

## **REFLECTIONS OF AN OBSERVER: THE INTERNATIONAL CONFERENCE ON LEGAL EDUCATION REFORM**

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The *International Conference on Legal Education Reform: Reflections and Perspectives*, at National Taiwan University on September 16 and 17, 2005, may yet have an impact on the direction of reforms in legal education now being discussed in Taiwan. The presentations at the conference and the papers it spawned put forward many ideas worthy of careful consideration in any deliberations on the reformation of legal education. In addition, the presentations and the papers demonstrated that the issues to be addressed in the reform process and the obstacles to reforming legal education are somewhat similar across all of the jurisdictions represented. Unfortunately, the conference and papers are in much less agreement on what would encompass successful reformation of legal education, although there certainly was widespread agreement that what works in one environment may not be suitable in another. Japan's recent efforts to adopt many aspects of American style legal education, for example, were seen by the Japanese participants as raising more problems than they solve.<sup>1</sup>

What follows are some observations about reforming legal education. These observations are greatly influenced by what I learned from participating in the conference and reading the papers, but inevitably they also are shaped by more than thirty years of experience teaching and consulting on law and public policies in Africa, North America, Europe, and Asia.

### **I. COMMON ISSUES IN REFORMING LEGAL EDUCATION**

The conference had presentations and papers from Taiwan, Japan, Germany, Singapore, South Korea, and the United States. There also were active participants from Vietnam and Thailand,

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<sup>1</sup> See Takahiro Saito, *The Tragedy of Japanese Legal Education: Japanese "American" Law Schools*, 24 WIS. INT'L. L.J. 197 (2006).

and many of the presenters and participants had extensive experience with legal education from other jurisdictions—most notably Australia, Sweden, France, and Indonesia. In the conference discussions and supporting papers, there was general agreement that the following issues required the most attention in any efforts to reform legal education.

#### A. THEORY VS. PRACTICE

The issue that was mentioned most often in the conference presentations, and appears most commonly in the papers, is whether legal education should emphasize law as science or should include more practice skills. In other words, should the legal education curriculum focus on legal theory and doctrine, or should the curriculum include professional skills training? In fact, in a number of jurisdictions, the drive to reform legal education has origins in a certain dissatisfaction with the theoretical nature of legal education that failed to properly prepare graduates for productive entry into the legal profession. As the papers by Keith Findley,<sup>2</sup> Susan Katcher,<sup>3</sup> and Cheryl Weston<sup>4</sup> make clear, in the United States, the movement away from pure legal theory and doctrine began during the first half of the twentieth century. The predictable result was an increase in legal clinics, courses in trial and appellate practice, moot court competitions, and simulation courses in alternative dispute resolution. Similarly, in Japan, dissatisfaction with the abstract nature of legal education resulted in major efforts to introduce American-style skills-based courses into graduate level legal education, although, as Takahiro Saito stresses,<sup>5</sup> the wholesale importation of these Americanisms has created problems and resulted in significant redundancies because of the failure to take into account the ways in which Japanese legal culture differs from that of the United States. The pressures to reform legal education in Taiwan and South Korea also are at least partly driven by concerns about an

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<sup>2</sup> Keith Findley, *Rediscovering the Lawyer School: Curriculum Reform in Wisconsin*, 24 WIS. INT'L. L.J. 295 (2006).

<sup>3</sup> Susan Katcher, *Legal Training in the United States: A Brief History*, 24 WIS. INT'L. L.J. 335 (2006).

<sup>4</sup> Cheryl Weston, *Legal Education in the United States: Who's in Charge? Why Does It Matter?*, 24 WIS. INT'L. L.J. 397 (2006).

<sup>5</sup> Saito, *supra* note 1, at 205-06.

excessive emphasis on theory and not enough attention to practical skills training.<sup>6</sup>

On balance, there was general acceptance of the need to include practice skills in all systems of legal education. In this context, the only questions for debate are first, when practice skills should be introduced into legal education; second, the extent to which legal education should emphasize practice skills (because, at some point, an educational institution risks becoming a mere trade school rather than a serious academic enterprise); and, third, what particular skills should be included in the curriculum.

