Legal Education in the United States and in Germany: Lessons for Korea?

Mathias Reimann*

In the last decade or two, legal education, including its reform, has been a prominent issue in Korea.1) In her search for new ideas, Korea has often looked to foreign countries. Prominent among the potential models are Germany and the United States. This is no coincidence. Germany was considered a world leader in legal education in the late 19th and early 20th centuries and thus became a model for Korea (via Japan) during the formative era of its own system of legal education.2) The top American law schools have acquired worldwide prestige since World War II and have therefore intrigued observers in Korea and elsewhere in more recent times.3)

Having studied and taught extensively both at German law faculties and in American law schools4), it is tempting to suggest what Korea could

---

* Professor of Law, University of Michigan Law School


2) See West, supra note 1, at pp. 366-369.

3) See e.g. Kim, supra note 1.

4) The author of this essay underwent the complete course of German legal education, obtained a doctorate in law from the University of Freiburg (1982), held a chair for private law, comparative law, and legal history at the University of Trier (1995-1999) and taught at several other German universities as a lecturer or
learn from either of them. Yet, this would be inappropriate for three reasons. First, I know too little about the Korean system of legal education to be a competent critic or advisor. Second, I fear that I do not have much to add to other people's insights into the potential advantages of German or American legal education. Third, and perhaps most importantly, I am not convinced that Korea can learn much directly from either country alone.

The last point may be somewhat surprising and thus requires at least a short explanation. I doubt that either the American or the German system in its entirety can be a model for Korea because the former is too different while the latter is too similar. American legal education deviates fundamentally from its Korean counterpart with regard to its defining features - its structure, teacher-student relationship, method, material, and pedagogical goal - which are all intimately interrelated. Simply adopting the American approach would therefore require a complete rebuilding of the Korean system. Even if that was possible, it would be difficult because the American model may not fit the Korean academic, political, and social environment. The German regime, in contrast, closely resembles the Korean system in many important characteristics. Thus, in its current and mainstream form, German legal education is unlikely to provide much stimulation for innovation in Korea, apart from measures on the margin: this may change soon but it is too early to tell.

visiting professor. He also holds an LL.M. from the University of Michigan (1983) where he has been professor from 1985 to the present.

5) It is a single- (rather than two-) stage education on the graduate (rather than undergraduate) level, characterized by a low student-teacher ratio and a fairly non-hierarchical relationship between professors and students. It focuses primarily on cases (rather than on statutes), relies mainly on discussion (instead of lectures), and aims to teach students "to think like a lawyer" (rather than the technical mastery of complex legal doctrine or memorization of rules). Finally, it is geared towards the mentality of an attorney in private practice rather than the mindset of a public official.

6) It also comprises two stages, i.e. undergraduate studies at the university followed by practical training as a requirement for admission to bench and bar, has a high student-teacher ratio, and is run by a rather aloof professorate. Like the Korean system, it relies primarily on the lecture method, focuses on codes, statutes, and their exegesis, and emphasizes doctrinal analysis, although students also have to learn how to solve (hypothetical) cases. It is also geared towards the training of state officials, rather than private practitioners: on the last point, see infra. l. i.
Incidentally, the Korean system’s differences from the American, and its similarities to the German, approach are vividly reflected in the experiences of Korean law students abroad: they experience American law schools as alien worlds but find themselves quite at home at German law faculties.

It is of course possible for Korea to derive inspiration from the German and American models in this or that regard but instead of presenting one of these foreign countries as a potential model, this essay will compare the German and the American system from two broader perspectives in the hope that this may be interesting to a Korean reader. The first perspective is a fundamental (but often overlooked) difference between the German and the American pattern of legal education: the former centers around the state while the latter essentially trusts in the market (infra. I.). The second item is a strong similarity between these two regimes: both show a rapid trend towards internationalization (II.). Combining these differences and the similarities, one can observe how in both countries a new type of lawyer is slowly emerging as the lodestar of legal education – a phenomenon which may be worth noting from a Korean perspective as well (III.).

I. The State and the Market: Two Models of Legal Education

Probably the most fundamental difference between the two systems of legal education is that the German regime belongs to the realm of the state while its American counterpart belongs to the sphere of the market. This is, of course, a broad generalization and perhaps even an

7) In the last ten years, German professors, students, practitioners, and politicians have hotly discussed a myriad of reform measures. So far, however, talk has been cheap and fundamental changes have been wanting. It is true that the state governments have implemented limited reforms on a broad scale, mainly through offering incentives to study more quickly. Also, some universities are experimenting with small improvements, such as examinations at the end of most courses in combination with a credit point system. But as of the summer of 2000, it is still uncertain whether more serious reforms will be forthcoming. There is reason to be skeptical in light of the traditional persistence of established patterns and of the conservative mood of the professoriate. Even if fundamental changes do occur in the near future, it would take time before one could assess their impact.
oversimplification. But I hope that the reader will forgive me for focusing on the overall nature of the systems rather than on a myriad of details.

1. The German Model: Schooling State Officials

The nature of German legal education is essentially that of a state school. It is run and controlled by the state, officially endorses the judge as the model jurist, and actually produces graduates fit for public service. These features are primarily a heritage of the Prussian system of legal education instituted in the 19th century and gradually adopted all over the country.

