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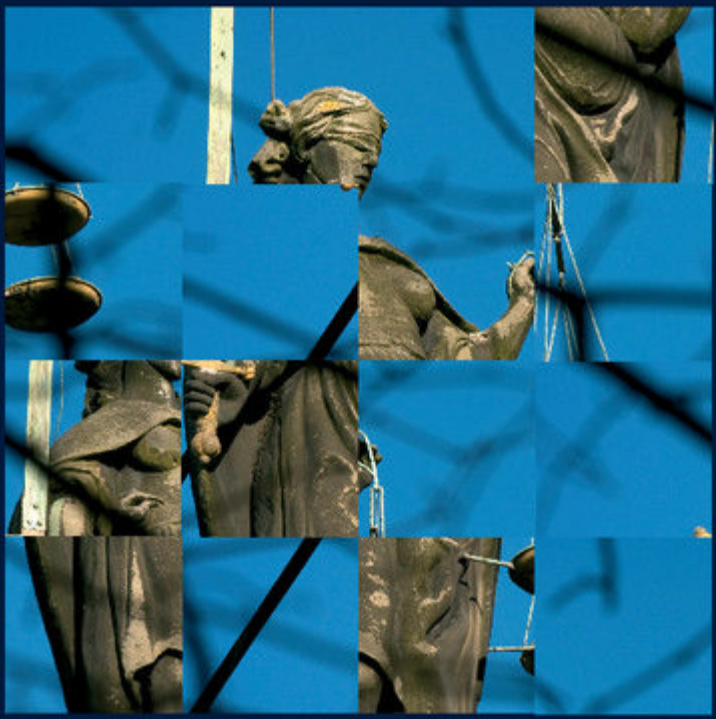
Rethinking the Law School

Education, Research, Outreach and Governance



CAREL STOLKER

CAMBRIDGE

RETHINKING THE LAW SCHOOL

Law schools, by their very nature, tend to think locally, not globally. This book has a broader scope, both in terms of the range of nations and offers a succinct journey through law schools on different continents and subject matters. It covers education, research, impact and societal outreach, and governance. It illustrates that law schools throughout the world have much in common in terms of values, duties, challenges, ambitions and hopes. It provides insights into these aspirations, whilst presenting a thought-provoking discussion for a more global agenda on the future of law schools. Written from a perspective of a former dean, the book offers a unique understanding of the challenges facing legal education and research.

CAREL STOLKER has been Rector Magnificus and President of Leiden University since February 2013. He was previously Dean of the Leiden Law School. For many years he taught a range of private law subjects. He obtained his PhD degree with a comparative study of medical law. He was a deputy judge at the Court of Haarlem and a deputy justice at the Court of Appeal of 's-Hertogenbosch.

RETHINKING THE LAW SCHOOL

Education, Research, Outreach and Governance

CAREL STOLKER
Leiden University

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To
Hans (1958–1997)
Great brother, passionate lawyer

Trois degrés d'élévation du pôle renversent toute la jurisprudence. Un méridien décide de la vérité; en peu d'années de possession, les lois fondamentales changent; le droit à ses époques. L'entrée de Saturne au Lion nous marque l'origine d'un tel crime. Plaisante justice qu'une rivière borne! Vérité au deçà des Pyrénées, erreur au delà.

Blaise Pascal, *Les pensées* (1669)

Three degrees of latitude reverse all jurisprudence; a meridian decides the truth. Fundamental laws change after a few years of possession; right has its epochs; the entry of Saturn into the Lion marks to us the origin of such and such a crime. A strange justice that is bounded by a river! Truth on this side of the Pyrenees, error on the other side.

English translation by W. F. Trotter

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Introduction

Law schools are fascinating institutions. Law being among the first four disciplines ever taught at university,[1] law *schools* have, for centuries, been responsible for the education of presidents and princes, professors and supreme court justices, practising lawyers and diplomats, CEOs and bankers, public notaries and tax advisers, as well as numerous others working in professions that – at least superficially – often have little to do with law.

Legal education has not always been as closely tied to law schools as it is today. In England, one can still be called to the bar with a degree in classics or history, followed by a one-year conversion course and in-house training at the London Inns of Court. How fascinating: would we ever consider such a path in order to qualify as a medical doctor?

And what makes it even more fascinating is that the overwhelming majority of the professors in the top-tier law schools in the US have never *practised* law, while 95 per cent of their graduates end up in legal practice. Another eccentricity in US law schools is the absence of PhD dissertations in core areas of the law, such as contracts and torts, criminal law and criminal procedure, and administrative law. This also means that in most US law schools only very few tenured professors have a PhD degree, which is a prerequisite in almost every other university discipline, and indeed almost every other jurisdiction.

There are equally fascinating characteristics to our *research*. Take US legal scholarship, for example, which offers an interesting picture of the tension between professional education and academic research. There, it

[1] Antonio García y García, 'The Faculties of Law', in: H. De Ridder-Symoens (ed.), *A History of the University in Europe*, Vol. I: *Universities in the Middle Ages*, Cambridge: Cambridge University Press 1992. At the end of the eleventh century, Bologna's faculty of law became a prototype and model for all others and remained so for a very long time (p. 388). I can only recommend every reader, from whatever legal tradition, to take up this wonderful four-volume series, covering so many subjects that occupy us to this very day.

is the students who run many of the scientific legal journals, including the initial culling of manuscripts, the evaluation of their content, the decision as to whether to publish, and the final editing. Again, this is fascinating: would we ever consider having students run the prestigious journals *Nature* or the *British Medical Journal*?

Every country in the world has its law schools, from South Africa to Canada and from South Korea to Brazil, all with their own particularities in teaching and research. In most parts of the world, law is a deep-rooted discipline in the history of academia. In many countries, law is also one of the most popular degree courses on offer, measured in terms of enrolled student numbers. As a rule, law schools are, with the exception of some common law countries, large organisations with large numbers of academic and support staff, and thousands of students – 1,000 first-year students at Leiden University and as many as 1,300, for instance, at Rome's La Sapienza. Looking at these numbers alone, one can conclude that law schools are significant entities within their universities.

There is a plethora of books, articles, websites, blogs ('blawgs') and internal and external reports devoted in particular to legal education; most of this material is nationally oriented. But law schools *as such* – their research, education and governance – have not often been the topic of an entire book. Law professor Fiona Cownie has produced a refreshing empirical work on legal academics;[2] there are also her edited books on power relations played out in the law school,[3] and one dealing with the history of the British Society of Legal Scholars.[4] A book that can be considered as a sequel to Cownie's empirical work is Australian law professor Margaret Thornton's thought-provoking account of the 'corporatisation' of law schools (the 'neo-liberal law school') in some of the common law countries, where, in her words, the market has impoverished the law curriculum, commodified research, transformed students into customers and reduced academics to auditable performers.[5] This is

[2] Fiona Cownie, *Legal Academics: Culture and Identities*, Oxford and Portland, OR: Hart Publishing 2004; Fiona Cownie and Raymond Cocks, *'A Great and Noble Occupation!': The History of the Society of Legal Scholars*, Oxford and Portland, OR: Hart Publishing 2009.

[3] *Stakeholders in the Law School*, Oxford and Portland, OR: Hart Publishing 2010.

[4] Fiona Cownie and Raymond Cocks, *'A Great and Noble Occupation!': The History of the Society of Legal Scholars*, Oxford and Portland, OR: Hart Publishing 2009.

[5] Margaret Thornton, *Privatising the Public University: The Case of Law*, London and New York: Routledge 2012.

a daring book exactly the reverse of Professor Anthony Bradney's equally daring work on the 'liberal law school'.[6]

These books, however captivating, have a more specific scope, such as the concept of a liberal law school, and their focus is mainly limited to one particular country. The same is true for a book edited by the late Professor Peter Birks of Oxford University in the series *Pressing Problems in the Law* (1996),[7] and a fine and beautifully written piece of work by William Twining, *Blackstone's Tower* (1994).[8] Annie Rochette's excellent dissertation of 2010 is fully devoted to teaching and learning in Canadian law schools, with numerous useful empirical findings;[9] and American law professor Deborah L. Rhode published her book, *In Pursuit of Knowledge* (2006), a lively description of various aspects of academic life, in particular the law school.[10] A book by German Professor Christian Baldus *et al.* provides a useful overview of legal education in a number of European countries after the Bologna Declaration (1999).[11] In the Netherlands, Jan Smits published a book on different aspects of legal research in the law school.[12] And, finally, in 2012, both Christophe Jamin's book *La cuisine du Droit*, on the introduction of a new law school concept at Sciences Po in Paris, one of France's prestigious Grands Écoles,[13] was published, as was a most valuable report by the German Council of Science and Humanities (the Wissenschaftsrat – the country's leading science policy advisory body) on German legal education and research.[14]

[6] Anthony Bradney, *Conversations, Choices, and Chances: The Liberal Law School in the Twenty-First Century*, Oxford: Hart Publishing 2003.

[7] *Pressing Problems in the Law*, Vol. 2: *What Are Law Schools For?*, Oxford: Oxford University Press 1996.

[8] William Twining, *Blackstone's Tower: The English Law School*, London: Sweet & Maxwell 1994; William Twining, *Law in Context: Enlarging a Discipline*, Oxford: Clarendon Press 1997.

[9] Annie Rochette, *Teaching and Learning in Canadian Legal Education: An Empirical Exploration* (Dissertation), Montreal: McGill University 2010.

[10] Deborah L. Rhode, *In Pursuit of Knowledge: Scholars, Status, and Academic Culture*, Stanford, CA: Stanford Law and Politics 2006.

[11] Christian Baldus, Thomas Finkenauer and Thomas Rüfner, *Bologna und das Rechtsstudium*, Tübingen: Mohr Siebeck 2011.

[12] Jan M. Smits, *The Mind and Method of the Legal Academic*, Cheltenham: Edward Elgar 2012.

[13] Christophe Jamin, *La cuisine du Droit. L'École de Droit de Sciences Po: une expérimentation française*, Paris: Lextenso éditions 2012 (in French).

[14] Wissenschaftsrat, *Perspektiven der Rechtswissenschaft in Deutschland. Situation, Analysen, Empfehlungen*, Cologne: 2012 (in German). A translation in English followed in 2013: Wissenschaftsrat, *Prospects of Legal Scholarship in Germany: Current Situation, Analyses, Recommendations*, Cologne: 2012.

Since I finished writing this book, other relevant books have been published. I can only mention these latter works in passing.[15] This listing shows that, *if* law schools are studied, it is often within the context of a particular country or region – often the common law countries. Law, by its very nature, tends to think locally, not globally. My book has a broader scope, both in terms of the range of nations – it offers a whistle-stop tour through law schools on different continents – and in terms of the subject-matter; it covers education, research, impact and outreach, and governance. It illustrates that law schools throughout the world have much in common in terms of values, duties, challenges, ambitions and hopes. It provides concise insights into these aspirations, presenting food for thought for a more global agenda for the future of law schools. As the German Wissenschaftsrat stated in its report, the current strengthening of the autonomy of higher education institutions as well as intense competition in the field of science and higher education institutions present

> a challenge for the discipline of law to redefine its position nationally and on the European scale. The German legal system, too, is developing dynamically. Europeanisation and internationalisation as well as further structural changes in the law present the discipline with fundamental changes concerning its object of inquiry.[16]

At the same time, the report says, legal professions are becoming more specialised, and new fields of occupation requiring legal skills are developing.

Some challenges for legal education

Law schools across the world differ greatly from one another: from elite schools, mainly but not exclusively in the US and Canada, Australia and the UK, with motivated students and almost infinite resources, to less well-funded schools in continental Europe, which often have to accommodate large numbers of students and where drop-out rates are

[15] Aalt Willem Heringa, *Legal Education: Reflections and Recommendations*, Cambridge: Intersentia/Ius Commune Europaeum 2013; Daniela Piana *et al.*, *Legal Education and Judicial Training in Europe: The Menu for Justice Project Report*, The Hague: Eleven International Publishing 2013; Richard Susskind, *Tomorrow's Lawyers. An Introduction to Your Future*, Oxford: Oxford University Press 2013. Another, somewhat similar book to mine has appeared not on law schools but on business schools: Thomas Howard, Peter Lorange and Jagdish Sheth, *The Business School in the Twenty-First Century*, Cambridge: Cambridge University Press 2013.

[16] Wissenschaftsrat, *Prospects of Legal Scholarship in Germany: Current Situation, Analyses, Recommendations*, 2012, p. 11.

high. Then there are the law schools in Central and Eastern Europe, Latin America, Asia and Africa, which are often more poorly funded – some even being in an initial phase of development or in a period of transition towards a new and energetic future, while others, by contrast, struggle in the deep waters of adverse or even hostile political circumstances. Our law schools reflect our world.

It is difficult to establish the number of law students worldwide. My educated guess would be 3.5 million at least, spread over the many thousands of law schools. In China and India alone, it is reported that there is a total of 700,000 and 300,000 law students respectively. By 2020, these two countries will account for almost one-third of *all* university graduates in the world aged 25–34.[17]

These numbers are significant, especially when taking into consideration the fact that many developing countries, as well as the so-called transitional countries – a term usually referring to the transformation of a centrally controlled system to a market economy, such as China and the former states of the Soviet Union and Eastern Europe – are currently in the phase of 'catching up', and doing so rapidly, with Western nations.

Yet law students only account for a rather small portion of the total student population in higher education. Just to give a few examples from recent news reports on higher education in general, the number of college graduates in China, one of the so-called BRIC countries (Brazil, Russia, India and China[18]) is estimated to increase by 200 million over the next two decades – more than the entire labour force of the US.[19] In another BRIC country, Brazil, a 2011 higher education census by the government revealed that student enrolment had increased by 110 per cent within a decade. At the time of writing, there are more than 2,300 institutes of higher education in Brazil, offering nearly 30,000 academic courses to 6.3 million undergraduate students.[20] And, in India, a government agency has warned that universities there have grown too large: the University of Mumbai, for example, accounts for about half a million students, many of them studying law.[21]

[17] OECD, *Education Indicators in Focus (2012/05)*, OECD Publishing 2012.
[18] For a brief overview, see Chapter 8 of Colin Brock and Nafsika Alexiadou, *Education Around the World: A Comparative Introduction*, London: Bloomsbury 2013.
[19] World Bank, *China 2030: Building a Modern, Harmonious, and Creative High-Income Society (Executive Summary)*, Washington DC: 2012.
[20] Ministério da Educação Brasil, *Censo da Educação Superior 2010*.
[21] University Grants Commission, *Inclusive and Qualitative Expansion of Higher Education. 12th Five-Year Plan, 2012–17*, New Delhi: 2011.

Although law schools are seldom the subject of an entire book, there is a lot of research being done on legal education and pedagogy. Most of the results are published in specific, English-language educational journals, such as *The Law Teacher* or the *Journal of Legal Education*, as well as other more general journals. Unfortunately, these results do not seem to percolate down to the work floor. It is difficult to understand why there is so little interest in reflection on teaching and learning theories, when most of the available time and money in law schools *is* devoted to the education of these 3.5 million law students. For instance, the pedagogy underlying the teaching of law does not seem to attract much attention in our law schools, with the possible exception of those in the US.

Another vital question to be raised and pondered is: what exactly makes a good lawyer? The importance of a shared vision amongst members of the legal profession on what legal education should and must entail and the goals it must achieve, is underscored. Collaboration between all stakeholders in developing and delivering legal education programmes, as members of a devoted team, is essential.[22]

This book will therefore bring together and address some important issues regarding legal education, such as pedagogy, the curriculum (its content, values and quality), the transition between education and the professional field, textbooks and the often grossly underestimated importance of assessments.[23] It intends to open up lines of communication between pedagogy and legal practice and to fill in the missing link between pedagogy and legal education by tracing lines of communication that will contribute to strengthening the power and authority of (future) legal education.

So much for education. We turn now to consider the question of research.

About legal research

In 2013, the Dutch government distributed a total of €156 million of research money among the sciences – *not a single penny* in this programme went to law. Legal scholarship is but one discipline among many. In 2003, on the occasion of my university's 432nd *Dies Natalis*,

[22] Thomas Finkenstaedt, 'Teachers', in: Walter Rüegg (ed.), *A History of the University in Europe*, Vol. IV: *Universities since 1945*, Cambridge: Cambridge University Press 2011.

[23] Ian Ramsay, 'Intensive Teaching in Law Subjects', in: *The Law Teacher*, 45, 1, 8 February 2011.

I delivered a lecture on legal science versus the *natural* sciences, addressing some of the perils that I thought were threatening the scientific or academic nature of legal research.[24] Scientific disciplines increasingly experience one another as competitors, within the university (for its internal funding) and beyond. I posed as the opening question: 'How do other disciplines view us?' My brief answer was that our scholarship is considered to have a peculiar national focus, a strong individualistic nature and a rather odd publishing culture; it is normative, argumentative and often 'commentative', it is a discipline lacking an explicitly defined scholarly method, and one with little interest in empirical research.

At the same time, national governments, particularly in the Western world, have set a course that promotes academic collaboration, particularly that of an interdisciplinary nature, competition wherever possible and necessary, and an emphasis on social relevance, quality improvement, further internationalisation, decreasing direct and increasing indirect governmental funding, and the contest for research funds.

Let me give one example of incongruous bureaucracy that really frustrated me as a law dean. In 2011, the nine Dutch law deans were unsuccessful in their efforts to convince the most prominent research funding body in the Netherlands that young and excellent law graduates who had completed their law degree programme *magna cum laude*, or who had rounded off their academic studies with a one-year LLM at Columbia University Law School, or a *Magister Juris* in Cambridge, and having done an internship at one of the top law firms in the country or abroad, should be *allowed* to apply for a government-funded PhD grant. According to the funding organisation, they were not eligible because a two-year 'research masters' (rather than the standard one-year LLM) from one of the Dutch law schools was required. Although the funding organisation admitted that these students were indeed interesting students, their international and internship-enriched backgrounds did *not* compensate for not having a Dutch research master's degree.

Comparable difficulties are faced when applying for other types of research grant. Although the community of legal scholars would consider it an academically sound strategy to gain some experience as a practising lawyer after completing one's law degree, from the point of view of an academic career where significant external funding is required, this is not

[24] C. J. J. M. Stolker, '"Ja geleerd zijn jullie wel!" Over de status van de rechtswetenschap', in: *Nederlands Juristenblad*, 15, 2003 (in Dutch).

the wisest thing to do. Law, I concluded ten years ago, has fallen behind on a number of points when compared to other disciplines. As this story shows, law still continues to lag behind, and this book highlights some present-day challenges and opportunities which, if taken on board by law schools, may help to redress this situation.

And so many other issues

In addition to education and research, I shall also consider the challenges law schools worldwide are facing in the wider framework of reforms undertaken at university level: increasing competition for the best students, external competition for the best faculty and research funds, worsening student/teacher ratios, governance issues, internationalisation, and the role universities are expected to play as economic drivers in our current, rather chilly financial and economic climate.

A very important issue is the funding of legal education, including fees and student aid. In 2011, David Segal from the *New York Times* wrote an article about unfortunate American law graduates trapped with loans of up to US$200,000, many without hope of the once-guaranteed, well-paid job.[25] Some law schools in the US were even sued by their former students who didn't get their 'promised' job.[26] Is law school indeed 'a losing game'? Aren't there simply too many law schools and too many law students with worrisome employment prospects? Do we not need to do something about this?[27] Can law schools simply abdicate their responsibility and pass the buck to someone else – students and their parents, or society?

Are deans responsible?

The American law professor Pierre Schlag, in an amusing essay about the quality of American legal research, once asked, 'Are *deans* responsible?' 'Yes', he replied, '[o]f course they are. I am. We all are.'[28] Since I, too, have spent a number of years as dean of a large law school, I share this

[25] David Segal, 'Is Law School a Losing Game?', in: *New York Times*, 8 January 2011.
[26] See Chapter 2.
[27] 'Prestigious Law School Reduces Admissions, Marks New Trend', *US Today*, 5 January 2012.
[28] Pierre Schlag, 'Spam Jurisprudence, Air Law, and the Rank Anxiety of Nothing Happening (A Report on the State of the Art)', in: *Georgetown Law Journal*, 97, 2009.

sense of responsibility. Hence this book, *Rethinking the Law School*, about legal education, research, outreach and governance.

In 2003, after my lecture, some law colleagues criticised my views for being both too negative about the discipline of law, and at the same time too upbeat about the so-called harder sciences. In retrospect, the latter criticism may have been just, at least in the sense that other disciplines, more than I thought, have their *own* concerns, both in research and in education.

Let us, for instance, look at medical education. In *The Lancet*, a group of scientists argued that, although health professionals have made immense contributions to health and socio-economic development over the past century, 'we cannot carry out 21st-century health reforms with outdated or inadequate competencies'. Medical education, the journal concluded, has not kept pace with these challenges, 'largely because of fragmented, outdated, and static curricula that produce ill-equipped graduates'.[29]

Or take biomedical research, where high numbers of papers in certain areas of translational research cannot be replicated, a worrying problem that is definitely not typical for biomedical research alone. 'It's time to start rewarding the people who take the extra time to do the most careful and reproducible work', stated the Reproducibility Initiative, launched in 2012.[30]

Another random example may be taken from criminology. In his 2012 inaugural address, Leiden Professor Paul Nieuwbeerta concluded that most of what we know about penalising, the execution of penalties and the effects of punishment is largely unknown territory in terms of 'what works?'. Evidence-based criminal justice is still far away. If we criminologists were doctors, Nieuwbeerta claimed, we would probably be associated with alternative medicine, or even quackery.[31]

A further example may be taken from the discipline of economics. In his impressive book, *Economics of Good and Evil* (2011), Hungarian, Tomas Sedlacek, policy adviser to the late Václav Havel, challenges today's economic, mostly analytical, research. Economics, Sedlacek

[29] Julio Frenk *et al*., 'Health Professionals for a New Century: Transforming Education to Strengthen Health Systems in an Interdependent World', in: *The Lancet*, 376, 9756, 4 December 2010, pp. 1923–58.

[30] https://www.scienceexchange.com/reproducibility (last accessed 2 December 2013).

[31] Paul Nieuwbeerta, *Een onderzoeksprogramma naar de oplegging, uitvoering en effecten van straffen* (Inaugural Address), Leiden: Leiden University 2012.

claims, has over-emphasised the mathematical and neglected the non-mathematical humanity in us: normative economics has been suppressed by positive (descriptive) economics.[32] This may be all the more reason for today's schools of economics seriously to examine *their* role in the economic downturn our world is experiencing.

Other scientific disciplines are being faced with turmoil for very different reasons. Take, for example, the discipline of social psychology, which has been greatly harmed by the Dutch professor, Diederik Stapel, in probably one of the most worrying stories of fraud ever (see Chapter 2); or medicine, in another Dutch case of serious scientific misconduct concerning Professor Don Poldermans, who performed research on patients without written consent and who took blood samples without their permission. Even more frighteningly, one investigation found that Poldermans had invented research data. He had created fictitious survey forms that could not 'be traced back to the data in the relevant patient records'. This is not only a 'theoretical' problem, but also a practical one: guidelines prescribed for cardiologists for their practice were based on these invalid research data. And it also holds for social psychology, where flawed research findings can also have a devastating effect on people's welfare.

I believe it is valuable for *any* discipline, from time to time, to wipe the slate clean and reconsider its proper role in academia and society. Pierre Schlag did this with current American legal research, in hilarious and uncompromising language, using expressions such as 'case law journalism', 'spam jurisprudence', 'rank anxiety' and 'nothing happening'.[33] Of course, he may to some extent be speaking tongue-in-cheek, but he does make us reconsider our role. When I sent Schlag's much-read essay to Leiden University professor, Ton van Raan, an international expert in bibliometrics, he sent me this e-mail in return:

> I have yet to hear anybody speak so colourfully about his own profession. It does happen from time to time that specialists ask themselves whether anything of substance happens in their field. This can be without respect for the work in hand (because it doesn't produce anything anyway, the attitude of Pierre Schlag), or with respect for the work in hand, but unfortunately there is no progress. We still do not know exactly how

[32] Tomas Sedlacek, *Economics of Good and Evil. The Quest for Economic Meaning from Gilgamesh to Wall Street*, Oxford: Oxford University Press 2011, p. 300.

[33] Pierre Schlag, 'Spam Jurisprudence, Air Law, and the Rank Anxiety of Nothing Happening (A Report on the State of the Art)', in: *Georgetown Law Journal*, 97, 2009.

> the cell works, what causes cancer, etc. I once heard a molecular biologist from Karolinska University argue the following: 'We work hard, but there has not actually been any real progress since the nineteen-seventies.' The social sciences and the economy are often affected by professional pessimism as well. Only in the natural sciences there is an indestructible optimism, especially in physics and astronomy. Every bit of research is a building block in a structure that keeps on getting bigger and more beautiful; technical and computer sciences as well. Professional pessimism will be greater, I think, the closer the field relates to socio-economic problems. After all, such problems cannot be resolved easily and quickly, whilst entire armies of researchers are working on them worldwide. I can imagine that this can also lead to despondency at times. However, the question is whether such pessimism is justified. It is evident that our world has improved considerably, also by the scholarly work in the humanities and in law.[34]

As a former law dean, my sabbatical has given me the opportunity to contemplate the numerous issues confronting the legal discipline which I have experienced and observed in passing over the years. I was able to test many of the sometimes quite intuitive decisions I made against much of what has been written about higher education and research – of the existence of which I was only half aware. Hence this book, which I write for my fellow deans across the world, department heads, university presidents and administrators, legal practitioners and all others who deal with the exciting academic branch of law.

And since I have not only built up a sense of a dean's responsibility, but also gained some personal experience in this field of legal education and research over the past years, I have constructed most chapters to conclude with a summary of observations and some views and advice for the future, based on others' research findings as well as my own personal experience. Having said this, I do realise that the idea of writing a book on law schools, their education and research, their outreach and role in society, the way they are governed, together with some input from developments *worldwide*, may seem somewhat ambitious.

I have constantly been challenged by the versatility of such terms as 'university', 'law school', 'student', 'lawyer' and 'legal practitioner'. I have chosen as far as possible to describe the 'university' as an institution for

[34] See further Tony Becher and Paul R. Trowler, *Academic Tribes and Territories: Intellectual Enquiry and the Culture of Disciplines*, Buckingham and Philadelphia: SRHE and Open University Press 2001; Paul Trowler, Murray Sanders and Veronica Bamber (eds.), *Tribes and Territories in the 21st Century: Rethinking the Significance of Disciplines in Higher Education*, London and New York: Routledge 2012.

teaching and research; a 'law school' as an institution where, almost always within the context of a university, 'lawyers' are trained – 'lawyers' who subsequently enter the 'legal professions' (the law firms, the courts, the legislature, and so on), although I know very well that in many jurisdictions further training is necessary, and moreover that many law graduates will never go into these typically legal professions. This has been a means for me to bring focus to the book. To put it in more pregnant terms: law schools are academic institutions where future judges and lawyers are trained.

This may be considered to be too ambitious a project, but I decided nevertheless to give it a try.

Some methodological remarks

Finally, some methodological remarks, and even some allusions to the weaknesses – one may even call them flaws – of this book. It opens with a brief look at law schools worldwide, as well as at some strategic questions faced by the universities of which they are a part. Yet some may argue that it is not clear that there is any such thing as global legal education conducted in universities; instead, it might be the case that different kinds of academics are trying to do different kinds of things with different kinds of students and different kinds of legal professionals in different kinds of institutions, in different kinds of countries, all of them currently in a state of flux. If there are connections to be made, some may say this is too short a book in which to do so.

This, indeed, may well be the first shortcoming of the book, in other words my ambition to say something meaningful about law schools across the world. Having researched the available literature and pulled together my personal observations and experiences as well as the input from colleagues and friends in the field, the differences, variations and continuous changes turned out to be much greater than I had initially anticipated.

To begin with, at a global level, law schools deal with very dissimilar students: some schools are very selective in their intake, others not at all; some receive first-year students aged 18, others have 24-year-olds in their entry classes; some schools call themselves professional, others academic; some have very high tuition fees, others may be free; some have law courses lasting only one year, others five or six; some provide only undergraduate education, others graduate or even

postgraduate; some carry out cutting-edge research, others hardly engage in any research at all.

Moreover, the socio-economic and political circumstances in which legal study and research have to be conducted are very different, varying from the small law school in an African country to generously endowed elite schools in the US, Australia, Canada and the UK, to the legal education institutions on an industrial scale in many of the European and Latin American countries.

Yet I live in hope that these differences are addressed in a meaningful manner in this book, and I beg the reader's pardon for some unavoidable Dutch–European centredness. Readers with a common law background may find the position in the so-called civil law countries (continental Europe, for example, and Latin America) particularly striking, and *vice versa*.

In a way, the second weakness of the book may be that it is written in English. English, of course, has become the world's *lingua franca*, and much of what has been written about law schools already comes from the common law countries. I thought it sensible to follow up on this literature – a choice which is both a risk and an opportunity. The risk is that the use of English – or any language for that matter – makes the world appear much more neatly arranged and comprehensible than it really is, by paying insufficient attention to cultural and societal differences, for instance. It is striking to see the complacency with which some authors from the common law countries implicitly yet sincerely regard their own legal system as the obvious or only one – as though law were not taught or researched anywhere else. My book runs the considerable risk of falling into this trap as well. All the same, the opportunity I spotted was that I might be able to offer some counterbalance to precisely this kind of 'common law centricity' by also writing in English, but from a non-English-speaking, Dutch, viewpoint.

A third possible weakness of the book that deserves to be highlighted from a methodological perspective is that I often choose both the *external* viewpoint of academics of other disciplines on the one hand, and my own personal *internal* perspective on the other. An example of the former can be seen in Chapter 3, for instance, where questions are addressed to our discipline such as: 'Do you, legal people, really belong in the university?' In terms of the latter perspective, I asked myself the question: what do *I* think, after being a dean for quite some time, about how things should be done in the law school? As the reader will notice, I therefore talk about 'us' and 'them', thus adopting internal and external perspectives,

respectively. It is precisely this switching of perspective that my colleagues have encouraged me to adopt: 'You are one of us, so bring in your experience, even if it is anecdotal, including your frustrations.' However, from a methodological point of view, this approach can be somewhat troublesome.

The final weakness may be that I am a private law expert, and not an expert on the many different issues that I cover in this book. Like most deans, I am not a specialist in university finance, real estate, governance, marketisation, open access, pedagogy and so on. Deans have seldom been trained as deans; they are senior academics who have been appointed to the role and have to learn on the job. The added value of this book, though, may precisely be this broad and generalist, non-expert and experience-driven dean's perspective. I trust the reader will find the books, papers and websites mentioned in this book helpful.

Having said this, our discipline is certainly not 'much ado about nothing'. Law is vital for people to be able to co-exist, whether locally in our towns and villages, at national and supranational levels within our continents and regions, or as citizens of the world. The concept of the rule of law, for example, applies everywhere and at all levels, be it in a village, a nation state or at global level. Immerse yourself in the World Justice Project Rule of Law Index, a fascinating comparative initiative to strengthen and expand the rule of law everywhere.[35] It provides data on different aspects of the rule of law, such as limited government powers, absence of corruption, order and security, fundamental rights, open government, effective enforcement and effective civil and criminal justice. The annual reports of the project should be essential reading for law students and academics, for policy-makers, and for governments and judiciaries everywhere. In his inspirational book, *The Rule of Law*, Lord Bingham has got it right:

> [I]n a world divided by differences of nationality, race, colour, religion and wealth the rule of law is one of the greatest unifying factors, perhaps the greatest.[36]

If law, indeed, is a condition for civilised living, one may conclude that the study of law must be one of the key disciplines in our universities.

[35] See www.worldjusticeproject.org (last accessed 8 February 2013); on governance stability, see the Worldwide Governance Indicators (WGI) Project, http://info.worldbank.org/governance/wgi/index.asp (last accessed 8 February 2013).

[36] Tom Bingham, *The Rule of Law*, London: Penguin Books 2011, p. 174.

True, its professors tend to be forever quarrelling among themselves about the nature of their discipline – often to the amusement of their colleagues in other disciplines. During my research, I have often contemplated the opening sentences of *The Story of Art*, by E. H. Gombrich:

> There really is no such thing as art. There are only artists.[37]

In this book, I have attempted to bring the legal discipline and *its* artists a bit closer together – so that we can learn from one another and in the end appear stronger as a discipline. Consequently, my efforts – patchy and impressionistic though they may be – show how far I have come in my one-year sabbatical, which was kindly offered to me by my ever-inspiring colleagues from the Leiden Law School and the university to which I belong.

[37] E. H. Gombrich, *The Story of Art*, London: Phaedon 1950.

1

Law schools: some preliminary sketches

1.1 Law schools in all shapes and sizes

Throughout the world, law schools, or law *faculties* as they are also called, exist in many different shapes and sizes, as do the universities of which they are a part. Many prepare their students for the legal professions, others just provide legal education; the provision of professional specialisation may or may not follow. This chapter will glance briefly at the diversity amongst law schools in their approach to education and research, across the world's five continents. The second chapter will – again briefly – examine some of the strategic questions faced by the universities of which most of today's law schools form a part. The following chapters of the book will look in greater detail at some of the different aspects of law schools, including education, research and governance.

Universities and other institutions offering legal education range from, for example, the selective elite law schools in the US that target some 200 or fewer freshmen on an annual basis ('the best, brightest, and most academically oriented', as many of their websites claim); to the equally selective schools in the UK, where Oxford and Cambridge with their collegiate system accept around 220 of the smartest undergraduates each year; to the large, open access schools in Italy, the Netherlands and many other European countries, where up to 1,000 or even more students enrol each year, and where academic education is still a public good, carrying with it the resultant, prevalent high drop-out rates. Here we have, directly, one of the most important differences in the approach to legal education at universities worldwide: 'open access' or 'selection at the gate'. We will revisit this universal quandary later in this book.

1.2 The United States and the United Kingdom

For centuries the common law countries managed without university-educated jurists. Although now boasting some 100 law schools, in terms

of legal education, England was a latecomer on the university scene.[1] Legal education has been traditionally associated with or indeed closely tied to the legal profession, at the Inns of Court in London. These law schools did not rank as fully fledged law faculties, forbidden as they were to teach Roman law. In Oxford, civil law (Roman law) and canon law were taught from the twelfth century but civil law was never regarded as anything more than 'a necessary addition to canon law'.[2] After the Reformation, only civil law was taught, and, although the first chair of English law was created in the mid-eighteenth century, there was no degree in English law until the late nineteenth century.[3] In 1967, only 40 per cent of solicitors were graduates,[4] and, although legal practice has now become a graduate profession, it is still possible to qualify as a solicitor or be called to the bar with a degree in some other subject such as classics or history, followed by a one-year conversion course and in-house training in a law firm or at the Inns of Court, as I noted previously. Nevertheless, today most British law students follow a three-year undergraduate course of law before entering the profession.

Amongst today's US law schools, Harvard Law School, dating back to 1817, is the oldest still in operation. Law school in the US is a postgraduate professional discipline geared at training students for the bar. It follows on from four years of academic, non-law undergraduate university education (often called 'college'). Hardly any law is taught in college. By contrast, in Europe and in most other countries of the world, students receive a sufficiently sound general education at secondary or high school level whereby they are prepared to enrol directly in their country's universities on the course of their choice, whether law, medicine or literature, etc. In these countries, law is generally considered an academic discipline, aiming from the outset at educating 'academics', for gaining access both to the legal professions as well as to the university as future law professors. In most countries, undergraduate degrees in the American sense with a liberal arts approach do not exist, although the idea of law as a graduate programme seems to be spreading beyond

[1] William Twining, *Blackstone's Tower: The English Law School*, London: Sweet & Maxwell 1994, Chapter 2.
[2] Antonio García y García, 'The Faculties of Law', in: *A History of the University in Europe*, Vol. I: *Universities in the Middle Ages*, 1992, pp. 388 ff.
[3] F. H. Lawson, *The Oxford Law School, 1850–1965*, Oxford: Clarendon Press 1968, Chapter 1.
[4] William Twining, *Blackstone's Tower: The English Law School*, 1994, Chapter 2, p. 36.

the US nowadays, for example in Australia, Japan, South Korea and other Asian countries. These two fundamentally differing systems demonstrate another crucial difference in legal education worldwide: American students start law school at the age of 23 or 24, whereas in most other countries law students tend to commence their law studies when they are 17 or 18. This is close to the medieval concept of a law student or a medical student, although the vast majority of entrants to a university in those days were much younger, 14 or 15.[5]

After completing their law degree (a so-called JD), it is customary for American students to pursue the so-called 'bar exam' a few months after graduation. However, it is a fact that many American JD holders, like law graduates elsewhere, never actually practise, or simply practise for short periods before changing careers. These bar examinations, where federal law and state law are tested, are administered by agencies of the individual states, but it is the American Bar Association that controls the accreditation of law schools in the US. While certain states permit graduates from unaccredited law schools to take the bar exam, they impose additional obligations on the applicants. For example, California requires them to take a pre-bar exam (the so-called 'baby bar') before being permitted to take the actual bar exam. Additionally, all licensed lawyers must pass the bar exam of the state where they wish to practise. Merely getting a degree does not qualify you to practise. Pass rates of bar exams vary from state to state, from as high as 90 per cent, to 60–70 per cent.

In addition to the variation in the average age of law school entrants and the differences between legal education being considered either an undergraduate or a graduate activity, we now come to a third anomaly: that of whether the bar exam qualifies as a passport to the legal profession or even to practise law as such. Many countries do not have such an additional entrance exam: a general graduate professional education programme suffices.

With respect to research, there are also many differences to note. In the UK, for instance, legal research was for a long time primarily focused on explaining legal rules for barristers and solicitors. In fact, that was how it all started when, on 23 June 1753, Dr William Blackstone, Fellow at All Souls College in Oxford, announced his first course on the laws of England:

[5] Antonio García y García, 'The Faculties of Law', in: *A History of the University in Europe*, Vol. I: *Universities in the Middle Ages*, 1992, pp. 183–4.

> not only for the use of such Gentlemen of the University, as are most immediately designed for the Profession of the common law; but of such others also, as are desirous to be in some Degree acquainted with the Constitution and Policy of their own Country.

The original announcement still hangs on the wall of All Souls' law library, Anson Room, in the Codrington Library, mentioning that 'The Course will be completed in one Year.' Blackstone's courses on common law became a massive success and led to the publication of *An Analysis of the Laws of England* in 1765, which is, in itself, one of the strongest examples of the entwinement of teaching and research.[6] However, it was only from the 1960s onwards that legal scholarship began to really consider a greater range of issues to do with the nature, operation, efficiency and morality of law in the UK.

In the US, legal scholarship had a somewhat earlier start, but was, until recently, mostly carried out in a handful of law schools or by just a small number of the faculty of a particular law school. Today, almost every US law school has adopted a research and writing agenda – whether good or not.[7] This is a matter of controversy among American legal educators: do all law schools need to have such a concentration on research? The importance of retaining research faculty may be driven by the desire or need for high rankings, and may have a particularly perverse effect on faculty hiring. The overwhelming majority of new faculty hires in 'elite' and 'want-to-be' elite law schools are holders of dual degrees (JD and PhD). The vast majority of these hires have never practised law, whereas the vast majority of the students they are teaching have all initially practised law.[8]

1.3 The European continent

On the European continent, legal education and research, which dates back to the twelfth century in Bologna, have always been – more or less content – bedfellows. Legal education in most European countries today is split into two phases: a theoretical instruction at the university law

[6] Dennis R. Nolan, 'Sir William Blackstone and the New American Republic: A Study of Intellectual Impact', in: *New York University Law Review*, 52, 1976, pp. 731–68.

[7] Richard W. Bourne, 'The Coming Crash in Legal Education: How We Got Here, and Where We Go Now', in: *Creighton Law Review* (ssrn.com/abstract=1989114), 45, 4, 2012, pp. 46 ff.

[8] For a good discussion, see Brian Tamanaha, *Failing Law Schools*, Chicago and London: University of Chicago Press 2012.

school leading to a bachelor's degree (LLB) and a master's degree (LLM), followed by in-house practical training of varying lengths. The 1998 European Bologna Declaration (which was not legally binding) heralded the introduction of the bachelor-master ('Ba-Ma') system across Europe. This Ba-Ma system has basically three objectives: to achieve a more comparable system of higher education in the countries of the European Union, consisting of a three-year bachelor's and a one- or two-year master's; to increase student mobility within Europe by enabling students to, for example, take their master's degree at another university, preferably in another European country; and to allow students to complete their university studies with a (three-year) bachelor's degree if they should so wish.[9] Other, related, aims include: improved employability of graduates on the European labour market; increased competitiveness of European legal education; more comparable quality assurance; and the mutual recognition of degrees in Europe.

Since then, many continental European countries have implemented the Ba-Ma system, with the bachelor cycle lasting three years and the master one or two. Rapid reformers were Belgium, the Netherlands, Luxembourg, the Scandinavian countries, France and Italy. However, different paths were taken: the Netherlands and some Nordic countries opted for a four-year curriculum (3 + 1, although the extent to which the Bologna model has been implemented varies), whereas Belgium turned its structure to 3 + 2, and France ended up with 3 + 1 + 1 or 3 + 2. Overall, little time was taken for in-depth reflection, and the changes introduced were rather pragmatic.[10] The countries in the centre of Europe were 'rather slow or thoughtful movers',[11] while English and Irish law schools did not move at all. Unfortunately, Bologna did little to increase student mobility in the master's cycle, and for many European students it remains difficult to compare and understand the different systems, courses and assessments that still exist today.

Italy – where the whole idea of a law school started at the end of the eleventh century in that magic little town of Bologna with probably no more than 10,000 souls – originally introduced the Ba-Ma system for its law schools but quickly decided to return to the previous situation

[9] *Bologna – An Overview of the Main Elements*: www.eua.be/eua-work-and-policy-area/building-the-european-higher-education-area/bologna-basics/Bologna-an-overview-of-the-main-elements.aspx (last accessed 21 February 2013).

[10] Frans Vanistendael, 'Bamalaw: A Decade's Assessment of Renewal in Legal Education', in: *Legal Education in the EU, a Bologna Handbook*, Berlin and Stuttgart: Raabe and the European University Association 2010.

[11] *Ibid.*, p. 7.

whereby law is currently a five-year study programme.[12] In Spain, the implementation of 'Bologna' only started some years ago. As law is an undergraduate study programme there, the length of the bachelor phase remains at four years.[13] Among the recognised deficiencies in the Spanish education system are the lack of communication, reasoning and legal argumentation skills of some law graduates. As in most other places in the world, law schools in Spain tend to use the large, group lecture methodology.[14] But since Spanish universities are currently adapting to the Bologna Process, this is clearly a time of significant change.[15]

In France, there is the peculiar situation of law being taught at two very different types of institution: the universities and the so-called '*grandes écoles*'. The division between the university law schools ('*facultés de droit*') and the *grandes écoles* originated in the seventeenth and eighteenth centuries. The French kings mistrusted the traditional universities, and royal academies and *écoles* emerged as a result. It was Napoleon who reinstated the law schools at universities after their abolition in 1795; they were then equipped to prepare students specifically for the legal profession. The reform movement, which lasted from the end of the nineteenth until the beginning of the twentieth century, did not end the historic rivalry between the universities and the *grandes écoles* for the best students and staff.[16] Until recently – with the Institut d'Études Politiques in Paris (Sciences Po Paris) seeking to emulate the US model with its own law school, a controversial development in France – these very selective *grandes écoles* did not offer pure law degrees. Rather, legal studies were part of a broader interdisciplinary curriculum. Although the *grandes écoles* tend to attract the brightest students, most lawyers and magistrates went to traditional law schools – with the exception maybe of administrative judges, who are often graduates of Sciences Po Paris or the École Nationale d'Administration (ENA). The French system demands a four-year degree (Master 1) as a prerequisite for eligibility to enter and train for the legal profession. For legal academics it is not unusual to hold

[12] Paolo Flavio Mondini, 'Italien', in: Christian Baldus, Thomas Finkenauer and Thomas Rüfner (eds.), *Bologna und das Rechtsstudium*, Tübingen: Mohr Siebeck 2011 (in German).
[13] Association Henri Capitant, 'La formation du juriste', www.henricapitant.org/node/30, 2011 (in French) (last accessed 12 December 2013).
[14] Soledad Atienza, 'The Evolution of Legal Education in Spain', in: *Journal of Legal Education*, 61, 3, 2012, p. 472.
[15] *Ibid*., generally.
[16] Julien Walther, 'Frankreich', in: Christian Baldus, Thomas Finkenauer and Thomas Rüfner (eds.), *Bologna und das Rechtsstudium*, Tübingen: Mohr Siebeck 2011.

degrees from both a law school and a *grande école*. The university's *facultés de droit* often (but not always: lawyers are frequently accused of doing more consultancy than research *per se*) have a strong research agenda in France; academic staff working at Sciences Po Paris are also increasingly subject to research targets. Since 2007, Sciences Po has offered two very practice-oriented, internationally designed master's programmes, giving access to the legal professions, without requiring a university law school degree.[17]

Germany, a fierce antagonist of the Bologna agreement, has kept legal education within the realm of the universities, as is the case elsewhere in Europe. However – almost uniquely – legal education in Germany, which is entirely state-funded, is closely watched over by the ministries of justice of the *Bundesländer* (the states), with the examining body being made up of professors and members of the legal profession, such as judges, prosecutors and ministry officials. Since 1877, legal education in Germany has consisted of these university studies and a two-year practical (training on the job) phase called the *Referendariat*. Only when students successfully complete both phases do they become fully qualified jurists ('*Volljurist*'). In order to be admitted to the *Referendariat*, students have to take the first state examination at the end of the university phase. The highly selective exam consists of two parts: 30 per cent is examined at the university and 70 per cent during the actual state exam. The education of lawyers thus remains strongly regulated by the federal government and the *Bundesländer*.[18] For those students who do not make it to the *Referendariat* after completing the first three years, their dream of entering the legal profession, and *de facto* private business, is shattered. This system may lead to a *Zweiklassengesellschaft* (a two-class society) of '*Volljuristen*' and other '*nur universitär ausgebildeten Juristen*'.[19] However, some universities are now offering a master's-level law degree ('*Diplomjurist*'), although this still does not give access to the bar and the judiciary. The same holds for those who graduated from some new full-fledged bachelor/master programmes in law and

[17] Christophe Jamin, *La cuisine du Droit. L'École de Droit de Sciences Po Paris: une expérimentation française*, 2012.

[18] Heino Schöbel, 'Einführung des Bologna-Modells in der deutschen Juristenausbildung?', in: Christian Baldus, Thomas Finkenauer and Thomas Rüfner (eds.), *Bologna und das Rechtsstudium*, Tübingen: Mohr Siebeck 2011 (in German).

[19] Ute Mager, 'Die Ausbildungsreform von 2002. Ziele, Inhalte, Erfahrungen und Folgerungen für weitere Reformen', in: Christian Baldus, Thomas Finkenauer and Thomas Rüfner (eds.), *Bologna und das Rechtsstudium*, Tübingen: Mohr Siebeck 2011 (in German).

economics which combine traditional legal education with Business Administration. These graduates, too, are not entitled to become a judge, public administrator or practising lawyer, but they are highly welcomed by private entities. Some German students can improve their chance of becoming qualified jurists if they manage to enrol in the Bucerius Law School, a small and selective private institution founded in 2000.

In 2012, the Wissenschaftsrat (Germany's Council of Science and Humanities) published a comprehensive report on legal education and research in Germany.[20] Among many other issues, the report warns against the trend of over-specialisation in legal education.

In Russia, legal education is provided both within universities and by stand-alone law institutes. In total, some 350 law schools are listed, of varying quality and size. The Russian/Soviet system of education – in the pre-World War Two period and at all levels – was 100 per cent state-funded and state-controlled. Private courses were sometimes taught but never recognised for state credit. Since the dissolution of the Soviet Union, things have changed dramatically in this regard, as has so much else in Russia and the region. While centralised state control of education remains quite strong, Russian universities have witnessed a sharp drop in the number of state-funded student scholarships at most faculties, law included. This has been accompanied by a concomitant increase (from zero in the pre-1991 era) in privately funded places for students.

The Soviet Union traditionally had two major law schools: those of Moscow and St Petersburg, although there were other strong centres of legal education and research, such as Ekaterinburg (Sverdlovsk) and Saratov. By 1999, the number of law schools had increased to over fifty. Today, of those students studying law in Russia, only 10–15 per cent are actually receiving a really strong legal education in these institutions; the rest are muddling along in the country's many weak schools. Russia too has been influenced by the European Bologna Process, and in the last decade it has seen its legal education redesigned along the lines of 'Bologna'. Subsequently, since 1991, an increasing number of Russian law students have been spending a part of their undergraduate law studies abroad. Furthermore, some have managed to pursue postgraduate degrees abroad. However, for the present, the overall numbers of Russian students (undergraduate and postgraduate) studying abroad – in absolute figures and in percentages – remain much smaller than is

[20] In English: Wissenschaftsrat, *Prospects of Legal Scholarship in Germany: Current Situation, Analyses, Recommendations*, 2012.

the case in, for example, China. This is also true for legal studies. It remains to be seen whether visionaries in Russia will be able to close this 'study-abroad gap' in the foreseeable future. Some of the major Russian law schools have begun to stimulate their academic staff by offering additional funding for research and publishing as well as for attending scholarly conferences both inside and outside Russia. Yet, for now, these 'extras' seem to be the exception rather than the rule. As we have seen in many other countries, legal education here is almost completely theoretical and taught by means of lectures to large groups of students. A law course traditionally consists of a five-year degree, directly after secondary school. The Russian legal profession is not as strictly regulated as one might expect in light of the Soviet past, although there have been moves towards unification and more encompassing regulations in the last few years.

Turkey, nested in one of the most strategically important geographical locations in the world between Europe and Asia, became a signatory to Bologna in 2001. A university law degree in Turkey usually takes four or five years. After a bachelor's degree, students can pursue a master's programme, but this is not a condition for access to the profession. The best of the country's approximately forty-five law schools – several more are currently in the process of accreditation – only accept top students, through a centrally organised admissions procedure. Despite the arrival of a number of new – often private and wealthy – law schools during the past years, with correspondingly higher fees (thirty or more times higher than the state institutions), the old and respected law schools of Istanbul and Ankara are still the most prestigious in the country – in terms of teaching, strong research, and the quality and reputation of their alumni. Yet, as in many other countries, Turkey's legal education is mostly of a rather theoretical character, with little contact between the professors and their students, partly due to the tradition of large group teaching and lack of adequate funding, among other things. Practical skills are supposed to be gained in practice, after graduation.[21] This rather gloomy picture of Turkey's legal education,[22] which unfortunately seems to mirror the situation elsewhere in its higher education system, provides opportunities for some of the wealthiest

[21] Julian Lonbay, 'Experts' Report on the Legal Education and Training System in Turkey', in: *SSRN Electronic Journal*, August, 2009.

[22] Fatma Mizikaci, 'European Knowledge Society and Higher Education: Universities between the Tradition and Transformation', in: *Yükseköğretim Dergisi*, 2, 2, 2012.

newcomers on the stage, such as the selective law schools of Koç, Bilkent and Başkent, to mention but a few.

1.4 Asia

In many other parts of the world, such as the former Soviet Union, the Arab countries, Latin America and the Far East, legal education is mostly based on the continental European model, with most law schools putting the emphasis on education rather than on research. Meanwhile, as we have seen, changes and transformation in legal education are sweeping across East Asia where law schools and other institutions of higher education still face major problems in areas such as funding, staffing and quality, as well as the dilemmas of change versus tradition, and authoritarian versus democratic. In the volume *Legal Education in Asia – Globalisation, Change and Contexts* (2010), edited by the Asian Law Centre at Melbourne Law School, an inspiring account is given of the numerous and vibrant developments in that part of the world and leaves the reader in no doubt that legal education in East Asia, in China, Japan and South Korea, and elsewhere in the region, is undergoing fundamental change, both institutionally and pedagogically.

American influence is strong in China: much stems from the close, mutually dependent economic relationship between these two countries. It is not surprising then to see that a common feature of these changes seems to be the introduction of elements of the US and Australian systems of legal education, even though China has a civil law system. China's almost 650 law schools offer four-year undergraduate law programmes for the country's 700,000 law students. At graduate level, Chinese law schools have started offering selective graduate LLM programmes, which are more academically oriented, and doctoral PhD programmes. This emulation of 'Western' structure in legal education can be attributed to a collection of push and pull forces: many Chinese legal scholars have studied in the US, course materials are in English and easily accessible, and the US is exercising its influence in the region through international development agencies such as the World Bank.

Chinese universities with law schools offer the LLB degree. Many are now accredited to also offer an LLM. Moreover, some also offer a JM degree – for those who did not major in law in their undergraduate studies. This track has been analogised to the American JD, but there is a great deal of controversy in China with respect to this programme. The JM degree seems to be held in less esteem among faculty and students

than the LLM, the former being a vocational degree, and not an academic degree. PhD programmes are limited as to subject-matter, and schools must be accredited to offer a PhD programme in each specific subject.

To obtain a licence to practise as a lawyer in China, one must pass the Judicial Exam and complete a year-long apprenticeship. A law degree is not a prerequisite to qualify to take the Judicial Exam; rather, a four-year university degree in any subject will suffice. Most applicants take so-called 'cram courses' to study for this exam.

In any event, the American style of a graduate JD degree is spreading throughout Asia but is still not offered in China. The closest to the JD is the degree offered by the School of Transnational Law of Beijing at the University in Shenzhen. However, three universities in Hong Kong offer LLBs as well as additional JD degrees, a situation that is mirrored in, for instance, India and the Philippines. Graduates who wish to practise law after their JD have to follow a two- or three-year postgraduate programme in law.[23]

In Japan, there are nearly 100 law schools offering undergraduate education. However, in the 1990s, a major reform of legal education in Japan was requested by a dissatisfied business community. It wanted more and better-educated lawyers with broader academic backgrounds, who could more effectively protect and realise business interests, often contrary to Japan's very bureaucratic government. The inherent reason for the shortage of lawyers was the Japanese government's strict quota of just 500 new lawyers per annum for the entire country. This policy was effected by setting the level of the bar examination such that the pass rate was extremely low, i.e. around 3 per cent.

For a long time, Japan was proud of being everything but a litigious society: lawyers were rare and courts played a very limited role in dispute resolution. In an increasingly globalised society, this position had to change. With very low odds of passing the bar exam, a situation existed where students merely studied purely to pass this exam. Students tended to simply skip the regular university courses, preferring to attend 'cram schools',[24] where the focus was mainly on teaching exam techniques instead of educating good lawyers. Japan, therefore, wanted to move towards a more American-style form of graduate-level legal education,

[23] Jeffrey S. Lubbers, 'Japan's Legal Education Reforms from an American Law Professor's Perspective', in: *SSRN Electronic Journal* 1552094, 2010, pp. 15 ff.

[24] From the slang term 'cramming', where students memorise a large amount of material in a very short period of time.

with fewer students (3,000 at the most), in two- or three-year programmes, most of whom were added to undergraduate law departments, and much higher bar exam pass rates of around 70–80 per cent. The new law schools would embark on more interactive teaching methods and brand-new curricula. In 2004, however, when the new system was launched, instead of the expected fifteen law schools, the astonishing number of sixty-eight new graduate law schools were established, with around 5,800 students selected from 72,000 applicants. Six more schools opened in 2005. Admission procedures became rather complex, although the new system at least led to an increase in female students.[25] Japan's legal education now finds itself in a rather confusing transitional phase.[26]

South Korea also had a very low ratio of lawyers per head of population, and the country has had problems in its legal sector similar to those in Japan. It was inevitable therefore that it would transform its system of legal education.[27] The country is now replacing its bar examination with a Lawyers Admission Test which focuses on assessing a student's ability to produce practical advice and the application of legal principles.[28] Pedagogical reforms are more pervasive in South Korea than in China, mainly because they are stimulated by chartered and external accreditation standards. One author notes that the South Koreans seem to have learned some key lessons from Japan's experience.[29]

Singapore has a common law tradition owing to its former colonisation by the British. Its second law school was opened in 2007 at the Singapore Management University, with a curriculum that, at least according to its website, is in no way inferior to any European or American law school. In addition, Singapore's higher education system seems to be rapidly becoming a very international environment. Its first law school, NUS Law, has a faculty that is much more international, in terms of nationality and foreign doctoral experience at prestigious British and American universities, than almost every law school in Europe. It is

[25] Shigenori Matsui, 'Turbulence Ahead: The Future of Law Schools in Japan', in: *Journal of Legal Education*, 62, 1, 2012, pp. 14 ff.

[26] *Ibid*., pp. 25 ff; Jeffrey S. Lubbers, 'Japan's Legal Education Reforms from an American Law Professor's Perspective', in: *SSRN Electronic Journal* 1552094, 2010.

[27] S. Spencer Reyner Lee, 'Legal Education in Korea: New Law School Reforms', in: Stacey Steele and Kathryn Taylor (eds.), *Legal Education in Asia: Globalisation, Change and Contexts*, London and New York: Routledge 2010.

[28] *Ibid*., p. 174.

[29] Jeffrey S. Lubbers, 'Japan's Legal Education Reforms from an American Law Professor's Perspective', in: *SSRN Electronic Journal* 1552094, 2010.

also interesting to note that students are selected at the gate, as is the case with many other universities in East Asia.

In Indonesia, the world's most populous Islamic country, the legal system is based on the European civil law system, introduced by the Dutch during the colonial era. Yet law in Indonesia is also being influenced by traditional customary law (*Adat*), and increasingly by Islamic law (*Sharia*), notably in the province of Aceh. It is unfortunate to see, however, that the core of the country's legal education curriculum has not fundamentally changed since the colonial period. The same holds for the way law is taught in today's Indonesia in the more than 200 law schools.

In his very critical analysis of current Indonesian legal education, the former law dean of the country's prestigious University of Indonesia, Professor Juwana Hikmahanto,[30] explains that any progress is hindered by a range of factors, such as the old-fashioned way new faculty are recruited, seriously outdated textbooks, poorly prepared professors, and a lack of societal and political willingness to really improve Indonesian legal education. Some assistance is under way, however, in the form of teach-the-teacher programmes undertaken in cooperation with foreign sister universities (see Chapter 8), but far more fundamental changes are needed.

India has a rich and ancient legal tradition illustrated by treatises like *Manusmriti* and *Arthashastra* dating from a few centuries before and after the birth of Christ. During the Mughal rule, Islamic law was widely used. However, the foundation of the current legal system in India was laid down by the British in the eighteenth century. Indian independence in 1947 saw the drawing up of a constitution that is the essential legal pillar for today's largest democracy. The main form of legal education in India has been a three-year university undergraduate-level course leading to a bachelor's degree recognised by the Bar Council of India. However, the need to enhance the standard of Indian legal education led to the establishment of 'National Law Schools' that offer a five-year degree course at undergraduate level after twelfth grade. This bachelor's degree is often a combined degree with, for example, a bachelor of arts or a bachelor of business administration. Since the establishment of the first National Law School in 1987 in Bangalore, there are today eleven National Law Schools spread throughout the country. A trend is visible in India's many universities offering law courses towards opting for a five-year undergraduate course instead of the traditional three-year

[30] Hikmahanto Juwana, 'Legal Education Reform in Indonesia', in: *Asian Journal of Comparative Law*, 1, 1, 19 January 2006, p. 215.

postgraduate study. Further programmes in the form of LLM and/or PhD opportunities are small in number, often leading to the pursuit of further studies abroad. Research work is very limited. There is a gradual but growing awareness of the need for a higher standard of legal education to provide this vibrant democracy with qualified lawyers.

1.5 Australia

Although the traditional route to practice is an undergraduate bachelor's programme, similar equivalents of the three-year JD programme are now also being offered in Australia. There are several underlying factors that favour this development:[31] the growing demand for law graduates, an increased interest in studying law among mature students, the fact that a JD is an internationally recognised degree, and there is a financial motive. Since law schools in Australia have been 'chronically underfunded', full fee-paying JD students help meet funding shortfalls. The Australian law deans have expressed concern that reserving a law degree for fee-paying postgraduates would further entrench inequality, driving law towards 'an elitist profession from a narrow social background'.[32] Melbourne's law school even shifted completely from undergraduate to graduate legal education. In Australia, legal education is not regulated by a single national body but at state level, which means that there are differences among the schools.[33] The country has thirty law schools, of which two are private. An Australian legal education usually starts with a bachelor of law degree, which most students begin immediately after high school. Students often combine their law programme with another discipline, such as medicine or engineering.[34] The bachelor's degree takes four years, and after that a student needs to complete a year of practical legal training such as an apprenticeship. Legal education in Australia has an academic approach, and all of the universities in Australia follow, to some extent, the Western European approach of combining research and education; clinical legal education is also gaining in popularity.[35]

[31] Donna Cooper *et al.*, 'The Emergence of the JD in Australian Legal Education Marketplace and Its Impact on Academic Standards', in: *Legal Education Review*, 21, 2011.
[32] Council of Australian Law Deans, *Consultation Paper for the Review of Higher Education Base Funding*, 2010.
[33] James Douglas and Luke Nottage, 'The Role of Practice in Legal Education: National Report for Australia', in: *Legal Studies Research Paper No. 12/28*, 2010.
[34] *Ibid.*
[35] Harvard Law School Program on the Legal Profession, *The Australian Legal Profession*, 2011.

1.6 Latin America

Law in Latin America is based on the civil law tradition. In many law schools, legal education is moving from a rather traditional approach, sticking to the conventional pedagogy,[36] to a more academic approach, with a greater focus on the research of both students and staff. The pace of this shift is slow, and the curriculum and its pedagogy in most Latin American law schools is still quite traditional, making it seem rather rigid and old-fashioned.[37]

On completion of high school, students commence undergraduate studies to obtain a basic law degree. They take a wide variety of mandatory courses, which cover the important areas of law, such as civil, criminal and administrative law. This broad curriculum may come at a cost to the depth of study. In Latin America, as in Europe with its Bologna Process, efforts are being made to improve comparability in the standards and quality of higher education qualifications, and the fostering of student and staff mobility throughout the region.[38]

Brazil, being a tremendously important economic power in the region, and fast becoming one in the world, has over 1,200 law schools of varying quality, consisting of public and private institutions, which is fairly typical of the continent as a whole. To be allowed to practise law in Brazil, a student must complete an undergraduate course, which takes a minimum of five years, including internships. In addition, a further examination at national level (*Ordem dos Advogados do Brasil*, OAB) is required, which is very similar to the bar examination in the US. The legal education curriculum in Brazil is still academic in nature, but students must also receive vocational training, and internships are an important part of the legal education.[39] Unless they wish to pursue an academic career, it is rare to have students who have completed their bachelor's degrees without an internship. The final exam has now been harmonised throughout the entire country.

Briefly, legal education in Brazil and other Latin American countries is facing broad challenges, going beyond the definition of the curriculum

[36] Juny Montoya, 'The Current State of Legal Education Reform in Latin America: A Critical Appraisal', in: *Journal of Legal Education*, 59, pp. 545 ff.

[37] *Ibid*., generally.

[38] Augusto Jaeger Junior, 'Lateinamerika', in: Christian Baldus, Thomas Finkenauer and Thomas Rüfner (eds.), *Bologna und das Rechtsstudium*, Tübingen: Mohr Siebeck 2011, pp. 194 ff (in German).

[39] Harvard Law School Program on the Legal Profession, *The Brazilian Legal Profession*, 2011.

structure. Inequality and the lack of diversity in access to legal education is a major problem in Latin America; many law students come from the wealthier segments of society.[40] Furthermore, institutions of higher education have seen an enormous growth in the number of students in recent decades. The situation has been no different for law schools. Critics of traditional legal education in Latin America, such as a former law dean of the Universidad de los Andes, in Bogotá, Colombia, think that it needs to become more flexible, so that legal education in Latin America can also help promote democracy and human rights.[41] An important development in Latin America's higher education is the increasing number of students studying abroad: only 15 per cent of those study in the region, 60 per cent go to the US, and the rest to Europe, particularly to Spain, the UK, France and Germany.[42]

Research in Latin America is concentrated in a small group of universities in the continent's major cities. The continent has an increasing number of good universities: for example, Brazil is home to the renowned public universities, such as the University of São Paulo which is widely considered to be the best university in Latin America, and the University of Rio Grande do Sul. However, a study of Latin America's doctoral education opportunities shows that these are, to a large extent, concentrated in Brazil and Mexico, and, within Brazil, in the state of São Paulo. The study supports the argument for more collaboration, with a clear capacity-building purpose, in order to overcome the considerable challenges in the region concerning the retention of researchers.[43]

1.7 Africa

Completing this global overview of law schools, universities and their legal research and education 'infrastructure', I move on to the African continent. Here, we will observe that, in developing countries, the

[40] Alfredo Fuentes-Hernández, 'Globalisation and Legal Education in Latin America: Issues for Law and Development in the 21st Century', in: *Penn State International Law Review*, 21, 1, 2002, p. 42.

[41] *Ibid*., p. 54.

[42] Isabel Cristina Jaramillo and Hans de Wit, 'Student Mobility Trends in Latin America', in: Hans de Wit (ed.), *Trends, Issues and Challenges in Internationalisation of Higher Education*, Amsterdam: Centre for Applied Research on Economics and Management, School of Economics and Management of the Hogeschool van Amsterdam 2011.

[43] Thomas Ekman Jorgensen, *CODOC – Cooperation on Doctoral Education between Africa, Asia, Latin America and Europe*, Brussels: European University Association 2012.

situation is often very different, and most worthy and needing of our full attention. No matter where you find yourself in today's globalising world, good legal education and research are of utmost importance for social stability, the rule of law and economic growth.[44] But many law schools across the world, including in Africa, quite understandably, struggle with basic needs, such as qualified teaching staff. Other issues high on many African law schools' agendas include the relatively high workloads of professors and other staff members, deficient course materials, a lack of translated foreign case law, a desperate need for academic books and reference works, insufficient ICT and other library facilities and inadequate buildings. Unfortunately, this is often compounded by an outdated pedagogical 'instruct and memorise approach', barely contributing to the development of academic thinking, and an absence of basic rules of scientific integrity. Across this continent, depending on locality, a political and academic culture hostile to such concepts as the rule of law and academic freedom prevails.

In addition, in many African countries, a weak secondary education system makes a high-quality start for students in law school more difficult. Having said this, it is important and encouraging to note that student and staff mobility may help law schools in developing countries to improve. In an interesting project, the Legal Education Center of the Pittsburgh Law School invited some of its former LLM graduates from developing and transitional countries to describe the impact of their education at their local law school. The resulting book, *The Export of Legal Education – Its Promise and Impact in Transition Countries* (2009),[45] contains impressive insights, for instance, into the positive ways in which legal education impacts the legal system in the recipient's home country.

The book also shows how cautious one has to be when addressing the phenomenon of law schools worldwide. The importance of a thorough legal education cannot be underestimated. In a paper on sub-Saharan Africa, Kenyan Robert Kibugi gives a good example of the importance of a good legal education: African societies, he says, need brilliant minds, not only in private practice, but also on the judicial bench, in the civil

[44] For a good discussion on a variety of related topics, see *Does Law Matter? On Law and Economic Growth*, Cambridge, Antwerp and Portland, OR: Intersentia 2011. This book is the 100th volume of the excellent Ius Commune Series, under the auspices of METRO, the Institute for Transnational Legal Research at Maastricht University.

[45] Ronald A. Brand and D. Wes Rist (eds.), *The Export of Legal Education: Its Promise and Impact in Transition Countries*, Farnham: Ashgate 2009.

service and in civil society, as well as in policy-making. African academics, he argues, have

> a tough task ahead, as far as legal education is concerned. They have to train lawyers who can practice law in the strict sense. But then, with too many in private practice, opportunities are scarce, forcing many to emigrate to the West in search of better opportunities. To nip this in the bud, [the academics have to] rethink their philosophy of legal education, so that the components of training prepare lawyers for their evolving roles in [African] society.[46]

But, apart from basic legal education needing more attention, the region also needs more investment in research, a better research infrastructure, more funding, and particularly more regional collaboration. Many African universities and their law schools have a poor research culture. An international study devoted to doctoral education worldwide points out the glaring discrepancy between South Africa, which is by far the major provider, and most other African countries. And, within South Africa itself, the study concludes, disparity persists, partly on account of the country's past.[47] The quality of legal education varies enormously, often, although not entirely, along formerly advantaged and disadvantaged lines.[48] As a result of the developmental needs of many of the African states, the emphasis has principally been on teaching, to provide suitably qualified persons to, *inter alia*, the legal profession – rather than research. Research, in many instances, is still hampered by a lack of resources, such as properly equipped libraries, as mentioned above. With regard to teaching, this situation has resulted in many, if not most, staff members being appointed as law teachers without any postgraduate qualifications. In South Africa, this situation was, and to a large extent still is, especially prevalent in the so-called historically black universities established under the policy of *apartheid*. The challenge there is to assist these institutions in their further development into fully fledged universities and law schools within a limited state budget. This, of course, cannot be achieved overnight.

[46] Robert Machatha Kibugi, 'Training Lawyers for the Sub-Saharan African Market: What Role for Academics? Perspectives from Kenya', in: *The Law Teacher*, 43, 1, 6 March 2009, p. 48.

[47] Thomas Ekman Jorgensen, *CODOC – Cooperation on Doctoral Education between Africa, Asia, Latin America and Europe*, 2012, p. 7.

[48] According to Rob Midgley, 'South Africa: Legal Education in a Transitional Society', in: Fiona Cownie (ed.), *Stakeholders in the Law School*, Oxford and Portland, OR: Hart Publishing 2010, p. 124.

The influence of the different colonial powers on their respective colonies in Africa on the level of tertiary education should not be underestimated. This influence is visible not only in the forms and styles of management, but also in the structure and traditions of the various universities, and perhaps more so with regard to the content of their law courses. As a result of colonialism, many curricula strongly reflect the legal systems and traditions of the colonial powers and, though to a much lesser extent, those of the indigenous peoples and even religious groupings such as Muslims and Jews. This process is sometimes referred to as white man's law versus indigenous (or customary) law. Since decolonisation and the attaining of their independence, most African states have generally embarked on a process of 'Africanisation' of their universities, including with regard to their law curricula.

The discourse on the ideal content of law courses is an ongoing discussion in, for example, South Africa. The foundation of South African law is Roman Dutch law coupled with a heavy influence from English law; indigenous law is usually studied as a totally separate discipline. The legal systems in African states are therefore sometimes described as pluralistic or mixed. The debate is often emotional, due to the cultural issues which form an inherent part of it. Law, after all, is also a cultural phenomenon. An additional difficulty associated with a greater recognition of traditional law is the fact that it is to a large extent unwritten, customary law with many variations among the different ethnic groups. This, as a result, sometimes lacks clarity and certainty. But most African law schools know that we live in a global world and that internationalisation is of ever-increasing importance, and that all this should be reflected in the content of the law courses presented by universities – it is a difficult balancing act!

In sub-Saharan Africa, legal education started in the colonial era. Colonial powers standardised legal procedures in their colonies, which gave rise to a need for attorneys. First, the educated African elite filled this gap, but subsequently a different form of legal education was needed.[49] Yet this did not lead to the creation of institutions for legal education within Africa. The majority of legal professionals in Africa during the colonial era were Europeans or Asians. The few Africans who did practise law were all educated in Europe.[50] European legal education,

[49] Samuel O. Manteaw, 'Legal Education in Africa: What Type of Lawyer Does Africa Need?', in: *McGeorge Law Review*, 39, 2008, pp. 912 ff.
[50] *Ibid*., pp. 915 ff.

however, was inadequate for the purpose of practising law in the colonies, not least because it did not teach the customary law which was applicable in the colonies.[51] After many African nations had gained their independence, institutions for legal education began to emerge. Because the newly independent countries had a great need for lawyers, European legal education was often copied with only minor modifications. Today, in most African countries, legal education is an undergraduate study, resulting in a bachelor's degree. The duration of the bachelor's programme varies from one country to another: for example, a Nigerian LLB takes five years,[52] whereas the LLB programme in Rwanda takes four years.[53] Admission to legal education in most African countries is gained through a written examination and sometimes a subsequent interview and further screening.

The language of instruction often constitutes a hurdle to the academic performance of students. As a result of the vast number of languages on the African continent, and the fact that most of these cannot by any stretch of the imagination be described as developed academic and scientific languages, it is practically impossible to accommodate every student in his or her mother tongue. Once again, the situation in South Africa can be referred to as an example. South Africa has eleven official languages of which only two (Afrikaans and English) can fulfil higher-order academic and scientific functions. Although the state has a constitutional duty to develop the African languages, not much progress has been made in this respect. This means that many – especially rural black – students have to cope with learning in their second or sometimes even their third language. This situation is further exacerbated by the fact that education at school level is often of such poor quality that students cannot read, speak and write Afrikaans and/or English properly. The challenge this presents to schools and legal education is obvious. Most South African universities therefore are obliged to offer remedial courses in order to better equip students for tertiary education.

Nonetheless, African legal education has its unique strengths. The curriculum is very international and comparative, letting students experience the different legal traditions, such as civil law, common law, customary law and religious law. It gives students a good understanding

[51] *Ibid*., p. 916.
[52] Okechukwu Chinwuba Oko, *Problems and Challenges for Lawyers in Africa*, Lewiston, NY: Edwin Mellen Press 2007, pp. 118 ff.
[53] See www.law.nur.ac.rw/spip.php?article27 (last accessed 9 September 2012).

of how legal issues are resolved in different legal traditions. Human rights, constitutionalism, legal history and jurisprudence are often core courses in the curriculum of African nations.[54] However, with the exception of South Africa, where legal education is relatively well supported, sub-Saharan law schools suffer badly from a lack of resources. Libraries are often poorly equipped and there are shortages of textbooks and other study materials and publications. Furthermore, the school buildings are often inadequate and overcrowded.[55] This is also reflected in the teaching pedagogy, arising from law teachers having to lecture in overcrowded classrooms.[56]

The difficulties of legal education in sub-Saharan Africa may directly impact the access to justice in those countries. The number of lawyers produced by African legal education falls far short of the number of lawyers needed for the basic constitutional requirements and structures of these countries. One of the worst examples of this problem is Niger, which has a population of 11 million, but fewer than 100 practising lawyers. Another major challenge is that many practising lawyers in Africa tend to migrate to the big cities, while most of the African population still live in rural environments.[57] It is in the interest of all developed countries to do what they can to help and support the rule of law and democratic institutions in Africa.[58]

Unsurprisingly, the demand for tertiary education in African states is immense. Most South African universities are bursting at the seams, especially because the *apartheid* era has created huge backlogs amongst the black population insofar as they previously had been denied opportunities to study at tertiary level. One of the most interesting contributions of law schools to African society can be found in the increasing number of clinical legal education programmes. These programmes provide students with the possibility to acquire practical legal skills while

[54] Samuel O. Manteaw, 'Legal Education in Africa: What Type of Lawyer Does Africa Need?', in: *McGeorge Law Review*, 39, 2008, p. 932.

[55] Jan Stromsem, *Africa Regional Rule of Law Status Review: Right to Justice* (USAID Report), Washington DC: 2009.

[56] Okechukwu Chinwuba Oko, *Problems and Challenges for Lawyers in Africa*, 2007, pp. 125 ff.

[57] Jan Stromsem, *Africa Regional Rule of Law Status Review: Right to Justice* (USAID Report), 2009.

[58] Thomas F. Geraghty and Emmanuel K. Quansah, 'African Legal Education: A Missed Opportunity and Suggestions for Change: A Call for Renewed Attention to a Neglected Means of Securing Human Rights and Legal Predictability', in: *Loyola University Chicago International Law Review*, 5, 1, 2008, pp. 87–106.

at the same time providing free legal advice to people who would otherwise not have access to justice. South Africa has been a front-runner in clinical legal education, with the first law clinic being established by Cape Town University in 1972.[59] And, although clinical legal education is not yet part of the curriculum of many law schools in Africa, this is definitely changing.[60]

1.8 Some conclusions

So far, the differences between and diversity among law schools across the world seem considerable. One of the most notable differences is the variation in the duration of legal studies in the law schools, ranging from a mandatory three years in most common law countries to up to six years in many of the civil law countries. Some students take even longer to complete their studies. In some European countries, the period of study is often extended for students who enrol for two very different programmes at the same time, such as law and history, law and political sciences, or even – for the real die-hards – law and medicine. However, some students manage to complete two programmes within the time allotted for a single programme.

Differences also exist in terms of the total costs for students associated with gaining a law degree, as well as in entry requirements, ranging from open access in most civil law countries to tough selection at the gate in many common law countries. Furthermore, the exit requirements differ greatly. In most countries, a law degree and a certificate to practise are two different things. In some countries, such as Germany, students must pass a final examination in order to be entitled to practise. In the US, a prerequisite to practise is passing the 'bar exam'. In other jurisdictions the final grade is calculated on the basis of the second- and third-year examinations for the bachelor's, and the fourth- (and sometimes even fifth-) year examinations for the master's. Other countries again allow law graduates to continue as practising lawyers without further formal hurdles, and, as we have seen, some also allow non-law graduates to become practising lawyers.

A question that is probably one of the most crucial, yet is also one of the most underrated for the whole enterprise of legal education, is who controls admission to the legal profession. We find a great variety of

[59] Okechukwu Chinwuba Oko, *Problems and Challenges for Lawyers in Africa*, 2007, p. 143.
[60] Jan Stromsem, *Africa Regional Rule of Law Status Review: Right to Justice* (USAID Report), 2009, p. 22.

answers across the world. Two Australian scholars distinguish four different, in their words, 'models of gatekeepers': the state, the law schools, the market and the legal profession itself. And, although there are definitely many subtle in-betweens – the authors themselves speak of 'a minefield of misunderstood context, misplaced assumptions and sheer cultural arrogance' – these four models of gatekeepers give some insight into how access to the legal profession can be designed and/or regulated. This is an extremely important issue because, as we shall see, each of the different models has a profound influence on the content, quality and level of the resultant legal education.

- The first model, that of *strict state control* over the number of legal professionals. can be found in countries such as Germany and Japan. The idea behind such, sometimes very stringent, quotas is that, where government covers the costs of professional legal training as well as the salaries of all trainees, it cannot afford to subsidise an unlimited number of students. The downside of this model may be the danger of governmental control over the content of legal education. Another drawback may be a lack of students with diverse values and backgrounds, with the result that the legal profession remains the elite group it has always been.
- In the second model, where the *legal professions* themselves determine who shall join them – England is an example – there is the risk of a guild being formed, 'the legal fraternity', possibly with an all too exclusive orientation on vocation.
- In the third model, in countries where the *market* exclusively determines who will practise and who will not, there may be no government or practitioner intervention at all. This model is the dominant one in most US states. According to Anderson and Ryan, in a market model, the content of legal education, with its unlimited supply of law graduates, tends to be more varied.
- The fourth model is that of the *law schools* as the gatekeepers to the profession. This is, more or less, the case in Australia and in many European countries. In this model, it is the law schools and their faculty who are responsible for the content of the curriculum, as well as the admissions and assessments – whether rigorous or more easy-going. There are also law schools which offer courses in law, but whose graduates are not allowed to enter the legal professions, either because of national legislation or through the absence of accreditation. These graduates may end up in jobs that require a more basic type of legal practice.

Law schools are fascinating institutions indeed, with their great variations in terms of focus on primarily vocational or academic, more research-driven, education; in terms of student numbers; in terms of entrance requirements, such as fees and access; in terms of exit requirements, such as the types of examination; and in terms of follow-up requirements, such as passing an additional bar exam to become fully qualified for the legal profession.

2

Universities and their strategic challenges

2.1 'Universitas: what a proud word!'

'*Universitas*: what a proud word! An institution comprising the totality of knowledge. An organism aspiring to the dynamic concept of both abstract and empirical totality', wrote George Steiner recently.[1]

'Universitas', an institution indeed. But *one* institution? No. Our universities, including those that house our contemporary law schools, also come in many different shapes and sizes: some with a strongly research-oriented agenda, others with an exclusive focus on teaching; some are relatively small, with only two or three schools or disciplines, while others offer a wide variety of established disciplines in the arts, humanities and social sciences – including behavioural sciences, economics and business studies – medicine, natural and engineering sciences, archaeology and so on; some are rich, others poor; and yet others share unbeatable reputations drawing on the time-honoured traditions of centuries, while newcomers display the inspiring ambition of freshmen.

And, let us not forget, there are so many places in the world where universities, with their assumed freedom of education and research, are often less autonomous than one would imagine with many struggling to survive while others are engaged in tough and sometimes even dangerous uphill battles for survival and development to accommodate local, national and international interests and values.

That is by no means to say that in the prosperous nations of the 'West' everything is sweetness and light with universities mirroring Steiner's description of 'organism[s] aspiring to the dynamic concept of both abstract and empirical totality'. Resistance against this stereotyped image has been smouldering for some time among scholars and scientists. Is the university really still that 'proud word', to quote Steiner once again?

[1] George Steiner, *Universitas?*, Tilburg: Nexus Instituut 2013, p. 25.

In October 2013, an article published in *The Economist*, entitled 'How Science Goes Wrong', spread rapidly across the Internet:

> A simple idea underpins science: 'trust, but verify'. Results should always be subject to challenge from experiment. That simple but powerful idea has generated a vast body of knowledge. Since its birth in the 17th century, modern science has changed the world beyond recognition, and overwhelmingly for the better.
>
> But success can breed complacency. Modern scientists are doing too much trusting and not enough verifying – to the detriment of the whole of science, and of humanity.[2]

The Economist article asks academics from all disciplines a number of pertinent questions: Aren't too many of the findings that fill the academic ether the results of shoddy experiments, or poor analysis? Isn't there too much flawed research, too little verification, too much proof of weak peer review, careerism 'that encourages exaggeration and the cherry-picking of results'? Moreover, failures of a hypothesis are rarely even offered for publication, or accepted by the journals that prefer not to deal with such failures: 'negative results' account for only 14 per cent of published papers, down from 30 per cent in 1990.

A group of gravely concerned Dutch researchers have been driven by their collective dissatisfaction with this state of affairs to start a new grassroots movement: *Science in Transition – An Agenda for Change*.[3] What has driven them to take action is the poor public image they believe science has acquired through the actions of its practitioners: Its credibility – 'arriving on foot and leaving on horseback' – the quality of the output, scientific integrity, how research is communicated, academics' relationship with the media and the inherent 'quality' of the media ('Do science journalists actually know how science arrives at the facts?'), relationships with the government, and the way research is financed. Pondering on this line of thought, one could ask the question: have research-intensive universities put research (too far) ahead of teaching?[4]

In another fascinating essay, entitled 'An Avalanche Is Coming: Higher Education and the Revolution Ahead', the authors, Barber,

[2] 'How Science Goes Wrong. Scientific Research Has Changed the World. Now It Needs to Change Itself', in: *The Economist*, 19 October 2013.

[3] www.scienceintransition.nl (last accessed 1 December 2013).

[4] As UK Minister for Universities and Science David Willetts argued in the *Guardian*, 21 October 2013; a survey among UK undergraduates showed they were being set less work and received notably less tutor feedback than did their peers fifty years ago.

Donnely and Rizvi, compare today's university landscape with a snow-covered mountainside that, on the surface, looks solid:

> Nothing looked more impervious to revolutionary change than Brezhnev's Soviet Union in 1980, yet just over a decade later it was gone. The hegemony of the Catholic Church in Ireland looked unshakable in 1990, but two decades later it was gone. Lehman Brothers seemed a good option for top graduates in 2007. Just a year later, it too was gone.[5]

They believe that 'a deep, radical and urgent' transformation of our universities is required. Even if these authors may appear outspoken, no university leadership can deny that some major fundamental questions need to be asked and answered and that strategic decisions need to be made to steer current universities and safeguard our legacies for the development of future generations.

My book, this book, is about law schools, about the research and teaching carried out by legal academics, about how they perform in the academic world. In recent years, I have been critical of them, particularly of their research, their often rather weak methodology and their attitudes to publishing. It is not without reason that in the next chapter of this book I raise the question 'Should law be in the university?'

Yes, I am critical of lawyers: there is still a lot that needs to be improved in law schools. But now that I have completed my research for and writing of this book, I have come to the conclusion that it is not only law schools that need to step up to the mark: *every* discipline should regularly engage in self-reflection and ask itself on a regular basis, 'Should science be in the university?' Or even, 'Should *I* be in the university?' These are fundamental questions that we all have to ask one another, and not just the lawyers. Law schools and their universities continue to be interdependent. In some universities, the law department often shares physical space, resources and management with other disciplines, such as economics or the social sciences, and where the head of the school is not always a lawyer. Today's deans, vice-deans and other faculty administrators have their weekly or monthly meetings with the president of the university and his or her colleagues, on a broad spectrum of issues related to (the management of) education, research and resources, to the marketing of the university, through ICT and real estate, to legal issues,

[5] Michael Barber, Katelyn Donnely and Saad Rizvi, 'An Avalanche Is Coming: Higher Education and the Revolution Ahead: Essay', London: Institute for Public Policy Research 2013.

facilities, and so on. Many of these more practical, yet utterly important, issues indeed require a university-wide approach and can best be tackled at the central level, acknowledging the differences among the disciplines, which range from subject-matter through size to indeed culturally rooted idiosyncrasies.

This chapter can be nothing more than a general consideration of some of the strategic developments in the world of higher education and research. I have chosen to focus on a finite number of strategic issues based on developments that are discernible almost everywhere in the present-day university landscape; I am referring here to topics such as massification, diversification, marketisation, privatisation and even 'financialisation', research profiling (or prioritisation) including also the so-called 'triple helix' model, university governance and management, corporatisation, internationalisation and globalisation, the size and scope of the university, ranking and league tables, as well as integrity. Most of the literature is European[6] or American,[7] but, increasingly, developing and transitional countries, too, need to relate to the changing roles and challenges their institutions of higher education and research are facing.[8]

Again, I will only briefly touch upon some of these global questions and developments. In different chapters later on in this book, special attention will be paid to the position of law schools.

2.2 Funding of the universities

When universities around the world are being discussed, one must always bear in mind that the differences between continents and regions, as well as between the countries in those regions, and even within one and the same country, are enormous. The differences between research-intensive

[6] See Jo Ritzen, *A Chance for European Universities*, Amsterdam: Amsterdam University Press 2010; Philippe Aghion *et al.*, *Higher Aspirations: An Agenda for Reforming European Universities*, Brussels: Bruegel 2008.

[7] See e.g. Committee on Research Universities *et al.*, *Research Universities and the Future of America: Ten Breakthrough Actions Vital to Our Nation's Prosperity and Security: Condensed Version*, Washington DC: 2012.

[8] *Universities in Transition: The Changing Role and Challenges for Academic Institutions*, New York: Springer 2011. With case studies on Brazil, China, Cuba, Denmark, Germany, Latvia, Russia, South Africa, Sweden, Tanzania, Uruguay and Vietnam; Maurice Kogan *et al., Transforming Higher Education: A Comparative Study*, Dordrecht: Springer 2006, particularly focusing on Norway, Sweden and the UK.

universities – these 'storehouses of knowledge and the broad capabilities that provide an underlying state of preparedness and capacity-based insurance and broader vigilance that business, government and communities can draw upon to help deal with the unexpected and unknown'[9] – are enormous.

But it is not only that. Some systems, such as that in the US, have both privately funded and state-funded universities, where the *hierarchy* between the universities is a crucial element of the system. This is much less the case in Western Europe, where higher education and research are, above all, viewed as a public good and primarily the responsibility of the state or other public authorities. The same largely applies to Latin America, although recent years have seen considerable growth in privately financed education in the region. Universities in the Far East exhibit enormous differences but are moving rapidly towards the US model. A country like China has a mix of private funding in education (where the student pays), and a high degree of public funding, focused mainly on those scientific areas in which the country aspires to be a world-class player. These are just a few examples; there are many other important regions and countries that could be mentioned.

Rectors and presidents across the world consider the level of funding of higher education and research as the most pressing challenge faced by today's universities. In Europe, for instance, total investment in higher education is low: 1.3 per cent of GDP on average, compared with 1.5 per cent in Japan and 2.7 per cent in the US. Yet public funding in Europe, the European Commission warns, is the basis for sustainable higher education in Europe. Similar warnings are being issued in the US, where Congress commissioned a special committee to assess the competitive position of America's research universities. The committee reported 'an array of challenges', from unstable revenue streams and antiquated policies to increasing competition from universities abroad. Even though higher education is probably among the most prudently led sectors in society, the costs of fundamental research, the ongoing massification of higher education, the almost worldwide economic downturn, as well as the rising costs of university administration and management, are forcing universities to adapt to more moderate funding perspectives, and to look for alternative funding opportunities.

[9] Association of American Universities *et al.*, HEFEI Statement on the Ten Characteristics of Contemporary Research Universities, Hefei, China: 2013.

There are a great variety of university funding systems in existence. Their characteristics have considerable influence on academic life and performance. A first distinction of funding flows is by purpose: education, research and '*valorisatie*' which is a standard Dutch term referring to the transfer of knowledge and its economic and wider societal application.

A second distinction is by source: public and private. A further distinction is by the basis on which the level of funding is determined: performance based, plan based or independently based. Finally, an important distinction is by the degree of freedom which the university management has with regard to how the money is spent.

Zooming in on research first, public funding is usually a mix of block funding, where university management is usually free to spend the money as it sees fit, and project or personalised funding, where there is no spending freedom. Block funding can be performance based, as is the case for the UK's Research Excellence Framework (REF), or independently based, as in the Netherlands where each university's share in total research block funding is fixed. Project and personalised funding can be channelled through special funding organisations, such as the European Research Council (ERC) or the American National Science Foundation (NSF), and is then usually based on rigorous peer review. Research funding can also be more direct and based on other considerations such as potential economic or societal impact, cooperation with the business sector, and so on (many examples of such projects can be found in the European Framework Programme). There is also contract research, for example NASA R&D contracted to universities. Private funding of research also takes many different forms: endowments based on gifts from alumni, private funding trusts such as charities, contract research for business, and so on.

Traditionally, leading universities and researchers have held the opinion that research funding with no strings attached leads to the best and most innovative research. It is for this reason that, when the NSF was formed in the US after the Second World War, Ivy League universities expressed some hesitation about accepting this form of funding as an addition to their own endowments, fearing a loss of academic freedom.

In the Netherlands, universities have for similar reasons expressed strong objections when the government has wanted to transfer block funding to other, project-based, funding schemes. On the other hand, both governments and private funding organisations have displayed a strong tendency towards project funding in order to retain control over

quality and economic or social impact. The debate about which form of funding is best is ongoing and undecided, although it is suggestive that the countries with a substantial proportion of funding where university management has spending freedom – be it block funding or endowments – are also the countries with the best research performance, regardless of how this is measured.

A second source of university funding is student fees and external student scholarships. In some countries, such as the US, student fees have been skyrocketing for a long time. But also in countries where students are less used to paying substantial fees for their education, this situation will change, in part due to the economic downturn. The level of student fees, and the institutions' ethical responsibility when setting such fees, has become one of the fundamental issues confronting universities. Will, for instance, education for overseas students develop into the money-spinner it has already become in a number of developed high-income nations? The effects of increasing costs, varying from country to country, affect or could potentially affect participation of students from poorer backgrounds.

In terms of higher education, this raises the fundamental question of whether education should be considered a public good or an economic investment to secure future private earnings – or perhaps both. This book takes into consideration the extreme situations in which, for example, American law graduates find themselves saddled with debts for the rest of their lives due to having pursued a law degree. An intriguing question is whether the developments we will see below in respect of American educational outposts elsewhere in the world, and the 'Americanisation' of higher education in general, will also lead to the export of this particular socio-economic problem.

A third source of income is from private donors, such as alumni ('learn, earn and return') and foundations (see section 9.5 below) as well as firms and businesses, out of either enlightened self-interest or from a sense of corporate social responsibility. When private funding is of a purely commercial nature, other pressing problems may arise, such as possible conflicts of interest. The breath-taking film, *Inside Job* (2010), a documentary about the financial crisis of the late 2000s, directed by Charles H. Ferguson, explores how changes in the policy environment and banking practices helped create the financial crisis in the US and the role university-employed economists have played. The film forced Columbia University to review its conflict-of-interest disclosure policies. Columbia President Lee Bollinger, a lawyer himself, pictured the dilemma:

> There is at the moment strong criticism of a variety of disciplines that there has been too much outside activity which has had a negative impact on the scholarly independence. I think that can happen and when that does happen it's a tragedy, it's wrong; it violates what we stand for . . . But it's important to realise that we really benefit in our scholarship from engagement with outside activity; we want our faculty to be a part of the outside.

I will address the issue of conflicting interests and of scientific integrity in the final section of this chapter.

In the past, when universities were almost exclusively financed by the regional or national government, funding was much less of an issue. Today's diversity in funding has brought universities numerous opportunities but also much uncertainty and therefore a need for careful administration, planning and monitoring – all leading to a considerable increase in the need for specialised management staff. And one important aspect of university funding allocation has not yet been mentioned: the money that is spent on university buildings and resources. Many of today's universities have considerable estates, needing serious investment just to maintain them. In Europe, such buildings often belong to the country's cultural heritage, but are now part of the university's infrastructure and the result of accumulation of centuries of donations by, among others, generous and engaged alumni.

This, all-too-short, section on university funding highlights the complexities of today's universities and how money may affect the two core missions of the university, teaching and research, in many different ways.

2.3 Widening participation: massification, diversification, privatisation and marketisation

A development that warrants strong strategic consideration is the ambition, evident in most countries, to *widen participation* in their higher education. In many instances, higher education has developed – or is developing – from an activity engaged in by the elite, to a system of open/mass post-secondary education.[10] Take Europe, for example, where the target is that, by 2020, almost 40 per cent of its young people should successfully complete higher education. Although attainment levels have

[10] Roger Brown (ed.), *Higher Education and the Market*, London and New York: Routledge 2011; Mike Molesworth, Richard Scullion and Elisabeth Nixon, *The Marketisation of Higher Education and the Student as Consumer*, London and New York: Routledge 2011.

risen significantly across much of Europe in the last decade, they are still largely insufficient to meet the expected growth in knowledge-intensive jobs.[11] While 35 per cent of all jobs in the EU will require high-level qualifications by 2020, only 26 per cent of the workforce currently has a higher education qualification.[12] The same or similar will apply for many other countries and regions of the world.

The strategy of widening participation means that the student inflow to higher education has become more *diverse* than it was, say, twenty or thirty years ago – let alone a century ago. In many countries, the number of female students, for instance, is continually rising, as are the much-applauded numbers of students from deprived backgrounds, and students from ethnic minority groups, as well as students from overseas. The increased diversity in pre-university education and in students' motivation is equally important. By contrast, with the growing popularity of life-long learning programmes, students in higher education tend, on average, to be older than their predecessors, which in itself contributes to increasing diversification. My eldest daughter, who is a master's student at the Leiden Law School, has fellow students in her philosophy elective who are, in her view at least, even older than her dad.

As a result of this growing diversity, it has become more difficult to prepare students to access and successfully complete higher education than it was in the past. In order to match these students effectively to appropriate courses of study, either system-level institutional diversity *among* institutions is needed, whereby, by applying selection at the gate, individual institutions aim at specific segments of the available student population (as happens in the US or the UK, for example); or curriculum diversification *within* each institution is required, whereby each university tries to accommodate as broad a segment of the potential student population as possible (as is happening in continental Europe). On the whole, what will probably be needed is greater diversity in the degree courses offered, as well as greater variation in the curricula, in terms of content, skills transferred and assessment, the introduction of more advanced teaching/training programmes for more able or highly motivated students (moving away from 'one size fits all'), and the provision of more diverse and customised support services.

