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Bartl, M.; Leone, C.

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11. The politics of legal education

Marija Bartl and Candida Leone¹

1. INTRODUCTION

The chapter highlights the politics of different articulations of the legal research/legal education nexus. The baseline is relatively straightforward. Given the predominantly positivistic, state-centred set up of most European law programmes, and certainly of most bachelor's programmes, one may think that high-quality education requires most staff at law faculties to focus on doctrinal questions and national law – making law faculties relatively more closed to internationalisation than other faculties and departments. Departments composed in this way, however, will likely reproduce the type of research on account of which they have been selected, arguably perpetuating a rather conservative approach to legal research. The ensuing education will hardly empower students to use law to tackle the struggles keeping researchers, politicians and law-makers awake at night, from climate change to the challenges to legitimacy and social cohesion caused by growing inequality and societal enclosures.

We argue that the normalised tendency to 'use' legal education and its needs to claim a priority for nationally oriented doctrinal research misrepresents both the needs of legal education and the real stakes at play in the politics of legal research in contemporary academia, to the detriment of meaningful education and of law's ability to contribute to sustainable societies – a point that should be particularly dear to scholars interested in progressive research agendas and the politics of legal research.

First, contrary to what is often assumed in the field with which we are best acquainted – (European) private law –, the oft-invoked dichotomies of doctrinal/non-doctrinal research on the one hand, and national/international levels on

¹ Amsterdam Centre for Transformative Private Law. The authors would like to thank the participants in the two 'Politics of European Legal Research: Behind the Method' workshops, most of whom contributed to the volume at hand, as well as Iris van Domselaar, Giovanni Sileno and Guilherme Vasconcelos Vilaça, for their comments on an earlier draft of this chapter.

the other, do not straightforwardly align. Instead, doctrinal scholarship exists in national private law just as in transnational private law, and, in reverse, there is vast non-doctrinal scholarship in national law. There is nothing, we argue, that limits the questions *about law* normally asked in non-doctrinal research to the context of international or European scholarship, just as there is little preventing the questions *of law* from taking over international² and European scholarship.

Second, the pairs national/doctrinal and international/non-doctrinal do not stand in any linear relationship to the needs of legal education today. We need to lay bare the assumed connections between *national=doctrinal=useful* and *international=non-doctrinal=useless*. None of these assumed connections are strictly necessary, nor do they hold in reality. If anything, the needs of legal education and practice are varied and complex, and the constant changes in legal rules, regimes and the political projects furthered through them, in the context of globalised economy and societies and rapid technological change, require sustained effort in cultivating pluralist legal education, where *learning how to learn* becomes a paramount objective.

Third, to meet contemporary challenges of globalisation, technological change and environmental degradation, legal education for the twenty-first century needs to be accountable to a broader set of actors, to a much more inclusive concept of 'legal practice' than has been the case so far. Such openness is best served by pluralist research agendas, including doctrinal and non-doctrinal scholarship, with both national and international perspectives and sensitivity to inter-connected and ever changing laws and governance structures rather than by doctrinal monism and national enclosures.

The chapter is divided as follows. In section 2 we set the stage, outlining some common assumptions concerning the relationship between internationalisation, doctrinal research and the needs of legal education. In section 3 we use the example of European private law to highlight that it is not the level of governance (national–international) that demands a certain method (doctrinal–non-doctrinal); rather, it is the political context and intuitions driving our research agenda that will be decisive for the choice of the method. Section 4 relates national legal education to the question of level and method, suggesting that a narrow understanding of what legal practice is and what it needs, in legal academia itself, may be at the root of tensions between research and legal education. In section 5 we outline some core challenges and elements for a basic

² Interesting, in this respect, could be the different perceptions between disciplines: while, for example, international law appears to many private lawyers as the locus for heterodox approaches, Elgar recently published a collective book devoted to Rossana Deplano, *Pluralising International Legal Scholarship: The Promise and Perils of Non-Doctrinal Research Methods* (Edward Elgar Publishing 2019).

vision of legal education for the twenty-first century. Section 6 reflects on why this is a problem requiring urgent consideration and concludes.

2. THE POLITICS OF LEGAL EDUCATION: GROWING TENSIONS?

We would like to start with an example close to our experience in Dutch legal academia. In 2019, an incendiary blog post³ on the website of one of the main Dutch legal journals claimed that the relative success of internationally oriented and interdisciplinary research in funding rounds, and, hence, in fostering researchers' careers, means no space is left for the kind of research that is needed to keep national legal systems in good shape and secure qualitative legal education. This would be reflected in particular in the difficulty of finding good candidates for (assistant professor) faculty positions in the 'core' areas of teaching, namely private law, criminal law and constitutional and administrative law.

The lack of PhD positions with a focus on Dutch law and the 'unattractive' conditions that attach to an assistant professorship – with its generally high teaching load – are identified as reasons for the scarcity of applicants. 'Young researchers who populate universities with their NWO grants', on the other hand, often have an international background and/or do research in international areas,⁴ meaning the little time they spend on education is not devoted to teaching Dutch law. Furthermore, if they do teach Dutch law, they may not possess sufficient expertise to provide high-quality – read: doctrinally rigorous – education: the authors lament that 'It can happen that an assistant professor in constitutional law can excellently explain what the Chinese constitution looks like, but has no deep knowledge of the Dutch version'.⁵ On the flip side, the little time left for others to do research and write is not enough to guarantee the academic quality of the education offered to students, whose 'core business' must be, after all, Dutch law.

