortly after their graduation in the 1950s. They used the Russian textbooks which were full of the descriptions of class struggle. Some others might have been labeled as 'extreme rightists' as they admired the constitutional politics, democracy and the rule of law, including the independence of the judiciary of western countries, without any criticism. When we talked privately in our dormitory about the legal references edited by our teachers, we paid high respect to the social position of the lawyer mentioned in these reference materials.[11]

Although as the diligent students at the beginning of 1980s, we opened both of our arms to embrace the foreign laws and applied them in the law-making proposals, theoretical discussions and after-class studies, our knowledge about these comparisons was sporadic. Some of which was even limited to books translated during the Republic of China. At that time, the textbooks used in the law departments and institutes were a strange combination of former Soviet Union textbooks and those written by Chinese scholars with some innovation. The quality of the teaching staff was too bad. Many of them received their higher education before the Cultural Revolution (1966–76) or just finished their four-year university studies and remained to be teachers.[12]

Although many changes had taken place at the beginning of the 21st century in terms of the teaching staff, teaching methodology and teaching units compared with those of the 1950s, the basic divisions of disciplines of the law major (civil law, administrative law, criminal law, jurisprudence and others), the curriculum, the unified requirements of the textbooks and even the contents of teaching were basically the same. It was still not difficult to find the impact of

10 The Ministry of High Education stated clearly at a National Conference of Politics and Law held in 1954 that 'Renmin University should review its translated Russian law textbooks and introduce them to other Chinese universities'; *Yearbook of China's Legal Education (1949–1981)* (China Encyclopedia Press 1984), 267.

11 Interview with a former law department student who graduated in the 1980s, 1 July 2012.

12 Interview with a former law department student who graduated in 1980s, 2 July 2012.

the former Soviet Union's legal education system on China's at this time. Class struggle, for example, is still one of the important parts of jurisprudence and the state economy is the basis of China's socialist market economy.

3 *Common-Law Tradition*

Since 1922, with the worsening of Sino-Japanese relations, throughout the Republic of China the American legal-education system began to replace that of Japan. This became more obvious at the beginning of the 1930s. The number of overseas Chinese students majoring in law in the United States increased more quickly than in other countries. The total number of overseas Chinese students majoring in liberal arts, law, business and education in the years of 1935 and 1936 were 431 and 509 respectively. The number of qualified professors and associate professors recognised by the Ministry of Education from 1941 to 1944 was 2448. 1913 of them had an overseas-study background, taking the percentage to 78.6%. Among those who had an overseas-study background, 934 of them studied in the United States (49% of the total mentioned above). For the first time, the number of students returning from the United States overtook that from Japan. They began to take important positions in Chinese universities and supported China's legal education system. There was no doubt that the new thoughts and ideals of legal education in America had played an important role in the transition from the Japanese-style legal education to the American-style legal education in China at that time.

With the support of American churches, the establishment of Soochow University, Saint John's University and others marked the American inclination in legal education in China. For example, the length of education and curriculum at the law school of Soochow University, one of the two famous law schools during the Republic of China (namely Zhao Yang Law School in Beijing and Soochow Law School in Soochow), imitated the American legal-education system. The teaching contents at this school also focused on English law and American law. By 1946, there were more than 1200 students graduating from this law school. 72 of them took teaching positions in various Chinese universities (four of them took the position of dean). 21 became judges and 72 worked for the government. In addition to that, there were seven graduates working in the National Law Codifying Committee. The Soochow University Law School, therefore, became the model of legal education in modern China.[13]

Although, as mentioned above, a lot of Taiwanese and Japanese legal writings had been introduced to mainland China and had influenced its legal-education system which was originally based on that of the former

13 Hou Qiang (n 1) 87.

Soviet Union – a variety of the civil-law system – before the end of the 1990s, many young scholars who graduated in the late 1970s and 1980s had grown to maturity by then. Except for a few of them who had the experience of studying in Japan,[14] many more of them were influenced by the legal systems of the United States and other common-law countries through learning English. They had become the backbone of China's legal-education system.[15] Meanwhile, great changes to the legal-education system were taking place in some civil-law countries like Japan, Korea and Germany. They replaced their law departments with American-style law schools. What is more important is that, by the end of the 20th century, the American higher education system was officially accepted by the Chinese government as the model for China's higher-education reform. As one of the vocational-education reforms, the American legal education was copied in China without much thought, partly because China has been making increasing efforts towards strengthening its vocational education. American legal education, since the end of 1990s, has again become the most important model for China to imitate. The invention of Juris Master (JM) which is the copy of the American JD is one such example.[16]

B Excess Capacity: One Big Obstacle to the Development of Legal Education in Modern China

By the end of 2013, there were 535,000 enrolled students majoring in law at law schools in China. This figure refers only to undergraduates and does not

14 They include Professors Ji Weidong, Wang Yaxin, Lin Laifan, Ding Xiangshun, He Qinghua, Zhu Mang and others.

15 In the period from 1990 to 2000, the most important law schools and research institutes like those of Beijing University, Renmin University of China, Southwest University of Political Science and Law, China University of Political Science and Law, Law Research Institute of the Academy of Social Science of China, Wuhan University, Jilin University, Zhongnan University of Economics and Law, Sun Yat-sen University, Nanjing Normal University, Fudan University, Xiamen University, Zhejiang University and Nanjing University all completed the transition of their deans from those who graduated before the Cultural Revolution to those who graduated after the Cultural Revolution. The latter including Professors Zhang Wenxian, Xu Xianming, He Qinghua, Zhu Suli, Wang Chenguang, Wang Liming, Han Dayuan, Ge Hongyi, and Sun Xiaoxia all entered the law schools in the late 1970s or early 1980s. Some in this group completed their undergraduate studies before 1977 and obtained master degrees after 1980.

16 See Zeng Xianyi, 'Working Report at the 10th Anniversary of the Implementation of JM Education, in The Innovation and Development of the JM Education in China', (2006) 5 The Jurist; He Weifang, 'China's Legal Profession: The Emergence and Growing Pains of a Professionalised Legal Class', (2005–2006) 19 Colum. J. Asian L. 138.

include the 50,000 registered as full-time and part-time JM students, 54,000 MPhil students and 15,000 PhD students.[17] In addition to that, there are many more students who are studying law as a second degree with a diploma at university, or are trained in the professional schools. There are no official statistics about this group of students. Therefore, the total number of higher-education students majoring in law has already exceeded the legal market's capacity in China, which is predominated by professions such as judges, procurators and lawyers.

1 *From the Most Popular to One of the Most Unpopular Majors with the Lowest Rate of Employment*

The Blue Paper Report on the Employment of Chinese University Graduates in 2015, published by Social Science Reference Press, made public a group of statistics which stated that university graduates with a BA degree in law, and legal-professional- school graduates with a diploma, had the lowest rate of employment among university graduates. Furthermore, the law major has been ranked as one of the lowest three majors for three years consecutively. The same report also listed majors with a high unemployment rate for graduates, a low income for those employed and a low job-satisfaction rate (the so-called 'red-card majors'), which include biological engineering, fine arts, biological science, applied physics, applied psychology, law, and musical performance. Law, biological engineering and fine arts were all listed as 'red-card majors' in the previous year.[18] This change occurring to the law major seems a little dramatic as it declined from a very popular major around 2000 to one with a very bad employment rate within such a short period.

The statistics from 2010 to 2015 indicate that law, as one of the top five majors most favoured by outstanding high school students, has gradually lost favour.[19] The bleak employment prospect of law majors, consecutively labeled

17 'Statistics' (*Ministry of Education of the People's Republic of China*, 2015) <http://en.moe.gov.cn/Resources/Statistics/> accessed 3 June 2017.

18 This trend has also been verified by a report published by the Shanghai Municipal Committee of Education in 2015, which indicates that law is the only major with its postgraduates, graduates and diploma students all having a lower rate of employment; 'A General Survey on the University Graduate Employment in 2015 Published by Shanghai Municipal Committee of Education: Low Rate of Employment for Law School Graduates but More Opportunities for the Arts School Graduates' (*Ministry of Education of the People's Republic of China*, 19 June 2015) <http://old.moe.gov.cn/publicfiles/business/htmlfiles/moe/s5147/201506/189459.html> accessed 17 February 2016.

19 'The Ranking List of the Majors Most Favoured by China's Outstanding High School Students, the Outstanding Students like Those "Money-absorbing Majors"' (*Feng Huang*

with the 'red-card', has reduced the enthusiasm of high school students for it. The low graduate employment rate has diminished their appetite for choosing to study in law school. Nevertheless, since the Chinese government decided to strengthen the rule of law in 2014, which meant an increasing demand for legal services, legal education in China did not show its waning trend quickly, taking into consideration the total number of students at school.[20] This is partly due to the fact that the major of law in its broad sense includes the following six majors: law, sociology, political science, ethnology, Marxist theories and public security.[21] This chapter focuses on the law major in its strict sense, i.e. excluding the latter five majors. The lower employment rate was, to a large extent, made by the decreasing popularity of those other majors. One other reason which deserves mentioning is the planned economy in China's high education. The Ministry of Education decides the exact number of enrolled freshmen for each university. This type of administration is not so sensitive to changes in market demand. Applicants, for fear of losing the opportunity to enter a better university, have to choose the law major or even be transferred to law school after being rejected by other schools.

Our teachers told us in class that if there were no judges or government officials in our family members, we should not choose law schools. Law is the major for the people with power. The children from poor families will not have a bright future after graduation. It is said that the teaching in many law schools is not so satisfactory. The students are only required to recite the textbooks.[22]

Due to the various factors mentioned above, the number of law school graduates in China has not reduced, but continued at a stable, increasing rate. The Ministry of Education has now realised this problem and started to control the number of enrolled students. Since 2008, the total percentage of law-school

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Education Channel, 10 June 2015) <http://edu.ifeng.com/a/20150610/41106983_0.shtml> accessed 21 February 2017.

20 According to a survey jointly made by Xin Lang website and Shou Hu website, the law school of Beijing University had the highest entrance score in selecting the applicants among thirty majors in 2008 in many provinces and municipalities; 'Beijing Received The Highest Score' (*Sina Education*, 3 March 2009) <http://edu.sina.com.cn/gaokao/2009-03-05/1900190708.shtml> accessed 21 February 2017.

21 According to the Catalogue of Undergraduate Majors of Common Universities (2012) published by the Ministry of Education, there are six categories including 32 majors within the law major in the broad sense; (Ministry of Education of the People's Republic of China, 14 September 2012) <www.moe.edu.cn/publicfiles/business/htmlfiles/moe/s3882/201210/143152.html> accessed 17 February 2017.

22 Interview with a high school student applying for the universities, 10 July 2012.

students in China's universities has decreased a little. According to the statistics provided by the Ministry of Education, while the percentage in 2009 and 2010 was 3.87%,[23] this number declined to 3.80% in 2012. It is predictable that the number will decline further in future. This trend is roughly in parallel to the enrolment of undergraduates in China's law schools. For example, the number in 2009 was 191,800, while the numbers in 2010 and 2012 were196,100 and 193,000 respectively.[24] The numbers above indicate that, while the number of students majoring in law in the broad sense is decreasing, the number of students majoring in law in the strict sense is increasing a little. The students interviewed in the following paragraphs are either from the law major in broad sense, or from the law major in strict sense but located in small cities.

Our employment is OK. Nevertheless, those who wish to work in government offices have to pass the Civil Servant Examination or National Judicial Examination. Except for a few of my classmates who chose to practice law, work in the government or study abroad, most of us are working at enterprises.[25]

The students in the local universities like us are encouraged to continue to study for a master degree or go abroad for advanced study. Among the three hundred students in our grade, there are about five or six who continued to study for master degrees. Those who are practicing law or working in the government are no more than 10%. The majority of us went for business other than law. Some are even practicing pyramid sales.[26]

Within three years after graduation, only 55% of the law school graduates with a bachelor's degree and 37% of professional school graduates with a diploma reported that their jobs were still connected with law (see Table 11.1). This figure is much lower than graduates of other majors. Although legal education in China imitated civil law countries from the very beginning, which focuses on theoretical education rather than professional education, there lacks sufficient legal practice or a strict national judicial examination in the curriculum of China' law schools. There is not much expectation for law school graduates to have a

23 See the official website of the Ministry of Education of the People's Republic of China: Numbers of Graduates with a Bachelor Degree and Graduates with a Diploma (Chinese). <www.moe.gov.cn/s78/A03/moe_560/s4958/s4960/201012/t20101230_113569.html> accessed 17 February 2017.

24 See the official website of the Ministry of Education of the People's Republic of China: Numbers of Graduates with a Bachelor Degree and Graduates with a Diploma (Chinese). <www.moe.gov.cn/s78/A03/moe_560/s4628/s4633/201010/t20101021_109904.html> and <www.moe.gov.cn/s78/A03/moe_560/s6200/201201/t20120117_129594.html> accessed 17 February 2017.

25 Interview with university graduates in Guangdong, 20 July 2012.

26 Interview with university graduates in Zhejiang, 20 April 2012.

high employment rate in legal professions like in law firms or courts. Nevertheless, we must pay more attention to the reasons behind this phenomenon due to the large number of graduates and their influence on the future rule of law.

While foreign law firms are focusing on the foreign-language ability of law school graduates, many domestic firms found it difficult to attract law-school graduates to fill the huge shortage of law professionals. Insufficient professional training is also one of the factors leading to the high unemployment of law-school graduates. Many people have a view that the Great Leap Forward in China's legal education system in 2000 (the enlargement of enrolment) should account for the decline in quality of China's legal education. In addition to the fact that law schools have an insufficient number of teaching staff, this staff consists of young and inexperienced teachers. The curriculum focuses on theory and is incapable of providing the training courses which the legal

TABLE 11.1 *Sample study: diversification of employment of the graduates from China university of political science and law in 2013.*[a]

Graduates	**Statistics**	**Continue to study for a higher degree**	**Study Abroad**	**Sign an employment agreement with a government department**	**Sign an employment agreement with a law firm or other enterprises**
undergraduates	number	612	194	453	476
	percentage	35.27%	11.18%	26.11%	27.44%
postgraduates	number	54	43	1073	574
	percentage	3.09%	2.46%	61.52%	32.91%

Among the graduates who signed an employment agreement with a government department, 202(44.6%) of the undergraduates and 481(44.8%) of the postgraduates chose to work in the various Communist Party committees and administrative departments[b]

a Planning Department of China University of Political Science and Law, 'Analysis on the Current Status and Its Impact of the Legal Professions Which the Graduates of China University of Political Science and Law Have Participated In' in Xu Xianming and Zheng Yongliu (eds), *Reform on the Model of Six-year Legal Education* (China Legality Press 2009); China University of Political Science and Law, 'Employment Information: Yearbook on the Quality of Graduates of China University of Political Science and Law in 2013' <http://edu.people.com.cn/NMediaFile/2014/0403/MAIN201404031439000526875920252.pdf> accessed 10 June 2017.

b Yearbook, ibid.

profession dearly needs. Although this is emblematic of a wider malaise which China's higher education is encountering, it is discouraging that the situation for the legal education system is even worse than others. Many universities are considering cutting down the number of enrolment at law schools. The State Council even ordered that the enrolment of JM students for each law school should be no more than 200.[27]

Perhaps it is still too early to conclude that there are more law school graduates than the market demands, as the fostering of legal professionals is a dynamic process. The current excess of law-school graduates is not necessarily connected with the enlargement of enrolment of students. Perhaps it is also connected with the general structure of China's legal education system because of the other five majors calculated as part of the law major in the broad sense. If there had been no increased enrolment in law schools, there might have been a shortage of legal professionals between two generations due to the suspending of legal education for almost twenty years in China. Even so, we should not ignore the declining quality of legal education in the process of enlargement.[28]

2 *The Opportunity to be a Judge or Procurator: Enough is Enough for Law-School Graduates*

Although there are voices arguing that many government departments are insufficiently staffed and that legal professionalisation needs further development, those popular public departments for law school graduates like courts, procuratorates and public-security bureaux have already become saturated with legal professionals after a comparatively long period of development. These departments are now recruiting new staff at a regular rate.[29] Meanwhile,

27 It seems that Korea has a similar problem; 'Legal Education Reform Is in Full Swing in Korea' *Fazhi Daily* (Beijing, 28 November 2009).

28 Ji Xiangde, The Current Status and Development Tendency of China's Legal Education (China Social Science Press 2008) 160–161.

29 According to the official statistics, by the end of 1993, there were only 628 judges and 200 procurators nationwide with a master's or PhD degree in law, which were 0.25% and 0.11% of their total numbers respectively. There were 14000 judges and 7700 procurators nationwide with a bachelor's degree in law, which were 5.6% and 4.32% of their total numbers respectively. Furthermore, there were altogether 43000 people who retired from courts, procuratorates and public security bureaus each year at that time. This number is even more than the total number of law school students nationwide. See Huo Xiandan, *The Development and Transition of China's Legal Education (1978–1998)* (Law Press 2004) 18, 334.

the number of graduates from law schools was constantly increasing from 2000 until 2013, when the number reached 177,000. This is a huge number compared with the total number of current judges, procurators and lawyers employed which is 600,000 (see Figure 11.1).

Furthermore, since 2014, under the decision made at the Fourth Plenum of the 18th Central Communist Party Committee, the judiciary in China has been promoting judicial reform. The pilot provinces and municipalities like Guangdong and Shanghai have begun to streamline the number of judges to be within 40% of the total staff, with the aim to make judges a more admirable profession with high pay. This has led to some judges being encouraged to leave the court, and further restrictions on the entry of law school graduates. In 2011, the enrolment of candidates for judges and procurators in Zhejiang Province (see Figure 11.2) was 783. The number declined to 641 in 2014.[30] With the judicial reform, this number will decrease further in future.[31] As a matter of fact, there has already emerged 'a wave of leaving the court' in some places.[32] Will the vacancies left by those leaving judges be filled by graduates from law schools? This is worth questioning.

Except for courts, procuratorates and public-security bureaux which traditionally accepted the majority of law school graduates, the Communist Party and the administrative departments have enrolled a considerable number of law school graduates since 2000. In recent years, graduates with majors like law, economics, finance and computer studies are the most commonly enrolled as new civil servants. In 2012, the three provinces of Zhejiang, Jiangsu and Shandong provided 4,428 job vacancies which required the applicants to have a law major in the broad sense.

Although these three provinces are the most developed areas in China and the above numbers do not represent the average level of the country, we can still calculate a rough number of job vacancies requiring applicants with the law major nationwide according to the population proportion of these three provinces. Together with job vacancies in courts and procuratorates, this number is around 20,000, which is almost 20% of all graduates of law schools. However, the question is how long this percentage (see Figures 11.4 and 11.5)

30 'Zhejiang Personnel Testing Copyright Office' (2017) <www.zjks.com/≥ accessed 15 February 2017.

31 Hao Hong, 'Who Will Be Judges and Procurators after the New Policy Is Implemented?' (*People.cn*, 24 April 2015) <http://sh.people.com.cn/n/2015/0424/c134768-24620635.html> accessed 15 February 2016.

32 Liu Bin, 'On the System Logics of the Number Restriction System of Judges – from the Phenomenon of the Wave of Leaving the Court' (2015) 10 Law Science.

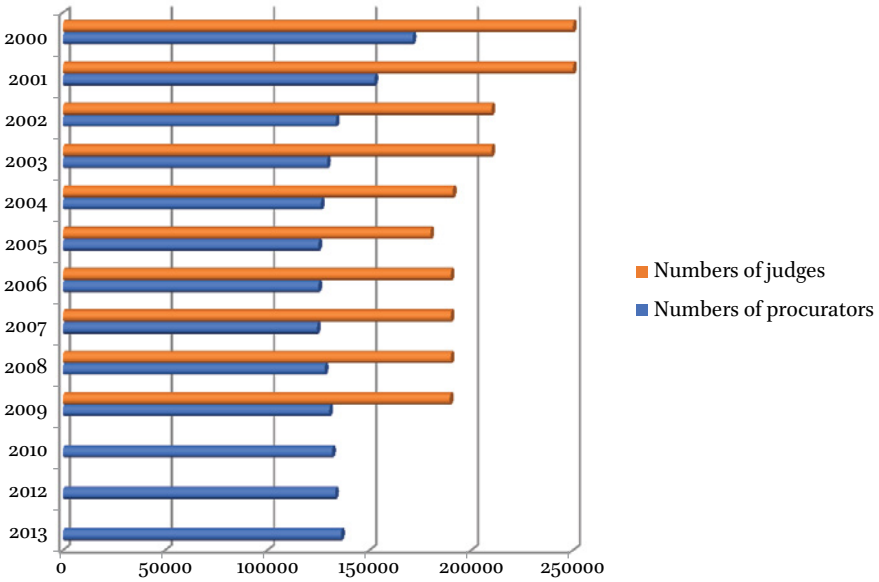

FIGURE 11.1 *Changes in the numbers of judges and procurators in China from 2000 to 2012 The number of judges from 2010 to 2013 and the number of procurators in 2011 are not available.*[33]
SOURCE: YEARBOOK OF LAW IN CHINA (2000–2013).

can be sustained in view of the current 10 million civil servants? With the slowing down of China's economic development and the strengthening of restrictions on public expenditure, some invisible benefits attached to civil servants have been taken away. Some civil servants have already left for jobs with higher incomes, and the attraction of being a civil servant is decreasing.[34]

From the comparison of the data in Figure 11.3 between 2011 and 2015, we can find that the success rate between the applicants and the recruited for all majors is generally declining in recent years. The law major is, in contrast, going in the opposite direction, increasing in rank from No.4 to No.1 with the highest percentage. This indicates that law school graduates will encounter more competition in job seeking compared with graduates from other majors.

33 http://wenku.baidu.com/view/fdbc6104a26925c52cc5bf78.html?from_page=view&from_mod=download###, accessed 22 September 2017.

34 'The National Examination Civil Servants Is Held Today: The Number of Applicants Is the Lowest in the Recent Five Years' (*China News*, 30 November 2014) <www.chinanews.com/gn/2014/11-30/6828456.shtml> accessed 16 February 2016.

TABLE 11.2 *The numbers of recruitments of the judiciary of Zhejiang from 2011 to 2016*[a]

Year	Judicial Administrative Satff	Pre-Judge and Procurator
2011	1185	783
2012	963	549
2013	753	783
2014	575	677
2015	738	–
2016	898	

Year	Recruitments	Applicants
2011	1185	10581
2012	963	10028
2013	753	10491
2014	575	8935
2015	738	9362

a The data were gathered from the Recruitment Announcement for Civil Servants of Zhejiang Province, released over the years (2011–2016) by the Department of Organization of Zhejiang CPC Committee, Human Resource and Social Security Department of Zhejiang and Civil Service Bureau of Zhejiang Province. http://www.zjks.com/showInfo/Info.aspx?id=1904; <http://www.zjhrss.gov.cn/art/2011/12/14/art_561_32347.html>; <http://www.zjhrss.gov.cn/art/2015/03/09/art_561_68667.html>; <http://www.zjhrss.gov.cn/art/2015/06/02/art_1985104_43670.html>; <http://www.zjhrss.gov.cn/art/2016/03/02/art_1985104_2199502.html>. All accessed 23 September 2017.

3 *Limited Capacity of the Legal Services Market*

Although from 2000 onwards law firms in China have sprung up like mushrooms, they have increased in size gradually.[35] In the same period, foreign law firms began to set up their branches in China and hire Chinese law school graduates. Nevertheless, the capacity of the legal service market in China is still limited in view of the huge number of law school graduates. In the period between 2002 and 2011, although there were altogether 500,000 examinees who passed the National Judicial Examination, only one-fifth of them registered as lawyers including those who graduated from other majors. What deserves mentioning here is that there are more law-school graduates who have never taken part

35 According to the official statistics, the number of registered lawyers increased from 117000 in 2000 to 271000 in 2014; *Yearbook of China Law* (*2000–2014*) (China Yearbook Press 2014).

