New Graduate Law Schools in Japan and Practical Legal Education

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I. INTRODUCTION

The Legal Reform Council (*Shihô Kaikaku Shingi-kai*) published its Interim Report on November 20, 2000 (Interim Report). It states that "at the Graduate Law School, the central part of the education will be theoretical, keeping in mind the reasonable solution of problems arising out of the practice of law. At the same time, it will also involve the introduction of practical education, such as the basic theory for determining prerequisites for claims (*yôken jujitsu-ron*), and the skills for finding material facts. The Graduate Law School should consciously provide education bridging law practice and legal doctrine. From this standpoint, the content and methods of education, the selection and creation of teaching materials, and cooperation between academic teachers and practitioner teachers (*jitsumu-ka kyôin*) are required."

Also, the Ministry of Education (since January, 2001, the Ministry of Education and Science) issued on October 6, 2000 a Report to the Legal Reform Council. A paper entitled "An Idea on the Graduate Law School and its Meaning: relating to the report to the Report to the Legal Reform Council" compiled by Professor *Takeshi Kojima* of Chûo University and others (Ministry of Education Report)[1] includes the following statement: "The Graduate Law School is a professional school (*purofeshonaru sukûru*).

1 See <*http://www.mext.go.jp/b_menu/houdou/12/10/001038.htm*>.

In the third year, practical courses such as Legal Clinic will be offered. The teachers will be composed of academics and practitioners. It is expected that a change in appreciation among the universities will arise so that they will realize that the vocation of the universities is to create excellent practitioners, rather than to increase the percentage of their graduates that successfully pass the bar exam." The report continues: "This may be repetitious, but the basic point of view should first be to have a firm idea on what is the most appropriate system to create practitioners for the people, not practitioners for practitioners, and then to design a reasonable system open to the people with the will to be practitioners." It further emphasizes the importance of coordination between practice (*jitsumu*) and the study of doctrine. It also states: "Not only the practice for litigation, but also the requirements of law practice in other fields such as ADR, negotiation, preventive law and compliance" should be taught.

II. LACK OF CONSENSUS ON THE MEANING OF "PRACTICAL EDUCATION"

Traditionally, in Japan, law practice has meant only litigation or court practice. For example, substantially all of the time for practical education at the Legal Research and Training Institute is devoted to practical education as judges, national prosecutors, and litigation lawyers.

Compared to the practice of lawyers in the United States, practice other than litigation, such as the practice of legal advisors as general corporate lawyers, tax lawyers, environmental law specialists or labor lawyers, has been very limited except in the Tokyo metropolitan area and Osaka. Therefore, sometimes there is still a tendency when people discuss law practice to refer only to litigation or court practice. While the above-cited part of the Interim Report seems to mention "practice" only in its narrow meaning, apparently the Ministry of Education Report seems to mean legal practice in its expanded meaning. But it is important to remember that from time to time, the discussion on practical education tends to be limited to litigation or court practice.

By contrast, industry now seems to mean by the term "practical legal education" education about anti-trust, intellectual property law or the law of international business, which can be used immediately upon graduation from new law schools.

Going even further, the American Bar Association's Section on Legal Education and Admission to the Bar published in 1992 a "Report of the Task Force on Law Schools and the Profession: Narrowing the Gap" (MacCrate Report) which suggested that legal skills include: (1) problem solving, (2) legal analysis, (3) legal research, (4) factual investigation, (5) communication, (6) counseling, (7) negotiation, (8) skills required to employ, or to advise a client about, the options of litigation and alternative dispute resolution, (9) skills necessary to organize and manage legal work effectively, and (10) skills involved in recognizing and resolving ethical dilemmas.[2] It is far broader than the

2 MacCrate Report, at 135.

meaning assigned to the word practice under the Interim Report and different from the expectation of industry.

III. WHO WILL TEACH "PRACTICAL SKILLS"?

1. Disdain of Practice or Skills among Academics

An important difference between American legal education and Japanese legal education is that in the United States legal education evolved out of apprenticeship by and for practitioners. Legal education by practitioners then was transferred to the law schools. So legal education started as an education for lawyers. By contrast, in Japan at the beginning of the Meiji Restoration of 1868, formally there were no legal practitioners at all. The Meiji Government was desperate to modernize every aspect of Japan including the legal system. They imported legal and judicial systems from abroad mainly from Prussia and France.