### *1. Timing the Inclusion of Professional Skills Training in Legal Education*

As to the first question, the old Japanese system<sup>7</sup> and the German,<sup>8</sup> South Korean,<sup>9</sup> and Taiwanese<sup>10</sup> systems all emphasize legal theory and doctrine in the early stages of legal education and then shift late in the process to practical skills training, typically under state supervision. In contrast, the American<sup>11</sup> and Singaporean<sup>12</sup> systems, the idealized system in Japan after the latest reforms,<sup>13</sup> and the reforms being considered in South Korea<sup>14</sup> and Taiwan<sup>15</sup> all would inject skills training earlier in the legal education curriculum.

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<sup>6</sup> Chang-fa Lo, *Driving an Ox Cart to Catch up with the Space Shuttle: The Need and Prospects of Legal Education Reform in Taiwan*, 24 WIS. INT'L. L.J. 41, 77-78 (2006); Chang Rok Kim, *The National Bar Examination in Korea*, 24 WIS. INT'L. L.J. 243, 245-47 (2006).

<sup>7</sup> Katsumi Yoshida, *Legal Education Reforms in Japan – Their Background, Rationale, and the Goals to Be Achieved*, 24 WIS. INT'L. L.J. 209, 212-13 (2006).

<sup>8</sup> Stefan Koriath, *Legal Education in Germany Today*, 24 WIS. INT'L. L.J. 85, 93-94 (2006).

<sup>9</sup> Kim, *supra* note 6, at 243-45.

<sup>10</sup> Lo, *supra* note 6, at 57, 61.

<sup>11</sup> Findley, *supra* note 2, at 307-08.

<sup>12</sup> Alexander Loke, *Forging a New Equilibrium in Singapore Legal Education*, 24 WIS. INT'L. L.J. 261, 267-69 (2006).

<sup>13</sup> Masako Kamiya, *Structural and Institutional Arrangements of Legal Education: Japan*, 24 WIS. INT'L. L.J. 153, 173-74 (2006).

<sup>14</sup> Kyong Whan Ahn, *Law Reform in Korea and the Agenda of "Graduate Law School"*, 24 WIS. INT'L. L.J. 223 (2006).

<sup>15</sup> Lo, *supra* note 6, at 79.

A frequent complaint about legal education in civil law countries is that the students do not take their formal university training seriously. They do not buy the required texts, and they often do not attend their classes; when they do attend, they are unprepared and passive.<sup>16</sup> The students in civil law countries spend more of their time in cram schools than in the formal university environment.<sup>17</sup> It may be worthy of note that one advantage of an early introduction of skills training in the legal education curriculum is that the students are likely to be more engaged in their studies, including their studies of the more theoretical aspects of law. Courses emphasizing professional skills tend to be light on lectures and heavy on interactive classroom experiences. In such classrooms, passivity is not an option for the students – peer pressure and survival in the skills courses require that students prepare in advance for the classes and then actively participate in the classroom. Although the extraordinary pressure to pass bar exams or the first or second state exams draws students out of the universities and contributes greatly to the attractiveness of cram schools, the absence of classroom rigor in the large lecture halls that dominate civil legal education also must contribute to the disengagement of the students.

In opposition to the early inclusion of professional skills courses, some civil law teachers claim that teaching the code-based civil law requires that students first acquire an in-depth understanding of legal theories and doctrines that only can be obtained in an efficient fashion through a traditional lecture format. This frequent assertion, however, is based on two false premises. First, it is claimed that the civil code system somehow gives rise to a greater body of law than in common law jurisdictions.<sup>18</sup> Students in civil law jurisdictions, it is said, thus have a greater burden to learn the law than their counterparts in common law jurisdictions. But it is simply not true that there is more *law* under the civil codes than the common law. The body of American or British or Australian law, for example, is every bit as extensive and complicated and nuanced as the body of German or French or Japanese law. The law may take different

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<sup>16</sup> Kamiya, *supra* note 13, at 163.

<sup>17</sup> Mark E. Steiner, *Cram Schooled*, 24 WIS. INT'L. L.J. 377, 379-82 (2006).

