

THE TRAGEDY OF JAPANESE LEGAL EDUCATION: JAPANESE “AMERICAN” LAW SCHOOLS

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I. INTRODUCTION

In 1985, about five hundred candidates, out of twenty-five thousand, passed the National Bar Examination in Japan.¹ This low passage rate led to strong criticism by some that the examination was too difficult to attract able young people to the practice of law. This criticism sparked a very strange reform in Japanese legal education.

Until 2000, some believed that the best solution to the problem was to increase the number of successful applicants to the bar examination. However, the Japanese government decided instead to import the “American” legal education structure to address the low passage rate problem.² The business community endorsed the reform plan because it wanted to increase competition in the lawyers’ market, and the mass media generally supported the reformers due to the endorsement by the business community.

As a result, Japan now has more than seventy newly established law schools, although all are still in the two-year preparatory stage.³ For the 2005 academic year, the number of applicants for most schools is far below that of the 2004 academic year, so some of these schools may close in the near future.⁴ The real victims, however, are not the law schools but their students.

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¹ See The Japanese Ministry of Justice, <http://www.moj.go.jp> (last visited Feb. 13, 2006). for the Judicial System Reform] Mar., 2002, *available at* <http://www.kantei.go.jp/jp/sihouseido/keikaku/020319keikaku.html>.

² See Shiho Seido Keikaku [Promotional Plan for the Judicial System Reform], Mar. 2002, *available at* <http://www.kantei.go.jp/jp/sihouseido/keikaku/020319keikaku.html>.

³ 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).

⁴ See The Japanese Ministry of Education, Culture, Sports, Science and Technology, Heisei 16 nendo Hokadaigakuin Nyugakusha Senbatsu Jisshi Jokyo no Gaiyo [Overview of Law School Admission in 2004] (May 12, 2004), <http://www>.

Most students will be forced to spend approximately four million Japanese yen (US \$36,000) on tuition for three years of study.⁵ However, fewer than 40 percent of these students will be able to become legal practitioners,⁶ leading many undergraduate law students to consider taking the current bar examination while they still can, rather than risk attending the law schools only to find themselves unable to practice law upon graduation.

This Article explains why such a tragedy occurred, and how the bar examination and the preparatory schools have contributed to the outcome.

II. FAILURE OF THE REFORM

A. CIVIL LAW AND THE STATUTORY SYSTEM

Studying the civil law presents a challenge for students. In the civil law jurisdictions, the courts analyze facts, extract legal issues, and then apply the law to the disputes before them. In most instances, case law is used to interpret statutes. The statutes themselves do not always explain how they ought to be interpreted or how they should be applied in each case. Thus students must engage in a thorough study of textbooks that explain how to interpret various statutes and the relationships among the articles. That study is very time consuming, as there are many articles in each code. For example, the *Japanese Civil Codes* are composed of 1,044 articles, and students are responsible for understanding the meaning and interrelationship of almost all of the articles through the textbooks that analyze them.

In contrast, in common law jurisdictions, students use casebooks during their very first stage of study to understand

mext.go.jp/b_menu/houdou/16/05/04051301.htm; The Japanese Ministry of Education, Culture, Sports, Science and Technology, Heisei-17-nendo Hokadaigakuin Nyugakusha Senbatsu Jisshi Jokyo no Gaiyo [Overview of Law School Admission in 2005] (May 20, 2005), http://www.mext.go.jp/b_menu/houdou/17/05/05052002.htm.

⁵ See Kokokusya, 2006 "Law School Guide," http://www.law-school.jp/c1_4.asp#6 (last visited Feb. 13, 2006).

⁶ In 2006 the number of successful applicants to the new Bar Examination is expected to be 900-1,000. See The Ministry of Justice, *supra* note 1. On the other hand, the number of candidates for the new Examination in the 2006 academic year is expected to be approximately 2,350, which is equivalent to the total number of students of the two year course in the 2004 academic year. See Overview of Law School Admission in 2004, *supra* note 4.

how the courts reach a specific conclusion in each case. In their basic legal studies, common law jurisdiction students do not have to spend as many hours studying as those students in civil law jurisdictions do. In this respect, the nature of legal education in civil law jurisdictions differs significantly from legal education in common law jurisdictions.

