

# Experiential Education in International Legal Education: Bridging Differences, Finding Convergence

By:

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## *Abstract*

Although a growing body of literature suggests that experiential education is critical in developing professional identity and mastery of both core concepts and competencies, there is no single path for achieving that learning. Various delivery methods have been developed in the laboratory of the American clinical legal studies movement. These include: simulation courses, internships, and law-school sponsored clinics. Indeed, the American Bar Association requires that students in Juris Doctor programs at ABA-accredited law schools receive substantial instruction in professional skills and have opportunities to participate in at least one live-client or other real-life practice experience. But questions remain at the international level:

- Must professional skills education occur during the degree process, or can it be effectively achieved in an apprenticeship serving as a predicate for licensure,
  - Should experiential education principles be incorporated in large credit doctrinal courses to ensure content mastery,
  - How can interactive learning and experiential education be incorporated in legal education traditions employing traditional lecture format,
  - Is experiential education appropriate for undergraduate study in a ECTS regime, or may it (should it) be reserved for graduate law program participants, and
  - If it is to be required, what are the "best practices" that inform program design and assessment.
  - Are there core competencies all graduates of law programs should possess.
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## *Defining Experiential Learning and Experiential Education*

When a course is spoken of as an "experiential course", that label means that experiential education [teaching methodology] comprises a significant component of the method of instruction. In some cases, it is the primary instructional method. Experiential learning is the preferred learning style for adult students, a group that reaches understanding and mastery "by doing".<sup>2</sup> This stands in contrast to child learners, a group that is more passive and teacher-dependent.

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<sup>2</sup> Adult learning theory is referred to as "andragogy". It makes four assumptions about the typical learner over eighteen years old:

1. Adults have the need to know why they are learning something.
2. Adults learn through doing.

Experiential education involves the application of adult learning preferences to the academic experience. It integrates theory and practice. It couples academic inquiry and actual experience. In contrast to experiential learning, it is an academically designed, deliberate, managed experience.<sup>3</sup> In this way, it refers to more than mere experience alone; rather, it includes informative feedback and reflection.

### *Experiential Learning in Legal Education*

Experiential education in law schools occurs in a variety of settings. In one method, experiential education takes place in a secondary role in a “traditional” doctrinal class. For example, students may participate in a “mock trial” or “moot court” exercise concerning the subject matter of the course, or students may engage in a short problem-solving exercise.<sup>4</sup> In other courses, experiential education is the primary method of instruction; these courses are frequently umbrellaed under the term “clinical” courses and include simulation-based courses, internships and in-house clinics.<sup>5</sup>

### *American Legal Education*

The American model of legal education differs from legal education paradigms in most other countries in that it is a graduate level, post-baccalaureate degree program, with additional advanced degrees available at the masters and doctoral level.<sup>6</sup> It also differs as a result of its deliberate stress on professional skills development during that education process.

In the American law school experience, accreditation guidelines for American Bar Association approved law schools require that all students attaining the preliminary Juris Doctor degree receive substantial instruction in professional skills and have opportunities to participate in at least one live-

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3. Adults are problem-solvers.

4. Adults learn best when the subject is of immediate use.

<sup>3</sup> Roy Stuckey et al, *Chapter Five*, BEST PRACTICES FOR LEGAL EDUCATION (2007) [hereafter, Stuckey, BEST PRACTICES].

<sup>4</sup> Example: Students in environmental law course prepare briefs and present oral argument in the role of either government agency or corporation as part of end of semester assessment. Example: Students in evidence class attempt to proffer or oppose introduction of specific piece of evidence in three-minute simulation.

<sup>5</sup> **Simulation** courses place students in *hypothetical* situations performing law-related activities, in role. Example: criminal trial advocacy course. **Externships [or Internships]** place students *in the field* either performing professional lawyering tasks under supervision or observing them. Examples: students placed in judicial chambers, or students working in non-profit organization delivering client services with concurrent class component. **In-house clinics** involve students representing clients or *performing other professional tasks under faculty supervision*. Example: students work with clients to develop small business loan application.

