CURRICULUM AND PEDAGOGY

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I. DEVELOPING OPTIMAL USE OF CURRICULUM AND LEGAL EDUCATION METHODOLOGIES

In today's world of many legal cultures and traditions, development of optimal curriculum and legal methodologies by law schools with varying financial resources and diverse missions and cultures generates a wide range of combinations of curriculum and legal methodology choices.

As legal educators we balance advantages and disadvantages of various curricula and legal education methodologies including balanced use of case law, case problem, lecture, simulation, clinical and other methodologies to meet unique economic, political, and societal needs of differing legal systems, cultures, and law schools around the world. To facilitate general discussion of this process by law schools in diverse legal systems and cultures, this paper uses recent experience of the University of Cape Town Law School in South Africa, the University of Maastricht Law School in The Netherlands, and the decision of the Harvard Law School to supplement its use of case law methodology with case problem methodology.

The impact of the new information technology and globalization in the post World War II era and through the 20th and into the 21st centuries far exceeds the impact on law and legal institutions generated by the 19th century industrial revolution and technology. Currently, issues in which legal norms are domestically and transnationally intertwined proliferate amongst national, regional, and global political and economic structures. In addition, environmental, health law, division of power between central governments and component

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governmental units in individual countries and in regional organizations like the European Union, voting systems in global organizations like the United Nations, criminal and civil transnational procedural rules, international human rights conventions — to mention only a few of many other topics compete for attention. The need for change in public and private law generated by new 20th and 21st century technology and globalization continues unabated and expands. These challenges impact on the structure and operation of legal education worldwide.

II. THE UNIVERSITY OF CAPE TOWN EXPERIENCE[1]

RELATING LOCAL, REGIONAL AND GLOBAL NEEDS

The relevance of these factors is illustrated in a paper recently presented by Chuma Himonga in presenting a South African perspective on enrichment of legal education. Professor Himonga takes the position that uniformity is unlikely to be achieved among law schools with regard to the purposes for which they educate students. While changes in national and international scenarios have required law schools worldwide to embrace common goals, law schools are also asked to consider local legal educational needs which are inherently different. In this context she addresses the specific goals of the University of Cape Town (UCT) Law School to provide insight to the relationship between local needs and the general goals of the Law School.

Professor Himonga identifies conditions that influence how a law school determines its objectives. The first is whether the law school is public or private. Private law schools usually enjoy greater flexibility in determining their objectives. Public law schools are more likely to have goals closer to those identified as national or other governmental and political goals. Connection to the public is important in South Africa, since universities are visualized as key sites for the production of intelligent graduates who are socially responsible and sensitive to local, regional, national and transnational needs.

South Africa's political history and its colonial past also influence the purposes for which students are educated. Since its foundation in 1859 the UCT Law School has shown a dynamic character in the choice of its missions, dealing at the beginning with two different and competing legal systems (i.e. the Roman Dutch law and the English common law).[2] In the early years of the apartheid regime, concerns about respect for basic rights in a racially segregated society led the school to focus its teaching on the protection of the rule of law and on conveyance of the ethical framework within which lawyers should work to benefit society.

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[1] Himonga, *Goals and Objectives of Law Schools in Their Primary Role of Educating Students: South Africa—The University of Cape Town School of Law Experience*, 29 Penn St. Int'l L. Rev. 41 (2010).

[2] On the interaction between Roman (Dutch) law and the English Common law in the South African legal system, see KONRAD ZWEIGERT AND HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 231 ff. (1998, 3rd).

Under the new constitutional system (initiated in 1993 under the "Interim" Constitution and completed in 1996 with the current "Final" Constitution),[3] the UCT Law School has supported the new national aspirations and the country's commitment to a new birth and to the abandonment of previous inequalities. The main goal is to produce versatile law-school graduates whose knowledge and skills will contribute to the social, cultural, legal, economic and political development of South Africa. UCT Law School trains students for work in various areas of national and international professional practice. At the same time it strives to promote professional responsibility, a sense of duty to stand up for the rule of law, and commitment to the improvement of the law and the legal system. It also trains students for leadership and civic responsibility.