TABLE 11.3 *Statistics of the job vacancies and applicants for the civil servants of central government from 2010–2016*[a]

Year	Job Vacancies	Recruitments	Qualified Applicants	Actual Applicants	Success Rate
2010	9275	15526	1.443 million	0.927 million	59:1
2011	9763	15290	1.415 million	0.902 million	59:1
2012	10486	17941	1.3 million	0.96 million	53:1
2013	12927	20879	1.383 million	1.117 million	53.5:1
2014	11729	19538	1.404 million	1.1195 million	57.3:1
2015	13475	22249	1.41 million	1.05 million	47.2:1
2016	15659	27817	1.3946 million	0.93 million	33:1

a Analysis On Recruiting Rate of Central Civil Servants over the Years (from 2004 to 2017), <http://www.exam8.com/zige/gongwuyuan/dongtai/zixun/201209/2433792.html>

TABLE 11.4 *The five majors which contribute more in the recruitments of civil servants for the central government in 2011*

Rank	Major	Recruitment	Applicants	Success Rate
1	Economics	1602	141021	88:1
2	Finance	1494	134993	90.4:1
3	Law	1324	109544	82.73:1
4	Computer	1071	135824	126.8:1
5	Security Management	912	41974	46:1

TABLE 11.5 *The five majors which contribute more in the recruitments of civil servants for the central government in 2015*[a]

Rank	Major	Job Vacancies	Recruitments	Applicants	Success Rate
1	Economics	3747	6085	357835	58.81:1
2	Accounting	3464	5889	266669	45.28:1
3	Finance	2444	4303	150055	34.86:1
4	Tax	2250	4020	140182	34.87:1
5	Law	2268	3813	260990	68.45:1

a Ministry of Human Resources and Social Security of the People's Republic of China <www.mohrss.gov.cn/index.html> accessed 23 September 2017.

in, or passed, the National Judicial Examination. From this viewpoint, the law firms have the limited capacity to accept law-school graduates due to the fast development in the past three decades. The current increase rate of lawyers is 10%, i.e. 20,000 each year. Even if these new lawyers are all graduates from law schools, they would make up only 20% of the total number of graduates.[36]

In spite of these changes mentioned above, the legal-services market will become more competitive. Various factors may account for this, such as the slowing down of economic development, many civil disputes being settled at the stage of conciliation, and the control of residence permits in big cities.

Different from what one would have imagined, the number of lawyers in Beijing began to decrease this year. The number of newly-registered lawyers this year is smaller than that of last year. We do not know exactly what is going on. The control of residence in Beijing is surely connected with this. Besides, the legal service has become more competitive.[37]

One reassuring change at that time was that foreign law firms which have opened their businesses in China began to hire graduates from Chinese law schools. Meanwhile, some Chinese law firms started to be involved in international lawsuits. But this is good news only for the top students, since few students are qualified to work in this area:

> I finished my undergraduate, postgraduate and PhD studies in China, but what I learned at law school is almost irrelevant to what I am doing now. My working skills are acquired gradually in my work. What many teachers taught in class is nonsense. Although there are a few teachers who have very good legal theory background, what we need to learn is how to solve practical problems.[38]

C Imbalance of Supply and Demand in the Legal Service Market: Shortages of High-End and Grass-Root Lawyers

On the one hand, there has emerged a low employment rate for law school graduates. On the other hand, there exists an imbalance of supply of and demand for legal professionals. While many law school graduates find it difficult

36 The development of legal services in different cities is uneven. Big cities like Shanghai and Beijing are much better than other cities. From 2010 to 2015, the number of law firms in Shanghai increased from 1064 to 1321 with an increase rate of 24%. The registered lawyers increased from 12298 to 16900 with an increase rate of 37%; Peng Wei, 'The Registered Lawyers in Shanghai Has Reached 16900', *Jie Fang Daily* (Shanghai, 19 April 2015), Section 11.

37 Interview with a lawyer in a Beijing law firm, 31 May 2012.

38 Interview with a lawyer in a Shanghai law firm, 10 August 2009.

to get a satisfactory job, many areas in western China – and the rural and less developed areas in particular – are seriously short of lawyers. Many factors may account for this, and the imbalance of the legal service market is one of them. In contrast to the fact that more and more law school graduates choose to stay in big cities, the high-end legal professionals are still in urgent demand.

1 *A Constant Shortage of Legal Professionals in Western China and Less-Developed Areas*

Since 2007, the Ministry of Justice has begun to give some preferential treatment to the less developed areas and minority autonomous regions. Specifically, the legal professionals in Xinjiang, Tibet and some other western areas were organised to take part in a Judicial Examination specially arranged for them. By the end of 2011, this preferential treatment had covered 1386 counties in 25 provinces and autonomous regions. More than 90,000 legal professionals have passed the National Judicial Examination in this way, which has greatly relieved the shortage of legal professionals in some western areas and rural areas. Nevertheless, there were still 174 counties which did not have any law firms or a single lawyer in July 2013. Another 42 counties which had set up law firms had no registered lawyers at all. This did not change until June 2014 with the support of the government and legal aid.[39] Even so, there are still some remaining problems such as sustainable development of legal service in these areas.

2 *The Shortage of High-End Legal Professionals: Multi-Disciplinary Knowledge is Dearly Needed*

Those legal professionals who acquired knowledge of international trade, intellectual-property rights, high technology, environmental protection, finance, medicine and media are most favoured in China's legal-services market. Lawyers and legal counsels who have acquired multi-disciplinary knowledge are dearly needed. Among the legal professions such as the judiciary, procuratorate and public security, there are few people who are capable of holding international negotiations and dealing with emergent cases. As one official of the Ministry of Education pointed out, the market is full of middle- or lower-level legal professionals. This sort of provision is already more than what is needed.[40]

The problem above is caused by the unsatisfactory structure of China's legal- education system. One of the reasons behind the current situation where the popular major of law is encountering a fairly cool job market is that, on the one hand, some universities set up law schools simply for the purpose of

39 See Liu Zhiyang, '174 Counties End the History without A Lawyer', *Legality Daily* (Beijing, 23 October 2010).

40 Liu Meihong, 'The Excess of Law School Graduates Is Only a Superficial Phenomenon', *Legality Daily* (Beijing, 10 June 2010).

transforming their universities into comprehensive ones, while on the other hand, the curriculums in many law schools have not caught up with the development of society. From a bachelor's student to a PhD candidate, most teaching staff received all their higher education at the law school. It is difficult for them to acquire multi-disciplinary knowledge and to change this sort of curriculum.

3 *The Prosperous Prospects of In-House Counsel and The Shortage of Law-School Graduates with Practical Experience*

Since the 1970s, to be a legal counsel in a corporation has become a popular choice for law school graduates around the world. The percentage who does this has reached up to 9% of all law school graduates in some countries. The fast development of the Chinese economy should have provided a great prospect for law school graduates. The reality is, however, that many corporations still find it difficult to hire a satisfactory in-house counsel.

There are more than thirty in-house counsels in our department. This is a bigger number compared with many other corporations. There are few vacancies for future law school graduates. This is not the problem. The problem is that the newly enrolled legal counsels from law schools know nothing but some legal doctrines and texts. What we really need are those law school graduates with multi-disciplinary knowledge. In a word, those who have acquired much legal practical experience and marketing skills with proficient foreign language ability are most welcome.[41]

According to the draft Appraisal Regulation on Special Registered Lawyers issued by the State Council, which is soliciting public opinions, the six categories listed for future special-registered lawyers include international economics and trade, intellectual-property rights, finance and securities, environmental protection and high technology, which are all concerned with the combination of the knowledge of law and other disciplines. Nevertheless, the ability of current law-school graduates is far from such expectations in view of either their professional knowledge or their practical experience. Many law-school graduates have found, after graduation, that what they learned at law school is almost irrelevant to what they are expected to do.

D The Dilemma for Legal Education in China

1 *The Overflowing of Law Degrees and the Shortage of Working Skills*

In the past fifteen years, the expectations associated with law degrees have declined greatly. In the 1990s, a law-school graduate with a master's degree could

41 Interview with a chief legal counsel in a corporation in Shanghai, 10 May 2012.

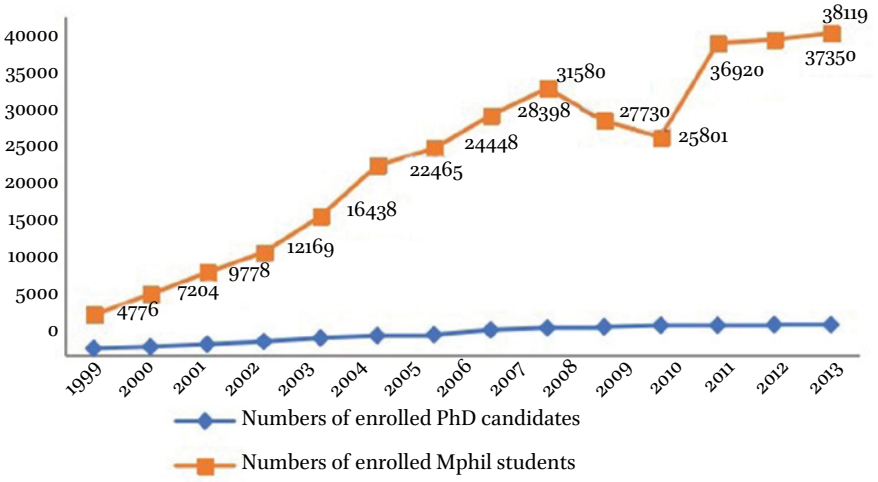

FIGURE 11.2 *Changes in the numbers of enrolled postgraduates in Chinese law schools from 1999 to 2013*[42]

find a satisfactory job without much effort. This is unimaginable today. Like the devaluation of the currency, law degrees in China are also encountering 'inflation', and so are law-school graduates. Increasing enrolment has pushed many students at law schools to continue studying for a higher degree in order to keep ahead of others. Since the end of the 1990s, the enrolment of law-school students with a master's degree has increased ten times. The number of PhD candidates has increased five times. In 2013 when the number reached its peak, 38,119 postgraduates for the master's degree were enrolled and 3603 were enrolled for the PhD degree.[43] Figure 11.2 illustrates the changes in the numbers of postgraduates in Chinese law schools.

There are many factors accounting for the changes illustrated in the table above. On the one hand, the Chinese government purposefully enlarged the enrolment of undergraduates in order to relieve pressure on the job market, given a huge population of young people. On the other hand, many law schools tend to educate legal elites rather than legal professionals. In recent years, few courts and procuratorates in developed areas have enrolled undergraduates as their new staff.

42 Calculated from the statistics and data released by the Ministry of Education over the years, <http://www.moe.gov.cn/s78/A03/moe_560/s8492/,/> accessed 22 September 2017.

43 'Number of Postgraduate Students By Academic Field' (Ministry of Education of the People's Republic of China, 2017) <http://old.moe.gov.cn/publicfiles/business/htmlfiles/moe/s8493/201412/181649.html> accessed 17 February 2017.

"In my opinion, law school is suitable for adults, not for teenagers. The knowledge an undergraduate student acquired is definitely insufficient, neither is that of a postgraduate student. Therefore, when we enroll new staff with a master degree, we care a lot to the university which offered their bachelor degrees. For example, those graduating from top universities or law institutes are more welcome than others. Of course, we know this is unfair to some graduates, but we have no other alternatives."[44]

In the eyes of many legal practitioners, there are few amongst China's law school graduates who meet their requirements and have acquired the quality of a legal professional. Indeed, in the increase in the number of all degrees, a law degree has been devalued to a certain extent.

"Most law school graduates are not qualified. We cannot depend on them too much. Those law school teachers who are good at research are not familiar with legal practice. Those teachers who are practicing law are short of either professional ethics, or legal theories. Many students escape from the classes and only do some recitations before examination. Many students are at an idle state in all their four years of undergraduate studies. The JM students are even worse as they all come from second or third class universities."[45]

2 *Commercialisation of China's Law Schools and Imbalance of Legal-Education Structures*

Since many American universities are not supported by the government, the main responsibility for a law school dean is to raise funds from society.[46] The United States has a culture of donating to education, especially higher education. This is the important factor which sustains the high quality of American higher education. In contrast, most Chinese universities are supported by the government. Social donation provides only a small part of the university's daily expenditures. Facing a shortage of education funds, Chinese universities have to fill this gap by raising tuition fees (they must do the same if they wish to raise teaching staff's wages).

Law schools in China seem to have more opportunities than others in raising funds from society. The most popular way is to jointly train legal professionals with some government departments or big corporations. The latter provide high tuition fees to train their staff with administrative funds or the corporation

44 Interview with the Chief Judge of a local court in Nanjing, 1 March 2012.

45 Interview with a lawyer in a law firm in Shanghai, 20 August 2012.

46 KE Lan, 'The Origins of Legal Clinics and Its Jurisprudential Significance' (2006) 3 Journal of China's Legal Education Study.

profits. Law schools organise special classes for those government officials or corporation legal counsels and offer their degrees separately.[47] This may lead to corruption in the form of 'buying a degree' or 'power-selling'.[48] Furthermore, many market problems such as fake advertisements, selling second-rate services at best quality prices, and cheating on labour and materials have also appeared alongside the commercialisation of legal education. Together with scandals over some corrupted officials with law degrees, the reputation of legal education in China has been greatly hurt.[49] What is worse is that this has caused a negative impact on the formation of professional ethics for law school students. Some American scholars studying China's legal profession lamented that there were no 'cause lawyers' in China.[50]

In addition to the problems pointed out above, some other issues deserve mentioning, which are concerned with the distribution of financial resources. Both when the Ministry of Education authorised law schools to enroll JM students in 2000 and when the Ministry of Education promoted the Elite Legal Professional Training Program in 2012, the opportunities and resources, in general, were distributed to the law schools located in the central and eastern areas of China despite the fact that law schools in the western areas were given some preferential treatment. This distribution does have some logic since most job vacancies for high-end legal professionals who need to acquire knowledge about economics, trade, technology and environmental protection are in the central and eastern parts of China. Indeed, in terms of the number of law schools, there are more located in the central and eastern areas than in the western areas. Given all this, it is likely that the mutual relationship between demand and resource distribution will continue for a quite long time, and consequently the gap between developed and undeveloped areas will become even bigger in respect of legal services, which will have a great impact on China's legal-education system and perhaps societal consequences such as reduced access to justice for people living in the western areas.

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47 Ye Tieqiao, Chen Jie and Yuan Mengchen, 'Whopping-price Tuitions Charged by Universities Have Been Questioned for Profit-making', *China Youth Daily* (Beijing, 14 September 2009).

48 Li Liang, 'Professor Liang Huixing Criticised Publicly the Corruption in China's Legal Education', *Nan Fang Du Shi Bao* (Beijing, 19 March 2009).

49 Ye Tieqiao, Chen Jie and Yuan Mengchen, 'Debate on the Whopping-prince Tuition for Professional Master Degrees', *China Youth Daily* (Beijing, 14 August 2009).

50 Austin Sarat and Stuart A Scheingold (eds), *The Worlds Cause Lawyers Make: Structure and Agency in Legal Practice* (Stanford University Press 2005).

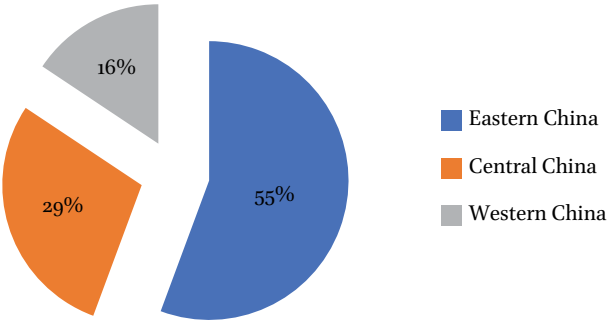

FIGURE 11.3 *Distribution of the law schools which have been authorized to offer Master Degrees in Law by the end of 2011*[51]

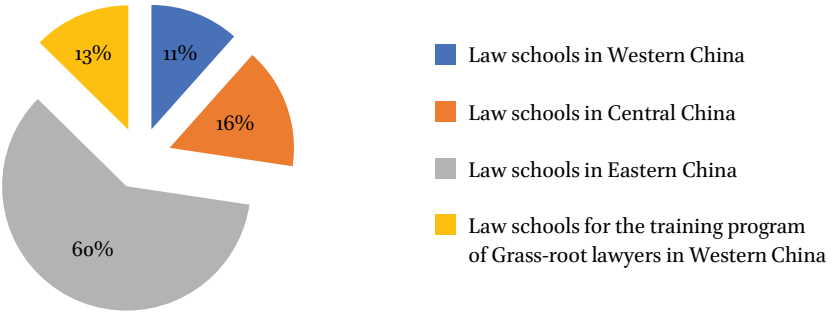

FIGURE 11.4 *Distribution of implementation of the Elite legal professional training program in 2012*[52]

E Conclusion: The Future of Legal Education in China—Construction of a Multi-Oriented Legal Education

The authorities who administer China's legal-education system have already realised the problems discussed in this article. The late professor Zeng Xianyi, former president of the China Legal Education Research Association, stated frankly that the main task for legal education in China is for it to improve in overall quality.[53] According to Professor WuHandong, former president of

51 The List of JM Cultural Unit of China, <http://www.china-jm.org/article/default.asp?id=625>, accessed 22 September 2017.

52 The list of First Batch of Elite Legal Professional Training Program, <http://www.gov.cn/zwgk/2012-12/19/content_2293555.htm>, accessed 22 September 2017.

53 Zeng Xianyi and Zhang Wenxian, 'The Current Status and Future Development of Legal Education in China' (Keynote speech, 22nd World Law Conference, Shanghai, 2005).

Zhongnan University of Economics and Law, the Law Steering Committee under the Ministry of Education has entrusted Jilin University to draft evaluation criteria on legal education.[54]

Although there are many ways to reform China's current legal-education system, the priority issue, in the view of the authors, is to restructure it. In view of China's vast territory and huge differences in the economic development of different areas, legal education should be divided into different groups in accordance with these differences. This is not simply to label law schools as first, second, or third class, but to set up law schools according to different locations and requirements. Under this reasoning, some law schools should be research-oriented while others might be profession-oriented. There should also be some law schools with a focus on the training of legal practitioners in developing and rural areas. If a law school accomplishes its target, it should be regarded as the best in its group. This law school should be allocated the same amount of resources from the government as the best law schools in other groups.

Following the proposal mentioned above, the education authorities had better design different criteria to evaluate law schools. As most universities are supported by the government, government evaluation judges the performance of each law school and, eventually, its financial resources. Many of the existing problems for legal education in China are caused by the rigid and narrow evaluation criteria, which has made more than six hundred law schools in China compete for the same target. In this sense, the current surplus of law-school graduates is only comparatively in surplus. If each law school could readjust its orientation, different law-school graduates would have different choices. The legal job market would respond positively to this because there would be a differentiated set of potential applicants suited to different jobs. Legal education in China might then have a bright prospect.

54 Wu Handong, 'Completing the Appraisal System on Scientific Contributions and Promoting Academic Innovations', *China Education Daily* (Beijing, 28 December 2011); Ran Jin, 'Tsinghua University Law School Has Squeezed into World Top 50, Has It Shared the Heavy Responsibility of Reform?' *Nan Fang Zhou Mo*, (Beijing, 9 December 2011).

CHAPTER 12

Legal Education in 21st Century Vietnam: From Imitation to Renovation

Bui Ngoc Son[1]

Introduction

In May 2015, in Tiền Giang, a southern province of Vietnam, at the age of fifty-five, a Vietnamese woman, named as Phan Thị Kim Hoa, who sold bananas in a corner at a small market, received a bachelor's degree in law from Cantho University Faculty of Law, a young law school, through a distance learning program. 'Lawyer Hoa', as the local people now call her, had a dream of becoming a lawyer when she was very young, but poverty prevented her from realizing her dream before she was fifty-five years old. Explaining her enthusiasm for studying law, she said that she wanted to be a lawyer to protect the peasants who are oppressed and suffer arbitrary trials because of their lack of legal knowledge.[2]

The story tells two sides of legal education in Vietnam. On the positive side, the story highlights the rising social need for legal education and the speedy development of legal education in Vietnam, which allows more people to access legal education. It is only in the context of the change of legal education in this twenty-first century that 'Lawyer Hoa' could obtain a law degree. On the other hand, the story reveals the loose and easy access to legal education in Vietnam, which may constrain its quality.

The need for legal education and the challenge of ensuring its quality, as indicated in the story above is just one of many tensions in the Vietnamese legal education system. This paper will broadly explore two sides of legal education in Vietnam in the early twenty-first century, namely change and constraints. The change may not reflect the move '*from imitation to innovation*' as the theme

1 I greatly appreciate the support of the Centre for Asian Legal Studies. I am grateful to Professor Andrew Harding and Miss Bui Thi Thu Hien for their comments on earlier drafts of this chapter.

2 Hồ Nam, 'Bà Bán Chuối Nhận Bằng Cử nhân Luật ở Tuổi 55' ('A Woman who Sells Banana Has Received a Bachelor Degree in Law at the Age of 55') (*Vnexpress*, 10 June 2015) <http://vnexpress.net/tin-tuc/giao-duc/ba-ban-chuoi-nhan-bang-cu-nhan-luat-o-tuoi-55-3231424.html> accessed 5 May 2017.

 | DOI 10.1163/9789004349698_013

of the conference that originally inspired this chapter suggests. 'Innovation' is defined by Oxford English Dictionary as 'the alteration of what is established by the introduction of new elements or forms', implying original, and more or less radical, changes. The change in legal education in Vietnam has not yet happened in that innovative way. Rather, the change resonates with Vietnam's more general approach to national building captured by the term *đổi mới* (renovation), which is also the name of the famous reform program introduced by the Communist Party of Vietnam in 1986 with the goal of transforming the Soviet model of planned economy into a market-based economy with socialist orientation. Consistent with this *đổi mới* approach, changes in legal education in Vietnam involve revamping, improving, or modifying the outdated system of legal education which imitated the Soviet system. This chapter attempts to explore how and why such renovation has happened, and why innovation has not taken place.

Legal education in Vietnam has been examined by both Vietnamese and international scholars. Vietnamese scholars, such as Phạm Duy Nghĩa,[3] Bùi Thị Bích Liên,[4] and other commentators,[5] have documented the history and the general structure of the system of legal education in Vietnam, and revealed its changes and problems. Many Vietnamese commentators invoke the experiences of legal education in developed countries, such as the United States, Australia, and Japan, to offer normative suggestions for renovating legal

3 Phạm Duy Nghĩa, 'Dậy Luật ở Việt Nam' ('Teaching Law in Vietnam') (*Tuổi Trẻ Online*, 23 December, 2006), <http://tuoitre.vn/tin/giao-duc/20061223/day-luat-o-viet-nam/179225.html> accessed 5 May 2017; Phạm Duy Nghĩa, 'Gia tài 60 Luật học,' ('The Heritage of 60 of Legal Studies') in Phạm Duy Nghĩa, *Bay Cùng Đàn sếu* ('*Flying with the Crane Flock*') (Ho Chi Minh City: Youth Publishing House, 2007); Phạm Duy Nghĩa, 'Cử nhân Luật UEH: 10 Năm Nhìn lại' ('Undergraduate Law Program in UEH: A Review of 10 Years'), (*UEH Law School,* 24-09-2014) <http://law.ueh.edu.vn/cu-nhan-luat-ueh-10-nam-nhin-lai> accessed 5 May 2017.

4 Bùi Thị Bích Liên, 'Legal Education in Transitional Vietnam,' in John Gillespie and Pip Nicholson (eds), *Asian Socialism and Legal Change: The Dynamic of Vietnamese and Chinese Reform* (ANU E Press and Asia Pacific Press 2005) 135–158; Bui Thi Bich Lien, 'Legal Education and Legal Profession in Contemporary Vietnam: Tradition and Modification,' in John Gillespie and Albert H.Y. Chen (eds), *Legal Reform in China and Vietnam* (Routledge 2010) 229–319.

5 Vũ Văn Huân, 'Chất lượng đào tạo cử nhân luật và quy định giảng viên luật không được làm luật sư,' ('The Quality of Legal Education and the Provision that Law Teachers cannot be Lawyers') (2012) 12 *Tạp Chí Nghiên Cứu Lập Pháp* 37; Nguyễn Thị Ánh Vân, 'Đào tạo Cử nhân luật ở Việt Nam trước những thách thức của Hội nhập quốc tế' ('Legal Education in Vietnam under the Challenges of Global Integration') (2012) 19 *Tạp chí Luật học* 67; Phạm Trí Hùng, 'Một số Ý kiến về Chương Trình Đạo đạo Cử nhân luật ở Đại học Luật Thành phố Hồ Chí Minh' ('Some Comments on the Legal Education Program in the Ho Chi Minh City Law University') (2009) 1 *Tạp chí Khoa học Pháp lý* 49.

education in Vietnam.[6] Legal education in Vietnam has also been discussed by international experts such as Mark Sidel,[7] Pip Nicholson,[8] Charles R. Irish,[9] Carol Rose,[10] and others.[11] In particular, the recent report prepared for UNDP Viet Nam (2010) by Mark Sidel and Phạm Duy Nghĩa has documented the profiles of law schools and identified the problems of legal education in Vietnam, and provided remedies for improvement.[12]

Yet, the existing scholarship has not fully explored the contextual determinants of the change and problems in the legal education system in Vietnam. In this study, I hope to fill in this gap. I approach this issue from a contextualist perspective. Contextualism suggests that the understanding of legal education in Vietnam requires situating it within the socialist legal system in the country. The contextualist approach also requires us to locate the legal education

6 Lê Thu Hà, Ngô Hoàng Oanh, Phạm Trí Hùng, 'Đào tạo luật sư trên thế giới và công tác đào tạo Luật sư ở Việt Nam,' ('Education of Legal Profession in the World and in Vietnam'), *Tạp chí Nghề Luật* (3) 2006 <https://luatminhkhue.vn/kien-thuc-luat-lao-dong/dao-tao-luat-su-tren-the-gioi-va-cong-tac-dao-tao-luat-su-o-viet-nam.aspx> accessed 5 May 2017; Nguyễn Văn Quang, 'Đào tạo luật ở các trường luật của Australia: Một vài phân tích và kinh nghiệm cho đào tạo luật ở Việt Nam trong bối cảnh hội nhập' ('Legal Education in Australian Law Schools: Analysis and Experiences for Legal Education in Vietnam in the Context of Integration') (2012) 11 *Tạp chí Luật học* 59; Nguyễn Thị Ánh Vân, 'Xu hướng mới trong Đào tạo Luật ở Nhật Bản và Và iGợi mở cho Đổi mới Đào tạo Luật ở Việt Nam' ('New Trend in Legal Education in Japan and Suggestions for Renovation of Legal Education in Vietnam') (2009) 7 *Tạp chí Nhà nước và Pháp Luật* 70.

