Legal academic training requires teaching law from a comparative perspective

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Published in:
Ars Aequi

Publication date:
2002

Document Version
Peer reviewed version

Def. versie 3.10.02

LEGAL ACADEMIC TRAINING REQUIRES TEACHING LAW FROM A COMPARATIVE PERSPECTIVE

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In this paper, we will present and explain our opinion that teaching law in a comparative way, as part of the transnational orientation of law students, is a prerequisite for university legal education being qualified as academic. When supporting the teaching of law comparatively, our perspective is neither the preparation of students for an alleged forthcoming unified or harmonised European law, nor the reform of the present law faculties into European law schools, which would then become the cradle of a new type of European lawyers trained to work in all European countries.[3] Our perspective is the improvement of the academic quality of university legal education. We think that, among other things, teaching law in a comparative way is an indispensable contribution to such an improvement. In the illustrations of our point of view, we concentrate on private law.

The perennial discussion on legal education

A former Dutch Minister of Education, Culture and Science, Job Cohen, once asked what came first: legal education or the discussion on legal education.[4] In the Netherlands, we are already experiencing the fourth broad discussion on the topic since the **Nederlandse Juristen-Vereniging (Dutch Lawyers Association)** devoted its annual meeting to it in 1972.[5] Once again, the major topic is the emphasis on the aca-

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3 Having read a vast number of works using the method of comparative law, Esin Örücü, *Critical Comparative Law: Considering Paradoxes for Legal Systems in Transition*, preadvies Nederlandse Vereniging voor Rechtsvergelijking, Deventer 1999, p. 5, mentions other objectives, e.g. the reconciliation or convergence of common and civil law, an aid to international practice of law, and, long ago, a tool for research to reach a universal theory of law, and an aid to world peace.

4 M.J. Cohen, 'De opleiding: speciaal?', in: *Gevraagd: 'jurist voor morgen'*, Bureau Symposia Nijmegen 1991, p. 13.

5 In the early eighties, the legal curriculum was restructured into a two-phase programme of one propaedeutic year and three graduate years. In the nineties, the influence of Europe made clear that, in a short time, the dominant orientation to national law in legal education would no longer be self-evident. However, after an enthusiastic start interest faded and there were no drastic reforms, besides some occasional and slight adaptations. In 1996 the rapidly increas-

demic training to be offered by universities in order to clearly distinguish them from institutions of higher vocational training. It is generally **acknowledged** that offering academic training is inherent to university legal education**.**[6] **Nevertheless,** when carrying out this objective there is a lot of confusion. What makes university education 'academic' and what is meant by 'academic training'? And how does this relate to what is further considered to be an aim of university legal education**, namely,** preparing students for specific legal professions such as lawyers, judges, and notaries?

The Joined Declaration of the European Ministers of Education and Science, who convened in Bologna on the 19th of June 1999, revived the discussion on legal education. In the Declaration**,(-)** the Ministers promised to adapt the university curricula to a system essentially based on two main cycles: undergraduate and graduate. Access to the second cycle requires the successful completion of the first cycle**, i.e.** a Bachelor**'s** programme **taking at least** three years. The second cycle consists of a Master's programme and lasts one or two years.[7] The rationale behind this Bachelor-Master operation, as it was soon called, is to make curricula comparable and, therefore, to remove current problems **with respect to** the exchange of students, **lecturers** and knowledge and to stimulate their mobility.[8] In other words: the former German *Wanderstudent* should become a European figure.

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ing numbers of students became one of the reasons to limit the curriculum to a maximum of four years (with only a few exceptions). The 1999 Joined Declaration of Bologna, mentioned later in the main text, is the basis for the current discussion on the topic in the Netherlands.

