De opleiding van wetgevingsjuristen en wetgevingsonderzoekers in vergelijkend perspectief

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Vereniging voor wetgeving en wetgevingsbeleid

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Vereniging voor Wetgeving en Wetgevingsbeleid

De opleiding van wetgevingsjuristen en wetgevingsonderzoekers in vergelijkend perspectief

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Shocking news for legislatures and law schools: statutes are law

Prof.dr. E.L. Rubin[1]

The Western World's first political scientist, it is generally agreed, was John of Salisbury. The book that earned John his seminal position in political theory is *Policraticus*, written during the 1150's and dedicated to Thomas Beckett.[2] It presents a general and essentially secular theory of government, using the human body as a model. *Policraticus* is clearly seminal, its insights profound and its erudition impressive. But there is an oddity about the book that renders it a bit disorienting. Although John lived in the era that we now refer to as the High Middle Ages,[3] he makes little reference to this intense, eventful era and, indeed, seems almost oblivious to the political system that prevailed at the time. His basic description of government, with its references to a powerful, functioning Senate, governors of provinces, organized cadres of public officials and a standing army is applicable mainly to the Roman Empire. Medieval monarchies did not possess any of these features.

Harold Berman has suggested that John draws his examples from the past as a means of avoiding controversy or condemnation.[4] That is certainly a plausible hypothesis, but John was not a timid person, even though he was both scholarly and short.[5] Not only does he endorse tyrannicide in

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1 University Professor of Law and Political Science, Vanderbilt University.

2 John of Salisbury, Politicraticus (Cary Nederman, trans.) (Cambridge, Eng.: Cambridge Univ. press, 1990)

3 In fact, it was a time that has gained a rather specific cachet among Medieval historians as the "Twelfth Century Renaissance." See, e.g., Charles Homer Haskins, The Renaissance of the Twelfth Century (Cleveland: Meridian, 1957); Jacques Le Goff, The Birth of Europe (Malden, Mass.: Blackwell, 2005), pp. 75-81; Hans Liebeschutz, Medieval Humanism in the Life and Writings of John of Salisbury (London: Warburg Institute, 1950); D.E. Luscombe & G.R. Evans, The Twelfth Century Renaissance, in J. H. Burns, ed., The Cambridge History of Medieval Political Thought c. 350-c.1450 (Cambridge, Eng.: Cambridge Univ., 1988), p. 306.

4 Harold Berman, Law and Revolution (Cambridge, Mass: Harvard Univ. 1983), p 282-83; See also Luscombe & Evans, supra note [3], pp. 325-29.

5 There are no surviving descriptions of John, but he called himself Johannes Parvus, or John the Short.

Policraticus,[6] but the book as a whole is filled with moral condemnations of various political practices that could readily have taken been taken amiss.[7] Moreover, he ends his book with a ringing condemnation of Church politics and some negative descriptions of King Henry that come close to calling him a tyrant.[8] A deeper explanation for John's inattention to the present lies in the general inclination to seek authority to support one's argument. Scholars tend to rely on the work of predecessors as authorities, and those predecessors necessarily lived in the past. John himself is credited with introducing the image of the contemporary scholar standing on the shoulders of giants.[9] In addition, the past possesses an alluring charm for many scholars. To turn away from one's own times, replete as they are with declamations by people one dislikes and grinding problems that no one seems capable of solving, and immerse oneself in some intriguing prior era is, for many scholars, like going on vacation.[10]

Thus, to whatever timidity John felt in writing about his own time, a feeling that is likely to be weaker in the modern Western World, we can add the desire for authority and the yearnings of nostalgia, two inclinations that are likely to be just as powerful today. There is, however, one more explanation for John's inattention to the present that runs deeper still. This involves his conceptual framework, his way of looking at the world.[11]

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[6] A position that was partially implemented a short time later by Magna Carta. A.E. Dick Howard, Magna Carta: Text and Commentary, rev. ed. (Charlottesville, Va.: Univ. of Virginia, 1998). See J.C. Holt, The Magna Carta, 2nd ed. (Cambridge, Eng.: Cambridge Univ., 1992).

[7] Despite its originality, John's book thus belongs to the Medieval "mirror of the princes" genre, that is, moralistic accounts that attempt to hold up a mirror to the ruler. See Jean Dubabin, Government, in Burns, supra note [3], p. 470, 483-85; Liebeschutz, supra note [3], pp. 38-44; Quentin Skinner, The Foundations of Modern Political Thought, vol. 1: The Renaissance (New York: Cambridge Univ., 1978), pp. 33-35, 46-48.

[8] John of Salisbury, supra note [2], pp. 215. See id., p. 230: "[H]e terrorizes not only Provencal all the way to the Rhone and the Alps but he has also aroused fear in the princes of the Spanish and the French (as though he was presently threatening the whole world). . ."

[9] John of Salisbury, Metalogicon (Daniel McGary, trans.) (Berkeley, Cal.: Univ. of California, 1955), p. 136. John attributes the phrase to Bernard of Chartres, but he clearly agreed with it. Significantly, the full quote is that a modern scholar is like a dwarf standing on the shoulders of giants. See R.W. Southern, The Making of the Middle Ages (New Haven, Conn.: Yale Univ., 1953), p. 203.

[10] See Connie Willis, The Doomsday Book (New York: Bantam, 1992), where the Oxford Department of Mediaeval Studies sends a researcher back to the fourteenth century in a time machine.

[11] On the centrality of this factor, see, e.g., Peter Berger & Thomas Luckmann, The Social Construction of Reality: A Treatise in the Sociology of Knowledge (New York: Random

The modes of analysis that were available to him, the understandings of government, politics and social structure that he inherited from prior authors, may have rendered him incapable of perceiving the political situation that surrounded him in the analytic, systematic way that scholarship requires. Contemporary times may have simply passed through him, like the flux of neutrinos that constantly passes through our bodies without our being aware of them in any way. In other words, he was willing to write about his own times, and he thought he was doing so, but the realities of contemporary politics were conceptually invisible to him.

Although the disconnect between his book and his era may not have been evident to John, it is easy enough for us to perceive as we look back across a span of eight and a half centuries. What is more difficult is to perceive similar gaps in our own work. We are often aware of our desire to rely on authority and our feelings of nostalgia for the past, but conceptual invisibility operates beyond the reach of conscious thought because it controls the framework within which that thought occurs. The topics we define, the terms we use, and the analytic approach that shapes our efforts often come from the past; we believe we have adapted them to describe our present situation, but in fact they embed the status of society that prevailed at the time they developed. We fully intend to write about our own times; we direct our work to contemporary figures and address them, even sermonize them, about the proper way to deal with contemporary problems. But much of this work is shaped by issues and situations that no longer exist, and are preserved by our desire for authority, our nostalgia for the past, and, most of all, the conceptual invisibility of modern times.[12]

There is probably no field, at least in the Anglo-American world, where this problem is more severe than in the study of law. The fact is, our way of thinking about our legal system, and consequently the way we educate law students who will go on to play so many crucial roles in managing this system, reflect a mode of thought as outmoded as John's. Like John, we rely on a model of law that prevailed in an earlier era, and era separated from us by changes as dramatic as the collapse of Roman rule and the rise

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House, 1966); Nelson Goodman, Ways of Worldmaking (Indianapolis: Hackett, 1978); Peter Winch, The Idea of a Social Science and its Relation to Philosophy, 2nd ed. (London: Routledge, 1990).

12 See Edward Rubin, Beyond Camelot: Rethinking Politics and Law for the Modern State (Princeton, N.J.: Princeton Univ., 2005).

of feudalism. In our case, those changes are the advent of representative democracy and the administrative state, which occurred, very roughly, at the end of the eighteenth century.[13] No one denies that these exist and define our system, just as John would not have denied the existence of hereditary monarchs and the feudal system. But when we write about law, we still place ourselves in a prior world. In the future, people will look back on contemporary legal scholarship and education and perceive the disjunction between what prevails and what we describe. They will wonder at the motivation for this odd situation, and perhaps ascribe it to a timidity we would deny, a reliance on authority that we might reluctantly concede, a nostalgia for the past that we might abashedly admit and the conceptual invisibility of the present that we simply accept at an unconscious level.

We are not exactly in John's situation, however; we are not the modern world's first generation of legal scholars by any means, and if we display much of John's inattention to the present, we may nonetheless be able to become more conscious of our situation, as his successors such as Marsilius of Padua, Dante and Machiavelli managed to do.[14] Modern legal scholarship has recently begun to free itself from past authority and ongoing nostalgia, and to make visible the new and somewhat disconcerting reality that surrounds us.[15] This essay draws upon that scholarship. It argues

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13 For the timing of these events, see id., pp. 29-36.

14 Dante Alighieri, Monarchy (Prue Shaw, trans.) (Cambridge, Eng.: Cambridge Univ., 1996); Marsilius of Padua (Annabel Brett, trans.) (Cambridge, Eng.: Cambridge Univ., 2005); Niccolo Machiavelli, The Prince (Luigi Ricci, trans.) (New York: Mentor, 1952).

15 Specifically with regard to administrative agencies, and the regulatory process. The classic work is Max Weber, Bureaucracy, in Max Weber, Economy and Society (Guenther Roth & Claus Wittich, eds.) (Berkeley, Cal: Univ. of California, 1978), pp. 956-1003. On organizational structure, see, e.g, Peter Blau, Bureaucracy in Modern Society (New York: Random House, 1956); Walter Powell & Paul DiMaggio, eds., The New Institutionalism in Organizational Analysis (Chicago: Univ. of Chicago, 1991); Philip Selznick, TVA and the Grass Roots (Berkeley, Cal.: Univ. of California, 1949); on policy making, see, e.g., Michael Barzelay, The New Public Management: Improving Research and Policy Dialogue (Berkeley, Cal.: Univ. of California, 2001); John Friedman, Planning in the Public Domain: From Knowledge to Action (Princeton, N.J.: Princeton Univ., 1987); Steven Kelman, Making Public Policy: A Hopeful View of American Government (New York: Basic Books, 1988); on implementation, see,e.g., Ian Ayres & John Braithwaite, Responsive Regulation: Transcending the Deregulation Debate (New York: Oxford Univ., 1992); Eugene Bardach, The Implementation Game: What Happens After a Bill Becomes a Law (Cambridge, Mass.: MIT Press, 1977); Eugene Bardach & Robert Kagan, Going By the Book: The Problem of Regulatory Unreasonableness (New Brunswick, N.J.: Transaction, 2002).

that our basic analysis of law refers to a political and legal system that no longer exists (Part I), that a new concept of law is required (Part II) and that this new concept requires a new approach to legal education, specifically to the often-stated aspiration of teaching our students to "think like a lawyer" (Part III).

I. The Concept of Law and the Conceptual Invisibility of Administration[16]

The *Concept of Law* is the title of a book by H.L.A. Hart, often regarded as the most influential work of Anglo-American jurisprudence in the last half of the twentieth century.[17] It responds to Hart's fellow positivist Hans Kelsen, often regarded as the most influential figure in Continental jurisprudence of the entire twentieth century, and explicitly claims to modernize Kelsen's approach.[18] According to Kelsen, law consists of commands of the sovereign that are backed by sanctions, and nothing more. Hart argues that law does not simply establish a set of sanctions, or disadvantages for behaving in a way that the sovereign finds undesirable. Rather, it establishes norms that citizens are expected to follow; in other words, it consists of a set of rules that tell citizens how to behave. Hart agrees with Kelsen that law is exclusively a positive enactment of the state, and need not conform to any unenacted principles of morality. But he further alters this positivist position by pointing out that it need not be enacted by the sovereign, but rather can be enacted by subsidiary authorities, such as administrative agencies, that the common law is in fact a delegation of law making authority to the courts, and that all modern legal systems confer law making ability on private persons. Hart describes these so-called power-conferring rules as secondary, and contrasts them with the primary rules that state the actual behaviors that those subject to

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16 This section largely restates my argument in two previous publications: Rubin, supra note [12]; Edward Rubin, Law and Legislation in the Administrative State, Columbia Law Review 89:369 (1989).

17 H.L.A. Hart, The Concept of Law (Oxford, Eng.: Clarendon, 1961).

18 His leading works are Hans Kelsen, General Theory of Law and the State (Anders Welberg, trans.) (Cambridge, Mass.: Harvard Univ., 1946); Hans Kelsen, Pure Theory of Law (Max Knight, trans.) (Berkeley: Univ. of California, 1978). See also John Austin, The Province of Jurisprudence Determined (Wilfrid Rumble, ed.) (New York: Cambridge Univ., 1995), which Kelsen follows.

the rule are expected to follow. [19]

Hart's positivism was in turn challenged by Lon Fuller, who argued that there is an inherent morality to law.[20] It is not a substantive morality that requires the enacted provisions to conform to a higher moral standard, as St. Thomas argued,[21] but rather a procedural morality that requires an enactment to possess certain structural features. Fuller identifies eight such features: generality – a law must be stated as generally applicable rules; promulgation – a law must be made readily available to citizens; clarity – a law must state rules that are sufficiently comprehensible to be followed; non-contradiction – a law must not give an order that requires violation of another law; non-impossibility – a law must not require an action that the subject is incapable of performing; non-retroactivity – a law must not impose punishment for past actions that were legal at the time; constancy – laws must not change with excessive frequency; and congruence – a law must be stated in such a way that its application bears a reasonable resemblance to its stated form. If an enactment violates one of these principles, Fuller argues, then it is simply not something that we recognize as law. Fuller concedes that not all statutes enacted by a modern legislature fit his definition of law, and gives as an example a statute declaring the chickadee to be the official bird of Massachusetts.[22] But he asserts that his principles apply to any "system for subjecting human conduct to the governance of rules."[23]

Hart and Fuller engaged in a famous debate based on their divergent positions,[24] one that attracted widespread attention from legal scholars;[25]

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[19] It is not clear why Hart thought that Kelsen had failed to achieve these insights.

[20] Lon Fuller, The Morality of Law, rev. ed. (New Haven, Conn.: Yale Univ., 1969).

[21] St. Thomas Aquinas, Summa Theologica (Fathers of the English Dominican Province, trans.) (Notre Dame, Ind.: Christian Classics, 1948), pp. 1008-22 (I-II QQ. 94-96); p. 1359-60 (II-II Q. 42).

[22] Fuller, supra note [20], pp. 91-92.

[23] Id., p. 46. See id., pp. 38-44.

[24] Id., p. 187 ("A Reply to Critics"); Lon Fuller, Positivism and Fidelity to Law – A Response to Professor Hart, Harvard Law Review 71:630 (1958); H.L.A. Hart, The Morality of Law, Harvard Law Review 78:1281 (1965) (book review); H.L.A. Hart, Positivism and the Separation of Law and Morals, Harvard Law Review 71:593 (1958).

[25] Bernard Bell, "No Motor Vehicles in the Park": Reviving the Hart-Fuller Debate, Journal of Legal Education 48:88 (1998); Ronald Dworkin, Hart's Postscript and the Character of Political Philosophy, Oxford Journal of Legal Studies 24:1 (2004); Joseph Mendola, Hart, Fuller, Dworkin and Fragile Norms, SMU Law Review 52:111 (1999). The debate was recently the subject of a symposium in the New York University Law Review,

Nicola Lacey, writing in 2008, noted "the remarkable fact that it still speaks to us so powerfully today.[26] That may be the case, but the Hart-Fuller debate does not speak to us today about today's legal system because it is not about that legal system; what Hart and Fuller are discussing are the legal system that existed several centuries ago, before the advent of the administrative state. When applied to our contemporary legal system, every general statement they make about the law is false, not false by some process of complex reasoning that one needs legal or philosophic training to understand, but false in an obvious way that is apparent to anyone who has had any exposure to modern government. This is not because they did not want to talk about the contemporary legal system – they obviously thought they were – but because that system was conceptually invisible to them.

To begin with the most obvious example, consider public benefits programs. The modern administrative state provides a wide variety of benefits to people: poverty relief, old age pensions, veterans' benefits, disability payments, unemployment compensation, subsidized health care, subsidized housing and many others. These payments comprise a major part of every modern national budget. They are almost always authorized by statute, that is, by law, but their purpose is not one of "subjecting human conduct to the governance of rules." To be sure, there are rules governing the conduct of people who receive the benefit; they are supposed to tell the truth when applying, use the benefit for its intended purpose and so forth, but the purpose of the benefit is rarely to induce compliance with such rules. It would be strange, for example, to say that a benefits program is a means of inducing truthful behavior in the general populace; most people, including the legislators who established the benefit, would say that truthful behavior is a means of ensuring that the benefit goes to its intended recipients. It would be even stranger to say that the benefit is designed to encourage people to engage in the behavior that makes them eligible. A modern state does not give benefits to blind people because it wants people to go blind, or indeed because it wants blind people to

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which included Nicola Lacey, Philosophy, Political Morality and History: Explaining the Enduring Resonance of the Hart-Fuller Debate, 83:1059 (2008); Jeremy Waldron, Positivism and Legality: Hart's Equivocal Response to Fuller, 83:1135 (2008); Benjamin Zipursky, Practical Positivism Versus Practical Perfectionism: The Hart-Fuller Debate at Fifty, 83:1170 (2008).

[26] Lacey, supra note [25], p. 1059.

engage in any particular behavior at all. It establishes this benefit because it wants these people to have a decent life despite their disability. A person who does not engage in the expected behavior for a good reason – someone, for example who declines to apply for the benefit because she is independently wealthy – would be the subject of admiration, not condemnation.

Next, consider the enormous number of institutions that modern states establish. They include schools, universities, libraries, museums, parks, research stations, playgrounds, airports, train lines, metros, bus lines, hospitals, clinics, and fire departments. Again, they are almost always created by law, and always constitute a large part of a modern governmental budget. But it is only by toying with language that most of these institutions can be described as subjecting human conduct to rules. Their purpose is to provide a service, usually in response to already existing attitudes that the government wants to satisfy, not sanction, such as people's desire to experience nature, get exercise,travel, be healthy or protect their property. It is true that virtually all these institutions impose rules of conduct on the people who use them, but the purpose of these rules is to enable the institution to serve its intended purpose, not to induce particular behaviors. Governments do not build airports so that they can compel people to behave in an orderly manner; they build them so that people can travel by air, and they establish rules of conduct in airports so that the facility can serve that purpose. That is not to say that institutions are never designed to subject human conduct to rules. Public schools are in fact intended to teach children how to behave when they become adults, and prisons are expected to rehabilitate criminals so that they can function in civil society. But even in these cases, the overlap with Hart's and Fuller's basic definition of law is only partial. The primary purpose of public schools is to provide children with knowledge and skills, something they – or at least their parents – desire in the first place, while prisons are not only designed to rehabilitate, but also to deter, incapacitate and deliver just desserts.

Statutes that confer benefits and create institutions not only fail to meet Hart's and Fuller's standard of subjecting human conduct to rules, but they also fail to fit the requirements that either author establishes for valid law. They simply cannot be described as establishing norms that citizens are expected to follow, as Hart articulates; any norms of conduct they

establish are secondary to quite different purposes. Similarly they need not, and often do not, comply with Fuller's rules regarding the inherent morality of law. The creation of institutions typically violates his principle of generality; there is nothing wrong with a law creating an engineering school in Factoryville, and nowhere else, or specifically setting aside Elysian Fields as a national park. Neither of these laws needs to be readily available to citizens; they will find out about the engineering school when it starts recruiting students, and the legislature may want to avoid publicizing the new park if its purpose is to protect the endangered Heffalumps that live there. Benefits programs may well be revised on a regular basis and can certainly be retroactive; why not decide to pay people for the prescription drugs they have been taking for the past three years as well as the ones that they will take for the 30 years to follow? In other cases, following Fuller's principles would be good practice, but hardly a moral imperative. Suppose the government violates his principle of contradiction by taxing illegal drug sales or his principle of impossibility by offering a monetary award for construction of a perpetual motion machine? Viewed in the context of institution creation and benefits, Fuller's principles may often avoid governmental silliness, but they do not define law, nor do they necessarily rise to the level of morality.

The reason why Hart and Fuller can claim to be stating general principles of law when these principles clearly and obviously do not apply to important types of laws like benefits distribution or institution creation is that they are writing about law as it existed in the past, before the advent of the administrative state. Pre-modern European governments typically did not carry out functions of this kind, but rather left them to private institutions, specifically the local nobility and the Church. Their primary concern was in establishing civil order, suppressing separatism by the higher nobility, ensuring that the developing cities functioned under royal charters, and, in general, forging their juridical domains into a functioning nation state. In the present, administrative era, these issues have been generally resolved. There are occasional separatist crises in Western nations – the American Civil War, the Parti Québécois in Canada during the last several decades, the current dissension in Belgium –but under ordinary circumstances, the mechanisms of representative government and public administration are sufficient to maintain high levels of unity and order. Modern governments are concerned with managing the economic

and social systems, modifying the rigors of industrialism and mass society, replacing the private institutions that declined or disappeared as a result of modern secularism and urbanization, and advancing the welfare of the people through affirmative governmental programs. Everyone knows this, but it is often conceptually invisible to scholars writing about the concept of law. Having inherited the intellectual framework of the prior era, they continue to work within that framework and remain as oblivious as was John of Salisbury to the world that surrounds them.

But the disconnect between legal theory and modern law is still more extensive than the previous examples indicate; it applies not only to those laws that confer benefits and create institutions, but to virtually all laws enacted in a modern state. Hart and Fuller both place great emphasis on the law's relationship to citizens. Both define law as establishing rules of conduct for citizen behavior; Hart further specifies that these rules establish norms for citizens, rather than merely threatening sanctions, while Fuller's inherent moral principles all refer to the effect of law on citizens – they should be informed of the law, they should not be asked to do something impossible, they should not be punished for acts that were lawful at the time they were done. This in fact the way law worked in the pre-modern world. The primary method by which the law was applied to citizens was through the courts, which were required to regard statutory law as authoritative and complete, although of course subject to interpretation. Judicial application of the law occurred when one citizen, or sometimes the government itself, brought a legal action, civil or criminal, against another citizen, claiming that the second citizen had violated that law, and the court then decided the dispute.[27] In this system, the laws were essentially addressed to citizens, telling them what standards of behavior were required and which of their actions were prohibited. It was only on this basis that citizens could enforce the law by initiating suits, and only on this basis that it seemed fair to make them subject to such suits.

In a modern administrative state, the primary enforcement mechanism is the administrative agency, a hierarchically organized staff of credentialed

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[27] Prior to the eighteenth century, criminal prosecutions in England were generally brought by private parties. See John Langbein, The Origins of Adversary Criminal Trial (Oxford, Eng.: Oxford Univ., 2003). Public prosecutions were based on the private model, that is, the crime was being prosecuted by the Crown because it was regarded as a personal offense against the monarch.

specialists, often numbering in the tens of thousands.[28] Agencies regard statutory law as authoritative, just as courts do, but they do not regard it as complete. Rather, they are generally given the authority to elaborate the statute by enacting their own rules, which are, in effect subsidiary statutes.[29] They rarely rely on courts and private litigants to enforce either their authorizing statute or the subsidiary rules that they enact. Rather, they initiate a wide range of implementation strategies, including reporting requirements, inspections, specific demands for information, cease and desist orders, and contingent penalties. In addition, they have a wide range of informal mechanisms, including advice, guidance, cajolery, negotiation, threat, conciliation and petulance. A court's relationship with those against whom a law is being enforced is strictly limited to a small number of highly structured interactions; the agency's relationship with regulated parties, in contrast, is fluid, partially unstructured and often continuous.

As a result of these differences, legislatures in the modern world have an option that was denied to their pre-modern predecessors. I have previously described this option in terms of the distinction between transitive and intransitive legislation.[30] A transitive statute is one that states the actual rules that those subject to the statute are expected to follow. It can be described as transitive because it passes through the enforcement mechanism and speaks directly to the subject. Hart describes this process correctly; such statutes do not simply tell the enforcement mechanism to impose a sanction but pass through that mechanism and tell citizens what behavior is expected of them. But in making this point, he has only succeeded in describing the pre-modern state, where the primary enforcement mechanism consisted of courts. Because of their limited staffing, formal procedures, and reliance on private litigants, courts can only implement transitive laws. But a modern state includes administrative agencies. Consequently, the legislature has the option of drafting statutes that do not specify the rules that their subjects are expected to follow. Instead, it can delegate authority to the agency to specify these rules and devise the means for their enforcement. Such statutes can be described as

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28 The classic definition of an administrative agency is Weber, supra note [15],pp. 956-1005. Weber uses the term "bureaucracy," which will be avoided here due to its pejorative connotations.

29 For general descriptions in the American context, see Kelman, supra note 15; Jeffrey Lubbers, A Guide to Federal Agency Rulemaking, 4th ed. (Chicago: ABA, 2006).

30 Rubin, supra note 16, pp. 380-85.

intransitive because they do not pass through the administrative agency, which is the enforcement mechanism in this case. Rather, they give the agency one set of instructions and the agency, acting on those instructions, then implements the law by issuing a different set of instructions of various kinds to the general public. Those instructions include law-like rules, together with the whole range of other techniques that the agency has at its disposal. In short, with intransitive legislation, the legislature grants the agency the authority to make rules, rather than making rules itself.

Unlike pre-modern statutes, which are inevitably transitive, modern statutes exhibit wide variation along this dimension. Some are as fully transitive as pre-modern statutes; for a variety of reasons, the legislature may decide to draft the actual rules that those subject to the statute are expected to follow. But most modern statutes are at least partially intransitive and some are intransitive in their entirety. Consider for example the Federal Communications Act of 1933, which creates an agency and then instructs that agency, the Federal Communications Commission (FCC) to develop and implement rules to regulate commercial broadcasting.[31] The only guideline provided by the statute is that the FCC must act in accordance with “public convenience and necessity.” These terms are meaningless; they were borrowed from statutes regulating public transportation. Commercial radio broadcasting is almost entirely used for entertainment purposes, which is by definition not a necessity, and is only convenient when compared to other equally unnecessary entertainment, such as going to a vaudeville theater. The statute is entirely intransitive; it does not specify any operative rules. What it really says is: “The FCC is hereby created and given authority to regulate commercial broadcasting in whatever way it decides to do so.”

The reasons modern legislatures enact intransitive statues are familiar.[32]

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31 Communications Act of 1934, Pub. L. No. 416 (1934), ch. 652, 48 Stat. 1064, codified as amended at 47 U.S.C. Sec. 151 et seq. (2010).

32 See Jerry Mashaw, Greed, Chaos and Governance: Using Public Choice to Improve Public Law (New Haven, Conn.: Yale Univ., 1999), pp. 146-55; Rubin, supra note [16], pp. 387-97; Peter Schuck, Delegation and Democracy: Comments on David Schoenbrod, Cardozo Law Review 20:775 (1999). See also Lisa Bressman, Schechter Poutry at the Millennium: A Delegation Doctrine for the Administrative State, Yale Law Journal 109:1399 (2000), which argues that the delegation doctrine should be read as a constraint on administrative agencies, rather than a constraint on legislation. That is, if the legislature chooses to delegate broadly, the agency is obligated to enact regulations that channel and constrain its authority. As Bressman argues, this is a

First, and most obviously, no legislature could possibly have the time to draft all the rules that it wants to apply. In order to serve its representative function, the legislature must be small enough to deliberate, or, to put this point in other terms, small enough so that it does not need to be organized in the hierarchical structure of an administrative agency. But the tasks of modern government – tasks demanded of it by the majority of voters who need protection from industrial society and can no longer rely on village or religious institutions – are so extensive that a deliberative body could not conceivably fulfill them if it was required to enact only transitive statutes. Second, no legislature could possibly possess the expertise necessary to draft such statutory rules. Modern legislators must be generalists, people who stand for election in their districts in order to represent their constituents' views about all issues of concern, from foreign relations to national defense to social welfare to environmental protection. But industrial society is complex and technologically advanced; only specialists possess the knowledge to draft effective rules for regulating nuclear power plants, prescription drugs, bio-engineered crops, high rise residential buildings, and so forth. These specialists must be appointed. Citizens could not possibly inform themselves, evaluate and vote for a specialist in each of the many areas of knowledge that are involved in modern governance. Third, and certainly not finally, legislatures are often required to act before the most effective way to do so has become apparent. Governance is too complex a task to be carried out abstractly and in advance; it generally requires experience, experience that can only be acquired through intensive interaction with the regulated parties over an extended period of time. For all these reasons, and others, modern legislatures necessarily rely on high levels of intransitivity in drafting statutes. Their reliance has spawned the large, hierarchical and technically specialized agencies that characterize the administrative state; conversely, the existence of these agencies, and the expertise they have acquired, induces the legislature to rely on them.

Several legal scholars, taking note of the importance and ubiquity of intransitive statutes, have argued that they are unconstitutional. The argument generally relies on the idea that the legislature has delegated excessive authority, or sometimes "its own authority," to an administrative

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modern formulation of the delegation doctrine because it monitors the institution that is ultimately responsible for imposing government authority on the populace.

agency.[33] No American court has ever struck down a federal statute on this ground, however.[34] A more substantial argument is that extensive delegation is irresponsible or ill-advised; this generally invokes the rule of law, and declares that the legislature is failing to fulfill its assigned function by enacting transitive statutes and, more specifically, that such statutes are not “law.” Two of the post-War era’s best known political science books, Frederick Hayek’s *The Road to Serfdom* and Theodore Lowi’s *The End of Liberalism*, base their arguments on this assertion.[35] They are correct, of course, if we define law as the sorts of statutes that were enacted in the pre-administrative “era”.The question, of course, is why anyone would chose to define such a basic term in such an antiquarian, outmoded manner. To be sure, that is what the term law originally meant, but it seems odd to treat pre-modern definitions like endangered species. We might just as well define “element” as air, earth, fire and water,” or “whale” as a very large fish. But just as we have changed the definitions of these terms to reflect modern scientific knowledge, so it would be advisable to change the definition of “law” to reflect modern political practice.

It is possible that these authors are entirely sincere about the dangers of intransitive regulation, which are certainly not insignificant. But it seems more likely that they dislike modern regulatory governance and are attempting to reduce or eliminate it by advancing constitutional or

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[33] See e.g, Larry Alexander & Saikrishna Prakash, Reports of the Nondelegation Doctrine’s Death are Greatly Exaggerated, University of Chicago Law Review 70: 1297 (2003); Gary Lawson, Discretion as Delegation: The “Proper” Understanding of the Nondelegation Doctrine, George Washington Law Review, 73:235 (2005); Gary Lawson, Delegation and Original Meaning, Virginia Law Review, 88:327 (2002); John Manning, The Nondelegation Doctrine as a Canon of Avoidance, Supreme Court Review 2000: 323 (2000); Michael Rappaport, The Selective Nondelegation Doctrine and the Line Item Veto: A New Approach to the Nondelegation Doctrine and Its Implications for Clinton v. City of New York, Tulane Law Review 76: 265 (2001); David Schoenbrod, Power Without Responsibility: How Congress Abuses the People through Delegation (New Haven, Conn.: Yale Univ., 1995).

[34] In A.L.A. Schechter Poultry v. U.S., 295 U.S. 495 (1935), the Supreme Court held Franklin Roosevelt’s National Industrial Recovery Act unconstitutional on grounds of excessive delegation, but the problem that the Court perceived with the Act was delegation to private parties, not to an administrative agency. Another factor that contributed to the decision was the accession of Adolph Hitler, which gave Fascism, and its corporatist approach that the Act reflected, a bad name.

[35] F.A. Hayek, The Road to Serfdom (Chicago: Univ. of Chicago, 1944); Theodore Lowi, The End of Liberalism: The Second Republic of the United States, 2nd ed. (New York: W.W. Norton, 1979).

normative arguments against delegation. They certainly recognize the existence of modern, intransitive legislation but they want to deny it the status of law. The point of this claim, of course, is to de-legitimize it, to discourage legislatures from relying on it. It is, of course, impossible to eliminate intransitive legislation except in the post-apocalyptic world of science fiction.[36] For reasons stated above, this legislation is essential to the operation of an administrative state. The only way to eliminate it, or even reduce it in any significant way, is to seriously retrench, if not eliminate the administrative state itself. That will not happen, of course, not only because bureaucratic governance is relatively efficient and thus "escape-proof," as Weber argues,[37] but more importantly because modern electorates demand that their representatives enact such legislation. Although not every administrative state that has developed in the modern era is a representative democracy, every representative democracy has established, or more correctly, evolved together with, administrative governance. The demand that a representative legislature should take more responsibility for drafting rules, that is, enact only transitive legislation, is self-contradictory. The only rationale for such a demand is that the legislature is authorized to act by the electorate, but every modern legislature, in carrying out its authorization, has chosen to enact enormous amounts of intransitive legislation and every modern electorate has continuously, often insistently approved these enactments.

