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BA-MA Reform, Access to the Legal Profession, and Competition in Europe

Frans Vanistendael*

I. The Status Questions

At the annual meeting of the European Law Faculties Association (ELFA), held in Riga in February 2002, representatives of 60 different European law schools discussed the impact of the Bachelor-Master (BAMA) reform on curricula in European Law Schools. A position paper was adopted, stating that “the model underlying the Bologna declaration could be adapted to the study and practice of law in such a way that accession to the profession should be possible after an average of five years of study and practical training, consisting of a university phase of basic academic training of at least three years, and a second phase of at least two years of specialised theoretical and additional professional training.”¹ The objective is to “make law degrees in Europe more compatible and comparable” with the Sorbonne-Bologna declaration.² The discussion held during this meeting illustrated all too well the wide divergence of opinion with respect to the implementation of the BAMA reform and its potential impact on law curricula.

Rather than analyze all the details, the purpose of this paper is to compare the basic structure of the main existing models of legal education with the structures of the main models of access to the regulated legal profession, and to compare the models with the basic principles underlying the BAMA reform. Part of parcel of this task is an examination of the objectives of transparency and competition that the BAMA reform seeks to realise.

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1. See EUROPEAN LAW FACULTIES ASSOCIATION, ELFA DISCUSSION PAPER ON THE SORBONNE BOLOGNA DECLARATION (1999), available at elfa.bham.ac.uk/ELFA/Bologna_Declaration_1999/bolognafinal.htm (last visited Sept. 3, 2002).

2. See *id.*

II. Traditional Models of Academic Legal Education and Professional Legal Education and Access to the Regulated Profession

In describing existing models, both academic and professional legal education are taken together as both are required, in all European countries, in order to be admitted to the regulated legal professions. There are four different models of access to the legal profession.

The first and the oldest model, still alive in Ireland and the U.K., consists, as it did in medieval times, of a period of apprenticeship, without any formal requirement of academic qualification. A one-year conversion course and an apprenticeship of two years—of which a part is, again, course work—are the only requirements to practice the legal profession. The position of the Law Society in England is that 18 months of training provides adequate technical knowledge for a lawyer. Additional training and expertise, it follows, can be learned on the job. In this model, legal education is not a question of learning at schools or universities but, rather, of working and living with the brethren in the trade. The academic legal education of a potential candidate to the profession is considered almost irrelevant, provided that the candidate brings with him a good general academic education. Access to the regulated legal profession is totally under control of the members of legal profession. A candidate will only be admitted when the profession considers him or her fit for duty.

The second model has its roots in the French tradition and, more specifically, in the imperial decree of 1810 organizing the profession of *avocat*. Access to the profession is basically determined by obtaining the academic law degree and by taking part in the swearing-in ceremony at the local bar. Without academic qualification there is no access to the bar. There is a period of apprenticeship of three years, but until rather recently control was not very strict. Access is not in the hands of the profession but, rather, of the university. It is the university which provides the label of professional competence by awarding its law degree.

The third and most recent model has its roots (Saxonia, 1863, and Prussia, 1879) in the German tradition of qualification for the judiciary and the highest offices in the administration. It requires an academic degree and, more importantly, two state examinations geared towards the judiciary and the civil service, with an apprentice period in between. The ultimate quality guarantee in this system depends on the state examinations and not on the academic qualification.

In the fourth category, many Central and East-European countries

have a model that requires a long academic education (up to five years), followed by a long period of apprenticeship (an additional five years prior to access to the bar).

At the beginning of the 21st century, all kinds of hybrid forms of access to the profession have seen daylight. A considerable number of English lawyers now have law degrees and, in large law firms, the apprenticeship is reduced to only a minor part of day-to-day activities. In France, the bar is now organizing a program of professional education with examinations that, as it happens, a substantial number of law graduates fail. In Germany, current plans for the reform of the curriculum give a greater role to the universities in the preparation for the state examinations.

Regardless of the differences in models of legal education and access to the profession, all these models had one and the same major objective: to prepare a candidate for the profession as it practiced in one specific national legal system. Only among the former colonies and dependencies of the U.K. was it possible to practice law in another national jurisdiction with a legal and professional education coming from another jurisdiction. However, this was an incidental consequence of the political expansion of the British empire and, later, the Commonwealth, and the pragmatic and elastic character of the English Case Law, rather than the result of a clear objective on the part of English legal education. In all the other legal systems, and, in particular, on the European continent, the basic premise was that a candidate would be educated and later practice within the framework of one single national legal jurisdiction. Nevertheless, even in the “old days” that premise was not entirely valid, as a significant number of law graduates did not end up in the regulated legal profession. Instead, they found themselves in a range of unregulated trades and professions and, in particular, in international business activities. In that capacity, they were often engaged in legal professional activities in jurisdictions other than the one in which they had studied the law. Apparently, this crossing of jurisdictions did not result in great legal catastrophes. On the contrary, most of these international businesses lawyers have thrived, notwithstanding the fact that, in the aggregate, they were in charge of only a very limited part in all legal activities.