<sup>6</sup> Typically the Juris Doctor program involves 90 credits, over a three to six year time period. In contrast, in most of Europe, Asia and Central and South America, law is an undergraduate discipline, with opportunities for advanced degrees in law at the masters and doctoral level. Using the European Credit Transfer System [ECTS] as an illustration, an undergraduate law degree requires 180-240 credits, not all of which specifically relate to law. A Masters degree under the regime requires 90-120 credits; a doctorate does not specify a fixed number of ECTS credits but requires substantial original research and a body of work meriting national or international refereed publication. Since May 1999, 46 European countries have been reformatting their higher education systems to achieve greater “convergence”. This undertaking is known as The Bologna Process. It impacts more than 4,000 institutions and 16 million students. Clifford Adelman, Institute for Higher Education Policy, THE BOLOGNA PROCESS FOR U.S. EYES: RE-LEARNING HIGHER EDUCATION IN THE AGE OF CONVERGENCE (2009). The European Higher Education Area (EHEA) was launched along with the Bologna Process’ decade anniversary, in March 2010, during the Budapest-Vienna Ministerial Conference. For more on the EHEA see, <http://www.ehea.info/>.

client or other real-life practice experience as a predicate to graduation.<sup>7</sup> The critical distinction between these courses and the learning that students acquire from apprenticeships or private clerking is that these courses are accompanied by academic inquiry.

What constitutes that group of “professional skills generally regarded as necessary for effective and responsible participation in the legal profession” becomes a critical preliminary question for American legal educators. Much of their determination of “necessary professional skills” is informed by studies of the profession, including the famous 1992 project of the American Bar Association referred to as the MacCrate Report.<sup>8</sup>

### *Bridging the Perception Gap: What is the Role of Legal Education, Legal Educators?*

When non-American-non- JD legal educators meet their American JD program counterparts, differences in educational styles and theories are a common discussion point.<sup>9</sup> Several reasons are

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<sup>7</sup> American Bar Association, Section of Legal Education and Admissions to the Bar, Accreditation Standards. Standard 302 provides:

#### **CURRICULUM**

(a) A law school shall require that each student receive substantial instruction in: ...

(3) writing in a legal context, including at least one rigorous writing experience in the first year and at least one additional rigorous writing experience after the first year;

(4) other professional skills generally regarded as necessary for effective and responsible participation in the legal profession; and ...

(b) A law school shall offer substantial opportunities for:

(1) live-client or other real-life practice experiences, appropriately supervised and designed to encourage reflection by students on their experiences and on the values and responsibilities of the legal profession, and the development of one’s ability to assess his or her performance and level of competence;...

#### **Interpretation 302-2**

*Each law school is encouraged to be creative in developing programs of instruction in professional skills related to the various responsibilities which lawyers are called upon to meet, using the strengths and resources available to the school. Trial and appellate advocacy, alternative methods of dispute resolution, counseling, interviewing, negotiating, problem solving, factual investigation, organization and management of legal work, and drafting are among the areas of instruction in professional skills that fulfill Standard 302 (a)(4).*

#### **Interpretation 302-3**

*A school may satisfy the requirement for substantial instruction in professional skills in various ways, including, for example, requiring students to take one or more courses having substantial professional skills components. To be “substantial,” instruction in professional skills must engage each student in skills performances that are assessed by the instructor.*

<sup>8</sup> American Bar Association, Section of Legal Education and Admissions to the Bar, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT – AN EDUCATIONAL CONTINUUM (1992) [hereafter MacCrate Report]. That report identified ten fundamental lawyering skills:

