

The Futures of Legal Education in Japan

*Luke Nottage**

Articles by Andrew Watson and Stacey Steele in the previous issue (no. 41 (2016)) of the *Journal of Japanese Law* review recent developments in Japanese legal education. They helpfully add to an already surprisingly voluminous literature in Western languages on the topic.¹ This short Comment summarises some background before sketching some innovative ways forward.

As outlined by Watson,² the starting point was the Judicial Reform Council's recommendations in 2001 for an array of measures to bring the legal system closer to everyday life in Japan. This program included moving away from the government directly regulating matters in advance to minimise harm, towards allowing citizens and firms to plan and undertake activities more freely, subject to relief being provided if and when any suffered harm.³ For this to work, the court system as well as Alternative Dispute Resolution mechanisms were reinforced, but so was legal education. From 2004 universities added new postgraduate "Law School" programs, requiring two more years of study after an undergraduate law degree or three more years after a non-law degree. To support these Law Schools, until 2011 only their graduates could sit a revamped National Legal Examination, which needs to be passed to qualify as a *bengoshi* lawyer, judge or public prosecutor. The Council had also envisaged that around 3000 students would eventually pass the Examination each year, with a pass rate of 70–80 percent. The aim was not only to increase the quantity of legal professionals, but also their quality and diversity, as the new Law Schools moved away from the narrow focus of private cram schools that had emerged to support students competing to pass the old-style Examination (open to all) with a much lower pass rate.

* Professor of Comparative and Transnational Business Law, Sydney Law School; Co-Director, Australian Network for Japanese Law (ANJeL). I thank Sonya Chater, Giorgio Colombo, Stephen Green, Akira Kawamura, Arjuna Nadaraja and Taku Okada for useful information and insights, but take sole responsibility for the views expressed.

1 See eg H. BAUM, et al., *Japanese Business Law in Western Languages: An Annotated Selective Bibliography*, 2nd ed. (New York 2013) 105–111.

2 A. WATSON, *Changes in Japanese Legal Education*, in: *J.Japan.L.* 21 (41) (2016) 9–15.

3 See generally D. VANOVERBEKE/D. NELKEN/S. PARMENTIER (eds.), *The Changing Role of Law in Japan*, (Cheltenham 2015) and L. WOLFF/L. NOTTAGE/K. ANDERSON (eds.), *Who Governs Japan? Popular Participation in the Japanese Legal Process* (Cheltenham 2015).

From the early years of this experiment, however, things did not go as planned.⁴ Most universities with undergraduate Law Faculties were allowed to add postgraduate Law Schools, which competed to attract new students. The number allowed by the government (influenced especially by the views of the Japan Federation of Bar Associations, public prosecutors in the Ministry of Justice, and the judiciary) to pass the new Examination only rose slowly. Numbers rose to around 2000 each year over 2007–2013, but dropped back to around 1800 in 2014 and 2015, and the government then agreed to cap passers at 1500 each year due to concerns that there was insufficient demand and quality. Even more disturbingly, average pass rates dropped from 40% in 2007 (the first year with both 2-year and 3-year Law School graduates) to around 25% over 2009–2015, with a much lower rate for the diminishing proportion of those taking the 3-year program.⁵ As Steele shows for 2015, the pass rates and absolute numbers are also heavily skewed in favour of some large public and private university Law Schools.⁶ She also shows how people are flocking to sit the preliminary qualifying examination (*yobi shiken*) introduced from 2011 as a bypass in lieu of Law School graduation. Although only around 4% pass, most then go to pass the new-style National Legal Examination, and those are then highly sought-after by law firms. Unsurprisingly, therefore, applications to Law Schools are way down from a decade ago, some already closing or merging, and many more will probably follow. Their students and instructors are understandably nervous, and pressured to focus again more narrowly on Examination subjects.

The situation is clearly not sustainable. So what can be done? The government envisages and is encouraging a gradual squeeze on the numbers of law schools, hoping that fewer graduates sitting the National Legal Examination will boost their pass rate and therefore the attractiveness of the remaining Law Schools. Yet such an outcome, including the possibility of those Law Schools broadening again their curriculum, will depend on how the squeeze correlates with pressures to keep reducing those allowed to pass the Examination each year, as well as the attractiveness of the preliminary qualifying examination alternative.