7 Mark Sidel, 'Law Reform in Vietnam: The Complex Transition from Socialism and Soviet Models in Legal Scholarship and Training' (1993) 11 UCLA Pacific Basin Law 221; Mark Sidel, 'The Reemergence of Legal Discourse in Vietnam' (1994) 43 International and Comparative Law Quarterly 163.

8 Pip Nicholson, 'Effectiveness of Donor-Funded Legal Education: A Vietnamese Retrospective,' in Steele and Taylor (eds), *Legal Education in Asia: Globalisation, Change and Contexts* (Routledge 2009).

9 Charles R Irish, 'Regional Recollection: Reflections on the Evolution of Law and Legal Education in China and Vietnam,' (2007) 25 Wisconsin International Law Journal 243.

10 Carol Rose, 'The "New" Law and Development Movement in the Post-Cold War era: A Vietnam Case Study,' (1998) 32 Law and Society Review 93.

11 Per Falk, 'Legal Training: The Case of Vietnam,' in Sevastik (ed) *Legal Assistance to Developing Countries: Swedish Perspectives on the Rule of Law* (Kluwer 1997); Hien Thu Bui, Bruce A Lasky and Richard Grimes, 'Legal Education in Vietnam: An Overview and Future Strategic Vision' in Shuvro Prosun Sarker (ed) *Legal Education in Asia* (Eleven International Publishing 2014), 19.

12 Mark Sidel and Phạm Duy Nghĩa, *'Reforming and Strengthening Legal Education in Vietnam: A Resource Report Prepared for UNDP Viet Nam'* (United Nations Development Programme 2010).

in Vietnam in a broader context of the higher education system, institutional arrangement, political ideology, legal intellectual environment, and social and economic circumstances. In terms of method, this paper relies mainly on analysing written sources. This study also benefits from my informal conversations with some Vietnamese law students and teachers. My experience in the Vietnamese system of legal education as a student and a lecturer also informs this study.

The scope of this chapter should be noted. As the history and the general structure of the legal education system in Vietnam have been comprehensively explored by other scholars, I will not repeat these here. Rather, I am more concerned with (1) the socialist features of legal education in Vietnam; (2) its most recent changes; (3) the determinants of these changes; and (4) the constraints on innovative change. I particularly underline the relationship between the issues in legal education and Vietnamese socialism. I will focus mainly on the full-time undergraduate programmes in Vietnamese law schools.

I argue that legal education in Vietnam has changed in the direction of *renovation* of the socialist model of legal education. The renovation is driven by the political commitment to the socialist rule of law state, economic renovation, and the 'new' law and development movement. Yet, there are constraints on the innovative development of legal education in Vietnam due to the general situation of higher education, as well as ideological, political, and financial factors. If the difficulties can be moderated, innovation of legal education in Vietnam can be achieved by the creative integration of global experiences with the domestic legal education legacy and the experience of the renovated socialist legal education.

A The Socialist Legal Education in Vietnam

Legal education in Vietnam must be situated within the Vietnamese legal system. As its name indicates, the Socialist Republic of Vietnam is a socialist country. Socialism informs substantial aspects of the nation, such as the economic, political, and legal systems. The legal system is also influenced by the Soviet legal tradition. Together with Chinese law,[13] Vietnamese law is an example of socialist law which still exists in the contemporary world. Whether socialist law is a separate legal tradition or a branch of the civil legal tradition

13 William E Partlett & Eric C Ip, 'Is Socialist Law Really Dead?' (2016) 47 NYU Journal of International Law and Politics 463.

is debatable.[14] This is not the place to engage in this debate, but suffice to note that the socialist legal system in Vietnam shares many features of the civil law tradition (such as codification and legislative supremacy), but also differs from the latter in substantial ways. The most notable difference is that substantial ideas and principles underlying the Vietnamese modern legal system are backed by the socialist ideology. This leads to an extreme positivist and instrumentalist view of law. The practical consequence is that law is more political than professional, in the sense that law is controlled by the party-state rather than by lawyers.[15]

As a reflection of the dual nature of the legal system, the legal education system in Vietnam shares some features of civil law education. Firstly, like civil law education,[16] legal training in Vietnam is an undergraduate university education.

Secondly, like civil law education,[17] Vietnamese legal education is general and interdisciplinary rather than professional. Vietnamese legal education is not meant to produce professional lawyers. Careers for the Vietnamese law graduate include not merely legal professions like practicing lawyers, judges, procurators, and notaries, but also a wide range of administrative positions in central and local government. and in social-political organizations.

Thirdly, like civil law education,[18] Vietnamese legal education is not meant to educate law graduates who can immediately embark on legal practice after graduation. In law schools, Vietnamese students are trained with general knowledge of the most important 'branches of law' and are virtually not trained at all in practical legal skills. If they want to practise law, like law graduates in civil law systems,[19] Vietnamese law graduates need further formal practical legal training. In Vietnam, the Judicial Academy provides such practical training for those who want to become practicing lawyers, judges, and procurators, and

14 J Quigley, 'Socialist Law and the Civil Law Tradition,' (1989) 37 The American Journal of Comparative Law 781.

15 Ugo Mattei, 'Three Patterns of Law: Taxonomy and Change in the World's Legal Systems' (1997) 45 American Journal of Comparative Law 5. Ugo Mattei distinguishes three types of law: professional law, political law, and traditional law. Accordingly, he classifies most legal systems of Asia as belonging to traditional law. However, I contend that Vietnamese law is more political than traditional and professional.

16 Mary Ann Glendon, Michael Wallace Gordon & Paolo G. Carozza, *Comparative Legal Traditions in a Nutshell* (West Group 1999), 75.

17 Ibid.

18 Ibid 77.

19 Ibid 78.

notaries.[20] The duration of practical training depends on the type of career the student seeks. For example, to be a practicing lawyer, a Vietnamese law graduate must take a twelve-mouth practical training course at the Judicial Academy, engage in an apprenticeship in a law firm for twelve months, and finally pass the national bar examination organized by the Ministry of Justice.[21]

Fourthly, like the civil law tradition, the teaching method and materials in Vietnamese legal education are top-down and theoretical. As the class size is normally huge, sometimes involving hundreds of students, lectures are employed as the main teaching method. Seminars and communication between teachers and students in the class are highly limited. The lectures are heavily theoretical and textual. Students are taught abstract concepts, theories, and principles. The main materials are systematic treatises rather than casebooks, and they describe and explain general concepts and basic legal principles and norms with reference to codes, legislation, and other legal documents by different authorities. Supplemental materials may be added, which include statutes and other legal instruments.

However, legal education in Vietnam differs from civil law education in many aspects, which reflect the socialist features of the Vietnamese legal system and the influence of the Soviet legal education model. First, most senior Vietnamese legal scholars were educated in the former Soviet Union, Eastern Europe, and East Germany. They produce treatises on the socialist conceptual framework which are used as main textbooks in teaching. Second, Vietnamese law schools are divided into several departments paralleling the Soviet model. The departments are organized consistently with the Soviet distinction of 'branches of law', which is different from the civil law distinction between private and public law. For example, the Law School of the Vietnam National University at Hanoi (VNULS) comprises six departments, namely Theory and History of State and Law, Constitutional and Administrative Law, Criminal Law, Civil Law, Business Law, and International Law. Hanoi Law University (HLU) and Ho Chi Minh City Law University (HCMCLU) have similar structures with slight variation. Third, like the Soviet model,[22] the curriculum in Vietnamese legal education includes three distinctive groups of subjects. The first group includes ideological subjects, such as Marxism-Leninism, Scientific Socialism, Ho Chi

20 Pip Nicholson, 'Renovating Courts: the Role of Courts in Contemporary Vietnam,' in Jiunn-rong Yeh and Wen-Chen Chang (eds), *Asian courts in Context* (Cambridge University Press 2015) 549.

21 Vietnam's Law on Lawyers (2012).

22 GM Razi, 'Legal Education and the Role of the Lawyer in the Soviet Union and the Countries of Eastern Europe' (1960) 48 California Law Review 788.

Minh's Thought, and History of the Communist Party of Vietnam. The second group comprises background subjects. Some of these subjects are related to a general understanding of law from a socialist perspective, such as General Theory of State and Law, History of State and Law of the World, History of State and Law of Vietnam. The names of these subjects were modelled on, and adapted from, the Soviet curriculum. Other background subjects concern general social and cultural knowledge such as sociology, Vietnamese culture, and the history of the world's civilizations. These subjects are directly or indirectly connected to the socialist ideology of the state. The third group focuses on the "branches of law" subjects. In Soviet legal jurisprudence, "a 'branch of law' is understood as the aggregate of legal norms regulating relations in a particular sphere (branch) of social life".[23] The branches of law taught in Vietnamese law schools include state law or constitutional law, administrative law, financial law, land law, civil law, labour law, marriage and family law, criminal law, criminal procedure, civil procedure, economic law, and international law.

B The Renovation of the Socialist Legal Education System in Vietnam

Since the initiative of the *Doi moi* program, substantial aspects of Vietnam have been changed, including the economic system, the political system, and the legal system, which indicates a departure from the Soviet model. The *doi moi* approach focuses on revamping, improving, or modifying rather than making fundamental change. There are specific policies for reforming the legal education system in Vietnam. For example, Politburo Resolution No 49-NQ/TW (2005) on strategy for judicial reform suggests: 'further renovating the substance and methods for the education of bachelors of law.'[24] In fact, the legal education system in Vietnam has been reformed in the following aspects.

1 *Growing Number of and Geographic Proliferation of Law Schools*

This century has witnessed a growing number of law schools created throughout Vietnam, and the number is increasing as some universities are considering creating new law schools. As of November 2015, there are 29 law schools in Vietnam.

23 Harold J Berman, 'Legal System' in FJM Feldbrugge, G P van den Berg, William B Simons (eds) *Encyclopedia of Soviet Law* (M Nijhoff Publishers & Kluwer Academic Publishers 1985) 477.

24 Resolution No 49-nq/TW (2005).

TABLE 12.1 *Law schools in Vietnam*[a]

1. Vietnam National University – Hanoi School of Law (Hanoi)
2. People's Security Academy Faculty of Law (Hanoi)
3. People's Police Academy Faculty of Law (Hanoi)
4. Diplomatic Academy Faculty of Law (Hanoi)
5. Trade Union University Faculty of Law (Hanoi)
6. National Economics University Faculty of Law (Hanoi)
7. Hanoi Law University (Hanoi)
8. Foreign Trade University Faculty of Law (Hanoi)
9. University of Commerce Faculty of Law (Hanoi)
10. Hanoi Open University Faculty of Law (Hanoi)
11. National Academy of Public Administration Faculty of State and Law (Hanoi)
12. Thai Nguyen University Faculty of Law and Social Management (Thai Nguyen Province).
13. Hong Duc University Faculty of Politics and Law (Thanh Hoa Province)
14. Vinh University Faculty of Law (Nghe An Province)
15. Hue University Faculty of Law (Hue Province)
16. Da Nang University Faculty of Law (Da Nang Province)
17. Vietnam National University College of Economics and Law (HCMC)
18. People's Security University Faculty of Law (HCMC)
19. People's Police University Faculty of Law (HCMC)
20. HCMC Economics University Law School (HCMC)
21. HCMC Law University (HCMC)
22. Saigon University Faculty of Law (HCMC)
23. HCMC Open University Faculty of Law (HCMC)
24. University of Finance and Marketing Faculty of Law (HCMC)
25. Tôn Đức Thắng University Faculty of Law (HCMC)
26. Thu Dau Mot University Faculty of Law (Binh Duong Province)
27. Binh Duong University Faculty of Law (Binh Duong Province)
28. Cantho University Faculty of Law (Cantho Province)
29. Dalat University Faculty of Law (Lam Dong Province).

a Author's own calculation.

The growing number of law schools indicates the important trend towards decentralization in legal education in Vietnam. In the last century, legal education was centralized in Hanoi with the HLU as a national centre for legal education. Ho Chi Minh City Law University (HCMCLU) was created as a branch

of the HLU and only became an independent institution at the turn of the new century. For many years, legal education in HCMLU was based on law textbooks produced by HLU before it was able to produce its own material. There is political effort to centralize legal education around these two largest law schools. Politburos Resolution No 48-NQ/TW in 2005 on strategy for legal reform suggests "renovating the state management of education of legal officers [and] building the Hanoi Law University and Ho Chi Minh City Law University as the key sites for educating legal officers."[25] The attempt to centralize legal education may be due to the need to enhance the quality of legal education, but may be also motivated by the political incentive to manage legal education and thereby control legal discourse and legal conscience, so as to ensure consensus on socialist legal values.

Yet, the reality is different from the political aspiration. In Hanoi, HLU is now no longer the exclusive provider of legal training as there are many competing institutions, such as the law schools at VNU, Diplomatic Academy, Foreign Trade University, Trade Union University, National Economics University, University of Finance and Accountancy, and Hanoi Open University. Similarly, in Ho Chi Minh City, HCMCLU has no monopoly in legal education, given the creation of many new law schools in the city, such as the law schools at Vietnam National University at Ho Chi Minh City, Economic University Ho Chi Minh City (UEH), Saigon University, HCMC Open University, University of Finance and Marketing, and Ton Duc Thang University, as well as around the city such as the law schools at the Thu Dau Mot University and Binh Duong University. Apart from the two centres in Hanoi and Ho Chi Minh City, law schools have been created in different regions throughout Vietnam, such as the law schools at Vinh University, Hue University, and Danang University in central Vietnam, at Dalat University at Central Highlands, and at Cantho University at Mekong Delta region. Finally, there are some law schools dedicated to special public careers, such as the law school at the National Academy of Public Administration which trains future administrative officials, and the law school at the People's Police Academy which trains future police officers.

The decentralization of legal education allows more people to access legal education. The Vietnamese legal education system has produced around 20,000 law graduates a year.[26] The number of lawyers has grown speedily. By the end of 2014, Vietnam had 8,928 lawyers compared to 5,300 in 2009, when

25 Resolution No 48-NQ/TW (2005).

26 Sidel and Pham (n 11) 7.

the Vietnam Bar Federation was created.[27] The decentralization of law schools also means that they have to compete with each other to attract students. Some suggest that competition among law schools in the South is more intense.[28] This competition is instrumental in enhancing the quality of legal education. This results in the recruitment of better teachers, the designing of better curricula, and the renovation of teaching methods.

The internal structure of the law schools has also witnessed new changes. Apart from the traditional departmental structure, large law schools such as HLU, HCMCLU, and VNULS have also created specific legal research centres. These centres particularly focus on contemporary legal issues which are not the main concerns of the Soviet legal tradition. Examples are the Centres for Comparative Law at VNULS and HLU, and the Centres for Human Rights and Citizens' Rights at VNULS and HCMCLU. There are also some centres particularly focusing on the law of developed nations, such as the Centre for German Law at HLU and the Centre for Japanese Law at HCMCLU. The creation of legal research centres is useful for specializing, deepening, and updating research and teaching in Vietnam.

2 *New Generations of Legal Scholars*

In addition to the Soviet-trained senior law professors, there are younger legal academics who have received overseas education elsewhere, mostly in Europe (Belgium, England, France, Germany, and Netherlands), but also some in Australia, New Zealand, Japan, Canada, the United States, and others. Other younger legal academics were educated in Vietnam but are competent in foreign languages, especially English. The exchanges among younger and senior legal academics have engendered changes in legal thinking, methods of legal teaching, and teaching materials as the result of the interaction of western and Soviet values.

3 *Modification of Curriculum*

The curriculum in Vietnamese law schools has been modified to meet contemporary needs. On the general subjects, as a response to legal globalization, the most notable change is the inclusion of comparative law as a compulsory

27 'Việt Nam có bao nhiêu luật sư?' ('How Many Lawyers Are There in Vietnam') (*Tiền phong*, 17 April 2015) <www.tienphong.vn/Phap-Luat/viet-nam-co-bao-nhieu-luat-su-849781.tpo> accessed 5 May 2017.

28 'Học và hành nghề luật tại Việt Nam' ('Studying and Practicing Law in Vietnam'), (*RFA*, 31 May 2013) <www.rfa.org/vietnamese/in_depth/stu-n-prat-lw-in-vn-05312013063019.html> accessed 5 May 2017.

subject in law schools such as VNULS, HCMCLU, and Cantho University Law School.[29] An audacious move in UEH Law School should be noted: a new western-style course called Legal Theory has been introduced to replace the Soviet-style course, General Theory of State and Law. On the 'branch of law' subjects, the important move is their separation into smaller subjects. For example, in HLU, commercial law has been divided into five separate smaller subjects (tax law, state budget law, banking law, security law, and commercial insurance law).[30] In HCMCLU, civil law is separated into contract law, tort law, and property law.

Traditionally, most law courses in Vietnamese law schools were compulsory. Elective courses were extremely limited. However, Vietnamese law students can now choose their teachers and courses. In addition to compulsory courses, a number of elective courses have been added to the curriculum of legal training 'in an effort to bring law education closer to the marketplace.'[31] These selective courses include topics on substantive law relating to economic development in Vietnam as the result of *Doi moi*, such as law on the monetary market, real estate business, and insurance business, among others. Other elective courses have been introduced as a reflection of Vietnam's active integration into the international community, such as customs of international trade, law on promotion of domestic investment and incentivizing of foreign investment, labour relations with foreign elements, and others. Some elective courses are designed for legal practice,[32] such as contract negotiation and legal advice. Other elective courses have been introduced as a response not to the needs of the marketplace, but the rising social concern and consciousness regarding contemporary legal issues, such as human rights and citizen rights in Vietnam, international human rights law, and law on environmental protection.

The introduction of elective courses varies in different law schools. Some law schools have more choices than others. The electives menu of HCMCLU tends to focus more on economic issues, reflecting the economic dynamism of Ho Chi Minh City. VNUSL at Hanoi, on the other hand, seems to be more concerned with political issues, which echoes the reality that Hanoi is the political centre of the country. For example, VNUSL has made human rights law (which is an elective in HCMCLU) a compulsory course and has introduced elective courses such as foreign constitutional law and ASEAN law.

29 For relevant discussion on teaching comparative law in Singapore, see Chapter 5.

30 Bui Thi Bich Lien, 'Legal Education and Legal Profession' (n 3) 305.

31 Ibid 304.

32 Ibid.

The undergraduate law programs are now more diversified. In addition to the traditional program, some law schools have introduced specialized programs. For example, law schools at VNU-Hanoi and Hue University have introduced an undergraduate program specializing in business law. Some law schools have also introduced programs taught in foreign languages. For example, VNULS has programs taught in French. HLU and HCMCLU have programs taught in English.

4 *Teaching Method and Materials*

Some new teaching methods have also been implemented in Vietnamese law schools in this century. First, major law schools have introduced 'high quality classes', which comprise around twenty students and are taught with more interactive methods. Normally, students in these classes are chosen by the law school from the candidates who achieved the top grades in university entry examinations. Students who are highly ranked in the normal classes can also be transferred into the 'high quality classes'. Seminars are employed and students' engagement in these classes is more active. Second, there are some efforts to equip law students with practical knowledge. Moot courts have been practised in many law schools. In particular, the *Young National Assembly*, or 'moot legislature' project has been implemented, with the support of the British Embassy in Vietnam, which helps Vietnamese law students become familiar with the work of the National Assembly, meet and exchange views amongst the young legislators, and discuss topical legal issues.[33] Some law schools have invited legal practitioners to lecture or give talks to their students. Furthermore, there are some initial efforts to introduce clinical legal education, which helps Vietnamese law students to acquire more practical skills.[34] With the assistance of international aid programs, the clinical legal education programs have been practiced in VNULS, HCMCUL, and the law schools at Cần thơ University, National Economic University, Foreign Trade University, Hue University, and Vinh University.

Materials for use in legal education have also been 'renovated'. First, there is a diversity of textbooks. The HLU's textbooks were formerly the dominant

33 For information on the project, see Bao Yen, 'Project Implementation Phase 2' (*National Assembly of the Socialist Republic of Vietnam*, 8 September 2015) <http://quochoi.vn/tintuc/Pages/tin-hoat-dong-van-phong-quoc-hoi.aspx?ItemID=30012> accessed 5 May 2017.

34 Rebecca Parker, 'Developing Law Clinics in Vietnam – a Model for Progress?' (*The University of Law,* 27 November 2012) <www.law.ac.uk/futurelawyers/vietnam-law-clinics/> accessed 5 May 2017.

materials and are still used in the newer law schools. Yet, many law schools have now developed their own textbooks with different approaches and contents. For example, VNULS's textbooks are more theoretical, while those of HUL are more textual. This reflects their perceived objectives. VNULS tends to focus on producing 'scholars', while HUL is more concerned with creating professional lawyers. The conceptual framework of the law textbooks has also undergone some changes. This became possible as law teachers who were educated in western law schools have revised the texts and introduced more western legal concepts. Consequently, the conceptual framework of the law textbooks is now more comparative rather than exclusively socialist. For example, the western concepts of contractual constitution and judicial review have informed constitutional law textbooks. Similarly, the liberal concepts of property rights and freedom of contract have informed the civil law textbooks. Particularly in business law, socialist concepts have become less influential and western concepts are more evident. Moreover, law textbooks in Vietnam now include more practical knowledge and discussion of judicial cases.

In addition, teaching material is more diversified. Some law schools, such as VNULS, HCMCLU, and UEH Law School, have begun to produce casebooks as the supplementary material to the main treatises. In addition to textbooks and casebooks, law teachers have also produced a number of extensive treatises dealing with particular legal issues, and these materials have been also used in teaching and been referenced by students. Moreover, writings in national law journals, normally published monthly, offer important sources of knowledge-sharing. Major Vietnamese law schools publish their own law journals, such as HLU's *Journal of Jurisprudence*, HCMCLU's *Journal of Legal Science*, and VNULS's *Journal of Science-Legal Studies*. In addition, there are many law journals published by legal research institutions and state organs, which are widely referenced by law teachers and students, such as *State and Law Review, Journal of Legislative Studies, Journal of Law and Democracy, Journal of Law and Development, Journal of People's Court,* and *Journal of People's Procuracy*. These national law journals provide rich commentaries on legal documents and practical cases, as well as some comparative knowledge and updates on most recent legal developments, which are useful for both legal research and legal education. Finally, some law schools have also begun to use English materials in teaching. In particular, UEH Law School has planned to use textbooks entirely in English.

5 *International Cooperation*

During his visit to the major Vietnamese law schools in both Hanoi and Ho Chi Minh City in the early 1990s, Professor Charles R Irish, the founding director of the University of Wisconsin Law School's East Asian Legal Studies Center, was

astonished by the poor facilities of the law schools which led him to concluding that: 'There was simply nothing for the University of Wisconsin Law School to cooperate with.'[35] By the turn of the 21st century, he returned to Vietnam and witnessed new changes: 'By 2006 and 2007, the attitude towards international legal cooperation had changed dramatically. Now, as best I can tell, almost without exception, the law departments of universities and government agencies [in Vietnam] are exceptionally enthusiastic about the possibility of working with us.'[36]

Major Vietnamese law schools have now entered into co-operation with some foreign universities. For example, HLU has co-operated with many law schools in Australia, China, Japan, France and Sweden. It has around a hundred faculty members educated in overseas universities, and receives more than thirty overseas law professors who are teaching there.[37] VNULS has mainly cooperated with some French universities, such as the University of Toulouse, Jean Moulin Lyon III University, and University of Bordeaux IV to offer postgraduate joint degrees. It also hosts some one hundred law professors from overseas universities, who teach or give talks there.[38] The College of Law and Economics of Vietnam National University at Ho Chi Minh City has joint degrees with Benedictine University and Panthéon-Assas University, Paris II.