Skill One: Problem Solving

Skill Two: Legal Analysis and Reasoning

Skill Three: Legal Research

Skill Four: Factual Investigation

Skill Five: Communication

Skill Six: Counseling

Skill Seven: Negotiation

Skill Eight: Litigation and Alternative Dispute-Resolution Procedures

Skill Nine: Organization & Management of Legal Work

Skill Ten: Recognizing & Resolving Ethical Dilemmas

<sup>9</sup> This conversation takes place on the campuses of American law schools as well, particularly during curricular planning while scarce elective course credits are considered. There is no monolithic “American” response on the part of all teaching faculty in JD programs although the American Bar Association’s accreditation standards and process is frequently a determining factor.

advanced by professors teaching in non-JD programs for selecting pedagogies that are neither interactive nor based on experiential education theory.<sup>10</sup> Four common observations emerge<sup>11</sup>:

1. We are part of a University. We are not a trade school preparing workers for a future job in the legal profession.
2. We have a viable lawyer apprenticeship program that occurs after law school. That is where law graduates should acquire their skills.
3. Classes are this type are appropriate for common law systems but do not translate into civil law systems.
4. Most of our graduates will not be working as attorneys in court settings. Consequently, this practical training is irrelevant for them.

### *Legal Education as Trade School*

The crux of this discussion centers on differing perceptions about the proper role of law schools.<sup>12</sup> One camp advocates that law is merely one of many academic disciplines and hence, theory should be the most important aspect of student's education. The opposing camp views the professor's role in part as preparing students to work in a legal profession increasingly frustrated with graduates who possess only a theoretical framework.

There is perhaps a middle ground founded in educational psychology theory: students as adult learners master theoretical concepts when those concepts are applied contextually.<sup>13</sup> Thus, "application" exercises during a course, such as problem solving and role playing; enhance students' understanding of theory, regardless of their later professional life choices.

Additionally, a doctrine-only based approach presupposes that law will remain relatively static; however this assumption is increasingly subject to question as law becomes more "internationalized." As various legal theories collide, and as new models develop or prior models are modified to accommodate social changes, the law graduate should be prepared to *transfer* prior knowledge to new contexts. Experiential education practices equip them with the vital ability to apply doctrinal concepts to new settings.

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<sup>10</sup> The common pedagogy is the large lecture format, in which students have little interaction with the teaching faculty in the classroom. There is a heavy emphasis on rote memorization, with a single, summative assessment at semester's end by either written or oral final examination.

<sup>11</sup> With thanks to my colleague Delaine L. Swenson, Professor of Law at the Faculty of Law, Canon Law and Administration of the John Paul II Catholic University of Lublin, Poland, in the Chair of American and Comparative Law. Professor Swenson serves as Director of the Center for Advancing Legal Skills. He served for a number of years as an American trial attorney and during the last 10 years as an expert on legal reform of transitional legal systems in Central and Eastern Europe, the former Soviet Union and Asia. I have adapted his comments from interviews conducted with him in February 2011.

<sup>12</sup> Law and law-educated graduates occupy a unique role in contemporary society: "Compared to medicine or engineering, the particular social position of the legal profession and the nature of law as a field of study together create a unique situation for legal education. .... Legal professionals act as social regulators. The bar is not simply a guild or trade association." William Sullivan et al, The Carnegie Foundation for the Advancement of Teaching, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007) [hereafter, Carnegie Report].

<sup>13</sup> Stuckey, BEST PRACTICES, "Employ context-based instruction throughout the program of instruction."

### *Post Degree Apprenticeship / Internship*

The point of departure in this conversation is the locus of the apprenticeship / internship opportunity --- should it occur during the preliminary degree program or following it. A related sub-issue is how any required class component should be structured. In some non-JD programs, an internship is a necessary component of a subsequent master's of law program. In some non-United States jurisdictions, an apprenticeship is a predicate to licensure.