<sup>18</sup> *Id.*

forms – principles distilled from cases under the common law versus rules derived from specific sections of the code in the civil law countries—but the sum of what is considered law is not markedly less under the common law than under any of the civil codes. The convergence of the common law and the civil law systems also argues against the sum of one or the other being significantly larger. Increasingly, the law in common law jurisdictions consists of detailed codes and administrative regulations, while many of the important interpretations of the various civil codes emerge from the national courts.

The second false premise is that students in civil law countries must have a broad knowledge of the legal theories and doctrines, not only to be successful legal practitioners, but even before they are able to effectively participate in skills training courses. This comfortably explains the absence of skills training in the early years of legal education in civil law systems, but it is most fundamentally not accurate as evidenced by the successes of U.S. law school graduates. In fact, the single greatest difference between legal educators in civil law countries and U.S. legal educators is the degree to which each is committed to teaching the substantive law. The educators at U.S. law schools agree with their civil law counterparts that some knowledge of the substantive law is important, but they disagree most strongly with the notion that a thorough knowledge of the law is an essential precondition to a successful professional career. Much more important, the American legal educators argue, are both an understanding of the law in action and the development of problem-solving, research, and communication skills. In fact, the degree to which American law schools emphasize the substantive law is inversely related to their reputation in the legal community. Harvard, Yale, and Columbia Law Schools, for example, are widely recognized as being among the preeminent schools in the United States and the world. And yet their curricular emphasis is less on giving students a comprehensive knowledge of U.S. substantive law, and much more on the development of the professional skills necessary to succeed as a lawyer, judge, or public policymaker. In contrast, the lowest ranking law schools in the United States are noted for their emphasis on “learning the law,” an emphasis that has earned many of them reputations

as being little more than three-year-long cram schools, with graduates significantly under-prepared for the full rigor of professional life.<sup>19</sup>

#### B. THE AMOUNT OF PROFESSIONAL SKILLS COURSES IN THE LEGAL EDUCATION CURRICULUM.

The second question in the legal-theory versus legal-practice debate is the extent to which professional skills courses should be included in the legal education curriculum. The concern is that too many skills courses will transform legal education into trade schools. The graduates then will be capable of preparing legal pleadings and the other basic tasks of the legal profession, but unable to play the broader roles envisioned for lawyers in a globalized economy.

For at least two reasons, however, it appears that the danger of over-emphasizing skills training should not be great. First, skills training courses and substantive law courses are not mutually exclusive. There are many opportunities for using one course to teach both substantive law and professional skills. A course in contracts, for example, can also be a vehicle for legal writing exercises—as is done as part of the first year program at the University of Wisconsin.<sup>20</sup> Similarly, a simulation course in negotiations may be concurrently used to develop an understanding of international trade finance, and a course in taxation may be used to develop problem solving and business planning skills. As a result, skills training does not necessarily bring about a one-for-one displacement of substantive law in the curriculum.

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<sup>19</sup> While the recent reforms in Japanese legal education were driven by the desire to emulate the top tier American law schools, it is unfortunate that the late change in the pass rate on the Japanese bar exam (from 70 percent to 30 percent) has made it necessary for the new law schools to compete on their bar exam pass rates. See Midori Ochi, *Introduction of the Law Schools*, RES. & INFO., Mar. 16, 2004, available at <http://www.ndl.go.jp/jp/data/publication/issue/0444.pdf> (analyzing and clarifying the background of the Reform). This has led the new Japanese law schools to shift their attention to the bar exam, with the result that they now more closely resemble the lowest ranking law schools in the United States.

<sup>20</sup> During the first year at the University of Wisconsin Law School, students are enrolled in small section courses. The substantive elements of the courses may be contracts, torts, civil procedure, or criminal law, but each small section also has legal writing requirements.