6 See, e.g., B. de Witte and C. Forder (eds.), *The Common Law of Europe and the Future of Legal Education*, Maastricht 1991; S.C.J.J. Kortmann (ed.), *Legal Education in the Netherlands in a Comparative Context*, Nijmegen 1995; E.H. Hondius, *Juridisch onderwijs in vergelijkend perspectief*, preadvies Nederlandse Vereniging voor Rechtsvergelijking, Deventer 1998; W.J.M. Bekkers, R.M. Koning and N.J. Vette (eds.), *Rechten in Utrecht. De academische studie in verleden, heden en toekomst*, Deventer 2002; F. Bruinsma, 'De ondraaglijke lichtheid van de rechtenstudie', *NJB* 2000, pp. 1371-1374; *NJB*-special *Van Meesters en Masters*, *NJB* 2001, pp. 153-165, e.g. A.M. Hol, 'Recht als ervaring. Over academische vorming in de juridische opleiding', *NJB* 2001, pp. 158-163; M. Nolen, 'De rechtenstudie van de toekomst of de hoop op diepgang, uitdaging en bevlogenheid. Congresverslag: Bachelor- en masterstructuur en inrichting van de academische rechtenstudie', *Ars Aequi* 51 (2002), pp. 412-417.

7 In the Netherlands, the first Kok administration (1994-1998) proposed similar plans, based upon a report of the Scientific Council for Government Policy of January 1995, but these plans vanished in a discussion on the number of years students are entitled to spend at universities: five instead of four years.

8 According to G.E. van Maanen, 'Een uniforme Bachelor/Masters-structuur voor de Nederlandse juridische opleidingen?', *WPNR* 6418 (2000), pp. 667-668, this rationale of increasing the mobility of students should be the real reason to teach law in a comparative way. For us, teaching law in a comparative way follows from the claim that university legal education should offer students academic training.

Although the Bologna Declaration did not contain suggestions for the **reform** of legal education as regards content,[9] some Dutch law faculties appear to have used the Declaration as a starting point for a critical evaluation thereof. Given the purpose of academic legal education, we think that law faculties should grant a more prominent place in their curricula not only to topics such as methodology, legal reasoning, the philosophical status of the study of law and the relation of law to social sciences, but also to the issue of 'transnational orientation'**, i.e.** the ability of law students to mentally and physically cross the borders of their national legal system and culture and, as a result thereof, to extend the boundaries of their legal minds. **One of the questions of f**uture legal education should **be** the development of such an ability. How could this objective be realised?

Legal education and comparative law

There are many ways to develop the 'transnational orientation' of law students. In the next sections, we will concentrate on a particular method**, i.e.** the introduction of comparative law in legal education. Obviously, there are other methods as well.

Firstly, one might think of **paying more attention to** European and international law in legal curricula. It could be argued that law students, apart from their own national law, should also study law primarily developed by international and supranational organisations, courts and treaties.[10] Another way in which the 'transnational orientation' of law students could be developed is the internationalisation of legal education**, e.g. by encouraging** students **to take** part in foreign law courses at their own universit**ies or in** students exchange programme**s** (**such as** Erasmus) at a foreign university**. (-)**

We consider these other methods **to be** intrinsic and self-evident parts of current legal education and not related to comparative law. As regards the **increased attention for** European and international aspects of the various fields of law, for instance, national private law cannot be taught without taking into account the enormous influence of European Community Directives and decisions of the **European**

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7 However, both the Bachelor**'s** programme and the Master's programme need the approval of the National Accreditation Board, which implies that the **programmes** have to meet certain quality standards.

10 Obviously, it is particularly EC law we have in mind here. Formal **(-)** implementation or ratification by a national legislator may still be required for making such a law binding on a **country's** citizens.

Court of Justice and of the European Court on Human Rights, e.g. on damages, government**(-)** liability, access to justice, and so on. As to the second way of developing a 'transnational orientation', i.e. by means of internationalising legal education, we certainly recommend that the initiatives mentioned in the examples above be maintained and even be increased. But again, they have nothing to do with what we have in mind: the introduction of comparative law in legal education.

Why law should be taught from a comparative legal perspective

Depending on how comparative law is to be introduced in legal education,[11] we suggested above that this would help students to widen their perspective and to prevent them from becoming too much attached to their national legal system and culture. We believe this is essential to a student's academic training. Legal education should stimulate students to critically reflect upon their own legal system. By confronting them with the arguments and solutions on the basis of which a particular problem or a more general issue is analysed and solved in other legal cultures, students will no longer take for granted the way in which similar problems or issues are dealt with in their own legal system.