Legal education is run and controlled by the state from beginning to end under a rigid statutory framework. It consists of two phases, each of which ends with a state examination. Law is first studied academically at public universities all of which are closely supervised by the government. Law professors are civil servants (Beamte), most of whom lack any practical experience at the bar. The academic phase does not lead to a university degree but ends with the first state examination which is administered by the ministry of justice. Those who pass it enter the second phase which consists of a two-year practical training period (Referendariat). It is, again, exclusively controlled by the state. Interns must take an oath of loyalty to the constitution, are employed and paid by the state and supervised by the appellate courts, and they spend most of their time clerking for state institutions. This phase ends with the second state examination. Everyone who wishes to become a full-fledged lawyer (Volljurist) must follow this course. A deleterious effect of this system is that the need to pass the state exams dominates the

---

8) Federal law determines the overall parameters in § 5-6 of the Deutsches Richtergesetz (German Statute on Judges). The individual Länder (states) then define the details under their respective Justizprüfungsordnung (Justice Examination Ordinance), generally known by its acronym as JAPO.

9) Traditionally, they had the status of temporary civil servants (Beamte auf Zeit) but many states are switching to employing them merely as trainees in the public sector.

10) They must for clerk for a civil judge, criminal judge or prosecutor, an administrative court, office or agency, and an attorney in private practice. Typically, they spend only a few months (out of two years) with a law firm or office, often without much involvement.
whole process. It narrows the students’ attention to the topics and skills tested on the exams, mostly suffocating any truly academic study of law.

The primary goal of this system is to produce officials who know the positive law, are capable of applying it to the facts before them, and can explain their decisions under existing rules. While the universities claim to teach law as a “science” (Wissenschaft), the emphasis is really on learning the law as written, on acquiring the skills to apply doctrinally complex systems of principles and rules, and on internalizing meticulously prescribed orders of statutory and logical analysis. During the practical training phase, interns learn primarily how to work with official files, how to make decisions based upon them, and how to write reasoned opinions according to rigid patterns. This is also by and large what the second state examination tests. The objective of all this training is ultimately the job of the magistrate or other official decisionmaker. This is not a tacit implication but expressly stated in the respective statute: one who passes the second state exam acquires the "Befähigung zum Richteramt", the "qualification for the office of the judge." This qualification is the one and only ticket for access to all jobs as a fully qualified lawyer, including the bench, bar, and other positions in the public and private sector.

By and large, the system works as intended. It reaches its educational goal of producing lawyers with the technical and reactive skills required of public officials who have to make decisions according to positive law. Prominent among these skills are technical mastery of codes, statutes, and regulations as well as their interpretation by the courts: the ability to analyze, dissect, and resolve often complex issues; and the discipline to apply existing principles and rules precisely. In short, the system by and large generates able, reliable, and loyal bureaucrats. This is no small accomplishment. Yet, one must not overlook its limitations: it does not, in and of itself, produce able and skillful advisors, investigators, or litigators, not to mention policymakers. It teaches next to nothing about

11) Criticizing existing law, questioning its foundations and implications, or thinking about alternatives is not forbidden but it generates no benefits in the exams and actually jeopardizes positive results.

12) § 5 Deutsches Richtergesetz, supra note 8.
counseling or drafting, negotiating or investigating, economic implications or policy goals. At the university itself, such skills are completely neglected.\textsuperscript{13)} There is some opportunity to learn the trade of a private practitioner during the internships students must do while at the university and during the law firm segment of the practical training period. But whether such learning actually takes place is pretty much left to the student or trainee as well as to his supervisor, and on the whole the results are meager. Of course, many German lawyers ultimately acquire these skills but they do so mainly on the side or on the job.

2. The American Model: Training Market Actors

American legal education essentially works on the market level. Its institutions operate independently from the state, its goal is to train lawyers for the job market, and it actually produces graduates primarily for law firms and other private businesses. Since its origins in the late 19th century, it has been much more closely tied to professional organizations than to governments.

By and large, American law schools are not state institutions, at least not in the German sense. Many of them — a majority among the top schools — are privately organized to begin with and have no official ties to the state. It is true that many law schools are part of state universities, depend on public funding, and are subject to government regulation. On the whole, however, they suffer much less from government interference than German law faculties.\textsuperscript{14)} Professors are not civil servants, and the majority have considerable experience in private practice. As a result,

\textsuperscript{13)} While § 5 sec. 3 Deutsches Richtergesetz now provides that the study of law must take the "rechtsberatende Praxis" (practice of legal counseling) into account, this provision has virtually no effect in the classrooms or exams. For an exception, see \textit{infra. fn.} pp. 20-21 and text.

\textsuperscript{14)} In over 15 years as a law professor at an American state university, I have never seen, spoken to, or had anything else to do with anyone from the state government. In most public universities in the United States, the idea that a state official might tell a law professor what to teach, research, or otherwise do borders on the absurd. As a German law professor, one is involved with the state bureaucracy almost on a daily basis; as an American legal academic, virtually never.
American law schools teach, examine, and graduate their students virtually without state input. Instead, they operate on a competitive market. The best students and faculty try to get into the best schools, and the best schools try to attract the best students and faculty. As far as practical training beyond the law school is concerned, most of it takes place during summer internships and (after graduation) on the job. Opportunities for such training exist overwhelmingly on the private market, although some graduates accept judicial clerkships for a year or two in order to learn more about the judicial process. Arranging practical training opportunities is left entirely to competition among students and employers with the law schools providing assistance. Except as a potential employer, the state has nothing to do with it.\textsuperscript{15}

The state is officially involved in the whole process of producing young lawyers only insofar as it guards the final entry gate to the legal profession. In order to acquire a license to practice law, one must pass the bar examination which is administered by a government agency of the respective state. Yet, even this hurdle is not a state exam in substance because its goal is not to test the qualifications needed for public office. It only checks the minimum knowledge required of every practicing lawyer, and in most states the passing rate is so high that it presents no serious obstacle. Of course, the state does nothing to prepare candidates for it. This preparation is left to the candidates themselves who enroll in several weeks of intensive private prep courses.