The second reason skills training courses should not threaten the legal academy is that effective skills training encompasses many different disciplines beyond the basics of judicial pleading and law office management. As pointed out in Alexander Loke's and Keith Findley's papers,<sup>21</sup> skills training can properly include such diverse subjects as oral and written communications in a variety of settings, legal research, case and problem analyses, interpersonal relations, and legal ethics. In addition, in their papers both Kenneth B. Davis and Alexander Loke suggest a number of new areas for skills training to accommodate the pressures and opportunities brought on by the globalization of economic activities.<sup>22</sup> The diversity of possible skills-based course offerings, coupled with the capacity to include some substantive elements in the courses, makes it more likely that such offerings will enrich the legal education curriculum rather than transform the institutions into trade schools.

There is, however, one concern that deserves special attention: Saito-san points out that the recent reforms in Japanese legal education have brought many new skills courses into the curriculum of the new Japanese law schools.<sup>23</sup> Since this was done while retaining the existing state sponsored skills based programs, the result is a redundancy in certain types of skills training in Japanese legal education. Given how precious time and money are in the legal education process, such redundancies certainly should be avoided. Saito-san's observation also has broader implications – as is true with any aspect of a curriculum, it is possible to overemphasize some aspects of skills training to the detriment of both substantive law courses and other types of skills training. At the University of Wisconsin Law School, for example, we devote enormous resources to trial and appellate advocacy courses even though many of our graduates never engage in either trial or appellate practices. In the fall of 2005, the University of Wisconsin Law School offered three courses with a total of nine sections that deal directly with trial and appellate

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<sup>21</sup> Loke, *supra* note 12, at 264-69; Findley, *supra* note 2, at 313-20.

<sup>22</sup> Kenneth B. Davis Jr., *Six Uneasy Pieces*, 24 *Wis. INT'L. L.J.* 31, 35-59 (2006); Loke, *supra* note 12, at 278-86.

<sup>23</sup> Saito, *supra* note 1, at 203.

advocacy.<sup>24</sup> In the spring semester of 2006, there will be two courses with a total of ten sections that deal with trial and appellate advocacy. Even though the UW Law School curriculum is not overbalanced in terms of skills training generally, it may be that too much of the UW Law School's scarce resources are devoted to a form of skills training of little use to most students.

As to the extent of skills training in the legal education curriculum, the conclusion here is that there is little danger of over-emphasizing skills training in its broadest form because of the diversity of skills training and the capacity to infuse substantive legal education into skills-training courses or vice versa. The greater risk is that skills training will be under-emphasized and that graduates will be poorly prepared for their professional lives. There are, however, concerns that particular types of skills training may become excessive. If curricular reform is an ongoing process within an institution, however, these concerns can be addressed as they arise.

### C. WHAT IS INCLUDED IN SKILLS TRAINING?

Many of the presentations and papers described different skills training courses. Included among the more traditional skills training courses are legal writing using various voices, legal and factual research, case analysis and statutory interpretation, oral communications using different voices, clinical courses involving client counseling, client representations in criminal and civil courts, and simulation courses on negotiations. Internships in law offices, NGOs, judicial chambers, and government departments are also important sources of skills training.

The increased competition in legal services flowing from the globalization of economic activities and the astonishing improvements in transnational communications also suggests new areas for skills training, as implied by Chang-fa Lo and identified by Kenneth B. Davis and Alexander Loke in their papers. The latter papers argue that students today need extensive exposure to different legal systems and cultures. While the students cannot be expected to know the laws of foreign jurisdictions, they should be able to find the right people to answer the questions, and then

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<sup>24</sup> See Univ. of Wis. Law Sch., Courses and Schedules, <http://www.law.wisc.edu> (follow "Courses and Schedules" hyperlink) (last visited Dec. 28, 2005).

be able to frame the questions in a way understandable to foreign lawyers and business people. In other words, students today need to develop “a professional and cultural sophistication in dealing with lawyers [and business people] rooted in different legal systems.”<sup>25</sup> Under this view, exchange programs that offer opportunities for cultural immersion are important for skills training, as are collaborative research and writing projects conducted as parts of physical exchanges or through internet video-conferencing. By extension, language training also would be an important skills course.