This line of approach would further contribute to legal education becoming more academic, in the sense that it would force both teachers and students not to dwell upon the technical details inherent in **a particular** legal system. Legal education does not become 'academic' **by** merely **conveying** knowledge regarding the technical operation of an abstract set of rules. It requires a more fundamental and ongoing debate on general concepts, principles, ethics and values. Both teachers and students should consider and reconsider the **(-)** arguments **underlying** a reasoning that seeks to establish a satisfying and consistent approach to and solution for a concrete problem or a more general issue. As a consequence, they will inevitably have to face the possible influence of law on society and ask themselves what law is able **(-)** to do in society. This brings us to the question *how* law should be taught from a comparative legal perspective.

11 We will address this issue in the next section of our paper.

How we would teach law from a comparative legal perspective

There are many ways to introduce comparative law **into** legal education. **(-) A** sliding scale **could be drawn** on which several options can be identified. On one side of that scale, we identify the – as we call it – most traditional option. This option involves a teaching programme that starts by concentrating on the national legal culture of the students involved. More particularly, students are taught **the abstract constructs of** their national legal system **(-)** and **the application of** the rules embedded in that system to concrete problems. This approach will be followed until the final stage of their education has been reached. At that stage, comparative law is introduced in the teaching programme. Students will then be shown, at a basic level and from the perspective of their own national legal system, how foreign legal systems are constructed and how they operate as sets of concepts and rules. Eventually, they will learn how foreign legal systems – again, at an abstract level of rules and concepts – are different from or similar to their own national legal system.

We are not in favour of this traditional option. We support a more progressive option to be found on the other side of the scale referred to above.[12] That option would **consist in introducing** comparative law right from the **start** of the legal education of the students involved. **The** teaching programme and teaching process would not be **based on** the dominant perspective of their national legal system and culture**, nor** would the teaching process start **with** explaining law in terms of an abstract system of concepts and rules, which the students are then trained to apply to concrete problems. Instead, we would favour the opposite approach by letting the process start from the analysis of either a concrete problem or a more generally defined issue. **(-) The** focus of such an analysis would be **on identifying** the various

12 Neither the traditional nor the progressive approach appears to be taken in legal education in England, France, Germany and the Netherlands. We asked our research assistant, Jeroen Kruis, to **make** a rough survey of the comparative legal content of compulsory private law courses (undergraduate and graduate) taught at some important law faculties in the countries mentioned: Bristol, Cambridge, King's College (London), London School of Economics, Manchester, Nottingham, Oxford, Queen Mary & Westfield College (London), University College (London), Warwick, Bonn, Freiburg, Hamburg, Heidelberg, München, Münster, Passau, Regensburg, Saarbrücken, Aix-Marseille-3, Bordeaux-4, Lilles, Lyon-3, Nantes, Paris-1, Paris-2, Paris-5, Paris-10, Paris-11, Paris-12, University of Amsterdam, Free University (Amsterdam), Groningen, Leiden, Maastricht, Nijmegen, Rotterdam, Tilburg and Utrecht. The survey shows that very few law faculties offer students introductory courses on comparative law. Moreover, apart from Maastricht, it seems that none of these law faculties offer compulsory private law courses from a comparative legal perspective.

ways in which these everyday problems and general issues are approached and solved throughout the legal cultures studied by the students. In addition, they would have to concentrate on the question what the underlying arguments are that will eventually have to be weighed and valued in any of the various legal cultures. Students should then be able to formulate a proper approach and solution for themselves, given the results of the comparative legal analysis. At a later stage, they would have to redefine both this preferred approach or solution and its underlying arguments, and determine whether these arguments can be consistently **fitted** into the system of rules and concepts of their own national legal culture. Obviously, students should be able to formulate value judgments if it turns out to be difficult or even impossible to fit the approach or solution preferred into their legal system. In doing so, they would also have to concentrate on the question whether the arguments and the approach or solution preferred can be generalised for the purpose of future reference when similar concrete problems or general issues occur.

