The History of the Advanced Degree in Law in the United States

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Date : December 10, 2015

Gail Hupper, Educational Ambivalence: The Rise of a Foreign-Student Doctorate in Law, 49 **New Eng. L. Rev.** 319 (2015).

In the United States, the most advanced degrees offered by law schools are, counter-intuitively, predominantly granted to foreigners. The LLM, or master in laws, has become a staple for law graduates from other countries hoping to further their careers back home, find a job in the U.S., or merely spend a year enjoying a fun experience abroad. The JSD or SJD, or doctorate of science and law, is generally targeted at foreigners wishing to teach, either back in their own country or hoping to find a job on the U.S. academic market. Meanwhile, most U.S. law students, including those interested in a teaching career, never even consider one of these advanced degrees, at least until the recent creation of Yale's PhD in law.

How did this seemingly paradoxical situation come to be, where the most advanced law degrees are largely ignored by U.S. students, but embraced by foreigners? Gail Hupper does a skillful job in her recent article, *Educational Ambivalence: The Rise of a Foreign-Student Doctorate in Law*, explaining the history of this phenomenon, particularly the story of the JSD/SJD. The article was the focus of a recent symposium issue of the *New England Law Review*, in which Bruce Kimball, Carole Silver, and Paulo Barrozo provided commentary on Hupper's piece.

As Hupper explains, the JSD/SJD started in the late 1800's at top U.S. law schools like Harvard, Yale, and Columbia, to train U.S. lawyers for the domestic teaching market. The rise of these advanced degrees corresponded with that of full-time law teachers in the U.S., as well as the view of law as a standalone science. Students who were interested in a career in teaching would pursue a JSD/SJD at an elite law school, which would frequently confer an LLM as an interim degree. By World War II some 20% to 25% of professors at top U.S. law schools had a JSD/SJD, as did many professors at other law schools around the country.

After World War II though the degree went out of favor for those interested in the U.S. law teaching market. Many LLB students (the LLB was the precursor to the JD) began to take many of the same classes as JSDs/SJDs, and legal practice, particularly clerkship experience, became more valued by hiring law schools. At the same time, the realist turn in the legal academy meant perspectives from other fields, like economics or political science, became more prized, heightening the advantage of a PhD from another discipline for those interested in graduate study before pursuing law teaching.

Instead of fading away though, international students started taking up the degree, and by the 1970s two-thirds of JSD/SJD graduates were non-citizens (today almost all are). As Hupper details, State Department and Ford Foundation grants fueled the initial push for students from Europe in the post-World War II environment and Cold War politics and a sense of missionary altruism by a handful of faculty soon led these top US law schools to recruit students from Asia, Latin America, and Africa. At first these students filled LLM programs, but they quickly became integral to the JSD/SJD programs as interest in these degrees from U.S. students waned.

Yet, the internationalization of these advanced degrees also pushed them towards the margins of the U.S. legal academy. Hupper emphasizes the permissive, and unplanned, nature of this transition. She argues, "there was never an institutional commitment to foreign doctoral students in the way that there had once been a commitment to U.S. doctoral students." Schools often gave these students no facilities of their own and minimal financial assistance. A handful of faculty, who often taught comparative or international law, invested disproportionately in these students, while other faculty often treated them with ambivalence.

Today, despite more attention to the JSD/SJD programs at many top law schools, clear tensions exist in how schools view their American-dominated JD programs and their foreign dominated graduate programs. Both Hupper and the commentators on her piece point to Yale's recent development of a PhD in law as evidence of this unresolved strain. Hupper notes that when Yale created its new PhD program that it made explicit the degree was only for the further training of students who already have a U.S. law degree. This, of course, is ironic as this is precisely what Yale's J.S.D. program had been designed to do, and did with considerable success in the first half of the 20th century. Carole Silver in her commentary argues that the PhD in law represents an attempt by Yale to reassert its centrality in the U.S. academic hiring market, where Yale Law School now faces increasing competition to its prestige and clout from PhD programs in other disciplines. Paulo Barrozzo in his commentary though expresses concern that Yale's PhD program will relegate the JSD to a second-tier degree. Already the JSD/SJD has had to battle perceptions within the U.S. that because it is dominated by foreigners that it is not as prestigious. The development of a PhD in law dominated by U.S. students, but largely excluding foreigners, may only cement this perception.

Foreign students pursuing advanced degrees could be excused if they do not feel that they quite fit in in the U.S. legal academy. As Silver notes in her commentary, top U.S. MBA programs are much more internationalized than top U.S. law programs. However, perhaps this is to be expected–the result of a provincialism that is at least partially inherent to the study of law, but arguably accentuated by the approach to legal studies in the United States. For example, in many countries, law students are required to take jurisprudence. If there is a globally shared cannon in the study of law it is probably the writings of Hans Kelsen, H.L.A. Hart, or Dworkin. However, this tradition of grounding law in first principles has been frequently and openly shunned in the U.S., where jurisprudence is not only not a required class, but, at many law schools, it is not even offered regularly.

Barrozzo in his commentary on Hupper's article laments the U.S. legal academy's parochialism and pragmatism, which in turn limits its global relevance. Yet, arguably these same contextualizing features are also part of its great strength. U.S. law schools at their best train legal technicians, equipped to borrow methodologies and insights from other fields to solve the challenge at hand. This leads U.S. law faculties to make large investments in exploring the intricacies of U.S. law and its relationship with U.S. history, politics, and economics to find context specific solutions for legal problems facing U.S. society. While the methodologies of this scholarship frequently have relevance more broadly, the actual substance of much of this academic work is of more limited interest to foreigners, outside of areas like international or corporate law where issues are fairly similar across jurisdictions. Indeed, one of the great challenges facing top U.S. law schools is how to reconcile their desire to situate themselves as global leaders in the study of law and also succeed at producing scholarship that provides concrete answers for U.S. legal and policy debates and contributes to creating "practice-ready" U.S. lawyers.

Although outside the scope of Hupper's article, it would be informative to explore how other jurisdictions are dealing with this tension. U.S. law schools very much compete with schools in the United Kingdom, Europe, Singapore, Canada, and Australia to attract law students from other countries for advanced legal study. The approach, and relative success, of these schools and countries in this endeavor is undoubtedly deeply intertwined with the history of their advanced degrees in law. Hupper has done us a

great service by helping illuminate the history of these degrees in the U.S.

Cite as: Nick Robinson, *The History of the Advanced Degree in Law in the United States*, JOTWELL (December 10, 2015) (reviewing Gail Hupper, *Educational Ambivalence: The Rise of a Foreign-Student Doctorate in Law*, 49 **New Eng. L. Rev.** 319 (2015)), https://legalpro.jotwell.com/the-history-of-the-advanced-degree-in-law-in-the-united-states/.