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# Bases and Prospects for Internationalization of Legal Education In the United States

Dean Robert C. Clark\*

## I. Introduction

Thank you and good morning to everyone. I want to talk about the bases and prospects for internationalizing legal education in the United States. Other speakers and panelists will talk more about particular approaches that might be taken.

My basic initial point may be ammunition for talking to the many faculty who need to be converted to an acceptance of internationalization. That basic point is as follows: The fundamental factors that are causing or encouraging the internationalization of U.S. legal education suggest a very strong and continuing trend—a trend that will be one of the biggest and most important that U.S. legal education has to deal with in the next generation or two. In other words, the movement is a big natural phenomenon, not just the idea of a few people. It must be understood by first looking at the external trends that are pushing towards internationalization. Before concentrating on particular international programs—what kinds of degrees a school might offer, and so on—one should first see the background that makes internationalization such a big deal.

To that end, I want to talk about five trends.

## II. Pattern of Growth of Law and Legal Education in the United States

First, look at the U.S. situation in domestic legal education. It is a story of long, rapid growth now slowing toward equilibrium growth rates. This is an important background fact that every law school dean or program head should understand.

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In the post-World War II period, for about 40 years, there was a tremendous growth of law and legal education in the United States. The number of lawyers grew faster than the general population during most of that period. In one 15-year stretch, the increase in lawyers was five times faster than the increase in the general population. (This phenomenon once prompted jokes, e.g., “By extrapolating the trend I calculate that by 2023 we’ll have more lawyers than people in the U.S.,” as well as serious fear of excessive resort to law.) The percentage of gross domestic product devoted to externally purchased legal services doubled in a similar 15-year stretch. New areas of economic and social life became subject to massive regulation that did not previously exist. Most legal academics know this, but it is worth recalling the great sweep of new legal regulation: Environment, health care, pension funds, employment practices, telecommunications, the internet, and new forms of intellectual property were all greatly affected.

And then, of course, all this growth in the legal system spilled over into the law schools. The number of ABA-approved schools increased greatly and so did the growth rate of applicants to law schools.

But, as many of you know, more recently the growth has declined. The 40-year growth spurt—the biblical 40 of law, lawyers, and legal education—seems to be moderating. Among many indicators is the fact that there was a recent decline in the number of applicants to ABA-approved U.S. law schools. After the number peaked in ’90-’91 it went down for six years. Last academic year it ticked up again by 1.2%, a change that seems very modest when compared to developments in the ’70s and ’80s. Prediction of the future is perilous, of course. Perhaps the most recent change signals a return to an era of very rapid growth. But perhaps it is more prudent to assume that we are finally near the higher end of a classic S-shaped growth curve, such as is typical of many natural processes.

### III. Pattern of Growth of Law and Legal Education in the Rest of the World

The second trend is a contrast. In many other parts of the world, the situation is beginning to resemble that of the U.S. about 30 years ago: There is accelerating growth in the demand for lawyers and legal education. For example, in China, there were virtually no or only a handful of law schools 15 or 20 years ago - now there are about 300. This is greater than the number of

ABA-approved law schools in the United States (181 or so) and it is increasing. China, like many other countries, has now developed a belief that it needs a minimally effective rule of law in order to have economic growth and proper relations with other economies and polities. This increasing appreciation of “the rule of law” spills over into the demand for lawyers and legal education. (As an aside for today, I can’t help but note that, if you believe the rhetoric you will find on the official Kremlin website put forward as being authored by Vladimir Putin, we may expect a similar respect for the rule of law, and growth in demand for legal education, to develop in Russia soon. We’ll see.)

#### IV. Foreign Interest in U.S. Law and Legal Education

The third trend is that there is an enormous foreign interest in U.S. law and legal education. Along with a great upsurge in global legal activity, there is a great interest in studying U.S. law and legal institutions in the U.S.; there is also foreign interest in U.S. methods of legal education and U.S. approaches to international law. So applications by foreign nationals to U.S. law schools are on the rise.

There are various reasons for the trend. The most prominent, perhaps, is that many applicants contemplate a transnational legal practice that will involve interacting with the U.S. at a business or political level, and they want to know something first-hand about the U.S. legal system and the people in it. But other factors pull more on people with policy and academic interests. United States legal education has a reputation for being more inter-disciplinary and more interactive than in many other places, and those features draw potential scholars and teachers. In addition, the U.S. legal system, for better or worse, is highly articulated. (Note that I use this word rather than one that has more self-congratulatory value connotations, like “developed” or “evolved.”) There is a huge amount of legal doctrine, commentary, and theory. This massive existing base of normative and intellectual material is worth study. Study of U.S. law may prompt imitation, adaptation, or strong critique, but in each case the fact that it is there in rich detail can be a useful catalyst. On the other side of the equation, the more enlightened U.S. legal academics realize that there is much to be learned from carriers of foreign legal knowledge and perspectives, and this group stimulates a desire to recruit foreign students and scholars.