III. Freedom to Establish and Provide Services, and Free Access to the Profession

The basic conditions of the traditional models changed quite radically when the basic freedoms of the Rome Treaty were implemented for the regulated legal profession. The oldest directive (77/2479),

enabling regulated legal professions and allowing for professionals to occasionally provide services across borders, has been of limited importance, since the large majority of the clients still prefer the services of local law offices. They also prefer lawyers with a local law degree to advise on matters of both local and European law.

All this changed considerably when the European Court of Justice began to push forward the implementation of the freedom to establish and provide cross-border services.

IV. Consequences of the Implementation of the Basic Freedoms on the Legal Profession and on Legal Education

Directive 98/5, on the right of establishment, has far-reaching consequences with respect to competition among legal professionals in Europe, and for the position of law schools, as the providers of academic and professional education that enable access to the legal profession. There is, indeed, an automatic right of establishment, without any prior test of knowledge of local law.

The consequences of this directive are problematical in several ways. To the extent that the foreign lawyer establishing himself in another Member State will indeed practice exclusively local law, which he is entitled to do, there is not even the minimal guarantee of professional competence that is normally provided by the national degree. This raises the argument of consumer protection, which has some, though not unlimited weight, in this debate.

As long as conditions for access to the legal profession are unequal among the Member States, the more serious consequences are with respect to distortions in competition. This is true because academic and professional legal education is expensive, even when it is partially subsidized by the government. In the comparison between conditions for a law degree and conditions for access to the bar, there are, of course, many elements such as whether the training period consists of a full time activity, whether the apprentice lawyer must submit to examinations, and whether he is entitled to remuneration (at low levels) for the work which he performs as an apprentice and, later, on his own (albeit, under the supervision of an established lawyer). Competition will not necessarily be distorted because, in one Member State, a lawyer might achieve access to the bar with one year, or one semester, less education, training or apprenticeship. There are many other factors, such as difference in language, which may be more important than a few months' difference in the training period. However, we are not addressing differences in legal education of a few months or one year. We are talking, instead, about differences of four or even five years of preparation. If we compare

Poland and Austria, where the total period of preparation may take up to ten (!) years after leaving high school, with countries such as Ireland and the U.K., where the distance between secondary education and full membership of the bar is six years, or Belgium and Spain, where after a five year degree, graduates become apprentices but can see clients and act on their own, it is clear that this situation will have some consequences for competition.

Competition has a role to play in whittling down these large differences. At the ELFA meeting, all professors present were unanimous in agreeing that a ten year period was a too long for the education and professional training of lawyers, and that this should be reduced considerably. They also agreed that freedom of establishment and the resulting competition was a good way to achieve the objective uniformity. That, however, is where the unanimity ended.

The question is whether to arrive at a system like that of Belgium or Spain, where after five years of academic legal education graduates have a rather direct and unrestricted access to the bar, or, in the alternative, to allow bar authorities to test or accredit candidate lawyers before allowing them into practice. The answer to this question is all the more important because, traditionally, in all systems there was minimal professional and technical training in the basic rules of the system which, in turn, resulted in a reasonable guarantee of knowledge of technical expertise. The freedom of establishment directive apparently dismisses this quality guarantee for lawyers operating in a jurisdiction other than their own.

The basic problem is that none of the existing models of legal education and access to the profession were intended to allow lawyers to practice in another jurisdiction. They were all intended to allow lawyers to practice in the national jurisdiction for which they had been educated and trained.

V. The Complication of a Multi-National System

The situation has been complicated because Europe has become a single market with different jurisdictions. Prima facie, this situation looks very much like that in the United States, which also has one market and different state jurisdictions. There are some major differences, however, which make it difficult to impose the U.S. solutions. First, in the U.S., various jurisdictions operate in one and the same language; whilst Europe operates in more than a dozen languages, many of which are not even remotely related. Second, the component of federal law in the U.S. system is substantial and generally well-codified, while the common community law in Europe is less important and consists to a large extent of shifting case law. Third, the law in many state

jurisdictions of the U.S. is much more harmonized than similar areas of law in Europe. The structure and the pattern of most state legal systems are basically similar and differences are often in the details.