Two illustrations

We will further illustrate the progressive option outlined above by giving two examples. The first example deals with a concrete problem, a 'wrongful birth' case. Such cases have occurred – and probably still occur – in many legal cultures. In a compulsory private law course, a wrongful birth case could be used as a model to determine the scope of protection offered by the law of obligations. The case raises fundamental questions, e.g. on the relation between ethics and law, and whether law should be involved in personal, intimate matters like family planning or birth control. Does the doctor have to compensate the parents' costs of bringing up the child? When studying the Dutch Supreme Court's decision of 1997,[13] students would learn that the Court allowed compensation, although limited to the average costs of bringing up a child and only until the child turns 18. The Court's decision is primarily based upon Articles 6:74, 6:96 and 6:98 of the Dutch Civil Code. Analysis of these Articles led the Court to the conclusion that the Code is in principle not opposed to allowing compensation to the parents. That conclusion is followed by an evaluation of arguments that might **have induced** the Court to go back on its initial conclusion. However, the outcome of the evaluation did not change the Court's mind. One may wonder

13 HR 21 February 1997, *NJ* 1999, 145, with note by C.J.H. Brunner.

whether such a change was to be expected, given the approach taken by the Court. Nevertheless, the additional evaluation is remarkable because it is rather unusual in the Dutch Supreme Court's way of legal reasoning.

Does the approach of the Supreme Court sufficiently provoke Dutch students to reflect critically upon their own legal system concerning the scope of protection offered by the law of obligations in personal, intimate matters like wrongful birth? We think Dutch students should not start with analysing a typical wrongful birth case from the perspective of the relevant legal provisions of the Dutch Civil Code or of any other Civil Code. These provisions merely provide a framework within which the crucial arguments have to be weighed and valued. Therefore, it is essential to get to know these arguments. The best way to achieve this objective is by having students also read the landmark cases on wrongful birth **in** other legal cultures,[14] challenging them not only to list all crucial arguments that are eventually weighed and valued, but also to find out how this weighing and valuing is carried out. This comparative legal analysis would show students that supreme courts **in** other countries may address a wrongful birth case in a way quite different from that of the Dutch Supreme Court, and that the same arguments can be used to reject a claim for compensation of the costs of bringing up the child. Why is that? What are the real underlying arguments in deciding a wrongful birth case? Ethical considerations? Policy arguments? Insurability? Cultural differences? We think these are the fundamental questions that ought to be discussed, instead of lingering on the mere technical aspects of current law regarding wrongful birth.

The second example to illustrate our point of view that teaching law comparatively would contribute to the academic level of university education, involves a more general issue. In all Western societies, it is regarded as the government's duty to offer citizens a procedure to help them solve their legal disputes **in** a court of law. Inherent in this duty is the prerogative of the government to declare that it is only within the framework of such a procedure that citizens can be granted a title to enforce their rights **against** other citizens with the help of private law means. The power that is thus conferred on citizens, is far-reaching. Strict and clear rules are required. Tradi-

14 As for English law, this would obviously be *McFarlane* v. *Tayside Health Board (Scotland)* [1999] 4 All ER 963. A German case to start with would be BGH 27 June 1995, *NJW* 1995, pp. 2407-2410.

tionally, this is the field of civil procedural law and of the law of attachment and enforcement.

Nowadays, procedural law is generally considered to be very much orientated to practice.[15] Textbooks on procedural law confirm this view. They offer an overview of current civil procedure, limited to one's own national legal system. Students are acquainted with almost all steps and all legal events that may occur in the course of ordinary and extraordinary proceedings, and also with the very extensive and technical rules on attachment and enforcement. The explanation in the textbooks includes both the many questions that have arisen in the past and the relevant case law, together with the doctrines that have been developed to answer them. The student has to study all this rather detailed information and is taught to apply the knowledge gained to concrete cases. Of course, essential principles such as the right to be heard or the **requirement** of an impartial and independent court, are dealt with as well, just **as are** new developments, but the way in which this **is done** is usually the same**, namely,** on the basis of current law. This means that the general approach in teaching procedural law is explaining the law as it stands, in a predominantly non-critical way and almost exclusively limited to national law. This approach does not differ from the one that is taken in institutions of higher vocational education and in post-graduate professional training for judges and lawyers.