The goal of American legal education is to train graduates with good prospects on the market for legal counsel. 80–90\% of the targeted market is in the private sector, i.e. with law firms or corporations. The public sector is relatively small, and even there, young graduates are hired not as official decisionmakers but as attorneys representing their employer. For this kind of market, law students must learn primarily the skills of an attorney. They must understand (and perhaps explore) the facts, research the law, make the most convincing argument for their side (ideally in full consideration of the counterarguments), write memoranda

\textsuperscript{15} It may, of course, be a potential employer among many others.
and briefs, argue cases in court or before other state institutions, and consider potential economic, tax, or policy implications. They do not have to decide disputes as a state official - that is left to more experienced, and hopefully wiser, people.

This system also works by and large as intended. Most of the graduates, at least of the better American law schools, enter the market equipped with the skills for a successful career in private practice. Of course, they are not immediately and completely ready to represent clients, and there are complaints that they do not possess enough practical skills. Yet, while they have a lot to learn on the job, they basically understand how to process facts, recognize issues, and research legal questions, and they are prepared to advise clients, write briefs, and argue cases. Perhaps even more importantly, most of them know how to explore new terrain and how to acquire new skills. These are important strengths. Yet, one must not overlook the weaknesses of this educational system either: its graduates have no systematic overview and understanding of the law, they are rarely capable of mastering complex statutes, and their ability to produce structured analysis is weak. They are not trained to render impartial decisions nor have they learned to write a well-ordered judicial opinion.

3. Modern Needs: What Type of Lawyer?

At the end of the day, both models of legal education produce the envisaged kinds of lawyers. These lawyers are being equipped with very different mindsets and trained for very different jobs.

The differences in mindset are to some extent simply reflections of the difference in the nature of the respective legal systems. The civil law requires more of the technical and analytical dexterity of German graduates and has traditionally emphasized knowing, applying, and obeying the law. The common law puts a premium on the fact-specific and argumentative thinking of their American colleagues and expects active participation in finding, arguing, and shaping the law. To this extent, each educational approach fits its environment.
The differences regarding the jobs for which students are being trained cannot be justified by the differences between the legal systems and are considerably more troublesome. In light of modern realities, there is a serious question whether it is (still) appropriate to school primarily public officials rather than to train attorneys for private practice. In most developed countries with market economies, by far most lawyers do not hold state office but work in the private sector, i.e. in a law firm, a corporation, insurance company, or bank. In the United States with its relatively small governmental apparatus, this has been true from the very beginning. In Germany, as in many other Western countries, it has become true in more recent times: while the state used to employ a large portion of all lawyers, privatization and fiscal constraints have dramatically reduced this share. Today, only a tiny percentage of law graduates are appointed to state office while the vast majority look for jobs in the private sector.\textsuperscript{16} In such a situation, the American, market-oriented, system is at an advantage because it is more likely to train its students for what most of them will actually do. In contrast, the German, state-centered, approach tends to become dysfunctional because it is geared toward a job that most of its graduates will never have.

None of this implies a value judgment about the inherent academic or educational merits of these two models. It is probably true, for example, that the German training provides a better basis even for private practice than the American training does for public office. Nor do these concerns mean to elevate the practical skills of an attorney above the technical abilities of a public official. But a system of legal education that trains for one kind of job while nine-tenths of its graduates work in quite another will – and deserves to – come under pressure.

It is no wonder then that such pressure has been growing in Germany. The reform of legal education is a perennial topic and in the last decade the discussion has become particularly intense.\textsuperscript{17} Prominent among the

\textsuperscript{16} Only about 3\% of those who have passed the second state exam become public officials while about 75\% work as attorneys in private practice, many because they have no other choice. The rest take many other, often non-legal, jobs. See Gerald Rittershaus, Forum: Anwaltssorientierte Juristenausbildung, 1998 Juristische Schulung 302.

\textsuperscript{17} See supra note 7.
many recent complaints about the current system is the critique that it lacks practical orientation and trains students for the wrong kind of work.\textsuperscript{18} The persistent calls for greater emphasis on the skills needed by lawyers working in the private sector\textsuperscript{19} are finally beginning to have some effect. Three developments are particularly noteworthy. First, several universities have modified their curricula in that direction. Some provide additional training in economic theory, law, and regulation for students intending to work in the private sector, especially as in-house counsel.\textsuperscript{20} Others cooperate with members of the bar and offer courses emphasizing the perspective of the attorney in private practice.\textsuperscript{21} Second, in the fall of 2000, the Gerd Bucerius Law School Hamburg, Germany's first private law school, is opening its doors with an orientation towards training primarily private practitioners, not state officials. Its curriculum "will take into account the fact that after completing their education, the majority of law students will become attorneys, others will seek creative legal solutions in companies and associations on the national as well as international level."\textsuperscript{22} Third, about a dozen Fachhochschulen, i.e. professional colleges, now offer a three-year program for "Diplom Wirtschaftsjuristen", roughly translatable as graduates with a diploma in law for the economy.\textsuperscript{23} These young professionals take a short track.


\textsuperscript{19} In 1996, two prominent German bar organizations (Bundesrechtsanwaltskammer and Deutscher Anwalt Verein) even suggested that the bar take over the practical training of future attorneys, see Frankfurter Allgemeine Zeitung of December 21, 1996. 41. Of course, the bar already organizes and supervises the training of its future members in many other European countries.

\textsuperscript{20} On the model implemented at the University of Halle, see Stefan Grundmann, Ökonomisches Denken und etwas angloamerikanischer Elan in der Juristenausbildung – ein Hallenser Modell des Doppelstudiums. 1998 Neue Juristische Wochenschrift 2329.

\textsuperscript{21} The University of Heidelberg has developed the leading model, see Görg Haverkate, Forum: Anwaltsorientierte Juristenausbildung. 1996 Juristische Schulung 478: Rittershaus, supra note 16.

