

# European Legal Education, or: How to Prepare Students for Global Citizenship?

By:

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## Abstract

Legal education is gradually moving away from the teaching of national law towards a more European, transnational, or even 'global' way of teaching. This contribution seeks to explain why an international legal education is to be preferred to a national curriculum and what this means for how law is taught and how law schools are ideally organized. The arguments for an international legal education lie in the increasing plurality of legal sources, the desire to attract students from a larger pool than only the national one, and the need to give students not only a specialized professional training but also to prepare them for global citizenship. It is claimed students should be exposed to alternative ways of achieving justice, thus creating a *dialogue with otherness*. This can be done by a focus on the arguments behind the choices made by the relevant authorities and not on the doctrinal intricacies of national legal systems.

This type of international curriculum, in which competing conceptions of justice are at the centre of attention, requires a specific teaching method. Two methods seem best suited to allow students to construct their own understanding of legal problems: problem-based learning (PBL) and the Socratic Method. In addition, teaching law in an international setting forces us to think through the sequence in which the various jurisdictions come to the fore, the assessment of students and the use of teaching materials and language of instruction. Also discussed are the challenges for the law school as a whole, such as the relationship between teaching and research, the recruitment of faculty and the decreasing relevance of the traditional departmental structure.

## 1. Introduction

It is well known that legal education is gradually moving away from the teaching of national law towards a more European, transnational, or even 'global' way of teaching. Such international legal education has now firm roots in Europe, the United States, and in many other countries throughout the world. The form this international legal education takes, however, differs enormously from one institution to another. While some law schools only recently started to offer mandatory courses on some international aspect of the law – Harvard Law School being one example<sup>1</sup> – others offer full bachelor programmes that no longer aim at teaching one national law. The two best-known examples of such programmes are the combined bachelor degree of civil law (B.C.L.) and common law (LL.B.) at McGill University<sup>2</sup> and the European Law School bachelor at Maastricht University.<sup>3</sup> Although both programmes differ in scope, content, and the type of

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<sup>1</sup> In 2007 Harvard Law School followed other American law schools in adding an internationally oriented course to the first year as part of the first substantive change of the 1L curriculum in 130 years. First year students now have to take one of three courses devoted to Public International Law, International Economic Law, or Comparative Law.

<sup>2</sup> There is abundant literature on the 'transsystematic' programme at McGill (taught since 1999). See the special issue of *McGill Law Journal* 50 (2005), 701-1006 and most recently Helge Dedek & Armand de Mestral, *Born to be Wild: The 'Trans-systemic' Programme at McGill and the De-*

*Nationalization of Legal Education*, *German Law Journal* 10 (2009), 889-911 and Peter L. Strauss, *Transsystemia – Are we Approaching a New Langdellian Moment? Is McGill Leading the Way?*, *Journal of Legal Education* 56 (2006), 161-171.

<sup>3</sup> Apart from the contributions to this volume, the Maastricht ELS programme (taught since 1995) is discussed by Aalt Willem Heringa, *Towards a European Law School! A Proposal for a Competitive Diversified Model of Transnational Co-operation*, in: Michael Faure & Jan Smits (eds.) *Towards a European Ius Commune in Legal Education and Research*, Antwerpen 2002, 3-13.

graduates they aspire to produce (at McGill, these are lawyers who will work mostly – though not exclusively<sup>4</sup> – within the domestic Canadian legal system, while the Maastricht graduates are more likely to work in an international setting), they are both characterized by the same ambition: to educate lawyers in a non-national way by creating a ‘transnational’ or ‘European’ law graduate.

The aim of this contribution is to ask why we should teach law in a more international way and to explain what the *denationalization* of legal education means in terms of *what* is taught and *how* it is taught. It will also attempt to answer the question of what this implies for the organization of the traditional law school. Although these questions are of paramount importance, they have not been sufficiently addressed in the flourishing literature on international legal education.<sup>5</sup> I believe that teaching law in an international curriculum is fundamentally different from teaching (one or more) national laws: it assumes not only a different conception of law, but also a different attitude of both lecturer and student. For programmes that offer a complete transnational curriculum (such as McGill and Maastricht), it is therefore necessary to identify what makes them unique (even though some of the answers I will provide can also be valuable for programmes devoted to the study of two or more different national jurisdictions<sup>6</sup>).

Before discussing what is ideally taught in an international curriculum (section 3), how it should be taught (section 4) and what this means for law schools (section 5), it is appropriate to ask why – if at all – we should pursue an international legal education (section 2). Although I believe my arguments to be valid for international legal education in general, they apply in particular to the European situation.

## 2. Why A European Legal Education? Towards A Dialogue with Otherness

Until around 1990, legal education in Europe was primarily national: the law of one jurisdiction was taught to students of usually one nationality by lecturers of that same nationality, aiming at the production of graduates that would mostly work within their country of study. This situation had persisted for almost 200 years and, in hindsight, it is surprising that almost<sup>7</sup> everyone considered this to be the normal state of affairs. In the last two decades, however, this changed dramatically: apart from courses on international law and European law<sup>8</sup> (that were already part of the traditional law curriculum), almost everyone now accepts that it is no longer possible to teach the classical areas of law (such as private law, constitutional law, criminal law and tax law) without taking into account European and international influences. This led to whole new fields of academic study: many European law faculties now have professorial chairs for, *e.g.*, European private law, European criminal law and European tax law to name just a few. It is also widely accepted that it is beneficial to have students and lecturers from abroad at one’s own law school, and perhaps even better to have one’s own students and lecturers spend some time at a foreign university.<sup>9</sup>

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<sup>4</sup> McGill graduates are increasingly hired by the big international law firms (including those in New York) because of their ability to work in both civil law and common law jurisdictions.

<sup>5</sup> See most recently the special issues of the *Penn State International Law Review* 26 (2008), 811-912 and of the *German Law Journal* 10 (2009), 629-1168.