Several voices, one should say, have added context to the original blog post. An article published in the paper version of the same journal showed that

³ Tom Barkhuysen and Jacobine van den Brink, 'Onderzoek Naar Nederlands Recht in de Knel Door Internationalisering. Biedt Het Sectorplan Rechtsgeleerdheid Uitkomst?' (*NJB blog*, 18 February 2019) www.njb.nl/blogs/onderzoek-naar-nederlands-recht-in-de-knel-door-internationalisering-biedt-het-sectorplan-rechtsgeleerdheid-uitkomst/.

⁴ *Ibid.*, our translation. 'NWO' is the main public granting institution in the Netherlands, providing among others three main talent schemes – VENI, VIDI and VICI for, respectively, early career, mid-career and advanced researchers.

⁵ *Ibid.*

between 2012 and 2017, fewer than 40 colleagues *in total* – thus including more advanced scholars certainly not in the market for assistant professorships – received NWO grants, of which a bit more than one third were in the area of international and European law.⁶ This is of course a larger proportion than one may expect based on the faculty composition of most law schools – but perhaps less so if one considers that proposals in that area also account for more than 40 per cent of all submissions to the same financing schemes. Willem van Boom, then Civil Law chair holder at the traditionally prestigious Leiden University, openly wondered whether other factors may play a role in causing the lamented scarcity:⁷ perhaps, he speculated, the close proximity between Dutch law research and practice makes a transition between the two so easy that, after their PhD, many young scholars find the challenges and economic conditions of the legal profession an attractive option. And perhaps the increased interest in specialised, ‘non-core’ areas is a reflection of the fact that such areas have acquired *increased relevance* over the past decades.

The tension, we submit, is a real one – just not the one that the original blog post claims to be about. It may not be by chance that struggles concerning the internationalisation of legal education and research are emerging vividly right now.⁸ Certainly since the Brexit referendum and the 2016 US presidential elections, political scientists have been increasingly discussing the emergence of a new core ‘cleavage’ – whereby the traditional left–right cleavage is complemented by the cleavage between cosmopolitans and nationalists, in their both left and right incarnations.⁹ This perceived struggle, however, should not distract us from other, perhaps more relevant, tensions.

The story of internationalisation and ‘interdisciplinaryisation’, we believe, ultimately represents but a variation of debates that have been going on in legal academia for quite some time: how do we keep legal research and education aligned and in which relationship to legal practice should they stand? In other words, to what extent should legal education be academic and to what extent should it be practical or, at least, practice-oriented? And crucially: what is

⁶ Michel Vols, Gijs van Dijk and Benny van der Vorm, ‘Mythes En Waarheden over Kansen Voor Juridisch Onderzoek Bij NWO’ [2018] PNAS 1.

⁷ Willem van Boom, ‘Onderzoek Naar Nederlands Recht in de Knel Door Internationalisering? Laten We Dat Eens Onderzoeken’ (22 February 2019) <https://willemvamboom.blog/2019/02/22/onderzoek-in-de-knel-laten-we-dat-eens-onderzoeken/>.

⁸ A 2020 controversy in Copenhagen concerning Danish-language requirements for international staff may echo similar struggles: see <https://uniavisen.dk/en/researchers-not-happy-with-tough-new-danish-language-policy-draft/>.

⁹ On cleavages, see the review in Robert Ford and Will Jennings, ‘The Changing Cleavage Politics of Western Europe’ (2020) 23 *Annual Review of Political Science* 295.

it, really, that *legal practice* requires? And *what* legal practice? It is these questions that need to be addressed in order to meaningfully discuss the ideal composition of law faculties, rather than opting for a slightly crude framing in terms of ‘national’ and ‘international’ approaches.

A brief look through the window of European private law will serve to illustrate this point, first with reference to research and later (in section 5), more briefly, closing in on legal education in this rather peculiar field.

3. ON THE *LEVEL* AND THE *METHOD*: THE CASE OF EUROPEAN PRIVATE LAW

We have seen how, in the example discussed in section 2, internationalisation and interdisciplinarity were presented as going hand in hand – as possibly part of the same movement and certainly of the same problem. Responses to the kind of critique raised in the blog post could be tempted to do the same – connect methods and level of legal research to elevate the increased interdisciplinary sensitivity of non-national legal research as the ‘better’ option in research and possibly teaching. On the example of European private law (EPL), we would like to argue here for the importance of thinking clearly about *methods* and *levels*: to the extent that an overlap exists making non-national legal research more methodologically open, there are good reasons to think that this is a temporary phenomenon; furthermore, on a longer-term view, and certainly considering current developments, there are no reasons to think that the kind of questions asked in more methodologically open research would not be of interest to nationally oriented research too. At the same time, a degree of doctrinal research will be required by more or less any serious academic project, whatever the nature of the main question. A look at developments in the area of harmonisation-related debates and some recent private law scholarship emerging in Benelux gives us a snapshot of this fluidity which may help to defuse the nastier undertones of the discussion described above.