\textsuperscript{22} Gerd Bucerius Law School Hamburg (bulletin) (1999) 8.
avoiding state examinations and internships. They forego the qualifications required for public office, bench, and bar, because they intent to work for private enterprises anyway. While it is clear that they have an inferior academic status, it is not clear at all that their employment opportunities in private enterprises are worse than those of the fully qualified lawyers.

So far, these developments are taking place on the margin of the traditional system, and it is too early to tell whether they will have any broader effect. It is likely, at least for the time being, that preparing to pass the state examinations will continue to dominate legal education for all fully qualified lawyers in Germany. But over time, even these exams may have to be modified in order to reflect an incipient and gradual shift away from public official to private practitioner as the lodestar of German legal education.

II. Domestic and International Law: One Trend in Two Countries

While the German and the American systems differ fundamentally in nature, method, and objective, they share an important feature: in the last decade or so, both have striven to go beyond domestic law and to include transnational and comparative perspectives. In their own ways, both have made considerable progress toward that goal.

1. German Developments: Europe and Beyond

In Germany, the driving force behind this development is the rapid integration of Europe, first as a market, then as a political system, and to some extent even as a society. Yet, the focus is not restricted to Europe.


24) Currently, the most vociferous support for adherence to the system of state exams comes from the law faculties, in large part simply because they are reluctant to take over the examination of masses of students.
but encompasses other parts of the world as well. The internationalization of German legal education currently takes place on several levels.

Perhaps its most visible and important aspect is the great success of the European student exchange programs.\textsuperscript{25)} These programs have created an international network of partner universities and enable students to spend a semester or a year in another European country. Such foreign studies are easy to arrange and encouraged by scholarships from the European Union. A large percentage of German law students uses this opportunity to study abroad, often in order to practice foreign language skills.\textsuperscript{26)} Several universities also have exchange programs reaching overseas, some involving American law schools.\textsuperscript{27)} The new, private, Bucerius Law School in Hamburg will even make a semester abroad mandatory.\textsuperscript{28)} In addition, some law faculties offer joint degree programs in which candidates can study for the first state examination and at the same time obtain a foreign degree.\textsuperscript{29)}

Foreign and international perspectives have gradually entered even the German classrooms themselves. The basics of European Union law are now an official (i.e. statutorily prescribed) part of the curriculum as well as a mandatory subject on the state examinations, at least in theory.\textsuperscript{30)} Several universities have very popular programs combining the study of (German) law with training in a foreign legal language and system.\textsuperscript{31)}

\textsuperscript{25)} The European Union organizes and funds an umbrella program in the field of education generally which is known as Socrates. Within in, Erasmus is the exchange program especially for university students. Detailed information about these programs is available at European Commission’s website, http://europa.eu.int/comm/education/socrates/generalen.pdf.

\textsuperscript{26)} In the 1998/99 academic year, about one in six of all university students, and about one in ten law students went abroad under the Erasmus program according the information provided on the website, http://europa.eu.int/comm/education/socrates/erasmus.

\textsuperscript{27)} The University of Freiburg, for example, has had an exchange program with the University of Michigan Law School since 1998.

\textsuperscript{28)} Gerd Bucerius Law School Hamburg, supra note 22, at 9.

\textsuperscript{29)} See Reimann, supra note 5, pp. 180-189; see also David Clark. Tracing the Roots of American Legal Education - a Nineteenth Century German Connection, 51 Rabels Zeitschrift 313 (1987).

\textsuperscript{30)} §5a sec. 2 Deutches Richtergesetz.

\textsuperscript{31)} The most expansive and firmly established programs are those of the universities of Augsburg, Passau, Münster, and Trier. In the meantime, however, many other
Besides, a lot of law faculties offer at least occasional courses about foreign law, taught in English or French: these courses law are sometimes staffed by regular faculty, often by visitors.

Finally, there is a lively culture of foreign graduate studies, both as a matter of import and export. Many German law faculties now have a one-year program for foreign graduates, leading to a Magister (Master) in German law: these programs are virtually tuition-free and attract students from all over the world.\(^3^2\) In turn, hundreds of German graduates go abroad every year to obtain an LL.M. degree from an English or American law school or a maîtrise from a French university. They do so upon their own initiative but they are often supported by the advice and recommendations of their academic teachers and by the money from government scholarships, mainly from the DAAD (Deutscher Akademischer Austauschdienst) in Bonn.

2. American Ambitions: Global Studies

In the United States, the trend toward internationalization is fueled by the needs of private practice and by a current, somewhat fashionable, infatuation with globalization. After many years of enthusiastic but practically futile talk, American legal education is now actually opening up to comparative and foreign perspectives.\(^3^3\) This is true primarily, but not exclusively, in the elite law schools.

The most visible change is the internationalization of the curriculum. Courses about transnational and comparative topics have skyrocketed, often exceeding actual student interest.\(^3^4\) Introductions to the world's

---

German law faculties offer more limited opportunities to combine the study of law with that of a foreign language. Information about these programs is available at the websites of the respective universities.

\(^3^2\) About two dozen such programs now exist in Germany. Most of them are general introductions to the German legal system and thus specially tailored for foreign students. Some offer specialization in a particular area of law and are open to students from both Germany and abroad. Information is available at the websites of the respective universities.

\(^3^3\) The literature, consisting of symposia, articles, and brochures, on this topic is vast and growing every day. See, e.g., Symposium on Globalization. 46 Journal of Legal Education 311 (1996) (with further references).

\(^3^4\) See infra, note 40 and text.
great legal systems, including the civil law, European Union law, and the law of many Asian countries, have become almost standard, as has the teaching of public international law, human rights, international litigation, and international business transactions. Many of these courses are taught by foreign visiting faculty who bring a touch of their legal cultures to American classrooms and hallways.