We do not think this approach meets the academic standards we have in mind. Instead of focusing on details of national law, here and now, academic education requires a more reflective attitude. We mention three topics in this context, which partly result from a comparative analysis, and should partly be taught comparatively to gain a better and more profound understanding. We apologise for dealing with these topics only briefly, due to lack of space.

The first topic is the relation between procedural law and substantive law. It is **generally held** that this is a unilateral relation: substantive law confers rights and imposes duties**, whereas** procedural law is **nothing more than** a means **(-)** to ensure the correct determination of these rights and duties and to provide the parties with a title to enforce the court's decision. We think this is a one-sided view. The other side is that procedural law has its own dynamics. To a certain extent, it creates

15 Perhaps this is the reason why the level of scholarly study is rather poor in many countries, e.g. in the Netherlands. See C.H. van Rhee, 'Civil Procedure: A European *Ius Commune*',

substantive law. With this we have in mind the phenomenon of judge-made law, the creation of which follows especially from the task of the highest courts. Large parts of substantive private law consist of case law. It is generally **acknowledged** that case law is very important, if not indispensable for the development of private law in this modern age. This phenomenon should be discussed in classes on civil procedure, e.g. to reconsider the current system of judicial adjudication in which it is rather coincidental whether cases go through to the highest courts. Is that the best way to organise a phenomenon of such an important public interest? Analysing the phenomenon from a comparative legal perspective could help revealing and balancing the arguments at stake.

The second topic studies litigation in courts of law from the perspective of dispute resolution. Many other techniques and means to solve disputes between citizens are available in society, such as arbitration, mediation, conciliation, facilitation, early neutral evaluation, mini-trial, pre-action protocols, consumer complaints tribunals, binding advice**(-)** and complaints codes. A comparative tour shows that alternative techniques and means, above all mediation, have started an almost sensational victory march through many countries. How to **judge** them in relation to procedures followed in a court of law? In recent reforms of civil procedure, e.g. in Germany, England and Wales, **(-)** the influence of the alternatives **can already be observed**, because **in these countries** the courts are now under a statutory duty to try **more often** to reach friendly settlements at any stage of the proceedings **(-)**, or, at least, to encourage the parties to use an alternative procedure to resolve their dispute. Is this a development that deserves support? What are the prevailing arguments pro and con?

The third topic concerns the content of procedural law more directly. **The s**tarting point is the criticism on the current procedural law in the Netherlands and the proposals to reform it. A comparative tour shows that this criticism **is expressed** almost worldwide. The civil litigation's shortcomings are even defined in almost the same terms**, namely, it takes** too much time and money, it is inefficient and unable to meet the requirements of a modern service **(-)**organi**s**ation. It is interesting to note that not only the shortcomings, but also the proposals to resolve them **point** in the same direction. To mention only two of them: the current three-tier system of first in-

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ERPL 2000, pp. 589-611 (593). In the United Kingdom, procedural law has even been denied

stance, appeal and cassation or revision which exists in most civil law countries, is as such unknown in common law and in Scandinavian countries. One of the major points of discussion is the function of appeal**. In** most civil law countries,[16] **appeal is a full** second chance (re-hearing)**, whereas** in common law **countries** and **in** Scandinavia **it** merely **is** a review of the decision in first instance (whether or not in combination with a system of leave to appeal). A discussion of this issue recently started in the Netherlands, not only in **respect to** civil procedure, but also in **respect to** criminal, administrative and tax procedural law.[17] Again, what are the arguments pro and con?