In addition, major law schools in Vietnam have relationships with international organizations such as the United Nations Development Programme (UNDP), Swedish International Development Cooperation Agency, Japan International Cooperation Agency, Canadian International Development Agency, Vietnam-France House of Law, Danish International Development Agency, and German Konrad Adenauer Stiftung.[39] These international donors do not focus directly on reforming legal education in Vietnam, except a few programs like SIDA which support HLU and HCMCLU,[40] but indirectly contribute to the increase in the quality of legal research and legal education. For example, they offer financial support for law schools to organize conferences and workshops or conduct research projects. International cooperation with foreign law schools helps Vietnamese law teachers to gain global legal knowledge by either

35 Irish (n 8) 249.

36 Ibid 252.

37 See HLU's website at: <http://doitachoptac.hlu.vn/SubNews/Details/1100> accessed 14 June 2017.

38 See School of Law, 'Cooperation and Development' (*Vietnam National University School of Law*, 4 February 2015) <http://law.vnu.edu.vn/article-Hop-tac-va-Phat-trien-Khoa-Luat----Dai-Hoc-Quoc-Gia-Ha-Noi-14073-1100.html> accessed 10 June 2017.

39 For more details, see Sidel and Pham (n 11) 17–24.

40 Ibid 17.

formal education or short visit, which contributes to the increase of teaching quality. The coming of international visitors is also helpful to both Vietnamese teachers and students in terms of access to global legal knowledge. Workshops supported by the international donors create opportunities for the exchange of views between Vietnamese and international scholars, which is useful for improving legal thinking and teaching.

C Analysis

1 *Contributing Factors to the Renovation of Legal Education In Vietnam*

Changes in the Vietnamese legal education system are driven mainly by the following factors: the commitment to the 'socialist rule of law state', economic renovation, and the 'new' law and development movement.

(a) The Socialist Rule of Law State

The change in legal education in Vietnam must be situated within the broader context of legal change in Vietnam. The framework for legal change in Vietnam in this century is the concept of 'socialist rule of law state.' Although the concept had been discussed earlier, it was constitutionally confirmed at the turn of the new century in 2001.[41] The concept underlines, among other things, governance according to the law. The commitment to the construction of a socialist rule of law state in Vietnam results in what John Gillespie calls 'juridification'.[42] Gillespie argues that, in response to the challenges of industrialization and post-industrialization, the state in Vietnam 'is increasingly relying on legal rules, legal professionals, and regulation – governance is undergoing juridification.'[43] The process of juridification 'does not merely denote the proliferation of laws and regulation, it also suggests structural changes in the way laws and regulation are used within society.'[44]

The construction of the socialist rule of law state and the process of juridification results in the need for legal personnel across different sectors. In 2001, the Institute of Legal Science under the Ministry of Justice conducted a survey to estimate the need for legal personnel in different sectors from 2001 to 2010. The report estimated the need as follows:

41 Constitution of Vietnam 1992 (Revised 2001), Art 2.

42 John Gillespie, 'Juridification of State Regulation in Vietnam' in John Gillespie and Albert Chen (eds), *Legal Reform in China and Vietnam* (Routledge 2010) 78.

43 Ibid 78.

44 Ibid.

TABLE 12.2 *The estimated need for legal personnel from 2001–2010*[a]

Sectors	Numbers	Percentage
Public Security	75500	57%
Professional Lawyers	18000	13%
Courts	15500	12%
Ministry of Justice	15000	11%
Procuracies	9500	7%
Legal Officials	500	0.4%
Social-political Organizations	100	0.08%
International Organizations	40	0.03%

a This data is based on Institute of Legal Science, 'Đánh giá Thực trạng và Nhu cầu Phát triển Công tác Đào tạo Pháp luật ở Việt Nam đến năm 2010' ('Evaluation of the Reality and the Need for Development of Legal Education in Vietnam until 2010') (2003) 4 Thông tin Khoa học Pháp lý 40.

The state's long-term project of building up the 'socialist rule of law state' results in its concern with the promotion of the role of professional lawyers. The promotion of the role of lawyers entails the renovation of legal education. The proliferation of law schools is partly a response to the need for lawyers. Yet, according to the above estimate, lawyers account for a small number (13%) in the aggregate need for legal personnel. Not only the courts and the procuracies, but also the public security system, the administrative system, the social political organizations, and other sectors also need 'standardization' (*tieu chuan hoa*) of its officials, which means acquiring a formal qualification. A law degree in particular meets the requirement of standardization in these sectors. The growing number of law schools is in significant part a response to the need of the state for juridification of governance and legal standardization of state officials, not only the need for more professional lawyers. In addition, local governments also need to standardize their personnel. In the context of the central government promoting governance according to the law throughout the nation, local officials tend to study law to meet the requirement of standardization. The emergence of provincial law schools stems from this practical need. Consequently, the political attempt to centralize legal education is conflict with the state and social need for legal personnel. This latter need has compelled the party-state to accommodate the decentralization of legal education.

The commitment to building up the 'socialist rule of law state' also explains the rise of a new generation of law teachers in Vietnam. Although some argue

that the Vietnamese concept of 'socialist rule of law state' has a Soviet origin,[45] most Vietnamese legal scholars consider the rule of law as a Western concept and turn to the Western world to comprehend its substances. This motivates young legal scholars to go overseas to obtain postgraduate study, and young Vietnamese-trained scholars to explore the ideas and institutions of the rule of law from Western scholarship through foreign languages, mainly English. Soviet-trained scholars have also turned to the Western understanding of the rule of law, mainly relying on translated works.

The political commitment to the 'socialist rule of law state', the actual process of juridification, and the growing number of law schools, as well as the emergence of a new generation of law teachers, have resulted in change in legal education from imitation of the Soviet model to renovation by incorporating some Western experiences. Renovation is therefore the result of 'new imitation': the shift of imitation from that of the Soviet world to that of the Western world. The consequences of this renovation or 'new imitation' are the creations of legal research centres which focus on Western law, the introduction of new courses on Western values of the rule of law, such as human rights or comparative law; the incorporation of Western legal concepts in teaching materials; the publication of a wide range of comparative legal issues in national law journals; and the willingness to collaborate with Western law schools.

(b) Economic Renovation

The implementation of the economic program of *Doi moi* has resulted in speedy economic growth in Vietnam. The change from a centrally planned economy to a market-based economy (albeit with socialist orientation) creates the need to change from governance by personal fiats to governance by law. The juridification of governance in Vietnam is therefore the consequence of the marketization of the economy. Marketization and juridification generate demand for legal education. The change to the socialist market economy requires public officials to acquire legal knowledge suitable for the governance of the economy according to the law.

Moreover, the transition to the socialist market economy also creates a need for legal education from the private sector. The liberalization of the economy as the result of the *Doi moi* program has resulted in the speedy growth of the private economic sector. Being aware of the state's trend of governing the economy according to the law, private companies are more concerned with legal knowledge. Therefore, they have an incentive to hire lawyers to ensure legality in their business activities. A number of law firms have been created

45 Gillespie, (n 42) 81.

to meet this demand. New law schools have been created to meet this need from the market. In addition, as the companies and the market are mainly concerned with commercial and private issues, the curriculum of legal education has been modified to meet this demand. Consequently, big 'branch law' subjects such as civil law have been separated into smaller subjects in order to be more specialized and intensive, and more elective courses concerning the market economy have been introduced.

(c) 'New' Law and Development Movement

In the new law and development movement in the post-Cold War era, 'governments, international organizations, private foundations, and law firms once again are investing millions of dollars in international legal assistance projects around the world.'[46] The assumption is that international assistance in legal and institutional reform can promote economic growth, social justice, and other developmental aspects in developing nations. As a developing nation, Vietnam has been affected by this movement: there are many international legal aid programs from international bodies like the UNDP, governments of developed nations, and other international organizations, which assist legal and political reforms in Vietnam. The renovation of legal education in the country is also in part affected by the 'new' law and development movement. Particularly, the development of international cooperation and several aspects such as the introduction of clinical legal education programs can be understood in the context of the effect of the 'new' law and development movement.

Yet, there are local factors that affect the extent to which law and development programs can assist legal education in Vietnam. To begin with, as the consequence of its colonial heritage,[47] Vietnamese law schools tend to maintain connections with several French legal education institutions, especially the law schools in the two national universities in Hanoi and Ho Chi Minh City. Several young law teachers were educated in French law schools on scholarships offered by the French government and organizations. The proximity of socialist law to civil law also affects international assistance to legal education in Vietnam. Many international donors to legal reform and legal education in Vietnam come from Europe. Under scholarships provided by foreign governments and organizations, several young Vietnamese law teachers have been educated in European nations with civil law systems, or other Asian nations where civil law is dominant (such as Japan or Thailand). Very few Vietnamese legal scholars have graduated from common law nations like the United States

46 Rose, (n 9) 93.

47 For a relevant discussion, see Chapter 1.

and the United Kingdom. However, there are more Vietnamese law graduates in Australia, a common law nation. Particularly through the Australia Awards – the international scholarships funded by the Australian Government – several young law teachers have received postgraduate degrees from Australian law schools.

(d) Constraining Factors on 'Genuine' Innovation

Although there are the aforementioned renovations, the legal education system in Vietnam is facing serious deficiencies. According to the report to the UNDP by Mark Sidel and Pham Duy Nghia, the problems in legal education in Vietnam include: (1) inadequate faculty and facilities; (2) 'a sparse, undertrained and over-burdened teaching corps that often functions on a part-time basis and that has little time for legal research or to provide the intellectual support for legal reform'; (3) 'students rarely learn practical skills, and have few opportunities to contribute to society and to the promotion of access to justice, social justice, and the rule of law'; and (4) the curriculum 'remains relatively inflexible and still over-dominated by central policy making.'[48] The legal education system in Vietnam has encountered several difficulties in resolving its problems.

Legal education is affected by the general circumstances of higher education in Vietnam.[49] Minister of Education and Training Phạm Vũ Luận has admitted that: 'Vietnam is now suffering from an excess of low quality universities and a lack of high quality ones.'[50] Ngô Bảo Châu, a Vietnamese mathematician at the University of Chicago, who was one of the founding members of the Education Dialogue Group in 2014, stated that: 'Higher education is perhaps the area that needs the most urgent fundamental and comprehensive renovation.'[51] One of the most serious problems confronting Vietnamese universities is their lack of institutional and financial autonomy. Legal education is hard to develop when 'the government still controls everything, especially the finances, and universities are unable to get money from the authorities for research, one of the keys

48 Sidel and Pham (n 11) 6–7.

49 See generally Grant Harman, Martin Hayden, Pham Thanh Nghi, *Reforming Higher Education in Vietnam* (Springer, 2010).

50 Hiep Pham 'Vietnam: Higher Education Quality Poor, Says Minister' (*University World News*, 4 December 2011) <www.universityworldnews.com/article.php?story=20111202223403 38> accessed 5 May, 2017.

51 Dong Nguyen, 'US Consulate General Hosts Conference On Vietnam's Higher Education Reforms' (*Tuoi Tre News*, 8 January 2014) <http://tuoitrenews.vn/education/21389/us-consulate-general-hosts-conference-on-vietnams-higher-education-reforms> accessed 5 May 2017.

to improving higher education,'[52] according to Minister of Science and Technology Nguyễn Quân.

Apart from the general situation of higher education, there are specific ideological, political and financial constraints on the development of legal education in Vietnam which will be examined below.

(i) *The Ideological Factor*

Bui Thi Bich Lien has discussed the ideological constraints on legal education in Vietnam. She points out 'the tension between a state ideology that insists on training students to become loyal state officials and a growing social demand for professional skills and globally relevant knowledge.'[53] Not only have the ideological and background subjects been dominated by socialist ideology; the branch subjects too have been shaped by socialist legal ideology although some Western concepts have been incorporated. The socialist legal ideology limits students' and teachers' ability and interest to search for global legal knowledge. Particularly due to the ideological constraint, Vietnamese law students and teachers are unfamiliar with many global thinkers like Ronald Dworkin, HLA Hart, John Finnis, and Lon Fuller, and non-socialist legal theories like non-Marxist legal positivism, legal realism, and critical legal studies. Partial and occasional incorporation of global legal knowledge may be possible, but the domination of socialist legal ideology tends to limit its systematic acquisition.

(ii) *The Political Factor*

The socialist legal system in Vietnam is a kind of political law, in which 'political process and legal process cannot be separated, in the sense having achieved autonomous fields of operation.'[54] The particular consequence of this on legal education is that it does not enjoy autonomy, which constrains its development. The political control of legal education is due to the need to produce law graduates who will serve, be loyal to, and legitimize the socialist regime. This control is also meant to preserve the socialist legal identity under the challenge of legal globalization. The diffusion of global legal knowledge into the domestic context may be inimical to the preservation of socialist values.

52 'Conference Highlights Obstacles In Reforming Higher Education System' (*Vietnam News*, 1 August 2014), <http://vietnamnews.vn/society/258257/conference-highlights-obstacles-in-reforming-higher-education-system.html> accessed 10 June 2017.

53 Bui Thi Bich Lien, 'Legal Education and Legal Profession' (n 3) 299.

54 Mattei (n 14) 27.

The political dependence of the legal education system in Vietnam is evident in the following aspects. To begin with, Vietnamese law schools lack autonomy to design their curriculum. While they may now introduce some elective courses, the main subjects (around 70% of the curriculum) are mandated by the Ministry of Education and Training.[55] In addition, Vietnamese law schools do not have autonomy to appoint faculty members to the position of professorship. University professorship in law, as well as in every other discipline in Vietnam, is bestowed to scholars at the state's discretion through the state's council of professorship and according to a complex procedure. So, law schools do not have liberty to attract and select the best law teachers.

As the consequence of the political law phenomenon, legal research in Vietnam is a kind of 'political jurisprudence.'[56] Legal research and teaching must be consistent with certain directive principles and policies adopted by the party and the state. The party's political documents and the state's law-making program operate as directive guidance for legal research and education.[57] Consequently, legal research and education in Vietnam arguablylacks an autonomous epistemological and methodological framework. In particular, there are certain sensitive issues that are not suitable for discussion in academic fora and classrooms, such as a multi-party system, the separation of powers, and civil society.

Fourth, for political reasons, it is hard to develop analytical skills in law students. Legal research and legal education in Vietnam are mainly descriptive and text-based, without serious analysis. That is in significant part because there are certain political barriers to legal analysis. Since law in Vietnam is tied so closely to politics, to analyse the working of the law means to understand political factors, motivations, and interests. It is hard to conduct such analytical discussions in academic fora and classrooms.

(iii) *The Financial Factor*

The lack of sufficient financial support from the state and domestic and international donors is the main cause of inadequate faculty and facilities in law schools. It should be noted that 'while a number of donors have programmes

55 Sidel and Pham (n 11) 8; Phạm Trí Hùng, (n 4).

56 I borrow this phrase from Stéphanie Balme and Michael W Dowdle, 'Introduction' in Stéphanie Balme and Michael W Dowdle (eds) *Building Constitutionalism in China* (Palgrave Macmillan 2009) 6. However, the meaning of the phrase is used differently in the present paper.

57 It is typical for a Vietnamese legal research paper to begin with the Party's perspective on the issue under consideration.

supporting professional training institutions in Vietnam, there have been few projects directly focused on strengthening legal education and research.'[58] Due to financial constraints, salaries for law faculty members are low, which explains why they are over-burdened with teaching to improve their financial situation and hence have less time for doing research. Financial constraints also disable law schools from attracting the best law teachers.

Materials for legal research and legal education are also limited, largely due to financial constraints. Particularly, English law books and legal databases like HeinOnline, Westlaw, and LexisNexis are luxuries for most Vietnamese law libraries. Financial constraints also limit Vietnamese law teachers from international co-operation. In particular, not many Vietnamese law schools can provide funding for their faculty members to study overseas or attend international conferences.

Financial constraints have also resulted in the commercialization of legal education. Law schools, especially young law schools, need financial improvement, and this may lead them to commercialize their educational product and neglect the quality. Law schools have admitted a number of students (especially part-time students) who are bureaucratic officials in need of standardization. In particular, newer law schools do not have sufficient faculty members and have to hire faculty members from major law schools to work on a part-time basis. This commercial situation negatively affects the quality of legal education. The commercial incentive to law schools allows even a banana-seller to obtain a law degree.

D Conclusion

Legal education in Vietnam has witnessed renovative changes. There are both positive and negative factors affecting the situation of legal education in Vietnam. This study does not pursue normative suggestions for dealing with the difficulties. Yet, some prospective observations can be offered.

To begin with, the continuing development of legal education in Vietnam depends on the party and state's policies for reformation of higher education. In particular, there is evidence indicating that the Government is allowing universities to have partial institutional autonomy. Some universities in Ho Chi Minh City have been granted a certain level of autonomy, such as UEH and Ton Duc Thang University. In particular, the Government's granting of autonomy allowed UEH Law School to take the audacious step of introducing a

58 Sidel and Pham (n 11) 17.

new compulsory course, Legal Theory, which teaches legal theories of Western thinkers and uses English textbooks. In addition, the party and state's policies for legal reform are important. The continuing political commitment to the promotion of the Vietnamese version of the rule of law (the 'socialist rule of law state') may put further pressure on the reformation of legal education in Vietnam.

If the difficulties mentioned above can be alleviated, innovation in the legal education system in Vietnam may be possible. Learning from the global experience of legal education both from Western law schools and Asian law schools (especially excellent law schools in Singapore, Japan, Korea, Hong Kong, and mainland China)[59] may be useful for Vietnam's move from imitation and renovation to innovation. However, learning does not mean copying or blind imitation. Theories of learning in sociology 'tend to view learning as a complex cognitive process rather than a simple information updating. Learning does not just generate new truths, but also generates new beliefs.'[60] Consequently, 'actors "internalize" new norms and rules of appropriate behaviour and redefine their interests and identities accordingly.'[61] So, creative learning can generate innovation: new truths, new beliefs, and new models. Among other things, innovation in legal education in Vietnam can be achieved by the creative integration of global experience with the domestic legacy of legal education and the experience of the renovated socialist legal education in contemporary Vietnam.[62]

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59 See Chapters 6, 7, 8, and 11.

60 Benedikt Goderis and Mila Versteeg, 'The Diffusion of Constitutional Rights,' (2014) 39 International Review of Law and Economics 3.

61 Ryan Goodman and Derek Jinks, 'How to Influence States: Socialization and International Human Rights Law,' (2004) 54 Duke Law Journal 635.

62 I thank Professor Andrew Harding for suggesting the idea of considering the legacy of domestic legal education.

CHAPTER 13

Legal Studies at Thammasat University: A Microcosm of the Development of Thai Legal Education

Munin Pongsapan

A Introduction

The ASEAN Economic Community, commencing in 2015, presented Thammasat University with an opportunity to take a leading role once more in devising educational innovation to meet the social, political and economic challenges facing Thailand. The University has, from its founding, been a main player in the legal-education system which formally began when the Law School of the Ministry of Justice was established in 1897. The establishment of the first law school was a major step forward for the country, which was in urgent need of a modern legal system to end Western powers' consular jurisdiction and to escape from colonisation. The curriculum and styles of instruction were overwhelmingly influenced by English jurisprudence. This dominance in the early stages of Thai legal education, however, contrasted with the government's policy to adopt European codes as the model for the country's codification.

It was not until the founding of Thammasat University in 1934 that there was a shift from English to French-oriented legal education. Monopolising Thai legal education for more than thirty-five years, Thammasat University provided the template for the Thai law schools established subsequently. Its curriculum was even adopted by the Institute of Legal Education of the Thai Bar, which was established in 1948 with the main aim of providing vocational legal training in the same fashion as the English Inns of Court. However, in a stark diversion from its original purpose, the Institute seems to have repeated what had already happened at law school; itplaced the emphasis on expounding the judicial application of legal rules rather than producing practical lawyers. The absence of a government agency with the power to regulate legal education in Thailand means that the development of Thai legal education has effectively been directed by the Thai Bar, which has regulatory authority over the qualifications of prospective judges and public prosecutors. The strict academic requirements for law graduates who wish to be barristers, judges and public prosecutors seem to leave no room for innovation. It is a true challenge

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for Thai law schools to clear this hurdle to catch up with the global development of legal education and successfully respond to a changing society.

B Thailand's First Law School

Alan Watson observed that:

> For law to be changed there must be a sufficiently strong impulse directed through a Pressure Force operating on a Source of Law. This impulse must overcome the Inertia, the general absence of a sustained interest on the part of society and its ruling élite to struggle for the most 'satisfactory' rule.[1]

This statement seems to explain adequately how legal change in Thailand was triggered in the nineteenth century when commercial and military expansionism forced the Thai government to sign a treaty with Great Britain known as the Bowring Treaty of 1855. This treaty marked the beginning of the system of extraterritoriality in Thailand[2] and became the model for a series of treaties with other Western countries. Consular jurisdiction eventually proved to be disastrous to the Thai government as it came to be seriously abused by some Western powers. As a result, King Rama V (Chulalongkorn) and his government felt a strong impulse to modernise their traditional law in order to regain full judicial autonomy.[3] The external challenge alone, however, is not sufficient to account for these changes. Contact with Westerners also helped the ruling elite to identify defects and the inadequacy of the Thai legal system, a product of the Hindu law of Manu with its spirit grounded in Theravada Buddhism.[4] External pressure and internal motivation effected a major change in Thai society in general, and the modernisation of Thai law in particular. The reform

1 A Watson, 'Comparative Law and Legal Change' (1978) 37 CLJ 313, 331.

2 FB Sayre, 'The Passing of Extraterritoriality in Siam' (1928) 22 AJIL 70, 70.

3 P Kasemsup, 'Reception of Law in Thailand – A Buddhist Society' in M Chiba (ed), *Asian Indigenous Law: In Interaction with Received Law* (KPI 1986) 291; DM Engel, *Code and Custom in a Thai Provincial Court: The Interaction of Formal and Informal Systems of Justice* (UA Press 1978) 1.

4 S Boonchalermvipas, **ประวัติศาสตร์กฎหมายไทย** (Thai Legal History) (Winyouchon 2005) 86–87; S Viraphol, 'Law in Traditional Siam and China: A Comparative Study' (1977) 65 JSS 81, 93; T Masao, 'Researches into Indigenous Law of Siam as a Study of Comparative Jurisprudence' (1905) 2 JSS 14, 15; AB Griswold and P Na Nagara, 'A Law Promulgated by the King of Ayudhyā in 1397 A.D.: Epigraphic and Historical Studies, No. 4' (1969) 57 JSS 109, 109.

of the legal system began with the reorganisation and Westernisation of the judicial system, and later the first law school was established. Codification was the last stage of the modernisation of Thai law.

A formal educational system did not exist in traditional Thai society. Until the nineteenth century when modern schools were established,[5] most Thai men were educated by Buddhist monks at Buddhist temples.[6] Some young royals and elites may have had the privilege of studying law at residences of senior government officials who possessed legal knowledge usually acquired from their routine work.[7] This can only be considered to be informal legal education. Given that there was no legal profession in pre-modern Thailand, the absence of formal legal education is understandable. Before judicial Westernisation, judges were governors in provincial cities and ministers or heads of government departments in the capital.

Following the reform of the judicial system, Gustave Rolin-Jacquemyns proposed Western education programmes for King Chulalongkorn's sons,[8] including Prince Rabi, who spent two years studying Latin, English and French in Edinburgh between 1886 and 1888[9] and went back to Great Britain for a second time to study law at Oxford between 1891 and 1894.[10] In 1897, the Belgian General Advisor recommended that the king should establish a law school to produce professional judges and lawyers.[11] King Chulalongkorn accepted this recommendation and in the same year Prince Rabi, then Minister of Justice, established the first law school in Siam. The law school was not a government

5 L Amarinratana, 'การส่งนักเรียนไปศึกษาต่อต่างประเทศตั้งแต่ พ.ศ. 2411–2475 (The Sending of Students Abroad from 1868–1932)' (MA Thesis, Chulalongkorn University 1979) 21–26.

6 D La Loubère, *Kingdom of Siam* 58; DK Wyatt, *Studies in* **Thai** *History: Collected Articles* (Silkworm Books 1994) 223; J Bunnag, 'Loose Structure: Fact or Fancy? Thai Society Re-examined' (1971) 59 JSS 1, 4; J Low, 'On the Laws of Muung Thai or Siam' (1847) 2 JIAEA 329, 381.

7 D Leelamien, 'การศึกษากฎหมายในประเทศไทยตั้งแต่การปฏิรูประบบกฎหมายและการศาลในรัชสมัยพระบาทสมเด็จฯ พระจุลจอมเล้าเจ้าอยู่หัว (Legal Education in Thailand since the Modernisation of Thai Law during the Reign of King Chulalongkorn)' in Bar Association (ed), *100 ปี โรงเรียนกฎหมาย* (A Hundred Years of the Thai Law School) (Institute of Legal Education of The Thai Bar 1999) 49.

8 ibid 88.