In the heyday of positivism, European law faculties developed a clear distinction between departments of legal philosophy, which were supposed to be trans-disciplinary, and more or less broadly arranged *national* disciplinary areas, with ‘international law’ departments gradually absorbing most of the emerging sub-disciplines (from trade law to international criminal law), possibly including EU law studies. Private law departments, in particular, have been largely populated by scholars doing refined analyses of a systematic nature, threading together the norms relevant to a certain specific problem or analysing recent developments in line with the locally prevailing canons of legal interpretation. ‘Opening’ in these contexts has from early on been characterised by (national) scholarship engaging with the influence of constitutional rights on private disputes. Fundamental rights opened up private law debates to

an explicit consideration of the broader context in which interactions between private parties took place and highlighted the political stakes involved in ‘technical’ issues of private law adjudication.¹⁰

For private law scholarship, however, Europeanisation was a full-on watershed moment.¹¹ First, harmonisation by directives and their interpretation by the Court of Justice had no concern for the integrity of national legal systems: goals were established that had nothing to do with predictability and formal equality, foreign concepts were introduced, the unity of national systems was put under severe strain. It has become standard to observe that EU intervention, with its functional approach, shows no concern for the distinction between public and private law.¹² Second, at the turn of the century a discussion was opened as to whether – also in order to counter the ongoing disruption – private law should not be comprehensively harmonised or unified.

Between the early 2000s and its abandonment in 2015, the idea of comprehensive harmonisation known as the ‘European Civil Code’ movement provided a constitutional moment where the stakes were raised in an uncharacteristically overt way. Which political colours EPL would don was not a matter of incremental developments through new rules or interpretation or veiled duels about the specific meaning of certain established principles: the principles, rules and even interpretive canons had to be established.¹³ Furthermore, this debate was often dominated by scholars whose determination to be involved was already signalling their openness to matters other than their national discussions. Comparative lawyers, usually a small minority with limited prestige and influence, enjoyed unprecedented sway: the various expert groups, first emerging spontaneously and later to an extent institutionalised by the Commission, were largely populated by lawyers with considerable ‘foreign’ experience by the standards of traditional continental academia.

For almost two decades, while many scholars decided to keep as far away as possible from these ongoing debates, those who engaged were divided across two main camps: those in favour and those against (various versions of) a European Civil Code. *Within* these groups, however, very different

¹⁰ Chantal Mak, *Fundamental Rights in European Contract Law: A Comparison of the Impact of Fundamental Rights on Contractual Relationships in Germany, the Netherlands, Italy and England*, vol 12 (Kluwer Law International BV 2008); Duncan Kennedy, ‘The Political Stakes in “Merely Technical” Issues of Contract Law’ (2002) 10 *European Review of Private Law* 7.

¹¹ Martijn W Hesslink, *The New European Legal Culture* (Kluwer Law International BV 2002).

¹² See lastly Olha O Cherednychenko, ‘Rediscovering the Public/Private Divide in EU Private Law’ (2020) 26 *European Law Journal* 27.

¹³ Hesslink (n 11).

approaches could be distinguished: the pro-harmonisation camp included some hinging towards critique, as well as traditional comparatists, doctrinalists and some legal historians; sceptics featured conflict lawyers, law and economics scholars, other doctrinalists and other legal historians and comparativists with a penchant for cultural approaches.¹⁴ Each camp included in itself a palette of (more or less open) political preferences. Arguments, in particular, against comprehensive harmonisation ranged from national cultures to democratic experimentalism to the maintenance, in more socially oriented Member States, of existing levels of (among others) workers' and consumer protection. The 'positivist' argument of 'legal fit', or the idea that harmonised private law would cause excessive disruption to the overall coherence of national legal systems – albeit influential – was only one of many in the anti-harmonisation camp.¹⁵ The European Civil Code debate all but faded out when the Juncker Commission, in 2015, decided to shelve the last proposal borne out of that movement, the so-called Common European Sales Law. The political project abandoned, many of the scholars involved have gone on to very different avenues.

In practice, after the demise of the codification efforts, the degree of EU activity with an influence on national private laws has if anything increased: the Commission has embraced several projects directly engaging with private law, from certain aspects of the Digital Single Market agenda (2015) to the New Deal for Consumers (2018) to the 'Digital Services Act' package (2020).¹⁶ Measures adopted include, among others, non-cosmetic recasts of major directives, a new directive on digital contracts and even rules of contract law in the agricultural supply chain directive and the platform-to-business regulation¹⁷ – not to mention an entirely novel principle of non-discrimination related to price in the geoblocking regulation. While they may of course have been criticised by many authors in different fora, none of these instruments has met with the major principled opposition that sank the relatively modest Common Sales Law proposal.¹⁸ In fact, the latest successful insurgency may

¹⁴ Doing justice to all the various positions and contributions here would be impossible. A loving reconstruction can be found in Hugh Beale, 'The Story of EU Contract Law – From 2001 to 2014', *Research Handbook on EU Consumer and Contract Law* (Edward Elgar Publishing 2016).

