

AALS Panel – Global Legal Education – Legal Education in the New Europe and the USA: Shall the Twain Ever Meet?

By Tadas Klimas*

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There are a myriad of avenues that could be taken by every person and organization each and every day. While perhaps opportunities should be taken advantage of, one must see the need. Some interests are not vital; whereas others are and should not be risked save in cases of grave necessity. And it is morally difficult to require heroism, such that some roads are not taken judiciously and others through lack of awareness or through the lack of requisite heroism.

This article seeks to explore two related questions. What could the institutions teaching law in the “New Europe,” that is, in Eastern Europe and Russia, do in relation to new opportunities in legal education, and what should American law schools do in relation to the same essential problem (and opportunity).

The problem is this. The states of the “New Europe” emerged from Soviet law only just recently.¹ It is axiomatic that Soviet law did not serve the same purposes as law in states recognizing the rule of law. But it is not necessary, however, to delve into an exposition of communist ideology in order to make the point that institutions of Eastern Europe providing legal education needed to reform subsequent to the changes of the late 1980s; it is clear that, for example, contracts in a state with no

* Tadas Klimas is Dean of the School of Law at Vytautas Magnus University, Kaunas, Lithuania. VMU is the only American-style law school in Europe. A version of this article was given as a presentation during the American Association of Law Schools (AALS) annual convention in Atlanta, Georgia on January 4, 2004.

¹ For example, Lithuania declared the restoration of its independence on March 11, 1990. Its new Civil Code (including of course rules on contract law) came into effect upon June 1, 2001.

free market are very different from contracts in a free market economy, and that hence the teaching of contracts must be reformed.

But the persons teaching law stayed the same even though the environment became very different. Indeed, some authors have stated that legal education in Eastern Europe has changed very little since the fall of the Soviet Union, and I would agree with this assessment.

As a law professor in the Czech Republic, writing in the year 2000, has stated,

“Against expectations, the old, unqualified, and xenophobic professors did not die out. They reproduced themselves through inbreeding, selecting future teachers from among their students according to the criteria of loyalty and lack of intellectual challenge to the current incompetent professoriate.”²

Therefore at the least we can say this: There is a need in these countries for very good legal advice, since everything having to do with the free market, with individual liberties and constitutional rights, is quite new. Yet it is no surprise that, at least immediately after the change in systems, that legal education in Eastern Europe was not prepared to produce the product needed. It is worth remembering as well, that a seasoned law professor takes years to produce. The problem may well be deeper, however, and involve bad habits that are hard to break.

Institutions of legal education in Eastern Europe could organize themselves to serve the needs identified above by adding courses in fundamental legal disciplines such as contracts and human rights which would be taught by means of distance learning technology from American and other Western law schools.³

But it is highly unlikely that anything like this will occur. Since schools in Eastern Europe were not reformed wholesale at the time of the fall of the Soviet empire, they also generally see no reason to reform. They do not know what it is they do not know. And they are proud. The idea of importing foreigners, albeit electronically, to teach disciplines they cannot teach nearly as well, if at all, on their own is, frankly, too much. It would require a heroic effort, and therefore is unlikely to occur.

² Tucker Aviczer *Reproducing Incompetence: The Constitution of Czech Higher Education*, 9 EAST EUROPEAN CONSTITUTIONAL REVIEW, Nr. 3 94, 95 (2000).

³ The important disciplines can all be taught on an a-national basis. A high-level course on contracts could be taught using the CISG, PECL, and UNIDROIT as a base. Similarly, the European Union has had a standardizing effect in other fields, such as environmental law and securities regulation, as well as competition law.

At this point, rather parenthetically, let me remark that many students and young practitioners in the New Europe do recognize the deficiencies in their education. One popular response is to take internet based courses offered by the Law College (of England) and the International Bar Association. After a certain number of courses, the student will be awarded what in essence is a certificate—he will be made a Fellow in International Practice.⁴

There are other obstacles to what I have proposed as well. Several have to do with the mindset of legal educators in Eastern Europe. The mindset lacks certain concepts or has misunderstood others without which distance learning via the internet cannot be put into place.

