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978-1-107-07389-0 - Rethinking the Law School: Education, Research, Outreach and Governance

Carel Stolker

Excerpt

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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.

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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 Rübner, *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.

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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 China¹⁸) 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.

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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.