Jurisprudential writers such as Fuller and Hart, who are motivated by the desire to understand law, rather than by the desire to decrease regulation, have taken a different approach. They simply ignore regulatory law by defining law as rules for regulating human conduct. Instead of declaring that intransitive legislation is not law, they define law in way that makes such legislation conceptually invisible. Their motivation, it would seem, is to understand law, but their conceptual framework is so conditioned by pre-modern concepts that they simply do not perceive modern regulatory legislation – legislation that distributes benefits, creates institutions, or

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36 This branch of science fiction, while generally portraying post-apocalypse society in negative terms, generates a sense of adventure and romance by positing the elimination of the administrative state. See, e.g, David Brin, The Postman (New York: Bantam, 1985); Walter Miller, A Canticle for Leibowitz (Philadelphia: Lippincott, 1959); George Stewart, Earth Abides (New York: Modern Library, 1949); John Wyndham, The Day of the Triffids (Garden City, N.Y.: Doubleday, 1951);

37 Weber, supra note [15], pp. 1399-1403.

regulates conduct by intransitive authorizations – as belonging in the category they are attempting to describe. Like John of Salisbury, they are living in the midst of an intense, eventful era, perhaps an era to which future generations will look back at with nostalgia, but their gaze is fixed on a previous era, and their theories are framed primarily with that previous era in mind.

Another way of expressing the same point is to observe that Hart, Fuller and many other jurisprudential writers treat criminal law as the modal or characteristic form of law and tend to draw both their examples and their theories from that source. Hart's and Fuller's basic definition of law as"subjecting human conduct to the governance of rules" is most directly applicable to criminal law. The same is true for Hart's specific claim that law establishes norms of conduct. Many economists would argue, for example, that the civil law of contracts and torts is not designed to establish norms but to achieve efficiency by internalizing costs. If someone will lose money by performing a contract, for example, many economists argue that the efficient, and hence preferable solution is to breach the contract and pay damages.[38] Fuller's eight principles are not intrinsic to all forms of law, but rather are the principles of fairness that we demand in the criminal law context. He comes close to conceding this point when he limits his principle of retroactivity to punishment. If he were truly expounding a general theory of law, there would be no reason for such a limitation, and Fuller offers no justification for imposing it in this particular case but not in any of the others. The only reason he does so is that this principle is obviously wrong with respect to the pre-modern civil law that is conceptually visible to Fuller, whereas the other principles are only obviously wrong when one considers the regulatory law that Fuller fails to perceive.

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[38] See, e.g., Robert Cooter & Thomas Ulen, Law and Economics, 6th ed. (Upper Saddle River, N.J.: Prentice-Hall, 2011); Melvin Eisenberg, Actual and Virtual Specific Performance, the Theory of Efficient Breach, and the Indifference Principle in Contract Law, California Law Review 93:975 (2005); Charles Goetz and Robert Scott, Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach, Columbia Law Review 77:554 (1977); Fred McChesney, Tortious Interference with Contract versus "Efficient" Breach: Theory and Empirical Evidence, Journal of Legal Studies 28:131 (1999); Richard Posner, Economic Analysis of Law, 7th ed. (Austin, Tex.: Wolters-Kluwer, 2007); John Simpson & Abraham Wicklegren, Naked Exclusion, Efficient Breach, and Downstream Competition, American Economic Review 97:1305 (2007).

The problem, of course, is that criminal law is the legal system's most traditional field – the most adversarial, the most formal, and the one where the demand for fairness to individuals is at its most insistent. It may not be accurate to generalize its features even to other traditional, court enforced areas of law, such as the law of contracts and torts. It is certainly not accurate to generalize it to the bulk of the modern legal system, which includes economic and social regulation as well as benefits distribution and the creation of institutions. In fact, for a modern regulatory state, the generalization process operates in reverse. Criminal cases were often brought by private parties in the pre-modern era, particularly in England, there were relatively few public police forces, and criminals were executed, mutilated, enslaved or transported, none of which required continuing government involvement. The creation of a government agency, the public prosecutor's office, to represent the government in criminal cases, plus the creation of extensive, hierarchically organized police forces and prison systems, has transformed modern criminal law into a largely administrative enterprise. The major issues involve policing and correctional practices, not the substantive definition of crimes or the procedural rules for obtaining convictions. These issues are administrative;they involve the same kinds of questions about resource allocation, institutional organization and complex authority structures that dominate other areas of administrative law. Moreover, the vast majority of criminal cases – well over 95%-- are resolved by plea agreements, at least in the U.S. To be sure, prosecutors are generally denied the kind of substantive rulemaking authority granted to other administrative agencies, but the shift to plea agreements grants them de facto what they are denied de jure. The internal, informal rules of the prosecutor's office – do we charge drug users, do we seek maximum penalties in child abuse cases, do we reduce the charges when we get cooperation –determine the way the criminal laws actually operate. In other words, not only do prevailing jurisprudential theories of law ignore the administrative laws that have become so prevalent in modern governance, but they also fail to describe the one area of law to which they are directed because that area of law has become administrative as well.

II. How the Conceptual Invisibility of Regulation Hurts the Law

It may seem that the tendency of jurisprudential discussions to focus, as John of Salisbury did, on the legal system of a prior era, and the conceptual invisibility of our current legal system in those discussions, is merely an academic or scholarly matter. It is not. While only academics debate the meaning of law, the concept of law that their work defines and reflects has powerful effects on our entire society. To begin with, it affects the way we design and draft legislation. Most modern legislation is in fact regulatory law, but the way that it is structured and written reflects the continued influence of pre-modern concepts. In other words, we are drafting modern statutes in pre-modern form, much as the first automobiles looked like horse drawn carriages. But as automotive engineers have discovered, it is not efficient or advisable to base the design a vehicle that goes sixty miles an hour on the design of one that never went more than fifteen or twenty. The same is true for legislation.

Modern legislation is not a set of rules for the control of human conduct. Rather, it is a mechanism for defining, and partially implementing, social policy. A modern national legislature is typically the supreme policy maker of its nation, defining its nation's basic goals and strategies. It serves this role for two related reasons: first, because it composed of the people's representatives, and second because the people, through prior representatives, have established an administrative state. In other words, the dual phenomena of representative democracy and administrative governance confer the role of prime policy maker on the national legislature. Of course, policy is often initiated by the chief executive, who is also the people's representative and also part of the administrative state. But in all Western democracies, the chief executive's proposals, including the design and language of the statute, must be approved by the legislature. While there is no theoretical reason why a representative democracy could not distribute these tasks differently, the following discussion will focus on the situation as it actually exists. In any case, a different arrangement would not change the analysis in any significant way.

Another institutional complexity in modern government is that legislatures exist at different levels. In addition to the national legislature, virtually every Western democracy possesses regional and local legislatures that make policy for their state, province or department, and their city, town or

village. Conversely, the European Union now possesses a legislature that makes some of the policy for the nation states that constitute the Union. Whether the national legislature remains the supreme policy maker for the nation once these other legislatures are taken into account depends on the nation state's internal organization on the one hand, and on European Union law on the other. The idea of the legislature as supreme policy maker must be modified, therefore, by specifying the subject matter of the legislature's jurisdiction, as well as its geographic area. That is, within a single geographic area, or overlapping geographic areas, one legislature may be the supreme policy maker regarding one set of substantive issues, while another may play that role regarding different issues.[39] Again, these arrangements do not change the analysis of modern legislation in any significant way.

The policies that the legislature enacts, either by itself or in conjunction with other legislatures, include the entire range of functions that a modern administrative state carries out.They do indeed establish rules for human conduct, but they also involve the distribution of benefits, the creation of institutions, the allocation of resources, the design of government agencies (Hart's secondary rules) and a variety of other functions. In other words, they involve all the tasks that must be performed to manage the economic and social system of a contemporary industrial state. Once policy is established, it must be implemented, that is, translated from a declaration of intention to a set of operational instructions that either state agents or private parties are expected to follow. Typically, these implementation functions are carried out by the administrative apparatus, the various government agencies that constitute the defining structural feature of an administrative state.The boundary between the two functions of policy making and implementation is vague, complex and controversial. There are, for example, legal limits on the legislature's ability to implement its policies by imposing detriments on specific individuals, and other legal limits on the ability of administrative agencies to declare policy in certain areas, such as fiscal appropriations and the imposition of

[39] For my views on this subject, see Malcolm Feeley & Edward Rubin, Federalism: Political Identity and Tragic Compromise (Ann Arbor, Mich.: University of Michigan Press, 2008); Edward Rubin & Malcolm Feeley, Federalism: Some Notes on a National Neurosis, UCLA Law Review 41:903 (1994); Edward Rubin, Puppy Federalism and the Blessings of America, Annals 574:37 (2001).

criminal penalties. None of these complexities need be considered here, however. The analysis of modern legislature can be effectively pursued by considering the modal situation, that is, where the legislature declares policy and agencies implement it. While it is helpful to keep in mind that legislatures often specify a number of implementation strategies, and that agencies often engage in extensive declarations of policy within the legal framework established by the legislature, these are merely variations on the basic theme. For reasons given above regarding the delegation of rulemaking authority, the legislature cannot possibly specify more than a fraction of the implementation strategy for any important statute in enacts, and certainly cannot carry out the implementation process itself. It is thus accurate to say that a modern legislature almost always relies on the administrative apparatus to implement the policies that it establishes.

The way legislation is drafted and designed, however, does not reflect its modern character. Rather surprisingly, the conceptual invisibility of regulatory law afflicts legislators as well as legal scholars, limiting them to horse and buggy methodologies that impair their ability to carry out their tasks. First, legislation is typically drafted as a set of rules, rather than as policy instructions to implementing agencies. The committee responsible for drafting a particular statute typically begins with a version of the completed statute and then revises its language on the basis of the evidence it gathers and the political debate within the committee.[40] This is not the way that any modern policy analyst would recommend that policy should be formulated. The standard approach to formulating policy is to define the problem, generate a range of alternative solutions, analyze each solution and chose the one that looks most promising, on the basis of evidence and political debate.[41] Interestingly, Executive Order 12,866, the cost-benefit program that has prevailed in the U.S., in different forms, for the past 30 years, declares that this is the appropriate approach to

40 For descriptions of the legislative process generally, see Richard Fenno, Congressmen in Committees (Berkeley, Cal.: University of California, 1995); John Kingdon, Agendas, Alternatives and Public Policies (New York: Longman, 2002). For the design and enactment of specific laws, see Bertram Gross, The Legislative Struggle: A Study in Social Combat (New York: McGraw Hill, 1953); Eric Redman, The Dance of Legislation (New York: Simon & Schuster, 1973); Edward Rubin, Legislative Methodology: Some Lessons From the Truth in Lending Act, Georgetown Law Review 80:233 (1991).

41 Friedman, supra note [15], pp. 137-79; Edward Quade, Analysis for Public Decisions (New York: American Elsevier, 1975); Edith Stokey & Richard Zeckhauser, A Primer for Policy Analysis (New York: W.W. Norton, 1978), pp. 4-6.

drafting regulations.[42] Regulations are essentially equivalent to legislation of course; the unproblematic way in which policy analysis is encouraged in this context suggests that it seems so foreign to the legislative setting because we are thinking of legislation as a way of stating norms, not as a way of regulating our society.

Beginning with a draft of the completed statute would be an appropriate strategy if the legislature were simply declaring the rules for proper human conduct, as Hart and Fuller apparently believe. Presumably, all people in the society know the basic contours of such rules, as St. Thomas asserted,[43] and the legislature's only task is to articulate them in legal form, following Fuller's principles. But if one is making policy, this is a defective approach because there is no point at which alternative solutions to the problem are considered on an even-handed basis. Rather, the solution that appears in the first draft is necessarily treated as the presumptive choice, the one that rival alternatives must overcome. This will not only distort or preclude the collection of evidence about the effectiveness of the rival alternatives, but it will tend to exacerbate the political or ideological conflicts that the statutory proposal generates. Legislatures are inherently political bodies, to be sure, and they should be, but they are also supposed to be deliberative bodies.[44] Beginning with a draft of the completed statute induces blanket opposition, whereas an open-ended, fair-minded inquiry into ways of solving a problem might well encourage cooperation and compromise.

A second problem with the prevailing legislative methodology is that statues tend to be drafted as a set of transitive rules, even when they are largely intransitive in nature. Transitive rules must be stated in complete, explicit terms. They must tell citizens, to whom they communicate directly, what to do and what advantages or disadvantages will be imposed on

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42 Executive Order No. 12,866, 3 C.F.R. Sec. 638, reprinted in 5 U.S.C. Sec. 601 (2010).

43 Aquinas, supra note [21], p. 995 (I-II, Q. 90, Art. 4).

44 See Edmund Burke, Speech to the Electors of Bristol at the Conclusion of the Poll, in The Works of the Right Honorable Edmund Burke, vol. 1 (Qontro Classic, 2010), p. 446; Hannah Pitkin, The Concept of Representation (Berkeley, Cal.: Univ. of California, 1972). Burke never developed his idea on representation at any length. As he friend Oliver Goldsmith noted, Burke, "Who, born for the universe, narrowed his mind, And to party gave up what was meant for mankind: Though fraught with all learning, yet straining his throat, To persuade Tommy Townsend to lend him a vote." Oliver Goldsmith, Retaliation, in Frank Brady & Martin Price, English Poetry and Prose 1660-1800 (New York: Holt, Rinehart & Winston, 1961), p. 318, 319.

them for their compliance or their disobedience. This is the standard that most of Fuller's morality of law, such as his principles of generality, promulgation, clarity, non-contradiction, constancy and congruence, is designed to achieve, as discussed above. Intransitive statutes do not need meet this standard, however. They can tell the agency what it should do in much more varied ways because it is the agency, not the statute, that will determine the rules that citizens are expected to follow. In other words, a legislature drafting an intransitive statute can employ the discourse that a hierarchical superior in the government uses when addressing a subordinate, and need not resort to the discourse that is considered necessary when a government official addresses private citizens.

Thus, the legislature can, in the most extreme form of intransitive legislation, issue a general grant of jurisdiction. Instead of encumbering the statute with meaningless terms like "public convenience, interest or necessity," it can simple create an agency like the FCC and instruct it to regulate a given area, such as public broadcasting. If it wants to exercise more guidance, it can state a general goal, such as maximizing the availability of radio programs to the public or achieving economic efficiency in the broadcasting market. To increase the level of guidance still more, the legislature might make the goals explicit, specifying the minimum number of radio stations that should exist or the number of stations that should be available to citizens in each major city. Such goals can be stated as targets rather than fixed amounts; a statute might state that an implementing agency should attempt to achieve 95% employment, or to strive to reduce air pollution by 50% during the next five years. The legislature can also instruct the agency by means of examples; instead of trying to draft explicit rules, it can tell the agency the sorts of rules it wants the agency to draft. It might draft one rule dealing with a single issue – the emission of sulfur dioxide, let us say – and then tell the agency to draft rules of this sort for other pollutants. This would enable the legislature to be quite explicit about what it wants without undertaking the impossible task of researching every aspect of the problem. Executive Order 12,866, again reflects the modern approach to rulemaking in recommending this standard for regulations. It states: "Each agency shall, . . . to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance

that regulated entities must adopt."[45]

Because the intransitivity of modern legislature is not generally recognized, legislative drafting also embeds pre-modern concepts of law by casting obligations and prohibitions that apply to citizens in normative or categorical terms. It states that factories should provide proper ventilation for their workers, or that the agency should make rules so that factories provide proper ventilation for their workers, as if such provisions are self-enforcing and need only be declared to be effective. Appropriations for agency enforcement of the statutory requirements are provided in a separate bill. In fact, the actual process of enforcement always achieves a particular compliance level that is less than perfect and that depends on a variety of factors that include the stringency of the requirements and the resources allocated to the agency. While Hart is correct in saying that law establishes norms for citizen behavior, he is out of date in treating that as a general description of legislation. Legislation also involves decisions about the compliance level that the legislature wants to achieve, the extent to which the norms are instantiated in practice when they conflict with the passions or self-interest of their targets. When these decisions are left unstated, they are not avoided, but only obscured. The legislature might act more effectively by stating the desired compliance level in the statute and specifying the resources that should be appropriated each year to achieve that goal. In other words, it can state its requirements as policy goals, rather than behavioral norms.

Still another way in which legislation is bound by outdated, pre-modern norms involves the reluctance of legislatures to enact experimental legislation. Experimental legislation can be defined as the application of different legal regimes to different populations for the purpose of determining which regime is preferable. It must be distinguished from ordinary legislation, which may also apply different regimes to different populations, but does so because the legislature has already decided that a particular regime is preferable for that population. For example, the legislature may decide to apply licensing requirements to home electricians but not to kitchen remodelers because it has concluded that home owners cannot effectively evaluate electrical work, or that such work creates life-threatening dangers if improperly performed. That is simply the sort of

[45] Executive Order No. 12,866, supra note [42], Sec. 1(b)(8).

decision that must be made in enacting any regulatory legislation. But suppose the legislature is uncertain whether licensing would be desirable for kitchen remodelers. It might then enact licensing requirements in one part of the nation, leave another part of the nation unregulated, and compare the results. To serve as a true experiment, the two areas subject to the differential treatment should not have distinguishing features that justify the difference, but rather be as similar as possible along all relevant dimensions. In other words, the application of the regulatory regime to one or the other area should be arbitrary.

Use of experimental legislation has been urged by a number of legal scholars.[46] In the U.S., it has become a standard justification for federalism. This argument was suggested by James Madison in Federalist No. 56[47] and elaborated by Lord Bryce in his discussion of American government.[48] Justice Holmes referred to it in a 1918 dissent[49] and Justice Brandeis provided the classic formulation in a 1932 dissent: "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory, and try novel social and economic experiments without risk to the rest of the country."[50] But very little truly experimental legislation, as just defined, has actually been enacted. American federalism, or what passes for American federalism, certainly allows variations in state legislation, but as I have argued elsewhere, these often result from divergent norms or circumstances and do not represent experiments in any meaningful sense.[51] The most extensive and

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46 See, e.g., Michael Dorf & Charles Sabel, A Constitution of Democratic Experimentation, Columbia Law Review 98:267 (1998); Rob van Gestel & Gijs van Dijck, Better Regulation through Experimental Legislation, European Public Law 17:539 (2011); Bradley Karkkainen, "New Governance" in Legal Thought and in the World: Some Splitting as Antidote to Overzealous Lumping, Minnesota Law Review, 89:471 (2004); Eric Orts, Reflexive Environmental Law, Northwestern University Law Review, 89:1127 (1995); Susan Sturm, Second Generation Employment Discrimination: A Structural Approach, Columbia Law Review, 101:458 (2001).

47 James Madison, Alexander Hamilton & John Jay, The Federalist Papers (Isaac Cramnick, ed.) (London: Penguin, 1987), p. 339.

48 James Brye, The American Commonwealth (London: Macmillan, 1888), p. 353.

49 Hammer v. Dagenhart, 247 U.S. 251, 281 (1918) (Holmes, J., dissenting).

50 New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (Brandeis, J., dissenting).

51 Feeley & Rubin, supra note [39], pp. 26-29. States have no incentive to experiment with legislation of uncertain value, or to share information on their successes or failures with other states. See Brian Galle & Joseph Leahy, Laboratories of Democracy? Policy Innovation in Decentralized Governments, Emory Law Journal, 58:1334 (2009); James Gardner, The State-as-Laboratories: Metaphor in State Constitutional Law, Valparaiso

rigorous experimental legislation implemented in the U.S. was probably the Seattle-Denver Income Maintenance Experiment (SIME/DIME),[52], which measured various labor force and social consequences of the negative income tax proposal. But it was designed andimplemented by an administrative agency, not by Congress.[53]

Experimental legislation is often regarded as raising normative or moral problems. It conjures up images of experimentation with human beings by moral monsters such as Dr. Frankenstein, Dr. Moreau or Dr. Mengele, the last whom, unfortunately, was real.[54] But the image is inapt because there is no particular element of cruelty in such legislation; the legislature is simply trying to determine which approach will be the most effective. A more relevant objection, noted by Professors Rob van Gestel and Gijs van Dijck,[55] is that experimental legislation seems to violate the principle of equal treatment, precisely because it imposes different regulatory regimes on an arbitrary basis. In fact, the objection depends upon the pre-modern concept of legislation as stating norms, or rules, for human conduct. In that case, it seems natural to demand that the legislature impose the same

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Law Revew, 30:475 (1996); Susan Rose-Ackerman, Risk Taking and Reelection: Does Federalism Promote Innovation?, Journal of Legal Studies 9:593 (1980).

52 Office of Income Security Policy, Final Report of the Seattle and Denver Income Maintenance Experiments (U.S. Department of Health and Human Services, 1983). This was actually the final and largest of a series of experiments conducted by HHS during the 1970s. The prior studies were conducted in New Jersey, Iowa and North Carolina (the “Rural Experiment”), and Gary, Indiana. See Robert Spiegelman & K. E. Yaeger The Seattle and Denver Income Maintenance Experiments: Overview, Journal of Human Resources, 15:463 (1980).

53 For analysis of the SIME/DIME data, see, e.g., Rebecca Blank, Analyzing the Length of Welfare Spells, Journal of Public Economics, 39:245 (1989); Glen Cain& Douglas Wissoker, A Reanalysis of Marital Stability in the Seattle-Denver Income-Maintenance Experiment, American Journal of Sociology, 95:1235 (1990); Michael Hannan & Nancy Tuma, A Reassessment of the Effect of Income Maintenance on Marital Dissolution in the Seattle-Denver Experiment, American Journal of Sociology, 95:1270 (1990); Mark Plant, An Empirical Analysis of Welfare Dependence, American Economic Review, 73:673 (1984); Philip Robbins, The Labor Supply Response of Twenty-Year Families in the Denver Income Maintenance Experiment, Review of Economics and Statistics, 66:491 (1984); Nicholas Williams, Reexamining the Wage, Tenure and Experience Relationship, Review of Economics 73:512 (1991).

54 Mary Shelley, Frankenstein, or The Modern Prometheus (New York: Harrison Smith & Robert Haas, 1934) (first published 1818); H.G. Wells, The Island of Dr. Moreau (London: Penguin, 2005) (first published 1896). Regarding Mengele, see Robert Jay Lifton, The Nazi Doctors: Medical Killing and the Psychology of Genocide (New York: Basic Books, 2000).

55 Van Gestel & Van Dijck, supra note [45], p. 549.

norm on everyone; if there is a desirable mode of behavior, then everyone who is similarly situated with respect to that behavior should be expected to follow it. To experiment by allowing some people to follow a different and less desirable norm, just to see what might happen, seems to violate our notions of political morality.

If we think of legislation in the modern, administrative terms of policy formation and implementation, however, the status of experimental legislation appears quite different. In the policy process, the decision maker, having defined the problem and generated a set of alternative solutions, is supposed to choose the best of these solutions.[56] But airy statements about choosing the best solution can obscure the crucial fact that the legislature will frequently have no idea which of these possible alternatives is best. Social policy is a complex enterprise and experience repeatedly reminds us that we lack mathematical formulae or definitive methods of prediction for carrying it out. Often the only way to discover whether a particular alternative will be effective in achieving the desired goal is to actually implement it and see whether it works. From this perspective, the real immorality may well consist of failing to try several alternatives on a more limited scale before imposing one that may not be effective on the entire nation. Experimental legislation does not abuse human beings, nor does the unequal treatment that it temporarily creates violate our norms of fairness. As van Gestel and van Dijck argue, when "the experiment is instigated by the legislature in order to ensure that the policy objectives behind the law are served in the most effective and efficient way, [objectionable discrimination] will hardly ever be the case unless the objective of the legislature itself violates the right to non-discrimination."[57] Experimental legislation represents a conscientious effort to achieve the legislature's goals, a procedure that recognizes the complexity of the task it faces, concedes its lack of knowledge, and adopts a plausible means of overcoming that deficiency.

To summarize, much of the difference between the pre-administrative and the administrative concepts of law can be attributed to the pre-administrative view that law is inherently normative, that is not only tells people what is right and wrong, but consists essentially of such declarations. In our legal system, however, law is an instrumentality for

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[56] See note [41] supra (citing sources).

[57] Van Gestel & Van Dijck, supra note [45], pp. 548-550.

the implementation of social policy. Sometimes, although with decreasing frequency as time goes on, that policy can be best implemented by conduct rules that consist of or resemble moral statements. More often, however, it is best implemented by other means, such as intransitive statutes that authorize agencies to use a much wider range of mechanisms, including guidelines, advice, inspections, reports and so forth. The conceptual invisibility of this modern situation not only afflicts scholars like Hart and Fuller, however, but also afflicts modern legislatures. Were they recognize the nature of modern law, they could free themselves from the format used for moral declarations and make use of policy analysis, examples, compliance targets and experimental statutes.

This does not mean that morality is absent from the modern governmental system. No observer of the political situation in any contemporary Western nation could maintain that view. Rather, as Weber noted, and Habermas has extensively discussed,[58] morality applies at the level of policy formation. The choice of policy by the legislature, the chief executive, and sometimes by administrative agencies, is a matter of robust debate that implicates the moral viewpoints of the citizenry. This debate is the essence of representative democracy. Once the policy is chosen, however, the question of how it should be implemented is essentially instrumental, not normative. The overriding norm for implementation is that it should be effective, that it should carry out the chosen policy rather than undermining or controverting it. Any remaining moral considerations operate as what Robert Nozick described as side constraints; they are not inherent in the implementation process but rather impose certain limits on the range of mechanisms that can be used.[59] They preclude us, for example, from convicting the innocent in order to deter crime, or suppressing criticism of the welfare system in order to increase people's willingness to claim

[58] Jurgen Habermas, The Theory of Communicative Action, vol. 1: Reason and the Rationalization of Society (Thomas McCarthy, trans.) (Boston: Beacon Press, 1984), pp. 243-71; Jurgen Habermas, Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy (William Rehg, trans.) (Cambridge, Mass.: MIT Press, 1996), pp. 42-81, 287-328. Habermas' discussion of Weber, in this context, refers to various works including Max Weber, The Sociology of Law, in Weber, supra note [15] pp. 753-76; Max Weber, The Protestant Ethic and the Spirit of Capitalism (Stephen Kalberg, trans.) (Los Angeles: Roxbury, 2002); Max Weber, Politics as a Vocation, in H.H. Gerth & C. Wright Mills, From Max Weber: Essays in Sociology (New York: Oxford Univ., 1946), p. 77.

[59] Robert Nozick, Anarchy, State and Utopia (New York: Basic Books, 1974), pp. 26-42.

the benefits for which they qualify. But they do not preclude intransitive, exemplary or experimental legislation.

III. How the Conceptual Invisibility of Regulation Hurts Law Students

The fact that the modern legal system is conceptually invisible to the legislators who create it may seem surprising at first, but on reflection it is readily explained. It results from what they learned in school, particularly if they went to law school. Law schools, certainly in the U.S., and to a lesser extent in other Western nations, structure their curriculum around the pre-administrative concept of law. That is, they teach the law of the previous society, the one that existed before the advent of the administrative state, rather than the law of the current society. Students graduate from law school with this pre-modern image of law fixed in their innocent, impressionable heads. After a few months of exposure to the modern legal system, they realize that their legal education has been what Victor Turner describes as a liminal ritual, a set of actions with no particular intrinsic content whose purpose is to mark the boundary between one stage of life and another.[60] But just as tribal people never quite forget the experience of being hung up by their thumbs or subsisting in the wilderness for a few days on locusts without wild honey, law-trained people rarely free themselves entirely from the pre-modern concept of law that was embodied in their introduction to their field.

The sixteenth century political theorist François Hotman voiced a similar criticism of French legal education as it existed at his time. Hotman was trained as a lawyer and intended to follow his father as a legal administrator for the French monarchy,[61] but he converted to Protestantism, developed radical political ideas and fled France for Switzerland, where he served as secretary to John Calvin and then professor at the University of Lausanne. The fame of his writings enabled him to return to France as a law professor, but he fled to Switzerland once again to shield his family from the savage

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60 Victor Turner, The Ritual Process: Structure and Anti-Structure (New York: Aldine de Gruyter, 1995), pp. 94-130; Victor Turner, Dramas, Fields and Metaphors: Symbolic Action in Human Society (Ithaca, N.Y.: Cornell Univ., 1974), pp. 231-70. See also Arnold van Gennep, The Rights of Passage (London: Routledge & Keegan Paul, 1960).

61 See Donald Kelley, Francois Hotman: A Revolutionary's Ordeal (Princeton, N.J.: Princeton Univ., 1973) . Hotman's grandfather had emigrated to France from Silesia, which explains his Germanic last name.

religious conflicts of late sixteenth century France. His great work, the Francogallia, favored limited monarchy and representative democracy.[62] Among his other works is Antitribonian, attacking France's continued reliance on the Justinian code that Tribonian compiled.[63] "The laws of one monarchy will often be virtually useless for another," Hotman writes. "As the ancients often said, the laws change depending on the seasons, the alterations of values and the conditions of the people."[64] Recognizing this, the Romans taught their own legal system to law students, including a number of practical skills that we would currently describe as clinical legal education.[65] Hotman observes that modern France is following the content of this educational system rather than its underlying concept, by teaching Roman law to its students. The results are predictably unfortunate, and indeed "deranged." "[I]f the goal is to prepare a young man to serve the French government one day, which one of these two courses should he concentrate on: one on the Roman and Constantinople magistrates, or one on the officers of the Crown and of justice in this Kingdom."[66] He goes on to observe the deleterious effects of the former choice: "Who has not seen and is not still seeing a plethora of young men . . . who, after expending time on these Tribonian codes, feel totally disgusted and turn

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62 François Hotman, Francogallia (J.H.M. Salmon, trans.) (Cambridge, Eng.: Cambridge Univ., 2010).

63 François Hotman, Antitribonian or the Discourse of a Great and Renowned Jurist of Our Time on the Study of Law. Translated into English by Rachel Loko. Copy on file with the author. For discussions of this work, see Julian Franklin, Jean Bodin and the Sixteenth-Century Revolution in the Methodology of Law and History (New York: Columbia Univ., 1963), pp. 46-58; Kelley, supra note [61], pp. 192-97.

64 Hotman, supra note [63], Ch. 2, p. 8.

65 Id., Ch. 10. See p. 37: "At the end of the advisory sessions, the young men descended to the forum to sit at the oral arguments presented in the courts before a judge. This seems to me, unless anyone can offer a better idea, the quickest and most efficient way to learn. The practice of a discipline cannot be taught exclusively through reading; . . .as we can see in the art of painting, the basic way to learn a discipline is through practice."

66 Id. Ch. 3, p. 10. He proceeds to specify all the aspects of modern French government that the young man in questions should know: "the law of the King's sovereignty, the power and authority of the three social classes, the rights of the Queen, of the heirs to the crown, of the King's brothers and their royal inheritance privilege (apanage), of the Princes, of the King's illegitimate children and his brothers, of the supreme commander of the French armies, of his peers, of French Marshalls, of the Great Master, of the great chamberlain, the admiral, the dukes, the counts, the viscounts, and the barons. He should do the same for the treasurers of France, the General of Finances and the Chamber of Finance." Id. at 11. In other words, there is a lot to learn, and learning the details of Roman administration instead is a waste of time.

to another discipline? Or, when some obligation ties them to this field, they find a way to avoid their assignments as often as they can . . .?"[67]

Hotman's criticism of legal education is certainly easy to understand and to endorse. If French law schools in his day were truly continuing John of Salisbury's inclination to think about contemporary political and legal issues by describing ancient Rome, and truly basing their curriculum on such nostalgia-driven antiquarianism, then they were not effectively preparing those students to practice law in the very different legal context of sixteenth century France. It is a bit more difficult, however, to recognize that we are doing exactly the same thing. Our system of legal education makes so much sense to us, and seems so well-designed and well-established. Don't we hire some of the smartest law-trained people in the country to staff our law schools? Don't we provide courses on corporate law, international trade, environmental law and the national constitution? Don't we train our students to "think like lawyers?"

We do, but we are subject to deeply embedded conceptual attitudes that are difficult for us to perceive or to combat. We may hire smart people and have them teach the content of contemporary law, but the basic character of modern law remains conceptual invisible in the law school curriculum. This is most apparent in the first year of American law school, when we provide our students with a steady and nearly exclusive diet of common law courses: torts, contracts, civil procedure, property, and crimes.[68] When C.C. Langdell initiated this curriculum in the 1870s, it was up-to-date;[69] American law, particularly at the federal level that most national law schools focused on, was predominantly formulated and enforced by judges, this being the so-called common law method. It remained up-to-date until 1887, when the first federal regulatory statute, the Interstate Commerce Act, was passed and the first independent federal agency,

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[67] Id., Ch. 15, p. 57.