[11] European Commission, 'Supporting Growth and Jobs – An Agenda for the Modernisation of Europe's Higher Education Systems', COM(2011) 567 final, Brussels: 2011.

[12] European Commission, 'An Agenda for New Skills and Jobs: A European Contribution Towards Full Employment', COM(2010) 682 final, Brussels: 2010.

A push towards diversification in higher education can be seen in the growing popularity of the 'polytechnics', or 'universities of applied sciences' within the broader higher education system. These institutions concentrate predominantly on professional education, and not – or far less – on research and science-based education.[13] Many of the so-called 'new universities' in the UK are strongly oriented towards vocational subjects, and some are among the top in their field. The same applies to the '*hogescholen*' in the Netherlands, that offer legal studies but without the possibility of access to the legal professions, as do the '*Fachhochschulen*' in Germany,[14] and the French '*instituts universitaires de technologie*' (IUTs). These IUTs, which were set up in 1966, often teach law in the context of other fields, such as management. Some countries, notably the Netherlands and Germany, still have a strictly binary system of higher education, separating the universities with their more fundamental research agendas and academic teaching from the universities of applied sciences with their strong emphasis on practical and vocational skills, and applied research. In other countries, the borderline between professional education and more research-oriented university education is becoming increasingly blurred. This can be seen in the UK, where in 1992 the polytechnics were given university status.

In order to attract the *right* kind of candidates in this growing and diversifying market of new students, universities pay increasing attention to student recruitment and to how they communicate the outcomes of external audits and league tables. Even where selection at the gate is forbidden, universities nonetheless do their utmost to recruit particularly those students who best match the institution's profile. Moreover, where institutions are free to set independently the level of their fees, they will almost certainly have to contend with competition in terms of the price/quality ratio. I will return to this issue shortly.

In addition, this process of massification, diversification and creeping privatisation lays the foundation for a further development, namely, 'marketisation'. Marketisation can be defined as the increasing supply of higher education in the open marketplace. Dutch author Ben Jongbloed has identified a number of conditions for such a higher education market, from the perspective of both the demand side (students and their

[13] UNESCO, UNESCO Forum Occasional Paper Series Paper No. 6: 'Diversification of Higher Education and the Changing Role of Knowledge and Research', Paris: 2004.

[14] Wissenschaftsrat, *Prospects of Legal Scholarship in Germany: Current Situation, Analyses, Recommendations*, 2012, p. 10.

parents) and the supply side (universities). For the providers of education, he identifies the freedom of entry, the freedom to specify the 'product', the freedom to use available resources and the freedom to determine prices. In terms of the students and their parents, other 'freedoms' are important: the freedom to choose the university and the 'product', and adequate information on prices and quality.[15]

The supporters of such marketisation in higher education argue that universities and their professors will become more effective and responsive in meeting students' expectations, through the greater flexibility, innovation and openness to change that marketisation will bring about.[16] Opponents, however, claim that marketisation will lead to increasing stratification of both the institutions and the social groups they serve. They are concerned that the academic community may, as a result, become increasingly divided. An example is Andrew McGettigan's book, *The Great University Gamble* (2013), about education in the UK 'being re-engineered by stealth through a directed process of market construction'. He concludes:

> Academics . . . seem about to be squeezed by the demands of new student-consumers and the pressures from management to become more efficient, productive and therefore profitable.

This, McGettigan says, is exacerbated by a failure of academics, in particular, to properly defend their profession:

> pressed by workloads and atomised through research assessment, yes, but too willing to cede difficult chores to bureaucrats. The 'self-critical community of scholars', which is meant to safeguard degree standards, has been eroded to a large extent by an expansionist executive and managerial class, who will now have a new range of performance metrics with which to discipline more and more pliable academics.[17]

Collegiality, McGettigan maintains, has been displaced by corporatism. Yet marketisation seems to have already become a reality in some countries more than in others.[18] Some say that thinking in terms of marketisation leads to a greater degree of responsibility: towards the

[15] Ben Jongbloed, 'Marketisation in Higher Education, Clark's Triangle and the Essential Ingredients of Markets', in: *Higher Education Quarterly*, 57, 2, April 2003.

[16] Roger Brown, 'Introduction', in: Roger Brown (ed.), *Higher Education and the Market*, London and New York: Routledge 2011, pp. 1 ff.

[17] Andrew McGettigan, *The Great University Gamble: Money, Markets and the Future of Higher Education*, London: Pluto Press 2013, p. 186.

[18] It is not possible to address this subject in greater detail here.

parents of students, towards taxpayers, future employers, the government, in fact, towards society as a whole.

Privatisation may indeed be a stealthy process. A step that more and more universities take, for instance, is to focus on students who no longer receive any public funding at all, with overseas students representing an important target group. The fees paid by these students cover the real costs of the programmes or even exceed them. This form of 'privatisation' of higher education brings private capital, ownership and influence into an area that has in many cases traditionally been publicly funded and owned. It results in a student body comprising both publicly funded students and students who have no form of state support. And both of these types of student often share the same lecture rooms. An instance of how this can develop can be seen in the example of a *fully* private law school founded in 1976 by a group of Oxford academics who, despairing of the direction British universities were taking, established a law school within the financially independent University of Buckingham. In 2012, Britain's largest commercial provider of legal education and training received full university status as – believe it or not – the 'University of Law'.

This development towards a true or quasi-market of higher education has a number of possible consequences. First, the more students pay for their course of study, the more demanding they are likely to become. In any market-driven environment, the 'users' invariably acquire purchasing power and associated legal 'rights'. Not surprisingly, therefore, students in this type of a market of higher education increasingly regard themselves as consumers or customers. They demand value for money – and are not prepared to accept a drop-out scenario after their first year or bankruptcy after graduation. Whether there is any wisdom in this 'customer' perspective remains to be seen.[19] This issue will be further addressed in Chapter 9.

Another effect of marketisation and privatisation may well be *corporatisation*, i.e. that universities start behaving like private businesses, with distinctive corporate identities ('brands'), with the rector magnificus, the president or the vice-chancellor becoming CEOs, their salaries linked to achieving agreed performance targets, and having to spend at least part of every day studying university league tables that increasingly resemble stock market ratings. And, as we have seen, the students in this new

[19] For a recent overview, see Malcolm Tight, 'Students: Customers, Clients or Pawns?', in: *Higher Education Policy*, 26, 3, 26 March 2013.

economic reality run the risk of being regarded as mere customers; I have even heard the term 'units' bandied about.

The academics, for their part, become 'knowledge workers' in a 'knowledge economy' or even a 'knowledge society', managed by 'increasing numbers of university administrators spouting managerial jargon',[20] and surrounded by 'stakeholders' whose overriding interest seems to be the universities' contribution to short-term economic growth. It is not a prospect that fills them with joy. They believe that the traditional academic culture is where they are best able to thrive: and one can well understand their disgust at having to adopt a predominantly corporate culture: they themselves played no part in bringing about the financial-economic mess that businesses and governments have made of our world, and it is therefore asking a lot to expect them to embrace the kind of corporate culture that was the root cause of this disaster. Many have warned of the dangers of this business analogy; one of them being Cambridge professor Stefan Collini. Analogies are always potentially treacherous figures of speech:

> I work in the knowledge and human-resources industry. My company specializes in two kinds of product: we manufacture high-quality, multi-skilled units of human capacity; and we produce commercially relevant, cutting-edge new knowledge in user-friendly packages of printed material. I hold a middle-management-position, responsible to a divisional head who reports directly to the Chief Executive.[21]

'No', Collini says. 'I'm a university teacher. I teach students and I write books. I'm part of what used to be a largely self-governing community of scholars.'

Although there definitely is some relationship between marketisation and corporatisation, the question may be less whether *management* can be kept outside the universities, than whether the corporate culture that often goes with it can be kept at bay. Corporatisation is substantially different from management. No reasonably sized organisation can function without management and administration, and universities are no exception to this rule. I will come back to this shortly. Conversely, universities can manage very well without a corporate culture, which is at odds with traditional academic culture that has its basis in academic

[20] Benjamin Ginsberg, *The Fall of the Faculty, the Rise of the All-Administrative University and Why It Matters*, Oxford: Oxford University Press 2011, p. 208.

[21] Stefan Collini, *What Are Universities For?*, London and New York: Penguin Books 2012, p. 132.

collegiality. It is this tension – of unavoidable management versus avoidable corporatisation – that is one of the most widely debated issues in the current literature on higher education. Coping with it is, in my view, the most important job of every individual in a leading position in a university. This issue will be further addressed in Chapter 11.

A final side-effect may be increasing but futile *competition* between universities, sometimes even among the faculties of a single university, competition for students, funding and even attention. This is at odds with the greater need for cooperation taking into account the enormous challenges facing the universities. That is not to say that universities are in any way unused to competition; they compete on a daily basis to be among the best. But, if competition is carried too far, it can easily constitute a threat to the traditional culture of borderless communication and collaboration. To give an example: in many countries when a university is recruiting a new professor, colleagues at *other* universities lend their support in identifying the right candidate. This type of cooperation would be unthinkable to a corporation such as Sony or Samsung, yet it is common practice in the university sector, where individual academics are not solely motivated by the future glory of their own school or university, but by the future of their discipline.

There is a wealth of literature available on the marketisation and corporatisation of higher education. In many instances, the literature takes the form of eloquently written books by concerned professors, such as Collini, McGettigan,[22] Ginsberg,[23] Donoghue[24] and Thornton,[25] to mention some of the most important ones, who have the uncomfortable feeling that their universities are being snatched away from under their noses. There is also a wealth of research by higher education specialists, such as Brown and Molesworth[26] and many others, whose findings in most cases tend to be fairly evenly balanced.

[22] Andrew McGettigan, *The Great University Gamble: Money, Markets and the Future of Higher Education*, London: Pluto Press 2013.

[23] Benjamin Ginsberg, *The Fall of the Faculty, the Rise of the All-Administrative University and Why It Matters*, Oxford: Oxford University Press 2011.

[24] Frank Donoghue, *The Last Professors: The Corporate University and the Fate of the Humanities*, New York: Fordham University Press 2008.

[25] Margaret Thornton, *Privatising the Public University: The Case of Law*, London and New York: Routledge 2012.

[26] Roger Brown, 'Markets and Non-Markets', in: Roger Brown (ed.), *Higher Education and the Market*, London and New York: Routledge 2011; Mike Molesworth, Richard Scullion and Elisabeth Nixon, *The Marketisation of Higher Education and the Student as Consumer*, London and New York: Routledge 2011.

I believe the main impetus behind such developments lies in how universities are funded, in terms of both research and teaching. Should the public sector withdraw from funding university teaching and research, the dynamics of the private market will come into force, bringing about a step change in the collective package of rules, values and regulations to which most universities are currently accustomed.

One thing that has to be borne in mind is that, in a true education market, students have real choice:[27] in terms of the price, content and quality of the education and services they are being offered, and the attractiveness of the local environment. In the UK, for example, such a market – or at least a 'quasi-market' – already seems gradually to have emerged.[28] Marketisation is gaining a strong impetus as a result of the growing internationalisation among students,[29] including in countries that traditionally have a public system of education.

Finally, there are also signs of a market emerging in the field of research. In Ivy League universities throughout the world, research funding is increasingly less reliant on the revenue streams from tuition fees. Instead, funding for research has to be acquired from other sources, in a competitive arena. Funding based on competition and determined by performance has now become a broadly acceptable way of allocating financial resources.[30] In time, this may call for a different set of employment conditions, with the academic employment market becoming more like the football transfer market, and where successful researchers and

[27] It is extremely important for students to have choice: widening participation means that the new student body is becoming more diverse, and the range of programmes offered has to be equally diverse. Universities appear to be successful at meeting this challenge: Nick Foskett, 'Markets, Government, Funding and the Marketisation of UK Higher Education', in: Mike Molesworth, Richard Scullion and Elisabeth Nixon (eds.), *The Marketisation of Higher Education and the Student as Consumer*, London and New York: Routledge 2011. For an extensive discussion of the conditions for a true education market, see: Roger Brown, 'Markets and Non-Markets', in: Roger Brown (ed.), *Higher Education and the Market*, London and New York: Routledge 2011.

[28] For an excellent overview of the progress of marketisation in the UK, see: Nick Foskett, 'Markets, Government, Funding and the Marketisation of UK Higher Education', in: *The Marketisation of Higher Education and the Student as Consumer*, London and New York: Routledge 2011, pp. 26 ff.

[29] *Globalization and Internationalization in Higher Education: Theoretical, Strategic and Management Perspectives*, New York: Continuum 2012.

[30] See in particular Anne-Charlotte Ek *et al.*, 'The Tension between Marketisation and Academisation in Higher Education', in: *Studies in Higher Education*, 38, 9, 24 November 2013.

academic managers will be lured by other organisations with offers of salaries determined by their 'market value'.

The trend towards a market or quasi-market[31] in higher education is showing no signs of abating. However, it still remains to be seen where this will eventually lead us. Roger Brown, an expert on higher education funding, concludes:

> The marketisation of higher education is a complex process, with every major system falling somewhere between the market and non-market extremes. Nevertheless there is a clear international trend towards introducing greater competition, including price competition, into the provision of student education and, as a quasi-market, into the supply of academic research.[32]

The thinking on teaching or conducting research in terms of a market still has a long way to go. It is an exceptionally complex issue, where what matters in the end is striking the right balance.[33]

2.4 Diversification in research and the triple helix challenge

In many places, the world of research, too, is becoming dominated by the concepts of diversification and differentiation. That holds not just for individual universities, but also for the countries of which they are a part. How can a country, or a whole global region, become and remain successful as academic education and research become increasingly competitive, specialised and expensive? Europe and the US often look to one another (with Europe in particular looking to the US), but they also look, with a degree of concern, to such upcoming powers as China, India and in time Brazil. A recent American report notes that, although there is still some way to go before the research bases of these latter countries match the 'highly diversified knowledge economies of Japan and the West', there is clear evidence of a growing wedge of excellent

[31] In most countries, higher education is not a market at all. True markets require institutional autonomy, institutional competition, a certain freedom of price-setting (representing a significant share of the cost of teaching), and free access to reliable information for students and their parents. See Roger Brown, 'Markets and Non-Markets', in: Roger Brown (ed.), *Higher Education and the Market*, London and New York: Routledge 2011.

[32] Roger Brown, *Everything for Sale? The Marketisation of UK Higher Education*, London and New York: Routledge 2013, p. 20.

[33] Roger Brown, 'Taming the Beast', in: Roger Brown (ed.), *Higher Education and the Market*, London and New York: Routledge 2011.

research, and the numbers of very highly cited papers have increased.[34] For the time being, American universities, a few British institutions, and a few others dominate league tables. But countries like Japan and Singapore, too, have universities that rank among the world's leading institutions.

Research has shown that the path to becoming a world-class science-intensive university is determined by four main factors:

> the ability to attract, recruit, and retain leading academics and high quality students, abundant funding, an appropriate regulatory framework, and adequate management.[35]

The extent to which that path is feasible or not will differ from institution to institution and from country to country. Some are just at the start of the process, while others are well on their way, and yet others have already reached the top. In many instances, the policy advice given to governments is not to strive to achieve world-class status for all areas of the country's education. The German Wissenschaftsrat, for example, states with respect to Germany that 'the "World Class University" model is unrealistic and creates distortions'.[36]

A much more sensible approach is to motivate all these higher education institutions – in Europe alone there are about 3,000 universities, colleges, polytechnics and specialised higher education institutions – to make choices and to benchmark themselves in a particular field of research or scientific discipline. This is not only prompted by a lack of the necessary funding to achieve excellence across the full breadth of all disciplines and institutions; the idea is that, by diversifying in terms of functional differentiation, universities can perform at a higher level. As the authors of 'An Avalanche Is Coming' predict:

> Increasingly, we believe university leaders will challenge the university as a whole, and individual departments, to answer the question, 'What's so special about you?' In other words, universities and departments will need

[34] Jonathan Adams, David Pendlebury and Bob Stembridge, *Building Bricks: Exploring the Global Research and Innovation Impact of Brazil, Russia, India, China and South Korea*, 2013.

[35] Jamil Salmi, 'The Road to Academic Excellence: Lessons of Experience', in: Philip G. Altbach and Jamil Salmi (eds.), *The Road to Academic Excellence: The Making of World-Class Research Universities*, Washington DC: World Bank 2011, p. 341.

[36] Wissenschaftsrat, *Recommendations on the Differentiation of Higher Education Institutions*, Cologne: 2010.

> to justify their existence – just ticking over won't be good enough. This will dramatically affect how universities benchmark themselves and similarly how they are perceived by others.[37]

Choices for a particular positioning in research (as well as in education) can be made on the basis of the proven quality or competitive advantages of a country or institution in a particular scientific field, or on the basis of the ambition of a country, region or city to become world class in particular disciplines. But choices can equally be prompted by the ambition to take advantage of specific international, regional or demographic opportunities and possibilities – consider, for example, the presence of similar institutions in the city or region. Or they might arise from the desire to focus on certain social issues, challenges and educational needs, such as setting up particular types of professional training, offering advanced programmes for selected groups of excellent students or a broad liberal arts education.

The Netherlands, for example, where public universities perform well across the board, is opting for the latter strategy: instead of aspiring to create and facilitate one or two top universities of global excellence, disciplines are given the opportunity to excel within their universities, by setting research and teaching priorities, and by seeking cooperation with partners at sister institutions.

Germany deserves a somewhat closer look. To motivate its universities to make such choices, two rounds of the so-called 'Excellence Initiative' have taken place, in which considerable government funding has been distributed on the basis of research excellence.[38] Although there are also objections – eminent universities seemed suddenly to be left empty handed – the Wissenschaftsrat noted a number of positive effects of such an exercise, effects that are not limited to Germany alone. The 'Excellence Initiative' created a new kind of public debate on these differences among the institutions. While the differences had for a long time been transparent only to the members of the relevant scientific community, now other observers, too, have become aware of and interested in these differences. Finally, through the involvement of foreign experts, the competition also produced results that sometimes failed to correspond to traditional internal assumptions. An additional finding of the exercise was that success in acquiring external funding had an impact not only on the

[37] Michael Barber, Katelyn Donnely and Saad Rizvi, *An Avalanche is Coming: Higher Education and the Revolution Ahead: Essay*, 2013, p. 50.

[38] www.excellence-initiative.com (last accessed 20 January 2013).

resources and reputation of the academics and scientists or their departments, but also on the reputation of the institution. And, finally, whereas previously the research achievements of individuals and their departments or faculties were compared, in this 'Excellence Initiative' the research quality of entire universities has become the subject of comparison.

Yet the Wissenschaftsrat concludes that such excellence policies alone cannot bring about the necessary differentiation in the German higher education system. If the specific performance area to which such an excellence policy is geared were to become the sole strategic focus of all universities, this would all too easily lead to unwanted standardisations. This is where there is a serious risk for the whole enterprise in opting for a particular profile on the basis of research excellence alone. The Wissenschaftsrat even refers to 'excellence rhetoric' ('World-Class', 'Super Research University'), which

> can lead to dysfunctionalities in the university spectrum. Furthermore 'excellence', which is intended to function as a category of difference, risks becoming a category of similarity, where self-description as an excellent research institution has in many cases become standard.[39]

The Wissenschaftsrat's view is that universities alone are not responsible for this inflation of 'excellence rhetoric'. In a situation of chronic underfunding of higher education in Germany, which has persisted for decades, the universities are forced to use the term 'excellence' and to take part in the excellence competition because this determines the allocation of additional resources, above all for research and for young academics and scientists. In a more differentiated higher education system, institutions would operate at different levels of functional quality. A description of these institutional profiles, such as the American Carnegie classification and the European U-Map (see below), may serve as tools to describe such institutional diversity. Such tools may assist the institutions in benchmarking exercises or in developing inter-institutional cooperation. U-Map distinguishes between teaching and learning, the student profile, research involvement, regional engagement, involvement in knowledge exchange and international orientation. The Carnegie classification focuses on three fundamental questions: What is taught (undergraduate and graduate study programmes, types of degree

[39] Wissenschaftsrat, *Recommendations on the Differentiation of Higher Education Institutions*, 2010, p. 27.

etc.)? What is the composition of the student body (percentage of part-time students, transfer students, etc.)? And what is the institutional setting like (size, extent of residential housing, etc.)?

A decision to opt in favour of a particular profile can best take place in the context of an overall stratification of higher education in the country in question. The widely praised Californian model is often held up as an example; under this model, there is a clear division of responsibilities between the University of California, the state universities and the community colleges, involving institutional complementarity rather than direct competition.

The 'excellence' rhetoric is still alive and well, and in most countries there is still no certainty about what the end result will be. German universities are groaning under the administrative burden of their 'excellence schemes', and the Wissenschaftsrat is warning about going too far. In the UK, the Research Excellence Framework (REF), a more or less similar research-funding scheme to that in Germany, will come into effect in 2013–14; the REF, too, will have to prove its worth to the state and its other stakeholders.

Moreover, it is not about excellence alone. A question that has been regarded as crucial, particularly since the Second World War, in more and more countries is how universities can connect more effectively with their social, industrial and political environment. This applies to both teaching and research. The corresponding metaphor is that of the 'triple helix': that 'smart' ecosystem of institutional connections between science, society and industry.[40] In this triple helix, some people even talk of a *golden triangle*, believing that universities should also be the drivers of economic activity. In this triple helix model, it is, of course, not a matter of a single authority, but of the whole range of national, regional and local authorities; and increasingly supranational authorities and institutions, as in Europe and Latin America. The business sector within this triple helix is already diverse, varying from multinationals with their own – often extensive – influence in education and R&D, to the more local business sector with its particular wishes in terms of teaching and contract research.

But how do you achieve such a triple helix? This is a question to which there is no clear answer. The solution should lie in a clever architecture of

[40] Henry Etzkowitz and Loet Leydesdorff, 'The Dynamics of Innovation: From National Systems and "Mode 2" to a Triple Helix of University–Industry–Government Relations', in: *Research Policy*, 29, 2, February 2000.

the national and supranational knowledge-intensive sectors, where justice is done to the diverse teaching and research needs within the higher education sector and science-innovation systems. In research, these can vary from curiosity-driven 'blue sky' fundamental research to strongly applied and industry-driven research, from large-scale to almost individual research, or from largely multidisciplinary research to almost monodisciplinary research. For higher education, it is a matter of ensuring an optimal link with secondary education on the one hand and a good view of what society needs on the other.

The institutional architecture of 'a knowledge economy' differs from country to country. Germany, for example, has a system in which fundamental research is carried out within the famous Max Planck institutes and applied research takes place at the so-called Fraunhofer institutes. Universities in Germany are somewhere between the two in terms of their research. In the US, conversely, fundamental research is the domain of the approximately 100 research universities, with high-tech companies taking care of the translation of research findings to societal and economic applications, often with support from public investment.

In a country such as England, the link between fundamental and applied research is found mainly within the universities, which leads to the previously mentioned corporatisation of the university, or even the 'entrepreneurial university'. A (wealthy) country such as Norway has opted for a very individual path, and decided no longer to invest in fundamental research. The country intends to piggyback on what is being discovered or conceived elsewhere in the world. France has a rather complex institutional system of scientific teaching and research, with the prestigious and selective *grands écoles* providing the best teaching in the country, but almost always without research. Research has to be carried out in the rather rigid and top-down-organised universities and a wide range of research institutes funded by the CNRS.[41] Asian countries – Japan, South Korea and China (the 'Asian tigers'), but also Indonesia – have for years pumped large amounts of money into their knowledge economies and are making rapid progress in research productivity and scientific quality. And my own country, the Netherlands, has a bit of everything, without any clear thought process driving it. A recent report by the Dutch Scientific Council for Government Policy (WRR) stresses the importance of 'knowledge circulation':

[41] Centre National de la Recherche Scientifique (CNRS), which is a public organisation responsible to the French Ministry of Higher Education and Research.

> At the moment, the traffic is almost all one-way: knowledge is disseminated to society through published articles, patents or graduates. There should be more sensitivity to what society actually needs.

But the question, of course, is how can this bidirectional link with society be achieved? One of the recommendations is that universities in the Netherlands should differentiate more. With education, research and '*valorisatie*' (i.e. knowledge transfer for economic utilisation), all Dutch universities today have these three main missions at which they are expected to excel. And, concludes the WRR committee, that is 'a problem'.

Jonathan R. Cole gives a good overview of the state of affairs, in his excellent book, *The Great American University* (2012). In the final chapter, Cole looks – through an American lens – at Europe and Asia, and in particular at the French, German, British and Chinese systems of higher education and research. He concludes:

> Each of these systems must overcome some significant obstacles if they are to achieve great distinction as research universities. At the end of the day, the relatively poor conditions of these systems . . . reflect larger social and political problems in the societies in which they are embedded.[42]

All these countries have, argues Cole, great hills to climb before their universities will be fully competitive with the most distinguished American research universities.

The route to the establishment of an internationally competitive national science system or, as conceived by the European Commission, a supranational 'European Research Area', is thus one of the most complex social and political challenges of the present day. This is an issue that involves a great deal of money, where very diverse private and public parties have to be brought together, and that above all needs *time* to become embedded – time that, particularly for politicians – is often not taken.

2.5 Between institutional autonomy and state regulation

In 1810, German explorer and scholar Wilhelm von Humboldt wrote a famous memorandum that led to the creation of the University of Berlin. Humboldt envisaged a university based on the principles of unity of

[42] Jonathan R. Cole, *The Great American University: Its Rise to Preeminence, Its Indispensable National Role, and Why It Must Be Protected*, New York: PublicAffairs 2009, p. 455.

research and teaching, of freedom of teaching and academic self-governance.[43] Humboldt's principles have become values, fostered by academics and university administrators across the world.

Yet almost all of today's university education and research depends heavily on taxpayers' money. Small wonder, then, that governments and politicians want to have some say in what is going on within the universities – in those communities ostensibly of freedom and self-governance. They try to achieve this either through direct regulation, or through regulated subsidies, or along the lines of the so-called 'evaluative' or 'supervisory' state.

For public authorities, it is perfectly legitimate to impose a number of public policy objectives on universities in return for the funding they award them.[44] Higher education and academic research involves large amounts of money. Transparency, efficiency and access concerns are among the most important governmental reasons to intervene in university education.[45] Other reasons may include enhanced social cohesion, regional and national development and economic growth, preservation of minority languages and cultures, and the promotion of national identity.[46] For these reasons, another development of strategic importance for universities concerns questions relating to who decides what the governance relationship should be between the university and the state.

Given the scale and complexity of most of today's universities, governance has both an internal and an external facet. Internal governance is concerned with the institutional arrangements within universities, such as lines of authority, decision-making processes, financing and staffing, academic activities, including curriculum development, assessments and selection of research areas, as well as the appointment of new faculty staff. External governance, by contrast, refers to the institutional arrangements at macro or system level, such as national statutory frameworks,

[43] Wilhelm von Humboldt, 'Über die innere und äussere Organisation der höheren wissenschaftlichen Anstalten in Berlin (1810)', in: E. Müller (ed.), *Die Idee der deutschen Universität. Die fünf Grundschriften aus der Zeit ihrer Neubegruendung durch klassischen Idealismus und romantischen Realismus*, Darmstadt: Gentner Verlag (in German).

[44] Philippe Aghion *et al.*, *Higher Aspirations: an Agenda for Reforming European Universities*, 2008, p. 50.

[45] Paulo Santiago *et al.*, *Tertiary Education for the Knowledge Society*, Vol. 1, OECD Publishing 2008.

[46] Walter Rüegg and Jan Sadlak provide a thorough overview of the relations with the authorities in Europe since the Second World War: Walter Rüegg and Jan Sadlak, 'Relations with Authority', in: Walter Rüegg (ed.), *A History of the University in Europe*, Vol. IV: *Universities since 1945*, Cambridge: Cambridge University Press 2011.

including, for example, the admission of students, funding arrangements, the reward structure for staff, and external accountability.[47]

One European study, for example, found that national governments more often than not urge universities to adopt explicit quality assurance practices, market behaviour, stronger vocational missions and public accountability,[48] even though studies show that higher education flourishes best with minimal state intervention,[49] and that state control may easily run the risk of creating inflexibilities and damaging the capacity for innovation. Dutch professor Jeroen Huisman observed that, where governments step back and give more leeway to universities, this process is paradoxically often accompanied by increasing accountability. In his view, the rise of accountability is the main driver for the increasing complexity of institutions of higher education:

> Not surprisingly, serving many masters – all of them rather assertive – may lead to tensions, dilemmas and problems ... The ideal situation would be that governments put trust in institutions to carry out their designated public roles without government intervention, but it seems – whether one likes it or not – that governments were not and are not convinced that leaving it all up to the higher education institutions themselves would be wise.[50]

Although there is little or no doubt about the appropriateness of accountability, there is much debate about the growing burden of compliance and its detailed and costly reporting. An OECD study found that universities across the world stress an in-built tendency for detail and an over-emphasis on compliance 'rather than on getting on with the job'. The study concludes:

> the challenge is to find an appropriate balance between securing the public interest on the one hand and encouraging institutional autonomy on the other.[51]

[47] Harry de Boer and Jon File, *Higher Education Governance Reforms Across Europe*, Brussels: 2009; Michael Shattock, *Managing Successful Universities*, Maidenhead, UK: McGraw-Hill and the Open University Press 2010.

[48] Maurice Kogan *et al.*, *Transforming Higher Education: A Comparative Study*, Dordrecht: Springer 2006.

[49] Sybille Reichert and Christian Tauch, *Trends IV: European Universities Implementing Bologna*, Brussels: 2005; Andrée Sursock and Hanne Smidt, *Trends 2010: A Decade of Change in European Higher Education*, Brussels: 2010.

[50] Jeroen Huisman, 'The Anatomy of Autonomy', in: *Higher Education Policy*, 20, 3, September 2007, pp. 219–20.

[51] Paulo Santiago *et al.*, *Tertiary Education for the Knowledge Society*, Vol. 1, 2008, p. 89.

Where, then, do we find such a balance between beneficial autonomy and legitimate state intervention? The European University Association (EUA) has identified four basic dimensions of university autonomy:[52]

- *Organisational structures* and *institutional governance*, in particular the ability to establish structures and governing bodies and university leadership, and to make explicit who is accountable to whom.
- *Financial issues*, in particular the different forms of acquiring and allocating funding, the ability to charge tuition fees, to accumulate surplus, to borrow and raise money from different sources, the ability to own land and buildings, and reporting procedures as accountability tools.
- *Staffing matters*, in particular the capacity to recruit staff, the responsibility for terms of employment such as salaries and issues relating to employment contracts, for example regarding civil servant status.
- *Academic matters*, in particular the capacity to determine the academic profile, to introduce or terminate degree programmes, to define the structure and content of degree programmes, the roles and responsibilities with regard to the quality assurance of programmes and degrees, and the extent of control over student admissions.

The latter two dimensions of university autonomy – in short: people, and educational and research outcomes – should in particular be closely guarded. Worldwide, though, the differences are enormous, from countries where universities have to operate in an environment of little freedom to teach and to write, to countries with limited state regulation, where university autonomy and independent research and teaching are considered truly beneficial for educational, cultural, intellectual and economic progress.

But, even in countries with a relatively autonomous university sector, subtle involvement of the state may occur along the lines of providing external performance-related funding, by negotiating performance contracts, or by setting a 'national research agenda', as the Dutch government and universities have done. In their desire to push universities to contribute to 'innovation', industrial competitiveness and economic growth, major research themes are developed jointly with national and regional governments, private industries and universities.

[52] European University Association (EUA), Lisbon Declaration. Europe's Universities beyond 2010: Diversity with a Common Purpose, Brussels: 2007.

The important work by Michael Gibbons and his colleagues in the mid-1990s shows the dynamics of such a development.[53] They argue that private industry strongly influences the university's research agenda in different ways. Science-based knowledge and skills are increasingly created in the context of the user-oriented frameworks of the present-day research agenda and its preoccupation with economics. Not only that, 'transdisciplinarity' has become the norm; there is an increased focus on social accountability – a term that appeared in higher education in continental Europe for the first time after 1970[54] – and a more comprehensive system of quality control has become a prerequisite.

Quality-assurance systems, too, may be a subtle route to state intervention. Most developed countries have established a more or less robust system of quality control. But now it may founder as a result of a permanent stream of internal and external evaluations, audits, accreditations, mid-term reviews and efficiency assessments – to name but a few. All those stakeholders involved acknowledge that a critical glance, especially from external peers, is valuable for every research or educational programme. But many would hope to reduce the sum of assessments and audits somewhat, preferably by urging the professionals to set up their *own* formal and informal ways to organise quality-driven 'checks and balances'. After all, scientific autonomy and professional responsibility should go hand in hand.

Because of its strategic consequences, the issue of autonomy and self-governance versus state regulation and control should be a continuous concern for the universities and their professionals on the one hand, and public authorities on the other. Basically, the issue of autonomy versus control can be summed up in one question: Whose university is it?[55] Its traditional constituents, namely, its faculty and students? The alumni maybe? The government or any other local, regional or public institution? Employers? In many countries, the sense of academic ownership and the associated culture of academic values has been transformed by the policies of marketisation. Advocates of the marketisation of higher

[53] Michael Gibbons *et al.*, *The New Production of Knowledge: The Dynamics of Science and Research in Contemporary Societies*, London and Thousand Oaks, CA: Sage Publications 1994.

[54] Geoffrey Lockwood, 'Management and Resources', in: Walter Rüegg (ed.), *A History of the University in Europe*, Vol. IV: *Universities since 1945*, Cambridge: Cambridge University Press 2011.

[55] Douwe Breimer and Frans Saris, *Whose University Is It?*, Leiden: Leiden University and Amsterdam University Press 2006.

education argue that this process will turn today's higher education into a more flexible and efficient institution. As Frank Furedi puts it:

> They claim that the expansion of the market into the lecture hall will provide better value for money and ensure that the university sector will become more efficient and more responsive to the needs of society, the economy, students and parents.[56]

Some of these needs are a wider and more diverse participation of students in higher education, and a better enabling of students' choices and rights through increased quality control, auditing and ranking performance. Over recent decades in the UK and the US, many universities have embraced a 'student-as-customer' model. Universities across the world, from continental Europe to East Asia, follow their example – to the regret of many. After all, shouldn't universities be public goods, like clean air and fresh water: essential to everyone and owned by no one, and therefore best left untouched, with confidence in their professionals? Some of these fundamental questions will be addressed in Chapter 9 of this book.

2.6 Academics versus managers

Governance and management are inextricably linked. Whereas the concept of governance is accepted as unavoidable in every organisation – even in universities – 'management' as an activity and 'managers' as the individuals performing this role are often regarded by academics as among the most lamentable phenomena in a university. A nice example is taken from an article in one of my nation's leading newspapers, by a Dutch professor of 'financial geography' and specialised in 'intellectual provocation':

> Universities were always sleepy, elitist institutions with professors who unhindered by third parties governed and ruled their own shops. They are now quasi-commercial enterprises with mission statements and professional governors with market-based salaries and chauffeur driven cars, who are more concerned about their real estate projects than what is happening on the work floor. The manager has won.[57]

[56] Frank Furedi, 'Introduction to the Marketisation of Higher Education and the Student as Consumer', in: Mike Molesworth, Richard Scullion and Elisabeth Nixon (eds.), *The Marketisation of Higher Education and the Student as Consumer*, London and New York: Routledge 2011, pp. 1 ff.

[57] Ewald Engelen, 'De manager heeft gewonnen', *NRC.Next*, 18 July 2012 (my translation).

This sort of talk is an illustration of the sincere annoyance often vented by university academics about where *their* universities are going. In their fury, they often become their own worst enemies. Yet it is wise for all university administrators, be it those on the university boards or deans and department heads, to pay genuine attention to this widespread annoyance. We need management, preferably 'enlightened' management, but as faculty we must keep it under control. As British/French Professor Geoffrey Williams argues, the challenge is to do this without losing contact with the shop floor, 'without selling your soul'.[58] The challenge of striking the right balance between the roles and responsibilities of academics and management such that neither experience the other as 'irritating' and that both work together, in harmony, towards a common goal, is one of the most fiercely debated issues among academia and management in higher education institutions.

In the final volume of *A History of the University in Europe* (2011), one of the most experienced academics in the field of university management, Geoffrey Lockwood, gives his vision of the managerial revolution in higher education in Europe since 1945. Before that, Lockwood argues, 'management' was not part of the cultural vocabulary of the university. The university was governed and administered, not managed.[59] Throughout the centuries, universities were characterised by relatively loose, unstructured, casual, and often unpleasant management styles.[60] The main reason for the shift towards a much more dominant role of output-driven management in higher education – regretted by many – has been the increased scale and complexity of today's university, stemming from institutions' responding to societal and environmental change.

Lockwood identifies five drivers for this change. The first is the explosion of knowledge and the fact that much of the growth occurred at or across the traditional boundaries of the disciplines; 'financial geography' is probably a nice example of this development. The tremendous growth in knowledge has had an immense impact on curriculum development, which often became more interdisciplinary and complex, thereby increasing the need for organisation and the involvement of

[58] Geoffrey Williams, 'Management Need Not Be Punishment for Academic Success', in: *Research Europe*, 6 June 2011, p. 7.

[59] Geoffrey Lockwood, 'Management and Resources', in: *A History of the University in Europe*, Vol. IV: *Universities since 1945*, 2011.

[60] Francis E. Rourke and Glenn E. Brooks, *The Managerial Revolution in Higher Education*, Baltimore, MD: Johns Hopkins University Press 1966.

professional full-time managers. The second driver for change was the pressure for widening participation in university education, its massification and the growing diversity of students and faculty. A third driver is the dazzling development of ICT and other technologies and their impact on university teaching and research practices, but also on in-house management information systems and evidence-based decision-making processes (such as the use of bibliometric data within internal research evaluation frameworks). Furthermore, there is a range of socio-political developments, such as state control, the changing demands of customers (students and their parents, for example) and, for European universities, the policies of the European Union and their impact on university management. Overall, crucial factors for the rise in the growth of management are internal complexity and external competition for the best faculty, students and research funding. Management, in short, is an unavoidable aspect of the modern university. Lockwood agrees:

> The twin needs of institutional economic efficiency and for full and effective accounting to investors (whether states or individual students) considerably increased the role of management, as can be seen from the widespread introduction of development (fund-raising) offices, the extension of finance offices into audit/value-for-money activities, and the major increase in attention paid to external reports on the finances of the university. In general terms, the exercise of choice within the university about the usage of scarce resources in the face of unlimited aims and the need to explain or defend such choice to external bodies has been a significant factor in the rise of university management.[61]

Yet it is one of the most exciting challenges for every university administrator – often themselves academics – to establish a sensible buffer between their managerial responsibilities and their professional yearning for Von Humboldt's principles of academic '*Freiheit und Einsamkeit*' (freedom and solitude).

2.7 Globalisation and internationalisation of higher education and research

Certainly, one of the most prominent recent developments in higher education has been its ongoing globalisation and the internationalisation of teaching and learning.

[61] Geoffrey Lockwood, 'Management and Resources', in: *A History of the University in Europe*, Vol. IV: *Universities since 1945*, 2011, p. 137.

At times we seem to forget how international the world of the university once was. 'Medieval men loved travel', is Hilde De Ridder-Symoens' opening sentence in an excellent chapter on the mobility of university professors and students in the Middle Ages:

> It mattered little that roads were few and that they could only go on foot or on horseback, by cart or by boat. The twentieth century thinks of the travelers thronging the roads of Europe in the Middle Ages as the ubiquitous armies, merchants going from town to town, and pilgrims.

Yet,

> until the end of the eighteenth century pilgrims . . . of another kind were also a familiar sight on the roads of Europe. These were the university students and professors. Their pilgrimage was not to Christ's or a saint's tomb, but to a university's city where they hoped to find learning, friends and leisure.[62]

Despite the difficult conditions that travellers experienced on their journeys,[63] there were several factors that made communication between university centres of learning easier than today. To give some examples: Latin was the working language, the *lingua franca*, common to all universities until late in the nineteenth century, country borders were not yet the obstacles that they were later to become, and subjects and degrees at different universities could simply be combined, without the intervention of audit committees, accreditation organisations or the professions. Nor should we forget that, in the early stages, many countries – the Scandinavian countries, Iceland, Ireland, Scotland and the Low Countries, for example – did not have their own universities. Mobility was then a bitter necessity. It was only from the twelfth century when the number of universities in Europe started to increase that we witness the start of the transition from internationalism to regionalism:

> Preference for a regional university or for the nearest university became general at the end of the fourteenth century, and most marked in the fifteenth century, when every state and political or ecclesiastical unit tried to found a *studium* so that its citizens should study there instead of abroad. In this way, it kept their intellectual and ideological training under observation and prevented the flight of capital abroad, detrimental to local traders and craftsmen.[64]

[62] H. De Ridder-Symoens, 'Mobility', in: H. De Ridder-Symoens (ed.), *A History of the University in Europe*, Vol. I: *Universities in the Middle Ages*, Cambridge: Cambridge University Press 1992, p. 280.

[63] *Ibid.*, pp. 299 ff. [64] *Ibid.*, p. 285.

As a result, mobility slowly decreased, only picking up again in the twentieth century, particularly after the Second World War, and now not only within Europe, but throughout the whole world.

Globalisation and internationalisation, William Twining once criticised the over-use of words like global, globalisation and globalising – he called them the 'G-words'.[65]

There is a vast amount of literature on the internationalisation of higher education, books, reports, papers and websites, no longer dominated by North American and Western European conceptions, but with a growth in information about student and staff mobility from Asia, Latin America and Africa, in both education and the changing roles of universities.[66] All these studies make sense. Globalisation and internationalisation have huge impacts on institutions of higher education. In his PhD dissertation, Eric Beerkens identified some broad themes in higher education, in which globalisation manifests itself, and which in turn contributes to the growth of international inter-organisational arrangements. One is the increasing interconnectedness between universities. Two others are the changing relationship between the university and the state, and the issue of the identity of universities in a globalised world: universities and higher education become less tied to their national institutional structures and contexts.[67]

In a comprehensive essay about different aspects of globalisation and internationalisation in higher education, Philip Altbach and Jane Knight define 'globalisation' as the economic, political and societal forces pushing twenty-first-century higher education towards greater international involvement, whereas 'internationalisation' includes the policies and practices undertaken by universities to deal with that global academic environment.[68] They argue that globalisation, with its increasing number of links and interconnections that transcend

[65] William Twining, 'A Cosmopolitan Discipline? Some Implications of "Globalisation" for Legal Education', in: *Journal of Commonwealth Law and Legal Education*, 1, 1, December 2001, pp. 24–5.

[66] For a thorough and most useful overview of journals, books, databases and websites that are relevant for the practice of international education, see Hans de Wit and David Urias, 'An Overview and Analysis of International Education Research and Resources', in: *Trends, Issues and Challenges in Internationalisation of Higher Education*, 2011.

[67] H. J. J. G. Beerkens, *Global Opportunities and Institutional Embeddedness: Higher Education Consortia in Europe and Southeast Asia*, Enschede: CHEPS 2004.

[68] P. G. Altbach and J. Knight, 'The Internationalization of Higher Education: Motivations and Realities', in: *Journal of Studies in International Education*, 11, 3–4, 1 September 2007, p. 290.

national borders and cultures,[69] may be unalterable. By contrast, internationalisation encompasses many choices. This is the reason why these two are on my agenda of strategic issues that may affect all university disciplines – including law schools. A recent report by the European Association of Universities shows that, although universities, in particular European universities, feel they need to take a more strategic, cross-institutional approach to mobility, they find it difficult to identify 'key questions regarding their wants and needs'.[70] The questions are even more important, given the way higher education institutions respond to internationalisation; Europeanisation and globalisation are related to internal institutional and external factors.[71] They include global questions such as – randomly – access and equity, the growing use of the English language in universities, internationalisation of the curriculum, long-distance education and e-learning concepts, website and marketing, international standards of quality assurance and control, recognition of diplomas and study credits, the choice of profit or not-for-profit education, international mobility of faculty, university rankings and typology (think of the European Commission's 'U-Multirank' project[72]), global policy coherence, and so forth. After all, it is important to note that the global embeddedness of universities does not automatically lead to national standardisation; instead, universities *evolve* in their daily national and organisational settings. This process of 'locally adapting transnational trends' – in 1995 labelled 'glocalisation' by Robertson[73] – leads to creative deviations and incomplete adaptations.[74]

[69] David Sugarman and Avrom Sherr, 'Globalisation and Legal Education', in: *International Journal of the Legal Profession*, 8, 1, March 2001, pp. 5–10.

[70] Elizabeth Colucci *et al.*, *Mobility: Closing the Gap between Policy and Practice*, Brussels: EUA Publications 2012.

[71] Anneke Luijten-Lub, *Choices in Internationalisation: How Higher Education Institutions Respond to Internationalisation, Europeanisation, and Globalisation*, Enschede: University of Twente 2007.

[72] Frans A. van Vught and Frank Ziegele, *Multidimensional Ranking: The Design and Development of U-Multirank*, Dordrecht: Springer 2012; European Commission, 'Supporting Growth and Jobs – An Agenda for the Modernisation of Europe's Higher Education Systems', COM(2011) 567 final, 2011.

[73] R. Robertson, 'Glocalization: Time–Space and Homogeneity–Heterogeneity', in: M. Featherstone, S. Lash and R. Robertson (eds.), *Global Modernities*, London: Sage 1995.

[74] Georg Krücken, Anna Kosmützky and Marc Torka (eds.), *Towards a Multiversity? Universities between Global Trends and National Traditions*, Bielefeld: Transcript 2007.

Higher education, indeed, has become international.[75] In a volume about globalisation and internationalisation, the two editors, Nick Foskett and Felix Maringe, conclude that, for those universities in national systems where student participation rates have already reached high levels, the only response to the market is to compete for students internationally or to adopt a niche strategy of specialisation. Increased internationalisation, they argue, is 'the inevitable path for universities to enable them to operate in the global markets to which they will be exposed'. For higher education, Foskett and Maringe foresee a future in more or less four tiers: a relatively small number of global universities whose reputation and markets are global and which operate with limited constraint from domestic national policies and markets; a second tier of internationalised universities will also operate in the global arena, but from a base which is strongly rooted in their own national system; the third tier will be those that operate principally at national level, drawing students and resources largely from their own national context, but providing some opportunities for international engagement; and the final tier will be those that operate entirely within sub-national and regional contexts – they engage comparatively little with global markets, but demonstrate internationalisation in terms of curriculum design and content or links with regional employers operating in international markets.[76]

Some even expect today's universities to merge into 'networked universities', with multiple audiences and stakeholders as its context.[77] Across the world today, an estimated 4 million students study abroad; Asians account for more than 50 per cent of this population,[78] and experts think that some 15 million students will study abroad by 2025.[79] In Europe, too, where there has been student and staff mobility in both teaching and research from its medieval university origins, with

[75] Simon Chesterman, 'The Evolution of Legal Education: Internationalization, Transnationalization, Globalization', in: *German Law Journal*, 10, 7, 2009, pp. 877–88.

[76] Nick Foskett and Felix Maringe, 'The Internationalization of Higher Education: A Prospective View', in: Felix Maringe and Nick Foskett (eds.), *Globalization and Internationalization in Higher Education – Theoretical, Strategic and Management Perspectives*, New York: Continuum 2010.

[77] Paul F. van der Heijden, *Working for the University (Dies Lecture 8 February 2013)*, Leiden: Leiden University 2013; Nicholas Standaert, 'Towards a Networked University', in: Ronald Barnett (ed.), *The Future University*, London and New York: Routledge 2012.

[78] OECD, *Education at a Glance 2013: OECD Indicators*, OECD Publishing 2013.

[79] P. G. Altbach and J. Knight, 'The Internationalization of Higher Education: Motivations and Realities', in: *Journal of Studies in International Education*, 11, 3–4, 2007.

Latin as the common language, internationalisation in education has become increasingly prominent over the past twenty years. Student exchange programmes in Europe have proven to be most successful. In early 2012, the so-called Erasmus Programme celebrated its twenty-fifth anniversary: up to then almost 3 million students had benefited from a six-month to one-year period of study abroad.[80] Students continue to benefit from this programme; the study credits they earn at host universities are recognised by and can be transferred to their home universities. In addition, student mobility not only broadens the exchange student's horizons; both the sending and host universities benefit from each exchange: the longer-term effect is a creeping but indelible change in the universities' world view and outlook, and indeed their appeal to third parties.[81] The European Commission's ambition is to double that number and to provide mobility opportunities to an additional 5 million learners (including bachelor's and master's students, and sport, as well as faculty mobility) over a seven-year period until 2020 (renamed: *Erasmus+*). This would mean one out of every five students.

'Erasmus' is definitely one of the successes of European university cooperation, although the overarching benefits of student mobility, as well as the actual numbers, have seldom been thoroughly analysed. Mobility at bachelor's level gives the student, at the least, an insight into education in another country. In addition, mobility at master's or doctoral levels should also be significant. Other European academic mobility and cooperation programmes, such as 'Tempus', support the modernisation of higher education in Central and Eastern European countries, Central Asia, the Western Balkans and the Mediterranean region, mainly via university cooperation. But, although reliable and comparable data on mobility are only scantily available,[82] student mobility at master's level in Europe is showing a very gradual and somewhat lethargic progression. Yet Europe's 2020 target is that an average of at least 20 per cent of higher education graduates should have enjoyed a period of higher-education-related study or training, including work placements abroad,

[80] European Commission, 'Supporting Growth and Jobs – An Agenda for the Modernisation of Europe's Higher Education Systems', COM(2011) 567 final, 2011.

[81] European Commission, *ERASMUS – Facts, Figures and Trends: The European Union Support for Student and Staff Exchanges and University Cooperation in 2011–12*, Luxembourg: Publications Office of the European Union 2013.

[82] Elizabeth Colucci *et al.*, *Mobility: Closing the Gap Between Policy and Practice*, 2012.

representing a minimum of 15 ECTS credits (out of 40) or lasting a minimum of three months.

Elsewhere in the world, for instance in the Commonwealth countries, even larger numbers of students travel abroad for exchange programmes.[83] Four English-speaking countries alone, the US, the UK, Australia and Canada, account for more than half of all foreign students in the OECD area.[84] In some of the top British institutions, foreign students outnumber their national counterparts. In short, international mobility matters: besides the benefits for students, it has an impact on staff, and on the institutional policy of today's universities.[85]

Other, different examples of globalisation are the so-called 'global mega-universities', such as the University of Phoenix in the US that provides, in addition to its campus-based programmes, long-distance learning opportunities for 600,000 students across the world, and embraces slogans such as: 'As champions for the working learner, our degree programs are built around your goals. You'll get the accredited education you deserve and the support you need.' Another example is the Open University in the UK, with 250,000 students supported by centres in the UK, Ireland and continental Europe; and there are many more examples to be given of such ongoing distance education. Another interesting example is Tecnologico de Monterrey in Mexico ('Tec Virtual'), serving 200,000 students in twenty-one Latin American countries, from literacy programmes in remote and indigenous areas of the continent to PhD programmes. These 'universities' are very different from our traditional concept of a university as 'a bricks and mortar place of learning'. From an educational perspective, the boom in 'massive online open courses' (MOOCs) providing wide and free access to higher education and research across the world, is a fascinating development. The first MOOC that the Leiden Law School offered – 'The Law of the European Union: An Introduction' – drew 43,000 students when it opened its online gates in the summer of 2013 (see section 5.5 of this volume)

Another relatively new development within the realm of internationalisation, high on the agendas of some well-endowed universities, is the

[83] More or less similar programmes are UMAP for University mobility in Asia and the Pacific, the Columbus Programme, consisting of a network of seventy Latin American universities and eleven European countries, and the Program for North American Mobility, promoting student exchange across Canada, the US and Mexico.

[84] OECD, *Education at a Glance 2013: OECD Indicators*, 2013.

[85] See e.g. League of European Research Universities (LERU), *LERU Paper on International Curricula and Student Mobility*, Leuven: LERU April 2013.

establishment of overseas campuses. In December 2011, Berkeley announced plans to open a large teaching and research centre in Shanghai as part of its broader presence in China. Universities such as Duke, Stanford and NYU, the latter of which already has a campus in Abu Dhabi, foresee having campuses in China as well. And, while Yale opened its first new college to bear the name 'Yale' (the Yale–National University of Singapore College), the Carnegie Mellon University announced that it would open a branch in Rwanda.[86] Many British and Australian universities, too, have their overseas campuses; even China is currently opening campuses in Asia (for example, in Laos), Europe (in Italy) and Africa (in Egypt).[87]

Although remote campuses can easily be seen as a new format of old colonisation, they may well serve interests at both ends. As we have seen, Singapore, with its prestigious National University of Singapore and a law school that claims to be 'Asia's Global Law School', promotes internationalisation in higher education as a vital element of the country's strategic policy. In doctoral studies, for instance, it aims to provide a higher education hub for the region.[88] Besides developing a number of new public and private institutions, Singapore is hosting some of the most prestigious foreign campuses in order to expand access to higher education for its own growing and demanding student population. Another example is the LLM in international business law (Singapore/Paris) offered by the Sorbonne University's International Law School, in both Paris and Singapore.

For the settlers, the motivation for having outposts abroad is the scouting for top students and faculty for their own institutions, preparing their students for a globalised world, and exporting their own intellectual thought to these countries. In 2012, NYU's campus in Abu Dhabi received more than 15,000 applications for 150 places. Other incentives may be increasing international opportunities for home students, government policies to attract skilled migration, and expanding access in countries where public higher education cannot provide sufficient places. Financial gain may also play a role; some American universities are now considering fully fledged foreign branch campuses in the oil-rich Middle East. And in continental Europe, too: Michigan State University not only

[86] 'American Campuses Abroad', in: *The Chronicle of Higher Education*, 4 December 2011.
[87] www.sinograduate.com/chinese-universities-abroad (last accessed 28 February 2013).
[88] Thomas Ekman Jorgensen, *CODOC – Cooperation on Doctoral Education between Africa, Asia, Latin America and Europe*, 2012, p. 36.

has degree programmes in Singapore, South Africa and China, but also in France and Italy. Higher education is an export product.[89] As we have seen in, for instance, the EU's policies on higher education, there has been a shift from predominantly cultural political rationales to, nowadays, a more economic perspective. Finnish researcher Minna Söderqvist performed a discourse analysis of internationalisation at higher education institutions, to better understand this process. She found three different discourses on internationalisation: one related to obtaining funding for teaching, learning and research; the second related to an institution being both competitive and appreciated and respected; and the third discourse is of a more cultural political nature, with internationalisation of a particular institution contributing to what Söderqvist calls a 'multicultural and more equal world'.[90]

There is a trickier side. Universities setting up overseas campuses in developing or transitional countries with little respect for the rule of law, for example, will have to weigh the value of their presence there against the academic values that are so prominent on their home university websites, such as the freedom to speak, to teach and to do research. Members of the Yale college faculty have been raising concerns about their institution joining an autocratic city-state where drug offences can bring the death penalty, homosexual relations are illegal and criminal defamation charges are aggressively pursued.[91] Here, Söderqvist's three discourses may be of value: if an institution's internationalisation policy is mainly driven by financial motives, the enterprise of establishing institutional relationships and setting up overseas campuses may be questionable and suspect. In such cases, it is a question of financial opportunity over institutional integrity.[92] If, by contrast, the overriding motive is, for example, to contribute to a more multicultural and more equal world, to strengthen freedom and the rule of law in a particular country, such developments can only be welcomed.

Even more so than education, most scientific research has become a truly global enterprise. Modern science has been a cross-border activity

[89] See www.globalhighered.org/branchcampuses.php.

[90] Minna Söderqvist, *Internationalisation and Its Management at Higher-Education Institutions: Applying Conceptual, Content and Discourse Analysis*, Helsinki: Helsinki School of Economics 2007.

[91] Tamar Lewin, 'Faculty Gives Yale a Dose of Dissent Over Singapore', in: *New York Times*, 4 April 2012.

[92] Worldviews 2013: Global Trends in Media and Higher Education, Conference, Toronto, June 2013.

since its early days in the sixteenth century when leading scholars travelled Europe to teach and interact with their peers. In many academic fields, notably in the sciences and medicine, people increasingly publish in English. English has become the *lingua franca* of the universities, at least in the natural sciences.[93] CERN, the European Organization for Nuclear Research, is a well-known example of what international research cooperation is capable of. CERN is one of the world's largest centres for physics research, with investments and researchers that can only be brought together with a truly international approach. Other strong examples of internationalisation draw on the tightening relationship between universities, governments and multinational companies, as (co-)funders of research, through technology transfer and through an increased focus on appropriating intellectual property rights through global patents. For researchers in virtually every discipline, the Internet and its many scientific applications, of which Google Scholar is but one, have a tremendous influence on international research cooperation and the dissemination of research results. Science and scholarship is indeed undergoing massive change and is developing into an 'open science movement', much of which is driven by technology and IT advancements. Some even speak of 'Science 2.0', assuming that these changes concern much more than just open access, open data and open science. They believe the whole 'modus operandi' for research is changing, as can be seen in the increase in the number of researchers and even the advent of 'citizen science'.[94]

2.8 Size and scope: collaboration in higher education

All these six 'developments' seem to come together in recent activities referred to as CAM developments (collaboration, alliance, merger) in higher education institutions, including research institutes, at local, regional and national level. Scale is an important factor in ensuring that universities can flourish in research and education on the one hand,[95] and

[93] See Scott L. Montgomery, *Does Science Need a Global Language? English and the Future of Research*, Chicago: University of Chicago Press 2013. And, although English does not equally cover all university areas, the author believes that a country that determines that it will not teach or do research in English is one that seeks defiant isolation (p. 241).

[94] Fascinating examples include 'Galaxy Zoo', which lets thousands of users classify galaxies, as accurately (it is claimed) as astronomers do; and 'Synaptic Leap', intended to find alternative drug treatments.

[95] Paulo Santiago *et al.*, *Tertiary Education for the Knowledge Society*, Vol. 1, 2008.

can contribute to more diversified higher education, on the other.[96] 'Collaboration' focuses on institutional arrangements rather than relationships between groups of academics; 'alliances' are more systematic forms of collaboration, covering a wider range of their operations; a 'merger', finally, leads to the creation of a single institution.[97] There are a number of reasons why universities may wish to grow or to collaborate.[98] One, mainly financial, reason may be the advantage of scale: larger institutions may cut costs by sharing their back-office activities, for instance. A more strategic reason can be that, because of the increasing diversification of the student population, a larger institution may serve students better through a more diverse and at the same time more focused and efficient portfolio of teaching programmes. An example of such a full-scale merger is the Université d'Aix-Marseille, resulting in one of the largest universities in France, with about 70,000 students.

A third reason for universities to grow bigger through collaboration may be the quest to rise in the league tables,[99] the perception being that a higher ranking leads to more international prestige, thus making an institution more attractive to more and better students and faculty, as well as leading to more research money (see section 2.9 below).

A fourth reason for growth may be the motivation for universities located in close proximity to each other to merge and take advantage of their locations. Departments and faculties of one larger university cooperate more easily and more effectively in research and teaching. Co-location is often necessary to deliver significant synergy or efficiency.[100] This is to the benefit of the students who may be provided with a more challenging curriculum portfolio, to researchers through an improved and often more interdisciplinary research synergy, and to national higher education as a whole if institutional fragmentation in certain areas of teaching and research can be avoided or non-viable parts of the university can flourish through collaboration.

[96] *Ibid.*, pp. 96 ff.
[97] HEFCE, *Collaborations, Alliances and Mergers in Higher Education: Consultation on Lessons Learned and Guidance for Institutions*, London: 2012.
[98] Grant Harman and Kay Harman, 'Institutional Mergers in Higher Education: Lessons from International Experience', in: *Tertiary Education and Management*, 9, 2003, pp. 29–44.
[99] Anthony F. J. van Raan, 'Universities Scale Like Cities', in: *PLOS ONE*, 8, 3, 27 March 2013.
[100] HEFCE, *Collaborations, Alliances and Mergers in Higher Education: Consultation on Lessons Learned and Guidance for Institutions*, 2012, para. 103.

In their book on the globalisation of higher education, Nick Foskett and Felix Maringe expect an emerging group of 'super universities':

> These universities will be the product of regional mergers and partnerships . . . distinguished by strong internal segmentation to enable them to reach out to the full diversity of aspiring students within their region and beyond.[101]

Rather than on the nation state, the focus of future economic power seems to lie in the growth of the (mega)cities and regions and their local knowledge-based economies, technology parks and 'innovation hubs'.

All in all, clarity about the objectives for CAM activities will energise the parties and avoid wasted effort.[102] A clear case for the new strategy is crucial: one of the important lessons learned in the Higher Education Funding Council for England's thorough study on higher education cooperation is that institutions should avoid seeing the case for a particular proposal as self-evident. A rigorous review of options, prepared objectively and subject to consultation, should precede any agreement in principle, and it is important to engage with dissenting views. Where a proposal affects students, the HEFCE report argues, their interests and needs are a major priority.[103]

Finally, the idea behind growth may be that bigger is better because it makes the institutions more visible, particularly those operating on an international scale in education and research, as well as more relevant in the regional, national and international political arena. However, the HEFCE report makes clear that size in and of itself is rarely a good argument for a merger.[104] Mergers are closely watched by politicians and by society at large, particularly where education is involved. If schools or institutions grow too large, even though there is a strong desire for synergy, the personal relationship teachers, staff and students should have with one another and which is so crucial for every form of education, may disappear. Other equally important and equally sensitive issues may be the naming of the new institution and its branding, as well as, where institutions from different cities consider merging, how the merger impacts on the cities that host the universities.

[101] Nick Foskett and Felix Maringe, 'The Internationalization of Higher Education: A Prospective View', in: *Globalization and Internationalization in Higher Education – Theoretical, Strategic and Management Perspectives*, 2010, p. 313.

[102] HEFCE, *Collaborations, Alliances and Mergers in Higher Education: Consultation on Lessons Learned and Guidance for Institutions*, London: 2012, para. 25.

[103] *Ibid.*, para. 19. [104] *Ibid.*, para. 42.

Strategic decision-making in this area is therefore one of the most delicate issues that university strategists have to deal with; and communication with the academic staff, students, alumni and city or the region is always a tough challenge.

This is in fact strongly connected to the question of ownership, which I mentioned earlier in this section: whose university is it?

A fortuitous example is the University of Manchester, which was created in 2004 by the merger of the Victoria University of Manchester (1851) and the University of Manchester Institute of Science and Technology (1824) – two city-based institutions merging into one world-class university. Another successful example is the birth of the French University of Strasbourg in 2009, arising from the merger of three separate universities focusing on sciences, humanities and legal, political, social and technological education. For a university, the combination of natural sciences and medicine, the social sciences (including law) and humanities may be important in light of the growing multidisciplinarity of education and of research funding.[105] This was precisely the incentive to merge the three Paris universities – Panthéon-Assas (law and management), Paris-Sorbonne (arts, humanities and social science), Pierre et Marie Curie (science and engineering), one engineering school: UTC (University of Technology of Compiègne), a business school (INSEAD), a museum (the National Museum of Natural History) and three public research organisations – into one fully fledged broad university: Sorbonne Universités.[106]

2.9 Scientific integrity and the league tables: ever more writing, or more reading?

In 2012, the Netherlands was shocked to learn of a serious breach of scientific integrity, involving a very well-known professor of social psychology (the 'Stapel case'). It was a case of fraud on an inconceivable scale.[107] The worst part of the case perhaps was that young researchers

[105] www.unistra.fr/index.php?id=2716 (last accessed 27 December 2013).

[106] www.sorbonne-university.com (last accessed 27 December 2013). Another example in Paris is the Paris-Saclay University project.

[107] To get some idea of what happened, see Paul A. M. van Lange *et al.*, *Sharpening Scientific Policy After Stapel*, Amsterdam, 2012; John M. Budd, 'The Stapel Case: An Object Lesson in Research Integrity and Its Lapses', in: *Synesis: A Journal of Science, Technology, Ethics, and Policy*, 2013.

had already been awarded a PhD, or were still working towards it, based on their supervisor's faked research data. A more dramatic start to a career in research is difficult to imagine.

Although nobody denied that the case was outrageous, some thought that the pressure to publish could be an instigating factor for the fraud. For more than half a century, 'publish or perish' has been the message to academics in a growing number of countries and in most scientific fields. The committee of enquiry, chaired by Professor Levelt, indeed, concluded that the three universities for which Stapel had worked were also to blame, as well as social psychology as such. The discipline was hit right in the heart: an image was painted of a 'sloppy research culture' in which some scientists do not understand the essentials of statistics, journal-selected article reviewers encourage researchers to leave unwelcome data out of their papers, and even top journals print results that are obviously too good to be true.[108] It is most probably not a matter of the lack of published and accessible norms; they are numerous.

At most, it could be a matter of sloppy communication. Most scientific disciplines, universities, medical hospitals, science academies and other institutions of education and research have their codes of research ethics and scientific integrity.[109] It is more than ever a matter of teaching students the basic rules of research integrity, which of course should start as early as in secondary education,[110] of keeping tabs on one another's scientific conduct, of better communication of standards, policies and previous cases and rulings, of training, auditing and monitoring, of providing funding to support education and compliance programmes, and of enabling employees to feel that they can whistle-blow – in short: of putting scientific integrity – back – into the heart of our institutions. On the other hand, since allegations of scientific misconduct can easily be the

[108] Commissie Levelt, *Falende wetenschap: De frauduleuze onderzoekspraktijken van sociaal-psycholoog Diederik Stapel* 28, 2012 (in Dutch).

[109] See e.g. Association of Universities in the Netherlands, The Nederlands Code of Conduct for Scientific Practice. Principles of Good Scientific Teaching and Research, The Hague: 2004; ESF and ALLEA, The European Code of Conduct for Research Integrity, Strasbourg: 2011; European Science Foundation, Fostering Research Integrity in Europe: Executive Report, Strasbourg: 2010; Leiden University Medical Hospital, Scientific Integrity at the LUMC, Leiden: 2011; Committee on Science Engineering and Public Policy, *On Being a Scientist: A Guide to Responsible Conduct in Research*, Washington DC: National Academies Press 2009.

[110] Tricia Bertram Gallant, *Academic Integrity in the Twenty-First Century: A Teaching and Learning Imperative*, Wiley 2008.

end of one's research career and such allegations may be false or frivolous, the right to a fair trial for the accused must come first.

Another committee, set up by the Royal Netherlands Academy of Arts and Sciences, rightly argues that law and disciplines in the humanities – like literature, theology and philosophy – are less vulnerable to misconduct. With the exception maybe of socio-legal studies and criminology, the discipline of law does not seem to stray easily into the danger area of scientific misconduct. The law professors' materials – court rulings, publications and legislation – are all publicly accessible. For the legal discipline, misconduct through *plagiarism* is more likely, as the German Guttenberg case has shown.

The medical sciences are more prone to danger. An international review of more than 2,000 biomedical and life science research articles indexed by PubMed, an online database of biomedical publications, showed that research misconduct, as opposed to error, accounts for the majority of cases. Only 21 per cent of retractions were attributable to error. In contrast, almost 70 per cent of retractions were attributable to misconduct, including fraud or suspected fraud (43 per cent), duplicate publication (14 per cent), and plagiarism (10 per cent). Incomplete, uninformative or misleading retraction announcements, the researchers found, 'have led to a previous underestimation of the role of fraud in the ongoing retraction epidemic'.[111] Wilfred F. van Gunsteren, from the technical university, ETH Zürich, has identified and ranked 'seven deadly sins' in order of increasing gravity:

> A poor or incomplete description of the work, for example, publishing pretty pictures instead of evidence of causality; failure to perform obvious, cheap tests that could confirm or repudiate a model, theory, or measurement, for example, to detect additional variables or to show under which conditions a model or theory breaks down; insufficient connection between data and hypothesis or message, leading to lack of support for the message or over-interpretation of data, for example, rendering the story more sensational or attractive; the reporting of only favourable results, for example, reporting positive or desired (hoped for) results while omitting those that are negative; neglect of errors found after publication; and finally plagiarism, or even the direct fabrication, or falsification of data.[112]

[111] Ferric C. Fang, R. Grant Steen and Arturo Casadevall, 'Misconduct Accounts for the Majority of Retracted Scientific Publications', in: *Proceedings of the National Academy of Sciences of the United States of America*, 109, 42, 16 October 2012, p. 170.

[112] Wilfred F. van Gunsteren, 'The Seven Sins in Academic Behavior in the Natural Sciences', in: *Angewandte Chemie* (international edition in English), 52, 1, January

It seems as if the natural and medical sciences, in particular, have come into the line of fire,[113] as have the social sciences. In the Dutch Stapel case, the commission appointed by the Royal Academy was asked to investigate how the necessary care in handling research data could be improved.[114] The commission produced a number of important recommendations. However, what had the greatest impact on me was the headline above an interview with its chairman, sociologist and legal scholar, Professor Kees Schuyt: 'Less writing, and more reading.'[115] He suggests that academics should publish less and spend more time reading each other's work. Fraudulent research, says Schuyt with some understatement, is rarely noticed by colleagues in peer review: 'Some things in the academic forum have been found not to be working properly.'

'Trust but verify' may be a central notion in science, yet there is evidence that research producing *negative* results is disappearing from most disciplines.[116] Mere 'verification' does no good to a university career, nor to the 'impact factor' of a scientific journal. 'Winner takes all' competitiveness is embedded in the heart of contemporary global science and scholarship. The first to stake the knowledge claim in a scholarly publication is of paramount importance in the academic race for recognition and prestige. For researchers, regular publication has become critical for funding and jobs; their academic careers depend on it: 'publish or perish'.

For their universities, institutional competitiveness has become equally important. Universities are increasingly judged on their ranking – for education, research, or for both. Listings have become a widespread trend in higher education, but also right down to pre-schools and elsewhere. There are scores of them, but the internationally most visible ones are:

2013; Wilfred F. van Gunsteren, 'Die sieben Todsünden akademischen Handelns in der naturwissenschaftlichen Forschung', in: *Angewandte Chemie*, 125, 1, January 2013 (in German). See also, providing many cases, Frank Kolfschooten, *Onspoorde wetenschap. Over fraude, plagiaat en academische mores*, Amsterdam: De Kring 2012 (in Dutch), especially pp. 283 ff.

[113] David Goodstein, *On Fact and Fraud: Cautionary Tales from the Front Lines of Science*, Princeton, NJ: Princeton University Press 2010.

[114] Royal Netherlands Academy of Arts and Sciences (KNAW), *Responsible Research Data Management and the Prevention of Scientific Misconduct* (Advisory Report), Amsterdam: KNAW 2013.

[115] NRC Handelsblad 22/23 September 2012 (in Dutch).

[116] Daniele Fanelli, 'Negative Results Are Disappearing from Most Disciplines and Countries', in: *Scientometrics*, 90, 3, 11 September 2011.

Shanghai (ARWU), QS, Times Higher Education and the Leiden Ranking. Additional rankings are launched every year.[117] The general public, reading their newspapers, must be driven mad: universities being jostled by each other, pushed this way and that, moved from supreme joy to the depths of despair. It seems worse than being listed on the stock exchange. The ranking of universities is controversial, particularly among the academics themselves, because reputations for excellence are at stake, and because of the encouragement it gives to target proxies rather than underlying reality.[118] In many countries, law schools, too, are being ranked.

Yet the importance of league tables should not be trivialised by faculty deans or by university presidents. Although the relationship is not yet completely understood, rankings have bearing on the availability of research funding for faculties and the university as a whole, on their ability to attract the best students (particularly graduate and postgraduate students), lecturers and top researchers. League tables introduce a seemingly straightforward stratification of universities, which affects the reputation and social standing of a university in the eye of politicians and the public at large, but also with the institution's own alumni. In the US, and now also in the UK, they are sometimes even used to determine the salary of the president or the vice-chancellor of a university, based on performance in teaching, research, improving admission standards, increased production of degrees and improved financial performance, including fund-raising results.[119] In the US, this involves not only six-figure salaries, but quite often also allowances for cars and housing, as well as large contributions to pension funds – significantly more than what I know is paid at European universities, for instance. Yet it is fair to say that the current poor economic conditions have persuaded some American university administrators

[117] For a thorough study focusing on detailed descriptions and analysis of the methodologies used by the main international rankings, and the products and services on offer, see Andrejs Rauhvargers, *Global University Rankings and Their Impact – Report II* – Brussels: European University Association 2013.

[118] Geoffrey Boulton, *University Rankings: Diversity, Excellence and the European Initiative*, Leuven: 2010.

[119] Heather Tarbert, Kaihong Tee and Robert Watson, 'The Legitimacy of Pay and Performance Comparisons: An Analysis of UK University Vice Chancellors' Pay Awards', in: *British Journal of Industrial Relations*, 46, 4, December 2008, pp. 771–805. Peter J. Dolton and Ada Ma, 'Executive Pay in the Public Sector: The Case of CEOs in UK Universities', in: *Newcastle Discussion Papers in Economics 2002-1*, 2002, pp. 1 ff.

to convert performance-based 'bonuses' into scholarships for students, particularly at public institutions.[120]

The drawbacks of university rankings are well documented, as we have seen. By primarily counting highly cited researchers and papers published in eminent journals such as *Nature* or *Science*, for example, their focus is on the 'elite' universities, the result being that often apples are compared with oranges and entire academic disciplines are being ignored. Often their methodologies are considered questionable, such as the large role that the numbers of Nobel Prize winners play in the well-known Shanghai (ARWU) index; a ranking which was initially set up by Shanghai University to assist its students when considering studying abroad. Performance in *education*, however, is even more difficult to measure and rank.

The U-Multirank Project of the European Union seems a sensible programme because it tries to compare apples with apples and oranges with oranges, that is to say, it is based on strategic focus, by region and discipline, available capital, and the gross national product of a country.[121] Times Higher Education (THE) is doing the same, assessing institutions on thirteen indicators in the areas of teaching, research and innovation. By doing so, THE is gaining significant strategic and intrinsic value for administrators. After all, it is difficult to provide leadership in an organisation without at least some idea of what comparable institutions are doing. Yet newspapers, politicians, alumni and the public at large do not like subtleties such as comparing only the comparable. That is not nearly as much fun. The external world wants one thing only: a list that starts with Harvard, followed by ninety-nine other universities. For a university's administration it is very difficult not to follow this public sentiment, in the hope that their university is among that top 100.

In the end, the most fundamental question is: what is the core purpose of universities? Is *everything* focused on achieving the highest possible place in the rankings with lots of writing (132 publications per year, per person), by publishing strategically, and by allocating the available university funds primarily where they will make a difference in the rankings?[122]

[120] 'Presidents Defend Their Pay as Public Colleges Slash Budgets', in: *The Chronicle of Higher Education*, 3 April 2011.

[121] See e.g. Frans A. van Vught and Don F. Westerheijden, 'Multidimensional Ranking: a New Transparency Tool for Higher Education and Research', in: *Higher Education Management and Policy*, 22, 3, 2010, pp. 1–26.

[122] See e.g. Paul Wouters and Rodrigo Costas, *Users, Narcissism and Control – Tracking the Impact of Scholarly Publications in the 21st Century*, 2012.

Or is it first of all about adventurous research; about providing students with an inspirational education, where new groups of students are given opportunities they have never had before; about societal impact and non-academic activities focusing on the city or the region; about an environment and atmosphere that is truly academic and where serendipity is given full scope? After all, would a good position in the rankings not *follow* as a matter of course, instead of becoming a goal in itself?

As dean of my law school, I was never intentionally preoccupied or indeed overtly aware of the rankings of our international law master's. That was probably just as well. Sir James Black, the Nobel-Prize-winning pharmacologist, coined the word 'Obliquity': 'Goals are often best achieved without intending them.' John Kay has written a book on the subject, *Obliquity: Why Our Goals Are Best Achieved Indirectly*, which is as brilliant as it is humorous, addressing such questions as: why the most profitable companies are not the most aggressive in chasing profits, why the wealthiest men and women are not the most materialistic, and why the happiest people do not set out to pursue happiness.[123] Could the same be true of university rankings? If a high position in the rankings is to be attained without it becoming a singular goal, universities should concentrate on doing their very best in teaching and research and remain true to their core values and mission – and the recognition will come by itself.

Above all, universities should avoid practices such as creating part-time appointments to attract and recruit their competitors' researchers in order to raise their own scientific output. They should resist the temptation to divide their research output into 'least publishable units'; and refrain from scrapping particular disciplines simply because they deliver too few points in the rankings. They should resist the enticement of hiring new faculty in advance of upcoming research assessments to bolster research output just before deadlines, as some universities in the UK are reported to do. None of these practices is appropriate for academia.

Fortunately, as we have seen after the Stapel case, the regenerative ability of academic scholarship is inspiring confidence. Soon after the case was disclosed, four respected social psychologists identified concrete steps to help reduce the risk of fraud and other forms of scientific

[123] John Kay, *Obliquity: Why Our Goals Are Best Achieved Indirectly*, London: Profile Books 2011.

misconduct in their field and in other disciplines.[124] The Stapel case is a lesson from which social psychology and *all* disciplines can learn. The American author John Budd welcomes requirements for the reporting of responsibilities of all named authors to ensure some measure of integrity in science.

> If any individual is going to sign such a voucher, that person should take the responsibility to review every component of the research. Another step that could be taken is a similar assurance to be signed by manuscript reviewers.[125]

All this shows that the academic social psychology community has made huge progress in less than two years. But what it all boils down to is whether we really put academic integrity and academic self-esteem at the forefront of our teaching and our research, and whether the balance between writing and reading is acceptable. More than twenty research papers per annum (which, incidentally, is ONE academic paper every eighteen days!) should be considered *not done* in the academic community. It must be about education, academic and scientific progress in our universities, not about numbers.

This is precisely why Kees Schuyt asks his sobering question: 'Shouldn't we read a bit more and write a little less?' 'No', the president of a university will probably answer in the current ranking climate: 'that would cost us our position in the rankings, and therefore a lot of money. Just *thinking*, for one, cannot be measured and therefore it doesn't count.'

More writing versus more thinking: this will probably remain the horns of a dilemma for some time to come.

[124] Paul A. M. van Lange *et al.*, *Sharpening Scientific Policy After Stapel*, 2012.
[125] John M. Budd, 'The Stapel Case: An Object Lesson in Research Integrity and Its Lapses', in: *Synesis: A Journal of Science, Technology, Ethics, and Policy*, 2013.

3

Law school in search of identity

3.1 The 'odd man out' in the university?

As university academics, we all belong to that one '*universitas magistrorum et scholarium*', with a multitude of well-respected academic branches and disciplines. '*Universitas*', this proud (Steiner) and abstract word in classical Latin, means 'the totality' or 'the whole'.[1]

Yet it would be an interesting experiment to ask a random sample of professors to list all the disciplines and related faculties at their universities. Even if they came close to listing the names of the different faculties and schools, they would probably not be familiar with the nature of the research undertaken in each one, the manner in which students and PhDs are educated, or their traditions of publishing. Whereas legal academics may consider the faculty of sciences as one undifferentiated block of scientists researching and teaching in a similar way, there are enormous differences in approach between, let's say, biologists and astronomers. Stefan Collini provides such a useful summary of how academics tend to see uniformity in other groups but find distinctions within their own:

> From the perspective of a biochemist or electrical engineer the differences between an empirical sociologist and a modern social historian may seem barely perceptible: similarly, to the classicist or the art historian what the different branches of physics share seems far more salient than what divides them. But all these fields or sub-fields have increasingly developed their own concerns, methods, and vocabularies to the point where no one division is obviously more significant than all others. The theoretical economist and the critic of French poetry are as mutually

[1] For the definition of 'university', see Jacques Verger, 'Patterns', in: H. De Ridder-Symoens (ed.), *A History of the University in Europe*, Vol. I: *Universities in the Middle Ages*, Cambridge: Cambridge University Press 1992, pp. 35 ff. See also Olaf Pedersen, *The First Universities: Studium Generale and the Origins of University Education in Europe*, Cambridge: Cambridge University Press 1997.

> incomprehensible in their professional work as ever 'scientists' and 'humanists' were supposed to be.[2]

The academics in law school at least have the advantage of belonging to one and the same discipline, if by discipline we mean a group of academics with a comparable education, sharing a jointly accepted research methodology, and the same body of knowledge, vocabulary and theories. Yet law school is often seen as the 'odd man out' in the university: its education is considered dangerously close to the practice of law, its degrees mainly as a technical qualification, its funding a money-spinner for the university, its research annotative and nationally oriented, its methodology ambiguous, and its publishing curious. Some even speak of 'a discipline in crisis' and of 'legal science at the crossroads'.[3]

3.2 Should 'law' be in the university?

In the eyes of every legal academic, this question is defamatory. Yet in his classic enquiry into the cultures of university disciplines, *Academic Tribes and Territories* (1989), Professor Tony Becker paints a picture of what *others* think of us:

> The predominant view of lawyers is that they are not really academic – 'arcane, distant and alien: an appendage to the academic world'. Their personal qualities are dubious: vociferous, untrustworthy, immoral, narrow, and arrogant: though kinder eyes see them as impressive and intelligent. The discipline is variously described as unexciting, uncreative, and comprising a series of intellectual puzzles scattered among 'large areas of description'.[4]

One way of dealing with these negative perceptions is to shrug our shoulders: after all, our birth certificate dates back to the very beginning of the whole idea of a university, and today law is among the most popular disciplines on offer. The natural sciences gained ground much

[2] Stefan Collini, 'Introduction', in: C. P. Snow, *The Two Cultures*, 12th printing, Cambridge: Cambridge University Press 2009, p. lvi; Paul Trowler, Murray Sanders and Veronica Bamber (eds.), *Tribes and Territories in the 21st Century: Rethinking the Significance of Disciplines in Higher Education*, London and New York: Routledge 2012.

[3] Jan M. Smits, *The Mind and Method of the Legal Academic*, Cheltenham: Edward Elgar 2012, pp. 1 ff.

[4] Tony Becher, 'Towards a Definition of Disciplinary Cultures', in: *Studies in Higher Education*, 6, 2, January 1981, p. 111.

later; and the social sciences, including economics, only arrived on the university scene after the Second World War. Moreover, law graduates are among the best paid, and universities across the world depend heavily on their law alumni, both as financial sponsors as well as for their governance. Furthermore, in many universities, it is the law school that helps support those disciplines that do not have sufficient numbers of students to justify independent existence.

However, neither of these ways of justifying law as a university discipline ('we are old and important') is very constructive, I would say. But why has law, more than most other disciplines, been criticised by its fellow-academics? Several reasons come to mind.

First, in some common law countries law is openly marketed as a *professional* discipline, in contrast to most other disciplines at the university, which is not particularly helpful for its status as an academic discipline. Similarly, as we have seen in the UK, a graduate in any discipline can be appointed to the bar after a one-year conversion course in law. It is not only in the common law countries that the academic/vocational debate has put legal academics on the defensive *vis-à-vis* the other disciplines. Because of law's strong vocational characteristics, there is an incumbent danger that legal education is being considered as barely academic.

Second, the massification of enrolment in higher education today (the widening participation policy of many governments) has hit many *law* schools hard. It requires them to pay a lot of attention to activities that are generally considered less academic, such as teaching and assessing large groups of students, quality management, marketing and communications, and student counselling.

Legal research, too, is often challenged to justify its place in the university.[5] The research status is vulnerable because of its normative character, which is difficult to understand by many empirically oriented outsiders. The physicist's personal feelings about gravitation are irrelevant. Behavioural scientists such as sociologists and anthropologists proceed in a similar way, examining their data objectively and adopting a descriptive, not a prescriptive, approach. Legal research is partly aimed at 'the betterment of the law' and thus at the betterment of a particular society. Later in this book, I will emphasise the importance of a

[5] Jan B. M. Vranken, *Exploring the Jurist's Frame of Mind: Constraints and Preconceptions in Civil Law Argumentation*, Deventer: Kluwer 2006; Jan M. Smits, *The Mind and Method of the Legal Academic*, Cheltenham: Edward Elgar 2012.

somewhat more neutral, detached attitude in the natural sciences: scholars must be as detached from their subject as possible.[6]

Also, the implicit methodology of law studies, its strong orientation to legal practice and its long tradition of textbooks, case notes and commentaries on statutes[7] make people sceptical about law's place in academia. As a consequence, doctrinal legal research, which has been the natural backbone of our scholarship for centuries, is nowadays challenged by the empirical approach of the social sciences. The empirical/doctrinal law debate has the potential to split the discipline in two, with empirical researchers in the common law countries considering doctrinal research as not much more than black-letter law research, and academics in civil law countries perceiving empirical research as an activity for second-rate jurists.

Also, by its very nature, legal research has to deal with *national* problems. Legal academics have a responsibility to conduct research in their national language; whereas, by contrast, the natural sciences, for example, are not tied to a particular culture: for them, research has to be conducted in English – almost by definition.

Furthermore, PhDs in law are relatively rare, whereas in most other disciplines a PhD is generally seen as an essential *rite of passage* to career progression at the university. In most common law countries, PhD research in law is generally only being carried out in connection with another discipline, such as the political sciences or economics. In the civil law countries, by contrast, PhDs in doctrinal law are considered to be at the pinnacle of academic research.

Moreover, legal academics at universities are not only actively engaged in legal scholarship; many of them also perform consultancy work, or are connected to the bar. This, too, may contribute to the idea of a discipline too closely tied to the profession to be really academic. In addition, the number of part-time legal practitioners in law schools is relatively high compared to other disciplines, however good the reasons may be. In law, with its siren voices of practice, life-long academic careers are less common than in disciplines where those voices are more muted. This has a negative impact on the discipline's success in obtaining external

[6] For much more detail, see Chapter 6.

[7] For an extensive overview of the literary genres in legal writing, see Antonio García y García, 'The Faculties of Law', in: *A History of the University in Europe*, Vol. I: *Universities in the Middle Ages*, 1992, pp. 394 ff.

funding, where a consistent research CV is deemed of particular importance. This in turn contributes to its – in the eyes of others – problematic research status.

And, finally, philosophically speaking, the distinction that is often made between the so-called 'hard' and 'soft' sciences may have some logic, but this metaphor is, in the end, not very helpful. There is an inherent danger in dismissing these 'soft sciences', such as law, as less academic – rather like an applied science, being viewed as less fitting to the scientific and scholarly community of a university.[8]

3.3 Is law an academic discipline?

From their very origin, universities have had two tasks. They teach and educate scholars so as to prepare them to become knowledgeable and valuable members of our society; and they facilitate and perform scientific research to increase the common body of knowledge, thus helping us gain a better understanding of our world and enabling us to contribute to solving the societal problems we face. In doing so, practitioners are continuously enlightened and informed. But what the legal discipline considers as one of its strengths – that professors and practitioners read the same legal books and journals, participate in the same conferences, understand and learn from one another – can easily be perceived as a weakness by others.

3.3.1 Scholarship or science?

The outcome of legal research is often called 'legal scholarship', less so 'legal science'. An old divide runs between scholars and scientists in universities. It is a divide between disciplines like medicine, the natural and technical sciences, as well as parts of the social sciences on the one hand and on the other hand the humanities, including literature, theology and philosophy. Lawyers are usually included among the 'scholars'. Scholars are associated with writing monographs and long articles, with libraries and impressive study rooms, well-written research, men and women of learning with an individual approach and less concerned with such trivial inventions as university rankings and citation indexes. Science, by contrast, is more characterised by short papers, digital

[8] See section 6.3.

journals, teamwork, a global playing field, the importance of citations, and with English as the common language.

Science or scholarship? In a Dutch research assessment report, the commission opted for legal science instead of legal scholarship: 'Dutch legal scholarship has now become a true "science of the law".'[9]

The issue goes beyond semantics alone. The commission's choice of 'legal science' is not a mere conclusion, in the sense of David M. Walker's introduction to the Scottish legal system:

> Law, moreover, is truly a science, that is, a systematic body of coherent and ordered knowledge about the institutions, principles and rules regulating human conduct in society.[10]

The commission's choice, however, is a strategic one. In the internal and external funding of research, the more normative sciences like law and sociology lose out to the natural sciences. The term 'legal science' is gaining popularity in the English-speaking world. However, in Germany the umbrella term is 'Recht*swissenschaft*'[11] and in France '*sciences* juridiques', both referring to legal research as 'science'.[12]

3.3.2 No more than a shared postal code?

The somewhat indeterminate position of the discipline of law is also reflected in the ambiguous position the law school has within the organisation of the university, as is the case, for example, in the US and the UK. In 1918, the famous American sociologist and economist Thorstein Veblen could remark that 'in point of substantial merit the law school belongs in the modern university no more than a school of fencing or dancing'.[13] Some sixty years later, a commentator could still talk about jurists at universities as 'a very inferior set of people who mainly teach

[9] Evaluatiecommissie Rechtswetenschappelijk Onderzoek, *Kwaliteit & diversiteit. Rechtswetenschappelijk onderzoek in Nederland*, Amsterdam: 2009.

[10] David M. Walker, *The Scottish Legal System*, Edinburgh: W. Green/Sweet & Maxwell 2001, p. 2.

[11] Bernd Rüthers, Christian Fischer and Axel Birk, *Rechtstheorie – mit Juristischer Methodenlehre*, Munich: C. H. Beck 2011, pp. 176 ff (in German); Wissenschaftsrat, *Perspektiven der Rechtswissenschaft in Deutschland. Situation, Analysen, Empfehlungen*, 2012 (in German).

[12] Philippe Jestaz and Christophe Jamin, *La doctrine*, Paris: Dalloz 2004 (in French).

[13] Thorstein Veblen, *The Higher Learning in America (1918) with a New Introduction by Ivar Berg*, New Brunswick, NJ: Transaction Publishers 2000, p. 155.

because they cannot make a success at the bar'.[14] The American Paul Samuelson observed that, in the US, the relation between universities and their law schools often amounts to little more than a shared postal code.[15] Law schools in the US are often, both organisationally and physically, still separate from the rest of the university.[16] The situation in the UK is said to be much the same. Until the 1960s, law schools in England were often geographically separated from their parent universities, who saw themselves as having a more academic role in education and research. The British professor Anthony Bradney shows that the British law school historically 'has contributed little to the main body of the university except to provide large numbers of highly qualified students taught very cheaply'.[17] Furthermore, he states that, in their research, law schools are mainly focusing on providing explanations of legal rules for barristers and solicitors. Common law has managed without university jurists for a very long time. The late Peter Birks notes that, in the second half of the nineteenth century, there was hardly any need for juristic literature apart from the law reports. That change has only taken place in the UK since the 1960s.[18]

In the US, law schools are usually part of a university, as they are in most countries, but their education, as we have seen, is predominantly *professional*, varying in level and scope in more than 200 schools. This does not mean that no research is being done. As one legal scholar notes, in many of today's US law schools, there has even been a shift from mere teaching to scholarship.[19] While scholarship was once required in only a handful of law schools, today many law schools expect their faculty to publish textbooks, casebooks and, of increasing importance, scholarly articles and tomes. As a result, some schools show a remarkable decline in average teaching loads. Maimon Schwarzschild has found that up to 40 per cent of faculty salaries

[14] Quoted by Anthony Bradney, *Conversations, Choices, and Chances: The Liberal Law School in the Twenty-First Century*, 2003, p. 3.

[15] Paul A. Samuelson, 'The Convergence of the Law School and the University', in: *The American Scholar*, 44, 1975, p. 258.

[16] Marilyn Averill, 'Law', in: Robert Frodeman (ed.), *Oxford Handbook of Interdisciplinarity*, Oxford: Oxford University Press 2010, p. 525.

[17] Anthony Bradney, 'Law as a Parasitic Discipline', in: *Journal of Law and Society*, 25, 1, 1998, p. 80.

[18] Peter Birks, 'Editor's Preface', in: Peter Birks (ed.), *Pressing Problems in the Law*, Vol. 2: *What Are Law Schools For?*, Oxford: Oxford University Press 1996, p. vii.

[19] Richard W. Bourne, 'The Coming Crash in Legal Education: How We Got Here, and Where We Go Now', in: *Creighton Law Review* (ssrn.com/abstract=1989114), 45, 4, 2012.

support this scholarship.[20] Richard Bourne is cynical about the impact this has on education:

> Regardless of whether one sees great virtue in such scholarship or simply academic conceit, it remains extremely difficult to find that it contributes much in the way of direct benefit to the students who pay for it. Requiring that every teacher publishes reams of such material, rather than spend more time in the classroom, is difficult to square with the notion that law schools should perceive themselves as fiduciaries of the students they serve.[21]

In continental Europe, law has always been regarded as an academic discipline, in terms of both its teaching and its research. But even there the law's position in the community of sciences is somewhat unclear. There might also be a historical explanation for this. Leiden University historian Professor Willem Otterspeer, comparing medical science and law, points to the decisive importance of the nineteenth century, a period in which law was sometimes seen as more of a science, at other times as a preparation for a profession. In the end, there was consolidation from an emphasis on generally formative, encyclopaedic education to a curriculum that is much more focused on practical application of the science.[22] Whereas jurists 'concentrated on tradition, class and work placement', the medical schools opted 'to present themselves via modernity, university and science'.[23] The legal curriculum, with some exceptions, became increasingly directed at national state law, whereas the natural sciences and medical science were becoming increasingly international.

In the Netherlands, another factor lowering the academic esteem in which law was held within the university was that the lawyers were given the sole privilege in 1840 of taking an easy route to a doctorate without the necessity of writing a doctoral dissertation (a PhD), a privilege which lasted until 1921. This route usually consisted of compiling a few pages of academic writing which even when skilfully done was considered by the other sciences as nothing more than 'a laborious kind of business card'.[24]

[20] Maimon Schwarzschild, 'The Ethics and Economics of American Legal Education Today', in: *Journal of Contemporary Legal Issues*, 17, 2008, pp. 8 ff.

[21] Richard W. Bourne, 'The Coming Crash in Legal Education: How We Got Here, and Where We Go Now', in: *Creighton Law Review* (ssrn.com/abstract=1989114), 45, 4, 2012, p. 46.

[22] Willem Otterspeer, 'Professionalisering in Nederland in de negentiende eeuw – Een vergelijkend perspectief', in: B. van der Boom and F. S. Gaastra (eds.), *Kerk, cultuur en koloniën. Opstellen over Nederland rond 1900*, Amsterdam: Balans 2005, p. 92 (in Dutch).

[23] *Ibid*., p. 91.

[24] *Ibid*., p. 94.

For centuries, legal education and scholarship in Europe used to be truly international, with Latin as the *lingua franca* and scholars and students travelling from one country to another. By contrast, the medical and natural sciences followed a different path in that they developed from their national origins into an international field. In the nineteenth century, the study of law became geared to the national legal profession, and so lagged behind the rapid international development of medicine and the natural sciences.

After the Second World War, the distinction between the so-called hard and soft sciences took on a new dynamic.[25] In 1959, British writer C. P. Snow delivered an influential lecture entitled 'The Two Cultures', in which he pointed out the gulf separating the humanities from the natural sciences.[26] Towards the end of the 1950s, Snow was particularly concerned about the problems poor countries were facing. His central thesis – that the world benefits more from the sciences than the humanities – irritated those in the arts, but it had an even more profound consequence. Jerome Kagan, a psychologist at Harvard, argues in his book, *Revisiting Snow*, that, since Snow's celebrated lecture, the natural sciences and medical research have been very successful in taking up the major social challenges facing mankind. At first, the money needed to finance scientific projects came directly from the government, but universities soon started to increase their own funding to match the government's, with the result that the sciences became very well resourced.[27] Kagan goes on to describe a development with some of the social sciences rushing 'to join the natural scientists'. The Dutch research assessment commission warns that law has come off 'badly' in the university allocation of finance.[28] The social sciences, however, particularly psychology and economics, have greatly strengthened their position in recent decades.