Recently, a few law schools have gone beyond simply offering a smorgasbord of courses and decided to expose all students to law beyond American borders. One approach has been to include some foreign and transnational perspectives in the mandatory first-year courses. An even bolder step was taken at the University of Michigan Law School which just made an introduction to (public and private) international law mandatory for all students.

Exchanges with foreign universities are lively, although they do not reach the European level. Many law schools have standardized exchange programs with foreign partner institutions and offer their students a semester abroad for credit at home. Of course, students are free to organize their own semester abroad pretty much anywhere in the world. In addition, they can take a large variety of externships at foreign and international organizations. To some extent, even the many foreign summer programs contribute to a more international atmosphere. While they teach American students in English, they do make the participants spent time abroad and often expose them to foreign and international topics.

Perhaps the weakest point in this picture is the students' frequent lack of foreign language skills. For American students, the rise of English as


36) The University of Michigan Law School, for example, has exchange programs with the universities of Leiden (Netherlands), Leuven (Belgium), Paris II (France), Freiburg (Germany), and University College London (England). Addentional programs are under consideration.

37) The website of the American Bar Association http://www.abanet.org/legaled/fsinfo.html currently lists over 150 such programs in all parts of the world, including one in Seoul, organized by Santa Clara University School of Law.
the international lingua franca of law is not only a blessing but also a
curse since it leaves them with little incentive to learn anything else. In
order to fight linguistic parochialism, some law schools offer, at least
occasionally, courses in foreign languages about the respective legal
systems, e.g. in German, Japanese, and Spanish: more of such courses
would be desirable to tap what foreign language talent there is at
American law schools.

3. Joint Ideals: The International Lawyer

The German and the American systems are thus united in the ambition
to educate lawyers for the international age. To be sure, neither attempts
to produce large numbers of specialists in public or private international
law. Instead, they both seek to generate graduates who are solidly trained
in the respective domestic laws but who have also been exposed to foreign
and international perspectives so that they are ready for a world in which
transboundary transactions and disputes are becoming routine.

In pursuing this course, each system faces its own peculiar opportunities
and challenges. The German situation is favorable in the sense that the
country is situated in the middle of Europe, a neighbor to nine foreign
nations in which over half a dozen different languages are being spoken.
In this environment, it comes naturally to look across borders. Yet, the
strengthening of international perspectives is hindered by inflexible
statutory regulation of curricula and examinations. Nor do such
perspectives fit easily into a system geared toward the training of state
officials who are by their very nature likely to think in domestic terms. In
the United States, in contrast, the internationalization of legal education
is facilitated by the autonomy and flexibility of the law faculties which
compete heavily in this area. It is also driven by the needs of an
increasingly global market and by the prominent role of American law
firms and courts in handling international transactions and litigation.
Finally, it fits easily with the goal of training attorneys who represent
clients in today’s world. But the American efforts are often hampered by
the widespread perception of isolation from the rest of the world, by the
persistent parochialism of many students and faculty, and, on the practical level, by the paucity of language skills.

On both sides of the Atlantic, much remains to be done. In Germany, professors, students, and practitioners keep pointing out that comparative and international law need to be intensified and integrated into the mainstream curriculum. As things stand now, these topics often receive mere lip service, and even European Union law is frequently neglected in classes and examinations. A serious problem is that students do not receive academic credit for studies abroad, and mastering a foreign legal language counts for nothing in the state examinations. Thus the rewards of foreign experience lie outside of the official education system, i.e. on the job-market. In most American law schools, the main problem is that too few students actually enroll in one of the many international and comparative courses, take a semester abroad, or do a foreign externship. Those who pursue international studies testify almost unanimously to the enormous benefits they have reaped, both personally and professionally. But law schools still need to motivate more students to take the plunge.

Despite these problems, the attitude of the majority of German and American law graduates is decidedly more international today than it was even ten years ago. This is not the result of this or that individual course


39) They only count for purposes of computing the overall length of study. This is somewhat important because students who take the first state exam already after seven or eight semesters have two successive attempts if they fail instead of only one. On this feature of a "Freischuss" (free kick), see Choi, How is Law School Justified in Korea? supra note 1.

or program but the compound effect of many small steps in the right direction. The soundly parochial atmosphere still prevailing well into the 1980s, has become the exception in German law faculties and American law schools alike.

III. Old and New Models: Lessons for Korea?

If we combine our observations about the differences and commonalities between the German and the American systems of legal education we can see that in both worlds, the traditional ideals are gradually being superceded by a new paradigm. In Germany, the change is slow and of a dual nature: the model of the jurist as a public official is beginning to be pushed aside by the reality of the lawyer in private practice, and the graduate trained only in domestic law will eventually give way to the professional with an international view. Legal education in the United States can skip the first part because training private practitioners has always been its primary purpose but the American regime is a leader in the second process as it rapidly moves toward an internationalist approach. As a result, in both systems an identical new lodestar for legal education is emerging: the private practitioner in the international context.

It remains to be seen if this new type of practitioner will become the lawyer of the future. Many signs on the market point in that direction. Both in Germany and the United States, the majority of the top graduates now enter international law firms. One can observe much the same phenomenon in many, if not most, highly industrialized nations. As a result, attorneys from several countries often work side by side in the same law firm or corporation in New York, Frankfurt, or Hongkong. So far, this involves only the elite among the young graduates but elites often set the trend and create a trickle-down effect on a much broader scale. If the current trend continues, it will become necessary for many systems of legal education to adjust accordingly. Failure to do so could entail at minimum a dramatic loss of international competitiveness on the
growing market for legal services.