<sup>6</sup> Prime examples of such programmes are the Hanse Law School (a cooperation between the universities of Bremen, Oldenburg and Groningen, focusing on German and Dutch law) and the joint LLB programme of Paris I and King’s College London (focusing on French and English law). In addition, numerous transnational programmes exist at the master and ‘post-master’ level.

<sup>7</sup> Of course, there have always been dissident voices. One of the earliest is Rudolf Von Jhering’s famous lament that legal science had deteriorated into a provincial field of study (‘Die Rechtswissenschaft ist zur Landesjurisprudenz degradiert’): *Geist des Römischen Rechts*, vol. I, Leipzig 1852, 15. More recently the turn towards a European legal education received theoretical and programmatic underpinning in Mauro Cappelletti (ed.), *New Perspectives for a Common Law of Europe*, Florence 1978 and in Bruno de Witte & Caroline Forder (eds.), *The Common Law of Europe and the Future of Legal Education*, Deventer 1992.

<sup>8</sup> On which Bruno de Witte, *European Union Law: A Common Core or a Fragmented Academic Discipline?* (in this volume).

<sup>9</sup> The exchange of students and staff in Europe is facilitated by the highly successful Erasmus Programme (established by the European Commission in 1987, later part of the Socrates Programme and now part of the Commission’s Lifelong Learning Programme) and by the creation of the European Higher Education Area (as a result of the Bologna Declaration of 1999).

As indicated above, this phenomenal change in attitude led to different degrees of internationalization in individual law schools. The aim of this section is to make the case for a far-going type of international legal education (such as the one offered in the Maastricht European Law School<sup>10</sup>). I believe three arguments can be put forward in favor of such a European bachelor programme in law. The first is based on the changing character of the law itself, the second on the requirements an academic study should meet and the third on the importance of attracting highly motivated students.

The first argument in favor of a truly European education is that the law itself is no longer a national phenomenon, but increasingly flows from other than national sources.<sup>11</sup> In private law (as well as in all other traditional sub-disciplines), we accept law of European and supranational origin, as well as a variety of rules originating from private initiative (ranging from the Common Frame of Reference for European Private Law<sup>12</sup> to standard form contracts and codes of conduct on corporate, social and environmental responsibility). Most of these authoritative rules and norms from 'sites of governance beyond the nation-state'<sup>13</sup> would not be recognized as binding in a traditional conception of law because they do not meet the formal criterion of being enacted by the relevant authorities. But they do set the norms for specific groups of people and are important in predicting their behavior. Any modern legal education should take these norms into account, not only because they are indispensable in understanding the *existing* law (and consequently play a big role in practice), but also because it makes the students realize that law is not necessarily tied to the nation-state.<sup>14</sup> Patrick Glenn rightly observes that if law is no longer considered exclusively in terms of national sources, the discipline of law 'must assume the cognitive burden of providing information on law beyond national borders.'<sup>15</sup> This does not mean that the law is taught 'without the State'<sup>16</sup>, but it does imply that a legal education exclusively based on the intricacies of national legislation and court decisions is a poor one.

At this point, it is important to address a likely counterargument. It is sometimes argued that a European legal education is impossible because a European private law, criminal law or constitutional law do not really exist: such fields would (at least to a large extent) not be based on the authoritative statements of legislatures and courts, but at best be 'a brooding omnipresence in the sky'.<sup>17</sup> The flaw with this argument is that it gravely misunderstands the nature of legal authority. Apart from the fact that there are a rapidly increasing number of European treaties, regulations, directives and court decisions in these fields, it denies that the authority of legal sources is not necessarily dependent on the political institutions. Thus, when the University of Bologna started teaching the *Corpus Iuris Civilis* in the 11th century, it taught a law that was not in force anywhere. Roman law gradually derived its authority from how it was taught and from its acceptance by the legal profession – how could it have been different in the absence of State structures in medieval Italy? In fact, it is often the legal profession and not the legislature that determines the authority of a text.<sup>18</sup> This makes it important not to limit legal education to those

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<sup>10</sup> More in particular in the so-called 'English track' of this programme ('ELS-ET'): see on this programme Nicole Kornet, Building the European Law School – English Track (in this volume).

<sup>11</sup> See, with many references, Jan M. Smits, The Complexity of Transnational Law, in: *Netherlands Reports to the Eighteenth International Congress of Comparative Law*, Antwerpen 2010, 113-130.

<sup>12</sup> The importance of which for teaching is emphasized by Bram Akkermans, Challenges in Legal Education and the Development of a New European Private Law, *German Law Journal* 10 (2009), 803-814.

<sup>13</sup> De Burca, Developing Democracy Beyond the State, *Columbia Journal of Transnational Law* 46 (2009), 101-158, at 104.

<sup>14</sup> For an elaboration of the idea of private law beyond the nation-state: Ralf Michaels & Nils Jansen, Private Law Beyond the State? Europeanization, Globalization, Privatization, *American Journal of Comparative Law* 54 (2006), 843-890, Nils Jansen & Ralf Michaels, Private Law and the State, *Rabels Zeitschrift* 71 (2007), 345-397 and the special issue of the *American Journal of Comparative Law* 56 (2008), 527-843.

<sup>15</sup> H. Patrick Glenn, Aims of Comparative Law, in: Jan Smits (ed.), *Elgar Encyclopedia of Comparative Law*, Cheltenham 2006, 57-65, at 59.

<sup>16</sup> Harry W. Arthurs, Law and Learning in an Era of Globalization, *German Law Journal* 10 (2009), 629-639, at 637.

<sup>17</sup> *Southern Pacific Company v. Jensen*, 244 U.S. 205, at 222 (1917), opinion of O.W. Holmes.

