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Convergences and Divergences in Educating Transnational Lawyers

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I. Introduction

The aim of this short paper is to tentatively explore possible convergences and divergences in the education of transnational lawyers across jurisdictions. As the comments made herein are based largely on personal experience, this paper will attempt to raise issues for discussion, rather than to offer any definitive views or conclusions about the education of transnational lawyers. The central observation that will be made—and again it is emphasized that this is untested and tentative—is that there appears, at least in the common law world, to be increasing convergence in the manner in which lawyers are educated *academically*; however, there remain significant divergences in the manner in which lawyers are educated *professionally*. Given the limits of this author's knowledge, the analysis in this short paper will be focused on a consideration of the education of lawyers in the United States, on the one hand, and in England, Wales, and Ireland on the other.

II. Convergences in Academic Legal Education

Before identifying possible convergences in academic legal education, it is important to note that there is one major distinction in the delivery of academic legal education in North America versus the delivery of legal education in the Anglo-Irish context—legal education is delivered at the undergraduate level in Anglo-Irish universities, but not until the graduate level at North American universities. There is much to be said about the advantages and disadvantages of each method. Certainly, one downside of the delivery of legal education at the undergraduate level is that—and this I note from direct personal experience as a tutor and Fellow of Trinity College—it is not uncommon for very young freshman students to find themselves distressed by what they regard as the tedious detail of law. The students often find themselves desperately filing transfer forms and explaining that they only chose law at the urging of parents or schoolteachers and that actually they had wanted to study something completely different (usually something much more creative or exciting). On a more global level—and no doubt this claim would be con-

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tested—the choice to deliver legal education at the postgraduate level could be argued to result in a more interdisciplinary practice of law. For instance, judges educated at the postgraduate level would be better equipped to deal with the types of multifaceted problems with which they are faced. One obvious example might be a judge with an undergraduate degree in economics dealing with an antitrust case.

But, although the stage at which academic legal education is delivered is different in the two systems, there are at least two important similarities:

- (1) the Socratic Method of teaching;¹ and
- (2) the awareness of and unspoken incorporation of the teachings of American Legal Realism and Critical Legal Studies.

A. SOCRATIC METHOD

Benefits hailed for the Socratic Method include:

- (1) It forces students to think for themselves at an early stage, by formulating and testing their own hypotheses.²
- (2) It teaches students more, by requiring them to carry out their own investigations of the course materials, from which they learn more than they would by simply memorizing a textbook.³
- (3) It teaches students about the wider implications of a subject, i.e. its implications beyond the confines of the subject itself, and how it fits into a wider body of knowledge.⁴
- (4) It enhances student self-knowledge, by encouraging students to interrogate the assumptions and premises that underlie their conclusions.⁵
- (5) The Socratic Method can be more egalitarian than its alternatives. Students who are less able or who have only “mediocre prior training,” who have read the class materials in advance, can perform better in class than students of high intelligence who have not done the preparatory work.⁶
- (6) Requiring meticulous preparation before class can, in time, give the student “a sense of adequacy to the task before him” which, if absent, can lead to a failure to engage with course materials before examinations are imminent.⁷
- (7) The questions posed under the Socratic Method will usually produce more than one reply, which can lead to an exchange of views among the class.⁸

1. For a useful discussion on what the Socratic Method entails, see Phillip E. Areeda, *The Socratic Method*, 109 HARV. L. REV. 911, 911-22 (1996).

2. See, e.g., Winslow Hatch, *The Socratic Method in Modern Dress*, 5 IMPROVING C. & U. TEACHING 60, 61 (1957).

3. *Id.*

4. *Id.*

5. Ethan Fishman, *Counteracting Misconceptions About the Socratic Method*, 33 C. TEACHING 185, 186 (1985).

6. John McKenna, *Ageirotics: In Aid of the Socratic Method in Intermediate College French*, 44 FRENCH REV. 889, 897 (1971).

7. *Id.* at 896.

8. *Id.* at 893.

While the Socratic Method of teaching is largely associated with law schools in the United States, it is increasingly used outside that context.