The UCT Law School achieves these goals by carefully determining the content of the LL.B. curriculum, which includes non-law disciplines such as history, politics, language and economics. Tutor programs have been established to support Black, Colored and Indian South African students who suffered educational disadvantages under the previous apartheid regime. Finally, courses are offered to make students aware of the increasingly interrelated international-law environment, and of national and regional needs and culture. The curriculum includes subjects such as International law and Jurisprudence and African Customary law, which is incorporated in the curriculum as a stand-alone course in recognition of the importance the subject plays in the South African legal system.[4]

Professor Himonga demonstrates the difficulty of positing uniform goals for legal education as long as there are fundamental differences in the conditions under which law schools are established and operate in different countries. Law-school curricula should take into account culture-relevant aspects of legal education and local needs. However, the pressure of globalization and the effects of international human-rights treaties in domestic jurisdictions are leading to increased consideration and to the establishment of common goals, methodologies and content in legal education. Law schools should not insulate themselves, and their educational curricula and goals should prepare students to operate in an increasingly interrelated world. Issues of globalization incorporated into the law-school curriculum, at the same time, should not minimize the importance of local realities. These competing legal-education goals must be balanced.

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[3] For a legal and constitutional analysis of the country's transition to democracy and a valuable introduction to the South African Constitution in its historical and social context, see HEINZ KLUG, THE CONSTITUTION OF SOUTH AFRICA. A CONTEXTUAL ANALYSIS (2010).

[4] African customary law has also been officially recognized by the 1993 Interim and the 1996 Final Constitutions of South Africa: *see* articles 33, 35, 181, 183 and 184 of the 1993 Interim Constitution and articles 39, 211, 212 of the 1996 Final Constitution. Text of both constitutions available at: http://www.constitutionalcourt.org.za/site/theconstitution/thetext.htm. On the debate surrounding recognition of African law, with specific reference to the African system of customary law, *see* Werner Menski, COMPARATIVE LAW IN A GLOBAL CONTEXT. THE LEGAL SYSTEMS OF ASIA AND AFRICA 380 ff. (2006).

III. UNIVERSITY OF MAASTRICHT EXPERIENCE[5]

THE BOLOGNA DECLARATION, THE EUROPEAN UNION AND HIGHER EDUCATION

Aalt Willem Heringa has recently addressed the status of legal education in Europe after the Bologna Declaration,[6] focusing on the impact of European law on legal education and on comparative and international legal research in the face of Europeanization and globalization. Dean Heringa also provides an account of the University of Maastricht's initiative to establish a European Law School as a new and innovative law school whose mission is to train lawyers and academics according to a state-of-the-art legal-education curriculum.

Despite existence of the Bologna Declaration since 1999, a unified system of legal education has not yet been established in Europe, neither in the context of the twenty-seven European Union (EU) Member States, nor in the context of the forty-seven Member States of the Council of Europe. Dean Heringa concludes that this slow implementation results from the voluntary nature of adhesion to the Bologna Process, coupled with the right of participating States to determine the pace of implementation in accordance with their own traditions and histories of higher education, and their limited financial capacities. To protect their sovereignty in the field of education, EU Member States have also avoided delegating competences in this area to the EU.[7] Finally, in Europe regulation of the legal profession is still under the strong influence of national bar associations.

Despite these difficulties the EU has been able to influence the Member States' systems of legal education through grants of funds for research and student mobility.[8] Moreover, since

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[5] Herina, *European Legal Education: The Maastricht Experience*, 29 Penn St. Int'l L. Rev. 81 (2010).

[6] Bologna Declaration, June 19, 1999, *available at* http://ec.europa.eu/education/higher-education/doc1290_en.htm. The Bologna Declaration is the main non-binding guiding document establishing the Bologna Process. It was adopted by the Ministers of Education of twenty-nine European countries in Bologna in 2009 with the purpose of encouraging harmonization of legal education in Europe through creation of a European Higher Education Area (EHEA). The purpose of the EHEA was to further adoption of a three-tier system of legal education (bachelor, master, Ph.D.) in the participating countries and common terminology and standards for higher legal education. After the initial meeting in Bologna in 1999, further governmental meetings have been held in Prague (2001), Berlin (2003), Bergen (2005), London (2007), Leuven (2009), Budapest and Vienna (2010), each meeting producing a communiqué detailing progresses made in the process of harmonization. The Bologna Process has currently forty-seven participating countries. One year before the Bologna Declaration, in 1998, the Ministers of Education of France, Germany, Italy and the United Kingdom signed the so-called Sorbonne Declaration in Paris, committing themselves to "harmonizing the architecture of the European system of Higher Education."