#### D. PASSIVE VS. INTERACTIVE CLASSROOM

Some of the conference presenters and conference papers continue to support the utility of the large lecture hall in which the few unprepared students who bother to attend sit passively while the lecturer expounds on the law. This is the hallmark of undergraduate legal education in the civil law countries represented at the conference. It is true that often the exposition is presented in a time-tested and especially systematic fashion that is perfectly consistent with the civil code, but if the students are not in attendance, or they are not listening (or they are listening, but not comprehending), it is hard to see the efficiency of such a system. Such a system can be justified if the principal purpose of undergraduate legal education is to delay the entry of the students into the cash economy, but it seems little else supports such a system, which is probably why attendance at university lectures wanes even as the civil law cram schools are filled.

Whether the goal is to educate the students as generalists or in law and the legal profession, the conference participants generally acknowledge in their papers that the interactive classroom is a more effective mechanism for the transfer of knowledge to the students. Even the defenders of the large lecture halls recognize that students educated in an interactive classroom environment, whether through a Socratic dialogue, problem solving, or simulation exercises, are better able to remember and apply what they have learned than are rote learners.<sup>26</sup> Compared to the

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<sup>25</sup> Davis, *supra* note 23, at 33.

<sup>26</sup> Loke, *supra* note 12, at 289 n.88.

transmissory concept of knowledge communication, the interactive classroom consistently produces a deeper, more thoroughly developed, and consistently retained understanding. “[K]nowledge cannot be handed over as if it were the intellectual equivalent of a bag of groceries to be delivered, or a message to be transmitted and received over the Internet.”<sup>27</sup>

#### E. LEGAL EDUCATION IN A GLOBALIZED ECONOMY

Legal education must be responsive to changes in the underlying society. As Chang-fa Lo notes in his paper,<sup>28</sup> a system of legal education designed to accommodate a simple and underdeveloped agrarian society is unlikely to be responsive to the needs of a cosmopolitan population emerged in a fast moving economy heavily dependent on cutting edge technologies.

Globalization puts pressures on legal education in at least three ways. First, the globalization of economic activities increasingly requires a capacity to conduct business across continents and multiple time zones with unseen and sometimes largely unknown individuals and enterprises. Successful business operations in this context depend on a rules-based system, rather than a more relational system that may work well in localized circumstances. While some commentators contend that the world needs more engineers and scientists and fewer lawyers, the reality is that the rising popularity of rules-based systems is increasing the demand for professionals who can facilitate commercial interactions across two or more rules-based systems. Lawyers who are comfortable outside their own milieu will be in great demand and very well compensated.

Second, even as globalization increases the demand for international legal competence, the consumers of international legal services (for example, transnational corporations) now find it easier to seek out competent lawyers wherever they may be found. The growth in international trade in services, as a result of multilateral, regional, and bilateral treaties, is eroding the traditional barriers that have made legal services one of the last

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<sup>27</sup> *Id.* (quoting Gordon Wells, *The Case for Dialogic Inquiry*, in ACTION TALK AND TEXT: LEARNING AND TEACHING THROUGH INQUIRY 171, 175 (Gordon Wells, ed.)).

<sup>28</sup> Lo, *supra* note 6, at 41-44.

remaining guilds in many countries. At the same time, the massive improvements in international communications mean that while geographic proximity with one's legal advisors is nice, it is not essential. As a consequence, consumers of high end transnational legal services now go where the competence is. Systems of legal education that fail to produce globally competitive professionals increasingly will see their graduates doing little more than carrying the briefcases of those better trained to deal with the complexities of a globalized economy.

Third, as indicated in the previous section, globalization is also changing what is relevant in legal education. Lawyers must be not only professionally competent within their own jurisdiction, but also in possession of the cultural sophistication to work with lawyers and business people from markedly different legal and social environments. Much of this sophistication can only be attained through direct experience, such as through immersion programs that are part of international academic exchanges. Language training can also be important in skills-based courses for students aiming for a transnational legal career.