¹⁵ For a defence of such opposition against suspicions of nationalism: Vanessa Mak, 'Book Review: Nationalism and Private Law in Europe, by Guido Comparato (Oxford: Hart Publishing, 2014)' (2015) 52 *Common Market Law Review*.

¹⁶ <https://ec.europa.eu/digital-single-market/en/digital-services-act-package>.

¹⁷ <https://ec.europa.eu/digital-single-market/en/business-business-trading-practices>.

¹⁸ Still under-researched is the impact of the recent prevalence of 'trialogues', as has been argued in the case of the copyright directive: see <https://euobserver.com/institutional/145649>.

well have been the one against establishing different directives for online and distance sales in 2015–16, which led to a brief halt being called and the subsequent quick adoption of the new Consumer Sales Directive (online and offline) in 2019.

This does not mean that academics have remained still; the type and focus of the ongoing debates seem, however, to have shifted. In 2011 the European Law Institute was founded, with the aim to ‘improve the quality of European law, understood in the broadest sense’. The task of the institute is ‘to initiate, conduct and facilitate research, to make recommendations, and to provide practical guidance in the field of European legal development’. In 2019 the Institute did indeed publish model rules on platforms which had some influence on the Digital Services Act proposal.¹⁹ In 2017, Riesenhuber’s *European Legal Methodology* – essentially a treatise on interpretation in EU private law – was published in English. Has EPL scholarship reached its positivist stage, past the political exuberance of its teenage years?²⁰

If doctrinal scholarship and a more tame *ex post* critique seems to have taken over the EPL debate ‘proper’, on taking a closer look we can see a number of parallel movements. On the one hand, a growing number of private lawyers in Europe pursue questions *about law* on the axis of national/non-doctrinal private law scholarship. This scholarship will usually contest the basic (usually national) categories of private law, from various standpoints: for instance, ‘law and’ approaches, which place philosophical or social theoretical concerns at the forefront;²¹ ‘empirical legal studies’ of various strands; and ‘law and economics’ approaches, which aim to uncover the (in)efficiencies or distributive effects of legal rules, categories and so on.²² On the other hand, for the already quite established group of private lawyers interested in digitalisation, different levels of regulation are but a matter of expediency and feasibility since it is clear to (almost) all that national efforts and interventions have limited bite when confronting largely transnational phenomena. Scholars in similarly characterised areas such as data protection and intellectual property have, in fact, already been practising such a mixed strategy for a couple of decades. The

¹⁹ www.europeanlawinstitute.eu/projects-publications/completed-projects-old/online-platforms/.

²⁰ See among recent PhD theses: R de Graaff, *Concurrence in European Private Law* (Leiden University 2020) or Emilio Bufano, ‘Il controllo sui contratti asimmetrici nel diritto private europeo, armonizzazione delle tecniche ed economia dei rapporti di consumo’ (Pisa 2019) – the latter showing again the fluidity with which lawyers with a fundamentally doctrinal approach ‘borrow’ from methods such as economic analysis.

²¹ For example Lyn KL Tjon Soei Len, *Minimum Contract Justice: A Capabilities Perspective on Sweatshops and Consumer Contracts* (Bloomsbury Publishing 2017).

²² For example Aart Jonkers, *Insider Guarantees in Corporate Finance* (Eleven International Publishing 2020).

emerging movement exploring the connections between private law and sustainability, irrespective of whether more doctrinal or more interdisciplinary, will also look at and into different levels of regulation essentially as a matter of expediency.²³

What all this scholarship has in common is that the question of level (be it the national, European or global context) is a background question at best. The focus on (national) private law categories, a crucial step in constructing a serious legal inquiry, is expressly made secondary to the core project of trying to understand how they play out, or should play out, in the contemporary inter-connected world. Will this development, then, forecast even larger troubles for legal education?

4. WHICH LEGAL PRACTICE? WHAT KIND OF EDUCATION? WHOSE NEEDS?

In section 2, we denounced the alleged tensions between the internationalisation and ‘interdisciplinisation’ of (in particular) legal research and the needs of legal education, and promised to unpack instead some tensions existing *within* legal education. In the coming two sections we will first generally introduce such fault lines and tensions and then discuss how they have evolved in the past few years.

Legal education, on the European continent in particular, is historically characterised by its being an academic education with a clear vocational outcome. While not all trained jurists end up in one of the traditional legal professions, they are historically educated with this outcome somewhat in mind. The extent to which the vocational element of the legal educational mix is to be integrated in the official university study programme, whether comprising a (long) bachelor’s or a combination of bachelor’s and master’s programme, however, has traditionally varied – with some countries closer to a complete separation and some others essentially making training a component of the academic qualification. Legal research profits handsomely, on an aggregate level, from its connection with legal education – to date, a hugely popular study in all countries which do not restrict access to law faculties.²⁴ Given

²³ See for example Enrico Caterini, *Sostenibilità e Ordinamento Civile: Per Una Riproposizione Della Questione Sociale* (Edizioni scientifiche italiane 2018), making a normative claim valid for the ‘Euroitalian legal ordering’; Bram Akkermans and Gijs van Dijck, *Sustainability and Private Law* (Eleven International Publishing 2020), which expressly seeks to mix different perspectives through a common lens.