B. NATURE OF THE CURRENT REFORM IN JAPAN

The current reform of the Japanese legal education system is based specifically on the "American model."⁷ Proponents of the reform argue that law should be taught both clinically and theoretically at the newly established law schools,⁸ criticizing three major components of orthodox legal education in Japan: (1) the "one-way" lecture style, (2) the bar examination, and (3) the preparatory schools.⁹

The "one-way" lecture method is the most efficient way to convey as much information as possible within a limited period

⁷ See Mark Reutter, *Japanese Legal Education System Undergoing Radical Transformation*, NEWS BUREAU, U. ILL. URBANA-CHAMPAIGN, Jan. 13, 2003, <http://www.news.uiuc.edu/news/03/1113japanlaw.html>. The U.S. government actually applied pressure to the Japanese government to increase the number of lawyers in Japan, leading in part to the reform. See OFFICE OF THE U.S. TRADE REPRESENTATIVE, ANNUAL REFORM RECOMMENDATIONS FROM THE GOVERNMENT OF THE UNITED STATES TO THE GOVERNMENT OF JAPAN UNDER THE U.S.-JAPAN REGULATORY REFORM AND COMPETITION POLICY INITIATIVE, Oct. 14, 2004, available at <http://japan.usembassy.gov/e/policy/tpolicy-regref.html> (explaining how and why the U.S. government applied pressure).

⁸ Shigeru Kagayama, *Legal Education Reform in Japan – To Foster Creative Thinking Ability of Students* (Aug. 18, 2003) (unpublished abstract, submitted to the International Association for Philosophy of Law and Social Philosophy, 21st World Cong., Aug. 12-18, 2003, Lund, Swed.), available at http://www.ivr2003.net/workshop_abstracts/Special-workshops-abstracts-list.htm.

⁹ In Japan, in order to get a legal profession, one has to pass the National Bar Examination that is very hard because the ratio of successful applicants is about 3%. It is not too much to say that this examination has had a bad influence upon the above permanent realities of professors' one-way teaching of theories and students' passive learning in legal education given in Japan. However, it is impossible to bring up the creative legal profession with only one-way teaching and passive learning like this. . . .

. . . .
In order to foster creative thinking ability, in contrast with the existing training for legal professionals, it is important to foster the capacity to fix a concrete case at first, the capacity to search for rule that can solve the problem and 'the capacity to find out an appropriate rule'.

of time. This efficiency is the one of the most important reasons that faculty have long used this method; instructors need to convey substantial information about the statutory system in a very short period of time. However, the current reformers believe the traditional teaching method is wrong.¹⁰ Reformers and bureaucrats also strongly criticize the bar examination and the preparatory schools for their roles in the problems with the bar passage rate.¹¹ According to the reformers and bureaucrats who favor importation of the American model, the bar examination is simply too difficult, and the preparatory schools teach test-taking techniques rather than the law.¹²

Part of the current reform, spearheaded by these critics, has been a shift from the old lecture style to the American-style “Socratic case method” lectures.¹³ Law schools have also chosen to hire many legal practitioners, such as lawyers, public prosecutors, and judges,¹⁴ as full-time or part-time lecturers, even though these individuals have limited or no legal teaching experience. Perhaps the law schools and the reformers believe that clinical training with these legal practitioners is a shortcut to future law practice, but as a practical matter, such a method does not work well in teaching civil law, especially for first-year students. It may be useful for students who already have basic legal knowledge; however, it can be very harmful to students who know very little about the nature of the statutory system.

C. LAW SCHOOLS AND PREP SCHOOLS

In the near future, each law school will be ranked by independent, third-party institutes,¹⁵ based on the percentage of the school’s graduates who pass the new bar examination, among

¹⁰ See *supra* note 3 and accompanying text.

¹¹ See *id.*

¹² *Id.*

¹³ See, e.g., Ryukoku University Law School, <http://www.ryukoku.ac.jp/lawschool/tokushoku3.html> (last visited Feb. 13, 2006).

¹⁴ In some law schools, a significant number of lecturers are retired public prosecutors and/or retired judges.