## V. General Increase in Foreign Student Enrollment in U.S. Institutions of Higher Education

It is also important to understand that the third trend—the increase of foreign interest in U.S. legal education—is part of a larger development of foreign interest in U.S. higher education. This fourth and larger trend, which presumably has basic and pervasive causes, is fairly dramatic. As pointed out recently in the *Chronicle of Higher Education* (December 1999), foreign student enrollment in United States institutions of higher education—mostly in colleges, but also in many graduate and professional schools—has increased from about 342,000 in '84-'85 to about 491,000 in '98-'99. This is rapid growth, which appears even more striking when one considers the economic setbacks that have occurred during this period in parts of the world (like East Asia) that supply many students to the U.S. Whatever the full set of reasons for this significant overall trend, the trend itself reinforces what is happening at the law school level. Consider, for example, the fact that more foreign students graduating from U.S. colleges means that more foreign students will feel comfortable about going on to legal education in the U.S.

As an indicator of internationalization, however, the fourth trend should be kept in perspective. The number of U.S. students studying abroad is also increasing—and increasing rapidly—but it is still only about one-fourth of the numbers I just gave you. Another perspective comes at the macro level. Despite the fact that the half-million-or-so foreign nationals enrolled in U.S. institutions of higher education pump about \$13 billion into the economy and have a great impact on social relations and the flow of ideas, they represent only about 3% of the higher education enrollment. Nevertheless, the numbers are growing.

## VI. Increase in the Globalization of the Legal Profession and Law Work

The fifth trend has a special significance: It is the one that is most likely to prod more of our domestic colleagues and students to look beyond the United States and to get an international or transnational focus. This fifth trend is the rapid increase in the globalization of the legal profession and law work.

Compared to 15 or 20 years ago, the largest United States law firms have many more offices abroad, a greater percentage of cross-border business in their portfolios, more lawyers doing work

abroad or on transnational business, and a greater percentage of foreign lawyers in their ranks. One could make a similar point about the great accounting firms and other multi-disciplinary practices - they have become much more international.

One can document this fifth trend in different ways with various indicators. Consider the work that large law firms typically do; there are indicators that the percentage of business that is cross-border or global in some relevant sense is increasing. For example, in the ten years leading up to 1996, cross-border mergers and acquisitions more than tripled. Global bond offers doubled in number and tripled in value. Global equity offers quintupled - they increased by a factor of five in just ten years. In the few years since 1996, these growth rates have exploded even more. Just a few days ago, I called up Steve Volk, managing partner at Sherman & Sterling, to ask whether he knew where one might find updated statistics. Of his own initiative, he put eight associates on the task - I love the way great law firms do things - and they gave me a memo with many more good statistics about recent increases in cross-border legal work than I can cite or discuss now.

However, let me dwell for a moment on one striking example. There was a tripling of the annual deal value of cross-border mergers and acquisitions in the ten years leading up to '96. From '95 to '98, the deal value tripled again. Thus, the growth rate itself increased dramatically. Note that these data refer to the deal value of cross-border mergers that involve U.S. companies as acquirers or as targets. So they reflect not the whole world's set of cross-border mergers and acquisitions but only those involving U.S. firms. Even so, the data cover a whopping 2,223 transactions involving \$333 billion in 1998.

What does this factoid and many related phenomena imply? Among other things, it means a lot of work for lawyers, especially young associates (at least when they are not being assigned to do research for law school deans). Less directly, the growth in this kind of law practice will eventually percolate into the consciousness of law students and law professors. Related courses and scholarship are and will be elicited into being.

As these statements suggest, I believe that the globalization of law practice has implications for law schools. It will influence domestic U.S. students, eventually shaping more career choices and also influencing what they want to study and learn about in law school. The trend in practice will also influence professors. At Harvard, I've been quite struck by the observation that the

attitudes of professors in traditional subject-matter areas (e.g., corporations or property) change as they get consulting opportunities with law firms to work on cross-border or international projects, or as they take on a government-sponsored law reform project in another country. Suddenly their scholarship becomes much more comparative and they begin to like what their international colleagues are doing. (As an aside to deans in the audience who wish to promote internationalization, I suggest that allowing and encouraging regular faculty members to do international work is probably a more important tactic than launching another official international program.)