A second proposal to improve civil procedure **concerns the question of whose responsibility it should be to gather** the relevant information on the basis of which the judge has to decide. **(-)** Answering **this** question forces both **lecturers** and students to study some very fundamental issues, e.g.:

- the autonomy of parties and their entitlement to defend their rights in the best possible way versus a duty to inform and to co-operate in order to have the dispute solved efficiently and effectively;
- the public interest in such an effective and efficient system of judicial adjudication **(-)** also requires a more active role of the judge (catchword: case management). This would differ from what is traditionally regarded **as** his role**, i.e.** mainly a passive one;
- differentiation of proceedings, in which the resources available are allotted in appropriate shares**. The question is whether this is** in accordance with the principles of doing justice**(-).**

Teaching materials

Teaching law in the manner outlined above requires adequate teaching materials. There are not many adequate textbooks yet, but **such books may** easily be devel-

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the status of academic discipline. Only very recently, this situation has changed.

16 Exceptions are Austria and Germany.

17 See F. Hovens, 'Het civiele hoger beroep in de toekomst', *Ars Aequi* 2001, pp. 866-874; J.E.M. Polak, 'Hoger beroep in het bestuursrecht', *Ars Aequi* 2001, pp. 622-629; P. van Schie and R. den Ouden, 'Belasting-rechtspraak in twee feitelijke instanties', *NJB* 2002, pp. 2176-2181; M.S. Groenhuijsen and G. Knigge, *Onderzoeksproject Strafvordering 2001*, third interim report, Tilburg/Groningen 2002; W.D.H. Asser, H.A. Groen, J.B.M. Vranken and I.N. Tzankova, *Fundamentele herbezinning Nederlands burgerlijk procesrecht*, interim report, 2002, Chapter 9 (forthcoming).

oped, particularly if legal scholars from various legal cultures **(-)** join hands.[18] Besides, landmark decisions on concrete problems occurring throughout Europe are rather easily available in the legal cultures concerned. However, they will not always be accessible to every student due to language barriers. This problem could be solved if the case law of the supreme courts of all European countries would, in the near future, not only be published in the national language of the country concerned, but also in a language read and understood by most European lawyers. Therefore, we recommend the translation **(-)** of **such** case law **into English**. This would not only support the teaching of law from a comparative legal perspective, it would also stimulate comparative legal research and perhaps even contribute to legal practice. As for the total translation costs, we believe they would probably not have to exceed the money spent on translating the decisions of the **European** Court of Justice into the languages **of** the Member States of the European Union.

Concluding remarks

When developing the ideas written down in this paper, another thought came to our minds. We have **an (-)** impression of how law students in the Netherlands will probably be educated and trained once the Bachelor-Master operation has been fully completed. We **assume (-)** that the three-year Bachelor**'s** cycle will mainly be used to teach students the law as it stands. Although**, obviously,** not all fields of law will **(-)** be dealt with, students will most likely get a rather broad overview at a sufficiently profound level that will enable them to deal with everyday legal problems once they enter practice. We further **assume** that the education of law students will become **somewhat** more academic once they enter the Master**'s** cycle of either one or two years. During that additional and academic training, they will deepen their knowledge of one or more general or specialised fields of law. Both cycles appear to contain elements of professional training.

Given the ideas developed in this paper, we question the aforementioned approach. In our approach, the Bachelor**'s** cycle would exclusively aim at academic legal training in the manner illustrated **above (-)**, **focusing** on general fields of law, while the Master**'s** cycle would focus on one or more specialised areas of law.

18 See, e.g., H. Beale, A. Hartkamp, H. Kötz and D. Tallon (eds.), *Cases, Materials and Text on Contract Law*, Oxford and Portland, **Oreg.** 2002. W. van Gerven (ed.), *Cases, Materials and Text on National, Supranational and International Tort Law*, Oxford and Portland, **Oreg.** 2000.

Teaching the law as it stands as well as **the** professional training of **law** students should, to our mind, take place in a postgraduate stage after students have entered their profession. We consider this training to be the responsibility of legal professional organisations of lawyers, notaries, company lawyers and judges. In the Netherlands, these organisations have already acknowledged this responsibility and established compulsory postgraduate training, lasting at least three years and covering not only current law, but also the teaching of practical skills. The intensity of these postgraduate training courses could be strengthened, if so desired, **(-)** by contracting out parts of that training to **the universities**, e.g. courses on new legislation and new developments in case law.