¹⁵ See MEXT, The Relationship Between the Criteria for Establishing Law Schools and the Criteria for Evaluating Law Schools by Third Party Institutes, http://www.mext.go.jp/b_menu/shingi/chukyo/chukyo4/gijiroku/005/021201b.htm (last visited Feb. 13, 2006).

other criteria. The new bar examination will test basic legal knowledge that can be learned only through the classic study method in a lecture theater or a library.¹⁶

In the past, no university provided lectures or tutorials to the full satisfaction of students seeking to pass the bar examination. Some universities, however, provided extracurricular courses for the bar examination.¹⁷ A number of students studied at these courses almost thirty years ago when there were no prep schools, but as students moved into the prep schools, some universities were forced to reduce these courses.¹⁸

There are several reasons why students prefer the prep schools to the universities.¹⁹ One of the reasons is that the information with which students needed to be familiar broadened as the number of the legal topics included on the bar examination increased.²⁰ Furthermore, the bar examination questions have become so difficult and so complicated that students need special techniques to answer them quickly and correctly. Most university lecturers, whose backgrounds are usually strictly academic, are not in a position to teach such specialized techniques. Prep schools, on the other hand, hire lawyers who have passed the bar examination and who are familiar with successful test-taking techniques.²¹ As a result, the prep schools can easily attract law students who wish to pass the bar examination, the absolute requirement for entering the legal profession.

The prep schools have been regarded as an "evil" in the legal education system because they teach test-taking techniques

¹⁶ First, the students must read textbooks to understand statutes, then examine each case to analyze facts, and finally, extract legal issues from the facts and apply the law to cases.

¹⁷ See, for example, the extracurricular courses for the legal profession at Waseda University, <http://www.waseda.jp/hougakubu/houshoku/index.htm> (last visited Feb. 13, 2006).

¹⁸ *Id.*

¹⁹ See Yoshihisa Nomi, Reform Plan of Legal Education in Japan, (Dec. 2000) (unpublished paper for the Symposium on Legal Education at Renmin University, Dec. 2000), available at <http://www.j.u-tokyo.ac.jp/~nomi/ENGLISH/Chinasymlegaledu.html>.

²⁰ Compare, for example, questions on the Bar Examination essay in Constitutional law in 1962 with 2005.

²¹ See, e.g., LEC [Tokyo Legal Mind], <http://www.lec-jp.com/shihou/begins/lecturer/index.shtml> (last visited Feb. 13, 2006) (a leading prep school).

rather than “the law,”²² and they do it for profit. Furthermore, the bar examination, in turn, has been criticized for creating demand for the prep schools and their test-taking approach to legal education.²³ Despite the criticism, the prep schools continue to increase; even after the current reforms are complete, prep schools will further expand because the newly established law schools fail to teach the techniques for passing the new bar examination.²⁴

III. WHAT ARE THE JAPANESE LAW SCHOOLS?

A. AMERICANIZATION²⁵

Reform originated with the advisory council for legal reform (“Reform Council”),²⁶ made up of the reform-minded critics of the then-current legal education system.²⁷ A number of the members of the Reform Council who had lived in the United States were strong believers in the success of the American legal education system.²⁸ People who agreed with them insisted that the American law schools be imported into Japan.²⁹ To my understanding, most of the public was unaware of the differences between the Japanese and American legal systems, and thus could not foresee any risks or difficulties in importing the American law school model.

²² See Ochi, *supra* note 3.

²³ *Id.*

²⁴ No major prep school has gone bankrupt or been forced to close.

²⁵ For more information, see Rob Wakulat, *Japan Looks to West for Judicial Reforms*, FOREIGNER JAPAN, Apr. 15, 2005, available at <http://www.theforeigner-japan.com/archives/200504/judicialreforms.htm>.

²⁶ Shihouseido Kaikaku Shingikai [the Advisory Council of the Legal System Reform], <http://www.kantei.go.jp/jp/sihouseido/> (last visited Feb. 13, 2006).

²⁷ However, the biggest reason that forced both the Reform Council and the Government to adopt the American legal education system was strong pressure from the U.S. Government. See *supra* note 7 and accompanying text.

²⁸ See Prime Minister of Japan and His Cabinet, Members of the Justice System Reform Council, http://www.kantei.go.jp/foreign/policy/sihou/singikai/members_e.html (last visited Feb. 13, 2006).