## II. THE OBSTACLES TO REFORM

### A. THE EFFECTS OF BAR EXAMS

The papers and conference presentations from Taiwan, Japan, and South Korea made frequent reference to the pass rates on their national bar exams. There was less recognition, however, that these bar exams are a major obstacle to reforming legal education. There are two principal causes. First, the exceptionally low pass rate on the Taiwanese,<sup>29</sup> Japanese,<sup>30</sup> and South Korean<sup>31</sup> bar exams makes it very difficult for students. Since law professors in civil law systems typically have had no experience as legal professionals, are not members of the bar, and often are prohibited from actually engaging in the practice of law, it is not

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<sup>29</sup> See *id.* at 65 (indicating a pass rate for the Taiwan bar exam of six to eight percent in recent years).

<sup>30</sup> See Yoshida, *supra* note 211 (indicating a pass rate of two to three percent). Under the newly reformed system, graduates of the new Japanese law schools are expecting a pass rate of significantly less than fifty percent. Hisasha Aizawa, *Japanese Legal Education in Transition*, 24 WIS. INT'L. L.J. 131, 148 (2006).

<sup>31</sup> Over the last forty years, the pass rate on the Korean bar exam averaged 2.54 percent. Kim, *supra* note 6, at 257.

surprising that their classroom teachings usually are far removed from the real world of the legal practice. It also is not surprising that the low pass rate on the bar exams in Taiwan, Japan, and South Korea has produced a student exodus from the formal university lecture halls into the cram courses, where the students have a greater, but still small, chance to learn what is necessary to pass the bar exam. No wonder the students eschew the university lecture halls for cram courses, which often are taught by those who have been successful on the bar exams.

The second problem with the bar exams is that they reward comprehensive knowledge of the law without measuring the capacity to make effective use of that knowledge. In other words, the bar exams are not good indicators of professional competence; they mostly measure memorization skills. This is in fact a criticism of the U.S. bar exams as well; in the United States, however, the bar exams have much less influence on legal education because the pass rates are much higher than in Asia.<sup>32</sup>

The combination of low pass rates and tests that do not measure professional competence means that young, smart Taiwanese, Japanese, and South Koreans may devote enormous time and energy learning information of limited utility to the actual practice of law, and for the great majority of them who are unsuccessful in their quests, the time and energy may be wasted.<sup>33</sup> Those favored few who do pass the bar exams gain entry into the massively protected legal services industry, where they are able to enjoy a very profitable livelihood. However, their comfortable position does not exist because of their global competitiveness as legal professionals; it exists only because the legal services industries in Taiwan, Japan, and South Korea are effectively protected from foreign competition. As mentioned in the preceding section, the clock is winding down on their privileged existence, because globalization and the legal agreements that support it are slowly breaking down the protective barriers. Slowly, but inexorably, the privileged position of members of the

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<sup>32</sup> The U.S. has a long tradition of easy access to the legal profession. Steiner, *supra* note 17, at 392-93. The eventual pass rate in the U.S. is over ninety percent. *Id.*

<sup>33</sup> In Japan, for example, the average age of those who pass the bar exam is about twenty-nine; they have studied for the exam for ten years and have taken it on average more than seven times. Kamiya, *supra* note 13, at 165.

bar in Taiwan, Japan, and South Korea is being eroded, with much more significant erosion forecast for the future.

Where the bar passage rates are low, there are three options: (1) do nothing, with the consequence that cram schools will continue to flourish and the high-end transnational legal services market will be increasingly dominated by foreign trained lawyers; (2) change what is tested on the bar exams so that they are better measures of professional competence (and, at the same time, adjust the legal education curricula to accommodate the changes in the bar exams); and (3) increase the pass rate so that the supply of licensed lawyers is more responsive to market forces.

The first option requires little elaboration. The papers and the conference presentations all were critical of the status quo in Japan, Taiwan, and South Korea. The Japanese papers were also not optimistic that the recent reforms in legal education will bring about notable improvements in legal education (and, by implication, eventually the Japanese legal profession).

The second option may be possible, but only through a major redesign of the bar exams and the infusion of much greater subjectivity into the grading process. Attempting to measure written and oral communication skills in a variety of contexts, for example, is inherently subjective. Where bar exams have high pass rates, the subjectivity of the grading process is of less concern, because just about everybody passes. With pass rates of between 2 and 10 percent, however, diminished objectivity will give rise to very significant dissatisfaction with the grading process and at the same time it will invite corrupting influences into the process.<sup>34</sup> Thus, even if the reforms recently introduced in Japan and the reforms now being considered in Taiwan and South Korea are effective in bringing a greater practice orientation into the legal education curricula, the low pass rates and the subjectivity of the grading process in the redesigned bar exams are likely to remain as major problems.