### VII. Response to Strong Bases for Internationalization

So we have all these trends: apparently slowing growth in domestic demand for lawyers and legal education; rising growth in other parts of the world; increasing foreign interest in U.S. legal education and U.S. higher education generally; and more global law practice. These trends together suggest that the bases for substantial and sustained internationalization of U.S. legal education are strong.

Should we respond affirmatively to the trends? Is further internationalization of U.S. legal education good? It would take a very long additional speech to address these issues properly. Here I will simply assert my belief that it is enormously important to the world that we take up the charge; further internationalization of U.S. legal education can contribute greatly to the advancement of human welfare both in the U.S. and elsewhere.

Assuming that most of you share this normative reaction, I turn briefly to the question of institutional responses. What if anything should law schools do about internationalization? One of the implications of my analysis of trends is, I think, not always obvious. It suggests that the forces behind internationalization of U.S. legal education are so strong and widespread that a socially optimal (or even good) response will not be able to be supplied by the dozen or so familiar law schools that already have a very strong set of international activities. Many U.S. law schools are going to have to become more involved in internationalization.

### VIII. An Embarrassment of Riches

What are the prospects for U.S. law schools wishing to respond to the demand for internationalization? In fact, they face a stunning array of challenges. Perhaps the biggest one to

mention today is just the embarrassment of riches when one has to choose among strategies, tactics, and techniques. The very range of options is an embarrassment—indeed, a potential minefield—because it is very, very hard to build a law school that is fully international in all dimensions, and attempting to do so may result in disaster. Internationalization requires work, much of which depends on vast resources, contacts abroad, many qualified people, and exchanges of people. So, if a school is not already positioned as an international player, it has to think very hard about a focused strategy that is coherent, builds on the school's strengths, and has a good chance of meeting a real demand or otherwise succeeding. Indeed, the need for a considered strategy is the main point I would like to commend to you.

### IX. Finding a Good Strategy

I have many ideas about which programs and tactics might make sense for a given school, but let me first dwell on the point about how large a task it is to have a fully diversified mix of international strategies. Harvard Law School is blessed because it has been at the game for a while. It has many resources, a great reputation, many contacts abroad, and so on. We have developed to the point where there is a great deal of international activity. For example, this year we have 233 foreign nationals in our degree programs. We have 22 regular faculty members teaching foreign, international, or comparative law, and about half of them are focused on those areas in their research. We have 20 visiting professors (many of whom are from abroad) doing international courses and related work. We have 61 courses on foreign, international, or comparative law. We have 8 specialized programs with an international focus, some of which, like the East Asian Legal Studies Program and the Graduate Program, are quite large. The 2 programs just mentioned, together with our Human Rights Program, bring in about 54 foreign visiting scholars a year and host an enormous range of activities such as conferences, research projects, trips abroad, and so on. All of this activity—the professors, visitors, scholars, students, courses, programs, journals, conferences, and so forth—costs a vast amount of money and takes up a great deal of physical space.

Because of its large scale and long history, Harvard can and does aim at a diversified set of excellent international programs. We try to have a mix of public and regional programs with those that are more transactionally focused and subject matter specific.

So we have an International Finance Program and an International Tax Program as well as programs on European law, Islamic law and East Asian law. We also have a lot of student involvement. We have no formal joint programs with law schools abroad, but we have many students going abroad for summer or winter work in law and development or human rights work around the world. (For example, in the last year we sent about 30 students as Reginald Lewis Fellows to almost as many countries.) In addition, roughly 50 of our current third-year J.D. students spent this past summer working abroad. A sizable number of faculty members spend sabbaticals abroad or work on international projects. In just the past few years, ten of them worked on law reform projects in other countries.

Finally, we relate actively to our 4,771 international alumni/ae. They are organized into associations and we find it important to keep in touch with them because doing so has a big payoff for the school. For example, I think here of Professor Song, who is on the panel today; he has steered some of the very best Korean law students to our degree programs. I could cite many other examples of the beneficial influence of engaged foreign alumni.

I return to my initial point about approaches to take. If your law school is small or not already much involved in international legal education, it is wise to pare down the number of new initiatives you will actually pursue and to focus on those that both meet demand and build on your strengths.

#### X. Tactics: Faculty, Opportunities Abroad, Building on Strengths and Networks

I will close with some miscellaneous observations about approaches that seem to me to work pretty well as tactics for internationalization. These tactics don't necessarily add up to a strategy, but they are useful to consider regardless of one's overall plan.