²⁹ For example, bureaucrats of the Ministry of Education, lawyers wishing to teach at law schools, academics majoring in the American legal education, foreign governments and foreign law firms intending to expand their business opportunity in Japan, etc.

B. DIFFERENCE IN PLT

A significant difference between legal education in Japan and the United States lies in the two countries' respective systems of practical legal training ("PLT"). In the United States, there is no PLT course similar to the course provided by the Supreme Court of Japan. For almost sixty years, the Legal Training and Research Institute attached to the Supreme Court of Japan ("LTRI")³⁰ has provided a PLT course for legal apprentices³¹ who have passed the bar examination.

The Japanese PLT course is similar to some PLT courses in the Commonwealth countries, such as a PLT course provided by the College of Law in New South Wales, Australia.³² In this course, law school graduates learn how to apply basic legal knowledge for future practice. As a result of this training, the law schools in New South Wales do not have to provide students with PLT.

In Japan, even after the reform, practical legal training in the PLT course at the LTRI is still a requirement to be qualified as a legal practitioner.³³ Yet the law schools now offer American-style practical legal training courses such as "lawyering," "clinic," and "externship" courses, among others.³⁴ These courses are redundant because they provide the same training as the LTRI and the LTRI is still a requirement to become a lawyer.

There is no practical reason why both the LTRI and the law schools should provide PLT. The new Japanese law schools offer PLT simply because American law schools have the PLT courses. It seems likely that the American-influenced reformers, who

³⁰ See Saibansho ho [Judiciary Act], Law No. 59 of 1947, art. 14; Legal Training and Research Institute of the Supreme Court of Japan, <http://courtdomino2.courts.go.jp/kenshujo.nsf> (last visited Feb. 13, 2006).

³¹ See Judiciary Act, art. 66.

³² See The College of Law, Professional Legal Training (PLT) Through the Professional Program, <http://www.collaw.edu.au/pp/index.asp> (last visited Feb. 13, 2006).

³³ See Nihon Bengoshi Rengokai [the Japan Federation of Bar Associations], http://www.nichibenren.or.jp/ja/jfba_info/attorney/become.html (last visited Feb. 13, 2006).

³⁴ See Jitsumu Kyoiku no Arikata ni Kansuru Cyosakenkyu [Outline of the Practical Training at the Law Schools], <http://www.congre.co.jp/lawschool-partnership/rinshyou/katudou/syousai/gaiyou.html> (last visited Feb. 13, 2006).

knew very little about the difference between the Japanese and the American PLT systems, insisted that all of the subjects related to the PLT provided by American law schools be imported into the newly established law schools in Japan.

In the United States, the state bars do not require post-law-school PLT to obtain legal qualification, so the law schools must provide PLT for their students.³⁵ However, in Japan, the PLT is required; the reformers failed to make this important distinction.

Furthermore, a period of two or three years is insufficient to acquire even basic legal knowledge, leaving little to no time for students to undergo PLT during law school. Thus, the PLT should be completed at the LTRI. If Japan maintains the PLT course at the LTRI level, we do not need the same type of PLT at the law schools.

C. ANOTHER REDUNDANCY

The reforms have created another redundancy: an overlap between the four years of undergraduate coursework for an LL.B. and the two to three years of postgraduate coursework required for a J.D.³⁶ Both degrees provide students with basic legal knowledge and a law degree; the only difference between them is that the J.D. is required for a legal practitioner while the LL.B. is not.³⁷

There is no other country in which such a system of overlap exists, and no one can reasonably explain why it is needed. It is likely that this overlap again results from the introduction of the American legal education system to Japan without consideration of possible flaws and redundancies. The Japanese government and the Reform Council could have foreseen the overlap

³⁵ Furthermore, in America it is difficult to provide so many law graduates with the PLT.

³⁶ There are 92 universities with an undergraduate law faculty and approximately 50,000 law-major undergraduate students in Japan. Among those 92 universities, 71 universities and one brand new university applied for opening a law school in the first year. Consequently, 68 law schools were approved and 4 failed to obtain approval.

Synopsis of Mayumi Saegusa, *The Development of Japanese Law Schools: University Responses to the Law School Reform*, AAS Annual Meeting, Mar. 31 – Apr. 3, 2005, <http://www.aasianst.org/absts/2005abst/Japan/j-49.htm>.