These characteristics of the multi-jurisdictional set up make it much easier for U.S. law schools to prepare law graduates for legal practice anywhere in the U.S., than it is for European law schools to do the same for European law graduates. The heavy, common federal component in legal education is the same anywhere in the U.S. With respect to state legislation, the patterns to be studied are similar (not unlike the most harmonized parts of domestic law in the European Union). Finally, the tradition of the Common Law is a body of law that transcends national and state borders. As a consequence, the specificity of the State Bar examination is minimal compared to the specificity of national law examinations in the E.U. The State Bar examination cannot be considered an unreasonably burdensome obstacle to entry into the legal profession. In the U.S., all of these factors have resulted in the development of "national" law schools that prepare students for practice anywhere in the country. Therefore, multi-jurisdictional legal education cannot be considered as a serious complication in the U.S.

In Europe the situation is quite different. As mentioned above, language plays an important role as a factor of restriction for students, as well as to their eventual professional mobility. In addition, the common component of "communitarian" law is far lower than that found in the U.S. European law schools would certainly be capable of organizing a common year of European legal education consisting of European community law, international law, and comparative law, but they are, as of yet, in no position to design a common three year curriculum like that found in the U.S. The differences in the technical content of European law curricula are substantial and cannot be bridged easily. After four or five years of legal education, the European law graduate possesses a body of technical knowledge that cannot readily be used in the jurisdiction of another Member State. It means that a law graduate who has taken law courses in one particular jurisdiction is effectively better prepared for local practice and has a comparative advantage in preparing for local bar examinations.

VI. The Bachelor-Master Reform (BAMA)

To address this imbroglio, the European Ministers of Education have articulated the principles of the Sorbonne-Bologna declaration, with the stated objectives of making university degrees in Europe more transparent, increasing student mobility, and enhancing competition between law schools across Europe. These are lofty ideals which many

law schools in Europe applaud, but do not practice. In addition, these ideals become difficult to achieve because of a number of very hard and basic rules that accompany the acceptance of the Sorbonne-Bologna declaration. These rules provide that academic education should result in a bachelor's degree after three years (or 180 ECTS points) of study, and that this degree should give effective access to the labor market. The only other rule is that the master's degree, which could be earned after completion of the bachelor's degree, should take at least one year (or 60 ECTS points) of study. With respect to the latter, it could take longer (i.e., a period of 2 or more years), without violating the Sorbonne-Bologna principles, although a 3-year bachelor, 2-year master, and 3-year doctoral period of study seems to be the ideal model. Since the advent of the Sorbonne-Bologna degree, the initial reaction in many countries has been that there was no need to change, and that the whole discussion was more a question of form rather than substance.

That has, for example, been the position in France, which already had a three year curriculum, with a fourth year leading towards a basic law degree and, upon completion of a fifth year, the receipt of a *Diplôme d'études approfondies*. The Scandinavian countries already had a bachelor's degree, earned after three years of study, and master's degrees of varying length that provided access to legal practice and regulated legal professions. England, too, has a bachelor's degree for legal practice and a master's degree for academic specialization. On its face, the reform is not going to change very much in those countries.

Some countries have already implemented the BAMA reform. The Netherlands has settled on an approach that provides for three years of study leading to the bachelor's degree, and one additional year leading the master's degree and access to the bar. At the bar, however, the candidate must take a technical training course that resembles the English conversion course in that it has a duration of approximately one year. The biggest reform came about in Italy, which drastically reduced the duration of the curriculum by adopting a three year bachelor's degree program which includes the preparation for the bar.

All of these reforms now raise a basic question: what, in fact, is the basic degree that gives access to the bar? A master's degree, as is currently the case in most European countries, or the bachelor's degree, as is likely in an increasing number of European countries? As usual, reforms in Europe tend to result in greater diversity rather than uniformity, which was, of course, just the opposite of what the reformers had envisaged.

VII. Opportunities of the Bachelor-Master Law Degrees

The position taken by ELFA, that the law curriculum should consist of a two-tiered structure that encompasses a three-year bachelor's degree and a two-year master's degree, presents several opportunities for widening the scope and the depth of student exchange programs.