<sup>18</sup> See the recent book by Nils Jansen, *The Making of Legal Authority*, Oxford 2010, at 28; cf. p. 43: the 'abstract authority of a text giving expression to a legal norm consists in the legal profession accepting it as an ultimate source of the law.'

elements that are laid down in legislation and court decisions: law schools should not only *react* to legislatures and courts, but they also play an important role in *shaping* the future law.<sup>19</sup>

It would be possible to argue that this plurality of sources does not prompt us to adopt a far-going type of international legal education: one could still teach the national law and add some international and comparative elements here and there. I do not deny this as a possibility (it is even common practice at most law schools), but I do not think that this is the best way to teach students in today's globalizing world. Even if one would assert that the only goal of legal education is to offer a professional training for future practitioners (which I would deny<sup>20</sup>), these practitioners should be able to work in the different legal systems of various countries to meet their clients' needs.<sup>21</sup> Even when the graduates stay in their home country, they are increasingly advising multinational and foreign clients who want to know about different solutions.<sup>22</sup> This calls for a much more rigorous international curriculum in which alternative approaches are sketched from the first day onward. Teaching one national law does not adequately prepare students for the world they have to work in.

The second argument in favor of an international legal education is that it better meets the requirements of an academic study. This is not the place to summarize the extensive literature on what requirements an academic study has to meet,<sup>23</sup> but in my view a legal education should do at least two things: it should offer a specialized professional training in becoming a lawyer *and* it should shape students to become academics. In brief, students should learn to use the law not only as an instrument, but also to think about law in an intellectual way.<sup>24</sup> Martha Nussbaum aptly argues that in today's world, this academic aspect means that students have to be prepared for 'global citizenship':<sup>25</sup> they should learn how to become a citizen, not only of their country or local community, but also of the increasingly interlocking and interdependent world they live in.

This means that an academic legal education, in my view, should educate students about the contingency of the law. In other words, students have to be exposed to legal diversity, not only through grasping common law and civil law (and the varieties within these legal families), but also by extending their understanding to Nordic, Asian and Islamic laws. They should learn about the fact that different societies give different weight to issues such as social justice, efficiency, equality of man and woman and the value of life. They should learn to think through the consequences of choices made in different societies, to understand why these choices were made, and to argue why they think one choice is better than the other. If this 'dialogue with otherness'<sup>26</sup> is at the core of legal education – as I think it is – to focus on only one or two jurisdictions would be a poor and rather limited curriculum. A true legal education is only worth its salt if it shows to a full extent alternative outcomes to common problems and teaches students to think through the arguments and their alternatives.<sup>27</sup>

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<sup>19</sup> Cf. Duncan Kennedy, Legal Education as Training for Hierarchy, in: David Kairys (ed.), *The Politics of Law: A Progressive Critique*, New York 1990, 38-58.

<sup>20</sup> See below, text surrounding footnote 24.

<sup>21</sup> Strauss, *o.c.*, *Journal of Legal Education* 56 (2006), *o.c.*: today's lawyers should be 'resourceful in imagining alternative approaches to clients' needs, drawing on the full range of the law's possibilities.'

<sup>22</sup> See on the increasing importance of 'legal tourism' (in Dutch) Jan Smits, *Rechtstoerisme: Burgerlijk Wetboek en Grondwet voorbij de Staat*, Tilburg 2010.

<sup>23</sup> See, instead of many, the overview by John Bell, Legal Education, in: Peter Cane & Mark Tushnet (eds.), *The Oxford Handbook of Legal Studies*, Oxford 2003, 901-919 and the recent book by Anthony Kronman, *Education's End*, New Haven 2007.

<sup>24</sup> Cf. Strauss, *o.c.*, *Journal of Legal Education* 56 (2006), at 165: the goal must be to 'catch students in a University enterprise.'

<sup>25</sup> Martha C. Nussbaum, Cultivating Humanity in Legal Education, *University of Chicago Law Review* 70 (2003), 265-279, at 265 and for a more general account Martha C. Nussbaum, *Cultivating Humanity: A Classical Defense of Reform in Liberal Education*, Cambridge Mass. 1997.

<sup>26</sup> See Yves-Marie Morissette, McGill's Integrated Civil and Common Law Program, *Journal of Legal Education* 52 (2002), 12-28, at 22. Cf. Todd D. Rakoff & Martha Minow, A Case for Another Case Method, *Vanderbilt Law Review* 60 (2007), 597-607, at 606: 'The focus will be more on alternatives, choices, and living with the sequential consequences of earlier choices.'

<sup>27</sup> This view fits in with what I think is at the core of normative legal scholarship, namely a concern with the *ought*, on which opinions will always differ: see (in Dutch) Jan Smits, *Omstreden rechtswetenschap*, Den Haag 2009.

It must be emphasized that this argument is not just to advocate teaching students about multiple legal systems, but it is about promoting students to learn *the legal way of thinking* (to ‘think like a lawyer’). In a similar way as economists do not focus on the study of one particular economy but adopt a method of analysis (‘the economic approach’<sup>28</sup>), law is ideally not regarded as a subject but as a method. Students then no longer study Dutch law or German law, but learn to apply a legal approach towards the questions they are confronted with. They then learn that views on what ought to be necessarily differ from one jurisdiction to another and that legal scholarship deals with exploring and contrasting the implications of these conflicting normative positions.<sup>29</sup> Legal scholars do not search for what is *the* just society, but discuss alternatives.<sup>30</sup> Although after 200 years of teaching only one law, many law schools may find it difficult to adjust to this ambition, this does not mean that it is impossible.<sup>31</sup> One should realize that of the almost 1000 years in which law is taught at universities, the last 200 years have been exceptional: before 1800, students learnt about more than one law, be it Roman law and Canon law, common law and mercantile law or Roman law and local law. It was self-evident that all these laws had a rationality of their own and could not be brought under one heading. The names of the academic degrees and titles law graduates receive still remind us of this practice.<sup>32</sup>

The final argument for why an international legal education is preferable over a national one is that it will attract better motivated students. In this respect, the success story of the curriculum reform made by Langdell at Harvard is telling: before Langdell became the dean of Harvard Law School in 1870, law was taught by way of lectures, textbooks and moot courts. This was good enough for the great majority of the students, but it did not give any real intellectual stimulation for the best among them. This changed when Langdell introduced the case method (and combined it with the Socratic Method): it attracted ambitious students because of the academic rigor of the programme. After graduation, these students were hired by the top law firms in New York because of their ability to deal with more than one State jurisdiction.<sup>33</sup> At present, to study law is in most European countries not particularly the most ambitious thing to do. This is at least partly caused by the way in which law is usually taught: as given by an authority and as inalterable. First year law students often learn to give up their inquiring state of mind and trade it in for learning their national system.<sup>34</sup> I believe this is wrong. A European or cosmopolitan legal education can be a real intellectual challenge, attracting more capable students and producing better graduates.<sup>35</sup> If it in fact *does* so, is of course dependent on what is taught and how it is taught. These are the topics of the next two sections.