This can be illustrated by the following tale. In a book on distance learning via the internet published by a university in a Baltic state in 2003, whose author is a legal educator, (by the way, there is no distance learning by internet technology in any of the universities in the country concerned)⁵, the author repeats a fallacious belief which is popular in Eastern Europe. He writes of “criteria-based” and “normative” testing. (In American parlance, “normative” testing is usually described as “objective” or “multiple-choice” testing.) And he concludes that multiple choice testing has no place whatsoever in any institutions of higher learning.

This is of course utter nonsense in itself. So-called criteria based testing can be “blasted out of the water” conceptually by calling attention to its application: while fine in theory, it is ... non-objective, or in other words—subjective; it is **not** based on objective criteria, because this cannot be done—criteria based evaluation is a myth. Can law professors agree on the criteria? Can they be applied in truth? Is an A in a very highly ranked law school contracts course the same as that in a school of a lesser rank?⁶

⁴ Press Release of November 16, 2001 in the International Bar Association News Bulletin as distributed by email in translated form by the Lithuanian Bar Association (Lietuvos advokatu taryba) on November 26, 2001. This is the only set of courses I have ever seen advertised in Eastern Europe.

⁵ There may be the odd course taught in this way, but there are no degree-bearing programs taught by distance learning. The first law course that I am aware of taught through asynchronous internet technology at VMU was taught by Jurate Vaiciukaite, then of VMU School of Law, in 2001.

⁶ I am not the first to voice such arguments. They can be found in nearly any normal discussion of the evaluation of student performance. For instance, see Daniel Keating, *Ten Law School Grading Myths*, 76 WASH. U. L.Q. 171 (1998). Keating uses the term, “non-relative” to mean “criteria-based,” and argues that it is a myth that criteria-based evaluation is non-subjective, whereas it is quite subjective (or relative). “Non-relativity says that there is some absolute meaning that can be attached to an “A” or a “B” or a “C,” wholly apart from where that grade places a student within a particular class. ... Perhaps we fall prey to the non-relativity myth because we are thinking back to our third-grade math class, where you either could do your multiplication tables correctly in the allotted time or you couldn't. In that setting

The mindset against objective (multiple choice) testing is so ingrained that it even has found its way into Vytautas Magnus University's (which is the university at which I am dean of the law school) *Regulation on Studies: §15.5. The criteria based system of evaluation of student performance shall be applied in the University.* Happily, the law school at VMU is exempt from this nonsense.

While it is not my purpose in this article to dissect the reasons for the ingrained prejudice for the "criteria" system, the reason for it is this: until only recently, all exams in Eastern Europe were oral. One of the illusions that come out of such a system is that the examiner often feels he has truly examined the student and come up with a very exact measure of his performance, because he has posed questions to the student, and this gives the examiner satisfaction (he is blissfully ignorant of the fact that both the original question posed and his follow-up questions differ from student to student and therefore are completely subjective). Obviously, multiple-choice testing removes this "touchy-feely" component, and hence is far more foreign than subjective "criteria-based" exams, especially when coupled with the prevalent post-examination discussion of the exam prior to grading.⁷

But returning to the matter at hand, it is, or should be, striking that, in a work on internet-based teaching written by a legal educator of high rank, the educator concludes that multiple choice testing is beyond the pale in a university environment. Internet-based courses are, however, almost unimaginable without multiple choice tests! Without such a capability, the internet can only be used to deliver text and to receive the student's answers in essay form; the internet as fax machine or correspondence course. Such a conception could only befit the internet-based coursework of a lesser god.

