

Volume 22

Issue 1 *Symposium: Experiential Education in China:
Curricular Reform, The Role of the Lawyer and the
Rule of Law*

Article 4

1-1-2009

Practice in Legal Education: International Experience and Chinese Response

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Available at: <https://scholarlycommons.pacific.edu/globe/vol22/iss1/4>

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Practice in Legal Education: International Experience and Chinese Response^{*}

Qingjiang Kong^{**}

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As a Chinese saying goes, stones from other hills are good for working jade. Bearing this in mind, I reflect in this paper upon the modes for practical legal education in representative countries and try to shed light on their relevance to Chinese legal education.

I. INTERNATIONAL EXPERIENCE IN PRACTICAL LEGAL EDUCATION

A. *The American Model: Purposeful, Practice-oriented Legal Education Throughout Law School*

In the United States, legal education is a professional education that occurs at the graduate level in law schools.¹ Legal education in the U.S. has a clear

* This paper was presented at the Workshop on Experiential Legal Education in China, which was held at the University of the Pacific, McGeorge School of Law on January 25-26, 2008 under the auspices of the USAID-sponsored program Experiential Legal Education: Enhancing the Rule of Law in China.

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1. Huo Xiandan, *From Legal Profession to Legal Education*, CHINA LEGAL EDUCATION RESEARCH, vol. 66, no. 4 19-36 (2006).

professional objective: to produce qualified lawyers. After obtaining a J.D. degree from a law school accredited by the American Bar Association (ABA), students are eligible to apply for and take any state's bar exam, which is organized and administered by the bar association of that particular State.²

Legal education in the U.S. is founded on a basic principle: treating students as attorneys who shoulder the responsibility of serving their clients. Therefore, it is natural for American legal education to focus on practice, with a special emphasis on the training of such basic skills as writing, client interviewing, and oral argument. This capacity-building is very important to American lawyers, who are expected to be skilled in the art of debate, conducting logical analysis and producing impressive written work. These skills are developed and enhanced throughout the whole legal education, for example, through the participation of students in legal clinics and advocacy programs.

Moreover, modern U.S. law schools offer students opportunities to apply their legal skills as they are acquired, to allow students to use what they learn as they learn it. For example, externship programs allow students to receive academic credit for unpaid work with a judge, government agency, or community legal services office.³ Law schools across the U.S. now have programs under which students can work for the city's legal aid department or public defender's office. Students are also given opportunities to work with governmental agencies in drafting legislation, codes and regulations. During the summer, students will find many jobs available in government offices. The summer after a student's second year in law school—or perhaps even after the first year—will often afford them the chance to work in a law firm to see first-hand what these firms do and how they do it. Some of these firms use summer employment as an opportunity to evaluate promising newcomers.

In sum, U.S. law students will never cease to be exposed to the practical side of the legal profession from the time they enter law school to the time they graduate. It is this opportunity for a great deal of practical experience that will make a law student a better and more knowledgeable lawyer.

B. German Model: Built-in Practical Education as Assured by Law

Legal education in Germany is divided into two stages by the first state-administered exam: university studies and the pre-legal career stage. Students must attend a university for four years. University studies are completed when the student passes the first state exam organized by each individual state.⁴

2. Robert W. Gordon, *Legal Education in the U.S.: Origin and Development*, in ISSUES OF DEMOCRACY 6-7 (Aug. 2002), available at <http://usa.usembassy.de/etexts/gov/legalijde0802.pdf>.

3. Wikipedia, *Legal Education in the United States*, http://en.wikipedia.org/wiki/Legal_education_in_the_United_States (last visited Jan. 4, 2009).

4. Zheng Yongliu, *An Introduction to the Legal Education in Germany*, in COMPARATIVE LEGAL STUDIES (1997).

University students who have passed the first state exam may opt to enter the second stage in legal education (pre-career stage), which is career-oriented. The characteristics of the German model are the integration of professional qualifications and legal education. Students in the second stage are referred to as “apprentices.” Prior to the end of the apprenticeship (*Referendardienst*), students will take another state exam. Those who pass this second exam are qualified for any legal profession in Germany.

The first stage (university studies) aims to bring students into legal education and to provide students with the essential knowledge for legal scholarship and practice. The courses are taught in seminar or lecture format. Lectures are led by professors and are designed to enhance the students’ theoretical understanding of law and to ignite discussions of cases in related fields, which will help students find solutions to the questions presented. Seminars also are hosted by professors, but students play major roles therein. They are encouraged to identify issues and to find solutions to real world questions on their own.