Although not linked to the efforts of Dean Langdell, perhaps the most well-known examples of the Socratic Method in action in the United Kingdom are of the tutorial system in the Universities of Oxford and Cambridge. Tutorials in Oxford University and Cambridge University consist of extremely small classes, typically with one or two students supervised by a college fellow.⁹ Fellows are typically college researchers, and tutorials typically take place weekly.¹⁰ At these tutorials, students engage in in-depth discussion of the assigned reading for that week.¹¹ Students may also be required to prepare essays for their tutorials, which will then serve as a basis for discussion in class.¹² Tutorials in Oxford aim to instill the qualities of “independent thinking, confidence, and self-reliance.”¹³ Other U.K. universities also engage in the Socratic Method to different extents.¹⁴

In Ireland’s Trinity College, for example, the Socratic Method is increasingly prevalent. Indeed, this has been to the extent that students receive a proportion of marks in a number of subjects based on class participation and, in what is a novel development of the Socratic Method, participation in webcourse discussions.¹⁵ Seminars are also used extensively throughout the entire academic degree.¹⁶

Thus, although it is most well-established and predominant in the United States, it appears that the Socratic Method is not unique or particular to legal education there.

B. AMERICAN LEGAL REALISM/CRITICAL LEGAL THEORY

Contrary to the common perception, American Legal Realism/Critical Legal Theorists contend that legal materials such as statutes and case law do not completely determine the outcome of legal disputes.¹⁷ Instead, they contend that while the law imposes many restrictions on judges in the form of substantive rules, such restrictions may not be enough to ensure the judges reach a particular decision in a given case.

Again, contrary to the view that is sometimes held at certain U.S. law schools, the views of American Legal Realists or Critical Legal Theorists are not only espoused by U.S. lawyers and are not unique to U.S. law schools. The possibility (or probability) that law is indeterminate, and that it cannot ultimately predict every outcome with any degree of certainty, is one that pervades legal teaching in British and Irish law schools (and indeed possibly elsewhere). For instance, a course entitled “Perspectives on American Law,”

9. *List of Bilateral Investment Treaties with Chile*, ORG. AM. STATES, http://www.sice.oas.org/cty/index/CHL/CHLBits_e.asp (last visited Mar. 27, 2012).

10. *Id.*

11. *Id.*

12. *Id.*

13. See, e.g., *New Student Tutorial System*, NEW C. U. OXFORD, <http://www.new.ox.ac.uk/prospective/undergraduate/oxford-tutorial-system> (last visited July 13, 2012).

14. See generally Adam Lefstein, *Dialogue in Schools: Toward a Pragmatic Approach* (King’s College London, Working Paper No. 33, 2006).

15. See, e.g., *Freshman Modules: Constitutional Law I*, TRINITY C. DUBLIN, <http://www.tcd.ie/Law/undergraduate/llb/freshman.php#ConstitutionalI> (last visited June 19, 2012).

16. *Bachelor in Laws (LLB)*, TRINITY C. DUBLIN, <http://www.tcd.ie/Law/undergraduate/llb/> (last visited June 19, 2012).

17. See John Schlegel, *American Legal Theory and American Legal Education: A Snake Swallowing its Tail?*, 12 GERMAN L.J. 67, 67 (2011).

which was formerly taught as a compulsory course for all Harvard LL.M. students, had to be abandoned. LL.M. students complained vociferously over a number of years that the materials taught therein—which largely focused on introducing the students to the supposedly unique aspects of U.S. teaching incorporating American Legal Realism and Critical Legal Theory—taught them nothing that they did not already know from learning law in their own jurisdictions.¹⁸

III. Divergences in Professional Qualification

A. QUALIFYING DOMESTICALLY

Notwithstanding convergence in important aspects of the delivery of academic legal education, there remain important divergences in professional training for lawyers.

The primary distinction between the United States and England, Wales, and Ireland, is that in the United States, there is no professional legal training. Instead, law graduates sit for bar exams to enter the profession in the various states, and, once they have passed the examination, they are entitled to practice law. By contrast, professional courses are compulsory in the Anglo-Irish legal world.