[68] See Edward Rubin, What's Wrong with Langdell's Method, and What to Do About It, Vanderbilt Law Review. 60: 609 (2007)

[69] On the origins of American legal education, see William Chase, The American Law School and the Rise of Administrative Government (Madison, Wisc.: Univ. of Wisconsin, 1982); Lawrence Friedman, A History of American Law, 3rd ed. (New York: Simon & Schuster, 2005), pp. 463-82; William LaPiana, Logic and Experience: The Origin of Modern Legal Education (New York: Oxford Univ., 1994); Robert Stevens, Law School: Legal Education in America from the 1850s to the 1980s (Chapel Hill, N.C.: Univ. of North Carolina, 1983).

the Interstate Commerce Commission, was created.[70] In the century that followed, the Progressive Era, the New Deal, and the Great Society era produced hundreds of important regulatory agencies and spawned dozens of major regulatory agencies. In other words, the United State became an administrative regime. But American law schools clung to the same common law curriculum in their first year classes; their notion of how to introduce their students to the law was to teach them the basic contours of a legal system that had been largely displaced.

Upper class courses, which are almost always elective in American law schools, are somewhat less outmoded. They cover contemporary law, which is almost all statutory, and, unlike the first year courses, address many of the legal issues that concern modern society. They provide students with the opportunity to grapple with the sorts of policy dilemmas that animate political debate, the issues which Weber and Habermas identified as the essence of our moral controversies. But these courses frequently remain shackled by the common law mentality that prevails in the first year curriculum. They tend to focus on judicial decisions, as if judges were still the primary originators of legal rules that they were in the common law era.The administrative process that dominates modern subjects such as securities law, environmental law, employment law, financial law, even administrative law itself, is viewed from the perspective of the judiciary. As a result, that process maintains only a shadowy existence in the typical American law course, floating in a vaguely perceived nether world until some portion of it crystallizes into the fact pattern of a judicial decision. Since only a small portion of regulatory law is ever litigated, and since this litigation almost never captures the complex reality of the modern regulatory process, students gain only a fragmentary and distorted view of the American legal system. When they actually begin practicing law, they find themselves reading statutes and regulations, negotiating with administrative agencies, writing comments for their clients as part of the administrative notice and comment process, and engaging in a wide range of other activities that their legal education only hinted at. Only then do they

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[70] Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887) (codified in scattered sections of 49 U.S.C.). See Friedman, supra note [69], pp. 329-40; Thomas McCraw, Prophets of Regulation (Cambridge, Mass.: Belknap, 1984), pp. 60-65; Stephen Skowronek, Building a New American State: The Expansion of National Administrative Capacities, 1887-1920 (Cambridge, Eng.: Cambridge, Univ., 1982).

realize that their education was as outmoded, as aggressively antiquarian, as the study of Roman law in sixteenth century France.

To be sure, there is a substantial amount of litigation in the modern American legal system. In his illuminating comparative study of legal practices in the United States and the Netherlands, Robert Kagan observed that American firms are much more likely to sue their regulator than corresponding Dutch firms, much more likely to resolve disagreements by litigation rather than by negotiation.[71] The American approach, Kagan wrote, can be described as adversarial legalism. But Kagan is very far from claiming that the American legal system is not essentially administrative or regulatory in nature. His point, rather, is that it relies rather heavily on litigation given its essentially administrative character. In their basic structure, the American and Dutch systems are quite similar; in both, basic policy is set by the legislature, in both, that policy involves extensive regulation of the economic and social system, and in both, policy is implemented largely by administrative agencies. The difference between the two occurs only at the end of the implementation process, when disagreements arise between the agency and the regulated parties.[72] Moreover, the extent to which Americans rely on litigation to resolve these disagreements, something which Kagan clearly regards as peculiar and counter-productive, may itself be a product of the American legal education system. Americans resort to litigation because they have been taught, in law school, that litigation is what real lawyers do. In other words, the only reason why American legal education remains even partially relevant to the modern administrative system is that it has bootstrapped itself into such partial relevance by inducing its graduates to engage in inefficiently and counterproductively aggressive behavior.

American legal educators are not completely oblivious to the statutory character of modern law, or to the vast areas of our legal system that lie beyond the reach of litigation and judicial control, of course. Their most frequent excuse for their failure to take account of these developments is that they are teaching the students to “think like lawyers.” This phrase,

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[71] Robert Kagan, Adversarial Legalism: The American Way of Law (Cambridge, Mass.: Harvard Univ., 2001).

[72] My co-authors and I reached the same conclusion in a study of American and Japanese practices. See David Litt, Jonathan Macey, Geoffrey Miller & Edward Rubin, Politics, Bureaucracies, and Financial Markets: Bank Entry into Commercial Paper Underwriting in the United States and Japan, University of Pennsylvania Law Review, 139:369 (1990).

originally coined by Langdell and his mentor, Harvard president Charles Eliot,[73] suggests that there is an underlying methodology to all of law, and that the best way to learn that methodology is to study common law decision making by judges. It is invoked as a contemptuous assertion of intellectual superiority over any effort to modernize the law school curriculum. Teaching students how to read statutes and regulations, to understand the structure of modern government, and to interact with the administrative agencies that implement the law is regarded as mere detail that can be learned on the job. It should not be allowed to displace the deeply conceptual task of teaching them to think like lawyers. To achieve that goal, the holy grail of legal education, students need to understand how common law judges think because they, and only they, are in contact with the great and underlying principles of the Anglo-American legal system.

But common law and statutory law do not rely on the same methodology. They are, in fact, completely different from each other, different all the way down to their most basic principles and premises. At least five basic differences can be readily identified. First, common law is designed to resolve individual disputes or legal claims between two individual persons or entities. When it needs to deal with a complex private institution, a public institution, or the government as a whole, it does so by conceiving such institutions as individual parties.[74] In resolving these individualized or dyadic disputes, courts begin by analogizing the dispute to prior disputes that have been resolved by other courts. If the dispute is deemed sufficiently similar to a prior dispute, the disposition of that prior dispute will control. If it differs in detail, the court will assess those differences to determine if they are legally significant. If they are, it may simply modify the prior decision. Alternatively, it may articulate a new rule of law to resolve the case. Such rules are generally incremental extensions, retrenchments or revisions of a prior rule; they are guided by the general, although unstated principles of

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[73] Charles Eliot, Langdell and the Law School, Harvard Law Review 33:518 (1920), pp. 523-24; Mark Spiegel, Theory and Practice in Legal Education: An Essay on Clinical Education, UCLA Law Review, 34:577 (1987), pp. 582-83; Russell Weaver, Langdell's Legacy: Living with the Case Method, Villanova Law Review 36:517 (1991), p. 549.

[74] Most notoriously in the Supreme Court's recent decision, Citizens United v. Federal Election Commission, 558 U.S. 50 (2010). See Meir Dan-Cohen, Rights, Persons and Organizations: A Legal Theory for Bureaucratic Society (Berkeley, Cal.: Univ. of California, 1986).

common law, but they are articulated in terms of the prior rules, and strive to remain as consistent with those prior rules as possible.[75]

Regulatory law includes dispute resolution, but only as an aspect of policy implementation. Its basic approach, as described above, is policy analysis: define the problem, generate alternatives, select the most promising alternative, implement that alternative and evaluate the results. This is often what occurs at the agency level, where regulations are drafted within the framework of the authorizing statute and most implementation and evaluation functions are performed, and it is an approach urged on all agencies by Executive Order 12,866. Lawyers are deeply involved in this process; they serve as agency heads and agency staff, designing and drafting the administrative regulations. They are often heavily involved in the actual implementation of the statute, carrying out inspections, reviewing reports, offering advice, writing guidelines and making threats. Lawyers for private firms are involved as well, lobbying the agency or writing comments for its notice and comment proceeding when the regulations are being considered. They interpret the statute and the regulations for the firm, determine what the firm needs to do in order to comply with, or avoid, the enacted requirements, predict what the agency is likely to do, negotiate with the agency to change what it is likely to do, and respond to agency assertions that the firm has not done enough. In all these roles, they are engaged with the policy process, not the litigation process.

The mode of thought that all these legal tasks require is totally different from the common law methodology by which judges decide cases. The starting point of the policy making process is a social problem, not a dispute between two parties. It typically involves large groups of individuals or organizations and avoids focusing on specific cases. Indeed, nothing is worse for defining a problem, generating alternatives or choosing the best alternative than to proceed from a single case. That will almost always produce bad results for many of the other individuals or organizations that are included in the statutory category and do not share the characteristics of the exemplary entity. When a lawyer negotiates or argues with an

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75 See Melvin Eisenberg, The Nature of the Common Law (Cambridge, Mass.: Harvard Univ., 1991). Also useful are two older books that are so well known they have affected common law as well as having described it: Oliver Wendell Holmes, Jr., The Common Law (Cambridge, Mass.: Belknap, 2009); Karl Llewellyn, The Bramble Bush: The Classic Lectures on the Law and Law School (Steve Sheppard, ed.) (New York: Oxford Univ., 2008).

agency about proposed regulations or enforcement, emphasizing some specific characteristic of the client firm will often be a losing strategy; it is much better to assert that the agency's general approach will produce unfortunate results for an entire industry or group of people, and needs to be reconsidered for that reason. Fuller recognized this distinction, describing policymaking as based on "polycentric" considerations that were difficult for courts to manage;[76] he simply forgot that policymaking generates law.

A second way in whichthe methodology of common law and statutory law diverge involves the nature of the parties. In common law, the modal party is an individual and most of the actual parties were individuals in the pre-modern era. As institutions came to play an increasingly important role in the economy and appeared with greater frequency in court, they were analogized to individuals. Thus, the common law cases speak of the institution's interests, its rights, its knowledge and its intent. As a descriptive matter, most of this does not make sense; in light of modern organization theory, it is embarrassingly naïve. But it enabled courts to apply common law concepts like negligence, foresight and bad faith to the institutional parties that appeared before them. In drafting statutes or regulations, establishing an implementation strategy, or representing private parties affected by these functions in an administrative adjudication, however, organizations cannot be analogized to individuals. Very often, it is precisely the institutional features of the organization that are at issue, both for the government to carry out its goals and for the firms that is responding to the government initiative. Here the theory of organizations, which rarely if ever appears in common law, becomes a crucial consideration. Law students who do not learn the basics of institutional behavior, or at least that there is such a thing as institutional behavior, will be ill prepared to practice in the modern world.

Third, prior actions by the decision maker, which loom so large in

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[76] Lon Fuller, The Forms and Limits of Adjudication, Harvard Law Review 92:353 (1978). Fuller writes: "Generally speaking, it may be said that problems in the allocation of economic resources present too strong a polycentric aspect to be suitable for adjudication." Id., p. 400. But he never focuses on the fact that non-adjudicatory decisions, involving polycentric (as opposed to dyadic) considerations, are nonetheless a standard subject for law, even if, as he correctly points out, they are not a good subject for adjudication. In other words, he writes as if adjudication is the only mechanism for enforcing law.

common law, are often regarded as irrelevant in the regulatory process. In some cases, they are informative, but they are almost never authoritative. Statutes make new law and supersede previously enacted statutes. They may be drafted using the experience gained from observing the performance of a previous statute, but they generally represent a new effort, shaped by need and circumstance, rather than by precedent. In fact, their novelty and creativity is generally regarded as a virtue; the elaborate and contrived arguments that common law judges make to prove that their new decisions are mere extensions of previous ones are unnecessary, and thus absent, in the statutory realm. Regulations recognize authority, of course, but it is the authority of the authorizing statute. Prior statutes might sometimes be helpful in interpreting the current one, and prior regulations may provide useful experience, but any preference for the past, any suggestion that a prior statute or regulation should be given precedence over a more recent one, would be regarded as improper.

Beyond this obvious difference in the authoritativeness of prior decisions lies a deeper one. Common law developed during an era when age was venerated; the older something was, the more admiration that attached to it and the greater its moral authority. People not only looked back on Ancient Greece and Rome as nobler societies, despite their paganism, but also subscribed to the Greco-Roman belief that the golden age lay in the past, a belief sustained by the universally accepted Christian doctrine of the Fall. During the eighteenth century, however, at the same time that representative democracy and administrative governance were becoming established in the West, a new idea -- the idea of progress – became prevalent.[77] Things were getting better, not worse, according to this view, and the golden age lay in a yet unrealized and barely imaginable future.[78] The animating idea of the administrative state, the belief that the governing forces of society could consciously enact social policies that improved people’s lives, is clearly linked to this conception of social

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77 See J.B. Bury, The Idea of Progress: An Inquiry into Its Growth and Origin (New York: Dover, 1932); Peter Gay, The Enlightenment: The Rise of Modern Paganism (New York: W.W. Norton, 1966), pp. 31-38; Habermas, supra note [58], pp. 143-55; Karl Jaspers, Man in the Modern Age (Garden City, New York: Anchor, 1957), pp. 4-15.

78 E.g., Antoine-Nicholas de Condorcet, Outlines of an Historical View of the Progress of the Human Mind (Chicago: G. Langer, 2009); G.W.F. Hegel, The Philosophy of History (J. Sibree, trans.) (New York: Dover, 1956).See David Williams, Condorcet and Modernity (Cambridge, Eng.: Cambridge Univ., 2004).

progress. Thus, common law methodology is based on a belief system we have ceased to accept and contradicts the one that reflects the basic commitments that characterize our society. One of those commitments, of course is educational reform; most educational programs, from pre-school to graduate and professional school, regularly update their content to take account of current developments and alter their methodology to reflect new insights into human learning. But American legal education not only clings to an outmoded method that inappropriately venerates the past, but then allows itself to be so influenced by this method that it rejects the modernization process that virtually every other area of education has embraced. In other words: "thinking like lawyer"has been a major impediment to necessary educational reform.

To be sure, the idea that legislators and regulators write on a clean slate, that they resolutely turn away from the past as they advance into the future, has not gone unchallenged. Charles Lindblom has proposed an alternative account, which he describes as "muddling through."[79] According to Lindblom, policy makers rarely have the time, staff resources, information or political insulation necessary to rethink their policies and strategies anew. Instead, they adapt previous approaches, making incremental adjustments to their existing practices in order to fulfill their assigned tasks without arousing the ire of the legislature, the chief executive, or whatever interest group sponsored the authorizing statute. Lindblom's account bears a closer resemblance to the common law process than the standard approach to policy analysis, but the differences between the two remain significant. Muddling through may rely on past practices, but it does so as a convenience and a heuristic, not as a source of authority. The veneration of the past, the belief that something should be done in a particular way because it has always been done that way, is as foreign to the approach Lindblom describes as it is to the standard policy approach.

A fourth distinction, which follows directly from the differential treatment of the authority, is that the common law relies on analogical and inductive

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[79] Charles Lindblom, The Science of Muddling Through, Public Administration Review 19:79 (1959). See David Braybrooke & Charles Lindblom, A Strategy for Decision: Policy Evaluation as a Social Process (New York: Free Press, 1963); Charles Lindblom, The Intelligence of Democracy (New York: Free Press, 1965); Charles Lindblom, Usable Knowledge: Social Science and Social Problem Solving (New Haven, Conn.: Yale Univ., 1979); Charles Lindblom, Still Muddling, Not Yet Through, Public Administration Review 39:517 (1979).

reasoning while regulatory law employs deductive reasoning. All judicial decisions are at the same level of specificity; they decide a particular dispute and yield a precedent that arises from that dispute. Courts are arranged in a hierarchy of course, from trial courts to appellate courts, but the higher courts are "higher" because they can overrule the lower courts, not because they decide cases in more general terms or make more explicit reference to principle. To use one decision as authority for another, one must, in effect, move laterally, applying the rule of the prior case to the situation in the present one by analogizing their fact patterns. As Melvin Eisenberg points out, this process is necessarily informed by principle, but the principles are regarded as embedded in the cases.[80] There is no list of common law principles; instead, the principles that guide the analogical process must be discerned by induction from the opininions in the cases. In regulatory law, however, the enacted rules almost invariably exist at a higher level of generality than the means of implementation. They are stated in definitive form in advance of their implementation. Implementation is regarded as a means of applying the enacted rules, whether enacted by the legislature or the agency, to particular situations. This is a deductive process; one derives the application from the rule. It is difficult to think of any worse way to teach students how to think in this way than to inculcate them in the common law method.

The fifth way in which common law thinking differs from the mode of thought that characterizes modern law lies in its source of guiding principles. When common law judges need to articulate new legal rules to decide a case of first impression, they are generally guided by generalized principles such as foreseeability, intent, negligence, and responsibility. Public policy – the idea that the case should be decided according to what rule would best achieve some economic or social goal – is certainly not absent from the common law process, but it is generally treated as a means of modifying the decision that precedent and principle would recommend. The modern regulatory state, of course, is policy driven; economic and social goals are its starting point, as Weber and Habermas observe. Thus, the role of policy in common law and regulatory law can be understood as a sort of figure-ground reversal. In common law, previously decided cases create the legal topography,

[80] Eisenberg, supra note [75].

in Guido Calabresi's phrase,[81] that constitutes the primary determinant of specific decisions, and policy serves as a sort of modification or qualification, perhaps a type of side constraint. In regulatory law, policy determines the basic topography. It guides the enactment of statutes and regulations, which in turn guide the application of the law to specific cases.

Most judges, and most scholars, find this difference between the role of social policy in the common law and its role in regulation not only unsurprising but appropriate. Judges are not elected officials, at least at the federal level that law schools tend to focus on;[82] they are not supposed to articulate public policy, but only use it when it seems necessary to avoid unacceptable results.[83] This explanation, however, highlights an even more serious way in which the common law method fails to reflect that modern mode of "thinking like a lawyer." Our system of government is representative democracy; at the most basic level, this means that the representatives we elect, both legislative and executive, are our primary lawmakers. An educational approach that focuses almost entirely on the

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81 Guido Calabresi, A Common Law for the Age of Statutes (Cambridge, Mass.: Harvard Univ., 1985).

82 In the U.S., some states elect higher ranking judges, a product of American populism that has been widely criticized. See Steven Croley, The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law, University of Chicago Law Review 62:689 (1995); Daniel Pinello, The Impact of Judicial Selection Method on State-Supreme-Court Policy (Westport, Conn.: Greenwood Press, 1995); Charles Franklin, Behavioral Factors Affecting Judicial Indepenence, in Steven Burbank & Barry Friedman, eds., Judicial Independence at the Crossroads: An Interdisciplinary Approach (Thousand Oaks, Cal.: Sage, 2002), p. 148. This places certain constraints on them – typically, it encourages them to be excessively harsh in criminal sentencing – but it does not make them representatives of the people in the way that legislators or the chief executive are.

83 See Chevron, U.S.A. v. NRDC, 467 U.S. 837 (1984). This is probably the most important case in modern American administrative law. It establishes the principle (subject to various caveats, of course) that courts should defer to agency interpretations of the statute that the agency administers. Part of the rationale given for this decision is as follows:
"Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices -- resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities." 467 U.S. at 865-66.

decisions of unelected judges ignores this essential reality of our system. Judicial resolution of private disputes in areas such as contract, tort, and, property, and an ordinary civil procedure for doing so, are a feature of virtually any capitalist system. Fascist Italy, Fascist Spain and Nazi Germany had reasonably fair and orderly judicial systems in these areas.[84] Even criminal law, within the limited areas covered by the first year law school curriculum, did not differ greatly under these dictatorial or totalitarian regimes; they defined crimes in roughly the same way, and had roughly the same level of interest in correctly identifying non-political offenders. It is only if one looks at police procedures and corrections, the administrative aspects of criminal law that first year law school courses generally ignore, that the differences between the two systems emerge. And it is only in the constitutional law course, generally but not always taught in the first year, that the democratic nature of the American legal system appears as anything other than a minor influence on the judicial decision making process.

This cannot be right. Constructing a first year curriculum that virtually ignores the basic structure of our government cannot possibly provide law students with an appropriate introduction to our legal system. Legal educators who defend the traditional approach are certainly correct in noting that most judges are appointed, not elected officials, and must take their status into account when reaching their decisions. But this only emphasizes the distortion that results from the failure of the first year curriculum to discuss the regulatory system and the tendency of upper class course to look at legislation from the perspective of the judiciary. Law, in our modern system, is primarily produced by elected representatives and their immediate, politically appointed staffs, not by judges. To think like a lawyer, in the modern world, is to understand this process and to use it as a guide to interpreting the law that the elected officials have created.

Most of the political scientists who have studied the legal system would take issue with the above account of judicial decision making. They generally assert that judicial decisions are governed by policy considerations, and that the judiciary's claim that it reaches its decisions based on precedent

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[84] See R.J.B. Bosworth, Mussolini's Italy: Life Under the Fascist Dictatorship, 1915-1945 (London: Penguin, 2005), pp. 224, 307-13. Nazi Germany allowed most judges appointed by previous governments to remain in office. See Mark Mazower Hitler's Empire (New York: Penguin, 2008) p. 254-55.

and embedded principle is a distortion or, to be even more direct, a lie.[85] If that is true, however, then American legal education is much worse than the preceding criticism would suggest. It is, in effect, propagating a lie, purveying a flattering myth that has little if any relationship to the real situation. But one need not go that far; even if judges are truly doing what they say they are, our method of legal education is woefully out of date. In fact, the more sincere judges are being, the more they are truly guided by the decision making method that they claim to use, the greater the divergence between their mode of thought and the modern policy making process. It is truly remarkable when the most serious criticism of an educational institution continues to apply whether or not that system is teaching its students the truth. But that is the case with American legal education; teaching students to think like a judge deciding a case, whether that teaching is accurate or mendacious, will not enable them to understand our system of regulatory law.

In short, if American law schools are teaching their students to think like lawyers, then are being taught to think like nineteenth century lawyers, or perhaps eighteenth century lawyers. They are teaching them to think in terms of dyadic disputes, to ignore the complexities of modern organizations, to focus on precedent in a society that favors change and innovation, to use analogical and inductive reasoning in an essentially deductive system, and to be oblivious to the basic structure of our government and its lawmaking process. Legal thinking in the twenty first century is a distinctly different process, a process based on the democratic formulation of policy and the implementation of the policy through the administrative system.

The problem in legal education, as in legal design and drafting, and in jurisprudence, is the the conceptual invisibility of the modern legal system. Perhaps, as Edgar Allen Poe's detective says, "the intellect suffers to

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[85] Lawrence Baum, American Courts: Policy and Process, 6th ed. (Florence, Ky: Wadsworth, 2007); Robert Dahl, Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker, Journal of Public Law 6:279 (1957); Lee Epstein & Jack Knight, The Choices Judges Make (Washington, D.C.: CQ Press, 1998); Jeffrey Siegal & Harold Spaeath, The Supreme Court and the Attitudinal Model Revisited (Cambridge, Eng.: Cambridge Univ., 2002); Glendon Schubert, The Judicial Mind: Attitudes and Ideologies of Supreme Court Justices, 1946-1963, rev. ed. (Evanston, Ill.: Northwestern Univ., 1974); Sidney Ulmer, Courts, Law and Judicial Processes (New York: Free Press, 1981); Barbara Yarnold, Politics and the Courts: Toward a General Theory of Public Law (New York: Praeger, 1992).

pass unnoticed those considerations which are too obtrusively and too palpably self-evident."[86] In any case, the result is a situation as odd as the one Francois Hotman criticized; we are teaching our students about a legal system that has largely ceased to exist. Just as Roman law had continuing influence and use in Hotman's day, so common law continues to be somewhat influential and applicable today. But common law is not the basis of our modern legal system. The solution is not to stop teaching common law entirely – students still need how to read cases, and common law cases are a perfectly adequate basis for doing so, but rather to teach statutory and regulatory law as well. When students complete their first year of law school, they should not only be able to read a case, but also to read a statute and a regulation. They should not only understand the way disputes are decided, but also the way policy is made. They should not only learn to think like a common law lawyer, but like a modern lawyers in a regulatory state as well. As John of Salisbury, our first political scientist reminds us, it is difficult to look at one's own society and accept the sometimes harsh realities that it creates. But it is a feature of reality, perhaps a defining feature, that it punishes people for ignoring it. That is as true in education as it is in governance.

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[86] Edgar Allan Poe, The Purloined Letter, in Collected Works of Edgar Allan Poe (New York: Greystone, n.d.), pp. 247, 257.

Developments in the Education of Legislation and Regulation: Germany and Switzerland

Prof.dr. F. Uhlmann[87]

I. Introduction

«Die Uskoken sind tot, es leben die Uskoken.» Kurt Held finishes his book «Die rote Zora» with this striking sentence[88]. The outlaws, forming a gang of Uskokes, i.e. militant fugitives, will now turn to respectable breadwinning.

One may apply the same paradox to the legislation theory («Gesetzgebungslehre») in Germany and Switzerland. «Legislation theory is dead, long live legislation theory!» Indeed, on the one hand, a recent German work comes close to declaring legislation theory dead[89]. On the other hand, a new concept in administrative law considers legislation theory «nowadays established»[90]. Ironically, and bringing back the Uskokes, it is not a clash of schools *pro* or *contra* legislation theory – the first work explicitly cites the second in support of its theory[91]. How do we deal with

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[88] Probably based on the old saying: the king is dead, long live the king, cf. Duden, p. 318.

[89] *See* Schuppert, pp. 7 and 26, referring *to* Helmuth Schulze-Fielitz. This author raises the question of whether legislative theory is able to comply with its own standards of rationality. He criticizes that legislation theory is merely a collection of well meant but ineffective advice (Schulze-Fielitz, Seismograph, p. 211). The «list of deficiencies» includes e.g. that legislation theory is oriented more on a legal than an interdisciplinary basis, more towards legal institutions than non-legal structures and processes and it is too focused on the parliamentary phase and on national legislation (Schulze-Fielitz, Seismograph, p. 211-212).

[90] *See* Mertens, p. 3-4. In administrative law in particular, research is shifting from statutory interpretation to legislation and decision-making. The establishment of the subject «legislation theory» is cited as a (further) proof for this new perspective (Vosskuhle, pp. 18-20, admitting the enduring importance of the law; *see also* Schmidt-Assmann, pp. 245-246).

[91] *See* Schuppert, p. 100.

such seemingly contradictory results?

The paper will first analyze the academic discourse in Germany and Switzerland, looking for an explanation for this seemingly contradictory perception of legislation theory. After that, it will explore the teaching of legislation in these two countries, both for students and practitioners, showing that courses in legislation and regulation exist but that they are not widespread. This picture of education in legislation and regulation would be incomplete without a look at legislation in the political debate and a comparison between Germany and Switzerland. Finally, the paper will close with a personal note on education in legislation, proposing efforts towards a more in-depth legal education in legislation and education.

II. Academic Discourse

1. Origins and Rise of Legislation Theory

It is interesting that one of the first books specifically dedicated to legislation theory was written by an academic who published and taught in Germany as well as in Switzerland. Peter Noll[92] published his book «Gesetzgebungslehre» in 1973. It is certainly true that the discussion on legislation and legislation theory is much older than that; it is one of the «eternal themes» in law and political science[93]. However, Peter Noll's book was well received in both the German and the Swiss academic world and helped to shape the boundaries of a new area of legal theory.

In Peter Noll's book, we see a clear distinction between questions of legislative process («Methode der Gesetzgebung») and questions of

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92 Peter Noll was born in 1926 in Basel. Before teaching in Zurich, he was a private lecturer at the University of Basel and a professor at the University of Mainz (Strathenwerth, p. 6). Many of his works concern legislation theory, e.g. one of his first publications (together with Andreas Linn, Stimmbürger und Gesetz – Gedanken zur gegenwärtigen Gesetzgebung und ihren Aufgaben, Basel 1956) as well as one of his latest (Symbolische Gesetzgebung, ZSR 100 [1981], pp. 347-364). He also participated in many legislation projects both in Germany and Switzerland (for details see Stratenwerth, pp. 1-9). Peter Noll died of cancer in October 1982.

93 Since the age of enlightenment, in fact, the act of legislation has increasingly attracted more and more academic attention and a whole series of works and essays on the subject of legislation theory or legal drafting has been published (*see* only Mader, évaluation, p. 11 with further references).

legal drafting («Technik der Gesetzgebung»)[94]. Legislative process deals with questions of process and methods when enacting new legislation. Typically, it follows a chronological order from the impetus for a new law to its publication, encompassing e.g. methods of proper fact finding, consultation procedures and the roles of parliament and the administration in preparing new laws. Legal drafting (or legistics) focuses on language, addressees, systematic aspects, density of norms, legal definitions, references to norms outside the law, etc[95].

In later works, an array of different fields within legislative theory developed. Ulrich Karpen, for instance, distinguishes between «analysis of the law», «tactics of legislation», «methods of legislation», «techniques of legislation» and «management and evaluation of law»[96]. Heinz Schäffer sees five main areas of research. According to him, «legislation theory» embraces the reflection on the boundaries of scientific knowledge on legislation[97]. Other fields of work are «legislative analytics», «legislative tactics», «legislative methodology» and «legislative technique» (or legistics)[98].

Legislation theory is not only developed by universities but also by governmental entities and private associations. These organizations have a wide variety of members, such as parliamentarians, university teachers,

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94 *See* Noll, Gesetzgebungslehre, pp. 63-64 and 164-169.

95 *See* Hill, p. 96; Müller, Elemente, pp. 46-49. In Georg Müller's book «Elemente einer Rechtssetzungslehre» legislation theory is separated into «method», «process» and «technique» of law-making (Müller, Elemente, pp. 39-222). However, the author sees a close connection between «methods» and «process» (Müller, Elemente p. 46) and, therefore, the approach is not too different from Peter Noll. Gerhart Holzinger uses the term «legal drafting» in a much wider sense (Holzinger, p. 277-285). According to him, legal drafting includes also the whole planning of a law (including methods and process of law-making). Peter Noll himself does not define «legal drafting» as he considers such a definition as superfluous (Noll, Gesetzgebungslehre, p. 164; little terminology is also found by Schneider, p. 20).

96 *See* Karpen, Gesetzgebungslehre, pp. 190-191; Karpen, Rechtsprechungslehre, pp. 15-16.

97 *See* Schäffer, Theorie, p. 33.

98 Schäffer, Theorie, pp. 33-34. «Legislative analytics» encompasses the basic ideas of norms, laws and legislation. «Legislative tactics» not only includes an analysis of the legislative organs and process but also methods of influencing and steering these. «Legislative method» is based on the legal and political process and raises the question of how to make «good», «sound», «utter» and «effective» laws. On terminology *see* also Maihofer, pp. 24-25 (Methodik, Technik und Taktik); on the difficulties with terminology *see* Hill, Gesetzgebungslehre, pp. 2-3.

administrative staff and other practitioners[99]. They organize conferences, train practitioners and edit journals. Such associations have been founded both in Germany and Switzerland. Two associations should be introduced in detail:

The «German Society of Legislation»[100] was founded in 1988. It aims at stimulating discourse on legislative theory and practice[101] by organizing conferences and lectures. It also publishes the «Journal for Legislation»[102] which appears four times a year. Worth mentioning is the so-called «Prize for Good Legislation» which is awarded annually for an outstanding law (or a draft), a brilliant proposal for an improvement in existing legislation or an important Regulatory Impact Analysis (RIA).

Its Swiss counterpart, the «Swiss Society of Legislation»[103] was founded in 1982 and totals around 150 members. It goals are similar to the German association[104]. Typically, its members are parliamentarians, administrative staff and academics. The Swiss Society of Legislation organizes academic conferences and offers training programs on law-making. Furthermore, it publishes a journal (LeGes – Legislation and Evaluation[105]) and fosters exchange with similar organizations in other countries.

2. From Legislation Theory to Multilevel Regulatory Governance

At first sight, legislation theory is in a comfortable situation. There is a sound scientific basis for legislation theory. Questions of legislation are recurrent themes in the academic discourse both in Germany and in Switzerland. Two scientific societies and two law journals are explicitly dedicated to legislation[106].

However, a closer look reveals serious cracks in this rosy picture. The first crack becomes evident when looking at the products of legislation:

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99 *See* Karpen, Gesetzgebungslehre, p. 191; Delbrück, pp. 35-36.
100 Deutsche Gesellschaft für Gesetzgebung – DGG (http://www.dggev.de/index.php).
101 *See* § 1 no. 1 of the articles of incorporation.
102 ZG - Zeitschrift für Gesetzgebung (cf. http://www.hjr-verlag.de/hjr/detail/order_nr/0179-4051).
103 SGG or SSL – Schweizerische Gesellschaft für Gesetzgebung (http://www.sgg-ssl.ch/, information is partly available in English).
104 *See* art. 2 of the articles of incorporation.
105 The journal is published three times a year since 1990. Articles are available free of charge in the internet (http://www.bk.admin.ch/themen/lang/00938/02124/index.html).
106 *See supra*.

laws. The lamentation on the poor quality of laws is almost legendary[107]. This is not the place to debate whether such criticism always stands up to sound scientific review[108]. It may be noted, however, that there is a substantial amount of discomfort as to the quality of legislation.

This discomfort goes hand in hand with a certain frustration that academic advice seems to be disregarded repeatedly[109]. To cite one example: Academia is almost unanimous in its insistence that the necessity of a new law is a key question in any legislative process. In practice, new laws are often passed although their need is at least doubtful[110].