Ideally, the bachelor's degree program of study should consist of the technical study of the national legal system. This study would take place within the national framework and does not need to contain many opportunities for exchange. The master's degree curriculum should then be the stage upon which the student broadens and deepens legal analysis in order to sharpen legal argumentation and judgement. It should also provide room for the study of other legal systems and strengthen the focus on European, international, and comparative law. Ideally a student, after having completed his bachelor's degree, should be able to take his master's degree anywhere else in Europe and be admitted to the legal profession in any Member State of the European Union. This situation would truly correspond to full student mobility and full freedom of establishment in accordance with the Treaty of Rome.

One should not forget, however, that such a situation does not even exist in the U.S., where law graduates still have to submit to the local bar examination. Also, it is not unreasonable for the legal profession to require some testing of the technical competence of the candidates, when the universities cannot provide adequate guarantees that these graduates have studied the rule of the jurisdiction in which they are applying to practice.

Assuming, however, that the bachelor's study allows for a general introduction into a particular national legal system, the master's study should provide the key to multi-jurisdictional legal studies, enabling a graduate to practice law in any jurisdiction of the E.U.

Theoretically, it should become possible for any European law school in a particular member state to offer a master's degree to candidates with a bachelor's degree, from any other law school in any other member state. This master's degree should allow the holder to have access to the legal professions in his home state. In that way, access to the legal professions in Europe would become comparable to access in the U.S.: regardless of which law school awarded the law degree, any holder of a J.D. is, in principle, eligible for bar admission. This is the dream model, which the most dynamic European law schools would like to realize, because it would allow them to compete in a market of more than four hundred million people.

There are two major obstacles to the realization of this dream. The first obstacle is language. The fragmentation of Europe into more than

thirty different languages means that there is not a single market for legal education. There is a German market for almost one hundred million German speakers, and other markets for sixty million French speakers and forty million Polish speakers. Education offered in one market is totally useless in most others, unless the students also operate in the language of other markets. The law school that offers legal education only in its national language cannot compete in this European market and, also, is not attractive to non-Europeans, unless they first learn a language like German, French, or Polish.

During the last quarter of the previous century, however, English became the *de facto* second language of most of European university-educated elites. The English proficiency of continental Europeans may be uneven, but they have sufficient basic knowledge and skills to allow them to acquire an operating proficiency in English and, hence, to follow a legal curriculum in English.

Therefore, law schools offering a full legal curriculum in English have acquired the *de facto* power to compete for students throughout Europe. Previously, this was only possible for all English-speaking law schools, which had a three-year curriculum for domestic use that they could export very easily. No law school on the continent has been capable of organizing an international English-speaking curriculum encompassing a minimum of three years, in addition to its domestic curriculum in its national language.

The BAMA reform has fundamentally changed these conditions. Assuming that a student has a three-year bachelor's degree in his own language, he can take a master's degree of one or two years in English. Organizing such a master's degree in one or two years is not beyond the capacity of many European law schools. Apart from the English and Irish law schools, more than a dozen other European law schools are doing just that.

The second obstacle is much harder to overcome and concerns curriculum content. Under what conditions may a student, who has obtained a bachelor's degree in his home country and a master's degree in another European country, enter the legal profession in his home country on the same footing as his colleague students who, in addition to their bachelor's degree, obtained their master's degree in their home country? Does such a student get credit for the courses in the other state for the purpose of bar admission? It is generally agreed that the essential parts of the national legal system should be part of the curriculum and that these parts cannot be replaced by studying the essential parts of another national system of law. Traditionally, a student is presumed to learn the rules which he will apply in legal practice in his home state, and not the rules of another country. It is here that cross-border teaching of

generic courses enters the picture.

In areas outside the European continent, the obligation to learn only the rules of one's own jurisdiction is not so absolute. In the U.K., the U.S., Canada, and Australia, students are not learning all, or even most of the rules they will apply in practice. In corporate law, criminal law and matrimonial law, the rules of the home state may be different from the rules learned at the law school. Of course, there are large parts of the system that are shared: constitutional law and federal taxation are pillars of the national system, and torts and contracts have a large common base stemming from the Common Law. But, no major law school in the above-mentioned jurisdictions has the ambition to cover all or even most of the areas of law in which its graduates will be practicing.