At the outset, both education traditions must acknowledge that learning takes place in the field, and it can, and does, happen without the intervention of teachers or institutions. However experiential learning and experiential education are two related but distinct concepts. While not disputing that work experiences can provide learning opportunities, the critical distinction is that the learning taking place in that environment is not supplemented by academic inquiry.<sup>14</sup> Similarly, the learning is often not assessed in the same systematic manner seen in the Academy nor are interns required to engage in self-reflection.

Concerning the availability of apprenticeships / internships, there are three concerns. First, in either tradition, only a limited number of law graduates have an opportunity to participate. Second, the quality of supervision provided by mentors in the field varies greatly. And third, as the number of apprentices supervised by a mentor increases, the quality of any meaningful mentor relationship decreases.

Concerning the class component, a key consideration which spans differing legal education traditions is what learning outcome is desired and how it will be assessed. For example, some internships provide opportunities to study and learn about the capacities and limitations of the justice system. Some internships provide insights into professional skills development and expertise in problem solving. Seemingly, either internship would benefit from a contemporaneous class that is not largely theory-based and non-interactive but one which in part requires students to reflect on their experiences, their skills acquisition where appropriate, and their professional identity formation. Assessment in such classes can be based on objective criteria that references the profession, as well as assessment that is formative and encourages the student's growth and mastery through novice, intermediate and advanced levels.

### *Not Appropriate for Continental Legal Systems*

This concern is an outgrowth of a perception that the legal skills taught in American JD programs do not involve skills necessary for lawyers practicing in a Continental system and have relevance only for common law legal traditions. Meaningfully addressing this concern requires legal educators to expressly articulate the legal skills at issue.

Some issues which legal educators from both traditions might consider include:

- Is the application of a legal principle to a fact pattern [traditional legal analysis] a skill that transcends legal traditions.
- Is the legal skill of problem solving unique to only one system.

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<sup>14</sup> Stuckey, *Chapter Five*, BEST PRACTICES.

- Is the ability to consult with a client and determine his underlying interests and goals unique to only one legal tradition.
- Is the ability to communicate effectively, whether orally or in writing, solely the province of one legal system.

Another consideration for legal educators from both traditions is the impact of the “internationalization” of law and the migration of legal traditions across systems. Recently, some European criminal procedure codes have been amended so that prosecutions now involve jury trials and the direct and cross examination of witnesses,<sup>15</sup> features that in the past were largely considered hallmarks of an adversarial system.

Similarly, international criminal tribunals, whether ad hoc or permanent, have blended systems, with many markers of the adversarial trial system. Additionally, the function of precedence, once thought to be exclusively in the purview of common law systems, is increasingly seen in international tribunals such as the European Court of Justice and the European Court of Human Rights.

### *Irrelevance of Practical Skills Training*

Many law program graduates in non-JD regimes, do not become practicing lawyers. They will never be members of bar associations. They will never represent clients or appear in a court or before a tribunal. Somewhat similarly, some JD law program graduates will never sit for a bar examination or practice law. Against that backdrop, the question becomes: are there certain identifiable skills that *all* law graduates should possess, regardless of their future career choices.

Among the likely candidates for basic skills are (1) problem solving (2) legal analysis, and (3) written and oral communication. Related skills might include (1) legal research (2) negotiation, and (3) litigation and alternative dispute resolution procedures.

### **CONCLUSION**

American legal education has done extensive work to identify core competencies and skills; however, it has done little to establish benchmarks describing desired levels of competency either at various stages of a law student’s studies or upon graduation.<sup>16</sup> Similarly, in contrast to European models such as the Bologna Process, American legal educators have done little to require students to demonstrate a desired level of proficiency before advancing to the next level of instruction. Thus both legal traditions have much to offer the other.

This is the appropriate moment in time for candid, meaningful dialogue for all legal educators concerning the appropriate role of experiential education and skills development in law programs, as well as identification of core competencies all graduates of law programs should possess.

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<sup>15</sup> Italy and The Republic of Georgia are two examples.

<sup>16</sup> Stuckey, *Chapter Five*, BEST PRACTICES.