During the second stage, which takes place over a two-year period, trainees undertake internships in required, pre-selected places. The required places include courts, public prosecutor’s offices, and governmental agencies. The selected places—domestic or overseas—are selected by the trainees themselves according to their own interests and career preferences.

The German model enables students to acquire the basic knowledge of legal scholarship in the classroom in the first stage and to learn applied skills for the legal profession in the second stage. Under this module, students not only are given the choice of whether or not to be a legal professional once they have passed the first state exam, but those who do choose to be legal professionals can develop their professional capabilities in the real world during the second stage.

However, nothing is perfect in the world, and the German legal education system is no exception. In the early 1960s, the German legal education system heard a critical voice, which became louder and louder.⁵ After decades-long debates, Germany adopted the Legal Education Reform Act in March of 2002 and implemented it on July 1, 2003.⁶ According to the Act, the two stages of legal education remain unchanged. However, the Act integrated the practical training and doctrinal teaching in the first stage, which was a departure from when legal education used to focus on delivering the legal knowledge with less consideration paid to practical training. The practical skills training, which was formerly found in the second-stage apprenticeship period, now begins early in the first stage.⁷ For example, the clinic experiences in courts, administrative divisions

5. Veraltet, *Praxisfern, zu langwierig: Die deutsche Juristenausbildung steht in der Kritik* [Outdated, Theoretical and Too Lengthy: The German Legal Education is Criticized], *SÜDDEUTSCHE ZEITUNG* (F.R.G.), Aug. 10, 2001, at 5.

6. Gesetz zur Reform der Juristenausbildung [Law on the Reform of Legal Education], July 11, 2002, BGB I, at 2592 (F.R.G.).

7. Johannes Riedel, *The Reform of Legal Education in Germany*, 0 *EUR. J. LEGAL EDUC.* 3, 4 (2001),

and law firms are now integrated in the curriculum during the first stage. The changes in German legal education also include increased requirements of other practical skills, including negotiation management, oral argument, alternative dispute resolution (ADR), litigation strategy and communication.⁸

C. Japanese Model: From Doctrinal Approach to Absorbing Approach

During the post-war period, university education became increasingly popular in Japan. Correspondingly, legal education in Japan also became popular as a kind of higher education tailored to the needs for a well-rounded education. Legal education, at the undergraduate or graduate level, was not directly associated with legal professions.⁹ However, critics of the Japanese legal education system, which included lawyers, alleged that the legal education was too theoretical and not practical enough. The critics had several reasons for their complaints. First, legal education was not intended for legal professions. Most students at law schools had no interest in becoming lawyers. Rather, they aspired to become civil servants, diplomats, company executives and journalists. Moreover, law schools were not established only for potential lawyers. Historically in Japan, civil servants were above lawyers in the social hierarchy,¹⁰ and although this hierarchy has changed recently, there are still many law school students who do not intend to become lawyers.

Second, the difficulty of the national judicial examination in Japan had a substantial effect on the career development plans of law students.¹¹ In this respect, law professors had difficulties determining the relative importance of practical skills vis-à-vis doctrinal teaching.

Third, the curriculum in the Japanese law school was divided by disciplines.¹² Family law professors only taught family law and tax law professors only tax law. This division hindered practical skills teaching. Moreover, the traditional teaching methods impacted the introduction of practical teaching as well. With

available at <http://www.elfa-afde.org/PDF/Journal/THE%20REFORM%20OF%20LEGAL%20EDUCATION%20IN%20GERMANY.pdf>.

8. Stephan Liebfried et al., *Redefining the Traditional Pillars of German Legal Studies and Setting the Stage for Contemporary Interdisciplinary Research*, 7 GERMAN L.J. 661, 678-79 (Aug. 1, 2006), available at <http://www.germanlawjournal.com/article.php?id=750>; see also Han Chifeng, *Legal Education in Contemporary Germany and its Ramifications* [当代德国法学教育及其示], COMPARATIVE LEGAL STUDIES [上海交通大学法学院教授, 德国慕尼黑大学法学博士], No. 1 (2004) (copy on file with author).

9. The purpose of the University was once defined by The Decree on Imperial University (Teikoku Daigaku Rei) as the teaching of arts and skills that satisfy needs of the state. See Setsuo Miyazawa & Hiroshi Otsuka, *Legal Education and the Reproduction of the Elite in Japan*, 1 ASIAN-PAC. L. & POL'Y J. 2, 7-8 (2000).

10. *Id.* at 6.

11. *Id.* at 6-8.