Another obstacle to the introduction of internet based distance learning has to do with academic dishonesty in the form of cheating on exams and homework. No school is ever free from this; much in life is a matter of scale. And cheating on normal, non-distance, exams and homework in Eastern Europe is pretty well off the scale. This can be illustrated by a conversation I had about a year ago with a dean from another law school in the Baltic area. The dean complained that cheating on exams was rather out of control. He stated that the main problem is one of students

there really was an absolute standard, and all the relevant parties could agree on what the appropriate minimum competence level was and how to measure it. Law school is not like that. Even if the faculty could agree on which skills were necessary for minimum competence, we could probably not agree on how to objectively assess them. And even if we could agree on how to assess them, there would be no way to ensure that different graders would be consistent in applying those assessments." *Id.* at 173.

⁷ This discussion prior to grading (finally evaluating) is prevalent at Vytautas Magnus University (with the exception of the law school) as well as many others in the area.

utilizing specialized radio communication devices with which they received the answers to the questions on the exams (first having read them into transmitters) from their confederates. The dean then told me he had requested his physics department to come up with a jamming device. (He was absolutely serious.)⁸

Things at my own university, Vytautas Magnus, are not much better (saving for the law school, which operates under a different set of rules). During the last finals week I myself saw three students⁹ sitting right outside the law school offices, boldly cutting up crib notes that they had apparently just miniaturized. They had no fear whatever of anyone, including a dean. It is no wonder, actually. No student has been expelled for academic dishonesty from VMU for at least six years—and I doubt any had been expelled before that.¹⁰

The last few paragraphs serve to bring us to this point. Sometime last year I was speaking with a high ranking official of another university about internet-based courses. His first comment was to point out that there will be grave difficulties in ascertaining who is actually doing the work—and that therefore this will be a very big obstacle. And the official was right. To a large extent, internet-based courses rely upon the good faith of the student. It is my hypothesis that good faith is created by a good and honest system which expects good faith. It is unfortunate, but this sort of system does not yet exist in the countries of Eastern Europe. We can therefore conclude that until such a system does exist, it is difficult to believe that Eastern European universities will embrace asynchronous internet technology to run courses.

⁸ The following is from the official report of the outside evaluating team which recently (2002) evaluated Vilnius University's law program. The team was headed by Carl Monk of the AALS and included Richard DeFriend, director of the Law College of England. "The students also complained about rampant cheating in exams, sometimes by very sophisticated methods. This problem seems to be so widespread that otherwise honest students feel discouraged because their efforts at memorizing the laws lead to lower grades than those obtained by their classmates who use inappropriate means. The students also informed the experts that some professors are apparently taking up the battle against cheating by electronic means, concretely by using devices for the detection of mobile phones and other means of improper communication between students in the examination room and outside helpers. The majority of the professors, however, were allegedly not much interested in the integrity of the examination procedures." *Kokybes siekiniai* No. 6, (Vilnius: Studiju kokybes vertinimo centras, 2002, p. 48). The evaluation report is also available online at <http://www.skvc.lt/siekiniai/A.3.htm>

⁹ These were not law students, but VMU undergraduates.

¹⁰ The policy of VMU has been stated by the Secretary of the University, Assoc. Prof. Nina Klebanskaja, to whom an article in a student newspaper attributed the explanation that at VMU "A student is not thrown out of the university, but receives a failing grade in the course [if caught]." *Lietuvos studentu laikraštis Savas* 2003 12 08d. Also available at <http://www.savas.lt/savas.php/nr,151;ps,Akiratis#3.txt>

Next we turn to the United States. We can posit two needs here. One is to fill a market, a market of Eastern Europeans who need to have certain courses, some of which are fundamental courses, taught to them; the courses must be of high quality. U.S. law schools have the ability to fulfill this need, since they have the professors, and because the American law school structure serves to guarantee a level of quality beyond that of many if not all schools in Eastern Europe.¹¹ The need, on the part of the American law schools, is to fill a market, or in other terms, to increase the size of their student body by offering courses and degree programs to the Eastern Europeans.

The second need would be related to America's role in the world. What duty does the sole superpower have? Can it effectively meet the above-described need without becoming over-stretched? Is it either a minimal investment or in the interest of the American law school? In short, the question of American participation in legal education in Eastern Europe subject to the same essential questions as other questions of American involvement abroad.