Are there other ways forward? One possibility is to go the way of Korea, which closely monitored Japan's initiative. Korea's US-style alternative means tightly limiting

4 L. NOTTAGE, Build Postgraduate Law Schools in Kyoto, and Will They Come – Sooner *and* Later?, in: Australian Journal of Asian Law 7 (2005) 241–263.

5 WATSON, *supra* note 2, 23–28. Indeed, the pass rate is even lower – only around 20% say in 2015 – if we take the number of passers (1850) in proportion to those who applied to sit the Examination (9072) rather than those who actually sat it (8016): see <http://www.moj.go.jp/content/001158038.pdf> and http://www.moj.go.jp/jinji/shihoushiken/jinji08_00111.html. After all, the attrition is probably due mainly to people deciding their prospects for passing are not as good as expected, which is a factor that should make Law School study even less attractive.

6 S. STEELE, Japan's National Bar Examination: Results from 2015 and the Impact of the Preliminary Qualifying Examination, in: J.Japan.L. 21 (41) (2016) 59–60, 70–74.

the number of Law Schools, and requiring those accredited to forgo undergraduate Law Faculty education.⁷ But this approach is quite elitist and expensive, since all students would then have to spend at least 6 years to qualify to sit the examination. It also limits the incentive and scope for universities to innovate in developing new postgraduate law programs and specialisations.

A second and even more radical possibility might be to abolish the postgraduate Law Schools in Japan. There should be no shame in concluding that an experiment has largely failed, but transpose into new directions some positive accomplishments.⁸ In particular, those skilled instructors and teaching resources that have undoubtedly emerged at Law School level could be reallocated to undergraduate Law Faculties. They could teach law students who are streamed, after the first (or perhaps second) year at university, to sit the new Examination because they are motivated and have realistic potential to enter legal practice. The others could continue studying law but in a broader context, so as to prepare them for careers (eg in business, NGOs or government⁹) which do not involve the focus on court work still associated with the National Legal Examination.

To ensure the former cohort of students retain a broader perspective, increasingly necessary for lawyers and even judges dealing with ever more complicated socio-economic issues nowadays, they could be encouraged or required to undertake a undergraduate degree in parallel.¹⁰ This is one solution that has emerged in Australia and New Zealand.¹¹ At Sydney Law School, for example, half the students graduate from high school (scoring in the top 0.3% of the State school-leaving exams) and then are required to complete double degrees in law (LLB) and another discipline over five years. The other half complete another degree first over three years, followed by a three-year JD

7 STEELE, *supra* note 6, 61–62, 68 (noting also the voluntary move by Melbourne Law School to abolish undergraduate LLB education for a US-style JD program); WATSON, *supra* note 2, 47–48.

8 See generally WATSON, *supra* note 2, 42–45.

9 Cf. L. NOTTAGE/S. GREEN, Who Defends Japan? Government Lawyers and Judicial System Reform in Japan and Australia, in: *Asian-Pacific Law and Policy Journal* 13 (2011) 129–173.

10 For earlier proposals to focus legal education reform in Japan on undergraduate education, see L. NOTTAGE, *Sōzōryoku o hatarakaseyo - nihon ni okeru hōgaku kyōiku/shihō kaikaku o kangaete* [Let's Use Our Imagination: Thoughts on Reform of Legal Education and the Administration of Justice in Japan], in: *Jurisuto* 1170 (2000) 148–150; L. NOTTAGE/T. SAITO, *Nihon no hōsō yōsei seido kaikaku e no teigen – osutoraria-hō no shiten kara* [Proposals for Reforming Japan's System for Training Legal Professionals: From the Perspective of Australian Law], in: *Hōritsu Jihō* 76(2) (2004) 30–36.

11 See eg. L. NOTTAGE, *Nyujirando no hōgaku kyōiku ni okeru hōshiteki na kaikaku shugi* [Conservative Reformism in New Zealand's Legal Education], in: *Shihokaikaku Zasshi* 6 (2000) 61–68; L. NOTTAGE/T. SAITO, *Osutoraria-hō wa beikokuka shita no ka? Nihon no hōsō yōsei seido kaikaku e no shisa* [Has Australian Law been Americanised? Implications for Japan's System for Educating the Legal Profession], in: *Causa* (2003) 66–69.

degree at Sydney Law School.¹² With either the LLB or JD, graduates can complete a 3-month full-time course to qualify as a lawyer, but this is very easy to pass. Such a system in Australia and New Zealand produces many well-regarded young lawyers who now make up a disproportionately large group within major law firms in the main centres throughout Asia.¹³