In Ireland for example:

- (1) To qualify as an Irish solicitor, it is necessary to take two professional practice courses and to pursue a training contract with a law firm.¹⁹
- (2) To qualify as an Irish barrister, it is necessary to take a one-year professional degree course at the King's Inns followed by a period of devilling in which a barrister shadows and is mentored by a well-established barrister.²⁰

Likewise, in the United Kingdom, those who wish to become solicitors take a course known as the Legal Practice Course (LPC) followed by a training contract.²¹ The Law Society website suggests that the LPC will “prepare [student solicitors] for practice [and] provide [them] with a general foundation for subsequent practice.”²² Meanwhile, in England and Wales, barristers are required to take a Bar Vocational Course followed by a one-year period of training, known as pupillage, in a barrister's chambers.²³

It may be that the difference in professional legal education between the United States and Anglo-Irish context can be linked to the distinction between undergraduate and postgraduate delivery of academic legal education. Nonetheless, the merits and disadvantages of professional legal courses are always under debate in England, Wales, and Ireland, where courses are continually being revised. Moreover, it is expected that the EU/IMF

18. *Graduate Program Handbook 2011-2012*, HARV. L. SCH., available at <http://www.law.harvard.edu/academics/degrees/gradprogram/overview/graduate-program-handbook-administration.html> (last visited July 13, 2012).

19. *PPC Courses*, L. SOC'Y IR., <http://www.lawsociety.ie/Pages/Public-Becoming-a-Solicitor-CMS/Irish-Applicants-Solicitor/PPC-Courses/> (last visited June 19, 2012).

20. *Prospective Students*, HONORABLE SOC'Y KING'S INNS, http://www.kingsinns.ie/website/prospective_students/prospective.htm (last visited June 19, 2012).

21. *Routes to Qualifying*, L. SOC'Y, <http://www.lawsociety.org.uk/careersinlaw/becomingasolicitor/qualifying.page#lawdegree> (last visited June 19, 2012).

22. *Id.*

23. *Becoming a Barrister*, B. COUNCIL, <http://www.barcouncil.org.uk/becoming-a-barrister/> (last visited June 19, 2012).

Programme of Financial Support for Ireland will have an impact on the provision of professional legal education there, at least insofar as the current system of having one provider of professional legal education—the King’s Inns—will most likely be replaced by a system involving a number of service providers.²⁴ This may produce an even more acute debate in this jurisdiction about the appropriate content and structure of such courses, given that various providers will be offering alternatives.

B. QUALIFYING TRANSNATIONALLY

It remains relatively difficult to cross-qualify as a lawyer. Hence, becoming a transnational lawyer (in the sense of being qualified in different jurisdictions) is not at all straightforward. It often involves long and complex applications to the relevant regulatory authorities, which inevitably take time to exercise their discretion as to whether to permit admission or identify a particular qualification route for admission.

To give a few examples:

- (1) When qualifying from the United States to England and Wales as a solicitor, transfer is governed by the Solicitors Regulation Authority Qualified Lawyers Transfer Scheme Regulations 2010.²⁵ It is necessary to apply to the Solicitors Regulation Authority for permission to take the Qualified Lawyers’ Transfer Test for the Law Society of England and Wales.²⁶ Qualified lawyers from outside the European Union are also required to show that they have gained two years of common law experience within the past five years.²⁷ This experience must include three areas of common law and must have covered contentious and non-contentious areas of practice.²⁸
- (2) To qualify as a barrister in England and Wales from overseas, one is required to submit an application to the Qualifications Committee of the Bar Standards Board (BSB) and may have to take an aptitude test.²⁹

EU law has also had a significant effect in this case. In brief, Directive 98/5/EC (the Establishment Directive)³⁰ (which replaced Directive 89/48/EC) provides as follows:

- (1) The directive applies to lawyers in private or salaried practice in a host Member State.³¹
- (2) Lawyers may pursue their profession on a permanent basis in another Member State under the professional title acquired in the home Member State.³² Those

24. See generally *Minister Shatter Secures Government Approval for Publication of the New Legal Services Regulation Bill*, DEP’T OF JUST. & EQUALITY, <http://www.justice.ie/en/JELR/Pages/PR11000184> (last visited June 19, 2012).

25. *Routes to Qualifying*, L. SOC’Y, <http://www.lawsociety.org.uk/careersinlaw/becomingasolicitor/qualifying.page> (last visited Aug. 3, 2012).

26. *Id.*

27. See *Routes to Qualifying*, *supra* note 21.

28. *Id.*

29. See *Qualified Foreign Lawyers*, B. STANDARDS BOARD, <http://www.barstandardsboard.org.uk/qualifying-as-a-barrister/transferring-lawyers/qualified-foreign-lawyers/> (last visited Aug. 3, 2012).

30. Council Directive 98/5, 1998 O.J. (L 77) (EC).

31. *Id.* art. 1.

