

“Reflections on Global Legal Education”

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Good morning. It is an honor and privilege to have been asked to open our discussion here today.

Let me begin by setting to one side the desirability of a more global form of legal education and the related question of for whom such a thing would be useful - those being educated for the civil service, for technical legal work, or for leadership in the corporate and political worlds. There is no question that legal work is changing. Business clients must navigate an ever more complex regulatory terrain, crossing jurisdictions, in which foreign legal materials can be a strategic asset as much as a risk to be mitigated. Policy makers in every country must contend with the impact of foreign law, informal law, and learn to see the opportunities opened up to harness them to policy objectives. Working in this environment will require lawyers who think differently and have been trained differently.

I begin rather with the observation that in many countries and at many levels of the educational system some people have made "globalization" a rallying cry for reform of legal education. This may be a fashion - it is a fashion that has had ups and downs over the last half century in my own country. It would be interesting to write a history of calls for "internationalization" and "globalization" in legal education to understand the social, political and intellectual context in which they arise. For what problems does “globalisation” seem a useful response for particular institutions or national traditions? Doubtless the answers everywhere are subtly different. In the United States, the call for “global” legal education today sounds different than it did in the years before the economic crisis and a decade of disappointing wars. In Japan, I wonder how economic stagnation or events like Fukushima relate to the call for a global education in law and policy.

But let us assume we hear such a call today - what kind of reform might be pressed in the name of a more " global legal education"? This morning I will say something about the *obstacles* to global legal education, and paths of *curricular reform* that might be undertaken to overcome these obstacles. I focus on the curriculum - the pressure globalization would place on our intellectual patterns of research and teaching - rather than other, also important, parts of the story - student and faculty mobility, library materials, language of instruction, partnerships with foreign institutions, and so forth. These institutional elements are important – young faculty must be in dialog with global peers if they are to understand the global legal environment and position themselves at the cutting edge of legal science. Law and policy are not, in this way, different from engineering or mathematics.

At Harvard, we founded a new Institute in the aftermath of the economic crisis to ask questions that had been overlooked, engage voices from across the world we had not heard and build a network among young legal scholars worldwide. My colleague David Wilkins has established an important new Institute for research and teaching about the global legal profession and many colleagues are integrating global perspectives and materials into their courses and research. I am sure other law schools are pursuing similar institutional reforms. But ultimately, globalization is less an institutional challenge than an intellectual one. To sharpen our thinking about that intellectual challenge, let me focus on the content of law school curriculum.

The obstacle is clear: law everywhere is taught and understood as a national subject. Technical law schools and those focused on law as training for leadership all focus on national laws, institutions and traditions. They teach national modes of legal reasoning AS legal reasoning.

This need not be the case - and it was not always so. Law could, of course, also be understood as a form of universal reason, an expression of natural right or logic and practice of universal empire. Traces of these ideas survive in many courses on legal theory, legal history or legal philosophy, although these are now also different in different national traditions, each with its own take on the universal.

In every national legal curriculum there are exceptions to the national focus. And in every law faculty there are specialists in these exceptions: the “fields” devoted to “global” or “international” legal matters: public international law, international economic law, comparative law, etc.

It is understandable to begin by imagining globalization as the expansion of these exceptions and specializations. Many American law schools – Harvard included – have made one or another of these fields mandatory subjects in recent years.

The problem is that these exceptions too often confirm the rule. As we developed our own “international” requirements at Harvard, we discovered that the content of these traditional subjects also needed to be rethought.

In broad terms, legal curricula channel student and research interest in global matters into four paths:

Path One -- The international dimension of national regulatory subjects, primarily in commercial fields - tax, and international tax, antitrust and international "aspects" of antitrust, alongside national laws about immigration, foreign affairs powers. These fields treat the extension or reception of national regulatory law across borders.

These are promising places to begin -- national law is, after all, also global law – but the fields in which this is commonly understood are narrowly economic. We need to understand also the global impact of national family law, of private law – not “international private law” but the

global political and regulatory functions of everyday national private law. And the law of cities in a world of global cities.

Consider corporate law. It is a domestic legal subject with obvious international relevance. But to understand that relevance we would need to rethink the CONTENT of corporate law. First to assess the public functions and responsibilities undertaken by corporations in global political and economic life in the absence of strong global or national state governments. And second to understand the “corporate governance” if you will of economic forms that are not, strictly speaking, corporations --- the “corporate governance” of global supply chains, for example, which is not a matter of allocating powers between shareholders and managers but of distributing power across a chain of different economic entities.

The second traditional path for students interested in global matters has been public international law. This is conventionally imagined as a kind of obverse image of the national legal order, a parallel order "above" national legal regimes confirming their centrality, autonomy and regulating relations among them. PIL promises students at once a grand overview and a quite narrow institutional field of specialization. Here, it is said, one can study the “world constitution” – how is the world ordered, how does it all fit together – and acquire tools to limit war, protect the environment and defend human rights.