Of course, it is easy to blame politicians for such deficits. Indeed, there is little doubt that the rationality of the parliamentary process need not

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[107] One author states that in all the industrialized countries there is the same frustration that there are too many laws and they are poorly drafted (Lammer, p. 93; *see also* Maihofer, p. 3; Karpen, Germany, p. 197). The critique concerns quality as well as quantity, the latter sometimes described by forces of nature such as «legislative flood» (Uhlmann, p. 786). On the quality of legislation *see also* Hill, Bemühungen, p. 5; Schweizer, pp. 89-93; Eichenberger, Gesetzgebung, p. 15; M. Müller, pp. 356-358; Flückiger, p. 15; Manning, p. 767; Musgnug, p. 23.

[108] In Germany, Ulrich Karpen's report «Gesetzescheck: Die Gesetzgebung der Grossen Koalition in der ersten Hälfte der Legislaturperiode des 16. Deutschen Bundestages, 2005-2007», giving 22 recommendations to the legislator such as thorough examination of possible costs and the avoidance of «legislative snapshots», was criticized by Gunnar Folke Schuppert as not very helpful and even showing a certain «populist tendency» (Schuppert, pp. 80-81). Sound statistical data does not seem to be available. A swift look at the sheer numbers in Swiss federal legislation reveals that the pages have nearly doubled between 2000 und 2011 (3'112 pages to 6'418 pages). There are roughly 1'900 laws and ordinances on the federal in total level whereas on the cantonal (state) level we find roughly 3'100 laws and 17'500 ordinances (Roth, p. 309).

[109] *See only* Schuppert, p. 26, speaking of «praktisch weiterhin folgenlosen Verbesserungs-vorschlägen».

[110] Unnecessary laws are often labeled «symbolic legislation». Such legislation brings few if any changes in existing legislation but satisfies popular demand for «the legislator to do something». (*see* Müller, Elemente, pp. 171-172; Kindermann, p. 225; Noll, Symbolische Gesetzgebung, p. 355). According to Harald Kindermann, there are three groups of symbolic legislation: reinforcement of social values, (doubtful) demonstration of the state's capability to act, dilatory compromise (Kindermann, p. 230). In Switzerland, new regulation on doorstep selling has been introduced despite the fact that it did not apply in the most common cases (Müller, Elemente, p. 172; for another example *see* Wenger, p. 236). According to Peter Noll and Georg Müller, certain symbolic rules can be useful in legislation through their legitimating and integrating function (Müller, Elemente, p. 171; Noll, Symbolische Gesetzgebung, pp. 356-360) as long as they do not block the solution to a real problem (Müller, Elemente, p. 172; Noll, Symbolische Gesetzgebung, pp. 361-362; for a more critical approach *see* Kindermann, 230-239; Wenger, pp. 233-242). For the situation in the Netherlands cf. van Gestel/Menting, pp. 11-17.

coincide with legal analysis[111]. However, this seems to be only one side of the coin. A recent Swiss study shows that civil servants also tend to neglect handbooks, check lists and other tools for better legislation[112]. This suggests that other factors must come into play.

The debate on the gap between legislation theory and practice is not made easier by the fact that there is a rather heated academic dispute[113] on the boundaries between political and legislative advice, or more precisely, on whether legislation theory can be academically «neutral» in the light of evident political questions[114]. The discussion seems to have become less virulent in recent times but may help to explain why some concepts of good laws tend to be rather abstract in order to avoid the blame of political bias.

One common criticism of legislation theory is its lack of interdisciplinarity, and hence, that the legislative process and laws do not pay enough attention to factors outside the legal world[115]. There is a similar complaint about a

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[111] *See* Schulze-Fielitz, Theorie und Praxis, p. 397; Schulze-Fielitz, Umwege, pp. 862-865; Schuppert, p. 33; Uhlmann, p. 785; for an example *see* Kloepfer, p. 349. There is some debate whether parliamentarians should care about principles of good legislation. According to Axel Burghart, members of parliament cannot be expected to be experts in this field; their true strength lies in negotiating compromises (Burghart, pp. 135-137; on compromises *see also* Schuppert, p. 356; Müller, Elemente, pp. 17-19). According to Ortlieb Fliedner, on the other hand, parliamentarians should assume responsibility for the quality of their laws instead of passing the buck to the administration (Fliedner, Thesen, p. 13; Voigt, p. 14, appropriately speaks of «love-hate relationship» between politicians and the administration; *see also* Wimmer, pp. 228-229). There are also *initiatives for better regulation* from politics (*see infra* pp. 53-56).

[112] In 2009, a study analyzed whether guidelines, handbooks and other legislative tools were observed by the administration. The results were sobering and showed that work in practice differs widely from the procedures recommended by legislative theory (Delley/Jochum/Ledermann, p. 41). This is at least partly confirmed by the administration, citing time pressure as possible reason (*see* Guy-Ecabert, p. 41).

[113] Morand, p. 31, with further references, speaks of a «mauvaise querelle».

[114] The debate on «neutral» science («Postulat der Wertfreiheit») goes back to the works of Max Weber (*see* Weber, Der Sinn der «Wertfreiheit» der soziologischen und ökonomischen Wissenschaften, in: Johannes Winckelmann [ed.], Gesammelte Aufsätze zur Wissenschaftslehre, 7. Aufl. 1988, p. 500, cited from Hilgendorf, pp. 1-2). According to Schäffer, Theorie, p. 17-19, legislative theory must judge as it comments on laws, the legal order and its improvements (for a dissenting opinion *see* Hilgendorf, pp. 18 and 32; *see also* Morand, p. 31; Müller, Elemente, p. 13; Noll, Gesetzgebungslehre, p. 134-137; Richli, Interdisziplinarität, p. 128). The question typically gets more relevant if academics comment on current legislative projects (Uhlmann, p. 784).

[115] According to Paul Richli, only the resources of legal science are sufficiently used, which is not enough for good legislation. There are experts from other academic fields

lack of interdisciplinarity in legislative theory. It is undisputed that legistics and legislative theory have many «sister sciences» such as political sciences, sociology and economics but also linguistics, informatics and psychology[116]. However, it seems difficult to integrate these disciplines into legislation theory and into the legislative process in practice[117]. All works on legislation share the challenge of forging a comprehensive theory from different academic disciplines[118].

Financial constraints and time pressure are also typical excuses for bad legislation[119]. Time pressure is a problem not only in the parliamentary process but also for preparatory work; it typically prevents proper fact finding, reflection on goals and good legislative drafting.

More radically, it has been recently suggested that legislation theory just confines itself to a ghetto producing merely well meant, naïve concepts of better regulation[120]. It is not that questions of legislation are not worth discussing, on the contrary. It is that «classical» legislation theory does not catch the essence of modern regulatory challenges, showing particular neglect for other forms of norm-setting by state and private actors. Regulation has become the joint task of various instances at different levels, including national and supranational legislators, and private and public actors. A new term proposed in this respect is «Multilevel Regulatory

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during the preparation of new regulations; however, it seems that their knowledge often remains ineffective (Richli, Interdisziplinarität, p. 125).

116 *See* Müller, Elemente, p. 2; Uhlmann, p. 783; Karpen, Gesetzgebungslehre, p. 193; Schulze-Fielitz, Umwege, pp. 867-868. For an earlier discussion on the relationship between sociology and law, *see* Noll, Gesetzgebungslehre, pp. 38-43; Engel, pp. 7-22.

117 Many authors propose interdisciplinary contributions in the conceptual phase of a new law (*see* Schulze-Fielitz, Umwege, pp. 865-866; Schneider, Gesetzgebung, p. 65; Herten-Koch, pp. 196-197; Richli, Interdisziplinarität, p. 125; for a possible solution in Spain concerning bioethical regulation see Montoro Chiner/Casado González, pp. 393-394).

118 *See* Hill, Gesetzgebungslehre, pp. 2-3.

119 *See* Leupold, p. 112 (especially when combined with political pressure from the media); Schulze-Fielitz, Umwege, p. 864, with further references; Schulze-Fielitz, Theorie und Praxis, pp. 397-403; Bühler, p. 477, concerning financial market regulation. On the time needed and the frequency of legislative changes *see* the quantitative measurements by Schuhmacher, p. 65.

120 *See* Schuppert, pp. 26 and 99; for earlier doubts see e.g. Krems, pp. 23-24. However, the critique omits the fact that many earlier works on legislation have not narrowly focused their thoughts on the law but indeed had a wide understanding of regulation and regulatory process. René Rhinow, e.g., criticized in 1979 (pp. 195-202) the categorical differentiation between creating and applying the law (see also Müller, Inhalt und Formen, p. 18).

Governance»[121].

The shift in the academic debate is maybe most aptly recognised by the latest conference of the (still important) «Vereinigung der Deutschen Staatsrechtslehrer» (VDStRL)[122]. The conference deals with basic questions of legislation and interpretation («Grundsatzfragen der Rechtsetzung und Rechtsfindung»)[123]. Three out of four main topics concern questions of legislation but are at least not typical questions discussed in current legislation theory[124].

In sum, the need to understand regulation und regulation processes is more important than ever. It is plausible, however, that «classical» legislation theory only covers some aspects of this problem, neglecting other important factors. The Uskokes must move on to new pastures – if they don't want to give up such fields to other academic disciplines.

III. Education

1. Universities

Academic discourse typically influences the subjects taught at universities. Indeed, universities both in Germany and Switzerland offer courses in legislation. The following remarks and the list in the appendix concentrate on courses offered by law faculties, available in their online course catalogues, usually covering the year 2011 (spring and autumn semester 2011). Only courses specifically dedicated to subjects of legislation theory in the previously discussed sense[125] were considered; other courses usually remain unaccounted for even if they encompass aspects of legislation theory as part of the course (e.g. on constitutional law).

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[121] «Multilevel Regulatory Governance» acknowledges that there are many different levels and actors within the law-making process. It encompasses a whole range of different forms of regulations including «hard law» (e.g. laws) and «soft law» (e.g. guidelines or codes). In addition, Multilevel Regulatory Governance is aware that laws result from interaction of different actors, including non-state actors (SCHUPPERT, pp. 330-334).

[122] *See* http://vdstrl.zar-muenster.de.

[123] *See* http://www.uni-muenster.de/Staatsrechtslehrertagung/index.html.

[124] While «Rechtsetzungen der europäischen und nationalen Verwaltungen» can be seen as a typical topic from legislation theory, this is less obvious for «Rationalitätsanforderungen an die parlamentarische Rechtsetzung im demokratischen Rechtsstaat» or «Finanzkrisen als Herausforderung der internationalen, europäischen und nationalen Rechtsetzung».

[125] *See supra*, pp. 44-50.

In Germany, there are fewer than ten universities offering courses in legislation (out of roughly forty universities). The law schools in Augsburg, Berlin (both the Humboldt University and the Free University), Bochum, Cologne and Halle-Wittenberg offer these courses at the bachelor level. Legislation theory also used to be taught at the universities of Hamburg and Leipzig, with the latter still offering courses that touch on some aspects of law-making (e.g. «Einführung in das Recht und die Rechtswissenschaft»[126]).

In Switzerland, courses are to be found in Basel, Bern, Fribourg, Geneva and Zurich, all at master level. No courses are offered in Lucerne, Lausanne and Neuchâtel. The University of St. Gallen offers a seminar[127].

To summarize, it may be said that courses on legislation theory are not part of the curriculum of the ordinary law student in Germany or Switzerland. Comparatively speaking there are fewer courses in Germany than in Switzerland. Requests for more courses in legislation can be heard both in Germany and Switzerland[128]; the numbers however, especially in Germany, have to be considered modest. One may speculate whether the «cracks» in the academic debate[129] may be part of the explanation or whether external factors such as cost-cutting must be blamed. It remains to be seen whether concepts like «Multilevel Regulatory Governance» may spark new courses.

2. Education for Practitioners

Education for practitioners is of some importance in Germany and Switzerland. Courses are usually tailored to administrative personnel but may be also be aimed at members of parliament and academia.

In Germany, the «Berlin Forum», organized by the «German Society of Legislation»[130], offers a platform for discussion among practitioners[131]. The German Federal Ministry of Justice («Bundesministerium der

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[126] http://www.uni-leipzig.de/~strafe/index.php?option=com_content&view=article&id=15.

[127] «Law and Economics of Regulation and Law-Making» (autmn semester 2011).

[128] *See* Gerne, pp. 150-151; Hill, Gesetzgebungslehre, pp. 8-9; Karpen, Gesetzgebungslehre, pp. 93-94; Karpen, Zwischenbilanz, pp. 129-130; Kettiger, p. 78; Mader, Stand und Perspektiven, pp. 146-147; Schäffer, Stand und Perspektiven, pp. 138-139.

[129] *See supra*, pp. 44-46.

[130] *See supra*, p. 46.

[131] *See* Karpen, Zwischenbilanz, pp. 127-128.

Justiz») edits a handbook for the formal aspects of laws («Handbuch der Rechtsförmlichkeit»)[132]. No further educational courses are to be found, however.

In Switzerland, two seminars («Murtener Gesetzgebungsseminare») are offered, one on legal method (process)[133] and one on law drafting[134]. Each seminar lasts roughly two and a half days. Similar programs can be found in the French speaking part of Switzerland[135]. One-day conferences are regularly organized by the Swiss Society of Legislation[136] and the «Zentrum für Rechtsetzungslehre», Zurich[137].

The «Murtener» seminars in particular are quite well-known in Switzerland and have currently long waiting lists; hence demand is not a problem. This may be at least partly explained by the fact that new laws are typically prepared by the government entity in charge of a specific area of administrative law, and not by a central legislative unit or by specialized parliamentary staff. So, technically, every person working in the Swiss administration may face the challenge of law drafting.

V. Legislation and Politics

It has already been mentioned that legislation theory and political rationality do not always go hand in hand[138]. However, it should not be overlooked that «good» (or even «better») regulation is also a political goal, even if it is not at the top of the political agenda and even if it is sometimes forgotten in the heat of political debate. Both Germany and Switzerland have taken measures to improve the overall quality of legislation. These measures influence academic discourse and education in legislation.

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[132] *See* http://hdr.bmj.de/vorwort.html.

[133] Organized by Institute of Federalism of the University of Fribourg together with Zentrum für Rechtsetzungslehre (ZfR), Zürich, overviewed by the Swiss Society of Legislation (*see* http://www.federalism.ch/index.php?page=712&lang=1).

[134] Organized by Institute of Federalism of the University of Fribourg together with Federal Office of Justice and the Federal Chancellery, overviewed by the Swiss Society of Legislation (*see* http://www.federalism.ch/index.php?page=712&lang=1).

[135] See the offers from the «Centre d'étude, de technique et d'évaluation législatives (CETEL)» (http://www.unige.ch/droit/cetel/index.html). Their «Séminaire de Légistique» includes three modules, a basic course and an advanced training.

[136] *See supra* p. 46.

[137] *See* http://www.rwi.uzh.ch/oe/ZfR.html.

[138] *See supra*, pp. 47-48.

Germany has established the «Normenkontrollrat» (NKR) whose tasks are defined in the Law of August 14, 2006[139]. This NKR helps the German government to produce better laws. Better laws are mainly defined by the avoidance of new bureaucracy costs and the reduction of existing costs (§ 1 sec. 2). Costs are expressed by the time private actors need to fulfil their information obligations towards government (filling out forms etc.)[140]. The work of the NKR mainly targets new legislation[141]. It is strongly influenced by the Dutch *Standard Cost Model*[142]. According to both German and the Dutch officials, this system will (hopefully) lead to a 25% reduction in red tape costs[143]. Other initiatives for better regulation in Germany have been less successful[144].

Switzerland has chosen a different approach to improving the quality of its legislation. Both at federal and at cantonal level projects have been initiated to tidy up and improve the law («Rechtsbereinigung und Rechtsverbesserung»). While the federal government has concentrated its efforts on formal issues[145], two cantons (Graubünden, Ticino) have explicitly targeted superfluous legislation and other material aspects of good legislation[146]. On both levels, federal and cantonal, checklists were used. The work was primarily done by civil servants working with these laws.

Initiatives for better regulation also came from local chambers of

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139 «Gesetz zur Einführung eines Nationalen Normenkontrollrats» of August 14, 2006 (BGBl. 2006, I, 1866).

140 *See* Schuppert, p. 93; Frick/Brinkmann/Ernst, pp. 32-33; Ernst/Koop, p. 179. The largest costs are generated by the ministry of finances, especially through taxes (Jann/Jantz, p. 60). For questions on measurement of costs *see* Frick/Brinkmann/Ernst, p. 33; Kroll, pp. 261-262; Jann/Jantz, p. 55; Ernst/Kopp, p. 183. *See also* Ernst/Meier, pp. 84-96, discussing the results from the conference of the Bertelsmann Foundation on this subject of December 14-15, 2006.

141 Jann/Jantz, p. 62.

142 For the Dutch model from a German perspective *see* Schuppert, p. 92; Ernst/Kopp, pp. 185-186.

143 Schuppert, p. 92; Ernst/Meier, p. 84; Frick/Brinkmann/Ernst, p. 32.

144 Formal improvements by the «Erste Gesetz über die Bereinigung von Bundesrecht im Zuständigkeitsbereich des Bundesministeriums der Justiz» of April 19, 2006 (BGBl. 2006, I, 866) resulted in more work for private persons (Fliedner, Rechtsbereinigungsgesetze, pp. 404-406). *See also* Fliedner, Thesen, p. 17.

145 *See* «Botschaft zur formellen Bereinigung des Bundesrechts», of August 22, 2007 (BBl 2007, 6121), with an overview on similar projects both in Switzerland and Germany (pp. 6129-6134).

146 *See* Müller, Rechtsbereinigung, p. 418. From an international perspective *see* Hill, Bürokratieabbau, p. 725; from a historical persepective see Mertens, pp. 268-274.

commerce and political allies[147]. In the canton of Zurich, a popular initiative introduced a «Law to Reduce the Density of Legislation and the Administrative Burden on Small und and Medium Enterprises (SME)»[148]. The government of Zurich as well as Parliament rejected the initiative but introduced a counter-project which induced the initiative committee to withdraw its initiative[149].

At federal level, one political party is currently collecting signatures for a popular initiative named «Stop Bureaucracy!»[150]. Among other things, the popular initiative hopes to introduce an individual right to «unbureaucratic» enforcement into the constitution[151].

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[147] Canton *Schwyz* (popular initiative «Für weniger Bürokratie», accepted on November 25, 2007); canton *Basel-Landschaft* (popular initiatives «KMU-Förderinitiative» and «KMU-Entlastungsgesetz», accepted on June 5, 2005); canton *Solothurn* (Debate in local parliament on the popular initiative «KMU-Förderinitiative: Weniger Bürokratie – mehr Arbeitsplätze», May 2011); canton *Graubünden* (popular initiative «Gegen unnötige Bürokratie und Reglementierung», supported by the government of the canton).

[148] «Gesetz für den Abbau der Regelungsdichte und die Reduktion der administrativen Belastung für kleine und mittlere Unternehmen (KMU)» (ABl 2007, 2296; ABl 2008, 1909). According to the formulated legal text of the initiative the number of legal norms (§ 1 sec. 2 lit. b) and the effort to find and consult them (§ 1 sec. 2 lit. g) should be reduced. Administrative procedures must be simplified (§ 1 sec. 2 lit. d) and coordinated (§ 1 sec. 2 lit. e and § 4). Regulatory impact assessment has to be introduced (§ 3), applying to new as well as to existing norms (§ 3 sec. 3 and § 5).

[149] «Gesetz zur administrativen Entlastung der Unternehmen» vom 5. Januar 2009 (LS 930.1). The counter-project was much shorter than the initiative. As the title indicates, the new law focuses on the administrative burden on businesses. Zurich is supposed to reduce the number of administrative units to be consulted, give access to the administration by electronic means, simplify and harmonize forms and data collection by the administration (§ 1 sec. 2). RIA – in respect to the administrative burden on businesses – has been introduced, limited however to new and newly enacted laws (§ 3); older laws must checked on their compliance with the reduction of administrative burden (§ 5), as the new law puts it more vaguely. The new law came into force on January 1, 2011.

[150] BBl 2010, 6633.

[151] The proposed new article 9a of the Constitution reads as follows: «Every person has a right to laws […] that are understandable and simply, unbureaucratically and efficiently implemented […].» The initiative was published on October 12th, 2010 in the Federal Gazette (BBl 2010, 6633) which triggers the 18-month period within the gathering for the necessary 100'000 signatures has to take place (until April 12th, 2012). A successful popular initiative must be submitted to the vote of the people and the cantons, with Parliament either rejecting or supporting the initiative (article 139 sec. 5 of the Federal Constitution of the Swiss Confederation).

It is questionable whether these initiatives will lead to better laws[152]. However, they may – as in Germany – stimulate Regulatory Impact Assessment (RIA) which is not well established in Switzerland. Regulatory Impact Analysis (RIA) was embraced by the Swiss Government in 1999[153], which assigned this task to State Secretariat for Economic Affairs (SECO)[154]. However – as the OECD have pointed out – the RIA is applied rather late in the political process if at all, SECO is inadequately staffed to deal with this task, and in-depth cost-benefit analyses are rarely carried out[155] and if they are, this is often in a «simplified» version in order to assess the needs of small and medium enterprises (SME)[156]. RIA stands also in the shadow of the formal consultation procedure, well established by law and tradition[157]. With the popular initiatives, RIA may become more relevant in Switzerland.

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[152] Markus Schott warns of too high expectations. It is doubtful whether a right to understandable laws can be enforced by courts (Schott, pp. 240-241). The simple and unbureaucratic application of the law is already covered by art. 9 and 29 of the Swiss Federal Constitution. It seems, therefore, difficult to define an area of application for the intended norm (Schott, pp. 242-243).

[153] «Bericht des Bundesrates über Massnahmen zur Deregulierung und administrativen Entlastung» of November 3, 1999 (BBl 2000, 994). The newly drafted Swiss Constitution of 1999 explicitly requires in article 170 that «federal measures are evaluated with regard to their effectiveness» (*see* Mastronardi, pp. 2503-2510; Mader, Artikel 170, pp. 29-37; Biaggini, pp. 757-759.

[154] cf. http://www.seco.admin.ch/index.html?lang=en.

[155] OECD report «Regulatory reform in Switzerland: government capacity to assure high quality regulation» (2006, pp. 43-44). The Federal Office of Justice (FOJ), overseeing legislation in general, also deals with RIA, usually using the term «evaluation». In 2004, a working group between several administrative units, including SECO und the FOJ, prepared a common report on the techniques to measure the effectiveness of federal measures (*see* http://www.ejpd.admin.ch/content/dam/data/staat_buerger/evaluation/umsetzung/schlussbericht-kontaktgruppe-d.pdf).

[156] Following parliamentary motions Durrer (no. 99.3284): «KMU-Verträglichkeitsprüfung für geplante staatliche Regulierungen und Verfahren.» These tests are typically carried out by a series of in-depth interviews with selected firms (Cf. Gautschi, p. 19; Miauton/Gautschi, p. 48).

[157] «Bundesgesetz über das Vernehmlassungsverfahren», Vernehmlassungsgesetz, VlG, of March 18, 2005 (SR 172.061). An official but non-binding translation into English can be found on the website of the federal government (http://www.admin.ch/ch/e/rs/1/172.061.en.pdf; Federal Act of 18 March 2005 on the Consultation Procedure). «The consultation procedure has the aim of allowing the cantons, political parties and interested groups to participate in the shaping of opinion and the decision-making process of the Confederation» (art. 2 sec. 1). «It is intended to provide information on material accuracy, feasibility of implementation and public acceptance of a federal project» (art. 2 sec. 2). For further details of this law *see* Thomas Sägesser, Handkommentar zum Bundesgesetz vom 18. März 2005 über das Vernehmlassungsverfahren, Berne 2006.

It is interesting that both in Germany and Switzerland the political quest for good laws has a strong focus on administrative burdens, especially the costs to private enterprises. There is little mention of cost models in traditional legal training. Cost models and their like have the (strong) appeal of simplicity and objectivity; it may be also politically attractive to «fight» bureaucracy. However, there is little doubt that «good» laws encompass many more factors. Simplistic models are useful only if their information is correctly understood as – maybe small but important – part of «good» legislation.

VI. Germany and Switzerland in comparison

The analysis so far has treated legislation theory as being part of both the German and the Swiss tradition. It is certainly true that there are many similarities, especially between Germany and the German speaking part of Switzerland. However, it might be appropriate to have a closer look at the differences – in order to find out whether Germany and Switzerland are twins, siblings or just distant relatives when it comes to legislation. I will concentrate on three aspects only.

Usually, German law literature is just overwhelming. This is a question of numbers in the first place: There are roughly 82 million German and fewer than 8 million Swiss inhabitants, i.e. a ratio of more than 10:1. Sticking to the figures, there are consequently at least 10 answers from Germany and one from Switzerland to every legal question, assuming that every scholar in Germany and Switzerland writes a comparable amount of books and articles.

There are no statistics available in the field of legislation theory. However, the impression prevails that legislation theory is – relatively speaking more often discussed in Switzerland than in Germany. This assumption is supported by the fact that a higher percentage of Swiss universities offer courses in legislation[158]. This assumption might not hold true for the latest debate on «Multilevel Regulatory Governance»[159], which has yet to find a proper foothold in Swiss academic literature.

As a second point, one might also ask whether the ideals of «good legislation» are not somewhat different in Germany and Switzerland. This

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[158] *See supra* pp. 50-52.
[159] *See supra* pp. 49-50.

seems especially true in the area of addressees and language and goes back to the time of the first codifications. Whereas in Germany, the German Civil Code «Bürgerliches Gesetzbuch (BGB)» was built on rigorous legal logic[160], the Swiss Civil Code was written with the explicit intention that every Swiss citizen would understand its provisions[161]. «Der Gesetzgeber soll denken wie ein Philosoph, aber reden wie ein Bauer» («The legislator should think as a philosopher but speak as a peasant»). Even though Jhering's famous dictum was never followed in his home country, it found many followers in Switzerland[162]. Indeed, when Swiss students are asked in their first legislation class what a good law should be about, «simplicity» and «comprehensibility» are the ideals most often named.

Lastly, Switzerland has four national languages[163], three of which are official languages that every federal law has to be translated into[164]. Translation is time-consuming but important work on the quality of legislation. German, French and Italian are all equally suitable for the authentic interpretation of federal law. Hence, the effects of translation on the quality of legislation were more intensely discussed in Switzerland than in Germany where the discussion basically came into view with the European Union and its many official languages[165].

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[160] The BGB is, in terms of systematic, style and content, a product of the «Pandektenlehre» addressing a legally-trained audience (Wesel, p. 481-482). There is a saying in Germany that the only difference between the «BGB and the Bible is that the latter has been translated into German» (Klein, p. 197).

[161] Eugen Huber, the «father» of the Swiss Zivilgesetzbuch (ZGB), intended a law with a high grade of comprehensibility (Huber, pp. 12 and 14; Hauck, p. 49; Caroni, p. 44). Some «rules» from Eugen Huber are still found in modern works on law-drafting (Müller, Elemente, p. 182; Bundesamt für Justiz, Gesetzgebungsleitfaden, Leitfaden für die Ausarbeitung von Erlassen des Bundes, 3rd ed., Berne 2007, p. 357).

[162] *See*, e.g., Lötscher, pp. 135-156; Fleiner, p. 38. On the limits (and dangers) of comprehensibility see Müller, Elemente, pp. 187-189; Ogorek, pp. 297-305.

[163] See art. 4 of the Swiss Constitution: «The National Languages are German, French, Italian, and Romansh.»

[164] See art. 70 sec. 1 of the Swiss Constitution: «The official languages of the Confederation shall be German, French and Italian. Romansh shall also be an official language of the Confederation when communicating with persons who speak Romansh» (for more details *see* Häfelin/Haller/Keller, no. 1435-1436). Art. 70 sec. 2 of the Federal Constitution authorizes the cantons (states) to decide on their own official languages. The cantons of Bern, Fribourg and Valais consider German and French to be their official languages, while in the canton of Graubünden, they are German, Italian and Romansh .

[165] For translations into French see Schmidt-König, pp. 83 et seq.; more generally Gémar, pp. 73-77. According to Mincke, pp. 42-44, translation does not pose a problem as long as it takes place within a single legal system or a similar group of systems, which is the

Language also works as a separator in legislation theory. Although questions of legal process are easily discussed in any language, legal drafting is typically linked to language. Generally, Swiss German scholars tend to pay more attention to the work of their German colleagues than to that of Swiss academics writing in French or Italian.

Despite my potential bias as a Swiss, I would cautiously contend that legislation theory is an area of academic discourse where German and Swiss contributions are each independent and enjoy a level playing field. Switzerland is helped by a strong foundation in administrative practice, an old tradition going back to the time of first codifications and multilingual challenges.

VII. How to Educate in Legislation – a Personal Perspective

Education in legislation theory should be a part of every legal education. Such a statement, coming from a teacher in the field of legislation theory, is obviously biased and must be considered rather as a personal statement than a sound scientific contribution. So be it.

In my view, education in legislation should take place on three levels: It should start at the bachelor level of the legal education. Students should learn the basics of the legislative process («Methode der Gesetzgebung») and of legal drafting («Technik der Gesetzgebung»). Moreover, they should be able to follow the logic from the genesis of a law to its publication (and possibly the subsequent evaluation of its effects). Furthermore, the possibilities and challenges of legal drafting should be demonstrated to students in an effective way with practical examples.

Why is education in legislation early in the studies rewarding? First of all, it helps students to improve their understanding of the political aspects of law and its inherent ties to politics and power. They will also better master the «classical» interpretation of statutory law: whoever has structured a law will better understand the systematic element in interpretation. Whoever has understood which documents and reports are prepared during the legislative process will better understand what the legislator actually intended and what the relevant sources are to determine that intention. Last but not least, students enjoy drafting legal norms. They

case for Switzerland but not the EU (for similar problems before the European Court of Justice, see GÄCHTER-ALGE, p. 110-112).

usually hear a lot of criticism of legislation but they rarely get first-hand experience of actually writing a legislative text themselves (and having it interpreted – sometimes in amusing ways – by their fellow classmates). It is understood that students are not qualified legal drafters after such an experience; such exercises merely expose them to a very delicate task that needs further education both in theory and practice.

At master level, students should learn that the written national law is not the only source of regulation. They must realize that although laws are important, they are by no means the only plants in the «jungle of regulation». International law, standards, codes of conduct, guidelines and recommendations build complex clusters of rules and are strongly intertwined. In addition, formerly unknown economic and social problems require a process of interaction between many players, with different levels of state involvement and responsibility. It is open to question whether one should speak of «Multilevel Regulatory Governance»[166] but this term certainly catches some of the fundamental challenges of modern regulation theory. The courses should, therefore, closely follow the current academic debate, politics and practice; the form of seminars suggests itself.

Students at master level should also be introduced to the sister disciplines of legislation theory such as evaluation techniques, linguistics, political science, public choice theory, etc. Academics from other disciplines should be invited to these courses. As prospective lawyers, students should at least grasp the essence – and maybe the language – of these debates. Legislation projects are often in the hands of lawyers, working with all sorts of experts in different fields. Communication is simpler if one knows at least the basics of their respective expertise.

To sum up, master courses on legislation should be innovative, international, and interdisciplinary[167] - ingredients every ideal master course should consist of. As a result, the term «regulation» – although vague – is clearly better suited to underlining these aspects than «legislation» or «legislation theory».

Finally, training for practitioners should be on the third level of education in legislation. The exchange between law teachers and practitioners is

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[166] *See supra* pp. 49-50.
[167] «Comparative studies» are maybe a more appropriate term but «international» was temping in order to triple the “i”s …

essential for the quality of education. Practitioners are the touchstone of any concept in legislation theory: if they are not convinced, the concept will typically be flawed. Universities may give new ideas and keep government entities up-to-date. Ideally, universities and government entities work together in designing courses for practitioners. The courses may be integrated in existing patterns of continuing training within the public administration.

In conclusion, I would argue – again on merely personal basis – that legislation and regulation theory does not enjoy the standing in legal education that it should have. This holds especially true for Germany, but also applies to Switzerland. It is possible that the lack of courses may be due to more complex reasons, such as doubts about legislation theory per se. I hope that initiatives from politics, practitioners and academia will give the impetus required to change this.

De vorming van de wetgevingsjurist

Mr. M.Tj. Bouwes[168]

1. Inleiding[169]

Studenten kiezen over het algemeen niet voor de juridische studie uit bijzondere belangstelling voor het recht of de functie van de wet in de samenleving. Voor hen vormt de universiteit “hoofdzakelijk een vrije levenszone vóórdat zij gefixeerd zullen worden in een bepaalde rol in de maatschappij”. Aldus H. Drion, *Het conservatieve hart*, p. 165. Voor een succesvolle afronding van de studie heeft men vooral doorzettingsvermogen en een goed geheugen nodig, heeft iemand ooit gezegd, maar ik weet niet meer wie.

Die rol in de maatschappij waar Drion het over heeft verschilt nogal, afhankelijk van het vak dat de jurist uitoefent. Een deel van de juristen beoefent het ambacht in de typisch juridische beroepen als advocaat, rechter, notaris, bedrijfsjurist of jurist belast met de voorbereiding van wet- en regelgeving bij de overheid. Veel juristen belanden uiteindelijk in een meer bestuurlijke functie waar het juridische handwerk niet meer wordt uitgeoefend.