### 3. What Should We Teach? On Doctrines, Arguments and Principles

The mandatory curriculum of traditional law schools in Europe is well known.<sup>36</sup> In the bachelor stage, students are usually introduced to the main fields of study (not only private law,

<sup>28</sup> Gary S. Becker, *The Economic Way of Looking at Life*, Nobel Lecture in Economics 1992. Cf. Steven D. Levitt & Stephen J. Dubner, *Superfreakonomics*, New York 2009, at 13: economics is not a subject matter, but ‘a decision to examine the world a bit differently.’

<sup>29</sup> Cf. Edward L. Rubin, *The Practice and Discourse of Legal Scholarship*, *Michigan Law Review* 86 (1988), 1835-1905, at 1893: ‘The conflict of norms is the essence of normatively-based scholarship (...)’ and Smits, *Omstreden rechtswetenschap*, o.c., *passim*.

<sup>30</sup> Also see Amartya Sen, *The Idea of Justice*, Cambridge Mass. 2009, at 106: we should ‘have something to say about the choices that are actually on offer.’

<sup>31</sup> On the strong tradition of having (and teaching) only one law (the *ius unum*): H. Patrick Glenn, *A Transnational Concept of Law*, in: Peter Cane & Mark Tushnet (eds.), *The Oxford Handbook of Legal Studies*, Oxford 2003, 839-862.

<sup>32</sup> Apparent in the use of the terms LL.B (legum baccalaureus or Bachelor of Laws), LL.M (legume magister or Master of Laws) and LL.D (Doctor of Laws).

<sup>33</sup> See Strauss, o.c., *Journal of Legal Education* 56 (2006).

<sup>34</sup> Cf. Richard A. Posner, *The Problems of Jurisprudence*, Cambridge Mass. 1990, at 431-432: (national) doctrinal work is now ‘*work for followers rather than leaders*’, if not ‘*old-fashioned, passé, tired*’.

<sup>35</sup> There is more than just anecdotal evidence that the graduates of McGill and the Maastricht European Law School get better job opportunities than traditional graduates.

<sup>36</sup> But important variations exist among countries and universities. A useful overview is provided at <http://www.europaeische-juristenausbildung.de> (last consulted 8 September 2010).

criminal law, constitutional law, procedural law and European and international law, but in many countries also company law, administrative law, labor law, tax law, legal history and philosophy of law). This bachelor is almost invariably followed by a master, in which students specialize in a specific field. In both stages of study, these substantive mandatory courses are supplemented by skills training and optional courses on a wide variety of topics.

This section raises the question of what is covered by the ideal curriculum in a European legal education. One aspect of this question can be easily answered: the very same subjects that are part of a bachelor of national law should also be part of a European curriculum.<sup>37</sup> Instead of Dutch, English or Polish law, the curriculum then consists of courses on European Private Law (possibly split into European Contract Law, European Tort Law and European Property Law), European Criminal Law, European Constitutional Law, European Procedural Law and European and International Law *per se*. Courses on these topics are at the heart of any law study in Europe, not only because many countries require these courses in order to enter the bench and the bar, but also because of their substance: they *make* the discipline of law.

Another aspect of the question is much more difficult to answer: what do we actually teach in these 'European'<sup>38</sup> courses? In so far as private, criminal, constitutional and procedural law are governed by binding rules of European origin (as is increasingly the case), it is still possible to teach these topics in the same way as one teaches national law. This traditional way of teaching usually takes the form of telling students how 'the law' reads: they are informed of the law as it stands today in the particular country they study in. I do not deny that some lecturers are able to escape this authority paradigm, even when teaching the law of one national jurisdiction, but they are the exception. The textbooks predominantly used in teaching national law confirm this conclusion. What Patrick Atiyah and Robert Summers wrote almost 25 years ago is still true today.<sup>39</sup>

'The tone of textbooks is often dogmatic, with decisions presented as if they were strict decisions from basic principles. (...) The ultimate and all-pervasive aim is to lay out the law as it stood on the day the book went to press.'

But while I think it is wrong to teach national law in this way, it is outright impossible when teaching European courses. In order to cover the whole field of, *e.g.*, contract law or criminal law, there is simply not enough binding law produced by the European institutions. This calls for a different approach.

It was argued in section 2 that the main aim of legal education is to explore and contrast the implications of conflicting normative positions. Students should not just learn one system of law, but ought to be exposed to alternative ways of achieving justice. This provides the answer to the question of what materials we should use and what we should focus on when studying these materials. The focal point is no longer the national legislation and case laws of a particular doctrinal system. Instead, the full range of materials that informs us about how we can possibly deal with normative conflicts should be brought to the fore. These materials can come from civil law and common jurisdictions, but also from, *e.g.*, Chinese law, ethics, conventions, religion or private documentation (such as contracts, general conditions and memorandums of understanding). When discussing these materials, the emphasis is on the *arguments* behind the choices made by the

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<sup>37</sup> See for the same view Heringa, *Towards a European Law School!*, *o.c.*

<sup>38</sup> The term 'European' is not completely correct. I use it to indicate an approach that seeks to teach lawyers about alternative approaches, not necessarily restricted to those adopted in the European Union. Ideally, terms like 'contract law' and 'constitutional law' would already out of themselves imply that these topics are treated in an international way: likewise, one should not teach 'comparative law', but law. As the current understanding of these terms is different, I add the term 'European' to denote this international aspect.