3.3.3 *Why is law an academic discipline?*

And law? If law, as we have seen, is indeed a condition for civilised living, it is far too important to be left to the profession or to workplace learning

[25] See section 6.3.1. It is my wish to get rid of the terminology of 'hard' and 'soft' sciences.
[26] C. P. Snow, *The Two Cultures: And a Second Look*, Cambridge: Cambridge University Press 1964.
[27] Jerome Kagan, *The Three Cultures: Natural Sciences, Social Sciences, and the Humanities in the 21st Century*, Cambridge and New York: Cambridge University Press 2009, pp. vii, ix.
[28] Evaluatiecommissie Rechtswetenschappelijk Onderzoek, *Kwaliteit & diversiteit. Rechtswetenschappelijk onderzoek in Nederland*, 2009, pp. 55 ff (in Dutch).

only. Without falling into the trap of being defensive, I believe there are at least four obvious reasons why law must be regarded as an *academic* discipline, in its teaching and its research: its impact on people and society, its complexity, its connection to other disciplines and its role in raising future legal scholars.

First, law deeply affects human beings in their daily lives: law is about telling people how to behave; it is about securing their freedom and taking it away from those who do not abide by the law; it is about protecting the weak against the powerful and about settling disputes. Without law, civilisation would slip back into anarchy.[29]

Second, over the years law has become an increasingly complex discipline: we are witnessing a constant increase in legal rules and new legal specialisms; state law and international law are merging into one another, and society's expectations of what the law and lawyers are capable of is increasing everywhere.

Third, law has always been, and remains, connected – and increasingly so – to a number of other academic disciplines, an issue I will come to shortly. This requires lawyers to be able to work in more worlds than just one, which is not only to the benefit of the law, but also to the benefit of most other disciplines. The many grand challenges the world is facing often call for an interdisciplinary approach where law and its academics can ill be missed.

And, finally, the discipline of law, just as with every discipline, needs to raise and nurture its future academics for its continued existence.

In short, law is far too important, and too complex, not to be treated as an academic discipline. It may well be that some countries in the past managed without university-educated jurists, but today it would be irresponsible to do that. Walker, in his introduction to Scottish law, formulates it as follows:

> Law must not be thought of solely or even primarily as a body of professional knowledge, the stock-in-trade of the practitioners of certain professions, or as purely a practical or applied science. It is primarily a social science, a pure science, an area in the field of studies of men's relations with one another.

The knowledge, Walker continues, gained from the legal study can be used to understand and to solve actual everyday problems, as a basis for advice, decision or action. Yet

[29] David M. Walker, *The Scottish Legal System*, 2001, p. 2.

> [t]he evident utility and manifold applications of the knowledge should not be allowed to obscure the status of the [legal] subject as a major department of the social sciences, indeed one of the most ancient of them, and one which has in every age and country attracted the attention and devotion of some of the ablest minds of their times.[30]

So, *if* the law school's mission is to prepare students for this increasingly complex legal practice, and *if* legal practice cannot do without legal research and *vice versa*, and *if* academics and practitioners are to communicate easily with one another, then fostering an academic attitude must be an important part of what happens in law school. Hence, law students should be guided in learning to perform independent research and equipped with the necessary skills to be competent in evaluating the research of others.

Taking the premise that the quality of the student's learning experience and the resultant quality of the student's output is directly related to the quality and expertise of the teacher, it is essential that, in order to be effective in their teaching mission, universities must number experienced researchers among their teaching staff in their law schools. And, since it is much easier to understand and use legal research if one has experience in undertaking research, it is unquestionably wise to train students to do some research of their own. This does not mean that all law students should become university researchers and PhD candidates: what we wish to do is to prepare our future lawyers for their important tasks in society after they graduate from university. By way of exception, for functions that only require basic or routine legal knowledge and skills, a different kind of education, one that does not engage students in research, is most likely sufficient.

Legal education everywhere faces many other challenges that encroach upon its identity. In England and Wales, for instance, many law students want to become solicitors, but, as supply now greatly exceeds demand, the question may arise as to whether it is ethical to raise expectations which cannot be met.[31] In the US, where there has been a proliferation of new law schools in recent decades, a similar situation has arisen.

And, in continental Europe and Latin America, for instance, the democratisation and massification of higher education since the 1960s has had a greater impact on law schools than on almost any other

[30] David Walker (*ibid.*, p. 5) indeed pictures the legal discipline primarily as belonging to the social sciences.

[31] Alexis Brassey, 'Legal Education's Oversupply Is Unethical', in: *The Lawyer*, 25, 17, 2011.

university discipline. Classes of hundreds of students – mass schools – have become the norm, although this increase in the influx of students has not necessarily resulted in greater investment in staff and facilities.[32] Law is one of the more economically priced disciplines and is much in demand at a number of levels.[33]

3.3.4 *Legal research: case law journalism?*

The characterisation of legal research as an academic subject was already being challenged by a German scholar a long time ago. In Berlin, in 1847, Julius von Kirchmann gave a lecture to the jurists of the Berlin Law Society, on the worthlessness of jurisprudence as a science ('Über die Wertlosigkeit der Jurisprudenz als Wissenschaft'):

> Even a partial revision of the law can turn whole law libraries into collections of waste paper.[34]

As the root of most evil in the German courts was to be found in the law schools, Kirchmann argued, the malign influence of jurisprudence had to be stopped, if necessary by dismissing the parasitic legal scholars from their universities.

Today, in the eyes of some American scholars, legal scholarship seems to be reaching its nadir – which may stem from a sincere lack of self-confidence. In a most entertaining discussion between two highly regarded American legal scholars, Pierre Schlag and Richard A. Posner, Schlag speaks of legal academics '[arguing] among themselves ... in a kind of mock common law sort of way', and producing 'spam-jurisprudence', 'case law journalism', and in the end there is 'nothing happening'; a dozen good scholars would suffice for the US.[35] Posner, invited to comment on Schlag, appeared to be less pessimistic, and emphasised the importance of 'normal science' in the sense of doctrinal research. He said he would like to see more academic effort 'devoted to

[32] Dirk Heirbaut, 'Law', in: Walter Rüegg (ed.), *A History of the University in Europe*, Vol. IV: *Universities since 1945*, Cambridge: Cambridge University Press 2011, p. 416.

[33] William Twining, *Blackstone's Tower: The English Law School*, London: Sweet & Maxwell 1994, p. 43.

[34] Julius von Kirchmann, *Die Wertlosigkeit der Jurisprudenz als Wissenschaft*, Berlin: Verlag Julius Springer 1848 (in German).

[35] Pierre Schlag, 'Spam Jurisprudence, Air Law, and the Rank Anxiety of Nothing Happening (A Report on the State of the Art)', in: *Georgetown Law Journal*, 97, 2009, pp. 821 ff.

tidying up after judges', instead of 'academics ... wasting their time writing about constitutional law and theory'. The hundreds of articles written about *Roe* v. *Wade* and the other US Supreme Court abortion cases are without the 'slightest significance'.[36]

Schlag's and Posner's observations may be related to what Chief Justice John G. Roberts Jr said:

> What the academy is doing, as far as I can tell, is largely of no use or interest to people who actually practice law.[37]

What can US legal academics learn from their European counterparts? Could it be the importance of sound doctrinal research, also including the tidying up after the courts and the legislators? The link to legal practice remains critical for our discipline. Birks has noted that a law school that has lost its connection with the activities of the courts, as well as with the legislator and practising lawyers, would be a *contradictio in terminis*: 'It would have defined itself out of existence as a law school.'[38]

It is likely that this negative perception reflects England's long history without university jurists. Bradney comments:

> What academics did in law schools 40 years ago is slightly mysterious. Comparatively few produced a body of published work that proved to be of lasting consequence.[39]

Some years ago, *my* answer was, in brief: legal scholarship is different from the other university disciplines, because it has such a strong national focus, an individualistic nature and a rather peculiar publishing culture; it is normative, 'commentative', a discipline lacking an explicitly defined scholarly method, and one with rather little interest in empirical research. As a result, it is a remarkable discipline in terms of both form and content.[40] This may have been true in England, but it is only fair to note that, in most European countries as well as in the US, there has always been a strong tradition of high-quality scholarly publishing. Germany, in particular, shows academic excellence in almost every legal

[36] Richard A. Posner, 'The State of Legal Scholarship Today: A Comment on Schlag', in: *Georgetown Law Journal*, 97, 2009, pp. 853, 855.
[37] Adam Liptak, 'Keep the Briefs Brief, Literary Justices Advise', in: *New York Times*, 2011.
[38] Peter Birks, 'Editor's Preface', in: *Pressing Problems in the Law*, Vol. 2: *What Are Law Schools For?*, 1996, p. ix.
[39] Anthony Bradney, *Conversations, Choices, and Chances: The Liberal Law School in the Twenty-First Century*, 2003, p. 7.
[40] See the quote from Fred Rodell, at the opening of Chapter 7.

field, from constitutional law to private law, and from criminal law to jurisprudence[41] – excellence which continues today.

The responses to my article revealed that there are many others who feel a need for something to be done. It is difficult to get a clear picture of what we do. This broad overview raises important questions of identity for law schools. Should every law school have a research agenda? Is the output of legal scholarship up to standard? And who should pay for this scholarship – students, by pushing them further into debt, or other sponsors such as government and private institutions? And, finally, it is also essential that we consider how legal education and scholarship are performing in developing and transitional countries and regions, where thus far law schools have been mainly concerned with education. Will they mainly learn from 'us', or is there also something they can teach the more developed countries?

These questions go right to the heart of our law schools.

3.4 Is law an international discipline?

In 1949, Dutch jurist Paul Scholten emphasised that the science of law is always the science of a particular law in a particular country.[42] Law is historically and nationally rooted.[43] In this respect, legal research is similar to historical research; the great Dutch historian Huizinga defined history as 'the mental form in which a culture gives account of its past'. Within a single culture, a nation or a continent is held together by a certain world view. Every culture, Huizinga wrote, holds its own history to be the true history and rightly so.[44]

The debate about law being rooted in the nation state versus law as an international phenomenon is still ongoing. In *Roper* v. *Summons*,[45] for

[41] Karl Larenz, *Methodenlehre der Rechtswissenschaft*, Berlin and New York: Springer 1983 (in German).

[42] P. Scholten, 'De structuur der rechtswetenschap', in: G. J. Scholten, Y. Scholten and M. H. Bregstein (eds.), *Verzamelde Geschriften van Professor Mr Paul Scholten. Eerste en tweede deel*, Zwolle: W. E. J. Tjeenk Willink 1949, p. 437 (in Dutch).

[43] See e.g. John Bell, *Judiciaries within Europe: A Comparative Review*, Cambridge: Cambridge University Press 2006, investigating some different factors that shape the character of the judiciary in some European countries.

[44] Johan Huizinga, 'Over een definitie van het begrip geschiedenis', in: Mededeelingen der Koninklijke Akademie van Wetenschappen, Afdeeling letterkunde, deel 68, serie B no. 2. (1929); opnieuw verschenen in de bundel Geschiedenis als wetenschap, a.w. 1979, p. 35 e.v., 68, B.2, 1929, pp. 35 ff (in Dutch).

[45] 543 US 551 (2005).

example, the US Supreme Court considered whether it was constitutional to execute offenders who were under the age of 18 at the time of their capital crimes. The Court decided it was not. In his opinion for the majority, Justice Anthony Kennedy referred to the laws and authorities of other countries. Justice Antonin Scalia, known for advocating 'textualism' and 'originalism' in statutory interpretation, dissented. The Court, he wrote, is

> itself sole arbiter of our Nation's moral standards – and in the course of discharging that awesome responsibility purports to take guidance from the views of foreign other courts and legislatures.[46]

In his account of comparative law in the US, David Clark indeed argues that, whatever view one takes on foreign law, it is clear that for over 200 years the US Supreme Court – and the highest courts across the world – have influenced foreign legal systems, but have, in turn, also been influenced by legal opinion abroad.[47] Clark is right. As we shall see in this book, law as a discipline is rapidly growing to become an increasingly international and even transnational discipline – a development which holds true for legal practice (including the legislator and the judiciary) as well as for legal education and research. However, it is often a bumpy road: in many European countries, we are witnessing nationalistic movements and politicians who have great difficulty putting legislative and judiciary powers in the hands of non-national authorities, such as the European Commission and the European Court of Human Rights.

In Europe, two world wars saw a shift towards strengthening national identity, and one could deduce that the thrust this last decade for curricula in universities to become more 'international' in content and outlook is not a new phenomenon but rather a return to earlier modes of academic cooperation that, in turn, lead to many of the wonderful discoveries, inventions and conventions which form and steer our current daily lives and society at large.

3.4.1 'Transnational law'

Nationally oriented as law and the discipline of law may seem, for quite some time we have been living in an era of rapid internationalisation and

[46] *Ibid*., 1217.

[47] David S. Clark, 'Development of Comparative Law in the United States', in: Matthias Reimann and Reinhard Zimmermann (eds.), *The Oxford Handbook of Comparative Law*, Oxford: Oxford University Press 2006, p. 177.

globalisation,[48] leading to a discipline that is international and global far beyond the obvious areas of international law, maritime law or air and space law. Cross-border business, migration, the Internet and numerous other transboundary interactions and contacts make for ever more interconnectedness in our world – to such an extent that the term 'transnational law' has become widely used. The term itself is much older: Professor Van Asbeck in his Leiden University farewell lecture in 1962 wished to explore

> how the present law has come to be what it is, how it is involved in a process of reform and extension and intensification, in order that we may be able to assist in the building, stone upon stone, in storm and rain, of a transnational legal order for States and people and mankind.[49]

On an almost daily basis, practising lawyers and academics deal with the undeniable influence and applicability of international law, private international law and European law in such diverse legal fields as family law, human rights, sales, the environment, labour, succession, property, antitrust and insolvency, company law, administrative law and criminal law. In my own field, which is the area of private law, the work of the Hague Conference on Private International Law,[50] dating back to 1893, is a telling example of the old roots of internationalisation in private law. It was internationalisation with a mission: Tobias Asser, born in Amsterdam in 1838, a lawyer and a scholar, expected peace as a result of international commerce regulated by law. In his 1862 Amsterdam inaugural address as a professor of commercial law and commerce, Asser showed great vision. The time, he wrote, in which we now live is most excellently suited to bringing this principle to fruition:

> it is a time of peace, and of an appreciation of material interests. For even though battle is being joined today – here between iron-clad ships, there between a hide-bound party of reaction and a nation shaken at last into wakefulness – on all sides the voice of the conscience of our century is speaking louder than the roar of American cannon, and the bloated language of Prussian *Junkers*.[51]

[48] See section 2.6.

[49] Frederik M. van Asbeck, 'Growth and Movement of International Law', in: *International and Comparative Law Quarterly*, 11, 4, 1962. The term 'transnational law' itself was probably coined by Philip C. Jessup, at that time Judge of the International Court of Justice. See Philip C. Jessup, 'The Concept of Transnational Law: An Introduction', in: *Columbia Journal of Transnational Law*, 3, 1963.

[50] www.hcch.net/index_en.php (last accessed 21 November 2012).

[51] Tobias Asser, *Inaugural Address on Commercial Law and Commerce (Amsterdam 1862)*, The Hague: Asser Press 2012, p. 33.

Asser became the initiator of important international conferences, one being the Hague Conference. In 1911, two years before he died, he was awarded the Nobel Peace Prize for his pioneering work in the field of private international law – work that laid the foundations for what would become the permanent organisation of the Hague Conference on Private International Law,[52] its purpose being to work for the progressive unification of the rules of private international law.[53] One can think of treaties regarding adoption, the enforcement of judgments, or the recognition of divorce. There is, for example, the very important issue of child abduction, for which the 1980 Hague Abduction Convention provides an expeditious method to return a child, internationally abducted by a parent, from one member nation to another – these are treaties that are used across the world on a daily basis.

Another well-known example of the worldwide internationalisation of private law is the 'soft law'-producing International Institute for the Unification of Private Law (UNIDROIT, 1926), an independent intergovernmental organisation studying the needs and methods for modernising, harmonising and coordinating private and in particular commercial law.

In Europe, various studies have been carried out looking into the possibility and desirability of a shared European private law. Top legal academics and their research groups are involved in research projects such as the Principles, Definitions and Model Rules of European Private Law, led by Christian von Bar of Germany and Eric Clive, a former professor of Scots law. They delivered a superb piece of work that may well become the basis of a European code of private law.[54] It is certain that similar examples exist in other parts of the world.

Adding further complexity to this interplay between national law and international law, most current legal systems are also strongly influenced by underlying so-called 'legal traditions', ranging from indigenous law, Talmudic law, Hindu law and Asian law, through the better known civil and common law, to the increasingly visible Islamic law (*Sharia*). These traditions, with all their inherent diversity, underpin the world's legal systems, often in very complex ways.[55]

[52] Ernst Hirsch Ballin, 'A Mission for His Time', in: *A Mission for His Time: Tobias Asser's Inaugural Address on Commercial Law and Commerce*, The Hague: Asser Press 2012.

[53] Art. 1 of its Statute.

[54] Christian von Bar and Eric Clive, *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)*, Oxford: Oxford University Press 2009.

[55] Patrick H. Glenn, *Legal Traditions of the World*, Oxford: Oxford University Press 2010.

3.4.2 *Legal research and internationalisation*

The development of this complex and interdependent legal order has had a strong impact on legal research. The internationalisation of the law cannot be achieved without comparative law and comparative legal scholars. The study of comparative law has become an academic discipline in its own right. It has made considerable progress over the past decades. As editors Reimann and Zimmermann note in their monumental overview of comparative law, the comparative approach lost its 'methodological innocence' when scholars began to ask hard questions about the traditional approaches:

> It has engaged in interdisciplinary discourse with history, sociology, economics, anthropology, and other fields. As a result, comparative law has become a vibrant and intellectually stimulating field of study.[56]

And, in its 2009 research assessment, the Dutch-Flemish Commission's first observation relates to the growing internationalisation of the legal discipline: it has become a fact of life for most researchers and most law schools.[57] This truth, incidentally, may easily lead to the conclusion that, for example, research into *international* criminal law is more 'scientific' than research into *national* criminal law. This conclusion, although obviously incorrect, persists among non-lawyers in the university. Law deans across the world are constantly having to explain the validity of scientific research into national law to their rectors and university presidents with a non-legal background. After all, the subject of research may have a national or an international focus, or possibly both.

Yet, even if the subject of research has an exclusively national focus, we would still expect legal scholars of whatever nationality to be receptive to international debate. A publication about a strictly local topic may well be of importance to legal scholars elsewhere. By writing exclusively in one's own national community, one cuts oneself off from this debate. The national focus of the law is no excuse *not* to publish internationally at all.

The internationalisation of legal research is developing rapidly. Exposure to other legal systems enables us to better understand our

[56] 'Preface', in: *The Oxford Handbook of Comparative Law*, Oxford: Oxford University Press 2006.

[57] Evaluatiecommissie Rechtswetenschappelijk Onderzoek, *Kwaliteit & diversiteit. Rechtswetenschappelijk onderzoek in Nederland*, 2009, p. 30 (in Dutch).

own law. This has consequences for the organisation of our research. For instance, it unavoidably leads to scaling up into larger and more complex research groups. Such a development has to do not only with the importance of comparative and international research. It also concerns the tendency towards ever more specialisation, apparent in all sciences, as well as the ambition of many law schools to conduct more multidisciplinary and empirical research. Departments of private law (usually with not more than ten to fifteen researchers, who also have sizeable teaching tasks) can no longer cover the whole field of private law to a high level. The same holds for most other legal fields. Also, cooperation with researchers from other scientific domains could call for a multidisciplinary expansion of the group. Scaling up has become inevitable. And, finally, internationalisation will make legal research more competitive for funding. As with other sciences, legal scholars will become increasingly dependent on international funding. All in all, internationalisation inevitably requires the more elaborate organisation of law schools.

3.4.3 Legal education and internationalisation

A crucial question is what is understood by 'internationalisation of the law curriculum'. For example, what should a law school's curriculum look like if it is to meet the needs of the twenty-first-century student? Most disciplines are already 'internationalised', such as the natural sciences and parts of the humanities, or lend themselves to internationalisation more easily. For law schools, one must decide whether developing the curriculum to provide a broader knowledge base through including conceptual and theoretical work from non-Western sources, to provide opportunities for practice in diverse cultural contexts, or to examine practices in the discipline in different parts of the world, are the keys to providing international legal education.

What does internationalisation mean for legal education? There are at least two ways of looking at it. On the one hand, there is the perspective of law and the legal profession becoming more and more transnational. The former chairman of the European Association of Law Schools, Norbert Reich, rightly points at the expansion of the big US, British and German law firms, requiring a different type of lawyer,

> one who is proficient in both English and his or her native language, who masters international transactions, and refers them back to national law

> (i.e. taxation, company, environmental, consumer law, and mergers and acquisitions), and who is aware of the European and global impact of his or her professional work.[58]

The traditional national model of legal education, he maintains, is much too narrow for this new profile of an internationally mobile, or if you prefer 'global', lawyer. The globalisation of economic activity, the constantly growing mobility of people and the enormous rise in information technology are but three drivers that change parts of the legal profession. Today, law firms range from sole practitioner firms to large, networked businesses, with often hundreds – and sometimes even thousands – of lawyers covering almost the entire globe, not only in the US and the UK, but also in countries such as India, Brazil and China. Moreover, one should not forget the increasing numbers of lawyers practising as corporate *in-house counsel*, working for a single company and handling specialised tasks such as international contracts, transfer pricing, compliance, labour law, mergers and acquisitions, intellectual property and so on, and even trying cases in court. The same holds for the numerous public and government agencies across the world. They, too, need more 'global' lawyers.

On the other hand, most lawyers across the world still work in a predominantly national environment, applying national private law, national criminal law and national administrative law. They will in all probability continue to do so. Most legal practice is still jurisdiction-based. Moreover, basic law degrees will also remain within the domain of individual jurisdictions.[59] It is therefore quite natural that legal *education* has a tendency to remain a mostly national enterprise. The primary mission of law schools is to educate legal practitioners for the home market, such as attorneys, judges, consultants, law-makers and business lawyers. Few make it to purely international jobs. Yet a recent report states that the changing environment of the increasingly global marketplace for legal services also affects the smaller law firms and sole practitioners.[60]

It is therefore surprising that David Clark, in his overview of comparative law teaching in the US, sees no American law school making

[58] Norbert Reich, 'Recent Trends in European Legal Education: The Place of the European Law Faculties Association', in: *Penn State International Law Review*, 21, 2002, p. 25.

[59] Simon Chesterman, 'Globalization of Legal Education', in: *Singapore Journal of Legal Studies*, 58, 2008, p. 66.

[60] The New York City Bar Association Task Force, *Developing Legal Careers and Delivering Justice in the 21st Century*, New York: 2013.

comparative law 'a core discipline' or 'putting comparatists at the centre of scholarly debate'.[61] This observation is probably true for most, or even all, law schools worldwide. If at all, comparative law is mostly offered to students as an elective. At the end of the day, it is national law that legal education focuses on, and much less the law of one's neighbours, let alone the law of far-away continents. On the other hand, there is Chesterman's observation that links law as an international discipline to the previous section about law as an academic field of study: the move away from the memorisation of black-letter law will become irresistible. Law schools, he says,

> will seek ways to ensure that their graduates are both intellectually and culturally flexible, capable of adapting not merely to new laws but to new jurisdictions. Comparative and international subjects will receive greater emphasis, with comparative and international perspectives also being introduced to a wider range of subjects. There will be resistance, but not for long.[62]

The trend and international acceptance of the tendency to 'internationalise' law curricula and thereby consider a period of study abroad or indeed interaction and collaboration with academics from other nationalities, backgrounds, beliefs and cultures is a strong catalyst for increasing international understanding, tolerance and often acceptance and imitation of regional and national 'best practices'.

Another development crucial to the observation that law is transforming into an international discipline is student and staff mobility. The first such development concerns the popularity of LLM programmes offered by US law schools, hosting increasing numbers of European law students. Many European law schools are imitating this trend and now offer mainly postgraduate programmes to international students. In 2002, Reich noted that legal education had become much more open, competitive and specialised than it had traditionally been: 'They are now an attractive and popular addition to what are still nationally oriented undergraduate law studies.'[63]

[61] David S. Clark, 'Development of Comparative Law in the United States', in: *The Oxford Handbook of Comparative Law*, 2006; David S. Clark, 'American Law Schools in the Age of Globalisation: A Comparative Perspective', in: *Rutgers Law Review*, 61, 4, 2009.

[62] Simon Chesterman, 'Globalization of Legal Education', in: *Singapore Journal of Legal Studies*, 58, 2008, pp. 66–7.

[63] Norbert Reich, 'Recent Trends in European Legal Education: The Place of the European Law Faculties Association', in: *Penn State International Law Review*, 21, 2002, p. 25.

Chesterman expects more law schools to offer exchange and double-degree programmes, as well as future tie-ups that focus on Asia and on the Gulf.[64] Another example here of internationalisation in law schools is the use of modern technology ('streaming') and social media to deliver specific (and have actively discussed and debated) subject material to an entire community of students. I expect a trend among law students to migrate towards the global centres: The Hague for international criminal law, for example, with its many international courts and tribunals, Brussels for European Law, and New York, Geneva, Vienna, and again The Hague for international law. Similar examples exist for financial law capitals across the world.

I expect the same to happen in PhD education. Law students across the world benefit from being exposed to different legal systems, traditions, values and subjects. Although precise figures are not available, millions of students must have had study experience abroad. In Europe alone, with its successful Erasmus and Socrates programmes, hundreds of thousands of law students have benefited from these exchanges.

As a result, in university classrooms and the student digs around the world, religious and ethnic differences, national prejudices, long-term grievances and even conflicts often melt away like snow in the sun. Life-long friendships among individual students and whole classes are formed – and maintained thanks to the possibilities of social media. As a result of this increasing mobility, students and their teaching faculty often serve as a most welcome link between law schools in different countries and across different cultures. Not only does our world benefit from this mobility but so do the law schools, including their students. This surely impacts on legal education – for instance in terms of specially designed courseware for an international audience and professors teaching in English.[65]

3.5 Does law need other disciplines?

I know of few disciplines with as many perfectly natural relations with other disciplines as the legal discipline.[66] To begin with, law has always

[64] Simon Chesterman, 'Globalization of Legal Education', in: *Singapore Journal of Legal Studies*, 58, 2008, p. 67.

[65] For a series of interviews with international students, see *International Students Negotiating Higher Education: Critical Perspectives*, London and New York: Routledge 2013, covering such issues as policy-making, teaching and learning in an international classroom, language, and the motivations, expectations and experiences of home students 'going the other way'.

[66] For more detail, see David M. Walker, *The Scottish Legal System*, 2001, pp. 5 ff.

had a strong connection with philosophy: for a long time the law was studied as part of philosophy, and large areas such as jurisprudence and legal theory have a philosophical basis. Theology, too, is an old companion of law: until not so long ago, many viewed the law as grounded in God's created order; and, although that idea has more or less vanished, the emergence of *Sharia*, the religious law of Islam, shows that theology, being the academic study of religion, still plays an important role.[67] Together with philosophy and theology, ethics are also inherent in legal science, for example in the concept of 'justice'. As a discipline, history is equally connected to legal teaching and scholarship:[68] both civil law and common law stem from Roman law. Political science[69] – and to a lesser degree newcomers such as business studies – have a natural connection with constitutional and legislative studies. Knowledge of linguistics[70] may also be considered as essential to legal scholarship, since the law is in many ways a language-based field; much research focuses on the relationship between law, language and logic. Moreover, although not a discipline in the strict sense, great literature can enhance our imaginative conception of what constitutes law and justice.[71]

Another relative newcomer, but now entirely settled into the university curriculum, is the field of law and economics. Law, considered as a set of social rules, is partly a behavioural science in which notions of efficiency play important roles. Firmly established as related disciplines are three other social sciences which examine relationships between the law and human behaviour: psychology, sociology and anthropology.

Psychiatry is related to the study of criminal law, while criminology has evolved into an independent discipline separate from criminal law, as has health law. This seems equally true in the case of gender studies. Increasingly, science disciplines are relied upon to aid legal science, in particular certain applications of probability, the forensic sciences and

[67] Jan Michiel Otto, *Sharia Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present*, Leiden: Leiden University Press 2010.
[68] *The Oxford International Encyclopedia of Legal History*, Oxford: Oxford University Press 2009.
[69] *The Oxford Handbook of Law and Politics*, Oxford: Oxford University Press 2008.
[70] Marcus Galdia, *Legal Linguistics*, Frankfurt am Main and New York: Peter Lang 2009.
[71] E.g. Richard Posner, *Law and Literature*, Cambridge, MA: Harvard University Press 1998.

even the neurosciences.[72] The latest seed sprouting here seems to be biology and law, which examines the biological foundations of law.[73] And, finally, there are the many fields of law which examine the law within a particular societal domain such as health, construction, IT and transport.

3.5.1 Multidisciplinary research

The question of whether law and the other sciences need one another therefore seems superfluous: they clearly do.[74] Law is more than legal doctrine and normative legal theory alone; law is an inherent part of society. It is impossible to separate it from its societal and social contexts. Most law schools' curricula, therefore, rightly pay significant attention to the law's inherent multidisciplinary character: legal history, jurisprudence, as well as some law and economics and sometimes political science are among the core courses of almost every law school.

In some countries, such as Japan and France, there are university faculties or departments of law and political science. Yet there is much debate on the relevance in both legal research and education of the social sciences to law, a discipline often referred to as 'socio-legal studies'. In legal education, socio-legal courses are mostly electives, and in research there is still a yawning gap between legal research in the US and the rest of the world (see Chapter 6). From a European perspective, almost all high-profile research being done in the US today seems related to socio-legal studies, although most legal research in the US is still not related to socio-legal studies.

The Dutch commission's 2009 report referred to above shows that Dutch legal research is still strongly monodisciplinary in character. Though the 1980s and 1990s saw some cooperation between legal science and for example public administration, economics and political sciences, this development did not really advance any further. In most areas of the law, researchers remain active mainly within their own legal domain

[72] Michael D. A. Freeman, *Law and Neuroscience*, Oxford: Oxford University Press 2011, as part of the Oxford Series in Neuroscience, Law, and Philosophy. The *Nederlands Juristenblad* published a special issue on the importance of Neurosciences for the law: Katy de Kogel *et al*., 'Neurolaw in Nederland. De betekenis van de neurowetenschappen voor het recht', in: *Nederlands Juristenblad*, 88, 2013 (in Dutch).

[73] Hendrik Gommer, *A Biological Theory of Law: Natural Law Theory Revisited*, Seattle: Createspace/Amazon 2011.

[74] Marilyn Averill, 'Law', in: *Oxford Handbook of Interdisciplinarity*, 2010, Chapter 35.

instead of taking steps to cooperate with other scientific disciplines. This is not just a Dutch phenomenon. A British report – *Law in the Real World* – concludes that there is little disagreement that law schools have historically been dominated by theoretical and text-based doctrinal research:

> This is reflected in the research skills taught at undergraduate level. Most law courses do not incorporate empirical legal research material into their teaching programmes. Thus undergraduates have few opportunities to read empirical legal research, much less develop skills in empirical data collection. Even in areas like family law and welfare law, where evidence about social context is arguably vital to understanding the profile of cases that arise, there are few texts that build in empirical material.[75]

At the core of this debate may be the very identity of legal studies: whether law connects more naturally to the humanities or to the social sciences. In my view the study of law has characteristics of both. In part it is linked to the humanities with its more text-based methodologies; but it is also linked to the more empirical data-centred analysis of the behavioural sciences. Multidisciplinary and even interdisciplinary research enables us to look at the law as it functions, from sociological, anthropological, psychological, political, or economic perspectives. Legal empirical research is therefore often referred to as 'law in action' or 'law in the real world' as contrasted to 'law in the books' – which may, incidentally, be quite irritating for those doctrinal researchers who actually follow the interaction between the courts and the legislator on a daily basis. Less annoying descriptions, therefore, are 'socio-legal studies' (a term that I prefer), 'law and society' and 'the sociology of law'.

3.5.2 Empirical research

For the legislature in particular, empirical research may be relevant – think of the choice of basing liability on either negligence or strict liability. For the courts, empirical research may also be relevant, but to a lesser extent.

It must be said, however, that this multidisciplinary type of research has been neglected, often rather arrogantly, in many of our law schools in the non-common law countries. After all, most legal academics in the

[75] Hazel Genn, Martin Partington and Sally Wheeler, *Law in the Real World: Improving Our Understanding of How Law Works (Report Summary)*, London: 2006.

civil law tradition much prefer analysis-based methodologies to the data-centred analysis of the social sciences. They do not like interviewing and compiling statistics. As a result, in most law schools outside the US, professors of jurisprudence or Roman law greatly outnumber the professors of socio-legal studies. Most legal academics in the non-common law countries simply hate socio-legal studies with its empirical baggage, considering it totally irrelevant.

On the other hand, the socio-legal scholars often seem to have only little interest in doctrinal legal scholarship. The American professor Deborah L. Rhode referred to the legal discipline as one that is 'glutted with theory and starved for facts', a view, incidentally, which seems very counter-intuitive to a practising lawyer. About this 'data-free universe' she wrote ironically:

> Doctrinal writing has ... advantages. It requires neither specialised expertise nor time-consuming acquisition of skills or data. This is not a small benefit in an academic field that, unlike other disciplines, does not train its practitioners to be scholars.[76]

The domination of doctrinal research in many of our law schools may easily lead to self-replication – and that is exactly what has happened. Sitting monodisciplinary scientists will not be readily inclined to take on researchers from other disciplines. And as far as they themselves are concerned, 'once in a post, the mid-career possibilities for legal academics interested in developing empirical research skills are limited'.[77]

As a result, the importance of working together with other scientific disciplines often receives lip service only: it is easy to refer to research as 'multidisciplinary' because of the extra funds available for this type of research. Hence, the Dutch audit commission reserves the terms 'multidisciplinary' and 'interdisciplinary' for cooperation between legal science and other scientific disciplines. From this point of view, *multidisciplinary* research is research in which scientists from various disciplines work together, each using their own methods and techniques. *Interdisciplinary* research differs in that it focuses on a question which covers various disciplines, using a jointly developed set of methods and techniques. But research in two separate fields of law, such as criminal law and tax law,

[76] Deborah L. Rhode, 'Legal Scholarship', in: *Harvard Law Review*, 115, 2002, p. 1353.
[77] Hazel Genn, Martin Partington and Sally Wheeler, *Law in the Real World: Improving Our Understanding of How Law Works: Final Report and Recommendations*, London: 2006.

should no longer be called multidisciplinary or interdisciplinary.[78] This is the standard scientific terminology.

Of course, there is a good explanation for the dominance of the monodisciplinary doctrinal approach: traditional legal scholarship is less aimed at the study of law as a social or cultural phenomenon, which requires an external perspective, than at legal practice, where the law is studied as a normative phenomenon, which requires more of an internal perspective. These two perspectives make uneasy bedfellows. In addition, law schools are responsible for educating legal practitioners. In Chapter 6, which is about research, I will suggest that empirical research in legal scholarship can be relevant in every single field of the legal discipline.

3.6 Producing academics or professionals?

As we saw in Chapter 1, there are basically four possible perspectives on legal education. One is that lawyers can best be educated on the job. The common law countries managed without university jurists for centuries; and, as we have seen, in England to some extent one can still manage with a degree in a totally different discipline, followed by a one-year conversion course and in-house training at the Inns of Court. The second perspective is legal education as a predominantly professional education within law school: the US provides a strong example of this. A third perspective is legal education as a predominantly academic education: this is officially the situation in most continental European countries, as well as elsewhere in the world. A final perspective is having an academic focus complemented by a strong professional experience, as is the case in Germany, for instance.[79]

This division into four perspectives, however, should not be perceived in terms of the quality of the education provided, or even in terms of it being more or less 'academic'. Most of the barristers in England, although trained on the job at the Inns of Court, received an exceptionally thorough academic education, though not necessarily in law, mainly at the universities of Oxford and Cambridge. American law graduates who studied at the top-end institutions having completed college also received high-quality legal education with much attention paid to

[78] Evaluatiecommissie Rechtswetenschappelijk Onderzoek, *Kwaliteit & diversiteit. Rechtswetenschappelijk onderzoek in Nederland*, 2009, p. 32 (in Dutch).

[79] Ute Mager, 'Die Ausbildungsreform von 2002: Ziele, Inhalte, Erfahrungen und Folgerungen für weitere Reformen', in: *Bologna und das Rechtsstudium*, 2011.

academic courses. And it may appear that European and Latin American students, as well as students in Asia, have received an academic education, whereas in practice they may well have undergone a rather uninspiring education, learning by rote without much reflection on the underlying subject-matter.

All in all, however, I have come across few university law schools focusing solely on training their students for the job market. Most law schools seem more or less to share a responsibility for what the Germans after Wilhelm Von Humboldt call a *Bildungs Ideal*, by also teaching students higher values as jurists, practitioners and citizens, such as the ability to reflect on 'the meaning of life' (Kronman,[80] Bradney[81] and many others) and on how to become empathetic and democratic citizens (Nussbaum[82]). I believe indeed that this is an ambition cherished by most university faculties and schools (see Chapter 4).

Quite another issue is to what extent schools finally succeed in realising their ambitions. What really matters is less the distinction between professional and academic, and more the quality and the degree of motivation of the students and their professors, and the quality of the curriculum as well as of the school's learning environment and resources. More important than the distinction between academic and professional may be the division between education and training: university law schools have a duty to *educate*, not to *train* our future lawyers.

Having said that, most law schools (though not all) across the world do share the challenge of providing an education while bearing in mind the natural postgraduate destination of their students, the legal profession. There is a tension between law schools and professional bodies everywhere, often about which qualifications are needed to make a good lawyer. Particularly in England, many long battles have been fought about legal education in relation to the profession: two authors used seventeen pages to describe those that have raged until today.[83] It is therefore tempting to compare legal education with its medical

[80] Anthony T. Kronman, *Education's End: Why Our Colleges and Universities Have Given Up on the Meaning of Life*, New Haven, CT: Yale University Press 2007.

[81] Anthony Bradney, *Conversations, Choices, and Chances: The Liberal Law School in the Twenty-First Century*, 2003.

[82] Martha C. Nussbaum, *Not for Profit: Why Democracy Needs the Humanities*, Princeton, NJ: Princeton University Press 2010.

[83] Andy Boon and Julian Webb, 'The Legal Professions as Stakeholders in the Academy in England and Wales', in: Fiona Cownie (ed.), *Stakeholders in the Law School*, Oxford and Portland, OR: Hart Publishing 2010, pp. 65–96.

counterpart, which combines academic and practice-based learning. Every medical school is affiliated to a local university hospital, whereas law schools rarely have an in-house law court or law firm. I believe this strong and close connection in medicine between academia and the profession – most professors and lecturers teach, do research and engage in patient care in the hospital as well as the medical school – may explain the more easy-going contact between the university and the profession.

In their book, *Educating Lawyers* (2007), Sullivan *et al.* asked what constitutes a good lawyer.[84] There are many obvious answers, such as a profound knowledge of private law and public law, as well as particular skills, but of course there is much more. Practising lawyers often work in multidisciplinary, or transnational contexts, for which law school has to prepare its students. There is a great deal of literature on this subject, which will be discussed in Chapter 4.

3.7 Tapping poor law students: education for profit?

Tertiary education funding and student support and its impact on student behaviour are among the most heavily debated issues in the world of higher education. A valuable international survey by the Dutch Center for Higher Education Policy Studies (CHEPS) among nine countries with sometimes very different funding systems[85] shows that generous student financing arrangements are available in Sweden, Norway, the Netherlands and Germany. In Canada and the US, there is substantive indirect support for the parents of students, primarily in the form of tax-credits. All the countries selected offer grants and scholarships for students from lower income groups, serving between 20 per cent of students in higher education in the UK and 50 per cent in the US. However, the report notes, in the UK, Canada and the US other scholarships may be available through the individual higher education institutions.[86]

In the US, the price for a decent legal education seems to occupy a very special and much debated place. Students there pay high or at least

[84] William M. Sullivan *et al.*, *Educating Lawyers: Preparation for the Profession of Law*, San Francisco: Jossey-Bass/Wiley 2007.

[85] Hans Vossensteyn *et al.*, *International Experiences with Student Financing: Tuition Fees and Student Financial Support in Perspective: Final Report*, Enschede: 2013. The countries selected were: Australia, Canada, England, Germany, the Netherlands, New Zealand, Norway, Sweden and the US.

[86] Hans Vossensteyn *et al.*, *International Experiences with Student Financing: Tuition Fees and Student Financial Support in Perspective: Final Report*, 2013, pp. 188, 189.

relatively high tuition fees because every school tries to attract the brightest students and the best professors. As a result, law schools in the US differ from one another in quality and level to a much greater extent than law schools elsewhere. They can be ranked from top to bottom, which in a sense is a good thing, as this gives American students a choice, with the happy few ending up in one of the elite law schools. In most other countries around the world, however, tuition fees are set by the government.

It may also be noted, however, that the system, with its skyrocketing tuition fees, does have its drawbacks. There is a crisis brewing for legal education in the US. For many years law school was a booming industry. Fees for students were rocketing. Many law schools became rich institutions, partly paid for by the students. By the time they graduated, however, students ended up with high debts, sometimes close to US$200,000 and with an average topping US$100,000.

As long as the law firms provided employment that enabled law graduates to shoulder their debts, there was not really a problem. But this situation has changed dramatically. The financial crisis of recent years has radically altered the market for legal education in the US. The recession caused a massive downturn at the top of the newly qualified lawyer market. Today, there are simply not enough jobs for graduates from law school, and *if* they find one it is much less highly paid than in the past. The *New York Times* published the story of graduates from top law schools trying to pay back those enormous debts they have been building up – by delivering pizza.[87] They were trapped not only by debt, but also by 'pride', as Richard Bourne wrote after the tragic suicide of one of his former students. He was referring to the pride of a young 22-year-old American law student, who thought the doors would be open to a world all his predecessors had stepped into so easily.[88] Similarly, I too remember one of my students from the time I was lecturing in California in 1991. On the wall above his study desk, he had written '80,000' in red figures, this being the salary he hoped to start with after graduation and passing the bar exam. Every evening, when he was tired, he would look up at the wall, and study for another hour or so.

The story in the *New York Times* and the article by Bourne show very clearly the problems law schools face nowadays in the US: the cost of a

[87] David Segal, 'Is Law School a Losing Game?', in: *New York Times*, 2011.

[88] Richard W. Bourne, 'The Coming Crash in Legal Education: How We Got Here, and Where We Go Now', in: *Creighton Law Review* (ssrn.com/abstract=1989114), 45, 4, 2012, p. 2.

law degree seems vastly out of proportion to the economic opportunities available to the majority of graduates.

Is law school worth the cost?[89] One of my colleagues, Frank Wu, currently law dean at Hastings College of the Law, commented that the problems existed before, but that 'we just didn't pay attention to them'. The economic crisis from 2008 to the present day has made the issues of failing law schools and return on investment more obvious and more urgent. But these problems will probably continue even as the economy recovers. He is probably right, even though US law students' debt problems vary greatly according to whether students went to a high-rank, middle-rank or low-rank law school (where employment prospects are worse) and whether they avoided large debts by going to a public law school with in-state tuition or by obtaining a large scholarship or grant that covered much of the tuition. But you will shudder when you consult the American 'paying for law school' website,[90] and see that tuition fees are still rising.

Something drastic needs to be done. A recent report by the New York Bar states:

> The legal profession in the US is undergoing fundamental change. The nature and impact of the change varies among different sectors of the industry, in different geographies, and at different levels of seniority among professionals. But no group is affected as much as new lawyers, who are likely to spend their careers in a working environment that would have been unrecognizable just a few years ago.[91]

But the problem is wider than just the law schools: the volume of student loan debt has surpassed US$1 trillion and is now greater than credit card debt.[92] As a result of similar widespread stories, the problem of the massive debts of young American students and graduates is well understood nowadays. However, for those unfortunate students who are graduating during the current economic situation, the outlook is even bleaker: not only will their debt follow them for most of their lives, but, when the job market picks up, law firms and other enterprises will

[89] Brian Z. Tamanaha, 'Is Law School Worth the Cost?', in: *Journal of Legal Education*, 63, 2, 2013; Brian Tamanaha, *Failing Law Schools*, 2012.

[90] www.admissionsdean.com/paying_for_law_school/law-school-cost-calculator (last accessed 9 December 2012).

[91] The New York City Bar Association Task Force, *Developing Legal Careers and Delivering Justice in the 21st Century*, 2013, p. 1.

[92] Jeff Denneen and Tom Drethler, *The Financially Sustainable University*, Bain & Co. 2012.

tend to choose new graduates instead of those who graduated three or four years previously.

Because of the crisis, *European* governments are also considering introducing or increasing fees for students. In Europe, provision for higher education has traditionally been seen as an important obligation of governments. Tuition fees are generally low or even non-existent. Two years ago, however, the UK government gave universities the right to increase fees, with a cap of £9,000 a year. The cap, which was originally intended to be exceptional, soon became the norm and, most fees in England will soon reach that figure. However, undergraduate students in the UK only begin to pay back their loans once they earn £21,000 or more per annum. They pay nothing upfront: if graduates are unemployed or earn less than the threshold salary, they are exempt from paying back their loans until their income reaches or exceeds the threshold amount. Yet, with a projected value of £200 billion (!) on outstanding student loans by 2042, the concern has arisen whether the UK government will get its money back. A report by the National Audit Office has warned, for instance, that there is a lack of information about the employment situation of graduate students.[93]

The Dutch government, too, has decided to increase (upfront) fees up to around €1,900 for its students. Universities are entitled to charge additional fees, up to a maximum of around €8,000 per annum for a second degree. Similar developments can be seen in other European countries. There are few countries where the cost of higher education is wholly considered the responsibility of government, such as Germany.

Commercial programmes provided by universities are not governed by any legal maximum fee. In Leiden, our international LLM programmes currently cost between €13,000 and €18,000 per year. For law schools everywhere, such programmes may become (at least moderate) money-spinners and a way of compensating for the financial cutbacks they are facing as a result of financial austerity.

The American experience, however, teaches us a lesson. It is nothing less than unethical to charge fees that leave students with debts they will never be able to pay back – unless, of course, schools provide job guarantees, or repayment obligations are scaled according to a graduate's income. In the US, graduates filed class-action lawsuits against a number of law schools, alleging that the schools used deceptive postgraduate

[93] National Audit Office, *Student Loan Repayments*, London: 2013.

employment numbers to boost their rankings and attract more students.[94] Is it possible that similar lawsuits will pave the way for a more ethical attitude?[95] Are law schools and their universities going to change their policies? Is there any such thing as a 'sustainable law school'? And, as one author has suggested, should the value of a legal education for most law school graduates not be the value of a decent living, and also help to address the unmet legal needs of individuals who cannot afford the costs of their legal representation?[96] Australian law deans have warned that legal education itself may be at stake:

> The gross imbalance between the government and student contributions, almost a complete privatisation of legal education, encourages a mindset amongst law students of the selfish pursuit of personal goals and obscures the contribution of law and lawyers to civil society, the rule of law, and the public good.[97]

This brings us to our values.

3.8 Values

Genealogy is especially important where identity seems to have been lost. A university needs its legends, heroes and heroines, and a motto. They stand for our values.

3.8.1 The Cleveringa story

In May 1940, the Second World War came to the Netherlands. It would result in five long years of German occupation and terror. In November 1940, the Germans ordered the dismissal of all Jewish staff, as a result of which the Leiden law school lost two of its professors, and fourteen other Jewish faculty members and staff. On 26 November 1940, as a protest against these dismissals, the dean of the law school, Professor Cleveringa, delivered a famous speech during the scheduled lecture that would normally have been given by one of the two dismissed professors, his Jewish colleague Professor Meijers. Cleveringa made sure he had a

[94] 'Law Grads Face Brutal Job Market', *Wall Street Journal*, 25 June 2012.
[95] Maimon Schwarzschild, 'The Ethics and Economics of American Legal Education Today', in: *Journal of Contemporary Legal Issues*, 17, 2008.
[96] Luz E. Herrera, 'Educating Main Street Lawyers', in: *Journal of Legal Education*, 63, 2, 2013.
[97] Council of Australian Law Deans, *Consultation Paper for the Review of Higher Education Base Funding*, 2010, p. 9.

packed suitcase waiting for him at home, as he fully expected to be arrested at the end of his protest. In fact, his fears were realised and he was imprisoned in Scheveningen jail for eight months. Before his speech, Leiden's student organisation had already decided to boycott lessons and this strike soon took on national dimensions. In response, the Germans closed down the university. Cleveringa was detained again in 1944, this time as a hostage in Camp Vught, while Meijers was imprisoned in the German concentration camp of Theresiënstadt. By some miracle, both men survived the war. Other universities in the Netherlands, and no doubt elsewhere, saw similar examples of courage.

To honour Cleveringa, Leiden instituted a special Chair as well as an annual lecture to commemorate the impressive way his speech gave meaning to the Leiden University motto, '*Praesidium Libertatis*' ('Bastion of Liberty'). And, each year, on 26 November, Leiden alumni gather in numerous places all over the world to honour Cleveringa's memory. '*Praesidium Libertatis*'. The relationship between freedom and restraint has become deeply rooted in the history of the university, and it was the notion of freedom that played a decisive role in its foundation. University historian, Willem Otterspeer, pictured that moment as follows:

> In a letter dated 28 December 1574, William of Orange urged the States of Holland to found a university 'as a pillar and buttress of the country's freedom and its sound and lawful national government'. He saw the university as an ideal instrument for preventing the country's enemies from continuing 'their rampant tyranny and oppression of both the country's religion and its freedom, by force or often by subterfuge'. The university would be a castle and fortress for the entire country.[98]

The source of William's words is unknown. It may have been the Bible or perhaps the Roman poet Livy's *Ab Urbe Condita*. Surprisingly, the motto, *Praesidium Libertatis*, is actually relatively recent, having been adopted for the university's new seal in 1917. It was derived from an address in 1875 by a former Rector of Leiden University, who described his university as an institution 'that has always been a bastion of liberty'.

3.8.2 Academic freedom

'Academic freedom' has three distinct dimensions: the individual right of freedom of expression for both staff and students, institutional autonomy

[98] Willem Otterspeer, *The Bastion of Liberty: Leiden University Today and Yesterday*, Leiden: Leiden University Press 2008, p. 116.

for the academic institution, and the obligation of public authorities to respect and protect academic freedom and ensure its effective enjoyment.[99] For academic institutions, the freedom to teach and the freedom to conduct research are of paramount importance, and yet in many places in the world this is not self-evident. In particular, the subjects that are taught and researched at law schools, such as the concept of the rule of law, may be seen as a threat by the ruling elite of a nation. Freedom from inappropriate influence by the church, too, is a principle that applies to all institutions of scientific training and research, even though there are some universities, such as the Catholic university of Bilbao, that want to cling on to their religious heritage, its values and hallmarks:

> Jesuit universities share the mission of serving the individual and society through their contribution to science and culture, whilst simultaneously fulfilling their mission as member universities of the Society of Jesus. Therefore, in keeping with their founding principles, they face the challenge of fulfilling their mission of service to faith, through knowledge of science and culture.[100]

Religious values have underpinned universities' missions for many centuries. However, he who pays the piper always calls the tune: freedom from undue interference can never be taken for granted. There are universities across the world where tensions with the church are still palpable. In most countries today, however, it is the *state* rather than the church that may challenge academic freedom. Where the state funds the university, it may require that its research should be geared to particular fields, those that enhance economic growth.

There may be other examples of intervention in education, too, for very different reasons and by other interested parties. For law schools, there is the sometimes rather complicated relationship with the legal profession. In some countries, students have to pass an external bar exam before they are allowed to practise, and such a requirement may result in a subtle loss of the school's academic freedom. The school may modify the content of its curriculum in order to prepare its students for these exams. The danger lies in the subtlety of the process – where bar exam pass rates form part of the ranking of law schools, for example – but as long as the schools and the legal profession, as true partners, are aware of

[99] Jogchum Vrielink *et al.*, *Academic Freedom as a Fundamental Right*, Leuven: LERU 2010.

[100] Universidad de Deusto, www.deusto.es (last accessed 15 January 2013).

a possible conflict of interest, it should not be a serious problem. We will come to that in Chapters 4 and 5.

I believe it is important, then, to have a clear picture of the values we hold. Most modern universities seem to use their values as a marketing instrument via their websites, such as:

> respect and concern for students and colleagues; truth, inquiry and the pursuit of advanced knowledge; excellence in everything we do and pride in achievements; effective collaboration and teamwork; accountability for performance, actions and learning; productive engagement between students and staff.[101]

Such statements demonstrate how difficult it is to specify values. They can easily become goals or mere ambitions. Striving for excellence in everything that you do – providing 'superb teaching' for instance, which is a very popular phrase on US law schools' websites, or even 'advancing knowledge' or 'working together effectively' – is not so much a value, but a goal. The same holds for the ambition to become 'a world-class university', 'establishing a strong link between research and teaching', 'a multidisciplinary approach' and – a very popular one – 'an international outreach'.

3.8.3 The university's mission and vision

Some semantics may help. It makes sense to distinguish between a vision, a mission, a strategy, goals and values. A 'vision' is the big dream of what you want to achieve; it is a long-term view and it focuses on the future: 'I see a world where . . .'. A 'mission' represents a general statement of how one hopes to achieve that vision and with whom, for example students, faculty, alumni, the profession, the city, or other schools. The 'strategy', then, is the road map towards achieving your vision (I will discuss the importance of a strategy in Chapter 11); and 'goals' are the general statements about the mileposts in achieving your vision. The *values*, finally, are of a somewhat different nature, as they give the outside world an idea, a promise even, about how you will behave as a school or a university when teaching and doing research.

'Academic freedom' is the most prevalent 'core value' one comes across when looking at university websites. It is immediately followed

[101] Hundreds of similar examples can be given.

by the institution's contribution to society, which, although usually presented as a value, is probably best seen as part of the institution's mission. These two, the freedom to teach and to do research, as well as the university's orientation towards the good of society, are paramount almost everywhere. Over the years, they have become the foundations upon which academia rests.

Other popular values are open-mindedness, equality, respect, integrity, diversity, accountability and responsibility, and engagement with the community, the nation and the world. In a way, this short list may look somewhat disappointing; perhaps with the exception of academic freedom, most community organisations would adhere to these values.

'Vision' and 'mission' are often confused with each other. The vision – the future, the dream of reality twenty or thirty years hence – is then partially absorbed into the mission, i.e. who we are and what we are going to do in the coming years. The disadvantage of combining the two may be that the collective dream, which can strongly bind people together within an organisation, may die, as the organisation has to focus on what is achievable in the short and medium term. However, the institution should also be rooted in a broader vision of the future of the world, the country, or the region in which it is active.

A fine example of a university with such an inspiring vision is the relatively new Central European University in Hungary during the period of transition from dictatorship to democracy after the end of the Cold War. The Central European University was founded in 1991 with the explicit aim of helping the process of transition from dictatorship to democracy in Central and Eastern Europe and Central Asia. It is

> committed to bringing together students from these 30 countries and from the West in order to nurture respect for diverse cultures and opinions, human rights, constitutional government, and the rule of law. In its first decade, CEU sought to contribute to innovative academic research, progressive higher education and the development of dynamic, sustainable open society primarily in the former 'socialist' countries. More recently, its interest has become global, with special attention paid to emerging democracies throughout the world. These aims – all in step with promoting the values of the Open Society – remain fundamental to CEU, but our mission has become global with special attention to emerging democracies worldwide.[102]

[102] Central European University, www.ceu.hu (last accessed 15 January 2013).

The butterfly flapping its wings in one place may cause a storm elsewhere. In our globalising world – think of 'the Arab Spring', or the quest for human rights in China and Russia, the long road to peace in the Middle East, terror in Asia and elsewhere, shortage of food in Africa, the brutal violation of women's rights in India, our energy problems, the link between poverty and immigration – CEU's vision is an inspiring example for every institution of higher education.

How might one formulate a vision for a law school? It must be more than just training good lawyers and conducting good research, or, as the Americans put it: 'we train world-class leaders through superb teaching'; 'we are ground-breaking, multidisciplinary and cutting-edge in our research'. The quest for a vision reaches beyond that, to the underlying dream: a more peaceful, more secure, fairer and more prosperous country or world; a society and a world where people learn how to resolve disputes peacefully; better legal protection for citizens from government (the 'rule of law'); a community of equal rights, equal opportunity and diversity; a world in which the protection of privacy is meaningful; a community where people treat each other with more respect; a world that cares about generations that follow. Perhaps this is the dream of the university as a whole, from the sciences, the humanities and the social sciences to the law schools, in both education and research.

I have noticed how it is particularly the law schools in developing nations, or in countries that are in transition, such as those in Central and Eastern Europe, that remind their 'Western' sibling institutions – for whom the law often appears an enterprise of relatively little value – of the fundamental meaning of legal education and research. CEU is indeed an example of this. The University of Western Cape in South Africa seems to be another, drawing on its 'proud experience in the liberation struggle', seeking racial and gender equality, helping 'the historically marginalised participate fully in the life of the nation'.[103]

Many other examples can be mentioned. In Asia, the Centre for Asian Legal Studies (CALS) opened its doors in 2012. Its aim is to explore and analyse the legal systems of the region:

> As legal integration and transnational activity generates new legal questions in respect of Asian countries, CALS will also assist in answering these questions and developing Asian legal systems towards all-embracing

[103] University of Western Cape, www.uwc.ac.za (last accessed 15 January 2013).

> justice and the rule of law. It will identify the most important legal issues confronting Asia, increasing awareness and understanding of those issues from an Asian perspective.[104]

And yes, I know, these are all websites. How do all these institutions live up to their promises in reality?

3.8.4 No gain without pain

In order to become real visions and missions, values must take us out of our comfort zone. I therefore spent a day reading the visions and missions of a number of universities, asking myself: what does it *really* mean? Is there gain without pain? I will provide some random observations.

Universities that refer to their long history ('our time-honoured tradition'), often as a value in its own right, should say how their long history contributes to the realisation of the university's dream. Universities that see their task as 'expanding and disseminating knowledge' will have to demonstrate how they make open access a reality in their publication strategy. Universities that place 'freedom of expression' at the forefront should not complain about researchers who really test the limits of such freedoms, for example in the media. Those who dream about a world that is more 'pluralistic and multicultural' must demonstrate how they actually make diversity work, for example in the curriculum, by accepting students from a wide range of backgrounds, giving extra support to students, or when recruiting personnel. Those who want to honour the importance of 'equal opportunity' must have a robust scholarship programme. Those who say that they want to tackle 'the world's great challenges' must demonstrate their intentions in their research programmes and their research results. Those who extol the importance of the humanities and our 'cultural inheritance' will have to show how these disciplines in particular will also be able to flourish during difficult financial and economic times. Those who really want to conduct 'cutting-edge research' in one specific field will have to show what sacrifices have to be made in other fields. Those who claim that they strive in their teaching for a world of 'open-mindedness and tolerance' in which people will learn to understand each other will have to demonstrate how this dream is reflected in their curriculum or in their

[104] National University of Singapore Centre for Asian Legal Studies, www.law.nus.edu.sg.

international mobility policy. Those who feel strongly about 'social engagement' must show how this social engagement is effected through their students and faculty members. Those who want to hold their staff to the 'highest principles of scientific integrity' must make clear where this 'extra' effort is to be made. Those in a big law school who say that they are doing everything to train 'future world leaders' must demonstrate how they can achieve this when they produce 200 lawyers every year. A law school that really wants to be 'academically oriented' must show how their research is integrated into the learning. Those who say that the student is central to everything they do may have to lower their tuition fees in economically difficult times. Those who claim to foster contact with former students and graduates will have to demonstrate a sense of responsibility when the employment market crashes and students are trying to repay enormous student loans by working as pizza delivery couriers or cleaners. The university that wants to give young researchers additional opportunities will have to show how the oldies make room for the young ones at any given point in time. And, finally, a law school which claims to strive for the advancement of law and justice in the world will have to justify their claims by, for example, making a course on ethics in banking central to a master's programme in financial law.

Reading visions and missions is an intriguing occupation; they can so easily become free of any obligation. Many of the texts that I read appeared to be directly from the pen of the public relations department. I will give you one typical example:

> Our university builds on its four-hundred-year-old tradition of scholarship to confirm its position as one of the great universities of the world, providing a liberal environment where independence of thought is highly valued and where staff and students are nurtured as individuals and are encouraged to achieve their full potential.
>
> The university is committed to excellence in both research and teaching, to the enhancement of the learning experience of each of its students and to an inclusive university community with equality of access for all. The university will continue to disseminate its knowledge and expertise to the benefit of the city, the country and the international community.[105]

Nobody would disagree with that. It may very well be that the university lives up to all its promises, but it is important that mission statements do not go unquestioned. Deans and university rectors or presidents

[105] Again, I could provide hundreds of others, including my own university.

(including me) must from time to time challenge their faculty and staff to enter the debate about values. No matter whom I spoke to during the past year, whether academics or students, all showed great interest in these larger questions, such as what characterises us in the way we work and what we share; and yet they all admitted that they should become more involved. An inspiring example of such a university-wide debate is provided by the Dutch Tilburg University (which, incidentally, has a very good law school). In an attractive booklet, the university's tradition is linked with its present-day responsibilities.[106]

Although I do not know whether it is enough, Leiden has its Cleveringa Lecture once a year: about 'law, freedom and responsibility' – an exciting trilogy. By linking values to the academic form of expression *par excellence* – i.e. the formal lecture – at least once a year, it gains some real substance, even if only fleetingly.

This is particularly important for legal education, as we will see in Chapter 5. The Council of Australian Law Deans was correct when warning of the danger of privatisation of legal education leading to law students' selfish pursuit of personal goals and a blindness to the contribution made by law and lawyers to civil society, the rule of law, and the public good:

> Even for those for whom the spirit of altruism survives . . . their high level of debt on graduation propels many of them, of necessity, away from lower-paid public interest work and into more remunerative private practice. All of this fosters negative stereotypes of lawyers as interested only in personal material gain, and reinforces other negative stereotypes of lawyers as obstructors rather than facilitators.[107]

In 1995, Leiden theologian, Leertouwer, one of the most eloquent rectors that the university has ever known, asked a question about Cleveringa's suitcase (the suitcase that stood waiting for Cleveringa in case he was arrested by the Germans after his protest speech). What spiritual contents will we find in the suitcases of our lecturers and our students, Leertouwer speculated?[108]

[106] Erik P. N. M. Borgman, *Met het oog op goed leven. Cobbenhagen en onze universitaire cultuur*, Tilburg: Tilburg University 2011.

[107] Council of Australian Law Deans, *Consultation Paper for the Review of Higher Education Base Funding*, 2010.

[108] L. Leertouwer, 'Cleveringa's koffer', in: Kees Schuyt and Ineke Sluiter (eds.), *Cleveringa's koffer. Recht, vrijheid en verantwoordelijkheid. Een selectie uit de 26-novemberredes aan de Universiteit Leiden, 1940–2010*, Leiden: Leiden University Press 2010, p. 170 (in Dutch, my translation).

In 'a moment of weakness', Leertouwer said, 'I am overtaken by the thought that the suitcase of today's professors is primarily filled with worries', together with 'a couple of plans to ensure the continuity of their own career and that of their own department':

> There is nothing improper about that, but like that moment in 1940, it is not enough. The self-respect of individual scholars will erode under the pressure of public indifference and turn into aloof behaviour, if it is not rooted in deeper and more fertile soil than individual, personal interests.

That soil, Leiden's former rector said, 'lies here', in the Academy, where Cleveringa spoke. '*Miles Praesidii Libertatis*', Soldier of the Bastion of Freedom – and this duty to serve, Leertouwer said, applies to us all.

And what did he find in the suitcases of our students? Not just a degree certificate as a passport to the world, that much is certain. The spiritual luggage that a student needs cannot be expressed in academic grades and success only. According to Leertouwer, it is less a student's triumphs than his defeats that form the essence of the learning process. Students need room to learn from their failures and 'to fail better next time' (Samuel Beckett). Or take Skinner: 'Education is what survives when what has been learned has been forgotten.'[109]

Rector Leertouwer left it to the faculty and to the students themselves to ponder the contents of the suitcase. This is a wise policy: answers have to be given, again and again, by every new generation of students and faculty.

[109] See section 4.4 below.

4

Educating law students

4.1 'As university that world was known'

The outside wall of my law school in Leiden proclaims the ideal to which a university should aspire. It is a verse by the late Dutch poet Gerrit Komrij:[1]

> *The School-Leaver*
> A mountain of rice pud I waded through,
> Set reading and a host of bookish facts,
> Where every urge for freedom was taboo
> Where nothing stuck though all fell on my back.
> Until I landed in an open field,
> Far from that rule-bound, cold, oppressive place;
> Wisdom a peacock to me there revealed
> And knowledge from the trees I picked apace.
> For uselessness my time was all my own
> And I struck gold when all I sought was shale.
> As university that world was known—
> A world that one can hear folk claim instead
> To wolves and speed hogs now is up for sale—
> As if you could spread banknotes on your bread.

So, the poet also provides an admonition: a university should not be too ready to sell its soul to the wolf and devil of expediency, especially not in times of financial crisis. The warning is particularly pertinent at the present time because, inside the walls of many law schools, administrators are wrestling with such questions as: How do we increase student–lecturer contact hours under shrinking budgets? What do we do about the drop-out rate of nearly one-third of the students in the first year? How can we improve the worryingly poor student/faculty ratio? What do we do with 1,000 first-year students? How do we get our students to study harder, and what extras can we provide for our most

[1] Gerrit Komrij, 'De Schoolverlater', translation by John Irons.

motivated students? How do we drive down the number of resits? How do we deal with a legal profession complaining about the educational level of our graduates ('meagre' was the finding of the President of the Dutch Association of Lawyers a few years ago[2])? How many spelling and language mistakes can a student make and still pass the second year? All this, and then we are further exasperated by the multitude of reviews, accreditations and inspections that, with ever-increasing frequency, are telling us what we often already know.

The number of publications on legal education is vast, certainly at international level. As far back as 1972, four Dutch authors revealed how a great deal had already been written about the need to reform law schools, especially in the US and in the Federal Republic of Germany. 'The four of us are nearly drowned in it all.'[3] The volume of literature has become no smaller since then. When Dutch professor Ewoud Hondius searched for the words 'legal' *and* 'education' on the Internet for his study of legal education in 1999, he obtained a million hits.[4] Now, fourteen years later, there are more than 1.3 billion in the English language alone. This chapter must therefore confine itself to sketching a rather brief overview.

4.1.1 The academic/vocational debate

The discipline is wrestling with the content, length and structure of legal education on almost all fronts, often in connection with its relevance to the commercial field of private practice.[5] This is not surprising. Unlike medicine, for example, the study of law presents a wide array of prospects, both on entry to and graduation from a programme. The diversity makes legal studies both fascinating and complicated at the same time. On entering the programme, many students have hardly any idea of which direction their studies should take or which path they should pursue when they graduate. Only a

[2] Michiel van Kleef, 'De zorgen van Willem Bekkers', in: *Mr Online*, 2010 (in Dutch).

[3] H. F. M. Crombag *et al.*, *Handelingen der Nederlandse Juristen-Vereniging deel 1. (Gezamenlijk voorwoord) De juridische opleiding*, Zwolle: W. E. J. Tjeenk Willink 1972 (in Dutch).

[4] E. H. Hondius, 'Juridisch onderwijs in vergelijkend perspectief', in: *Preadvies uitgebracht voor de Nederlandse Vereniging voor Rechtsvergelijking No. 56*, Deventer: Kluwer 1999 (in Dutch).

[5] Andy Boon and Julian Webb, 'The Legal Professions as Stakeholders in the Academy in England and Wales', in: *Stakeholders in the Law School*, 2010.

portion of graduates wind up in typical law careers, and these traditional professional paths may also vary greatly.

Many law schools are struggling, as well, with issues concerning the desired level of education and the degree of specialisation. In the world of private practice, considerations of finance and efficiency play a central role. What students learn in law school is often not of *direct* relevance to commercial law firms. To cite two British authors on this subject:

> The interest of the profession is to establish a form of legal education that is fit for purpose that responds effectively to increasing levels of specialization, the demands of government and students for economy and to the need for regulatory efficiency. The profession is under steady pressure from its own constituency. One of the most vociferous sectors is the corporate/commercial law firms which criticize the inadequate standards of legal education that all firms are seeing now.[6]

The discussion about the nature of legal studies is often characterised as an opposition between academic and professional education. Nothing resembling a satisfactory reconciliation of these opposing views has ever been proposed, not even in the US where the study of law is primarily regarded as a *professional* discipline and less as an *academic* discipline. Indeed, the first working day of David French as a young lawyer may be very familiar to many other recent graduates:

> Then comes the bracing reality of a first job. I'll never forget the moment when a partner handed me stack upon stack of documents, asked me to review them thoroughly and 'draft a complaint for breach of contract'. He might as well have asked me to redesign the Space Shuttle's external fuel tank. I remember thinking, 'After I read these documents, I can probably write five thousand words about how this transaction oppressed women and minorities, but I don't have the slightest idea how to state a legal claim.'[7]

This anecdote accurately portrays the tension between law as an academic discipline and law as a professional qualification, a tension that permeates all parts of the discipline. At best, legal studies may be regarded as a hybrid form of academic professional learning, comparable to medicine or engineering.

Insofar as the level of education is concerned, there are considerable international differences. Programmes that can be selective when

[6] *Ibid.*, p. 73.
[7] David French, 'American Legal Education and Professional Despair', in: *Academic Questions*, 24, 2, 26 April 2011.

admitting first-year students, and that can maintain reasonable student numbers as well as sufficient capacity and money to provide personal attention, will more easily achieve a high level of education than programmes where none of these are possible. At one end of the spectrum are the Oxbridge colleges, with an average intake of twenty strictly selected law students in each college and a tutorial system that creates a strong link between students and lecturers.[8] At the other end is, for example, La Sapienza in Rome, with an average of 1,300 first-year students, or Leiden with 1,000 freshers in 2013, including Criminology.

The reason for these sorts of numbers is partly historical (many Oxford and Cambridge colleges started off with large endowments) and partly purely political and economic. If a country or continent, such as Europe with its Lisbon Agenda (2000), has the ambition of offering higher education to half the population without having the infrastructure and money for it, the resulting load is primarily borne by the larger programmes such as law, economics, business studies, psychology and history. It is quite a challenge to provide personal attention under these circumstances. As Thomas Finkenstaedt puts it, the whole German Humboldtian ideal of *Bildung* through *Wissenschaft*, one's personal development through scholarship, is impossible to achieve for a student population of more than a few per cent of the age group.[9]

4.2 What makes a good lawyer?

Qu'est-ce qu'un 'grand' juriste? ('What Makes a Great Lawyer?') is the title of a book that appeared recently in France.[10] In her quest for what constitutes a great lawyer, Lauréline Fontaine is seeking the answer to this question in her book: is a 'great lawyer' the original academic, the astute lawyer, the wise judge, maybe? The answer seems difficult to find.

Insofar as the education of young lawyers is concerned, there are, in my opinion, six important questions that have to be answered: (1) What are the professional qualifications of a 'lawyer'? (2) Do legal studies constitute an academic and/or professional form of education? (3) What

[8] *The Oxford Tutorial: 'Thanks, You Taught Me How to Think'*, Oxford: Oxford Centre for Higher Education Policy Studies 2008.

[9] Thomas Finkenstaedt, 'Teachers', in: *A History of the University in Europe*, Vol. IV: *Universities since 1945*, 2011.

[10] Lauréline Fontaine, *Qu'est-ce qu'un 'grand' juriste? Essai sur les juristes et la pensée juridique moderne*, Paris: Lextenso éditions 2012.

should the curriculum look like? (4) What should be the level of education? (5) How should education be related to the job market, especially with regard to the various fields of the legal profession? (6) With what extra values do we wish to endow our law students?

These general academic values have already been discussed in Chapter 3 and represent the ambition of nearly all university programmes since Humboldt. They include intellectual development, democratic values, good citizenship, and global responsibility.

The above six questions are essential elements of every law course. Once they have been answered, if only in general terms, there are six *further* questions that concern practical matters. This second set (these are not framed as questions) explores: (1) Do all lecturers collectively share the vision of the programme and are they ready and able to collaborate freely? (2) Does the school or department have, and retain, the appropriate expertise about the subject? (3) Are all parts of the programme reliably integrated into one programme? (4) Is the quality of education and assessments adequate? (5) Is there good, non-academic educational support and are all facilities adequate, such as IT, library and study space? (6) Very importantly, what are the final requirements that we impose on our students?

What can a university do to make a good lawyer?

4.2.1 The 'Dublin Descriptors'

There is no internationally accepted answer to this question for legal studies. There are the so-called Dublin Descriptors that apply to all academic programmes and that create a sort of framework within which they can be evaluated.[11] In the final phase of a university programme, these descriptors provide a basis or opportunity for originality in developing or applying ideas often in a research context in order to acquire knowledge and understanding, and apply it in new or unfamiliar environments within broader or multidisciplinary contexts. This is about the ability to integrate knowledge and handle complexity, and about how to formulate judgments with incomplete data or facts, their conclusions and the underpinning knowledge and rationale to specialist and non-specialist audiences, and how to study in a manner that may be largely self-directed or autonomous.

[11] JQI meeting in Dublin: www.jointquality.org (last accessed 21 January 2013).

Within this framework, at the end of their studies, students should have demonstrated the following: a systematic understanding of their field of study and mastery of the skills and methods of research associated with that field, and the ability to conceive, design, implement and adapt a substantial process of research with scholarly integrity.

Students should also have made a contribution through original research that extends the frontiers of knowledge by developing a substantial body of work, some of which merits national or international refereed publication. Furthermore, students should have shown: that they are capable of critical analysis, evaluation and synthesis of new and complex ideas; that they can communicate with their peers, the wider scholarly community and with society in general about their areas of expertise; and, finally, that they are able to promote, within academic and professional contexts, technological, social or cultural advancement in a knowledge-based society.

However valuable, these descriptors do not furnish a complete answer to the necessary knowledge, skills and attitude of a *lawyer* starting out on his or her career. Law schools mostly supply their own answer to this question, sometimes in consultation with various parts of the legal profession. Nearly all law schools educate and train people to be employable as lawyers in various fields of law, as well as to serve a number of other legal functions at academic level, including those of future law lecturers and researchers. Although some programmes primarily see themselves as 'professional', few law schools wish solely to train people in mundane practical skills; instead, they wish to offer 'education'.

Graduates should possess a critical and reflective attitude in addition to a thorough knowledge of the principles of law and a mastery of certain skills. The German Wissenschaftsrat recommends that law schools create a didactic practice which combines knowledge acquisition with critical reflection. They should:

> develop concepts for a broad and encompassing legal education ('*Juristische Bildung*') in order to systematically strengthen the transfer of contextualised and foundational knowledge as well as the methodological competence needed to comprehend structural and systemic interrelations. Strengthening these aspects would also free law teaching from too detailist knowledge.

Moreover, scholarly and practical aspects of legal training should be combined in order to promote skills in the application of law, law-making and implementation, and in the provision of legal advice, as described above.

> Seminars have proven to be a reliable format for the training of reflexive competencies and the fostering of critical thought. This format allows students to acquire and deepen their knowledge through intensive discussion in small groups.[12]

How legal education is organised and regulated has a great influence upon the way we educate our students. Whether we select our students and how, who pays for their education, how we select our faculty and how we govern the law school – *all* this has an impact on the content of our education.

In a challenging paper about 'the battlefield of competing and inconsistent truths in Australian legal education', Nickolas James claims that in every law school there are competing notions of the proper content of legal education and its connection to society.[13] However, they often remain implicit. That became a problem when in 1987 the 'Pearce Report' on legal education concluded that Australian legal education was 'insufficiently critical'. Most Australian law schools were too 'rule-oriented': there was too much emphasis on the exposition of legal doctrine and insufficient emphasis on the theoretical and critical dimensions of law. The report did its work and gave rise to much discussion and change.

In his paper, James focuses on the concept of critical thinking. Law schools, he believes, are the site of competing discourses of critique, such as doctrinalism, vocationalism, corporatism, liberalism, pedagogicalism and radicalism. Legal education, in his view, is still 'a nebulous term seeking to encircle an unstable and inconsistent collection of texts, practices, ideologies and assumptions'. Each of these discourses, James says, is simultaneously 'a form of knowledge' and 'an expression of disciplinary power within the law school'.

While most texts are consistent in their definition of a critique as some form of criteria-based judgment, within this two-part definition there is still significant scope for variation: what are the criteria upon which the judgment is based and what is it that is being judged? The answers to the first question include truth, intellectual rigour, rationality, fairness and justice; the answers to the second question include law, legal doctrine, legal practice, social norms, authority, tradition, the statements of others and an individual's own thoughts and beliefs.

[12] Wissenschaftsrat, *Prospects of Legal Scholarship in Germany: Current Situation, Analyses, Recommendations*, 2012, p. 59.

[13] Nickolas John James, 'Australian Legal Education and the Instability of Critique', in: *Melbourne University Law Review*, 28, 2004, p. 377.

I agree that we tend to avoid such difficult discussions in our law schools, with the result that we may have lost sight of what should be the main academic duty: teaching students to think critically. For some in the law school, however,

> critique is a skill; for others, it is an attitude. Some portray critique as peripheral to the learning of law, whilst others argue that it is central to that endeavour.[14]

4.2.2 Who is happy with the state of legal education?

To be actually admitted to the legal profession, candidates are nearly always required to satisfy national or regional requirements regarding the various fields of law, in addition to passing their chosen academic subjects. Germany is interesting in this regard because a close link exists in that country between the law schools and professional practice. Since 1877, German legal education has consisted of a four-year university programme and a two-year practical phase known as the *Referendat*, which involves paid employment in a court as a law clerk (see Chapter 1). Exams are drawn up and administered by both university professors and practising lawyers. The resulting educational programme seems, in many ways, to parallel the structure adopted in medicine. However, Germany would seem to be rather unique, to the extent that theory and practice are strongly integrated in its programme for producing legal professionals.

In most countries, the study of law is considered an academic discipline, often divided into two levels (bachelor and master) intended to provide students with the knowledge, understanding, application, attitude and skills required for legal positions, especially those associated with the bar or the bench. Some programmes promote specialisation and in-depth knowledge of a narrow field, while others remain broader and more general. Some have an entirely fixed curriculum; others offer students greater freedom. However, the study of law is almost always arranged in the four categories of knowledge and understanding, application, skills and attitude.

All the same, I have met very few people who are actually happy with the state of legal education, either inside or outside the Netherlands.[15]

[14] *Ibid.*

[15] For a thorough overview, see Christian Baldus, Thomas Finkenauer and Thomas Rüfner, *Bologna und das Rechtsstudium*, 2011.

In many countries, the nature, content and quality of legal education is a subject that flares up frequently and dies down again. As Dutch Law deans, we have often noticed the rather unsystematic manner in which our law schools discuss the issue of 'final qualifications' for students. Such discussion is, indeed, long-standing. The circularity in which the discussion is trapped becomes apparent when one takes a quick look at a Dutch publication from 1931.[16]

The issues being discussed more than eighty years ago remain relevant to the Netherlands of today, as well as to many other countries. On the poor preparation for legal practice:

> the call for practical schooling is a general phenomenon of our age.

On the theoretical/academic nature of legal studies:

> [p]roviding academic education is the proper goal of the university; defining terms and identifying to what they refer, which belongs to the realm of theory, therefore constitutes the essence of university teaching.

On teaching methods:

> the classes in which education occurs mostly consist of lectures by professors without any further contact occurring between them and students.

On the laziness of students:

> in choosing subjects, they look for places where the faculty offers the least resistance and, in most cases, successfully display great virtuosity in doing this.

On analytical thinking and writing skills:

> Young lawyers have to learn to think at university, although they have not sufficiently learned to order their thoughts, to express them properly and to work them out in a logical way. What faculty members sometimes receive from students as writing is often very disturbing.[17]

It is both fascinating and comforting to realise that all these issues were being raised as long ago as 1931. This does not mean that no progress has

[16] E. J. J. van der Heijden and E. Jacobson, 'Voldoet de universitaire opleiding van den jurist aan de daaraan uit wetenschappelijk en practisch oogpunt te stellen eischen? Gemeenschappelijke inleiding van de preadviseurs', in: *Handelingen der Nederlandsche Juristen-Vereeniging*, The Hague: F. J. Belinfante 1931 (in Dutch).

[17] *Ibid*., p. 12.

been made since then. It only indicates how difficult the answers to these very old questions are.[18]

4.3 An excursion into medicine

There is no doubt that a number of common law countries, such as the US and Australia, devote much more time to discussing legal education than do other countries. In the US, the Association of American Law Schools meets annually, and conferences on legal education are held regularly in the different American states. The same cannot be said of the so-called civil law countries, where legal education is debated much less frequently. On a global scale there are indeed the annual meetings of the International Association of Law Schools, but even these cannot disguise the fact that there is by no means a worldwide community of law teachers. The situation is completely different in the field of medicine, at both the national and global levels. At this point, it is therefore interesting to venture a little into medicine, straying from the law school into medical school. I have, in recent years, enjoyed making this crossover when attending the annual meetings of the Dutch Association of Medical Education, which brings around 900 people together for a two-day think-tank on medical education. The sessions include talks by international speakers, PhD candidates presenting their research on medical education, policy-makers discussing best practice, experts in social media, doctors and nurses. It is a dazzling assembly of people reflecting on the education of medical students and doctors.

In most countries, with the exception of the US and some others, such an assembly would be in sharp contrast to the conferences of its legal counterpart. Professors with chairs in medical education maintain scientific contacts with a worldwide network of colleagues. Even if some questions still need to be asked about the content and quality of medical studies, there appears to be reasonable international agreement about, for example, the objectives, methods and testing of medical education.[19]

The educational programme for training doctors in the Netherlands is organised within a framework that is often more concrete than the

[18] Margreet Ahsmann, *Over 'meesters in de rechten' en 'priesters van het recht': feit en fictie in hun opleiding (Oratie Leiden, 2011)*, The Hague: Boom Juridische uitgevers 2012 (in Dutch).

[19] Tim Dornan *et al.*, *Medical Education: Theory and Practice*, Edinburgh: Elsevier 2011.

structure underlying the study of law.[20] It is noteworthy that, even in countries where a doctor's education consists of various types of studies that together can easily last ten years, substantial thought is generally given to the qualifications that graduate doctors must attain. Sets of skills are often formulated in order to obtain some understanding of these qualifications. In the Netherlands, there are seven such sets: medical expertise, communications, collaboration, organisation, health care advocacy, professionalism and academic knowledge. The latter means that the graduate doctor can, for example, undertake limited empirical research, develop a course of study that may be offered to students and professional colleagues, and review personal strengths and weaknesses. Finally, new doctors are advocates for health care practices that comply with the highest medical and ethical standards. These seven skill sets are further detailed in lists of concrete 'practical skills', such as recording a patient's description of the symptoms, performing a physical examination, using electronic patient records or immediately recognising critical symptoms.

Although this chapter may take a somewhat rosy view of medical training, medicine in many countries seems to have a more integrated vision of the entire programme of study. It ranges from the secondary school graduate to starting professional practitioner, this latter category being matched by the lawyers, notaries and judges of the legal profession. This vision involves a coherent programme extending over three cycles.

At first sight, the seven sets of skills for legal professionals may seem over-exaggerated. On further reflection, these skills will make the discussion about what qualities a good doctor needs much easier and more insightful. By thinking in terms of the skill sets, the qualifications of the new doctor are given systematic attention from year one, and this focus continues throughout the entire course of study. The result is a coherent whole by means of which the student slowly but surely becomes a doctor, with all its related responsibilities. This also makes it possible to include agreements in the programme about the objectives that the young professional has to achieve.

4.3.1 A schizophrenic in the classroom?

Finally, medical studies are characterised by the amount of practice incorporated in the programme, not only by means of work group

[20] Nederlandse Federatie van Universitaire Medische Centra (NFU), *Raamplan Artsopleiding 2009*, Utrecht: 2009 (in Dutch).

discussions and the examination case, but by literally bringing health care into the classroom in the form of real patients, whether dead or alive. I remember when our professor of forensic psychiatry brought one of his patients into a class on criminal law. The students did not know what was going on: a schizophrenic in the classroom, isn't that rather dangerous? As normal as such activities are in medical studies, they are extremely unusual in law. If law students do not decide on their own to complete a practical internship, which is, as we know, not required in many law schools, they then finish their studies without *ever* seeing or hearing an actual criminal, an angry neighbour, a desperate employee, an infuriated survivor of medical error or a child in juvenile care.

There are, of course, important differences between medical and legal studies. Medical students often know as early as the middle of high school that they want to become doctors. They usually have to select a certain set of courses for this purpose. Admission to the programmes partly depends on the average marks on final high-school exams or at high-school graduation, causing students to study harder and be more motivated. The educational programme to become a doctor mostly takes place in a hospital right from the beginning, as a result of which the ultimate professional activities of a doctor are constantly visible to students. Possible tensions between academic study and professional practices are neutralised.

When comparing legal and medical education, law professors tend to draw a stark contrast, claiming that all medical students become doctors, while *law* graduates spread themselves over many different professions and careers. This distinction, however, should not be over-stated – not only because not all medical students do in fact become doctors, but, more importantly, because differences also exist between different medical specialities, such as the gynaecologist and the surgeon, the radiologist and the orthopaedist, the consulting company doctor and the anaesthetist.

4.4 Knowledge and understanding, attitude and skills

The same subjects appear in legal curricula all around the world, such as the general introduction to law, private law, criminal law, constitutional and administrative law, international law, philosophy of law, legal history, and the economic foundations of law. The associated challenge is to begin simply and slowly to build up the complexity of the programme.

A similar observation was made by a Dutch legal academic in 1946: 'Do not begin any concert with Beethoven's Ninth.'[21]

4.4.1 Knowledge and understanding

The subjects within the curriculum are one thing; the level at which they are taught and examined is another. There are a great many complaints about this at present, but, as we have seen, these issues were also around in 1931. Universities able to be selective with their admissions, to have small numbers of students and to maintain a favourable student/teacher ratio have, in general, few problems. This, however, is not the case for many law schools. For them, the ambition to provide as many first-year students as possible with the same type of education has its price. The above-indicated numbers, the increased diversity of the students (in 1931, a diploma from a pre-university secondary school offering thorough mandatory instruction in Latin and Greek was a requirement for Dutch students) and a prohibition against selective admissions has almost inevitably led to a focus on the 'most average' of the average student.

In addition, the international component of legal studies has, without a doubt, become more important. For around two centuries, the legal discipline was primarily restricted to the individual state and, therefore, to the laws, decisions and academic studies of individual countries. The world is currently internationalising and globalising at a rapid rate. The business community, the mobility of people, the Internet, the media (including social media), the notion of more universal social values, rights and duties, and the ability to internationally enforce them – all of this has made the world a much smaller place. This will have consequences for legal education. Opinions differ, however, on how these consequences should be handled. In Germany, the Wissenschaftsrat advocates that German students – at least those who want to embark on an academic career – ought to possess good foreign-language skills.

> In view of the growing Europeanisation and internationalisation of the law and legal scholarship, law students must at the very least be capable of reading and understanding legal texts written in English, preferably also

[21] J. Kruseman, 'De academische opleiding der juristen. Overzicht van het tijdvak 1876–1946', in: *Rechtsgeleerd Magazijn Themis*, 1946 (in Dutch).

> those in other European languages. Students wanting to pursue an academic career in legal scholarship should be capable of expressing themselves academically in languages other than their own.[22]

This holds true not only for European countries. Take, for instance, China: many of the world's best law schools opt for a Chinese partner, and many law firms establish offices there and look to recruit the best Chinese legal experts. For Chinese lawyers who want to reach the top of the legal profession in China, it is essential to be able to speak and write excellent English and to understand what Western companies expect from a lawyer. For these Chinese lawyers, the route to the top runs via an LLM or in some cases in the US via a JD, followed by a bar exam, preferably in New York – or California where the exam is harder – and a period as an associate in a big US law office. They then hope to be able to return to China with the right qualifications and experience. Numerous Chinese lawyers have taken their LLM and bar exam, but for many the step to a large international office still seems to elude them.

But all this does not apply only to Chinese lawyers. The major law firms in South Korea, for example, employ a large number of lawyers who have been trained in the US, a development that started some time ago. One difference to China is that until recently the South Korean market was closed to foreign offices. Today, more than twenty US and UK practices have opened offices in Seoul, which will only have the effect of increasing the demand for Korean lawyers who have been trained in the US or the UK.

The globalisation of the legal professions will have major consequences for legal training programmes. Dr Geert Potjewijd, an attorney working for a Dutch law office in Beijing, stresses that his clients seldom or never ask him to resolve a problem under Dutch law:

> They ask us to resolve a problem somewhere in the world. Dutch law is more or less irrelevant; the only connection with the Netherlands is that the client may be Dutch. Our work covers a whole range of issues: take-overs in Brazil, China or the US; cartel investigations worldwide; arbitration under foreign law, etc. Our contact person at the client is often a lawyer trained in Dutch law, but his or her work doesn't stop at the Dutch border. This means that our office is competing not only on the Dutch market, but on the world market. This calls for different knowledge and skills.[23]

[22] Wissenschaftsrat, *Prospects of Legal Scholarship in Germany: Current Situation, Analyses, Recommendations*, 2012, p. 63.

[23] E-mail, 6 January 2013.

It also requires that these lawyers are not only exceptional lawyers, but also that they can identify with clients from other cultures and that they have an awareness of what is going on in other societies. The question is therefore how law schools – wherever they are in the world – can best train lawyers for this international employment market. The curriculum of such programmes will contain quite a lot of private law, as well as international law (and/or European law). And intensive internships and international mobility during the study programme will be unavoidable.

Yet in the Netherlands law deans, for instance, have collectively refused to make any definite commitments on internationalisation. Although comparative law may certainly be important for them, they are far from making any such comparisons in all or even some of the law classes. International mobility, too, seems crucial for a student's development, but again not much more than 20 per cent choose that option. Attention to the relationship between governance, development and the rule of law in large parts of the world is at best packaged into an elective course. What internationalisation and globalisation precisely entail for law schools is evidently still not known. Yet we know that society, or the consumers of our graduates, expects us to also produce at least some 'global lawyers' (see Chapter 3). Such an obviously necessary subject as international law has, in some American law schools, only recently been introduced.

4.4.2 An academic attitude

The study of law involves the transfer not only of knowledge but also of understanding. It is the creation of this 'understanding' that is the primary academic task of law schools. The term 'academic attitude' is often used to describe what we wish to transmit to our students.

To my mind, this means a natural commitment to law, legal issues and the community, as well as to the development of an inquiring mind and a healthy – and above all *sceptical* – outlook. In an academic programme, we teach students not only to look for the solution to a problem but also to seek out the problem in a solution. Doubt should be written in the lawyer's DNA. Professor Peter Birks stated this point succinctly:

> A lawyer is bound to develop a routine scepticism, taking no argument at its face value, no set of words as meaning what it seems to say. That is a condition of legal life.[24]

[24] Peter Birks, 'Editor's Preface', in: *Pressing Problems in the Law*, Vol. 2: *What Are Law Schools For?*, 1996, p. xiv.

An academic education also requires powers of imagination and empathy, along with an ability to be objective, complemented by inventiveness, creativity, attention to detail and a love of facts and factuality.

Added to this list is a feeling for language, an awareness of the limits of personal knowledge and expertise, and a highly developed capacity to reflect on personal action and emotions, and to accept feedback from others.[25] All these values that are inherent in the study of law are, according to Birks, valuable not just for future members of the bar or bench. From earlier chapters, we know that only a relatively small number of law graduates will attain such positions. Law studies also have inestimable significance for a number of other professions, provided students have sufficient time to mature. In this sense, the study of law may fulfil the same role that the study of classical languages occupied for so long.

> Many law students will not practise law, but an education in law is precisely a programme that will both engage their intellect during their studies and equip them to be useful in the world after university.[26]

Viewed in this manner, the aim of legal education is precisely that of the *Bildungs Ideal*, in which the university is viewed as an institution with a generally formative task primarily concerned with the intellectual development of the student and independent of professional interests. This ideal can only be realised by devoting sufficient attention to the broad scope of the metajuridica in which law studies are rich (see Chapter 3), but certainly also by devoting enough attention to the major core subjects as well as to the intellectual and moral dimensions of law. A member of the legal profession must be trained and educated, and this should be evident in every subject of the curriculum.

4.4.3 Societal values

Finally, the realisation of a general education ideal also involves the societal values that we wish to awaken in our students, perhaps one of the most difficult tasks of education. As noted in Chapter 3, the

[25] Renée M. van der Leeuw and Irene A. Slootweg, 'Twelve Tips for Making the Best Use of Feedback', in: *Medical Teacher*, 27 February 2013.

[26] Peter Birks, 'Editor's Preface', in: *Pressing Problems in the Law*, Vol. 2: *What Are Law Schools For?*, 1996, p. xv.

American psychologist B. F. Skinner once said: 'Education is what survives when what has been learned has been forgotten.'[27]

The debate is especially active in the US: 'What makes life worth living?', and how does the university make a contribution? Examples of this approach are to be found in books by former Harvard law dean Anthony Kronman,[28] Martha Nussbaum[29] and Derek Bok, the latter's interest being more generally about 'underachieving education'.[30] Just as inspiring for law studies are the American 'Seven Principles of Excellence', which should feature in the education of all students,[31] and the phenomenal study on law schools by the German Wissenschaftsrat.[32]

These principles are mainly concerned with the need for a stronger focus on democratic values. Dutch law professor Jan Smits provides a good example, with his focus on Europe and 'global citizenship'.[33] In addition, a wryly written book by Cambridge Humanities professor Stefan Collini has recently been receiving a great deal of attention. In seeking an answer to the question regarding the purpose of the university, he primarily adopts a position in opposition to the 'economic growth' school of thought.[34] In effect, Collini's view also insists on the fact that we should teach our students to reflect on the wider world in which law functions in order to cultivate a broad intellectual interest in each student.

4.4.4 A professional attitude

Of the 'knowledge and understanding', 'application', 'attitude' and 'skills' elements, we have, in comparison with medical studies, concentrated

[27] B. F. Skinner, 'New Methods and New Aims in Teaching', in: *New Scientist*, 122, 1964, pp. 1483–4.

[28] Anthony T. Kronman, *Education's End: Why Our Colleges and Universities Have Given Up on the Meaning of Life*, 2007.

[29] Martha C. Nussbaum, *Not for Profit: Why Democracy Needs the Humanities*, 2010.

[30] Derek Bok, *Our Underachieving Colleges: A Candid Look at How Much Students Learn and Why They Should Be Learning More*, Princeton, NJ: Princeton University Press 2006.

[31] National Leadership Council for Liberal Education and America's Promise, *College Learning for the New Global Century*, Washington DC: 2007.

[32] Wissenschaftsrat, *Prospects of Legal Scholarship in Germany: Current Situation, Analyses, Recommendations*, 2012.