12. Ding Xiangshun, *Japanese Law Schools and Judicial Examination Reform, Law and Social Development* [日本法科大学院教育制度及其特征], 法制与社会发展 No. 5 (2006).

the traditional teaching method, lectures were often given in auditoriums packed with hundreds of students and were highly doctrinal.¹³

Fourth, Japanese law professors tended to teach law and approach legal problems from the judge's point of view, and this contributed to the neglect of practical legal education. In accordance with this approach, learning law meant "giv[ing] the right answer to the question," just as judges decide cases. In this context, the lawyer's oral argument capabilities were less important and less necessary. Few lawyers actually debated in the courts. For example, if a judge posed a question to a trial lawyer that the lawyer was unable to answer during the trial, the lawyer would likely give the answer in a written form during the next hearing. Therefore, it was rare to find adversarial debate in the courtrooms. In stark contrast to American lawyers, Japanese lawyers did not seem to have a high opinion of oral argument. Japanese lawyers also tended to have trouble performing analysis and were less able to write impressively, due to the fact that they received little exercise or training in these aspects. The framework for legal education in Japan did not provide them with opportunities to develop these capabilities.

In the 1990s, the game among the stakeholders of legal education forced Japanese law professors to consider reforming legal education by introducing practice-oriented skills training. The stakeholders, including law students, the customers of legal education, lawyers, the products of law school, and rivals in legal education markets, such as American law schools, all forced the Japanese legal education to undergo changes and undertake reforms. The year of 2004 witnessed the inauguration of law school programs as part of broader reforms initiated in 2001 by the Judicial Reform Council (JRC).¹⁴ What the Japanese law schools have done, among other things, is to narrow the gap between doctrinal teaching and practical training. The state universities—the "Imperial Universities" before World War II, such as the University of Tokyo, Kyoto University, and Hokkaido University, and the major private universities in large cities have introduced practice-oriented postgraduate courses. These postgraduate courses function as on-the-job training. One good example of such a postgraduate course that was rarely seen in the conventional curriculum is "Corporate Governance," which incorporates corporate law, securities law, accounting law and management into its curriculum mapping.¹⁵

13. *Id.*

14. Luke Nottage, *Build Postgraduate Law Schools in Kyoto, and Will They Come - Sooner and Later?*, in *COMPARATIVE RESEARCH IN LAW AND POLITICAL ECONOMY (CLPE) RESEARCH PAPER 3/2005, VOL. 01 NO.01, CORPORATE GOVERNANCE AND LAW REFORM IN JAPAN: FROM THE LOST DECADE TO THE END OF HISTORY?* 2 (Luke R. Nottage & Leon T. Wolff.), available at http://papers.ssrn.com/soi3/papers.cfm?abstract_id=986529.

15. For example, the Kyoto University Faculty of Law now offers elective courses which cover a wide range of practical skills training. For a survey of the legal curriculum, see Kyoto University Bulletin 2006/2007, available at http://edb.kulib.kyoto-u.ac.jp/bull/html/03_schools/grd01_letter.html.

In sum, American legal education is simply the professional education and practical skills training employed throughout the graduate law school years; both the German and Japanese models for undergraduate legal education are similar to the undergraduate legal education in China. The Japanese model for legal education that was implemented after the legal education reform is to an extent, a duplicate of the U.S. model. However, although those changes have been implemented at the graduate level, few changes have been made to cater to undergraduate legal education.¹⁶ By contrast, in accordance with the post-reform German model, practical education in Germany is integrated into the rudimentary education much earlier.

After an overview of the models for practical legal education in representative countries, the issue remaining for Chinese law schools seems to be the choice of models for practical legal education. The U.S. and German models for practical legal education are mature; still, the German model has undergone adjustments. Currently, the Japanese model also is undergoing a big change. These three models, particularly the German and Japanese models, have much in common with China's. However, this is not to say that Chinese law schools should simply select and copy one of the three models, although the calls for reform and changes in German and Japanese legal education are worth noting. In other words, Chinese law schools should follow the general examples from the German and Japanese legal education reforms and benefit from their experience. For example, although the Japanese and German legal education share the same background as Chinese legal education, it is not difficult to see they ignore one fact: that is, they train students to obtain merely a single legal solution to real problem. This method is obsolete in that students, through practical legal education, learn how to write a brief or motion in the correct format but do not know how to resolve a real legal dispute. In contrast, the American model is better positioned to resolve this problem. American legal education treats a student as an attorney serving his clients. For the trial attorney, many complex legal issues do not dictate a single "right answer."