<sup>39</sup> Patrick S. Atiyah & Robert S. Summers, *Form and Substance in Anglo-American Law*, Oxford 1987, at 394.

relevant authorities (and others) and not on the doctrinal intricacies. Therefore, one no longer learns the law 'through the eyes of a distinguished commentator'.<sup>40</sup> It also means that the starting point of the discussion is a case or a problem that is functionally defined (such as 'When is a contract binding?') and not some doctrinal term (like 'consideration'). It is out of these materials that students can construct their own understanding of the problem and its possible solutions. Paraphrasing Peter Strauss: 'such a class, organized around a conceptual problem, might hop from Germany to England to China to nineteenth century France, forward and back in time and space without apparent concern.'<sup>41</sup> I emphasize that to give this method its full meaning, we should not confine our materials to Western jurisdictions only, but give ample attention to the differences among North and South and West and East<sup>42</sup> and move beyond the State-centered paradigm by involving sub-national and private producers of law as well.

Accepting this ambitious teaching method means a turn away from teaching law as an authoritative system. Case law and legislation are no longer regarded as authoritative statements about what is law in a certain jurisdiction, but viewed as empirical material on how to deal with conflicting normative positions. It is used to unveil the arguments pro and against certain outcomes. Existing jurisdictions are thus seen as experimenting laboratories<sup>43</sup> and it is through the comparative method that we learn about alternative outcomes to similar questions.<sup>44</sup> To make this the goal of legal education may have as a consequence that graduates are less versed in the details of one particular legal system, but this is compensated by their ability to apply the legal way of thinking in various jurisdictions.

This approach is well captured by Todd Rakoff and Martha Minow. In a recent article, they put it like this:<sup>45</sup>

'Students ought to be presented with relatively dense materials that lay out a situation, experienced as a problem for a person, or group of people, for legal treatment. Students should face a choice that challenges them to identify options and that permits multiple resolutions (...). The problems ought not to be situated in one doctrinal area, but should present opportunities for mental maneuvering around the legal universe. Teaching should emphasize generating alternative solutions as well as appropriate grounds for choosing among them. And criteria for resolution should include legal, normative, and practical considerations.'

It is important to emphasize two things. The first is that this method may invoke the criticism that students no longer learn to reason in a clean and precise way. This is wrong: analytical reasoning must be a quality every law graduate must possess and I believe that a broader European legal education is much more conducive to teaching this skill than a purely national education. Related to this is the critique that students would not learn how to think in a doctrinal way. This criticism is also flawed. As doctrinal thinking is an essential part of many civil law jurisdictions,<sup>46</sup> it has to be part of a European legal education, not as the only possible way towards a certain

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<sup>40</sup> Strauss, o.c., *Journal of Legal Education* 56 (2006).

<sup>41</sup> Strauss, o.c., *Journal of Legal Education* 56 (2006).

<sup>42</sup> Cf. Ugo Mattei, Teemu Ruskola & Antonio Gidi, *Schlesinger's Comparative Law*, 7th ed., New York 2009, Preface.

<sup>43</sup> After the famous expression of Louis Brandeis in *New State Ice Co. v. Liebmann*, 285 U.S. 262. Cf. Smits, *Omstreden rechtswetenschap*, o.c., no. 39.

<sup>44</sup> The importance of the comparative method in teaching law is also stressed by Jaap Hage, *Comparative Law and Legal Science* (in this volume).

<sup>45</sup> & Minow, o.c., *Vanderbilt Law Review* 60 (2007), 597-607, at 604.

<sup>46</sup> On the importance of doctrinal thinking in French law, see the much discussed book by Philippe Jestaz & Christophe Jamin, *La doctrine*, Paris 2004.

outcome, but as one of the alternative avenues of legal reasoning. Law schools thus teach students both practical ('know how') and propositional knowledge (understanding the law).<sup>47</sup>

The second point is admittedly a contested one. An important strand of legal scholarship claims that the ultimate goal in fields like European private law and European criminal law is to draft and implement common European principles. In particular, private lawyers have invested a lot of time and energy in such projects, leading to, *inter alia*, principles on European contract law, tort law, trust law, family law and private law in general.<sup>48</sup> Apart from the objections one can have against representing law through principles,<sup>49</sup> it cannot be denied that they are useful in teaching. Their importance should however not be overestimated. Too much focus on what jurisdictions have in common can conceal very real divergences, endangering what is at the core of the legal discipline: divergent views of what is the right answer to a legal problem. European legal education therefore should not only seek common ground, but also expose difference.<sup>50</sup>

#### 4. How Should We Teach? No Comfort of the Familiar

It became clear in the previous section that the ideal type of legal education exposes students to alternative ways of achieving justice, making the comparative method the most essential learning tool. What kind of teaching method this requires was already alluded to earlier: it is one in which a functional problem is identified and solved, thus allowing students to construct their own understanding of the possible solutions. This rather abstract statement is elaborated in this section. It looks at some, admittedly diverse, aspects of how to teach law in an international curriculum:<sup>51</sup> the sequence in which the various jurisdictions come to the fore, the approach to teaching, assessment of students and finally the teaching materials and language of instruction.

The first question is in what sequence the various legal systems are to be discussed. Two different approaches are possible. The first is to introduce students consecutively to different jurisdictions: one starts with one legal system and gradually confronts others. This is the model followed by many traditional law schools: they want their students to first obtain a profound knowledge of one law (*e.g.* Dutch law) and add some international component by requiring students to take capstone courses on foreign law or comparative law in the second or third year (or by stimulating them to study abroad). This model was also adopted in the original international programmes at McGill and Maastricht University. In McGill's 'National Programme', taught from 1968 to 1999, common law and civil law were taught sequentially. The original European Law School programme consisted of a first year in which exclusively Dutch law was taught and a second year in which courses on Dutch law were combined with European courses. Only in the third year were students fully exposed to a truly international curriculum. This was motivated by the belief that an integrative approach would confuse the students and that they need training in one coherent legal system first before being able to engage in comparative study.<sup>52</sup>

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<sup>47</sup> See for this distinction in the context of teaching: Wolfgang Mincke, Practical and Propositional Knowledge as the Basis of European Legal Education, in: De Witte & Forder (eds.), *o.c.*, 285-294.