²⁴ Law students make up roughly one tenth of the overall university student population in the Netherlands (www.onderwijsin cijfers.nl/kengetallen/wo/studenten-wo/aantallen-ingeschrevenen-wo); in Italy, after a stark drop over two decades, they

the importance of student numbers for the financing of higher education, law faculties can hire a comparatively large number of long-term staff, limiting dependence on ad hoc funding via grants or separate research funds.²⁵ This, however, says very little about how research should feed back into education.

While an intuitive way to keep research and education aligned would be to teach students cutting-edge subjects reflecting the frontiers of current advancements in the discipline concerned, in law the pressure seems to go in a different direction, emphasising instead the need that we keep *research fitted to the 'needs' of education*, and education to the 'needs' of practice – which may, for example, require ignoring how contemporary advancements in legal theory could bear on positivist education. This seeming divergence is easily explained if we bring the vocational element into the mix: a law bachelor is, in most countries, the *only* path to a large regulated profession and to a career in the judiciary. While not all countries will have similarly tight arrangements in place, the Dutch '*Civiel effect*' covenant,²⁶ defining which subjects students must have passed in order to have access to the bar upon graduation, is a case at hand. Legal practice and its declared needs, thus, set the requirements of teaching and research.

The debate around the appropriate balance between academic and vocational elements has been going on for a very long time, with, as mentioned above, varying outcomes in different systems. In Europe – including the United Kingdom, and unlike in the US – law is mainly undergraduate study. Even for those who more directly see a law degree as foreplay to joining *one of the legal professions*, this has implied that law faculties must have a broader educational mandate. In terms of content, this has usually been reflected by the inclusion of a number of non-positivistic subjects in the curriculum, ranging from legal history to legal philosophy to Roman law. Less attention has been paid to skills – intellectual or professional – which, in most systems, were assumed to come implicitly with rather passive teaching. Legal reasoning skills, arguably an intellectual as well as professional asset, would be honed essentially by exposure to sophisticated legal reasoning produced by others and possibly by reproducing the same reasoning in exams, oral or written. As well as being popular, legal education has in this way traditionally been

made up 'only' 7 per cent of all university students in 2019 (see www.altalex.com/documents/news/2019/03/27/crollo-degli-iscritti-a-giurisprudenza); in Germany, law is the third largest area of study <https://de.statista.com/statistik/daten/studie/2140/umfrage/anzahl-der-deutschen-studenten-nach-studienfach/>; and so on.

²⁵ Vols et al, above n 6, observe something similar *within* law faculties, speculating that EU and international law scholars may be more drawn to grants due to the relative paucity of tenured position viz 'core' areas.

²⁶ www.advocatenorde.nl/starten-als-advocaat/rechtenstudie-in-nederland.

quite cheap to impart.²⁷ A focus on passive knowledge transfer has over time allowed universities to cope with growing student numbers and (especially in certain countries) limited resources, while also leaving academics some time for research.

All in all, thus, the vocational element in legal education also seems to have at best a rather thin and somewhat incidental connection to positivist methods and research. First, there are many national variations.²⁸ Second, it is far from obvious that the more methodologically closed systems of legal education are particularly good at feeding their graduates into legal practice – at least based on our experience of Italy and Eastern Europe.²⁹ Could we then start ruling out doctrinal research that is not useful for legal practice³⁰ on the grounds that it undermines the vocational goals of legal education?

There is more to it. Even assuming that the legal profession(al) a good small-town attorney will be is the target, the vision of *who* that professional is and what makes for a *good* legal professional – at least in the long term – is also contested ground. Adopting as the ideal-type (or *Leitbild*) for education a judge, a public servant, a small-town attorney or a lawyer in an international law firm may foreground not only different kinds of legal knowledge and different kinds of skills, but also different ethical attitudes:³¹ just think of how we expect judges to be impartial but we assume partisanship as a virtue for defence lawyers. Meanwhile, besides, a good small-town attorney will be in contact with everyday realities that are conspicuously far from those experienced by a corporate lawyer working on M&As. For law schools to choose a *Leitbild*, then, is as much a political as an academic choice – which will not only foreground some actors and interests over others, but also instils this hierarchy in new generations of legal professionals, their attitude to learning (in the first place) and their societal role. For decades at least, legal education – at least in Europe – has largely downplayed this diversity and made only implicit choices.

²⁷ Richard Grimes, 'Making and Managing Change in Legal Education: Yesterday, Today and Tomorrow' (2020) 7 *Asian Journal of Legal Education* 178.

²⁸ Rob van Gestel, Hans W Micklits and Edward L Rubin, *Rethinking Legal Scholarship: Transatlantic Dialogue* (Cambridge University Press 2017).

²⁹ See for example Michael A Livingston, Pier Giuseppe Monateri and Francesco Parisi, *The Italian Legal System* (Stanford University Press 2020) 76. The authors' summary claim is that a law degree in the country is essentially the equivalent of a BA in the US system.

³⁰ What about 'fundamental' doctrinal research, or research that seeks to uncover unexpected implications of legal rules by looking at extreme examples, which are, by definition, unlikely to occur often in practice?