9 National Archive of Thailand, Department of the Royal Private Secretary, Special Book No 17, 'หนังสือจากกรมหลวงเทวะวงศ์วโรปการถึงพระยาไชยสุรินทรและหมอกาแวน (Letter from Prince Devavonse to Phraya Chaisurindhorn and Dr Peter Gawan) (29 June 1885) 99–100.

10 N Tatsaro, *พระเจ้าบรมวงศ์เธอพระองค์เจ้ารพีพัฒนศักดิ์กรมหลวงราชบุรีดิเรกฤทธิ์* (Prince Rabi) (Nanmee Books 2006) 83.

11 L Kriruk, *เรื่องของเจ้าพระยามหิธร* (Chao Praya Mahidhorn's Stories) (Trironnasarn 1956) 51.

body[12] but rather a private school of the prince, who took care of its administration and curriculum himself; it was run in the Ministry of Justice's premises.[13] Since the school was associated with the Minister and the Ministry of Justice, it was known as the Law School of the Ministry of Justice. The school mainly taught English law and some traditional Thai law, especially on the Three-Seals Code.[14] Prince Rabi gave lectures on various subjects and authored several books on the principles of English law used at the school.[15] Civil-law lectures were sometimes given by visiting European legal advisors of the Thai government.[16] Those who passed the final examinations of the law school were recognised as Thai barristers,[17] and almost all of them served as judges in different courts.[18] Given the Prince's academic background, his profound influence at the Ministry of Justice and the Law School, and the general trend towards sending Thai students to study law in England, the predominance of English law in Thai legal education before codification is not surprising. It is also not unexpected that the lawyers and judges produced by the first Thai law school were learned men of English law.

The dominance of English law in the early stages of legal education in Siam apparently contrasted with the Thai government's policy to adopt European codes as the model for modern Thai law, and the dominance of common law displeased French diplomats and advisors. This is illustrated by the proposal for a reform of legal education in Thailand made by Georges Padoux, a French legislative adviser to the Thai government and the head of the draftsmen of the Thai Penal Code of 1908 and the civil and commercial code. Four years after the first code – the Penal Code of 1908, which was mainly modelled on European codes – came into force, Padoux submitted a memorandum on the 'Question of Legal Education in Siam' to the Minister of Justice. He described the legal education system in Siam at the time, saying:[19]

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12 Luang Saranaiprasas, *พัฒนาการการศึกษากฎหมายในประเทศไทย* (The Development of Legal Education in Thailand) (Thammasat University 1956) 3.

13 Leelamien (n 7) 79.

14 T Kraivixien, *การปฏิรูประบบกฎหมายและการศาลในรัชสมัยพระบาทสมเด็จฯพระจุลจอมเกล้าเจ้าอยู่หัวพระปิยะมหาราช* (The Reforms of Law and Judicial Administration during the Reign of King Chulalongkorn) (Ministry of Justice 1968) 28.

15 Leelamien (n 7) 82.

16 National Archive of Thailand, 'Georges Padoux's Memorandum on the Question on Legal Education in Siam' (20 Dec 1913) Kor Tor 35.10/10, 142.

17 Leelamien (n 7) 87.

18 ibid 95–97.

19 It is worth noting that by 1913, when Padoux submitted his memorandum, Prince Rabi no longer held any position at the Ministry of Justice and the Law School.

> The largest number have been educated in Bangkok or have taken their degrees in the Bangkok law school [the Law School of the Ministry of Justice]. They have learned the [Thai] Family, Inheritance and Land law from [Thai] professors. As to the general theories of law, lectures have been delivered in the Bangkok law school by [Thai] lawyers educated in England or sometimes by European Advisers. Those who know the English Language have completed their training by reading English Law books. The best men have been sent to England where they have spent several years studying English law finally being admitted as Barrister–at–law. In one way or the other the technical training of the [Thai] Judges is almost exclusively based on English methods and English Law.[20]

Padoux saw Japanese legal education as a good example of a legal-education system that was consistent with the style of codes which were mainly modelled on European codes and kept a balance between the three major systems – German law, French law and English law – each of which had a native professor at the Japanese law school.[21] He found the current law programme at the Thai law school inadequate and therefore proposed a reform of legal education modelled on a European programme of law.[22]

> Now, it is a very important point for the [Thai] Government that the new legal system to be derived from the Codes be properly applied. The enactment of a large and comprehensive body of Civil, Commercial and Criminal Law would have but an unsatisfactory effect if the Judges entrusted with the decision of the cases were not familiar with the spirit and characteristics of the Code system.[23]

The proposal was readily approved by King Chulalongkorn's successor, King Rama VI (Vajiravudh).[24] Two changes were introduced.[25] First, the government began to send Thai students to study in other Western countries, namely France and the US, and, second, it attempted to reform the curriculum. However, the

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20 National Archive of Thailand (n 16) 142.

21 ibid 149.

22 ibid.

23 ibid 145.

24 National Archive of Thailand, Ministry of Justice Doc No Yor 1/1, 'พระราชหัตถเลขาพระบาทสมเด็จพระมงกุฎเกล้าเจ้าอยู่หัวพระราชทานกรมหลวงสวัสดิ์วัตนวิศิษฎ์ (Letter from King Vajiravudh to Prince Svastiwatvisit)' (18 March 1913).

25 Leelamien (n 7) 111.

changes did not produce any dramatic effect, as we can see from the number of Thai students who were sent to study law abroad between 1913 and 1925. Out of sixteen students, twelve students went to England and only four studied in France and in the US.[26] One of these four students was Pridi Banomyong[27] who was sent to France in 1920 and who later became instrumental in the rise of French jurisprudence in the Thai legal system.[28] The curriculum especially in relation to private law did not undergo a significant change since Thailand did not have a civil and commercial code until 1923. We also need to consider that by the time the changes were introduced almost all the Thai judges were already familiar with English law.

A major reform of Thai legal education took place after the promulgation of the Civil and Commercial Code of 1923, the controversial code of French draftsmen, which was repealed two years later. In 1924, the king set up a council of jurists called the Council of Legal Studies to administer the Law School of the Ministry of Justice and its programmes of studies in accordance with the civil law system.[29] The Council introduced French law courses as alternatives to English law courses. English law was no longer the predominant foreign law taught at the Law School, but the new legal-education policy did not significantly reduce English law's influence. The Law School, in fact, kept a balance between these two legal systems since in each of the first three terms law students had to study certain foreign law courses, including both English and French.[30] The reason for maintaining English law and introducing only French law as an alternative foreign law to the former was political. The British agreement of 1925 required that the Thai government hire English law professors to teach at the Law School and, in the absence of Thai civil and commercial law, the Thai courts had to apply English law[31] whereas France asked the Thai

26 National Archive of Thailand, Ministry of Justice Doc No Yor 2 10/3, 'จำนวนนักเรียนไทยไปศึกษากฎหมายในต่างประเทศระหว่าง 22 มีนาคม 2455 และ 22 พฤษภาคม 2468) (The Number of Thai Students Sent to Study Law Abroad between 22 March 1913 and 22 May 1925)'.

27 Pridi Banomyong (1900–83), a doctor of law from Paris, was a leader of the revolution of 1932, which changed the system of government from an absolute monarchy to a constitutional monarchy. He was Prime Minister briefly in 1946. He established Thammasat University to promote free higher education and democracy in 1934.

28 C Sawaengsak, *อิทธิพลของฝรั่งเศสในการปฏิรูปกฎหมายไทย* (French Influence on the Reforms of Thai Law) (Nititham 1996) 117.

29 Government Gazette (10 August 1924) Book 41, 53–55.

30 Luang Saranaiprasas (n 12) 43–46.

31 Ministry of Foreign Affairs, Letter from Prince Tridos to Chao Phraya Mahidorn (2 July 1925), cited in S Foran, 'การแก้ไขสนธิสัญญาว่าด้วยสิทธิสภาพนอกอาณาเขตกับประเทศมหาอำนาจในรัชสมัยพระบาทสมเด็จพระมงกุฎเกล้าเจ้าอยู่หัว (The Amendment of Extraterritoriality

government to establish a department of legislative redaction, reform the curriculum, and hire Frenchmen to be the managing director and law professors of the Law School, and a legislative adviser to the Ministry of Justice.[32]

C Thammasat University's Monopoly of Legal Education

The Thai Revolution of 1932 marked a crucial turning point in twentieth-century Thai history. Pridi Banomyong, the architect of the revolution, along with a group of young military commanders and civilians successfully forced King Prachadhipok to adopt a new political regime: constitutional monarchy. The revolutionists announced an ambitious plan to make education available to all citizens, ending the monopoly of higher education by Chulalongkorn University, the country's first university, which had admitted less than 100 students per year.

The establishment of Thammasat University as an open university in 1934 was the revolutionists' main strategy to promote democracy and the rule of law, and renew legal education in Thailand. In 1933 the Government abolished the Law School of the Ministry of Justice and established the Faculty of Law and Political Science at Chulalongkorn Unversity to assume responsibility for providing legal education.[33] Nevertheless, in the next year, on Pridi's initiative, Thammasat University[34] was founded, and it took over Chulalongkorn University's Faculty of Law and Political Science.[35] In its first academic year, Thammasat University admitted more than 7000 students. Pridi became the first President of Thammasat University and exerted a profound influence over the university's management and administration of education.[36] Thammasat University's curriculum of legal studies was considerably remodeled to accord

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Clauses between the Thai and Foreign Governments during the Reign of King Rama VI)' (Chulalongkorn University 1959) 181.

32 ibid 158–59.

33 P Kowilaikul, 'การศึกษากฎหมายในคณะนิติศาสตร์จุฬาลงกรณ์มหาวิทยาลัย (Legal Education in Chulalongkorn University Faculty of Law)' in Bar Association (ed), *100 ปี โรงเรียนกฎหมาย* (A Hundred Years of the Thai Law School) (Institute of Legal Education of The Thai Bar 1999) 130.

34 The original name of Thammasat University (มหาวิทยาลัยธรรมศาสตร์) was the University of Moral and Political Science (มหาวิทยาลัยวิชาธรรมศาสตร์และการเมือง). The name was changed by the military government after a *coup d'état* in 1947.

35 Thammasat University Act BE 1934, s 5.

36 Sawaengsak (n 28) 136. See also C Kasetsiri, 'ปรีดีพนมยงค์กับมหาวิทยาลัยธรรมศาสตร์และการเมือง (Pridi Banomyong and the University of Moral and Political Sciences)' in

with the civil law system, especially French law.[37] As a result, the influence of English common law in Thailand faded away, despite the fact that many Thammasat law professors were judges who were educated in England or had been students of English law. French law eventually replaced English law as the predominant foreign jurisprudence in Thailand. By 1987, France was the most popular destination for higher legal education among Thammasat law academics.

Until 1971, Thammasat University had been virtually the only Thai university offering law degrees.[38] The university had only one undergraduate degree entitled *Thammasat Bundit*, which focused on legal studies. The compulsory undergraduate courses consisted of Introduction to Law, Administration of Courts, Constitutional Law, Electoral Law, Administrative Law, Criminal Law, Civil and Commercial Law, Public International Law, Private International Law, International Criminal Law, Civil Procedure Law, Criminal Procedure Law, Bankruptcy Law, Evidence Law, Economic Theories, Economics, Public Finance Law, and Law of Government Organisation. The university also offered postgraduate degrees in law, political science, economics, and international relations.[39] The integrated undergraduate degree programme became popular among young progressive Thais and was successful in producing well-rounded men and women to serve the government. The popularity and success of Thammasat University later proved to be a threat to the military government which came into power in 1947. To weaken its academic strength, the government took control of the university's administration and reformed the curriculum. Four faculties, namely the Faculty of Law, Faculty of Commerce and Accountancy, Faculty of Political Science, and Faculty of Economics, were founded, each of which operated its own undergraduate and postgraduate programmes. The integrated undergraduate degree, hence, came to an end.

The reform of the curriculum in 1949 saw a significant increase in the number of compulsory courses, and laid the foundations for later curriculums. The undergraduate program was structured around four academic years. From Year One to Year Three, the students needed to enroll in nine to ten compulsory law

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T Petchlertanan (ed) ปรีดี ปวย *กับธรรมศาสตร์และการเมือง* (Pridi and Puey and the University of Moral and Political Sciences) (Thammasat University Archive 2006) 10–30.

37 Thammasat University, *แนวทางการศึกษาชั้นปริญญาตรีโทและเอกของมหาวิทยาลัยวิชาธรรมศาสตร์และการเมือง* (Bachelor, Master and Doctoral Programmes of Thammasat University) (Sri Krung 1934) 1–69.

38 Ramkhamhaeng University was established in 1971 with a law degree offered, and in 1972 Chulalongkorn University successfully established a law faculty.

39 Thammasat University Act BE 2476.

courses. In the final undergraduate year, five compulsory courses were taught.[40] In 1962, the Faculty of Liberal Arts was founded in Thammasat University, which shortly afterwards required all students from any faculty to spend their first two years studying general courses operated by the newly-established faculty. However, this requirement was sharply criticised for forcing law students to waste their time on non-law courses. In 1966, the university decided to reduce the length of general studies to one year. During the first year, the students would devote their time to liberal arts and would begin studying law from their second year. Some minor changes were introduced, but the structure of the law undergraduate curriculum remains largely intact.[41] In terms of credit points, Thammasat University's four-year undergraduate program in law is intensive. To complete the degree, it requires students to earn thirty credits from general courses during the first year, ninety two credits from compulsory law courses, and twenty-four credits from elective courses. A course usually has three credits, each of which accounts for one hour of teaching per week. For a three-credit course, the lecturer is therefore required to teach three hours per week for 15–16 weeks.

As the country's oldest continuously operating law faculty, Thammasat University's Faculty of Law has become a model for Thai law schools established subsequently. Its law undergraduate curriculum, in particular, was the blueprint for other curriculums and was recognised by the Thai Bar as the standard Bachelor of Law qualification for those who wished to be a barrister. Any LLB degree to be accredited by the Thai Bar must resemble the Thammasat

40 The courses offered in Year One are (1) Introduction to Law, (2) Administrative Law, (3) Economics, (4) Constitutional Law and Electoral Law, (5) Public International Law, (6) Legal History, (7) Criminal Law I, (8) Law on Persons, and (9) Property Law. The courses offered in Year Two are (1) Criminal Law II, (2) Juridical Acts and Contract Law, (3) Obligations, Tort and Unjust Enrichment, (4) Sales, Exchanges, and Gifts, (5) Securities Law, (6) Loans and Deposit etc, (7) Leases and Hire Purchase etc, (8) Family Law, (9) Private International Law, and (10) Land Law and Law on Natural Resources. The courses offered in Year Three are (1) Criminal Law III, (2) Bills of Notes and Insurance Law, (3) Company Law, (4) Law on Agency, (5) Law on Succession, (6) Administration of Courts, (7) Criminal Procedure Law, (8) Civil Procedure Law and Bankruptcy Law, and (9) Law on Evidence. The courses offered in Year Four are (1) Comprehensive Criminal Law, (2) Comprehensive Civil Law, (3) Comprehensive Criminal Procedure Law, (4) Comprehensive Civil Procedure Law, and (5) Judiciary Act, Public Prosecutor Act and Lawyer Act.

41 K Vachanasvasti, 'การศึกษากฎหมายในมหาวิทยาลัยธรรมศาสตร์' (Legal Education in Thammasat University) in Bar Association (ed), *๑๐๐ ปีโรงเรียนกฎหมาย* (A Hundred Years of the Thai Law School) (Institute of Legal Education of The Thai Bar 1999) 145.

model.[42] For this reason, the similarity of law undergraduate curriculums in Thailand is not surprising; Thai law students focus their first year on general courses before being required to take an excessive number of law courses for another three years.

Despite being the pioneer of legal education in Thailand, Thammasat University seems to have lost its leadership in educational innovation. Even though many new elective courses have been added to its Bachelor of Law curriculum to respond to social, economic and educational changes, its structure and compulsory courses remain nearly the same. Until recently, no major innovations were introduced to the curriculum. Thammasat University changed from the leader of innovation to a follower of new prominent players in the development of legal education – the Thai Bar, the Institute of Legal Education of the Thai Bar, and the Judicial Committee.

D The Dominant Role of the Thai Bar, and the Institute of Legal Education of the Thai Bar, and the Judicial Committee in Reshaping Legal Education in Thailand

The Thai Bar, as an organisation, was founded 17 years after the establishment of the Law School of the Ministry of Justice. However, the 'barrister qualification' can be traced back to the early days of the Law School. Its students who passed the Law School's final examinations would become barristers. They could then start out on their legal careers. Even though there were no regulations on the legal profession, judicial positions were usually filled with those who held legal qualifications, either domestic or foreign. When it was established in 1914, the Thai Bar was intended to administer legal education and exercise regulatory controls on lawyers' ethics. In fact, the Thai Bar's involvement in the administration of legal education was limited to law school admission. The Law School of the Ministry of Justice had its own management which had full control of its academic and administrative affairs.[43] However, the management team normally comprised senior judges who were usually concurrently members of the Council of the Thai Bar. The Council, as the governing body, has always been dominated by the judiciary. The President of the Supreme Court is *ex officio* the President of the Council of the Thai Bar.

42 Regulations of the Thai Bar B.E. 2507, Art 5.

43 Thai Bar, *80 ปี เนติบัณฑิตยสภา 1 มกราคม 2538* (80th Anniversary of the Thai Bar, 1 January 1995) (Amarin Printing 1995) 106.

The Thai Bar began to play a more active role in legal education after the Institute of Legal Education, as its educational arm, was established in 1948. The Institute was originally intended to provide practical training for law graduates mainly from Thammasat University, the successor of the Law School of the Ministry of Justice, and to administer bar examinations. This move met with protest from the university's students who were, before 1952, automatically qualified as barristers upon graduation.[44] The establishment of the Institute of Legal Education ensured that all Thai barristers had passed a one-year training programme and bar examinations. However, in a stark divergence from its original purpose, the Institute's one-year training programme turned into a repetition of what had already happened at law school. Most of the courses taught in the undergraduate programme are taught again at the Institute by lecturers, most of whom are senior judges, with emphasis on expounding the judicial application of legal rules. After one year of studying substantive law in the first semester and procedural law in the second semester, the students have to take bar examinations divided into four parts, namely civil law, criminal law, civil procedure, and criminal procedure. The substantive law parts are examined after the first semester finishes, while the procedural law exams take place upon completion of the second semester. In short, in Thailand, the bar examinations are rather a test of theoretical knowledge acquired at law school and the understanding of the Supreme Court judges' application of legal rules.

With the focus on theoretical knowledge rather than practical experience, being a barrister in Thailand is not a permit for practising law. The bar qualification merely qualifies the holder for the judge's and public prosecutor's exams. Law graduates who wish to practise law, especially to represent clients in court, need a lawyer's licence which is issued by a separate professional body, the Lawyers Council. To obtain a lawyer's licence, a law graduate needs to have a year of apprenticeship and pass a written examination on practical skills. To be a legal consultant, no specific qualification is required. Even a law student can give legal advice. The Lawyer Act only prohibits anyone without a lawyer's licence from being involved in civil and criminal procedures.[45]

As the Thai Bar's curriculum and examination format have become fixed and nearly unchanging, Thai law schools are reluctant to depart from their accredited undergraduate programmes. Any major change in the curriculum means a risk of losing recognition from the Thai Bar. Even at Thammasat University Faculty of Law, which produced the standard for the Thai Bar's accreditation, attempts to introduce major reforms to the Bachelor of Law curriculum,

44 Saranaiprasas (n 12) 105.

45 Lawyer Act BE 2528, s 33.

for example, the reduction of the period of study from four to three years and the creation of the five-year-bachelor-plus-master-of-law programme, failed. The main reason of the failure was faculty members' concern that the changes would not be accepted by the Thai Bar and the Judicial Committee.[46]

Despite having no direct role in legal education, the Judicial Committee's regulatory controls on the recruitment of judges have had a profound impact on the direction of its development. Given the fact that the judicial career has been perceived by many Thais as the most respected, most secure, and best paid legal career and become the favourite dream of most law students, any move of the Judicial Committee in relation to the academic qualification of prospective judges is being watched closely by university educators. Judges are selected mainly by written exams. An interview is also conducted, but failure at this stage is rare. A judge's entire career is largely determined by his or her performance in the written and oral exams. A candidate who is younger than others of the same class[47] and ranks first in the judge exams will become the President of the Supreme Court if he or she behaves well and is mentally and physically in good health. The rank of judges of the same class must strictly accord with their exam performance.[48] Some see this selection system as the most appropriate for a country which has long struggled with corruption.

Before 1978 the academic requirement for a judge was mainly a bachelor's degree in Law and the Bar qualification. Some practical experience was also required, but this was not taken seriously by the candidates and even the selection committee itself, as candidates were mainly tested on their theoretical knowledge of various law subjects which were taught at the Institute of Legal Education of the Thai Bar. The Court of Justice subsequently realised that they needed judges with specialised knowledge of law, so a special selection track was created. The new scheme allows those who have a domestic master of law degree from a programme of study which lasts at least two years. This new opportunity led to an increasing popularity of domestic master of law programmes. Besides, in response the growing demand for judges who were proficient in English and who had mastered foreign laws, the Judicial Committee

46 The Judicial Committee is the governing body of the Court of Justice, the country's main judicial system which deals with all kind of disputes except for constitutional and administrative cases which fall under the jurisdiction of the Constitutional Court and the administrative courts. The Judicial Committee is *ex-officio* chaired by the President of the Supreme Court and comprises twelve other senior judges elected by their peers, and two non-judge members selected by the Senate. It is in charge of regulating the recruitment, promotion and punishment of judges.

47 The minimum age for being a judge is 25.

48 Judicial Administration of the Court of Justice Act BE 2543, s 31.

launched another selection track for those who held a bachelor's degree in law from a programme of study which lasted at least three years, or one or two master's degrees in law with at least two years of study in total, from a foreign country. The invention of this special track saw a sharp increase in the number of law graduates who went abroad to pursue two master of law degrees as it was the least competitive compared to the other two schemes and the success rate of candidates during the early years was more than ninety percent.

The creation of the two special-selection tracks was initially seen as a stimulus to legal- education development. However, it later proved to be rather a barrier to innovation in higher education. On the surface, it seems to be a good idea to have judges who specialise in new areas of law, such as intellectual property, international commercial law, environmental law, and tax law, or those who have mastered foreign laws. And this would arouse law students' interest in emerging legal disciplines and encourage law schools to open new specialised programmes of study. In fact, what distinguishes between the foreign-degree, domestic-master-of-law, and bachelor-of-law tracks is the number of English language examination questions.

Those who hold a master's degree in law will not be tested specifically on their specialised legal knowledge. The candidates of all three main tracks will be tested on their theoretical knowledge of the same core subjects of law, namely civil and commercial law, criminal law, civil procedure, criminal procedure, law of evidence, and the English language. The applicants of the foreign-degree track are required to choose one more question on administration of courts of justice, law concerning municipal courts and their procedure, constitutional law, law concerning juvenile and family courts and their procedure, intellectual property law, tax law, labour law, bankruptcy law, international commercial law, or consumer protection procedure, while the applicants of the bachelor-of-law and domestic master-of-law tracks will have some more compulsory questions on the subjects earlier mentioned.[49]

Two dividing lines between the three main types of judge examination are: the number of questions on compulsory law subjects, and the number of questions on the English language. The applicants of the bachelor-of-law track will have 28 questions, including one question on the language, each of which accounts for ten points. The number of examination questions for the applicants of the domestic master-of-law track reduces to 17, including two compulsory questions on the English language. They can, however, choose to do one more question on the language instead of a law subject. In total, the

49 Judicial Committee's Regulations on the Application, Selection, and Examination of Judge-Trainees Act BE 2558, ss 11, 25 and 28.

language test comprises up to 30 points out of 170 points. By comparison, the applicants of the foreign-degree track can benefit most from their English proficiency as its three compulsory English questions account for 60 points out of 170 points. This English language test concerns the translation of legal passages from Thai to English and *vice versa* and an analysis of a problem-solving question. In all three tracks, the candidates require 50 percent of the total points to pass the written examination. The oral examination, though having a score, is rather ceremonial. It is rare that a candidate who passes the written examination fails the interview.

It is true that the foreign-degree track encourages hundreds of law graduates to study abroad each year, especially in English speaking countries or in postgraduate programmes taught in English. But it is unfortunate that what they learn from foreign legal systems is largely irrelevant to the judge examinations, which focus more on their English writing skills. This can be seen as a wasted opportunity to recruit a genuine expert on foreign law or a specialised area of law. A more undesirable outcome is that the system creates hunger for degrees rather than for knowledge. However, the most controversial outcome is the concern, held by many, about inequality between the poor and the rich who can afford two foreign master of law degrees.