<sup>48</sup> See resp. Ole Lando & Hugh Beale (eds.), *Principles of European Contract Law I and II*, Boston 2000 and Ole Lando et al (eds.), *Principles of European Contract Law III*, Boston 2003; European Group on Tort Law, *Principles of European Tort Law*, Wien 2005; D.J. Hayton et al (eds.), *Principles of European Trust Law*, Deventer 1999; Katharina Boele-Woelki (ed.), *Principles of European Family Law*, various volumes, Antwerpen 2004-; Christian Von Bar & Eric Clive (eds.), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference*, München 2009.

<sup>49</sup> Cf. Jan Smits, A Principled Approach to European Contract Law?, *Maastricht Journal of European and Comparative Law* 7 (2000), 221-223.

<sup>50</sup> See for a theoretical foundation Pierre Legrand, The Same and the Different, in: Pierre Legrand & Roderick Munday (eds.), *Comparative Legal Studies: Traditions and Transitions*, Cambridge 2003, 240-311.

<sup>51</sup> Also see Catherine Valcke, Global Law Teaching, *Journal of Legal Education* 54 (2004), 161-182 and Larry Catá Backer, Global Law in American Law Schools: Prospects and Difficulties of Incorporating a Transborder Element in Legal Education, available on SSRN (last consulted 8 September 2010).

<sup>52</sup> Heringa, Towards a European Law School!, *o.c.*, at 7.

The second approach is to expose students to civil law, common law and other jurisdictions right from the start. This means legal systems are examined and contrasted simultaneously: teaching never takes place on basis of one national law, but integrates alternative approaches to functionally defined problems. Interestingly, both McGill and Maastricht changed the structure of their original curriculum to adopt this integrative approach.<sup>53</sup> This change was prompted by the idea that it is much more natural to look at law in a comparative way if one is used to doing so from the very beginning (in particular for students expecting to participate in an international programme).<sup>54</sup> In the case of Maastricht, there was also the practical aspect that requiring students to start with one year of Dutch law (naturally taught in Dutch) was not helpful in building up an international student population. The European bachelor can then be followed by a master on the law of one particular jurisdiction (e.g. Dutch or Finnish law). This makes sense because law schools specializing in international legal education will still be eager to offer a full programme, having the additional benefit that such masters can host colleagues excelling in national law.

Which of these two approaches is to be preferred? I have no doubt that the integrative model is best suited to meet the needs of an international legal education. Students addressing a specific problem by moving back and forth from one jurisdiction to another are much more conducive to the 'dialogue with otherness' than the sequential model. Starting with one jurisdiction makes it likely that students regard all the rest as irrelevant. Jaakko Husa warns for this 'mind fixing' in the following way:<sup>55</sup>

'The problem with the traditional law-teaching approach is that it constructs a primary epistemic foundation for legal understanding, which is based on one mother-system. This creates an implicit mono-epistemology, which makes lawyers regard their own system as "normal" and other systems as "non-normal" or, at least, something that is "less-normal." From this monoepistemic platform, the law student is first immersed in the one-approach-thinking, which later makes it difficult to epistemologically adapt to transnational pluralism and to genuinely accept different approaches.'

In this approach, students are denied 'the comfort of the familiar',<sup>56</sup> which forces them to develop a pluralistic legal mind. Within their first year, they have to realize that legal views differ and that there is not *one* legal system or *one* solution to the problem at hand.<sup>57</sup> This view is motivated by the same reason why I believe it is so important to have the law school's best academics teach in the first year: it is in the first months of their university career that students are to be imprinted with what it means to study law.

A second important question concerns the approach to teaching: what model of teaching is the most effective in persuading students to consider a wide variety of sources to construct their own understanding (and not that of the learned author) of the legal problem? I am less concerned with educational theories here than with what works in practice. In my own experience, confirmed by distinguished colleagues elsewhere, the ideal teaching method is certainly not to focus on doctrinal questions or to teach 'comparative law' as such. What works best, is to select a topic and

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<sup>53</sup> McGill did so by introducing its 'transsystematic' programme (see the text surrounding footnote 2 above) and Maastricht by adding an 'English track' to its European Law School (see footnote 10 above).

<sup>54</sup> Cf. Rosalie Junker, Where Law and Pedagogy Meet in the Transsystematic Contracts Classroom, *McGill Law Journal* 50 (2005), 789 ff.

<sup>55</sup> Jaakko Husa, Turning the Curriculum Upside Down: Comparative Law as an Educational Tool for Constructing the Pluralistic Legal Mind, *German Law Journal* 10 (2009), 913-926.

<sup>56</sup> Arthurs, *o.c.*, *German Law Journal* 10 (2009), at 638.

<sup>57</sup> Also see Rakoff & Minow, *o.c.*, *Vanderbilt Law Review* 60 (2007), at 607, who point at the lesson of Langdell: 'the template for legal thinking established in the first year of law school has real staying power.' The advocated approach may be difficult to apply, but 'the greater fear is that, if we do not make the effort to challenge students in this way, students will learn to think of the legal system as only so many rooms, so many pieces of furniture, that they can never reorder.'

to provide materials on how this topic is dealt with in various jurisdictions. What follows then, is aptly described by Kurt Lipstein:<sup>58</sup>

‘The student must in his time examine the reading matter, possibly have recourse to further literature and practice cited there before coming to the classroom. Here accounts given by members of the class reporting on unfamiliar topics will be amplified, collected and explained by the lecturer (...). This exchange (...) requires a much greater participation by the directing lecturer and the audience (...).’

If this *exchange* is a central goal in teaching, it is clear that lecturing to a large group is not the ideal method to achieve it. This is confirmed by educational research: one person (‘the sage on the stage’) giving a two hour-lecture is generally rejected and dismissed as a noneffective way of teaching.<sup>59</sup> Small group teaching, with the lecturer as an initiator of discussion and students giving presentations and writing papers, is often seen as a much better method.<sup>60</sup> Working with the materials allows students to construct their own understanding of what is right or wrong, shifting the responsibility of learning away from the lecturers onto the students.