[7] It should be noted that the Bologna Process is not an EU initiative. While there are twenty-seven Member States in the EU, the Bologna Process currently has forty-seven participating countries. The European Commission of the EU has contributed in relevant part to the development of the Bologna Process, but the Lisbon Recognition Convention (the Convention making academic-degree standards comparable and compatible throughout Europe) was actually designed by the Council of Europe and members of the Europe Region of UNESCO.

[8] Among the most famous student-mobility programs, it is worth mentioning Erasmus/Socrates, Marie Curie, Erasmus Mundus and Jean Monnet.

its creation, the EU has established rules regarding the freedom of services and free movement of workers (including legal practitioners) which guarantee recognition of diplomas and qualifications anywhere within the EU.[9] Finally, the EU is also influencing legal education from another, more indirect, perspective. Many aspects of what used to be purely domestic areas of law are now under the influence of EU principles or direct legislation in the form of regulations or directives. With regard to these subjects, students all over Europe are taught the same substantive law in their courses, with a clear impact on the content of their legal curriculum.[10]

Dean Heringa compares some of the main features of the various European systems of legal education, focusing on law school admission processes, the amount of tuition and fees, and purposes of legal education. He notes that while in Scandinavian countries the admission process is very selective and in the United Kingdom only few seats are available in law schools nationwide, countries such as Belgium, France, Italy and Germany still retain their traditional open admission system which furthers enrollment of a high number of law students.[11] In almost all European universities, public funding is provided by the State, a factor that (combined with the high number of students enrolled) makes tuitions and fees very low. Law schools generally train students to become lawyers, but not necessarily for law-firm practice or for admission to the judiciary. Many law graduates still decide to not take the bar exam and use their academic legal training to work as legal advisers in private companies or as civil servants in public bodies.

It is in this context that the University of Maastricht Law School realized that a need was felt for lawyers with good training in European institutional and substantive law and in the common principles of the European legal systems. A need was also felt for lawyers with a good command of legal English as a second language who would be able to operate across

[9] EU rules provide that a person who is qualified to practice as a lawyer in one Member State can also practice in another State.

[10] According to this process, harmonization of law has an impact on legal education. According to some scholars, the process can also work in the opposite direction, through a bottom-up approach. In their view, harmonization of legal education would further convergence of legal systems, especially in the area of private law. *See* Jan M. Smits, *Convergence of Private Law in Europe: Towards a New Ius Commune? in* Esin Orücü and David Nelken, COMPARATIVE LAW. A HANDBOOK 229 ff. (2007).

[11] In the 2009-10 academic year, the number of first-year law students enrolled at the University "la Sapienza" of Rome Law School was 1,765. *See* Sapienza Università di Roma, Organizzazione, http://www.uniroma1.it/infostat/scheda.php?aa=2010&lk=1 (last visited Sept. 7, 2010). In the same academic year, the total number of law students enrolled at the University "la Sapienza" of Rome Law School was 10,487. *See* Sapienza Università di Roma, Organizzazione, http://www.uniroma1.it/infostat/scheda.php?aa=2010&lk=2 (last visited Sept. 7, 2010). John H. Merryman used to explain the open admission system in terms of the tendency of universities in the civil-law world to lean more towards a principle of "democracy" (i.e. the desire to make higher education available to everyone without distinctions, leading to the conception of the mass university) than towards a principle of "meritocracy" (i.e. the desire to make university a place where academic merit is recognized and rewarded, leading to the establishment of a university system where admission and advancement are controlled on the basis of academic aptitude and performance). This latter principle would have received a more prominent consideration in common-law countries. *See* John H. Merryman, *Legal Education There and Here: A Comparison*, 27 STAN. L. REV. 859, 861 ff. (1975).

boundaries. To answer these needs – and to answer a direct call of the European Council of the EU[12] – the University of Maastricht Law School developed in 2006 a program in law focused on European, Comparative and International law, taught in English from the first year of the curriculum. This curriculum aims at training students who will be better suited for the demands of the modern European labor market.

IV. EVOLUTION AND EXPANSION OF THE ROLE OF LAW SCHOOLS[13]

Regarding the educational role of law schools, Dean Michael Coper notes the evolution and expansion of the role of law schools from skills-training to the assumption of additional research and outreach roles. He also notes the country-specific character of this evolution.