³¹ See Elaine Mak, *The T-Shaped Lawyer and Beyond* (Eleven International Publishing 2017).

5. LEGAL EDUCATION IN THE TWENTY-FIRST CENTURY

What we submit is that when discussing the relationship between legal research and education in Europe, a few concurring factors should not be left out of the equation:

- (1) Changing societal pressures on education at large, with universities increasingly seen as in charge of delivering a ready-made workforce rather than educating citizens;
- (2) Competition among universities, fostered by actual or announced changes in financing, forcing universities to attract at the same time the ‘best’ students (that is, those who will achieve the most ECs³² in the least time) and the ‘best’ researchers (that is, those who are likely to publish well and attract external financing);
- (3) Developments in pedagogy, requiring a more explicit mix of knowledge, skills and socialisation aspects in order to deliver decent education in mass institutions;
- (4) Developments in law, with rule-making at multiple levels, in decentralised fora within each level and a growing mix between legal technique and different areas of knowledge – and, in fact, how we *understand* and theorise law;
- (5) Developments in legal practice, with more and more lawyers doing legal work which is however not close to resembling that of the traditional legal professions.³³

These developments cannot be selectively evoked when discussing legal research and legal education. The first issue, broadly denounced by a number of movements across western countries, connects to critique of the ‘neo-liberal university’³⁴ which has been sometimes underplayed within law faculties because of the perceived mixed mandate of such faculties in comparison with, for instance, the humanities.³⁵ The connected issue of competition for funds, which has increased in many systems over the past decades, certainly is visible in legal academia. To the extent that a growing gulf can be said to exist

³² ‘European Credits’ are used to standardise the expression of course load of both teaching programmes and individual courses.

³³ Technology is also a connecting point among many of these: see the current project on a Blueprint for Global Legal Education, www.ie.edu/law-school/initiatives/blueprint-global-legal-education/.

³⁴ See for all Stefan Collini, *What Are Universities For?* (Penguin 2012).

³⁵ See, however, Margaret Thornton, *Privatising the Public University: The Case of Law* (Routledge 2012).

between research and education, a main cause can be identified in these competitive mechanisms: on the one hand, attracting larger and more prestigious research grants usually requires ostensibly ‘academic’ ambition, contributing to larger theoretical and societal debates; on the other hand, attracting ambitious (especially: master’s) students who will pay growing fees and ‘deliver’ by generating public funds inflow is increasingly all to do with employability, which pushes law degrees to show their relevance to ‘practice’ since abstract prestige won’t hold.

Developments in general pedagogy also put legal education under pressure: how do we teach meaningfully to scores of young people with diverse (and unequal) backgrounds, diverse ambitions and also, inevitably, unequal talents? These developments call for expressly basing education on a workable combination of ‘doctrine, perspectives and skills’³⁶ with an eye to student activation, general academic and intellectual skills and a number of transferable skills more directly targeted to the legal world. While the exact mix of these elements remains a controversial matter, the core message is that university education is not to be considered as a method of selecting and training elites but as something that is increasingly needed for nurturing and reinforcing basic intellectual competences – which, far from being a luxury, increasingly appear as a pressing necessity if democratic orderings are not to collapse against the huge complexity of contemporary societies.

As concerns developments in law, while most readers will have an understanding of the phenomenon of growing legal complexity mentioned above, we would like to go back to European private law to provide an example of how the phenomenon reflects on teaching. Micklitz has discussed the challenges of teaching EPL through his experience at the European University Institute (EUI).³⁷ Such challenges come both with the nature of the subject – not a ‘system’ in the traditional sense that continental private lawyers have been accustomed to – and with the setting, bringing together students with very different backgrounds and different degrees of familiarity with the different elements relevant to a given subject of discussion. Micklitz argues that successful education in this field requires both more *abstraction* (discussing big themes rather than specific rules) and more *concretisation* (looking closely at specific cases in their genuine institutional, political and legal context) than

³⁶ Simon Chesterman, ‘Doctrine, Perspectives and Skills for Global Practice’ in *The Internationalisation of Legal Education* (Edward Elgar Publishing 2014). But also on this general puzzle, Christopher Gane and Robin Hui Huang, ‘Introduction’ in Christopher Gane and Robin Hui Huang (eds), *Legal Education in the Global Context: Opportunities and Challenges* (Routledge, 2017).

³⁷ Hans-Wolfgang Micklitz, ‘The Bifurcation of Legal Education – National vs Transnational’ in *Legal Education in the Global Context* (Routledge 2017).

much positivistic legal education does. Such approach does not aim to unsettle students or steer them away from traditional positivism. Rather, it aims to provide *an internal view on EPL*, something which a traditional positivist approach cannot do. Not only would any such approach be highly mediated by *national* approaches to EPL, it would also fail to account for the complexity in the background, not allowing students to grasp, for example, phenomena of private standard-setting, the role of private law in regulated markets and other conspicuous trends taking place far away from the purview of civil codes and most basic curricula.