In Europe, two major developments are creating new opportunities. The first is a new concept in law teaching that is gaining ground; the other is a recent development in European law. The first is the idea that law can be taught without reference to a specific national legal system. This idea was already developed during a conference on global legal education organized by New York University in Florence in May 1999.³ The concept holds that most rules, for example those of corporate law, can be explained by reference to the problems that need to be solved (i.e., in areas such as separation of assets to be used for corporate purposes; the command structure over those assets, internally and externally vis-à-vis third parties; the rights and remuneration for parties contributing such assets; the relationship between the providers of equity and the providers of debt; the relationship between different categories of providers of equity; transformation and reorganisation of legal entities; the dissolution of such entities; etc.). It is perfectly possible to teach these subjects by referring to rules of different jurisdictions, as is done in lectures on corporate law in U.S. law schools. This way of teaching is thought to be superior, precisely because it is not restricted to one legal system and gives a wider view with a range of varying solutions to similar problems that arise in different jurisdictions. The newness of the concept lies in the perception in Europe that this old way of teaching corporate law in the U.S. can be extended to many more areas of law than had been thought possible in the past. It can be applied to constitutional law, criminal law, taxation, torts, contracts, human rights, and international law (e.g., to the core of the law curriculum). It does not mean that all references to national legal systems should be abolished. References to the main legal frameworks remain necessary but they should serve as a compass indicating the right direction, rather than as a detailed road map indicating which street or alley to take.

3. Conference of International Legal Education.

The second element has to do with developments in European law. There is an emerging trend towards a common law for Europe. For example, the well-known influence of legal harmonization or approximation through European Community law. Many rules and standards have been harmonized through this process. However, in areas of law that so far have not been touched by the harmonization process, there is a trend of intensifying comparative legal studies and learning from each other's basic legal principles. This trend is often called the *Ius Commune*, or European Common Law development. This trend is exemplified by the work of the Lando Commission on the Principles of Contract Law and the recent publication of the Case Book on European Tort Law. The latter has been written specifically for use in cross border law teaching in Europe.

Both developments have widened the scope of European legal education. A few years ago, French law faculties launched the idea of a common year or common semester of legal education in Europe. Much of this common education was confined to international law, human rights, European community law, and comparative law. However, harmonization and the development of *Ius Commune* open opportunities to teach the hard-core legal subjects like criminal law, contracts, torts, procedure, corporate law, labor law, and taxation to students from any European jurisdiction as the basic principles of their respective national legal systems.

VIII. Bilateral or Multilateral Law Degrees

The combination of cross border law teaching and the bachelor-master structure opens new opportunities for bilateral or multilateral law degrees that provide access to the legal profession in the various member states of the European Union. During the three years of bachelor study, students will acquire the basic technical knowledge of their national legal systems and possibly general education in areas like philosophy, history, economics, sociology, and other human sciences. They will continue their master study in another jurisdiction in a cross border law-teaching curriculum. They will learn about the basic problems and principles underlying any area of legal practice and the rules that are common in the *Ius Commune*. At the same time, they will be allowed to specialize in a second jurisdiction, so that they will be able to penetrate and absorb the technical details of any national legal system within a very short period of time. On the basis of this curriculum, and as a minimum, they should have direct access to legal professions in their home country, where they obtained their bachelor's degree, and in their host country, where they obtained their master's degree. Ideally, as is the case in the U.S., such a

curricula should give access to the legal profession in any member state of the Union on the basis of a multilateral law degree. Again, at a minimum—and in a perhaps more realistic view—such a degree should give access to the legal profession in the two member states in which the student has completed his study.

Similar arrangements already exist on a limited scale and on a bilateral basis in the European Union, between K.U. Leuven in Belgium and the University of Nijmegen. The combination of cross border law teaching and the two-tiered bachelor master curriculum opens the possibility to widen dramatically the scope of such arrangements.

In order to achieve bilateral or multilateral law degrees, law schools in Europe will have to adapt their curricula and their traditional way of teaching. Curricula should take into account disciplines that have been studied in other member states, and general cross border law teaching should be introduced at least at the master's level of study. For those law schools willing to meet the challenge, it means a major reform that would forever change the landscape of European legal education.

IX. Conclusion

The conclusion is that ELFA and the European Union will have to make a choice as to what they consider the top priority: (1) free and unrestricted access to the legal profession for law graduates, or (2) full interchange ability of degrees in master of laws.

In view of past experience in other parts of the world—such as Australia, Japan, and the United States—it does not seem to be very realistic to expect the profession to accept a range of law degrees, with many different contents, as a passport to the legal profession.

Therefore, ELFA should reconsider its objectives and go for maximal interchange ability of master degrees in law on the one hand, and maximal student mobility and minimal testing by the legal profession on the other. The reasonable requirement of testing technical competence should not become an unreasonable technical barrier to access to the legal profession.