Dean Coper suggests that, at the very least, law schools worldwide share the common goal of trying to go beyond the mere production of lawyers with technical legal competence and also share the common goal of educating lawyers for the broader aspirations of public service. He notes that law schools have three major roles today:

a) introducing students into the discipline of law (educational role);
b) expanding the frontiers of legal knowledge (research role);
c) sharing the knowledge acquired with other relevant communities (community-outreach role).

With regard to the educational role, Dean Coper writes that the nature of the role that lawyers could and should play in society needs clarification. In his view, in the past thirty years three factors have greatly contributed to challenge the traditional Western conception of lawyering based on a relatively passive kind of legal practice. These factors are:

i. a progressive shift from transmittal of a frozen-in-time body of knowledge to proactive and creative problem-solving lawyering;
ii. globalization and the increased need for lawyers to be trained for transnational and international practice;
iii. increased importance given to service to the community, understood as the active use of legal knowledge and skills in the service of society as an identity-shaping element of the role of lawyers.

V. BEYOND THE SOCRATIC CASE LAW METHOD – HARVARD SUPPLEMENTS CASE LAW METHODOLOGY WITH CASE PROBLEM METHODOLOGY[14]

[12] The European Council of the EU called upon European law schools to improve the quality of legal training and expertise with specific regard to knowledge of substantive European law and its interplay with the national laws of the single Member States. *See* Council Resolution 2008/C 299/01, 2008 J.O. (C 299) 1, about the training of judges, public prosecutors and judicial staff.

[13] Coper, *Educating Lawyers For What? Reshaping the Idea of Law Schools*, 29 Penn St. Int'l L. Rev. 25 (2010).

[14] Del Duca, *Educating Our Students for What? The Goals and Objectives of Law Schools in Their Primary Role of Educating Students—How Do We Actually Achieve Our Goals and Objectives?*, 29 Penn St. Int'l L. Rev. 95 (2010).

Choice of legal methodologies is also relevant to this discussion. In underlining the need to adapt curricula and legal methodologies to changed societal needs, Professor Del Duca also offers some reflections on the relationship between the Socratic Method and the so-called "case method" introduced in 1870 by Christopher Columbus Langdell at Harvard Law School and still in use as the primary teaching methodology in the first year of law school in the United States.[15] The two methods are not synonymous. While the Socratic Method historically served as the "engine" to power Langdell's case-method approach, it can be also used successfully in working with statutes, codes, administrative regulations and problems instead of cases.[16] Properly used, the Socratic Method can provide at least three important benefits:

a) it produces an active – as distinguished from a passive – learning process, promoting active engagement of students, even in large settings;
b) it is instrumental in teaching cognitive-skills development;
c) it helps students to hone their verbal skills.

Properly utilized, the Socratic Method can be applied to the analysis of statutes, codes and administrative regulations, as well as to cases. Interspersed with lectures, it can be used to facilitate development of the broad theoretical background and lawyers' skills needed to operate with familiarity with concepts and procedures belonging to both civil- and common-law traditions as lawyers engage in client-counseling and public-service endeavors.[17]

[15] In Todd Rakoff, Martha Minow, *A Case for Another Case Method*, 60 VAND. L. REV. 597 (2007), Harvard Professors Rakoff and Minow lament the excessive reliance on the traditional case law Socratic methodology. They strongly recommend utilization of a problem Socratic methodology using complex problem cases to supplement the traditional case law Socratic methodology for developing skills needed for successful lawyering in an increasingly interrelated twenty-first century world.

[16] Jeffrey D. Jackson*, Socrates and Langdell in Legal Writing: Is the Socratic Method a Proper Tool for Legal Writing Courses?* 43 CAL. W. L. REV. 267, 271 (2007).

[17] Dean Claudio Grossman (American University) *inter alia* vigorously challenged the almost exclusive use of the case-law methodology and called for a more balanced methodology in preparing lawyers to meet challenges in an increasingly globalized world. *See* Dean Claudio Grossman, *Building the World Community: Challenges for Legal Education*, 18 DICK. J. INT'L L. 441 (2000*); see also* Symposium, *Emerging Worldwide Strategies in Internationalizing Legal Education*, 18 DICK. J. INT'L L. 411 (2000).