The domestic master of law selection examination is also highly controversial and has been producing detrimental effects on the administration and development of postgraduate programmes in law. The existence of this examination system helps significantly increase the number of students in master of law programmes in many Thai law schools. Despite the recognition of different specialized programmes, the Judicial Committee imposes a minimum academic requirement that the applicant must pass certain basic law courses, for example, civil and commercial law, criminal law, and procedural law. This makes the students focus their attention on passing the required law courses rather than building up genuine interest in a particular area of law. It is normal for law schools to divide their master of law programme into various specialised areas. At Thammasat University Faculty of Law, the Master of Laws programme is split into eight specialized programmes of study, namely civil law, commercial law, criminal law, public law, international law, tax law, international commercial law, and environmental law. Each specialized programme requires its students to take five core courses. The students need to choose three elective courses. A long list of available elective courses relating to each specialized programme is offered to the students, but most of them choose courses which enable them to apply for the judge examinations. As a result, most elective courses in each specialized programme are abandoned by its own students. Attempts to limit the students' choices of elective courses

to those offered by their specialized programme have always failed as many feared that this would result in a significant drop in the number of applicants.

Regardless of their differences in educational backgrounds, all applicants of the same selection track will have the same questions on the same subjects of law. It is therefore reasonable to believe that the Judicial Committee's regulations on judge examinations do not encourage diversification and specialisation of legal education but discourage any introduction of innovation to the accredited degree programme. It is understandable that law schools are reluctant to make changes to their master of law curriculum for fear of losing accreditation from the Judicial Committee, and most prospective students who wish to be a judge or a public prosecutor.[50]

E Law Degree Programmes Entirely Taught in English: Innovative Experiments

With Thailand's ever-increasing levels of global economic interdependence propelled by international trade and investment, English is becoming the common language adopted by native speakers of different languages to communicate. English has played an important role in assisting ASEAN Member States fulfill their AEC aspirations. The prospect of Thailand's domestic business landscape shifting toward a regional or international orientation based on the AEC raises concerns that language may be a trade barrier facing Thai business lawyers. For Thai legal practitioners preparing to catch the ASEAN wave, a quality legal education grounded in international business law and English may be the best asset available. More than fifteen years ago, Chulalongkorn University Faculty of Law successfully launched a master of law program in business law fully taught in English in collaboration with a number of foreign law schools. In 2009, Thammasat University Faculty of Law followed suit; the two-year Master of Laws Program in Business Law (English Program) was established.

From an administrative perspective, to run a postgraduate programme taught in English, the administrators have faced two major challenges: the number of applicants and compatibility with the academic requirements of the judge and public prosecutor examinations. A large number of Thai law graduates go abroad each year to pursue legal education at a postgraduate level. It is challenging to persuade prospective students to enter a domestic postgraduate program taught in English and spend at least two years to complete the degree when, for the same amount of time, they can do two master of law

50 The selections systems of public prosecutors resemble the judicial ones.

degrees abroad and may subsequently be eligible for the foreign-degree judge examinations. In 2015, the number of students in Chulalongkorn University's and Thammasat University's English-taught master of law programmes combined was less than 25 percent of the number of students who went abroad for postgraduate degrees. To administer the curriculum, it is even more challenging to avoid the effect of the Judicial Committee's academic requirements for judge exams. Even though the business law programme was originally designed to prepare students to become practitioners in law firms rather than judges or public prosecutors, most students prefer to have all career opportunities available to them, including eligibility for these two most popular legal careers. This forces the law school to distort its curriculum to serve the popular need and to be compatible with the Judicial Committee's academic requirements. For example, Thammasat University's English-language Master of Laws Program in Business Law requires the students to pass eight law courses consisting of four compulsory and four elective courses before they can enrol for a dissertation. Two non-business law courses, namely criminal law and procedural law, were included in the list of available courses as they are among the subjects that the Judicial Committee requires the applicants for the domestic master of law track for judge examinations to study. Each year these two elective courses were enrolled in by the majority of the class. Their popularity, however, came at the expense of some interesting business law elective courses, which did not have enough enrolments to open.

Since the ASEAN Economic Community became an imminent reality, there has been a pressing need for Thai lawyers to practise Thai law in English locally, regionally, and internationally. Thailand's two existing English-language master of law programmes are helpful, but do not satisfy the growing demand. Thammasat University Faculty of Law spent at least two years preparing for a proper response to this. In 2014, a new four-year undergraduate programme entitled 'the Bachelor of Laws Program in Business Law (International Program)' was launched at Thammasat University, with the main aim to answer the needs of lawyers who would need to be able to cope with increasingly complex commercial disputes resulting from rapidly growing economies especially in Asia, and to practise in English-speaking environments. This programme is Thailand's only bachelor of law programme entirely taught in English.[51] In what must be seen as one of the most innovative experiments in Thai legal education, Thai law is for the first time the subject of learning in a foreign-language

51 For more information about the programme, see 'International LL.B. Program In Business Law' (*Faculty of Law, Thammasat University*, 2013) <http://interllb.law.tu.ac.th/> accessed 6 June 2017.

environment at undergraduate level. This presents an immense challenge for the legal educational system in a country where English is not an official language and where English publications on its law are rare.

Since this new undergraduate program aims to produce legal practitioners for private entities and regional and international organisations rather than judges and public prosecutors, the programme administrators can largely avoid pressure from the students' strong desire for judicial careers. The programme's main target group of prospective students is students who go to domestic and overseas schools which teach in English. This group of students has a relatively high level of proficiency in English, and is more interested in business than public careers, including as judges and public prosecutors. In 2014 and 2015, the majority of the admitted students graduated from English-language high schools, and according to an internal survey the majority of them preferred to be legal consultants and business owners. Despite this, the most frequently asked question from parents of prospective students is whether the programme has been accredited by the Thai Bar and the Judicial Committee. To make the programme compatible with the academic requirements of the judge and public prosecutor examinations seems inevitable. However, unlike with master of law programmes, the Thai Bar and the Judicial Committee do not look into specific details of the law courses offered in the programme. In fact, they examine the programme holistically based on the existing recognised bachelor of law programmes as a frame of reference.[52] This allows the programme administrators flexibility in designing and operating the undergraduate curriculum.

As the administrator of Thammasat University's Bachelor of Laws Program in Business Law (International Program), the author has observed the development of the programme from the beginning. Although the programme was only launched in August 2014, we are already seeing a thriving course environment, thanks to a huge collaborative effort between the Faculty of Law at Thammasat University and a number of foreign institutions. It is the first programme of its kind in Thailand: the only international undergraduate programme in Law in the country, teaching Thai law in English at the undergraduate level. The author is satisfied with the development of the programme and can offer a self-evaluation of it in four areas.

Firstly, we are already seeing a significant improvement in the abilities of our students to interpret Thai law in English, even during their first year. Becoming familiar with Thai law in English (while at the same time understanding the correct terminology in Thai) is challenging. However, our students are

52 Regulations of the Thai Bar BE 2507, s 56.

rising to this challenge, and are taking advantage of the opportunities offered by lectures and tutorials in English (together with additional classes to ensure that they have the correct Thai terminology). They are already demonstrating progress in their skills, and clearly have the potential to excel in whatever avenue they choose to pursue in the future. Secondly, the author is satisfied that the students are already taking advantage of all the extra-curricular activities that are open to them, as members of the student community at Thammasat University. Even though it feels, in some ways, like our students have just arrived, they have quickly become heavily involved in all kinds of activities, including various sporting events, the Asian Law Student Association (ALSA), the Pro Bono Club in collaboration with National University of Singapore's Pro Bono Group, and a number of international moot court competitions. The programme encourages the students to engage in these activities, not just to expand their experience but also because such opportunities can help to develop skills which will be highly valued, whatever their chosen careers. Thirdly, we are so fortunate as to have been visited by renowned guest lecturers from academic institutions all over the world, who have given presentations on a wide range of topics. These guest lectures are a useful resource for students, providing broader perspectives and inspiring them with views from all around the world. Finally, the programme is in advanced discussions relating to exchange schemes with a large number of internationally renowned foreign academic institutions. These schemes will allow the students to spend one year of the course (in most cases probably their fourth year) overseas, reading law in, for example, the UK, the USA, or elsewhere. These schemes are an excellent opportunity for the students. We have also received exchange students from foreign law schools, which is a welcome addition to the already international atmosphere of the programme.

F Conclusion

Legal education in Thailand emerged from the imitation of foreign models during the time of colonisation. In 1897, the first law school was founded to offer legal study in the tradition of English law. It was not until the establishment of Thammasat University in 1934 that a European system of legal education was adopted and began to overshadow English law. Thammasat University's curriculum became the standard model for subsequent bachelor of law programmes in Thailand. Thammasat University's leading position was challenged by the establishment of the Institute of Legal Education of the Thai Bar, which, instead of offering a practical-training programme, runs a taught program of

undergraduate courses. Because of the popularity of judicial careers, Thai law schools strictly comply with the academic requirements imposed by the Thai Bar and the Judicial Committee for law graduates who wish to be a barrister or a judge. The requirements are too rigid and indiscriminate, so they discourage law schools from introducing any educational innovations. In recent years, Thailand's increasing levels of global economic interdependence propelled by international trade and investment signified an urgent need for Thai lawyers who are able to practise law in English. For this reason, English-language undergraduate and postgraduate programmes in law were launched at Thammasat University Faculty of Law. While we fully recognise that running these programmes effectively will require a supreme effort, we hold on to the hope that our success will bring a revolution to studying law in Thailand and will pave the way for many more innovations in legal education to produce a generation of practical lawyers who are equipped with the knowledge and skills to meet the domestic, regional and global demand.

CHAPTER 14

Second Fiddle: Why Indonesia's Top Graduates Shy Away from being Judges and Prosecutors, and What We Can Do about It

Linda Yanti Sulistiawati and Ibrahim Hanif

A Introduction

Some twenty years ago Indonesian law students considered positions in public service, such as prosecutors and judges as 'high ranking government officials' and very prestigious. This paradigm has now shifted, from government positions to corporate and trial advocates.

This chapter discusses this shift in Indonesia, from judges and prosecutors to advocates Indonesia. We seek to identify the main reasons why law graduates have shied away from entering the public service, and propose strategies to mitigate this trend. The reason for doing so is simple: a continued decline of graduates seeking to enter government office would reduce the efficacy and professionalism of law enforcement, thereby undermining faith in the legal system. In fact, law students gravitating towards being advocates is also prevalent in other countries, especially those undergoing rapid economic development – leading to competitive markets in legal professions.

It uses as a case study the experience of our own law faculty[1] at Universitas Gadjah Mada (UGM), and assesses which academic policies contributed to or failed to negate this trend. This chapter will assess how the rising popularity of the legal profession at the expense of government service has changed how students perceive and what they demand from legal education, and the implications. It canvasses UGM's particular efforts and future plans in this regard.

This chapter highlights the example of our new International Undergraduate Program, whose policies so far have greatly accelerated the move towards advocate-centric career prospects and recently allowed UGM's graduates to begin breaking into top-tier law firms, against UGM's historical slant towards academia and public offices.

1 For the purposes of this article, the terms 'law faculty' and 'law school' are used interchangeably to describe institutions of higher legal education. In Indonesia however, legal education Is typically carried out by a law faculty headed by a dean and attached to a university.

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The argument put forward in this chapter is that it is possible to enact policies within a relatively short time to promote and provide greater legal skills for certain professions. In that vein, the chapter seeks to serve as a starting point for further discussion and development.

B Indonesian Law Faculties

Unlike the United States or (as of recently) Japan, law has remained an undergraduate area of study in Indonesia, with specialized studies at the graduate level, such as the Masters in Notary (*Magister Kenotariatan*). Candidates for the bar,[2] prosecutors,[3] and judges[4] must have an undergraduate qualification in law (*Sarjana Hukum* – SH), irrespective of any other qualifications.

Law studies are at the very least 3.5 years, with students taking a minimum of 144 credits. Some universities require students to write and defend a final thesis (*Skripsi*) as a requirement to graduate, others do not.[5] Generally, students graduate within about 4–5 years, with students at UGM taking an average of 9 semesters -equivalent to 4.5 years.

Indonesia has a large number of law faculties – at least 390 of them are spread throughout Indonesia.[6] 27 law faculties are housed in government universities and the rest are run privately. In 2007/2008 alone, there was a total of 139,000 undergraduate applicants to law faculties in Indonesia, comprising of 8% of all undergraduate applicants.[7]

The number of law graduates varies, with some faculties claiming as many as 1000 students per intake and others less than 50.[8] UGM takes in about

2 Act No 18 of 2003 on Advocates, 5 April 2003 [Advocates Act] art 3(1)(5).

3 Act No 16 of 2004 on the Prosecutor's Office, 26 July 2004 [Prosecutor's Office Act] art 9(1)(d).

4 Act No 2 of 1986 as amended by Act No 8 of 2004 on Judicial Powers [Judicial Powers Act] art 14(1)(d).

5 For example, UGM generally requires such legal research for most disciplines including law; the University of Indonesia does not.

6 --, 'Wisudawan Terbaik Itu Pun Jadi Hakim' (*Hukum Online*, 28 April 2003) <www.hukumonline.com/berita/baca/hol7898/wisudawan-terbaik-itu-pun-jadi-hakim> accessed 10 June 2017.

7 Palupi Panca Astuti, 'Jajak Pendapat "Kompas"; Citra Buruk pada Profesi Hukum' (*Kompas*, 26 April 2010) <www.antikorupsi.org/id/content/jajak-pendapat-kompas-citra-buruk-pada-profesi-hukum> accessed 10 June 2017.

8 With the proliferation of law faculties, the issue of fictitious law faculties or legal education is not rare in Indonesia. Some schools offer 'shadow classes' where students do not attend classes but receive a degree; others may forgo subtlety altogether and forge their documents.

400 students per intake, and intends to reduce this in the near future. In 2015, there were 12,000 applicants to UGM and only 357 were accepted in the undergraduate programs: Regular and International Undergraduate Program. Law is not considered a 'favorite' subject for undergraduate study, but neither is it ranked too low, below the favorites in social sciences: accounting, business, management, communications and international relations.

Competition for the undergraduate classes at UGM is generally more competitive than that of the graduate programme, since most legal professions only require an undergraduate degree. Admission is based on a national selection and generally involves an initial separate selection by the university (different avenues based on merit, examination, and financial capability), with the rest of the places competed for through a nationwide examination for government schools. Private schools carry out their own selections.

Law teaching is generally divided into sectors according to each university's capabilities; some offer a wide selection, some fewer. These are taken in the form of 'concentration' classes beginning in the later semesters. UGM has several concentrations which may be taken from the fifth semester, including but not limited to: civil law, criminal law, procedural law, administrative law, constitutional law, international law, environmental law, Islamic law, *adat* (customary law) law, tax law, agrarian law, business law,.

Studies of national law tend to be highly theoretical and doctrinal in nature,[9] arguably similar to Japan prior to the reform in 2004.[10] Studies focus on the reading of legal texts, with little analysis of judicial decisions. This is partly due to the fact that Indonesia is a civil law jurisdiction[11] which does not recognize the binding force of precedent. Rare are the court cases which cite case law. As a side-effect, until reforms in the late 2000s, very little attention was paid to the publication and record-keeping of judicial decisions. Older cases generally go without online publication and many recent cases from the Supreme Court are still unavailable up to the present day. As a result, case law study has been difficult to carry out, minimally useful, and generally avoided or neglected during legal education.

9 National Planning Agency-USAID, *'Monitoring and Evaluation of USAID Grant: Final Report'* (Bappenas 2013) 17–18; Satjipto Rahardjo (ed), *Sisi-sisi lain dari hukum di Indonesia* (Penerbit Buku Kompas 2006) 17, 184.

10 See generally Shigenori Matsui, 'Turbulence Ahead: The Future of Law Schools in Japan' (2012) 62 Journal of Legal Education 3.

11 Mary Ann Glendon, Michael Wallace Gordon and Paolo Wright-Carozza (eds), *Comparative legal traditions in a nutshell* (West Group 1999) 77.

This reliance on theory stands in contrast to current trends to develop legal education by focusing on an integration of realistic and real-life lawyering experiences.[12] In Indonesia there exist competing demands for universities to teach direct lawyering skills, similar to those faced in Australia[13] and China, for example.[14]

C Judges, Prosecutors and Legal Education

As mentioned, the three leading legal professions – advocates, prosecutors and judges – all play a defining role in the court procedures, and require at an undergraduate degree in law (*Sarjana Hukum* or SH).

Under Indonesian law advocates are not formally divided into what in common law countries are known as barristers and solicitors. Advocates may represent all forms of clients, public and private, before Indonesian courts in criminal and civil litigation, so long as they have passed the Indonesian bar and have an advocate's (PERADI, the Indonesian Bar Association)[15] license.

A career in law starts with a 4-year undergraduate degree in law or a 3-year diploma. Diplomas are offered by a much smaller number of universities, and are aimed at those who plan to work as paralegals, legal secretaries or in other supporting administrative duties, but do not represent clients in court.

Prospective advocates should go through advocate training which may be held by several educational institutions -UGM runs one – before taking the bar exam. After passing the exam, an advocate is given a license which is applicable throughout Indonesia but will still require 2 years' experience working at a law firm.

Prosecutors and judges must also have an undergraduate degree and attend specialized schools and training, and then pass an examination to assume

12 Syahirah Abdul Shukor and others, 'The Common Bar Examination: Realities of Legal Education in Malaysia' (Paper presented at Legal Education in Asia Symposium, Shanghai Jiao Tong University, 2015) 1, 2.

13 See Chapter 3, at 63.

14 See Chapter 10, at 245.

15 Recently, there has been a split in the historically unified Indonesian Bar Asssociation; for a primer on the issue, see 'Ketua MA: Advokat Pecah, Sistem Hukum Pincang' (*Hukum Online*, 14 August 2008) <www.hukumonline.com/berita/baca/hol19926/ketua-ma-advokat'pecah-sistem-hukum-pincang> accessed 10 June 2017; Hendra Cipto, 'Peradi Pecah Tiga, Masing-Masing Kubu Punya Ketua Umum' (*Kompas*, 28 March 2015) <http://nasional.kompas.com/read/2015/03/28/09095281/Peradi.Pecah.Tiga.Masing-Masing.Kubu.Punya.Ketua.Umum> accessed 10 June 2017.

their prospective roles. Any law graduate can choose to apply, subject to meeting administrative and academic requirements, with the minimum GPA being 2.75 (out of 4.0).

Prosecutors work for and answer to the Attorney General's Office, which is subdivided into the Chief Prosecutor's Office at the provincial (*provinsi*) level the District Prosecutor's Office at the Regency (*Kabupaten*) level. Once judges complete their training, they are appointed to a given location as necessary. The Indonesian Judiciary is divided into the Constitutional Court on the one hand and the rest of the court apparatus – including the state courts, religious courts, military courts and administrative courts[16] – under the Supreme Court on the other hand.[17]

Judges may be divided into career judges and ad-hoc judges.[18] Career judges most likely first sit in the state courts at regencies, and thenceforth shall advance and be transferred under the authority of the Supreme Court. Judges may take specialized courses and accreditation in order to enter specialized courts, such as the industrial relations court or the fisheries court. Ad-hoc judges may be appointed from outside the judicial profession to serve as judges in specific cases, for instance in commercial and anti-corruption courts.

The importance of prosecutors and judges cannot be understated, and is easily understood: they manifest the state's duty to enforce law. Prosecutors represent the state's interests; a duty especially prevalent in criminal cases. Civil litigation against the state also sees prosecutors acting on behalf of the state. Judges meanwhile, are considered an impartial arbiter of the application of the state's laws. Both these professions form the state's end of the legal bargain: enforcement and adjudication of established laws.

D The Drift from Public Service to the Private Sector

Judgeship and a prosecutor's position were keenly sought after in the Soeharto pre-reformation era. As civil servants, these officeholders were held in high regard socially. This tradition is still present in the mindset of many Indonesians, and is especially prevalent in less-developed areas. Up to the present day, civil servants still expect a certain degree of deference regardless of their rank.

16 Constitution of the Republic of Indonesia 1945, Fourth Amendment [1945 Constitution] art 24.

17 Ibid.

18 Judicial Powers Act (n 4) art 30(1).

Being a civil servant was seen to guarantee success and stability within the less-than-democratic framework of Soeharto's long dictatorship. The government controlled national life and civil servants were an extension thereto, mandatorily comprising a majority of the then-incumbent party *Golkar*. Pay and facilities were generally adequate compared to those offered by the private sector.

Indonesia's economic growth following the 1998 reformation era has brought about a shift in the world of legal professions. The best law graduates rarely enter public service, at a time when they are needed most. They instead seek employment as lawyers.[19] UGM's experience also shows similar trends; very few of our top graduates enter employment in judgeship and the prosecutor's office. The need for an impartial, independent and professional judiciary is growing, but the position of court justice is considered unattractive at best.

As Indonesia seeks to develop, greater demands are made for good law enforcement in all fields, particularly in underdeveloped provinces outside of Java.[20] In urban areas, poor-quality judges and prosecutors threaten to undermine the state's ability to render competent judgment, represent itself adequately in civil trials, and prosecute crime; in rural areas these failings further exacerbate the resort to extra-legal and potentially violent means of dispute settlement.

Take for example foreign investment. The Indonesian government has recently stated its intention to renegotiate bilateral investment treaties and move to shift investor-state disputes into its national courts rather than make use of international arbitration which it views as unfavorable. This plan, combined with the push for decentralized government, will place great emphasis on first-instance district courts and local prosecutors to handle investment disputes with international elements. A lack of judicial competence will clearly hinder the successful implementation of the government's intentions.

With (very arguably) little but a common language and centralized government, the rule of law is central to a unified Indonesia. This is where the problems begin.

Corruption and criminal justice routinely capture front page headlines. While the desire to fight these is strong, few graduates consider the Prosecutor's

19 'Mimpi Sarjana Hukum Jadi Pengacara' (*Hukum Online*, 17 July 2003). <www.hukumonline.com/berita/baca/hol8367/mimpi-sarjana-hukum-jadi-pengacara> accessed 10 June 2017.

20 For a similar discussion on the shortage of legal professionals (advocates) at provincial levels see Chapter 11, at 13–15.

Office as the first choice, or even contemplate this career path at all. Top graduates from the most prestigious law faculties instead compete to land high-paying positions as corporate advocates or criminal defense lawyers.

The eventual consequence of this brain drain for the government sector is nicely captured by the author of 'International Moot Court as Equaliser: An Asian Paradigm':

> [I]f judges make bad decisions because they cannot tell what are good or bad arguments, lawyers will tend to make bad arguments because they think these will work, these lawyers will then teach newly graduated law students how to make bad arguments, and the vicious cycle is difficult to break out of. Over time, the legal fraternity loses credibility and resources will invariably be diverted away from it (which in turn will cause the country's rule of law to diminish, and this will certainly affect national interests such as foreign investment and trade).[21]

The drift away from a career as a judge or a prosecutor has yet to be pin-pointed to a specific date. During the 1990s and well into the reformation period, there grew political backlash against the Soeharto government's endemic corruption, coupled with the Asian monetary crisis which decapitated the growth of the Indonesian economy. Following the resurgence of the Indonesian economy, particularly from international businesses, the number of advocates has grown, as have salaries in private law firms.

Among the first hints that there may have been a lack of interest in a career as a judge or prosecutor was a 2002 study carried out by UGM and the National Law Commission (*Komisi Hukum Nasional*).[22] The survey targeted 180 law graduates, among them 22.78% who applied to become a judge and were rejected. The reasons given by the 77.2% or 139 respondents who did not apply to be a judge included a lack of interest (38.85%), already employed as civil servants (22.30%), unclear recruitment process (6.47%), and finally 'a large responsibility to the Almighty' accounting for 6.47%. About 65% of respondents indicated that the lack of interest in a career in judgeship was due to a higher interest in other professions (33.3%), the expected heavy responsibility

21 See Chapter 6, at 153.

22 'Rendah, Gairah Sarjana Hukum Berprofesi Menjadi Hakim' (*Hukum Online*, 1 August 2002) <www.hukumonline.com/berita/baca/hol6139/rendah-gairah-sarjana-hukum-berprofesi-menjadi-hakim> accessed 10 June 2017.

in decision making (10.26%), low wage and fear of placement in remote areas (5.98%) and unclear recruitment process (5.13%).

The Supreme Court carried out a comparable study in 2004–2005, conducted in 7 provinces.[23] This found that the chief reasons for law students to shy away from judgeship were the perception of it being a 'tough' profession, endemic corruption in the selection of judges, and various weaknesses in the judiciary (unhealthy work culture, poor institution image and the lack of independence of judges).[24] The full results can be seen in Tables 14.1–3.