At the beginning, the only ones who could explain the details of the law were those law professors who could read law books or case books in German or French, because there was no accumulation of cases or precedents in Japan yet. Therefore, authoritative law professors' treatises were quite influential, and created an atmosphere of the supremacy of law professors and disdain for law practice. More than that, it was firmly believed that the university was for "Wissenschaft" or academic study, and for academic education. Such supremacy and disdain is now beginning to disappear, but there is still some disdain towards teaching practical skills lingering at universities because it is not Wissenschaft. There is still a strong belief that the university is the place to teach Wissenschaft, but not skills. I believe this belief is still overwhelming among law professors.

2. The History of Legal Education in Japan: Complete Lack of Skills Education

There is almost no course in the law faculties of Japanese universities for practical legal skills, with some exceptions.[3] There are no courses involving legal clinics, almost no training by moot court, no legal writing courses, no training of legal interviewing and counseling, and almost no training in legal research.[4] Therefore it is interesting to read

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3 At the University of Tokyo, Professor *Shozo Ota* conducted a seminar on negotiation; Professor *Daniel Foote* conducted an interesting seminar on business negotiation between the United States and Japan using a video conference system (see his "Information Technology Meets International Contracting: Tales from a Trans-Pacific Seminar", paper presented at the fourth Japanese Law Online conference, University of Victoria, April 4, 2001); and I am conducting a seminar for legal writing and other aspects of preventive law together with Professor *Gerald P. McAlinn*.

4 However, in its *senshû* course (course for future non-academics), the Graduate School of Law and Politics of the University of Tokyo offers classes in legal research.

the heated discussions on the disjunction between legal education and legal profession in the United States.[5] In Japan, there has been an almost complete disjunction between legal education and the legal profession from the outset. Now Japan has to create a conjunction between legal education and the legal profession.

The Interim Report draws an analogy between the legal profession and medical doctors.[6] However, in medical education, skill is regarded as very important. The most difficult and advanced surgery, like a heart transplant, is usually done by professors of medical schools. If even a novice graduate of a medical school cannot examine and diagnose a cold or "flu", people would be surprised. But no graduate of a Japanese university's law faculty can draft a simple contract, nor write a sensible legal memorandum. Even trained lawyers sometimes have awful writing abilities. In printed contract forms prepared by an experienced lawyer, you might find the same word being used with different meanings, and the same thing being expressed with different words in different parts of a document. Contract clauses on representations and warranties, or conditions precedent, do not exist in Japanese contracts. There is no Japanese word corresponding adequately to the English "representations and warranties". Further, most lawyers in Japan write legal opinions without statements of facts. Many briefs filed by lawyers are full of "put downs" and indignant remarks about one's adversary, the opinion being appealed from a lower court or agency,[7] and a lot of emotional expressions such as "sheer nonsense", "laughable", "it is crystal clear", "awful" etc. Finally, it seems that the lawyers do not even know that there could be skills involved in interviewing and counseling.

3. Purpose of the New Law Schools

The purpose of the new schools is supposedly "to establish human resource infrastructure in order for the judicial system to function fully in the 21st century Japanese society". It seems to me that the new law schools now contemplated under the Interim Report may not be the place to teach Wissenschaft, nor the place to do academic research. I may be wrong. But it seems to me that most law professors believe that in the new law schools, academic activities or Wissenschaft will remain the most important thing, or at least as important as practical legal education, for future lawyers.

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5 H.T. EDWARDS, The Growing Disjunction Between Legal Education and the Legal Profession, in: 91 Mich.L.Rev. 34 (1993); R. POSNER, The Deprofessionalization of Legal Teaching and Scholarship, in: 91 Mich.L.Rev. 1921 (1993); G.L. PRIEST, The Growth of Interdisciplinary Research and the Industrial Structure of the Production of Legal Ideas: A Reply to Judge Edwards, in: 91 Mich.L.Rev. 1929 (1993).