[33] Jan M. Smits, 'European Legal Education, or: How to Prepare Students for Global Citizenship?', in: *The Law Teacher*, 45, 2, July 2011, pp. 163–80; Jan Smits, 'European Legal Education, or: How to Prepare Students for Global Citizenship', in: Aalt Willem Heringa and Bram Akkermans (eds.), *Educating European Lawyers*, Cambridge: Intersentia 2011.

[34] Stefan Collini, *What Are Universities For?*, 2012.

least on the formation of a professional attitude. We tend to think that this should be left to the professional groups themselves.

Nevertheless, a professional attitude is closely linked to the academic attitude that was discussed above. During their education, budding legal professionals must internalise the culture of law and its practitioners, along with their conventions and organisations. Students must, in the course of their studies, gradually develop a professional attitude, become aware of the social context in which law functions and, in conjunction with this, assume their social responsibilities. It is also essential that students are endowed with a natural curiosity for legal issues, legal thinking and the function of law in the community.[35] This curiosity must not cease after completion of the programme, but should rather remain vibrant. Any lawyer who thinks that he or she is 'finished' on graduation will be a bad lawyer. The need for continuing learning and professional development is a vital element of any sound professional attitude. Most countries therefore have mandatory continuing legal education requirements in order to maintain the licence to practise law.

It is worth noting that legal education scarcely concerns itself with any notion of student professional conduct throughout the programme of study. Unlike many medical schools, many law schools give little or no consideration to the character of the student. In the most literal sense, their students are totals of subjects passed and study points that are calculated in order to determine whether a diploma should be issued. In particular, students are 'totals': quantities in seminars and work groups, amounts of discontinuing, continuing and graduating students, numbers of diplomas issued. None of these figures are systematically determined. In contrast, medical studies are much better at examining the professional development of the student right from the start of the first year. For this purpose, it is meaningful to distinguish between the performance of tasks (i.e. is the student diligently working on the various elements of his or her study?), relations with others (with regard to empathy, impartiality, emotional balance, understanding for others, the capacity to collaborate) and self-awareness (reflection on personal behaviour). These are behavioural skills that are extremely important throughout the programme as well as afterwards, regardless of the ultimate position for which a graduate is hired.

[35] Disciplineoverlegorgaan Rechtsgeleerdheid, *Domeinspecifiek Referentiekader Rechtsgeleerdheid 2010*, Utrecht: 2010 (in Dutch).

4.4.5 Skills

There are also other skills that we recognise and train. Analytical skills are key to legal education, since they involve the application of learning, the ability to formulate a legal case – and then to resolve it. Performing this skill set requires students to collect, select, process and assess information in order to subsequently apply the relevant rules of law to the case. Skills acquired during the education programme include the formulation of the problem set and research questions, analysis of relevant data, proper use of sources, the capacity for legal argument and evaluation, clear and correct written and verbal communication, the ability to look outside an individual's specialism and the law, and research skills.

Professional practitioners tend, in fact, to deride the analytical skills of undergraduates, who, according to practitioners, can no longer reason logically and who think that they can use Google to tackle every case. This complaint is voiced too often not to be taken seriously. It appears to refer to a deficiency in the study of law as a logically coherent, doctrinal discipline. Consequently, it is very important to show students of each field that there is a coherence, as law, like medicine, can be divided into numerous sub-disciplines. Few law schools are able to offer all the new subjects, and they should not even attempt to do so. Students have to be taught to learn for themselves and be shown how to approach new areas of law. This can only occur if their studies emphasise the foundations and principles of law.

Language skills, spelling, writing, speaking, debating and communicating are elements that can cause headaches for lecturers in many countries. There has always been a perceived deficiency in writing skills, as demonstrated by the complaint in 1931 about 'annoying pieces of writing'. However, many people are now claiming that the problem is becoming worse, not only with regard to spelling, but also with regard to issues of syntax and how to organise the structure of a text, as well as imprecise formulations and an absence of any sense of punctuation. Just as for anyone without analytical skills, those lacking writing skills cannot enter the legal professions.

Rhetoric, too, is an essential skill. Persuasion in the legal context – evidence, analysis, application of law to persuade another trained in the field – lies at the heart of law and justice. These are not skills for the smooth of tongue, but rather skills of those who understand what makes the most convincing argument within the structure and

parameters of the legal process – whether it be a court of law, the legislature or a board room.

However, it is not always easy to determine and evaluate a student's development with regard to all these skills. In medical studies and the fine arts, the development of a good attitude is deemed to be a part of the education that is just as necessary as the acquisition of skills, knowledge and understanding. Having a good attitude allows a student to reflect on all these above-mentioned elements. Building up a personal portfolio is perhaps an important instrument in this regard.[36]

4.5 Conclusions and outlook

In September 2012, the French tabloid *Closer* aroused a great deal of controversy by publishing topless photos of the Duchess of Cambridge. The photos were taken with a long-range telephoto lens by a photographer standing on a public road. The photos showed the Duchess and her husband, Prince William, sunbathing during a private holiday at a château in the south of France. Legal action was taken against the magazine.

The case provides a splendid example of the ways in which lawyers think. What are the precise facts? What does the law say regarding the matter? Which law applies? Is the culture of the country where the photos were taken or published relevant? Does it matter that a public figure was involved? Do the photos impact on social interest? Is the distance at which the photos were taken a relevant factor? Does it matter that the photos were taken from a public road? Is it important that the case involves *topless* photos? Do the royal couple have to bear some legal responsibility? Was there any special news value: would it, for example, have made any legal difference if the Duchess was photographed with another man?

It is by constantly varying the facts and the legal and social perspectives that lawyers gradually arrive at an opinion. Anyone who cannot engage in such activity should not study law. A powerful ability to imagine numerous scenarios is a crucial skill for any person involved with law, regardless of that person's position in the profession.

[36] Much used in medical education: Erik Driessen, Karlijn Overeem and Jan van Tartwijk, 'Learning from Practice: Mentoring, Feedback, and Portfolios', in: Tim Dornan, Karen Mann, Albert Scherpbier and John Spencer (eds.), *Medical Education: Theory and Practice*, Edinburgh: Elsevier 2011.

Reminders of the danger of 'jumping to conclusions' must pervade *any* law programme.

Imagination is therefore required, along with judgmental reticence, feeling for and interest in the social and ethical dimensions of law,[37] sympathy for people and their behaviour, empathy, objectivity, a sense of the different characteristics of the various fields of law and their role in the constitutional state, as well as the courage to ask and answer questions. All this presupposes a social, academic background and a legal culture collectively supported by all fields of law, no matter whether they involve future lawyers, judges, law-makers, public notaries or company legal departments.[38]

However, this does not just involve attitude and skills alone. All the competencies required by members of the legal profession have to be complemented by thorough schooling in the most important topics of law and their interconnections. In this way, students develop the capacity to make quick and appropriate contributions to a matter under discussion and to learn how to resolve new legal issues.

The legal doctrine is therefore the backbone of legal education. Law schools have the task of designing law programmes around these issues so that knowledge, understanding, application, attitude and skills become a single inspirational whole. This will then make the old discussion about whether legal studies are academic or professional education much less important. The study of law is both academic and practical.

It resembles the hybrid model advocated by the American Carnegie Foundation for the Advancement of Teaching.[39] This organisation thoroughly investigated a number of American law schools and proposed an 'Integrative Model for Law Schools', one in which the parts interact with and influence each other. The elements of the model are: the teaching of legal doctrine and analysis, which provides the basis for professional growth; an introduction to the several facets of practice involved with lawyering, that will result in the ability to act responsibly for clients; and a theoretical and practical emphasis on inculcating the identity, values and dispositions consonant with the fundamental purposes of the legal profession.

[37] William M. Sullivan *et al.*, *Educating Lawyers: Preparation for the Profession of Law*, 2007.
[38] C. J. M. Schuyt, 'Juridische beroepsuitoefening en de eisen die aan een universitaire juridische opleiding gesteld kunnen worden', in: *Strafblad*, 9, 4, 2011, pp. 18–23 (in Dutch).
[39] William M. Sullivan *et al.*, *Educating Lawyers: Preparation for the Profession of Law*, 2007.

It is my firm conviction that law schools cannot be viewed separately from legal practice, but neither should the two be confounded. How such a model may be introduced and precisely designed depends on the specific social, financial and political context in which a law school exists. Numerous sections of this book clearly indicate how large the differences among law schools can be. Sometimes, there is more that can be demanded from students. In all cases, law schools can be somewhat more professional with regard to teaching and learning methods, awareness of programme coherence, its objectives, the development of skills, the introduction of a personal portfolio to be maintained by the student, an honours programme, and so on.

Our discussions about education must become more concretely concerned with content. Personnel policy also needs to be examined: how do we give education its rightful place beside research? Much more attention must be paid to 'evidence-based legal education': what works? Empirically, we *know* little about legal education. That is actually too absurd for words: while approximately 70 per cent of our time is concerned with education, we do very little to build a systematic structure of knowledge regarding this subject. Several PhDs on international criminal law (or any other field of law) are awarded every year in the Netherlands, while the first doctoral research into legal education has yet to be awarded. Most of what I read about legal education is strongly anecdotal – as is much of this chapter.

The discussion involving all fields of the legal profession about content, harmonisation and reciprocal expectations must therefore occur in a systematic manner. We should not forget that the popularity of law school – and therefore much of our research! – results from the fact that students' career prospects in the legal profession are good. The medical doctors to whom I showed this chapter emphasised that the early initiation of medical students into practical aspects of the discipline is a noteworthy difference between law and medical studies. One of them wrote to me to say the following:

> In recent years, I taught the first 2 course hours of the initial education block in the first year of study together with a patient who entered the classroom on a bed. I was following the example of Herman Boerhaave in the 17th century. Weekly patient demonstrations also occurred throughout the rest of the year and these were greatly appreciated by students. They therefore gain an impression of what the discipline entails and what problems are involved with patients. A good reading of your chapter reveals that this contact with practice has still not been properly

> developed in the law-school curriculum, while it is precisely what might provide incentive and hopefully stimulate students to display more active study behaviour.[40]

I think this doctor is right. And, although Gerrit Komrij's poem at the beginning of this chapter reminds us of our academic mission – 'for uselessness, my time was all my own' – our students are studying law not philosophy.

[40] Professor Jan Bolk, e-mail dated 31 October 2012.

5

Pedagogy: teaching law students

5.1 Some grounds for concern?

Pedagogy, the art of teaching and educating students, is a popular subject. In Oxford's famous Blackwell's bookstore, I counted more than 600 books on pedagogy and education alone, from primary up to tertiary. And that's not all: there are ample academic journals on education, some of them even focusing on law.[1]

However popular among the educational specialists – take, for instance, a recently published book on how human emotions play a role in learning and teaching the law[2] – among the law teachers on the shop floor, teaching and learning as such are much less discussed. In many of our law schools we seem to accept that the profession of teaching is passed down from generation to generation, without much further reflection.

On the one hand, such benign lethargy is a curious thing: in many law schools, teaching accounts for, say, 70 per cent of our job responsibilities. On the other hand, law teachers spend so much time preparing, being in class, grading assessments, and advising and counselling students, with all the administration that goes with it, that there is little time left for systematic reflection on teaching and learning. And if few students complain about their education, there is all the more reason to keep it as it is. In a rather gloomy chapter about American higher education in her book, *In Pursuit of Knowledge* (2006), Stanford law professor Deborah L. Rhode is struck by how little information is available on what students learn, given the enormous sums they and their families invest in higher education:

[1] For an overview, see Fiona Cownie, *Legal Academics: Culture and Identities*, 2004, pp. 28 ff.

[2] Paul Maharg and Caroline Maughan, *Affect and Legal Education: Emotion in Learning and Teaching the Law*, Farnham: Ashgate 2011.

> We know that a college degree increases earnings, but we lack reliable data on the effectiveness of teaching within and across institutions. Moreover, much of the information we do have suggests grounds for concern.[3]

Information comparing the quality of instruction at particular schools is limited, and Rhode rightly argues that college ranking surveys provide some data, but no direct measure of teaching effectiveness.[4] Student evaluations or student satisfaction surveys tend to emphasise the professor's entertainment value over effectiveness. In her PhD dissertation, 'Teaching and Learning in Canadian Legal Education' (2010), Annie Rochette's findings suggest that student evaluations have either a negative effect or no effect at all on teaching practices. Good evaluations seem not to have a huge influence on teaching practices. Negative evaluations, however, either are ignored by the teachers if they have been teaching for a while, and have tenure, or they can have a negative impact on teaching practices: some law teachers change from learner-focused to teacher-focused practices when they meet with constant student resistance and bad evaluations, or when they fear receiving bad evaluations.[5]

Yet I see more and more law schools reflecting on their pedagogy, often as a result of external drivers such as educational rankings in national and international magazines and websites, as well as accreditations.

Projects in the Netherlands, for example, range from setting up feedback projects among teachers, developing specific learning activities such as legal clinics and problem-based learning, experimenting with smaller classes, finding innovative strategies for more active learning, or paying more attention to what makes assessments really work. The Rotterdam School of Law moved its bachelor's education towards a system of small classes and problem-based learning; the former Rector of Rotterdam, being an education psychologist himself, is a strong supporter of problem-based learning.[6] In the UK, increasing attention is paid not only to academic abilities, but also to lawyering skills,

[3] Deborah L. Rhode, *In Pursuit of Knowledge: Scholars, Status, and Academic Culture*, 2006, pp. 65–6.

[4] *Ibid*., p. 67.

[5] Annie Rochette, *Teaching and Learning in Canadian Legal Education: An Empirical Exploration* (Dissertation), 2010. Other studies, however, are more confident: see *ibid*., p. 284; Mary E. Hiscock and William Caenegem, *The Internationalisation of Law: Legislating, Decision-Making, Practice and Education*, Cheltenham: Edward Elgar 2010.

[6] Henk G. Schmidt, Jerome I. Rotgans and Elaine H. J. Yew, 'The Process of Problem-Based Learning: What Works and Why', in: *Medical Education*, 45, 8, August 2011, pp. 792–806.

including employability aspects.[7] And, in Germany, a most stimulating report was published by the Wissenschaftsrat on the current situation of legal study in Germany.[8]

Issues relating to teaching and learning are numerous. In this chapter, I have made a personal choice based on my own experiences as a law teacher and a dean of a Dutch law school. The first section addresses the question of whether students have different learning styles, especially when you have 1,000 freshers and no selection at the gate, such as in Europe and Latin America. Large law schools often pretend that all those hundreds of students are of a kind. Is that a wise thing to do if you know that students differ in experiences and previous knowledge – when, in short, the student body is not homogeneous?

I will then turn to what the Carnegie report has called legal education's 'signature pedagogy': the case method and its corresponding 'Socratic way of teaching'. What can we learn from it?

In the fourth section of the chapter, I will continue with a tool that I have always believed to be vital for every form of education: a good textbook and other study materials. And, while writing that particular section, the so-called 'massive open online course' (MOOC) came into being, and I could not leave that, who knows game-changing, development out of the picture.

The fifth section of the chapter describes my own law school's project for reducing the excessive drop-out rate of almost 35 per cent among its first-year students. And, finally, before drawing some conclusions, I will address the question of whether law schools take teaching and assessing sufficiently seriously. There are many more pedagogical subjects worthy of inclusion, but those are the ones I want to concentrate on in this chapter.

5.2 Teaching and learning

Education is both teaching and learning. In a constructivist vision of education, a teacher's role is to facilitate student learning. Legal education, however, is often quite teacher-centred, to a large extent due to the size of many law schools and the resulting atmosphere of anonymity.

[7] See e.g. John Bell, 'Legal Education', in: Peter Cane and Mark Tushnet (eds.), *The Oxford Handbook of Legal Studies*, Oxford: Oxford University Press 2003, pp. 901 ff.

[8] Wissenschaftsrat, *Prospects of Legal Scholarship in Germany: Current Situation, Analyses, Recommendations*, 2012.

'Sir, how do I know what notes to take during a lecture?', a first-year student asks. I see her sitting there, in an auditorium with 500 (!) other students, that number making up half of her year. A new notepad, pen in hand, taking up a law course in Leiden, a tiny little professor in the distance. She could be my daughter. Her concerns: 'What's important? What is the best way to learn? Do you want me to read the whole textbook, including footnotes, or can I skip some bits? How do I distinguish between what's essential and what is not? What questions are you going to ask in the exam?'

British research seems to indicate that the switchover from the protected environment of secondary education to post-secondary education is much more radical than students themselves had thought it would be:

> Several students commented in their learning report . . . that they had not envisaged how different university would be from previous educational experiences. They were shocked to discover that some study methods they had used successfully in the past were no longer as effective.[9]

My first-year student had some good questions for me. I, too, have my own questions, such as: Do we pay enough attention to how our students *learn*? Are we not too focused on *teaching* rather than learning? How, in fact, *do* students learn? How do we teach and assess the study skills necessary for university? How do we prepare our students for the different ways of studying in higher education? Should drop-out rates of 35 per cent after the first year be normal in higher education?

In Leiden, when we started a new introductory programme for our first-year students, we had planned one session on 'effective learning'. But then, when that particular session was approaching, we as teachers had no idea what to do in that hour.

In the end, the whole idea of a session on effective learning was dropped, even though a short introduction to it seemed a crucial first step for every fresher. This example shows how little familiarity we have with the learning side of education, how one-sided our focus on *delivering content* is. This anecdote is supported by the findings in Canadian Annie Rochette's PhD dissertation:

> My impression . . . is that the law teachers I talked to reflect a great deal about teaching; they reflect on their good and bad experiences and bring improvements to their teaching by introducing new themes, new

[9] Rowena Murray and Everarda Cunningham, 'Managing Researcher Development: "Drastic Transition"?', in: *Studies in Higher Education*, 36, 7, November 2011, p. 29.

> perspectives, new ways of presenting the material, new assessments, and even new teaching methods. However, this reflection seems to be focused on teaching and rarely on learning.[10]

Teaching is what law teachers do on a weekly basis; they spend a significant number of hours preparing for it, being in class, preparing and grading assessments. Yet they do not seem to think systematically about the other side of teaching: student learning. At least, when I was a teacher, I didn't. And, if students are not learning what we are teaching, then why should we spend all this time doing it?[11]

In her dissertation, Rochette mentions law teachers' concerns about students' attitudes, such as coming unprepared to class, doing the least amount of work for the best grades, and being passive. In some cases, she found, students' unpreparedness for class led the teachers to revert to even more teacher-focused methods, such as the lecture.[12] Some teachers also mentioned *student* resistance to learning anything other than black-letter law, and to more learning-focused teaching methods. Student resistance is a predominant theme running through all Rochette's interviews.[13]

Although her research deals with *Canadian* legal education, the observation about law students is probably shared by law teachers in many more law schools around the world. The study suggests that many law students have adopted surface and strategic approaches to learning, whereas the law teachers have an overwhelming concern with coverage. It also reveals that teacher-focused teaching practices and anxiety-causing evaluation methods such as examinations are predominant in law schools, and that there is usually little opportunity for students to interact with each other in class. It brings Rochette to the conclusion that:

> [The] learning environments that we find in most law faculties do not likely foster deep learning approaches in law students.[14]

Our duty as law schools should therefore be to put learning at the centre of our teaching. In the next section, I focus on the students.

5.3 Do students differ?

One of the things many law schools do is to treat our students as if they all have the same mind-set, background, intelligence and learning

[10] Annie Rochette, *Teaching and Learning in Canadian Legal Education: An Empirical Exploration* (Dissertation), 2010, p. 296.
[11] *Ibid.* [12] *Ibid.*, p. 294. [13] *Ibid.*, p. 295. [14] *Ibid.*, generally.

style, even though we know that this cannot be the case when you have an intake of many hundreds of students without previous selection.

But, even if you had a highly selective admissions system, as some fine Anglo-American law schools do, it would probably be a mistake to think the students are all fungible. An interesting study in an American law school suggests that students' learning styles can be divided into five categories: physiological, psychological, emotional, environmental and sociological.[15] And, although learning style theories have been criticised by many[16] since Kolb's influential book in 1984,[17] it is worth looking briefly at each of these categories.

5.3.1 *Five 'learning styles'*

Physiological factors, to begin with, concern how students learn, process and remember information: students may be auditively or visually predisposed. They may make use of tactile strengths, such as writing and drawing, or they may be 'kinaesthetic learners', who learn by doing – for example role-play activities. A Finnish study shows that law students' basic interaction skills, such as presentations, interactions, negotiations, mediations and contracting skills, could be developed if law students, who often have a strong desire to enter a law firm in the future, are susceptible to 'learning by doing'.[18]

Another physiological factor is 'time of day energy levels': only 3 per cent of the American law school students were most alert in the early morning, whereas 37 per cent were evening high-energy preferents, while for 57 per cent afternoon was the best time of day.[19] This may mean that, if practicable, teaching is scheduled later in the day, but also that libraries and study areas for students stay open deep into the night. In some countries, they are already open 24/7, at any rate in exam periods.

[15] Robin A. Boyle and Rita Dunn, 'Teaching Law Students through Individual Learning Styles', in: *Albany Law Review*, 62, 1998.

[16] Harold Pashler *et al.*, 'Learning Styles: Concepts and Evidence', in: *Psychological Science in the Public Interest*, 9, 3, December 2009.

[17] David Kolb, *Experiential Learning: Experience as the Source of Learning and Development*, Englewood Cliffs, NJ: Prentice-Hall 1984.

[18] Soile Pohjonen and Sari Lindblom-Ylänne, 'Challenges for Teaching Interaction Skills for Law Students', in: *The Law Teacher*, 36, 3, January 2002.

[19] Robin A. Boyle and Rita Dunn, 'Teaching Law Students through Individual Learning Styles', in: *Albany Law Review*, 62, 1998, p. 233.

Finally, the physiological domain includes elements like the incorporation of some physical activity into lectures.[20]

With regard to *psychological* factors, we need to distinguish between students as 'global learners' and 'analytic learners'. Global learners, Soile Pohjonen and Sari Lindblom-Ylänne argue, prefer sound, soft illumination, an informal classroom design with soft chairs, partner or group work (these students prefer to work with a friend), and they have 'a need for intake' (food, drinks) while studying. The students tend to require frequent breaks and also prefer to work on multiple tasks at one time, rather than focusing on a single project. 'Globals' learn more easily when they understand the concept first and then concentrate on the details. They are also impulsive rather than reflective; when teachers ask questions, globals immediately raise their hands, and do so frequently.[21]

In contrast, the researchers found that 'analytics' learn step-by-step, analysing a problem first, and then reaching a decision. They often prefer learning in silence, with bright light and in a formal setting, such as a conventional classroom with hard chairs and desks. The analytics do *not* prefer intake while learning. Furthermore, they tend to be persistent; once they begin an assignment, they have a strong emotional urge to finish it. Analytics seem more reflective, and, when asked questions, they prefer to think about their answers before speaking out in class.

Emotional factors include: character traits like motivation and persistence; whether a student works on one task until it is completed, as opposed to working on several tasks simultaneously; and whether she needs an externally imposed structure or the opportunity to do things in her own way. Here, too, students prove to be very different; variation in teaching styles seems to make a difference.

Sociological factors, finally, show differences in the way students study: some prefer to study quietly at home on their own, others need a library atmosphere with other students, or even intensive cooperation with other students ('team learning'). One also sees individual students learning in a variety of ways rather than following consistent patterns, with either an authoritative or a collegial adult – and all possible combinations of these ways of learning. The experiment did in fact bear this out.

Although, as I said, the theory of learning styles has been criticised by educational experts, I still feel we should experiment with it in our law

[20] *Ibid.*, p. 234.

[21] Soile Pohjonen and Sari Lindblom-Ylänne, 'Challenges for Teaching Interaction Skills for Law Students', in: *The Law Teacher*, 36, 3, 2002.

schools. If this means we have to make more of an effort, for instance by varying our teaching methods, equipping our schools with virtual or blended-learning environments, or changing the opening hours of our teaching and learning facilities, so be it. Thinking more deeply about the differences between students, and about the pedagogy and type of teaching best suited to the different learning styles is a particular challenge for schools with a large and therefore diverse intake of students.

Think also of international students and ethnic minorities.[22] Many law schools force their students into the 'one size fits all' mould, and anybody that does not fit simply runs the risk of dropping out. Stephen D. Brookfield, an American educational expert, mentioned the need for at least three different learning modalities in every class, workshop or learning event. Of course, there is a limit to how far one can stretch to work comfortably with methods that contradict defining elements of one's personality. You cannot expect someone to change his or her style at the drop of a hat, particularly if it involves doing things of which one has no experience, or that make one feel very uncomfortable.[23] However, he concludes, many of us could probably inject a greater degree of diversity into our teaching than is currently the case.

5.3.2 Two objections

There are two objections to experimenting with teaching and students' learning styles. One is that already overworked teachers do not have time for it; the other is that teachers should not mollycoddle their students, because when they start practising law in a law firm they will have to adapt, irrespective of their 'learning styles'.

The first objection – lack of time – is quite understandable. In Rochette's study, workload issues are the number one stressor for academics.[24] This is a serious matter and requires an institutional response. We cannot expect teachers to take more time that they do not feel they have, when we do not institutionally value teaching. On the other hand, a high drop-out level of students is just as painfully discouraging for students and teachers. It is impossible to place students according to their learning

[22] Stephen D. Brookfield, *The Skillful Teacher: On Technique, Trust, and Responsiveness in the Classroom*, San Francisco: Jossey-Bass 2006, pp. 154 ff.
[23] *Ibid*., p. 268.
[24] Annie Rochette, *Teaching and Learning in Canadian Legal Education: An Empirical Exploration* (Dissertation), 2010, p. 267.

styles; most of them are not even aware of their learning styles. The key is variety, within the same classroom. Much of the literature on learning styles say it is good for students to have to learn with different styles and not just their preferred one.

The second objection is that we shouldn't mollycoddle our students. However, introducing variety in teaching methods – think of role playing, one-minute papers, simulations, breaking up into small groups or pair discussion, class discussions, think-pair-share, Socratic method, field trips, guest speakers, narratives and anecdotes, video clips, and the use of learning technologies[25] – should not be confused with reducing quality. Ultimately, all students will have to meet the standardised final requirements.

What matters, here, is *how* students learn and how they are best prepared for these requirements. When I was a dean, I often thought of the different ways in which *professors* prepared for their lectures. One writes out his text in full; the second prepares via the PowerPoint presentation she will give the students; the third goes for a walk on the beach; and the fourth prepares her class in close interaction with her colleagues and assistants. There is no blueprint for professors to tell them *how* they should prepare their lectures. So why do we impose uniformity on our students? Moreover, we know that, after graduating, our students will not all be working for the same company: they will diversify into different kinds of work and working environments. The choice of their future working environment, for example the type of law firm, business or company, is significantly determined by their personal considerations: the type of work and the working environment which is best suited to that particular student. So, if personal differentiation counts *after* university, why not *during* university? Meanwhile, the conclusion from the project in the American St John's University School of Law is clear:

> A single method of teaching, whether traditional or non-traditional, is unlikely to prove effective with all students because of the diversity of students' learning styles. Past experimental research has revealed that many under-achieving students failed because of the inappropriate instructional approaches used with them, yet they evidenced statistically higher achievement with different strategies.[26]

This is also Rochette's conclusion.

[25] *Ibid*., pp. 123 ff.

[26] Robin A. Boyle and Rita Dunn, 'Teaching Law Students through Individual Learning Styles', in: *Albany Law Review*, 62, 1998.

My wish is that law schools, and for that matter other large-scale institutions teaching such disciplines as economics, psychology or business studies, should experiment more with students' learning styles by using a variety of teaching methods – even if it takes some time to convince all faculty members: 'Dear chap, why would we want to change when we've been doing this for 400 years?'[27]

5.4 The case dialogue method

Apart from distance learning, there are roughly four types of courses. Across the world the usual way of teaching law students is by lecturing them in large, sometimes overcrowded groups, ranging from classes of 150 (the maximum in most US law schools) up to 500 students, or more, in many other places. In such a teaching environment, there is little opportunity for interaction; students are expected to be quiet and to take notes. Its main function is to transmit information. Often, in classes like this, the large lecture is accompanied by recitation or discussion sections or tutorials (such as the '*travaux pratiques*' in France) of about twenty-five to thirty students. In many US law schools, these classes may be led by graduate students.

At the other end of the spectrum lies the tutorial (or 'supervision' as it is known in Cambridge): students are taught in 'groups' of one to three on a weekly basis in their tutor's office.[28] This is the much-applauded Oxbridge way of teaching undergrads: with their tutor, students discuss an essay they wrote, and receive extensive feedback. Suzanne Shale, an expert on student learning, notes that in this system tutors and students do not pass like ships in the night:

> One of the great strengths of the tutorial system is that it enables tutors and students to engage in a dialogue that demands more sophisticated levels of understanding, and suggests new conceptions of learning. Tutorial teaching encourages students to make the discovery that higher learning is different from, and demands more of them than, learning as they may previously have conceived it.[29]

[27] Simon Brooman, 'Enhancing Student Engagement by Building upon the "Tectonic Plates" of Legal Education', in: *Liverpool Law Review*, 32, 2, 28 August 2011, p. 109.

[28] *The Oxford Tutorial: 'Thanks, You Taught Me How to Think'*, 2008.

[29] Suzanne Shale, 'The Oxford Tutorial in the Context of Theory on Student Learning: "Knowledge Is a Wild Thing, and Must Be Hunted Before It Can Be Tamed"', in: David Palfreyman (ed.), *The Oxford Tutorial: 'Thanks, You Taught Me How to Think'*, 2nd edn, Oxford: The Oxford Centre for Higher Education Policy Studies 2008.

For most law schools in the world, however, this tutorial system is a no-go area – with the exception maybe of the feedback sessions on the students' master's dissertations. Tutorials are simply too expensive to perform with 1,000 freshmen every year.

Seminars, being the third type of course or teaching format, are somewhere in between: they involve groups of around thirty students. In all the different forms – lectures, seminars and tutorials – students are expected to have prepared the subject in advance, and in seminars and tutorials teachers expect their students to also actively participate by joining in the discussion. It goes without saying that it is easier for students to learn in smaller seminars and tutorials because of the opportunities to really participate in class.

More modern forms of teaching include project work, team teaching and block seminars, interdisciplinary honours programmes, blended learning, or practical skills learning, such as moot court.[30] Professor Thomas Finkenstaedt also mentions the Internet. Many people, he notes in his beautiful description of higher education in Europe, look forward to a worldwide network tailored to the needs of the individual students: the Holy Grail?

5.4.1 The case dialogue method: Edutopia?

In most law schools across the world, and not only in law, I expect lectures to remain the dominant teaching method. In her study, Rochette found that teachers, including law teachers, show a great variety of approaches in their teaching. Every law teacher will recognise them, at least most of them:

> Some use notes, some read their notes, some write on the board, some read or talk to their slides, some draw charts or flow charts, some move around the room, some stay close to their notes mostly in one place, some speak fast while others speak clearly and slowly, stressing important points. I even saw one teacher do a dance at the front of the class![31]

As research shows, the lecture is an effective method for transmitting information. However, it is not as effective as discussion for promoting thought, for changing students' attitudes, teaching values, for inspiring

[30] Thomas Finkenstaedt, 'Teachers', in: *A History of the University in Europe*, Vol. IV: *Universities since 1945*, 2011.

[31] Annie Rochette, *Teaching and Learning in Canadian Legal Education: An Empirical Exploration* (Dissertation), 2010, p. 145.

interest in a subject, for personal and social adjustment, and they are relatively ineffective for teaching behavioural skills.[32]

Therefore, alongside the lecture, other teaching methods are used as well, such as class discussions and Q&A, although much depends on the size of the classes (100 versus 500, for example). In law, the best-known pedagogical form of teaching is the combination of lecture and the so-called case dialogue method. The case dialogue method was introduced in the 1880s by Harvard's law dean Christopher Langdell, as a reaction to the previously common method by which students, across the world, were lectured on current law in mainly abstract terms. Langdell took a different approach. He considered law teaching as a *dialectical* process between teacher and students, using concrete cases and opinions. This case method, or casebook method, has become the primary pedagogical technique in every American law school ever since, and has up to this time produced hundreds of thousands of American lawyers.

Langdell's innovation made the pedagogy of legal education 'Socratic': rather than studying highly abstract summaries of legal rules, teachers could now play with the details of real cases, their values and perspectives (think of the Duchess of Cambridge). The professor calls on one student and asks her to present the case, and then continues to question her, slightly modifying the details – or he moves on to another student. Characteristically in this method, there is not just one correct answer. As Robert Stevens says in his famous book about American legal education:

> The case method fulfils the latest requirements in modern education: it was 'scientific', practical and somewhat Darwinian. It was based on a principle of a unitary, principled system of objective doctrines that seemed or were made to seem to provide consistent responses. In theory, the case method was to produce mechanistic answers to legal questions; yet it managed to create an aura of the survival of the fittest.[33]

To some extent, its huge popularity in the US is remarkable. American law schools have a reputation for being primarily *professional* schools, as contrasted with the civil law countries where the case method is at most a small part of pedagogical practice. At the risk of over-simplifying, we can describe the American approach as bottom-up: by endlessly varying the details of the case, students are forced into the role of the attorney. By contrast, the 'civil law approach' is more top-down: law students

[32] *Ibid*., p. 177, referring to several studies.

[33] Robert Stevens, *Law School: Legal Education in America from the 1850s to the 1980s*, Chapel Hill, NC: University of North Carolina Press 1983.

invariably start with the codes, supplemented with cases and the doctrine. And though in the course of time civil law and common law legal education have started to overlap in many aspects, this pedagogical difference between the two remains relatively prominent.

Although the case method is a time-honoured pedagogical tool, it is insufficient to wholly support the formation of students in their journey towards becoming valuable professionals. The Carnegie Foundation for the Advancement of Teaching, an institute with much experience in different types of professional education such as medicine, accounting, engineering or nursing, has tried to capture the special strengths of legal education in the US.[34] During their visits to a number of law schools, the authors, not being lawyers themselves, were impressed by 'the pedagogical power' of the first phase of legal education in the US. In a relatively short period of time, the schools are able to impart a distinctive habit of thinking that forms the basis for their students' development as legal professionals:

> Within months of their arrival in law school, students demonstrate new capacities for understanding legal processes, for seeing both sides of legal arguments, for sifting through facts and precedents in search for the more plausible account, for using precise language, and for understanding the applications and conflicts of legal rules. Despite a wide variety of social backgrounds and undergraduate experiences, they were learning, in the parlance of the legal education, to think like a lawyer.[35]

By questioning – which also seems to be a science in itself: a waiting time of three seconds is the most effective, for example[36] – and by having argumentative exchanges with their professors, students learn to analyse legal situations and legal positions by looking for points of dispute and by considering as 'facts' only those details that contribute to someone's staking a legal claim. Students, Carnegie observes, learn to take a distinctive stance towards the world and 'to redefine messy situations of actual or potential conflict as opportunities for advancing a client's cause through legal argument before a judge or through negotiation.'[37]

Yet the case method, too, in its different variations, is not a panacea and has its limitations and downsides as well. As Deborah Rhode puts it,

[34] William M. Sullivan *et al.*, *Educating Lawyers: Preparation for the Profession of Law*, 2007.
[35] *Ibid.*, p. 186.
[36] Annie Rochette, *Teaching and Learning in Canadian Legal Education: An Empirical Exploration* (Dissertation), 2010, pp. 157 ff.
[37] William M. Sullivan *et al.*, *Educating Lawyers: Preparation for the Profession of Law*, 2007, p. 187.

the legal discipline is 'a case study in ineffective teaching strategies', deficiencies that are 'typical of problems in other fields of teaching'.[38] A Socratic way of teaching, Rhode continues, can foster a highly 'competitive atmosphere' in class which increases stress, erodes student self-esteem, and silences women and minority students.

5.4.2 *Two other limitations of the method*

The Carnegie researchers also noticed something else. Though training students to think like a lawyer, thinking through the social consequences of a case or its ethical aspects appears to remain outside the method:

> Issues such as the social needs or matters of justice involved in cases do get attention in some case-dialogue classrooms, but these issues are almost always treated as addenda ... In their all-consuming first year reading, students are told to set aside their desire for justice.[39]

Too much focus on systematic abstraction from actual social and ethical contexts may lead to two major limitations of legal education: lack of attention in the curriculum to practice, and weakness of concern for professional responsibility.

Unlike other professional education, notably medicine,[40] most law school education pays little attention to direct training in professional practice, with the exception, though, of some legal writing, moot court, or opportunities to work in clinics and to extern for judges. That is remarkable when one considers that American legal education, as opposed to that in the civil law countries, is generally seen as professional education.

The other shortcoming is the law schools' failure to complement the focus on legal skills with effective support for developing the ethical and social dimensions of the future legal profession. Despite progress in making legal ethics a part of the curriculum, the report claims, law schools 'rarely pay consistent attention to the social and cultural contexts of legal institutions and the varied forms of legal practice'.[41] Whether this is really a major shortcoming of US legal education may be debatable;

[38] Deborah L. Rhode, *In Pursuit of Knowledge: Scholars, Status, and Academic Culture*, 2006, p. 79.
[39] William M. Sullivan *et al.*, *Educating Lawyers: Preparation for the Profession of Law*, 2007, p. 187.
[40] See e.g. Tim Dornan *et al.*, *Medical Education: Theory and Practice*, 2011.
[41] William M. Sullivan *et al.*, *Educating Lawyers: Preparation for the Profession of Law*, 2007.

medical teaching seems more aware of the ethical and moral issues medical practitioners and educators are facing.[42]

Although the Carnegie study acknowledges that curriculum reform is one of the most difficult and tedious tasks any law school may face, the authors endorse a new and integrative strategy, instead of one that is merely 'additive', with minor alterations and additions only. The report distinguishes three forms of legal apprenticeships: a cognitive (the study of the doctrine of the law), a practical (oriented to the legal professions) and an ethical-social apprenticeship. Drawing heavily on the education of medical doctors, an approach is suggested whereby legal education is taught in the context of legal practice, with integral connections between the fundamental knowledge base and the complex skills of professional practice.

5.4.3 And what about the students?

There are those who have strongly criticised the Carnegie report. In their view, the case dialogue method remains 'a compelling method of pedagogy necessary for the sound preparation of students in the practice of law'.[43] However, what I, as a teacher for many years, endorse in the report is its observation that legal education tends to rely too heavily on one signature pedagogy.

Here again, it is important not to overlook the many differences in legal education around the world: law programmes lasting three, four, five or six years; programmes that follow up on secondary or on post-secondary education; programmes geared to prepare for the legal professions or not; programmes which may select their students or not; large group teaching in the first (bachelor's) years and smaller groups in the final phase (master's).

In addition, legal education is an inherent part of a broader national educational system, and is therefore dependent on the quality and the content of the preceding primary and secondary education. The same holds for the many differences that arise in the way the legal professions have organised their own professional educational programmes.

[42] Naomi Tan, Adrian Sutton and Tim Dornan, 'Morality and Philosophy of Medicine and Education', in: Tim Dornan, Karen Mann, Albert Scherpbier and John Spencer (eds.), *Medical Education: Theory and Practice*, Edinburgh: Elsevier 2011.

[43] Joseph A. Dickinson, 'Understanding the Socratic Method in Law School Teaching after the Carnegie Foundation's Educating Lawyers', in: *Western New England Law Review*, 31, 2009, pp. 97–113.

Yet what I support in the Carnegie strategy is its broad approach with the three forms of apprenticeships, which seem to combine the importance of the doctrinal knowledge, the skills and attitudes that are needed for the legal professions, and the societal and ethical role lawyers play in whatever professional theatre they end up. As long as legal education does not prepare for one single type of profession – and it never will – the proposed combination of academic, professional and social approaches seems the most fitting.

And the legal professions indeed do provide us with all the intellectual, professional, ethical and societal footage a proper law curriculum needs. In the various years of study, and most importantly the first year, every teacher in the law curriculum can, for instance, ask the students to play one of the many different roles in which the legal professions are so rich: the attorney, the judge, the public notary, the legislator, the company lawyer, the mediator, the politician, the banker, and so on. By asking the students to play these roles, in action or in writing, as if it were a game, students may more fully enjoy the doctrinal, the professional and the societal approach of legal education.

What could also help in much legal education are instruments of group learning, or team learning. The positive outcomes of group learning are found in higher academic achievement, the development of communication and interpersonal skills, and growth of ethical professional identity or professional formation.[44] Group learning is all the more important now that the study of law is largely 'self-tuition'; we expect our students to spend about three-quarters of their time studying on their own. Here again, we may learn from medical education.[45]

A vital condition of any teaching method, be it the lecture, the seminar or group learning forms of teaching, is that students show up for class and are prepared; that they have studied the legislation, the literature and the cases, that they are active in class and prepared to engage in 'polite disagreement'[46] with their teachers, instead of only taking notes.

I believe this is exactly what much of today's mass education suffers from: students who are ill prepared, and not interested in discussion with

[44] Verna Monson, 'Group Learning in Law Schools: A Key to Fostering Professional Formation', in: *SSRN Electronic Journal*, 2012.

[45] Scott Reeves and Joanne Goldman, 'Medical Education in an Interprofessional Context', in: Tim Dornan, Karen Mann, Albert Scherpbier and John Spencer (eds.), *Medical Education: Theory and Practice*, Edinburgh: Elsevier 2011, in particular about communicating and working with non-medical professional groups.

[46] Anthony Bradney *et al.*, *How to Study Law*, London: Sweet & Maxwell 2010.

their teacher and their fellow students, but who are mainly focused on finding the right answer for the exam. The teacher who goes along with this, both in teaching and in assessment, is left with a student who at best, and probably just for a very short while, has some superficial idea of what the law is. So there is a clear relation to assessment. These students can hardly be reproached for learning for the exam: assessment drives learning. A teacher who sets exams that only assess the students' superficial knowledge of black-letter law, important though this is, should not be surprised if students try to learn everything by heart and probably forget it as soon as the exam is over. There is so much literature that may help us to get our students more engaged.[47] A very nice example is a recently published American book, *What the Best Law Teachers Do* (2013):[48] the best teachers distinguish themselves by their thoughtfulness, caring about their students, high expectations, commitment to student learning, and the ability to engage their students.

5.5 Reading: what makes a good textbook for freshers?

> Questions to first-year students should require them to give a 'yes' or 'no' answer, two words which most *mature* lawyers have long since abandoned. As students develop and eventually become professionals black and white ('yes' or 'no') necessarily turn into shades of grey.

Such is the opinion of Leiden professor emeritus Hans Nieuwenhuis, also a former Justice in the Dutch Supreme Court, in the preface to his famous textbook on private law, which has acquainted many thousands of young law students with the principles of Dutch civil law since 1973.[49] Yes or no, a clear approach for first-year students, pedagogically sound as it seems – but did all these students actually *read* this introductory book? On the Internet, one first-year law student praises not the book itself, but the online *outline* of it:

> Law, boring, boring, boring, and then you have to read the whole book! Phew . . . Luckily I saw a summary on the Internet. Perfect, very transparent, and clearly explained. The essential points are mentioned, that's all you need. So, no fear, into the exam, there's no better way of learning.

[47] See e.g. Phillip C. Schlechty, *Engaging Students: The Next Level of Working on the Work*, San Francisco: Jossey-Bass 2011.

[48] Michael Hunter Schwartz, Gerald F. Hess and Sophie M. Sparrow, *What the Best Law Teachers Do*, Cambridge, MA: Harvard University Press 2013. In this empirical work, the authors' goal was to create a systematic, rigorous study of excellent law teaching.

[49] J. H. Nieuwenhuis, *Hoofdstukken vermogensrecht*, Deventer: Kluwer 2013.

The companies behind them tell students how useful outlines or course summaries are: they offer a good way to learn the material faster and more easily. In a very abbreviated form, they claim to provide a complete survey of what is important. Some publishers do advise students to use them together with the book. But this particular law student has a different view: '... that's all you really need.' Most outlines are written by other students, and their quality varies considerably from good to extremely unreliable.

Textbooks and course books, and for law students often casebooks, have a tradition which goes back to the Greeks. But what makes a good textbook? This question seems all the more relevant now that first-year student numbers are steadily growing across the world. Yet textbooks are rarely reviewed and they are glossed over in student evaluations. No research *at all* is being done into the origin and quality of the commercial outlines, though this does not mean that they are necessarily poor. You find them everywhere on the Internet, not just for law, but also for psychology or history. Students, however, rarely complain about the teaching material. But anyone who thumbs through their textbooks can see what is wrong: students are quick to resort to outlines. The side-effect of this is that they deprive themselves of the opportunity to make their *own* outlines, a very effective learning method.

5.5.1 Are the students to blame?

Meanwhile, nobody seems to worry about this recourse to outlines by the students. Teachers do not complain about it either; some do not even know about the outlines of their own books. They are happy with the dream of prescribing real academic books – whether the students use them or not. Students, for their part, do not complain because they think the outlines will hand them a pass, which they sometimes indeed do. They assume complaints would only lead to more difficult exams. For students and teaching staff, this makes for a culture of reciprocal non-intervention in which we do not bother each other about something as fundamental as textbooks.

Students can be partly forgiven for turning to the outlines if their official textbooks are, for example, unattractively designed. First-year books in the tradition of continental law easily run to 300 pages, sometimes published in formats which could best be described as 'non-user-friendly'. It is as if studying law is tantamount to suffering. How far a student gets in such a book, I have often wondered: fifty pages, a hundred?

Moreover, you do not just *read* a textbook, you have to *study* it. This calls for space between the lines, a margin with room for 'glosses' – one of the oldest and finest forms of legal scholarship, incidentally – paper thick enough so that marking a passage does not mean that the text on the other side of the page is automatically marked too. There is no valid excuse for inadequate design. How difficult can it be to produce a book of inviting length, with clear charts and graphs visually supporting the material, headings which provide structure and marginal notes for reference, accompanied by tests, and to provide an accurate index of terms and an index of relevant laws and case law?

Studying law is also learning 'to think like a lawyer', analytically, step by step, distinguishing the important issues from side issues, as well as making connections with legal doctrine more generally, within the context of real societal and ethical questions. This process is fostered by reading materials which familiarise the students with the legal topography. However, many law textbooks have few charts and graphs, if any – as if they do not belong in an academic environment. It is like a medical textbook without a diagram of the heart. But law is a combination of theory and practice: so a textbook should show students what a writ looks like, or a court ruling, a notice of a stockholders' meeting, a bill, and it should explain the basic structure behind legal regulations by using other means than merely traditional text.

In the latter context, experience shows that students find the use of graphic elements in order to visualise important elements of the legal content to be learned particularly helpful. At Leiden University, one of the professors in European Union law is the co-founder of a successful project that aims at providing students with learning materials that are based on charts or diagrams.

Her idea is to use these materials alongside traditional textbooks which, in the case of European Union law, often amount to more than 1,000 pages of pure text, with no graphic elements whatsoever. As is explained on the project's website,[50] modern teaching materials must cater for a public that belongs to a modern generation in several respects (Generation Internet, Generation iPod, Generation Executive Summary and Generation Global Village). In fact, 'visual law',[51] or even

[50] See www.eur-charts.eu/project/understanding-the-charts-method (last accessed 18 January 2013).

[51] Colette Brunschwig, *Visualisierung von Rechtsnormen: Legal Design*, Zurich: Schulthess 2001; Colette R. Brunschwig, 'Rechtsvisualisierung. Skizze eines nahezu unbekannten

'multisensory law' as it is sometimes called,[52] has become a university branch of its own; the University of Zurich, for example, has a special department devoted to this.[53]

An equally serious problem in many introductory law texts which I have come across in the Netherlands can be found in the laborious formulations and long sentences, often stemming directly from scholarly papers. If the point is to acquaint students with the complicated sentence structures they will later come across as legal practitioners, their use may be meaningful. But such language is hard to justify in an introductory first-year textbook. This is not to say that we should not expose our first-year law students to 'difficult language'. Students, and law students in particular, do need gradual exposure to typical legal language. But the author of a first-year book should not use such legalese: the law itself may be difficult, the explanation should not be. Too often, the language of many first-year textbooks is the language of handbooks for practitioners, not written to keep the reader interested for 300 pages, but for reference purposes. In many first- or second-year books, the authors seem more preoccupied with their scholarly colleagues than with the needs of their students.

The academic objections to simplified books are well known: We are not a secondary school; books with pictures should have no place in the law school; they will not find diagrams, textboxes, colour, outlines, short sentences, pictures, glosses or a helpful index to documents later in legal practice either; also, students should get used to the language of law as soon as possible; law happens to be a study involving thick dry tomes; law, after all, is an academic, much less a professional study.

Feldes', in: *Zeitschrift für Informations-, Telekommunikations- und Medienrecht*, 12, 1, 2009; Jacques Beglinger and Christa Tobler, 'Das EUR-Charts-Projekt oder: The Making of "Essential EC Law in Charts." Visualisierung eines Rechtsgebietes am Beispiel des Rechts der Europäischen Union', in: Erich Schweighofer, Anton Geist, Gisela Heindl and Christian Szücs (eds.), *Komplexitätsgrenzen der Rechtsinformatik. Tagungsband des 11. Internationalen Rechtsinformatik Symposions IRIS 2008*, Stuttgart: Richard Boorberg Verlag 2008 (in German); Susanne Hoogwater, *Beeldtaal voor juristen. Grafische modellen om juridische informatie toegankelijker te maken*, The Hague: Boom Juridische uitgevers 2009 (in Dutch).

[52] Colette R. Brunschwig, 'Multisensory Law and Legal Informatics – A Comparison of How these Legal Disciplines Relate to Visual Law', in: Anton Geist, Friedrich Lachmayer, Günther Schefbeck and Colette Brunschwig (eds.), *Strukturierung der Juristischen Semantik – Structuring Legal Semantics*, Bern: Editions Weblaw 2011.

[53] See www.rwi.uzh.ch/oe/zrf/abtrv_en.html (last accessed 18 January 2013).

What do these objections mean for our textbooks? First-year textbooks have three major functions. They should introduce the students to the study of law (no student of Arabic starts with 'advanced Arabic'), they should fire them with enthusiasm for the law (look how beautiful law is, or how practically relevant!), and they should help the students to confirm their wish to study law (is law indeed the career for me?). First-year books are important: they should immediately set the tone, showing from scratch what law is about. From day one: the momentum of something new.

In my view, the vital points in a good textbook are: a well-considered pedagogical structure, a clear connection with the curriculum as a whole and to the psychology and learning styles of 18-year-old students, written in plain language, inspirational and aspirational, and having a strong relation to legal practice. This is all the more important now that the study of law is largely 'self-tuition': we expect our students to spend about three-quarters of their time studying on their own. What the teachers do not do, the books must do. Law students, especially those in their first year, need reliable maps.

It is my belief that these maps are capable of considerable improvement. In academia there is little systematic feedback on the educational literature we prescribe. This contrasts sharply with our scientific work. My fear is that neither students nor teachers have much interest in this feedback. As far as I know, no publishers of books prescribed in Dutch law schools are themselves actively engaged in systematically organising feedback on their books. The situation is different with so-called educational publishers. In universities, the physical proximity of the author, who is often one of the teachers, to his readers, the students, offers numerous opportunities for feedback.

5.5.2 The OpenCourseWare movement

From Google you can learn the importance of making your customers your partner; or, to put it another way, your worst customer is your best friend:[54] by allowing students to influence the development of textbooks; by seeing textbooks as a joint enterprise between students and teachers; and by viewing teachers and students as having a joint responsibility for education. Anybody who wishes to can make a contribution. This

[54] Jeff Jarvis, *What Would Google Do?*, New York: Collins Business 2009.

notion of joint responsibility – education as a two-way experience – puts a new complexion on the traditional concept of 'academic community': that is, authors, teachers and students together, designing education as a team.

Digital developments in education are moving fast. Open content textbooks, such as Wikibooks and Wikiversity, aim to make complete, error-free and pedagogically sound learning units available to the student at no cost. Wikibooks is a cousin of Wikipedia: everybody can pitch in to write study material – including the students. Wikibooks is also part of Wikiversity, an initiative that aims to create 'one grand learning community' and links up with the push towards open textbooks. In 2002, the Massachusetts Institute of Technology (MIT) pioneered OpenCourseWare (OCW), with all of its course material freely available on the Internet. By the end of 2013, more than 2,100 courses were online, though with the *caveat* that OCW is not an official MIT education and does not grant any MIT degrees or certificates.[55]

Other universities have followed MIT's lead, with free textbooks, extracts, student lecture notes, tests and mock exams. On the Internet one can even buy a US$1,000 app that navigates graduated American law students through their preparation for the bar exam. The German website JuraWiki shows the possibilities in Germany, such as AppsFürJuristen or the educational Spiel der Juristen. In 2012, Google started its open-source Course Builder project, letting anyone make their own learning resources, complete with scheduled activities and lessons, and Stanford launched Class2Go, hosting its online university courses. In The Open Education Consortium, institutions of higher education from around the world collaborate in creating a shared model of open educational content.[56] And, for years now, the American Center for Computer-Assisted Legal Instruction (CALI) provides online interactive tutorials in legal subjects. The Center claims that students at more than 200 member law schools run over 1 million lessons each year.[57]

From an educational learning perspective, the booming rise of the 'massive open online courses' (MOOCs), with short videos rather than full-length lectures – aimed at large-scale participation, and definitely more than the textbooks we talked about in this section – is a fascinating

[55] www.ocw.mit.edu (last accessed 18 January 2013).
[56] www.ocwconsortium.org (last accessed 1 December 2012).
[57] www.cali.org (last accessed 1 December 2012).

development.[58] It started off in 2011 and some believe MOOCs may be the best thing to have happened to higher education in the last 200 years. MOOCs are designed to provide wide and free access to higher education and research across the world: no formal entry requirements, no charge and no participation limits. There are different types of MOOCs. The so-called cMOOC focuses on online knowledge co-creation and generation, whereas the xMOOCs focus on a seemingly more traditional knowledge duplication. Then there are the so-called synchMOOCs (synchronous MOOCs), that have a fixed start and end date; whereas asynchMOOCs (asynchronous MOOCs) have more flexible assignment deadlines.[59]

Although the revenue model underlying MOOCs was, and is,[60] rather unclear – as it often is with digital innovations – the University of Stanford's Sebastian Thrun and Peter Norvig were among the first to experiment with MOOCs.[61] Across Europe, too, there were more than 250 MOOCs at the end of August 2013, mostly offered by prominent universities.[62] And in that same period, Peking University (PKU) and Tsinghua University, two top universities in China, have started developing their first MOOCs. In 2014, the French started developing their first francophone *Cours en ligne ouvert et massif* (CLOM).

Worldwide enthusiasm is somewhat tempered by more critical voices, among them educational specialists and learning practitioners, claiming that the supposed benefits of MOOCs were already realised in previous generations of 'open and distance learning' (ODL) innovation – 'MOOCs are a victory of packaging over content'. The MOOC format is said to be suffering from weaknesses around access, content, quality of learning,

[58] See e.g. Li Yuan and Stephen Powell, *MOOCs and Open Education: Implications for Higher Education (A white paper)*, 2013; William G. Bowen, *Higher Education in the Digital Age*, Princeton, NJ: Princeton University Press 2013, with some interesting discussions with among others Daphne Koller, one of the Coursera co-founders.

[59] For a brief overview of the different forms, see Donald Clark, 'MOOCs: Taxonomy of 8 Types of MOOC', http://donaldclarkplanb.blogspot.com.es/2013/04/moocs-taxonomy-of-8-types-of-mooc.html.

[60] Chrysanthos Dellarocas and Marshall Van Alstyne, 'Money Models for MOOCs. Considering New Business Models for Massive Open Online Courses', in: *Communications of the ACM*, 56, 8, 1 August 2013.

[61] Steve Cooper and Mehran Sahami, 'Reflections on Stanford's MOOCs', in: *Communications of the ACM*, 56, 2, 1 February 2013.

[62] The European MOOCs Scoreboard: www.openeducationeuropa.eu. The courses had varying statuses: some were starting soon, some were ongoing.

pedagogy, poor engagement of weaker learners, and exclusion of learners without specific networking skills.[63] Moreover, it is suggested by some that MOOCs mainly serve students that are already well educated.

The two most crucial issues at stake, a critical report of the European Association of Universities notes, are currently the question of the business model, and the issue of awarding credits. Yet, the author concludes:

> in whatever way MOOCs may develop in the long run, the fact that they currently get so much attention and cause controversy gives hope that this might inspire a much broader debate on learning and teaching in higher education that seems long overdue.[64]

This is exactly what has happened in my own law school where one of the professors produced a MOOC on the law of the European Union.[65] More than 43,000 students from all over the world signed up, and almost 1,800 students completed the course.

Although writing and developing courses and textbooks for students should be one of the more important tasks at the university, it is often seen as an 'extra duty', academically not much valued and therefore little appreciated among academic colleagues. Yet the questions are so important. What makes a good academic textbook? How does it differ from a non-academic book? And what is the future? A book by one individual teacher/scholar, all of a piece? Books by 'nobody' (Wiki, Internet outlines)? Readers with texts mainly taken from other books (casebooks, commercial outlines)? New media formats or interactive combinations with regular textbooks, such as the American Interactive Casebook Series?[66] And, finally, is there still a role for a dry-as-dust book in the first year? Such pedagogical questions are far too important to be ignored in legal education.

[63] BIS Research Paper No. 130, *The Maturing of the MOOC – Literature Review of Massive Open Online Courses and Other Forms of Online Distance Learning*, London: 2013. This extensive overview shows that, until now (autumn 2013), almost anything goes in the MOOC landscape; conflicting perspectives on MOOCs divide entire education communities.

[64] Michael Gaebel, *MOOCs – Massive Open Online Courses* (EUA Occasional Papers), Brussels: 2013.

[65] www.centre4innovation.org/learning4innovation/projecten/moocs.html (last accessed 1 December 2012).

[66] www.interactivecasebook.com (last accessed 1 December 2012); Michael Hunter Schwartz, *Expert Learning for Law Students*, Durham, NC: Carolina Academic Press 2005.

5.6 The challenge of mass education: the Leiden project

When I became dean, the number of first-year law students in Leiden was about 850 out of a body of approximately 4,200. The Dutch higher education system basically allows those students wishing to study at university to choose their area of study without many prerequisites. For some courses, like medicine and the sciences, students need to have studied certain subjects in secondary school. For most other courses, however, from history to political science and from economics to Chinese, no preconditions have to be met. In addition, in many countries, universities have to take every student who wishes to enrol. 'Sorry, we are fully booked' is not an option. For my law school, therefore, any number of first-year students between 500 and 1,150 was possible. It is clear that this system challenges law schools and their staff with serious problems of planning, logistics and capacity – has anyone ever tried to run a restaurant on that basis, or a theatre?

Also, under Dutch law, the final results at secondary school cannot be taken into account when enrolling for law school. Public universities cannot pick and choose: they are not allowed to select students. They must accept every student no matter how weak or bright. Note that most systems of higher education have nothing between high school and university, whereas the US has its undergraduate university education (often called 'college', but different from pre-university 'colleges' in other countries). Law in Europe and in most other countries is not a graduate study. Students start law school at the age of 18, compared to the US with a first-year average age of about 24; many students in the US have worked for a time between graduation and law school.

So: no cap on numbers, no preconditions and no selection at the gate in Dutch law schools. And there are other problems as well when you run a law school. Since law is not taught in secondary school, prospective students' ideas about law and about studying law are thus predominantly based on what they have seen on television and what they have read in the newspapers – mostly to do with criminal law. Moreover, since teenagers often do not have a clue about what career to take up after graduation, for many of them law seems an attractive or at least a safe choice.

5.6.1 Our annual battlefields

So, at the beginning of the academic year, every Dutch law dean, together with the teaching faculty and support staff, welcomes large numbers of

very young students, all fresh-faced and thrilled at the prospect of new experiences. For many, though, it will turn out to be a very short experience. Of the 850 law students who enrolled at Leiden at the start of the 2005–6 academic year, about 100 had already left before Christmas. By the end of the academic year, another 100 students had melted away; and a further 200 were told by the school to leave the programme because they did not manage to obtain the required minimum of 40 credits out of 60. Of all these students, fewer than 250 were able to pass their first year and 200 others had to do one or more retakes in the following year. Fortunately, most of these students were successful, but again we had to say farewell to many of the (by then less happy) fresh faces. Almost 400 students saw their first illusion of post-secondary school life shattered.

That academic year of 2005–6 was a battlefield – as it was every year. This was not the case only in Leiden: such attrition rates were typical of most law schools, as well as in many other programmes of higher education in the Netherlands. As dean I have always considered this waste a real shame for both the students and the law school. I have often wondered what would have happened if, instead of running a law school, we manufactured cars and our assembly line plant routinely destroyed 40 per cent of the cars on the production line. With bankruptcy looming, wouldn't we consider a redesign of the machinery?

In fact, that was exactly what we did. We reformed our first-year course, basically by leaving the content intact, but by introducing five measures.

First, we decided to place all our students in fixed groups of thirty for the whole year. Before that, students had been free to choose for every specific subject which class would best suit their needs. Our hope was that this change would bring about more social cohesion within the group. Second, because face-to-face contact between student and professor is a vital element in education, attending lectures and seminars in the first year became compulsory. Although the number of contact hours in the first year was only nine per week, it had been up to the students to decide whether or not they would show up. Third, it became mandatory for students to *prepare* for their seminars and lectures. Any student who turned up unprepared for a session would be asked to leave – an often difficult but necessary sanction for the teachers to impose. Fourth, exams should be inescapable deadlines, giving structure to the lives of the students.

We therefore decided that *we* would enrol the students for exams in their first year. That is an exception to the unfortunate custom in many

universities of letting students sign up for exams themselves, or – more often – not. And, finally, we introduced the rule that retakes were to be scheduled a few weeks after the first attempt. No retake would be allowed if the result at the first attempt was less than 4 out of 10. Such students would have to do their retake a year later, i.e. in the next academic year. By contrast, some US law schools, for example, do not allow retake examinations: if allowed to remain in the law school, a student with a failing grade in a course must retake the whole course as if they were a new student.

Not showing up for class, not preparing for class or exams: over the years a free-and-easy atmosphere had developed in Leiden and in many other places of learning across the world. It had become an atmosphere in which students were allowed to make their own choices as to when they would study, whether they would prepare for lectures, seminars and exams, or even whether they would show up. For many years, we as a school overestimated the level of maturity of our first-year students and their ability to make informed decisions for themselves.

In return for all the obligations we placed upon the students, we as the law school offered something in return. Every class of thirty students got its own tutor, one of the school's professors or associate professors, supported by a highly competent student assistant. This so-called 'tutor group' would meet eight times in the autumn and four times in the spring. From then on, it became one of the tasks of these professors and their assistants to help the students become a cohesive group, where students and teachers felt some responsibility for one another. Included in the '*tutoraat*' was a visit to one of the district courts where students followed a case, a lecture given by a practising lawyer or judge, as well as a lecture given by the professor about his research – a recent publication, for instance. The group was given a brief introduction to the use of the law library, and a more extensive introduction to the reading of law cases. The programme also comprised a dinner with the tutor and his students, as well as a few drinks parties. These events enabled professors to get to know their students in a more informal way, the result being that every student was known by at least *one* member of the faculty, whereas previously first-year students had been mere numbers. At least once in the first semester, after the first round of exams in November, every individual student would have a short meeting with his or her tutor, affording the latter an early identification of students at risk.

There is another compelling reason why structure is so important. Every curriculum is designed in a logical sequence: one thing after

another, in their proper order. As soon as students start designing their own haphazard curriculum, the underlying pedagogical concept, including the balance between studying content and developing skills, may easily get lost. What I like about American law schools is the way their curricula are structured over three or four separate years, leading to Graduation Day for all of the students ('Class of 2012'). Of course, I am aware of the differences. Law school in the US is more like a professional training that follows on from college, with students who are at least three years older than their counterparts in Europe.

The outcome of the Leiden project, which was closely monitored by educational experts, was spectacular. I remember the excitement when we received the first results just before Christmas. In the past, very few of us were really interested in the success and failure of our students, but that changed considerably. In the new structure, students appeared to be doing much better than in previous years. By the end of the academic year, the number of students having to leave the law school was almost half that of the preceding years. And this progress was sustained in the following years.

5.6.2 What we failed to do

Looking back, we clearly managed to stem the number of failing students. The law school had become a better place for students. Three essential elements account for this success: offering structure to the students, facilitating cohesion among them and paying personal attention to them.

Looking back, I think the school did an excellent job. Yet we erred too much on the side of caution. With the *tutoraat*, we started off with two semesters; but, mainly because of the cost and the extra work, the second semester of the *tutoraat* was dropped. The result of abandoning the *tutoraat* after Christmas was that many tutors immediately lost sight of their students. As a result, the tutors lost the chance to help those students who fell behind after the first semester, or who needed additional advice, about such matters as the possibilities of finding an internship in the following year, or about opportunities for studying abroad.

Moreover, good as the first year had become, the results of the same students in their second year were nonetheless both bad and sad. We had decided to leave the second and third years of the bachelor's programme unchanged: the students' responsibility should begin immediately after the first year. This had rather devastating effects, though. Second-year attendance in classrooms immediately fell, students forgot to enrol for

exams, while others chose to immerse themselves in Leiden's spectacular student life, or decided to take a half-year off. For the school this was a disillusioning experience. We had missed an opportunity.

Although the situation in Dutch law schools, as I picture it, may seem somewhat depressing, we have to remember that, due to the very academic nature of the curriculum, students are also encouraged to look for external activities, such as part-time internships or jobs. Or they get involved in running the various student associations. All of this helps to prepare them for their personal and professional lives. Some students even opt for an additional bachelor's or master's degree, often at a foreign university, to strengthen their academic qualifications.

It is also remarkable to note that our master's programme, officially the fourth year, is much more structured than the undergraduate programme, and therefore much less of a problem. If one holds the opinion that responsibility comes with maturity, one would expect the master's programme to be much freer. However, in most countries it is not, probably because master's studies in Europe attract an increasing number of foreign students. Foreign students come for one year, and no longer. And Dutch students, too, see the master's as a very important year to which they know they will have to be fully committed as the profession is waiting around the corner.

5.6.3 Structure: belonging and tracking

Are the students to blame? I don't think so, although some were quite creative in finding ways to get round the school's rules. But most human beings need structure and supervision. Having had a clear target myself during my one-year sabbatical – this book – and having experienced the dips I experienced during that period, I realise more than ever the importance of structure, of deadlines and of people watching over you. The idea of a student taking responsibility for his own direction of study in the environment of a large law school of more than 4,000 students and only 150 (more or less full-time) faculty and only three student counsellors, is nothing short of reckless. Let's be honest, law professors themselves, or any other professors, are no different. Every editor of a scientific volume knows that most contributors to the book will be late in submitting text. They need at least one or more reminders. We all need structure and an environment; we all need someone to keep an eye on us.

Two studies clearly support this observation. In a report on *Tracking Learners and Graduates* (2012) by the European Universities Association,

student tracking was found to be critical, particularly in the first year of study; it was found to be closely related to ensuring retention and preventing drop-out. Where institutions have experimented with student tracking, even staff members who admitted to being 'highly sceptical' when tracking was initiated acknowledged the benefits of being able to rely on data rather than only on anecdotal evidence.[67] Yet the report also contains some critical remarks, mainly regarding lack of resources for tracking, and insufficient follow-up on results. This specific criticism has to be taken seriously, the report argues, in particular by the institution itself.

A second and equally important report was funded through the British What Works? Student Retention and Success Programme (2012).[68] In light of the rising student tuition fees in England, the researchers found that *student engagement* and *belonging* are central to improving student retention and success. The study claims that these rising fees challenge institutions of higher education to rethink their priorities, policies, processes and practices to enable a culture of belonging to be realised in the law school.

The challenge is one of major proportions: how to make thousands of students, often with no more than a few contact hours per week, feel the law school is a place they belong to.

On the other hand, we should bear in mind that high retention rates do not necessarily mean high learning rates. At some point in their learning, we have to treat our students like adults if they are to start acting like adults.

5.7 Taking teaching seriously

The observation that many law schools, and universities in general, tend to undervalue teaching, is shared by many around the globe.[69] If there is anyone to blame, I believe it should in the first place be these law schools and their universities; and not their teaching faculty. What I have seen

[67] Michael Gaebel, Kristina Hauschildt and Hanne Smidt, *Tracking Learners' and Graduates' Progression Paths TRACKIT*, Brussels: European University Association 2012.

[68] Liz Thomas, *Building Student Engagement and Belonging in Higher Education at a Time of Change: Final Report from the What Works? Student Retention & Success Programme*, London: 2012; Douglas Bennett *et al.*, *National Survey of Student Engagement (2011): Fostering Student Engagement Campuswide*, Bloomington, IN: 2011.

[69] Tony Becher and Maurice Kogan, *Process and Structure in Higher Education*, London and New York: Routledge 1992.

over many years is that teachers *do* care about their students and their teaching. In her interviews, Fiona Cownie, too, found that 'being a good teacher is an important part of the professional identities of legal academics'.[70] One of those interviewed, from a new British university, replied: 'The day I cease to be a good teacher is the day I'll want to get out.' And another, from an old institution, said:

> Yes, I'd be happy if I was a better teacher than I am. And I would be very unhappy if I was not a competent teacher. And if I have a class that goes badly, I feel miserable afterwards . . . And if I have a class that goes well, I feel quite elated. So it's important for me to be a really professional, competent teacher. But if you asked me with my hands on my heart is it as important to me as it is to be a really excellent researcher, the honest answer is no.[71]

Legal education, in the broadest sense of teaching, learning and assessments, can do much better. It is crucial for our students and for us as teaching staff. Annie Rochette is right: if students are not learning what we are teaching, then why should we spend all this time doing it?[72]

5.7.1 Towards a more evidence-based legal education

Literature on legal education is rarely empirically based.[73] Therefore, law schools need to do more research into what works and what does not – as many medical schools do more systematically.[74] It would be welcomed if law teachers themselves started to publish on issues of legal education, or take part in such research. We should also go to greater lengths to ensure that the findings of pedagogical research are being brought to the attention of teachers.

At present, this rarely happens. With some exceptions, there is a large gap between educational research and actual teaching. A rare example to the contrary is the American Institute for Law Teaching and Learning at Gonzaga School of Law,[75] which also publishes a journal with all sorts of

[70] Fiona Cownie, *Legal Academics: Culture and Identities*, 2004, p. 129. [71] *Ibid.*

[72] Annie Rochette, *Teaching and Learning in Canadian Legal Education: An Empirical Exploration* (Dissertation), 2010, p. 296.

[73] Rochette's dissertation and some of Cownie's work being the exception.

[74] Rachel H. Ellaway, 'Developing Learning Resources', in: Tim Dornan, Karen Mann, Albert Scherpbier and John Spencer (eds.), *Medical Education: Theory and Practice*, Edinburgh: Elsevier 2011.

[75] http://law-td.gonzaga.edu/Centers-Programs/inst_law_teaching-learning.asp (last accessed 1 December 2012).

practical advice for law teachers.[76] Another example is a website hosted by Leiden University with best practices, tools, educational literature and blogs.[77] As law teachers across the world, we need to become more involved in pedagogical writing and research. British academic Simon Brooman has the right idea. There is, he says, a persuasive argument to be made that law teachers should engage in more pedagogical activity to examine the educational structures we build upon the bedrock so as to pass on our core values and skills:

> It would help to test and disseminate the effectiveness of legal education. Are the structures and methods of delivery robust? Do they engage students? How do we know? At the very least, it seems odd that a discipline rooted in 'proof' and 'evidence' should be reluctant to produce sufficient proof in relation to the design of suitable learning environments.[78]

How should this be done? A great deal of research on legal education is published in English-speaking countries, for instance the excellent journal, *The Law Teacher*, and in other journals. Yet I have come across only a few places where this educational research actually filters down to the shop floor, i.e. to students and their teachers. A notable exception for American teachers is Roy Stuckey's *Best Practices for Legal Education*.[79] And, for our students, textbooks seem mainly to focus on how they get into an elite school.[80] Or they provide an introduction to the content of law, American[81] or UK law[82] for instance, on how the course is organised, or how to survive at law school,[83] rather than on effective learning advice for law students.

It is an interesting paradox. We sometimes question the impact of our research because of the multitude of papers and books being published today; some even argue that we can do with much less material. Somewhat exaggerated: it looks as if the institutions of higher education prefer

[76] http://lawteaching.org/lawteacher (last accessed 1 December 2012).
[77] www.studiesuccesho.nl (last accessed 18 December 2013).
[78] Simon Brooman, 'Enhancing Student Engagement by Building upon the "Tectonic Plates" of Legal Education', in: *Liverpool Law Review*, 32, 2, 2011.
[79] Roy Stuckey *et al.*, *Best Practices for Legal Education: A Vision and a Road Map*, New York: Clinical Legal Education Association 2007.
[80] Ann K. Levine, *The Law School Admission Game: Play Like an Expert*, Santa Barbara, CA: Abraham Publishing 2009.
[81] *What About Law? Studying Law at University*, Oxford: Hart Publishing 2011.
[82] Anthony Bradney *et al.*, *How to Study Law*, 2010.
[83] Robert H. Miller, *Law School Confidential. A Complete Guide to the Law School Experience: By Students, for Students*, New York: St Martin's Griffin/Thomas Dunne Books 2004.

producing *dead* papers, read by almost nobody, over educating *living* students. I know this is slightly exaggerated: as we will see in the following chapters, legal research is crucial in bringing the discipline forward and in helping society to function better. Yet it is somewhat shocking to see how slow institutions develop in terms of becoming true institutes of higher education.

According to a British survey among first-year law students, the word that best reflects the students' general attitude is 'disengaged'. This disengagement is caused particularly by the lack of human connection in almost every educational practice, from teaching methods to our formal assessments. There is extraordinarily little formal human interaction in our first year, other than the lectures. A second conclusion from this survey is that ideals and values are absent from the curriculum. The survey also suggests that many students come to feel that their learning is 'irrelevant and in some cases inconsistent with their prior beliefs'. The study seems to indicate that law students come to school with a very optimistic attitude, which they lose in their first year.[84] The reason for this is unclear, but it may help to have students write a reflective diary or journal, for instance after the first half-year.[85]

5.7.2 Assessments: beyond the formal exam

We have not spoken about assessments yet, but assessing students is an integral part of what we do. Assessments are another underestimated topic in our law schools.[86] Formal exams, either as a nerve-racking final exam, such as in Germany or the US, or as one exam per subject, as in most other countries, are the norm. Rochette found that a majority of law teachers in Canada use at least one other form of evaluation, whether it is a mid-term examination or a number of assignments.[87]

But it is my assumption that whether a curriculum has such mid-term assessments or not, and how they are carried out, mostly depends

[84] Maureen F. Fitzgerald, 'Rite of Passage: The Impact of Teaching Methods on First Year Law Students', in: *The Law Teacher*, 42, 1, January 2008, pp. 78, 79.

[85] Simon Brooman and Sue Darwent, 'A Positive View of First-Year Undergraduate Reflective Diaries: Focusing on What Students Can Do', in: *Reflective Practice*, 13, 4, 27 August 2012.

[86] For some empirical findings for legal education, see Annie Rochette, *Teaching and Learning in Canadian Legal Education: An Empirical Exploration* (Dissertation), 2010, p. 177.

[87] *Ibid*., p. 127.

on the individual teacher or the unit he or she is part of. Sufficient knowledge about the theory of assessing students is often lacking; think of when to use formative and when summative assessments, or of oral versus written exams, or how to ensure that an assessment is both valid and reliable.[88]

The distinction between 'formative' and 'summative' is fundamental. Formative assessments are designed to provide immediate and explicit feedback to improve and to promote the students' learning. This assessment is crucial for helping both the student and the teacher during the learning process. Summative assessment, by contrast, is about pass or fail. These assessments are generally carried out periodically, at the end of a course or a subject, to determine at that particular point in time what students know and do not know. Summative assessments are also tools to help the law school to evaluate the effectiveness of its programmes, the school's improvement goals, the alignment of curriculum, or student placement.

From what I have seen, legal education has a strong summative culture; it must add a more formative approach because assessment should also promote learning. Students, with all these hours of self-study, need more feedback than they usually get. They should also get feedback on their academic work regardless of whether they pass or fail.

When it comes to assessments, American law schools take a somewhat peculiar position. Besides the refusal of many to have ongoing assessment, rather than at the end of a semester or at the end of the year, first-year performance at most American law schools is 'graded on the curve': a predetermined and rigid distribution of A's, B's and C's is the norm, regardless of the mean ability of the students.[89]

Many American students complain about this 'grading on the curve', because it leads to a very competitive atmosphere among the students in the class: polarisation among students increases after grades are released.[90] These days, the curve is pretty gentle. Currently, most good law schools say that there should be 85 per cent A's and B's; there are, I was told, not many C's and very few D's. This grading on the curve has

[88] Valerie Wass and Julian Archer, 'Assessing Learners', in: Tim Dornan, Karen Mann, Albert Scherpbier and John Spencer (eds.), *Medical Education: Theory and Practice*, Edinburgh: Elsevier 2011, pp. 229 ff.

[89] William M. Sullivan *et al.*, *Educating Lawyers: Preparation for the Profession of Law*, 2007, pp. 168 ff.

[90] *Ibid.*, p. 165.

a long tradition going back to a practice at Harvard. But most law schools across the world employ the common criterion-referenced system which is based on a numerical scale of individual quality, regardless of the performance of other students.

For me as a teacher for more than seventeen years, the importance of preparing and assessing the students' work had always been self-evident, but I must admit that a new world opened up when I heard and read about all the theories and the literature underlying assessment.[91] Assessment is such an important topic for at least two reasons. If a student successfully passes all the summative assessments, in medicine or in law for instance, he or she will be allowed to practise as *your* physician or *your* lawyer. The second is that assessment drives learning: students study *for* their exams. Therefore, the curriculum learning outcomes and the teaching delivery should be decided before the appropriate assessment methods are selected.[92] Assessments should reflect what we value as important, also including writing and spelling, critical thinking, participating in class, presenting and collaborating.[93]

Assessing exams is usually rated among the most miserable tasks in education, especially if there are no grading assistants as in other disciplines. It is often found to be overly bureaucratic and serving to create a low morale among the teachers. In *Making Assessment Matter* (2010), Graham Butt wonders

> [i]f assessment is so beneficial to our students' education, why are teachers seemingly so negative towards it, and many students so dismissive of the educational feedback it can provide? Arguably, both teachers and students need to be clearer about the purposes of assessing, the best assessment procedures to adopt, and the ways to maximise the positive impacts of assessment.[94]

Although Butt's book focuses on secondary education, it may be equally applicable to us in the law school. Ensuring that summative and formative assessment remain in equilibrium is essential.

[91] Charles Secolsky and D. Brian Enison, *Handbook on Measurement, Assessment, and Evaluation in Higher Education*, London and New York: Routledge 2012. A clear overview of best practices for the legal education is given by Roy Stuckey *et al.*, *Best Practices for Legal Education: A Vision and a Road Map*, 2007, pp. 235 ff.

[92] Valerie Wass and Julian Archer, 'Assessing Learners', in: *Medical Education: Theory and Practice*, 2011.

[93] Annie Rochette, *Teaching and Learning in Canadian Legal Education: An Empirical Exploration* (Dissertation), 2010, pp. 179 ff.

[94] Graham Butt, *Making Assessment Matter*, London: Continuum 2010.

5.7.3 *Teaching the teachers*

Almost everywhere, the training of law teachers seems to be in its infancy. In the US, too, with all those numerous publications and conferences on legal education and students paying vast amounts of money for their education, most institutions do far too little to assist both new and established faculty in developing crucial teaching skills, including coping with inappropriate student conduct, such as student dishonesty and incivility.[95] Rhode says that it is 'an irony of American academic life how little we do to educate educators'; but it is not only in the US that this is the case. I would be surprised if the majority of law teachers worldwide have had any training at all. Most of them, I'm afraid, have never even received any serious feedback from their peers.

This does not mean nothing is done – some teachers themselves take initiatives, some law schools are more active than others – but systematic training of teachers is still the exception rather than the rule. This is not to say that there are no good or excellent law teachers: there certainly are. But they are predominantly self-taught or have randomly picked up their skills from others. I hail from the generation of the tacit knowledge and the self-taught. Some educational courses were available to us, but there was no systematic or mandatory approach whatsoever, nor was there any real concern shown by deans and department heads to engage in such education in their departments and schools.

In the Netherlands, however, change is under way. Gradually, but more than ever before, attention is being paid to training university teachers. This is partly due to external compliance regimes: the introduction of external peer review of teaching at the end of the previous century has led to a growing interest in teacher training, student learning, and in students' assessments being an integral part of student learning.[96]

Yet, after some good work in the beginning, I have never really been impressed by the quality of these external committees when it comes to pedagogy or new educational insights. During all the assessments I was involved in as dean, I never came across *one* educational expert visiting my law school. Lacking pedagogical knowledge themselves, these committees tend to concentrate on the formal and regulatory side of our

[95] Deborah L. Rhode, *In Pursuit of Knowledge: Scholars, Status, and Academic Culture*, 2006, p. 76.

[96] Graham Butt, *Making Assessment Matter*, 2010. Deborah L. Rhode, *In Pursuit of Knowledge: Scholars, Status, and Academic Culture*, 2006, p. 86.

teaching. The real drive for improvement must come from us, the law schools. An important factor may become the rapid growth of international education with students who pay high commercial fees. This more market-oriented approach to higher education accentuates the importance of our approach to teaching.

In the UK, an interesting scheme of formal training and teaching accreditation was adopted in 2006. After the completion of the whole teaching and learning support course, the status of Associate Fellow, Fellow, Senior Fellow or Principal Fellow is conferred by the Higher Education Academy, thereby giving extra prestige to the teaching profession.[97] Currently, Dutch universities offer the so-called 'basic teaching qualification', which can be followed up with an advanced qualification. New teaching faculty are obliged to complete this basic course, but some universities are more energetic and stringent than others.

All in all, my conclusion is simple: we should know more about student learning; about what works in legal education and what does not. Given the vast numbers, an estimated 3.5 million law students worldwide, this is a serious deficiency in the discipline. It may well be that more knowledge in this field may lead to improved results among our students. It would probably also lead to increased motivation and job satisfaction among the teachers. High drop-out rates in many countries among first-year students alone suggest that we are getting something seriously wrong: either in the selection process or in facilitating the transition to higher education through a less than effective style of teaching.

5.8 Conclusions and outlook

> Engineering education is in a turbulent period. Chronic industry complaints about skill deficiencies in engineering graduates, high attrition rates of engineering students with good academic performance records . . . and findings from . . . thousands of educational research studies showing serious deficiencies in traditional teaching methods have all provoked calls for changes in how engineering curricula are structured, delivered and assessed. As might be expected, many academic staff members and

[97] www.heacademy.ac.uk (last accessed 1 December 2012); Peter Devonshire and Ian Brailsford, 'Defining Pedagogical Standards and Benchmarks for Teaching Performance in Law Schools: Contrasting Models in New Zealand and the United Kingdom', in: *The Law Teacher*, 46, 1, March 2012, pp. 50–64.

> administrators are less than enthusiastic about the proposed changes, arguing that the traditional system functions well and needs no radical revision.[98]

As a law dean, I have often wondered whether the legal discipline is the only one struggling with its educational missions and methods. The above quote from a paper about engineering proves that it is not. It shows that the legal discipline may not be alone in experiencing a period of turbulence; the same applies to disciplines such as engineering.

As we have seen throughout this chapter, law schools across the world generally have a rather traditional approach to education. Teaching and learning the law takes place on the basis of mainly tacit knowledge and personal intuition, and is much less science-based. Although there are at least five journals that deal with legal education itself, and dozens more on higher education, as dean of a law school I was not aware of any of them. The same is true of my fellow law deans and I wonder whether it is much different elsewhere. It was only during my sabbatical that I had come across these journals and other educational literature. We have got to fill this gap between the teaching professionals and the large body of scientific knowledge about teaching, learning and assessing students.

One of the problems may be that research is still valued above teaching.[99] As legal academics we spend most of our time and effort on teaching and reading exams, but as soon as we finish our lectures or exam reading, we quickly return to our research. The teachers are not to blame; it is that same law school dean who is pushing them into new external-funding projects, for instance, or more scholarly output. Excellent teaching is rarely a means to further one's academic career; excellent research is.

This observation of research outshining teaching, though they are intrinsically connected, is not new at all; it is being heard everywhere in our schools and universities. But it is very hard to change. Teaching could be so rewarding if we gave it somewhat more attention. As it is now, teaching is all too often a frustrating activity, especially at the undergraduate level. It sometimes makes us feel that we are inspired by our research, not by our students.

In her book about legal academics, Cownie found that, where teaching *was* valued by the institution, this was based on a range of criteria: the

[98] Richard M. Felder, 'Engineering Education: A Tale of Two Paradigms', in: *SFGE, 2nd International Conference on Geotechnical Engineering Education, Galway*, 2012, pp. 1–10.

[99] Annie Rochette, *Teaching and Learning in Canadian Legal Education: An Empirical Exploration* (Dissertation), 2010, pp. 194–5.

allocation of resources to teaching initiatives, the inclusion of teaching in promotion criteria, and the reward system. But, even among those who felt teaching was valued, there was a considerable degree of cynicism. Some respondents emphasised the difference between institutional rhetoric and reality, and the element of lip service involved. Research or even going into management were generally seen as the better routes to an academic chair.[100]

There is at least one school that seems to do better: the medical school. I noticed the difference when I started visiting the annual meetings of the Netherlands Association of Medical Teaching: two-day conferences with almost one thousand participants, totally devoted to medical education: professors of medical education, associates, PhD candidates doing research in different aspects of medical education, policy advisers, all active in a very international environment.

Why is it that medical education brings together a worldwide network of people active in education, much more than is the case with law? Medicine, in both its research and education, operates on a much more international scale, where researchers across the globe share common scientific journals and other educational literature. Could it be that medical education is – more than its legal counterpart – focusing on future practising doctors and their patients? Where law schools are predominantly transmitting rather abstract doctrinal knowledge from teacher to student, with traditional formal doctrinal exams at the end, the medical schools, from the outset, are active not only in teaching substance (the human body), but also in teaching and assessing students in their skills, attitude and personal behaviour as future doctors. Medical education has become a discipline in its own right, whereas legal education is still more like an activity. The doctors are way ahead of the lawyers.

5.8.1 Education as a pentagon

Education can be seen as a pentagon. It needs teachers, students, a programme, a support organisation and facilities, and takes place within a regulatory framework and an educational culture. Let us briefly go over these elements of what one could see as the entire learning environment.

[100] Fiona Cownie, *Legal Academics: Culture and Identities*, 2004, p. 131.

Teachers

In education, it all starts with hiring excellent teachers. This sounds self-evident, but it is not. When appointing new faculty in our law schools, whether assistant professors, associates or full professors, we usually take more notice of the research they have done than their teaching experience. In higher education, teaching is rarely seen as a positive indicator for appointing someone. Whether one has creative ideas on teaching and education is not an important factor for being hired. Unlike primary and secondary education, for most higher education, including law schools, there are virtually no entry requirements; and, once appointed, the new law teacher is often pushed straight into the deep end. In the Netherlands, for example, until recently, none of the more experienced colleagues sat in on classes to observe teachers' performance and give advice. And think of the small elective courses taught by legal professionals who fly in for only a few weeks per year; not only do they miss the feedback from their peers during teaching, but they are also often on their own when it comes to preparing for their teaching and assessments. Teaching the law should become a profession in its own right, which itself requires education, training and reflection.

Good legal education needs teachers who are excellent in their field, have a basic knowledge of what works in teaching and learning, and show a true interest in the students and their learning. As reflective professionals they should enjoy being engaged in experimentation and innovation to become even better. Because they are eager to improve their teaching, they should not be afraid of receiving feedback from their peers and students, nor should they be reluctant to give it to others.

However, what exactly is excellent teaching? An educational programme needs teachers of *differing* styles and conceptions. Rochette distinguishes between teaching as transmitting knowledge, skills and attitudes, teaching as modelling students, as motivating students, as 'getting' or 'helping' students to acquire knowledge, skills and attitudes, as facilitating learning or as transforming students. She found that most law professors have more than one conception of teaching, although most of the teachers she interviewed have either teaching-centred or learning-centred conceptions of teaching.[101] Rochette claims that our

[101] Annie Rochette, *Teaching and Learning in Canadian Legal Education: An Empirical Exploration* (Dissertation), 2010, pp. 230 ff.

teachers are often overworked, as academics are in general; asking them to take yet more time to learn about learning is bound to fail.

Applying for research grants, being members of research teams (and therefore attending meetings), serving on administrative committees at different institutional levels, participating in community groups or non-profit organisations, writing for mass media, disseminating research, on top of the teaching obligations of preparing classes, preparing and marking assignments and exams, responding to students' ever-increasing e-mails, setting up course websites, preparing lively PowerPoint presentations, and so on, are only a few examples of the numerous and increasing obligations of today's university academics.[102]

For those academics who teach law there is often an additional stress factor: many are part-time law practitioners or *ad hoc* members of judicial bodies. And even today's full timers have all sorts of obligations outside the law school that feeds them with practical knowledge which is so crucial for their teaching and research – let alone one's work–life balance. Current on-line technologies, too, mean that the university is no longer 'a refuge from the hustle-bustle, a slow zone for reading and reflection, critical dialogue and knowledge creation – to the extent that it ever was'.[103] During her study, Rochette encountered 'cynicism and fatigue'.[104] And yet studies report that academics have high job satisfaction,[105] which is exactly what we found in studies in our law school. In the US, Rhode, too, came across 'resigned cynicism' and even 'ill-disguised hostility' among faculty members 'when confronted by apathetic, unprepared, discourteous, or disruptive students'.[106]

This is where the learners – the students – come in.

Students

Because education is a two-way ticket, students are equally important.[107] It is about teaching *and* learning. Students are an easily forgotten

[102] *Ibid*., p. 267.
[103] H. Menzies and J. Newson, 'No Time to Think: Academics' Life in the Globally Wired University', in: *Time and Society*, 16, 1, 1 March 2007, p. 83.
[104] Annie Rochette, *Teaching and Learning in Canadian Legal Education: An Empirical Exploration* (Dissertation), 2010, p. 298.
[105] *Ibid*., p. 268, referring to two Canadian studies.
[106] Deborah L. Rhode, *In Pursuit of Knowledge: Scholars, Status, and Academic Culture*, 2006, p. 76.
[107] Annie Rochette, *Teaching and Learning in Canadian Legal Education: An Empirical Exploration* (Dissertation), 2010, p. 273.

constituent in education.[108] Students should prepare for class, try to participate, and organise their lives around their course. In addition, they should affiliate with student associations, debating societies and other social and professional clubs, including sports, music, volunteer work, or taking up one of the necessary administrative jobs, attend conferences and lectures and visit the courts and law firms. Students, in short, should benefit from everything university can provide for them. This enhances their enthusiasm and gives them a vital sense of belonging – to the law school, to their fellow students and to their teachers. It would certainly help if we asked our students to make a student portfolio. Such a career portfolio documents the student's academic achievement and personal development. It should include items such as evaluations, assessments, sample work such as essays, activities undertaken, internships, foreign mobility, as well as testimonials and acknowledgments.[109]

Programme

The programme is the third side of the pentagon. Every educational programme is a set of courses in a certain order – the curriculum – leading to a diploma. In legal education, due to the number of students and to the multitude of areas that have to be covered, teachers have to collaborate. It is often a programme director, or an academic dean, who is responsible for the quality of the course and its internal cohesion. In particular, where a number of departments or units are involved, such as for an undergraduate law degree, this job is among the most difficult in the law school. Yet it is one of the most important: to ensure the coherence and completeness of the teaching with regard to its content, the development of skills and personal attitude, the pedagogy, as well as arriving at the promised final qualifications of the course. The programme director's job is complex, because it is positioned between the dean, who often is externally accountable on the one hand, and the teaching professionals and the support staff on the other. It is vital, therefore, that the programme director has enough authority to make decisions about the content of the programme, its cohesion and the teaching staff.

[108] Kevin R. Johnson, 'The Forgotten Constituency? Law School Deans and Students', in: *UC Davis Legal Studies Research Paper Series No. 254*, April 2011.

[109] Roy Stuckey *et al.*, *Best Practices for Legal Education: A Vision and a Road Map*, 2007, pp. 261 ff; Erik Driessen, Karlijn Overeem and Jan van Tartwijk, 'Learning from Practice: Mentoring, Feedback, and Portfolios', in: *Medical Education: Theory and Practice*, 2011.

Support staff and facilities

Especially in mass education such as law, the quality and organisational strength of the support staff is crucial for everything that happens in the classroom. Think of the student administration, the teaching schedules, communication with students and dealing with their complaints, providing management information to the dean's team, student counselling, keeping all the rules and regulations up-to-date, preparing accreditations and evaluations, and so on. Mass education requires dealing with many thousands of students with their high expectations of what the school can deliver; dealing with dozens or even hundreds of teaching staff, also with their own expectations and ambitions; and dealing with the law school's executives and programme directors with their ideas and ambitions for a better law school. The quality of the support staff is as vital to a law school as the quality of its teachers.

Good facilities are equally important. Today's libraries, for instance, are much more than numbers of volumes, titles and subscriptions; they are increasingly valued for providing the students and faculty with an open and pleasant space, for their opening hours, the ratio of librarians to enrolment, seats per student, and other services offered such as space in the law school for students to work on a project and to learn collaboratively with each other and with faculty, and to work with librarians to develop information literacy skills.[110] Libraries and their staff are crucial for the core functions of legal education and research. Richard Danner, an American expert in the field, observes that many academic law librarians have taken leadership roles for general technology development and implementation within their law schools.[111] Openness towards innovation is equally important – think of the broad enthusiasm around MOOCs,[112] and such new concepts as 'flipping the classroom', by using education technology to impart core learning, leaving the classroom as the place for coaching, mentoring and peer interaction, a model originating in Harvard in the 1990s, and increasingly adopted in university teaching.

[110] Richard A. Danner, 'Law School Libraries', in: Miriam Drake (ed.), *Encyclopedia of Library and Information Science*, 2nd edn, New York: Marcel Dekker 2003, Vol. 2. For an interesting discussion about the role of the future law library, see Richard A. Danner, S. Blair Kauffman and John G. Palfrey, 'The Twenty-First Century Law Library', in: *Law Library Journal*, 101, 1, 2009, pp. 143–56.

[111] Richard A. Danner, 'Law School Libraries', in: *Encyclopedia of Library and Information Science*, Vol. 2, 2003.

[112] For more information on MOOCs, see section 5.3 above.

For the students and their parents, facilities – such as classrooms, libraries, study rooms, restaurants and bars, learning centres, information technology and engaged student counsellors – are an important factor in making their choice of school. But, more importantly, they are vital for good education.

Regulatory framework, culture (and leadership)

Regulatory framework and institutional culture form the final side of the pentagon. The rules within which a law school has to operate greatly determine the available room for manoeuvre and for experiments. An example of how regulations can make life difficult can be found in my own country. The only time one can drop a student who fails the course is in the first year. Those who hang in there for long enough can almost get their degree by default; they are going to succeed eventually.