But public international law offers a very poor picture of law’s global power, precisely because it has been constructed as the mirror image of national law – its “outside” so to speak. Nor does the field offer strong tools for addressing social issues at the global level – again, precisely because the law that reproduces war, sustains global poverty and permits environmental destruction on a global scale is NOT global law – it is national law with powerful global effects. By restricting our vision to public international law, we offer students few intellectual skills for navigating the dispersed patterns of legalization that characterize global political and economic life today. The field’s overwhelming focus on the “legality” of international law makes it difficult to appreciate the role of ethical norms, religious commitments, cultural affinities and informal arrangements on the global stage – not to mention economic patterns of organization and hierarchy.

As a result, the specialized regimes within it - international criminal law, human rights law, law of war, international environmental law -- offer an extremely restricted view of the laws that affect the production and distribution of war, torture, environmental damage in the world by focusing on the few instruments of public international law aiming to respond to these problems, rather than the dense network of legal arrangements that generate environmental damage, human rights violations or war in the world.

The third path, focusing on the specialized regimes said to regulate international trade and economic life, focusing on the WTO or ILO or IFIs, is hardly better. They offer an extremely

narrow vision of the diverse local, national and transnational legal arrangements that structure economic activity globally. The WTO does not “regulate trade” – barter, transfer pricing, finance and all the confusing rules of diverse national jurisdictions do that.

And finally, the fourth path – comparative law. This has long been the province of scholars with foreign legal interests outside the “international” subjects. Too often, however, comparative law focuses on the relationship between national legal “systems” or “orders” or “cultures”. It focuses on the study of national legal regimes, as the name implies, for the purpose of “comparing” them, often by identifying cultural differences and technical similarities, or cultural similarities and technical differences in how common problems are addressed. But this is not how lawyers and policy makers encounter foreign law. They encounter it piecemeal, in fragments, not as the relationship between two “systems.”

These are all important intellectual traditions and political projects. Studying them is worthwhile. Expanding their significance in the curriculum is a common definition of what it means to render the legal curriculum more global. But it is not enough - and indeed, doing so can actually move law and law students further from understanding the role of law in global political and economic life today.

What is missing? The focus of public -- and private -- international law, on the potential for “order” -- among nations, among potentially conflicting national rules -- makes it hard to grasp the disordered hodge-podge or mush of rules that characterize the global legal terrain for commercial and political activity- a terrain that is fragmented AND legalized but not ordered. It makes it hard to see the global legal terrain as businessmen and diplomats see it – not as an order, but as a field of struggle and conflict, in which law is a vernacular of combat, a strategic tool, a risk or vulnerability to be managed.

The disconnection of public and private international law makes it difficult to see the governance roles of private actors and the politics of private law. In a similar way, the separation of international and national legal orders make it difficult to grasp the ways in which globalization is the ongoing product of national legal arrangements and management.

It would be better to use the opportunity created by the pressure to “globalize” to reform how we study public power in the world - to understand the role of law in disorder, in the instrumentalisation of public institutions by private or economic powers, and in the distribution of gains, losses and growth between regions, sectors or nations. And in the production of what we understand as the impersonal “forces” of globalization.

The focus of foreign legal study on comparison makes it more difficult to understand the genealogy of global legal consciousness as it is distributed and generated in various national

legal institutions and traditions. All transnational legal practice today involves foreign law - but not in the search for similarities and differences or best practices, but as the strategic engagement with legal pluralism - legal practitioners deal with a regulatory terrain that is full of unresolved conflicts, gaps and ambiguities. The result is a terrain of opportunities, vulnerabilities and risks. It would be better to use the opportunity created by the pressure to globalize legal education to improve our ability to understand and train for strategic engagement with divergent rules - including informal, illegitimate, unenforced or privately invented rules and institutional arrangements.

Finally, it would be good if the call for globalization emboldened us to rethink our approach to legal theory, legal method or legal philosophy to explore what we mean by "legal reasoning" in a global context to grasp the role of professional knowledge practices - background assumptions, common modes of reasoning, argumentative habits -- in construction and management of global political and economic life.

Globalizing legal education opens the way for specialists in international and comparative law to expand our turf. But it would be better if we used the opportunity to work with our colleagues to reinvent the way we understand the operations of law more generally to place legal pluralism, social conflict and distribution at the center of our analysis.

How to do it? It will require collaboration among scholars in different places who grasp the intellectual as well as the institutional challenge globalization poses. It will require cross training – across legal fields, finance people will need to learn about family law, human rights advocates about trade – and across disciplines. The significance of law in global affairs cannot be understood by study of law alone. And it will require a creative engagement of a new generation of law teachers and scholars with one another.

In the end, global legal education is an intellectual challenge – a challenge to our research, to our ideas, as much or more than it is to our institutions.

Thank you. I look forward to our discussions over the course of the day.