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Acceptance Speech – Honorary Doctoral Degree Keio

Miguel Poiares MADURO

Dear President, Professor Kohei Ito,
Dear Vice-Presidents, Professor Yoshimitsu Matsuura and other distinguished Professors,
Dear Dean, Professor Isao Kitai,
Dear Ambassador, His Excellency Mr. Vitor Paulo da Costa SERENO,
Dear Professor Katsuhiro Shoji
Dear Colleagues
Ladies and Gentlemen

I am deeply honoured and thankful for the Honorary Degree that Keio University has awarded me. There is no higher achievement for an academic than the recognition of his peers. I'm humbled and grateful for the generous gesture you have taken in my regard and I hope to continue to show myself worthier of it.

I was told there is no precise format, model or style for an acceptance speech. That didn't make it easier... Sometimes, freedom can also be a constraint. Particularly when that freedom – to freely choose my topic – comes with such responsibility. I have decided to use this opportunity to reflect on legal education and research. I do this because I believe you made me an honorary doctor mostly in recognition of my career as a legal educator and scholar. I thought it would, therefore, be appropriate to reflect on how legal education is changing and the challenges it faces. I hope you will forgive me

for a perspective that will be somehow Eurocentric. Even if I have had the honour and pleasure of teaching in many places of the world（including here at Keio）, the centre of my academic life has been Europe. That is, therefore, where I can claim some authority to reflect upon the teaching and practice of law. But I believe that many of the issues that legal education faces in Europe are present, in the same or similar form, all over the world.

Legal education is changing because law is changing. Legal rules increasingly originate from different sources of political and normative authority: state, transnational or supranational（in my case, European）and international legal sources. Lawyers increasingly need to operate in the context of a plurality of jurisdictions and legal sources. The market for legal services is also increasingly regionally and even globally integrated. At the same time, the social functions of law have progressively expanded and law has increasingly become a space for the resolution of social conflicts that the political process is incapable or unwilling to deal with. This impacts on what the law is, its social role and that of legal professions, from judges to lawyers.

Is legal education addressing these changes? Moreover, is it ready to cope with the challenges they bring to the teaching and learning of law?

One has reasons to be sceptical, not least because these questions are surprisingly understudied. The justification for this may be found in the ambiguity surrounding the character of legal education. This ambiguity is visible in how legal scholars have dealt with legal education: on the one hand, we do not "authorise" any other social scientists to research the study of law（the presumption being that legal education cannot be understood or questioned by non-lawyers）; on the other hand, we tend to focus exclusively on what the law, itself, is and consider issues of education as unworthy of the attention of legal scholars. In other words, while we treat legal education as a subject outside the province of legal science we do not recognise anyone else's right to address it. As a consequence, legal education is a "no man's land"; it is a subject that is practised but not often reflected upon. Apart from the usual curricular disputes, centred on the relative importance of our different legal subjects or their disciplinary borders, there is not much attention paid to how we teach the law and what ought to be the ulti-

mate purpose of legal education.

The ambiguity of legal education reflects, in part, a larger ambiguity about the character of law as science. Is law a technical expertise or a science?

Europe's doctrinal tradition of legal dogmatics has addressed this ambiguity by merging the two: law is the science of legal practice. The science of organising and systematising the legal materials of a particular legal system. In this perspective, law is a science because it produces an organised body of knowledge that determines the practice of law in a particular legal order. It is for this reason that, in Europe, we never really engaged in a discussion that has dominated American law schools: the divide between the conception of law schools as professional or academic schools; or the permanent tension between legal scholarship (thought of as the domain of science) and legal teaching (thought of as the training of a particular professional expertise).

It is the existence of this debate that, perhaps, explains why there is a much more developed American tradition of thinking about legal education. The origin has to be traced back to the "Langdell revolution". Langdell was the first non-judge made Professor and Dean at Harvard Law School in the late nineteenth century. He considered that a good law professor had first and foremost to be a good professor, and his case-study method has forever shaped American legal education. The "Langdell revolution" has acquired such a central role in the narrative of the emergence of American law schools and their distinctiveness that it created a culture favourable to a constant questioning of the nature of legal education and of different legal methodologies: how one teaches is as important as what one teaches. However, this has not helped to resolve the tensions mentioned. There is often a profound divide on how law is taught and researched in the United States. The dominant conception of the law in legal scholarship is not really reflected in the way in which the law is usually taught.

To a certain extent, the US and Europe have found two opposite ways of accommodating the ambiguous relation between legal teaching and legal science.

Americans have distinguished legal teaching from legal scholarship. The first is about the knowledge of legal materials and of the argumentative techniques and narratives to be used in courts on the basis of those materials. The second is, predominantly,

about questioning the social reality of those argumentative narratives, the underlying structures that shape them, as well as about what the law ought to be.

Europeans, on the other hand, merged legal teaching and legal scholarship by, as mentioned, conceiving legal science as the science of legal practice.