6 Interim Report of the Judicial Reform Council (20 November 2000) at 23.

7 This phrase is taken from EDWARDS, *supra* note 5, at 64.

IV. LACK OF EVERYTHING

1. Pedagogy

We have to establish a methodology on how to teach practical skills to the students. Externships will cause a lot of difficulty. How can 50 students[8] or less be trained at a law firm? Even if students will be distributed to several law firms, a total of about 4000 students[9] each year will have to get external education, while the total number of all lawyers in Japan is still about 20,000.

There are also no textbooks and no case books to teach negotiation, legal writing, and interviewing and counseling. There are many books on how to write contracts, especially contracts in English. But these are a collection of sample contracts for businessmen. Of course these books will be helpful, but not sufficient for legal writing education at the Graduate Law Schools.

For practical education in relation to litigation, the state-funded Legal Research and Training Institute has provided excellent education. This comes from investments in high quality human resources from judges and national prosecutors from the government, and devotion by capable lawyers. It is wonderful to see that lawyers of the finest caliber are teaching as full time lecturers at the Institute. Also, the time and energy put in to teaching materials, especially so-called white covers (*shira byôshi*), seems tremendous. Yet it will be very difficult to give the same quality of education at Graduate Law Schools, where they will not be able to obtain necessarily the same level of cooperation from judges and practicing attorneys. That may explain why the present movement is towards preserving the Institute after the creation of the Graduate Law Schools. Still there will be a lot of problems with the education at the Institute when the number passing the bar exam is increased to 3000 per annum, from the current 1000.

2. Consensus on the Meaning of Practice or Practical Education

As explained above, in the past the practice of law and practical education meant education only relating to court procedures. It seems that both the report of the Ministry of Education and Interim Report of the Judicial Reform Council no longer take this narrow view. But still it is not clear how far they think practical education at the Graduate Law

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8 Ch. III. A of "An Idea on the Graduate Law School and its Meaning: Supplementing the Report to the Report to the Legal Reform Council" suggests that the maximum number of students will be 50 in a lecture course and less than 20 in a seminar. Therefore the actual number of a unit of a course may be less than 50. But I am afraid that because of budget constraints and scarcity of teachers, the number of students in a course will not be so small to allow meaningful extern training at a law firm.

9 It is expected that the total number of those passing the bar exam will be about 3000 per annum. A substantial percentage of the graduates of the Graduate Law Schools are to pass the bar exam. If the percentage of success is 80 %, then there will be about 3750 students each year.

School should extend. Does it include, for example, negotiations for domestic transactions or international transactions, in labor relations or commercial scenarios; interviewing and counseling in business settings or for the poor or underrepresented; legal writing for commercial transactions; skills for arbitrators and mediators; clinical education; or moot courts?

Further, we must not forget legal ethics. If the purpose of the Graduate Law Schools is to create good lawyers, then education in legal ethics is indispensable. First, we have to decide whether education in legal ethics should be left to the Legal Research and Training Institute. If it should be given at the Graduate Law Schools, then we have to decide how and by whom.

3. Teachers

Who will teach these practical skills? Law professors who can teach these skills even in part are very few, because of lack of experience and lack of interest. For excellent practitioners, teaching may not be an attractive job in comparison with actual practice, because of the difference of income. At present there are practitioners who teach at the Institute, and at several universities as part-time lecturers in the metropolitan area and the Kyoto-Osaka area. But most of them do it as a kind of pro bono activity. They are not getting a matching reward. I am afraid that when a large number of teachers for practical legal skills are called for by the Graduate Law Schools from Hokkaidô to Okinawa, there will be great difficulty in finding qualified teachers.

4. Teaching Materials

There are no suitable teaching materials at all, except those now being used at the Institute mentioned above. Compiling these materials requires money and energy. It is unclear, and unexplored, as to who will devote that money and energy to prepare appropriate materials.

V. BAR EXAM FOR THE GRADUATES OF NEW LAW SCHOOL AND PRACTICAL EDUCATION

The success or failure of practical education at new law schools totally depends upon the pass rate and the contents of the bar exam for the graduates of new law schools.[10] If the bar exam is a test for quantifying the accumulation of legal knowledge, like the present bar exam, and the subjects of the new bar exam are only the traditional subjects, private prep schools (*yobikô* or *juku*) will do far better. Practical skills education will be

10 The influence of bar exams on legal education at law schools is important also in the United States. See the MacCrate Report, *supra* note 2, at 278.

neglected by students. What can be effectively taught will be determined by how the bar exam will be designed. If the bar exam does not require any special preparation other than a 3 month cram course like in the United States, students may have enough time to devote to practical education. If the bar exam includes evaluation of grades at the new law schools, the students there will work hard. This will be all the more so if law firms consider the grades at the new law schools in recruiting students.