What Micklitz maps above as an approach to the study of *doctrine* of EPL is ultimately applicable to the context in which *all* law finds itself in Europe, and globally. Globalisation may be an uneven process that proceeds at different speeds, but from the perspective of the economies of the ‘west’, and its private lawyers,³⁸ the world very much looks like one playing-field that needs private lawyers comfortable in multiple jurisdictions, who are able to deal with regulatory regimes that do not fit neatly either into domestic or international paradigms.³⁹ Besides, the plurality of levels and the plurality of legal problems – both ‘in practice’ and ‘in governance’ – requires legal education to make students aware of how law constitutes the world we live in and how it can change it. Such approach to legal education requires the internal perspective as much as the external one, understanding of the questions *of law* as well as questions *about law*, and understanding national law as embedded in layers of regional, transnational and international rules and governance. This applies both to lawyers who want to play the corporate game and to those who want to challenge the game or regulate or adjudicate around it.

The changing image of the legal profession(s), indeed, is the last development among those we have listed. It is a placidly acknowledged fact that most law students do not end up in one of the regulated professions, but coming up with a map is no simple task. Data protection officer, KYC compliance officer, legal account manager – many graduates end up in positions whose job titles will really not speak to the layman’s mind in the way that a black gown would. Inhouse counsels and even lobbyists could perhaps come closer to the general view of a law graduate. Again, a law degree cannot prepare students for each and every possible job outcome, so a choice needs to be made as to which skills and knowledge should be given preference. This choice is also not immune to political tensions, and dominating paradigms change over time.

³⁸ Katharina Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality* (Princeton University Press 2019).

³⁹ *Ibid.*

Elaine Mak has identified three successive paradigms, or *Leitbild(er)*, of the good legal professional in the Netherlands: the ‘lawyer-statesman’, a generalist with a largely independent (if idiosyncratic) moral compass; the ‘rational legal professional’, more specialised and expected to internalise the specific rationality of a certain organisation; and finally the ‘T-shaped lawyer’, who is expected to display a combination of core legal knowledge (the trunk of the T), a good grasp of a number of non-legal disciplines in their encounter with law (the flat line) and, crucially, empathy towards the client and society. The shifts in the *Leitbild* correspond to broader ideological shifts in society: while the rational legal professional emerges with New Public Management, the T-Shaped lawyer paradigm could be seen as a response to the economic crisis of 2008–9 and must respond to law’s interconnectedness with other disciplines – from forensics to accounting to AI – in current societies.⁴⁰

The ‘T-shaped lawyer’ idea has been powerfully put forward by some of the largest law firms⁴¹ and is not necessarily uncontroversial within Dutch legal practice: it seems worth pointing out that, with the notion first appearing in the Netherlands around 2014, the 2016 *Civiel effect* covenant between the Dutch bar association and Dutch law faculties went in a seemingly different direction, reinforcing ‘positive law’ requirements. The modern corporate image, thus, clashes with what is often considered a *Leitbild* in positivist legal education across Europe, and in fact gets us much closer to what it takes to be a more ‘flexible’, broadly educated lawyer. In some ways, in fact, the T-shaped lawyer resembles very much someone who has enjoyed Hans Micklitz’s version of education in private law.

This brings us to our last point – the question: what kind of politics is at stake in legal research and legal education for the twenty-first century?

6. CONCLUSION

Legal education is central to the politics of legal research and ultimately to the politics of law. The mix of ‘doctrines, perspectives and skills’⁴² that is required to form sustainable legal practice – in and outside the legal professions – must include a strong positive law component as well as other factual notions, but

⁴⁰ Mak, *The T-Shaped Lawyer and Beyond* (n 31).

⁴¹ See Martijn Snoep and others, ‘Opleiding jurist moet breder’ *NRC* www.nrc.nl/nieuws/2014/03/17/opleiding-jurist-moet-breder-1358770-a503857 accessed 20 August 2021.

⁴² Chesterman (n 36).

the rest should not be considered as fringe. Anghie has similarly recently explained how he teaches his students international law: while

teaching the classical approach is an important part of the larger project of teaching what we might broadly term ‘critical international law’ [...] some version of what might be called ‘critical international law’, a law that interrogates the Eurocentric character of international law, is essential for the simple purpose of getting students to engage with international law in any respect, even in the most positivist and orthodox tradition.⁴³

If we dig deeper into the T-shaped lawyer proposal, we see that the authors’ main point of reference is Anglo-American legal education – a system with a radically different funding model to most European university systems, extreme differences between ‘good’ and ‘bad’ universities and a range of problems of its own.⁴⁴ Taking the T-shaped lawyer as the main point of reference would likely make a ‘pure’ law bachelor’s entirely superfluous, which may be – besides possibly problematic – an unlikely path for European universities in the foreseeable future. However, if one of the most ostensibly ‘academic’ outposts of legal education and research in Europe (aka the European University Institute) and the managers of high-stakes law firms propose remarkably similar models of legal education, there is good reason to stand and stare. This may help explain why, in Amsterdam alone, the decade around the *Civiel effect* covenant has also seen the rise of a growing number of English-language programmes in law, alongside a growing number of legal programmes that are concerned with particular problems (such as environmental sustainability, globalisation or technology)⁴⁵ and even two bachelor’s programmes with a broad outlook and a law major.⁴⁶

While the debate on the *Leitbild* of the lawyer for the twenty-first century awaits broader and democratic discussion, it seems to us that the aforementioned points indicate quite unambiguously that we need to abandon all reflexes associating *national=doctrinal=useful for legal practice and hence education* and *international=non-doctrinal=useless for lawyers and hence education*.