Jaarlijks komen zo’n 4000 nieuwe juristen op de arbeidsmarkt (volgens cijfers van de VSNU 3847 in 2009 en 4265 in 2010). Ongeveer 1000 afgestudeerden gaan de stage-opleiding van de advocatuur volgen. 65 gaan de RAIO-opleiding volgen. Het notariaat is in 2005 door ongeveer 150 afgestudeerden gekozen. De overheid is de grootste werkgever voor afgestudeerden. In 2004 ging bijvoorbeeld 28% van de afgestudeerden bij de overheid werken.

Door Blauw Research is in 2009 in opdracht van de Rijksoverheid onderzocht welke werkgevers bij juristen favoriet zijn. Het blijkt dat

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169 Mijn gedachten over dit onderwerp zijn mede beïnvloed door gesprekken met Ad van Kooyk, Peter van Lochem, Gert-Jan Veerman en Stavros Zouridis. Zij hebben ook een eerdere versie van commentaar voorzien. Ik ben hun daarvoor zeer dankbaar.

rijksoverheid en gemeenten als meest aantrekkelijke werkgevers worden beschouwd. De werkgevers moesten spontaan worden genoemd, er werden dus geen namen van organisaties voorgelegd. De rijksoverheid werd door 20% als favoriete werkgever genoemd, 6% noemde de rechtbank, 4% noemde de naam van een advocatenkantoor. Onder startende juristen was bij 42% de rijksoverheid favoriet, bij 15% de rechtbank, bij 13% een advocatenkantoor. Van de starters wilde 49% bij de overheid solliciteren. Het imago van de overheid is dat van een maatschappelijk relevante organisatie, betrouwbaar en integer. De advocatuur scoort beter op uitdagend werk en eigen verantwoordelijkheid en men werkt er volgens de respondenten aan complexe vraagstukken.

De meeste studenten zullen dus na hun studie niet een togaberoep kiezen, maar elders terechtkomen. Ook tijdens hun studie beschouwen ze een togaberoep niet als hun natuurlijk voorland. Maar bij de inrichting van het onderwijs weegt nog altijd zwaar of de opleiding wel het civiel effect heeft. Vanuit advocatuur en rechterlijke macht wordt bij herhaling de zorg uitgesproken of de studie het civiel effect kan verschaffen: de poort naar de togaberoepen. Tekenend voor de oriëntatie op de togaberoepen is dat de juridische faculteiten voor hun eerste jaarcongres in januari 2011 met als onderwerp de juridische opleiding de president van de Hoge Raad uitnodigden om zijn licht te laten schijnen over de eisen die de rechterlijke macht aan de studie stelt. Tezelfdertijd besliste de rechterlijke macht dat de RAIO-opleiding niet meer openstaat voor starters, maar slechts voor juristen met drie jaar werkervaring. Geen student zal straks nog rechtstreeks doorstromen naar het rechterschap.

In 1953 sprak de toenmalige minister van Justitie L.A. Donker, in een rede over de vorming van de jurist (NJB 1953, p. 866-876). Die rede trok toen vooral aandacht door zijn pleidooi de vakken Romeins recht en oud-vaderlands recht te vervangen door het administratieve recht, fiscaal recht en internationaal recht. Hij constateerde ook dat de toenemende gecompliceerdheid van de maatschappelijke structuur steeds hogere eisen stelt aan degenen die daarin leiding moeten geven. In dit verband noemde hij twee ontwikkelingen: de steeds toenemende overheidsbemoeiing die heeft geleid tot een snelle ontwikkeling van het administratieve en fiscale recht, en de internationale samenwerking en integratie waarvan de gevolgen, ook voor het geldende recht, steeds ingrijpender en belangrijker worden. Wij kunnen daar de technologische ontwikkelingen

aan toevoegen. De nationale rechtsorde is voorts niet meer op zichzelf staand, maar onderdeel van een Europese rechtsorde en beïnvloed door internationaal geldende grondrechten. Met name de groeiende betekenis van grondrechten en mensenrechten doen de klassieke grenzen tussen de rechtsgebieden vervagen, wat het niet eenvoudiger maakt voor de jurist het recht te vinden en te vormen en de juiste keus voor regulering te maken.

Voor een wetgevingsjurist is niet zoals bij de togaberoepen de casus object van studie, maar de maatschappelijke werkelijkheid. De casus is hoogstens het ijkpunt waaraan hij de algemene regel toetst. Rechtsvorming en niet rechtstoepassing staat centraal. Tijdens zijn studie krijgt de student de feiten van de casus gepresenteerd en hij moet daar de relevante rechtsregels bij vinden. Het is meegenomen als hij tijdens de studie leert dat die feiten niet altijd zo duidelijk zijn en dat hij als rechtstoepasser die feiten zelf zal moeten ordenen. Dan beginnen wij voorzichtig het terrein van de rechtsvorming te betreden. Als de feiten en omstandigheden veranderen, veranderen ook de regels. In die zin doen rechter en advocaat aan rechtsvorming, maar het is niet de kern van hun werk. Rechtsvorming is de kerntaak van de wetgever en daarmee ook de essentie van de functie van wetgevingsjurist bij de overheid. Hij moet binnen veranderende omstandigheden en opvattingen rechtsregels formuleren die nieuwe maatschappelijke verhoudingen ordenen en de overheid in staat stellen haar taak te vervulle

Het vergt van de jurist die aan deze aspecten vorm moet geven, een grondige kennis van het recht en inzicht in het functioneren van een gelaagde rechtsorde. In dit preadvies komt allereerst aan de orde de universitaire opleiding en de vraag in hoeverre die van voldoende gewicht is voor de toegang tot het beroep van wetgevingsjurist. Betoogd wordt dat de bredere vorming van de wetgevingsjurist mede bepaald wordt door en afhankelijk is van een grondige kennis van het recht. Ingegaan wordt op de noodzaak van verdieping en verbreding van juridische en sociaal-wetenschappelijke kennis in het opleidingsprogramma van de Academie voor wetgeving en tijdens de eerste stappen op het wetgevingspad (hoofdstuk 2). De kwaliteit van het juridisch onderwijs wordt niet alleen bepaald door de onderwijskundige aspecten. Het juridisch onderwijs is sterk praktijkgericht door haar oriëntatie op de togaberoepen en pas de verbinding met rechtswetenschappelijk onderzoek dat bijdraagt aan inzicht

in het recht en de werking van het recht, brengt de opleiding op academisch niveau. Het is ook vooral dit onderzoek dat voor de wetgevingspraktijk het meest van belang is. De verbinding met het wetenschappelijk onderzoek biedt kansen voor een verdere professionalisering van het vak van wetgevingsjurist. Hoofdstuk 3 gaat in op dit huwelijk tussen wetgever en wetenschap en bepleit een landelijke onderzoeksagenda gericht op de grote maatschappelijke uitdagingen van deze tijd. Hoofdstuk 4 behandelt de verantwoordelijkheid van wetgevingsjuristen in het overheidsbestuur. Om aan deze verantwoordelijkheid inhoud te geven, mag de opleiding niet beperkt blijven tot kennisoverdracht van het geldende recht. Adorno spreekt in dit verband van *Halbbildung*: onderwijs dat slechts gericht is op kennisoverdracht en niet op de functionele en morele verantwoordelijkheid van hoogopgeleiden in de samenleving. Hij heeft daar een heel boek overgeschreven, *“Theorie der Halbbildung*”, maar daar komt het wel op neer. De vorming van de wetgevingsjurist zal ook oog moeten hebben voor de functionele verantwoordelijkheid van juristen in het overheidsbestuur en de vraag hoe de wet recht en rechtvaardigheid verwezenlijkt. Hoofdstuk 5 maakt de balans op en schetst een mogelijke onderzoeksagenda die antwoord geeft op de maatschappelijke uitdagingen waar de wetgever voor staat.

2. Wetgeving als vak

Prof. Mr. I. Henri Hijmans (1869-1937), advocaat en later hoogleraar Romeins recht te Amsterdam wordt vooral herinnerd door het begrip “vermaatschappelijking van het recht”: recht bestaat volgens hem alleen in samenhang met maatschappelijke verschijnselen. Wat recht is leidde hij af uit de gedragingen van mensen in de samenleving. De opleiding van juristen en van wetgevingsjuristen (die toen nog niet zo heetten) had zijn bijzondere belangstelling. Hij heeft er in de loop van zijn leven verschillende keren over geschreven. In 1902 schreef hij in het tijdschrift Themis over wetgevingsjuristen: ”Ik verzuimde zooeven nog onder de beroepen, welke deze groep samenstellen, dat van de wetgever te noemen. Het is, zooals ik bereids vroeger opmerkte, een groote fout, dat tot dusverre deze bezigheid nog niet als een bijzonder beroep beschouwd is, gansch aparten aanleg en studie vereischend. Zoo is het te verklaren dat juist op dit gebied, vooral ten onzent, zoo enorm veel dilettantenwerk verricht is.

Het wordt gewoonlijk met den mantel der liefde bedekt, wie de eigenlijke stellers onzer wetten zijn. Menigmaal is in den laatsten tijd de vraag gerezen, of de wijze, waarop onze wetten tot stand komen, niet voor een grondige herziening vatbaar zoude zijn. Wij wenschen dit punt hier slechts aan te stippen; dit staat echter vast, dat verbetering moet gezocht worden in de schepping eener opleiding in de kunst van het wetten maken. Aan de universiteit kan zeer zeker een aanvang met de beoefening dier kunst gemaakt worden. Hierover later meer in de onderafdeeling over den vorm van het onderwijs; hier nog slechts de opmerking, dat onze aanstaande wetgevers, voor zoover zij zich niet in het bijzonder willen wijden aan het vervaardigen van civiele of strafrechtelijke wetten, in deze derde groep de hun aangewezen plaats zullen vinden. In deze groep toch wordt de leerling ingewijd in het geheele samenstel onzer staatsorganisatie."

In 1938 verscheen in Rechtsgeleerd Magazijn een volgend artikel van zijn hand over de opleiding van de jurist. Hijmans merkte als inleiding op dat hij zijn opvattingen al sinds 1902 had verkondigd, maar dat hij had ondervonden dat zijn denkbeelden door bijna niemand werden gedeeld en zelfs niet de moeite van bestrijding waardig werden gerekend. Hij meende evenwel dat zijn standpunten binnen honderd jaar met algemene instemming zouden worden omhelsd. Omdat hij in de studie plaats wilde inruimen voor het onderwijs in het formuleren van wetten en reglementen is het goed zijn denkbeelden in herinnering te brengen. Allereerst pleitte hij voor differentiatie en specialisatie in de doctoraalfase. Die differentiatie is die in burgerlijk recht, strafrecht en staatsrecht met de daaraan verwante vakken. In de eerste groep werd opgeleid tot beroepen als advocaat, rechter, hogere ambtenaren bij het departement van Justitie en daarnaast directeuren van naamloze vennootschappen, bankiers en grote kooplieden. De tweede groep leidt op tot advocaat of rechter in strafzaken, hogere ambtenaren op het gebied van het strafrecht bij Justitie en het openbaar ministerie, directeuren van gevangenissen en commissarissen van politie. De derde groep moest zich richten op advocaten en rechters in administratiefrechtelijke geschillen, de niet in de andere groepen genoemde hogere ambtenaren bij de verschillende ministeries en die bij provincie en gemeenten en burgemeesters van grote gemeenten. De studenten zouden zich onder meer moeten oefenen in het opstellen van eenvoudige wetsontwerpen en bij de derde groep moest natuurlijk een ruime plaats worden ingericht voor het administratief recht en het staatsrecht. Het

aantrekkelijke van zijn voorstel was natuurlijk dat doctoraal studenten er in die fase al voor konden kiezen of ze bankier, burgemeester van een grote gemeente of hogere ambtenaar ten departemente wilden worden.

Eerst in de zeventiger jaren kwam de opleiding van de jurist weer in de belangstelling staan. Preadviezen van de Nederlandse Juristenvereniging over de opleiding van de jurist uit 1972 getuigen daarvan. Er ontstond aandacht voor instrumentele wetgeving. Wetgeving werd een manier om maatschappelijke bewegingen te sturen en overheidsbeleid te verwezenlijken door nieuwe overheidstaken en nieuwe instrumenten. De aandacht voor beleidsontwikkeling en beleidsverwezenlijking ging gelijk op met belangstelling voor de opleiding van de jurist. Piet Neleman schetst in zijn preadvies de eigenschappen en vaardigheden waarover een afgestudeerd jurist die wetgever wil worden, moet beschikken en waaraan derhalve tijdens de opleiding de nodige aandacht moet worden besteed. Hij moet kennis dragen van en inzicht hebben in maatschappelijke verhoudingen en in een complexe feitelijke verhouding weten welke feiten relevant zijn. Hij moet creatief zijn en nieuwe oplossingen kunnen vinden voor bestaande problemen. Hij moet kunnen onderkennen waarin eigen en andermans redenering sprake is van een subjectief oordeel. Hij moet kritisch kunnen oordelen over door hemzelf of door anderen gevonden oplossingen, met name of de oplossing voldoet aan eisen van rechtvaardigheid en doelmatigheid en of zij past in de maatschappelijke opvattingen en verhoudingen. En tenslotte moet hij in staat zijn tot een goede en heldere formulering van zijn eigen argumenten en oplossingen.

In 2000, toen het NJB 75 jaar bestond, ging het tijdschrift in op de ontwikkelingen binnen de verschillende juridische beroepsgroepen de afgelopen 75 jaar. Inge van der Vlies besteedde aandacht aan de positie van de jurist bij de overheid (NJB 2000, p. 127-133). Zij beschreef hoe de taak van de overheid aanmerkelijk was gewijzigd en daarmee ook de positie van de overheid. De overheidstaak werd breder opgevat waardoor ook de roep om rechtsbescherming sterker werd. Om de samenleving te sturen en richting te geven aan de rechtsontwikkeling werden meer wetten nodig. Er ontstonden nieuwe beroepgroepen: de juridische ambtenaar voor bezwaar- en beroepsprocedures en de wetgevingsjurist. Zij schetst de taak van de wetgevingsjurist als het beleid vertalen in recht. Het stellen van de wet levert een confrontatie op tussen de legitimiteitseisen van de politiek, het beleid en het recht. Wetgeving heeft het karakter van

bestuursinstrument gekregen. De wetgevingsjurist heeft een bemiddelende taak tussen de dynamiek van de maatschappelijke ontwikkeling en de tradities van het recht. Het onderwijs en het onderzoek in het recht bieden volgens haar geen steun om zich grotendeels tot een analyse van wetten en jurisprudentie te beperken. Zij verbaast zich erover dat voor degenen die de juridische kwaliteit bij uitstek moeten verzorgen geen toegesneden opleiding bestaat die vergelijkbaar is met die van de advocatuur en de rechterlijke macht. In de praktijk moeten juristen leren hoe de verschillende eisen van de politiek, de doelgroep, de eigenaardigheid van de materie en de beperkte financiële middelen met de eisen van het recht moeten worden verenigd om tot behoorlijke wetgeving te komen. Zij hoopte dat de groeiende belangstelling voor de kwaliteit van de wetgeving, onder andere tot uitdrukking komend in een eigen blad voor wetgevingsjuisten en degenen die geïnteresseerd zijn in wetgevingsbeleid (RegelMaat) en een eigen vereniging voor wetgeving en wetgevingsbeleid, ook leidt tot meer aandacht voor de opleiding van wetgevingsjuristen.

2.1 Het niveau van de universitaire opleiding

In zijn *Steunberen van de samenleving* (2006) – steunberen zijn de instituties die de samenleving nodig heeft om te blijven functioneren – gaat Kees Schuyt in op de academische vorming en scholing in het wetenschappelijk onderwijs (p. 214-232). Hij bestrijdt daarin de tegenstelling tussen een brede, academische vorming en een meer beroeps- of marktgerichte smalle vorming, tussen academische vorming als iets algemeens en bovendisciplinair en disciplinaire scholing als iets minder academisch. Volgens hem bereikt men juist het zoveel gevraagde academische denk- en werkniveau en verkrijgt men de zo gewilde academische vorming via een degelijke introductie in een van de vele academische disciplines. Er is geen tegenstelling tussen vorming en scholing of tussen wat een goede universiteit biedt en wat een goede maatschappij nodig heeft. Geen vorming zonder disciplinaire scholing en geen academische scholing zonder vorming. Als bestanddelen van een goede universitaire vorming ziet hij (a) het beschikken over intellectuele basisvaardigheden, (b) voldoende kennis van een bepaald vakgebied, (c) de wil om dingen uit te zoeken, op onderzoek uit te gaan, zelfstandig proberen met oplossingen voor problemen te komen, (d) voldoende

kennis van andere vakgebieden om de relatieve bijdrage van elke afzonderlijke discipline te leren doorzien (interdisciplinariteit). Hij meent bovendien dat men naast waarheidslievendheid tegenwoordig in elke discipline onvermijdelijk geconfronteerd wordt met grote ethische en morele vraagstukken, een reden waarom kennisname van de manieren om met deze vraagstukken om te gaan bij de moderne bagage van een academisch denk- en werkniveau behoort.

De vraag is of deze karakterisering van academische vorming in voldoende mate in de universitaire opleiding tot jurist herkenbaar is. De universitaire opleiding wordt regelmatig gevisiteerd. De vorige vond plaats over de periode 1996/2001 en verscheen in 2004. Op dat moment was de bachelor-masterstructuur nog niet ingevoerd, maar de visitatiecommissie heeft haar kwaliteitsoordeel daar wel zoveel mogelijk op gebaseerd. De commissie heeft in haar referentiekader geschetst tegen welke maatschappelijke achtergrond de juridische opleiding moet worden ingericht. Zij noemt enkele karakteristieke ontwikkelingen:

- een pluriforme en gecompliceerd geworden samenleving met aandacht voor fundamentele rechten en een volgens sommigen vervagend normbesef;
- toename van het aantal conflicten als gevolg van mondigheid van de burger en van een claimcultuur;
- toename van het aantal rechtsregels, dus juridisering van de samenleving;
- het toegenomen belang van Europees recht en internationaal recht als gevolg van de Europese integratie en van globalisering.

De commissie signaleerde dat er meer juristen buiten de traditionele juridische beroepen zijn dan daarbinnen. De rechtenopleidingen kunnen zich daarom niet meer alleen richten op de beroepseisen voor advocatuur, rechterlijke macht en notariaat. Het profiel van de rechtenopleiding wordt diffuser. Het is daarom de taak van de faculteiten een duidelijk profiel te ontwikkelen voor de geboden opleiding en duidelijk aan te geven waarop zij zich in de opleiding richt en waarop zij extra accent legt. De commissie meende dat de kwaliteit van de opleiding moet zijn afgestemd op de belangrijke plaats van het recht in de samenleving en op de verantwoordelijkheid van de jurist.

Als eindtermen moeten volgens de commissie gelden:

- een structureel overzicht van het positieve recht, met inbegrip van Europees recht en enige andere onderdelen van het internationale

recht (met name grondrechten);
- inzicht in de procedures ter voorkoming en beslechting van geschillen;
- het vermogen om mutaties in het recht te signaleren en juist te interpreteren;
- het vermogen tot juridisch argumenteren;
- het vermogen juridische besluitvorming en normering te verklaren voor niet-juridisch onderlegde geïnteresseerden.

In de opleiding moeten volgens de visitatiecommissie de wezenlijke kenmerken van het recht centraal staan: de maatschappelijke functie van het recht, kernbegrippen binnen het recht, de grenzen van het recht en de betrekkelijke waarde van een en ander. De opleiding moet streven naar een parate kennis van het positieve recht die toereikend is om juridisch vakkundig te kunnen handelen. Maar parate kennis is niet voldoende. Door het complexer worden van het rechtssysteem en door de moderne informatietechnologie is uitgebreide parate kennis ook een minder noodzakelijk einddoel van de opleiding aan het worden. Het accent moet minder komen te liggen op kennisopslag en meer op het beheersen van de mogelijkheden tot kennisvergaring, kennisverwerking en kennistoepassing. Tijdens de studie moet men leren hoe men op juridisch gebied leert en bijleert. De afgestudeerde jurist moet in staat zijn om permanent zijn juridische kennis te actualiseren en zich eventueel op nieuwe terreinen te specialiseren.

De commissie gaat er hier dus al vanuit dat voor de verschillende beroepen aanvullende opleidingen noodzakelijk zijn. Aan de ene kant moet de universitaire opleiding voldoen aan de beroepseisen voor bepaalde beroepen (in het bijzonder de traditionele togaberoepen: het civiel effect), aan de andere kant is een aansluitende opleiding noodzakelijk om het beroep op een redelijk niveau te kunnen uitoefenen.

De visitatiecommissie beoordeelde in 2004 de kwaliteit van de afgestudeerden van alle faculteiten als voldoende. De academische en professionele vaardigheden waren voldoende tot goed ontwikkeld. Alleen Leiden kwam er minder vanaf. Maar dat was kort na haar bestuurscrisis. Uit latere visitaties bleek die achterstand al in 2006 ingehaald.

De bachelor-masteropleiding is voor het eerst eind 2010/voorjaar 2011 gevisiteerd. De commissie schetst een vergelijkbare maatschappelijke context waarin de juridische studie moet worden beschouwd: een pluriforme en complexe samenleving, met een daardoor meer complex

recht, de invloed van Europese en internationale regelgeving, regelgeving van andere actoren, juridisering van de samenleving en de invloed van andere rechtssystemen en rechtsculturen. Als eindkwalificaties hanteert de commissie: beheersing van de kernleerstukken van het recht: privaatrecht, staats- en bestuursrecht, strafrecht, en internationaal en Europees recht. Inzicht in de grote juridische families (Common Law, Civil Law), in de historische en filosofische ontwikkeling van het recht en in de methode van rechtsvergelijking moeten geïntegreerd zijn in het onderwijs. De afgestudeerde moet aldus in staat zijn om permanent zijn juridische kennis te actualiseren en zich eventueel op nieuwe terreinen te specialiseren. Het voorgaande veronderstelt volgens de commissie een groeiende nadruk op het verwerven van academische vaardigheden van (levenlang) leren, het verwerven van een internationale attitude, het vertalen van maatschappelijke vraagstukken, het reflecteren op het recht en het zoeken naar vragen en problemen, en naar antwoorden en oplossingen, het verwerven van analytisch vermogen en het aanleren van het vermogen kritisch te denken, schrijven en presenteren. De commissie wijst er ook op dat meer juristen werken in andere beroepen dan de traditionele juridische beroepen en dat een goede afstemming met de arbeidsmarkt nodig is. Het is in dat licht opvallend dat de commissie vrijwel geheel bestaat uit universitaire vertegenwoordigers met één lid uit de rechterlijke macht. Dus geen personen die enig zicht zouden kunnen hebben op de behoefte van de overheid aan goede juristen. De commissie is zich er wel van bewust dat de traditionele juridische beroepen postinitiële beroepsopleidingen kennen, maar kennelijk niet dat de overheid naast de Academie voor wetgeving inmiddels ook een aanvullende masteropleiding voor andere overheidsjuristen nodig heeft gevonden. Voor zover de individuele rapportages inmiddels bekend zijn, komt de commissie tot een positief oordeel over de onderzochte bachelor- en masteropleidingen en meent ze dat ze minimaal voldoen aan de algemene, internationaal geaccepteerde kwalificaties. Weinigen gaan overigens boven die eisen uit.

2.2 De toegang tot de togaberoepen

Aan de opleiding van de afgestudeerde student rechten worden bij de traditionele juridische beroepen van advocaat, rechter of notaris wettelijk bepaalde toegangseisen gesteld. Nodig is in ieder geval een universitaire

of HBO-bachelor/master (de laatste met schakelprogramma) en een universitaire master. Om de advocatenstage te kunnen volgen moet de opleiding volgens het Besluit beroepsvereisten advocatuur ten minste omvatten het privaatrecht met inbegrip van het burgerlijk procesrecht, het strafrecht inclusief strafprocesrecht en één van de vakken staatsrecht, bestuursrecht inclusief bestuursprocesrecht en belastingrecht. De RAIO-opleiding stelt als eisen (Besluit opleiding rechterlijke ambtenaren) grondige kennis en inzicht in het burgerlijk(proces)recht, het bestuurs(proces)recht en het straf(proces)recht. Het Besluit beroepsvereisten kandidaat-notaris eist grondige kennis van voor het notariaat relevante rechtsgebieden.

Gelet op de positieve uitkomst van de verschillende onderwijsvisitaties is het opvallend dat de laatste tijd zowel door de advocatuur als door de rechterlijke macht scherpe kritiek wordt uitgeoefend op de universitaire rechtenopleiding. De voormalige deken van de landelijke Orde van Advocaten Willem Bekkers noemde de huidige rechtenopleiding flinterdun en de simpelste academische studie die er is. Margreet Ahsmann, vice-president rechtbank Rotterdam en lector civiel recht bij het Studiecentrum Rechtspleging, stelde in het NJB van januari 2011, p. 66-70, dat de verklaring van civiel recht van de universiteiten niet de kwaliteitsgarantie biedt die zij beoogt en belooft. De faculteiten maken volgens haar hun eigen eindkwalificatie niet waar en leveren studenten af die niet aan de wettelijk geformuleerde minimumeisen voldoen.

In 2010 bracht de commissie stagiaire-opleiding (commissie-Kortmann) aan de Nederlandse Orde van Advocaten advies uit over de hervorming van de huidige beroepsopleiding van de advocatuur en de voorgezette stage-opleiding ("Met recht advocaat"). In haar advies wijst de commissie op een aantal ontwikkelingen in de laatste decennia: de invoering van het BaMa-stelsel, de grote keuzevrijheid en de toegenomen specialisatie in de universitaire opleiding. De invoering van het BaMa-stelsel heeft volgens de commissie "bij veel universitaire opleidingen ertoe geleid dat de Bacheloropleiding wordt gezien als de algemene opleiding in het recht en de Masteropleiding als een daaropvolgende mogelijkheid tot specialisatie. Het gevolg is dat de algemene opleiding binnen drie jaren dient plaats te vinden. In die periode kennen diverse opleidingen bovendien een substantiële keuzevrijheid, de mogelijkheid van een buitenlands verblijf en/of een stagemogelijkheid. Indien de masteropleiding zich vanwege de wens tot "specialisatie" richt op een beperkt deel van het recht, is

het gevaar niet denkbeeldig dat in de universitaire opleiding de vereiste stevige basis niet kan worden gelegd. Deze ontwikkelingen en de opkomst van university en law colleges hebben er voor gezorgd dat een bonte stoet van jonge meesters met een geheel verschillend niveau van kennis van en inzicht in de centrale gebieden van het Nederlandse recht onze universiteiten verlaat. Daardoor is het voor het afnemend beroepenveld, zoals de advocatuur, niet erg duidelijk wat deze afgestudeerden weten en kunnen. De meester- of mastertitel is geen eenduidig keurmerk."

Een verklaring voor deze kritiek zou kunnen zijn dat het recht pluriformer is geworden met daaraan verbonden een grote mate van specialisatie op deelterreinen. Die ontwikkeling weerspiegelt zich in de opleiding met een breder aanbod van vakken met een specialistisch karakter. Daarnaast lijkt er in het onderwijs meer aandacht voor de bepleite interdisciplinariteit. Als daar tegenover de arbeidsmarkt evenzeer specialisatie vraagt, is het niet verwonderlijk dat vraag en aanbod niet automatisch matchen.

De commissie-Kortmann heeft overigens ook veel kritiek op de eigen advocatenstage-opleiding. De procesrechtelijke vakken in het eerste opleidingsjaar overstijgen volgens de commissie nauwelijks het niveau van de universiteit. Materieelrechtelijke vakken worden niet gegeven. Europees recht komt te weinig aan de orde. Er is in de hele opleiding een grote mate van vrijblijvendheid. De plaatselijke opleidingsactiviteiten verdienen die naam vaak niet. De commissie stelt als oplossing voor een driejarige opleiding met een zekere mate van specialisatie in het burgerlijk recht, strafrecht of bestuursrecht. Aandacht moet worden besteed aan procesrecht, beroepsattitude en beroepsethiek en keuzevakken. Er moeten examens en toetsen worden afgenomen.

Als je naar de studiebelasting van de huidige advocatenstage-opleiding kijkt, kun je de commissie slechts gelijk geven. De totale opleiding kent over drie jaar 79 dagdelen. Ervan uitgaande dat voor ieder dagdeel voor het volgen van lessen een dagdeel voorbereiding staat, besteedt de beginnende advocaat de eerste drie jaar 80 dagen aan zijn verdere vorming na de universiteit.

Kritiek op de beroepsopleiding van de advocatuur heeft 14 internationale advocatenkantoren ertoe gebracht een eigen additionele opleiding te starten. Het onderwijs van deze Law Firm School is geconcentreerd in het eerste stagejaar en voegt aan het de reguliere stage-opleiding vakken toe als litigation, ADR/mediation, bestuurs(proces)recht, straf(proces)recht,

schriftelijke vaardigheden, contracten- en vermogensrecht, belastingrecht, ondernemingsrecht, effectenrecht en verdieping jaarrekeningrecht. Totaal gaat het om 53 dagdelen college, dus totaal aan studie zo'n 100 dagen. De doorlooptijd van het onderwijsprogramma is een jaar en het programma start twee keer per jaar. Per cyclus starten ongeveer 80 stagiaires. The Law Firm School is opgezet in samenwerking met de rechtenfaculteiten van Leiden en Nijmegen.

De huidige RAIO-opleiding voor de zittende en staande magistratuur duurt zes jaar en is een combinatie van theorie en praktijk. De studiegids van de opleiding vermeldt niet hoeveel tijd daarvan aan studie wordt besteed. Geschat wordt dat dat 12 tot 15 dagen per jaar is gedurende de eerste vier jaar (binnenstage). In de twee daarop volgende jaren is dat voor de zittende magistratuur 30 uur per jaar. Met dergelijke opleidingseisen wekt het geen verbazing dat de RAIO-opleiding overbodig wordt geacht. Hans den Tonkelaar zegt in het NJB 2011, p. 474-475, dat er voldoende overstappers met ervaring elders en doorstromers vanuit de juridische ondersteuning (stafjuristen, senior-secretarissen) zijn en dat eigen kweek in de vorm van de RAIO-opleiding overbodig is.

De opleidingseisen in de rechterlijke macht worden in de toekomst in ieder geval niet hoger. In januari 2011 heeft de Raad voor de rechtspraak besloten dat de RAIO-opleiding tot vier jaar wordt verkort. Reden daarvoor is aankondiging in het regeerakkoord dat 10 miljoen euro op de opleiding gekort wordt, die nu 18 miljoen euro per jaar kost (dus zo'n 300.000 euro per jaar per persoon, wat toch een aardig bedrag is voor een opleiding die niet de masterserkenning heeft). De instroom zal worden teruggebracht van 60 tot 25 studenten. Vanaf 2012 worden nog slechts studenten toegelaten die drie jaar relevante juridische werkervaring hebben. Dat is dan net de periode dat juristen met de ambitie om rechter te worden de advocatenstage kunnen volgen, met als het meezit ook nog de kop erop van de Law Firm School.

2.3 Wetgevingsjurist als beroep

Voor het beroep van wetgevingsjurist gelden geen wettelijke toelatingseisen. Voor het vaststellen van de eisen die worden gesteld aan de beginnende wetgevingsjurist kan men te rade bij het nieuwe functiegebouw van het Rijk. Dat functiegebouw gaat uit van acht functiefamilies met voor

iedere 'familie" een beperkt aantal functiegroepen die bepalend zijn voor de aanstelling. Relevant voor de beginnende wetgevingsjurist zijn met name de functie-eisen (kernprofielen en kwaliteitenprofielen) voor de schalen 11-13. Men moet beschikken over een afgeronde wetenschappelijke opleiding (dus een hbo-opleiding rechten is niet genoeg) met in ieder geval brede of gespecialiseerde kennis van een rechtsgebied. Kennis van Europees recht is eveneens vereist. Voorts moet men over analyserend vermogen beschikken. Men moet inzicht hebben in het functioneren van het recht, juridische grenzen kunnen bewaken en "kunnen dejuridiseren". Andere eisen betreffen meer gedragskenmerken. Men moet gevoel hebben voor politieke en maatschappelijke ontwikkelingen en begrijpen dat participanten in de beleidsvorming in een grote organisatie functioneren vanuit verschillende verantwoordelijkheden.

In de kern gaat het dus enerzijds om het ambacht: analytisch vermogen, (gespecialiseerde) kennis van een of meer rechtsgebieden en kennis van het Europees recht. Anderzijds gaat het om persoonsgericht gedrag: belangstelling voor politiek en maatschappij (in het jargon politiek-bestuurlijk gevoel) en gevoel voor formele en informele processen in een organisatie (organisatie-sensitiviteit). Vergelijkt men deze eisen met de eisen voor advocatuur en rechterlijke macht, dan valt op dat alleen bij wetgevers kennis van het Europees recht wordt geëist en dat alleen bij advocaten en rechters kennis van het bestuursrecht en staatsrecht uitdrukkelijk wordt geëist.