On the other hand, if the bar exam is only for quantifying the accumulation of legal knowledge and if the bar exam remains very tough, the students will shift their study only to accumulate the required legal knowledge. They will treat non-bar exam subjects lightly.

VI. Is It Necessary to Teach Practical Skills at the New Law Schools?

Practical training should not end at graduation from a new law school. Rather, graduation should be just a beginning. Practical skills may be more effectively nurtured by mentors after the students became practicing lawyers or other legal professionals. Even in the United States, novice lawyers who have just passed the bar exam cannot effectively practice law unless supervised by a senior and experienced attorney.

VII. Conclusions

1. Despite Lacking Everything, We Must Start Somewhere

The above shows that I am quite pessimistic about whether we will be able to give effective practical legal education at the Graduate Law Schools, in spite of the emphasis given to this by the Law Reform Council and the people who compiled the above mentioned report of the Ministry of Education, and in spite of expectation of ordinary people and industry. However, it is clear that we have to start this long overdue task of giving education about practical legal skills to prospective practicing lawyers.

2. The Way Forward

We have to think about the purpose of the Graduate Law Schools we are going to create. It seems that there is some consensus that they are for the education of good practitioners. This raises the question of what are “good practitioners”. There may be slight differences from law school to law school. For example, a law school created by Christian universities may be influenced by their religion. This kind of diversification should be encouraged. Next comes the question of what should be taught to create “good lawyers”. It should not be limited by the idea that the university or graduate school should teach Wissenschaft rather than skills. We have to determine the best mix of theoretical legal education and practical skills education. Then we have to recruit the best teachers from academics and practitioners.

The teachers of legal skills should start workshops to exchange ideas and experiences. For example, we have to discuss if the catch phrase of "from legal adviser to problem solver" is valid or not. They should exchange teaching materials they create. These teaching materials should be improved through discussion among teachers of practical skills. Teaching methods also should be discussed at workshops, and tested by the instructors.

We can learn from American law schools about practical legal education. However, we cannot copy it because it is strongly tied with the American way of practicing law. For example, I suspect that the Socratic method has a strong relation with the oral arguments used in the American appellate courts and the Supreme Court. Textbooks on legal counseling may be too inclined to psychological analysis, which may be good for clients with mental distress, but not for business cases. Legal writing cannot be the same because of the language. But we may learn some basics such as forms for legal memoranda and the need to avoid emotional expressions.

We have a long way to go to establish a pedagogy of legal skills training in Japan. But we have to start this long overdue and formidable task.

ZUSAMMENFASSUNG

Diese Abhandlung kritisiert den Mangel an Weitblick und Beachtung spezifischer Probleme, die den Vorschlägen zur Schaffung neuer „Graduate Law Schools" in Japan inhärent sind, trotz jüngster Berichte, die andeuten, daß diese die Vermittlung praktischer Fertigkeiten für Juristen erweitern sollten. Vor allem besteht nach wie vor ein Mangel an Konsens über die Bedeutung von „praktischer" juristischer Ausbildung (Teil II); ein Mangel an Dozenten für praktische Fähigkeiten, die aus japanischen rechtswissenschaftlichen Fakultäten kommen, die traditionell mehr zu „akademischen" Fragen tendieren (Teil III); ein Mangel an anderen für die praktische juristische Ausbildung zentralen Aspekten (Teil IV); ungeklärte Fragen im Zusammenhang mit dem Format der landesweiten Anwaltsprüfung (Teil V); und keinerlei Berücksichtigung des Verhältnisses praktischer juristischer Ausbildung in Law Schools zu juristischer Fortbildung (Teil VI). Dennoch sind die jüngsten Vorschläge und Debatten eine seltene Gelegenheit zum Fortschritt praktischer juristischer Ausbildung in Japan, allgemein und im Besonderen (Teil VII).