II. REFLECTIONS ON CHINESE LEGAL EDUCATION IN LIGHT OF PRACTICAL EDUCATION

Chinese legal education, primarily the undergraduate education, is very similar to Japan's pre-reform legal education. Law, *per se*, is regarded as one of the social sciences. Students in a law school are viewed as the same as other students in social sciences. In the eyes of university educators, law students are in no way special or different from others studying history or math. In this regard, Chinese legal education has no clear professional objectives as does the

16. It was noted that the Japanese legal world has long been adept at adapting "legal transplants" to meet its particular circumstances. See Nottage, *supra* note 14.

American system. There are many law school graduates who ultimately take jobs working as insurance salesmen, high school teachers and so on.

The biggest problem in China's legal education consists of the doctrinal teaching or the "cramming" method of teaching, which is surprisingly similar to the Japanese method before legal education reform was introduced. The problem in China is actually worse than that in Japan; a typical situation would be a professor speaking all the time in the classroom, without encouraging any participation from students. This results in some students doing something else in class, such as sending text messages and tuning out rather than listening. Also, the absence rates are high and often frustrating. As a result, some students cheat by bringing notes in order to pass the final exams. Before final exams, students will be busy copying notes from one other. The students without any class notes will simply borrow from those who have the notes, and everybody recites the notes and key points day and night in order to pass the exam by sheer memorization. In this context, it is not difficult to find that law school graduates are not at all prepared when they join the legal profession.¹⁷

In recent years, more and more scholars and legal professionals have observed a disparity between legal education and legal practice, and they blame legal education for this. Referring to the experiences from American legal education, they have advocated a legal education leading to the Juris Master (JM).¹⁸ The introduction of the JM education has been an important reform in China's legal education, which showed that professional education should be one of the main objectives of legal education and, in fact, was already integrated into the legal education framework. Unfortunately, observed from the teaching standpoint, the curriculum design, teaching method and content of the JM education have not moved far enough away from the undergraduate legal education; the new bottle is still full of the old wine. Worse, the undergraduate legal education remains almost unchanged, while paying little or no consideration to the practical education. These problems show that it is really no easy job to recognize the value of practical legal education and to integrate this into a rational legal education curriculum.

III. ISSUES TO BE ADDRESSED FOR INTEGRATED PRACTICAL LEGAL EDUCATION AND CHINESE RESPONSES IN LIGHT OF ZGU PRACTICE

A. *The Relevance of Practical Legal Education*

There is always a debate among law school faculties and other stakeholders over the relative importance of practical skills as compared with doctrinal courses. Once their respective values are recognized, educators will take the

17. Wang Chenguang, *Theory and Practice: an Issue Perplexing the Legal Education* [理论与实践围绕法学教育的难题之一], PEKING UNIV. L. J., No. 10 (1998).

18. Xiandan, *supra* note 1.

initiative to introduce practice-oriented legal education rather than sticking invariably to the doctrinal approach. The issue of the value of practical legal education cannot be addressed without understanding the ultimate mission of the undergraduate legal education: to prepare talented law students with a “solid foundation, broad horizon, profound capacity and high qualification[s].”¹⁹

In China, it is impossible and unnecessary to produce an army of legal scholars. Nurturing practical, capable legal professionals should be the objective of legal education at the undergraduate level. In order to achieve this objective, developing learning ability and improving practical skills should be emphasized. Practice in legal education is the effective measure to improve and strengthen undergraduates’ learning abilities and “do-it-yourself” abilities.

In this regard, a side issue arises: the distinction between legal education and the national judicial examination. When it comes to the practical aspects of legal education, many people naturally will associate it with the national judicial examination. However, practical legal education should not be made solely to prepare students for the judicial examination, because, and only because, legal education carries far more important tasks than preparing students that examination; it is better to leave the task of preparing students for the national judicial examination to the preparatory training school. In a word, there must be a distinction between preparing for the judicial examination, which should take place in undergraduate school, and for practical legal education.²⁰

Moreover, law students’ career development plans cannot be ignored in this regard. As a result of empirical evidence, only one third of students at law school will enter the legal profession.²¹ For those students who choose to become non-legal professionals, the value of practical legal education likely will be compromised.

B. The Relationship Between Practical Legal Education and the Legal Curriculum

Introducing practical legal education requires a more purposeful, more focused and more integrated curriculum. It is advisable for a Chinese law school

19. This is a general requirement which is dictated by the Ministry of Education for undergraduate students. See People’s Republic of China, Ministry of Education Document No.5 (2005).