De nadruk die bij wetgevingsjuristen op gedrag en persoonskenmerken wordt gelegd is wel verklaarbaar. Verwacht wordt een brede, niet-juridiserende houding ten opzichte van maatschappelijke verschijnselen. Er ligt geen afgeronde casus voor, geen afgerond beleidsdossier dat met het bestaande juridische instrumentarium kan worden aangepakt. Men moet enigszins boven de materie kunnen staan en verbindingen kunnen leggen met andere rechtsgebieden en disciplines.

In het rapport van de eerste visitatiecommissie wetgeving Regels en risico's (2000) werd gesignaleerd dat de Rijksoverheid bij de werving van juristen moest wedijveren met andere maatschappelijke instituties en dat de overheid in verschillende opzichten op achterstand stond bij het aantrekken van goede jonge juristen. Destijds werd op een aantal universiteiten (Tilburg, Leiden, Rotterdam, Nijmegen, de VU en de UvA) het keuzevak Wetgeving aangeboden. Bekend was de postacademische

opleiding Wetgevingsleer van Northedge Opleidingen met als docenten Eijlander, Voermans en Konijnenbelt. De commissie constateerde evenwel een lacune in het aanbod van opleidingen op academisch niveau, wat uiteindelijk ten koste zou gaan van de kwaliteit van regelgeving. Gelet op de juridisering diende de overheid ervoor te zorgen dat zij een goede partij kan spelen met of tegen de experts van die andere instituties. Gepleit werd voor een gemeenschappelijke, interdepartementale aanpak van de werving, selectie, opleiding en beloning van wetgevingsjuristen. De visitatie gaf aldus de stoot tot de oprichting van de Academie voor wetgeving in 2001.

Bij de tweede visitatie van 2002 (Van wetten weten) constateerde de visitatiecommissie dat de Academie een vliegende start had gemaakt met 19 juristen in opleiding. De commissie stelde vast dat de wetgevingsdirecties in korte tijd tot een gezamenlijke aanpak waren gekomen. Wat de commissie bijzonder aansprak was de gedachte dat het vak van wetgevingsjurist als een geheel eigen metier was neergezet, aan de beoefenaren waarvan men specifieke eisen mag stellen. Sterker dan voorheen werden wetgevingsjuristen benaderd als afzonderlijke beroepsgroep; de eisen en voorzieningen werden niet langer per ministerie bepaald, maar rijksbreed vastgesteld. Een aldus vormgegeven beleid, mits krachtig doorgezet, zou volgens de visitatiecommissie een flinke impuls kunnen geven aan een “esprit de corps” onder wetgevingsjuristen. Dat op zijn beurt zou de (horizontale) mobiliteit van wetgevingsjuristen binnen en tussen de departementen bevorderen (blijkens het rapport “Partner in beleid” zijn tussen 2007 en 2010 zijn via het zogenaamde Juridisch Mobiliteitsplatform 40 juristen van de directies wetgeving en juridische zaken mobiel geworden waarvan ongeveer de helft na detachering bij het andere departement is ingestroomd).

2.4 De masteropleiding tot wetgevingsjurist

Ron Niessen, een van de vaders die aan de wieg van de Academie voor wetgeving stonden, heeft het, als hij spreekt over de overheid, in navolging van Max Weber over Fachwissen en Dienstwissen: vakkennis en kennis van de actuele dossiers van de overheidsorganisatie. Weber redeneerde eind 19e eeuw vanuit de Pruisische hiërarchie waarin de Beamtenherrschaft in ondergeschiktheid aan de politieke machtshebbers

zijn taken moet vervullen. Niessen ziet de moderne overheidsorganisatie als een kennisintensieve organisatie waarin minder in structuren en meer in mensen moet worden geïnvesteerd. Hij bepleitte daarom in zijn oratie “Vluchten kan niet meer…” uit 2001 om bij de opleiding en vorming van ambtenaren aandacht te besteden aan ambtelijk verantwoordelijkheidsbesef, rechtsstatelijk besef en integriteitsbewustzijn. Opleiding en vorming moeten bovendien in zijn ogen een permanent proces worden, af te dwingen door een opleidingspuntensysteem als in de advocatuur en het notariaat. Dus permanente aandacht in de opleiding voor vakmanschap en professionele verantwoordelijkheid.

Het is daarom aardig te zien hoe deze twee elementen terugkomen in het opleidingenaanbod van de Academie voor wetgeving. De Academie biedt een tweejarige masteropleiding aan. De opleiding gaat uit van 1680 studieuren (contacturen en zelfstudie) over twee jaar. Volgens de Onderwijs- en examenregeling is het doel van de opleiding “de kennis, vaardigheden en attitude bij te brengen die nodig zijn voor het functioneren als wetgevingsjurist teneinde kwalitatief goede wetgeving tot stand te brengen of om ontwerp-wetgeving te toetsen”. Het opleidingsprogramma kent vijf clusters: wetgeving, context van wetgeving, staats- en bestuursrecht, EU en internationaal recht en wetgevingsvaardigheden. Het eerste jaar ligt de nadruk sterk op overdracht van vakmatige kennis op het gebied van staats- en bestuursrecht, Europees recht en mensenrechten en schrijf- en onderhandelingsvaardigheden. Aandacht wordt besteed aan de politieke en bestuurlijke context waarin de wetgevingsjurist functioneert. Rechtseconomie (economische doelen van overheidsbeleid, financiële instrumenten en effecten van wetgeving) komt in het eerste jaar aan bod. In het tweede jaar is er aandacht voor de Haagse instituties in relatie tot wetgeving en rechtssociologie en filosofie. Het ambacht komt weer aan de orde in Europees (bestuurs)recht, verdragenrecht, strafrechtelijke en bestuursrechtelijke handhaving en overheidsinformatierecht (Wet openbaarheid van bestuur, Wet bescherming persoonsgegevens en elektronisch bestuurlijk verkeer).

Aan de rol en verantwoordelijkheid van wetgevingsjuristen wordt aandacht besteed in het eerste jaar in de module staatsrecht. In deze module gaat het om het functioneren van de wetgever in een democratische rechtsstaat en de organisatie van de overheid (legaliteitsbeginsel, ministeriële verantwoordelijkheid, grondrechten, privatisering en de

structuur van het Koninkrijk). Als leerdoel is geformuleerd inzicht in de politieke en juridische regels die van toepassing zijn op het functioneren van wetgevingsjuristen, inzicht in politieke besluitvorming en een kritische houding ten opzichte van de politieke besluitvorming. In de module politicologie en bestuur wordt een verband gelegd tussen het wetgevingsbeleid en de maatschappelijke en politieke opvattingen over rechtsstaat en wetgeving. Onder andere de politieke context waarin wetgevingsjuristen hun werk doen wordt daarin behandeld.

De Academie heeft geen eigen docenten in dienst, maar maakt gebruik van docenten van universiteiten, van ervaren wetgevingsjuristen en van enkele docenten van particuliere opleidingsinstituten. Het merendeel van de docenten is als universitair (hoofd)docent of hoogleraar verbonden aan een van de universiteiten. Per module is er een kerndocent die tot taak heeft om, samen met de programmamanagers van de Academie, te zorgen voor een coherent programma en te adviseren over de in te schakelen docenten. Een curriculumcommissie ziet erop toe dat in de opleiding actuele wetgevingstheorie wordt verbonden met de wetgevingspraktijk.

Het onderwijs vindt voornamelijk plaats in de vorm van werkcolleges. Gedurende de opleiding vinden stages plaats bij de Tweede Kamer, de Raad van State, de Raad van Europa of de permanente vertegenwoordiging van Nederland bij de Europese Unie. De opleiding wordt afgesloten met een eindopdracht waarmee de student moet laten zien dat hij het geleerde in de praktijk van de wetgevingsjurist kan brengen.

Er wordt van uitgegaan dat de studenten anderhalve dag besteden aan de opleiding en drie en een halve dag besteden aan hun werk met acht uur per week studie in de vrije tijd. Op hun werk worden zij begeleid door een patroon, een ervaren wetgevingsjurist, die hen helpt met het onder de knie krijgen van de technische, procedurele en inhoudelijke aspecten van de voorbereiding van wetgeving. De aansluiting van de opleiding op het werk wordt bewaakt door de deelnemersraad van de Academie die bestaat uit de wetgevingsdirecteuren van alle departementen en de Raad van State.

De deelnemersraad heeft inmiddels besloten dat voor “zittende” wetgevingsjuristen vanaf 2012 een opleidingspuntensysteem zal gelden. Dat biedt de directeuren wetgeving een instrument om hun ervaren wetgevings- en andere juristen aan te spreken op hun bereidheid zich te blijven bijscholen op het punt van juridische praktijkkennis en inzicht in de

actuele bestuurlijke en politieke omgeving. Zeker ervaren medewerkers zullen de verbinding moeten kunnen leggen met andere disciplines en oog moeten hebben voor beleidsontwikkeling. Een overheid die steeds meer een “regulator” van maatschappelijke processen wordt zal behoefte hebben aan medewerkers die een breder zicht hebben op reguleringsvragen dan de zuiver juridische. De Academie biedt cursussen op het gebied van economie en recht, de theorie en methodologie van empirisch onderzoek en de interactie tussen wetgeving en beleid en faciliteert zelfstandig wetgevingsonderzoek. Daarmee verworven kennis kan bijdragen aan een bredere beroepsopvatting bij zittende wetgevingsjuristen, dus niet alleen de juridische implementeerder maar ook in hun werk het zicht op de buitenwereld betrekken.

In 2008 heeft het SCO-Kohnstamm Instituut onderzocht of de Academie de verwachtingen heeft waargemaakt. Onderzocht zijn de alumni van de eerste zes jaargangen. Uit het onderzoek blijkt dat de afgestudeerden in vergelijking met andere wetgevingsjuristen behoren tot de beste 25%. Bijna alle alumni zijn tevreden over de aansluiting van de opleiding op het werk. Van de afgestudeerden werkte 61% nog als wetgevingsjurist, 20% elders bij de Rijksoverheid (waarvan vier van de vijf in een andere juridische functie). De overigen werkten vooral in het bedrijfsleven of waren naar het buitenland vertrokken.

Alles overziende kan men concluderen dat de Academie de verwachtingen heeft waargemaakt. De opleiding is van erkend hoog (masters)niveau, met aanzienlijk lagere kosten dan de RAIO-opleiding. De aansluiting van de opleiding op de functie is goed. De afgestudeerden behoren tot de betere wetgevingsjuristen. In het algemeen blijft men behouden voor de Rijksdienst als wetgevingsjurist of in andere juridische functie. Bij een zelfde uitgangspositie is de instrumentenkist van de jonge wetgevingsjurist aanzienlijk gevulder dan die van de gemiddelde jonge advocaat en vergelijkbaar met The Law Firm School van de grote kantoren.

3. Het huwelijk tussen wetgeving en wetenschap

In 1999 bestond het ministerie van Justitie 200 jaar. Ter gelegenheid daarvan vond een debat plaats over het huwelijk tussen wetgever en wetenschap en breder over de positie van wetgeving in het openbaar bestuur (*Het gelaat van Justitie, vijf lezingen ter gelegenheid van 200 jaar*

Justitie, 1999). Deelnemers aan dit debat waren Andrée van Es, Mark Bovens, Ad Geelhoed en Herman Tjeenk Willink. Een van de vragen was of de wetenschap nog fundamenteel onderzoek verricht, normatieve begrippenkaders ontwikkelt of brede analyses maakt waarbinnen wetgevingsjuristen hun politiekgestuurde werk kunnen doen. Oorzaken van een mogelijk minder hecht bondgenootschap tussen wetgever en wetenschap werden zowel bij de wetgevingsfunctie als bij de wetenschap gesignaleerd. Wetgeving zou meer politiek gestuurd zijn geworden, wat ook tot uiting komt is een versterking van de positie van beleidsafdelingen op de departementen. In de sturingsfilosofie van de sociale rechtsstaat wordt bovendien wetgeving steeds meer ingezet als sturingsinstrument. De turbulentie in de maatschappelijke opvattingen en de omloopsnelheid van maatschappelijke problemen maakt het moeilijk via wetgeving tot adequate antwoorden te komen. Dat speelt zeker als het gaat om regulering op een terrein met snelle technologische ontwikkelingen. Het is in een dergelijke omgeving niet eenvoudig ruimte te vinden om fundamenteel na te denken over de functie en toekomst van regelgeving in een veranderende samenleving. De gespreksdeelnemers meenden dat zowel binnen de overheid als in de wetenschap te weinig werd gekeken naar de eigen functie. Zij weten dat aan de interne gerichtheid die alles afmeet aan wat het oplevert. Die oriëntatie op eigen functioneren werd overigens ook gezien bij andere organen als Eerste en Tweede Kamer, Raad van State en rechterlijke macht. Zij bepleitten complementariteit van de beleidsgerichte wetgevingspraktijk en de abstracte, theoretische vragen van de wetenschap, waarbij de wetenschap ook wordt afgerekend op de bijdrage die ze levert aan de algemene noties die van belang zijn voor de rechtsstaat.

3.1 De wetenschappelijke omgeving

De wetenschappelijke wereld wordt geconfronteerd met bezuinigingen en druk om beter te presteren. De universiteiten hebben te maken gehad met herstructureringen, bezuinigingen en de eis tot internationalisering. Weinig hoogleraren komen nog toe aan het schrijven van grote handboeken. Men levert commentaar op wat door de wetgever wordt voorbereid zonder zelf bij te dragen door antwoorden te geven op de vragen waar de wetgever voor staat. In het rapport van de Evaluatiecommissie Rechtswetenschappelijk

Onderzoek 2009 over de periode 2003-2008 wordt een verzwakte relatie tussen rechtwetenschappelijk onderzoek en rechtspraktijk vastgesteld. De eis om jaarlijks een minimaal aantal publicaties te verzorgen, onderzoek dat internationaler wordt en het vervangen van onderzoeksfinanciering door financiering door competitie zet die relatie onder druk. Onderzoek wordt doel op zich. De evaluatiecommissie wees erop dat er risico's zitten aan deze richting. Beleidsmakers zijn meer belang gaan hechten aan maatschappelijke valorisatie van wetenschappelijke kennis. Dat zou kunnen betekenen dat op termijn meer waarde wordt gehecht aan de maatschappelijke relevantie en het maatschappelijke nut van rechtswetenschappelijk onderzoek.

De evaluatiecommissie signaleert dat veel onderzoeksprogramma's vooral een zaak zijn van hoogleraren met een kleine onderzoekstaak en junior onderzoekers. De universitair (hoofd)docenten worden vooral ingezet op onderwijs. De laatsten zien dan aantrekkelijker beroepsperspectieven buiten de universiteit. Het onderzoek wordt theoretischer op scherp afgebakende terreinen omdat daar financiering valt te halen. Maar tegelijk moet het onderzoek, bij gebrek aan middenkader, door de jongste bediende worden uitgevoerd.

Opvallend is de vaak kleine bezetting van de onderzoeksprogramma's, gemiddeld zo'n acht man. Ze zijn daardoor afhankelijk van één of twee personen wier vertrek onmiddellijk een bedreiging of beëindiging van het programma betekent. De vitaliteit en haalbaarheid van zelfs zeer relevante en veelbelovende onderzoeksprogramma's worden door de evaluatiecommissie vaak laag gewaardeerd.

In het oog springt de onwil van de Nederlandse faculteiten om tot samenwerking te komen. Het lukt "rechtswetenschappelijk Nederland" niet tot afstemming of consensus te komen op het vlak van onderzoeksprogrammering, de beoordeling van wetenschappelijkheid, het publicatiebeleid of het promotiebeleid. De evaluatiecommissie bepleit een agenda van onderwerpen waarover de faculteiten in actie komen, niet alleen omdat die onderwerpen het vermogen van de afzonderlijke faculteiten te boven gaan, maar vooral omdat alleen de discipline als geheel ze echt kan adresseren. Een zwak punt is ook de financiële situatie van de meeste faculteiten. De eerste geldstroom – vanuit de universiteit – staat onder druk, de tweede (NWO) neemt niet toe (niet meer dan 6% van het onderzoeksbudget), als gevolg waarvan men steeds meer afhankelijk

wordt van derde (contractonderzoek), vierde (Europese bronnen) en vijfde geldstroom (sponsoring).

Er zijn overigens ook uitzonderingen op die kwetsbare bezetting van onderzoeksprogramma's. Het Netherlands Institute for Law and Governance, een samenwerkingsverband van de Rijksuniversiteit Groningen en de VU (met inmiddels ook de leerstoelen Law and Governance en Public Governance Law van Wageningen respectievelijk Twente), telt zo'n 80 onderzoekers (55 fte) met een brede onderzoeksagenda op het snijvlak van publiek en privaatrecht. Een ander voorbeeld is het International Victimology Institute Tilburg. Intervict wil alle expertise op het gebied van victimologie in Nederland bundelen. Het instituut heeft een interdisciplinair onderzoeksprogramma dat een evidence-based kennisbestand over slachtoffer empowerment ontwikkelt, gericht op wetenschap en praktijk. Uit andere faculteiten zijn er medewerkers gedetacheerd. Ook de sectie ondernemingsrecht van de Erasmus universiteit werkt in een samenwerkingsverband, in dit geval met het Groningse Instituut voor Ondernemingsrecht en op deelterreinen met Hamburg en Southampton. De Ius Commune programma's zijn een vorm van samenwerking tussen universiteiten op het gebied van onderzoek. Samenwerkingsvormen zijn er dus wel en ze worden over het algemeen goed gewaardeerd.

Een aantal onderzoeksprogramma's is direct relevant voor de wetgevings-praktijk. Het Groningse programma Interdisciplinaire rechtswetenschap van prof. Pauline Westerman is daar één van. Het programma maakt gebruik van filosofische, sociaalwetenschappelijke en juridische onderzoeksmethoden. Het recht wordt niet benaderd als een op zichzelf staand onderzoeksthema, maar bestudeerd in wisselwerking met moraal, politiek, cultuur en sociale subsystemen. Het programma is zowel theoretisch als praktisch omdat het het inzicht in de werking van regelgevingssystemen vergroot. Het Rotterdamse Centrum voor Recht en Samenleving is ook een goed voorbeeld. Het centrum heeft vooral een sociologisch vertrekpunt en bestudeert de wisselwerking tussen recht en samenleving. Veel onderzoek werd verricht naar het proces van totstandkoming van wetgeving en de werking van wetgeving. Prof. Nick Huls publiceerde o.m. *Actie en reactie, een inleiding in de rechtssociologie*, met veel aandacht voor de werking van de wet en Suzan Stoter en Nick Huls publiceerden samen *Regeldruk, een blinde vlek van onderhandelend wetgeven*, 2006, en *Onderhandelend wetgeven, een proces van geven en*

nemen, 2003. Tilburg kent een lange traditie van fundamenteel onderzoek van wetgeving en wetgevingsleer dat zijn vertaling heeft gevonden in de praktijk van het wetgevingsbeleid van de rijksoverheid. De huidige Research Group for methodology of law and legal research richt zich op drie thema's: theorie en methode van wetgeving en regulering, rechtsvinding door de rechter en methoden van rechtswetenschappelijk onderzoek. De onderzoeksgroep zet sterk in op het op hoger plan brengen van de methode van rechtswetenschappelijk onderzoek. Die benadering vertaalt zich in een aantal voor de wetgevingspraktijk relevante onderzoeken die NWO-gesubsidieerd zijn, zoals het recente proefschrift van Anna Jasiak over gelegenheidswetgeving (*Constitutional Constraints on Ad Hoc Legislation: A Comparative Study of the United States, Germany and the Netherlands*). Prof. Rob van Gestel is nog steeds de eerste en enige full time hoogleraar wetgeving in Nederland. In 2001 heeft het ministerie van Justitie het initiatief genomen tot de instelling van een leerstoel Wetgeving en wetgevingskwaliteit bij de Universiteit Maastricht. De leerstoel is mede bedoeld om de relaties tussen de wetenschap en de (wetgevings) praktijk te stimuleren. Onderzoeksthema's zijn de concretisering van de bekende kwaliteitscriteria uit "Zicht op wetgeving", de mogelijkheden om de effecten van wetgeving te voorspellen en de inzet van andere reguleringsinstrumenten dan algemeen verbindende regels. Het vak Wetgeving wordt in de mastersfase gegeven. De houder van de leerstoel, Gert-Jan Veerman, heeft in 2007 het boek *Over wetgeving, principes, paradoxen en praktische beschouwingen* (m.m.v. S.R. Hendriks-de Lange) het licht laten zien en in 2010 het boek *Wetgeven met beleid, bouwstenen voor een bruikbare wetgevingstheorie* (samen met Robin Mulder). In het laatste boek wordt een model ontwikkeld voor de verschillende elementen van de werking van beleid en wetgeving en is mede gebaseerd op de activiteiten van het clearinghouse voor systematische wetsevaluatie, een samenwerkingsproject van het WODC en de directie Wetgeving van het ministerie van Veiligheid en Justitie.

In 2009 is de Universiteit van Amsterdam gestart met een Engelstalige master European Private Law. Het doel van de master wordt als volgt omschreven: "The central aim of the proposed programme is to train a new generation of truly European lawyers in obtaining a broad and deep understanding of European private law issues and to develop their academic skills in analyzing such issues….Students are trained

in understanding the questions and problems relating to the process of Europeanisation as such and its implications for the coherence, nature and style of private law in particular. Depending on the specific subjects, economic, political, comparitive, historical, sociological or philosofical perspectives will be discussed. The “in perspective” approach, which builds upon a successful innovation in the bachelor law curriculum at the faculty of law of the Universiteit van Amsterdam, is similar to the “in context” and “total law” approaches at the University of Warwick and New York University respectively. Relevant insights from other disciplines are integrated, as much as possible, in the discussion of legal questions in order to broaden and deepen the debate….The Master’s programme is intended for candidates with an interest in pursuing a career in various legal professions, both in and outside the European Union. Employment opportunities open to graduates include: internationally-oriented law firms, in-house law departments in mult-national companies across the world, European Union institutions (Commission, Parliament, Court of Justice), national public institutions responsible for private law legislation (in the Netherlands, e.g., the Ministry of Justice) and adjudication (in the Netherlands, e.g., law clerk at the Supreme Court) and academic research.”

Er bestaan dus wel degelijk mogelijkheden voor opleidingen die oog hebben voor de taak van de bij de overheid werkzame jurist en in het bijzonder de wetgevingsjurist. Het gaat dan niet om de vaktechnische kennis waarover deze juristen moeten beschikken (de ambachtelijke vaardigheden), maar om inzicht in het functioneren van de rechtsorde en het vermogen verbindingen te leggen met andere disciplines. De bekostigingsvoorwaarden van het ministerie van Onderwijs, Cultuur en Wetenschap houden uitdrukkelijk rekening met de behoefte van de overheid aan afgestudeerden met specifieke kennis die aansluit bij de beleidsdoelen van de overheid. Artikel 2.1 van de Beleidsregel doelmatigheid hoger onderwijs van 21 juni 2006 noemt als voorwaarden voor financiering onder meer:

a. de opleiding draagt aantoonbaar bij aan de verdere ontwikkeling van de Nederlandse kennissamenleving doordat de opleiding tegemoet komt aan een gebleken behoefte aan nieuwe beroepen of aan noodzakelijk geachte nieuwe (wetenschappelijke) ontwikkelingen in innovatieve sectoren;

b. de opleiding draagt aantoonbaar bij aan een door de Rijksoverheid

erkende behoefte;
c. de opleiding wordt gevestigd in een landsdeel waarvoor de Rijksoverheid een specifiek beleid voert ter versterking van de kennisinfrastructuur;
d. de opleiding mag op langere termijn niet leiden tot substantieel nadelige effecten voor de benutting van de bestaande capaciteit en infrastructuur op het desbetreffende onderwijs- en onderzoeksterrein;
e. de inbedding van de opleiding in de (regionale) kennisinfrastructuur moet in voldoende mate verzekerd zijn.

Bij de beslissing tot bekostiging van de master European Private Law speelde uitdrukkelijk de kwestie dat de overheid behoefte heeft aan juristen met inzicht in en kennis van rechtsordelijke vraagstukken. De Commissie doelmatigheid hoger onderwijs oordeelde in haar advies van 29 augustus 2009 over de masteraanvraag als volgt: “De commissie stelt vast dat de aanvrage voldoet aan criterium b van de beleidsregel. De commissie heeft daarbij betrokken een afschrift van de brief die u op 20 mei 2009 heeft ontvangen van de minister van Justitie. De minister van Justitie geeft in deze brief concreet aan dat onderhavig initiatief nauw aansluit “aan de behoefte van de overheid aan jonge juristen met een goed ontwikkeld inzicht in de samenhang tussen Europese en nationale privaatrechtelijke rechtsorde”. Daarbij geeft de minister aan dat hij het tot stand komen van de master European private law van groot belang acht. Achtergrond hierbij is de kwaliteitsslag op juridisch gebied die plaatsvindt in het Programma versterking juridische functie van het Rijk. Aan dit programma liggen ten grondslag de aanbevelingen van het rapport “Met recht verbonden” van de visitatiecommissie juridische functie en wetgeving (Kamerstukken II 2007/08, 31 201, nrs. 32, 33). Het programma wordt gedragen door de directeuren wetgeving en juridische zaken van alle departementen. Een van de onderdelen hiervan is het streven naar een betere aansluiting van de universitaire opleiding op de taken en verantwoordelijkheden van de rijksoverheid. Een van de speerpunten hierbij is het bevorderen dat universiteiten opleidingen aanbieden met voldoende aandacht voor de inrichting van de rechtsstaat en de Europese rechtsorde.” De minister van OCW voegde daaraan in zijn beslissing van 1 december 2009 toe dat de opleiding voldoet aan criterium c1, namelijk dat de opleiding bijdraagt aan de versterking van de kennisinfrastructuur: “De opleiding zal worden verzorgd in een economisch kerngebied, waarvan de minister van Economische Zaken heeft vastgesteld dat de ontwikkeling van de

bedrijvigheid en de kennisontsluiting moet worden gestimuleerd.”

3.2 Een strategische juridische agenda

Het vorige kabinet heeft in 2009 de commissie-Veerman opdracht gegeven een oordeel te geven over de toekomstbestendigheid van het Nederlandse hoger onderwijsstelsel in vergelijking met toonaangevende onderwijsstelsels elders in de wereld. Het rapport van de commissie “Differentiëren in drievoud, omwille van kwaliteit en verscheidenheid in het hoger onderwijs” (april 2010) beoordeelt het huidige onderwijsstelsel als een stelsel dat over het geheel genomen goed is en voldoet aan de basiskwaliteit. Ook het onderzoek is goed. Dit beeld komt overeen met het beeld uit de visitaties en accreditaties van de rechtenfaculteiten. De commissie signaleert ook zwaktes. Getalenteerde studenten worden weinig uitgedaagd. Men besteedt, vergeleken met het buitenland, weinig tijd aan zijn studie. Men studeert vrij lang en er is veel uitval. Op de laatste twee punten is overigens de laatste jaren wel verbetering zichtbaar. De aansluiting op de arbeidsmarkt is enerzijds goed (weinig werkloosheid en snel een vaste baan), aan de andere kant is men niet goed opgeleid voor topposities op de arbeidsmarkt. 20 tot 40% van de afgestudeerden werkt buiten het eigen vakgebied. Het is voor juristen allemaal erg herkenbaar.

De commissie komt met een aantal aanbevelingen voor verbetering van het hoger onderwijs. Zij bepleit een betere verbinding van het onderwijs met onderzoek. Versterking van het academisch profiel van de huidige opleiding bevordert reflectie en innovatie van de beroepspraktijk. De universiteiten moeten zich profileren en onderzoek clusteren, regionaal of programmatisch. Om de schaalnadelen van het huidige systeem te compenseren moeten tussen de universiteiten meerjarige afspraken worden gemaakt over taken, prioriteiten en grote infrastructurele investeringen. De commissie bepleit een kennisagenda met als doel kwaliteitsverbetering en differentiatie.

In de kabinetsreactie worden de analyse en de voorstellen van de commissie onderschreven (Kamerstukken II, 31 288, 150). In die reactie heet het dat de essentie van wetenschappelijk onderwijs is academisch onderwijs dat samenhangt met onderzoek. Bij grote delen van de universiteiten is het onderwijs te massaal geworden en is de verwevenheid met onderzoek onvoldoende. Het kabinet wil profilering op de inhoud van

onderwijs en onderzoek en meer specialisatie. Men wil o.a. sectorplannen voor inhoudelijke profilering en grotere doelmatigheid, uitmondend in een strategische agenda voor het hoger onderwijs met meer focus en massa in onderzoek. Het pleidooi voor specialisatie en differentiatie van Hijmans is dus na 100 jaar officieel kabinetsbeleid geworden.

De Strategische agenda hoger onderwijs, onderzoek en wetenschap “Kwaliteit in verscheidenheid” die op 1 juli 2011 aan de Tweede Kamer is aangeboden (Kamerstukken II, 31 288, 194), biedt de Nederlandse rechtenfaculteiten de kans hun positie binnen de universitaire wereld te versterken. Het rapport van de werkgroep Profilering en Bekostiging, dat ten grondslag ligt aan de strategische agenda en als bijlage bij de agenda is gevoegd , signaleert dat voor een aantal sectoren, waaronder rechten en economie, met urgentie een nadere analyse moet worden gemaakt. Gesignaleerd wordt dat rechten en economie kampen met een moeilijk te hanteren massaliteit. In deze sectoren moet de verwevenheid van onderzoek en onderwijs in het wetenschappelijk onderwijs toenemen. De commissie noemt als mogelijkheid dat hbo en wo studentenstromen gezamenlijk opvangen.

De rechtenfaculteiten klagen nu over gebrek aan aandacht van de universitaire bestuurders (behalve bij bezuinigingen). De te kleine capaciteit op de onderzoeksprogramma’s is daaraan mede debet: in vergelijking met de onderzoeksprogramma’s in de beta-wetenschappen zijn ze in de ogen van universitaire bestuurders nauwelijks serieus te nemen. Het nieuwe bekostigingsstelsel van de strategische agenda geeft minder gewicht aan studentenaantallen en meer aan kwaliteit en profilering. Het aandeel kwaliteit en profiel moet van 7% naar 10-15% oplopen. Er komt 20 mln euro extra beschikbaar voor universitair toponderzoek dat bijdraagt aan de topsectoren en onderzoek op het gebied van de *grand challenges* van het EU-kaderprogramma. Gevraagd wordt om onderzoek voor het oplossen van de maatschappelijke uitdagingen “zoals veiligheid en cohesie, de financiële crisis of pensioenzekerheid”.

De tien Nederlandse rechtenfaculteiten kunnen zich gemakkelijk specialiseren op het gebied van onderwijs en onderzoek zonder schade voor hun profiel. Men kan door samenwerking massa (bestendigheid) en specialisatie (profilering) bewerkstelligen. Utrecht en Maastricht kunnen bijvoorbeeld samenwerken bij bestuursrechtelijk onderzoek. Amsterdam, Leiden en Tilburg zijn nu al de centra voor internationaal recht. Hetzelfde

geldt voor Amsterdam en Nijmegen voor het Europees privaatrecht. Rotterdam, Nijmegen en Groningen werken samen op het terrein van het ondernemingsrecht.

De overheid van haar kant kan samenwerking en specialisatie bevorderen door onderzoeksopdrachten alleen aan universiteiten te gunnen die door samenwerking bereid zijn tot focus in onderzoek en accumulatie van kennis. Op die manier kan men ook tot meerjarige afspraken komen wat vanuit financieringsperspectief voor universiteiten aantrekkelijk is. Veel onderzoeksgeld is nu weggegooid geld omdat het onderzoek te weinig diepgang heeft en geen bijdrage levert aan beleidsontwikkeling. Verbetering is mogelijk als de overheid en de universiteiten gezamenlijk komen tot een nationale onderzoeksagenda waarin de speerpunten van onderzoek voor een aantal jaren worden geformuleerd. Daarin moet ruimte zijn voor fundamenteel onderzoek dat kabinetsbestendig is.

4. De Kamer wil het…

Dit hoofdstuk gaat over de verantwoordelijkheid van wetgevingsjuristen. Wetgevingsjuristen zijn niet alleen de ambachtsman of ambachtsvrouw die beleidsdoelen in algemeen bindende regels vastlegt. Zoals de wet niet alleen instrument van het bestuur is, maar ook een normatieve functie heeft, zo is de jurist niet louter implementeerder van beleid. Hij functioneert in een politieke context, maar heeft een eigen verantwoordelijkheid die mede bepaald wordt door de publieke taak die hij vervult. De modelgedragscode integriteit Rijk erkent uitdrukkelijk de professionaliteit en de morele verantwoordelijkheid van de ambtenaar in het licht van het dienen van het algemeen belang. De jurist moet op basis van zijn professionaliteit en zijn functionele kennis van het recht adviseren over rechtmatigheid van het overheidshandelen; loyaliteit aan de politiek houdt niet in dat overheidsjuristen ontslagen zijn van een eigen professionele en morele verantwoordelijkheid.