Dutch universities have no legal instruments to influence a student's attitude towards his or her studies. And because funding is primarily based on the number of registered students and diplomas, it is no surprise that universities have little motivation to drop poorly performing students. Combined with the absence of entry requirements for legal studies and a legal prohibition against pre-selection, for the Netherlands and many other countries, such a regulatory framework makes it difficult for universities to excel. Whether a school is allowed to select its students at the gate, whether it can get rid of seriously underperforming students, whether it can set its own tuition fees, all these determine the school's success. Rochette rightly emphasises that institutional culture and practices (class size, assessment methods, course requirements) have an impact on student expectations and engagement.[113]

Therefore, what it all boils down to is leadership: how to transform your school into a true learning organisation, whether it is primary, secondary or higher education.[114] The deans, their associates and the programme directors should take the lead. They must do more to motivate their staff to take advantage of the resources and incentives available.[115] This cannot be done by mere top-down orders. Leadership is

[113] Annie Rochette, *Teaching and Learning in Canadian Legal Education: An Empirical Exploration* (Dissertation), 2010, p. 280.

[114] Phillip C. Schlechty, *Leading for Learning: How to Transform Schools into Learning Organizations*, San Francisco: Jossey-Bass 2009.

[115] Deborah L. Rhode, *In Pursuit of Knowledge: Scholars, Status, and Academic Culture*, 2006, p. 87.

shown by being clear about the problem – what should be improved and why – by engaging some respected professors as 'sponsors' or 'ambassadors', and by organising support among the students. If deans, heads of departments and programme directors are not passionate themselves, if they do not believe their school can become a better place for students and teachers, if they want to stick to tradition, no innovation is possible. Do you remember the 'Dear chap, why would we want to change when we've been doing this for 400 years'-character?

5.8.2 Some personal ideas to conclude

To conclude, I would like to suggest some personal ideas about what I would recommend for law schools. The legal pedagogy should, in the first place, always be connected to the question addressed in Chapter 4, about what constitutes a good lawyer. Next, I believe that the backbone of our teaching and learning should be legal doctrine, just as the human body is for the medical education – because the large group tradition of legal education will remain strong, especially in the undergraduate years.

I would endorse many more experiments in effective teaching and student learning. To give an example from Leiden: two very successful concepts are the so-called *practicum* and *privatissimum*, which have formed part of the master's programme for over forty years. These small seminars of around twenty people are much applauded by the students, the professors and the legal professions. The *practicum* takes place over a seven-week period in class, in which the students, under continuous time pressure, have to write a number of pieces, such as an essay, a letter, an annotation, a legal draft, a legal opinion, a court ruling, and so on, and discuss and defend them in class *vis-à-vis* their fellow students and their professor – as if they were real practitioners. By contrast, the *privatissimum* takes place over a six-week period in class and is focused on the scholarly and academic education of the students. In six or seven short academic papers and oral presentations, students carry out an in-depth investigation of a particular scholarly subject, as if they were novice PhD candidates. Trying out and implementing such active learning strategies, as well as other more diverse ways of teaching, learning and assessments, would be in the core of my policy.

I firmly believe that as a discipline we can do much better, in small classes as well as in even the very large ones. We can probably learn a lot from the medical schools, for instance in assessing students (self-assessments, summative, and especially the undervalued formative

('feedback') assessments), but also in using different teaching methods, such as small group teaching, using buzz or brainstorming groups and applying group assignments. In Leiden, the law school has set up an internal website for its teaching staff to share personal teaching and learning experiences.

From the first year on I would bring the legal professions into our teaching: the law firms and the judiciary, the public notary and the legislator, the business lawyer and the mediator, and any other 'law jobs'. Across the course I would require students to attend lectures given by academics and practitioners, to visit law firms and the courts, and to undertake other extra-curricular activities, such as organising a symposium. Within the curriculum I would let the students play the different professional roles before a jury consisting of academics and practitioners, which, incidentally, would greatly contribute to the law school's alumni relations policy. By staying closer to the professions, I would expect the students to become more engaged and enthusiastic when studying legal doctrine, which can be rather dry if it is not linked to the outside world of the legal professions. By doing this, the students would also come across a plethora of ethical questions, practical lawyering skills and issues of professional attitude.[116] *Moot court*, for instance, is such an excellent tool to connect theory and practice in different phases of the course. As we have seen, in medicine, too, there is a growing recognition that medical science is best taught in the context of medical practice, with integral connections between the fundamental knowledge base and the complex skills of professional practice.[117]

From their very first year and throughout the rest of their undergraduate years, I would put my students in fixed groups, as much as possible, so that they can develop a stronger sense of belonging to their fellow students, to the law school as such, and to their teachers. Students must become *my* and *our* students.

Furthermore, I would expect our students to develop their social skills, by mandatory affiliation to one of the student associations that are

[116] Margie Rowe, Moira Murray and Fiona Westwood, 'Professionalism in Pre-Practice Legal Education: An Insight Into the Universal Nature of Professionalism and the Development of Professional Identity', in: *The Law Teacher*, 46, 2, July 2012.

[117] William M. Sullivan *et al.*, *Educating Lawyers: Preparation for the Profession of Law*, 2007. See also, on the formation of 'communities of practice', Paula Baron and Lillian Corbin, 'Thinking Like a Lawyer/Acting Like a Professional: Communities of Practice as a Means of Challenging Orthodox Legal Education', in: *The Law Teacher*, 46, 2, July 2012.

usually active in and around the law school, and I would expect them to find an internship or clinical and community service opportunities, during their undergraduate years, if only for a few weeks. I would also encourage the students to take up a paid job of ten hours per week (at the maximum) to further strengthen their social abilities and attitude. Students, however, who perform poorly should be dropped. And, finally, I would ask the students to keep a portfolio, so that they and their teachers can more easily reflect on what they have learned ('tracking').

This is what I would do as a start.

6

Legal scholarship: venerable and vulnerable

6.1 One question, nine answers

Some time ago, a little Dutch girl called Kelly was born severely disabled, both mentally and physically. Represented by her parents, she took the Leiden University Medical Center to court, blaming the hospital for allowing her to be born – a so-called 'wrongful life claim'. Her parents accused the hospital of refusing to run genetic tests during the pregnancy. Such tests would have shown that Kelly suffered from a rare genetic disorder. The parents said that in all likelihood they would have terminated the pregnancy if the tests had shown a high risk of disabilities in the foetus, in which case Kelly would not have been born. What complicates the wrongful life claim is that no injury has been done to a *healthy* child. In 2005, the Dutch Supreme Court ordered the hospital to compensate Kelly for all the damage she had suffered and would suffer in the future, including the medical costs and the living costs.[1]

This wrongful life claim was rather similar to that of the French baby, Nicolas. In 2001, France's Cour de Cassation ruled that Nicolas could sue his mother's physicians because they had not detected that she had caught rubella during her pregnancy, causing serious disabilities in Nicolas.[2] Other countries, such as Germany, England, Australia and the US, had dealt with wrongful life claims before. These claims, however, were almost all dismissed, even in cases where it had been established that the hospital had made a mistake.

There were many grounds for the dismissal of these cases.[3] For instance, a child does not have the right to have itself aborted; or because it was not the doctor who caused the disability but rather nature (the genes) or illness (rubella, for example); or the damage cannot be

[1] HR 18 maart 2005, NL: PHR: 2005: AR5213, NJ 2006, 606 (in Dutch).
[2] Cour De Cassation – Assemblée plénière, Arrêt du 17 novembre 2000 (in French).
[3] For a European overview, see: Reinhard Zimmermann *et al.*, *Essential Cases on Damages*, Vienna: De Gruyter 2011, Chapter 21.

calculated because, in order to do so, lawyers would have to compare the situation before the incident with the situation afterwards, which in a wrongful life case is very difficult. After all, had the doctor done his job properly, the child would probably not have been born, either because the parents would have opted for abortion in rubella cases, or because they would have decided not to conceive the child in cases of genetic defects. In addition to all these grounds for dismissal, there were also more *ethical* grounds for dismissing such a claim. The German Bundesgerichtshof presented a somewhat different argument from all the other courts: it dismissed the child's claim, referring to the terror caused by genetic testing during the Nazi regime.[4]

Apart from the courts, the role of the legislature can be equally important in wrongful life cases: immediately after the ruling of the French court, an intense public debate developed, prompted by pressure groups of parents with disabled children, about the admissibility of the wrongful life claim. The debate led to new legislation banning the claim, and similar legislation occurred in the US, as part of the anti-abortion agenda.

So what we see is that one legally and morally difficult question may lead to a number of possible answers for both the courts and the national legislatures. But what is even more intriguing is that legal *scholars*, too, came up with such a variety of solutions to the wrongful life problem: I once counted at least nine different scholarly answers to this one difficult question. Apparently, academia cannot give *one* right or valid answer to the wrongful life question. Nine scholarly answers, which, for the scholars themselves, all appear to be valid scholarly answers, can easily lead to the impression for *outsiders* that in legal scholarship anything goes: how reliable is law as an academic discipline? A German jurisprudence book rightly states:

> The question is not trivial. Can I rely on the outcomes of this discipline? Even in ancient times a clear distinction was made between knowledge and opinion.[5]

Can't we do better as a discipline? At least Ronald Dworkin's Hercules can.[6] He is the super-judge everyone, including scholars, would have

[4] Bundesgerichtshof 18. Januar 1983 (VI ZR 114/81 – BGHZ 86, 240 ff) (in German).
[5] Bernd Rüthers, Christian Fischer and Axel Birk, *Rechtstheorie – mit Juristischer Methodenlehre*, 2011, para. 282 (my translation).
[6] Ronald Dworkin, *Law's Empire*, Cambridge, MA: Harvard University Press 1986, pp. 238 ff.

liked to be, with an unmatched knowledge of the law and unlimited time to pursue aspects of the case and all its implications. For Hercules, therefore, there is one right way to decide a case – 'one right answer'. But can legal scholarship do better? Or can we *explain* it better? After all, I have often found that legal scholars, especially those in doctrinal law, find it difficult to describe their scholarship to those in other disciplines – as probably members of other disciplines find it difficult to do the reverse.

6.2 Is 'law' a science?

In section 3.3, I discussed the academic nature of the legal discipline. The lack of certainty in our scholarship leaves us vulnerable to criticism from colleagues in other university disciplines who argue: if the possibility of a 'right answer' is so remote in law, if apparently sensible scholars can come to such divergent conclusions on the same subject, does your scholarship really belong in our university? Those who hold this view have an ally in Richard A. Posner. In his *Problems of Jurisprudence*, he says:

> What is missing from law are penetrating and rigorous theories, counterintuitive hypotheses that are falsifiable but not falsified . . . precise instrumentation, an exact vocabulary, a clear separation of positive and normative inquiry, quantification of data, credible controlled experiments, rigorous statistical inference, useful technological by-products, dramatic interventions with measurable consequences, and above all and subsuming most of the previous points, objectively assessable – and continually reassessed – hypotheses. In law there is the blueprint or shadow of scientific reasoning, but no edifice.[7]

No more than a blueprint, and not an edifice. What, then, *is* science?

In the Netherlands, we have a so-called National Science Quiz, which is broadcast on television every year. The questions all derive from the natural sciences. The quiz deals with questions such as why a frog closes its eyes while eating, and what happens to our libido if we do mathematical calculations while watching a sex film. Questions about law, however, never feature in the quiz, and the reason is simple. A quiz needs *one* clear answer, not *nine*.

In that respect the natural sciences are doing much better. Based on verification and falsification, they are aiming at universal laws and

[7] Richard A. Posner, *The Problems of Jurisprudence*, Cambridge, MA: Harvard University Press 1990, pp. 431–2.

theories that can be generalised, tested and predicted. In science, the researcher detaches himself from the subject of his research and tries to examine the world as objectively as possible. And, although he doesn't always succeed, he will keep trying, using the same research method again and again, so that his colleagues can replicate his research. Physics is a good example: it is 'nomothetic' in that it attempts to formulate general laws to explain objective phenomena.

For a long time this was the dominant view of science. In the nineteenth century, however, with the rise of the behavioural sciences, human behaviour *itself* became a subject of research. However, the kind of detached study of human behaviour carried out by the sciences seemed insufficient for an understanding of it. More was needed than mere 'objectifying' observation; a 'subjectifying' approach, unknown to natural sciences, then developed. In the behavioural sciences, we need to understand what the other person is thinking and feeling. The German term '*Verstehen*' plays an important role in psychology. In legal scholarship, the equivalent is the so-called 'hermeneutic approach', as it is in history, literature, theology, and so on. They all have in common the interpretation of written and spoken texts ('*Verstehen und Auslegung*') and therefore face similar challenges to the legal discipline. Can historians ever agree on *the* cause (or even causes) of, say, the Second World War? This more subjective relationship between the researcher and his subject leads to 'ideographic' rather than 'nomothetic knowledge',[8] and it employs an individual, descriptive as well as a more general, prescriptive research method. Both descriptive and prescriptive approaches are used in legal scholarship.[9]

So, although much academic research is of the same high quality for all disciplines, there are also significant differences. To some extent, law is a descriptive, authority-based, as well as an interpretative enterprise. When interpreting, scholars often must take an *internal*, more participant-oriented approach to their object of study. But this approach is less reproducible than what is done in, for example, the natural sciences. Yet every branch of the university, whether more nomothetic or idiographic, needs a research methodology in order to allow others to replicate, verify or falsify, or at least carefully examine its research findings.

[8] Ideographic is the effort to understand the meaning of contingent, accidental and often subjective phenomena; nomothetic is the search for more abstract universal principles.

[9] See Mark van Hoecke, *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?*, Oxford and Portland, OR: Hart Publishing 2011.

This is even more critical for legal scholarship. Law still has no generally accepted or taught research method. In introductions to the field of the philosophy of science, written in many different languages, I have rarely come across any mention of legal scholarship or legal science. At best, it appears that we take our methodology as self-evident. But we then get into trouble if we have to explain to our colleagues in other sciences how we conduct our research. Teaming up with other disciplines calls for mutual understanding, and, when working together with others, it often appears that for the others the legal scholarship method is invisible or at least poorly articulated.

A blueprint, yes, rather than an edifice.

Throughout history, much has been written on the question of what 'law' is. Often its definition is successfully avoided by describing the main *functions* of law. In a nutshell, these are: creating and maintaining order in society and settling disputes. And, in addition, law must fulfil these three functions in such a way as to meet the requirements of justice, effectiveness and legal certainty. Legal scholarship is therefore more easily criticised than carried out. In particular, the notion of 'justice' shows how normative and therefore intangible legal research can be. Whether or not a legal rule is 'just' is determined to a great extent by moral – including religious – judgments and by personal views on how best to give shape to society.

However, it's not *all* about justice. Professor Stern, founding dean of the law faculty of University College London, is reported to have roared at first-year law students: 'This is *not* a Faculty of Justice; this is *not* a Faculty of Law; it's the Faculty of Laws.'[10] The story reminds us of another – equally powerful and well-known – story, about two of the greatest figures in US law: Justice Holmes and Judge Learned Hand. After they had had lunch together and Holmes was just leaving in his carriage, Hand suddenly ran after him and cried in a sudden burst of enthusiasm: 'Do justice, sir, do justice!' Holmes ordered his carriage to come to a halt and said through the window: 'That is not my job. It's my job to apply the law.'[11]

The divergence of cultures worldwide – behaviour, views, beliefs and values – we are witnessing today raises many and challenging new questions for the legal discipline. In his superb book, *General Jurisprudence*,

[10] William Twining, *Blackstone's Tower: The English Law School*, London: Sweet & Maxwell 1994, p. 68.

[11] Learned Hand, 'A Personal Confession', in: Irving Dilliard (ed.), *In the Spirit of Liberty*, 3rd edn, 1960.

William Twining emphasises the need to relate normativity directly to the great issues of our time, such as poverty, the environment and human rights *vis-à-vis* the value of security. There are many more to mention: other global challenges and the role of the law will be addressed in Chapter 8 below. Twining contends that we can no longer afford to ignore other traditions of thought and civilisations, including Islamic, Chinese, Japanese, Hindu or Jewish jurisprudence.[12] And, finally, he calls upon the law to take into account the interests and concerns of the most disadvantaged, whether they are expressed in the language of utility, justice, or legal rights, or in the idiom of other traditions.[13] It is an exciting and demanding agenda for today's legal scholarship.

Finding answers to the unparalleled difficulties in all these questions requires an equally unparalleled balancing act between the three requirements I've just mentioned: justice, legal certainty and effectiveness – notably for law professors, judges and legislators. One man's justice can be another man's injustice. In our world with its many and diverse private and public actors, from states to multinationals and from labour unions to NGOs, all with their legal rights and interests, the integrity or consistency – in short, the predictability – of the law should be one of our central concerns. Oliver Wendell Holmes sought the definition of law in its power of prediction. And predictability is not possible without order and internal consistency, and should also include standardisation or harmonisation of legal rules among different nations. Contributing to this internal consistency – cohesion, if you like – in the countless legal rules and court decisions is a vital task for legal academia. Its work may sometimes seem somewhat routine ('tidying up after the judges'[14]), but it may also be creative and innovative, resulting in exploring entirely new fields, issues and solutions, such as the rapidly growing opportunities for genetic counselling and its legal consequences in wrongful life cases.

6.3 What makes legal scholarship vulnerable?

It's up to us, the legal scholars, to try to answer these questions in a convincing manner rather than by simply referring to what we have been

[12] See also Chapter 3.

[13] William Twining, *Blackstone's Tower: The English Law School*, London: Sweet & Maxwell 1994, p. 123.

[14] Richard A. Posner, 'The State of Legal Scholarship Today: A Comment on Schlag', in: *Georgetown Law Journal*, 97, 2009, p. 855.

doing for many centuries. It is true that legal scholarship has a venerable tradition; for many centuries, legal academics have exercised an enormous influence on the economic, political, managerial, diplomatic and cultural developments in society. And so, what of this?

Alan Chalmers, an Australian philosopher of science, concludes his much-read book, *What Is This Thing Called Science?*, by saying that an adequate view of the various academic disciplines is only possible to attain by looking carefully at these sciences and their differences. As a representative of the legal discipline, I see three, interrelated, aspects of our scholarship that make it vulnerable, if only in the eyes of others: its normative nature, aimed less at 'is' than at 'ought'; the remarkable overlap of the researcher and his or her research object; and the often close interdependency between academic research and the practice of law.

6.3.1 Is and/or ought? Legal scholarship and its normativity

At some point in the twentieth century, legal scholarship moved radically from a focus on the law as it is, towards the law as it ought to be. In most academic disciplines, it is the other way round. Astrophysicists are interested in what black holes *are*, not in what they *ought* to be. And, although my colleagues from the natural sciences have often assured me that their science, too, is time- and 'belief'-dependent, and absolutely not value free, in legal scholarship 'should' is a key word, as illustrated by the wrongful life cases: culture, customs, morality, one's values, ideals and beliefs are reflected in the researcher's analysis of how the law deals with this group of disabled children. It was Blaise Pascal's observation that:

> Three degrees of latitude reverse all jurisprudence; a meridian decides the truth. Fundamental laws change after a few years of possession; right has its epochs . . . A strange justice that is bounded by a river! Truth on this side of the Pyrenees, error on the other side.[15]

In that sense, medicine's task is much simpler: we can be sure that blood circulates on both sides of the Pyrenees in the same direction: 'truth' in the natural sciences is of a different (epistemological) nature than 'truth' in the law. And, since the natural sciences have somehow become a standard, law and some of the other sciences find themselves in a position where they have to defend themselves. Legal scholarship is different from many other sciences in the sense that it has to deal with

[15] Blaise Pascal, *Les pensées* (1669), English translation by W. F. Trotter, para. 294.

moving targets such as time, morality and nationality. Good examples of legal research that deals with these moving targets are Professor Jan Michiel Otto's studies on *Sharia*, and how *Sharia* affects Dutch and EU foreign policy,[16] and national judiciaries.[17]

David M. Walker, in his famous introduction to the Scottish legal system, emphasises that much is at stake:

> [Law] is both a product of civilisation, in that wherever groups of individuals have attained that stage of organisation and of control over their environment which we call civilisation, some kind of legal ordering of society is found, and it is also an essential of the continuance and development of civilisation, in that without a legal order to regulate conflicting claims and to resolve differences, civilisation would slip back into anarchy.[18]

From a methodological perspective, sound legal scholarship is therefore more complex than that of the so-called 'harder sciences'.[19] Yet I believe it would be a wise idea to get rid of the terminology of 'hard' and 'soft' sciences. The philosophical idea behind it, nomothetic versus idiographic, may be clear, but in its effect it pushes the 'less' natural sciences onto the defensive, as if the one were inferior to the other and should therefore be less valued.

Quite the reverse: legal scholarship is a 'hard' enterprise, since law is about such diverse issues and targets as legal certainty, effectiveness and morality. Morality in particular is a challenging issue for a scientific discipline. Legal scholars need to be able to recognise ethical, cultural and behavioural aspects and dilemmas, in addition to being sound legal doctrinalists (legal certainty; Posner's 'edifice'). Legal scholarship is a balancing act, unparalleled by every other discipline in the university.

6.3.2 *Legal research and the overlap with legal practice*

In addition to this 'ought/is' challenge, law as an academic discipline is vulnerable for a second reason. A characteristic of legal scholarship is

[16] Jan Michiel Otto, *Sharia and National Law in Muslim Countries: Tensions and Opportunities for Dutch and EU Foreign Policy*, Leiden and Amsterdam: Leiden University Press 2008.

[17] Jan Michiel Otto, *Sharia Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present*, 2010.

[18] David M. Walker, *The Scottish Legal System*, 2001, p. 2.

[19] Clarifying: Mark van Hoecke, 'Legal Doctrine: Which Method(s) for What Kind of Discipline?', in: Mark van Hoecke (ed.), *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?*, Oxford and Portland, OR: Hart Publishing 2011.

that research and practice converge, and to a great extent even overlap, both functionally and methodologically: functionally, because many law professors are also practising lawyers, and in some countries even judges; and, methodologically, because legal research has a lot in common with legal practice: such as collecting, describing, ordering, analysing, explaining the law and applying it to concrete situations.

The overlap between legal research and legal practice is particularly strong in the case of the courts. Legal researchers and the judiciary look very similar in both the values they share, such as independence, impartiality, transparency, integrity, competence and diligence, as well as in their approaches. That legal research does not possess its own elaborate method probably has much to do with the fact that it has adopted the courts' way of doing things.[20] Most legal theory books that we prescribe for our students adhere to the judge's perspective ('jurisprudence'),[21] but few *scholarly research* skills are addressed in these books, let alone an in-depth epistemology of the law. As Dutch scholar and practitioner Jan Vranken observes, taking the judge as a model has as a result that legal scholarship is generally linked to current law.[22] The American Pierre Schlag even criticises American law review articles for being imitations of the attorney's legal brief or the consultant's judicial opinion.[23]

In legal education we often require our students to use the perspective of the judge or the perspective of the lawyer/advocate, in many instances without paying much attention to the differences between the two. Yet, for most practising lawyers, be they attorneys, business lawyers or even legislative drafters, partisanship is a core value when serving to the utmost the interests of the client, the company or their Government. In the eyes of some, this partisan perspective, which imbues legal education, may harm the legal scholar's scientific ambitions. In his book, *Saving the Constitution from Lawyers*, American Robert Spitzer argues that in legal scholarship it is not legitimate:

[20] Jan B. M. Vranken, *Exploring the Jurist's Frame of Mind: Constraints and Preconceptions in Civil Law Argumentation*, 2006, para. 146 ff.

[21] Ian McLeod, *Legal method*, Basingstoke: Palgrave Macmillan 2007. Bernd Rüthers, Christian Fischer and Axel Birk, *Rechtstheorie – mit Juristischer Methodenlehre*, 2011.

[22] Jan B. M. Vranken, *Exploring the Jurist's Frame of Mind: Constraints and Preconceptions in Civil Law Argumentation*, 2006, para. 146.

[23] Pierre Schlag, 'Spam Jurisprudence, Air Law, and the Rank Anxiety of Nothing Happening (A Report on the State of the Art)', in: *Georgetown Law Journal*, 97, 2009, p. 813.

> to offer up a partisan's lawyer's brief as scholarship; to make arguments and assertions based on obvious distortions and misrepresentations of evidence; to advance conclusions purportedly constructed or evidence that, when examined, leads to a contrary conclusion.[24]

Of course, in any academic discipline there is some place for advocacy and even partisanship, but Spitzer rightly says that partisan advocacy cannot be allowed 'to twist, distort or ignore the rules of inquiry, or offer up certainty for that which is anything but certain'.

So, although legal scholarship and legal practice partly overlap, there are important differences. Practising lawyers, as we have seen, will usually be on the side of their 'client', although they have to be able to see the opposite argument, in order to attempt to meet. Scholars, however, in their academic work are by the very nature of their profession not supposed to be on one particular side or interest. The same holds for the legal scholar *vis-à-vis* the judge, even though the role of legal scholarship as a source of law, and the view taken of it by the judiciary, varies from one system to another – and in general there is a common law/civil law divide here. More than the researcher, for instance, the judge is under pressure of time and is dependent on other people involved in the process. Also, the judge has no formal position in academic debate, no matter how much some individual judges would like to have such a thing.

And, most importantly, the judge is bound by the applicable laws, by the case law of the higher courts and by what is brought before him by the parties. Researchers, by contrast, are not bound by supreme court rulings, for instance, or by constitutions or even international treaties, although they cannot simply *ignore* all that because it does not *suit their research*.

Although a large group of law professors around the world combine the law school with the law firm, I am sure that they cannot be accused of what Spitzer is afraid of: offering up certainty for that which is anything but certain. Yet it is an intriguing question as to whether the perspective of the law practitioner has somehow crept in as the dominant perspective in their teaching and research. There is nothing against teaching the students from a lawyer's perspective – so long as such teaching is combined with the scholar's, much wider, perspective. Their research should always adhere to the accepted rules of the legal research

[24] Robert J. Spitzer, *Saving the Constitution from Lawyers: How Legal Training and Law Reviews Distort Constitutional Meaning*, Cambridge: Cambridge University Press 2008.

method, which again underlines the importance of a commonly shared method. The same holds for those faculty members who combine law school with judicial office. They, in their turn, may run the risk of being too authority-based in their teaching and research. These three perspectives – the scholar, the lawyer and the judge – should be clearly distinguished from one another. Although they share a lot, they have different duties.

In conclusion, there is much good to be found in a close relationship between the legal scholar and his practitioner counterpart – it is, in fact, a crucial relationship, but there is a danger. A seventeenth-century historian in England once noted:

> One of the principal characteristics of lawyers is that they are always found on both sides of any legal question.[25]

It is this flexibility that makes legal scholarship both strong and vulnerable.

6.3.3 Scholarship's dependence on legal sources

Besides the 'ought/is' issue and the overlap with legal practice, a *third* vulnerable spot in legal scholarship is its perceived dependence on such volatile sources as legislation and case law. As we have seen, legal research and legal practice resemble one another, in that they both value independence. At the same time, and paradoxically, they are also often dependent on one another. In nineteenth-century Germany, Julius von Kirchmann was already questioning the value of legal science/scholarship ('*Rechtswissenschaft*'). In Germany at the time, legal formalism ('*Begriffsjurisprudenz*' or what we would now call 'black-letter law') clashed with naturalism ('*das Volk*', the People). In his famous speech, delivered in Berlin in 1847, Kirchmann spoke about the worthlessness of jurisprudence as a science (*Die Wertlosigkeit der Jurisprudenz als Wissenschaft*):

> one stroke of the pen by a legislature or a court turns whole law libraries into piles of waste paper.[26]

This metaphor has become one of the cornerstones of the history of jurisprudence. Kirchmann criticised legal doctrinal writing – or legal

[25] C. W. Brooks, 'The Common Lawyers in England, c.1558–1642', in: W. Prest (ed.), *Lawyers in Early Modern Europe and America*, London: 1981.

[26] Julius von Kirchmann, *Die Wertlosigkeit der Jurisprudenz als Wissenschaft*, 1848.

dogmatics, as it is often called in civil law countries – as merely a reproduction of what the courts and the legislature expressed: black-letter law. Another giant in legal history, Rudolf von Jhering, followed in his footsteps by moving away from the formalism of black-letter law and the emphasis on mere systematisation, uncritical to questions of value. In his view, law had to be seen as a means to an end (*Der Zweck im Recht*).

Jhering gathered many followers, and the so-called '*Freirechtsschule*' paved the way for the development of socio-legal studies, as well as for other attempts to integrate the social sciences into the legal system. Today, Van Gestel and Micklitz show how the debate went beyond the German particularities and also led to the search for an appropriate legal method.[27] They give an example of the relevance of the German debate for today, juxtaposing a quote from the American Eric Posner of the Chicago Law School claiming that 'doctrinal research is dead',[28] with the view of his famous father Richard Posner that doctrinal research cannot be left to judges and legal practitioners alone: 'I would like to see more academic effort devoted to tidying up after judges.'[29]

These two opinions could be said to represent the different emphases of the doctrinalists and the multidisciplinarians. In a way, they also represent the – opposing – trends of continental Europe on the one hand, with its strong and highly esteemed tradition of doctrinal research, and the US on the other, where many full-time professors of elite law schools have moved away from doctrinal research to empirical legal studies. I will come back to this in the following sections.

To sum up: legal scholarship, as an old and reputed member of academic scholarship and science, has to provide some good answers to the fundamental questions regarding its inherent normative nature ('ought/is'), its close relationship to legal practice, and its perceived dependence on rather impermanent sources, particularly legislation and rulings by the courts. The most inconvenient accusation that legal scholarship has to deal with is the idea that legal thought can only be scientific if it allies itself to the social sciences and economics. I think a clear *distinction* between three different approaches to legal scholarship may help us understand it better.

[27] Rob van Gestel, 'Wetgeving en wetenschap', in: *Ars Aequi*, 1, 2009 (in Dutch).
[28] Congress Towards a European Legal Methodology?, Tilburg 10 June 2008.
[29] Richard A. Posner, 'The State of Legal Scholarship Today: A Comment on Schlag', in: *Georgetown Law Journal*, 97, 2009, p. 855.

6.4 Three perspectives on legal research

When describing legal scholarship, I have always found it useful to distinguish between three perspectives: analytical, empirical and normative research.[30] They are closely related to the above-mentioned characteristics of law: legal certainty, effectiveness and morality. One personal note to start with.

My PhD dissertation was about the wrongful life claim.[31] Although the research dates back to the 1980s, it was only much later that I realised that these three perspectives had all been represented in my research. *Analytical* research insofar as I studied issues such as the duty of care, informed consent, causation, damage, etc.; *empirical* research when I decided to send a questionnaire to sixty hospitals about how they performed their duty to inform their patients; and *normative* research when balancing the pros and cons of the claim, such as, can a child ask for her own abortion?

I must confess that my method was rather intuitive. I was trained as an analytical scholar, but I was ignorant of normative and empirical research. Nobody told me, nobody taught me. I only remember that I asked one question of my father, who was a psychologist, about what would be a reliable number of questionnaires to send out. 'As many as possible', he answered, 'you're OK then'. That was my empirical training and I'm afraid this hasn't improved much in many law schools across the world nowadays – with the exception of those law schools which offer PhD training programmes introducing even those students who are not working in criminology or sociology to methodology courses which are geared to socio-legal research. The Law and Society Association (LSA) and its *Law and Society Review* too have changed this picture considerably in recent years.[32]

Let us have a closer look at these three perspectives, and start with what many law schools have been really good at in the past: commenting on the law as it stands in a given situation, that is, analytical research. This must be the starting point for any legal scholarship. Without it, one cannot make any valid normative statement or conduct any sound empirical research. The increasing complexity of the law today cries

[30] Bernd Rüthers, Christian Fischer and Axel Birk, *Rechtstheorie – mit Juristischer Methodenlehre*, 2011, pp. 302 ff.

[31] Technically, my PhD was about wrongful *birth*.

[32] www.lawandsociety.org (last accessed 1 December 2012).

out for experts to explain and clarify the law as it stands and how different laws relate to each other – 'exposition', as it is often called in England. Since the last world war, Europe, for instance, has developed from a region composed of a large number of war-making countries towards a political, legal, economic and monetary union. Much of the legislation is created in Brussels nowadays, and binding court decisions from the European Court of Human Rights in Strasbourg and the European Court of Justice in Luxembourg touch the lives of every European citizen.

This development has shown changes in the law of a paradigmatic nature. Walter van Gerven, former Advocate General at the European Court of Justice and now emeritus professor at Leuven, contends that there is no longer any such thing as 'Belgian law' or 'Italian law': we should talk about the law *in* Belgium, or the law *in* Italy or even, whether they like it or not, the law *in* the UK. The interaction between the different levels of law-making by national and supranational law-makers as well as the national and supranational judiciaries has resulted in an often very complex interplay between different sets of rules. Legislatures and courts, legal practitioners, politicians and the media, all need the objective and clarifying input from academia on what the law says and means, in academic papers and monographs, in commentaries and in case notes. This research has to be valued as an *essential* academic task for law schools everywhere. Doctrinal research is much more than 'black-letter law' research, which is too often too readily considered as purely legalistic, simply applying rules to cases, as if the researcher were a robot.

Other descriptions of black-letter law are 'the expository orthodoxy', 'the textbook tradition' and also 'classical legal thought'. In the common law countries, doctrinal legal scholarship therefore faced the strong criticism by some of being too closely tied to the needs of the profession; it was even 'entering its final death throes'.[33] In the civil law countries, however, clarifying the law, including 'tidying up after the judges' and other law-makers, has been more valued as a true academic outcome provided it embodies research, leading to a new or better understanding of the law, provided it meets the standard requirements of good research.

[33] Fiona Cownie, 'Law, Research and the Academy', in: Paul Trowler, Murray Sanders and Veronica Bamber (eds.), *Tribes and Territories in the 21st Century: Rethinking the Significance of Disciplines in Higher Education*, London and New York: Routledge 2012.

Doctrinal research, in the sense of studying the law as it stands, is an irreplaceable member of the academic family, fulfilling a crucial function.[34] This so-called 'exposition' is almost everywhere seen as 'the core of legal scholarship'. In William Twining's words:

> the main role of jurists is to serve the legal system – especially the higher courts – by assisting in the rationalisation, simplification and interstitial development of legal doctrine.[35]

In continental Europe (and Scotland),[36] the importance of the legal-dogmatic approach is often emphasised: the systematic element in law. The Dutch legal scholar Jan Vranken is an example, although he also believes that legal scholarship should move towards research that is less focused on practice. The doctrinal approach, Vranken suggests, has a strong foundation, which is more than just a sign of conservatism:

> Legal dogmatism in itself is not a bad thing. Far from it. Dogmatism is an essential source of knowledge in achieving the core principles of law: universality, repeatability, transparency and criticism. Keeping this source of knowledge up to date, amending it, developing it, expanding upon it, and systematising it demands the constant efforts of many . . . Innovative research is not necessarily multidisciplinary.[37]

Analytical research in law is just as crucial as it is in physics and elsewhere. It does more than just examine and describe the law as it is. It includes comparative research – either comparing legal concepts in different countries or systems, sometimes called 'external comparative legal research', such as civil law versus common law, or French law versus Italian law; or comparing legal concepts *within* the national state, such as causation in private law against causation in criminal law, which is sometimes called 'internal comparative research'. Comparative research is a large area in US scholarship, one reason being the overlapping jurisdictions: the states, local law, federal positive law, the regional circuit courts, the national US Supreme Court, etc. Another example of

[34] Ferry de Jong, 'The End of Doctrine? On the Symbolic Function of Doctrine in Substantive Criminal Law', in: *Utrecht Law Review*, 7, 3, 2011, pp. 8 ff.

[35] William Twining, *Blackstone's Tower: The English Law School*, London: Sweet & Maxwell 1994, p. 141.

[36] David M. Walker, *The Scottish Legal System*, 2001, p. 3.

[37] Jan B. M. Vranken, *Exploring the Jurist's Frame of Mind: Constraints and Preconceptions in Civil Law Argumentation*, 2006, para. 149; Jan Vranken, 'Exciting Times for Legal Scholarship', in: *Recht en Methode in Onderzoek en Onderwijs*, 2, 2, 2012.

comparative research is the comparing of legal concepts over time as the legal historians do, 'vertical comparative research'.[38]

Also, analytical scholarship looks for intentions, backgrounds, underlying values, principles and motives, aiming at a better *understanding* of the law, at *improving* the law, or even *reforming* it. It deals with old problems in new circumstances, as well as problems that have never been raised before, such as the wrongful life claim from the beginning of this chapter, and finally it attempts to anticipate new questions that may arise.

Having said all this, there are an increasing number of voices claiming that 'most legal scholarship, doctrinal or otherwise, is read by hardly anyone and has no impact on anything'.[39] And, although I have done no research on this, I do indeed feel that many practitioners are mainly, or even only, interested in our more practical work – handbooks, textbooks, case notes and comments – and much less in our innovative scholarly work, which is more directed at the national or supranational legislatures, the higher courts and other academics. The issue of the impact of legal scholarship will be addressed in Chapter 8.

Then there is the perspective of two younger members of the legal scholarship family: multidisciplinary research (often *empirical* research) and the 'law and . . .' movement, including gender and minority perspectives. They are less focused on analysing 'the law as it stands'.

They look, usually from an external perspective, at law in its social context. Multidisciplinary and interdisciplinary research enables us to look at the law as it *functions*, from sociological, anthropological, psychological, political, or economic angles. The object of legal empirical research is often referred to as 'law in action' or 'law in the real world' – which are, incidentally, quite irritating metaphors to those doctrinal researchers who study, for instance, the daily inter*action* of the courts and the legislature. A much less annoying and better description is 'socio-legal studies'. For the legislature in particular, empirical research may be relevant: think of the choice of basing liability on either negligence or strict liability. To a lesser extent, empirical research may also be relevant for the courts.

[38] See e.g. Reinhard Zimmermann, *Comparative Foundations of a European Law of Set-off and Prescription*, Cambridge: Cambridge University Press 2002. Further, from a methodological perspective, see the papers by Samuel, Husa, Bell and Adams in: *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?*, 2011.

[39] William Twining *et al.*, 'The Role of Academics in the Legal System', in: Peter Cane and Mark Tushnet (eds.), *The Oxford Handbook of Legal Studies*, Oxford: Oxford University Press 2003.

It must be said, however, that this multidisciplinary type of research has been neglected, often rather arrogantly, in many (though not all) of the law schools in the civil law countries. Most legal academics in the civil law tradition much prefer analysis-based methods to the data-based methods of the social sciences. They do not like interviewing and compiling statistics – '*Iudex non calculat*'. As a result, in most law schools professors of jurisprudence outnumber the professors of socio-legal studies, which is not good for the health of an institutionalised discipline such as law.

The final perspective on legal research is law as *normative* research. As we have seen, law is not a neutral, positivistic and analytical enterprise alone. Underlying all analyses of law there is a value-laden subsoil. Civil law, for instance, *is* civil morality. Two requirements central to the Dutch Civil Code, to use this as an example, are 'reasonableness and fairness' (*redelijkheid en billijkheid*) – and these two words, constituting a so-called 'open norm', are the key to reaching just solutions to many legal disputes. In order to decide what in a particular private law case is 'reasonable and fair', the judge must take into account generally accepted principles of law and the views and values that exist in Dutch society, both among the prevailing majority as well as the minority. Law and the people mirror each other. This issue of normativity – how do we distinguish between fact and value?[40] – is therefore one of the core subjects of almost every jurisprudence book.[41] However, the awareness of the normative aspects of the law has sometimes drifted away from those who are, day in and day out, occupied in their analytical work, in both research and teaching.

6.5 Our common concern for law as an academic discipline

As we have seen, legal scholarship has a somewhat ambiguous identity, somewhere between the humanities and the social sciences, sharing characteristics from both. Where, then, is the law to be placed? Usually the law school and the legal discipline are a separate entity (school or faculty) within the university, but sometimes they are placed within the

[40] William Twining, *General Jurisprudence: Understanding Law from a Global Perspective*, Cambridge: Cambridge University Press 2009.

[41] See e.g. Jaap Hage, 'The Method of a Truly Normative Legal Science', in: Mark van Hoecke (ed.), *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?*, Oxford and Portland, OR: Hart Publishing 2011.

social sciences. I believe it is better not to classify law as a social science, although it shares many of its characteristics: law is a social phenomenon. Where normativity and legal certainty are concerned, legal scholarship is probably closer to the humanities. And, in some ways, law is really distinct from both – as if it were a hybrid science, mothered by the humanities and fathered by the social sciences.

What, then, can we do to strengthen law as an academic discipline? I suggest eight connected ways to achieve this.

6.5.1 We have to deal with normativity

Max Weber, one of the founding fathers of empirical sociology, introduced the notion of value-free science, or ethical neutrality, if you like.[42] Weber's postulate of *Wertfreiheit* has become one of the cornerstones of modern science. *Wertfreiheit* does not imply that disciplines where values play a role do not belong in a university. On the contrary, the interaction of a science and its value-driven environment is one of the most fascinating aspects of such a science. Fascinating as well as gruesome: in a first-year German introduction to legal theory, several pages are spent on the role legal scholarship and the courts played in establishing National Socialism and Stalinism. The authors rightly argue that jurists should not lend their scholarship to such perverse ends.[43]

This excellent introduction for German law students and others shows the complexity of our field. In legal scholarship, it all starts with carefully distinguishing between description ('is', *Wertenfrei* – more or less at least) and prescription ('ought', value-laden). As we have seen earlier in the chapter, this contrast, which indeed makes legal scholarship so fascinating, is something that every legal scholar and every student should always be aware of.

And subsequently, it is vital to realise that 'normative' does *not* equal 'subjective'. Normative statements, too, should always be based on valid statements that can be verified and discussed, so that in principle normative statements can be brought to a more objective and verifiable – and thus to a more academic – level. It is also true that not all views, theories or interpretations are equally good or bad, i.e. equally 'scientific'.

[42] Max Weber, *Die 'Objektivität' sozialwissenschaftlicher und sozialpolitischer Erkenntnis*, in: *Gesammelte Aufsätze zur Wissenschaftslehre*, Tübingen: Reclam 1988 (in German).

[43] Bernd Rüthers, Christian Fischer and Axel Birk, *Rechtstheorie – mit Juristischer Methodenlehre*, 2011, para. 574.

Dutch jurisprudence professor Carel Smith rightly points out that statements or interpretations have to be in accordance with perspectives, concepts, values and principles on which there is a consensus in the community. Not all interpretations are therefore equally good; not all arguments are equally well founded.[44] The fact that law is 'normative' does not necessarity mean that the study of law is 'normative' as well.[45]

Yet I believe that, in asking what the law is, legal research often takes an internal, participant-oriented epistemological approach to its object of study (research *in* law), rather than an appeal to an external reality (research *about* the law).[46] In a particular scholarly community, minimal consensus about what are reliable methods of research is therefore of vital importance. That consensus is definitely present in the community of legal scholarship, albeit often implicitly. Legal research methodology is more than what the professor had for breakfast.

6.5.2 Legal scholarship should aim to be innovative

Innovation and progress are characteristics of all sciences. The same must therefore hold true for legal scholarship, which, like all disciplines, advances in a mostly linear way and with small steps, sometimes with exciting shifts in paradigm.

To Thomas Kuhn we owe the identification of two types of scientific change or progress: periods of 'normal science', the day-to-day work of scholars and scientists, small steps, within a certain paradigm; and periods of 'revolutionary science' where progress may be achieved by the replacement of one paradigm by another.[47] The turbulent developments in the field of human rights and the increasing interdependency of legal systems in today's world are examples of this, raising such questions as how we can best accommodate law-making and enforcement in a world of multilevel jurisdiction.

[44] C. E. Smith, *Feit en rechtsnorm* (Dissertation, Leiden), Maastricht: Shaker Publishing 1998 (in Dutch); Anne Ruth Mackor, 'Legal Doctrine as a Non-Normative Discipline: A Refinement of Niiniluoto's and Aarnio's Distinction between Norm-Descriptions, Norm-Contentions and Norm-Recommendations', in: *Recht en Methode in Onderzoek en Onderwijs*, 2, 1, 2012.

[45] Jan B. M. Vranken, *Exploring the Jurist's Frame of Mind: Constraints and Preconceptions in Civil Law Argumentation*, 2006, para. 152.

[46] Paul Chynoweth, 'Legal Research', in: Andrew Knight and Les Ruddock (eds.), *Advanced Research Methods in the Built Environment*, Chichester: Wiley-Blackwell 2008, p. 30.

[47] Thomas S. Kuhn, *The Structure of Scientific Revolutions*, Chicago and London: University of Chicago Press 1962.

Both normal and revolutionary science are crucial for scientific progress; each needs the other. Innovation in legal scholarship cannot be restricted to what our constitutions say or what supreme courts rule; in academic research one is supposed to think beyond these boundaries. For legal scholarship, this means the detailed search, examination and analysis of the different sources of law and how they interact. American law professor William Lucy once termed these two types of legal scholarship as 'visionaires' and 'bricoleurs'.[48] Visionaires differ from bricoleurs in that the role of the latter is to help judges and legislators in their task of keeping the law on track, whereas for the visionaire the emphasis is more on playing with new ideas, perspectives and theories.[49] The distinction, Lucy admits, is illuminating, but can also become an over-simplification; he therefore looks for 'modest visionaires' and 'ambitious bricoleurs'.

In my opinion, our discipline, as well as every individual research group, should have all three: the bricoleurs, the visionaires and those in between. Legal scholarship is meticulous housekeeping as well as daring and ambition. If our academic activities were limited to writing short comments on court decisions and historical chronicles only, the allegation of conducting handyman-like science would be understandable indeed: 'case law journalism' (Schlag),[50] 'glutted with theory and starved for facts' (Rhode)[51] or even of useless science, 'nothing happening' (Schlag again); and even then 'What the academy is doing ... is largely of no use or interest to people who actually practise law' (Chief Justice Roberts Jr).[52]

And, finally, one should not forget that not *all* writing produced in law schools is intended to be *academic* research in the sense of increasing the body of knowledge, and not everything that a scholar publishes – however well done – is an *academic* publication for that reason. As Professor Anthony Bradney points out in his book on the liberal law school:

[48] William Lucy, 'Private Law, Between Visionaries and Bricoleurs', in: Peter Cane and John Gardner (eds.), *Relating to Responsibility: Essays in Honour of Tony Honoré on his 80th Birthday*, Oxford: Hart Publishing 2001. The image is from Lévi-Strauss.

[49] Rob van Gestel and Jan Vranken, 'Assessing Legal Research: Sense and Nonsense of Peer Review versus Bibliometrics and the Need for a European Approach', in: *German Law Journal*, 12, 3, 2011, pp. 901–29.

[50] Pierre Schlag, 'Spam Jurisprudence, Air Law, and the Rank Anxiety of Nothing Happening (A Report on the State of the Art)', in: *Georgetown Law Journal*, 97, 2009, pp. 803 ff.

[51] Deborah L. Rhode, 'Legal Scholarship', in: *Harvard Law Review*, 115, 2002, pp. 1327 ff.

[52] *New York Times*, 20 May 2011.

> Writing that is intended to do no more than explain and describe ideas cannot, by definition, be regarded as being research. Thus writing that simply (*sic*!) tries to explain ideas for students or simply tries to explain material for solicitors or barristers cannot be research. In both cases the writing is a form of teaching . . . The notion that description is a synonym for research is still plainly to be found within the law school.[53]

For precisely this reason, in Dutch research assessment exercises, a distinction is made between so-called 'academic', 'professional' and 'popular' publications. Does the publication increase the body of knowledge (an 'academic publication')? Is it merely disseminating among practitioners and students (a 'professional publication')? Or is it aimed at the public at large (a 'popular publication', such as newspaper articles)? Practitioner or student textbooks and similar commentaries will not usually be regarded as academic publications, unless they embody some new insights. This is also the position taken in the Research Excellence Framework for the UK. For research assessments, either by external reviewers or for internal purposes, it is necessary to have a protocol enabling comparisons of law schools and research groups.[54]

Debate, however, about what is 'academic' and what is 'professional' is always possible. For one particular format, the case note – which analyses, explains or criticises case law – these standards have led to some annoyance among Dutch legal scholars. Law deans there have agreed to categorise case notes as in principle *disseminating* publications, and therefore not as academic publications – unless the author provides evidence that it does embody original research. With some exceptions, these case notes are too short to meet the applicable standards for an academic publication (see Chapter 7). Besides, we should not forget that, if a publication is categorised as 'disseminating', instead of 'academic', this does not disqualify it. It only means that it is of a different type.

There is also an 'institutional' side to all this. What law schools, their deans and institutes should do on a regular basis is look at the balance between academic, disseminating and popular output against the background of the school's strategic ambitions. I have personally wondered for some time whether the emphasis in Dutch law schools was not overly

[53] Anthony Bradney, *Conversations, Choices, and Chances: The Liberal Law School in the Twenty-First Century*, 2003, p. 122.

[54] Rob van Gestel and Jan Vranken, 'Assessing Legal Research: Sense and Nonsense of Peer Review versus Bibliometrics and the Need for a European Approach', in: *German Law Journal*, 12, 3, 2011.

on disseminating knowledge, focusing too much on writing practical handbooks, textbooks, case notes and comments for legal practitioners. The German Wissenschaftsrat, too, feels that the genre of legal commentaries ('*Kommentarliteratur*') is essential for legal practice and for the transfer of knowledge to legal practice, but feel that it has become the dominant publishing format for some areas of German legal scholarship. Increased *academic* research might bring about more promising results for scholarly communication and legal practice.[55] In order to meet scholarly expectations, i.e. produce original, relevant and independent legal research, the Wissenschaftsrat recognises that more attention should be paid to 'research-oriented' papers and books which are 'theoretically informed, analytical and systematic.

> Research should be a place of intensive, controversial, and thorough discussion and debate. Marketing interests [the proliferation of textbooks, commentaries, case studies, exam paper collections] must not marginalise genuine scientific communication.[56]

In the US, by contrast, the legal academy has been criticised for moving *away* from dissemination: great comprehensive treatises, such as the American *hornbooks*, are being produced less and less. However, a notable example of the opposite case is the very influential work of the American Law Institute (ALI). The volumes of the various Restatements and Principles of Law the ALI develops and votes on are examples of work frequently cited and followed by lawyers and judges. The onerous work of the development of these large volumes is always led by academics serving as Reporters. Professors also take important roles in the development of various topics of federal, as well as equivalent roles on state law, revision commissions.

Peter Birks rightly argued that a law school which professed to have no interest in the decisions of the courts or which boldly announced that its research and publications bore no relation to the activities of the courts 'would be a contradiction in terms'.[57] It is up to the law schools *and* the legal discipline as a whole, as well as the different fields within it, to find a satisfactory balance. Individual scholars and also individual law schools may well choose a special approach and particular addressees of their

[55] Wissenschaftsrat, *Prospects of Legal Scholarship in Germany: Current Situation, Analyses, Recommendations*, 2012, p. 69.
[56] *Ibid*., p. 70.
[57] Peter Birks, 'Editor's Preface', in: *Pressing Problems in the Law*, Vol. 2: *What Are Law Schools For?*, 1996, p. ix.

research, such as other national scholars and practitioners, just scholars, a mainly international forum, and everything in between. What is important for the discipline as a whole has been expressed by Birks:

> No scholar can hope these days to be other than specialized, but we should all value and insist upon the diversity of the operation as a whole. Socio-legal and empirical studies, legal history, Roman law, legal philosophy, criminology, economic analysis of law, comparative and international law, all these, as well as work across the spectrum of common law doctrine, private and public, are essential to the enterprise. *We should care about them all and worry if any become thin.*[58]

6.5.3 *We should pay more attention to possible conflicts of interest*

We have struggled on a number of occasions in this chapter with the issue of 'ought/is' and the law's normativity. Lawyers may be able to learn something from the behavioural sciences regarding how to deal with the tension between objectivity and normative values. The methodology of the social sciences tries to make a clear distinction between values related to the subject of study and the values that prevail in the scientific method. In every scientific discipline we can expect the researcher to focus on logic, objectivity and open exchange. Others will then be able to retrace the work and be able to discern where influences from ideologies have crept into the research approach, the definitions, or where methodological mistakes have been made.[59]

In legal scholarship, since the persona of the researcher and his personal and professional interests can play a significant role, extra alertness is needed from the point of view of scientific integrity – more so because of the methodological and sometimes functional overlap between academia and legal practice. Potential conflicts of interest should be made explicit. Authors should provide information about possible conflicts of interest, for example, if he or she is involved as a practitioner or consultant. Information about external sponsors of the research should also be provided; for medical journals this is already common practice. Legal journals should also make such information compulsory, preferably at the end of the article.[60] Very few do.

[58] *Ibid.* (emphasis added). [59] See Chapter 2 on scientific integrity.
[60] C. J. J. M. Stolker, 'Legal Journals: In Pursuit of a More Scientific Approach', in: *European Journal of Legal Education*, 2, 2, 2005, p. 91.

The German Wissenschaftsrat point to yet another aspect of legal scholarship. In the legal discipline, published expert opinions are of a particular importance to research; their role in furthering academic progress should not be underestimated. The Wissenschaftsrat therefore holds the opinion that:

> economic or other vested interests held by either party, i.e. those who commissioned the expert opinion or those who produce it, should be made transparent in the interest of academic good practice.

It recommends that publications based on commissioned expert opinions should be clearly marked as such and that the names of those who commissioned the expert opinion should be made public:

> If those who commissioned the expert opinion are private individuals, at least the nature of their interests should be disclosed. If such information cannot be provided, authors should refrain from publishing altogether.[61]

6.5.4 We must aim for more explicit methodologies

If legal scholarship has its own methodology, it is implicit. For their analytical research, legal academics are in fact greatly indebted to the 'methodology' the courts use. For an academic discipline, however, it is rather bizarre (and epistemologically wrong) to be so heavily dependent on *practitioners* (the courts, or legal practice) for such a basic issue as methodology. Paul Chynoweth, from the UK, has convincingly argued that the process of doctrinal analysis is more at home within the humanities than the sciences:

> Its approach involves the development of scholastic arguments for subsequent criticism and reworking by other scholars, rather than any attempt to deliver results which purport to be definitive and final. Any 'methodologies' in this type of research are therefore employed subconsciously by scholars (and by practising lawyers) who would most usually consider themselves to be involved in an exercise in logic and common sense rather than in the formal application of a methodology as understood by researchers in the scientific disciplines.[62]

Reviewers from other academic disciplines often reject our projects for external research funding because of their lack of an explicit and

[61] Wissenschaftsrat, *Prospects of Legal Scholarship in Germany: Current Situation, Analyses, Recommendations*, 2012, p. 52.

[62] Paul Chynoweth, 'Legal Research', in: *Advanced Research Methods in the Built Environment*, 2008, p. 32.

convincing methodological section. As legal scholars, this infuriates us because we feel that we *do* follow a method, as we have done for centuries. Nonetheless, it would make sense if we paid more attention to an explicit methodology – and not just one: different types of legal research require a diverse use of supporting disciplines and methodologies[63] – not only because of the other scientists' criticisms, but also because it would help us cooperate with colleagues of other disciplines more easily and cope with the different roles we play as academics and practitioners.[64]

6.5.5 *Our scholarship should be as open as possible*

Science does not profess absolute truths, if only because it is always limited to a particular perspective in a particular context. Good scientists always take into account that their theory or solution may prove to be wrong or inadequate at a later date. As a matter of principle, all science and all scholarship must be open and thus verifiable and falsifiable. This is where legal scholars differ from practising lawyers who, by virtue of their profession, are supposed to entrench themselves in their briefs. And even judges shape consistent arguments to suit their judgments; in their rulings there is usually little room for openness regarding other possible solutions. In academic research, however, openness is indispensable.

So, are *our* publications sufficiently open to what in the natural sciences is called verification and falsification? If these concepts belong to the methodology of every academic discipline – and why should they not? – what do they mean for legal scholarship? As legal scholars, are we not too often looking for authorities, authors and courts, for example, that support our views, instead of focusing on diverging views? Are we not sometimes too essayistic in our academic work? Should we not limit ourselves primarily to presenting *different* solutions or scenarios to a

[63] *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?*, 2011.

[64] Rob van Gestel and Hans-W. Micklitz, 'Revitalizing Doctrinal Legal Research in Europe: What About Methodology?', in: *SSRN Electronic Journal*, 5, 2011; Martijn Hesselink, 'A European Legal Method? On European Private Law and Scientific Method', in: *European Law Journal*, 15, 1, January 2009, pp. 20 ff; Rob van Gestel and Jan Vranken, 'Assessing Legal Research: Sense and Nonsense of Peer Review versus Bibliometrics and the Need for a European Approach', in: *German Law Journal*, 12, 3, 2011, pp. 901 ff. Jan B. M. Vranken, *Exploring the Jurist's Frame of Mind: Constraints and Preconceptions in Civil Law Argumentation*, 2006, para. 155.

legal problem, instead of our own, personal, definitive solution? Why should *I*, as a legal scholar, make a choice from the various solutions in Kelly's wrongful life case? Should it not be left to judges and legislators? In other words, is there an argument for more distinction between the descriptive and the normative part of our research, and hence more room for falsification? In a discipline that relies so heavily on debate and, at least partly, less on hard facts and statistics, openness would appear to be of extra importance.

6.5.6 *We should pay more attention to indicators of scholarly research*

Verifiability, let it be said again, is crucial for scientific progress. As I will discuss in the following chapter, the journals and the book series to which we entrust our publications play a vital role. Few legal journals have external peer review, and, with the possible exception of the US, there is no ranking of A, B and C journals, as is the case, for example, with the economics journals. Nor does law have a citation index, giving guidance on the quality of individual researchers and their teams. Posner remarks:

> Unfortunately, quality of scholarship is difficult to measure. It is no good looking at scholarly citations. I am an enthusiast for citation studies, but while they can be used (with a grain of salt) to evaluate scholars within fields, they cannot be used to evaluate a field – really a group of fields – as broad as interdisciplinary legal scholarship.[65]

The same holds for a ranking of journals. Although in most countries there is a generally accepted distinction between good journals and those that are less good, worldwide there is no ranking of legal journals. Such a ranking, we keep on telling ourselves, is doomed to fail in the legal discipline. This is not only a problem for lawyers. Posner says:

> With the expansion in the size of faculty in virtually all fields, specialisation has increased and with it the isolation of scholars from broad currents of thought. There is a Sorcerer's Apprentice quality to much academic scholarship today, especially in the humanities. Do we really need several hundred philosophy journals?[66]

In the next chapter, we will see the crucial roles of publishers and librarians, law schools, journal editors, book publishers and the researchers themselves in this respect.

[65] Richard A. Posner, 'Legal Scholarship Today', in: *Harvard Law Review*, 115, 2002, p. 1325.
[66] *Ibid.*, pp. 1322–3.

6.5.7 *We should pay more attention to the relevance of empirical and interdisciplinary issues*

As we have seen in this chapter, empirical research in legal scholarship is still relatively rare, even though it may be relevant in every single field of the legal discipline.[67] Stimulating the awareness for empirical verification of what doctrinal researchers do is of great importance to legal scholarship, even if we are, in Twining's words, 'a very long way from achieving an empirical *science* of law'. Much that passes as 'sociological' or 'socio-legal', Twining argues, is theoretical or text-based. A great deal of legal research with an empirical dimension has been oriented towards policy, or law reform, or other kinds of immediate practical decision-making.[68] The American professor, Deborah Rhode, wrote somewhat ironically about the law school's 'data-free universe':

> Doctrinal writing has ... advantages. It requires neither specialised expertise nor time-consuming acquisition of skills or data. This is not a small benefit in an academic field that, unlike other disciplines, does not train its practitioners to be scholars.[69]

As I have argued before, I disagree with Rhode if she says that legal scholarship does not require a specialised analytical expertise. It does – and probably more than in any other discipline. But Rhode has a point in that we have to teach our students and researchers at least some awareness of the basic dimensions and principles of empirical research.[70]

The same holds for broader multidisciplinary research. Law and economics is an outstanding example which has transformed the way not only academics but also legal officials think about law.[71] Most non-US law schools I know are strongly dominated by representatives of analytical

[67] Hazel Genn, Martin Partington and Sally Wheeler, *Law in the Real World: Improving Our Understanding of How Law Works: Final Report and Recommendations*, 2006; Wissenschaftsrat, *Recommendations on the Differentiation of Higher Education Institutions*, 2010, pp. 37 ff (in German).

[68] William Twining, *General Jurisprudence: Understanding Law from a Global Perspective*, 2009, p. 260.

[69] Deborah L. Rhode, 'Legal Scholarship', in: *Harvard Law Review*, 115, 2002, p. 1353.

[70] For an extensive overview, see: Peter Cane and Herbert M. Kritzer, *The Oxford Handbook of Empirical Legal Research*, Oxford: Oxford University Press 2010; and, more briefly, John Baldwin and Gwynn Davis, 'Empirical Research in Law', in: Peter Cane and Mark Tushnet (eds.), *The Oxford Handbook of Legal Studies*, Oxford: Oxford University Press 2003, pp. 880 ff.

[71] William Twining *et al.*, 'The Role of Academics in the Legal System', in: *The Oxford Handbook of Legal Studies*, 2003, p. 933.

(doctrinal) research practice, with the exception of many strong departments of legal history, legal philosophy and law and economics. Socio-legal studies are still seriously underrepresented in many of these law schools, in terms both of the number of chairs and of the curriculum.[72] Aversion to empirical research runs deep there, as we have seen in this chapter.

From my own experience, I know how difficult it is to bring about change in long-standing curricula and in research practice – and yet that has to be achieved. But, even then, one new socio-legal section in the law school or one compulsory socio-legal course in the law curriculum would not necessarily lead to an increasing awareness among the doctrinal scholars of the empirical aspects of our legal scholarship. What might help would be if empirical researchers themselves sought the company of their analytical colleagues for help on particular research projects, for instance in the context of external funding opportunities; as always in academia, change is triggered by asking questions, not by giving orders.

6.5.8 We should join the international debate more often

As we have seen in Chapter 3 as well as in this chapter, that debate in legal scholarship is mostly nationally oriented, is partly unavoidable and partly a serious problem. When European law is applied, Greek or Spanish law, or a Danish ruling, is no more or less important than an English law or a French ruling. In Europe, particularly in Northern Europe where children still learn to read several languages, there is still a great deal of comparative research, even across language barriers. For the legal discipline, this is of immense importance.

In this respect, these European researchers, with strong academic projects on a European *ius commune*, differ from many of the common law researchers, who may be somewhat trapped in their own language. In its advice to the legal discipline, the German Wissenschaftsrat argues that, in order to be appreciated internationally in proportion to its true academic weight, German legal scholarship should closely follow and actively participate in European and

[72] Proof to the contrary in the Netherlands is the Erasmus Law School, which is building up a reputation in this field; see the Civilologie/Civilology series, edited by Willem van Boom (Erasmus Law School) and Ivo Giesen (Utrecht School of Law). See e.g. *Judicial Decision Making in Civil Law: Determinants, Dynamics, and Delusions*, The Hague: Eleven International Publishing 2012.

international academic debates as well as in processes of making and developing the law.

> In order to do so, legal scholars should publish more frequently in foreign journals and integrate foreign literature into their own disciplinary discourses. This does not mean that scholars should merely shift the emphasis from German to English and begin publishing exclusively in English. But since legal scholarship is concerned with an object of inquiry that is constituted by language, the discipline should broaden its perspective and adopt a multilingual approach.[73]

In many legal fields, there is no serious debate between common law and continental law; *at best* we sometimes refer to one another, rather than to authors from other parts of the world. For some fields, such as international law, jurisprudence, socio-legal studies, medical law perhaps, there is a growing international debate. But they are the exceptions. For instance, for private law or criminal law researchers, there is no set canon of genuinely international journals which are read everywhere and which form the foundation for international debate. My next-door neighbour in the street, who is a Leiden professor of pathology and dean of the medical school, and his colleagues across the world, read no more than eight international, but specialist, journals each month to keep themselves 'up to date'. More co-publications across the continents would definitely improve legal scholarship as a discipline. But that is the topic for our next chapter.

6.6 Conclusions and outlook

As we have seen, questioning the status of legal research dates back to at least the nineteenth century, and it sometimes feels as if the discipline has never found its feet again. In the eyes of some outsiders, our academic status is still all but convincing, with our unavoidable national bias, strong orientation on vocational education, sometimes weird publication culture, the differing ideological perspectives of our research, and our lack of a clear set of sound methodologies. These outsiders often simply do not understand the sheer complexity of legal research. I think that we, as everyday legal scholars, are to blame for that. We have never been particularly good at explaining what exactly

[73] Wissenschaftsrat, *Prospects of Legal Scholarship in Germany: Current Situation, Analyses, Recommendations*, 2012, p. 15.

we do and how, and that the study of law ranges from *black-letter law* and *analytical* research via normative and critical perspectives to *multi-* and many different forms of *interdisciplinary*, also including empirical, comparative and historical research, as well as their overlaps. But precisely because there are so many, we have to pay more attention to our research methodology, which is not just one and the same for everything we do, but *varies* depending on the type of approach we choose.

As we have seen, it was Peter Birks who, with respect to the different approaches, said that we should care about them all.[74] The study of law, for scholars and students alike, is far too important to quarrel about the academic standing of the different approaches to it. And a true gulf between (traditional) analytical research and some of the other and newer approaches would be devastating for the study of law.

The good news for Britain is that Cownie, in her interviews with legal scholars of different backgrounds,[75] reached the conclusion that among the legal academics themselves the differences between the socio-legal and the analytical lawyers 'were less stark than might have been anticipated'. Several socio-legal respondents stressed that, in order to be a good socio-legal lawyer, it is 'imperative to have a good grasp of traditional legal reasoning'.[76] And so it is. In her book, *A Nation under Lawyers* (1994), American Mary Ann Glendon gives a superb anecdote:

> 'So what is it that lawyers and judges know that philosophers and economists do not?', former Solicitor General Charles Fried once asked rhetorically. 'The answer is simple: the law . . .'[77]

It is my personal observation, too, that academic lawyers increasingly seem to occupy the middle ground between the two extremes of pure doctrinal analysis and the other approaches.[78] As soon as we improve on

[74] *Pressing Problems in the Law*, Vol. 2: *What Are Law Schools For?*, 1996.
[75] Fiona Cownie, *Legal Academics: Culture and Identities*, 2004.
[76] Fiona Cownie, 'Law, Research and the Academy', in: Paul Trowler, Murray Sanders and Veronica Bamber (eds.), *Tribes and Territories in the 21st Century: Rethinking the Significance of Disciplines in Higher Education*, London and New York: Routledge 2012.
[77] Mary Ann Glendon, *A Nation under Lawyers: How the Crisis in the Legal Profession Is Transforming American Society*, Cambridge, MA: Harvard University Press 1994, p. 104.
[78] Fiona Cownie, 'Law, Research and the Academy', in: Paul Trowler, Murray Sanders and Veronica Bamber (eds.), *Tribes and Territories in the 21st Century: Rethinking the Significance of Disciplines in Higher Education*, London and New York: Routledge 2012, p. 65.

that, there is no reason whatsoever to be dismissive of the legal discipline. Meijers, the Leiden private law professor who drafted the new Dutch Civil Code, in his rector's address of 1927, put the law's importance thus:

> legal scholarship holds the advantage above other disciplines of concerning itself with what is so important to people: justice. The insufficiency of his understanding must not deter the lawyer; it only emphasises the human side of his scholarship.[79]

And five years later, in 1932, German professor Philipp Heck, who originally studied natural sciences and founded the *Interessenjurisprudenz*, phrased it in an equally inspiring way:

> In the university we don't work to be regarded as scientists or scholars, but to serve life.

[79] E. M. Meijers, *De beteekenis der burgerlijke wet in de huidige samenleving (VPO 1)*, 1927 (in Dutch, my translation).

7

Lawyers' ways of publishing

7.1 Goodbye to law reviews?

In his famous essay, 'Goodbye to Law Reviews' (1936), Yale professor Fred Rodell wrote:

> There are two things wrong with almost all legal writing. One is its style. The other is its content.[1]

In this essay, which was especially directed against *American* law reviews, he declared that he would no longer publish in such journals. Of course, Rodell was being ironic, but he did what legal scholars should do more often: reflect on the nature of their work. In Chapter 3 I discussed the nature of our scholarship, and how others view us. In this chapter I address the ways we publish the results of that research. A remark need not be true to be effective. To quote French novelist Stendhal:

> Tous les vents sont bons, pourvu qu'ils nous poussent.[2]

As we will notice in many other places in this book, law is just one discipline among many others in the university. Most of these other disciplines have witnessed major changes in publishing research findings – we will come across many of these changes in this chapter – while *law* has always emphasised its distinctness in this respect. Such an attitude – 'We are different!' – may be risky for at least two reasons.

Worldwide, policy-makers in the sciences have set a course that promotes international competition wherever possible, decreasing *direct* government funding and increasing *indirect* funding. As a result of this, publication records have become a major factor when distributing research money. And, second, international *rankings* have become important in distributing money, and here, too, publication records play a decisive role.

[1] Fred Rodell, 'Goodbye to Law Reviews', in: *Virginia Law Review*, 23, 1, 1936, p. 38.
[2] 'All winds are favourable as long as they push us along.'

In this competitive world, legal scholarship is often on the defensive. Traditionally, it has a strong national focus, is normative, often 'commentative', lacks an explicitly defined scholarly method, has little interest in empirical research, and is a discipline with an individualistic nature and a rather peculiar publishing culture, as we will see. Therefore, it *is* a remarkable discipline in terms of both form and content. After all these years, Rodell still seems to have a point, I'm afraid: the American tradition of student-run journals is only one of many peculiarities.

Incidentally, Rodell's comment may also be applicable to other sciences. They, too, have their ironic stories, such as the case of one of our colleagues from the medical school, who published around 130 articles in one year alone, which means one scientific publication per 1.9 days![3] There is no reason whatsoever to defend our discipline from the jibes of others. And yet we have to remain alert.

The issues to be addressed in this chapter can be illustrated by my own personal experience. As a young scholar in the 1980s, I was working on a PhD on medical malpractice law. Because I was doing comparative research, I needed books and publications from many different countries, such as France, Germany (which had a strong reputation in health law and medical malpractice law) and of course the UK and the US, where lawsuits seem to have been invented.

To collect the publications and the case law I needed, I had to *physically* travel, as scholars have always done, to locate the materials I wanted. In England, I remember the Oxford camp site, from which I left for the library at 8 a.m. To acquire German literature, I went to Münster, just across the Dutch border, and to the Sorbonne for French sources. Gaining access to US sources was a more time-consuming and expensive adventure. Although Oxford had the main collections of American case law, there were some reviews to which I could only get access from the US. I had to send a letter to the Library of Congress in Washington, which took three weeks or so including the payment process. The documents they sent often referred me to other documents, and I then had to go through the same lengthy and laborious process to obtain them. This is how research used to work, only a few decades ago.

Today, the Internet makes scholarly research and communication incomparably easier and faster.[4] There is much talk of today's 'open

[3] 'Noem jij mij, dan noem ik jou', NRC Handelsblad 17/18 March 2012 (in Dutch).

[4] Paul Wouters, Anne Beaulieu, Andrea Scharnhorst and Sally Wyatt, *Virtual Knowledge: Experimenting in the Humanities and the Social Sciences*, Cambridge, MA: MIT Press 2013.

science movement', or even 'Science 2.0'.[5] Most papers are only one click away with general *search engines* like Google Scholar; *commercial legal databases* such as WestLaw and LexisNexis, together with many others around the world; *commercial aggregators of journal content*, such as Hein Online and JSTOR; *open access directories*, such as the Directory of Open Access Journals (DOAJ[6]) and the Science Commons Open Access Law Program;[7] *web-based reference management tools*, such as Mendeley and Zotero, enabling scholars to share their publications and research; *virtual research environments* (VREs) or *virtual laboratories*; *disseminators of published articles, working papers and pre-prints*, such as SSRN, which provide repository services for law, Bepress Legal Repository (part of Berkeley Electronic Press) or Research Gate, a social networking site for scientists and scholars; *university library repositories* provide dissertations and published papers; the *scholars' personal websites* and their *personal reference management systems*; and finally the *publishers of the law journals*, in the US often the law schools, and elsewhere predominantly the commercial companies, such as Kluwer, Springer and Sage.

An interesting development is the rise of blogs. Law blogs ('blawgs'), sometimes complemented by online companions and other vehicles of 'short form' legal scholarship, may better serve the needs of the practitioners and enhance the scholarly debate among the academics.[8] Their increasing popularity – especially in the US where law articles tend to be the very opposite of 'short form' – raises new issues: might these blogs harm legal scholarship, or are they becoming a legitimate form of legal scholarship in their own right?[9] Do blogs register intellectual property, as journal publications do?[10] Will these blogs replace our thousands of law

[5] See section 2.7 above.

[6] www.doaj.org (last accessed 21 December 2013); this directory aims to be comprehensive and cover all open access scientific and scholarly journals that use a quality control system to guarantee the content, including law. Most of the journals in the directory are non-American.

[7] http://sciencecommons.org/projects/publishing/oalaw (last accessed 21 December 2013), which is a part of the Science Commons publishing project.

[8] Brian A. Craddock, '2009: A Blawg Odyssey: Exploring How the Legal Community Is Using Blogs and How Blogs Are Changing the Legal Community', in: *Mercer Law Review*, 60, 2008.

[9] Brian Leiter, 'Why Blogs Are Bad for Legal Scholarship', in: *The Yale Law Journal Pocket Part*, 116, 2006, pp. 53–8.

[10] Clifford Tatum and Nicholas W. Jankowski, 'Beyond Open Access: A Framework for Openness in Scholarly Communication', in: Paul Wouters, Anne Beaulieu, Andrea Scharnhorst and Sally Wyatt (eds.), *Virtual Knowledge: Experimenting in the Humanities and the Social Sciences*, Cambridge, MA: MIT Press 2013, p. 208.

journals worldwide in the long term, and do libraries have a responsibility to preserve the blogs for future generations?

All these new developments might even herald the coming of an era where legal scholarship will mainly be available online rather than in print. In 1999, the so-called Durham Statement on Open Access to Legal Scholarship, the initiative of a group of American academic law librarians, called for two changes, one being the open access publication of law-school-published journals, and the other being an entire end to printed publication of law journals, coupled with a commitment to keep the electronic versions available in stable, open, digital formats.[11] This call has not been answered yet: declarations of open access are not new; the pathway is never a smooth one and there are many competing interests.[12] But, in the field of open access, things are moving very quickly. In Europe, ministers from the twenty-eight member countries supported the idea of developing broader and more rapid access to scientific publications in order to help researchers and businesses to build on the findings of publicly funded research, one of the goals being 60 per cent of European publicly funded research articles to be available under open access by 2016.[13]

And, in the UK, the government's favourite route leads to the 'gold model', where researchers pay an upfront fee to a journal for their paper to be made available online, free of charge, as soon as it is published. Following the Finch Report,[14] the government hoped that, with such a radical position, other countries would follow. A second model is 'green': authors publish in any journal and then *self-archive* a version of the article for free public use in their institutional repository or on some other open access facility. Not all countries or universities appear as enthusiastic about the idea, warning that open access will require that various other aspects such as funding, intellectual property rights,

[11] http://cyber.law.harvard.edu/publications/durhamstatement (last accessed 21 December 2012).

[12] League of European Research Universities (LERU), *The LERU Roadmap towards Open Access*, Leuven: LERU 2011.

[13] European Commission, 'Towards Better Access to Scientific Information: Boosting the Benefits of Public Investments in Research', COM(2012) 401 final, Brussels: 2012 and its accompanying recommendations on access to and preservation of scientific information.

[14] The Working Group on Expanding Access to Published Research, *Accessibility, Sustainability, Excellence: How to Expand Access to Research Publications (Executive Summary)*, 2012; Finch believed that costs would run somewhere between £50 million and £60 million a year on top of the £175 million that institutions already spend on journals and providing access to them – but this, the Commission believed, was all worth it.

security issues and data protection rules be taken into account. In the UK, the House of Commons now warns that the Gold route is expensive and therefore too heavy a burden for universities and individual researchers.[15] This heated debate will continue.

Legal research requires access not only to products of scholarship (either 'open' or 'paid'), but also to the primary sources of law: legislation, case law and other products of governmental activity. Worldwide, the Declaration on Free Access to Law (Montreal, 2002) considers free public legal information from all countries and international institutions as part of the common heritage of humanity: maximising access to this information promotes justice and the rule of law.[16] The website of the World Legal Information Institute ('WorldLII'), a joint initiative of six university-based legal information institutes, provides free, independent and non-profit-making public access to worldwide law, from Afghanistan to Zimbabwe and from South Korea to Brazil.[17] It is amazing to witness the rapid growth of free electronic access to legal information as a result of worldwide governmental and non-governmental action such as the many university-based initiatives.

Law, from being a discipline with rather archaic publishing methods, seems to be catching up. However, not all scholarly output is yet available for comparative research worldwide, to put it mildly. Many of us still need to travel to Germany for German or Swiss publications, or to Paris for the French equivalent – let alone the Far East, Africa or India. Law libraries across the world cannot afford subscriptions to *all* of these collections; while many law schools and their universities do not yet have a clear policy on open access to their own scholars' publications. Similarly, the scholarly *books* we publish are rarely available through open access (often because of contractual limitations). This shows how a worldwide scholarly debate is still hampered by how and where we publish the results of our research.

Finally, a very different point. The products of our scholarship should end up not only on our fellow academics' desks or computers, but also on those of the legal profession. After all, one of the strong features of academic legal research has always been the link between academia and the profession. In the US, this relationship between academic activity and

[15] House of Commons Business Innovation and Skills Committee, *Open Access: Fifth Report of Session 2013–14*, London: 2013.
[16] www.worldlii.org/worldlii/declaration (last accessed 21 December 2012).
[17] www.worldlii.org (last accessed 21 December 2012).

the legal profession seems somewhat tense. Chief Judge Jacobs wrote in the *New York Times*: 'I haven't opened up a law review in years . . . No one speaks of them.'

Others talk of reviews 'full of mediocre interdisciplinary articles', and of professors who are 'ivory tower dilettantes'.[18] More recently Chief Justice John G. Roberts Jr said: 'What the academy is doing, as far as I can tell, is largely of no use or interest to people who actually practise law.'[19] And, although empirical study does not indicate a sharp decline in judicial citation of legal scholarship in the US,[20] the quotes themselves are worrying; although it must be said that this is truer of the areas of law the US Supreme Court is primarily concerned with, such as constitutional law, than it is of the subjects addressed by the other courts.

The question is important, not only for the US but for law schools everywhere. Originally, *all* scientific periodicals were directed at a mixed public. At its origin in 1869, *Nature*'s mission was to be 'popular in part, but also sound, and part devoted to scientific discovery'. Only after the First World War did *Nature* develop into a scientific journal.

It would be a severe blow to *legal* scholarship if journals were to target only an exclusively academic readership. Our journals, too, should be sound in terms of scholarship, devoted to scientific discovery and progress, and also *popular* (disseminating) in part. Their audience traditionally consists of both academics and practitioners (attorneys, judges, corporate lawyers, the legislature, and many others). Posner claimed not to know of any legal academic article that cannot also be understood by practising lawyers – with the exception maybe of Kelsen's work.[21] This *is* indeed one of the strengths of our discipline. The more I have thought about its future, the more I see the importance of serving and bringing together these two groups of readers; nurturing this relationship can only be to their mutual benefit.

[18] www.abajournal.com/magazine/article/the_high_bench_vs._the_ivory_tower (last accessed 21 December 2012).

[19] *New York Times*, 20 May 2011.

[20] Whit D. Pierce and Anne E. Reuben, 'Law Review Is Dead; Long Live the Law Review: A Closer Look at the Declining Judicial Citation of Legal Scholarship', in: *Wake Forest Law Review*, 45, 2010; and David L. Schwartz and Lee Petherbridge, 'The Use of Legal Scholarship by the Federal Courts of Appeals: An Empirical Study', in: *Cornell Law Review*, 96, 2011, p. 1345.

[21] Richard A. Posner, 'Legal Scholarship Today', in: *Harvard Law Review*, 115, 2002, p. 1320.

This chapter will offer some views on the accessibility, quality, focus, aim and form of our publications – for both academics and professionals – in order to arrive at a few suggestions to help legal scholarship to become more of a worldwide coherent discipline, fulfilling its national obligations.

7.2 The editors: student- or peer-run journals?

7.2.1 Student-edited journals

The way legal scholarship is published and circulated paints a colourful picture. Let us start with the most gaudy part, the American *student-run* law review. Student-run journals are found in more countries, such as Germany, and one in the Netherlands, but they are the exception that proves the rule. In the US, every law school has its student-run journals:

> As cathedrals to every good-size medieval French town, and as universities to every twentieth century state of the United States, so law reviews are a necessary element of every respectable law school.[22]

And the majority of them are student-edited. Certainly, there are 'faculty-edited' journals along with journals that are published by the so-called 'learned societies', often in the fields of legal economics, legal history and the sociology of law. Some journals, such as the *American Journal of International Law* and about fifty others, also practise a form of *additional* external peer review. However, the majority of American law reviews are run by students. They generally serve two years on a journal. Since these journals were originally established to make a contribution to the education of students, and less for the purposes of legal research, students occupy the editorial positions – and they are not likely to relinquish them.[23] It is also connected to employment for the students. One of my American colleagues commented: 'Chief Justice Roberts might claim that legal academic publishing is worthless, but I'll bet you anything that he has never – and never will – taken a law clerk to work with him who has not served as an editor on the board of a major law review.'

As an *educational* argument, this may be true, but, consequently, it is *they* who are the gatekeepers of academic legal scholarship – to the

[22] John T. Noonan, 'Law Reviews', in: *Stanford Law Review*, 47, 1995, p. 1117.
[23] See James W. Harper, 'Why Student-Run Law Reviews?', in: *Minnesota Law Review*, 82, 1998, pp. 1261–97, for a history of law reviews.

dismay of other scientific disciplines. After all, law reviews are the primary outlet for legal scholars; at the same time, however, the law review system is still connected to legal education.[24]

Laurence Friedman, American law professor and sociologist, gave voice to this dismay:

> People in other fields are astonished when they learn about it; they can hardly believe their ears. What, students decide which articles are worthy to be published? No peer review? And the students chop the work of their professors to bits? Amazing. And then they check every single footnote against the original source? Completely loco. Can this really be the way it is? Secretly, I share their astonishment; and I think the system is every bit as crazy, in some ways, as they think it is.[25]

Simply stated, such astonishment arises from the fact that decisions about content are being made by non-experts – the students – who may be governed by the latest fashion or by what they happened to learn in their first year of law school. In terms of their format, most articles are incredibly long-winded: they endlessly reproduce the *status quo* before arriving at something new, and there are footnotes covering the whole page.

And, although this is a bit less true now because many journals have word limits, from the more scholarly perspective, and compared, for instance, to European papers, their format is still rather 'school-ish'. In many law reviews, even the most obvious of statements are footnoted: editors – the students – have demanded support for claims that Plato was an 'influential philosopher' or that 'one of the values of American life is equality'.[26] And, finally, many student editors consider it their task to completely or partially rewrite submitted articles, although this is happening less now than in the past. It is the rewriting of articles that especially annoys authors. Peter Birks, the greatly missed Oxford academic, wrote to me ten years ago saying:

> For my part, I do not much like publishing in America. The student editors are put under a strange discipline which inflicts amazing pain on them and leaves one's work unrecognisable.

[24] Cameron Stracher, 'Reading, Writing, and Citing: In Praise of Law Reviews', in: *New York Law School Law Review*, 52, 2008, pp. 349 ff.

[25] Lawrence M. Friedman, 'Law Reviews and Legal Scholarship: Some Comments', in: *Denver University Law Review*, 75, 1998, pp. 661 ff.

[26] Quote from Deborah L. Rhode, 'Legal Scholarship', in: *Harvard Law Review*, 115, 2002, p. 1335.

Another huge difference between the US and the rest of the world is that student-run law journals expect that they are competing with other journals for the right to publish the submitted articles. There are even services, such as *ExpressO*,[27] that allow authors to make simultaneous multiple submissions electronically. With peer-reviewed journals, the strong norm is that the submission is made to one journal at a time. If the journal accepts the article, there is no further wrangling as in the US.

There are some *advantages* as well: students carry out their work very well insofar as they check citations, footnotes, grammatical points, and so on.[28] They take a great deal of work off the hands of the academic faculty and they are quite cheap, which in the current financial climate may be of increasing importance. In addition, one advantage of these long law review articles for people like me when I was doing my research is that they give a comprehensive overview of the current state of affairs on a particular topic. You don't have to look elsewhere.

Professors, however, have attempted to change the system, employing either tact or emotion: 'Law professors unite: we have nothing to lose but our chains', Lindgren wrote in his Manifesto. 'This nonsense must stop. We must turn our professional academic journals into professional academic journals.'[29] The students see it very differently. One of them, a graduate, wrote:

> Faculty who just see the law review as a place to print their articles are missing the larger picture. Law review is part of the legal experience, with valuable lessons to be learned by everyone involved in the process – even authors. Rather than wresting control from students, we should be working with them to improve upon a storied institution.[30]

When my colleagues from other disciplines reviewed drafts of this book, this particular point of the student-peer journals attracted the most amazed reactions. They simply could not believe it!

[27] http://law.bepress.com/expresso (last accessed 21 October 2013).

[28] Richard A. Epstein, 'Faculty-Edited Law Journals', in: *Chicago–Kent Law Review*, 70, 1994, pp. 87–8.

[29] James Lindgren, 'An Author's Manifesto', in: *University of Chicago Law Review*, 61, 2, 1994, p. 527. Later, Lindgren wrote a sequel complete with proposals for change: James Lindgren, 'Reforming the American Law Review', in: *Stanford Law Review*, 47, 1995.

[30] Cameron Stracher, 'Reading, Writing, and Citing: In Praise of Law Reviews', in: *New York Law School Law Review*, 52, 2008, p. 370.

7.2.2 *Peer-edited journals*

In some countries, law journals operate somewhere between the US student-run law reviews and the professionally edited reviews. In these journals, students participate and gain experience, but *academics* are more involved in the editorial work and in the oversight of the journal. Some journals are hosted by a specific law school, but most journals are not. Either way, students seldom play a role in the process: the editorial boards consist of experts in the field; in other words, articles are reviewed by the authors' peers.

Having this kind of editorial staff for journals is vital for progress in any academic discipline. Being the experts in their field, they have quite a responsibility towards authors, readers and the community as a whole. And not only towards the community of today. Journals also form a scientific archive: they are the official public records of scientific achievement.[31]

The editors are supposed to make an appropriate selection from the contributions, a selection that connects with the audience at whom the journal is aimed. They test the quality of the submissions and they are concerned with the currently increasing importance of 'scholarly integrity'. Many branches of academia are experiencing increasing pressure to publish (see Chapter 3). The current forms of funding research can give researchers a feeling of unease and competition – speed before quality. Also, quantitative requirements, which are being imposed almost everywhere, may easily lead to research results being spread across several publications, in search of the 'smallest publishable unit', or, even worse, lead to fraudulent behaviour either by omitting relevant data or even making it up. Journal editors – being the gatekeepers of our journals – are crucial for the quality as well as the development and progress of our research. Moreover, editorial boards are responsible for informing their readers about important developments in other relevant legal areas, along with developments outside their own jurisdiction. Selecting, testing, informing, giving direction and providing a view on the future – *these* are key editorial tasks. They require the best people in the field.

[31] B. Houghton, *Scientific Periodicals: Their Historical Development, Characteristics, and Control*, Hamden, CT: Linnet Books 1975, p. 43; Alan J. Gross, Joseph E. Harman and Michael Reidy, *Communicating Science: The Scientific Article from the 17th Century to the Present*, Oxford: Oxford University Press 2002.

7.2.3 External peer review

In Europe, where virtually all law journals are at least peer-edited, meaning that the journal is edited by professionals in the field and not by students, there is a trend towards introducing *external* peer review by members of a diverse professional group, *on top of* the peer editing. In most academic disciplines, peer review lies at the heart of the process of assessing the quality of research, and *external* peer review serves as a vital additional and independent check. It is mostly carried out in the form of author-blind peer review, sometimes even double-blind. Although it may not always be perfect, it is generally accepted as the best available method. Worldwide, unfortunately, most legal journals lack this extra test. By introducing external peer review, the legal discipline would harmonise with most of the other disciplines.

In the sciences, the editorial process differs from one discipline to another, although they always have forms of external review. For many medical journals, for example, it often works as follows. Before an article is read, the journal's staff reviews the author's or the research group's credentials. This is done by means of a citation analysis: how often are these authors cited and where (their impact)? Citations, or so it is assumed, say something about the influence that an author, a research group or a scientific journal has in the scientific debate. Armed with this citation analysis, the article is read by one of the editors specialised in the subject and by the editor-in-chief. Should they find that the article is of sufficient quality, it is then sent to two external readers for additional peer review. If these readers feel positive about the content and expect the article to have sufficient scientific impact, the author receives the critical observations of the reviewers as commentary. The permanent journal staff then go over the article again: Is its methodology sound? Are the references correct (each footnote is checked)? Is there any possible conflict of interests? And, finally, is proper English used? In some sciences, even the reviewers themselves are evaluated: the journal regularly checks on how the published articles, which have received positive assessment from these reviewers, have been doing in the citation index. Should the scores turn out to be disappointing, no further use may be made of those reviewers' services.

I assume that external peer review, one that goes beyond the regular editorial process, will become the norm in the legal discipline as well. Legal research, too, needs it – as we have seen in the previous chapter. However, one American law professor wrote to me that there is more

justification for peer review in the sciences, especially medicine, where people's lives are at stake, and the accuracy of a paper's data can be conclusively confirmed or refuted. This, with all due respect, downgrades law as an academic discipline. And, apart from this reputational argument, law, too, is about 'people's lives'.

There may be a second hurdle to overcome for American legal scholarship. The legal academic discipline in the US is so large that peer review would be a huge burden. Unless they move to the rule that a manuscript can be submitted to only one journal at a time – which is the normal procedure outside the field of law – this would be unworkable.

And what about the many student-edited journals in the US? As I discovered while writing this book, the whole idea of student-edited journals is impossible to explain to colleagues in other scientific disciplines. Student-edited journals may be refereed, but this is rarely the case. Their position on the rankings parallels the position of the law school they are part of, which is also an intriguing phenomenon from the point of view of causation. Apparently, their reputation in the field is strong – and this is also the case among the professors, as I have often noticed. My guess is that they are here to stay, but everywhere else I would say: do not do this at home! And my advice to the student-run journal editors would be to at least introduce external peer review.

7.3 Law journals: accessibility, quality, impact and readership

7.3.1 Accessibility

In writing this book, I consulted Google Scholar almost every day, as a general point of access into the scholarly world. Through that website, in combination with my university's subscriptions to Hein Online, Springer, Sage, Kluwer and many other commercial publishers, I came across dozens of articles on every topic of my book. Sometimes one does not even need a subscription: Google directs you to publications on scholars' personal websites or to open access repositories of the law schools and their universities.

However, one must realise that a large amount of scholarship is *not* available on the Internet, not even through paid commercial databases. Moreover, the internationally available databases are clearly dominated by papers in English – often with a common law background. Legal scholarship from other jurisdictions and in other languages is much more difficult to find electronically. Books have their own problems of access,

either as monographs or as collections of separate papers or book sections. It often still takes a long time to find out that a book has been published. One is dependent on the publisher's marketing and communication activities, and even then, it may take a long time to become aware of the book and its content.

Finding hard copies of books that you have heard of is becoming easier, through numerous national aggregations of library catalogues such as *Copac*, which brings together the catalogues of over seventy major UK and Irish libraries, and worldwide aggregations such as Worldcat, which lets you search the collections of libraries in your area and around the world. And, if a particular book is not available, Amazon and its national and international equivalents ensure a speedy (paid) delivery.[32] Buying books is easier than it has ever been, but one cannot expect scholars or their institutions to buy every book they need. And that means that a part – possibly a large part – of our scholarship still goes unnoticed.

7.3.2 Quality

Then there is the issue of quality. For the massive number of research results available via the Internet today, researchers need some guidance on both the content and the quality. A first important measure of quality would be the reputation of the scholar or the group to which he or she belongs, which in a national context we often know. However, it would be unwise to ignore younger scholars or other newcomers, or scholars from less well-known scholarly communities or countries. Therefore, in addition to the reputation of the individual scholars and their groups, guidance can be given by journals specialising in such areas as 'company law' or 'health law' and many, many others.

In my view, the fact that the legal discipline has so many *general* law reviews (in the US alone more than 220) is one of its serious weaknesses. As far as quality is concerned, little guidance is available to scholars who come across these general journals in their research, especially in the case of researchers of other nationalities who are simply unaware of any informal 'rankings' that may exist. As we have seen, in the US the reputation of a general law review largely corresponds with the reputation of the law school publishing it. I firmly believe that the time has

[32] www.worldcat.org (last accessed 21 December 2012).

come for a number of general law journals to choose a focus on area and on methodology, such as mono/multidisciplinary, comparative, historical, and so on. This would make the journals more easily accessible and user-friendly, and thus enhance the quality of the journal in the long run.

For example, while doing my research for this chapter, I found a multitude of papers on Hein Online and on WestLaw, but with very little indication of quality, making it difficult for me, as a foreign researcher, to find what I was looking for. Although general law journals may still have greater prestige than most specialised journals, the latter are more likely to be noticed by increasingly specialised scholars, practitioners and judges.

7.3.3 Measuring impact

To help scholars find their way through the plethora of publications, science journals developed the system of an 'impact factor'. This measures the frequency with which an article has been cited in a journal during a particular period. The assumption is that the impact factor is an indicator of quality: the higher the impact factor of a journal's ranking, the better articles it attracts, and *vice versa*. Ranking quality and impact is supposed to be important for a number of very diverse reasons. It may help scholars find their way in the large numbers of publications that are available (is it sound, innovative research or merely average?); it may help them plan their submission strategies and make their publication decisions (where do I publish?); and it may serve as a quality-control mechanism for the reviews themselves. Ranking may also be of some use for universities, supervisors or department directors for appointment decisions or tenure. When used carefully, it may also provide funding organisations and external review committees with a tool to measure the quality of an individual researcher or a research group. And, finally, ranking may help library managers in determining acquisition policies.

In law, there are some, mostly national, impact initiatives being undertaken. In the US, a list maintained by the Washington and Lee School of Law provides an interesting ranking on several aspects of impact.[33] In Australia, the government has tried to adopt journal excellence schemes by persuading law deans to produce an international law

[33] http://lawlib.wlu.edu/LJ/method.asp (last accessed 19 January 2013).

journal ranking.[34] In the Netherlands and in Belgium, similar attempts have been made, though without much success.

All these attempts often annoy scholars and lead to argument on the pros and cons of ranking journals. It proves to be really difficult for legal scholarship to attune to what has become an internationally accepted scheme in most of the other sciences, even – or maybe in particular – on a national scale. The Australian law professor Dan Svantesson is one of the academics who has categorised some of the available ranking methods.[35] There are several methods being applied for ranking journals: the perceived prominence of the authors (which he labels as 'subjective and parochial', and, since most journals do not do blind reviews, may be self-fulfilling); citation frequency and other user statistics (the number of downloads, think of SSRN); and a survey of how law professors assess the quality of different law journals. All in all, Svantesson sees two possible methods for journal ranking: a purely statistical approach; and the 'wet finger in the wind' approach. Until now, however, neither of these approaches has been successful.