I believe this practice fits in with various ‘teaching theories.’ One of these theories is problem-based learning (PBL), adopted at various law schools throughout the world including Maastricht University’s Faculty of Law.<sup>61</sup> PBL regards discussion of carefully designed problems in small groups, and not systematic overviews in big lectures, as the main stimulus for learning. PBL can indeed work well if it is sufficiently adapted to law teaching<sup>62</sup> and understood in a broad sense as focusing on a discussion of problems with multiple solutions. PBL, however, still leaves open the issue of how to practically organize the learning process, other than that there is a strong emphasis on individual study and skills training. In my own experience, it is of vital importance that the lecturer is a highly qualified academic and much more than a mere ‘facilitator’ of discussions. As Nobel Prize winner George Stigler once put it: she is ‘to fan the spark of genuine intellectual curiosity and (...) to communicate the enormous adventure and the knightly conduct in the quest for knowledge’.<sup>63</sup> This calls for a much more active lecturer than some proponents of PBL suggest.

PBL is not the only educational theory consistent with small group teaching aimed at an exchange of ideas about alternatives for problem-solving.<sup>64</sup> The Socratic Method, consisting of a dialogue among lecturer and students in question and answer format, also enables ‘deep’ learning.<sup>65</sup> In American law schools, this Socratic Method is seen as a highly successful method to do the two things PBL also does: teach students to think like a lawyer and to practice their skills.<sup>66</sup> I do not think PBL and the Socratic Method differ fundamentally, except for the fact that in PBL there seems to be a preference for groups of maximum 12 students. However, the American experience shows it is very well possible to teach larger groups of students. I therefore believe that it is worth emulating

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<sup>58</sup> Kurt Lipstein, *European Legal Education in the Future: Teaching the ‘Common Law of Europe’*, in: De Witte & Forder (eds.), *o.c.*, 255-263, at 258.

<sup>59</sup> M.J. Dunkin, *A Review of Research on Lecturing*, *Higher Education Research and Development* 2 (1983), 63-78.

<sup>60</sup> Cf. Nussbaum, *o.c.*, *University of Chicago Law Review* 70 (2003), at 273.

<sup>61</sup> There is a voluminous literature on PBL in law. See, instead of many, Gabriël A. Moens, *The Mysteries of Problem-Based Learning: Combining Enthusiasm and Excellence*, *University of Toledo Law Review* 38 (2007), 623-632 and M. Tzannes, *Problem-based learning in legal education: intentionally overlooked or merely misunderstood?*, *The Law Teacher* 31 (1997), 180-197.

<sup>62</sup> For an example of how to do this: John H. Wade, *Meet MIRAT: Legal Reasoning Fragmented into Learnable Chunks*, *Legal Education Review* 2 (1990), 283 ff.

<sup>63</sup> George Stigler, *The Intellectual and the Marketplace and Other Essays*, London 1963, at 14.

<sup>64</sup> Rakoff & Minow, *o.c.*, *Vanderbilt Law Review* 60 (2007) also see this as the core of legal education: ‘the analysis of complex, rich factual descriptions of problems and (...) the generation of alternative avenues for problem-solving.’

<sup>65</sup> On the difference between deep and surface learning: Paul Ramsden, *Learning to Teach in Higher Education*, 2nd ed., London 2003, at 62 ff.

<sup>66</sup> Cf. Louis F. Del Duca, *The importance of understanding the role of statutes, regulations, and cases in legal practice and legal education in the United States legal system*, in: *IALS Conference Learning from each other: enriching the law school curriculum in an interrelated world*, Washington 2007, at 296.

the American system of splitting the (first year) class into sections that stay together for the entire year, adding considerably to the group feeling and the perception of students that they are part of a small school. At top law schools like Yale and Chicago, these sections usually consist of no more than 30 students.<sup>67</sup> What Europeans may dislike about this option<sup>68</sup> is that not all of the sections are taught the same way or even use the same materials. Each lecturer will teach the course and assess the students as they see fit. I do not think this is wrong: differences among the different lecturers, within the parameters set for the course, will only add to the diversity of a law school.

Closely related to the method of teaching is the assessment of students. If law is taught in the non-traditional way I just described, it makes little sense to assess students in the way it is traditionally done: by way of a final examination with one 'model answer.' Student oriented teaching requires student oriented assessment. This does not rule out there is still some form of a final exam, but in my experience it is best to combine this with essays and presentations.<sup>69</sup> In the way we assess students, we can also learn from American law schools. One of the problems with grading systems that are too detailed is that the students focus too much on obtaining high grades, whereas their focus should be on the intellectual stimulus they get out of their study and the contribution they can make to the intellectual community they are part of. This (combined with the problem of grade inflation) is why several American law schools (including Harvard and Stanford<sup>70</sup>) recently decided to abandon the old grading system. Students' performance is now graded as 'honors,' 'pass,' 'low pass' or 'fail,' one third of the class to receive the top mark ('honors') and the bottom 8% to receive a 'low pass' or 'fail.' I realize that this system may work better for graduate students (as law students in the United States are) than for European undergraduates, but I still think it is worth considering adopting this system in European law schools as well.

The final point concerns teaching materials and the language of instruction. I already mentioned that most textbooks describe the law in a positivistic way and not by way of alternative answers to functionally defined questions. Already in 1992, Hein Kötz defined this lack of truly European (or comparative) teaching materials as problematic:<sup>71</sup>

'We do not have, in Europe, a legal literature tackling the daunting task of developing in a given area a European common law. (...) True, there are books discussing legal problems from a comparative perspective. (...) What I have in mind is something else. It is a literature based on a decidedly non-national point of view, seeking to discuss its subject in a way which by no means ignores the rules national legal systems have arrived at, but treats them as merely local variations of a theme which in principle is unitary.'

