Legal Education Reform

Claudio M. Grossman
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In his article, “Exporting Legal Education: Lessons Learned From Efforts in Transition Countries” (Harvard International Review, Summer 2010), Ronald Brand recommends that the current discussion regarding the reform of US legal education take into account the impact that any such changes would have outside of the United States, in particular to those nations he refers to as “transition countries.” It is valuable to consider the impact of US legal education reforms on foreign lawyers and legal systems but for reasons that go beyond those identified by Brand, which lead to different conclusions about the value of legal education reforms.

Based on his conversations with students involved, Brand relates that what the foreign Master of Laws (L.L.M.) students value the most from their US education, and moreover what is indeed the hallmark of US legal education, is its ability to teach universally applicable problem-solving skills. He argues that the traditional system in place today, including case method instruction, provides necessary skills training, and that further vocational training may actually be undesirable.

The author makes a valid point on the importance of the impact of legal education on others. Along with the moral imperative of considering the impact of our actions on “the other,” pragmatic considerations deserve exploration. US legal education attracts thousands of foreign lawyers, resulting in educational opportunities as well as important professional networking possibilities. In addition, this educational experience helps develop a common language supporting the rule of law. From this perspective, impact on others is a legitimate consideration in discussions concerning legal education reform.

Assessing the impact on others is a positive step. But the data regarding why foreign lawyers enroll in L.L.M. programs in the United States reveal more reasons than just learning “how to solve problems.” While a transformation that will destroy the ability to “solve problems” must be rejected, Brand does not provide sufficient information as to why adding transnational components to the curriculum, including integrating skills with doctrinal courses during the first year of legal education, or educating future lawyers using materials not restricted to judicial decisions, are detrimental to the development of vital problem-solving skills. To the contrary, it would appear that these valuable initiatives would enrich the development of these important skills. Equally, Brand relates that what the foreign Master of laws (L.L.M.) students value the most from their US education, and more professional networking possibilities. In addition, this educational experience helps develop a common language supporting the rule of law. From this perspective, impact on others is a legitimate consideration in discussions concerning legal education reform.

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Brand’s analysis suffers from other limitations. Competition from Europe in their dedicated reassessment of legal education in an internationalized setting invites our own re-examination. The domains of ethics and global legal responsibility regrettably suffer from insufficient consideration in US legal education, despite their seminal importance
law. Also, the United States needs to expand on its strength in teaching classes with full–time faculty by offering more such courses to foreign law students. Finally, more needs to be done to create collaborative programs between law schools to allow meaningful cross-border interaction. Wallowing into complacency is not an option.  

To read more from Claudio Grossman, please turn to page 16.

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Indigenous and State Law

David Pimentel’s essay, “Can Indigenous Justice Survive? Legal Pluralism and the Rule of Law” (Harvard International Review, Summer 2010), offers a trenchant account of the challenges of legal pluralism. Pimentel correctly observes that accommodating the co-existence of indigenous and Western concepts of justice in post-colonial settings leads frequently to cultural conflict—for example, when indigenous traditions and values affront Western concepts of the rule of law or human rights. He further rightly notes that the burden of rectifying such conflicts typically goes only one way. Indigenous justice must adapt to survive. For legal pluralism unwittingly carries forth the not-so-bygone mindset of colonialism.

The United States provides a case in point. Nationwide, over 200 Indian tribes administer formal tribal justice systems. Many blend tribal customs and traditional methods of dispute resolution with elements of Anglo-American law. The resulting hybrid tribal jurisprudences generally model Western law augmented by customary remedies and procedures.

The Supreme Court acknowledged in Williams v. Lee (1958) that the power of Indian tribes to “make their own laws and to be ruled them” is a necessary incident of tribal sovereignty. Nonetheless, the tribal justice systems exist subject to the oversight of Congress and the federal courts. Self-governance may well be an inherent aspect of tribal sovereignty. But the authority to create tribal legal systems came from Congress. Before the 1930s, the United States followed a policy of Indian assimilation, expressly seeking to extinguish tribal customs and concepts of justice.

This policy changed in 1934 with the Indian Reorganization Act. In this legislation as well as in subsequent statutes, Congress encouraged tribes to enact their own laws and establish court systems. Tribal lawmaking power and court jurisdiction remain circumscribed, however, and are subject to federal court review.

The US regime of legal pluralism thus reveals paradigmatically the uneven status of Western law and indigenous justice. Indian tribes may include indigenous practices in their justice systems so long as they first satisfy the paramount principles of Anglo-American law. Tribal jurisprudence thus can be hybrid. But the dominant federal and state components of US legal pluralism suffer no adaptation. The accommodation falls strictly on the tribes and stays on the reservation.

Legal pluralism, however, does not exhaust the possibilities for accommodating Western law and indigenous justice. Some post-colonial societies have begun to scuttle the stratification of legal pluralism in favor of reciprocal integration of indigenous principles into Western law.

New Zealand in 1975 established the Waitangi Tribunal to hear claims by Maori founded on alleged breaches of the Waitangi Treaty (1840). Unlike the United States, where Indian claims founded on treaty violations are adjudicated wholly under Anglo-American law, the Waitangi Tribunal renders settlement recommendations based on Maori justice and customs, as well as Western law. The Tribunal rejects the simple idea that the only goal in resolving historical claims of colonial injustice is to pay off the past. Rather, it seeks to resolve cultural tension through reconciliation and reciprocal respect.

Australia also has adopted an innovative approach toward integrating Western law and indigenous justice. The Koori Court division within the County Court of Victoria gives Aboriginal offenders who plead guilty the opportunity for community participation in determining punishment. A “sentencing conversation” takes place at an oval table. Participants include Aboriginal Elders or Respected Persons and community members. The Koori Court encourages offenders to talk about their behavior and accept responsibility. It aims to craft sentences that take into account kinship connections, cultural perspectives on punishment, and the crime’s impact on the indigenous community.

The coexistence of Western law and indigenous justice thus need not require unilateral adaptation. Indigenous justice can survive and prosper when the accommodation is respectful and reciprocal.

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