20. For example, in the United States, law school exams typically follow the format of the bar exam, having both objective, multiple-choice questions as well as essay questions. This testing format prepares students for the bar examinations in their respective states. Most students at ABA approved law schools will utilize separate bar preparation courses after graduation as their main source of preparation. There is a large industry of proprietary bar preparation courses in the U.S. such as BAR/BRI and Kaplan. These companies publish their own study materials and provide intensive lecture courses in the weeks leading up to the bar. By this time, students will have already received their J.D. and usually undertake these courses completely independent of any program or curriculum offered by their law school faculty.

21. Survey among Zhejiang Gongshang University law graduates (on file with author).

to adjust its curriculum by offering a mix of doctrinal courses, skills-developing simulations and practical experience.

However, legal education is heavily influenced, if not dictated, by Chinese governmental authorities. An official committee, i.e., the Steering Committee for Legal Education, was created within the framework of the Ministry of Education to advise all law schools on curriculum design and to oversee regular evaluation of legal education.²² Given the total hours for teaching, the question of how to design a law school curriculum while observing the requirements of the Steering Committee remains unanswered.

Zhejiang Gongshang University's response is to extra-curricularize practical legal education, as well as to introduce practical education as much and as often as possible into the curriculum to ensure that students receive necessary exposure to practice-based knowledge and experience.²³

C. Interaction with Legal Practitioners

A purposeful curriculum would ask the question: "What do we want our students to have been exposed to before they leave here?" This question cannot be answered intelligently without a serious and continuing dialogue with practitioners, which is simply not happening in China. Promoting interaction between legal educators and practitioners will help law schools understand what law practitioners need from law students and will reap support for the reform of the law school curriculum, as well as legal education in general.

D. Capacity-building for Practical Legal Education

The teaching abilities of law professors are crucial to a successful practical legal education. Chinese law schools have a higher proportion of faculty to students. However, like other law schools, professors have long focused more on academic theories than on teaching practical skills. In this context, not only are they unmotivated to promote practical education, but they also lack the skills to qualify them to be good clinicians. For example, quite a few law professors have

22. The Steering Committees for various disciplines are delegated with the following responsibilities: (1) Organize and conduct studies of the theories and practice in respective disciplines; (2) Guide institutions of higher learning in disciplinary enrichment (*zhuan ye jianshe*), textbook perfection, construction of teaching-oriented laboratories and pedagogical reform; (3) Adopt normative documents for teaching; (4) Undertake undergraduate teaching evaluation; (5) Conduct examination and approval of application for setting-up of undergraduate disciplinary fields (*zhuan ye shezhi*); and (6) Organize and promote pedagogical training, scholarship and information exchange. See Circular of the Ministry of Education, No. 63, Division of Higher Education, (2005), available at http://www.edu.cn/policy_685/20060323/t20060323_150333.shtml.

23. At Zhejiang Gongshang University, the Curriculum designed for students to be enrolled in Fall 2008 allocates twenty percent of the hours to practical education. Law students will not only be able to select such courses as Clinics, Legal Writing, Lawyering & Notarizing, Arbitration and Negotiation, but will also be able to spend more time on the practical side of traditional courses like Civil Law, Criminal Law, Civil Procedure, Criminal Procedure, Administrative Law & Administrative Procedure Law.

little experience in legal practice. How, then, could they possibly teach the practice-oriented courses? In this regard, Chinese law schools might opt to hire practicing lawyers as part-time clinical professors. However, it is not uncommon to find that excellent lawyers are not necessarily good at teaching. In this regard, Zhejiang Gongshang University is now creating a law firm to include its faculty. Law professors will therefore be exposed to a greater depth of practical experience and be in a better position to help students with practical legal education.

E. The Expense of Practical Legal Education

As is often observed, practical legal education is very costly. Failure to address this issue will prevent Chinese law schools from adequately promoting practical legal education. For example, many law schools that are subject to financial pressures are not only reluctant to incorporate practice into curriculum, but have ordered elbow-to-elbow training for their students in what is called “judicial practice,” which used to be a common practice in Chinese law schools. Students are often left unattended during their “judicial practice” due to the fear that organized practice would consume limited legal education budgets.

The above issues, while not unique to China, will hinder the introduction of the practical legal education in China and even erode the existing practical education in the country until they are addressed properly. It is a formidable task for Chinese law schools to overcome these problems, but more important is for legal educators to pay adequate attention and act accordingly. Zhejiang Gongshang University is now taking advantage of the USAID program to consolidate the ideological, infrastructural and institutional bases for practical legal education.