TABLE 14.1 *Law students' choice of profession*

No.	Profession	Percentage
1	Advocates	17.8
2	Notary	16
3	Private sector, law related	13.5
4	Non-litigation consultant	13.1
5	Civil servant, law related	12.7
6	Judge	8.4
7	Prosecutor	7.6
8	Private sector, non-law related	3.6
9	Researcher	2.9
10	NGO Activists	1.8
11	Civil servant, non-law related	1.5
12	Lecturer	1.1

SOURCE: SUPREME COURT STUDY, 2004–2005, QUOTED BY E2J

23 E2J stands for 'Educating and Equipping Tomorrow's Justice Reformers', a USAID-funded governance program for Indonesia; see 'Educating and Equipping Tomorrow's Justice Reformers In Indonesia' (*The Asia Foundation*, December 2012) <https://asiafoundation.org/resources/pdfs/E2JENGLISHFINAL.pdf> accessed 10 June 2017. The provinces being West Java, East Java, North Sumatra, South Sumatra, Nusa Tenggara Barat, South Kalimantan and Jakarta.

24 For further discussion on corruption and advocates, see Chapter 4, at 85.

TABLE 14.2 *Primary reason why law faculty students avoid a profession in judgeship*

No.	Reason	Percentage
1	High moral responsibility	28.2
2	Widespread corruption, collusion and nepotism	18.3
3	Other professions are more attractive	11.5
4	Poor working culture in judgeship	9.9
5	Poor perspective in the community	9.1
6	High risk to personal security	5.2
7	Not independent	4.0
8	Civil servant status	2.8
9	Poor pay	2.4
10	Assignment in remote areas	2.0
11	Poor chance at higher education	1.6
12	Unclear career path	0.8
13	Poor facilities	0.8
14	Insufficient knowledge of judgeship as a profession	0.4
15	Other reasons	3.2

SOURCE: SUPREME COURT STUDY, 2004–2005, QUOTED BY E2J

TABLE 14.3 *Main reasons to join judgeship*

No.	Reason	Percentage
1	Want to be involved in law reform	34.8
2	Guaranteed pension fund	26.1
3	Benefit others	17.4
4	Sufficient wage	8.7
5	Social status	8.7
6	Others	4.3

SOURCE: SUPREME COURT STUDY, 2004–2005, QUOTED BY E2J

This trend has continued to the present day. In 2013 E2J conducted another study of 450 law students at *Universitas Hasanuddin* in South Sulawesi, *Universitas Sriwijaya* in South Sumatra and UGM in Yogyakarta. The results are as follows:

TABLE 14.4 *Career choices of respondents*

No	Career choice	Percentage
1	Judge	14.8
2	Prosecutor	21.3
3	Police	9.1
4	Other professions surrounding the Judiciary	1.8
5	Other professions	53.6

SOURCE: E2J STUDY IN UGM, UNIVERSITAS HASANUDIN AND UNIVERSITAS SRIWIJAYA, 2013

This study confirmed the poor reputation of careers in law enforcement (police, prosecutor and judges). Most respondents (around 50%) gave a 'neutral' rating, and a significant proportion (above 30%) rated the profession's image as poor or very poor. Only a minority gave positive ratings. Once again the three most common disincentives of joining law enforcement were low pay, a high degree of responsibility and a poor image.

These results were also replicated by a survey conducted by *Hukumonline*, Indonesia's premier online legal reporter, at three universities: *Universitas Indonesia*, *Universitas Pelita Harapan* and *Universitas Padjajaran*.[25] The survey showed that 83% of respondents intended to become lawyers, 10% were interested in a career as public notaries, and only 7% were interested in other professions (judges, prosecutors, police etc).

A *Kompas'* public survey yielded similar results: 90% of respondents are not interested in a career as a judge or prosecutor, and 80% will not enter these professions even if offered a position.[26] 47.8% claim that other professions are more attractive, and 23.2% are put off by poor public image of the profession. The survey also noted that there was limited information on the framework to join these professions, a lack of soft skills applicable in or relevant to law enforcement taught in universities, and poor transparency in the recruitment process.

Taken together, these studies reveal that graduating students consider law enforcement unattractive and that government service is a relatively unexplored career path. In the past, this did not mean that there were insufficient numbers; rather, the problem was their geographic distribution. Data from

25 Nurjannah, 'Minimnya Minat Jurnalis Hukum, @HukumOnline adakan Road Show' (*Hukumpedia*, 9 December 2015) <www.hukumpedia.com/nunu_nurjannah/minimnya-minat-jurnalis-hukum-hukumonline-adakan-road-show> accessed 10 June 2017.

26 Astuti (n 7).

the Central Judicial Statistics Agency in 2009 shows that the District Court of Semarang had 26 judges, while stating that 15 judges should have been able to handle the 1,637 criminal and 579 civil cases entered into the court that year.[27] The same study also noted that 89.4% of district courts have too many judges while only 8.7% suffer a lack thereof.

Recent data indicates that this may no longer be the case. In 2015 Commissioner Syahuri, who is in charge of Judge Recruitment at the Judicial Commission, noted that there are only 8,500 judges spread out in general, administrative and religious courts; 700 judges short of adequate numbers.[28] This is because for the last 5 years, the Supreme Court and the Judicial Commission have not been recruiting new judges. The lack of judges is especially prevalent in courts outside the main island of Java, where the economic and political power tends to be concentrated. This problem is compounded by the fact that many judges will soon be entering retirement.

According to the Supreme Court's 2006 Yearly Report, 266 new judges were appointed, adding to the total of 6,747 judges at the four judicial branches below the Supreme Court.[29] In 2009 548 new judges were appointed, but in 2010 the number dropped to 205.[30]

The Supreme Court carried out judicial recruitment reforms during 2005–2009,[31] but progress was slow and the Supreme Court itself recognized that goals set in 2003 were only 30% completed by 2008, and 50% by 2009.[32]

From 2011 to 2016 judges were only recruited for specialized courts, such as ad-hoc corruption courts. In 2011 there was no new recruitment of judges based on a joint regulation by the Minister of State Apparatus and Reform, the Minister of Interior and the Minister of Finance.[33] This was also the case in 2012,

27 Raised by Astriyani Achmad, Coordinator of Central Judicial Statistics in the Public Opinion Hearing with Commission III of the Indonesian House of Representatives.

28 'KY Akui Jumlah Hakim di Indonesia Masih Minim' (*Post Kita*, 2015) <www.postkita.com/news/ky-akui-jumlah-hakim-di-indonesia-masih-minim> accessed 10 June 2017.

29 Indonesian Supreme Court, *Annual Report 2006* (Sumber Jaya 2007) 38–39.

30 Indonesian Supreme Court, *Annual Report 2010* (Sumber Jaya 2011) 291–292.

31 Indonesian Supreme Court, 'Blueprint for Renovations 2010-2035' (*Mahkamah Agung*, 2010) 3–4. <www.mahkamahagung.go.id/media/198> accessed 10 June 2017.

32 ibid 7, 8; see also Indonesian Supreme Court, *Cetak Biru dan Rencana Strategis Pembaruan Peradilan: Laporan Hasil Organizational Diagnostic Assesment* (ODA) (Daya Dimensi Indonesia 2009).

33 Indonesian Supreme Court, *Annual Report 2011: Executive Summary* (Mahkamah Agung 2012) 54–55; Joint Regulation No 02/SPB/M.PAN-RB/8/2011; No 800–632 of 2011; No 141/PMK.01/2011 of 24 August 2011.

in which the Supreme Court's Annual Report only discussed the continued training of judges recruited in 2010. In 2014 the Supreme Court reported a total of 7,584 judges and claimed that they were 5,263 judges short.[34] The lack of recruitment has been due to disagreements between the court and the executive branch on the recruitment system, the unclear status of judicial candidates as state officials, and their pay. This was further complicated in 2015 with Constitutional Court Decision No.43/PUU-XIII/2015,[35] which removed the Judicial Commission from the selection process, vesting authority fully with the Supreme Court. As of July 2016, there has yet to be new recruitment of state court judges.

This has led to the serious reduction in the number of judges, and the increasing upward trend in the average annual case load for judges, seen below.[36] Data for 2015/2016 has yet to be published.

TABLE 14.5 *Increasing annual trend in the average annual case load of judges in Indonesia*

Year	Court	Cases Received	Cases Cleared	Clearance Rate	Judges	Case/Judge Ratio
2006	First	2349300	2777802	97.49	5243	543.45
	Appeal	11200	8770	78.30	612	18.30
	SC	24826	15245	61.41	46	539.70
	Total	2885326	2801817	97.11	5901	488.96
2007	First	3514709	3506293	99.76	n/a	n/a
	Appeal	12408	12258	98.79	n/a	n/a
	SC	21541	10714	49.74	n/a	n/a
	Total	3548658	3529265	99.45	6946	510.89
2008	First	3530042	3512369	99.50	n/a	n/a
	Appeal	13977	13453	96.25	n/a	n/a
	SC	22165	13885	62.64	n/a	n/a
	Total	3566184	3539707	99.26	6392	557.91

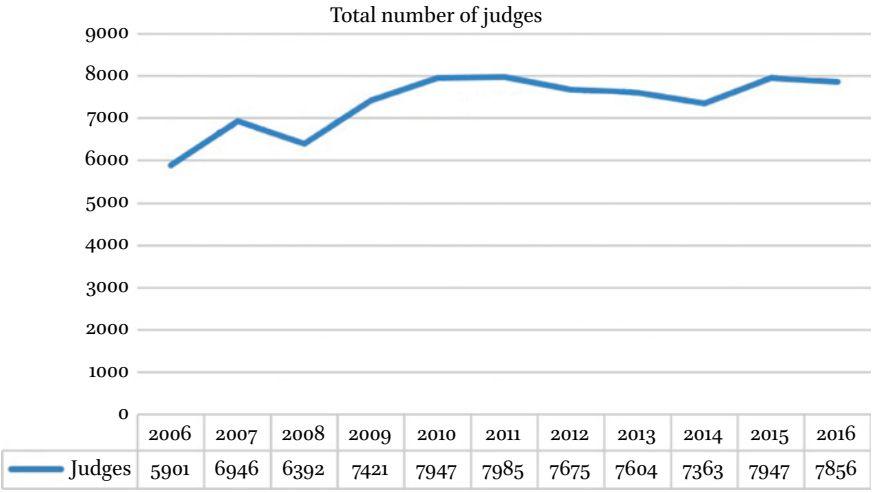
34 Indonesian Supreme Court, *Annual Report 2014* (Sumber Jaya 2015) 189–190.

35 *Soebechi and others* (Indonesian Constitutional Court Case No 43/PUU-XIII/2015), <http://ditjenpp.kemenkumham.go.id/arsip/mk/2015/43_PUU-XIII_2015.pdf> accessed 10 June 2017.

36 For discussion regarding an opposite trend, where an increased supply of graduates compete for a diminishing public service market, see Chapter 11, at 10–13.

TABLE 14.5 *Increasing annual trend in the average annual case load of judges* (cont.)

Year	Court	Cases Received	Cases Cleared	Clearance Rate	Judges	Case/Judge Ratio
2009	First	3546854	3462158	97.61	6547	541.75
	Appeal	14531	13395	92.18	843	17.24
	SC	20820	11985	57.56	31	671.61
	Total	3582205	3487538	97.36	7421	482.71
2010	First	3141480	3028916	96.42	6879	456.68
	Appeal	17324	14172	81.81	1029	16.84
	SC	17285	13891	80.36	39	443.21
	Total	3176089	3056979	96.25	7947	399.66
2011	First	5302149	5174966	97.60	6959	761.91
	Appeal	17373	14300	82.31	984	17.66
	SC	12990	7108	54.72	42	309.29
	Total	5332512	5196374	97.45	7985	667.82
2012	First	4164862	3757675	90.22	6689	622.64
	Appeal	15332	12731	83.04	954	16.07
	SC	21137	10991	52.07	32	659.59
	Total	4201301	3893004	92.66	7675	547.40
2013	First	4098935	3879364	94.64	6520	628.67
	Appeal	16181	13640	84.30	1046	15.47
	SC	22449	16034	71.42	38	590.76
	Total	4137565	3909038	94.48	7604	544.13
2014	First	3996607	3830543	95.84	6179	646.80
	Appeal	37505	22465	59.90	1145	32.76
	SC	18926	14501	76.62	39	485.28
	Total	4053038	3867509	95.42	7363	550.46
2015	First	4670145	4518618	96.76	6770	689.83
	Appeal	42513	25030	54.17	1128	37.69
	SC	18402	14452	78.53	49	375.55
	Total	4731060	4556100	96.30	7947	595.33
2016	First	3962833	3764629	95.00	6621	598.52
	Appeal	29843	16349	54.78	1187	25.14
	SC	18580	16223	87.31	48	387.08
	Total	4011256	3797201	94.66	7856	510.60



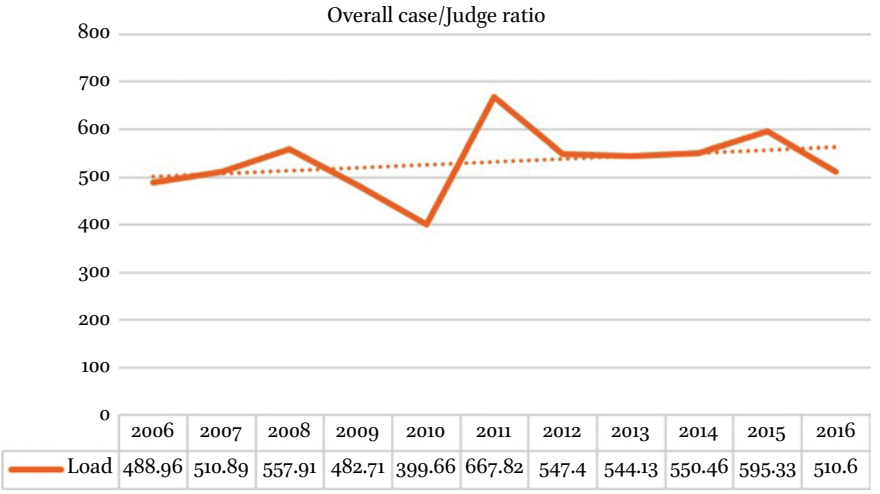


TABLE 14.6 *Number of judges in each level*

Year	District court	High court	Supreme court
2010	6879	1029	39
2011	6959	984	42
2012	6689	954	32
2013	6520	1046	38
2014	6179	1145	39

COMPILED FROM: SUPREME COURT ANNUAL REPORTS

If current trends are extrapolated by the end of 2015 Indonesia could lose an additional 400 judges, bringing the total to around 6,900. This means an increased court case-to-judge ratio, at roughly 580 cases per judge.

The precise calculation for annual caseloads of judges is of course difficult, but cases (civil or criminal) typically involve three judges. Therefore, as a very rough estimate,[37] the total maximum number of cases that each judge would need to clear in 2016 is an astounding 1575. The actual number is assumed to be somewhere between this and 525 with a strong leaning towards the lower end of the spectrum.[38] depending on the total number of panel cases. For district courts the load is between 1860 and 620, for high courts around 60 to 20, and between 1,115 and 372 for the Supreme Court. In contrast, the national average for US District Courts which uses single judges, was a caseload of 573 total filings per judge in 2016.[39]

As an aside, it should be noted that no explanation has as yet been provided by the Supreme Court or in other public sources for the sudden rise in court cases received in 2010, and the subsequent continuous downward trend during 2011–2014.[40]

Turning to the prosecutor's offices, the Central Judicial Statistics Agency notes that each prosecutor is expected to clear more than 23 cases per year. In 2007–2008, 2,776 prosecutors were estimated to be needed and 3,721 were available. Based on this number, in 2011, 184 prosecutor's offices had excess prosecutors while 102 had too few.[41] Current data from the Central Judicial Statistics Agency are still incomplete and difficult to access publicly,[42] making it

37 Assuming all judges were fully active during the 2014 period, and all cases cleared were panel cases with three judges.

38 Assuming all judges were fully active during the 2014 period, and all cases cleared were single judge cases.

39 United States Courts, 'Federal Court Management Statistics' (*US Courts*, 30 June 2016) <www.uscourts.gov/file/20172/download> accessed 10 June 2017.

40 What we do know is that in 2011 there were an additional 2,111,942 state court cases filed compared to 2010 (which included 2,078,261 criminal cases), around 50,000 more religious court cases filed, and negligible increases in administrative, military and tax court cases filed. The authors note that this is extremely unusual as a crime wave of this magnitude should have garnered media attention, and as of this time can offer no further explanation for this anomaly. If this data is truly anomalous, this only begs the question as to how the Supreme Court carries out its data collection.

41 Ali Salmande, 'Jumlah Hakim dan Jaksa Berlebih' (*Hukum Online*, 8 March 2011) <www.hukumonline.com/berita/baca/lt4d763a9d76c46/jumlah-hakim-dan-jaksa-berlebih> accessed 10 June 2017.

42 For more information on their reports, see Pusat Studi Hukum dan Kebijakan Indonesia, '*Laporan Studi Pemanfaatan dan Kebutuhan Data Statistik Penegakan Hukum sebagai*

difficult to assess whether graduates' lack of interest in joining the prosecutor's offices has resulted in too few prosecutors.

Binziad Kadafi, a researcher at the Centre for Indonesian Law and Policy Studies, has suggested that tighter competition and high qualifications for positions in judicial posts would serve to increase interest,[43] as judge recruitment currently carries little prestige. In addition, it is public knowledge that judge recruitment was not transparent, and many qualified candidates are rejected for unknown reasons. Indeed, Suparjo Sujadi, a staffer at the Dean's Office of Universitas Indonesia's faculty of law, has noted that among the most common complaints were those related to registration, which was complex, bureaucratic and demanding. Repairing the administrative procedures for selections would serve to increase the potential pool of candidates for public offices, and encourage tighter competition. Some reforms have been taken by the Supreme Court in 2010, in terms of recruitment of potential judges, to increase transparency and to allow for recommendations to be given for high-achieving students (those with the top 10 GPAs in certain universities) to enter into judicial service.[44] According to their self-reporting, this recruitment process resulted in 60% of new judges being filled by 'best graduates'. In contrast, the 2017 judicial recruitment allows for 168 slots to be secured for those graduating *cum laude*, as opposed to 1,484 slots open to the public.

Another issue that would need to be addressed is the lack of exposure of law students and graduates to judges. Unlike in some other countries, Indonesian judges do not make use of personal law clerks, but instead rely on the general personnel already established in the courts. Thus without entering judicial service or becoming a civil servant in the court (both of which involve quite lengthy and complicated entry and exit procedures), there is little option to expose oneself to the profession of a judge. Internship programs at district courts exist, but are mostly informal and ad hoc; the particular tasks of each internship would vary on a case-by-case basis, and many interns at district courts only assist in handling paperwork.

In sum, this section has shown how interest in the judiciary has decreased, due to a combination of poor pay and facilities, the difficulty of the job, problems in the recruitment process and unfamiliarity with the profession, and poor public image. Also bearing in mind the recent lack of judicial openings, the Indonesian judiciary stands to face a lack of competent justices at a time when it is being required to become the backbone of the Indonesian legal system.

Upaya Penerapan Evidence-based Policy Pada Lembaga Penegak Hukum' (PHSK/AUSAID 2013).

43 --, (n 6).

44 Indonesian Supreme Court, *Annual Report 2010* (n 30) 266.

E Accompanying Changes to Legal Education

The shift away from traditional legal employment in government offices has also been accompanied with a changing outlook from students towards legal education. These developments may have arisen from or were related to the shift, but the authors do not seek to rigorously analyze the causal relations between the two, as a large number of other factors may have been involved. Whether incidental, correlated, or causal, the fact remains that legal education must adapt.

First, we observe a tendency among students to request more and more practical, skills based teaching, breaking with the traditional approach that emphasizes analyzing the philosophical thought process and rationales behind legal issues.

This has resulted in an increased demand for classes and skills which have direct application in certain professions (predominantly that of lawyers), such as legal writing classes devoted primarily to contracts, legal memorandums to clients, powers of attorneys etc. Many of these requests came from students who have undertaken internships during studies, mostly with law firms. In response to such changing expectations from students, legal education too has undergone some changes. The curricula of the law faculties now include more practical/skills-based classes, including as negotiations, interviewing and counselling and the introduction of skills classes in procedural law as well as expanded law clinics.

We agree that law schools must teach in a manner that prepares graduates for the demands of legal employment, which includes inculcating practical skills. However when approaching legal problems, and arguing positions, there is a tendency among students to argue and request materials whose application is more straightforward. In interpreting legislation in criminal and business law, for example, students tend to favor referral to legislation and then base their argumentation directly on how court cases have implemented laws, without going through an analysis of the conceptual positions of why and how the law could be interpreted in a different manner. This approach, while pragmatic and occasionally time-efficient, means that they miss out on being able to understand the philosophical bases of the legal system, and the ability to argue from a deeper normative grounding.

Demands for more practical teaching have also developed unequally. While many lawyer-specific skillsets are being demanded of law schools, the same is not uniformly true for the other legal professions. We have yet to see significant demands for skills which would be directly applicable to, for example, judicial or prosecutorial postings, academia, or work in governmental and

non-governmental organizations. If law faculties simply cater to demands for lawyer-specific courses, this may further discourage students from entering into government positions, as they will more likely choose a profession in which they feel they have more prior knowledge and feel comfortable in

Approaching and especially teaching the law in a fashion focused on narrow problem solving and highly specific skillsets threatens to nurture students without adequate tools to assess how the law fits into society, and the corresponding moral, societal, economic and other interests feeding into how law should be applied, and – most importantly – how law graduates themselves fit into the system.

Second, students, parents, and other stakeholders have also become more critical and vocal in assessing the material benefits as well as the management of legal education. As the cost of education increases – with the Indonesian Central Statistics Agency noting that the cost of education in recent years has increased by an average of 10% year on year[45] – so has the frequency of input questioning a course's material value post-graduation; this has also led a large number of students to congregate in business law concentration, which is seen to be the most lucrative, and where jobs seem most readily available.

Further, heightened scrutiny has been aimed at how law faculties manage their resources, predominantly the spending and allocation of finances. This has resulted in requests for the faculty to produce more comprehensive and transparent annual reports. Law faculties have in turn become more transparent as to how they obtain and spent resources Law faculties now almost always have an 'alumni center', which track alumni and seek to gather their support. These centers often have data on the salaries of the employers across Indonesia, which is accessible to all students, and they invite their alumni to be involved in learning activities for as instructors or facilitators.

Parents of students have also become more organized, often utilizing social media groups to communicate with each other. This has led to stronger parental involvement in matters which were previously limited to student-faculty relations, such as class schedules, lecturer teaching quality and student assessment, sick leave, dispensations for failing to meet mandatory attendance, and funding for student activities.

In this vein, the third change we observe is that students increasingly demand from, and are willing to complain about, the quality of teaching staff. Traditionally – perhaps also attributable to the strong Asian deference to

45 'Saatnya Merencanakan Biaya Pendidikan Anak Sejak Dini (*Kompas*, 5 February 2016) <http://bisniskeuangan.kompas.com/read/2016/02/05/114701826/Saatnya.Merencanakan.Biaya.Pendidikan.Anak.Sejak.Dini> accessed 10 June 2017.

elders and those of a higher perceived social position – students have been reluctant to challenge professors on any number of issues: the quality of their teaching material and presentation, assessment of their class performance, availability for consultation and meetings, as well as other academic decisions (such as dispensations for leave from classes). This traditional reluctance to speak out on such matters has steadily declines, and with it, there has been a corresponding increase in complaints and appeals against lecturers' actions. These complaints are usually directed at, or end up being dealt with by, the Dean's office. We see this as a positive development, as it assists the faculty in assessing areas where systemic and personal improvements could be made.

Fourth, students are becoming more aware of the need to compete in the job market, and more accordingly elect to participate in out-of-class activities, particularly those they perceive will benefit them in a certain field. These may be in the form of internship or part time jobs, research within or outside of the university environment, volunteering opportunities, and various competitions. This has placed a larger burden on the faculty to fund or facilitate networking for student activities, as the student interest and budget requirements have grown significantly faster than the faculty's financial and networking base.

The final trend we have observed potentially has significant implications: students are becoming less 'connected' to the real world surrounding them, because they are focusing on themselves. Local, national, and international politics and development events become 'examples' or 'case studies' for them, instead of the students submerging themselves and demanding change. While student activities for the advancement of their skillsets or networking have increased, we have seen a significant decline particularly in political and social-based activism; even when they concern legal issues.

For instance, in 2015–2016 while Indonesia was experiencing divided views based on religion and political affiliations, the single largest demonstration (by a massive margin) by UGM students was one demanding that the university lower tuition fees. This was during a period where number of socially volatile events were taking place in the legal world and the law faculty: the Indonesian bar association split into three camps, potentially creating a legal vacuum in law practice accreditation; the government's negotiations of Indonesia's stake in the Paris agreement; and allegations of corruption were levelled against a law faculty staff who served as deputy minister of law.