First and foremost, it is important to get good people. The programs should follow the professors, not the other way around. A school should hire the best internationally oriented faculty members it can afford and get—including, if feasible, some who wish to build an empire—and give them lots of resources and support. That is an important first step.

A second tactic, implicit in what I said earlier, is to encourage your regular faculty to take up opportunities abroad. If a

professor wishes to spend a sabbatical in Morocco, look kindly on the request. If a professor wants to spend a year away at a foreign law school, a dean should try to let it happen, even if it creates a curricular crisis, because it may pay off later in terms of an increased international orientation.

A third point is that you should always have a preference for building on your strengths. A committee may talk abstractly about devising a program that has, say, a certain subject-matter concentration for foreign graduate students. It is a rather obvious but often ignored idea that a school should only do this when it has good assets in place to carry out the initiative. In legal academia, our main assets are people, and the people we have possess subsets of excellence, not universal excellence.

I find it useful to identify and reflect on developments that illustrate the positive side of this observation. At Harvard, a most encouraging recent development is that a number of our faculty started an international finance concentration. It had a tremendous positive response from the graduate students. It would not have worked unless we had the faculty who were willing and able to originate and pursue the idea. It was not something one could do by a decanal missive or top-down committee recommendation. It was critical to have to have some bottoms-up enthusiasm and commitment from the relevant faculty.

Finally, a fourth important tactic is to build on your networks abroad, whether they involve alumni or other forms of contact. It may seem a good idea to start a program with country X, but it may be better to work in country Y, where your school has existing strong connections, and perhaps use some technology to develop the links. In this connection, I would offer one modest example of something that has worked very well for us. At Harvard Law School, the Berkman Center for Internet and Society had our professor of financial institutions law, Howell Jackson, devise an internet-based, interactive course on financial institutions for Chinese students. As it happens, in his prior life he had worked in China. In addition, one of the Chinese visiting scholars who audited his course on financial institutions is now the dean of Peking University Law School. The dean at Peking selected several dozen top-notch students there and they got a crash course in financial institutions regulation. The course was designed by Professor Jackson, who was in England on leave; it was physically hosted on a web server at Harvard; the students were in China; feedback on exercises was provided by teaching fellows at Harvard, and by the professor. When they went online,

the Chinese students in the course had access to streaming audio, PowerPoint slides, interactive exercises and threaded discussion groups, and reference sources. (If curious, you may still be able to check out the course by going to this URL on the web: <http://cyber.harvard.edu/rfi>.) This experiment worked well because it built on existing assets—a faculty member, an international relationship, and a technological program with resources and a desire to innovate.

I could go on to offer other ideas about approaches that do or do not work, but I think it better to stop. The prospects for internationalization of legal education are bright, but finding the right approaches to it will be a challenge to all of us.

Q: Dean, I know you have been a great proponent of pervasively incorporating international and comparative components even into the traditional law courses. In the absence of any questions from the floor here, I would invite you to indicate what your experience has been and what the possibilities are for accomplishing that.

A: There is a major problem with the incorporation strategy. Most people who teach serious substantive courses, say corporations or financial institutions, feel they have so much to do that it is hard to even think of devising, mastering, and teaching an international module in such a course. Every time we've tried to launch such a pattern by committee or program head recommendation, it really hasn't caught on. What does one need that might make the technique work? Well, money can help. If you give people money to spend their summer research time or a semester to develop an international-law module that they then understand and "own," then maybe the approach will work. Meanwhile, it might be good to foster specialized courses with an international slant. For example, if you get an enthusiastic teacher of something like international joint ventures or cross-border M&As, that may get a bigger and better response from students, as well as sustainable faculty involvement.

Q: In my own limited experience, in the commercial law field, I've seen casebooks in the Sales area, for example, routinely now begin to incorporate materials on the Convention of International Sale of Goods and I think what that indicates is that as the world economy produces more and more of these international transactions, we'll be slow to react to it, but we will react.

A: I agree and I'll take back a little bit of what I just said. In many corporate law courses, for example, it's now a big topic to

talk about whether there will be convergence of corporate law systems around the world. In part this has happened because key professors have taught abroad and have become interested in the structural differences they have observed. They came to appreciate the fact that, in Europe, equity markets are not very highly developed, and stock ownership is concentrated rather than diffuse. Why is this so, and why is it so different from the U.S.? Now there is a large literature on these questions and the professors can't help teaching it in the basic course.