In 2011 verscheen de Nederlandse vertaling van de integrale editie van *Over de democratie in Amerika* van Alexis de Tocqueville. Het boek, oorspronkelijk uit 1835 en 1840, gaat niet slechts over de Amerikaanse staatsinrichting van de Amerikaanse samenleving van de eerste helft van de 19e eeuw. Het is ook een universele verhandeling over het wezen van het overheidsbestuur en het functioneren van de democratische samenleving.

Tocqueville besteedt uitgebreid aandacht aan het rechtssysteem en de positie van juristen. Hieronder volgt een lang citaat uit het tweede deel van Boek 1 (p. 286):
"Mannen die een bijzondere studie van de wetten hebben gemaakt, hebben daaraan een neiging tot orde overgehouden, een zekere voorkeur voor vormen en een soort instinctieve liefde voor logisch redeneren, waardoor zij natuurlijk sterk gekant raken tegen de revolutionaire geest en de ondoordachte hartstochten van de democratie. De bijzondere kennis die juristen verwerven door het bestuderen van de wet, verzekert hun een aparte plaats in de samenleving; zij vormen een soort bevoorrechte klasse onder de intelligentsia. Zij vinden het idee van deze superioriteit elke dag terug in de uitoefening van hun beroep; zij zijn de meesters van een noodzakelijke wetenschap, waarvan de kennis weinig verbreid is; zij treden op als arbiter tussen de burgers, en de gewoonte om de blinde hartstochten van de partijen in goede banen te leiden, zorgt ervoor dat zij een zekere minachting gaan vertonen voor het oordeel van de massa. Voeg daar nog aan toe dat zij van nature een korps vormen. Het is niet zo dat zij het met elkaar eens zijn en in gemeen overleg naar hetzelfde doel opmarcheren, maar de gemeenschappelijkheid van studie en de eenheid van methode zorgen voor een onderlinge geestelijke band, zoals hun belangen ervoor zouden kunnen zorgen dat zij hetzelfde willen."

Het is verleidelijk Tocqueville uitgebreid te citeren, bijvoorbeeld over constitutionele toetsing (vóór) en tijdelijke aanstelling van rechters (tegen), maar daar gaat dit preadvies niet over.

Als men les geeft aan de Academie van wetgeving wordt men regelmatig verrast door de beroepsopvatting van jonge wetgevingsjuristen die het louter hun taak vinden de opdrachten van "de politiek" uit te voeren: De Kamer (de minister, het beleid) wil het…. Maar ook beleidswensen kunnen stuiten op de grenzen van Grondwet, rechtszekerheid, gelijkheid voor de wet, toegankelijkheid of internationale verplichtingen. De Raad van State en de Eerste Kamer wijzen regelmatig op een bestuurlijke praktijk die te ver afstaat van het rechtsstatelijk ideaal. Heel basaal gaat het dan om te ruime delegaties of bestuurlijke sancties die in geen verhouding tot de overtreding staan. Meer fundamenteel kan het gaan om schending van fundamentele rechten en internationale verplichtingen. Rein Jan Hoekstra heeft in zijn rede voor de Nederlandse Juristenvereniging in 2009 gewezen op het gevaar dat de rechter belast wordt met een taak die daar niet

thuishoort, namelijk toetsing van de wet aan grondwettelijke rechten: de trias politica dreigt dan te worden verstoord. Die taak berust primair bij de wetgever.

Het is de taak van de wetgevingsjurist te wijzen op aspecten van rechtmatigheid en rechtsstatelijkheid van beleid en regelgeving, in de wetenschap dat de politiek uiteindelijk beslist. Men mag de toetsing van beleid en wet aan dergelijke kwaliteitscriteria ook niet laten afhangen van de oplettendheid van de Raad van State of de Eerste Kamer.

4.1 Een intermezzo: het rapport-Davids

Begin 2010 verscheen het rapport-Davids met het onderzoek naar de besluitvorming in Nederland over de politieke steun voor de inval in Irak. Het onderzoek betrof onder meer de volkenrechtelijke legitimatie van de inval, een kwestie die al eerder aandacht had gekregen door de weigering van het toenmalige kabinet advies in te winnen van de Commissie van Advies inzake Volkenrechtelijke Vraagstukken, het uitlekken in NRC Handelsblad van een memo van de Directie Juridische Zaken van 29 april 2003 (dus na de inval van 20 maart 2003) en de voor tweeërlei uitleg vatbare adviezen van de Britse Attorney General Lord Goldsmith over het volkenrechtelijke mandaat van de VN-resoluties over Irak, welke adviezen ook een rol speelden in de besprekingen in de ministerraad.

De commissie-Davids heeft een nauwgezette reconstructie gemaakt van de juridische advisering binnen Buitenlandse Zaken die met name interessant is omdat het de spanning tussen juridisch advies en politieke besluitvorming blootlegt en een scherp licht werpt op de functionele verantwoordelijkheid van juristen binnen de overheid. Het eerste adviesmoment over een mogelijke militaire aanval op Irak dateert van 27 mei 2002. Op de vraag of een dergelijke aanval volkenrechtelijk toelaatbaar zou zijn, antwoordde de afdeling internationaal recht van DJZ dat er in het volkenrecht twee onomstreden uitzonderingen waren op het verbod op het gebruik van geweld, namelijk het recht op zelfverdediging en een machtiging van de Veiligheidsraad. Een derde uitzondering, geweldgebruik in het kader van een humanitaire interventie, was omstreden. DJZ-IR voorspelde in het memo dat de Verenigde Staten een aanval op Irak mogelijk zouden pogen te rechtvaardigen met “een verwijzing naar in het verleden uitgevaardigde resoluties van de

Veiligheidsraad die een machtiging zouden verschaffen voor het militaire optreden". DJZ-IR stelde voorts vast dat er een diepgaand meningsverschil bestond in de Veiligheidsraad over wat de consequenties van schending van de resoluties door Irak zouden zijn. DJZ-IR constateerde dat resolutie 678 temporeel ongelimiteerd was en dat het doel "*to restore peace and security in the region*" vrijwel onbegrensd was, maar dat een uitleg van de resolutie waarbij voorafgaand aan een militaire aanval de Veiligheidsraad zou worden gepasseerd, niet werd gesteund door de ontwikkeling van het volkenrecht sinds 1991, noch door statenpraktijk, noch door doctrine. Ten aanzien van de rechtvaardiging van een militaire aanval door het argument van een *regime change* stelde DJZ-IR dat dit volkenrechtelijk ronduit onjuist was. "Indien bestaande resoluties al een rechtsbasis geven voor een toekomstige Amerikaanse militaire actie, is deze basis flinterdun."

DJZ-IR waarschuwde daarnaast voor een aantal consequenties van het passeren van de Veiligheidsraad. Rekening moest worden gehouden met minder legitimatie voor het geweldgebruik, precedentwerking en op lange termijn een ondermijning van het beginsel van de *rule of law*.

In augustus 2002 vroeg de net aangetreden nieuwe minister van Buitenlandse Zaken De Hoop Scheffer aan DJZ te reageren op een artikel in de *Financial Times* van mr. A.P van Walsum, voormalig Nederlands vertegenwoordiger in de Veiligheidsraad. In dat artikel verdedigde Van Walsum de stelling dat uit het NAVO-ingrijpen in het Kosovo-conflict in 1999 was gebleken dat er geen noodzaak was tot een nieuwe resolutie indien zich een uitzonderlijke dreiging voordeed of indien eerdere resoluties stelselmatig waren geschonden. Het stelselmatig schenden van Veiligheidsresoluties kon volgens DJZ/IR volkenrechtelijk zeker niet in het algemeen als rechtsgrond voor geweldgebruik worden onderschreven. De verwijzing naar Kosovo leek DJZ/IR niet toepasselijk omdat daarbij sprake was van een humanitaire interventie.

Op 13 maart 2003 gaf DJZ in een memo aan de minister op verzoek van de DG Politieke Zaken een juridische onderbouwing van geweldgebruik in Irak zonder tweede resolutie van de Veiligheidsraad. De onderbouwing verwees naar de ruime machtiging van resolutie 678 en het ontbreken van een tijdslimiet in deze resolutie. Daarnaast was in opvolgende resoluties geconstateerd dat Irak de eisen die bij het staakt-het-vuren waren gesteld in resolutie 687 niet had nageleefd. In resolutie 1441 was niet opgenomen dat geweldgebruik pas na een tweede resolutie mogelijk zou

zijn. Gewezen werd op de bombardementen in Kosovo en het gewapend optreden in Liberia. DJZ besprak ook de bezwaren van vrijwel geheel volkenrechtelijk Nederland tegen het regeringsstandpunt. De kern van de tegenargumenten was dat resolutie 678 betrekking had op de situatie na de inval van Irak in Koewijt. Voor de zienswijze dat deze resolutie ook een rechtsbasis bood voor de inval in Irak hadden het VK en de VS nauwelijks steun gekregen. Ook secretaris-generaal Kofi Annan van de Verenigde naties vond militaire actie zonder betrokkenheid van de Veiligheidsraad in strijd met het VN-Handvest. DJZ achtte het niet ondenkbaar dat Nederland met deze positie een procedure voor het Internationaal gerechtshof zou verliezen.

Uit de reconstructie blijkt dat DJZ driemaal schriftelijk heeft geadviseerd over de volkenrechtelijke legitimatie van de inval in Irak en daarbij telkens gewezen heeft op het risico van het ontbreken van een volkenrechtelijk mandaat (later kregen we nog de discussie over een adequaat of adequater mandaat). De Hoop Scheffer verklaarde in een gesprek met de commissie dat hij op de hoogte was van de opvattingen die binnen juridische delen van het departement over de opportuniteit en de legitimiteit “of het gebrek daaraan” leefden. Ook in de ministerraden van 28 februari, 7 maart, 17 maart en 18 maart 2003 kwam de volkenrechtelijke rechtvaardiging van een militaire actie aan de orde. In de eerste vroeg de minister van Justitie naar de rechtvaardiging van Nederlandse steun zonder een resolutie. In de volgende ministerraad werd die rechtvaardiging gezocht in de *material breach* van de resoluties sinds 1991. In de ministerraad van 17 maart stelde de minister van Justitie dat de discussie zich niet zou moeten toespitsen op de vraag “ of het gerechtvaardigd is dat het onvermogen van de Veiligheidsraad om tot een eensgezind besluit te komen ertoe mag leiden dat Saddam Hoessein zijn gang mag blijven gaan.” In de daarop volgende ministerraad van 18 maart voegde hij daaraan toe dat hij het onwenselijk achtte dat het kabinet zich laat meezuigen in een inhoudelijke discussie over de volkenrechtelijke legitimatie van een militair optreden. De minister van Buitenlandse Zaken stelde daarop dat deskundigen het niet eens waren over de vraag of militair ingrijpen op basis van de bestaande resoluties volkenrechtelijk gelegitimeerd was. Hij voegde daaraan toe dat het volkenrecht niet statisch was, getuige de militaire operaties in Kosovo. Het is opvallend dat de commissie in de volgende zin in haar rapport stelt dat in de ministerraad op geen enkel moment een

fundamentele gedachtewisseling heeft plaatsgevonden over de validiteit van de “ corpustheorie” noch over de vraag wie *material breach* vaststelt. Uit de reconstructie blijkt gewoon dat het kabinet een andere afweging heeft gemaakt, die primair politiek is, maar wel geënt op de gedachte dat er een juridisch mandaat lag in de bestaande VN-resoluties. In de interne discussie op Buitenlandse Zaken kwam die tegenstelling tussen juridische rechtvaardiging en politieke afwegingen ook uitdrukkelijk aan de orde. De DG politieke Zaken wees er bijvoorbeeld op dat de besluitvorming in de Veiligheidsraad politiek en niet juridisch van aard was en dat de gevoerde argumenten ook niet juridisch, maar politiek van aard dienden te zijn. Naar zijn oordeel was het dan ook een politieke vraag of Nederland “ zich meer thuis voelt bij Frankrijk, Rusland en China of bij de VS en het VK”. Ook dat is een volstrekt legitieme afweging. Men kan dan ook achteraf vaststellen dat DJZ/IR in haar advisering een zuivere en consistente lijn heeft gevolgd en dat die lijn zowel aan de minister als aan de ministerraad bekend was. DJZ heeft gewezen op het risico van afnemende legitimatie van geweldgebruik in andere situaties, precedentwerking en ondermijning van de *rule of law* bij een onvoldoende volkenrechtelijk mandaat. Maar misschien hadden de adviezen van DJZ meer invloed op de besluitvorming gehad als explicieter gewezen was op de politieke dimensie dat de afweging tussen (volken)recht en macht, tussen *right* en *might*, in Nederland anders kan uitvallen dan in de Verenigde Staten of het Verenigd Koninkrijk. Andersom geldt evenzeer dat men mogelijk een politiek betere beslissing had genomen als een meer juridische redenering was gevolgd. Dat lijkt ook wel te worden erkend in een notitie van 22 juni 2007 van het kabinet Balkenende IV waarin als algemeen uitgangspunt wordt gehanteerd dat “voor iedere staat geldt dat geweldstoepassing en uitzending van militairen in overeenstemming dient te zijn met het internationale recht.” Naar het oordeel van het kabinet geldt dit voor Nederland in het bijzonder, in verband met “de grondwettelijke plicht de ontwikkeling van de internationale rechtsorde te bevorderen” en de reputatie van Den Haag als “juridische hoofdstad van de wereld”. In het VK heeft de politieke steun van Nederland in ieder geval weinig indruk gemaakt. In het boek *Thirty days, An inside account of Tony Blair*, waarin Peter Stothard de Britse premier van 10 maart tot 9 april 2003 van dag tot dag op de voet volgt bij de besluitvorming in Downing Street 10, het Britse parlement, Brussel of Camp David, wordt de Nederlandse politieke steun in het geheel niet genoemd.

4.2 De ambtenaar is niet onschendbaar

De verantwoordelijkheid van wetgevingsjuristen wordt mede bepaald door hun positie als ambtenaar in het stelsel van de ministeriële verantwoordelijkheid. Ambtenaren werken voor de publieke zaak en in een politieke omgeving waarin de minister staatsrechtelijke verantwoordelijkheid draagt jegens de Staten-Generaal. De minister is verantwoordelijk voor het doen en laten van zijn ambtenaren en dus ook als zij hem verkeerd adviseren op terreinen waarop zij functioneel deskundig zijn. De minister hoeft niet alles te weten, maar hij moet er wel op kunnen vertrouwen dat ambtenaren het werk doen waarvoor ze betaald worden. Het feit dat een minister ter verantwoording kan worden gehouden, ontslaat een ambtenaar niet van zijn verantwoordelijkheid jegens de minister. De ambtenaar is niet onschendbaar, zoals Rob Visser zegt in zijn *In dienst van het algemeen belang, ministeriële verantwoordelijkheid en parlementair vertrouwen*. Hij wijdt in zijn proefschrift ook een hoofdstuk aan ambtenaren en het ambtelijk apparaat en wijst erop dat een ambtenaar zijn professionele kwaliteiten moet inzetten. Op die professionele verantwoordelijk kan hij ook worden aangesproken.

Wetgevingsjuristen zijn niet ontslagen van hun plicht om te adviseren op het terrein van hun specifieke deskundigheid “omdat de politiek, de minister, het beleid het wil”. Rob Visser schrijft dat de ambtelijke verantwoordelijkheid meebrengt dat de ambtenaar handelt en informatie verschaft op een wijze die het de minister mogelijk maakt zijn staatsrechtelijke verantwoordelijkheid waar te maken. Onderdeel daarvan is dat hij de minister intern tegenwicht en tegenspraak biedt waar dat nodig is voor een optimale belangenafweging. Een loyaal ambtenaar is geen ja-knikker, maar zorgt dat de relevante informatie beschikbaar is. Voor een ambtenaar die betrokken is bij de beleidsvorming betekent dit bijvoorbeeld dat hij alle aspecten en argumenten aandraagt die ten behoeve van politieke besluitvorming en verantwoording nodig zijn, dat hij wijst op keuzemogelijkheden en risico’s en dat hij intern tegenwicht biedt.

Deze benadering vanuit een klassiek staatsrechtelijk leerstuk is relevant omdat het tegenwicht biedt aan de gedachte dat het opereren in een politieke context professionele juridische verantwoordelijkheid uitsluit. Tegenwicht is wat anders dan remmen. Wetgevers zullen ook oog moeten hebben voor de dynamiek in de samenleving en de politieke

werkelijkheid die bepaalde eisen aan wetgeving en rechtsvorming kan stellen. Rechtsbeginselen zijn geen statische begrippen, maar moeten – in de woorden van het Europese Hof voor de rechten van de mens – worden geïnterpreteerd in het licht van de huidige omstandigheden (*the present-day conditions*). Dat is een uitnodiging aan wetgevingsjuristen om bij de uitoefening van hun taak rekening te houden met de maatschappelijke werkelijkheid waarin het recht functioneert.

5. Afronding

Voor de uitoefening van het vak van wetgevingsjurist is allereerst vereist een grondige kennis van het rechtsterrein waarop men werkzaam is. De basis daarvoor wordt gelegd tijdens de universitaire studie. Eenvoudig is het niet. Het recht dijt uit en Europese en internationale, grondwettelijke regels werken door in het nationale recht. Het recht functioneert bovendien in een maatschappelijke werkelijkheid die voortdurend verandert. Specialisatie op deelgebieden weerspiegelt zich in het universitaire opleidingsprogramma. De eis van "academisering" verlangt van de student dat hij ook kennis neemt van andere disciplines en de betekenis daarvan voor het eigen vakgebied. Van een beroepsopleiding wordt de rechtenstudie steeds meer een algemene academische vorming die zich richt op de grondbeginselen die aan het positieve recht ten grondslag liggen, met een specialisatie van de studie in de masterfase.

De rechtenstudie is geen beroepsopleiding (meer). Het grootste contingent studenten zal uiteindelijk in een grote variëteit van functies terechtkomen bij de overheid en alles wat daar aan uitvoeringsorganisaties en bestuursorganen omheen hangt. Na de studie zal de opleiding tot professional moeten plaatsvinden. De Academie voor wetgeving biedt een postinitiële masteropleiding met als pijlers verdieping van vakkennis en professionele verantwoordelijkheid. De Academie voor overheidsjuristen biedt een vergelijkbare opleiding aan andere overheidsjuristen die net van de universiteit komen. De advocatuur zal de eigen stageopleiding verzwaren. De rechterlijke macht maakt een tegengestelde beweging en zal nog slechts juristen met ten minste drie jaar werkervaring na de studie aannemen.

Dit jaar bestaat de Academie voor wetgeving 10 jaar. In die periode hebben 150 wetgevingsjuristen de startersopleiding met succes gevolgd.

Zo’n 120 werken nu nog als wetgevingsjurist of in een andere juridische functie bij de overheid. Uit het onderzoek van het SCO-Kohnstamm Instituut blijkt dat zowel afgestudeerden als leidinggevenden tevreden zijn over de opleiding. De Academie heeft bewezen bij te dragen aan de kwaliteit van wetgeving. Naast haar opleidingsfunctie wil de Academie bijdragen aan de kennisvorming op het gebied van regelgeving. Zij doet dat onder andere door wetgevingsjuristen te faciliteren bij het uitvoeren van wetgevingsgerelateerd onderzoek. In 2010 werden met financiële hulp van het Programma vernieuwing rijksdienst twee promotieplaatsen en twee publicatieplaatsen beschikbaar gesteld. Dit jaar zijn een tot twee promotieplaatsen en drie tot vier publicatieplaatsen beschikbaar. Deelnemers worden gedeeltelijk vrijgesteld van hun normale werkzaamheden.

De Academie kan door dergelijke activiteiten een schakelfunctie vervullen tussen wetenschap en wetgevingspraktijk. Door samenwerking met het kenniscentrum wetgeving, de Vereniging voor wetgeving en wetgevingsbeleid en faculteiten rechtsgeleerdheid (Groningen, Tilburg, Rotterdam, Maastricht, VU Amsterdam) ontstaat zo geleidelijk een netwerk voor een academische opleiding voor “reguleerders” en voor rechtswetenschappelijk onderzoek op het gebied van reguleringsvraagstukken. De nieuwe bekostigingsvoorwaarden van de strategische agenda hoger onderwijs zullen de universiteiten dwingen zich te specialiseren (profileren) in hun onderwijs- en onderzoeksaanbod. Het ligt voor de hand dat een deel van de faculteiten zich zal richten op de opleiding voor de togaberoepen. Dus een op de praktijk gerichte opleiding met een geringe onderzoeksagenda. Andere zullen zich specialiseren op reguleringsvraagstukken en het rechtswetenschappelijk onderzoek met verbindingen naar economie, bestuurskunde en sociologie.

Hiervoor is een meerjarige landelijke onderzoeksagenda bepleit. Die agenda zou moeten aansluiten bij de grote maatschappelijke uitdagingen, rechtsgebiedendoorsnijdend en kabinetsbestendig moeten zijn. De vraag is dan hoe zo’n agenda, vanuit het perspectief van overheidsbestuur en wetgever, eruit zou kunnen zien. Laat ik een voorzet doen.

Eén van de thema’s is de vraag hoe de overheid haar taken kan uitvoeren in een samenleving die hoge eisen stelt aan het bestuur en gekenmerkt wordt door schaalvergroting en intensivering van interpersoonlijke betrekkingen. In het bestuursrecht is er veel aandacht voor

de mogelijkheden het bestuur meer armslag te geven bij besluitvorming. De bestuurlijke lus, de experimenteergebieden in de crisis- en herstelwet (zie voor experimenteerbepalingen in wetgeving Sinem Bulut en Gert-Jan Veerman, *Voorbij de horizon*, Tijdschrift voor constitutioneel recht 2011/3 en gepubliceerd op de site van het kenniscentrum) en de belangstelling voor de wederkerige rechtsbetrekking in het bestuursrecht zijn daarvan verschijningsvormen. Op dit terrein begeeft zich ook het centrale onderzoeksthema van het Netherlands Institute for Law and Governance dat zich concentreert op de uitvoering van publieke taken en private actoren. In het strafrecht komt de verbestuurlijking tot uiting in het succes van de bestuurlijke boete en de OM-afdoening in de vorm van de strafbeschikking die een groot aantal delicten buiten de strafrechtelijke keten heeft geplaatst. In het privaatrecht is er sprake van collegiale rechterlijke afspraken tot standaardisatie in veel voorkomende zaken (kantonrechtersformule en alimentatienormen). De Hoge Raad heeft daar grenzen aan gesteld omdat deze vorm van harmonisatie op basis van globale normen en factoren onvoldoende rekening houdt met de individuele omstandigheden van het geval (Hoge Raad 12 februari 2010, LJN:BK 4472). De Staatscommissie Grondwet plaatste de toename van bestuurlijke boetes in de sleutel van de toegang tot de rechter en artikel 113 Grondwet dat de berechting van strafbare feiten opdraagt aan de rechterlijke macht. De centrale vraag is hoe schaalvergroting in het recht te verenigen is met individuele rechtvaardigheid.

Nauw hiermee verwant is een tweede dominante beweging die men de tijdsfactor in het recht zou kunnen noemen. De vice-president van de Raad van State sprak in zijn algemene beschouwingen in het jaarverslag 2007 over de gespleten tijdsorde waarin de wetgever opereert. Maatschappelijke opvattingen en omstandigheden veranderen. De samenstelling van de bevolking verandert en ook de economische situatie wijzigt zich soms snel. Het tempo van deze veranderingen en ontwikkelingen, de maatschappelijke tijdsorde, loopt niet synchroon met de legislatieve. De vraag is dan of dat een ander soort regulering eist. Men kan meer aan het bestuur delegeren (de traditionele benadering dat men delegatie nodig heeft om snel op veranderingen te kunnen reageren). Men kan ook in plaats van detaillering kiezen voor principiële normstelling met de wet als maatschappelijk ankerpunt (de WRR in het rapport “De toekomst van de nationale rechtsstaat” uit 2002). De neiging de afgelopen

decennia is voor het eerste te kiezen (met klachten over regeldruk en een kloof tussen recht en praktijk als gevolg). De vraag is of deze traditionele benadering volstaat en of de ontwikkelingen niet andere concepten voor regulering noodzakelijk maken.

Daarmee komen we op de derde dominante beweging in het recht, internationalisering en de doorwerking van het Europese recht in de nationale rechtsorde. Maurice Adams en Willem Witteveen spreken in het NJB 2011, p. 540-549, van *Gedaantewisselingen van het recht*: de internationalisering van de rechtsorde heeft behoefte aan gemeenschappelijke concepten en beginselen die de rechtsdomeinen overspannen. Deze benadering vanuit gemeenschappelijke beginselen en integratie van domeinen zal in hun ogen ook consequenties hebben voor het onderwijs. De Groene Amsterdammer van 21 april 2011 vroeg 75 wetenschappers wat de tien grootste problemen van deze tijd zijn. Egbert Dommering beschreef een wereldwijde netwerksamenleving die juridisch nauwelijks meer te controleren is. Hij noemde wikileaks als voorbeeld. Als tegenreactie wordt de nationale controle op de toegangspoorten tot internet verscherpt. Hij bepleit een duidelijk juridisch kader waarin de toegang tot informatie gewaarborgd is. Eric Tjong Tjin Tai betwijfelt of de bestaande concepten van het recht toereikend zijn bij nieuwe netwerkachtige samenwerkingsverbanden zonder centrale organisatie of zeggenschap over andermans gedragingen. Het HIIL-project *Shaping the Law of the Future* met veel aandacht voor horizontalisering en internationalisering van verhoudingen sluit daar mooi bij aan.

Een nationale onderzoeksagenda zou richting kunnen geven aan de keuzes waarvoor de “regulator” (zowel de publieke als de private) gesteld zal worden. Een gedeeld beeld wat verwacht wordt van het juridisch onderwijs, het wetenschappelijk onderzoek en de taak van de overheid helpt daarbij. In de inleiding sprak Drion over een vrije levenszone en Adorno over *Halbbildung*. Zij hadden het daarbij niet over de 20 uur die de gemiddelde rechtenstudent aan zijn studie besteedt, wel over de functie van het recht in de samenleving en de noodzaak bij de opleiding aandacht te besteden aan zowel de praktijkonderdelen van de juridische studie als de maatschappelijke verantwoordelijkheid van de jurist. Gezien die 20 uur lijkt daarvoor voldoende ruimte te bestaan.

Introductory speech at the symposium on 22 September 2011

R.A.J. van Gestel[170]

Dear members of the Dutch Association of Legislation and Legislative Policy,

Ladies and Gentlemen, I would like to start by welcoming you all.

I am addressing you in English because today is a special day for the association. Our annual conference this year is dedicated to the education of legislation and we are paying tribute to the 10th anniversary of the Academy of Legislation with three distinguished keynote speakers of whom two are from abroad. A special welcome to them. Before I am going to introduce our guests, though, I would like to take the opportunity to express my gratitude to Peter van Lochem, the Director of the Academy for his help to make this special event possible and also to Wanda Weeber who has been working behind the scenes and who did most of the organisation. Without Wanda many things could and probably would have gone wrong.

Before we go to the contributions of our keynote speakers, let me first introduce them to you.

Let us start with the éminence grise of our trio of guests, Professor Edward L. Rubin. He is the present dean and John Wade-Kent Syverud professor of Law at Vanderbilt University Law School. For those of you who are unable to locate Vanderbilt. Vanderbilt is situated in Nashville Tennessee (also known as the "Music City" of the U.S.). What many of you may not realize is that Vanderbilt ranks among the top 20 laws schools in the U.S, which is quite an achievement. I am told that one of the driving forces behind this success is Edward Rubin. Professor Rubin specializes in administrative law, constitutional law and legal theory and has a long

[170] Chairman of the association and Professor at Tilburg University, Department for Public Law, Jurisprudence and Legal History.

and impressive track-record in both teaching and research in the field of legislation and regulation. What is more important is that I believe it is fair to say that Edward Rubin may be considered as a legal scholar who managed to be ahead of his time. To give you a few examples, Edward Rubin was writing about experimental legislation, about the rise of the regulatory state and about the relationship between legal scholarship, law-making and methodology, already in the nineteen eighties when most of the legal research and education both in the US and in Europe showed little interest for these topics, whereas today this has completely changed. Edward Rubin is the author of numerous books and articles which almost always have in common a rich combination of legal theory, legal history, and a deep interest in matters that concern the nature of legal scholarship.

Our second speaker is Professor Felix Uhlmann. He holds a chair in constitutional and administrative law and legislation theory (‘Rechtsetzungslehre’) law at the University of Zurich. For those of you who don’t know where to locate Zurich; I am afraid a career in banking will prove to be difficult. Felix Uhlmann is the present director of the research centre for legislation, where he is the successor of Professor Georg Müller, who is also a well-known expert in the field of legislative studies in the German speaking world. Felix holds an LLM from Harvard Law School and has written an impressive PhD dissertation on the principle of the prohibition of arbitrariness (Willkürverbot) at the University of Basel. He is also the co-author of a few influential textbooks on economic law and administrative. Next to this he published about topics, such diverse as the meaning of legal principles for civil servants, procedural law and the Swiss Supreme Court, and the role of interdisciplinarity in legislative studies. What is interesting for us today is that he has a good overview of the developments in both Germany and Switzerland. So next to someone with roots in the common law tradition we also have an expert in our midst from the civil law tradition, which enables us to take a closer look in yet another mirror to see where we are standing today.

Reflections by Academics on the role of legislation and regulation in education are important if want to have a “learning legislature”. But perhaps the most difficult and challenging part of learning is self-reflection. Therefore I am also very happy that we have found Menno Bouwes, who

may considered to be an insider, prepared to reflect on the role of legislation and regulation in academic and professional education. Menno Bouwes is head of the department for legislative quality and deputy director of the legislative policy department of the Dutch Ministry of Security and Justice. Before this, Menno was the head of the private law department of the Ministry of Security and Justice.
What is interesting about Menno Bouwes is that he is not only one of the most important watchdogs for the quality of draft legislation in the Netherlands but he is also active on the other side of the spectrum in his capacity as a part time judge in the court of appeal in The Hague. Next to this, Menno is a member of the advisory board of several research institutes, such as the Van der Heijden institute in Nijmegen and the recently established Netherlands Institute for Law and Governance and he is also involved in the monitoring of several academic chairs sponsored by the Ministry of Justice. Last but not least he is also a teacher at the Academy of Legislation where he is responsible for a course on legal instrumentalism versus normative rule-making together with Frank van Ommeren from the VU-University in Amsterdam.

Now that our keynote-speakers are introduced, and the programme is shown, please let me say a few words about the subject of our meeting of today:

What could be the reason to choose the education of legislation as the central theme of our annual conference, apart from the 10th anniversary of the Academy of Legislation? Is there a problem one may wonder?
The fact that we have a flourishing academy of legislation is certainly reason for joy and I personally believe that the average quality of statutes and regulations in the Netherlands is certainly nothing to be ashamed of if we compare ourselves to other EU member states. Last time I was in Zurich, this was confirmed by Professor Ulrich Karpen, who ranked the Netherlands as one of the top countries in the world with respect to its policy to ensure the quality of legislation. It is hard to stay modest with such complements but as a sober Dutchmen I believe there is also some reason for concern.

First of all, I believe it is worrisome that there is so little attention for

legislation and regulation, especially in the bachelor curricula of most of the Dutch law faculties. I do not want to deny that legislation is a topic that is being discussed, for instance, in classes on constitutional and administrative law. But apart from theories and methods of statutory interpretation, most of the attention goes to the institutions and procedures at the rear end of the legislative process (right to amend, right to return a draft, right to approve or reject etcetera). This provides students with a distorted and incomplete picture about: the way laws and regulations are actually being made, about how politics interact with law and policymaking, and about the influence or lack of influence that facts and empirical data haveon the drafting process. I am afraid that legislation is usually treated by law students (and their teachers!) as something that is simply there; a "brooding omnipresence in the sky" as Oliver Wendell Holmes jr. would have formulated it.

Secondly, as a consequence of the lack of attention for the preparation of laws and regulations and the complex relationship between policymaking and legislative drafting, most students graduating from law school believe that the supremacy in the legislative process lies with parliament. However, they usually don't realise that about 2/3 of the total amount of legislation at the central government level in the Netherlands consists of delegated legislation with little involvement from parliament. And although students are told that the influence of European law on Dutch legislation and regulation is growing they usually don't have a clear idea about how this actually affects the interplay between national legislators and EU institutions, since most courses in European law and constitutional law concentrate on: the implementation and enforcement of EU-directives and regulations, on possible infringement procedures initiated by the European Commission, and on decisions by the European Court of Justice. Unfortunately, as we all know, anyone who wants to improve the co-actorship between EU legislators and those in the member states has to focus on the early stages of a proposal for new EU-laws, starting with white and green papers, followed by stakeholder consultations and so on. In the earliest stages it is still possible to question the necessity of regulation and to consider possible alternatives, and amend the proposal without much political turmoil in order to avoid conflicts with existing rules and legal principles. The more a proposal reaches the end of the policy tunnel, the more difficult it will become to accomplishmajor adjustments.