There are problems with both approaches. Here I am concentrating on the European case. How can law be a science if it does not critically reflect on its own assumptions and methodological choices? It may fit the notion of science as a body of knowledge but not the scientific attitude of testing and questioning, not only of that body of knowledge but of how it is constructed. True, this challenge is not unique to the law. Other disciplines（such has medicine）have important equal dimensions of research and practice but the character of a social science makes this tension even harder to manage in law.

Law is also often under-theorised. Doctrinal approaches mirror reality but do not explain it. There is no science without theory（a hypothesis with both explanatory and predictive power of similarities and differences）and a methodology（a reflective and critical approach to the study of the materials）but most doctrinal approaches are, in large part, a simple reproduction of the text of legal materials developed in a systematic, but largely uncritical and purely empiricist, way. When social reality do not corresponds to what the law wants（is）, the problem is treated as one of legal enforcement, not of the law itself. Law and legal studies are therefore reduced in their scope to fit the dominant conception of legal science inherent in purely doctrinal approaches.

This has, at least, five negative consequences. First, a lot of what actually determines legal outcomes is simply left unstudied. This leads to bad legal scholarship, bad legal practice and bad law-making.

Second, the nature of the relationship established between law and practice and its reflection in legal education is such that legal scholarship has become, itself, too advocacy oriented.

Third, in many instances, it has even become perfectly acceptable for legal scholarship to be a by-product of legal practice（transforming into research the products of legal practice and advocacy）.

Fourth, legal education has become both misleading and socially inadequate. It is misleading because it hides from students all the institutional variables that determine what the law is beyond the text of the existing legal materials. Students learn how to operate the law but without really understanding its mechanics. It is socially inadequate because the disconnect between the law taught（law in the books）and what the law actually is（law in action）induces a cynical attitude in the understanding and practice of law. In addition, it leads to a decontextualised interpretation and application of the law. In other words, the disconnect extends to the relationship between law and the social context of its application.

Fifth, if legal education and scholarship will remain hostile to embrace context in underastanding the law, what the law is will increasingly be contested by other social sciences. These will put forward competing narratives of the law focusing on what legal scholarship seems uncapable of explaining. The risk is to replace law's excessively self-centered approach by a purely external approach to the law, one that is also not fit to fill the gap between law and its social context.

My argument is, however, that the current changes in the character of law offer us an opportunity to address some of these older problems and rethink the nature of legal scholarship and legal education. I am witnessing at least five trends in legal education in Europe（most also happening outside Europe）.

The first is that which is perhaps more unique to Europe. Though legal education remains primarily a national affair there has been a gradual Europeanisation of legal education as a natural consequence of the Europeanisation of the law itself. Such Europeanisation is measurable by the extent to which the European Union has become a primary source of law for its member states. Several estimations indicate that the EU is responsible for at least fifty per cent of all new legislation applicable in the European states. This Europeanisation of the law is already visible at the level of litigation in courts. Both in the EU jurisdictions but also in national courts, most cases involve dimensions of national and EU law.

These developments must be reflected in the teaching of the law. It is not sufficient, however, to increase the importance of EU law in the curricula of European law

schools. EU law is "Europeanising" the teaching of the other legal subjects. It is no longer possible to teach contracts, consumer, sports, tax or family law, just to name a few examples, without teaching EU law. However, simply to account for EU law sources is also not be sufficient. EU law does not simply bring with it new rules. Such rules can only be properly interpreted and applied, and as a consequence taught, in the light of the particular nature of its legal order and its own methods of interpretation.

The Europeanisation of law is, therefore, not simply expanding what needs to be taught at European law schools. It is changing how teaching takes place.

A second trend results from the increased multi-national character of litigation. This creates a context in which judges and lawyers must learn to operate in a complex web of rules arising from their own legal order but also from other national legal orders and transnational and international legal orders. This is also a natural consequence of increased economic integration and its legal implications, such as the fact that companies are being set up and operate in different states and contracts as well as other legal instruments must be drafted in light of their connection to different legal orders. As a consequence, a growing number of legal actors need to operate in a context involving different legal sources, multiple jurisdictions and diverse legal cultures. They must be comfortable "travelling" (so to say) between different legal orders, so as to avoid the perils of some form of legal jet lag. This phenomenon will also increase the cross-fertilisation of legal concepts among legal orders and the miscegenation of legal cultures. This is so for two reasons: first, the growing transnational character of economic litigation and legal services means that lawyers will tend to circulate legal arguments and legal strategies among different legal orders; and, second, the circulation of legal ideas through networks of academics, lawyers and judges also entails a miscegenation of legal cultures.

This context of legal pluralism and legal miscegenation will require new legal hermeneutics and will promote the interaction between legal cultures, impacting on legal education.

A third trend results from changes in the market for legal services. The practice of law is increasingly international, and law firms reflect that. In Europe, law firms have

reacted to the Europeanisation and globalisation of law by becoming European and global themselves. A survey conducted by the magazine *The European Lawyer* illustrated how many law firms have expanded into other states and have merged with law firms from those states, either acquiring them or establishing cross-national partnerships. An increased percentage of top law firms have lawyers from multiple nationalities, and their revenue is increasingly of foreign origin. This is favoured by, but not dependent on, the liberalisation of cross-border legal services that has taken place in Europe and is being promoted by the WTO at the global level. Another important development has been the growth of in-house lawyers and, related to this, but not exclusively, the relative decrease of litigation as part of a lawyer's work. To this, one must also add the increased role of arbitration and other non-judicial forms of dispute resolution that lawyers are required to engage with. All require new legal and non-legal tools from lawyers and present them with challenges for which European legal education has hardly begun to prepare them.