What does *not* help is that many legal academics seem rather dismissive of statistical approaches to the ranking of journals. In itself, their attitude is quite understandable. Although it is hard to believe that no legal scholar has ever wondered how much scientific or societal impact his or her publications may have, some are against measurement almost on principle: they strongly feel that it cannot be done in a proper and fair way. And, indeed, numerous objections have been made to the use of rankings.[36] Measuring quality, or the lack of it, is one of the most heavily debated issues in academia, and, where ranking of legal journals has been attempted on the basis of the 'wet finger in the wind' approach, it has only led to endless discussions. The European Association of Science Editors (EASE), for instance, considers the use of a journal impact factor as a means of measuring the impact of scientific journals, but criticises *the extended use* of measuring the quality of scientific journals: the quality of individual articles and authors, the productivity of individual researchers for academic appointments, the evaluation of grant applications and the

[34] See www.arc.gov.au/era/default.htm (last accessed 21 December 2013).

[35] Dan Jerker B. Svantesson, 'International Ranking of Law Journals – Can It Be Done and at What Cost?', in: *Legal Studies*, 29, 4, 2009, pp. 678 ff.

[36] Rob van Gestel and Jan Vranken, 'Assessing Legal Research: Sense and Nonsense of Peer Review versus Bibliometrics and the Need for a European Approach', in: *German Law Journal*, 12, 3, 2011, pp. 901 ff.

allocation of other financial support for research programmes. In the eyes of EASE: 'the use of the impact factor for purposes for which it was not intended, causes even greater unfairness.'[37]

And they are not the only ones: recent scientific literature warns against 'the unthinking use' of indicators and rankings in research policy applications and evaluations. Danish bibliometric specialist Jesper Schneider emphasises that indicators and rankings are 'cultural constructs', not *natural* objects. Such cultural tools reduce a multidimensional problem to a simple number. Therefore, Schneider and many others argue that it is important that users of indicators and rankings be aware of their underlying assumptions and potential effects: different indicators have strengths and limits, and no indicator alone can express the multidimensional complexities involved in research evaluation.[38] This finding – of quality indicators being applied far outside their original scope or context – is attracting more and more scientific attention from those who study the field of impact measurement.[39] The aim is to shift from descriptive to analytical indicators, from simple counts to complex normalised weighting, and from one-dimensional to multidimensional analysis.

In a study by the Royal Netherlands Academy of Arts and Sciences on quality indicators for research in the humanities, it is observed that a number of objections can be made to the ill-considered use of bibliometric indicators in the humanities. According to the Algra Committee, there is no absolute correspondence between impact and quality; and there are major differences in citation culture between disciplines, between subjects within disciplines, and within language areas (the English-speaking or French-speaking worlds, for example). They all make comparisons between citation scores and impact difficult. There is also a major mismatch between the often lengthy dormant period in most areas of the humanities, maybe two or three years, before the publication makes an impact and the time frame that is generally used

[37] European Association of Science Editors (EASE), *EASE Statement on Inappropriate Use of Impact Factors*, Redruth, UK 2008.

[38] Jesper W. Schneider, 'An Outline of the Bibliometric Indicator Used for Performance-Based Funding of Research Institutions in Norway', in: *European Political Science*, 8, 3, September 2009, pp. 364 ff.

[39] CWTS Research Programme 2012–2015, 'Merit, Expertise and Measurement: Monitoring Knowledge Flows, New Performance Indicators, and Evaluation Cultures in 21st Century Science, Technology and Society', www.cwts.nl/pdf/cwts_research_programme_2012-2015.pdf, 2012.

when calculating bibliometric citation scores.[40] In their report, the Algra Committee present a system of quality indicators based on peer assessment – on a scale running from 1 to 5 – of quality from both the scholarly and societal perspectives: output, the use made of output, and indications of recognition. I think it would be wise for the legal discipline to hook on to this discussion in the humanities. That would require our discipline to more thoroughly analyse its output in different types of publications.

7.3.4 Readership

Sceptical voices raised against measuring impact can be heard in most academic disciplines. First and foremost, for measuring impact one usually needs a large, and therefore international, readership. In many areas of the legal discipline there is no real international forum: its scholarship is largely nationally oriented. All over the world, legal scholars communicate with their home markets in the first place; and publishing for one of these home markets is one of the things for which we are really valued – the link between academia and practice. If you are a Swiss health law scholar, you will probably publish your research papers in probably the only Swiss health law journal there is. Their readership is your readership: the community of Swiss health law scholars *and* health law practitioners. This example holds true for most of us: we tend to publish in the language of our community.

English-language journals *may* seem to provide a much larger forum, but they too are often merely national journals focusing on national communities of readers. In an empirical study by Hong Kong academics in the humanities and the social sciences about regionalisation of research, one of the interviewed academics commented:

> In the UK and US, the local market is large enough to claim to be international, even though most of the articles [published there] in social sciences are basically about research in the local context. It is not a level playing field, indeed there's a kind of hegemony, because of language,

[40] Royal Netherlands Academy of Arts and Sciences (KNAW), *Quality indicators for research in the humanities (Advisory report)*, Amsterdam: KNAW 2011. A final report was published in 2012 (in Dutch). A second KNAW report focuses on the social sciences: Royal Netherlands Academy of Arts and Sciences (KNAW), *Towards a Framework for the Quality Assessment of Social Science Research (Advisory Report)*, Amsterdam: KNAW 2013.

> because of the size, the scale, of the research community. So people have to attach to your research community in order to claim they are internationally significant.[41]

This academic is right. In law, too, most journals are geared towards the national or regional context. The same holds for most common law publications. They, too, are supposed to serve local markets. Only law journals whose focus is on – for example – international, comparative, supranational or transnational law, or on a multidisciplinary area, such as legal history or law and economics, can be the exceptions to the rule.

This local versus international engagement is not a question for the legal discipline only: other disciplines, such as the social sciences and the applied sciences, share this same tension, which can lead to a somewhat split loyalty. From a global perspective, the largely national orientation fragments many other disciplines into countless small communities, with many different languages, cultures and closed access to journals and databases. So, apart from the inherent obstacles to measuring impact either by statistics or the wet-finger approach, the challenge for law, as for the others, lies in formulating a reliable system to provide indications of quality over such a diverse range of disciplines and communities, while fostering its responsibility towards the international, national and regional communities of scholars and practitioners.

7.4 Goodbye to law books?

So far, I have mainly addressed law journals. Legal scholarship, however, has a strong tradition in *book* publishing: scholarly monographs (including many PhD dissertations), textbooks, case books and commentaries in all shapes and sizes. And, although I do not want to go as far as the university librarian (not mine!) who considered books nowadays as 'mainly good for acoustics', I expect journal publications to become the most important medium of legal scholarship in our time. They probably already are.

Let us take the PhD dissertation as an example of a well-known product of legal research. In civil law countries, legal dissertations are considered much more important than they are in the common law countries. In most universities they are a prerequisite for a further

[41] Yongyan Li and John Flowerdew, 'International Engagement versus Local Commitment: Hong Kong Academics in the Humanities and Social Sciences Writing for Publication', in: *Journal of English for Academic Purposes*, 8, 4, December 2009, pp. 279 ff.

academic career, often even for becoming an assistant professor. Dissertations in the legal field have almost always been in the form of books. In the Netherlands alone, more than 100 PhD dissertations are published annually. The size of many PhD dissertations, however, is viewed as a growing problem, particularly in the humanities and in law. In Leiden, therefore, a maximum of 100,000 words (shorter than the length of this book . . .) has been imposed. One of the arguments for imposing such a limit concerns the accessibility of the work and the ability of readers to really evaluate the quality of the content. We should not forget that academic research in law is mostly individualistic research: during the research process there is too often hardly any written exchange of ideas.

PhD candidates publish the results of years of research all in one go. Until the final publication of the book, apart from the supervisor and a few confidants of the author, no one has seen the overall research design, the initial findings or the provisional conclusions. Even the doctoral committee is only assembled once the book is *de facto* finished, shortly before the defence.

Viewed in terms of an open debate, it is questionable whether such practice is wise – especially for young scholars. In the natural and social sciences or in medicine, by the time of the defence, PhD candidates already have a substantial number of papers published; the doctoral degree is awarded mostly on the basis of these articles. So these earlier publications have already played a role in an open scientific debate.

Doctoral degrees based on *articles* can and must become more popular in legal scholarship, especially where it makes sense to publish research results throughout the research process in order to allow for the continuous development and adaptation of theoretical frameworks. The German Wissenschaftsrat mentions not only academic reasons, but also their personal circumstances, when candidates need to look after children or care for elderly family members – where a serialised habilitation would be more suitable to the candidate's circumstances.[42]

As dean, it has always been my feeling that scholarly books should not be published by the youngest of our scholars but by our senior researchers and our emeritus professors. With their long experience, depth of

[42] Wissenschaftsrat, *Prospects of Legal Scholarship in Germany: Current Situation, Analyses, Recommendations*, 2012, p. 48. In Germany, the share of women completing a habilitation in law is significantly lower than in other disciplines (p. 21).

knowledge and overview, one would expect *them* to demonstrate the added value of a visionary monograph; yet most of our senior professors have turned away from monographs, to articles.

Of the two types of publications – books and journal articles – I assume that the latter will have the most lasting impact because they are much easier to consult now and in the long term, especially with the amazing digital search possibilities and access available today. Moreover, journal publications are easier to read, easier to browse and text-mine and are more consistently subject to scientific testing than books. However, today's e-books may come to the rescue.

All this needs some further attention. First, accessibility should not be used as a substitute for quality. The fact that it is more difficult to find access to books electronically does not, of course, justify the elevation of journals. There are still many examples where the advantage of a monograph is apparent.

Second, positive reference should be made to the 'symposium', a book or special journal issue in which a number of authors contribute articles related to the wide-ranging theme of a symposium. Symposium articles, which are often shorter than the usual 'lead article', can be written in a more personal style and possibly with fewer footnotes, and may be less prone to being rewritten by student editors. The 'symposium' is often connected to an event at the law school or a department, and it is a way for the journals of less prestigious schools to attract prestigious authors (and speakers) for the school. In Europe, too, the symposium is popular; sometimes the papers are published in a journal, more often as a separate book. Quality assurance, however, may be questionable because, unless the publisher – or the editorial board of a series – takes care of this, these collections often lack external peer review. Weak publications, which would not make it to peer-reviewed journals, may easily hitch a ride on the good publications.

And, third, this chapter is no song of praise for journals. Our colleagues in the science faculties know better: the waiting times are much too long; the limits placed on the size of publications are too strict; subscribers pay for publications of no importance to them; editorial boards have become too dependent on their external referees; editors belong to an in-crowd; and so on. Costs may also be a problem. Many academic law journals have high subscription rates, especially those published by commercial publishers. And even if the cost of an individual journal subscription is low, the growing number of law journals available worldwide will make subscription costs a problem, *especially* for law

schools in developing or transitional countries. However, initiatives such as PLOS ONE may bring about a change.

Open access does not automatically lead to lower costs: open access is not free. The natural sciences pay around €2,000–€2,500 per article for having it published in open access, which would mean that the Leiden Law School would have to pay around €500,000 for its scientific publications alone (not including the non-scientific professional publications), which is more than the law school's *total* 'information budget'. Because of the ever-increasing pressure on universities and their researchers to publish ('publish or perish'), as well as the increasing number of scientific publications worldwide (China, India, Russia), costs have increased (more publications, more journals). Are we willing to pay for this policy of growth? It is a prisoner's dilemma – my university librarian has given me the choice: either change your policy of ever more publications, or increase your library budget.

7.5 Towards an international community of legal scholars

In 1942, the famous Robert Merton suggested as one of the norms of academic science that universities should be places of 'organised scepticism'.[43] It is my view that law journals as well as academic books should contribute to this mission. The first scholarly journal ever, the *Journal des Sçavans*, was founded by a lawyer, Denis de Sallo, and was first published on 5 January 1665.[44] Because the quality of any academic discipline depends largely on the quality of its publication culture, there should be more international debate about the future of our legal journals and our legal books. Changes should be considered with an open eye to the peculiarities of the legal discipline and to the mistakes being made in other academic fields. The responsibility for change lies with editors and their commercial publishers, with authors and their research institutes, and with university librarians.

7.5.1 Improve access to legal scholarship

In academic research it all starts with access. In 2009, the Durham Statement on Open Access to Legal Scholarship called for American

[43] R. K. Merton, 'The Normative Structure of Science', in: Robert K. Merton: *The Sociology of Science: Theoretical and Empirical Investigations*, Chicago: University of Chicago Press 1942.

[44] B. Houghton, *Scientific Periodicals: Their Historical Development, Characteristics, and Control*, 1975, n. 37.

law schools to end print publication of law journals in a planned and coordinated effort led by the legal community, focusing on ensuring access to and preservation of the electronic journal literature.[45] We can only form a scholarly community if we have national and worldwide access to our colleagues' publications. Of course, language may be a problem as well as culture, but the solution must be to make our research available as widely as possible. Legal scholars, therefore, should insist that journals and the papers they submit be openly accessible, or that authors should be allowed to post their accepted works in institutional or disciplinary open access repositories, such as SSRN, Bepress and other local or disciplinary repositories, including their personal websites. For it is part of their academic duty to have their work posted on the Internet.

Consider also the opportunities offered by the many interconnected reference management tools, such as Mendeley, which I personally work with. These web-based tools not only function as a digital personal library, they also enable you to share papers (PDFs) with colleagues in your area of interest and to start collaborating either publicly or privately. Librarians and others who support the work of legal scholars should actively assist them in using these tools, in helping them to locate open access possibilities, by encouraging them to publish in accessible journals and by informing them about other options.

Overall, the American law reviews – which we have grumbled about earlier in this chapter – are doing better than their European counterparts, probably because of the less commercial (cheaper) settings of their journals. Most of Europe's scholarship requires paid access through university libraries. Those publications are only accessible to researchers affiliated with institutions with the resources to pay for licensed access.[46] The good news, however, is that publishers increasingly allow scholars to include a PDF or a scanned document on their personal website or in one of the open access databases, or at least allow them to post the submitted manuscript.

Over recent years, some universities have made a great effort, but progress still seems to be slow, mainly because of lack of enthusiasm

[45] Richard A. Danner, Kelly Leong and Wayne V. Miller, 'The Durham Statement Two Years Later: Open Access in the Law School Journal Environment', in: *Law Library Journal*, 103, 1, 2011, pp. 39 ff.

[46] See Richard A. Danner, 'Open Access to Legal Scholarship: Dropping the Barriers to Discourse and Dialogue', in: *Journal of International Commercial Law and Technology*, 7, 1, 2011, pp. 65–79, for a number of examples.

and enforcement. We are to blame for that, at least partly. After submitting our papers to the journal, many of us consider the work is done. There are still far too many professors who do not regard it as a scholar's duty to ensure access, whereas *they* of all people, being the supervisors of many scholars, should set a good example by encouraging their younger colleagues to post their works on a regular basis. Many of them even leave the posting and archiving to a student assistant or their secretariat. And even at Duke Law School, which plays an important role in legal open access, although most faculty members provide their new papers for posting without prompting, others do so only in response to regular reminders to make their work available.[47] Is it a matter of age? If so, why, then, are other disciplines so far ahead of us – for instance, arXiv in physics or Math arXiv for the mathematicians?

Richard Danner, from Duke Law School, has given clear advice in his article about the responsibilities of legal scholars, and recommends joint action by scholars, department directors, deans and their staffs, and librarians.[48] They must all work together, locally as well as in their own disciplinary networks, to ensure that journals affiliated with their institutions post their content electronically in compliance with open access standards, and that the content is picked up in search engines such as Google Scholar, and other open access harvesters, such as Archiv.org. Institutional awareness of open access publishing alternatives is essential, as is establishing repositories to improve the visibility of local scholarship.[49]

Open access is also *public* access. In his book, *The Open Access Principle* (2006), John Willinsky argues that it is not only the scholars who benefit:

> The public's right of access to this knowledge is not something that people have to earn. It is grounded in the basic right to know.[50]

This is particularly important for legal scholarship, which, by its nature, is easier for the public to understand and to use than, for example, medical papers. Law schools should foster this audience: in Chapter 8 of this book we will look at the great importance universities attach to 'third mission activities'. In the UK's Research Excellence Framework

[47] *Ibid*., pp. 65 ff.
[48] Richard A. Danner, 'Applying the Access Principle in Law: The Responsibilities of the Legal Scholar', in: *International Journal of Legal Information*, 35, 2007, pp. 355 ff.
[49] *Ibid*., p. 395.
[50] John Willinsky, *The Access Principle: The Case for Open Access to Research and Scholarship*, Cambridge, MA: MIT Press 2006.

(REF), 'societal impact' counts for 20 per cent in the university's overall quality judgment. And let us not forget: 'the public' is larger than your boss or my neighbour. It includes all sorts of interest groups, from civil rights movements to Greenpeace.

7.5.2 Find prudent ways to measure the impact of law journals

Second, researchers involved in cross-border legal scholarship need guidance on both the content and quality of law journals. Measuring impact and ranking journals may provide guidance to readers and authors, especially from other jurisdictions, and may contribute to scholarly progress in the field.

Until now, however, many legal academics have been sceptical of any system for measuring impact or ranking journals by impact. And even in the long run, I do not foresee any global change: it is doubtful that a worldwide ranking of the impact of legal journals will come into being, and even then the use of impact measuring is often problematic. The above-mentioned understandable and appropriate national orientation of many legal scholars forms a major obstacle to journal ranking. Until now many areas in the law have lacked a worldwide community of readers and thus a cross-border forum for communication and debate.

And, on a national scale, measuring impact and ranking journals might be possible if there are enough journals in that particular country and if they are comparable in a meaningful way. The US could be an example, but, everywhere in the world, the legal discipline and its sub-disciplines should at least make their own *national* analysis of their publishing culture. These analyses will lay the foundations for a quality system that suits the discipline in the long run. At least it would be useful for scholars to have a compilation of detailed information about legal journals, including requirements and priorities for articles the journal will publish, acceptance rate, submission procedures, frequency of publication, identity and specialities of editors and others involved in decisions on article acceptance and editing, and subscription/readership details, such as primarily national or international, academic or practitioner, subscription volume, online distribution, and so on.

7.5.3 Accept external peer review as a must

Third, if for law the employment of any form of metrics is not the solution for the near future, high-quality internal and external peer

review is the only alternative. The quality of the journal's editors and its team of external reviewers as well as the editors of series of books is crucial for any scholarship or science. Progress in science and scholarship is peer-driven. An argument one often hears against peer review is: what work will not get done while scholars are taking the time to read manuscripts and prepare thoughtful reviews? This argument, however, does not hold water. What is important is the quality of the discipline as such. The natural sciences and most of the social sciences have understood this much better, which is why in these disciplines being appointed as a reviewer to a top journal is a firm condition for further success in academia's top positions.

7.5.4 Journals should choose a tighter focus

Fourth, to facilitate cross-border dialogue and foster international discourse, the general legal journals must think about their 'focus'. As I have already argued in this chapter, with the increasing specialisation and broadening of legal scholarship, journals must consider taking up certain focal points. General journals are aimed at an audience that is interested in the broader picture. These journals may bring together adjacent disciplines on untrodden paths and may thereby support scientific progress.

However, 'being general' should be a deliberate and substantive choice, instead of the result of mere tradition. It would be to the benefit of our legal discipline if more general law journals started focusing on specific fields of law, instead of cherishing their far too general outlook. Instead, the trend at US law schools has been to add speciality journals to the roster. I do not know of any law school which has converted its general journal into a speciality journal. They add speciality journals according to student interest, not necessarily the needs of the scholarly, judicial or practitioner communities.

Choosing a tighter focus does not mean that all journals have to become *monodisciplinary* periodicals with editors from only one particular field. Scholarly progress often takes place where various disciplines overlap.[51] The focus could well be on two particular areas of

[51] The German Wissenschaftsrat, for example, believes that the strong specialisation of many academic journals is therefore not conducive to internal debate within legal studies. Rather, a comprehensive legal discourse that bridges different disciplines should be promoted. Wissenschaftsrat, *Prospects of Legal Scholarship in Germany: Current Situation, Analyses, Recommendations*, 2012, p. 70.

law or a combination of disciplines, always with an open view to what is happening elsewhere in legal scholarship.

Consequently, editorial boards of more monodisciplinary journals should include one or two representatives from other fields or disciplines. This also makes for a remedy against *groupthink*: in a creeping manner, dominant theories in the field or preferences for certain types of publications or subjects can hamper progress in any given scholarly area. Therefore, journal editors and reviewers should rotate. In the natural sciences this is normal procedure. In a fascinating book, Marjorie Garber, an American literary scholar, writes about the relationship between the 'amateur' and the 'professional'.[52] She believes that as scholars we should tread deliberately on each other's terrain. She advocates 'discipline envy': the passionate desire to say something about someone else's field. Of course, she also advises that 'discipline envy' requires '*disciplined* envy'.

7.5.5 *Every publication needs a communication plan*

Today, science communication has become an important task for universities. Journals such as *New Scientist* and *Scientific American* play an intermediary role by explaining the incomprehensible scientific publications to the general public. Later in this book I will discuss the issue of our societal impact. Authors and their universities want their work to be spread and read and used as widely as possible, in order to have the greatest possible impact. In selecting the appropriate journal or book publisher, they will also examine the performance of the journal or the publisher in this respect. Practical books such as, *Explaining Research – How to Reach Key Audiences to Advance Your Work*, explain how to ensure the research findings reach the relevant audience.[53] This audience consists not only of university colleagues and practitioners, but also of the public at large. Communication with the general public has become an official task for universities and their law schools.

7.5.6 *Distinguish between different types of publications*

All journals have to discuss their aims in terms of academic research or dissemination. What most of them do can roughly be summed up as

[52] Marjorie Garber, *Academic Instincts*, Princeton, NJ: Princeton University Press 2001.
[53] Dennis Meredith, *Explaining Research: How to Reach Key Audiences to Advance Your Work*, Oxford: Oxford University Press 2010.

increasing the body of knowledge, disseminating knowledge and explaining it to legal practitioners. For law journals there are basically three possibilities: journals primarily focusing on the scholarly debate; journals merely focusing on dissemination (notes/annotations and short commentaries); and journals – probably the majority – doing both. The first category of journals will probably, but not necessarily, be more international. They concentrate on what the German Wissenschaftsrat calls 'high quality legal research', marked by its originality, relevance, independence, and, at least in the field of positive law, ability to anticipate future developments in law and case law. The second category – including journals merely intended to inform professional lawyers by disseminating knowledge – will tend to be more national.

The last category, the journals that do both, should clearly distinguish between scholarly papers and contributions aimed at disseminating new developments to *professionals*, and those aimed at the *public at large* by means of popular contributions or even personal opinions (columns, etc.). Journals do not have to do everything, but they have at least to be clear about what they do and for whom.

Books have always been popular in legal scholarship. I expect that to change in favour of journals, but it will definitely not mark the end of law books. Today, scholarly books seem more the domain of the PhD candidates than the professors: I call upon my senior colleagues and professors emeriti, with their broad experience and overview, sometimes even as practising lawyers, to consider writing visionary books more often. And I call on my fellow deans to adequately reward them for the effort required to produce such an important visionary book over many years, rather than pushing them to write a lot of smaller articles. As mentioned earlier, for books, access to the audience may remain a problem. So, *if* the book is published, it requires at least professional attention with regard to marketing and communication, both by the publisher and by the author and his school. Like journal articles, every newly published book also needs its own communication plan.

Chronicles and annual collections of papers, in which the records and reports of a learned field are compiled, are also essential for journals with an academic focus.[54] They can be published in journals, but public international law, for example, has a number of yearbooks as well, containing a mixture of scientific papers, annals and publications of

[54] B. Houghton, *Scientific Periodicals: Their Historical Development, Characteristics, and Control*, 1975, n. 37.

inaccessible source material. In the Netherlands, chronicles are officially regarded as non-academic publications – wrongly, I suggest. They greatly facilitate cross-border research – at least for those researchers reading Dutch.

And the law blogs and columns? They may become a great tool for international scholarly debate, as well as for the debate with society at large, but in itself a blog or a column can never be a formal product of scholarly research. The Scotusblog is an excellent example of a blog that has created an important niche in the dissemination of information.[55]

7.5.7 *Have a view of internationalisation*

In addition to thinking about focus, every academic journal should at least have a view on internationalisation: for instance, is a comparative approach in certain legal disciplines a *condition* for publication or not? To enhance cross-border discourse, some journals could consider setting up a system of 'allied journals' – *preferred partners* – to promote international debate. Publishing twice, once in a national journal and subsequently in a foreign journal, with the author receiving twice the credit for such a publication, seems to me to be quite acceptable for a discipline that serves both a national and an international market.[56]

For legal scholars in Europe, it is considered vital to be able to read several languages other than English.[57] Most scholars, however, have divided themselves into language-bound 'citation communities'. European scholars should be able to compare the law of at least a few neighbouring countries. Doing so would mean they would facilitate international scholarship.

7.5.8 *Develop a worldwide format for journal publications*

Finally, if we want to become a discipline that operates more globally, in addition to our central service to the local markets, we must develop a generally accepted format for our journal articles, including referencing in footnotes and bibliographies. A proper, worldwide academic *exchange* of ideas is hindered by the conflicting formats.

[55] www.scotusblog.com (last accessed 4 January 2013).
[56] See, for biomedical journals, the so-called Vancouver Rules: www.icmje.org (last accessed 21 December 2012).
[57] E.g. Wissenschaftsrat, *Prospects of Legal Scholarship in Germany: Current Situation, Analyses, Recommendations*, 2012, p. 64.

The format for the American law review article, for example, is very different from the form of publication used in most other scientific disciplines and from legal publications in other parts of the world. This would probably be solved with some sort of format-changing computer program. Common formats worldwide would contribute to the improvement of an international scholarly debate through scholars across the world publishing in one another's journals. If such a format for legal articles is to be adopted, I think it should be similar to that of the social sciences. It would make it easier for non-Americans to publish in US law journals, and *vice versa*, which generally speaking is not the case at present. With such a common format worldwide, *joint* publications by scholars from different countries and regions would provide an excellent platform to improve cross-border scholarly debate.

The harder issue is that the style of writing is so different for most US journals compared to, for example, most European journals. As with the style of opinion writing in common law versus civil law courts, it seems that the academic writing style is rather different for scholars from these two traditions. As compared with those in other sciences, legal scholars are still quite reticent in this respect.

Yet, as legal research comes to require more teamwork, joint authorship across the world will become inevitable. Working and publishing together promotes the involvement of colleagues in each other's work and may, in the end, close the gap. I would also venture to say that the quality of publications will also improve as a result.[58] And for the moment, we need not fear such aberrations as those that occur in physics or biology, where articles with more than 100 authors are not uncommon – I once even found one with more than 200[59] – or the medical colleague I mentioned, with an article every three days. Finally, PhD dissertations, too, may function as an important mechanism by which ideas about law and particular legal norms are diffused around the world.[60]

[58] There are many factors involved in this; see, for example, James Hartley, 'Single Authors Are Not Alone: Colleagues Often Help', in: *Journal of Scholarly Publishing*, 34, 2, 2003, whose study of a few psychology journals leads him to conclude that 'single authors' more often enlist assistance from colleagues than 'double authors' do.

[59] See e.g. articles such as Robert H. Waterston *et al.*, 'Initial Sequencing and Comparative Analysis of the Mouse Genome', in: *Nature*, 420, 6915, 5 December 2002, pp. 520 ff, which lists 221 'authors.'

[60] Gail J. Hupper, 'The Academic Doctorate in Law: A Vehicle for Legal Transplants?', in: *Journal of Legal Education*, 58, 3, 2008, pp. 413 ff.

7.6 Conclusions and outlook

Rodell, whose famous rant appeared at the start of this chapter, vowed never again to write an article for a law review. At the request of the journal in which he made this vow, he returned to this subject in 1962. His annoyance was undimmed: 'Ah, [legal] scholarship; ah, nuts.'[61] After more than fifty years, does he still have a point?

In law there are a number of distinct outputs, ranging from scholarly and non-scholarly books, to PhD dissertations, journal articles and chapters in books, annotations and comments, reports, chronicles and book reviews, all of them often targeting a national audience, such as other scholars, legal practice or the general public, but increasingly an international public – both lawyers and academics.

Our discipline would show great wisdom by fostering this diversity of output and its diversity of users. On the other hand, the legal discipline is only one out of many university disciplines and simply cannot duck out of what is developing elsewhere inside and outside the university arena. These developments are just as diverse: open access, quality and impact measurement, internationalisation and its importance for universities, the changing connection with society (our 'third mission', see Chapter 8), the rise of blogs, wikis and reference management tools, and the introduction of other digital newcomers, such as social tagging. Overall, one-third of our scientists and scholars are reported to use LinkedIn and Twitter. Science and scholarship are rapidly transforming into a fascinating variety of digitally networked forms. Too often the distribution and communication of the products of legal scholarship are considered the exclusive responsibility of the publisher. However, making your work widely accessible is, as we have seen, primarily a duty of the scholars themselves. Until we make progress in this area, cross-border scholarly debate will continue to be seriously hampered.

In recent years, the US has made progress in open access to journal publications. Today, many of them are fairly easy to access through law school websites. I assume this development is partly due to the fact that law schools realise that having a journal with a high reputation is an important marketing tool to attract the best students. Elsewhere in the world, university websites are not used to the same extent to link research to education and prospective students.

[61] Fred Rodell, 'Goodbye to Law Reviews – Revisited', in: *Virginia Law Review*, 48, 1962, p. 290.

In terms of digital access to legal research, Europe and countries where commercial publishers are involved lag behind the US. It is still not possible to get a complete survey of all the journals published in Europe or elsewhere, or to search the full text, not even on a commercial basis. Often it is even impossible to find the researchers' *lists* of publications on the web, let alone to get access to the publications themselves. Few law schools provide open access to their publications, although their number is increasing. So one needs to subscribe to the individual journals, travel to law libraries abroad, as we have done over the past centuries, or – much worse – simply ignore the scholarly output that is not easily accessible.

Costs will remain on the agendas of deans. Unless we opt for a policy aiming at *less* output (only the best publications), the increasing number of publications and journals will inescapably cause a further rise in library budgets. Open access does not come without cost. On the contrary, in countries where open access has become more and more the rule, some journal publishers cannot resist the temptation to require universities to pay twice: the author upon admission of the manuscript *and* the user.

I consider some subjects of this chapter as of vital importance to the future of legal scholarship: how to better facilitate cross-border dialogue and foster *international* legal discourse without losing our national commitments, and how to develop a format that is acceptable and of use to scholars and practitioners worldwide. No more, and no less. What makes them challenging is that they involve a number of 'stakeholders': the individual scholars, department chairs, deans and their staffs, increasingly, rectors and university presidents, librarians, journal editors, the legal practice, as well as the publishers. The prudent and comprehensive designs for a system of quality indicators for the humanities and for the social sciences by the Royal Netherlands Academy of Arts and Sciences could be of great help to the legal discipline as well.[62] If we find ways to develop a system that suits our discipline, there will be fewer complaints from outside. By contrast, if we simply continue to *ignore* the signs of our times, we will be on the defensive for years to come. And make no mistake, it is not only the debate between Europe and the common law

[62] Royal Netherlands Academy of Arts and Sciences (KNAW), *Quality Indicators for Research in the Humanities (Advisory Report)*, 2011; Royal Netherlands Academy of Arts and Sciences (KNAW), *Towards a Framework for the Quality Assessment of Social Science Research (Advisory Report)*, 2013.

countries which can be enhanced: the world is much bigger than that. Danner rightly emphasises the importance of improving the visibility of our scholarship in terms of the information flow between the Western world and developing countries.[63] The worldwide networks of scholars as well as open access to our scientific literature also provide unique chances for a 'South–South' exchange in law.[64]

[63] Richard A. Danner, 'Open Access to Legal Scholarship: Dropping the Barriers to Discourse and Dialogue', in: *Journal of International Commercial Law and Technology*, 7, 1, 2011, p. 65.

[64] Leslie Chan, Barbara Kirsop and Subbiah Arunachalam, 'Towards Open and Equitable Access to Research and Knowledge for Development', in: *PLOS Medicine*, 8, 3, March 2011, p. e1001016.

8

Law schools' economic and societal impact

8.1 Legal scholarship: no longer a matter of life and death

In times gone by, in England there was a convention that only the writings of deceased legal scholars could be cited. Today, all publications, whether by deceased or living authors, are consulted and cited by the legal profession and the legislature on a daily basis, all over the world. The impact of legal scholarship is no longer a matter of life and death.

This chapter will address the topic of 'third mission', or '*valorisatie*' as it is called in the Netherlands.[1] How can law schools and their academics contribute to the needs of society? I will address this question from different perspectives: education, the world's great challenges, international 'legal aid', and the perspective of the host city ('town and gown') or region of which law schools are part.

But first we will consider the idea of three different missions: does it make sense to talk about a *third* mission? After all, research among social scientists has shown that 'impact' is a far from unambiguous word; on the contrary, it is a concept that is open to a multitude of interpretations. Some researchers, for example, regard their peer-reviewed articles as having 'impact', whereas others set greater store by societal outreach.[2]

8.2 Do universities have a third mission?

Universities have two primary 'missions': education and research. I have discussed these extensively in previous chapters. Universities deliver scientific papers and scholarly books for the benefit of colleagues and

[1] Many Dutch tend to think that their *valorisatie* can be translated into English as *valorisation*, without realising that in English it has a Marxist definition. For its Dutch meaning, see the Glossary at the end of this book.

[2] Richard Watermeyer, 'Issues in the Articulation of "Impact": The Responses of UK Academics to "Impact" as a New Measure of Research Assessment', in: *Studies in Higher Education*, 39, 2, 2014, pp. 359–77 (published online 30 July 2012).

practitioners on the one hand, and well-educated graduates and PhD candidates on the other. In recent years, the concept of a *third* mission has arisen: the university's engagement with society.[3] The time when universities could take 'society' for granted is long past. In countries where universities are primarily state funded, governments monitor budgets and are anxious that public funds are spent efficiently and effectively and provide good value for money. The idea of having a responsibility beyond colleagues and students, towards the city, the region, and the country where the university is located and even beyond, is nothing new. Newcastle University in Australia, for example, has the motto 'Our Community, Your University'. Younger universities often use the word 'engagement', such as 'Globally connected, locally engaged'. Numerous other examples of such 'engagement' can be given. This does not necessarily mean that the universities of today have noticed something that universities in the past overlooked.

'We don't have a motto', Cambridge Professor Stefan Collini almost boasts, in his aversion to everything that shows any resemblance to business life.[4] But for universities that do have a motto, and some of them have had such a motto for centuries, there is little to feel ashamed of: it is today's societal context that has changed. Business and industry have become increasingly aware of the way society, the public, consumers and shareholders view it, as witnessed, for instance, by the discussions on corporate social responsibility.

Over recent years, we have seen some important developments. One is the growing attention paid to accountability: all organisations in society have to show on a regular basis that they are relevant and that they perform well. Another major change is the economic crisis that is besetting most countries today. Government budgets are tight and will most likely remain so for the coming years, whilst the challenges facing the world today, such as global warming and pollution, energy and food supply, or ageing societies, are considerable. In the area of the social sciences and law, wider issues are manifold, such as the desire for peace, security and freedom, and, more than ever before, a sustainable and fair economic and financial infrastructure. The universities, with their

[3] See e.g. E3M Project, *Green Paper Fostering and Measuring 'Third Mission' in Higher Education Institutions*, Brussels: 2012. Also Arend Zomer and Paul Benneworth, 'The Rise of the University's Third Mission', in: J. Enders, D. F. Westerheijden and H. F. de Boer (eds.), *Reform of Higher Education in Europe*, Dordrecht: Springer 2011.

[4] Stefan Collini, *What Are Universities For?*, 2012, p. 133.

brilliant scientists and scholars, are increasingly required to look for solutions to these kinds of grand, worldwide challenges.

Today, universities are no longer ivory towers, but institutions where outreach, visibility and engagement are the order of the day. The good news stemming from this is, of course, that universities matter – in three different ways, namely, research, teaching and, as a result, their societal impact. But does it make sense to introduce a notion of a third separate mission?

Although I believe that using terms like 'third mission' and 'societal impact' reminds us of our societal context, there is no hard dividing line between our first two missions and the possible third one. The law schools, through their efficient and relatively low-cost education of future lawyers, *do* make a great contribution to society. And in addition, there is the vital role law schools across the world play in the continuing education of practitioners and in other forms of lifelong learning for the profession. Times have changed since law graduates bade farewell to formal education once they had been awarded their first degree. Most jurisdictions have binding rules on continuing education of law practitioners, including judges, attorneys and public notaries. Moreover, the private sector requires its lawyers to maintain their knowledge and skills in accordance with current developments and practice. I remember the time that a brand new Civil Code was enacted in the Netherlands and law schools played a crucial role in training many thousands of law professionals. The Code itself had moreover been drafted in an inspiring interplay between the legislator and academia. I am certain that across the world similar examples can be found. So, is this continuing education part of the first mission, or is it an example of the third mission?

A draft Green Paper on a European project on the third mission, *Fostering and Measuring Third Mission in Higher Education Institutions* (2012), probably has it right: it is not a separate mission, 'but rather a way of doing, or a mind-set for accomplishing, the first two'.[5]

A way of doing, a mind-set – that is why the notion of a third mission may be useful, as a constant reminder that we are funded, hosted and valued by the societies and the communities we live in, and as an acknowledgment that we have a responsibility for helping shape their future. If I had written this book ten years ago, it would probably

[5] E3M Project, *Green Paper Fostering and Measuring 'Third Mission' in Higher Education Institutions*, 2012, para. 1.1.3.

not have included a chapter about the societal impact of what we do. The term 'third mission' is more encompassing than the Dutch term '*valorisatie*' in that the latter has the more restricted meaning of converting scientific and scholarly knowledge into commercially viable products and services. The Green Paper convincingly shows that a university's relationship with society is much broader than simply contributing to economic growth. It also includes the university's social and cultural engagement, such as facilitating public access to museums, concerts and lectures, voluntary work and consultancy by staff and students, and so on – a variety of activities that involve many academic branches of a university, including the law school.[6]

With respect to our own research mission, legal scholarship has as its special forte that its results are not just reserved for the small group of fellow academics, but are shared, often on a one-to-one basis, with practising lawyers. There are few law journals which are read exclusively by *scholars*. Finnish international law expert Martti Koskenniemi therefore described the difference between academics and practitioners as a 'contentious distinction': both practice law – only the context differs.[7] The situation is often different for other sciences. Psychologists and medical doctors, for example, are increasingly less capable of reading the scientific journals of their university colleagues; these journals have become too theoretical and too remote from the daily concerns of practitioners. Whereas societal impact in these fields can take many years, the time frame in legal scholarship is often a matter of days: an article published in a national law review on Friday is read by a legal practitioner on Saturday or Sunday, and incorporated into a legal brief by Monday.

In the following sections, I will highlight three perspectives on third mission activities in addition to examples such as continuing education and the impact of legal research. The first perspective is the notion that universities have a responsibility *vis-à-vis* the world to help resolve grand challenges (section 8.3). The second is one of the strongest examples of the third mission I personally know, capacity-building in developing countries (section 8.4). And the final section will deal with the contribution to challenges made by our immediate communities (section 8.5).

[6] *Ibid.*, para. 1.1.6.

[7] Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (reprint with a new epilogue), Cambridge: Cambridge University Press 2005, pp. 617 ff.

Many (probably too many) examples are taken from my own Leiden experience – these I know best. But I do know, of course, that every law school can provide similar accounts.

8.3 The world's 'grand challenges'

A good example of a region dealing with grand challenges and the role of universities is the European Union. In a changing world, Europe aims to realise a smart, inclusive and sustainable economy. It has set itself ambitious targets in the fields of employment, innovation, education, social inclusion and climate/energy – to be reached by 2020.[8] Within this general framework, all member states have adopted their own national targets in each of these areas. This strategy calls upon scholars and scientists to join in and help Europe achieve these goals. Europe is confronted with a number of complex interrelated socio-economic challenges – such as creating and maintaining growth and jobs, tackling inequalities and migration flows, finding solutions for its ageing society, enhancing the security of its citizens and of the economy, as well as the uptake of security solutions by potential users, and managing globalisation – which require in-depth understanding and comparable pan-European evidence for improved policy-making. The scientific challenge is thus for Europe to understand how and why these changes are taking place, how societies are likely to react and develop policies, technologies and related capabilities that can sustain the key objectives of inclusiveness, innovation and security, and how policy learning across Europe can improve.

For the period 2014–20, Europe has agreed on a sum of €70 billion for research and innovation. 'Horizon 2020', which implements the 'Europe 2020' strategy, has a strong economic focus. This focus is mirrored in Dutch politics, for instance, where so-called 'top sectors' are high on the government's agenda: life sciences, high-tech materials and systems, agro-food, water, energy, horticulture, the chemical industry, the creative industry and logistics. Within these top sectors, collaboration is envisaged and stimulated between knowledge institutions, business, and government – the so-called 'golden triangle'.

One could recall C. P. Snow fifty years ago asking which of the sciences truly contributes to the solution of the great questions that

[8] European Commission, 'Europe 2020: A European Strategy for Smart, Sustainable and Inclusive Growth', COM(2010) 2020, Brussels: 2010.

face Europe and the world.[9] Such questions often tend to have a highly technological and medico-scientific bias. For law schools, this development poses a difficult challenge. At most, the Dutch agenda mentions legal scholarship implicitly, within the context of 'social sciences and humanities'.[10] Yet the legal discipline is crucial because of its importance in both providing and analysing the necessary legal framework for all these challenges.

Where and how does the law home in on these grand challenges? Can ordinary private law, administrative law or criminal law academics contribute? My answer is: 'Perfectly well'. They *are* already contributing, but they should be more explicit and more enthusiastic and proud of their contribution. The rule of law, regulation, supervision, settling disputes, security and civil rights, consumer protection, food safety, or the unequal distribution of wealth between rich and poor, are all subjects that are at the very heart of law schools. They are certainly not only national or global issues, but they affect local communities too: 'Urbi et Orbi'. The recent 'Microjustice4All' initiative is an example, providing an umbrella for a variety of local initiatives that provide basic legal services to the poorest people around the world.[11] While resolving the grand challenges of society is not for law alone, law is an indispensable element of such resolution.[12]

And just think of what law schools can do via 'massive open online courses' (MOOCs),[13] for instance in areas of the world where women's and children's rights are violated on a daily basis, to help local groups and authorities deal with the evil of the violation of human rights. On its blog, Coursera, one of the most successful MOOC platforms, claims that already 40 per cent of their students are from developing countries. Coursera is therefore teaming up with the World Bank. Starting in January 2014, they announce their intention to 'democratise access to knowledge critical for global development and poverty alleviation', while

[9] C. P. Snow, *The Two Cultures*, Cambridge: Cambridge University Press 1959. See Chapter 3.

[10] Ministerie van Onderwijs Cultuur en Wetenschap, *Kwaliteit in verscheidenheid. Strategische Agenda Hoger Onderwijs, Onderzoek en Wetenschap*, The Hague: 2011 (in Dutch).

[11] http://microjustice.org (last accessed 29 December 2013).

[12] For the legal discipline, LERU's advice paper (covering the humanities and the social sciences) is exceptionally inspiring: Wim van der Doel (Chair), *The Future of the Social Sciences and Humanities in Europe: Collected LERU Papers on the SSH Research Agenda*, Leuven: LERU 2013.

[13] See Chapter 5.

exploring the possibilities of using technology to address challenges in developing countries.[14]

There is another excellent example of the societal impact of legal education and research in the role law schools play in helping developing or transitioning countries. There is strong scholarship pointing to the importance of law for economic development.[15] There is even a so-called 'legal-origins thesis' claiming that the economic performance of a country is largely the result of that country's legal system, and, more importantly, that legal origin impacts economic growth and that the common law is better for economic growth than civil law.[16]

Law schools and the legal profession are well equipped to assist countries in transition and to assist post-conflict countries to establish the rule of law. Legal capacity-building is extremely valuable to the recipient country in terms of the benefits a good functioning, fair, transparent and integral judiciary can bring. It is the basis for trade, industry and prosperity.

It is also valuable to the donor country in that it helps create new opportunities for international trade relations, and so on, and contributes to helping the donor country fulfil its commitments in contribution to the global 'grand challenges'. From my own experience I would like to tell the story of Albania in its search for a new civil code. The story is set against the backdrop of the theory of legal transplants, also to show that third mission activities are both deeply rooted in and lead to fundamental research.

8.4 International legal cooperation: the example of Albania

Flying out to Albania in 1992, I found myself in the company of politicians, engineers, American lawyers, trade union leaders, salesmen,

[14] http://blog.coursera.org/post/64164078376.

[15] *Does Law Matter? On Law and Economic Growth*, Cambridge, Antwerp and Portland, OR: Intersentia 2011. This book addresses the importance of institutions in economic development and in particular the role of law for economic growth: see Introduction by the editors, pp. 1 ff.

[16] For a critical introduction, see Ralf Michaels, 'Comparative Law by Numbers – Legal Origins Thesis, Doing Business Reports, and the Silence of Traditional Comparative Law', in: *American Journal of Comparative Law*, 57, 2009, pp. 765 ff; and Ralf Michaels, 'The Functionalism of Legal Origins', in: Michael Faure and Jan Smits (eds.), *Does Law Matter? On Law and Economic Growth*, Cambridge, Antwerp and Portland, OR: Intersentia 2011.

agriculturalists, captains of industry, government representatives, bailiffs, human rights activists and teachers. Like many other transitional countries in the 1990s, Albania was inundated with consultants – almost to saturation level. At first glance, this influx of well-meaning experts did not seem to help much. Although a part of Europe, Albania was one of the world's poorest countries. It seemed to be the general sentiment that in order to help put Albania's economy on its feet, economists were required. Everyone in Albania talked about foreign investment, and political parties from all sides were enthusiastically favouring free enterprise.

However, few foreign investors came to Albania. Institutions such as the European Union and the World Bank increasingly saw the importance of a well-functioning legal order. After all, what benefit are economists to a country if there is no adequate legal infrastructure, no reliable register of real estate and land, no contract or property law, no law of securities, or no enforceable criminal law? It seems logical that resources can be efficiently allocated, business risks rationally assessed and the transactional costs minimised only in a stable and predictable legal environment, or in a strictly authoritarian state. The inability to enforce private contracts, for instance, hinders the efficiency of economic discourse and thus has a negative impact on the economic development of a country in transition.[17]

In the late twentieth century, due to the break-up of the communist bloc, many Eastern European countries were in great need of a new civil code, if only to attract those elusive 'foreign investors'. In small countries such as Albania, there were only a handful of legislators at the Ministry of Justice, in Tirana; the legislators were expected to compensate for approximately fifty years of inactivity, as the ministry had more or less been abolished under the communist regime. As a result, I was asked to offer assistance to help draft a new civil code, hence my flight to Albania.[18]

[17] This is not to deny the existence of many informal and semi-formal mechanisms that may serve this purpose in the absence of either a working state legal system or an authoritarian regime. For instance, for land law, see Jan Michiel Otto, 'Rule of Law Promotion, Land Tenure and Poverty Alleviation: Questioning the Assumptions of Hernando de Soto', in: *Hague Journal on the Rule of Law*, 1, 1, 10 March 2009, pp. 173 ff.

[18] C. J. J. M. Stolker, 'Drafting a New Civil Code for Albania. Some Personal Experiences Contrasted with the World Bank's "Initial Lessons"', in: *Internationale Juristenvereinigung Osnabrück*, 6, 1997, pp. 29 ff.

8.4.1 Why not just copy a code?

My first idea was to copy another country's code. From law school I remembered some famous examples: for Japan and China, Germany's civil code had served as a template, Turkey and Greece had adopted the Swiss Code of Obligations and some parts of the German Civil Code. So why not just copy the then 'fresh off the press' new Dutch Civil Code (1992), or the Italian Codice Civile (1942) or the German Bürgerliches Gesetzbuch (BGB) (1900)? Why attempt to reinvent the wheel?

However, can legal reform simply be modelled on another country's codes and experiences? This question is still heavily debated among scholars from around the world. Educated in Leiden as a relatively nationally oriented jurist, with limited comparative knowledge of a few Western civil and common law countries, I had never been aware of how fascinating the whole subject of international legal cooperation is.

In 1974, Alan Watson, in his famous book, *Legal Transplants* (1974), had argued that legal rules, norms and systems can be successfully borrowed even where the circumstances of the host or recipient are different from those of the donor.[19] Watson, one of the most distinguished comparative legal scholars of his time, believed that law does indeed possess a life and vitality of its own, without there necessarily being a clear relationship between law and society. However, the liberal approach of Watson was rejected by other famous scholars such as Pierre Legrand,[20] Otto Kahn-Freund,[21] and Robert and Ann Seidman.[22] They all found it difficult to accept that national characteristics play no part in the transferability of legislative solutions and institutions. In their view, law is embedded holistically in the local culture, making assimilation of foreign ideas problematic. In 1972, Robert Seidman had already argued that such projects cannot and should not be carried out without making a careful estimate of the probable consequences of a proposed legislative programme in all its ramifications: its costs and benefits with respect to social organisation, the cost of enforcement, the effect of sanctions, the

[19] Alan Watson, *Legal Transplants: An Approach to Comparative Law*, Charlottesville, VA: University Press of Virginia 1974.

[20] Pierre Legrand, 'The Impossibility of "Legal Transplants"', in: *Maastricht Journal of European and Comparative Law*, 4, 2, 1997, pp. 111 ff.

[21] O. Kahn-Freund, 'On Uses and Misuses of Comparative Law', in: *Modern Law Review*, 27, 1, 1974, pp. 1 ff.

[22] Ann Willcox Seidman, Robert B. Seidman and Thomas W. Waelde, *Making Development Work: Legislative Reform for Institutional Transformation and Good Governance*, The Hague and Boston: Kluwer Law International 1999.

probable nature of citizen reaction, the extent of probable noncompliance, and latent consequences of all sorts.[23] He proposed a new approach to law reform by seeing such ventures as 'social problem-solving projects'.

This fundamental debate has been discussed by William Twining in his Tilburg–Warwick lecture series (2002),[24] by Gail Edwards when discussing legal transplants in a number of other countries, including Jamaica, Kenya and the Philippines (2007),[25] by Cuong Nguyen, testing in her dissertation the key claims in competing legal transplantation theories on the introduction of new Vietnamese consumer law,[26] and by many others. The two opposing 'Transplant Theories' (Watson v. Legrand/Kahn-Freund/Seidman) are still the subject of much scholarly debate, although it is now widely acknowledged that the contrast has often been exaggerated.

Twining speaks of a 'deeply unsatisfying debate', in which the only differences are ones of emphasis; borrowing is important, mentality is important and context and culture are important. In the Netherlands, which has been rather active in this field, we preferred to speak of 'legal cooperation' instead of 'transplanting' laws or legal concepts, not only out of respect for cultural differences, but also because the enterprise of legal cooperation with transitioning countries can so easily be based on pure national economic interests and donor selfishness. Indonesia, which has a civil law tradition, is an example of a country where notably the US has promoted its own financial law system in order to facilitate its national businesses and economic interests. In other areas, such as family law or criminal law, the discussion may be less economic and more value- and tradition-driven. What is always important, I believe, is a mutual feeling of cooperation, where lessons can be learned from both sides.

[23] Robert B. Seidman, 'Law and Development: A General Model', in: *Law and Society Review*, 6, 1972, p. 338.

[24] William Twining, 'Lecture IV: Generalizing about Law: The Case of Legal Transplants', in: *The Tilburg–Warwick Lectures*, 2000.

[25] Gail Edwards, 'Legal Transplants and Economics: World Bank and Third World Economies in the 1980s – A Case Study of Jamaica, the Republic of Kenya and the Philippines', in: *European Journal of Law Reform*, 9, 2, 2007, pp. 1 ff.

[26] Cuong Nguyen, *The Drafting of Vietnam's Consumer Protection Law: An Analysis from Legal Transplantation Theories* (Dissertation), Victoria: University of Victoria 2011. See also Helen Xanthaki, 'On Transferability of Legislative Solutions: The Functionality Test', in: William Dale, Constantine A. Stephanou and Helen Xanthaki (eds.), *Drafting Legislation: a Modern Approach*, Aldershot: Ashgate 2005.

Many other factors play a role in legal cooperation: the size of the importing country and its political power, for instance. Ownership of reform and 'authorship' are key issues, and in the country itself one needs receptiveness, and a willingness to receive advice and to act upon it. Each country has to make its own fundamental choices about the direction of its legal system, guided by the legal ethos as well as the social, religious, cultural and geographical characteristics and historical traditions of the country. It is important for the success of legal reform that the importing country, sometimes even the local authorities, prioritise their reform needs. However, there is no guarantee of success. Legal reform is more often than not a matter of contestation within these countries themselves, between the state, the business community and civil society. Thus, legal cooperation is intrinsically a political activity with winners and losers, and 'donors' should be well aware of this. And effective legal cooperation requires long-term involvement and thorough knowledge of both the law and political constraints.

Another example of the impact of legal scholarship is the development of the environmental laws in Indonesia, where the drafters of new legislation explicitly stated that they had been able to avoid the trap of 'wholesale copying' of environmental laws from any one country. Rather, they explored legal systems worldwide and selected and adapted various items to suit Indonesia's ecological and political-economic conditions. The 'project' involved Canadian experts, who stayed in Indonesia for protracted periods of time, Indonesians who studied environmental law in Canada and the Netherlands, and Dutch scholars who could speak and read Indonesian fluently and accommodated the process by their research and support of exchanging information. One of the researchers involved, Adriaan Bedner, later referred to the process as 'amalgamation' rather than 'transplantation'.[27] As a conclusion, we may say that copying a code is usually not enough, and that this is one of the important reasons for the often-heard lamentations about the ineffectiveness of rule of law development.[28]

[27] A. W. Bedner, 'Amalgamating Environmental Law in Indonesia. Some General Notes on the Transferability of Environmental Law', in: J. M. Otto, J. Arnscheidt and B. Rooij (eds.), *Lawmaking in Developing Countries*, Amsterdam: Amsterdam University Press 2008, pp. 171 ff.

[28] A recent example being Brian Z. Tamanaha, 'The Primacy of Society and the Failures of Law and Development', in: *Cornell International Law Journal*, 44, 2011, pp. 209 ff.

Yet it is important to realise that in many societies the legal culture – as an instrument for conflict resolution and social regulation – is so far removed from the general population and their problems that in a way it scarcely matters what is in the statute books. In practice, then, the law is merely an instrument for exercising power. Many governments and countries have so little notion of what they actually need now, that local production is often a matter of transplantation. This is not surprising since local legal professionals have learned the law at university according to norms transplanted from the nineteenth century. Most of the world's pieces of legislation appear very similar.

A much greater problem therefore is not the text of the law, but how it is implemented and the skills and level of organisation that are needed to enable rules and organisations to function. It is consequently an indication of a degree of wisdom when legal cooperation is interpreted more broadly than purely in terms of making new laws. Incidentally, this is nothing new: as early as the nineteenth century, large parts of the world had transplantations of the law from the Napoleonic Code or English common law including the countries from the former Soviet Union and the former Yugoslavia, as well as the former colonies of Latin America, Africa and Asia. And the loan constructions adopted by Japan and China for their legislation at the start of the twentieth century are poles apart – in terms of how the law is applied – from the countries from which they borrowed the legislation.

It is interesting to note that the debate on a possible third mission is also taking place in countries that are still undergoing socio-economic development, even though the term is sometimes interpreted completely differently. In Latin America, for example, universities are often accused of being elitist: 'fellows that put internationally competitive research first, regardless of its relevance for the country'.[29] This attitude is a supposed effect of the academic reward system, 'where publishing in international refereed journals is considered the hallmark of scientific soundness'.[30] And this accusation is not restricted to Latin America: I have heard it often enough in my own country. But the desire for research and

[29] Rodrigo Arocena and Judith Sutz, 'Changing Knowledge Production and Latin American Universities', in: *Research Policy*, 30, 8, October 2001, p. 1229.

[30] Rodrigo Arocena and Judith Sutz, 'Uruguay: Higher Education, National System of Innovation, and Economic Development in a Small Peripheral Country', in: Bo Göransson and Claes Brundenius (eds.), *Universities in Transition: The Changing Role and Challenges for Academic Institutions*, New York: Springer 2011, pp. 91 ff.

teaching that closely reflect concrete national needs is particularly understandable in countries that are still in a process of development – economic, social, political or human rights development.

8.4.2 'Buy yourself a judge!'

Advising other countries in law-making is one thing, but in international legal cooperation there is much more to be done. Introducing the rule of law and enforcing it needs an appropriate infrastructure. To mention only a few crucial aspects of what that infrastructure should entail: the removal of possible barriers in access to justice ('A2J') such as inordinate delays in legal proceedings; excessive costs associated with pursuing legal claims and the lack of alternative dispute resolution mechanisms; training for judges and other practising lawyers; improvement of court administration and case management; reduction of corruption and the raising of ethical standards in the judiciary and the legal profession at large; adequate financial resources to ensure a proper judiciary; de-politicisation of the judicial branch, especially with respect to selection and promotion of judges; modernisation of the many procedural codes; the establishment of a professional bar and licensing; and different forms of alternative dispute resolution.

'Why hire a lawyer if you can buy a judge?' used to be a popular slogan in Kenya for many years. There is much more to legal reform than assisting in the drafting of a new law. In a trusted environment of cooperation, it requires an almost holistic approach by the total legal infrastructure of a country in its socio-political context. This includes the education of young lawyers and the continuing education of practising lawyers. A good example of the size and complexity of such a post-conflict project is the EU Rule of Law Mission in Kosovo, Albania's neighbour. Kosovo is a highly polarised country that suffered from long-lasting tensions and serious violence between the Serbian and Albanian communities. It is the mission's aim to assist the Kosovo authorities in the rule of law area, specifically in the police, judiciary and customs areas.[31] But it also supports the law school of the University of Pristina by setting up moot courts, for example. Legal education constitutes a vital structural element in rule of law reform that is not always sufficiently acknowledged. An even more recent example of

[31] www.eulex-kosovo.eu/en/front (last accessed 21 November 2012); Maria Derks and Megan Price, *The EU and Rule of Law Reform in Kosovo*, The Hague: 2010.

international rule of law and justice assistance is a study on the fragile state of Libya after the Gaddafi regime, by a group of researchers, also including the Dean of the Benghazi Law School, and presented on the occasion of the celebration of the 100th anniversary of the Peace Palace in The Hague.[32]

8.4.3 *The impact of legal cooperation on the law schools*

Why this somewhat extensive story about Albania, other law reform projects, their do's and don'ts, and the pros and cons of legal transplants? I wanted to tell this in the context of a chapter about law schools' third mission. Over the past forty years, there have been thousands of projects that demonstrate how legal academics have contributed to international legal aid, often on a voluntary basis and in addition to their teaching and research.

Many of these projects are closely related to local law schools, their education and research. They range from China to Kenya, from the Philippines to Poland, and from Mongolia to Indonesia. An example in the latter two countries involves a project aimed at promoting the principles of human rights and good governance by helping to develop a new law curriculum both for students and for practitioners in these countries. This project integrates the teaching in both areas and aims at the gradual development of new generations of state officials and professionals able to apply these principles at an institutional level, thus contributing to a more engaged citizenship.[33]

Another example regarding Indonesia is the 'Building Blocks for the Rule of Law' project, a *teach-the-teacher* initiative by the Leiden Law School, the University of Groningen and Universitas Indonesia. The aim of this project has been to contribute to the improvement and quality of the Indonesian legal and socio-legal education system by strengthening the teaching and research capacity of Indonesian law schools.[34] Outcomes of the project have been new textbooks, suggestions for teaching pedagogy, and also the establishment of scholarly associations in the field

[32] *Searching for Justice in Post-Gaddafi Libya: A Socio-Legal Exploration of People's Concerns and Institutional Responses at Home and From Abroad*, Leiden: Van Vollenhoven Institute, Leiden University 2013.

[33] The Good Governance and Human Rights Education in Mongolia and Indonesia Project (HUGO), a project taken up by the Asian-link programme.

[34] http://law.leiden.edu/organisation/metajuridica/vvi/research/completed-projects/building-blocks-for-the-rule-of-law-project.html (last accessed 22 September 2013).

of labour law and socio-legal studies. A somewhat similar but equally stimulating initiative emerged at Stanford Law School: the Afghanistan Legal Education Project. This is a student-led initiative to produce legal textbooks and a legal curriculum focused on Afghanistan's current laws, with the aim of contributing to the effort to rebuild the country's institutions.[35]

Another example is the programme the T. M. C. Asser Instituut in The Hague has developed in collaboration with the Special Tribunal for Lebanon. The Institute has compiled a series of fourteen to sixteen lectures on international law and procedure. Many law schools in Lebanon are happy to incorporate this subject into their law school curriculum as they do not have the staff and the knowledge in-house. Every other week, lecturers and practitioners come to the Institute and deliver a specific lecture. Via live streaming and with translation, this material is transmitted to Beirut where some 100 students from the eight universities gather to listen and learn. Each session is followed by a live Q&A session. There are numerous other examples of law schools around the world and their academic staff being active in transitional and developing countries. Without exaggeration, networks of law schools play a crucial role in helping establish the rule of law in the world.

Many projects are also fine examples of legal academics working together with legal *practitioners*, both in their home countries and abroad. For example, in the case of a new civil code for Russia, the Leiden Institute for Eastern European law and Russian Studies worked closely together with some of the brightest Dutch law-makers, as well as some Supreme Court justices. Academia, legislature and judiciary melded nicely into one another.[36] Moreover, these legal aid projects brought law schools together from across the world. In the Mongolia–Indonesia project law schools from five very different countries combined their efforts: Utrecht, Belfast, Vilnius, Ulaanbaatar and Jakarta, giving a boost to international collaboration among law schools.

[35] www.alep.stanford.edu (last accessed 15 July 2013).

[36] W. Snijders, 'Lessons from St Petersburg: Commerce and Civil Law', in: *Review of Central and East European Law*, 34, 2, 1 May 2009, pp. 107 ff; Wouter Snijders, 'The Russian Experience: A Dutch Perspective on Legislative Collaboration', in: J. Arnscheidt, B. van Rooij and J. M. Otto (eds.), *Lawmaking for Development: Explorations into the Theory and Practice of International Legislative Projects*, Leiden: Leiden University Press 2008, pp. 245 ff; F. J. M. Feldbrugge, 'The Codification Process of Russian Civil Law', in: *Lawmaking for Development: Explorations into the Theory and Practice of International Legislative Projects*, Leiden: Leiden University Press 2008, pp. 231 ff.

Such projects often also have an impact on academic *research*. Working on comparative projects broadens the academic views of those involved in the most literal sense of the word. Ideas and concepts that had always been self-evident (such as the rule of law, or freedom of speech, or equality) are shown in a very different light. This in turn stimulates the comparative study of the law, which has gained new dynamics. Legal cooperation often crosses the geographic and cultural borders of the traditional 'legal families'. The well-known comparative lawyer Gianmaria Ajani, currently the Rector of the University of Turin, notes that major distinctions among civil law systems, such as the French and the German, have become blurred as a result, but that the same applies to the boundaries between civil and common law systems. Ajani concludes that the influence of foreign models and their reception by – in this case – the legislators of old and new post-socialist states 'has reached dimensions never before seen'.[37] Moreover, these projects in Asia and Africa have often strongly stimulated the academic study of the triangle: law, good governance and development.

Coming back to students again, these legal cooperation projects have also had a broad impact on legal education, because legal reform always has to be followed up by educating and training students and legal practitioners. For the Albanian students studying abroad, it turned out to be crucial in their education as lawyers and, at the same time, stimulated the implementation of the local legal reforms. Only few Albanian students had ever been abroad, although their ability to speak foreign languages was often remarkable, and these projects provided them with a breath of fresh air and some open windows to Western societies. Indonesia and China have embarked on massive programmes of sending their legal scholars abroad for training and education, both to common law and to civil law countries.

Students from the participating Western law schools, unfortunately, seem to draw less benefit from these exchanges with their counterparts from transitioning and developing countries. For Western law students in a globalising world, the example of Albania and, therefore, the significance of the concept of the rule of law in the real world should be something they should never forget in their practising lives, as was the case for me. For many law school students, however, the whole concept of the rule of law often remains a merely theoretical discussion,

[37] Gianmaria Ajani, 'By Chance and Prestige: Legal Transplants in Russia and Eastern Europe', in: *American Journal of Comparative Law*, 43, 1995, pp. 93 ff.

in contrast to Albanian students from universities and schools who at that time easily faced eight years in prison for merely making an unfortunate remark.

Student mobility, especially between developing and developed countries, offers law schools on both sides an unrivalled opportunity to teach law students the significance of law and its value for a society. The stories of our Albanian students and many, many others should continue to be heard in law school classrooms everywhere.

8.5 Law and the city: the local impact of law schools

From the world's grand challenges to the challenge of appeasing and contributing to the *cities* that host us: there is increasing pressure on universities to combine an emphasis on global research excellence with a visible and tangible contribution to the development of their host cities' reputations, local economies and communities. From being institutions that traditionally primarily served the purely academic goals of teaching and research (appearing remote and aloof and self-serving in the eyes of the community) without any visible connection to the region of which they are part, universities nowadays are increasingly expected to engage with others in the city or the region.

Universities are not extra-terrestrial entities. Rather, they are rooted in a specific city and region. In 2007, in a conference in Lund, the pleasing word 'Univer-City' was coined.[38] Looking at the Netherlands and its university landscape, Leiden University is located in the so-called Randstad, the large conurbation in the western part of the Netherlands together with five other universities: two in Amsterdam, and one each in Utrecht, Rotterdam and Delft with its prestigious university of technology. Curiously enough, the seat of the Dutch government, The Hague, is without a research university. It is the residence of the Parliament and of the King as the head of state.

In addition, The Hague houses a number of Dutch courts, among them the Dutch Supreme Court. Moreover, over the past century an

[38] Bo Larsson, *Univer-City: The Old Middle-Sized European Academic Town as Framework of the Global Society of Science – Challenges and Possibilities*, Lund: Sekel Bokförlag 2008. See also Anthony S. C. Teo, *Univer-Cities: Strategic Implications for Asia: Readings from Cambridge and Berkeley to Singapore*, Hackensack, NJ: World Scientific Publishing 2013, with seven strategic implications for Asia.

impressive number of international courts and legal organisations have settled there, such as the International Court of Justice and the Permanent Court of Arbitration (both based in the Peace Palace), the International Criminal Court, as well as a number of specialised courts, for example the International Tribunal for the Former Yugoslavia, the Iran–United States Claims Tribunal, and specialised courts for Sierra Leone and Lebanon. Among the many legal organisations are The Hague Conference on Private International Law, important for its worldwide unification of rules of private international law, as well as established academic institutions such as the T. M. C. Asser Instituut,[39] and promising newcomers, such as The Hague Institute of Global Justice and The Hague Institute for the Internationalisation of Law. The Hague has thus become 'The City of International Peace, Justice and Security', which is the effect of a very powerful focus on international law, in the broadest sense, by the city council and its successive mayors.

Amsterdam, the country's capital, can be characterised as a global city with an important financial centre and related high-end producer services including most of the country's big law firms, as well as the headquarters of many multinational companies, such as Philips and Ahold. One out of every eight attorneys in the Netherlands works in Amsterdam. Rotterdam is one of the world's main ports; the city has a strong university with a focus on law, economics, business and medicine, and is pleased to have many port-related companies within its borders. The city of Utrecht is in the very geographical centre of the country; it has a number of mostly regionally operating law firms, and a large district court, as well as one of the finest universities of the Netherlands.

Leiden, a medium-sized and pretty university town, is quite centrally located in the Randstad and, as a result, within easy commuting distance of these four large cities. Its university dates back to 1575 and is the oldest in the country. It has three medium-sized law firms, and the district court is a branch of the court in The Hague. Therefore, for Leiden's mayor, the university, including its academic hospital and the exciting Leiden Bioscience Park as well as the beautiful historic city, are of paramount importance. I will first briefly address the importance of a university for an urban area, and then move on to the even more interesting question of the specific significance of a law school.

[39] See Chapter 3.

8.5.1 *'The creative city'*

Let us start with the university as a creative hub for its region. Universities are people-intensive types of organisations: in the first place you need academics and supporting staff to operate a university. Such a highly educated and fairly well paid staff costs and spends money. Universities also need students and PhD candidates. They, too, typically live in the city or its region and contribute to the city's economy and prosperity.[40] Other sources of economic impact are even more important: the goods and services associated with research and education, impacts associated with industrial investment connected to research, such as a science park,[41] impacts associated with the output from research activity, such as benefits of licensing and the impact of spin-off and start-up companies, as well as tourism impacts, including family and friends visiting students and staff, as well as graduates returning to their former university, and conferences and other events hosted in the city and its region. Research shows that Leiden University and its medical hospital support more than 38,000 jobs: 20,000 in Leiden, an additional 9,000 in the region and another 9,000 elsewhere in the country.[42] Investing in education, research and health care is very profitable in financial terms, with a multiplier of 3.9; for every euro invested, the return is almost four euros, and for every job directly supported in Leiden University and the hospital an additional 3.6 jobs are supported in the wider Netherlands economy.

However, as we have seen earlier in this chapter, it is not only the economy that matters. Since Charles Landry's book, *The Creative City*, appeared in 2000, a new planning paradigm has emerged for cities all over the world.[43] Globally, more than half of all people live in cities nowadays, and their number is steadily growing. The concept suggests

[40] OECD, *Higher Education and Regions: Globally Competitive, Locally Engaged*, 2007. On environmental aspects see e.g. David Charles, 'The Role of Universities in Building Knowledge Cities in Australia', in: *Built Environment*, 37, 3, 2011, pp. 281 ff.

[41] Prasada Reddy, 'The Evolving Role of Universities in Economic Development: The Case of University–Industry Linkages', in: Bo Göransson and Claes Brundenius (eds.), *Universities in Transition: The Changing Role and Challenges for Academic Institutions*, New York: Springer 2011.

[42] BiGGAR Economics, *Economic Impact of Leiden University and Leiden University Medical Center: A Report to Leiden University and Leiden University Medical Center*, Biggar (Scotland): BiGGAR 2012.

[43] Charles Landry, *The Creative City: A Toolkit for Urban Innovators*, London: Earthscan Publications 2000.

that conditions need to be created for people to think and to act with imagination in addressing urban problems. These problems might range from addressing homelessness and other social needs in deprived areas, and health issues, to creating wealth or enhancing the visual environment of the city. Its assumption is that ordinary people can make the extraordinary happen if given the chance. Creativity is seen as 'applied imagination'.

This concept of a creative city, with openness, accessibility, diversity, tolerance, vitality and innovation as important factors, was strongly supported by another book, in 2001, John Howkins' *The Creative Economy*, on how ideas are transformed into money and prosperity.[44] We have seen some examples of this above.

In 2002, a third book appeared, *The Rise of the Creative Class*, by Richard Florida.[45] This book, which turned out to be an academic best-seller, describes the creative class in the US as comprising 40 million workers – 30 per cent of the US workforce – and breaks the class into two broad sections. The 'super-creative core': this group comprises about 12 per cent of all US jobs. It includes a wide range of occupations, for example science, engineering, education, computer programming, research, with arts, design and media workers forming a small subset. He considers that those belonging to this group 'fully engage in the creative process'.[46]

The second group comprises the 'creative professionals': they are the classic 'knowledge-based workers', and include those working in health care, business and finance, the legal sector and education. Richard Florida's underlying thinking is that competing on price only – given the enormous availability of cheap labour in China and elsewhere – is a dead end, and that quality must be the competitive advantage. He does not narrow this quality down to technological quality, but has a much broader concept. This quality must be reproduced time and again, which requires creativity – and quality is elusive in that it is the perception of quality by the recipient that determines the success of the product.

[44] John Howkins, *The Creative Economy: How People Make Money From Ideas*, London: Penguin 2007.

[45] Richard Florida, *The Rise of the Creative Class: And How It's Transforming Work, Leisure, Community and Everyday Life*, New York: Basic Books 2002 (a second edition was published in 2012).

[46] Richard Florida, *The Rise of the Creative Class: And How It's Transforming Work, Leisure, Community and Everyday Life*, 2002, p. 69.

While universities, especially the research universities, are key (if not *the* key) hubs of the creative economy, Richard Florida emphasises the multifaceted role they play. Three interrelated roles are to be distinguished, 'the three T's of creative communities: Technology, universities as centres for cutting-edge research; Talent, universities as amazingly effective talent magnets; and Tolerance, universities fostering a progressive, open people climate.'[47]

As far as Richard Florida is concerned, creativity is embodied by the creative class: they are the source of potentially new ideas. By attracting this group, a city will be able to achieve a strong competitive position. Where Landry uses creativity as a potential instrument for solving urban problems, for Florida, creativity is an essential weapon in the global struggle for a competitive edge. This once again turns the focus towards 'quality of the environment': the higher this is, the easier it will be to attract the creative class.

Another aspect of Florida's book is that it takes a much broader view of 'quality of the environment' than what has usually been the case, i.e. not just accessibility, but also attractive cafés and theatres. In Leiden, for example, this 'quality of the environment' for the highly educated is quite high, because of a large and diverse historical city centre, its extensive facilities and its proximity to several, much larger cities, as well as the country's main airport.

In short, the idea is that cities across the world may benefit from the concepts of 'city of creativity', 'creative economy' and 'creative class'. Cities, therefore, treasure their universities and other institutions of higher education as places of creativity, or should do so. That is probably why cities usually are not very eager to see *their* universities engage in less predictable adventures such as mergers – because merger may lead to acquisition. Today, Leiden has the third highest share of the creative class of the workforce (approximately 35 per cent) and the third highest portion of the highly educated (more than 50 per cent) of the fifty largest cities in the Netherlands. In less than four decades, the city has been transformed from a poor industrial city into a stronghold of the creative class in the Florida sense.[48]

The BiGGAR reports about the city of Leiden show that the economic impact of a university is much broader than 'the city' alone. It is,

[47] Richard Florida, *The Rise of the Creative Class: Revisited*, New York: Basic Books 2012, p. 310.

[48] Gerard Marlet, C. M. C. M. Woerkens and Nadine Van den Berg, *Atlas voor gemeenten 2012*, Nijmegen: VOC Uitgevers 2012 (in Dutch).

therefore, unwise to focus only on the city, and not for example on the regional impact.[49] This may range from really basic things – such as whether you allow the local public to use the library or your premises – to more fundamental activities, for instance by setting up a law clinic with law professors and students, dedicated to making justice more accessible to local and regional citizens and by helping them obtain justice by informing them of their rights and by supporting them through the judicial process.

Law clinics, too, are an example of how third mission activities can easily run parallel to the mission of education and even strengthen it: because clinics also provide hands-on experience for law students. In developing countries clinical legal education currently serves as a valuable example to help promote equal justice for the poor.[50] Law clinics in South Africa are an inspiring example of how students and academics find one another in their common struggle for social justice; with all the difficulties associated with it.[51]

The example of the law clinics also shows that regional engagement can enhance the core missions of teaching and research – the region serving as a laboratory for research. Regarding research, an example is a study by Leiden criminology students of violence at raves in Leiden as compared to other university cities (the outcome was that there were fewer violent incidents in Leiden than elsewhere).[52]

8.5.2 Students and the city

And, finally, law students typically contribute to local and regional politics, by serving on all kinds of councils and committees. They often share this particular form of social engagement with their professors. My own Leiden law school professors have a wide variety of ancillary functions and other part-time occupations and positions that contribute to society. Many hold public offices and functions, using their academic

[49] J. Goddard, *Connecting Universities to Regional Growth: A Practical Guide*, Brussels: 2011.

[50] Peggy Maisel, 'Expanding and Sustaining Clinical Legal Education in Developing Countries: What We Can Learn from South Africa', in: *Fordham International Law Journal*, 30, 2007, pp. 374 ff.

[51] J. C. Mubangizi and D. J. McQuoid-Mason, 'The Role of University Law Clinics in Public Interest Litigation, with Specific Reference to South Africa', in: *Journal for Juridical Science*, 38, 1, 2013.

[52] Sofie Derks *et al.*, *Uitgaansgeweld in Leiden*, Leiden: 2012 (in Dutch).

expertise to the benefit of society. Most notable are the adjudicating functions, such as: *ad hoc* judge in the law courts, mediation, dispute commissions, or local judicial review commissions. In addition, law professors have seats on many advisory commissions, both locally and nationally, such as museums, schools, etc. And, although the American journalist William F. Buckley Jr once said 'I'd rather be governed by the first 300 people listed in the Boston telephone directory than by the faculty of Harvard University', some of Leiden's faculty are even part of the legislative and governing bodies, ranging from municipal councils to the national parliament.

In addition, the private sector may benefit, including functions such as part-time lawyers, notaries and tax advisers, as well as memberships of supervisory boards of industrial companies. The numbers involved are large, particularly when one includes the contribution of well-educated young people, students, to the local employment market as part-time workers in the hotel, catering and retailing sector, and so on.

To conclude, cities and their regions benefit greatly from the presence of a university, economically, culturally and otherwise. The local availability of knowledge and skills is becoming increasingly important. However, let us not forget that city planning is more than just university impact. One of the authors of the book *Crap Towns* grew up in Oxford:

> At first glance Oxford appears to be the ideal English city . . . home to one of the world's most distinguished universities . . . Travel further afield though and you realise that this harmony is achieved thanks to the ghettoization of large sections of the community, as the working classes are forced to live miles from the town in some of Europe's largest – and most notorious – housing estates.

I conclude this section with one of my own experiences of how a city, the urban area it is part of, and a law school can effectively join forces. In 2012, Leiden started a master's degree programme in Child Law. The programme is the fascinating result of a joint initiative by the law school teaming up with the District Court of The Hague, the Dutch Children's Ombudsman in The Hague, UNICEF, the Association of Attorneys for Children, and most importantly the Dutch Child Rights Home in Leiden, being a project of one of Leiden's residents and benefactors, as a focal point for action and activities, experiences, debate and discussion, culture and games, media and publicity, all aimed at expanding and deepening the perception of what children's rights mean to children and society. A number of NGOs in the field of children's rights are the main

occupants of this Child Rights Home.[53] In a very inspiring way, this master's programme brings together students, law professors, practitioners, the judiciary and the city of Leiden and its region.

8.6 Conclusions and outlook

Whilst one could argue that the third mission is actually an expression of the other two missions (research and education), it is, nevertheless, pertinent to make explicit that there is a third mission. It is how one describes this third mission that is important. Higher education institutions, including their law schools, are increasingly recognised as crucial not only for the middle-income and advanced economies, but also for the developing ones. As a logical extension of this increase in attention, we witness taxpayers, governments, the media, the general public – in short, society – asking universities how they can contribute, or contribute more, to economic growth and to society at large.

It is wise not to perceive this development as an attack on academic freedom or criticism of the university and its operations as such, but to seize it as an opportunity to get and give a better picture of how universities are doing in this respect and to strengthen ties between the university world and its immediate and broader environment. By doing this, it makes sense to add a third mission to the traditional university missions of teaching and research: the third mission should include such varied phenomena as technology transfer and innovation, such as the science parks, continuing education, and social and cultural engagement, as well as societal academic visibility in general.

This is not to say that education and research have no societal impact in themselves. And therefore some people question the whole concept of a third mission. The Vice-Chancellor of the University of Cambridge, Sir Leszek Borysiewicz, argued in his keynote speech at the 10th Anniversary conference of the League of European Research Universities (LERU) in Barcelona on 10 May 2012 that 'universities' contribution to the economy is so effective precisely because it is not our primary objective'.[54] One can only agree. In one of LERU's position papers, 'What Are Universities for?', a similar account was given:

[53] 'Kinderrechtenhuis Nederland/The Child Rights Home', www.kinderrechtenhuis.nl (last accessed 26 October 2012).

[54] www.ub.edu/web/ub/en/menu_eines/noticies/2012/05/038.html (last accessed 26 September 2013).

> Universities are not just supermarkets for a variety of public and private goods that are currently in demand, and whose value is defined by their perceived aggregate financial value. We assert that they have a deeper, fundamental role that permits them to adapt and respond to the changing values and needs of successive generations, and from which the outputs cherished by governments are but secondary derivatives. To define the university enterprise by these specific outputs, and to fund it only through metrics that measure them, is to misunderstand the nature of the enterprise and its potential to deliver social benefit. These issues of function and purpose are important, and need to be explicit. They must be part of the frame for the animated debate taking place in Europe that generates headlines such as 'creating an innovative Europe', 'delivering on the modernisation agenda for universities', and 'the future of European universities: renaissance or decay?'[55]

Many people do not believe that universities are making any useful contribution to society. Therefore, the advantage of making societal impact a separate mission can be that it provides a wonderful opportunity to show how our research and education do make a difference to the general welfare and well-being of society.

Third mission activities will vary from one university and discipline to another. What the Green Paper sees as a decisive factor for its success is that the university as a whole commits itself, which does not mean that it makes 'a few gestures towards the communities outside its campus', but that it will go about its business of education, learning, research, critique and debate in such a way as to promote engagement and connection with society, and put its intellectual and other assets to work. Yet the different faculties and schools, varying from medicine to the natural and the social sciences, the humanities and law, will have to think about the opportunities for their particular discipline. My law school in its 2013–17 strategy includes this paragraph on societal impact. The School wishes to:

> pay attention, in various ways, to issues involving the 'rule of law', the environment, the fight against poverty and development. For instance, it complies with the measures of socially responsible enterprise in its own operations by using energy economically, to name just one example. Secondly, the faculty encourages initiatives by its student associations in this regard, such as collecting legal publications for developing countries, the organisation of a series of lectures on human rights for first-year

[55] Geoffrey Boulton and Colin Lucas, *What Are Universities For?*, Leuven: 2008 (footnotes omitted).

> students, and the organisation of a conference on climate change and the role of the law. Our law school is strongly supportive of its students in these types of initiatives, providing an annual budget for such activities. It provides similar support for the law clinic. Finally, social responsibility constitutes an important topic in our education and research.[56]

To gain some focus for law schools, it may indeed help to distinguish between the scenarios of the world, the nation, and the hosting city or region, all with their smaller or 'grander' challenges. Not one law school can help to solve all problems society has, and third mission activities, too, should be based on sound research and education. It therefore may help a particular law school to first think in certain 'profiles', including the type of research a particular school wishes to carry out, such as fundamental, disseminating, multidisciplinary, comparative; the focus of its research, such as private law, international law, criminology, child law, financial law, or law and development studies; the type of education it is engaged in, such as elite, mass, lifelong learning, or international; and finally the location and the region the school belongs to – and then, after having chosen a certain profile, the school should identify and describe the 'third mission' opportunities that are connected to it, at global level (the rule of law, access to justice, economic development, the banking crisis, energy, food, the uncertain future of Europe, and so on), and at national level (fundamental or practice-oriented research, lifelong learning, distance learning, and so on), and not forgetting that this should also be done at the local, urban level.

It would be wrong to view the local level as less important or less challenging than the national or global level. What role can law schools play in the midst of such diverse and multicultural cities as The Hague, London or New York, or in cities and the townships of less developed countries like Mumbai, Jakarta or Johannesburg? For a city, the mere fact of having a university or a law school is of great importance from an economic point of view. But, as we have seen, there is much more, such as access to law libraries for the local public, public lectures by academics, local debates or think-tanks, where their areas of expertise overlap with areas of public interest or concern, law clinics, law festivals and a multitude of other cultural and community developments, students and their professors actively engaging in local political bodies and

[56] Leiden Law School, *Strategisch Uitvoeringsplan 2012–2016, Midterm*, No. 60 (in Dutch).

committees, and so on.[57] All the same, one should not forget that universities are always part of a wider and diverse community. It is therefore an extra-challenging thought to consider what more one can do with so much intellectual power and capacity for the local community and *its* challenges.

[57] David Watson *et al.*, *The Engaged University: International Perspectives on Civic Engagement*, New York and London: Routledge 2011, providing numerous examples and practical and policy implications on the basis of a range of interviews.

9

Whose law school is it?

9.1 Universities under attack?

One Saturday morning in 2011, in a time of severe economic crisis, I attended a conference at King's College London entitled 'Universities Under Attack'. Professors from prestigious English universities, students, PhD candidates, young lecturers, all were gathered to discuss 'the radical reform of our university system'. The atmosphere that morning was rather depressing. Deeply felt worries were expressed about the future of universities and academia at large in Britain. To many of those assembled, it seemed as if 'corporatisation', 'marketisation', 'dynamisation', 'competitiveness' and the continuous talk of 'economic growth as the government's top priority' had taken the university away from its natural inhabitants: the academics and their students. The academic anger that morning was primarily targeted at the government and the politicians, but some even spoke of 'a global attack' on universities.

'From idea to invoice' is one of the current popular slogans in England, and in the Netherlands the most irritating catchphrase reads 'KKK': 'Kennis, Kunde, Kassa', meaning 'Knowledge, Skills, Cheque'. '*Valorisatie*' is the term the Dutch use for converting scientific knowledge into commercially viable products and services. Basic scientific research – sometimes called 'blue sky research' – has become less popular than the more economically viable forms of research. In 2009, British universities were directly subordinated to a new Department for Business, Innovation and Skills (BIS), separated from the Department for Education which focuses on schools. Its website reads:

> Almost everything that BIS does – from investing in skills to making markets more dynamic and reducing regulation, and from promoting trade to boosting innovation and helping people start and grow a business – helps drive growth.[1]

[1] Last accessed 21 November 2013.

This language, with its focus on economic growth and its disregard for scholarly joy, drove those intellectuals at King's crazy. The non-stop talk by the government, the politicians and industry about becoming more competitive may indeed need some correction. One of the speakers said: 'British universities are among the world's best, British *business* is not.' He received a well-deserved round of applause.

University teaching, too, is undergoing radical change in the current economic crisis. Students are said to have become consumers; teachers are 'service providers', as one academic stated later in the afternoon with some horror on his face. And, even if students are not yet consumers, the fees they pay or will pay in the near future, will turn them into consumers. As long as education was free, the concept of a consumer seemed irrelevant. But fees are rising rapidly almost everywhere: caps, in the UK of £9,000, have become targets. Future students will see their debts building up very rapidly, as is already the case in the US, and many will probably choose a course of study away from the humanities, instead of ending up in law schools, business schools or even medical schools.

A managerial revolution, strongly facilitated by information technology, seems another key component of the perceived attack among the assembled at King's. Through massive and probably expensive governmental 'control programmes', such as the 'Research Assessment Exercise' (RAE) and the 'Research Excellence Framework' (REF), relying on 'Key Performance Indicators', universities are continuously forced to prove their scientific and societal impact. Failure to participate in these exercises is not an option. Brownie points are at stake: the final score of a university in the current REF depends upon its scientific impact, which counts for 60 per cent of the total score, and societal impact which counts for 25 per cent.

For many at today's British universities, it feels as if their mission is less aimed at contributing to the body of knowledge, and more at collecting brownie points awarded by evaluation panels. According to the organisers of the conference, it has all become a matter of quantification 'which applies to the non-manufacturing economy (our universities, for example) the strict regimes of measurement, targeting and control hitherto largely confined to the factory floor'. The university in ruins,[2] and not only in the UK.[3]

[2] Bill Readings, *The University in Ruins*, Cambridge, MA: Harvard University Press 1997.
[3] Gary Rolfe, *The University in Dissent: Scholarship in the Corporate University*, London and New York: Routledge 2013, following up on Readings' book.

Competitiveness, targets and output control – it is indeed no longer the language of governments, politicians and businessmen only: it has also become the language of the universities themselves, of their chancellors and vice-chancellors, presidents, rectors and faculty deans. Since most law schools belong to universities, they too feel under attack. This is the daily experience of almost every law dean. They too run the risk of tending to be more excited by the law school's position in the newest ranking, than by a new series of academic books. And it is hard to resist these pressures. Since most institutions of research and higher education depend heavily on government funding in financially difficult times, they somehow have to adjust. This creates a tension of loyalty. In the opinion of the academics gathered at King's, the British government had seized the opportunity of the current financial crisis 'to push through dramatic and irreversible changes before the universities could organise effective resistance'.

That morning in November, walking to King's College, I passed a small theatre announcing one of the musicals London is so famous for: 'The Charm and Innocence of a Bygone Era', the poster promised. Could this also refer to today's universities? Whose university is it, anyhow? Hesitantly, a worldwide movement is growing – '*We Are the University*!' – students and academics are protesting to regain what they think they have lost over the past years.[4]

What is happening in the UK is increasingly becoming a worldwide phenomenon: how to transform universities and other institutions of higher education into engines for growth. The UK may be ahead, but in other countries there is a growing feeling among academics that their universities, too, are being taken away from them. The focus on economic growth is driving politicians and universities. A recent communiqué from the British government, 'Innovation and Research Strategy for Growth', says:

> Our universities, research councils, and businesses are national assets that form the foundation of the UK's future competitiveness. However, if we are to realise our vision for the UK's future we need to strengthen our innovative capability and encourage further investment in innovation.

I somewhat understand the feelings of my colleagues at King's. This kind of language makes them despair, regardless of the content of the message. It may well be that the universities only too gladly agree with the government's ideas about contributing to society, and that this

[4] 'We Are the University' is on Facebook.

contribution may well lead to economic growth just by educating our students. It is also the bombastic language, I think, that maddens them. As dean, I always tried to avoid it, checking every document that was sent to our academics word by word almost. The academics, the students and a devoted support staff are at the very heart of every university. It is their university in the first place, and they deserve the language that is natural to them. They know very well about their responsibilities towards society and all their 'stakeholders'. They are willing to listen and to change if necessary – it is just that they don't need that appalling language.

Of course, it is more than language only. Enjoying a sabbatical after ten years as law dean and vice-dean, I realised for the first time how *much* is being said and published about us, about universities across the world. We have our national governments, agencies, committees, bureaus, offices and authorities that distribute their reports, overviews, protocols and advice on an almost daily basis. In addition, we have the European Commission, the OECD, and all sorts of other institutions, private and public, national and international, who publish reports and update their websites even more frequently. Reading all this, one often wonders how many of these politicians, policy advisers and other externals have ever taught a class early in the morning, or have finished a PhD. I cannot say that their work is irrelevant; often it is even important or at least amusing. It is the terminology, as well as the information overload, that sets them apart from those working in the universities: one needs at least a sabbatical to keep oneself informed.

As I have already said, in Europe, the UK seems to lead the way. It is currently switching from the Research Assessment Exercise (RAE) to the new Research Excellence Framework (REF). The results of the REF are to offer support to the national research funds in distributing research monies, to report to the taxpayer, and to provide university boards with insight into the relative position of their research groups. An encouraging aspect here is that, in addition to the measurement of scientific impact, societal impact has become really important. Disciplinary panels will assess the quality of research outputs submitted in terms of their 'originality, significance and rigour', with reference to international research quality standards. This element will carry a weighting of 65 per cent in the final outcome. The 'reach and significance' of impacts on the economy, society and culture will carry a weighting of no less than 20 per cent. So, not just who publishes most in the best journals or who is cited most, but also, with a 20 per cent weighting, who is influential from a 'societal perspective' will be important questions. Types of impact may be

economic, but also social, cultural or linked to public policy and services, and 'should not be taken as restrictive'. In 2013–14, all British universities, including the law schools, will have to make a reasonable case for their economic, cultural and societal impact on the basis of a number of case studies.

The idea of trying to get an indication of the impact we have as universities, apart from our purely scientific duties, is interesting enough. What, then, could this societal impact be? When a court or a legislator cites your work, for instance? Whether these citations will show reliable measures is questionable. In some jurisdictions, courts refer to legal scholarship (Switzerland, Germany, the US); in many others, however, they do not. And legislators tend to refer only to work that supports the ministry and that particular piece of legislation, leaving out all opposing views or even the better or more original research. The REF criteria give examples like: practitioners who have used research findings in the conduct of their work; changes to professional standards, guidelines or training that have been prompted by research; or expert and legal work or forensic methods that have been informed by research.

It will be exciting to see whether the societal influence of scientific research can be measured. The total number of guidelines, specific variations of guidelines, criteria, working methods, impact templates, calibration during the process and weighing schemes the universities will have to deal with during this assessment, are impressive enough. One cannot help thinking how many young PhD candidates in law and the other fields could be financed by all the money that will go into this REF.

9.2 The academics?

This section is about 'us': my colleagues and myself. One of the reasons for writing this book was the worries I came across about the slow pace at which many law schools across the world adapt to new developments; or perhaps not so much the pace, but the aversion that legal academics so often seem to display when confronted by changes from outside.

Legal academics have a tendency to refer to their distinctness when faced with these changes, arguing that they cannot internationalise like the other disciplines; their citations cannot be counted; ranking law schools is absolute nonsense; lecturing in English or writing your PhD in English is impossible (as is the case in Germany and France); lawyers are not in a position to attract external funding; multidisciplinary research is, for the most part, not do-able for legal academics, and so

on. I believe this attitude stems less from conservatism, and more from a sincere conviction that the legal discipline *is* truly distinct and different.

If, then, legal academics claim they are different, the question arises as to what sets these legal academics apart. Those colleagues whom Fiona Cownie interviewed for her book, *Legal Academics: Culture and Identities* (2004), displayed considerable attachment to core academic values.[5] The value the academics – in the UK considered a middle-class job[6] – most valued, Cownie noticed, was the freedom to organise their own working life. They all claimed to be under considerable pressure from three major changes in higher education: the move from elite to mass education, the increasing efforts to introduce managerialism, and the corporatisation of the academy. And more recently, Australian Margaret Thornton published the results of a range of interviews with legal academics, showing their great anxiety about how in the privatised or corporate university the law curriculum has become impoverished, research commodified, students transformed into customers, and so on.[7]

Overall, legal academics are very positive about their choice of career. They are proud to be doing this job, and that feeling of satisfaction is based on a value judgment – that it is a 'worthwhile' way in which to spend their lives. As with all academics, autonomy was a key part of their professional identity, as was the importance attached to the ability to carry out *both* teaching *and* research. Legal academics share with others in the academy a strong dislike of things that impinge on their autonomy ('bureaucracy', 'audit', accountability') and they also expressed worries about changes in culture resulting in feelings of increased 'pressure'.[8]

It may all be very understandable, yet law schools in particular are in the firing line of their university presidents, vice-chancellors or rectors. These administrators complain about such things as the limited ability to quantify and qualify legal research, lawyers being too nationally focused, the traditionally small share of external funding for research, the long turn-around time of PhD research, and so on. Why should the 'tribe' (Trowler) of legal academics be perceived as more culpable than those in other disciplines? Of all university academics, one would expect lawyers in particular, together with doctors, economists and those in business studies, to have a natural connection with the world outside the

[5] Fiona Cownie, *Legal Academics: Culture and Identities*, 2004. [6] *Ibid*., p. 176.
[7] Margaret Thornton, *Privatising the Public University: The Case of Law*, London and New York: Routledge 2012.
[8] Fiona Cownie, *Legal Academics: Culture and Identities*, 2004, p. 119.

university, such as with government, the law firms, the judiciary, industry and business. After all, law is about daily life outside the university.

Moreover, there has always been a high degree of mobility between the legal professions and the law school through part-time appointments of people who come from law firms to strengthen the academic ranks – they at least should know better: there is no law firm without time sheets or annual reviews; no commercial business without management information and an eye to consumer rankings or the stock exchange; and there is no government agency without a human resources policy, or a consultancy firm that does not keep an eye on cash flows.

Finally, because law is such a popular discipline that for the most part moved from small-scale elite courses to mass education long ago, a degree of bureaucracy in the law school has been inescapable for a very long time, whereas in the smaller disciplines it could be withstood much longer. Why then do some have such an aversion to the corporate side of the university in the law school? I can think of a few explanations.