Let us take these questions slightly out of order. At present, the offerings of American educational institutions cannot meet the described need. For instance, the LL.M. programs are 1) expensive by Eastern European standards, 2) require the presence of the student (residency requirement), thereby increasing the cost. No ABA-accredited law school of which I am aware offers an LL.M. by distance-learning. This is probably because the ABA rules do not allow American law schools to offer J.D. programs by distance learning, and this attitude is carried into the LL.M. sphere. But additionally, the idea of the LL.M. is faulty, that is, these programs are in one way or the other advanced, whereas in large part it is fundamentals which are needed.

The S.J.D. is totally beyond the pale. First, as stated earlier, it is fundamental coursework which is needed. Secondly, the cost of the S.J.D. is enormous. Apart from tuition, this is in all instances of which I am aware set at the full J.D. tuition price; although arguably in the second and later years the student is essentially working independently. Even if there were programs which did not require residency,¹² this again would not satisfy the needs described above (because of the need for coursework, much of which consists of fundamental coursework).

¹¹ Language is increasingly not an issue, since the *lingua franca* of Europe is English.

¹² See for example the PhD programs via distance-learning at Middlesex University, UK, wherein a doctoral student is required to spend only two weeks in residency. <http://www.mdx.ac.uk/research/degrees/index.htm#dislearn> visited by Tadas Klimas on 2004 January 17.

Should U.S. law schools develop new types of programs to meet the needs of Eastern Europe? Perhaps there is a duty to do so. There is much to be said in favor of the American system of legal education. It is a much more fair system. It delivers a high-quality education. It promotes the sorts of lawyers who are rights-oriented and client-service oriented. These are not bad things. Indeed, the "export" of such a system could do much to help solidify the rule of law in a large section of the world.

Could it be done? Probably a new type of degree would be required. Perhaps an LL.B. It could be delivered entirely by way of the internet. Some foreign schools are making starting to enjoy some popularity by this means—the programs of the University of Leicester in England are internet-based, although they are not specially crafted for Eastern Europe. Nevertheless, through anecdotal evidence available to me, this school's internet-based LL.M. programs have begun to be popular.

Possibly also a partnership of sorts could be achieved with a school in Eastern Europe. Perhaps a joint degree program. Something in this direction has been achieved between Michigan State University DCL College of Law and Vytautas Magnus University. For some years MSU-DCL has been awarding a Certificate in Transnational Law to VMU students who amass 20 credits¹³ in VMU courses either taught by or approved by MSU-DCL. A certificate is not a degree, but it is highly esteemed by the VMU students and increasingly so by employers. It is kind of like those stickers which appear on otherwise relatively unknown computer brands, proclaiming "Intel Inside!" It conveys the meaning that the student's studies have been of demonstrably high quality, that he has mastered Legal English, and that in truth he has a true claim to a knowledge of transnational law. Knowledge of transnational law is in this era increasingly sought for by employers, as Lithuania is slated to accede to the European Union on May 1, 2004. Nevertheless, a certificate is not a diploma, and hence it is unlikely that this one program, that of VMU/MSU-DCL, will meet the needs described in this article.

Will U.S. law schools step into the fray in Eastern Europe? In conclusion, I view it as unlikely. The very success of the J.D. in a way holds them back from thinking in terms of other degrees, or of delivery of these degrees in ways which would be unacceptable for their J.D. programs. Furthermore, development of internet-based courses is not cost-free.

¹³ 20 ABA credits equal 30 VMU credits. An ABA credit is a credit as defined by the American Bar Association in regulations pertaining to accreditation of American law schools.

Will Eastern European law schools take advantage of internet-based technologies to improve their curriculum? If one believes in the inevitability of human progress, then most certainly. It is nevertheless unlikely in the short run, because to do so would require rather substantial changes in habitual manners of thinking about the delivery of legal education in general.