Thirdly, because most of the attention in the law school curriculum still goes to methods of judicial law-making, students are often unaware of the alternatives modes of regulation and governance, such as self-regulation and co-regulation. They know something is going on here but they do not understand what exactly that is. Both at the national and at the European level, however, non-state law and transnational private rule-making are on the rise despite the fact that our highest administrative and civil courts still don't pay too much attention to it. Whether the rise of non-state law is a bad, a necessary, or an unavoidable development may be up for debate. In combination with the Europeanisation of Dutch law it does raise questions about the top down model of "supremacy" we are still using to organise democratic legitimacy (see also article 290 TFEU).That is probably why in the literature on regulation and governance much of the debate is concentrated on an alleged shift from a top down model of law-making, in which the judiciary serves as a "last post", to a model of law-making that is more polycontextual and less centred around judge-made law. Unfortunately though, the constitutional debate about the consequences of this shift does not keep pace with what is going on in practice.

Not only in the academic literature but also in practice most European countries, and also the EU itself, are struggling with phenomena, such as: far reaching delegation of law-making competences, skeleton legislation, and all sorts of new modes of regulation and governance, challenging the position of national parliaments in the creation of national and European laws and regulations. Luzius Mader, the president of the International Association of Legislation, signalled at the last conference of the International Association of Legislation in Lisbon an increased "outsourcing" of legislative tasks from parliaments to governments, to supranational and international organisations, to independent agencies and even to NGO's, lobbyists and external experts. He called for a restoration of the position of parliaments. I wonder, though, whether his call is realistic or simply the result of wishful thinking. Perhaps we should not try to hold on so tight to old concepts about statehood, legality, and separation of powers, and start to look for new concepts of legitimacy and accountability that are better equipped to deal with the fragmentation of rulemaking powers in a globalising legal world. I am not saying that we should put parliaments out with the garbage yet. There is a well-known Dutch proverb saying that "you should not throw away your old shoes until

you have got new one's". What I am merely suggesting here is that it may be wise for us academics to take the lead in looking around for new shoes or thorough reparation of the shoes we are wearing today before the old ones are totally worn-out.
What does all this mean for the education of legislation? I certainly do not want to pretend that I have all the answers here but my feeling is that a couple of things need to be (re)considered. I will limit myself to what I believe to be five key issues:

1. We definitely need more attention for legislation and regulation in the law school curriculum. In the modern regulatory state, courses on constitutional law, administrative law, and European law should be supplemented with classes on theories and methods of legislation and regulation that combine strictly legal questions with more empirical ones (what works (not) and why?). The role-model of the judge has become far too narrow to capture the richness and diversity of law as a science and a profession and legal scholars should not let political scientist take the lead in developing a modern legisprudence because then the law will disappear from the scene and legislation and regulation will be reduced to: who has what power?
2. Since legislation and regulation are flourishing topics in the academic literature, it is of the utmost importance that we try to close the growing gap between research and education in law that also the latest research assessment exercise (RAE) has shown. Law research is increasingly multidisciplinary and international but that does not yet appear to affect especially the bachelor curriculum. The only way this will happen is by getting our best researchers to teach at the bachelor level and not hide them away in master programmes for often only a small number of students who have already made their choice to focus on public law and a career in public administration. Legislation and regulation are too important both for academia and practice (the administration is the biggest employer for students who graduate from law school).
3. As a consequence of the multidisciplinary and border-crossing nature of many questions regarding legislation and regulation more attention should be paid in law school education to the importance of facts, fact finding, and behavioural aspectsof laws and regulations as a precondition for an effective and efficient translation ofpublic policy into

rules. Besides this, it will become more and more important to integrate comparative law in courses on legislation and regulation in order to learn how to deal with a growing plurality of legal sources (not only hard law but also soft law) and in order to see how other jurisdictions cope with similar problems.

4. The need to focus more on facts, empirical evidence, comparative law and so on, in legal education necessarily implies that methodology deserves far more attention in the law school curriculum. Consequently this means that we can no longer simply rely on the methods and techniques that are being applied in judicial law-making. Far more difficult to answer is unfortunately the question how far we can and should go with the introduction of for example empirical research methods and comparative law methodology. But I think there is only one way to find out: I am afraid that is by trial and error.
5. The forgoing first and foremost presupposes cooperation. Apart from the fact that research methodology does not possess a prominent place in the law school curriculum, which is an understatement, the expertise on especially socio-legal and empirical legal research methods is fragmented and divided between academia and legal practice. The only way we are able to teach more students, teachers and starting researchers the tricks of the trade of fact finding, of data collection, of assessing the validity of policy documents and empirical evidence, of comparing regulatory approaches between different jurisdictions, and so on, is to join forces. What I believe is desperately needed is a national platform or centre of expertise where academics and practitioners work together in order to: exchange knowledge and information; develop methodology training programmes for law students and legal practitioners that go beyond finding ones way around a library; establish a help desk for academics and practicing lawyers who need assistance regarding the design of one's own research or the interpretation or application of research conducted by other experts.

I am not beforehand convinced that my plea will receive much support right away. Lawyers often consider methodology as something very basic. Why would anyone want to invest much time, money or energy in that? I am afraid that methods of law and legal research suffer from a bad reputation. Methodology is often associated with endless quarrels about

the ‘true’ nature of law as a science or with attempts to change the rules of the game in order to advance certain types of research (multidisciplinary, empirical, comparative etcetera.) to the detriment of other types (black letter law). Last but not least, the reaction of some colleagues will probably be that we have managed so far to produce sound legal knowledge and proper legislation without making our implicit methods explicit. So what is the problem and why do we need fundamental changes? Such a reaction may be understandable but it is short-sighted. Law and legal research are undergoing major changes currently. As the latest RAE has shown, we are rapidly moving from a national to an international focused discipline, from a monodisciplinary to a more multidisciplinary field of expertise, from a service to legal practice to a goal in itself, from an education monopoly towards a competition for students, and from overhead financing to competitive financing. This will have major implications whether we like it or not. Even if methodology is supposed to be something basic this does not make it self-evident or easy. One could just as well turn the question around. If methodology is so basic why do almost all other social sciences and humanities pay far more attention to it than law? If law and lawyers are really so special, we should be able to explain this to non-lawyers, including the ones who call the shots in national and international research foundations. If I am right legal scholars will face more and more difficulties in providing an acceptable explanation for the fact that we don’t make our implicit methods more explicit. In that case the best reaction to increasing external criticism probably starts with self-criticism.

Discussion at the Symposium on 22 september 2011

Van Gestel
All three of the advisory reports claim it is important for a legislative lawyer to know something about other disciplines, such as sociology and economy. This is a very interesting point. My question is: how far should we go? If we go too far, we might end up being a quasi-social scientist instead of a lawyer. Do you think this is a danger?

Rubin
In many disciplines the growing edge of the field is interdisciplinary. The work that remains to be done is that which falls between the disciplines. We have solidified law as a discipline in making it a profession. Thereby we have created rigidities. There is no necessary distinction between law and social science or between law and public policy. These distinctions have been created in the pre-administrative era. In the new regulatory world law means something different and the boundaries need to be rethought.

Uhlmann
Each discipline in time becomes more and more specialised. For example economy or sociology, these disciplines have so many specialised fields. About each specialised field there is an abundance of literature. Lawyers must work interdisciplinary. At the same time, it is important to remain lawyers. This is a difficulty.

Van Gestel
At Tilburg University, there are two schools of thought about interdisciplinary work. One is: just do it. The other is: if you do it, do it right. The latter has a practical side, because if you do a bad job, it could cost you your reputation.

Bouwes
I was thinking of a good example of integrating other disciplines in a legal advice. In my paper, I examined the reception and the appraisal of the legal opinions of the legal advisor of the Ministry of Foreign Affairs, about

the legitimacy of the Iraq-intervention. This legal opinion on the basis in international law for military intervention was discussed several times in the Council of Ministers. Within the ministry there was some tension between the legal appraisal whether the UN Security Council resolutions were a sufficient mandate for intervention and the desirability of political support for US-Britain military intervention. Looking back, one can conclude that the legal opinion, that there was no adequate legal basis, was in accordance with the generally held view of international law. And that the decision to support the intervention wasn't politically very wise. The reason that the legal opinion didn't impress the minister and the Cabinet probably lies in the fact that it was a rather academic approach of a highly political situation and it didn't take into account the context of the decision-making process. It's the same with decisions about regulation with economic, administrative, environmental, ethical or social aspects. Lawyers can't stay in the safe haven of their professional expertise and should always be aware of the context in which they give their opinion. Knowledge of other domains is therefore indispensable and these different domains should therefore also be part of the education of legislative lawyers.

De Lange (Erasmus University)
To seriously work with economists, you need a degree in economy, otherwise you will have problems with their methodology. The solution to this problem could be to bring an economist into your team. But economists like to publish in prestigious international economic journals, not in Dutch legal journals. Furthermore, they like to use mathematical formula's in their articles, and this makes the discourse between economists and lawyers difficult. At the Erasmus University we have a department of law and economics, and even they have problems working with the 'real' economists.
Economy and sociology are important. As a lawyer, it is also very interesting to work with historians and philosophers. They have a different knowledge that can be very useful for legal work. These disciplines are not often mentioned in a debate about lawyers working interdisciplinary, and I would like to emphasize that they are very interesting and useful.

Wuisman (Stichting Advisering Bestuursrechtspraak)
To promote the quality of legislation, the standards that are applicable to legislation should be enforceable rights. At the moment there are guidelines about consultation or about the comprehensibility and clarity of the law. Instead of guidelines, 'hard' law would be much more effective.

Uhlmann
This would mean that a court could rule: "this law is not comprehensible, so it may not apply to you." Certain minimal standards for legislation would be enforceable by the courts. This raises the question: does a law have to be a good law? Or does a law just have to be a law?

Rubin
What kind of right would this be? Would it be possible to challenge the law on the basis that it is not comprehensible? If we take, for example, the Health Care Act of the Obama administration. This is a highly technical act, very difficult to read and understand, and it is a 1000 pages long. The adversaries of this act taunted the proponents by saying "you haven't even read what you're voting for". Does this mean the courts should strike it down? It gives health care to millions of people!

At the university we teach law students how to read a law. We use a hierarchy to illustrate the degree of difficulty of a text. At the bottom is Harry Potter, which is very easy to read. Then there's a monograph, which is more difficult, en then a case, which is even more difficult to read. At the top of the hierarchy is legislation. What makes legislation the most difficult to read is its non-narrative structure. Another reason why legislation is difficult to read, is that society has become more and more complex. If you impose the requirement of comprehensibility on legislation, you would disable the state to legislate in a complex environment.

Wuisman
I think a judge will see when complexity is necessary and when it is not necessary. A judge will be able to rule whether a law is as comprehensible as it is possible to be, taking into account the complexity of the situation the law is applicable to.

Kortes (Ministry of Economics, Agriculture and Innovation)
I agree Fuller's definition of law as a "system for subjecting human conduct to the governance of rules" is incomplete. I wonder if we could update the basic definition of law by expanding it to public and private legal persons. This would result in a definition of law as "a system subjecting persons, including public and private legal persons, to the governance of rules".

Rubin
Most laws empower administrators to act in certain ways. A new definition of law should cover these laws. According to the anti-delegation movement, when making these kind of laws the lawmaker gives up its powers to an agency. This is not true. On the contrary, the lawmaker is exercising its powers by empowering agencies to act in particular ways.

Konijnenbelt (freelancer and former member of the Council of State)
The subject of this symposium is the education of regulatory drafters. Rubin warned us to make sure we have the right view of what regulatory drafting is about. There is a tendency to think old-fashioned, like Fuller, while his definition of law (a system for subjecting human conduct to the governance rules) does not concern most laws. Because I'm more post-Hegel than Rubin, I think Fuller and Hart saw it right. Only they saw it right for a part of reality.

Uhlmann told us about education of regulatory drafters in Germany and Switzerland, and gave his opinion about what the education of regulatory drafters should be like. Bouwes gave a practical view of the education of regulatory drafters. I would like to add to this discussion a distinction between several forms of education. First there's university, after which it is possible to do a two year course at the Academy for Legislation and a third form of education is a series of shorter courses at the Academy to learn the essentials. The question what education of regulatory drafters should encompass, should be answered separately for each of these three types of education.

Noordhoek (director at Northedge BV)
Legislative drafting is a craft looking for a broader profession. Legislative drafters are looking for ways to make laws more effective in society.

Policy makers often have a technical image of the professionals who write legislation. The policy makers make the policy and expect the legislative lawyers to just write it down in legal language. This constitutes a gap between the professionals who write the laws and the policy makers. It is important to close this gap.

Uhlmann
In Switzerland we don't have specialized legislative drafters. Most legislative drafts are made by the administrative body. They are written by civil servants, who don't have a specialisation in legislative drafting. They are specialized in other disciplines, the specialisation they have depends on the kind of policy they're making. The legal specialists can advise them, if needed. This has an advantage: in order to do the drafting, it is necessary to understand the underlying policy. I doubt that legislative drafting is a technical question.

Often, the legislative drafting starts too early. Once you have drafted a text, you already have a solution. It is better to start with a concept, get approval of the political authority and then start with the drafting process. This way there is more flexibility to change the concept.

Van Gestel
In the Netherlands the laws with many flaws often originate from the coalition agreement. During the making of a coalition agreement the choice has been made for a solution, which is to make a law. This is not the right moment to make this choice, because there isn't time to find out all the relevant facts and alternative solutions.

Rubin
In the United States there is no methodology for legislation. There is a specialized body whose task it is to give technical advice to congress, but this advice is limited. It is only about language, not for example about possible conflicts with other laws. In universities we don't teach legislative drafting, just like we don't teach contract drafting. We teach cases about contract law. The drafting of contracts is trained on the job. It is a recognized and respected skill. The drafting of legislation is also learned in practice. It is often done by lobbyists. Then the political debate is about the completed

draft. So we also have the disadvantage that drafting sometimes starts too early, and a solution is already chosen at the start of the political debate.

Bouwes
I never saw myself as a drafter of legislation. Drafting is only a very small part of our role. The administration used to employ primarily lawyers because they knew the law and had a feeling for procedures. Since 40 years the administration has seen an influx of other disciplines, be it economists, sociologists, business administrators etc. Still, we expect government lawyers to give advice about regulatory matters by integrating the findings of these other disciplines in their opinions. Our job is regulation based on policymaking in a political context, with all the instruments we dispose of. That encompasses making laws, but also facilitating or stimulating private regulation, making contracts whether binding or not-binding, behavioural incentives by communication. I didn't put it in my paper because it would generate all kinds of negative reactions that would distract from the overall message, but nowadays, in the regulatory state, if we do our job right by an integrated approach of our work, the administration doesn't need all those policymakers of different disciplines anymore.

Van Melis (Ministry of Security and Justice)
Some topics in other disciplines challenge lawyers to work more interdisciplinary. For example, the regulatory pressure and the way this affects our economy is a topic economists are interested in. The Better Regulation programme of the European Commission is developed by economists. The problem is communication between lawyers and economists. People who talk about standard cost models often don't understand people who talk about legal quality, and vice versa. The relation between lawyers and economists should be better, but how to accomplish this?

Uhlmann
I agree the discourse between lawyers and economists isn't always functioning. For this problem I see no simple solution, except to keep trying harder.

Rubin
In the United States an 18 million dollar grant was given to law schools to integrate law and economics. Sometimes an intellectual justification isn't enough incentive, and an 18 million dollar grant is.

Van Gestel
At the European level the goal is to make Europe the most competitive economy of the world. The Better Regulation programme is one of the means to this end. So in order to realize the Better Regulation programme, the European Commission turned to economists. A side effect of this way of thinking is that lawyers unjustly become a hurdle.

Noordhoek
At the Erasmus University the course "wetgevingsleer" (legislative studies) was in decline. When a new teacher began teaching this course, the first thing she did was rename it. She called the course "Law in action". Even before she had given her first lecture, the number of students doubled and later they tripled. The relabelling opened a new discourse. How important can a label be?

Uhlmann
My predecessor had a good reputation, which has created a constant flow of between 40 and 50 students each year. This is not bad for a master course. In the course I move away from the static picture of the law and I give the students a look behind the scenes. I think the course is attractive because it makes students understand law in a different way. Also, the law students know that if they find a job working for the administration, sooner or later they will have to deal with this topic.

Roording (Ministry of Security and Justice)
In the current system for the education of lawyers there isn't enough attention for certain skills that are needed for the work of a legislative lawyer. For example: working together, communication, training in methodology, working in a context where different disciplines influence the political decisions that are made.

Rubin
I agree these skills are needed. A graduate student needs on the job training to create the right awareness and attitude. At the university we teach our students certain basic skills, for example how to read and understand a case. After graduation the student has all the basic skills a lawyer needs and because of this he will be able to learn more specialized skills on the job.

Van Gestel
The education a law student needs, depends on the kind of job he will have after graduation. The current education of lawyers focuses on judicial law making. A drafter of legislation needs a different education. Also, there's a big difference between working as an academic and working as a practitioner.

Van Lochem (Academy of Legislation)
An effective government needs people who are specialised in all kinds of disciplines. For law-making you need awareness of these other disciplines. I wonder if in time the disciplines will come together. Besides being a lawyer, a legislative lawyers needs to be pragmatic and needs to have some education about sociology, economy, etc.

Van Gestel closes the discussion and thanks everyone present and especially the speakers.

Lijst met preadviezen

Jaar	Titel	Preadviseurs
1992	Delegatie van wetgevende bevoegdheid	mr. R.G. Mazel prof. dr. W.J. Witteveen
1993	Stimulerende wetgeving	dr. P.J. Klok mr. drs. P.A. Koppen prof. mr. H-J. de Ru
1994	Uitvoeringsgericht ontwerpen van regelgeving	prof. dr. M. Herweijer mr. M.G.M. Oosschot
1995	De wet, instrument en waarborg?	mr. F. Plate mr. dr. J.A. Smit
1996	Beroep tegen algemeen verbindende voorschriften	mr. H.G. Lubberdink
1997	Wetgever en gecoördineerde besluitvorming	mr. J.H.G. van den Broek mr. J. Struiksma
1998	Wetsvoorstellen in uitvoering	prof. mr. Willem Konijnenbelt ir. J.T. Schokker
1999	De Europese regelgever en de decentrale overheden	prof. dr. B. Hessel dr. R. Lefeber
2000	Overgangsrecht	prof. mr. F.H. van der Burg mr. A. Weggeman
2001	De Kaderwet zelfstandige bestuursorganen	prof. mr. H.R.B.M. Kummeling mr. drs. A. Bestebreur
2002	Certificatie: kansen en risico's	mr. R.A.J. van Gestel dr. J. van Erp en drs. S. Verberk mr. drs. Th.J. van Laar mr. H.J.H.L. Kortes

2003	Parlement en kwaliteit van wetgeving	prof. mr. P.P.T. Bovend'Eert prof. dr. U. Rosenthal
2004	De betekenis van de Europese Conventie voor de wetgevingspraktijk	mr. M. Jorna prof. dr. W.J.M. Voermans
2005	Wetgeving en ICT-toepassingen	prof. dr. A. Zuurmond, A. Strop, R. Schürmann en S. Rust mr. M.M. Groothuis
2006	Het wetsvoorstel OM-afdoening	prof. mr. G.T.J.M. Jurgens prof. mr. J.L. de Wijkerslooth
2007	Bruikbare wetgeving	prof. dr. P. Populier prof. dr. P.H. Eijlander
2008	De wetgevingsadvisering door de Raad van State	mr. T.C. Borman prof.mr. T. Barkhuysen prof.mr. R.A.J. van Gestel
2009	Effectenanalyse in Europees en nationaal verband	mr. L.J. Vester mr.dr. A.C.M. Meuwese
2010	Wetgever en constitutie	Prof. dr. L.F.M. Verhey Prof. dr. M. Kuijer Prof. dr. L.A.J. Senden
2011	Complexiteit van wetgeving	Dr. N.A. Florijn Prof. mr. W. Konijnenbelt

Appendix

Law schools in Germany

University:	Course:	Content of course	Level	Source of information
University of Augsburg	«Ausgewählte Aspekte hoheitlicher Rechtsetzung» «Einführung in die Gesetzgebungslehre»	Method and legal drafting; «Good Legislation»	BA/MA	http://www.jura.uni-augsburg.de/fakultaet/lehrstuehle/rossi/
University of Bayreuth	No courses offered			
Humboldt University of Berlin	«Gesetzgebungslehre, Gesetzgebungstechnik, Gesetzesfolgenabschätzung» «Rechtsetzungsrecht» «Soziale, ökonomische, kulturelle und politische Dimensionen der Rechtssetzung – Grenzen des Rechts»	Method and legal drafting; International aspects of Legislation (esp. EU); Aspects of interdisciplinarity	BA	http://www.rewi.hu-berlin.de/sp/kvv http://www.rewi.hu-berlin.de/lf/ap/mss/

Free University of Berlin	«Normsetzungslehre» «Seminar: Normsetzung und ihre Finanzierung»	Method; Legislative process; International aspects of Legislation (esp. EU)	BA	http://www.jura.fu-berlin.de/einrichtungen/we3/honorarprofs/hoelscheidt_sven/veranstaltungen/0910ws/vorlesung_normsetzungslehre/index.html
University of Bielefeld	No courses offered			
Ruhr University Bochum	«Praxis der Gesetzgebung»	No further information	BA	http://www.uv.rub.de/pvz-planung/i3v/00022200/21118622.htm
University of Bonn	*No courses offered*			
University of Bremen	*No courses offered*			
University of Cologne	«Blockveranstaltung: Gesetzgebungs- und Verwaltungslehre»	No further information	BA	https://klips.uni-koeln.de/qisserver/rds?state=verpublish&status=init&vmfile=no&publishid=99820&moduleCall=webInfo&publishConfFile=webInfo&publishSubDir=veranstaltung
University of Erfurt	«Praktikerseminar Recht»	Legislation work in parlia-	MA (Staats-	http://sulwww.uni-erfurt.de/elvis/vorlesungen/dataservice.asp?Jahr=2011&Semester=

		ment; Questions of modern legisla-tion	wissen-Schaft)	WS&All=27&ID=F2AD9C67-FD3D-468A-A4EA-A0B68E2E417F; autumn semester 2011
University of Erlangen	*No courses offered*: http://univis.uni-erlangen.de/form?__s=2&dsc=anew/tlecture&tdir=rechts/juris&anonymous=1&ref=tlecture&sem=2011w&__e=250; summer and autumn semester 2011			
Goethe Uni-versity of Frankfurt	*No courses offered*: http://www.uni-frankfurt.de/org/ltg/admin/lsf/vv/; summer and autumn semester 2011			
Institute for Law and Finance (Frankfurt)	*No courses offered*: http://www.ilf-frankfurt.de/List-of-Courses.148.0.html; summer and autumn semester 2011			
University of Freiburg	*No courses offered*: http://www.studium.uni-freiburg.de/studium/lehrveranstaltungen; summer semester 2011 and autumn semester 2011			
University of Giessen	*No courses offered*: http://studip.uni-giessen.de/studip/evv/extern.php?parent_id=9e1c87497c7b145418cb7cd61a18f33b&lang=de&mode=full; summer and autumn semester 2011			
University of Göttingen	*No courses offered*: http://univz.uni-goettingen.de/qisserver/rds?state=wtree&search=1&trex=step&root120112=96563|94439&P.vx=kurz; summer and autumn semester 2011			

University of Greifswald	*No courses offered*: https://his.uni-greifswald.de/qisserver/rds?state=wtree&search=1&trex=step&root120112=9593|10684|9370&P.vx=kurz; summer and autumn semester 2011			
University of Halle-Wittenberg	«Seminar Gesetzgebungslehre»	Method and legal drafting	MA	http://www.jura.uni-halle.de./aktuell/newsarchiv.13.de.php#anchor2268822
University of Hamburg	*No courses offered*: https://www.stine.uni-hamburg.de/scripts/mgrqispi.dll?APPNAME=CampusNet&PRGNAME=ACTION&ARGUMENTS=-A7nqmsBb74QhdB.jykU6VbQAyLm8.HC6D2se873IigELtbppaq5Qn6PTSOyVA2pb6biETaATZdKOAlC8BxtzPdx0t7UB0PZspGmDbLO7LKbmd-6UQn6g9dcZyuzuNCJluaQPh50chTDT77dZA; summer and autumn semester 2011			
Bucerius Law School (Hamburg)	*No courses offered*: http://bewerberportal.law-school.de/fileadmin/user_upload/Dokumentarchiv/Publikationen/SF_HT_2011.pdf; autumn semester 2011			
University of Hannover	*No courses offered*: http://qis.verwaltung.uni-hannover.de/qisserver/rds?state=wtree&search=1&trex=step&root120112=41222|41903&P.vx=lang; summer and autumn semester 2011			
University of Heidelberg	*No courses offered*: http://lsf.uni-heidelberg.de/qisserver/rds?state=wtree&search=1&trex=step&root120112=37699|36936&P.vx=mittel; autumn semester 2011			
University of Hohenheim	*No courses offered*: https://www.uni-hohenheim.de/index.php?id=1568&state=wtree&search=1&trex=step&root120112=851|861|878&P.vx=kurz; summer and autumn semester 2011			
University of Jena	*No courses offered*: https://friedolin.uni-jena.de/qisserver/rds?state=wtree&search=1&trex=step&root120102=421639|422598&P.vx=kurz; summer and autumn semester 2011			

<table>
<tr><td>University of Kiel</td><td>No courses offered: http://univis.uni-kiel.de/form; summer and autumn semester 2011</td></tr>
<tr><td>University of Konstanz</td><td>No courses offered: http://lsf.uni-konstanz.de/qisserver/servlet/de.his.servlet.RequestDispatcherServlet?state=wtree&search=1&trex=step&root120112=43771|38237&P.vx=kurz; summer and autumn semester 2011</td></tr>
<tr><td>University of Leipzig</td><td>A «Seminar: Gesetzgebungslehre» was offered in 2006[1].</td></tr>
<tr><td>University of Mainz</td><td>No courses offered: https://jogustine.uni-mainz.de/scripts/mgrqispi.dll?APPNAME=CampusNet&PRGNAME=ACTION&ARGUMENTS=-AViMKgN-ycDa4K1gmAuOKJTA-FM6OmaIkzdqYTw62V43t7RXCyHUt.VLL9j0ccPMKZogP.0043JIZqvSiuQSPA9KfIcqIJps06-2WcvzH.JaTMvVzwIgy6Dpv0wAGg6R.3i-K78bTcd2Be9E2; summer and autumn semester 2011</td></tr>
<tr><td>University of Mannheim</td><td>No courses offered: https://portal.uni-mannheim.de/qisserver/rds?state=wtree&search=1&trex=step&root120112=33912|33745|26706|26715&P.vx=kurz; summer and autumn semester 2011</td></tr>
<tr><td>University of Marburg</td><td>No courses offered: https://qis.verwaltung.uni-marburg.de/qisserver/rds?state=wtree&search=1&trex=step&root120112=39107|40628&P.vx=kurz; summer and autumn semester 2011</td></tr>
<tr><td>University of Münster</td><td>No courses offered: https://studium.uni-muenster.de/qisserver/rds?state=wtree&search=1&trex=step&root120112=57468|62862|60634&P.vx=kurz; summer and autumn semester 2011</td></tr>
<tr><td>Ludwig Max-</td><td>No courses offered: https://lsf.verwaltung.uni-muenchen.de/qisserver/rds?state=wtree&search=1&trex=step&root120112=1|71345|71554&P.vx=kurz; sum-</td></tr>
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[1] (http://www.jura.uni-augsburg.de/forschung/compliance/criminal_compliance/pdfs/A__Mosbacher_Lehrver_Vortr__ge.pdf).

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<tr><td>imilian Uni-versity of Munich</td><td>mer and autumn semester 2011</td></tr>
<tr><td>University of Oldenburg</td><td>No courses offered: http://www.studium.uni-oldenburg.de/lvstudip.php?file=https%3A%2F%2Felearning.unioldenburg.de%2Fextern.php%3Fmodule%3DTemplateSemBrowse%26config_id%3D7cafb7651fde4037faa802ac64812e2a%26range_id%3D7cadba7e78aee20b315bb023f768245d%26ext_templatesembrowse[start_item_id]%3Dc06fdc92aa601bb3c923a6bba4aef082%26ext_templatesembrowse[show_result]%3D1%26ext_templatesembrowse[withkids]%3D1%26ext_templatesembrowse[do_search]%3D0; summer and autumn semester 2011</td></tr>
<tr><td>University of Osnabrück</td><td>No courses offered: http://www.uni-osnabrueck.de/138.php; summer and autumn semester 2011</td></tr>
<tr><td>University of Passau</td><td>No courses offered: http://www.uni-passau.de/1769.html; summer and autumn semester 2011</td></tr>
<tr><td>University of Potsdam</td><td>No courses offered: http://www.uni-potsdam.de/studium/vvz/: summer and autumn semester 2011</td></tr>
<tr><td>University of Regensburg</td><td>No courses offered: http://www.uni-regensburg.de/Universitaet/Vorlesungsverzeichnis/WS11-12/Lehrveranstaltungen/index.html; summer and autumn semester 2011</td></tr>
<tr><td>University of Rostock</td><td>No courses offered: https://lsf.uni-rostock.de/qisserver/rds?state=wtree&search=1&trex=step&root120112=1621|1412&P.vx=kurz; summer and autumn semester 2011</td></tr>
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<tr><td>Saarland University</td><td>No courses offered: https://www.lsf.uni-saarland.de/qisserver/rds?state=wtree&search=1&trex=step&root120112=50729|49460|48307&P.vx=kurz; summer and autumn semester 2011</td></tr>
<tr><td>University of Trier</td><td>No courses offered: http://www.uni-trier.de/index.php?id=56; summer and autumn semester 2011</td></tr>
<tr><td>University of Tubingen</td><td>No courses offered: http://campus.verwaltung.uni-tuebingen.de/lsfpublic/rds?state=wtree&search=1&trex=step&root120112=38536|34408&P.vx=kurz; summer and autumn semester 2011</td></tr>
<tr><td>University of Würzburg</td><td>No courses offered: https://www-sbhome1.zv.uni-wuerzburg.de/qisserver/rds?state=wtree&search=1&trex=step&root120112=29793|29009&P.vx=kurz; summer and autumn semester 2011</td></tr>
</table>

Law schools in Switzerland

Universi-ty:	**Course:**	**Content of course**	**Lev-el**	**Source of information:**
University of Basel	«Verwaltungspraxis: Juristische Praxis, Gesetzgebungslehre»	Practical legislative work in the admin-istration[2]	MA	http://ius.unibas.ch/studium/lehrveranstaltungen/herbstsemester-11/details/person/hafner_felix/veranstaltung/verwaltungspraxis-juristische-praxis-gesetzgebungslehre-6/?tx_x4eunical_pi1[returnPageUid]=553&cHash=08e7e0794a62691364b0e24fedb36256
University of Bern	«Rechtsetzungslehre»	Method and legal drafting; prospective developments in legislative theory	MA	http://www.oefre.unibe.ch/content/studium_herbstsemester_2011/master_studium/w2051/index_ger.html
University of Fribourg	Sommerintensivkurs «Recht-setzungslehre» (German) / «Téchnique législative»	Method, legal drafting	MA	http://www.unifr.ch/oeffrecht/main/lehrveranstaltungen/biksik/rechtsetzungslehre http://gestens.unifr.ch/LAW/Public/ProgrammeCours.aspx?ID=3104

[2] The University of Basel has chosen a different approach than other institutions. Instead of teacher-centered trainings students get the opportunity to participate in a particular legal project (such as a new regulation etc.) usually on cantonal level. This highly practice-orientated system is possible due to the low number of students in the Master degree courses. On the other hand, participants do not get in contact with the «theory of Legistics» namely from the literature.

University of Geneva	«Légistique Suisse et Européenne» «Séminaire de légistique – Mieux légiférer: redaction et méthode législatives»	Method, legal drafting	MA	http://www.unige.ch/droit/e-cours/index.php?cours=5008 http://www.unige.ch/formcont/droit/cetel.html#
University of Neuchâtel	No courses offered			
University of Lausanne	No courses offered			
University of Lucerne	No courses offered			
University of St. Gallen	No courses offered			
University of Zurich	«Rechtsetzungslehre» (course)	Method, legal drafting	MA	http://www.rwi.uzh.ch/lehreforschung/alphabetisch/uhlmann/archiv/rsl.html

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