9.2.1 Aversion to the corporate side of academia

It starts with our young graduates: when they embark on an academic career, they always arrive at a point in time when the pros and cons of such a choice have to be weighed: 'Am I sure about staying within the law school or would I rather make a career as a practitioner?' For those who do choose an academic career, it is the academic environment that is the decisive factor. For the more experienced young lawyers, who *started* out working for a law firm or a private company, the academic environment is also the most significant reason for changing careers. I have heard it time and again: finally you get more time to think, away from the frenzied environment of the management reports and the time sheets; finally time for teaching and research, and managing your own agenda. In short, what they expect is a high degree of autonomy with few administrative or management tasks. Yet universities, too, have become large bureaucracies with their many and complex management needs.[9]

Furthermore, as far as research is concerned, it is largely a question of ploughing your own furrow. Compared to many of the other domains

[9] Philip G. Altbach, 'The Past, Present, and Future of the Research University', in: Philip G. Altbach and Jamil Salmi (eds.), *The Road to Academic Excellence: The Making of World-Class Research Universities*, Washington DC: World Bank 2011; Michael Shattock, *Managing Successful Universities*, 2010.

of academia, for example those who work in teaching hospitals, collaboration in the law school is only required to a limited extent, which is why a law school needs relatively fewer rules and why the unpalatable bureaucracy could be kept at arm's length for longer than is the case elsewhere.

A practising lawyer I spoke to recently came up with yet another explanation as to why legal academics seem so reluctant to change. He mentioned their inherent inclination to enter into debate: give them one argument for change and they will present you with two counter-arguments. Debate is part of our scholarly method and we are extremely good at it, as deans and their department heads know well enough.

Finally, legal academics do a lot of teaching, with all the administration that involves, and they often struggle to keep their research moving forward. It's quite understandable that changes that seem to *increase* rather than reduce their workload will effectively be seen as bizarre bureaucracy that nobody welcomes: 'What *idiot* invented this system?'

And yet law schools in many countries *are* changing. For my law school, in the past decade three instruments have been very important. Setting targets in annual agreements with department heads, and they in their turn with the heads of the units or individual professors – agreements they can be held to and praised for – should be the first driver. Second, it is important that the financial incentives are in line with the university's and the law school's strategy; an example of this might be that, if you want to increase external funding, you could promise to double any external award by matching it from university funds. And, finally, it is crucial for management information to be as open and accessible as possible to everyone in the school, so that units that lead the field can provide examples of best practice. The successes of some departments and units within the law school have been a spur to those who lag behind. Success breeds success, particularly among professionals.

But, even if legal academics remain somewhat more on the defensive side of academia,[10] as true professionals they always appear willing to talk about the substance and the quality of their profession. If one wishes to attribute *one* single characteristic to legal scholars as members of an

[10] There is some research about how the academic training of leaders in higher education influences their approach to their administrative duties: Lauren J. Way, *The Impact of Disciplinarity on the Organizational Leadership Styles of Academic Deans*, Open Access Dissertations 2010.

independent community, it is their natural propensity to speak their mind, or, as Professor Cownie puts it, of 'speaking truth to power'. This made her think that it is very likely that legal academics will be able to resist or undermine policy changes if core values are threatened.[11] That is, as she states, 'a positive view' indeed, and as a former law dean I wholeheartedly share it. A few final observations about professors are worth noting here.

9.2.2 The importance of full professors

The success of a university depends, more than anything else, on its senior academics, the full or chair professors. *They*, with their students, are at the heart of the university. A university can survive for some time without staff, managers, deans and presidents, but it cannot do so without professors. Every day, we should remind ourselves of their importance to the institution.

From their very beginnings, universities have had professors; at my university, professors of divinity were followed in turn by those in philosophy, law and medicine. If a university receives favourable publicity, it is almost always because of the successes or the discoveries of its professors, unlike deans, managers and administrators who attract the attention of the media only when they make mistakes. This, incidentally, led to wise advice from a former chairman of the Dutch Association of Universities, Sijbold Noorda, that deans and other administrators should treasure the successes of their school or faculty as much as possible, even if they haven't had anything to do with it, because they also take the flak for everything that goes wrong, even if they are blameless.

The decision to appoint a professor is often a multi-million dollar (or euro) one. Professors are expensive, especially if they get tenure, not only because of their salaries, but also because of the associated costs of PhDs, staff and facilities. Yet appointment procedures are all too often rather unconsidered and superficial.

Professors are usually selected because of their research, much less because of their teaching and even less because of their ability to lead a group or for their contribution to the academic community. Yet professors have many roles to play, in addition to the requirement to be more

[11] Fiona Cownie, *Legal Academics: Culture and Identities*, 2004, p. 205.

than merely 'an ordinary academic', 'but a very good one'.[12] They have to be role models, a term that we often restrict to female professors in respect to their (usually female) students. In his book about academic leadership in higher education, Bruce Macfarlane interviewed some UK professors. The role that was mentioned most frequently was that of mentor, which includes being a 'facilitator', 'a guide to others' and a 'nurturer'. As we have seen, universities have become increasingly complex organisations and the role of a professor has widened to include attracting funding, advising on publication outlets, supervising PhDs, sitting on panels, and so forth. Mentoring is therefore of the utmost importance.

The second role related to professorial leadership is that of 'guardian' of academic standards and values. More than anyone else in the university, professors carry responsibility for upholding the highest standards of academic integrity and of transmitting the typically academic *mores* of the university to new generations. Values and mores are our connection to the past, to what universities have stood for from their origins, as well as to the future. For Macfarlane's interviewees, guardianship means that the next generation of academics are inculcated with the values and standards inherent in the discipline, which goes further than merely ensuring that their own research and teaching interests are carried forward by their younger colleagues.

A third role model is that of the 'facilitator' or 'enabler'. Professors have to be aware that attracting grants, contracts and other resources has become an integral part of the new commercial and academic reality we are now in. Through creating research centres and winning research grants, for example, professors ensure opportunities to their doctoral students, young postdocs and other staff. Law professors, compared to, for example, their colleagues from the medical school, are not particularly good at this. In some other scientific fields, professors are much more involved in project management and obtaining grants, even to the point of abandoning their own research. We need to find a balance between these competing demands.

The final role model that some of the interviewees mentioned was that of 'ambassador' on behalf of the university: representing its interests on the national and international stage – of simply being visible. Macfarlane

[12] Bruce Macfarlane, *Intellectual Leadership in Higher Education: Renewing the Role of the University Professor*, New York: Routledge/Society for Research into Higher Education 2012.

observes that most professors put their discipline first and foremost, especially in the more 'mature' higher education systems, such as those in Australia, Japan, Canada, Norway, the UK and the US. And I am sure that many European countries can easily be added to this list. There are countless books, papers and essays about the decline of professorial weight in academia, including *The Last Professors – The Corporate University and the Fate of the Humanities* by the American school Frank Donoghue.[13] Eloquent, passionate, ironic to the verge of sarcasm, funny, tremendously convincing; however, it is now time to stop talking the talk, and to walk the walk.

9.3 The students (and their parents) as consumers?

Students, along with lecturers and researchers, are the heart of the university. Without students there would be no university; without students there would also be no law school. Virtually no law school anywhere in the world operates purely as a research institution.[14] The law institutes of the German Max Planck Gesellschaft may be an exception, but they cannot truly be considered a law school. The same holds for All Souls College in Oxford, that also does not have students, apart from a few law graduates. A large part of this book is therefore quite rightly about students: how they differ from one another, how they are admitted to the university, how their degree programmes are structured (Chapter 1), and what it costs them (Chapters 2 and 3). There is also a chapter about what makes them into good lawyers (Chapter 4), and a chapter on how you can achieve that as a university (Chapter 5).

In writing this book, I have constantly been challenged by the versatility of such terms as 'university', 'law school', 'lawyer', and 'legal practitioner'. The same applies to the concept of 'student'. I have chosen as far as possible to describe the 'university' as an institution for teaching and research: a 'law school' as an institution where, almost always within the context of a university, 'lawyers' are trained – 'lawyers' who subsequently enter the 'legal professions' (the law firms, the courts, the legislature, etc.), although I know very well that in many jurisdictions further

[13] Frank Donoghue, *The Last Professors: The Corporate University and the Fate of the Humanities*, 2008.

[14] Benjamin J. Richardson, 'Students as Stakeholders in Legal Education: Gaining Admission to Law School', in: Fiona Cownie (ed.), *Stakeholders in the Law School*, Oxford: Hart Publishing 2010, p. 127.

training is necessary, and moreover that many law graduates will never go into these typically legal professions. This has been a means for me of bringing focus to the book. To put it in more pregnant terms: law schools are academic institutions where future judges and lawyers are trained.

But, even with this pregnant formulation, there is still plenty of scope left for variation. We have seen in many places in this book that universities can be very different from one another. There are, for example, the most prestigious research-intensive institutions, to which only the most talented faculty and students have access, where there is generally a close-knit relationship between teacher and student; these institutions have the ambition of making their students into future 'world citizens' and 'thinkers'. These are almost by definition universities with abundant funding.

Icons of this model are Oxford and Cambridge, with their 'collegiate' structure, where students and academics share the same College, and where the contacts between professors and students are often on a one-to-one basis.

This model is found almost nowhere else. There are of course universities where students live on campus, and an increasing number of countries now have so-called *university colleges*, where living and teaching are brought together in one location; these university colleges bear some similarities to the English collegiate system. But most law students live in student rooms, somewhere in the city where their university is located, or they live at home with their parents. For many of these students, the physical contact with the law school is limited to the lessons they follow there, and to any extra-curricular activities they may take part in. For some, the law school becomes a home from home, where they spend much of their time; for others it is nothing more than a random building, a school room.

Law students worldwide have very few contact hours with their lecturers, so they tend to spend little time in the law school. This makes it difficult for these students to develop a real 'bond' with the law school and their lecturers. The situation is very different for students in the natural sciences or medicine, where the laboratories or the hospital offer communal spaces, or in, for example, archaeology where students and their lecturers often carry out fieldwork together lasting several weeks. In Chapter 5, I discussed the importance of 'belonging': the bond with the study programme, the lecturers and the premises of the institution.

There is another development that can at times make the students' bond with their law school fragile: the sheer number of students who populate so many law schools throughout the world. The policy of widening participation has had a major impact on law schools, as well as on such faculties as economics, business studies and psychology. Many of the students in these programmes, certainly in the first year of their studies, are just numbers. In some quarters they are even referred to as 'units'.

The intake of students has become more diverse. Many do not have parents with an academic degree so they are the first generation in their families to study at university. This widening of participation has also led to greater diversity in students' intellectual capabilities and motivation – which explains why universities try to offer extra challenges for the best and most motivated students, in the form of honours programmes. Diversity in terms of ethnicity has also increased strongly in many countries, and the number of international students in classes has increased. This diversity has some important advantages – I sing the praises of diversity elsewhere in this book. But it also generates problems. For many law schools, particularly where selection at the gate is out of the question, it is becoming increasingly clear that the 'one size fits all' concept does not work, or no longer works – often to the frustration of both students and teachers. This frustration often leads to discussions about students as consumers, customers or stakeholders. Because, when we refer to 'our' students, what exactly do we mean? What is the role of students in higher education? Are they merely subjects, even though often actively engaged in their education, or are they part of a commercial and competitive market for the sale and purchase of academic education?

This debate about the role of the student in higher education dates from the 1990s,[15] and is directly connected to the advent in the UK and the US of students paying for their courses.[16] Later on, the discussion took off as a result of the increasingly global *market* where universities compete for students, professors and funding.

I addressed these developments more extensively earlier in this book. What is potentially disturbing to many about the marketisation of

[15] Jill J. McMillan and George Cheney, 'The Student as Consumer: The Implications and Limitations of a Metaphor', in: *Communication Education*, 45, 1996.

[16] For an excellent historical overview and discussion, mainly of the US and the UK, see Joanna Williams, *Consuming Higher Education: Why Learning Can't Be Bought*, New York: Bloomsbury 2012.

education is the attempt to recast the relationship between academics and students after the model of a service provider and a customer. Frank Furedi, a sociologist at the University of Kent argues:

> [I]s the student purchasing instruction in an academic discipline or buying a credential necessary for the pursuit of a profession? Or is he or she doing both? It appears that what we have is a highly controlled quasi-market that forces institutions to compete against one another for resources and funding.[17]

The increase in student complaints over almost two decades or so has also been attributed in part to the growing consumer/customer culture in higher education.[18] One study dealing with cases in Australia and New Zealand shows that complaints by aggrieved students fall largely into three categories: complaints about the accuracy of information provided to students before or upon enrolment; complaints about the quality of the educational services provided by the university; and complaints about adverse decisions made by universities affecting students. The authors conclude that it is 'very seldom' that consumer law appears to help students in the courts.

> [I]t may be that the courts simply have difficulty in determining in each particular case whether the aggrieved student is frivolous or whether he or she is rightly wronged. Undoubtedly, the ability of students to initiate legal action focuses attention on the responsibilities of universities and all higher education providers.[19]

In their paper, Boon and Whyte give some brilliant examples, including the case of Roland, an angry student who – through his own mistake – had fruitlessly waited for his lecturer:

> You probably have other things to get on with but it ain't my fault. You shud have stayed in that room til 1 pm (as it is said on blackboard). Anyways, see you tomorrow sir, and enjoy the markin. Dats what you get paid to do.[20]

[17] Frank Furedi, 'Introduction to the Marketisation of Higher Education and the Student as Consumer', in: *The Marketisation of Higher Education and the Student as Consumer*, London and New York: Routledge 2011, p. 2.

[18] Felix Maringe, 'The Student as Consumer: Affordances and Constraints in a Transforming Higher Education Environment', in: *The Marketisation of Higher Education and the Student as Consumer*, London and New York: Routledge 2011, p. 146.

[19] Patty Kamvounias and Sally Varnham, 'Getting What They Paid For: Consumer Rights of Students in Higher Education', in: *Griffith Law Review*, 15, 2, pp. 327–8.

[20] E-mail from a first-year law student, The original was written all in capitals. Andrew Boon and Avis Whyte, 'Will There Be Blood? Students as Stakeholders in the Legal

And indeed, a few years ago, the Higher Education Funding Council for England (HEFCE) agreed that there seems to be more emphasis on viewing students as consumers and rather less on viewing them as partners in a learning community.[21] The HEFCE stresses the growing importance of lifelong learning, and the increasingly complex demands of employers; these demands require flexibility of course design and a greater focus on learner needs. And, in Britain, the large increase in student tuition fees in 2011 was accompanied, *nota bene*, by a policy document entitled *Students at the Heart of the System*.[22]

In the debate about the role of the student, six different 'terms' crop up: we seem to have students as 'partners', 'consumers', 'customers', 'clients' or 'stakeholders', and finally there is also the term 'units', that I am inclined to leave aside.

The use of these metaphors clearly has further implications. With their connotations, they can 'frame' the student–teacher relationship in different ways, and it is not difficult to predict that these metaphors will make many in the university very unhappy. Much of the resistance from the teaching side seems to stem from the perception that a consumer focus is potentially damaging to the learning process.[23]

Let us consider the student as 'consumer'. A consumer is a person who consumes a service offered to him or her.[24] It suggests that the relationship between teacher and student, or at least between university and student, has something of a legal nature ('consumer rights', 'consumer satisfaction', 'consumer protection'). With students having legal rights – the right to receive education, the right to information, and possibly even the right to a degree – teachers easily become service providers and students find themselves at the receiving end of education.

Academy', in: Fiona Cownie (ed.), *Stakeholders in the Law School*, Oxford and Portland, OR: Hart Publishing 2010, pp. 186–7.

[21] Centre for Higher Education Research and Information, *Report to HEFCE on Student Engagement*, London: 2009.

[22] Department for Business Innovation and Skills (BIS), *Higher Education: Students at the Heart of the System*, London: BIS 2011.

[23] A number of books and articles have been published recently on this issue, particularly in the UK. See e.g. Joanna Williams, *Consuming Higher Education: Why Learning Can't Be Bought*, 2012; Mike Molesworth, Richard Scullion and Elisabeth Nixon, *The Marketisation of Higher Education and the Student as Consumer*, London and New York: Routledge 2011.

[24] Ronald Barnett, 'The Marketised University: Defending the Indefensible', in: *The Marketisation of Higher Education and the Student as Consumer*, London and New York: Routledge 2011, p. 43.

Certainly, if students have to pay for their education and if the universities are spending large amounts of cash to attract students, this does raise the question of a (legal) contract. The universities tout for students because their governments strive for widening participation in higher education and because students are a good source of income for the institution. In some parts of the world, higher education seems increasingly to have been transformed into a competitive global marketplace for the wealthiest students.

The term 'customer' has a slightly different meaning. A customer lends his or her 'custom' to the provider. Customers have a greater influence in a market relationship than consumers. Indeed, the literature on the topic of customer *participation* reveals that there have been significant changes in customer theory. The supplier–customer relationship appears to have become more collaborative now than it was in the past. In society as a whole, customers are no longer viewed as passive recipients, but are seen as active participants in service delivery and co-producers of the services they receive. The quality of service and the level of satisfaction customers enjoy are also dependent on the quality of their own efforts and inputs.

And, finally, 'clients': they are like customers, but the term is mainly used to typify relationships with professionals where there is some form of intellectual exchange, such as psychiatrists, lawyers or notaries. Here, too, there is some degree of reciprocity in the relationship.

Yet there are some strong arguments against the idea of students being consumers, customers or clients. The traditional view is that higher education follows on seamlessly from parental input, as well as from primary and secondary education. Higher education can be seen as an enterprise in which an older generation invests in the well-being of future generations. Education is about what students need, not necessarily what they *want*. According to this view, education is not a reciprocal activity: it is, by its very nature, an unequal enterprise. In education, the other person, the teacher or the institution, is telling you what to do and how, and criticising and assessing you. Moreover, the desired result of a university degree can never be guaranteed: it requires effort and dedication on the part of the student, and a teacher who feels confident enough to hand the student over to society at large.[25]

[25] Frank Furedi, 'Introduction to the Marketisation of Higher Education and the Student as Consumer', in: *The Marketisation of Higher Education and the Student as Consumer*, London and New York: Routledge 2011.

For many, therefore, portraying students as consumers or customers is not a very helpful image for explaining what higher education is about:

> Education cannot be treated as a simple consumer good; consumer sovereignty is both an inappropriate means of placing students at its heart and liable to distort well-structured education. As John Stuart Mill insisted, 'Education makes a man a more intelligent shoemaker, if that be his occupation, but not by teaching him how to make shoes; it does so by the mental exercise it gives, and the habits it impresses.'

This quote is from the Brighton 'Statement of Principles' (June 2013), challenging the ideals of 'consumer sovereignty' and financial 'realism' that run, for instance, through current UK policy-making on higher education. But those who drew up this statement want much more: they are firm advocates of free education:

> Arguments that a university education should be paid for by the individuals it benefits are destructive of the very idea of such an education as a social good ... The removal of fees in Germany is an indication that an alternative is possible: an alternative to the present funding regime should urgently be sought.

In their eyes, the stakeholder metaphor is probably not much better. Although a stakeholder is definitely different from a shareholder, some may find this metaphor equally repugnant. Yet Andrew Boon and Avis Whyte in their comprehensive chapter in *Stakeholders in the Law School* (2010) suggest that for the universities, recognising students as holding 'stakes' in the academy is at least preferable to the exclusive focus required for customers. The weight attributed to 'stakes', they argue, requires balancing the loyalty, attention and resources attached to a range of other stakeholders, rather than prioritising the interests of one group, such as students, at the expense of others, such as employers, the government or the taxpayer.[26]

One cannot deny that students do have an interest ('a stake') in what is going on in higher education. They are continuously interviewed by the institutions themselves and by the audit and review teams in external quality assessments on their ideas about how their university could do better. Moreover, students often feature in advertisements in folders and brochures and on the websites of all the world's universities. And for an increasing number of universities, students with their often high tuition

[26] Andrew Boon and Avis Whyte, 'Will There Be Blood? Students as Stakeholders in the Legal Academy', in: *Stakeholders in the Law School*, 2010, p. 205.

fees are financing the scientific research carried out at that law school. Moreover, in many places across the world, students also play a substantial role in the university's governance. My law school has one student on its executive board, to ensure that student voices are heard in the school's decision-making. The same holds for representative councils at the level of the schools and faculties, and at university level. In the Netherlands, they have rather strong formal and informal powers; students make up half of these councils.

The discussion about the role of students in higher education is far from over. Felix Maringe has compared the different metaphors, with all their characteristics, and has concluded that there is a great deal of overlap between the concepts, but perhaps the strongest differences are in the nature of the association between the people involved. On the whole, though, Maringe concludes, unless it is for purely academic purposes, the use of these metaphors in education tends to be interchangeable.

Are students consumers or at least customers or stakeholders? I am personally not opposed to charging students tuition fees. Indeed, enjoying higher education is an important investment for the students in their (often highly paid) future. But a more important aspect of tuition fees, in my opinion, is that they make it clear to students that education is by no means free, but, quite the contrary, it is a very expensive period in their upbringing and in their personal development. And *if* that education is free, or almost free, then it should not be forbidden by law to remove from education any student who is not doing his best. That is the 'pain in the ass' of the Dutch universities. It should be one thing or the other. We would do well to bear in mind what the word 'student' actually means: it comes from the Latin *studens*, which means 'striving for', 'being interested in' or indeed 'endeavouring for'.

As far as I am concerned, where it goes wrong in the discussion about consumers, customers and stakeholders is when the word 'sovereignty' – the corporate cliché of 'the customer is king' – comes into play. In education, nobody is 'the sovereign', neither the student, nor the teacher. Anyone can see that the teacher–student relationship is essentially different from that between a buyer and a seller of cars. But the most important objection to the use of such concepts as consumer or client is not so much that no guarantee can be given of success and satisfaction, but rather that not only the teacher, but also the student, can and should be asked to contribute to this success. The concept of

'co-creation' seems to be appropriate – or even students, within their schools, as 'change agents'.[27]

As Felix Maringe puts it so well, education calls for a multiple view of quality as seen by a range of constituents that also includes parents, staff, government and other interested partners. Why? Because:

> the students are not on the receiving end of educational instruction, rather they are at the centre of it.[28]

9.4 Our future: the PhD students?

If it is the professors who determine the future of their discipline, then the PhDs they choose and supervise *are* that future. Without young, enthusiastic scholars engaging in research, every university discipline would wither and die. PhDs are vital to every scientific field, and doctoral education has become central to higher education and research policies. I once asked the department head of the world class Leiden Observatory what his main concern was, and he answered: 'Attracting *top* PhD candidates.'[29]

For the young researchers, a doctoral degree is universally considered to be official proof of their ability to undertake independent research. Of course, every PhD student has one or more supervisors and most candidates are part of a much larger research group, but the candidate needs to provide evidence of his or her own capability to undertake research. The defence of the dissertation, usually in public before a selective group of professors and other experts in the field, is a necessary *rite of passage* before entering the higher ranks within the university.

The form a PhD dissertation takes depends on the discipline. In the sciences and in medicine, for example, the output is usually a collection of five or more already published or submitted papers on a specific scientific issue, including an introduction and a conclusion covering the

[27] In their Change Agents initiative, the British Quality Assurance Agency for Higher Education and the University of Exeter suggest responses to the challenge of enabling students to be more clear about where change is most needed: Janice Kay, Elisabeth Dunne and James Hutchinson, *Rethinking the Values of Higher Education – Students as Change Agents?*, Gloucester: 2010.

[28] Felix Maringe, 'The Student as Consumer: Affordances and Constraints in a Transforming Higher Education Environment', in: *The Marketisation of Higher Education and the Student as Consumer*, London and New York: Routledge 2011, p. 152.

[29] www.strw.leidenuniv.nl/phd/apply.php (last accessed 2 January 2013).

various papers. In law and in the humanities, such collections of papers are much less common: PhD dissertations in law tend to be monographs, not papers, that is, they are a genuine book.

There are other differences, too. In some disciplines, including law, dissertations are often published in the national languages, and in some disciplines and countries it may even be a requirement. In addition, the period of the research varies: from the usual four years in the sciences to much longer in the humanities and in law. Moreover, the German system distinguishes between a two-year *Dissertation* track, and a six-year *Habilitationsschrift*, the latter being a strict requirement for becoming a tenured professor.

As well as being a passport to academia, PhD research makes a significant contribution to scholarship. Some random examples of subjects of recent dissertations in my own law school are: 'The Common European Asylum System and the Rights of the Child', 'Indonesian Law and Reality in the Delta', 'Societal Determinants of Corporate Social Disclosures: An International Comparative Study', 'Convergence and Europeanisation – The Political Economy of Social and Labour Market Policies' and 'The Principle in EU Law'.[30]

Although a doctorate usually takes from three to six years, candidates in some disciplines, notably the humanities and law with their tradition of producing monographs, tend to take longer. In addition, in some areas drop-out rates are high, for a range of reasons relating to the student, the supervisor or the chosen subject.

First, let us consider the *student*, or 'PhD candidate' as he or she is often called. In Leiden, we once analysed the most important characteristics PhD students should have. These included a genuine interest in academic research, as well as in the area they would be researching, perseverance, creativity, a good first degree, very good writing skills, a good command of the English language (or exceptionally of another language) and being a good team player. All these characteristics are equally important. To attract the best students, Leiden astronomers have developed a competitive selection process for their PhD selection. All the available vacancies for the forthcoming academic year are advertised at the same time. Successful applicants will be interviewed by the professors, and asked to give a presentation to the academic staff as part of this selection process.[31]

[30] http://law.leiden.edu/research/publications (last accessed 21 December 2013).

[31] On the application process, see for example Peter Bentley, *The PhD Application Handbook*, Maidenhead: Open University Press 2006.

For all those candidates in all disciplines who are selected, there is usually a doctoral training programme, organised by the institute or a group of institutes.[32] Increasingly, the university itself is involved in taking on the responsibility for training its PhDs, particularly in the so-called 'transferable skills'. These are skills learned in one context, for example PhD research or in other 'early career research' (ECR),[33] that are useful in another (for example, future employment, whether that is in research, the legal professions, government or business). Examples include communication, teamwork, entrepreneurship, project management and ethics.[34]

Finally, many schools and faculties appoint an experienced researcher as the head of their PhD studies, someone who acts as adviser, coach and trouble-shooter for all PhD candidates and who advises the school's governing body on matters relating to the PhD candidates and their training.[35]

We now have to consider the role of the *supervisor*.[36] During my time as dean, I noticed that those who are most effective give rapid feedback and expect students to meet their deadlines; one of the most important things for them to realise is that their young researchers cannot be expected to write the book they, the supervisors, had always wanted to write. Among their tasks are ensuring that the project stays within acceptable limits, and keeping the students up to speed. In recent years, many schools and faculties have introduced a mandatory second supervisor, preferably an associate professor, to support the student on a more regular basis. Successfully supervised PhD projects have become an important parameter for the supervisor's academic career. For some time now, Leiden has offered its supervisors a carefully designed course.

[32] There are some good guides, or survival manuals, to obtaining a PhD: see e.g. Caroline Morris and Cian Murphy, *Getting a PhD in Law*, Oxford: Hart Publishing 2011. More generally, see e.g. Estelle M. Phillips and Derek S. Pugh, *How to Get a PhD: A Handbook for Students and Their Supervisors*, Maidenhead: Open University Press 2010; John A. Finn, *Getting a PhD: An Action Plan to Help Manage Your Research, Your Supervisor and Your Project*, London and New York: Routledge Study Guides 2005.

[33] Adrian Eley *et al.*, *Becoming a Successful Early Career Researcher*, New York and London: Routledge 2012 (a helpful guide for young academics at the start of their career).

[34] European Commission, *Principles for Innovative Doctoral Training*, Brussels: 2011.

[35] For an interesting Swedish case study, see Jitka Lindén, Mats Ohlin and Eva M. Brodin, 'Mentorship, Supervision and Learning Experience in PhD Education', in: *Studies in Higher Education*, 26 September 2011, pp. 1–4.

[36] May-May Meijer, *Keep Talent!*, Utrecht: 2011.

Finally, there is the *project* itself. Some years ago, a Dutch review commission remarked that research projects are becoming increasingly challenging – primarily, it suggested, to satisfy the requirements of external, very competitive funding. To be successful, these projects have to demonstrate innovative methodology, interdisciplinary ambitions and comparative challenges. It is hardly surprising then that the commission concluded that many of these projects became unwieldy, or even failed to make it beyond the first year.

One way of getting round this problem is to fund the best *candidate* instead of the best project. Indeed, in PhD funding there are two possibilities: either start with the candidate and then let him or her choose a subject, or start with a subject and then find the right candidate for it. Both funding systems exist.

The European universities' study on doctoral education mentioned above shows how Europe has been going through a process of modernising its doctoral education, to a large extent promoted by the establishment of common structures for education and research in the Bologna Process and in the European Research Area. The researchers envisage a converging global system of doctoral education that has the potential to develop 'a worldwide research community', one that 'will fully embrace the richness of human knowledge and address the global problems facing mankind'.[37]

9.4.1 PhD training and scientific integrity

In recent years, science in Germany has been plagued by accusations of plagiarism in PhD dissertations. Two government ministers have been forced to resign, one from the justice department (Zu Guttenberg), the other from education and sciences (Schavan). In both cases, the plagiarism concerned PhD dissertations. In Germany, the 'Dr degree' is almost a prerequisite to being able to achieve anything in society. It is an exceptionally popular qualification that is awarded some 25,000 times a year.[38] Two or even three titles – 'Dr Dr Dr' or 'DDDr', that are used on all possible occasions in civic life – are not exceptional in

[37] Thomas Ekman Jorgensen, *CODOC – Cooperation on Doctoral Education between Africa, Asia, Latin America and Europe*, 2012, p. 7.

[38] For a division into the different fields of science, see Wissenschaftsrat, *Anforderungen and die Qualitätssicherung der Promotion*, Berlin: 2011. Law, social sciences and economics make up 14 per cent (that is, approximately 3,500 per year) (in German).

Germany.[39] The research that accompanies these titles can usually be completed in a maximum of two years. The real work necessary for a further *academic* career is often a '*Habilitationsschrift*', or in France a 'habilitation *à diriger des recherches*'. Such a '*Habilitation*' takes much more time, generally between four and ten years, and results in a book, often of more than 400 pages, or a collection of fifteen to thirty scientific articles. The Netherlands, as an example, is part way between these extremes: here a PhD takes four years (in the humanities and law often five or six years) and results in a monograph of around 300 pages, or in collections of five or six scientific articles in reputable academic journals. The UK has so-called DPhil programmes, generally taking three years, and many other countries have yet other formats.

Whereas until some time ago PhD research was coupled with a taught programme, now the concept of an 'external PhD' has gained in popularity. One consequence of this is that the intensive *Doktor–Vater* or *Doktor–Mutter* relationship between a supervisor and a young researcher no longer exist; the candidates in question are in many cases foreign PhD researchers, some of whom conduct their research in their own country, far away from their supervisor. Unlike the PhD candidates in a taught programme, they see their supervisor on only a few occasions in all the years of the research: their contact is primarily by e-mail. The German Wissenschaftsrat points out that these particular cases require extra supervision, especially in the initial phase.[40] The risks are indeed very real.[41] Because in some countries the number of PhDs is a factor in how universities and their faculties are funded, a perverse incentive can sometimes arise: the number of PhDs is then of crucial importance for the research group.

In order to safeguard the quality of the PhD degree, but also as a consequence of the scandals about plagiarism in Germany, the German Wissenschaftsrat has advocated a stricter policy, including transparent selection criteria for doctoral candidates, American-style 'thesis committees' to oversee and arbitrate, if necessary, and closer connections between external PhDs and universities.

[39] For a good discussion, see Paul Hockenos, 'High-Profile Plagiarism Prompts Soul-Searching in German Universities', in: *The Chronicle of Higher Education*, 2013.

[40] Wissenschaftsrat, *Anforderungen and die Qualitätssicherung der Promotion*, 2011, p. 17 (in German).

[41] *Ibid*., p. 20.

9.4.2 A PhD – and then?

After completing a PhD, there are basically two routes to take: to stay within the university or to leave academia. Those who stay usually become temporary postdocs, in the same university or elsewhere, preferably abroad. After completing their postdoctoral assignments, they once again have to decide to stay on or leave. Those who decide to remain usually opt for a tenure track, which essentially means that young researchers are expected to develop not only an appealing research programme, but one that is generously supported by external funding and that fits in with the overall institutional aims. This track often includes both teaching and management. For the sciences in Leiden, the procedure is such that, if the 'tenure tracker' is successful in meeting the criteria during the track, he or she will be offered a temporary appointment for a maximum of six years. Then, if all the criteria are fully met, this will lead to promotion to a tenured position as an associate professor. Ultimately, a position as full professor can be expected within the subsequent three to five years.

How does this work in law? Although today's legal postdocs cannot automatically count on a tenured position in the university, for those who enter legal practice prospects are good. This appears to be an attractive proposition for many of these talented people. In commercial practice, salaries are often higher, with a better chance of obtaining a permanent position within three to five years. However, for most legal postdocs that is not the main reason for leaving the university: to many, especially those in private law, administrative law or criminal law, the opportunity to really *practise* law after so many years of largely theoretical studies is the most appealing motive for leaving academia. Some may eventually return to the university, to become valuable associates or even full professors, but most will stay in practice.

From the perspective of my law school, I have always had mixed feelings about excellent young people leaving the school. On the one hand, it is undeniable that going into practice after completing a PhD provides individuals with the opportunity to broaden their views and experience; in short, it gives them a chance to grow. Those who after many years in practice return to the university will contribute greatly to the school's education and research as a result of their practical experience. The downside, however, is that these departments who lose their PhDs tend to lack a strong middle group, ending up with the PhDs and some young teaching staff on the one hand, and on the other hand the

full professors – with little in between. This is especially a risk for those departments that are dependent on external funding – there are often more funding programmes available for young researchers than for older faculty – as well as in terms of PhD supervision. In the sciences it is the norm for postdocs and associates to supervise large groups of PhDs.

Therefore, the challenge for law schools and their individual departments in particular must be to do their utmost to build a mixed group of young, upcoming and experienced people. I have seen some inspiring examples of this; Chapter 10 provides some strategies on how to achieve this balance.

9.5 The alumni and benefactors?

If there is anything that law deans around the world envy their common law sister institutions for, it is their relationship with alumni. Most thoughts immediately turn to the staggering endowments with which alumni support their universities, although the alumni's interest in a university or its law school goes beyond just money: the ultimate aim is institutional advancement. Alumni are all who have graduated from a particular university. They may have obtained a bachelor's degree, a master's, a JD or even a PhD. They may include both national and international students, and even students that have been connected with the law school on the basis of an exchange programme.

For alumni, the value of continuing contact with their school or university is certainly not only limited to the diploma. Their years at the university represent a value in its own right: living away from home for the first time, making friends and contacts that often last a lifetime, their academic development, and, equally important, the development into a well-rounded human being with an understanding of some of the fundamental values in life. University represents a pivotal point in their lives. In short, an Irish case study suggests that an *alma mater* leaves an 'indelible mark' on alumni both in the cognitive domain with knowledge, skills and critical thinking and in the 'affective domain with nostalgia, loyalty and fond memories'.[42]

A special example of the role education plays in people's lives is expressed in the book, *Harvard in Holland* (1986, 2011), which

[42] Maria Gallo, 'Beyond Philanthropy: Recognising the Value of Alumni to Benefit Higher Education Institutions', in: *Tertiary Education and Management*, 18, 1, March 2012, p. 52.

celebrates the long–standing connection between Harvard and its Dutch alumni. The book was initially published on the occasion of the 350th anniversary of the university and subsequently on the 375th anniversary. In one contribution to the volume, a Dutch alumnus from Harvard Business School shows the weight and the importance of good alumni relations:

> the best measure of the success of an educational institution is the success of its alumni, and HBS is well known to have one of the largest and most influential alumni networks of any institution in the world. At present [2011], the School has more than 70,000 alumni in more than one hundred and fifty countries around the world – a network that expands steadily with each graduating class.[43]

To the university, graduates are valuable for a number of reasons. The first is because they are able to provide important feedback about the linkage between their education and the rest of their professional career. They actually have taken advantage of the education that the universities boast about in their marketing brochures and on their websites, such as 'superb education, cutting-edge research'. For a prospective student, nothing is more useful than the answer that a graduate provides to the question: 'Would you recommend this course to your best friend?'

I am convinced that research among alumni with a view to improving the quality of education should be carried out on a much larger scale than is currently the case. In some universities, alumni themselves even start playing a front-line role in marketing and public relations at their *alma mater* so that prospective students have clear role models.[44] In addition, some of the older graduates also play an important role as ambassadors for their school. On the other hand, former students can also be damaging to the institution if they are dissatisfied with its performance or with the direction it has taken since they graduated. Regular contact between alumni and the leadership of the law school is therefore vital. Such personal contact can take many forms, from the institution organising seminars, continuing education classes, or discussions about the strategy of the institution, to simply having tea or dinner with alumni.

[43] Felix Twaalfhoven, 'Harvard Business School', in: B. W. M. Twaalfhoven (ed.), *Harvard and Holland: 375 Years*, 2011.

[44] Gillian Saunders-Smits and Erik de Graaff, 'Assessment of Curriculum Quality Through Alumni Research', in: *European Journal of Engineering Education*, 37, 2, May 2012, pp. 133 ff, in the field of engineering.

Some universities even provide their alumni with access to their libraries or to full-text academic journals.[45]

Alumni may also become fundraisers themselves: as 'class agents' they seek annual donations from classmates, for example, and they are often members of fundraising committees. My university has such engaged alumni, living in many different countries. They organise annual dinners for all Leiden alumni in a particular city or country, inviting one of Leiden's professors to give a lecture about her research and one of the current students to share their experiences of student life in Leiden. These events are of great importance to a dean or a president of a university. As William G. Bowen, a former President of Princeton, explains in his book, *Lessons Learned* (2011), visits by presidents to alumni clubs all over the world are 'an extremely important means of maintaining contacts, listening to concerns, and communicating the university's message'.[46] A lesson he learned during his presidency was the importance on these occasions of alumni speaking freely about their concerns.

To the law school, contact with alumni is also valued because it expands and strengthens the network of the law school and its dean. This is central to the quality of the school as a whole and for its individual students. Eminent alumni may provide internships to current students or provide possible employment for graduates, as well as enabling the dean to make connections with national and international politicians.

Furthermore, with a good database of alumni it becomes unnecessary to employ expensive consultants. One can find a wide range of expertise among law school alumni, and the dean is hardly ever met with a refusal from an alumnus: they are always prepared to offer advice and assistance. Younger alumni also have a 'commercial' self-interest in the success of their school: a high ranking for the school increases their own market value. Every graduate would rather have a diploma from a top law school. By supporting their own *alma mater*, the alumni also further their own careers.

Finally, alumni are often prepared to donate to specific projects, especially those alumni who have prospered as a result of their education. Sometimes, especially in Anglo-American countries, this involves helping with large projects such as a new building, a new reading room or sports

[45] See the University of Washington's Academic Search Alumni Edition Database, which provides access to over 3,000 academic journals in full text.

[46] William G. Bowen, *Lessons Learned: Reflections of a University President*, Princeton, NJ: Princeton University Press 2011, p. 128.

facilities. American universities provide impressive examples of what is possible, such as the renovation of undergraduate houses at Harvard, a US$1 billion-plus project.[47]

Smaller in scope, but equally important, are scholarships: scholarships for student support, career development fellowships for young academics, and graduate scholarships for international students. Perhaps the most 'delicious donations' come from donors who simply say, 'Here's my gift. Use it as you see fit.' These undesignated funds allow for flexibility: they can be used as seed money for a project or as supplements for pressing needs or new opportunities that require one-off funds.[48]

To most alumni, however, it is important that their contribution makes a real difference. Sometimes special chairs are created. It is remarkable how often donations are made to contribute to the area of human rights. Let me give a few examples from the Leiden Law School: chairs in the field of human rights, international organisations, international humanitarian law, children's rights, and international sexual orientation law. The latter proves that fundraising programmes should no longer be geared only towards traditional donors. Universities increasingly engage in more culturally sensitive fundraising practices: think of fundraising activities aimed at alumni of colour, women, or members of the gay and lesbian communities.[49]

Sometimes these donations are not even from alumni, such as the Leiden UNICEF chair. In everyday life, it proves there are many more friends of the law school: the judiciary, the legal profession, business or banking. In Leiden, for example, a Turkish commercial bank generously supports Turkish students in their master's degree studies of European law. The involvement of private business sponsors is just as significant, but clear arrangements have to be made to prevent possible conflicts of interest.[50] Special attention, of course, is required when academic

[47] 'Harvard President Drew Faust's 2012–2013 Beginning of Year Message', in: *Harvard Magazine*, November 2012.

[48] Bruce W. Speck, 'The Growing Role of Private Giving in Financing the Modern University', in: *New Directions for Higher Education*, 149, 2010, p. 12.

[49] Noah D. Drezner, *Philanthropy and Fundraising in American Higher Education*, Hoboken, NJ: Jossey-Bass/Wiley 2011, pp. 27 ff. See also Andrea Walton and Marybeth Gasman (eds.), *Philanthropy, Volunteerism and Fundraising in Higher Education*, Boston: Pearson Custom Publishing 2008, Chapter 11 ('Fundraising from Diverse Communities').

[50] See e.g. the Code of Ethical Principles and Standards of the American Association of Fundraising Professionals (AFP), www.afpnet.org (last accessed 9 February 2013).

activities become too heavily dependent on one particular donor or, for that matter, when relatives of important benefactors expect to be given preference when applying for admission to the university.[51]

In order for alumni relations to be successful – annual giving, capital campaigns, donor cultivation – a strong development office is required. This office needs to be closely connected to the academics in the school and to the teaching programmes. Over the last few years, many of the large donations to my own law school were received via contacts and initiatives by professors themselves, supported by our development office. Alumni contact should be a joint concern for the professors, the dean, the development office, and in particular cases for the president of the university directly.[52] Henry Rosovsky, in his famous book, *The University – An Owner's Manual* (1990), stated clearly that fundraising will always be a principal obligation of senior university administrators:

> In the jargon of the trade, one must learn to become a 'closer': somebody who can shift from polite, frequently awkward preliminaries to asking for a seven figure gift. It gets easier with practice . . . All too often, visits whose intent is well understood by all lead to no conclusion – positive or negative – because it is so difficult to say: 'We hope that you will contribute at least one million dollars in support of our supreme effort to maintain the excellence of the university.'[53]

For most university presidents across the world, having donors writing seven-figure dollar cheques is probably a very distant future. But one must admit that good education and research cannot do without the support of private donors, just as in the theatre and music. There is never enough money to go around and, for almost every university, from the wealthiest to the poorest, fundraising has become an integral part of higher education.[54]

Yet one must admit that there are major concerns about philanthropy in higher education. One important concern is that education should be

[51] Henry Rosovsky, *The University: An Owner's Manual*, New York: W. W. Norton 1990.

[52] W. Bruce Cook, 'Fund Raising and the College Presidency in an Era of Uncertainty – From 1975 to the Present', in: Andrea Walton and Marybeth Gasman (eds.), *Philanthropy, Volunteerism and Fundraising in Higher Education*, Boston: Pearson Custom Publishing 2008.

[53] Henry Rosovsky, *The University: An Owner's Manual*, 1990, pp. 255–6.

[54] Kai-Ming Cheng, former Vice-Chancellor of the University of Hong Kong, provides a brief yet comprehensive overview: Kai-Ming Cheng, 'Fund-Raising as Institutional Advancement', in: Philip G. Altbach (ed.), *Leadership for World-Class Universities: Challenges for Developing Countries*, New York and London: Routledge 2011.

viewed as a public good, and that resources should come from the government rather than from individual, foundation or corporate philanthropy.[55] Fundraising is, in this view, definitely not a value-free activity.[56]

No matter how, American and British law schools have entered an era where the law dean is first and foremost public envoy, professional fundraiser and alumni booster.[57] In his amusing paper about law deanships, the former American law dean Victor Streib mentions the dean's role as fundraiser. Most deans, he argues, accept the deanship with the belief that they can make a difference in legal education generally or in their particular institution. But change requires money or other resources:

> Once the dean receives a good idea about any important improvement in the law school plan, the dean must sell that idea, not only to the university and faculty, but also to potential donors who might make it possible to convert the idea to reality. Effective fundraising requires good ideas worth selling, a careful plan, an energetic development person, and an actively participating dean . . . If an individual, foundation, or corporation is to be moved to donate toward a concept, it must be apparent that the law school's chief executive officer is fully behind that idea.[58]

Contact with alumni is not all that complicated: always imagine how you would like to be approached yourself. Most books written for deans contain a section with tips.[59] I, personally, have noticed that the bond with alumni strengthened significantly when I asked them for advice on complicated issues I had to confront as a dean. As advisers, alumni feel appreciated and involved. Apart from personal contacts, the bond with

[55] Noah D. Drezner, *Philanthropy and Fundraising in American Higher Education*, 2011, pp. 79 ff, at p. 81.

[56] Fundraising and voluntarism in higher education have become the subject of much interest and some scholarship: Marybeth Gasman and Noah D. Drezner, 'Fundraising as an Integral Part of Higher Education', in: Andrea Walton and Marybeth Gasman (eds.), *Philanthropy, Volunteerism and Fundraising in Higher Education*, Boston: Pearson Custom Publishing 2008, p. 596. More recently: Noah D. Drezner, *Philanthropy and Fundraising in American Higher Education*, 2011, p. ix. Both books, and especially the encyclopaedic Walton edition, provide a plethora of publications and other useful sources.

[57] John A. Miller, 'The Modern Law Dean', in: *Journal of Legal Education*, 50, 2000, p. 398.

[58] Victor L. Streib, 'Law Deanships: Must They Be Nasty, Brutish, and Short?', in: *Journal of Legal Education*, 44, 1994, p. 121.

[59] Jeffrey L. Buller, *The Essential Academic Dean: A Practical Guide to College Leadership*, San Francisco: Jossey-Bass 2007.

alumni is maintained through newsletters, social media,[60] academic lectures and conferences, garden parties and barbecues, concerts, tea sessions or dinners with the dean, art exhibitions, and large-scale reunions.

The alumni do not own the law school any more than the professors, the students or anyone else for that matter; nor do they want to. Alumni are too diverse in their histories, experience and opinions to give unambiguous advice to the dean. The 90-year-old, much-decorated former ambassador sees his old law school in a different light from the 30-year-old lawyer in her law firm or the 50-year-old with children who may well be studying at your law school. Nonetheless, their influence, advice and network can be significant. But where private sponsoring has become a growing source of finance, ownership questions may arise, to the detriment of government influence. One author, therefore, notes that many institutions in the US have started to describe themselves as state-assisted rather than state-supported.[61] In fact, Speck argues, some would say public higher education has moved from the status of state-assisted to merely being state-located.[62] For all public universities in the US, extramural funding has become a *sine qua non*. There is a downside:

> What is irrefutable is the fact that increased private investment in public higher education will change the academy because donors give to promote their vision of the academy, and if their vision matches existing needs as the university sees those needs, so much the better.[63]

Alumni contact, therefore, really becomes 'delicious' when alumni unconsciously contribute to the strategic goals of the law school. In closing, I want to single out a special example, without detracting from the contributions by other alumni. They will understand the reason for the example of Rob and Gerda Hazelhoff, who passed away a few years ago, one closely followed by the other.

Rob Hazelhoff had a long, international career as a banker. He was one of two men who merged two leading Dutch banks into a single entity,

[60] Laura A. Wankel and Charles Wankel, *Higher Education Administration with Social Media: Including Applications in Student Affairs, Enrolment Management, Alumni Relations, and Career Centres*, Bingley: Emerald 2011.

[61] Don Hossler, 'Refinancing Public Universities: Student Enrollments, Incentive-Based Budgetting, and Incremental Revenue', in: Edward P. St John and Michael D. Parsons (eds.), *Public Funding of Higher Education: Changing Contexts and New Rationales*, Baltimore, MD: Johns Hopkins University Press 2004.

[62] Bruce W. Speck, 'The Growing Role of Private Giving in Financing the Modern University', in: *New Directions for Higher Education*, 149, 2010.

[63] *Ibid*., pp. 15–16.

namely, the ABN and AMRO. As with so many banks in our time, things did not turn out well for the ABN-AMRO bank, causing him a lot of grief. One of his profound observations dates back to well before the banking crisis: 'If you want to become wealthy, don't work in a bank. It is someone else's money.'

Rob had an ambition: Leiden students who specialised in commercial law should have some understanding of the developments in US financial and banking law. He foresaw how the financial sector would evolve: into a strong, globally regulated market. He wanted the Leiden graduates joining the world of banking to be lectured in this particular field. This ambition was realised in the form of a special chair, a prize for the best master's dissertation of the year, as well as financial support for PhD students. Rob and his wife had already contributed part of their property during their lifetime. It enabled them to enjoy what was being achieved with their money while they were still alive. In the meantime, the university's administrators did not sit on their hands: they made extra money available for an additional chair. At a moment like that, everything meshes perfectly. The master's programme in financial law started in 2012. Rob was one of those alumni who made a difference.

9.6 Nobody? University as a public good

As I admitted in the earlier chapters, using the notion of 'university' as a general term is far from problematic. Just like our law schools, they, too, come in all shapes and sizes: some with an exclusive focus on teaching, while others have a strong research-oriented agenda; some are small, with only two or three schools or disciplines, while others have a wide variety of established disciplines such as humanities, social sciences, economics and business studies, the natural and the technological sciences, archaeology, medicine, and so on; some are rich, others poor, and yet others share unbeatable reputations drawing on the time-honoured traditions of centuries, while newcomers show the inspiring ambition of freshmen – and let us not forget there are so many places in the world where 'being a university', with its supposed freedom of education and research, can be a tough and often dangerous uphill fight. Iran, for instance, is reported to lose more than half of its academic elite to pursue education at foreign universities.[64]

[64] www.payvand.com/news/12/may/1297.html (last accessed 20 November 2013).

Stefan Collini, Professor of Intellectual History and English Literature at Cambridge, has asked himself in his, what he calls a satire/jeremiad/manifesto/essay, *What Are Universities For?* (2012), how we should characterise what is distinctive in what universities do, and what differentiates them from schools, teacher-training colleges, agricultural schools, research laboratories, learned associations, museums and so on, although they most definitely share some characteristics with them.[65] In our time, Collini argues, the label 'university' is sometimes affixed to institutions that have practically nothing in common with those European and North American universities of the nineteenth and twentieth centuries that earned this prestige in the first place. Collini summarises the issue as follows:

> The task is made more difficult still by the great multiplication of subjects of study and research. In reality, many universities have long offered courses that went beyond the traditional core of disciplines in the humanities and the sciences, but there has been a marked expansion of such courses in recent decades. Diplomas in golf-course management sit alongside MScs in software design; professorships of neo-natal care are established alongside postdoctoral fellowships in heritage studies. In addition, universities are increasingly centres of the creative and performing arts as well as hubs of policy advice, while those in countries influenced by the Anglo-Saxon tradition may also be major nurseries of athletic achievement.[66]

Some may say that we have become a 'multiversity', challenging Humbold's and others' classical 'idea of the university'. This concept of multiversity, from the former President of the University of California, Clark Kerr,[67] nicely marks the strong internal differentiation and heterogeneity of today's university. And, without any doubt, all disciplines, law and Collini's humanities included, have contributed to the development of specialisation and vocational orientation away from the traditional core of disciplines.

A brief look on the LLM Guide website at master's of law programmes worldwide shows a variety of choices for today's students: Asian law, asylum and refugee law, banking law, bankruptcy law, biotechnology law, business law, comparative law, competition law, constitutional law,

[65] Stefan Collini, *What Are Universities For?*, 2012, p. 4. [66] *Ibid.*, p. 6.

[67] C. Kerr, 'The Idea of a Multiversity', in: C. Kerr (ed.), *The Uses of the University*, Cambridge, MA, and London: Harvard University Press 1963; Georg Krücken, Anna Kosmützky and Marc Torka (eds.), *Towards a Multiversity? Universities between Global Trends and National Traditions*, 2007.

construction law, and so on – I'm only halfway through the letter 'C' – where previously students could get by with civil law, common law or canon law (to mention three more C's). Collini's worries about what universities are for and what defines them deserve to be taken seriously, however, if only because of his superb introduction to C. P. Snow's *Two Cultures*,[68] the lecture that shocked the academic community in 1959. In our time, there are many different expressions of the idea of a university: universities, Krücken *et al.* argue, may best be understood as historical and time-dependent systems that are strongly embedded in their own national and organisational histories – I think this applies particularly to law schools. And in the online world a Wikiversity is developing, as a virtual place where one can find learning materials of all types to use for self-study (see Chapter 5).

If 'university' is taken seriously, we should therefore try to at least formulate an absolute minimum of what university characterises. In Collini's eyes, there are at least four characteristics: that it provides some form of post-secondary-school education, where education signals something more than professional training; that it furthers some form of advanced scholarship or research whose character is not wholly dictated by the need to solve immediate practical problems; that these activities are pursued in more than just one single discipline or very tightly defined clusters of disciplines; and that it enjoys some form of institutional autonomy as far as its intellectual activities are concerned.[69]

If one accepts, even if just for discussion's sake, this minimum, and zooms in on law schools worldwide, it becomes immediately clear that many of them cannot live up to these four characteristics. Even though most law schools belong to institutions that may present themselves as a 'university', many have their first and second orientation towards training students to become legal or paralegal professionals and not, or much less so, on educating academics. Yet, almost all law schools belong to a university, or at least to such an institution of post-secondary education, such as the '*Hogescholen*' in the Netherlands, which offer legal education without, however, providing automatic access to the bar and the judiciary.

Back to the university: law schools and their universities have become increasingly interdependent. Today's deans, vice-deans and other faculty administrators have their weekly or monthly meetings with the president

[68] Stefan Collini, 'Introduction', in: C. P. Snow, *The Two Cultures*, 2009.
[69] Stefan Collini, *What Are Universities For?*, 2012, p. 7.

of the university and his or her colleagues, about all sorts of management questions regarding education, research and resources, such as a human resources policy, the marketing of the university, ICT, facilities and real estate, legal, and so on. Many of these issues indeed require a university-wide approach or can best be carried out at central level, with respect for the differences among the disciplines, which are sometimes also cultural.

At least as important, however, are a number of developments that transcend day-to-day management questions, and require much more strategic thinking and a strong common approach by all deans and administrators concerned with the university.

We also use the word 'engagement' as a way of coding for the idea, deeply embedded in the notion of a social purpose for universities, of two-way processes, of dialogue, of co-creation and mutual learning. It means ensuring that some research is led by an understanding of the needs of the society; that some educational programmes will be so well focused on the ambition to foster access to higher education for the disadvantaged, that creative forms of programme will be trialled, departing perhaps significantly from the style of teaching habitually used for the mainstream population of full-time students. Indeed, this kind of creativity often stimulates a new look at how the formal teaching is conducted, resulting in an enhanced mind-set of engagement and collaboration between academic staff and mainstream students.[70]

[70] E3M Project, *Green Paper Fostering and Measuring 'Third Mission' in Higher Education Institutions*, 2012.

10

Creating creativity in the law school

10.1 The three princes of Serendib[1]

The Dutch ethologist Nikolaas Tinbergen (1907–88) – he was one of Richard Dawkins' teachers – had an aquarium with sticklebacks in his laboratory on Kaiserstraat in Leiden. The aquarium was positioned in front of a window looking out onto the street. From time to time the male fish in the aquarium became restless. Tinbergen noticed that this always happened when a red postal van was passing. The red colour of the van appeared to stimulate the fish. This discovery was a great help to Tinbergen in his research into the territorial urge of sticklebacks. In 1973, he would receive the Nobel Prize for his entire body of scientific work. But what kind of discovery was this: was it chance, pure luck, perceptiveness or genius? And, more significantly, can such a discovery be 'organised'?

This phenomenon, which every scientist would love to experience, is called serendipity, after the well-known Persian fairy tale about the princes of Serendib.[2] In the seventeenth century, the story was translated into English under the title, *Travels and Adventures of Three Princes of Serendip*. Next, it was Horace Walpole, an Englishman, who introduced the word 'serendipity' in 1754 in a letter to his friend Horace Mann, the British ambassador in Florence. Walpole wrote that he had found something he had not been looking for, and how surprised he had been. This discovery, wrote Walpole,

[1] An earlier version of the first two sections of this chapter was published in C. J. J. M. Stolker, 'Vooruitgang in de wetenschap – vooral toeval of organisatie', in: J. H. Nieuwenhuis and C. J. J. M. Stolker (eds.), *Vooruit met het recht. Wat geldt in de rechtswetenschap als vooruitgang?*, The Hague: Boom Juridische uitgevers 2006 (in Dutch).

[2] Derived from the ancient name for Sri Lanka (Serendib), the story had been translated and published in Italian, in Venice, in 1557, by a Michele Tramezzino, as *Peregrinaggio di tre giovani figliuoli del re di Serendippo*.

> is almost of that kind which I call Serendipity, a very expressive word, which, as I have nothing better to tell you, I shall endeavour to explain to you: you will understand it better by the derivation than by the definition.[3]

And then Walpole tells a 'silly fairy tale' about three princes. At that moment, 'serendipity' was coined by Walpole, 'an inveterate maker of words', to mean a discovery through 'accidents and sagacity' of things not sought, and thus a chance discovery.

For all its beauty, the new word went unnoticed for a long time. It was only in 1833, when Walpole's letters were published in book form, that 'serendipity' embarked on its journey. At first, it had trouble getting under way: it took more than forty years before the word was written down again. But then 'serendipity' took the world by storm. It is one of those rare words that fixes itself in the memory because of its form, melody and rhythm, but also its mysteriousness. For many, it was love at first sight: 'that beautiful sound', 'this useful word with the pleasant sound', the 'poetic cadence', a 'spacious word'. A nineteenth-century column stated that the word serendipity 'serenely trips off the tongue'. What would have happened to the word if Walpole had opted for 'serendiption' or 'serendipness'? Together with Elinor Barber, the American sociologist Robert K. Merton wrote a superb book on the subject: *The Travels and Adventures of Serendipity*.[4]

But the success of the word is due not only to its physiognomy. 'Serendipity', which is on a list of the ten English words hardest to translate,[5] refers to progress, to fate that is favourably disposed to man. In the course of the nineteenth century, the word 'serendipity' reached the domain of scientific research.[6] Fleming's discovery of penicillin was a result of serendipity, and for researchers it thus became an old friend.

In the end, the word also reached university administrators: can serendipity be organised? A generally accepted notion is that serendipity is a gift. Not every biologist will make the connection between a red van

[3] Letter to Mann, 28 January 1754, in *Walpole's Correspondence*, Vol. 20, pp. 407–11.

[4] Robert K. Merton and Elinor Barber, *The Travels and Adventures of Serendipity: A Study in Sociological Semantics and the Sociology of Science*, Princeton, NJ: Princeton University Press 2004. The book was originally written in 1954, but the manuscript remained untouched until 2002 when it was initially published in Italian.

[5] *Today Translations*, Global Oneness, June 2004.

[6] Pek van Andel, 'Anatomy of the Unsought Finding. Serendipity: Origin, History, Domains, Traditions, Appearances, Patterns and Programmability', in: *British Journal for the Philosophy of Science*, 45, 1994.

and the behaviour of his sticklebacks: 'Such accidents never happen to common men', wrote the philosopher of science William Whewhell in 1847 on Newton's apple. But Louis Pasteur intriguingly observes that chance favours only '*les ésprits préparés*' ('the prepared minds'). And, although progress, unlike change, is a somewhat normative term (a great Dutch novelist, Gerard Reve, once said: 'there is no progress, and that's just as well: it is bad enough as it is'[7]), Merton, just before he died in 2003, recommended that universities should look for both the psychological and the sociological aspects of serendipity. The sociologist will have to ask whether something like 'institutionalised serendipity' is possible, a 'serendipitous microenvironment'. The psychologist, for his part, will ask what characterises the 'serendipitist' as a person.

More than any other organisation, institutions of higher education and research should therefore think about serendipity, because they, by their very nature, aim at progress, or, in other words, *change*.[8] Often it seems so elusive: why does one school do so much better than another? Why is one department or unit so much more inspiring than another? This is seldom a matter of the mere quality of the researchers, the students or the building, of money or of the management alone, or simply 'luck'. Could it be a matter of allowing some room for chance, of bringing creative people together, and putting them in a creative environment – in short, serendipity?

As management research shows, there is no quick fix in managing creativity in organisations. A host of factors influence the degree of creativity in an organisation. But they depend strongly on the culture at the top of an organisation, Gilbert Tan argues:

> it will be pointless to train employees to be creative when the organisational culture is hostile towards creative people.[9]

During my deanship, I came across examples of rather outdated approaches to leading faculties or departments in many countries. Deans, or their department directors, sometimes have to cope with strict top-down cultures where (tenured) professors resist any change in strategy, teaching methods or curriculum, let alone giving their group members the space to come up with new ideas or creative solutions to long-existing

[7] Gerard Reve, *Zelf schrijver worden* (1995) (in Dutch).

[8] See John Losee, *Theories of Scientific Progress: An Introduction*, New York and London: Routledge 2004.

[9] Gilbert Tan, 'Managing Creativity in Organizations: a Total System Approach', in: *Creativity and Innovation Management*, 7, 1, March 1998.

problems. If that is the case, forms of change management are needed – I will address this topic in Chapter 11. Here, I want to focus on how to bring more creativity to a group, a law school for instance. On the strength of my own experiences, I have become a supporter of an integrated approach, which in the scholarly literature is also called the 'total system approach'.

10.2 Towards a serendipitous microenvironment

Let us first look at Merton's sociological question, about a 'serendipitous microenvironment'. Merton thought that universities should be places of 'organised scepticism'.[10] In the private sector only a few companies see this as their goal, but for universities it is generally accepted. John Ziman, an American sociologist of science, remarks in his book, *Real Science*, that it may seem coldly philosophical – 'a call for total doubt' – but that it mainly entails an attitude:

> scepticism has psychological overtones, favouring a 'questioning' attitude, akin to 'curiosity'. This attitude is as necessary to scientific progress as personal 'creativity', although it must not be confounded with a conservative stance that automatically rejects every new idea.

Today, we like to talk about an *academic* attitude: don't just look for solutions to problems, but above all for the problems connected with these solutions (see Chapters 4 and 5). Make sure that you don't unnecessarily agree in the scientific debate. This academic obligation has sociological implications, says Ziman:

> 'Scepticism' is a code word for those features of the scientific culture that curb 'originality'. Personal trust is an essential feature of scientific life. But scientific communities do not accept research claims on the mere say-so of their authors. The active systematic exercise of this norm by individual researchers is what, above all, makes science a communal enterprise. 'Peer review' is the key institution of the scientific culture.[11]

Science is a 'communal enterprise', in which personal trust forms the basis of daily academic life and where external peer review plays a leading role as the 'key institution of the scientific culture'. It is not the publisher,

[10] R. K. Merton, 'The Normative Structure of Science', in: Robert K. Merton. *The Sociology of Science: Theoretical and Empirical Investigations*, 1942, pp. 267 ff.

[11] John Ziman, *Real Science: What It Is, and What It Means*, Cambridge: Cambridge University Press 2000, p. 246.

not the dean, not the vice-chancellor, the rector or the president of the university, and least of all the minister of science (let alone a minister of *business, innovation and skills*, as in the UK), who decides on whether our papers or books are published; that is what external peers do. This external peer review also proves itself in procedures for the external funding of scientific research, in the way many universities advise each other on appointments of new professors, in the often compulsory participation of external peers in PhD committees, or in the intensive way the quality and effectiveness of our research and education are institutionally judged, by all sorts of external audits. Though, in university, we may be each other's competitors – and in fact we *are* – external peer review is the driving force behind Merton's organisational mistrust and thus behind scientific progress. The acceptance of the judgment of our peers is the jewel in the academy's crown.

While the sociologist looks at science as a communal enterprise – that is, at the way scientific information is produced and is regarded as valid inside and outside the scientific community – the *psychologist* looks more closely at the individual process of scientific creativity. In his book, *Creativity in Science*, the American psychologist of science Dean Keith Simonton searches for the sources of scientific creativity, and particularly for 'the generation of highly creative ideas'.[12] Is it a matter of hard work, of perseverance, of genius? Is it more about cooperation? Does chance play an important part, or sheer luck? Is age relevant?

Simonton investigates four conditions in his book: 'genius', '*Zeitgeist*', 'logic' and 'chance' – this last term with all its different connotations: luck, coincidence, opportunity, possibility, serendipity. His study is important because it supplements the sociology of science and the philosophy of science (which looks at the *method* by which scientific progress is made, epistemology) by trying to get a handle on creativity. 'If I had to identify the single most critical topic for research', says Simonton:

> it would probably concern the characteristics of the creative scientist. More specifically, we need to know more about how various developmental and dispositional factors determine the type of creativity displayed by any individual.[13]

And yet we do not talk much about it in our law schools. Is this perhaps because we think it is empty talk, or because we are afraid that university

[12] Dean Keith Simonton, *Creativity in Science: Chance, Logic, Genius, and Zeitgeist*, New York: Cambridge University Press 2004.

[13] *Ibid*., p. 180.

bureaucrats will start meddling with the intimacy of our brain? Though you might at first think that *genius* is the main and only condition for creativity, Simonton regards this as less material. No researcher, however brilliant, can live without her surroundings, and without the work of others. We are all familiar with the image of scientists standing on 'the shoulders of giants'. But we should add that each such 'giant' in turn stood 'on the shoulders of scientists of more *ordinary* stature, thereby contributing to the range of his vision'.[14] These are William Whewhell's 'common men' I mentioned to above.

A second determining factor for creativity is *Zeitgeist*, or 'the spirit of the times', as Simonton translates it. He distinguishes two forms: 'Disciplinary *Zeitgeist*' and 'Socio-cultural *Zeitgeist*'. The first is defined by the ideas – the phenomena, facts, concepts, variables, constants, techniques, theories, laws, questions, goals and criteria – that make up the domain of a scientific discipline at a given point in time.[15] This collection of 'ideas', Simonton argues, provides the necessary but insufficient basis for all discoveries and inventions that can be made at that particular moment in disciplinary history. For those sensitive to it, this collection of phenomena forms the basis for many discoveries. Many examples in the history of science show that discoveries and new theories are 'in the air' at a certain time, and that it is rather a matter of chance who brings them out first. This even applies to Einstein's theory of relativity: others were really close to discovering the same theory.

In addition to this disciplinary *Zeitgeist*, there is the *socio-cultural* form of *Zeitgeist*, consisting of the political, economic, social and cultural circumstances that impinge on the scientific enterprise from the outside. Examples here are the way research is funded, the amount of money available for research and education, legislation and regulation, and the existing infrastructure of an organisation – such as libraries and information supply.

Logic is a third important factor, but in Simonton's theory not the most distinctive for fostering creative ideas. After all, he says, the need for logic is obvious: 'arguments that justify a discovery must be logical at their very heart; pleading and haranguing do not suffice.'[16]

Chance, however, seems the primary basis for scientific creativity. Like bad luck, good luck rarely comes on its own.[17] Unlike the individual

[14] *Ibid*., p. 183. [15] *Ibid*., p. 169. [16] *Ibid*., p. 164.
[17] *Ibid*., p. 9: 'In cases of true serendipity, the discovery was not only accidental but also unintended or undesired.'

factor of genius and even more than the external factor of *Zeitgeist*, it seems easier to influence chance. Let me give an example from Simonton's study.

From other sciences we know that discoveries often result from close cooperation within and among research groups. The operation and composition of creative groups has been intensively studied. The phenomenon of brainstorming sessions shows that the likelihood of creativity increases strongly if the group is composed not just of many experts in a specific field, but is heterogeneous, with researchers who possess overlapping or completely different expertise. A research team whose membership is more heterogeneous with respect to expertise, experience and status may prove more creative than one that is far more homogeneous:

> Just as work on one project can lead to serendipitous priming of other products undergoing the incubation phase, so may the thoughts of one scientist have unexpected effects on the thoughts of his or her colleagues. The more diverse are the collaborator backgrounds and expertise, the greater the level of mutual stimulation. The upshot is group problem solving that is more creative.[18]

In addition to that, 'failure' is not a four-letter word. We need to see 'failure' in a positive way: 'Ever tried. Ever failed. No matter. Try Again. Fail again. Fail better' (Samuel Becket). In business and in science, 'failure parties' are organised, where people can celebrate their most important failures. An interesting example is from drugs research: in the early 1990s, W. Leigh Thompson initiated these failure parties to commemorate excellent scientific work, done efficiently, that nevertheless resulted in failure.

Finally, we can penetrate further into the individuality of the researchers. Then we really enter the domain of psychology, such as family situation, type of education, or former teachers. In terms of personality (character) an important role is played by the willingness to experiment, associative thinking, curiosity, openness to other scientific disciplines, dissatisfaction with the *status quo* and persistence.[19]

What can we do with all this? Until then, how do we make happy law schools into places of 'organised mistrust' (Merton) in which peer review flourishes (Ziman)? Into places of flowering genius, with antennae pointed at the 'spirit of the times', where chance is given maximum scope (Simonton)? And what is the role of leaders, including deans,

[18] *Ibid.*, pp. 155 ff. [19] *Ibid.*, p. 181.

university administrators and the heads of departments and units? The key point is, Ziman rightly observes, 'that serendipity does not, of itself, produce discoveries: it produces *opportunities* for making discoveries'.[20] From research literature and my own and others' experiences I will try to draw some preconditions and drivers for success, many of them being closely linked to creating diversity.

10.3 Leadership = Being there

What helps is that much has been written about managing creativity in organisations. Research shows that there is not just one approach or one solution if a law school or group of scholars is not functioning properly; managing creativity in organisations calls for a broader approach.[21] Research distinguishes four components of academic leadership. First, leadership in the strict sense: how individual researchers and groups are guided and stimulated by leaders' vision and inspiration. Second, group management: the tools which the leaders use to manage the research or the teaching process. Third, network management: the activities undertaken by the leaders to position their group in the academic and social environment so as to gain legitimacy, reputation and visibility. And, finally, what is called a resource strategy: the task of leaders to acquire resources for their groups.[22]

10.3.1 Provide a safe environment for ideas and critical views

As we have seen, one has to shape an environment of both organised mistrust and good feedback. At first sight, these two seem barely compatible, yet certainly for the legal discipline they are vital. Law displays a strongly individual orientation. True cooperation in research and in education is the exception rather than the rule. But even in peer-environments

[20] John Ziman, *Real Science: What It Is, and What It Means*, 2000, p. 217. One fascinating study found that high-impact biomedical research is highly complex, emerging not simply from individual genius or pure luck, but rather from a dynamic selection process involving cognitive and environmental components: Hilary Zelko *et al.*, 'Selection Mechanisms Underlying High Impact Biomedical Research – A Qualitative Analysis and Causal Model', in: *PLOS ONE*, 5, 5, January 2010.

[21] Gilbert Tan, 'Managing Creativity in Organizations: A Total System Approach', in: *Creativity and Innovation Management*, 7, 1, 1998.

[22] Maaike Verbree, *Dynamics of Academic Leadership in Research Groups* (Dissertation, VU University Amsterdam), The Hague: Rathenau Instituut 2011; Inge van der Weijden *et al.*, *Management en prestaties van onderzoeksgroepen*, The Hague: 2009 (in Dutch).

personal feedback is far from easy, as the shocking affair of an eminent Dutch professor of social psychology shows. He had fabricated almost his total research, including that of his innocent PhD students (see section 2.9). Feedback requires a high level of trust as well as an independent and accessible intermediary – not the dean. At the university where this affair took place, the rector magnificus held this position. But what we can learn from it is that the status of a rector or a dean is simply too 'magnificent' for a student or PhD candidate to simply knock on their door.

Personal trust is an 'essential feature' in the university, Ziman says. The institutions, faculties and departments need to offer a safe environment in which feedback can flourish from high to low, and even more so from low to high. There must be trust, respect for individual differences and open communication to support creativity. Open communication is important because ideas and the flow of information are the life-blood of creativity. When communication is blocked, the flow will stop, and creativity will be stifled.[23]

A stimulating group climate, mutual appreciation, an open atmosphere and open communication where even the youngest join in discussions on strategy, direction and quality – the value of these goals is self-evident, yet they are difficult to achieve in practice. Deans, department heads and professors need to set an example through their behaviour; this cannot simply come from below. In Chapter 11 I will more thoroughly address the issue of what can be done if more far-reaching management changes in schools and departments are needed.

10.3.2 Provide the right leadership

Putting together a creative group is one thing, leading it is another. If the traditional view was that creative people, by virtue of their autonomy and professionalism, simply do not need leaders, this view is heard less often nowadays. Few would deny that leadership is necessary.[24] Rather, the question focuses on the role of the leader, namely, to support, to

[23] Gilbert Tan, 'Managing Creativity in Organizations: a Total System Approach', in: *Creativity and Innovation Management*, 7, 1, 1998.

[24] Harry de Boer, Leo Goedegebuure and V. Lynn Meek, 'The Changing Nature of Academic Middle Management: A Framework for Analysis', in: V. Lynn Meek, Leo Goedegebuure, Rui Santiago and Teresa Carvalho (eds.), *The Changing Dynamics of Higher Education Middle Management*, Dordrecht and New York: Springer 2009. For European universities, see Geoffrey Lockwood, 'Management and Resources', in: *A History of the University in Europe*, Vol. IV: *Universities since 1945*, 2011.

facilitate, to encourage – leaders must, for example, acquire resources and encourage new ideas – and to inspire. But certainly they must also be consummate professionals, if only because otherwise they cannot possibly assess and evaluate their people. One warning from one of a number of excellent handbooks for deans states:

> The most horrifying words a dean can say are: 'I used to be a biologist, musician, chemical . . . engineer . . .' . . . There is no faster way to lose the respect of faculty colleagues.[25]

A 'grand theory' on how to lead creative groups has not yet been developed, but *some* conclusions can be drawn. An 'integrative style' is helpful, that permits the leader to orchestrate expertise, people and relationships in such a way as to bring new ideas into being, Mumford *et al.* claim.[26] Such a style of leadership focuses on three elements. The first is idea *generation*, also including some emphasis on crisis management skills and conflict resolution between all these creative spirits. Just as important is idea *structuring* by the leaders, which refers to guidance with respect to the technical and organisational merits of the work, setting output expectations, and identifying and integrating the projects to be pursued. And, finally, there is idea *promotion* to the outside world – which is essential also to securing long-term funding.

10.3.3 Provide visible leaders

Whatever structure is given to the organisation of a law school, it always starts with people: deans, administrators, department and unit heads, the academics, and the support staff.[27] A Swedish study examined how group leaders in academic and industrial research settings stimulate creativity among the members of a group.[28] For their research, they collected so-called 'creative incidents': providing expertise and support to individuals and groups turned out to be crucial for scientific progress. Therefore,

[25] David Bright and Mary P. Richards, *The Academic Deanship: Individual Careers and Institutional Roles*, San Francisco: Jossey-Bass 2001, p. 273.

[26] Michael D. Mumford *et al.*, 'Leading Creative People: Orchestrating Expertise and Relationships', in: *The Leadership Quarterly*, 13, 6, December 2002, pp. 705 ff.

[27] Jeffrey L. Buller, *The Essential Academic Dean: A Practical Guide to College Leadership*, 2007, pp. 2 ff.

[28] Sven Hemlin and Lisa Olsson, 'Creativity-Stimulating Leadership: A Critical Incident Study of Leaders' Influence on Creativity in Research Groups', in: *Creativity and Innovation Management*, 20, 1, 17 March 2011, pp. 49 ff.

group leaders should spend a considerable amount of time with each group member. Moreover, the researchers found, it is vital that leaders frequently assemble their group to discuss ongoing research issues.

Dutch research in the medical field shows that successful research leaders spend more than a quarter of their time on internal and external management tasks. In addition, they are deeply involved in the research of their group, which takes up about half their time. The rest is spent on teaching and patient care. Also, research leaders organise performance interviews with their staff, communicate internally and intensively on scientific research and organise meetings to discuss the group's long-term research policy. And most research leaders are found to attach significant value to internal quality control, particularly in the case of research proposals for external funding; they actively help to write these proposals.

A vital condition for creativity thus seems to be the *physical presence* of the members of a group, including those who lead the group. Law schools and many other faculties, however, used to have a time-honoured tradition of working at home. Until after the war, professors often had no room of their own in the law school. Exams were taken at home – the professor's wife served tea. These two, the professor and his wife, formed part of a centuries-old tradition in which university *buildings* simply did not exist. If a stranger in thirteenth-century Paris or Bologna had asked the way to the university, no one would have understood him: there *were* no special university buildings. The wealthier teachers taught in their own houses; the great majority of the teachers were left to rent classrooms from private landlords.[29]

History may have its beauty, but all current research shows that the importance of a regular physical presence can hardly be overestimated: and an open-door policy and awareness of each other's presence and activities are an important part of this. Through their mere presence and often without realising it, experienced staff pass on their experience to younger colleagues. Conversely, younger staff keep experienced colleagues young and on the ball in the rapidly changing times in which we live. Working at home happens less nowadays, though the available space in many law schools I have seen is insufficient to house everyone. A related problem is that, worldwide, many law schools have to cope with large numbers of part-time faculty. Deans, therefore, have to be keen on

[29] Olaf Pedersen, *The First Universities: Studium Generale and the Origins of University Education in Europe*, 1997.

an effective full-time/part-time ratio. Of what I have seen internationally, law schools with a strong body of full-timers, supplemented with a smaller number of devoted part-timers, do better in teaching and research than schools or departments where part-time work (i.e. less than four days a week) seems to be the rule.

Equally important is the male/female balance among the academics. In many law schools, the male/female balance is still an embarrassment. In German law schools, for example, women remain significantly under-represented, particularly in executive positions, and the share of female professors is smaller than in other university disciplines. The German Wissenschaftsrat recommends law schools to increase the diversity of approaches in legal scholarship; career paths should be laid out to improve the diversity of faculty members. In order to strengthen female participation across all academic positions, the Wissenschaftsrat urges schools and departments to commit to flexible quotas.[30]

It is often stressed that most higher education institutions need a drastic increase of female academics as role models for the overwhelming numbers of female students in the university. Such an observation is definitely true: the arrival of female academics in the higher ranks of a school is as important for the future of the school as a whole. Just as important is that in the past decades large numbers of women have entered the legal professions.[31] Many countries are witnessing a 'feminisation' of at least certain parts of the legal profession, notably the judiciary, but also the traditional law firms. This development, which raises many new questions,[32] cannot but change both the legal professions as well as legal education and the law schools themselves.[33] Diversity therefore is definitely among the most discussed topics in the legal profession, in law school and in the university at large.

A recent European report advocates a strong commitment from the university's (and faculty's) leadership: more women than men drop out of research careers, resulting in an underrepresentation of women in leading positions, a loss of talent for society and a lack of diversity in the

[30] Wissenschaftsrat, *Prospects of Legal Scholarship in Germany: Current Situation, Analyses, Recommendations*, 2012, p. 44.

[31] Suzan Ehrlich Martin and Nancy J. Jurik, *Doing Justice, Doing Gender: Women in Legal and Criminal Justice Occupations*, London: Sage 2007, Chapter 5.

[32] Fiona Kay and Elizabeth Gorman, 'Women in the Legal Profession', in: *Annual Review of Law and Social Science*, 4, 1, December 2008.

[33] Rosemary Auchmuty, 'Feminists as Stakeholders in the Law School', in: Fiona Cownie (ed.), *Stakeholders in the Law School*, Oxford and Portland, OR: Hart Publishing 2010.

workplace, each of which presents a threat to the search for excellence in research,[34] its quality – think of the *Gendered Innovations* movement integrating sex and gender analysis into research and therefore opening up new areas of research[35] – as well as leadership.[36] One decisive factor for the small share of female law professors, the German Wissenschaftsrat argues, is the fact that it remains difficult to plan career trajectories in higher education. Law schools should therefore make the process of gaining post-doctoral qualifications more transparent and predictable, so as to allow employees to start a family during these years. And key decision-making bodies, such as the selection committees, should aim to achieve adequate, preferably equal, representation of men and women.[37] But, in many law schools, such obvious recommendations appear all too often still difficult to implement, or, more importantly, to enforce.[38]

Over recent years, I have seen the number of female professors in my law school in Leiden grow rapidly from an embarrassing four, up to sixteen (out of seventy), which is still far from what it should be. But, speaking from my own experience and without any sound statistical research, women prove to be exceptionally good in engaged and effective leadership of a group or a programme, in supervising younger staff, and in group building in general. Furthermore, when women are part of the different boards and committees, meetings often become more effective, cooperation across departments and units becomes easier, and the whole atmosphere seems to become more open, which also allows women to speak out more directly.

[34] Katrien Maes *et al.*, *Women, Research and Universities: Excellence Without Gender Bias*, Leuven: 2012. This includes professional and support staff: Andrea Simpson and Tanya Fitzgerald, 'Organisational and Occupational Boundaries in Australian Universities: The Hierarchical Positioning of Female Professional Staff', in: *Studies in Higher Education*, published online 18 June 2013.

[35] European Commission, *Gendered Innovations: How Gender Analysis Contributes to Research*, Brussels: European Commission 2013, although nothing about *legal* research. Stanford University has a great website: http://genderedinnovations.stanford.edu (last accessed 21 December 2013).

[36] Tanya Fitzgerald, *Women Leaders in Higher Education: Shattering the Myths*, London and New York: Routledge 2013.

[37] Wissenschaftsrat, *Prospects of Legal Scholarship in Germany: Current Situation, Analyses, Recommendations*, 2012, p. 44.

[38] Interesting empirical work has been done by Celia Wells, Dean of the Bristol Law School in the UK. See e.g. Celia Wells, 'Working Out Women in Law Schools', in: *Legal Studies*, 118, 2001.

10.3.4 Provide training and development

Many are surprised how little universities, pre-eminently *educational* organisations, do in the way of educating or even incidentally training their *own* teachers, researchers, administrators and managers. Only now is awareness dawning that teaching, for example, is a profession. I would be surprised if the average Dutch professor has actually had more than one day of education per year during his or her professorship. One of them, a very good teacher incidentally, once said to me: 'I was appointed here to teach, not to be taught.' And, when it comes to management, it is up to the administrators and managers themselves to decide whether they want extra training or skills. Most education takes place on the shop floor, in a master–apprentice type of relationship – workplace learning. There is no worry at all if it really is workplace learning; quite the contrary. But there is a risk that weak, or very implicit, workplace learning will unwittingly preserve an existing culture of weak education, weak research and weak management and leadership. An equally large risk – especially when new people are appointed in departments that have become too small – is that there is no one to supervise the newcomer.

10.4 Creating creativity = Creating diversity

10.4.1 Provide diversity in the law school

As we all know, research into brainstorming shows that, if each individual in a research laboratory possesses an identical sample of ideas from the same scientific domain, then their productivity seldom exceeds the productivity of the same number of *individuals* working alone. Yet, in the many selection committees for new professors of which I formed part as dean, we were often struck how much we were inclined to appoint 'people like us'. By doing so, you play safe – but the appointment of the same people over and again easily leads to self-replication.[39] For instance, sitting mono-disciplinary scholars are less inclined to appoint researchers from other disciplines, and within departments you often still see an aversion to intruders from other fields of law, let alone other disciplines. Unlike in the US, departments in Europe are often composed according to the organisation of the school's teaching: civil law, criminal

[39] Hazel Genn, Martin Partington and Sally Wheeler, *Law in the Real World: Improving Our Understanding of How Law Works: Final Report and Recommendations*, 2006, p. 29.

law, administrative law, European law, sometimes with a tendency towards further subdivisions.

As a young PhD candidate I was part of a department where, due to housing restraints, substantive private law had been separated from procedural law. I have long felt the drawbacks of this separation, which was abolished long ago.

Opting for more of the same reduces the chance of the unexpected – of serendipity. This diversity lies in the male/female and young/old distribution, the national/international ratio, the regular presence of guest researchers (from abroad, preferably, or from another discipline), the addition of colleagues with different work experiences (professional practice/academy) and, as we have seen, the disciplinary/multidisciplinary distribution. The male/female distribution in many law schools, in particular, is a problem (see above). And so is the percentage of foreign professors in law for many law schools. The German Wissenschaftsrat, for instance, notes that a complicating factor is that foreign scholars rarely specialise in German law, which makes up the largest share of the law curriculum. While a number of German legal scholars have had successful careers abroad, the German system remains largely closed to foreigners. Foreign students who go there on scholarships also often find it hard to make the transition to becoming fully fledged academics.[40]

It is certainly true that a disciplinary division has its advantages. It promotes reflection on and cooperation in education and research within the specific field, which is good. The importance of sound disciplinary research is undisputed: there is no point in a weak or average group collaborating with another weak or average group. But an all too strict division into disciplinary departments may hamper or even preclude creativity in both education and research. In that case, cooperation needs to be organised. In our school, this has resulted in various forms of collaboration among academics: between fields of law (international law and criminal law, for instance, or European law and administrative law) and between different *disciplines* (such as tax specialists and economists, corporate law and business studies, criminal law and criminology). This will be enhanced by joint research in diverse teams from the department and from outside the law school (jurists and non-jurists, pure academics and professional jurists, men and women, young PhDs and experienced researchers).

[40] Wissenschaftsrat, *Prospects of Legal Scholarship in Germany: Current Situation, Analyses, Recommendations*, 2012, p. 45.

The Germans are particularly clear about the need for diversification. The Wissenschaftsrat argues that this entails:

> strengthening the foundational subjects, intensifying exchanges within and outside the discipline and opening up legal scholarship towards other academic disciplines and the wider system of higher education and academic research. In order to achieve this goal, it is essential that both staff and institutions in German legal scholarship become more diversified and that the discipline increases the variety of its theoretical and methodological approaches.[41]

Finally, it is important for departments and their units not to become too small. Units of fewer than about five or six academics often do not function well. The risk of people becoming embittered, tiring of one another after too many years, sticking to settled routines, or even ignoring each other then becomes a real threat. A scientific study among biomedical research groups shows that fifteen is a healthy staff number.[42] Groups can certainly grow larger, but in that case a second leader is required.

10.4.2 Provide diversity in tasks

Repetition builds up experience but kills creativity. I remember the rather young teacher who told me that she was going to teach the same subject for the nineteenth time, or the colleagues who went into the weekend with 1,150 exams to assess. Variation in tasks maintains and promotes creativity. This means giving each other the chance to try out new things in education and research, or simply exchanging tasks every so often: teaching each other's subjects, the professor taking the seminar and the younger staff member giving the lecture. Deans, department and unit heads have to provide diversity in tasks, both in education and research. And, even though you are the leader, you would do well to do the basic work yourself from time to time. It is natural to assume that generational differences, too, play a role. A Dutch study focused on the domain of scientific medicine, the age limit being 57. In preparation for their leave, the 57-year-olds are likely to reduce their research activity and place more emphasis on education. More specifically, although departing

[41] *Ibid*., p. 13.
[42] Inge van der Weijden *et al*., *Management en prestaties van onderzoeksgroepen*, 2009 (in Dutch).

academic leaders spend about half of their time on research and research management of their group,

> they spend a lower proportion of time on research activities and group management than starting and experienced academic leaders. Also, they spend a higher proportion of their time on education. On average, departing group leaders consider visibility in top journals as less important than starting and experienced academic leaders. Finally, departing leaders . . . attach value to the autonomy of PhD students, which indicates a shift from a group leader's role to a supervisory role.[43]

It would be interesting to find out how these generation differences turn out in the legal discipline. An important driver for older *medical* professors to do less research and more teaching, including the supervision of younger colleagues, is the changing funding of research, which has become much more competitive. Young researchers are found to adapt more easily to this change, which requires them to work out their own research agenda at an increasingly early stage.

Often tasks in the department or unit will be so diverse that precise complementarity is needed. For instance, one person will like dealing with first-year students, another will flourish better in continuing education; one is an engaged teacher, the other is good at supervising PhDs or talented students; one is cut out for administrative tasks and the other is adroit at acquiring external research commissions or at media presentations. In 1627, Francis Bacon published his novella, *The New Atlantis*,[44] in which he describes his ideal community of scientists. His book contains numerous proposals for the organisation of scientific research and particularly the division of labour within this research: collectors of books and instruments ('Merchants'), devisers of new experiments ('Pioneers'), members who reproduce the results of experiments in tables ('Compilers'), people who reflect on the practical application of results (splendidly called 'Benefactors'), those who carry out experiments ('Inoculators') and finally those who translate the results ('Interpreters'). Bacon's utopia ultimately had great influence on the realisation of the British Royal Society and its fellows. The art of leadership is to take advantage of people's individual qualities, without running the risk of settling into routines, getting bored and ignoring each other. And, individuals must become teams.

[43] Maaike Verbree, *Dynamics of Academic Leadership in Research Groups* (Dissertation, VU University Amsterdam), 2011, p. 93.

[44] Francis Bacon, *The New Atlantis (1627)*, Dodo Press 2006.

10.4.3 Provide a 'balanced' diversity

It is essential to find a proper balance in a group of lecturers and researchers. With this in mind, psychologists make a distinction between individuals with a 'promotion focus' and individuals with a 'prevention focus'.[45] Promotion-focused people pursue ideas, take risks and try out new things. Such activities are often associated with creativity. It is, however, also important for any ideas generated to be 'practical' as well, and it is for this reason that prevention-focused people are necessary. When confronted with new ideas, the latter group primarily tries to determine whether the innovations are feasible and ensure that they do not produce any unintended detrimental effects. Although many organisations, including universities, take notice of and reward the 'promotion-focused' manner of creativity, a balance between these two types of individual is crucial for overall success.

This balance does not, however, just happen on its own. People often find it difficult to work with someone who has a different approach, any resulting misunderstanding often leading to conflict. As a result, an organisation has to offer a clear structure in which various perspectives are all given due attention.

It is also important for any organisation that promotes creativity to allow enough time for new things to develop, teething problems to be ironed out and good ideas to be separated from bad ones. There also needs to be a sufficient buffer period for people to become involved in the development and implementation of the new ideas. Anyone wishing to be creative has to possess a tolerance for error, since results are by definition uncertain and may remain beyond reach for some time. Such an attitude is far from prevalent in our current culture of performance, in which immediate success is the primary expectation.

10.4.4 Provide diversity in scholarly communication

There are at least two ways of looking at scholarly communication: internally, i.e. within the law school and the university as a whole; and externally, at researchers from other universities and elsewhere. After

[45] E. Tory Higgins, 'Beyond Pleasure and Pain', in: *The American Psychologist*, 52, 12, December 1997; E. Tory Higgins *et al.*, 'Achievement Orientations from Subjective Histories of Success: Promotion Pride Versus Prevention Pride', in: *European Journal of Social Psychology*, 31, 2001.

hiring the best people, it is probably the most challenging task of a dean and her department heads to provide places, times and resources where people meet each other, physically and digitally. The physical layout of departments in the building is therefore significant. Those responsible for housing and for logistics thus play an important role in creating the conditions for quality of education and research. Just as the size of classrooms implies something about the chosen pedagogy, so the layout of a law school or a faculty, or even a whole university, says a lot about the *profile* of its education and research. Traditionally, the university library performed the function of meeting place, located in the heart of the building.

But it is not just about physical places and opportunities. It is just as much about *digital* meeting-places, where teachers and researchers can communicate across the boundaries of their group, pose questions about pedagogy, exchange teaching experiences or post preprints of papers or book chapters. A law school's weblog can also be helpful for external and internal communication. Enhancing creativity is often not an automatic process; it needs to be organised.

Then there is *external* communication for promoting creativity. Scholarly communication is increasingly taking place via the Internet, networks, weblogs, LinkedIn and Twitter – science journalists love Twitter! American author Michael Nielsen wrote a book about it, *Reinventing Discovery*.[46] Serendipity may have an entirely new future there: using social media is a rapidly growing phenomenon, including among researchers. They share tips, key words, favourite sources, blogs and publications or activities by putting information on publicly accessible websites and adding a short description or personal opinion. Tagging, the assignment of key words, facilitates searching. A site like Connotea focuses specifically on articles and thus performs the function of a library ('organise, share, discover'). Or take Mendeley, a reference management tool that has gradually become an academic social network. Companies like Amazon have thought up recommendations (the familiar 'Customers who bought this item also bought . . .'). It is today's serendipity. In some privileged university libraries, researchers doing a search can be alerted to related books or articles, or to people who have conducted a similar search, to lenders of the same book, or to books which lenders of the same book have ordered, references in articles,

[46] Michael Nielsen, *Reinventing Discovery: The New Era of Networked Science*, Princeton, NJ, and Oxford: Princeton University Press 2012.

citations of articles, and so on.[47] Libraries play a vital role in creating a serendipitous microenvironment. The much-praised 'open-plan library', which once seemed unbeatable for chance finds, is now being overtaken by its digital rival. Bill Thompson, who is a BBC technology commentator, once blogged:

> Not all of the things we find online are useful, but not every book stumbled across in a library is the one that changes your worldview and prompts a new scientific revolution. But every time I do a search, every time I read someone's blog, and every time I engage in an online conversation with a friend, I'm entering a space where the possibility for a serendipitous discovery exists, and to a far greater degree than in most other areas of my life.[48]

10.5 The importance of food and drink

And, finally, there is 'food and drink'. Mark Harrison, an American department director, drew up a survival guide for department chairs: 'These Are Some of the Things I Wish I Had Done, Not the Things I Did'. It is a brilliant list: print it and put it on your wall! One of his recommendations was:

> Spend as much as you can on food. The larger your department, the more it needs to be fed. Food brings people together and keeps them cheerful. They will enjoy each other's company, and rediscover what they share.[49]

In this way, shared lunches, drinks and barbecues contribute to interaction and new ideas, even at McDonalds. In the old English colleges there is still the simple and brilliant custom of pulling up a chair at lunch in order of entrance; it is one of the simplest ways of organising serendipity, even if for just one day a week. A few years ago, a Japanese company issued three edicts: staff were not allowed to hang around the coffee machine longer than strictly necessary, they had to move inside the building at a pace of at least five kilometres an hour, and they always had to keep their hands out of their pockets. I don't know enough about Japanese companies, but in Leiden we turned these edicts around: stroll

[47] These services are offered by, for example, Web of Science and Scopus, but also via reference managers like Mendeley.

[48] Bill Thompson, 'Serendipity Casts a Very Wide Web', http://news.bbc.co.uk/l/hitechnology/5018998.stm.

[49] Amanda H. Goodall, *Socrates in the Boardroom: Why Research Universities Should Be Led by Top Scholars*, Princeton, NJ: Princeton University Press 2009.

over to the coffee machine with your hands in your pockets as slowly as possible, and hang around there for as long as possible – it all happens at the coffee machine. Finally, celebrating successes cannot be exuberant enough: new publications, newly appointed or departing staff, research subsidies acquired, education prizes, or successful accreditations, besides being ideal moments for serendipity, are moments where leaders can show – unplanned and therefore even more genuinely – their appreciation. Food and drink therefore deserved a special section of this book.

10.6 Conclusions and outlook

Can creativity be organised? We can at least give it a boost. In this chapter, I explored a few possibilities, starting with Merton and Barber's inspiring work on serendipity. Sociologists and psychologists have their own perspectives on creativity. The former deals with the group of cooperating colleagues in the broader context of a school or faculty, the latter with the individual researcher or teacher within this school. Serendipity as a concept owes its charm mainly to its inspiring vagueness. Opportunities seem above all to be found where people are able to create order with room for chaos: Merton's 'serendipitous microenvironment'. What does such an environment look like?