A third possibility for Japan, perhaps most likely in the short term, is to provide more promising pathways to international legal practice for young Japanese law students by partnering with universities abroad. For example, Sydney Law School is already inaugurating a “3+2” double degree program with leading Chinese law faculties. Chinese students will complete 3 of their 4 years of undergraduate legal study, then complete the postgraduate JD degree at Sydney Law School in two rather than three years because they get credit for their three years of LLB study in China. When they finish Sydney Law School’s JD, the partner Chinese law faculty also credits one year of the JD study towards their LLB in China, so they graduate with two degrees after a total of five years. Thanks to the JD, the students can go on to qualify quickly in Australia. After working in local law firms, the Chinese graduates will be well positioned (just like Australian and New Zealand young lawyers over recent decades) to work in international legal practice back in China or world-wide.

Such a “3+2” pathway should also be attractive to law students in Japan. Of course, some Japanese law faculties may fear diverting their law students away from proceeding to their own postgraduate Law School program in Japan, in the hope of passing the National Legal Examination and becoming qualified as a Japanese *bengoshi* lawyer. But the low pass rate will be a disincentive anyway to those students, compared to the essentially 100 percent pass rate after graduating with a JD (or LLB) from an Australian university. The Japanese Law School subjects will also be less useful to future international legal practice compared to the compulsory core subjects taught from a common law perspective in the JD, when matched with the law subjects already studied in the Japanese undergraduate law degree. Sydney Law School’s JD degree also includes many interdisciplinary, comparative and international law elective subjects, including courses taught in Japan, China, South and Southeast Asia, and Europe.¹⁴ Japanese law students

12 See <http://sydney.edu.au/law/fstudent/>.

13 For example, even focusing on the 380 registered foreign lawyers in Japan as of 1 April 2015, 28 had Australian nationality: Japan Federation of Bar Associations, White Paper on Attorneys (2015) p. 30, via <http://www.nichibenren.or.jp/en/about/whitepaper.html>. Many more (typically younger) Australians work as “trainees” in Japanese law firms.

14 See <http://sydney.edu.au/law/offshore/index.shtml>. On the Kyōto Seminar in Japanese Law, still offered since commencing in 2005 under a 3-year Japanese government program to support the internationalisation of then new Law Schools, see L. NOTTAGE, et al., Beyond Borders in the Classroom – the Possibility of Transnational Legal Education, in: *Ritsumeikan Law Review* 25 (2008) 183–208, G. F. COLOMBO, ‘Kyoto Seminar & Tokyo Seminar: Japanese Law in the Global Era’: Impressions of an Italian Researcher in Kyoto, in: *J.Japan.L.* 17 (33) (2012) 277–280 and <http://www.ritsumei.ac.jp/japanese-law/kyoto-seminar/>.

deserve the opportunity of such a pathway to international legal practice, and Sydney Law School is interested in partnering with leading universities in Japan who are interested in exploring this idea.¹⁵

The third possibility is considerably less ambitious in scope, compared to the others outlined above. Nonetheless, it might encourage law students and educators in Japan to explore other imaginative solutions for meeting diverse legal needs in the 21st century.

SUMMARY

Articles by Andrew Watson and Stacey Steele in the previous issue (no. 41 (2016)) of the Journal of Japanese Law review recent developments in Japanese legal education. They helpfully add to an already surprisingly voluminous literature in Western languages on the topic. This short Comment summarises some background before sketching some innovative ways forward.

ZUSAMMENFASSUNG

Die Artikel von Andrew Watson und Stacey Steele in der vorherigen Ausgabe der Zeitschrift (Nr. 41 (2016)) haben die aktuellen Entwicklungen in der Juristenausbildung in Japan beleuchtet und damit einen weiteren hilfreichen Beitrag zu der bereits umfangreichen westlichen Literatur zu diesem Thema geleistet. Der vorliegende kurze Kommentar fasst die Hintergründe zusammen und zeichnet sodann einige innovative Wege für die künftige Entwicklung auf.

(Die Redaktion)

15 Another variant worth exploring is giving a final-year Japanese postgraduate law school (or Chinese 'JM') student one year's credit towards a Sydney Law School JD electives, so that it can be completed in two rather than three years, and the student can then at least qualify as a lawyer in Australia. However, this '6+2' model for three degrees entails significantly more direct and opportunity costs for the student and home governments.