32. *Id.* art. 2.

wishing to do so are required to register with the competent authorities of the host Member State.³³

- (3) Apart from specified exceptions, a lawyer practicing under his or her home-country professional title conducts the same professional activities as the host-country lawyers. He or she may give advice on the law of his or her home and host Member State, as well as on EU and international law.³⁴
- (4) After the effective and regular pursuit of activity for a continuous period of three years in the host Member State, the lawyer is deemed to have acquired the skills necessary to completely integrate into the profession of law in that Member State.³⁵
- (5) One or more lawyers who belong to the same grouping in their home Member State and practice under their home-country professional title in a host Member State may pursue their activities in a branch or agency of their grouping if the host Member State allows joint practices.³⁶
- (6) Lawyers practicing under their home-country professional title are subject to the rules of professional conduct and the disciplinary procedures of the host Member State.³⁷

The Establishment Directive has been given effect in Ireland by the King's Inns as follows:

(a) A person who is entitled to seek to practise the profession of barrister in Ireland pursuant to EC Directive 89/48/EEC ('the directive') and the regulations implementing same in Ireland (hereinafter called 'the migrant') may apply to be admitted to the Society and to the degree of Barrister-at-Law in accordance with this rule. Only holders of the degree may be called to the Bar of Ireland by the Chief Justice and admitted to practise in the Courts of Ireland as members of the Bar of Ireland.

...

(c) A migrant shall apply to be admitted to the Society and the degree of Barrister-at-Law in such form as may be specified by the Council. Such application shall include or be accompanied by

(i) particulars of the diploma or other evidence of training and qualifications relied upon by the migrant as entitling him to practise as a barrister in Ireland under the terms of the Directive,

(ii) the original or a duly authenticated copy of every such diploma, certificate or other document relied upon by the migrant,

(iii) such evidence as is relied upon by the migrant to establish:

(1) that he is of good character and repute; and

(2) that he has not been declared or adjudged bankrupt or had a similar order made against him or in relation to his estate; and

(3) that he has not on the ground of professional misconduct or the commission of a criminal offence been prohibited from practising in any member state in which he formerly qualified or practised and is not currently suspended from so practising,

33. *Id.* art. 3.

34. *Id.* art. 5.

35. *Id.* art. 10.

36. *Id.* art. 11.

37. *Id.* art. 7.

- (iv) such representations or evidence as the migrant may wish to make in support of any application that he be wholly or partially exempted from passing an aptitude test in accordance with paragraph (f) of this rule,
- (v) any other representations or material upon which the migrant may wish to rely in support of his application, and
- (vi) the migrant's application fee set out in the schedule of fees.³⁸

In reaching its determination of any application before it, the Council "shall consider the diploma or other qualification of each migrant relied upon in his application and may only require the migrant to pass those parts of the aptitude test which cover matters which differ substantially from those covered by his diploma or other qualification."³⁹ In addition, the migrant may be required to pass all or part of the aspects of an aptitude test and to "keep . . . commons."⁴⁰

Finally, for cases not governed by the Lawyers' Directive, what is known as a Morgenbesser application may be made to a competent authority for recognition. This process is named after Case C-313/01 *Christine Morgenbesser v Consiglio dell'Ordine degli avvocati di Genova* of the Court of Justice of the European Union.⁴¹

IV. Questions for Consideration

As noted at the outset, this very brief overview of convergences and divergences in the legal education of transnational lawyers has sought to raise some issues for discussion. A number of questions arise:

- (1) Can it be said that there are increasing convergences in academic legal education of lawyers across jurisdictions?
- (2) To what extent have the different choices resulting in divergences in professional legal education been tested?
- (3) To what extent are the requirements for cross-qualification between jurisdictions proportionate and appropriate?
- (4) If convergences in academic legal education are becoming increasingly notable across jurisdictions, to what extent are divergences in professional legal education justifiable?

38. *Qualified Lawyers from Other EU Member States*, HONORABLE SOC'Y KING'S INNS, http://www.kingsinns.ie/website/prospective_students/special/eu.htm (last visited June 20, 2012).

39. *Id.*

40. *Id.*

41. [2003] ECR I-13467; see also Press Release, Court of Justice of the European Union, Judgment of the Court of Justice in Case C-313/01 (Nov. 13, 2003), available at <http://curia.europa.eu/en/actu/communiques/cp03/aff/cp0399en.htm>.