Creativity is not something automatic. Three elements are crucial for any leader of a creative group: they must help develop ideas, they must help structure ideas and they must promote the results. This requires transparency, empowerment, strong team work and caring for individuals while supporting their growth and development.[50]

Promoting creativity also calls for a broad approach, varying from a sound appointment policy ('often rushed and unsystematic'[51]), to the scouting of excellent students or students who for other reasons do not belong to the mainstream, and young faculty and support staff as future leaders. And it varies from intensifying cooperation, organising diversity, looking for smarter ways of organising communication internally and externally, to – above all – *being there*. The dean, professors and other leaders within the institution have an exemplary role to play. It is like raising the new generations: they don't do what you say, but what you do.

[50] Lee G. Bolman and Joan V. Gallos, *Reframing Academic Leadership*, San Francisco: Jossey-Bass 2011, p. 100.
[51] *Ibid*., p. 102.

Is creativity just a matter of chance, or can it be manufactured? Of course, the answer is not unambiguously one or the other. A collection of interviews with Leiden scientists about their success – *Roasted Pigeons Don't Fly*[52] – shows one type of success factor to be crucial at researcher level: energy, hard work, perseverance, drive and total commitment to your subject.

[52] *Gebraden duiven vliegen niet. Leidse wetenschappers over hun succes en hun falen* . . ., Leiden: Leiden University 2006. The same conclusion is reached by a report of the Rathenau Institute: Barbara van Balen, *Op het juiste moment op de juiste plaats. Waarom wetenschappelijk talent een wetenschappelijke carrière volgt*, The Hague: Rathenau Instituut, 2011. Both publications are in Dutch.

11

Governing law schools: strategy, leadership and collegiality

11.1 The importance of having a strategy

Strategic leadership should be ranked highly in the job description of every dean. It was only when I became responsible for leading a law school that I became aware of the importance of strategy. Until then, as a law teacher, I was primarily engaged in teaching our students and law practitioners, and in publishing as much as I could, without really noticing how that would fit in with the overall direction of the school, let alone the remote university that I was in some way also part of. Of course, I had seen the plethora of books about strategy, leadership and management, but as long as you do not have responsibility for leading something yourself, you simply do not know where strategy fits in and what it is good for.

The need for a clear strategy, which is basically choosing a long-term direction by setting your goals and then sticking to them, may be both internally and externally driven.[1] For me, strategic thinking started in 2001, when the Leiden Law School got into some difficulty. In short, the causes were: a lack of financial resources because of continuous under-funding; a lack of reliable management information; the law school's premises scattered around the city resulting in poor internal and external communication; faculty members and their many units being mainly concerned with their *own* teaching and research (as I was); a negative outcome from one of the national teaching quality assessments, with headlines in a national newspaper about Leiden being the worst law school in the Netherlands; a lack of continuity in the school's leadership, with deans changing every two years; as well as a lack of a shared overall strategy – the law school, with its academic staff of only 120 full-time equivalents, had more than forty separate sections, each with its own ideas of where to go, and how and when to get there.

[1] For a good overview, see Paulo Santiago *et al.*, *Tertiary Education for the Knowledge Society*, Vol. 1, 2008.

At an all-time low for the law school, two successive, very experienced outside deans were hired. In regular meetings with faculty, support staff and students, a plan began to emerge as to how the new law school should look and also what its new strategy should look like. It took the school four years to get back on its feet again, ending up in the top ten of the most popular law schools in the world.[2] This story verifies the conclusion in a World Bank report, *The Road to Academic Excellence: The Making of World-Class Research Universities*, that, when it comes to existing academic institutions leadership, governance and management seem to be the key factors for starting a virtuous circle leading to momentous improvement.[3]

External pressures and developments may also be drivers for developing a new strategy or adapting an existing one. Particularly in higher education, governmental policies are often poorly coordinated, unstable and commonly lacking in continuity.[4] The World Bank report reviewed countries seeking to transform their top universities into flagship institutions. It stresses that analysing what happens *in* the institutions is not sufficient to understand the full dynamics of their success or failure. We also have to take into account the 'ecosystem' within which the institutions evolve, such as the quality of a country's secondary education or – even more importantly – the extent of academic freedom, particularly in politically sensitive fields such as law and political science. An important freedom is, for instance, that universities are able to select their students on the basis of merit alone. Generally speaking, the editors of the report argue that the rule of law, political stability and the respect of basic freedoms are important dimensions of the political context in which high-quality universities operate.[5]

11.1.1 'Sense making' and 'sense giving'

These observations again show how cautious one should be when discussing law schools worldwide. But they also prove that one of the most important tasks for any law dean is to bring the outside world *into*

[2] www.llm-guide.com (last accessed 22 September 2013).

[3] Jamil Salmi, 'The Road to Academic Excellence: Lessons of Experience', in: *The Road to Academic Excellence: The Making of World-Class Research Universities*, 2011.

[4] Harry Lintsen and Evert-Jan Velzing, *Onderzoekscoördinatie in de gouden driehoek. Een geschiedenis*, The Hague: 2012 (in Dutch).

[5] Jamil Salmi, 'The Road to Academic Excellence: Lessons of Experience', in: *The Road to Academic Excellence: The Making of World-Class Research Universities*, 2011, p. 339.

the school. I like the image of a leader as someone who from time to time sits at the top of her bell tower, thereby seeing more of what happens outside than colleagues on the ground. Deans and their department heads are supposed to interpret and explain to the academics in the school (and to the students) what is happening in the outside world, as it impinges on their work. This is what leadership scholars call 'sense making' or 'sense giving'.[6] At the same time, it is important not to lose sight of what is happening on the ground.

What do they see from their bell towers? We may mention but a few: the growth in policies aimed at widening access and the massification of student enrolment combined with declining government funding due to the worldwide economic situation; changing rules on access to law schools; growing competition for the best students and faculty, both national and international; growing diversity in the student population; increasing international mobility of students and faculty; changing relations with and expectations from the legal professions; increasing institutional emphasis on research; the rise of social media and other virtual revolutions; changing allocation models for financial resources, such as in Europe the shift from national research funding to European funding; diversification of funding, such as the matching schemes for external funding of research and increasingly the performance dependency of the funding; increasing emphasis on reporting and accountability; increasing sets of societal expectations; 'new kids on the block' to whom you have to relate; and so on.

Since most law schools are part of a larger organisation, such as a university, it makes sense to build the *school's* strategy on the strategy that has been created for the entire institution. In Chapter 2, some of the most important strategic challenges of today's universities were briefly addressed. A law school within a research university, for instance, cannot focus just on teaching but must share the research ambitions of its university. The same holds for strategies concerning internationalisation or excellence programmes for students. A university as a whole, in its origins, is a community: the '*universitas magistrorum et scholarium*', the community of teachers and scholars. The faculties and schools that make up the university are much more than collections of individuals. And, to become a community, there must be a shared strategy as well as some form of a binding communality, underpinned by shared values. It is

[6] Michael D. Mumford *et al.*, 'Leading Creative People: Orchestrating Expertise and Relationships', in: *The Leadership Quarterly*, 13, 6, 2002, pp. 705 ff.

instructive to see how private business – whose primary task it is to make a profit – has increasingly become more socially aware; their purpose and their values, along with their products, are now at the core of their identity.[7]

What I have seen over recent years in many universities across the world is a growing interdependency of the university and its schools and faculties. Above all, the main driver is probably the need for universities to strategically develop their so-called institutional profiles.[8] When strategy setting or institution profiling is undertaken, it becomes more important than ever for deans to play a key role in setting the university agenda, in organisational strategy development and its policy design.[9] Deans and their department heads are not merely implementers of distant university policies. On the contrary, it is essential to fully participate at university level: you've got to be in it to win it. The importance of this so-called middle level, being the connection between institutional and local strategies and implementation, is all too often neglected.

For many of the world's universities, the playing field has become much more international. This is particularly the case in medicine and the natural sciences, and is becoming increasingly so for law schools. International developments may to a large extent influence the university's strategy as a whole.

11.1.2 The art of implementation of a new strategy

After, and even while, defining a new strategy, *implementing* it requires further steps and operational planning: communicating the new strategy within the organisation and outside (alumni, politics, the media); communicating progress at regular intervals to generate enthusiasm among all those involved in the process; dealing with the financial investments that are needed as well as the possible cutbacks; implementing changes in administration policies, management information and management

[7] Rosabeth Moss Kanter, 'How Great Companies Think Differently: Instead of Being Mere Money-Generating Machines, They Combine Financial and Social Logic to Build Enduring Success', in: *Harvard Business Review*, November 2011, p. 66.

[8] See Chapter 2. Frans van Vught, *University Profiles: International Rankings, Institutional Maps and the Need to Discuss the Structure of Dutch Higher Education (Opening Academic Year 2012/2013)*, Maastricht: Maastricht University 2012.

[9] Harry de Boer, Leo Goedegebuure and V. Lynn Meek, 'The Changing Nature of Academic Middle Management: A Framework for Analysis', in: *The Changing Dynamics of Higher Education Middle Management*, 2009, pp. 229 ff.

structures that are required to adapt to the new strategy; bringing transparency to the allocation of financial resources; scouting for and appointing new people; setting up new research programmes or educational curricula; providing additional training of faculty and staff and helping them to make the transition to the new strategy; helping others to leave, if they are unable or not in a position to fit in with the new strategy; building up the new reputation within and outside the organisation; celebrating the first successes and analysing initial failures or drawbacks – it all takes time, often much more than initially expected. All this requires a determined executive team, devoted department heads, professors and other senior faculty who are committed to the new strategy, and a high-quality support staff, including someone who helps the dean to keep an overview of the whole process.

This is not all. The World Bank report referred to above, covering eleven universities in nine countries, shows what more is needed for an institution aspiring to become a research-driven university in the global scene.[10] The answer, in short, is the ability to attract, recruit and retain leading academics and high-quality students, abundant funding, as well as an appropriate regulatory framework, adequate management, and a strong and inspiring leadership. One of the ways in which such leadership manifests itself is 'through the talent of articulating an enticing vision for the future of the institution to all its stakeholders'.[11]

11.2 'Deaning'

I define a dean of a law school as its executive and academic head, even though historically deans have been the *primus inter pares*, or often even mere symbolic figures, more than the *leader* of their school or faculty. The dean first appeared in the thirteenth century in the universities of Paris and Montpellier, and in the fourteenth century elsewhere.[12] He was responsible for administration and teaching, disputations and examinations.

Universities are known for collegiality and decision-making by consensus. Collegiality has been defined as a group of academics of equal

[10] Philip G. Altbach and Jamil Salmi, *The Road to Academic Excellence: The Making of World-Class Research Universities*, Washington DC: World Bank 2011.

[11] *Ibid.*

[12] Aleksander Gieysztor, 'Management and Resources', in: H. De Ridder-Symoens (ed.), *A History of the University in Europe,* Vol. I: *Universities in the Middle Ages*, Cambridge: Cambridge University Press 1992, p. 122.

decision-making power acting together to determine standards of entry and accreditation, to share collective resources, and to determine divisions of labour and reward systems.[13] Universities can best be pictured as places of multiple hierarchies: leadership duties often rotating among the academics for periods of three to five years, in some countries shorter, or longer. According to Anthony Bradney, this phenomenon of multiple hierarchies:

> is of great consequence in an area of work where individuals owe greater allegiance to their discipline than they do to their employer.[14]

To this day, faculties and schools that make up the university have always been governed by academics, and in many universities also by student representatives, usually assisted by a capable financial administrator.

It is this self-governance, closely allied to a mission, that we share with the judiciary, the medical profession and the church.[15] Self-governance has proved its worth and is definitely one of the values we cherish. The substantive academic prerogatives, including control of admission, hiring new academics, designing (and reforming)[16] the curriculum, and awarding degrees, are core academic responsibilities. Neither government, nor industry, nor private business has a direct say in what we do and how we do it, including quality assessment. There is enough evidence that, where university autonomy comes under pressure, quality and quantity of output suffer. Of course, there are laws that universities have to abide by and many universities are government funded, but the principle of self-governance – as typified by Leiden's motto, *Praesidium Libertatis* ('Bastion of Freedom'), is one to defend.

But self-governance has a flipside, too. If we want to uphold this precious principle of 'academics governing academics', we need colleagues to take up this challenge enthusiastically and competently. I have little time for colleagues who complain about their governing and managerial tasks. My answer has always been that we *could* sacrifice his or her professorship for one or two outside managers. And sometimes

[13] Maurice Kogan *et al.*,*Transforming Higher Education: A Comparative Study*, Dordrecht: Springer 2006.

[14] Anthony Bradney, *Conversations, Choices, and Chances: The Liberal Law School in the Twenty-First Century*, 2003, p. 140.

[15] Philip G. Altbach, 'The Past, Present, and Future of the Research University', in: *The Road to Academic Excellence: The Making of World-Class Research Universities*, 2011.

[16] *Reforming Legal Education: Law Schools at the Crossroads*, Charlotte, NC: Information Age Publishing 2012.

that, indeed, is a very good idea, especially when special expertise is needed, such as marketing and communication, ICT, health and safety, finance, legal, real estate, maintenance and planning, secretarial support, student counselling, and so on. Yet the closer certain managerial or leadership tasks are connected to *academic* activity, the more sense it makes to hand over responsibility to the academics themselves.

11.2.1 The dean's activities

Academic leadership literature has listed the following as a dean's or vice-dean's core activities: strategic management; operational management, including resource allocation and support services; human resource management, including performance evaluations; academic management, including overseeing the teaching and research programme; and external relationship management.[17]

Moreover, as Kevin R. Johnson, Dean of the UC Davis Law School, rightly emphasises, deans should build and maintain positive relationships with their students. Although some deans still do spend some time in the classroom, he is not aware of any who teach a full load of courses like the average faculty member. Consequently, these deans must get acquainted with their students in other ways than in the classroom. In a motivating and personal account, he draws some lessons from his own experience in a small law school with only 600 students overall, as compared to European law schools with often over 5,000 students.[18]

'Deaning' appears to have become more professional in the US than elsewhere. So-called professional executive, yet academic, deans seem to have become the rule, some of them serving as 'outside deans' and moving from one school to another. These deans, always with a strong external orientation, from developing relationships with alumni, sponsors, and the legal profession, to raising money,[19] are supported by so-called 'academic deans', who in turn are often supported by one or two associate deans, running most of the day-to-day operations. The need for an outside dean may be explained by the law dean's increasing

[17] H. de Boer and L. Goedegebuure, 'The Changing Nature of the Academic Deanship', in: *Leadership*, 5, 3, 28 July 2009.
[18] Kevin R. Johnson, 'The Forgotten Constituency? Law School Deans and Students', in: *UC Davis Legal Studies Research Paper Series No. 254*, April, 2011.
[19] John A. Miller, 'The Modern Law Dean', in: *Journal of Legal Education*, 50, 2000.

off-campus duties.[20] Indeed, as Wolverton *et al.* phrase it in their study *The Changing of the Academic Deanship*:

> Over the past thirty to forty years, as universities grew in size and complexity, the deanship became decidedly more managerial in nature. Presidents began shifting external duties, such as alumni relations and fundraising, in part to deans. Academic deans, although still charged with the intellectual leadership of their colleges, were also expected to be fiscal experts, fundraisers, politicians and diplomats.[21]

Today's deans can easily be overwhelmed by their internal and external responsibilities and leadership duties. Although in most countries outside the US the divide between a more external dean and an internal academic dean does not yet exist, I wonder how long this will last. Until such time, universities will at least have to ensure that deans, whether selected by their colleagues or appointed by the university administration, are appropriately equipped to handle this ever-widening range of duties.

A European study of university governance found that deans have difficulties playing a powerful management role because of their 'missing professionalism'. The main reasons for their lack of influence are their short periods in office and the poor funding and staffing of the faculties.[22] Typically, new deans have spent most of their first year getting to understand the issues; major initiatives start in the second year – including the announcement of the dean's resignation. The dean's office is now often being extended to three, six, or even ten years, thus ensuring higher quality.[23] From what I have seen, deanship elsewhere across the world is on the up in terms of professionalism, incorporating more and more elements of private sector management and leadership in an academic setting.

The reasons behind the changing nature of the academic deanship are quite clear:[24] the massification of higher education, changes in the sources of funding (increasing performance-based funding, for example),

[20] Victor L. Streib, 'Law Deanships: Must They Be Nasty, Brutish, and Short?', in: *Journal of Legal Education*, 44, 1994.

[21] M. Wolverton *et al.*, *The Changing Nature of the Academic Deanship*, San Francisco: Jossey-Bass/ASHE-ERIC 2001, p. 15.

[22] Harry de Boer and Jon File, *Higher Education Governance Reforms Across Europe*, 2009.

[23] Bharat Bassaw, 'Determinants of Successful Deanship', in: *Medical Teacher*, 32, 12, January 2010, pp. 102 ff.

[24] Harry de Boer, Leo Goedegebuure and V. Lynn Meek, 'The Changing Nature of Academic Middle Management: A Framework for Analysis', in: *The Changing Dynamics of Higher Education Middle Management*, 2009, pp. 229 ff.

the greater emphasis on accountability and performance, and the increased expectations placed on the institutions by society at large, to mention but a few. Deans, who are usually the middle managers within the university, are not just implementers of organisational policies; they have become key players in university agenda setting, organisational strategy and implementation. Some research even suggests that organisational performance is influenced more by what happens in the middle, rather than at the top.

However, differences in governance structures across the world are manifold, which leads researchers of deaning to the conclusion that *the* dean doesn't exist since there is much variability in the roles and responsibilities depending on factors such as the type, status and size of the institution and the faculty, and, of course, the country.[25] To the extent that the dean is becoming more and more 'executive', some deans may end up sitting closer to the university's executives. This may ultimately result in the dean becoming part of the university's management team, a position that can paradoxically limit the dean's room for manoeuvre.

11.2.2 Relationships with the central university

Whatever the structure chosen, relationships with central university administrators and deans of the other schools are of critical importance to the well-being of the law school. Victor Streib from Cleveland State University argues that law deans find themselves continually educating these fellow-administrators as to the unique nature of legal education within the world of higher education

> while regularly dealing with suspicions within the university of preferential treatment for the law school. These intra-university politics have always been a most sensitive part of the Law Dean's job and appear to be growing more so in the current era of fiscal stringency and pressures to reduce university programs.[26]

It is probably an accurate description of the position in which many deans find themselves nowadays, adding to the complexity of their job. On the one hand, they are expected to be loyal to the policies and the decision-making of the university executives; on the other hand, a similar

[25] H. de Boer and L. Goedegebuure, 'The Changing Nature of the Academic Deanship', in: *Leadership*, 5, 3, 2009, p. 347.

[26] Victor L. Streib, 'Law Deanships: Must They Be Nasty, Brutish, and Short?', in: *Journal of Legal Education*, 44, 1994, pp. 116 ff.

loyalty is expected from their own people – the vice-deans, department heads and – even more challenging – bodies representing faculty, support staff and students. As Bolton has put it nicely:

> the role of the Dean is potentially stressful because of conflicting pressures – both from colleagues whose interests are to be represented to the powers that be, and from the centre of the institution, since the Dean will normally be a member of the senior management team which takes 'cabinet responsibility' and a whole institution perspective. Deciding how strongly to press the claims of their own departments and conveying unwelcome messages from the centre to the troops are likely to be everyday experiences for deans.[27]

From my own experience, operating in a system where it is ultimately the dean who is responsible and accountable for the law school's performance, I found myself in a better position to put the school's interest at the forefront, than as a member of a university president's management team. If the school's interests were seriously jeopardised by new university plans, it was eventually left to the wisdom of the university's and the school's leadership to find an acceptable solution. And if we could not come to an accord, it was in the end up to the board of the university to make the final decision, balancing all the interests at stake – this is how it is if you are part of one institution.

11.3 Collegiality and shared leadership

Research universities worldwide adhere to the principle of appointing an academic, preferably one of the professors, to a managerial role: from the president, vice-chancellor, or the rector magnificus, having responsibility for both the academic and administrative leadership of the university, to the deans, their department heads and the 'ordinary' university professor.[28] As we have already seen, in many countries the dean's role is developing from a merely symbolic function, as *primus inter pares*, to an executive function: the person formally presiding over the law school and its departments while being personally responsible and accountable

[27] Allan Bolton, *Managing the Academic Unit, Managing Universities and Colleges: Guides to Good Practice*, Buckingham: Open University Press 2000.

[28] Bruce Macfarlane, *Intellectual Leadership in Higher Education: Renewing the Role of the University Professor*, 2012 arguing the importance of the role of the full or chair professors and their intellectual leadership in the university, as a counterweight to the increasing managerial developments in today's higher education institutions.

for both its academic and administrative operations.[29] This practice of being governed by colleagues is a time-honoured tradition as well as a privilege. It presumes some form of collegiality in the governance of the institution. Anthony Bradney, referring to Max Weber who envisioned that collegiality 'favours greater thoroughness in the weighing of administrative decisions', paid considerable attention to what collegiality in practice may embrace:

> The necessity of inclusion, the structure of committees and other forums for decision-making and, of course, the intellectual quality of those academics engaged in the business of administration all help to ensure that any matter under consideration in a collegial setting is given the closest possible attention.[30]

From my own experience as dean, I treasured the intellectual quality of the economics professors – the Leiden Law School has a strong economics unit – even though it was precisely Adam Smith who said that academics would be 'likely to make common cause, to be all very indulgent to one another, and every man to consent that his neighbour neglect his duty provided he himself is allowed to neglect his own'.[31]

It is an interesting view because it juxtaposes so clearly the advantages of collegiality in university governance with the responsibility deans and administrators face on a day-to-day basis. In the end, collegiality does not equal *self-governance* of the departments, the schools and faculties, or even the university. The size of most of today's institutions of higher education and the complexity of their operations require a clear (in corporate terms) line-organisation. Moreover, it requires supplementary managerial and financial expertise in its governance to safely run the institution – competencies that not all academics necessarily are trained in, or at least have experience in.

11.3.1 A serious gap

A worldwide empirical survey, *The Changing Academic Profession*, covering Australia, Germany, the US and the UK, shows that Australian and British academics consider themselves less influential than their

[29] H. de Boer and L. Goedegebuure, 'The Changing Nature of the Academic Deanship', in: *Leadership*, 5, 3, 2009.

[30] Anthony Bradney, *Conversations, Choices, and Chances: The Liberal Law School in the Twenty-First Century*, 2003, p. 147.

[31] Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, Chicago: Chicago University Press [2012] 1776.

German and American counterparts.[32] The former characterise the management of their institutions as top-down, with a strong emphasis on performance. Likewise, they tend to disagree that there is good communication between management and academics. In those institutions where university management has been profoundly 'modernised', there appears to be 'a serious gap' between the leaders and management on the one hand and the academics on the other. According to De Boer *et al.*, an explanation might be that in these countries, in response to the changes in their higher education systems, deans and other leaders, such as the department heads, have embraced 'managerial values'.

There is some indication that this may indeed be the case, largely as a result of the typically managerial areas deans and their heads have to operate in nowadays, including networking, management and administration, finance, planning and policy development, and managing staff. As a result, De Boer comments, faculty deans may move away from a more hands-on operational management to a much more strategic role, with the next in line, the heads of department, taking over the dean's operational role.[33]

Personally, I have seen this strategic role of deans at university level growing rapidly over the past years. I have also been aware of the increasing importance of the heads of departments, as well as the heads of units, representing *their* respective legal fields as middle managers – although not so much in the sense of taking over the operational management role from the dean and her vice-deans as in *sharing* it with the academics and the support staff.

It is my strong belief that the art of deaning lies in the interaction of leading and sharing in the school's strategy, management and policy development; sharing and delegating the operational role with others in the school, notably with the academic heads; being visible as an academic among the faculty members and the support staff; and being trusted as a visible protector of the school at the university level.

In leadership literature, this shared form of distributive leadership appears to be a new genre of leadership, often focused on *teams*.[34]

[32] International Centre for Higher Education Research (INCHER), *The Changing Academic Profession (CAP): Draft Tables by Country. Internal Working Document*, Kassel: 2008.

[33] H. de Boer and L. Goedegebuure, 'The Changing Nature of the Academic Deanship', in: *Leadership*, 5, 3, 2009.

[34] Bruce J. Avolio, Fred O. Walumbwa and Todd J. Weber, 'Leadership: Current Theories, Research, and Future Directions', in: *Annual Review of Psychology*, 60, January 2009, p. 428.

The key distinction between shared leadership and traditional models is that leading an institution involves more than just top-down influence on subordinates by an appointed or elected leader. Rather, leadership is more broadly distributed among the academics instead of centralised in the hands of a single individual who acts in the role of boss.[35]

Shared leadership styles, broadly distributed throughout the law school, seem particularly suitable for organisations of academics that depend less on fixed hierarchical structures.[36] However, the larger and more complex an organisation becomes, the more hierarchy is needed. And that is the flipside to shared leadership: that the dean needs to be trusted by all the academics when decisions have to be made.[37]

11.4 *Managing* professionals?

In 1992, a book was published in the Netherlands that attracted a lot of attention: *Managing Professionals: Turning Creativity Into Money*. The same author published a second book in 2007, *Managing Professionals? Don't Do It!* A university dean's dilemma could not be described more succinctly.[38] What characterises a professional?

First and foremost, a professional regards his or her personal responsibility for the 'end product' as a central tenet. For universities, this end product – though you should never call it that! – is education, research and increasingly societal outreach. It is the lecturers and the researchers who determine to a large extent the content of their teaching and research and the way they do it, such as their research method and their teaching style. Professionals also select new members of the team themselves. In addition, when it involves evaluating the quality of their work, they will call upon their peers. In short, professionals thrive in an environment of confidence in their own capabilities, being given as much

[35] Craig L. Pearce and Jay A. Conger, *Shared Leadership: Reframing the Hows and Whys of Leadership*, Thousand Oaks, CA: Sage Publications 2003, p. 1.

[36] Philip G. Altbach, 'The Past, Present, and Future of the Research University', in: *The Road to Academic Excellence: The Making of World-Class Research Universities*, 2011.

[37] For a useful overview of current leadership theory, see Bruce J. Avolio, Fred O. Walumbwa and Todd J. Weber, 'Leadership: Current Theories, Research, and Future Directions', in: *Annual Review of Psychology*, 60, 2009, pp. 421 ff.

[38] Mathieu Weggeman, *Leidinggeven aan professionals*, Alphen aan den Rijn: Samsom H. D. Tjeenk Willink 1997 (in Dutch); Mathieu Weggeman, *Leidinggeven aan professionals? Niet doen! Over kenniswerkers, vakmanschap en innovatie*, Schiedam: Scriptum 2007 (in Dutch).

personal responsibility as possible and maximum freedom to organise their own working life. Yet many academics have found that their freedom has *decreased* over the last fifty years; indeed, it has probably made them somewhat defensive.[39]

A few factors can be mentioned that have contributed to this. In education, there has been a growing sense that a curriculum is more than a collection of separate subjects taught by separate professors in separate units. In line with its origins, the study of law is a *course* the student completes to become a graduate: the '*Gradus ad Parnassum*', the steps to Parnassus in the mountain range a few miles from Delphi, with one of the peaks sacred to Apollo and the nine Muses being the inspirational deities of the arts and sciences. This *Gradus ad Parnassum* metaphor has often been used with respect to progress in learning: content, skills and the development of an academic and professional attitude. Teachers must therefore give consideration to the place of their subject in the curriculum, as well as to the content of the related subjects and the teaching methodology; teachers are all, in that literal sense, part of a 'graduate' school. Even in pedagogy, there is no longer total freedom. As we learn more and more about what works and what doesn't in teaching and learning, academics will have to take note and incorporate new ideas into their teaching styles. The students, too, have some influence on the content and the pedagogy. They make their voices heard on student councils and committees, or simply through evaluations of the teaching they have received.

Another significant development in higher education and research is that of increased accountability.[40] Reporting has become increasingly important and more extensive, both in respect of the operational management and financial audits, as well as intrinsically, for example research assessments. Today, in a growing number of countries, with strict regularity – perhaps too strict – external peers examine the quality of our education and our research. They force us to look at ourselves critically, to review our strengths and weaknesses, and to plan for the future. Committees give assessments and recommendations, expecting them to be acted on, even if lecturers and researchers feel little inclination to do so.[41]

[39] See section 9.2 above.
[40] Paulo Santiago *et al.*, *Tertiary Education for the Knowledge Society*, Vol. 1, 2008.
[41] For a good overview of the importance of quality assurance in higher education, see Paulo Santiago *et al.*, *Tertiary Education for the Knowledge Society*, Vol. 1, 2008.

And, finally, there is a growing informal accountability to, for example, the parents of our students, our alumni, the city and region, the legal professions, and the media. It is no longer possible to fail without being noticed, and here again it is important to find an acceptable balance. The costs of the most recent assessment of the Leiden Law School's bachelor's and master's programmes were around €300,000, covering both external and internal costs, equivalent to funding seven full-time teachers for one year. This expenditure is rather difficult to justify to our teaching faculty and support staff, who are fully committed to their students.

Increased *external* funding of scientific research, money that is often taken from a university's internal budget, is a third example of growing accountability. Some funding is unconditional, but most is tied to specific subjects or programmes. As the latter category expands, academics will increasingly be limited in their own freedom to choose their own research subject. Also, external financing, with its strict protocols and deadlines, is unavoidably accompanied by bureaucratic activity. This also applies to the increased demand for researchers to justify that their research has 'value' – increasingly, an *economic* value. Consider the British situation, where responsibility for British universities has been subsumed into the Department for Business, Innovation and Skills, or the Dutch '*Topsectorenbeleid*' where Dutch national research funding has largely been related to its potential for stimulating economic growth. This has put considerable pressure on some disciplines, such as law and the humanities. University research policy has to adapt; it requires more collaboration within and outside the university, as well as choices with regard to research profiling in specific fields.

Each law school needs a sound bureaucracy, with people who attend meetings and answer letters from the minister, manage human resources policy, look after the safety of staff and students, prepare teaching rosters, organise open days, take action in the case of absences due to illness, prepare forecasts and budgets, manage and maintain property, and keep the website up to date. All these things are necessary and therefore demand a certain amount of order, task allocation and other arrangements. A sanctuary for the academic spirit does not survive when besieged by anarchy. As Henry Rosovsky once said: 'We professors have the income of civil servants but the freedom of artists.'[42] Yet, whether they like it or not, these artists live in an environment of freedom in

[42] Henry Rosovsky, *The University: An Owner's Manual*, 1990, p. 165.

restraint. Managers and bureaucrats have become necessities, but they should always carry out their tasks in a manner that is in keeping with the character of their professionals.

11.5 My own five golden rules

How is this done? Here are my personal five golden rules.

If I have learned one thing as dean, it is that academics, from PhD candidates to professors, blossom like anyone else when they are appreciated by their peers as well as deans and other administrators. This applies first and foremost to their publications, prizes and honours, and student evaluations, but also to their work as administrators and managers of their *own* departments and units. Due to pressure of work, deans tend to pay attention to others on formal occasions, such as the New Year's speech; but it is the *informal* occasions that really leave an impression. My first golden rule for 'managing' professionals is therefore: stay physically and emotionally close to your teams.

A second golden rule: keep bureaucracy away from the academics as much as possible. However, involve your professionals in *strategy*, make them your partners, make them financially responsible both for generating and spending money, and encourage them, as often as you can, to look at the bigger picture of the law school and the university. Most professors are primarily oriented towards their own research and teaching in their own unit – as they should be. Yet they need to be reminded regularly of that bigger picture. A good example of how difficult this can be is when a curriculum change is needed in the law school.[43] For academics, having to sacrifice something of one's own subject in favour of something else in the overall curriculum, is often a bitter pill to swallow; after all, fewer teaching credit points or scrapping certain areas of teaching or research means less money for the unit or department.

A third rule is this. Once a school's vision has been created or its strategy determined, it is critical to stay on course and not to deviate from it. Academic professionals are intelligent people and every new

[43] For an extensive (American) study on the essential elements of the reform of a law curriculum, see *Reforming Legal Education: Law Schools at the Crossroads*, 2012. Since education, at all levels, has entered an era of accountability, the editors consider 'the most significant question facing legal education in this regard is how to foster an enduring culture of accountability and feedback such that the focus on data-driven reform enhances our work in meaningful ways' (p. 226).

observation or external change, no matter how small, can lead to their reopening the discussion, and coming up with new analyses and new solutions. I like the metaphor of a sailing boat: once the position of the lighthouse is determined (the strategic goals), that position determines the direction in which you are heading; only the wind and the currents, as external factors, may limit the speed of your progress, and the latter alone may still be up for discussion.

Fourth, and a very important rule for managing professionals, is to agree on outcomes but allow the professionals to decide on the best ways to achieve these ends. To make sure that nobody lags behind, adequate and transparent management information is needed so that professionals can learn from each other's achievements. Professionals tend to respect management information. But it is important to avoid such jargon as 'total quality management', 'human resources management', 'market share', 'performance indicators', or 'knowledge worker' instead of 'academic'. It is crucial for the dean to speak the language of her professionals to foster mutual trust – 'Is the dean still one of us?' Also, never distort management information, and stick to what you have agreed.

Finally, each law school has some academic staff members that are impossible to manage. They go their own way in teaching and research and take little or no notice of what they call 'the dean's bureaucracy'. Some may even be perversely eccentric, rebelliously cynical or deliberately obstructive.

A university needs some 'characters', but not too many. There are, however, some staff members on whom every dean or department head has to keep a close eye. Those that shirk management tasks are resented by others who have to take up the slack. Moreover, those who systematically refuse to abide by the rules will force the dean and the school's management to spend extra time dealing with the problem. The biggest trap that a dean can fall into is allowing 10 per cent of her people to account for 90 per cent of her time. Furthermore, a team or a programme must not suffer by this failure to abide by bureaucratic rules, for instance by getting poor external assessments. And, finally, the anti-bureaucratic attitude of these free spirits must never mask poor teaching or research performance. On the contrary, they in particular must be expected to produce work of the highest quality. These professionals can then be more than just a cheerful counterpoint, and their presence may even be a benefit, as a constant reminder of what ultimately matters in the university, i.e. excellent education and research.

11.6 Conclusions and outlook

Governance in higher education institutions is concerned with how decisions are made. In this chapter, I first showed how important it is for a law school to have a broadly shared strategy, and then addressed some specific difficulties deans may come across. The second part of the chapter investigated the essence of deaning in the challenging environment of devoted professionals and other 'stakeholders', such as the legal profession. In a number of publications, growing attention is paid to research into deaning, or, in other words, how to run a faculty or a law school. Several books have been written on deaning, with many useful practical tips and guidelines, ranging from how to become a dean and what it takes to be one, to leadership and management, and how to administer a faculty, to dealing with budgets and resources, difficult people, working with students, collaborating with other deans and the university executive board, as well as how to engage in external activities, including contact with alumni and the media.[44] Michael Shattock, a British expert in higher education, published the second edition of *Managing Successful Universities* (2012), which is particularly interesting for executives at university level.[45] Equally interesting are: Anthony Bradney's book, a law professor himself, about the liberal law school, with enlightening chapters about administration and accountability in the British system,[46] Fiona Cownie's empirical research among legal academics in 2004,[47] and an edited volume by Bjørn Stensaker *et al.*, about how change in higher education should be managed.[48] Particularly useful for deans and presidents of universities in developing and middle-income countries, although not only for them, is a volume edited by Philip Altbach, covering all the subjects that are important for university leaders.[49] And, finally, everyone interested in university management in

[44] Jeffrey L. Buller, *The Essential Academic Dean: A Practical Guide to College Leadership*, 2007; David Bright and Mary P. Richards, *The Academic Deanship: Individual Careers and Institutional Roles*, 2001; Gary S. Krahenbuhl, *Building the Academic Deanship: Strategies for Success*, Westport, CT: Praeger 2004.

[45] Michael Shattock, *Managing Successful Universities*, 2010.

[46] Anthony Bradney, *Conversations, Choices, and Chances: The Liberal Law School in the Twenty-First Century*, 2003.

[47] Fiona Cownie, *Legal Academics: Culture and Identities*, 2004.

[48] *Managing Reform in Universities: The Dynamics of Culture, Identity and Organizational Change*, Palgrave Macmillan/Issues in Higher Education 2012.

[49] Philip G. Altbach, *Leadership for World-Class Universities: Challenges for Developing Countries*, London and New York: Routledge 2011.

its historical context should read Geoffrey Lockwood's superb contribution about university management and resources in the fourth and final volume of the excellent series, *A History of the University in Europe* (2011), which covers many managerial developments since 1945. Lockwood makes it clear that the history of management and resources over the period reflects the increasing scale of the university, rising societal expectations of increased productivity, the growth in accountability, and the impact of IT.[50]

Among the most important tasks of a dean is that of setting a strategy which is shared throughout the school. A law school's strategy can focus on different aims, such as: a primarily regional, national or international emphasis in its teaching and research; focusing on elite or mass education; on professional and/or educational lifelong learning; on profit or non-profit education; on ethnic and cultural diversity; on either a strong research profile, also including PhD education, or a more professionally oriented educational profile; on a multi- or monodisciplinary orientation, including cooperation with other faculties within the university or with outside partners; on contract research and other forms of academic entrepreneurship, such as start-ups and off-spins; on regional engagement for law schools in developing and transitional countries, or, closer to home, on the city and the region the school is part of.

This overview of strategic choices that every law school has to face shows the potential diversity not only of these law schools but of any institution of higher education in the world. In Europe, the U-Map project offers institutions of higher education a tool to help them make their positioning in the higher education marketplace more transparent, and to assist them in potential benchmarking exercises, and in developing inter-institutional cooperation.[51]

However, it all has to begin with what is sometimes called 'purpose' and 'meaning'. What is your *raison d'être*, the distinctive reason for your existence as a law school, your identity? What is your purpose? What values do you share in your teaching and research? And what is it that you do *not* want to be? Many present-day multinational companies,

[50] Geoffrey Lockwood, 'Management and Resources', in: *A History of the University in Europe*, Vol. IV: *Universities since 1945*, 2011, pp. 124 ff.

[51] www.u-map.eu (last accessed 20 December 2013); Frans A. van Vught and Don F. Westerheijden, 'Multidimensional Ranking: A New Transparency Tool for Higher Education and Research', in: *Higher Education Management and Policy*, 22, 3, 2010; Frans A. van Vught and Frank Ziegele, *Multidimensional Ranking: The Design and Development of U-Multirank*, 2012.

operating in a multitude of countries and cultures, have become increasingly interested in these kinds of fundamental questions. The answers can provide a coherent identity for the whole school or the university, and may serve as a buffer in times of uncertainty and change.[52] It is a central function of every dean's leadership to contribute to this 'purpose' and 'meaning'.

In the past years I have learned that if you do not know where you are going, any road will take you there. Mapping and setting a strategy, therefore, is an important duty of any university leader. A good and broadly shared strategy gives peace of mind, trust and something to hold on to for the dean, the staff, and the other professionals of the school. Although it is these days quite a challenge to look any further ahead than five years, the basic strategy of a law school should stand for at least five to ten years, and should not be changed every two or three years. Despite all the internal and external pressures and changes that law schools are subject to, our time is quite volatile and a dean should keep faith in her intuition as the leader of the pack.

[52] Rosabeth Moss Kanter, 'How Great Companies Think Differently: Instead of Being Mere Money-Generating Machines, They Combine Financial and Social Logic to Build Enduring Success', in: *Harvard Business Review*, November 2011, pp. 66 ff.

12

Towards a common agenda for law schools: some conclusions

12.1 The eternal themes of teaching, scholarship and service

Law and law schools have always played a great part in my life. As a schoolboy, with a growing interest in law and society, I used to cycle to secondary school past Leiden University's Academy Building. At that time, this most impressive building seemed to me a closed, sombre and somewhat frightening institution. Then as a student, lecturer and faculty member, I frequented this and other buildings and gradually grew to appreciate the beauty of the university. And ultimately as vice-dean and dean of a law school, I was afforded the wonderful experience of being able to oversee the academic and social richness of the university, its schools and faculties, with its scholars, staff and students.

Clark Kerr, former President of Berkeley and the man who coined the term 'multiversity', once pictured the time-honoured tradition of the university as follows:

> About eighty-five institutions in the Western world established by 1520 still exist in recognizable forms, with similar functions and with unbroken histories, including the Catholic Church, the Parliaments of the Isle of Man, of Iceland, and of Great Britain, several Swiss cantons, and seventy universities. Kings that rule, feudal lords with vassals, and guilds with monopolies are all gone. These seventy universities, however, are still in the same locations with some of the same buildings, with professors and students doing much the same things, and with governance carried on in much the same ways. There have been many intervening variations on the ancient themes, it is true, but the eternal themes of teaching, scholarship, and service, in one combination or another, continue.[1]

Kerr is absolutely right about the university's remarkable stability, its unbroken history and its eternal themes of teaching, scholarship and service. One of the first references in my book concerns *A History of the*

[1] C. Kerr, 'The Idea of a Multiversity', in: *The Uses of the University*, 1963, p. 152.

University of Europe, a series of four tomes that tells the story of the European university, tomes that everyone in the university should read. Yet it is not only a story of stability, but also of continuous adaptation, survival or downfall. The final volume, from 2011, shows how much has changed, especially since the Second World War, both within the university and outside. It is our duty to hold fast to what is good and precious, and to adapt when and where needed – hence *Rethinking the Law School*. As a former law dean I was thrilled to have the opportunity to write about the future of that important part of the university, the law school.

12.2 Where law schools differ

I started this book emphasising the worldwide diversity of law schools. Having visited quite a few over the years, and noticing of course the goals and ambitions we share, I have always been surprised by the many differences. They are so numerous that my overview in the first chapter could be no more than a first impression.[2] Even though most law schools provide their students with the training necessary for a future in one of the branches of the legal profession, it does not make much sense to speak about legal education without paying attention to the societal, political and academic context in which this education takes place. The same holds for legal research and for law schools' societal outreach.

During my research and writing, there were times, I confess, when all these apparent differences made me somewhat despondent. But most of the time the richness of the diversity I encountered provided the extra motivation I needed to finish this book. Moreover, it is not just the law schools that differ so much: the universities they are part of also vary considerably. This is why I provided a brief impression of some of the different strategic questions today's universities are facing.[3]

As far as legal education is concerned, there are, first of all, the differences in the intake of freshmen. Numbers vary from 100 to more than 1,000 per year; some schools have a tough admission process, others do not; some schools demand a high-quality secondary education as a prerequisite for entry, others do not; and some have high levels of tuition fees, while others are virtually free.[4] The core subjects such as private law, administrative law and criminal law are taught universally. And,

[2] Chapter 1. [3] Chapter 2. [4] Chapter 4.

although the pedagogy seems quite familiar and comparable, with lectures, seminars and summative assessments, the US law schools are particularly well known for their case dialogue method. Some schools focus primarily on legal training, others show the much wider ambition of educating intellectuals. Schools also vary greatly in their international orientation and ambitions, in their quality and depth, and in how their education links into the legal profession.[5]

There are also differences in how law schools are perceived and rated, i.e. top level, middle of the road, etc. Some schools serve only the most ambitious and intelligent students and prepare them for the top jobs in the legal profession and the university. Other schools seem to have a much broader scope, or are more socially inclusive if you will, admitting and catering for all students who qualify for a university place as a result of their preparatory secondary school education, without any additional entry requirements and without any selection process. The latter ambition, of course, leads to much greater diversity among the students.

Then there are the wealthy law schools, where teaching and research are conducted beyond the constraints of having to worry about or adhere to funding issues. They have access to the best – full-time lecturers and researchers, educational resources, libraries and other facilities, sports centres, a gym, and even a swimming pool. They seem to have infinite numbers of affluent alumni and other sponsors and benefactors that are able to pull the school through any financial troughs.

At the other end of the spectrum there are the equally fascinating law schools, often in developing and transitional countries, fighting long uphill battles in a political and social environment in which lecturing and writing about the law are certainly not always without danger. Here the importance of the rule of law is much more than merely a topic in a law curriculum. Academic freedom – basically the freedom to teach, learn and research without fear of retribution – should be at the very heart of every university, but it is not. These schools often lack the most elementary financial resources and other facilities for proper legal education, let alone research. In this sense, the diversity in law schools mirrors the real world.

Law schools also differ from one another with regard to scholarly research. Some have a strong research agenda and are at the cutting edge of national, international, legal and transdisciplinary scholarship. Others

[5] Chapter 5.

engage solely in training young people to become lawyers, whether or not in the legal professions. And others again are positioned somewhere in between.

Some of these differences arise from external factors over which law schools have little control. A good insight is provided in the report entitled *The Road to Academic Excellence*, which covers eleven universities – not law schools in particular – in nine countries. The study highlights the possible attributes required by a university aspiring to become a first-class, research-driven institution in a global environment. The answer is challenging: the ability to attract, recruit and retain leading academics and high-quality students, abundant funding, an appropriate regulatory framework, a high-quality system of secondary education, as well as adequate management, together with strong and inspiring leadership.[6]

Money is indeed one of the decisive factors. It is a condition for transforming ordinary institutions into good and even excellent ones. In the present economic climate, it is the lack of funding, in particular, that can be a serious obstacle for institutions of higher education in their struggle to excel. We must not ignore the many law schools in the non-Western world that have to survive in much poorer circumstances. Still, the importance of adequate, let alone 'abundant', funding speaks for itself. Perhaps even more so for law schools.

In addition to being able to offer a challenging and fulfilling post, the ability to attract good faculty and staff also requires having sufficient funds to offer good salaries and facilities. Like medical science, economics and business studies have to compete with well-paid job offers in the private sector. So everything is dependent on the availability of talented staff. In some countries there are simply not enough qualified and experienced staff available due to poor educational circumstances. This is also an issue when trying to attract good students and PhD candidates: in a national situation, *their* availability is largely dependent on the quality of secondary education that precedes law school (supply) and indeed the research ambitions the law school has (demand).

Roughly speaking, universities get their funding from four principle sources: core public funding, student tuition fees, competitive research funding, and private sources, including contract research from private companies, income generated from the market, and endowments and

[6] Philip G. Altbach and Jamil Salmi, *The Road to Academic Excellence: The Making of World-Class Research Universities*, 2011.

donations. The ratios between these sources are changing worldwide. For example, the limits with respect to tuition income appear to have been reached in countries where students are accustomed to shelling out a lot of money for their education; tuition fees of over US$40,000 per year are not exceptional, living costs not included. A well-paid job, where the employer takes care of the student's debts, is no longer a given. Triggered by the economic downturn, some schools have finally come to realise that students are hard pressed financially and often incapable of repaying the enormous debts they accumulate in pursuit of their qualification.

Law schools, as well as the students and their parents, are becoming increasingly aware that studying law should be a worthwhile investment in the future, rather than the gateway to a life of debts and poverty. By contrast, there are countries where the study of law has been relatively inexpensive or almost free until now, but where the economic crisis is leading to increases in fees.[7]

Surveying the global scene, with all the current talk about 'sustainability', one wonders if there is such a thing as a 'sustainable law school'? Is it fair that poor students pay for the law school's academic writing ambitions? Can we come up with an acceptable and fair cost for law school education, and can we agree on what is definitely unacceptable?

Student fees aside, the variation in available funding is not confined to international differences only. Universities' income in the US is on average a lot higher than in Europe, but the differences in funding between US universities themselves are also considerable. The same holds true for Europe. Spain, Italy and Greece experience mass education and modest funding and income, whereas the universities in Switzerland enjoy a far higher level of funding. The Netherlands and Sweden appear to be faring better than Belgium, Denmark, Germany and Ireland. France is striving to maintain its complicated separation between top education and top research, with an educational system in which the best students tend to study at the '*grandes écoles*' rather than at national universities.

In South America – Brazil is an example – and in many other places in the world, there are excellent law schools, but mostly for the rich. The funding situation for legal education and research differs from country to country, and often from one university to another, depending also on local parameters.

[7] Section 3.7.

It is important to bear in mind that most law schools are dependent on their own university's model for allocating funds. Here too, there is a snag. Many of the law deans I have met over the years believe that their discipline is not doing as well in the applicable financial allocation system as many of the other disciplines. The reason for this may be lack of success in attracting external funding whereas many allocation models are based on a core sum plus top-up in line with a discipline's success in attracting funds from other funding streams ('matching'). A further reason could be the relatively inexpensive cost of providing legal education compared to, for example, medical or engineering studies. Law schools across the world often receive all too modest funding from their host university.

Finally, there is the regulatory environment in which the institutions of higher education operate. National laws and regulations determine the available room for manoeuvre for a higher education institution. An example of how regulations can make life difficult can be found in my own country, the Netherlands. The only opportunity to expel a student from a degree programme is if he or she does not acquire the required number of credits for that programme, in the first year of study. Students who make it to the second year of study have more control over their own study progression. Dutch universities have virtually no legal instruments to influence a student's attitude towards his or her studies. Moreover, because funding is often based on the number of registered students and diplomas, it is no surprise that universities have little motivation for making a misery of the lives of poorly performing students. Combined with the absence of entry requirements for legal studies and a prohibition against pre-selection, for the Netherlands and many other countries, such a regulatory framework makes it difficult for these universities to excel.

12.3 What law schools have in common

As a law dean, there is not much that one can do about external factors such as money, the regulatory framework, or the quality of secondary school education. However, in this book I have examined what we *can* do. And it is more than we may think! Each law school, no matter where in the world, starts every year with a hundred, five hundred, or a thousand freshmen, all embarking on a new stage in their lives. They have decided to do 'something' with the law: however vague their ideas, dreams, motivations and ambitions may still be, they have decided to enrol in law school.

Apart from these students, most law schools have motivated lecturers, who want nothing more than to communicate and transfer *their* dreams, knowledge and experience to these young people. And, finally, there are the passionate researchers that many law schools have, researching to improve their national and international law. Apart from advancing the legal discipline, many of them are also heavily involved in the dissemination of law and research among legal professionals. They do this in their writings and through continuing education, via law clinics, as legislative advisers, on numerous governmental and private committees, and in transitional countries through what we might call 'legal development aid' leading to capacity-building. The latter activity, in particular, is impressive in both its societal and scientific impacts.

Law schools worldwide also have a lot in common. Their primary focus is on training young people to become lawyers – the sort of professionals that an advanced country cannot do without. Every nation needs a credible and efficient judiciary: judges and other mediators to settle disputes, barristers and solicitors, corporate lawyers and legislators, law lecturers and researchers, as well as all those in countless other jobs that require legal training. Adequate education and training of lawyers is crucial for the quality of life in a country in the broadest sense, just as much as is the education of doctors.

Law is far too important, and too complex, not to be treated as an academic discipline. The ability to abstract, conceptualise and apply are skills that cut across 'hard' and 'soft' sciences, to the humanities, as well as to the law. I feel that the academic/professional intellectual divide is a false one. Whether the student goes on to join the legal profession or not, her education in the research, analysis and application of the law develops skill sets which are the foundation for any pursuit. Those well trained in other fields also develop similar skill sets. Both employ them in their area of specialisation.

For the legal discipline, it sometimes seems more difficult to justify its importance and worth to society than is the case for the medical discipline, the latter publicly waging its war against life-threatening diseases and contributing to what has become known as 'healthy ageing'. But look at what is happening in India.

The revolt against the astounding extent of the violence against women in that country, where the caste system with 170 million casteless people plays a significant role, is one of the many examples of lawlessness about which we hear on a daily basis. In India, the government, politicians, police and prosecutor rarely give any consideration to the rights of

women. Now, following the public gang rape and subsequent death of a young woman in December 2012, and more since, there are some signs of change, primarily because the middle classes are now letting their voices be heard: it is finally no longer possible for them to distance themselves from this violence. In an analysis of this development, a Dutch expert on India indicated that those facilities that can be privatised, such as good education and health care, can be bought by this affluent middle class. But a *legal* system cannot be privatised. And so things happen to the middle classes for which they cannot hold anybody to account.[8]

India is not the only country where the position of women causes great concern: the same is true of other countries such as Pakistan and Bangladesh, Indonesia, the sub-Sahara and other African countries, China, the Philippines, countries in the Middle East, to mention but a few regions in the world. Violence against women ranges from instances of domestic violence by intimate partners,[9] to violence specifically aimed at women in situations of armed conflict.[10] Precisely the same is true for the position of children in numerous countries. Child labour is just one of the problems. Peace, security, ownership, concern for human rights and a reasonably well-functioning legal system are absolute prerequisites for development in every country wherever it may be. It is the legal experts, at the universities and in legal practice, who can make a major contribution.

But it is not just India. Those who find it difficult to explain the importance of educating good lawyers should consult the 'Rule of Law index' of the World Justice Project, in which countries and regions are measured on a global level against the benchmarks for basic human rights.[11] This 'Rule of Law' concept is not something vague by any means. It touches the core of human co-existence. It is about ensuring that governments and their officials and agents are accountable under the law; that the laws are clear, publicised, stable, and fair; that they protect fundamental rights, including the security of persons and property; that

[8] Interview with Gerard Oonk, Trouw, 4 January 2013 (in Dutch).

[9] World Health Organization, *WHO Multi-Country Study on Women's Health and Domestic Initial Results on Prevalence, Health Outcomes and Women's Responses (Summary Report)*, Geneva: 2005. See further World Health Organization, Fact Sheet No. 239, November 2012, www.who.int/mediacentre/factsheets/fs239/en (last accessed 4 January 2013).

[10] Réka Berekméri-Varro, 'Women, Armed Conflict and International Law', in: *Free Law Journal*, 1, 1, 2005, pp. 137–48.

[11] http://worldjusticeproject.org/rule-of-law-index (last accessed 15 January 2013).

the process by which the laws are enacted, administered and enforced is accessible, fair and efficient; that access to justice is provided by competent, independent and ethical adjudicators, attorneys or representatives; and that an adequate number of judicial officers with sufficient resources reflect the make-up of the communities they serve. The website of the World Justice Project, with sixty-five country profiles, ranging from Albania to Mexico and from Germany to China, shows what law is about. Moreover, it shows that there is still a lot to be done in *every* country, just as there is in health care, to stay with the comparison with the medical discipline for a moment.

The World Bank's website offers similar insights, but aims more particularly at the law as a condition for economic stability and growth. Both websites, and these are merely examples, show the worldwide importance of what I call 'good law', and therefore of good lawyers who make their practical and scientific contribution. The Hague Institute for the Internationalisation of Law (HiiL), with its challenging research agenda called 'Law Scenarios to 2030', is providing 'wind tunnels', in which ideas and strategies concerning the laws of the future can be tested and debated.[12] These scenarios may help us think, imagine, conceptualise and debate, in order to make the law more than just a reactive force. To make it a force that is going to help shape a better future for people, nature and the world at large. There are an endless number of other initiatives being undertaken in many other countries.

What law schools finally have in common is a number of thought-provoking questions that are posed to them by other academic disciplines: Are you not too nationally focused? Does your research use a proper methodology? Don't you isolate yourself too much within your own discipline? Is there a real scientific debate? Why are you so invisible in the international rankings? These are the types of questions to which we, as a discipline, have to find answers, and what this whole book is about.[13]

What I have discovered in writing this book I have divided, in this final chapter, into the topics of governance, research, and education. I intentionally set out to write on governance, not because governance

[12] For an excellent example in the case of Ethiopia, see Sam Muller, 'The Future of Law and Legal Institutions: Some Reflections on Justice Strategy Making', in: Elias N. Stebek and Muradu Abdo (eds.), *Law and Development, and Legal Pluralism in Ethiopia*, Addis Ababa: Justice and Legal Systems Research Institute 2013.

[13] Chapter 3.

and management are the primary tasks of a law school, but because they are an absolute pre-condition for success in education and research.

12.4 Opportunities for governance

Those law schools without a strategy are without direction.[14] It is important for every law school to think, from time to time, about what it wants to be – and what it definitely does not want to be. In doing so, deans need to include many 'stakeholders', including faculty members, supporting staff, students, alumni and interested and useful 'observers' such as regional and state representatives. If at all possible, colleagues from other faculties of the university should also be involved; the benefit of such outreach is enormous.

A good strategy is vital. As we saw in Chapter 2, the world of education and research is currently dominated by the concepts of diversification and differentiation. How can a country, or a whole region, become and remain successful as academic education and research become increasingly competitive, specialist and expensive? What does this development towards diversification mean for law schools? Most of them are part of large universities; only a few are stand-alone.

Finally, what does the development towards diversification and profiling mean for law schools? Mostly they offer the prospects of a job within the legal professions and their teaching is directed towards this aim. As we have seen, there is only a small degree of diversity between law schools and countries. In their teaching, few law schools seem to opt for more internationalisation (of both the content of the courses and the range of international courses offered), or for greater interdisciplinarity, or a more explicit focus on scientific research in their teaching. Although some graduates continue in research, the majority choose to enter legal practice. This means that, if the legal profession worldwide continues to determine the model for law studies, there will be little diversification among law schools. On the other hand, I do expect there to be room for diversification in the pedagogy of the law schools and in the quality and level of the programmes offered.

In legal research, by contrast, I expect greater profiling and diversification: take, for example, the choice for a more national or more international approach, of a scholarly knowledge production that is focused

[14] Chapter 11.

primarily on either applied research or on more fundamental research, or of a predominantly monodisciplinary practice of doctrinal law versus a more multidisciplinary approach, in terms of socio-legal studies. Therefore, law schools that choose the truly international or truly multidisciplinary path will at some point be facing the challenging job of keeping teaching and research together, including the academics that do the research and teaching. No dean wishes her school to be divided into two separate entities: teaching staff on the one hand, and researchers on the other. I therefore expect that for most schools the margins will not be wide.

All these critical reflections help to strengthen the values of the law school, both as a teaching establishment and as a research facility. Values are crucial. Broad consultation facilitates inter- and cross-professional interaction, resulting in rich and often refreshing input, contributing to helping define and plot direction in difficult times. University academics often tend to focus more on their own field of expertise than on the school as a whole. It is therefore important to remind them of the entire university community and their role within it. Having mapped out a faculty's strategy, one of the most important roles a dean plays is to keep this strategy at the forefront, to explain it, to facilitate it and to embody it.

A second important task for a dean is the hiring of excellent people, both academics and support staff. A fantastic strategy is worthless if there is not a fantastic staff in place to carry it out – from the librarians, student counsellors and security personnel, to the PhDs, teaching staff and IT wizards. It is immeasurably wise to recruit the best people and give them your full attention and support from day one. 'The best' does not necessarily mean the most intelligent. A dean therefore needs to be alert to the qualities, the expertise and the personalities that may be needed within the team as a whole. At the end of the day, one has to say goodbye to those who do not perform or fit. I have seen a dramatic improvement in law schools and departments which have adopted a good hiring and firing policy. However, herein also lies the risk: the road to the top is just as long as the road to the bottom, but the latter can be travelled faster. Good staff have better employment prospects than mediocre staff and can move more easily between jobs. Deans can therefore never assume that their 'heroes' will stay forever, so they should keep on giving everybody the appreciation they deserve and need, and strive to keep the working environment 'exciting' and 'challenging' for them. A good human resources policy is crucial for any academic institution, but it is not something at which all universities excel. Hiring and firing, and everything in between, rank among every dean's most important tasks.

Diversity in the broadest sense of the word should be encouraged.[15] Diversity of tasks is necessary to keep people motivated, certainly for law schools in a mass education environment. Diversity in teaching staff, researchers and professional staff – men/women, old/young, internal/external, native/foreign, monodisciplinary/multidisciplinary – helps the institution to become and remain creative and innovative. No university and no law school can do without creativity. It is important therefore that departments and units have critical mass; creativity tends to disappear as soon as people are put into little boxes. The happy diversity of every university also includes friendly grumblers, the 'in-my-time-everything-was-better' brethren who have a sceptical comment for every change and initiative. However, if their numbers are too large, it can be deadly for any organisation. Try to keep them as part of the team, but also continue to remind them how demotivating such behaviour can be for their environment, and how damaging it is for the development of their university or law school, in times of change. If it applies anywhere, it applies in higher education and research: standing still quickly translates into going backwards.

Therefore, prevent fragmentation and do everything possible to promote cooperation within the law school. Small steps are the most successful. Try to get prominent professors to develop an interest in a second area of the law in addition to their own specialisation, or even in a second discipline altogether. In this way, a strong network with enormous opportunities may be created, either internally or connected to the outside world, for both education and research. To achieve this, look for connections with other faculties in the university. In this book, I have suggested many times that there is little that is more important to an academic than his or her own field. They are more likely to be interested in going into greater depth than in a horizontal link with closely associated academic fields or disciplines. Specialists are people who know increasingly more about increasingly less. This is not a problem in itself – as long as they remain aware of being part of a larger, inspirational entity. This is a challenge for all leaders within the law school.

Academics live for theory, and are often less interested in its application. The best and most innovative projects can fail because of poor execution. Therefore, for important projects, such as new courses or new

[15] Chapter 10.

research programmes, always ensure you have 'leaders' at the level of the best professors, but also involve the level below that: the associate and the assistant professors. The former will ensure that the project will be considered important within the faculty; the latter, when honoured with a task, will give it all their energy, time and intelligence to make the project a success. Weekly attention to progress by the law school management is crucial for every project that is of strategic importance.

Law schools are not extra-terrestrial entities. They are part of the real social, political and scientific environment. It is vital, therefore, to map this environment and identify the crucial 'stakeholders' or 'constituents'. In no particular order – because they are all equally important – these stakeholders include: the members of the executive board of the university and the deans of the other faculties and schools within the institution; the students and their parents; alumni, including bachelors, masters and PhDs; and the secondary schools from which students are drawn. Furthermore, the legal professions and business; the city or the region, both the residents and administrators; the national government and its policy-makers, the ministries of justice and of education and sciences; legislators, fellow institutions both national and international; and the media, and certainly also regional publishers and journal editors. Write a short plan for communicating with each of these stakeholders and include it in the law school's permanent agenda.

Together with the professors, pay attention and devote a great deal of energy to the alumni.[16] The alumni, more than anyone else, influence the reputation of a law school. If alumni are proud of their *alma mater*, they will prove to be the best ambassadors for the school and can provide important feedback on the education they have received. They can be employed in the education process, and they expand the dean's personal network. Alumni, certainly the younger ones among them, also have their own personal interest in high recognition for their faculty; it increases their own market value. Alumni, certainly the most successful among them, will often be prepared to support concrete projects financially; but, if they do, make sure they feel their contribution 'made all the difference'. The larger universities will have the support of a development office for this purpose.

Bring the outside world, including the business sector, into the law school: there is a lot that can be learned, particularly from their mistakes.

[16] See section 9.5 above.

As much as possible, prevent the engagement of expensive consultants, but rely instead on the knowledge and capacities of your own people. Important (and free) expertise can also be found among the alumni of a law school. They love to help.

Over the years, universities and their faculties have become organisations of increasing complexity. Managing such institutions demands more than just symbolic leadership; it requires a coordinated approach including having strong entrepreneurial and management skills present at the different levels of the institution.

On the one hand, the fact that some vital management and leadership tasks in the university are in the hands of the academics themselves is of incalculable value. At the same time, management is not something academics are particularly keen on doing, or particularly good at. For many academics, each manager is one too many. A dean would not consider employing an accountant to head up a specific discipline within her law school, yet it is unfortunately commonplace to see academics delve into the world of management, for which they are not trained and rarely suitable, or competent. Deans should always show their academics what is involved in the administration and management of the school. Deans have to deal with this tension on an almost daily basis, particularly in times of increasing complexity and pressure. Geoffrey Boulton, former Vice-Principal of the University of Edinburgh, once put it:

> The difficulty is, that changing a university is like moving a graveyard, you get no help from the people inside! The temptation to weak rectors or governing boards is to manage this potential anarchy so strongly that all autonomous creativity and diversity of action is squeezed out. We must not fall prey to the fallacy of managerial primacy, that things that make management difficult necessarily need to be removed or reformed.[17]

For every law dean, leading a law school is a challenge, but it should be a satisfying one.

12.5 Opportunities for our research

Law schools with strong research ambitions will have to draw up a comprehensive research agenda. Such an agenda should embrace all the school's departments, with a clear view of such important questions as: Is

[17] Geoffrey Boulton, 'Global: What Are Universities For?', in: *University World News*, 29 March 2009, para. 69.

there an existing collaborative research culture within the law school? What do we want to be very good at, and, therefore, what are we not going to do any more? Is this choice consistent with the great challenges in our present-day society nationally, regionally and internationally? Do we have the right people for this, now and later? Will society learn anything from our research and how can we demonstrate this? Furthermore, which partners, strategic or otherwise, are needed for this research agenda? Where exactly is it that the scientific debate will occur, nationally or internationally? What language skills will be required, and which additional disciplines and skills? How is future quality assurance organised around the research agenda, and what are the relevant indicators and requirements that will be set in this context? Are we capable of sustaining the research agenda for an extended period, and what does this mean for recruiting and retaining researchers? A very important issue is how we link the research to education; where is the synergy?

And, finally, is the internal allocation of funds within the school and the university as a whole properly organised? Where will the necessary, additional funding come from? Do we have the right in-house people to obtain the funding? Will every member of the scientific staff be doing research, or will the scope of the research be concentrated among certain colleagues? What does our external environment look like, and where are the most important competitors located? Where is the potential benefit of collaborating with other faculties within the university? Is there an adequate knowledge infrastructure for the planned research agenda, such as library facilities, digitally available literature, and so on?

It is remarkable, in a scientific discipline, that publishing for a worldwide audience is still an exception. Between Europe and the US, for example, there is an 'Atlantic Divide' that should worry every serious scientific or scholarly field. With the exception of a few areas of the law, such as international law, there is little scientific debate between the US and Europe, let alone the other continents and regions. We hardly read each other's journals, and we do not write for them either. I believe that this has to change, and in this book I have touched upon and briefly explored some pathways.[18]

This is not to say that 'national' publications are somehow inferior; they are not. With their national publications about national issues, law schools contribute to the development of judicial thinking within the

[18] Chapters 6 and 7.

national legal professions, government agencies including the legislature, and national trade and industry. The discipline must never abandon this task, certainly not at a time of increased focus on the contributions that universities make to society and the national economy.

Another divide appears to exist in the discussions between a monodisciplinary and a multidisciplinary approach to the law. Both are needed, but, here too, the legal world still appears to be divided into separate camps. In the US, interest in multidisciplinary research has grown strongly, but, in Europe and almost everywhere else in the world, legal research, and certainly legal education, are mainly monodisciplinary. This is problematic where research questions require a multidisciplinary approach, or where practising lawyers come up against multidisciplinary issues.

12.6 Opportunities for our education

What often strikes me about many European law schools – and this is no doubt also true of other places – is how little has changed over the years in terms of curriculum and how we teach it, compared to the medical schools. Of course, subjects have been added, removed or altered over time. The chalk and the blackboard have been replaced by PowerPoint presentations. Yet the current digital learning environments and open courseware developments may have the potential of revolutionising the way we teach and interact with students.

Let me just mention a few challenges for today's law schools.[19] Legal education in many countries is often characterised by large student numbers – an intake of 1,000 per year is no exception. How do we deal with such large and increasingly diverse groups of students in a pedagogical sense? Moreover, many law schools have high drop-out rates, and there are considerable delays in finishing a course, sometimes running into several years. How do we bring about change? Contact hours are low practically everywhere, ten or sometimes even less per week, and students in many law schools are offered a great deal of freedom to choose their own path through the curriculum. Does a system like this offer these students enough structure and attention? Furthermore, law schools in many countries are not permitted to pre-select their students; those who are not allowed to pre-select are faced with an even greater challenge

[19] Chapters 4 and 5.

(or burden) of diversity in the freshmen student population. How do we prevent the most motivated and talented students from being swamped by the grey average; or how do we retain these bright students such that they do not choose another, more challenging course of study?

There are also important questions pedagogically speaking. Our legal training is often very cognitive in nature. Students, with very different learning styles, are expected to read books, generally large tomes, and then regurgitate the knowledge they have gained for an exam, or apply it to a case study. Studying law often comes down to lots of learning, little debate, and not much 'doing'. Perhaps this worked well in the past. However, the question is whether this one-sided approach is still sensible today. Furthermore, the training of lecturers at the university is all too often done with the greatest of caution and adherence to tradition, and new pedagogic insights often do not make it to the shop floor; there is a gap between theory and practice. The effectiveness of our study materials, for example, is seldom analysed in a scientifically responsible manner. Instruments such as peer review are rarely used, and our methods of assessment are all too often rather intuitive. Finally, discussions with the legal professions about how our courses link into their teaching are often superficial, certainly when compared with the medical profession.

This is not to say that all these law schools deliver poor outcomes. However, whether they achieve optimum results is another question. Of course, every spectrum has two extremities. Those who are admitted to an elite school in the US, the UK or Canada have gone through a stringent pre-selection process. They were probably intelligent, motivated and disciplined students to start with. High tuition fees and a rigid structure with fixed years of study complete the picture. These students will probably complete their studies on time, and with excellent results. For the remaining hundreds of thousands, however, their courses will appear to be a far riskier undertaking. A special example of this uncertainty is Germany, where approximately 40 per cent of the students will be told *on completion of their studies* that they do not qualify for any of the legal professions.

Each university, I believe, is duty-bound to do all it possibly can to ensure that students succeed in their studies. This means paying attention during intake: students and their future teachers must be able to make an informed decision at an early stage, preferably before the start of the course, as to whether legal studies is the right career choice. The momentum must be seized right from the start. It also means there is some structure during the course, well away from the 'anything goes'

mentality that is still prevalent among many students in many law schools. In the end, it means preparing students for practice in the real world. This can be achieved by bringing the real world into the school – not at the end of the course, but straight away in the first and second years. After all, most law students elect to study law because they want to practise law in the real world, the way most doctors want to heal patients.[20]

A project at my own law school has shown how important it is to involve students in their own course.[21] 'Belonging' is the magic word, as recent British research has shown. It has to become *their* course. Involving the students is primarily a task for the law school and its lecturers; but it is also a task for senior students and student associations. Students for students. This is the only way in which a true university community of lecturers and students can be created.

The contents of the curriculum should also be given continuous attention. The world and our society continue to change, and this should have consequences for the course, as the German Wissenschaftsrat rightly noted.[22] At present, the subjects in a curriculum may keep each other in firm equilibrium; the number of study points for a subject within the curriculum determines the composition of the department concerned. For example, if the course is aimed at a possible future in the legal professions, which is not always the case, the curriculum must pay attention to the increasing internationalisation of society, and therefore of the law. The realisation that the laws of other countries must sometimes be applied, and how this should be handled, is part of the baggage with which every lawyer and judge must travel.

At the same time, legal issues themselves increasingly take on an international dimension. This was pointed out repeatedly and rightly at an American conference of law deans. Moreover, increasing internationalisation is ensuring that more and more countries will have a multi-level legal system. Applicable law is found in regulations and in the administration of justice, not only at a national level but also regionally, such as in Europe, as well as at the level of international law. Internationalisation and globalisation also bring with them the provision of services to different cultures within a single legal system. The realisation, therefore, that culture plays a role in the administration of justice is part of

[20] Chapters 4 and 5. [21] Section 5.6.

[22] Wissenschaftsrat, *Perspektiven der Rechtswissenschaft in Deutschland. Situation, Analysen, Empfehlungen*, 2012 (in German).

the stock-in-trade of all students who are considering entry into the legal professions.

The same applies for the realisation that – and this is something that students must be made to realise – the insights of other sciences may be important for the law and the administration of justice. Students must be taught that the law does not exist in isolation, but has a close relationship with other scientific disciplines. Even if they do not need to become psychologists, sociologists or statisticians, they do have to know something about how these other sciences interact with the law.

Law students must acquire certain skills. These skills obviously relate to language, i.e. the ability to read, write and speak with accuracy, and to be able to plead passionately. To do this successfully, lawyers must be able to play with and have a feeling for language. They must also be able to think analytically and separate the main issues from side issues, perhaps even more so than in any other discipline. They must also have imagination: the ability to empathise with other people and imagine themselves in their situation. Those who are unable to do this will be unsuited to most legal professions. Finally, there is the academic foundation underpinning all these skills: law students must learn to think independently.

One of the most debated questions about how university education links into professional training cannot be answered in a general sense.[23] The differences between countries are too great in this regard as well. It depends, for example, on the place that legal education occupies in the higher education system of a country, i.e. in the US as postgraduate education; in most other countries as undergraduate courses. The content and the quality of the education are also important, as are the national rules that apply for admission of graduates to training for the legal professions. The professions will always have their own professional training courses, with their own quality requirements. A distinct system is that which operates in Germany where the university education and professional training are closely linked.

With so many tasks to tackle, I believe the legal discipline (including lecturers, students and administrators) must become more flexible, reflective and innovative. If we do not find answers to the questions that have been raised in this book, there will be three losers in our system of education.

[23] Chapters 3, 4 and 5.

In the first place, the students: they all too often put themselves into debt for the sake of an uncertain adventure and take from their course a lot less than what it claims to offer. The law schools themselves are also negatively affected: lecturers and support staff give a lot of their precious time and resources to students who are not willing or able to study. Frustration, scepticism, poorly motivated teaching, an escape into scientific research, or a departure of the best lecturers to the law profession can be some of the consequences. Society at large is the third loser. It pays for something that could have been done a lot better and may not get the well-qualified lawyers it was counting on. All three – students, law schools and society – must therefore act – act in unison and act now.

A final observation. One of the most difficult challenges for a university as a whole, and for large law schools in particular, is having to operate in an environment where on the one hand research is highly competitive, yet at the same time in teaching – to put it bluntly – almost anything goes. The Netherlands is a good example of a country where universities are expected to compete with the world's top in terms of research, but where a comparable ambition in education is almost completely lacking. It seems as if, often under external political pressure, just about every measure to motivate students to turn in top performances is doomed to failure. In such an environment, learning to handle this conflict, between the ambitions in research and those in education, represents a challenge for every dean and every professor.

12.7 Conclusion: rethinking the law school

As we have seen in this book, law schools, being large organisations, are in the spotlight of the greater world, but so are the universities themselves. It is my firm belief that, however irritating those spotlights may be, it would be unwise to sit and stare at them like paralysed rabbits. None of the disciplines within our university do this. They all fight an ongoing battle, i.e. for more and better students, for more money, for a better scientific climate, and for more international recognition and presence and influence.

In this book, I wanted to think a little more deeply about the issues that I have come across as a dean over the last few years. They are: our legal education (Chapters 4 and 5), our research (Chapters 6 and 7), the social significance of our research and education for the community (Chapter 8), and a range of issues and questions regarding the governance of the school (Chapters 9, 10 and 11).

I have done this against a background of questions that I have been asked from time to time as a law dean and as a member of the Leiden Council of Deans: why so national, why so monodisciplined, and why such a strange publication culture? Where are your rankings, why so little external funding? Why so little PhD research, why so un-academic, and why do so many lecturers drop out (Chapter 3)?

I have also tried to discuss this type of question, not only from our own national perspective, but also with input from the experiences of law schools worldwide. All in all, I have wanted to present our teaching, our research and our social impact in a somewhat integrated manner.

There is much that has to be treasured, and there is much to be done. Left to their own devices, law schools do appear to change, but slowly. Unfortunately, it appears that real change in our education and research requires external drivers, such as rankings, outside examinations and accreditations. This in itself is a painful realisation, because you would expect, particularly from an organisation of professionals, that they would shoulder this responsibility. Perhaps we are part of the problem ourselves to some extent, being lawyers. We do not much like change.[24] It therefore requires leadership, not just from the dean, but also from the leading departmental heads and professors of the school, and the professional strategic executives and other managers.

One of my ambitions for this book was to see whether we could collaborate more internationally and learn from each other, thus gathering strength as a discipline. Other disciplines within the university have already experienced such international cross-fertilisation. As has been mentioned in this book on a number of occasions, the legal discipline, by its nature, is oriented rather nationally. There is nothing wrong with that. It is true that we are strongly oriented towards national law, both in education and in research. However, this orientation should not be an excuse for continuing to shelter under our national umbrellas. With this book, I have wanted to contribute to the strengthening of international collaboration between law schools. An organisation such as the International Association of Law Schools (IALS) could play a role in this; and much more can be done. I am thinking of more joint publications by lawyers from different countries and different legal traditions; of the encouragement of open access, so that we can read

[24] Section 9.2.

each other's publications; of agreement about how a legal scientific publication should look; and of the reinforcement of international mobility for lecturers and researchers, including dual appointments of professors in different countries.[25]

As is often the case in our discipline, education will be the driver for such internationalisation. In Europe mobility of students preceded the mobility of lecturers. Law schools should be doing a lot more in this respect, through a much broader offering of English-language courses and subjects (in many countries these are still the exception), by setting up our own scholarship funds, and by allowing results obtained in one school to be accepted in others. We could allow students to write dissertations at two universities, and even enter into agreements about joint degrees and joint PhDs. All this requires more knowledge about each other, and a lot more collaboration.

Throughout this book, I have also given a lot of thought to the subject of 'values', i.e. socio-legal values (democracy, the rule of law), values that a lawyer and a researcher or lecturer must imbue in his or her profession. But also the values that a part of the university, like a law school, wants to be seen to be upholding, such as whether we should be a not-for-profit or a for-profit organisation. These days, no organisation or company can avoid questions such as: 'What do we stand for?'

I want to close with one of these values. Those who recognise the differences between all these law schools worldwide, particularly between the rich ones and the poor ones but also between the free and the oppressed ones, should ask themselves how our discipline could have more meaning for the world.[26] International mobility and collaboration between scholars and students is not only very important for the discipline as a science, but also for the role that the law itself can play in the world; initiatives such as the 'Scholars at Risk' international university network promoting the academic freedom and human rights of scholars. Its core activity is to help individual threatened academics through giving them temporary academic positions at the member institutions,[27] 'Microjustice', an umbrella term for a variety of initiatives that provide basic legal services to the poorest people around the world,[28] and countless others that deserve attention and support, including from law schools and their alumni. At least equally fantastic are the local initiatives, such

[25] Chapter 7. [26] Section 3.8.
[27] http://scholarsatrisk.nyu.edu (last accessed 18 January 2013).
[28] http://microjustice.org/page (last accessed 18 January 2013).

as student associations that bring students together internationally, book projects shipping older editions or duplicate law books to needy faculties elsewhere in the world. Deans, especially those at the more privileged law schools in the wealthy West, could set their students and lecturers on this path.

This is perhaps the finest contribution that law schools would be able to make to a world facing such big challenges.

GLOSSARY

An asterisk indicates that the definition of the term has been derived from glossaries produced by the OECD.

AALS — Association of American Law Schools (1900), a non-profit organisation of 170 law schools in the US. Its purpose is to improve the legal profession through legal education. It also represents the interests of law schools *vis-à-vis* the US federal government and other national associations of institutions.

Academic freedom — The individual freedom to teach and conduct research in an academic environment and to communicate ideas and facts, whether or not they are inconvenient to external political groups, sponsors and donors, or to governmental authorities, without being targeted for repression, job loss, or imprisonment.

Administration — The branch of university or college employees responsible for the maintenance, management, leadership and supervision of the institution, in contrast to the faculty or academics, although some personnel may have joint responsibilities. Some form of separate administrative structure exists at almost all academic institutions, as fewer and fewer schools are governed completely by employees who are also involved in academic or scholarly work. Many administrators are academics who have advanced degrees and no longer teach or conduct research actively. (http://en.wikipedia.org/wiki/Academic_administration)

Alumnus — Someone who has graduated, for example, as a bachelor, a master or a PhD at a particular institution.

Annotations Academic comments that analyse, explain or criticise, or a collection of brief summaries of cases used within a course.

Assessment The process of documenting and measuring the level of a student's knowledge, skills and achievements. Two important forms of assessment are the 'summative assessment', carried out at the end of a course or project, and the 'formative assessment', which is carried out throughout a course, and is primarily used to aid student learning. 'Quality assessment' focuses on a school's or institution's educational system as a whole.

Bachelor Master PhD system A three-cycle system commonly used in Europe, the US and many other higher education systems around the world. The degree awarded after the first cycle is commonly referred to as the bachelor's degree, usually taking three or four years; the degree awarded after the second cycle is the master's degree, this latter being generally a taught rather than a research degree, as a rule taking one or two years to complete.

Binary system/binary divide The division of higher education institutions into two classes or subsectors, such as the distinctions between universities and polytechnics (as was formerly the case in the UK), the *Fachhochschulen* in Germany and the *hogescholen* in the Netherlands.

Blended learning Education that combines face-to-face classroom methods with various e-learning computer-assisted activities. (http://en.wikipedia.org/wiki/Blended_learning)

Bologna Process The Bologna Process started in 1999 and contains a series of reforms to make European higher education more compatible and comparable, more competitive and more attractive for Europeans and for students and scholars from other continents. The most visible of its ten action lines include the adoption of a three-cycle system of study (BA, MA, PhD), together with almost universal application of the ECTS as the credit system and adoption of the Diploma Supplement.

Civil law and common law Two of the world's best-known legal traditions or families. The civil law tradition developed in continental Europe and was applied in the colonies of European imperial powers such as Latin America and Indonesia. Civil law was also adopted in the nineteenth and twentieth centuries by countries formerly possessing distinctive legal traditions, such as Russia, Turkey and Japan. The common law emerged in England during the Middle Ages and was applied within British colonies. Common law, from its very origin, is uncodified, whereas civil law is codified; but this distinction is increasingly being blurred.

Class size The number of students per class, calculated by dividing the number of students enrolled by the number of classes.

Common law See **Civil law and common law**.

Compulsory curriculum The minimum required time devoted to core subjects and study areas within the curriculum (subjects and study areas that are common to all students).

Contact hour A unit of measure that represents an hour (often 45 or 50 minutes) of scheduled instruction given to students.

Continuing education and training All organised, systematic education and training activities in which people already in the work force take part in order to obtain knowledge and/or learn new skills for a current or a future job, to increase earnings, to improve job and/or career opportunities.*

Dean Executive head of a university faculty or school, often assisted by an academic dean, a vice-dean, an associate dean or an assistant dean.

Disciplines ('academic disciplines') Defined by the *Oxford English Dictionary* as 'a branch of learning or scholarly instruction'. Although there is no universal agreement about the definition of an academic discipline, most understand the disciplines as having two components: First, the scholars share a set of tools, methods, procedures and theories, as well as an identification with a unique intellectual tradition. And, second, they share certain sociological

characteristics, including institutional structures (such as journals, research centres, academic programs, and conferences).

Dissertation This term may refer to a bachelor's or master's thesis or a PhD, the latter being either a monograph or a collection of published or submitted papers. A 'doctorate' is sometimes used as a synonym for a PhD thesis. See also **PhD**.

Drop-out rate The proportion of students who leave a specified level in the educational system without obtaining a qualification. For a contrast, see **Retention rate**.

ELFA European Law Faculties Association (1995) founded in Leuven by more than eighty law schools of different universities across Europe. The organisation now has more than 200 members from countries within the EU and beyond. It acts as an international forum for the discussion of many topics related to legal education.

Entry rates This represents the proportion of people of a synthetic age cohort who enter the tertiary level of education.*

EUA European University Association, representing and supporting more than 850 institutions of higher education in forty-seven European countries.

Europe 2020 The European Union's growth strategy. The strategy is focused on five goals in the areas of employment, innovation, education, poverty reduction and climate/energy.

Expenditure Expenditure on educational core services includes all expenditure that is directly related to instruction and education (all expenditure on teachers, school buildings, teaching materials, books and administration). Expenditure on research and development (R&D) refers to all expenditure on research performed at universities and at other institutions of tertiary education, regardless of whether the research is funded from general institutional funds or through separate grants or contracts from public or private sponsors.*

Faculty In European traditions, a large part of a university that integrates education (and research) in a certain area of knowledge, for example a faculty of law or faculty of humanities. The term is used in US higher education to indicate academic staff (both teaching and research).

Faculty of law Synonym for a law school or a school of law. A faculty of law is usually part of a university.

Feedback Information on aspects (for example, performance, but also side-effects) of processes to the steering unit of a system (and to other stakeholders, i.e. parties affected by the system). Often, the reporting of the results of a review of a person's work (however formal or informal that review has been) back to that person, often with the purpose of noting good performance or identifying areas for development.*

Fees/private contributions ('tuition fees') Any sum of money paid by or in the name of students as a contribution to the costs of their education.

Financial aid to students Government scholarships and other government grants to students.*

Foreign students Students who do not hold the citizenship of the country where they are enrolled in an educational institution.*

Globalisation Globalisation in higher education can be seen as the economic, political and societal forces pushing societies, including higher education, towards greater international involvement. Globalisation includes the integration of research, the use of English as the *lingua franca* for scientific communication, the growing international labour market for scholars and scientists, multinational and technology publishing, and the use of information technology.

Governance This refers to the internal structure, organisation and management of academic institutions, generally carried out by a governing board, the university president (executive head) with administrative staff, faculty senates, academic deans, department chairs and sometimes some form of organisation for student representation.

	(http://en.wikipedia.org/wiki/Governance_in_higher_education)
Graduate level	Master's, JD or PhD level.
Graduate students	Students in graduate-level programmes.*
Grandes écoles (France)	In contrast to French universities, the *grandes écoles* select students for admission based chiefly on national ranking in competitive written and oral exams.
Hard and soft sciences	Shorthand label used to compare scientific fields on the basis of perceived methodological rigour and legitimacy. The natural sciences and medicine are considered 'hard', while the social sciences, the humanities and law, are often described as 'soft'.
HEFCE	The Higher Education Funding Council for England, a non-departmental public body of the Department for Business, Innovation and Skills in the UK.
Higher educational institutions ('HEIs')	Entities that provide instructional services to individuals or education-related services to individuals and other educational institutions.
Human resources management (HRM)	A term referring to diverse issues regarding training and development, recruiting, testing, promotion, compensation and retirement, labour relations, etc., of personnel.
Impact factor	The impact factor of an academic journal is a measure reflecting the average number of citations to articles published in the journal.
Internationalisation	Like 'globalisation', there is no agreed definition of internationalisation. Terms such as 'globalisation', 'internationalisation' and 'regionalisation' are often used interchangeably to highlight the international activities and widening outreach of higher education. The term embraces such issues as cross-border student and staff mobility and cross-border research cooperation between researchers and their institutions. In Europe, the Bologna Process is a clear example of the internationalisation of higher education.
JD	'Juris Doctor', a three-year postgraduate programme, typical of American law schools and some other common law countries, and elsewhere,

	that prepares the student to enter the profession. It is not a research degree such as a PhD.
Jurist	A person with a legal degree. The term is widely used in civil law countries, but also elsewhere. The term is also used to refer to university academics, as opposed to practising 'lawyers'.
Law school	This is another name for faculty of law. Often law schools are separate organisations within the university; sometimes they are a department within the faculty of social sciences.
Lawyer	A very broad term usually referring to legal practitioners admitted to the bar, such as 'advocates', 'attorneys', 'attorneys-at-law', 'counsellors', 'solicitors' and 'barristers' in some common law countries, 'jurist', or even 'esquire'. Within their national contexts these terms may have a different meaning, and their responsibilities may vary across legal jurisdictions.
Legal professions	Notably the judiciary, public notaries, the bar and the legislature.
LERU	League of European Research Universities, established in 2002, an association of twenty-one leading research-intensive universities in Europe.
Lisbon Agenda (2000)	Also known as the Lisbon Strategy or Lisbon Process, this was an action and development plan for the European Union aiming for Europe to become the most competitive and dynamic knowledge-driven economy by 2010.
LLM	Master of Laws, which is an advanced academic degree and usually requires a previous bachelor's degree (LLB). There is, however, no universal definition for the term 'LLM'. Often LLM programmes are designed to teach foreign law students the basic legal principles of the host country. In most countries, lawyers are not required to hold an LLM degree, and many do not choose to obtain one. An LLM degree by itself generally does not qualify graduates to practise law. It is used in different ways by institutions around the world.
Mode of study	The way in which the curriculum is delivered to students, whether full-time or part-time, face to face or by distance learning.*

MOOC 'Massive open online courses', designed to provide wider access to higher education. MOOCs are defined by their open access: participants do not have to be enrolled in an educational institution. The students generally do not receive a degree, but in many cases are given a certificate of completion.

OCW OpenCourseWare. Courses created at universities and posted on the Internet so that people can follow them free of charge.

OECD The Organization for Economic Co-operation and Development, an international organisation of thirty-four countries founded in 1961 to stimulate economic progress and world trade. It is a forum of countries committed to democracy and the free-market economy, providing a platform to compare policy experiences, seek answers to common problems, identify good practices, and coordinate the domestic and international policies of its members.

Open access The practice of providing unrestricted access via the Internet often to peer-reviewed scholarly journal articles. Open access is also increasingly used in the field of theses, scholarly monographs and book chapters.

Pedagogy The science and art of teaching and educating students. The term usually refers to the theoretical underpinning of the educational and teaching process, covering a range of activities such as instructional design, teaching models, assessment practices, human development and curriculum development.

Peer-edited journals Journals that are edited by professionals in the field. External peer review in most academic disciplines is considered a crucial additional and independent quality check. It is often carried out in the form of double-blind peer review, or at least author-blind.

PhD This is a postgraduate academic research degree awarded by universities, either on the basis of a number of articles or a monograph, testifying amongst other things (see for more details the

	qualifications framework of the European Higher Education Area (EHEA)) that the holder is able to make an original contribution to science or scholarship. The theoretical duration of PhD (doctoral) programmes is three or four years of full-time study in most countries, although the actual enrolment time is typically longer. The programmes are devoted to advanced study and original research.*
Polytechnics/Hogescholen/ Fachhochschulen/Colleges	Institutions which offer mainly professional/ vocational education. They award degrees, and they are part of the higher education system. In England, the polytechnics were given university status in 1992.
President	In many countries the administrative and educational head of the university, also Principal, Vice-Chancellor or Rector. In the US, the head of a university is most commonly a university president. In US university systems that have more than one affiliated university or campus, the executive head of a specific campus may have the title of Chancellor and report to the overall President.
Professional orientation	The extent to which the programme or course is specifically oriented towards a certain class of occupations or trades and leads to a labour-market-relevant qualification.*
Professor	In many (but not all) European countries reserved for someone who holds a chair. In the US system this would be equivalent to the rank of full professor.
Rankings	An ordering of universities, schools/faculties or study programmes in terms of higher or lower levels of 'quality'. There are many providers of university rankings. The most well known are: the QS World University Rankings, the Shanghai (ARWU) Rankings, the Times Higher Education World University Rankings, and the CWTS Leiden Rankings. Ranking universities is controversial, particularly among the academics themselves, because of the lack of a model for

aggregating data about different types of activities (education, research), incompleteness of data (for example, reliance on international bibliometric databases), problems of data comparability, the potential for 'game playing' when reputations for excellence are at stake, and for the encouragement it gives to target proxies rather than underlying reality. In many countries law schools, too, are being ranked. An international ranking of law schools could be derived from university rankings such as the Times Higher Education, or from international websites such as LLM-guide.com, listing the world's most popular LLM programmes. The US News of the World Report is very influential, but not an international ranking.

Rector (or 'Rector Magnificus') The highest academic official in most universities across Europe and other countries that have been influenced by the European tradition. See also **President** and **Vice-Chancellor**.

REF The Research Excellence Framework is the system for assessing the quality of academic research in UK higher education institutions. It replaces the Research Assessment Exercise (RAE) and its first round will be completed in 2014. (www.ref.ac.uk)

Research integrity A set of moral and ethical norms by which to conduct research, such as honesty in reporting and communicating, reliability in performing research, objectivity, impartiality and independence, openness and accessibility, and fairness in providing references. See, for example, 'The European Code of Conduct for Research Integrity' (2011) or the American code 'On Being a Scientist: A Guide to Responsible Conduct in Research' (2009).

Retention rate The proportion of new entrants to a specified level of education who successfully complete their (next) qualification. For a contrast, see **Drop-out rate**.

SARFaL Strategic Alliance of Research Faculties of Law, a group of research-intensive law schools committed to facilitate and enhance international research cooperation and research policy.

Scholarships Gifts of money to students to cover their academic and/or living expenses. These are usually provided by government agencies, private donors or universities themselves.

Sciences Sciences in English parlance usually refers to the natural sciences, academic disciplines that study phenomena of the material world, such as physics and chemistry. In translations from other languages, the term is sometimes used to denote all types of science, including a second group of sciences, namely, the social sciences. This term refers to the academic disciplines concerned with society and human behaviour, and is commonly used as an umbrella term to refer to such studies as anthropology, archaeology, criminology, economics and psychology. A third group of sciences includes the humanities, that study the human condition. Examples of the humanities are ancient and modern languages, literature, philosophy and religion. The legal discipline belongs to both the humanities and the social sciences.

SJD/JSD Doctor of the Science of Law, a research degree – more or less the equivalent of a PhD.

SSRN Social Science Research Network, a database devoted to the rapid dissemination of scholarly research in the social sciences and humanities. SSRN is viewed as particularly strong in the fields of economics, finance, accounting, management, law, Internet security, browser security and Internet safety.

Staff Ancillary or support staff, as opposed to academic 'faculty'. Ancillary services are services provided by educational institutions that are peripheral to the main educational mission, such as student welfare services (including dining halls, and health care) and services for the general public.

Student A person who is registered at and attends an educational institution, not necessarily a university.

Student aid This is assistance provided by the school or the university.

Student/teacher ratio	The total number of (usually full-time) students divided by the total number of full-time educational personnel.*
Teaching hour	See **Contact hour**.
Teaching staff	This term includes personnel who hold an academic rank with such titles as professor, associate professor, assistant professor, instructor, lecturer, or the equivalent of any of these academic ranks.*
Tertiary education	Post-secondary education, largely theory-based and designed to provide sufficient qualifications for entry to advanced doctoral research programmes and professions with high skill requirements, such as law, medicine, dentistry or architecture.*
Third mission	Activities that facilitate a university's engagement with society and industry (see **Valorisation**).
Transferable skills	Skills learned in one context (for example, PhD research) that are useful in another (for example, future employment whether that is in research, government, business, etc.). Examples include communication, teamwork, entrepreneurship, project management and ethics.
U-Multirank	A multidimensional global university ranking (commissioned by the European Commission). This ranking is intended to differ from existing rankings by attempting to rate universities according to a broader range of performance factors, namely, teaching and learning, research involvement, regional engagement, involvement in knowledge exchange, and international orientation (see **Rankings**).
Undergraduate	A student enrolled in a bachelor's degree programme or in a programme leading to sub-bachelor qualifications.
University	An institution of higher education and research which awards academic degrees, including the PhD or equivalent, usually in a variety of subjects and as a rule provides both undergraduate education and postgraduate education. (http://en.wikipedia.org/wiki/University)
Valorisation/valorisatie (or commercialisation)	A Dutch/French term that refers to activities that facilitate and promote a university's engagement

with society and industry, often focusing on knowledge-based innovations and the university's economic function in terms of technology transfer, intellectual property and university–industry–government.

Vice-Chancellor A Vice-Chancellor (commonly called a 'VC') of a university in England, Wales, Northern Ireland, New Zealand, Australia, India, Sri Lanka, other Commonwealth countries, and some universities in Hong Kong, is the chief executive of the university. In Scotland, Canada and Ireland, the chief executive of a university is usually referred to as the principal or president. Strictly speaking, the Vice-Chancellor is only the deputy to the Chancellor of the university, but the Chancellor is usually a prominent public figure who acts as a ceremonial figurehead only, while the Vice-Chancellor acts as the day-to-day chief executive. (http://en.wikipedia.org/wiki/Chancellor_(education)#Vice-Chancellor)

Vocational education This type of education prepares participants for direct entry, without further training, into specific occupations, such as the legal professions (see **Polytechnics**).*

Wissenschaftsrat Germany's Wissenschaftsrat, the country's leading science policy advisory body.

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