Although we now have more comparative casebooks and textbooks in the traditional areas of law compared to 20 years ago,<sup>72</sup> we still need more. We need their authors to adopt different approaches and consider different materials. Only in that way, will we be able to create a critical mass of materials out of which students can choose what they like best. Although these materials are likely to be written in different languages, I believe they should as much as possible be written in English. One occasionally hears the argument that it is impossible to teach law in another language than the one in which the sources are available. I think this view is mistaken. The argument is

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<sup>67</sup> Both law schools admit about 200 students per year. At Harvard, the entire first year class of about 550 is split into sections of maximum 80 students (which seems too large to pursue the type of teaching advocated in this contribution).

<sup>68</sup> Probably (but unjustly) motivated by concerns of accountability and quality assurance.

<sup>69</sup> On the enormous importance of students writing papers as critical examination of the materials (and oneself) see Nussbaum, *o.c.*, *University of Chicago Law Review* 70 (2003), at 273.

<sup>70</sup> Yale had already abolished letter grading in the 1960's.

<sup>71</sup> Hein Kötz, A Common Private Law for Europe: Perspectives for the Reform of European Legal Education, in: De Witte & Forder (eds.), *o.c.*, at 39.

<sup>72</sup> See for a brief overview in the field of European private law Bram Akkermans, The Development of European Private Law and its Challenges on the Law School Curriculum (in this volume).

certainly true for the study of one national law: it does not make any sense (and one should not try) to teach Dutch or Finnish law in English.<sup>73</sup> However, this is different for the type of European education propagated in this contribution: the entire point of such a programme is that it teaches students to think like a lawyer in an international setting. As it became clear in section 3, this means a necessary turn away from texts and their interpretation towards the arguments behind these texts. These arguments can very well be discussed in English for they are not dependent on one national jurisdiction.

## 5. Concluding Remarks, On the Law School of the Future

This contribution focused on the reasons *why* we need a European legal education, *what* we should teach and *how* we should teach it. I did not say too much about what this means for the organization of the law school as a whole, although it is clear that the ambitious programme propagated here can form a true challenge for the law school that offers it. In this respect, it is important to emphasize that not every law school can or should offer a European or international programme. Having said this, it is also clear that the present uniformity in the European university landscape will gradually disappear. In the Netherlands alone, universities teach nine astonishingly uniform programmes on Dutch law. This will soon change with law schools opting to increasingly specialize, attracting the students they want to have. Some universities will end up attracting students from all over the European Union, while others will remain primarily national. This type of niche marketing is important, also to inform prospective students about the type of education they can expect when choosing for a specific university.

Meanwhile the challenges for the more internationally oriented law schools are many fold. I will mention three of them here. The first is about the relationship between teaching and research. It is no coincidence that McGill and Maastricht not only teach international programmes, but also have a strong tradition in doing internationally oriented research. The two reinforce each other considerably: students profit from the internationally acclaimed academics teaching their courses and faculty is able to try out new ideas when teaching and to attract teaching assistants from the student body. This interaction between teaching and research is essential: it would be just as unthinkable to teach an international programme without doing (comparative) research as it is to publish internationally without having the benefit of teaching students about the topics one writes about. Some law schools have been able to interlink their European teaching and research in an optimal way, but it is clear that this can be a difficult process.

The second challenge relates to the recruitment of faculty.<sup>74</sup> It is probably the most important factor in building up an international programme. A law school can only decide to offer European legal education if there is sufficient faculty expertise to do so, or has the resources and prestige to attract new colleagues. The alternative is to force specialists in national law to change their precincts, but this is – at least in most cases – not a very wise decision to make. Forcing talented and experienced people to re-educate and conform to a new standard often lead to mediocre results; it is better to let people do what they are best in. Attracting visiting staff and cooperating with other law schools is then a better option.<sup>75</sup>

The final challenge concerns the ideal organization of the law school. It is well known that Europeanization and internationalization of law affect the distinction between the traditional legal

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<sup>73</sup> The suggestion is not as unworlly as it seems: it is part of the internationalization mission of various Dutch universities to insist on all faculty (including those teaching Dutch law) teaching in English.

<sup>74</sup> On which the special issue of *American Journal of Comparative Law* 41 (1993), 351 ff.

<sup>75</sup> The importance of international cooperation is emphasized by Akkermans, *o.c.*, *German Law Journal* 10 (2009), 803 ff. and Louis Del Duca, Cooperation in Internationalizing Legal Education in Europe – Emerging New Players, *Penn State International Law Review* 20 (2001), at 7.

fields.<sup>76</sup> The distinction between public and private law has set the discourse in the last 200 years,<sup>77</sup> but it does not make much sense anymore today.<sup>78</sup> For example, it is impossible to discuss the Europeanization of private law without asking the question at what level of governance private relationships are best regulated or how legitimate the rulemaking by European institutions or private regulators actually is. These are questions that directly touch upon discussions in other disciplines. In the same vein, similar developments in different fields are now too often seen as isolated because of too little contact among academics working in different fields.<sup>79</sup> Therefore, I do not believe that the common departmental structure in continental universities, with its sharp distinction between departments of private law, public law, criminal law, European law and legal theory, is conducive to promote high quality teaching and research. It is a much better strategy to form interdisciplinary groups in which academics of different backgrounds work together, also because the more creative research is often at the intersection of disciplines.

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<sup>76</sup> Cf. Geoffrey Samuel, What is it to have knowledge of a European public law?, in: De Witte & Forder (eds.), *o.c.*, 171-184.

<sup>77</sup> Although the dichotomy of public and private law can already be found in Roman sources (D. 1.1.1.2), its importance as an epistemological categorization is much more recent and directly related to the emergence of the nation-state.

<sup>78</sup> Cf. Duncan Kennedy, The Stages of Decline of the Public/Private Distinction, *University of Pennsylvania Law Review* 130 (1982), 1349-1357.

<sup>79</sup> An example is the discussion about comparative inspiration in private law and about 'constitutional dialogue' in constitutional law.