It appears, therefore, that the key to removing the bar exams as major obstacles to the reformation of legal education is to

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<sup>34</sup> The objective nature of the Korean bar exam is especially important to maintain the public perception that the legal profession is open to anybody. Ahn, *supra* note 14, at 226-27.

increase the pass rates on the bar exams. Two reasons are most commonly given in opposition to this idea and in support of maintaining the low passage rates: first, the low passage rates are necessary to maintain the quality of the legal profession and protect consumers of legal services from inferior lawyers; and second, the low pass rates are appropriate because Asian societies are less litigious than their Western counterparts so there is less need for legal services. Both reasons are red herrings, however.

As to the first argument, it is hard to accept that a legal system that severely limits entry into the profession without measuring professional competence and then allows those within the system to extract monopoly rents from the consumers of legal services somehow better serves the public than a legal system in which professional skills training is an essential component of the curriculum, where legal fees are set by the marketplace, and which then provides extensive administrative and judicial remedies for legal malpractice. As to the second argument, whether Asian societies are more or less litigious is really not material—the real question is why the government should decide the number of lawyers. There is nothing about government officials that makes them especially prescient about the proper number of lawyers. Instead, why not let the market decide the numbers in the legal profession? Without significant barriers to entry, if there are too few lawyers, the premium earned by those in the profession will induce others to join. Conversely, if there are too many lawyers, market forces will drive out those at the margin.

In most cases, the real reason for limiting the bar passage rates is to enable the artificially small number in the legal profession to extract monopoly rents from the performance of uncompetitive legal services. In some cases, governments also may view a large association of law-trained professionals as an unwelcome challenge to the dominant political powers. An open and informed bar association is more likely to act as a brake on questionable government policies and practices than a closed association that owes its sheltered existence to the protective powers of the government.

## B. MONEY

The legal reforms discussed in the papers and at the conference dealt mostly with movements away from legal theory and

doctrine to practical skills training, and from large lecture halls to smaller, more interactive classrooms. Clinical programs, simulation courses, internships, and written and oral exercises all imply a more interactive educational environment, but such an environment requires a much lower teacher-student ratio and educational facilities with an abundance of smaller classrooms or other spaces suitable for small scale activities. These, in turn, imply a large infusion of money into the legal education system. Very few of the presentations or papers addressed this issue, but it certainly is likely to be a major constraint on effective reforms of legal education.

It may be that some governments will be forthcoming with the significant additional resources necessary to finance legal education reforms. In the United States, however, most law schools are faced with a tightening of the money coming from government sources. In such circumstances, U.S. legal educators increasingly recognize the need to be more entrepreneurial in the development of new, non-traditional resource bases. This is such an important topic, mostly neglected in the papers and conference presentations, that I have reserved it for part of my concluding observations.

### C. EXISTING STAKEHOLDERS

The existing stakeholders often are formidable obstacles to reform in some of the following ways:

- Practicing attorneys, not unreasonably, want to maintain their sheltered status and preserve their lifestyles.
- Law professors do not want to alter their teaching styles or undertake new substantive areas of law. Some of what is being asked of law professors also may be beyond their competence – notably to adopt a more practice friendly approach in the classroom and to be more entrepreneurial in attracting outside resources into legal education.
- The egalitarian structure of universities may be a fatal impediment to more practice oriented curricula and more entrepreneurial faculty.
- The students as consumers may resist efforts at reform until there is some apparent connection between the reforms and their careers as legal professionals.

In addition, more professional legal education and an expanded legal services community may be viewed as the enemies of indigenous culture. Globalization suggests more commerce taking place at a distance, which must be supported by a more rules-based, less relational environment. But societies that pride themselves on informal dispute resolution through mediation, conciliation, and arbitration may view the shift to a more rule based environment as a threat to their cultural traditions.