³⁷ Shiho Shiken Ho [Bar Examination Act], Law No. 140 of 1949, art. 4, available at <http://www.moj.go.jp/SHIKEN/hourei04.html>.

problems, but the government did not abolish the undergraduate LL.B. course, the only solution.³⁸

Today, a number of systemic problems must be resolved: (1) how to allocate the academic staff of the undergraduate and postgraduate courses of study, (2) how to recruit legal practitioners to work as postgraduate teaching staff, and (3) how to attract applicants to the undergraduate program³⁹ now that it no longer qualifies students to enter the legal profession.

IV. BAR EXAMINATION AND PREP SCHOOLS: ARE THEY REALLY WRONG?

A. FAILURE OF THE REFORM

As explained above, the reform of Japanese legal education simply "copied" the American J.D. curriculum while retaining the four-year Japanese undergraduate LL.B. programs. Now we have two law courses that share similarities, but also differ significantly: one is a requirement for sitting for the bar examination and the other is not, and one is for undergraduate students and the other is for graduate students. These distinctions have led students to ask why they should study for four years in an undergraduate LL.B program if it is not a sufficient condition for entry to the legal profession.

When the law schools were first created, the expectation was that, like the New York State bar examination, at least 70 to 80 percent of law school graduates would pass the new bar examination.⁴⁰ However, it became clear that only 30 to 40 percent of

³⁸ The reason why the Government did not close the LL.B. course is, perhaps, that so many academics may lose their jobs and so many universities may lose their income if the courses are closed.

³⁹ For example, in dealing with problem (iii), the Government allowed the law schools to run two different postgraduate courses, i.e., the two-year course for students with a basic legal knowledge and the three-year course for students without the knowledge. To be a legal practitioner, some students are allowed to study at the two-year postgraduate J.D. course which is one year shorter than the three-year postgraduate J.D. course. It was said that the three-year J.D. course is for students with university degrees *other than* LL.B. However, it became clear that most of the students in the three-year J.D. course already completed the four-year undergraduate LL.B. course of study. As they could not be accepted to the two-year J.D. course, they had no choice but to choose the three-year J.D. course.

⁴⁰ See Ochi, *supra* note 3.

them could pass the examination.⁴¹ Consequently, in the 2005 academic year, only the second year of the new system, the number of applicants to law schools has already sharply decreased.⁴² Many people have decided not to study at the law schools for entry under the new system; instead, they are studying at the prep schools, regarded as one of the evils in Japanese legal education, to pass the old bar examination before it is abolished in 2011.⁴³

B. CAUSES OF THE FAILURE

Perhaps the government did not know of, or perhaps it deliberately ignored, the differences between the legal education systems in Japan and in the United States. Due to the lack of recognition of these differences, the American system was injected into Japan without necessary modification, and both the prep schools and the bar examination were used by the reformers in order to justify their “American”-based reform plan. According to the reformers, the American system⁴⁴ was superior to the Japanese system because it provided for not only academic but also clinical legal training of students. It appeared that they did not know, or deliberately ignored, the difficulty in teaching civil law with the American model as well as the unique nature of Japanese PLT.

In addition, the government did not restrict the number of the new law schools, even though such a restriction was a requisite for maintaining a high ratio of successful applicants to the new bar examination.⁴⁵ Consequently, the ratio of the successful

⁴¹ Furthermore, applicants cannot sit for the new Bar Examination more than three times within five years from graduation. Thereafter, they are not allowed to sit for the Examination.

⁴² In the 2005 academic year, the number of the applicants to all law schools was 41,756, which is only fifty-seven percent of the 72,800 applicants in the 2004 academic year. *Compare* Overview of Law School Admission in 2005, *supra* note 4, with Overview of Law School Admission in 2004, *supra* note 4.

⁴³ On the other hand, in the 2005 academic year, the number of applicants to the Bar Examination was 45,885 which is 91.7% of the 49,991 applicants in the 2004 academic year. Japanese Ministry of Justice, <http://www.moj.go.jp/> (last visited Feb. 13, 2006).

⁴⁴ See Mark D. West, *Amerika de Mimi ni suru Hōka Daigakuin Kōsō ni Kanuru Uwasa no Shinsō* [*The Truth and Rumor of American Views on Japanese Law Schools*], 76 *HORITSU JIHO* 24 (2004).