⁴³ Tony Anghie, ‘Critical Pedagogy Symposium: Critical Thinking and Teaching as Common Sense – Random Reflections’ (*Opinio Juris*, 31 August 2020) <https://opiniojuris.org/2020/08/31/critical-pedagogy-symposium-critical-thinking-and-teaching-as-common-sense-random-reflections/> accessed 20 August 2021 [emphasis added].

⁴⁴ See Brian Z Tamanaha, *Failing Law Schools* (University of Chicago Press 2012).

⁴⁵ Not only in Amsterdam – examples abound at, for example, Groningen, SOAS London, Strathclyde...

⁴⁶ Amsterdam University College was co-founded in 2008/9 by the two Amsterdam universities; the UvA programme in Politics, Psychology, Law and Economics has been in place since 2014/15.

First, legal education has to be conscious of the complexity of inter-connected, and ever changing, laws, regulations and governance structures. Second, it needs to be built on pluralist research agendas that draw on doctrinal and non-doctrinal scholarship, with both national and global perspectives in mind. Finally, legal education for the twenty-first century has to be accountable to a broader set of actors than has been the case thus far: it needs a more inclusive concept of ‘legal practice’.

The role of law and lawyers in bringing about a boom in inequality and environmental degradation is currently subject to renewed scrutiny in scholarship⁴⁷ as well as by our very students.⁴⁸ Legal education has actively contributed to the current state of affairs, fuelling a legal practice geared towards coding capital in the folds of globalisation and unconcerned with the possible consequences or ensuing backlash. This problem is by no means helped by a too ‘cosy’ relationship between legal academia and legal practice – understood as law firms, with the rich and amoral solicitor as *Leitbild* – when academia pushes both research and legal education to attend to the (assumed or real) needs of this type of practice, while inculcating the *Leitbild* as the aspiration for generations of young lawyers. What is more, epistemic communities in many ‘commercial’ disciplines, made up of academics with strong connections to practice, tending to the needs of their clients while writing and teaching, stand in the way of rethinking these fields towards greater sustainability.⁴⁹

If we are to ‘grow’ responsible lawyers, we do not only need some courses on ‘ethics’ in the law school curriculum – however important these actually are. What is necessary is to change the structures of accountability and aspirations among new generations. We need to expand our understanding of legal practice – not only law firms, but also public offices, judges and civil society actors all need to come into our vision of the community we serve.

This chapter should serve as a caveat in two different directions: for those who are committed to progressive scholarly agendas, it should read as an invitation to engage with the politics of legal *education* if they want their projects to reach beyond their scholarly communities; for those who worry about the

⁴⁷ Pistor (n 38).

⁴⁸ See the scorecards published by ‘Law students for climate accountability’, www.ls4ca.org.

⁴⁹ A state recently denounced, for Dutch tax law, by Jan Vleggeert in his inaugural lecture: www.nr-online.nl/jan-vleggeert-over-de-dubbele-pet-van-belastingjuristen/. For an idea of the ensuing debate, see Laurens Berentsen, *Financieel Dagblad*, <https://fd.nl/economie-politiek/1362835/belastingwetenschap-verliest-geloofwaardigheid-door-dubbele-petten-11h1captKTcf> or Prof. J.L. van de Streek, *NL Fiscaal* [http://www.nlfiscaal.nl/fiscanet/pf.nsf/files/03CAFD74460CDFE5C12586FE003152D0.pdf/\\$file/nlfopinie2021_0017.pdf?openelement](http://www.nlfiscaal.nl/fiscanet/pf.nsf/files/03CAFD74460CDFE5C12586FE003152D0.pdf/$file/nlfopinie2021_0017.pdf?openelement).

tendency of legal education to raise uncritical professionals, it seeks to show that forming critical lawyers requires embracing a bold and comprehensive agenda on legal education as a public good which is too important to be confined within the limits of national law and practice.⁵⁰ Especially in times of crisis, the ability of students to engage meaningfully with law cannot be left to chance. The epistemic legitimacy of law as a discipline *and* the ability of legal education to provide societies with well-formed lawyers are poorly served by curricula which strictly separate ‘core’ disciplines and non-positivistic approaches or subjects. A methodologically open, inclusive integration of different ways of knowing the law and working with it offers the best chance for legal education – including its positivist component – to maintain its relevance in the decades to come. Let us all do better.

⁵⁰ In this respect, our diagnosis and recipes diverge starkly from Ortlep <https://www.njb.nl/blogs/kinderopvangtoeslagaffaire-ook-een-spiegel-voor-de-rechtenfaculteiten/> and, most recently, van den Brink & Ortlep, *Hoe leidt de kinderopvangtoeslagaffaire naar een maatschappelijk relevante en kritische rechtswetenschap?* *Ars Aequi* January 2022 p 58. The puzzles addressed, however, are very similar, which only goes to highlight the importance of continued engagement - with the relevant issues as well as with each other.