While protesting rising fees is perfectly understandable, the prioritization of this issue over others signifies a stark change from the sentiment of student movement in 1998–1999, when students were strongly involved in legal and social matters, culminating in demanding a change of government from the

authoritarian Suharto regime. At that time, students were actively engaged in political and developmental discussion of the nation, and were willing to put themselves on the line for a number of social issues. The current trends for student organizations are that they primarily operate within the ambit of the law faculty's internal workings, and work primarily on issues which directly relate to student life or post-graduation needs.

The Ministry of Research and Technology of Higher Education (*Menristekdikti*) has yet to systematically address the disconnect between students and their surroundings. On the ground however, a number of lecturers have begun expanding student involvement in their activities, particularly in terms of research in remote areas in the country, assigning them to write papers on actual problems/cases, and through the various centers of studies the university has at its disposal.

It is against the backdrop of these trends that we shall assess how UGM students have begun to shift their job preferences away from prosecutorial and judicial posts, and how this shift can be curbed or reversed.

F UGM and What Went "Wrong"?

We turn now to the examination of UGM's Faculty of Law. It was selected both for the author's familiarity with the institution as well as its unique position. Historically, many of UGM's law graduates have opted to pursue careers in academia, as government officials, and public legal offices such as prosecutors and judges. This was in line with UGM's vision to become a public service university, supporting national development. Prior to the 1998 reformation, there was little problem in generating interest in recent graduates to enter the judiciary and prosecution. In fact, a relatively small number of large law firms' partners and associates graduated from UGM. In recent years, however, UGM's graduates have also begun to shift towards the private sector and the Faculty of Law has successfully pursued a program to accelerate this. At the same time, it failed to maintain and nurture interest in the public sector.

During a seminar session in 2015, 100 students were surveyed on whether they were going to be judges, lawyers or prosecutors. 7 wanted to be judges, another 7 wanted to be prosecutors, and the rest were interested in other professions (a large majority in being corporate lawyers). Data from UGM law faculty's Law Career Development Centre showed a general decline in graduates who want to apply for public officers' positions.

Several of the underlying factors for this state of affairs can be influenced by law schools: raising awareness about to the functioning of the judiciary and

prosecution, imparting preparatory skills to prepare students for specific professions and exposure to professional practice.

In terms of preparatory skills to become a judge, the bulk of the legal education that is currently provided does not yet incorporate adequate instruction on law-finding nor effectively utilize problem-based learning, especially those which focus on the work of public officers.

The use of reading materials is relatively limited, with few classes strictly enforcing weekly reading materials of books or journals, let alone Indonesian case law. Few courses are taught from the perspective of practitioners, or involve visiting lecturers on a routine basis. For advocates, this is partly explained by Yogyakarta's relative distance to Jakarta (which is the *de facto* seat of the best firms in the country) and advocates' tight work schedules.

This explanation is less satisfactory in the case of prosecutors and judges, as the vast majority of the local province's courts and prosecutor's offices lie within less than one hour's drive from the university.

Classes on criminal or civil law and their procedures rarely include a full analysis or readings of actual documents produced by prosecutors or judges: judicial decisions, prosecutor's briefs etc. Field research and interaction with practitioners is not endemic to most courses and is only addressed through specialized courses such as Methodology of Legal Research, the final year thesis, during Community Service or in some of the legal clinics available. Many students only meet their first judge or prosecutor during the mandatory Criminal Law Clinic and Civil Law Clinic.

Intensive and specific education is often hampered by the large number of students attending basic classes. With an annual intake of 300–400 undergraduates, mandatory courses at UGM law faculty usually consist of 40–80 students or more. Concentration courses usually contain anywhere between 20–40 students, depending on popularity.

The problem is not only the method of education but also the assessment of the students' progress. Most course exams (more than 75% of courses during any given exam period) fail to adequately test a student's problem solving and analytical skills, opting instead to test them on gross memory retention. A large number of exams (more than 50%) fail to include a single question which challenges students' analytical abilities. These include the very courses that are critical in the future education of judges: Criminal Law, Criminal Procedural Law, Civil Procedural Law, Islamic Law and Islamic Procedural Law. These courses tend to be heavily populated, and examinations primarily test a student's memory retention, while providing little avenue for a practical application of legal knowledge.

There has been little effort to rectify the poor public image of judges and prosecutors in the classroom environment. This problem is so persistent that lecturers often casually joke that even if a law student performs poorly and fails to graduate on time, they can still become prosecutors and judges; this general attitude is not limited to UGM.

While advocates are also poorly perceived, exposure in university has served to rehabilitate the latter. Outstanding judges and prosecutors, or their legal works, are rarely exposed to the student body in class or outside. There exists no policy to suggest to students that a profession as a judge or prosecutor is a viable alternative to joining the bar. As a result, most consider it best to avoid a career in these public services.

Internships are not mandatory and most students can only conduct these in the month or so of vacation between the end of one academic year and the start of another,;otherwise they are compelled to take leave from the law faculty. Most graduate without having undergone internship.

Mandatory legal clinics for upper year students do provide direct access to judges and prosecutors: Criminal Court Practice and Civil Court Practice. Classes are fully taught by practitioners: civil litigation lawyers, criminal defense advocates, prosecutors and judges. These clinics connect academic theory and real world practice, and contribute greatly towards students' preparedness.[46]

Such classes involve approximately 24 meetings throughout one semester, comprising around 40 students. They are handled by a combined team of practitioners, usually an advocate and a judge, with a prosecutor in Criminal Court Practice. Students are divided into 4 groups per class and decide amongst themselves the division of labor for the written documents as well as the roles they will play during the trial. Witnesses, experts, bailiffs, advocates, prosecutors, the conflicting parties, and judges are all simulated. The preparations for these documents are largely carried out by the students with supervision from practitioners. This educational experience culminates in a mock trial where students prepare all the documentation (evidence, brief, police reports, minutes of case proceedings, judgments, etc) leading up to, and role play, a compacted version of a criminal or civil trial at the district court stage.

Sometime towards the latter half of the semester, students also carry out judicial monitoring of cases at local district courts. They must monitor at least 10 legal proceedings comprising all stages of a trial; all monitoring activities are carried out in coordination with a judge at a given district court.

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46 See Chapter 12, at 287; for a similar discussion regarding legal clinics in Australia, see Chapter 3, at 65–6.

However, these legal clinic classes are hampered by several factors.[47] First, busy practitioners, a large class size and the sheer volume of documentation to be prepared (legal documentation prepared for simulation easily stretch far beyond 400 pages) mean that supervision of the simulated courtroom experience is limited. Comprehensive feedback for each stage of documentation is unrealistic. Second, these legal clinics do not actually expose students to the daily work of judges or prosecutors, in the way that a law firm internship does for advocates.

While judicial monitoring has strong potential to inspire student interest, many students actually become disillusioned with what they see in court. Tardiness and unclear court schedules frequently hinder monitoring; parties often do not show up leading to extensions, and decisions are taken *in absentia*. In addition, local courts in Yogyakarta do not deal with high profile cases or complex litigation, leading to many quick sessions with few opportunities for a deeper look into court practice. There is no integrated effort in these clinics to connect the students with prosecutors and judges, aside from using them to teach.

This means that students graduate without the requisite positive attitude, skills or ideas as to how to plan for careers in the judiciary or prosecution. Poor opportunities to network also discourage students from pursuing options to enter government service.

Besides legal clinics, national moot courts – either internal to the law faculty or open to all Indonesian law schools – can also help students hone practical legal skills and expose them to judges and prosecutors. The framework for national moot courts is similar to that of the legal clinics, with a focus on specialized areas of the law (common cases involve corruption, environmental protection etc). Teams are large – at least a dozen students, with the larger teams exceeding 20 participants.

The problems faced in clinics – poor supervision and large class sizes – are remedied through intensive supervision from alumni and networking developed through the years; critical in establishing networking and a knowledge base.[48] Practitioners are often called on to assist in the training of teams, and personal relations are forged through this avenue.

Teams are trained intensively for months, preparing their written briefs and practicing oral submissions for a simulated trial. Highly competitive, UGM teams have tended to dominate national moot courts in recent years.

47 For similar discussions on conducting legal clinics in HKU, see Chapter 9, at 201–2.

48 For similar discussions on the benefits of international moot courts, see Chapter 6, at 129.

Moot courts provide a strong basis for a professions-based education. Moot alumni tend to be more knowledgeable than their peers about court-room proceedings, rules of evidence and legal argumentation. These students also tend to have a better understanding of the role of other parties in and outside of the courts.

Unfortunately, only a minority of students are able to participate in moot courts. As a result – and unless they were particularly proactive – many students graduate from the law faculty with a poor skillset and little knowledge or interest in pursuing a career as a judge or prosecutor. While this would not be a problem in normal circumstances, a law faculty intending to reverse the shift away from such public offices must address these shortfalls.

G Odd Bird: UGM's International Undergraduate Program

Traditionally most partners and associates in top-tier Indonesian firms have not come from UGM and such is still the case today. Even with the high pay offered by law firms and strong media attention devoted to the role of lawyers, UGM students have previously shied away from such a career or were unsuccessful in their applications.

Surveys of the backgrounds of lawyers in Tier I, II and III firms[49] in Indonesia show that on average less than 5% of their lawyers come from UGM; some firms have none at all. The most common public university alma maters for advocates remain Universitas Indonesia or Universitas Padjajaran, together providing more than 50% of advocates at some firms.

In 2008 UGM's law school launched a new (and costly) international undergraduate program (IUP) aimed primarily at the more affluent segment of Indonesian society that seeks to prepare students to enter a more international legal job market.[50] When it first started, the IUP had four students, growing to an annual intake of about 30 students in 2011, and stabilizing to more than 70 students in 2017.

This section will argue that if it is possible to devise a program to attract students into a legal career in the private sector in a short time, then it should be possible to use that experience to devise methods to reinvigorate interest in a career as a judge or prosecutor.

Taught in English, and requiring two mandatory internships in addition to the university-wide requirement of a community service program, graduates

49 'Indonesia' (*The Legal 500*, 2017) <www.legal500.com/c/indonesia> accessed 10 June 2017.

50 For discussions on similar experiments, see Chapter 13, at 313–6; on responding to a more international legal education, see generally Chapters 3 and 10.

of this new international program have – against UGM's historical bias – begun to break into top-tier firms in fairly large numbers. Of the roughly 30-plus graduates of this program thus far (as of July 2015), at least 13 graduates are or were employed, or are undergoing probative internships at Tier I, II and III firms. While the regular program has also seen a recent increase of students eventually joining law firms, the IUP program produces a much higher proportion of lawyers. An examination of the framework of this program goes some way to explain this.

Most top-tier firms regularly deal with international clients coming from different legal backgrounds and therefore use English in their dealings, which is also the language of instruction in the IUP.[51] Thus, graduates are more linguistically prepared for the work.[52]

In terms of the course framework, the IUP only offers three specialisations: constitutional law, business and international law. The latter two are the most popular. A number of courses especially available in this program are geared to a career in a law firm; these include Interview, Counseling and Negotiation,[53] Accounting for Lawyers and Legal Audit. Other courses frequently involve an analysis of foreign legal systems. This comparative element is crucial for the next generation of Indonesian law graduates, considering the growing relations between, *inter alia*, nations in the ASEAN region and the increasing prevalence of cross-border legal acts.[54]

IUP accommodates these extra courses by dropping those considered less suited to its goals: Islamic Marriage and Inheritance, Legislative Drafting, as well as some selected legal clinics (leaving two: criminal and civil court practice). This is to the detriment of courses normally associated with a career as a civil servant.

A large number of courses involve regular visiting professionals and guest lecturers, from within Indonesia or abroad. In addition, advocates are regularly invited to teach legal writing, tax law and a number of business law concentration courses. Due to IUP's large budget it is possible for practitioners to be flown in from Jakarta. Legal professionals (especially lawyers) are enthusiastic at being given the chance to teach, both as a getaway from work and for the

51 Admission requires a TOEFL ITP score of 500 or more, or an IELTS score of at least 5.0. Candidates with TOEFL scores of 450 to 499 may be admitted but are expected to raise their scores to 500 within one semester.

52 For similar emphasis on the use of English and lawyering skills, see Chapter 10, at 245–7.

53 For an example of how soft skills may taught in particular context, see Chapter 9, at 209–11.

54 For discussion of how Singapore's universities respond to this challenge, see Chapter 5.

satisfaction of 'giving something back'. This practice leads to greater degree of exposure to advocates, with many maintaining personal contacts after college.

A wider use of problem-based learning, and a smaller class size facilitate greater analytical methods in education. Evaluations of the examination questions in IUP show that most classes consistently provide a much larger proportion of questions which test the student's analytical capabilities. Exchange programs with a number of foreign universities are also in place, with IUP serving as both sender and host.

Perhaps most distinctive is IUP's insistence on two mandatory four- to six-week internships, generally carried out in the second and third/fourth years. These are supervised, and take place during the breaks between academic semesters or years – and in the past had cut into active semesters. During internships, students are also tasked with conducting specific legal research which is written and defended together with their final internship report.

Internships provide students with practical experience, and allow them to test the waters for professions they are interested in. They are also useful in providing feedback to the faculty regarding the quality of the legal education provided to students. As internships are carried out in the middle and at the end of the four-year legal education, it is possible for practitioners to assess students and their education before graduation.

Placement is mostly based on student preference with faculty assistance. Students are supervised by a faculty supervisor and a field supervisor. Only a miniscule number of students (less than 2% of all internships) choose district courts or prosecutor's offices for their internships; the most popular options being law firms, followed by consultant offices and companies, NGOs, embassies and ministerial offices.

In addition, IUP students are disproportionately represented in international moot courts.[55] While the ratio between IUP and regular students stands at about 1:5, more than 50% of international moot court participants come from the IUP program. The IUP rate of participation in international moots varies between intake years, but range from 25–50% of students during 2008–2013. It has now dropped due to larger intake sizes and limited slots in teams.

As opposed to national moot court's wide scope and procedural focus, international moot courts focus on the written and oral arguments before the court, simulating the advocacy of law before a panel of judges. Training is similarly intense to that of national moot courts. The emphasis is on practicing the skills of a litigation lawyer: legal research on international topics, drafting of written

55 For further discussion on international moot courts and their role in legal education, see Chapter 6.

arguments and oral arguments against an opposing team.[56] Teams are much smaller than in national moots, with around 3–7 participants. Teams regularly travel to Jakarta for several days in order to practice with lawyers at top firms; ex-mooters and foreign counsels are especially involved in these trainings.

Upon graduation most IUP students have received a disproportionate exposure to lawyers and law firms, both in terms of skills taught in university and through direct experience and personal relations via internships and moot courts. As a result, the trend in IUP is for most students to opt for a career in law firms or other employment in the private sector. At the time of writing, no IUP student has entered a career in the judiciary or prosecutor's office. In the classes of 2011–2015, comprising cohorts of 20–30 students each, only one or two students – if any at all – ever expressed an interest to become a judge or prosecutor.

While public opinion continues to view lawyering as a dirty profession, most IUP students, including most international moot court alumni, report positive experiences working at law firms and being advised by lawyers.

The factors canvassed in the previous paragraphs help explain why]the interest of IUP students has shifted towards a career in law firms and may be used as a basis for introducing changes to shift the focus back on judgeships and the prosecution, as a strong example of how a law faculty's curriculum could impact career choices of graduates.

H Shifting Interest Back

Several factors which influence students' (dis)interest in a career as a judge or prosecutor are beyond a law faculty's control. Poor pay and facilities are clearly within the ambit of the government. Law faculties could however assist by continuing to inquire into the reason(s) that lead students to spurn a career in government service, and could perhaps serve as a discussion partner during the drafting of remedial.[57] The opinion of law students and recent graduates are especially important sources of information for reformative policies, to gauge the level of support for their implementation, and effectiveness in practice.[58] Reforming the recruitment of judges and prosecutors to enhance the transparency and professionalism of such processes is within the ambit of

56 Ibid (for more details on international moot courts).

57 For similar discussion on how outside actors interact with legal education, see Chapter 13, at 297.

58 For discussions on evaluating courses, see generally Chapter 9.

the Supreme Court and Attorney-General's Office. This has been recognized as a key issue by the Supreme Court as well as in USAID's E2J program, which foresaw problems with information access and policies, even if the Indonesian judiciary were to carry out hiring.[59] The Supreme Court has identified the need for more transparent and accountable recruitment procedures as the primary object of reform in the period 2010–2035.[60] Law faculties could arguably also assist by utilizing and publicizing relevant data in order to provide a clearer picture of overall trends.[61] It can be noted that special admission processes are already in place for 19 accredited universities to admit potential judges by recommendation of their alma mater.[62]

At the same time, law faculties can influence other factors: teaching legal skills relevant to a given profession, exposure to real practice and remedying the poor public image of judges and prosecutors. As such, the role of judges and prosecutors could be emphasized both within existing classes and perhaps via specialized professions-based courses, which could become part of the optional legal clinics offered. Integration within existing classes will require relevant courses to include more analysis of the legal products of judges and prosecutors and their impact upon legal study. A tailored framework appropriate to Indonesia's context could be developed, perhaps learning from Japan's experience with *yoken jujitsu* teaching – which emphasizes the use of facts in a civil-law derived system.[63] For example, discussions of good and bad judgments alike present interesting opportunities to analyze the law in any relevant practice; likewise, arguments made by prosecutors. This has the dual effect of shifting away from a purely doctrinal approach to a more practical one, as well as to highlight the critical importance of these.

A more practice-based approach to teaching must necessarily be coupled with reforms in the examination methods. Realistically speaking, larger classes do not lend themselves easily to analytical exams. What would be possible, though, is asking fewer, but more comprehensive questions in the examinations, and to carry out more frequent activities in class to enforce greater use of reading materials. A more comprehensive solution would inevitably require a mix of improving campus learning infrastructure, improving the quality

59 Cohen and others, *Mid-term Performance Evaluation of the Educating and Equipping Tomorrow's Justice Reformers* (*E2J*) *Program: Final Report* (USAID April 2014) 15.

60 Indonesian Supreme Court, 'Blueprint for Renovations 2010-2035' (n 31) 3, 36, 42, 51.

61 ibid 17.

62 Indonesian Supreme Court, 'Annual Report 2010' (n 30) 265–6; --, (n 6).

63 See Chapter 7, at 127–8.

of educators and reducing the faculty-to-student ratio to more manageable numbers.

In a comparable vein, current legal clinics, especially criminal and civil court practice have excellent potential to be revised and improved. Smaller class sizes and a larger number of invited practitioners (especially judges, prosecutors, and other professions as necessary) would allow for a more personal and intense education. While time-consuming, invited practitioners should ideally also undergo training to maximize their impact as educators, all the more so since there have been complaints that some invited practitioners are notoriously poor educators. Training will initially be time-consuming, especially bearing in mind the workload of legal practitioners.

Specialized professions-based clinics could be held as an optional clinic (UGM already runs a Prosecutor's Clinic, but no Judge Clinic as of this writing)[64] that would incorporate key aspects of the specialized training given to judges and prosecutors. These classes would require greater cooperation with current and former judges and prosecutors; in UGM's experience, a long history of institutional cooperation and personal relations and adequate compensation for their expertise facilitate cooperation with current legal professions. Pilot runs of such clinics need not be large, but could target prospective applicants.

Furthermore, faculty support to national moot court activities, as well as other activities which facilitate direct contact with the judiciary and prosecution, should receive greater support in order to drive interest and exposure. If possible, the campus should also take proactive steps to invite more legal practitioners who are interested in assisting these student activities, which would also require tapping into and improving the school's cooperation and alumni network.

Steps could additionally be taken to expand the scope of faculty-supervised internships outside of the IUP program and design these so as to attract sufficient students. A common complaint about the internships the IUP concerns their workload: each internship is worth only two credits but takes four to six weeks consisting of five to six eight-hour workdays, in addition to the legal research assigned by the faculty. These internships also tend to clash with the student's planned curriculum without directly contributing to it, acting as an additional burden. Such practical considerations ought to be borne in mind when designing new internship programs. Special cooperation in the form of pre-placed internships in courts or prosecutor's offices could be considered in

64 For a similar discussion on conducting legal clinics in HKU, see Chapter 9, at 201–2.

addition to or in lieu of special professions-based clinics. Care should be taken to ensure that interns are assigned tasks which conform to their capabilities and expectations, as poor experience in internships negates the goal of increasing interest. To increase accessibility, these internships could be designed as a part-time matter over the course of a semester requiring fewer working hours per day. Good institutional cooperation and close physical proximity to relevant institutions would support the implementation of pre-placed, part-time internships.

In UGM's framework, internships are run by specific sectoral departments, as opposed to an independent internship unit or through the academic affairs office. It would make sense for the departments in charge of subjects like criminal law, civil law and procedural law to work together in organizing internships at prosecutor's offices or in the courts.

Another approach would be to set annual or semester-based faculty-wide research topic. For each topic, departments (staff and students) would be invited to participate in research relating to or incorporate teaching materials within their curriculum regarding that topic, which could be tailored for example, to address the role of prosecutors and judges, in various issues. These could make for interesting perspectives, for example from the international law or administrative law clusters.

Before proceeding with any of the measures just mentioned, it may be necessary to consult the Indonesian Cooperation Body for Universities (*Badan Kerjasama Perguruan Tinggi*) and perhaps also lobby this body with the help of prosecutor's offices or courts.

Most students graduate hoping to affect positive changes in Indonesian society and its legal system; integrating the role of the judiciary and prosecution into the framework of legal development would open students perspectives, and show them the part that judges and prosecutors can play in this regard. In this regard, conscious steps should be taken to improve the perception of the courts and prosecution on campus. While censorship of unflattering news about these professions is clearly out of the question, efforts can be stepped up to celebrate their excellence and positive achievements. Faculties could begin to prepare students on how to deal with the negative realities of law practice – including for example corruption – as a part of their education.[65] Both professional ethics and knowledge of the anti-corruption frameworks are key if students are to feel confident when faced with threats.

65 For further discussion on corruption and legal education, see Chapter 4.

Consistent exposure to high quality judges and prosecutors could serve as one of the most direct means of image control and could be fulfilled through the implementation of many of the recommendations set out above.

The implementation of such a PR campaign should be closely coordinated in cooperation with the judiciary, prosecution and other concerned stakeholders. These efforts do not necessarily have to be expensive, but must be accessible and effective. These may be integrated into campus newsletters, fliers and daily education activities such as classes or discussions.

The primary goal would be to restore students' interest in a career as a judge or prosecutor, primarily by focusing on success stories, articulating how common problems can be avoided and can be achieved, and by dispelling uncertainties and false public assumptions regarding the functioning of the government legal sector. This PR campaign should be based on the truth: the problems of status quo must be acknowledged, but ways to change these and career opportunities should also be emphasized.

Finally, proper career information and counselling is crucial to provide students with a clear idea of the preparations and procedures necessary to pursue their careers. An oft-overlooked asset in UGM law faculty is the Law Career and Development Centre, which helps students prepare for, and gives information on, potential future careers. LCDC has already printed out free professions books to students who register (including those on advocates, judges, prosecutors and diplomats) to the office. However, LCDC services are not directly integrated into the curriculum and students enter the office on their own initiative. Career days are also held periodically on campus premises to give information. These programs can provide students with a host of information and connections on the procedures, requirements and prospects of a career in a wide variety of professions, and will greatly benefit from a larger initial interest in the judiciary and prosecution. Any future development in the curriculum to shift interest towards certain professions should be closely coordinated with similar offices and those in charge of the faculty's external cooperation affairs.

In sum, the recommendations for change set out in this section are premised on a two-pronged approach: increased exposure to information about the role of judges and prosecutors, and the creation of specialized programs and (more) opportunities on campus to enable students to learn and hone the practical skills necessary for those who are interested in a future in those professions. At the same time, it is important to reiterate that the implementation of these recommendations is no panacea: there is a need for cooperation from, and reform of, the judiciary's and prosecution's work and recruitment processes to address concerns about transparency, pay and other issues that at present discourage students from opting to join these professions.

I Conclusions

While many of the factors that seem to turn high-quality students away from the judiciary and prosecution are outside law faculties' control, some are not. Law faculties could carry out curriculum reforms, provide a better infrastructure for learning relevant skills, increase exposure to these professions, and ameliorate their poor public image.

The experience with IUP shows that it is possible to overcome historic attitudes towards a particular legal profession – i.e. advocates. The challenge is how established programs can be reformed in a similar vein for other legal professions. All law faculties, including UGM, have to adapt to potentially rapid drops of graduates' interest in becoming judges and prosecutors. Quick academic reforms are necessary to enable Indonesia's law faculties to continue to support national needs, and such reforms could in turn complement and reinforce related reforms in the judiciary and prosecutor's offices.

This challenge is not limited to UGM-Indonesia, or even Asia-and as such, creates opportunities to share knowledge between domestic and foreign law faculties and other stakeholders. The hope is that this could, in the longer term, help change the paradigm so that positions in the government legal sector are once again seen as attractive and eagerly pursued by students, to the benefit of the Indonesian legal system as a whole.

Index