Yet, an adjustment in the direction of producing internationally-oriented lawyers for the private sector (i.e. by and large in the American direction) should not be undertaken without due consideration of its costs and dangers. Suffice it to mention just three concerns that both German and American legal education constantly face. First, focusing on the professional needs of private practitioners risks that legal education degenerates into mere practical skills training, and that law faculties become trade schools. Second, teaching foreign and international perspectives easily becomes superficial and thus misleading, reminiscent of the old American adage that “a little learning is a dangerous thing.” Third, excessive enthusiasm for foreign and international material jeopardizes a thorough grounding in domestic law and, more importantly, in one’s own legal culture as a whole. Thus, changes in legal education, however advisable or necessary they may be, require circumspection and carefully considered compromises if we want to avoid breeding international technocrats without intellectual depth and a cultural home.

Do any of these general lessons drawn from a comparison between current trends in German and American legal education apply to Korea? An outsider cannot answer that question. He can only hope that his ideas provide others with food for thought about their own system.
〈Abstract〉

미국과 독일의 법학 교육: 한국을 위한 교훈?

Mathias Reimann

지난 10~20년간 법조 개혁을 포함한 법학 교육은 한국에서 이슈가 되어왔고 그 과정에서 다른 국가의 예를 살펴본 하였다. 이 경우 독일과 미국의 모델이 가장 주 참조되었는데, 그것은 우연이 아니다. 독일은 19세기말 20세기 초에 이르러 법학 교육에 있어 세계적으로 지도적인 위치에 있었고, 한국이 (일본을 통해) 법제도를 세울 당시 그 모델이 되기도 하였다. 그리고 미국의 이름난 로스쿨들은 2차 세계대전 이후 세계적인 권위를 가질게 되었고, 최근에는 한국 및 다른 나라들의 흥미를 끌고 있다.

미국과 독일의 체계 중 하나가 그 자체만으로서 한국의 모델이 될 수 없다고 생각하는데, 그것은 전자는 너무 다르고, 후자는 너무 비슷하기 때문이다. 미국의 법학 교육은 그 구조나 방식, 교수와 학생간의 관계, 교과자료, 교육목표 등이 한국과 기본적으로 다르므로, 미국의 방식을 그대로 모방하는 것은 법학교육 체계의 완전한 재건을 요구하게 되며, 이것이 가능하다 하더라도 미국의 모델이 한국의 학계, 정치계, 사회적인 환경에 잘 맞지 않기 때문에 권할만하지도 없다. 대조적으로 독일의 제도는 한국 체계와 주요한 부분들에서 매우 닮아서 개선적인 자극을 제공할 가능성이 적다. 따라서 이 글은 모델을 제시하는 것이 아니라, 독일과 미국의 체계를, 법학 교육 방식의 기본적인 차이점과 두 체제간의 강한 유사성을 중심으로 설명한다. 이러한 차이점과 유사성을 결합으로 새로운 유형의 변호사가 서서히 등장하고 있을 뿐이다 이는 한국의 관점에서도 주목할 만한 것이다.

I. 국가와 시장: 법학교육의 두 모델

1. 독일 모델: 국가 공무원 교육

기본적으로 독일 법학교육의 속성은 국립학교이다. 국가에 의해서 운영, 규제되고, 공식적으로 법관을 법학 전문가의 자격으로 인정하여 공직에 적합한 졸업생을 배
출한다. 법학 교육은 법령의 틀 속에서 두 가지 단계를 구성한다. 우선, 정부의 감독 아래 있는 공립대학교에서 법을 학문적으로 배우게 되는데, 법학 교수들은 공무원이고 대개 실질적인 경험이 없다. 이 단계는 법무부가 관할하는 국가고시로 끝난다. 이를 통과하면 2년제 실무훈련 기간에 들어간다. 인턴들은 헌법에 대한 충성을 맹세하고 국가에 충성되어 국가로부터 급여를 받으며, 항소법원의 감독을 받고 국가기관에서 공무원으로 지낸다. 이 단계도 국가고시로 끝낸다. 완전한 변호사가 되기 위해서는 이 과정들을 거쳐야 한다.

이 제도의 단점은 국가고시가 과정 전체를 지배해 버린다는 점이다. 출제율 주제에 관심이 집중되고, 진정한 학문으로서의 법학을 역투하는 것이다. 결국 이 제도의 주된 목적은 성문법을 익혀 법을 당해 사건에 적용하고, 현행 법률로써 판결을 해석할 수 있는 관료를 배출하는 것이다. 두 번째 국가고시를 통과하면, "Befähigung zum Richteramt"를 얻고, 이는 판사, 변호사, 그 이외의 공직 사적 분야의 직위를 포함해서 완전한 자격이 있는 변호사가 될 수 있는 유일한 통로가 된다. 이 제도는 현행 법률을 정확하게 적용할 수 있는 유능하고 명실적한 관료를 만들어 내긴 하지만, 그것만으로는 능력 있는 상담인, 수사관, 소송대리인, 정책결정자일 만하다. 이들을 위한 것은 대학에서는 가르치지 않고, 변호사들은 일하면서 배우게 된다.