⁴⁵ I believe that it is for very political reasons.

applicant to the new bar examination may not be more than 40 percent, far below the level expected.⁴⁶

V. COMMONWEALTH MODEL

From personal experience at the prep schools, I do not see any concrete reasons why the teaching method at these institutions is inferior to the method used at the universities, nor do I believe that the prep schools are unable to teach the nature of the law itself in addition to teaching test-taking techniques. Furthermore, I firmly believe that the current bar examination, in its sixty years of history, has produced a good number of able legal practitioners.

There is no statistical or scientific evidence which shows any inferiorities, shortcomings, or defects of the prep schools or the bar examination. Therefore, the best way to reconstruct the legal education system in Japan would be to abolish all law schools immediately and return to the former system.⁴⁷

Since, for political reasons, we will be forced to keep the law schools, we should look at legal education in the Commonwealth countries as a model for constructing a new reform plan.⁴⁸ In the Commonwealth countries, I have not observed any organizations or institutions that are similar to the Japanese prep schools, and they have no bar examination. Law students are qualified as soon as they complete the undergraduate LL.B. degree coursework and the PLT course or an equivalent thereof.⁴⁹ Since each course is well organized, highly standardized, and extremely challenging, only very patient students of high intellectual caliber can survive.

⁴⁶ See sources cited *supra* note 6 and accompanying text.

⁴⁷ To solve a shortage of legal practitioners, which is one of the reasons why the Reform was carried out, the number of successful applicants for the Bar Examination should be increased.

⁴⁸ See Luke Nottage & Takahiro Saito, *Nihon no Hosyo Yoso Seido Kaikaku e no Teigen - Osutorariaho no Shiten Kara* [Proposals for Reforming Japan's System for Training Legal Professionals: From the Perspective of Australian Law], 62 *HORITSU JIHO* 30 (2004); Frank Astill & Takahiro Saito, *Hoka Daigakuin no Saisei* [Access, Efficiency and Quality of Education (1)-(3)], 32 *KOKUSAI SHOJI HOMU*, 54, 198, 347 (2004).

⁴⁹ For example, the Article Clerkship in Queensland, Australia. See LexisNexis Australia, Queensland, <http://lexisnexis.com.au/aus/academic/students/career/PracticeAustralia/QLD.asp> (last visited Feb. 13, 2006).

If we were to adopt this “Commonwealth Model,” the Japanese law schools would be modified as follows:

- (i) Courses and curriculum would be fully reviewed. The two-year program would be abolished and the subjects of the three-year program would be made up of very basic legal subjects.⁵⁰ No advanced or clinical legal coursework would be offered.⁵¹
- (ii) Student achievement would be strictly examined and only students of a high caliber would be permitted to graduate and apply to the new bar examination.⁵²
- (iii) The bar examination would be abolished once the law schools became institutes that could produce a number of graduates of high caliber.⁵³
- (iv) Finally, the four-year undergraduate LL.B. course would be abolished.⁵⁴

VI. CONCLUSION

If the Japanese government had adopted the “Commonwealth Model” that I have proposed, they would not have failed in their reform efforts. Neither the bar examination nor the prep schools were objectively bad, though they were excuses for introducing the “American” legal education system. As a result, Japan now has a large number of law school students who, I fear, are losing time and money. Thus, Japan’s experience provides not a model for reform but rather a valuable lesson about how not to reform a legal education system.

⁵⁰ These subjects include civil law, criminal law, civil procedure, criminal procedure, constitutional law, commercial law, legal ethics and jurisprudence. It is necessary to teach the civil law statutory system, which is very time consuming.

⁵¹ In the civil law jurisdictions, three years are too short to study these advanced subjects together with the basic subjects.

⁵² Currently, even students without sufficient legal knowledge can pass examinations at the law schools.

⁵³ Once the law schools can produce graduates with appropriate legal knowledge, we will not have to examine them again after their graduation. For such purposes, content and teaching method for each subject are fully reviewed and standardized.

⁵⁴ If it is impossible, the number of students for the LL.B. course must be cut down in order to allocate teaching staff both to the LL.B. course and to the J.D. course properly.