Studies on the sociology and history of the legal profession have highlighted that the precise role of the legal profession is historically contingent, and that the changes in that role also impact on the style of lawyering. It is inevitable that the changes in the structure and character of the market for legal services will affect the recruitment policies for lawyers and the legal education expected of them.

A fourth trend is the increased centrality of law in contemporary societies. This is a product of the expansion of regulation into new social domains（both as an instrument of the state where the state was not present before or to actually replace the state where it used to provide services and now simply regulates）.

However, the expanded social reach of the law is also a product of the increased judicialisation of social and political conflicts. The current fragmented and polarised nature of the political process often makes it particularly difficult to reach a clear agreement. Political deadlocks and compromises lead to ambiguous rules that amount, intentionally or not, to a delegation to courts of the final decisions on those issues. This is not necessarily a negative thing: a political community may legitimately decide to exclude certain issues from the "passions" of the political process and "delegate" them to

more insulated institutions such as courts. Similarly, political communities can decide to agree on very broad principles without articulating solutions to the conflicts which will necessarily occur in the practical application of such principles. This may be so as to prevent collective action problems. We trust to courts the concretisation of such principles where high transaction and information costs make it impossible for the political process to act effectively. This makes agreement possible on delicate and controversial political questions by politically deferring its practical effects to a judicial solution to be derived from a universally agreed principle.

Despite this a paradox is created. As stated, pluralism increases the centrality of law and courts, and often leads to the delegation to them of decisions of high political and social sensitivity. However, this same context tends both to increase the contestability of judicial decisions and rigidify their outcomes（because the political process is less capable of overcoming them）. The only way to deal with such a paradox is by changing our understanding of the role that the law and courts play in a democratic political community. This requires an upgrading of the legal software of judges and lawyers, particularly with respect to legal reasoning. It will also bring new questions to the classrooms that legal education needs to embrace.

The fifth relevant trend regards the impact of technology and artificial intelligence. In some areas, it challenges well established conceptual and theoretical foundations of the law（think of how the notions of liability or contract will be changed by Artificial Intelligence or how the regulation of free speech is done by algorithms in social networks）. In other areas, it is replacing the work of lawyers: it is already doing so in due diligence, for example. But also judges are being partially replaced: artificial intelligence systems are being used or tested, already, to take more simple judicial decisions. All this imposes changes on how we understand and teach the law. Not only by expanding and changing what we teach but also by requiring different assets and skills from lawyers. Creativity, strategic thinking, negotiating and mediating social skills will all be among the assets to be more valued in the future for lawyers, as more memory driven activities will be transferred to artificial intelligence systems.

But technology will also change the media of legal teaching. Online masterclasses

– recorded or live – are appearing and some of extremely high quality（both in terms of speakers and the teaching aid instruments used）. Let me be clear. I am a believer that nothing can replace the social and intellectual interaction between students and professors that a classroom offers. But for that to be so our teaching will increasingly need to be interactive indeed. All this will take place in an increasing global market for legal education. Top American Law Schools have multiplied and tailored LLM programmes to fit such search for global legal education. Some have even open branches abroad. Many European Law Schools are following this trend. International alliances of law schools are also emerging.

These five trends constitute a major challenge for law professors, law schools and legal education. The law to be taught is different. The social role played by the law is also different. Even the profile of the lawyer demanded by the market is different. Moreover, law schools will increasingly be competing in a global market.

Answering these trends requires a deep rethinking of legal education, legal scholarship and even law schools. This presents an opportunity to rethink the legal methodologies and pedagogical approaches currently employed in legal education.

Only the opening up of legal education will prepare students for the opening up of law. Paradoxically, the need to adapt to changes in legal practice may require a stronger theorisation of law in legal education. That is, the right theorisation of law; one that is not a mere abstraction from legal practice but genuinely engages with the institutions and processes that shape that practice beyond simply the textual legal materials. It is only by truly understanding the "mechanics" of law that students will be able to make sense of the law and adapt to its constant changes as well as to the different legal cultures in which they will be increasingly required to practise it.

The focus, however, should be on law and the departure point must always be the existing legal sources. We do not want to teach social scientists of the law, we want to teach better lawyers. What is needed is for lawyers to be equipped with a new set of social, critical and analytical tools in order to better understand law and make use of those legal sources. That is the challenge. To be good lawyers we need to understand the social context in which law operates and how human beings behave. Changes in

that social context and the role of law in it provide us with an opportunity to reflect deeper on how to be good lawyers. This has always been what has guided me as a law Professor as I know it is what guides Keio University Law School.

The honour you have granted me today imposes on me an even greater responsibility for continuing to pursue that endeavour: to teach and bring law closer to its social context in order to make better lawyers.

Thank you.