2. 미국 모델: 시장 활동자의 양성

미국의 법학 교육은 근본적으로 시장을 표준으로 한다. 교육기관들은 국가와 독립되어 운영되며, 그 목적은 직업 시장을 위해 변호사를 훈련하는 것이다. 그리고 실제로 주로 로펌과 그 밖의 사적 영업을 위한 졸업생을 배출한다. 미국 로스쿨은 적어도 독일적인 의미에서는 국가기관이 아니다. 많은 로스쿨들이 공립 대학에 속해 있고 정부의 재정지원과 규제를 받지만, 독일의 교육기관에 비해 간접을 통한 독립을 얻은 필요, 그 교수들 또한 공무원이 아니라 사적 범죄 영업에 경험이 가지고 있는 사람들이다. 미국 로스쿨들은 국가의 간섭 없이 학생들은 가르치고 시험하고 졸업시키는 대신 경쟁적인 시장에 의해 운영된다. 국가는 단지 법률 전문직의 통로를 지키는 것으로 변호사들을 양성하는 전제적인 과정과 공식적인 관련을 맺는다. 변호사가 되기 위해서는 각 주의 법무 기관이 실시하는 사법시험을 통과해야 하는 것이 다. 하지만 이것은 공직에 필요한 자격을 시험하는 것이 목적이 아니므로 실질적으로 국가 시험이 아니다. 변호사들에게 필요한 최소한의 지식만을 검토하는 데다 합격을 너무 높아서 심각한 장애물이 아니다.

미국 법 교육의 목적은 변호사 시장에서 좋은 전망성이 있는 졸업생을 훈련하는 것이다. 목표로 하는 시장의 80~90%는 로펌이나 기업 같은 사적 분야이다. 공직 분야는 상대적으로 작고, 그곳에서조차 졸업생들은 공식적인 결정권자로 채용되는
것이 아니라 변호사로 채용된다. 이러한 시장을 위해서 법대생들은 주로 변호사의 기술을 배워야 한다. 사실을 이해하고 법률을 살피, 자기 편에 가장 설득력 있는 주장을 떠고 의견서를 쓰고, 사안을 따지고, 전반적인 의미를 고려할 줄 알아야 한다. 이는 중요한 장점이지만, 법 전반에 대한 체계적인 이해가 없고, 법률에 대하여 숙달되지 못하고, 구조적인 분석능력이 약하다. 그리고 객관적인 판결을 할 훈련이 되어 있지 않고 훈련한 판결문을 쓸 능력을 배우지 않는다.

3. 현대의 수요: 어떤 유형의 법률가인가?

이들 두 법학교육 모두 기대하는 법률가를 만들어낸다. 이들은 매우 다른 자세를 가지고 매우 다른 직업을 위해 훈련된다. 예컨대, 대류법은 독일의 학생들에게 기술적이고 분석적인 민첩함을 요구하며, 법을 알고 적용하고 준수하는 것을 강조해 왔다. 커먼 로는 미국의 졸업생들에게 구체적인 사실과 논쟁적인 사고를 강조하고 법을 찾고, 따지고, 형성하는 데에 활발히 참여하도록 한다. 각각의 교육적인 접근은 어느 정도 그들 환경에 적합하다.

지금의 현실에서 주로 사적 범죄 영업이 아닌 공적을 위해 법률가들을 훈련시키는 것이 적절한지는 매우 의문이다. 시장경제를 유지하는 나라에서는 대개 법률가들이 공적에 있지 않고, 로펌, 기업, 보험회사, 은행 같은 사적 영역에서 일한다. 독일에서도 최근에 그렇게 되어, 졸업생의 극소수만이 공직에 임명되고 대부분은 사적 분야에서 직업을 찾는다. 이러한 상황에서는 미국적인, 시장중심적인 체계가 유리하고, 독일적인, 국가중심적인 접근은 기능상 잘 맞지 않게 된다.

독일에서 법학 교육의 개혁은 계속적인 주제가 되어 왔고, 논의가 80년대에는 특별히 강조되었다. 비판 가운데 두드러지는 것은 실용적인 방침이 부족하고 부적절한 일을 위해 학생들을 훈련시킨다는 지적이다. 변호사들에게 필요한 기술에 대한 강조는 마침내 효과를 보기 시작했다. 먼저, 여러 대학이 교과목을 수정하였고, 특히 몇몇 어린 대학들은 기업 내 변호사로서 일하고자 하는 학생들을 위해서 경제이론, 법, 규제에 관한 추가적인 교육을 마련하기도 하였다. 둘째, 2000년 가을 독일의 첫 사립학교인 Gerd Bucerius Law School Hamburg는 공직 관련가 아닌 주로 사적 영업을 위한 변호사를 훈련하는 것으로 방침을 정했다. 셋째, 10여개의 전문 대학이 (군이 변역하듯) 경제를 위한 법학 학위를 가진 졸업생들을 배출하도록 하는 3년 과정을 설치하였다. 이들 학교를 거치는 젊은 전문가들은 공직 법률가가 되기 위한 자격을 포기한다. 이들이 학문적으로는 떨어지지만, 취직 기회가 완전한 자격의 변호사보다 못하다고는 할 수 없다. 이제까지 이러한 발달은 전통적인 체계의 변두리에서 일어나고 있고 아직은 넓은 파급 효과를 가지게 될지 알 수 없다. 그러나 시간이 지남에 따라 이 또한 공직 관련에서 사적 변호사로 가는 단계적
인 변화를 겪게 될지도 모른다.