The reform of legal education cannot occur in a vacuum. As the great Chinese warrior and military strategist, Sun Zi said, more than 2,300 years ago, it is essential to know both yourself and your enemy. So in seeking to reform legal education, it is necessary to identify not just the strengths of the reform movement, but also the forces in opposition to the reform agenda.

### III. CONCLUDING OBSERVATIONS

I have two concluding observations on points not directly discussed in the papers or in the conference presentations.

#### A. COMPETITION IN LEGAL EDUCATION

First is the notion of competition in legal education. The dominance of the market place is an essential component of the globalization process. In the last twenty-five years, many hundreds of millions of people have moved from command economies into more market-friendly economies. And the great majority of these people are better off as a result of the shift because it is so widely understood that market-based policies deliver the best quality and variety of goods and services at the lowest prices. There is no reason to believe that what is so widely accepted in all other areas of economic activity is somehow suspended in the context of legal education. Legal education is, after all, a service, and it seems quite plausible that if legal education is subject to competitive pressures the resulting product will be of higher quality and lower cost—in short, it will be a cost effective pathway to successful careers in the legal profession. Within any given legal system, competition in legal education would require that the educators have discretion as to the nature of the product they deliver. The greater the discretion among legal educators, the greater the competition, with the output likely to be more innovative and generally superior to that

arising in an uncompetitive environment. Where all essential decisions involving legal education are reserved to a few people in the Ministry of Justice or the Ministry of Education, the resulting product is likely to suffer. The successes of the marketplace have proven that the market is smarter than any single person or any small group of people.

Of course, there is already competition in legal education, but the competition is at the national level among the systems of legal education in Taiwan, Japan, South Korea, Singapore, and the United States, for example. And, at the national level, it seems that Singapore and the United States are winning the competitive battle as evidenced by the largely one way flow of students from Taiwan, Japan, and South Korea to the National University of Singapore and the U.S. law schools. Language capabilities may partly explain the lack of reciprocity, but it seems likely that even among those Singaporeans and Americans who are fluent in Chinese, Japanese, or Korean (and they are quite a considerable number) the movement is much more into the Singaporean and U.S. law schools than the Taiwanese, Japanese, or Korean law schools.

#### B. A NEW CLASS OF EDUCATORS: THE ENTREPRENEURIAL LAW PROFESSOR

In the face of pressures for far reaching and innovative reforms and the demand for increased financial resources to support the reforms, many legal educators are recognizing the need to become more entrepreneurial. This is an exceptionally difficult task for most legal academics because, however liberal their political beliefs may be, they tend to be social and economic conservatives. In my experience, even more so than the general population, legal academics are much more comfortable staying within the established methods than attempting to chart new paths. In the current environment, however, law faculties are under great pressure to become more entrepreneurial with the result that those able to overcome their innate conservatism and adherence to tradition will see their legal education systems flourish and their graduates prosper. Those unable to do so will see neither.

Even among those who recognize the need for entrepreneurial initiatives, there is a tendency to adopt a narrow

definition of entrepreneurship. So often when academics talk about the need for entrepreneurship, what they have in mind is the search for a previously unheard-of technique or unknown pot of money that, once discovered, everybody agrees is the solution to the previously unsolved problem. But that is only a small part of the true entrepreneur's workshop. A much larger portion is the entrepreneurial activity that succeeds because it flies in the face of conventional wisdom and defies what previously were the accepted norms. By way of conclusion, let me give two examples of the latter type of entrepreneurship that could be used to open the way for innovative reforms and new techniques for financing the reforms:

- Academic salaries based on performance, not seniority, would enable legal educators to attract new talent previously uninterested in the secure but seniority based salary system. Pay-for-performance also would reward innovative teaching and research programs.
- Dedicated tuition arrangements under which programs are begun with the commitment to use the fees generated by such program for the continuance and expansion of the programs. Offer this kind of incentive to law professors and see what new programs quickly emerge.

Overall, this conference provided an invaluable forum for the exchange of ideas across different legal systems and among different perspectives on legal education. I hope many of the ideas shared will be incorporated into the legal education dialogue as legal education systems adapt to the new transnational framework.