II. 국내법과 외국법: 두 나라의 한 추세

1. 독일의 발달: 유럽 그리고 유럽을 넘어서서

독일 법학 교육의 국제화의 원동력은 유럽 통합이라 할 수 있다. 이는 최근 여러 단계에서 일어나고 있는데, 주요한 성공은 유럽 교환학생 프로그램이다. 이 프로그램은 교류 학교의 국제적인 망을 만들어서 학생들이 다른 유럽 국가에서 한 학기나 일년을 보낼 수 있게 한다. 외국에서의 공부는 계획이 쉽고 유럽 연합의 장학금으로 지원된다. 많은 독일 법대생이 외국어 능력을 습득하기 위해 이 기회를 이용하며, 많은 대학들은 미국 로스쿨을 포함해서 유럽을 넘어서는 지역까지 교환 프로그램을 가지고 있다. 게다가 일부 학교들은 국가고시를 공부하면서 동시에 외국의 학위도 받을 수 있는 연대 학위 과정을 제공한다. 국제적 관심의 증가는 유럽연합법의 기초가 교과과정의 공식적인(끝, 법령으로 명시되어 있는) 부분이 되게 되었고, 독일 법과 외국 법체계에 대한 교육을 결합한 강의는 인기가 있다. 영어나 프랑스어로 가르치는 외국법 과목을 개설하기도 한다. 독일의 많은 학교들은 외국인을 위해 독일 법학석사 학위를 주는 1년 과정이 있다. 여기에는 대개 등록금이 있고 전세계에 걸쳐 학생들을 끌어들인다. 반대로 수백 명의 독일 졸업생들은 매년 영국이나 미국의 로스쿨로 유학하여 LLM 학위를 받거나, 프랑스 대학으로부터 maitrise를 받는다.

2. 미국의 아심: 세계적 연구

미국에서 국제화 경향은 사적 영역에서의 필요성과 세계화에 대한 열의가 원동력이다. 수년간의 논의 끝에 미국의 법학 교육은 이제 비교법적, 국제적인 시각에 대해 열려있다. 가장 두드러진 변화는 교과 과정의 국제화이다. 세계법과 비교법의 주제를 가진 교과목들은 급속하게 많아졌고, 국제공법, 민권, 국제소송, 국제상거래와 같은 것에 대한 개설은 거의 표준이 되었다. 이러한 교과의 많은 부분은 외국 방문 교수들이 가르쳐서, 자국의 법문화를 미국의 교실에 가져오도록 한다. 많은 로스쿨들은 외국 학교와 교환 프로그램을 가지고 있고, 한 학기를 외국에서 보내면 국내에서 학점을 인정해 준다. 이 상황에서 큰 요인은 학생들의 외국어능력 부족이다. 미국 학생들에게 영어가 세계법의 언어로 도래한 것은 충격이지만, 다른 언어를 배운 필요성을 상상하기 때문에 저주하기도 한다. 이 때문에 일부 로스쿨들은 독일, 일본, 스페인과 같은 국가의 법 체계에 관하여 그 나라의 외국어로 진행하는 교과목을 개설하기도 한다.
3. 결합된 이상: 국제 변호사

독일과 미국 체계는 국제화 시대를 위해 변호사를 교육시키는 야심에 있어서 일치한다. 두 국가 모두 국제공법이나 국제사법의 전문가를 배출하려는 것이 아니라, 국경을 넘어선 거래와 분쟁이 일상화된 세계에 대비하여 확고한 국내법적 지식과 국제적 사고를 가진 졸업생들을 만들려고 한다. 그런데 국제적 관점의 강화는 윤리성 없는 교과 과정과 시험이라는 법률 규제에 얽매된다. 이 부분에서 미국은 보다 용이하며, 세계화되는 시장 요구와 국제 거래와 소송을 다루는 로펌과 법인은 국제화의 원동력이 된다. 그러나 학생과 교수의 협력, 외국어 능력의 부족이 장애가 되고 있다. 그럼에도 불구하고 독일과 미국의 법대 졸업생들의 테도는 10년 전과는 달리 실질 국제화되어 있다. 이것은 개별 과목이나 커리큘럼이 벗어난 것이 아니라 올바른 방향으로의 작은 움직임들이 모아진 결과이다.

III. 옛 모델과 새 모델: 한국에 교훈이 될 것인가?

독일과 미국 두 세계 모두에서 전통적인 이상은 점차 새로운 패러다임에 의해 대체되고 있다. 독일의 경우, 범죄인의 모델로서 공적 관료는 사적 범죄 영업을 하는 변호사에 의해 멀리고 국내법만으로 훈련된 졸업생들은 국제적 감각을 지닌 전문가에게 결국 밀리게 된다. 미국 후자의 부분에 있어 선도적이다. 결과적으로 두 제도 모두 법학 교육에 있어 같은 표지를 보이고 있다. 곧, 국제적인 맥락에서 일하는 사적 변호사, 최근의 이러한 경향이 계속된다면 많은 법학 교육 제도들은 그에 맞춰 적응할 필요가 있다. 그렇게 하지 못하면, 법률 서비스 시장에서 국제 경쟁력의 커다란 손실로 이어질 수도 있다.

그러나 사적 영역을 위한 국제적 변호사를 만들어내는 방향으로의 전환에 있어, 완전히 미국적인 방식으로의 전환은 비용과 위험에 관한 심각한 고려 끝에 이루어져야 한다. 이에 대하여는 독일과 미국의 법학 교육이 겸손 직면하는 다음 세 가지 문제를 연급하면 될 것이다. 첫째, 변호사들의 전문적인 필요성에 초점을 맞추는 것은 법학 교육을 단순한 실용적 기술훈련으로 퇴화시키고 교육기술을 직업학교로 만드는 위험이 있다. 둘째, 외국의 관점과 국제적 사고를 가르치는 것이 수박결합기에 그치 오히려 오도될 수 있다. 셋째, 외국 혹은 국제적인 과제에 대한 열정은 국내법, 나라가 그 나라의 전제적인 법률문화 기반을 다지는 데 지향을 주기도 한다. 그러므로 지적 심화와 문화적 교양이 없는 국제적 기술판류를 양성하는 일을 피하려면 신중한 조정이 필요하다. 독일과 미국의 법학 교육의 최근 경향을 비교함으로써 도출되는 이 일반적인 교훈이 한국에도 적용될 것인가? 외국은 이에 담할 수 없지만 자국의 제도에 관하여 생각할 여지를 줄 수 있기를 바랄 뿐이다.