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Editorial

Rethinking the Law School: The Wizard from Leyden Speaks

1. From 2005 to 2011, Carel Stolker was Dean of the Leyden Faculty of Law. In that period, he gained national fame by his Dean's address (2003) on the question of whether or not a legal *science* exists.[1] As is not uncommon in The Netherlands, after his deanship, Stolker obtained a sabbatical to do research and catch up with recent developments.[2] Stolker devoted his newly won free time to write up his experience as a manager of a law faculty. By the end of last year, his thoughts were published by Cambridge University Press.[3] His book has already attracted widespread attention.[4] Presently, Stolker is the President and *Rector magnificus* of Leyden University.

What has this to do with *ERPL*? At the outset, what the founding fathers of our Review had in mind was to bring practising lawyers in the various European jurisdictions in touch with developments in other parts of Europe. This purpose appears to have been attained with some success. But where we have been even more successful is in providing European academe with a platform for discourse. The number of authors with an academic background has risen sharply. Because academics will most probably also be interested in what happens in the teaching departments of their law faculties, we presume that a brief discussion of a major publication on the subject will attract their attention. Actually, practising lawyers may also be keen to know about the developments in the nurseries and training grounds of their future colleagues. So there are several reasons to have a closer look at Stolker's book.

2. Carel Stolker first of all provides us with an overview of the history of legal education. Law, he observes, is among the first four disciplines ever taught at a university. There exists a wealth of publications on this development. The author

1 C. Stolker, 'Ja, geleerd zijn jullie wel! Over de status van de rechtswetenschap', *Nederlands Juristenblad* 2003, pp 766–778.

2 Carel Stolker is not just an administrator but an expert in medical liability and the co-author of *Tekst & Commentaar*, the most popular textbook of Dutch civil law.

3 C. Stolker, *Rethinking the Law School/Education, Research, Outreach and Governance* (Cambridge: University Press 2014), 454 pp.

4 Two English language reviews are those by R. van Gestel, 78(4). *Modern Law Review* 2015, pp 716–720 ('This book (. . .) ought to be obligatory reading for every new law school manager around the globe . . .') and by barrister P. Taylor, http://youtu.be/Qs_tqjms8dg.

mentions books by among others Christian Baldus,[5] Peter Birks,[6] Fiona Cownie,[7] Aalt Willem Heringa,[8] Christophe Jamin,[9] Daniela Piana,[10] Deborah Rhode,[11] Jan Smits,[12] Richard Susskind,[13] Brian Tamanaha,[14] Margaret Thornton,[15] William Twining,[16] and the German *Wissenschaftsrat*,[17] which may be supplemented by those of William Van Caenegem and Mary Hiscock.[18] Stolker's conclusion from his overview is that law schools in the world differ greatly from one another. Some have infinite resources, others are poorly funded. Drop-out rates vary considerably. What makes a good lawyer is thought of very differently. I would personally conclude just the other way around that law schools in the world show striking resemblances. The subject matter is much the same everywhere, and the Bologna model is rapidly gaining popularity. But let us not quarrel over whether the glass is half empty or half full.

3. As a law dean, Stolker frequently met with deans from other faculties. These would more often than not consider law a non-science: 'law school is often seen as the "odd man out" in the university: its education is considered dangerously close to the practice of law, its degrees mainly as a technical qualification, its funding a money-spinner for the university, its research annotative and nationally oriented, its methodology ambiguous, and its publishing curious'. In discussing these issues, the author addresses questions such as those whether law is an

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5 C. Baldus, T. Finkenauer & T. Rüfner, *Bologna und das Rechtsstudium* (Tübingen: Mohr 2011), 290 pp.

6 P. Birks (ed.), *Pressing Problems in the Law, 2. What Are Law Schools for?* (Oxford: University Press 1996), 144 pp.

7 F. Cownie, *Legal Academics: Culture and Identities* (Oxford: Hart 2004), 227 pp.

8 A.W. Heringa, *Legal Education: Reflections and Recommendations* (Cambridge: Intersentia 2013), 230 pp.

9 C. Jamin, *La cuisine du droit/L'Ecole de Droit de Sciences Po: une expérimentation française* (Paris: Lextenso 2012), 280 pp.

10 D. Piana et al., *Legal Education and Judicial Training in Europe: The Menu for Justice Project Report* (The Hague: Eleven 2013), 312 pp.

11 D. Rhode, *In Pursuit of Knowledge: Scholars, Status, and Academic Culture* (Stanford: University Press 2006), 248 pp.

12 J. Smits, *The Mind and Method of the Legal Academic* (Cheltenham: Elgar 2012), 192 pp.

13 R. Susskind, *The End of Lawyers? Rethinking the Nature of Legal Services* (Oxford: University Press 2010), 368 pp.

14 B. Tamanaha, *Failing Law Schools* (Chicago: University of Chicago Press 2012), 216 pp.

15 M. Thornton, *Privatising the Public University: The Case of Law* (London: Routledge 2012), 270 pp.

16 W. Twining et al., 'The Role of Academics in the Legal System', in *The Oxford Handbook of Legal Studies*, eds P. Cane & M. Tushnet (Oxford: University Press 2003), pp. 920-949.

17 Wissenschaftsrat, *Prospects of Legal Scholarship in Germany: Current Situation, Analyses, Recommendations* (2012).

18 W. van Caenegem & M. Hiscock (eds), *The Internationalisation of Legal Education* (Cheltenham: Elgar 2014).

international discipline, multidisciplinary research, academics or professionals, and especially values.

Having discussed legal education, the author goes on to study the social significance of the research, the education for the community, and the governance of the law school. Here are Stolker's own 'five golden rules': (1) Academics blossom like anyone else when they are appreciated by their peers; (2) keep bureaucracy away from academics as much as possible; (3) once a school's vision has been created or its strategy determined, it is critical to stay on course and not to deviate from it; (4) managing professionals may agree on outcomes, but the real professionals should decide on the best ways to achieve these ends; and (5) each law school has some academic staff members that are impossible to manage. A university needs some such characters, but not too many.

4. As a true scientist, Stolker is aware of possible shortcomings of his book, which he sets out in this way. First, the book has an unavoidable Dutch-European centredness. The book is written in English, which has the risk that it 'makes the world appear much more neatly arranged and comprehensible than it really is'. Third, the book presents both the external viewpoint of academics of other disciplines and his own personal internal perspective. Finally, he is a private law expert (most readers of *ERPL* may not consider this a shortcoming).

The author concludes with a number of recommendations, all of which can easily be endorsed. Unfortunately, Stolker argues, 'it appears that real change in our education and research requires external drivers, such as rankings, outside examinations and accreditations', and '[lawyers] do not much like change'. Stolker does. He hopes his book will contribute to more international collaboration. He thinks of more joint publications by lawyers from different countries and different legal traditions, the encouragement of open access, and more mobility of lecturers. Lawyers should finally ask themselves how law could have more meaning to the world. In this regard, he mentions initiatives such as *Scholars at Risk*[19] and *Microjustice.*[20]

5. What does this issue of *ERPL* offer the reader? The first paper is by Mateja Djurovic from the European University Institute in Fiesole (originally from Serbia). It deals with the tenth anniversary of the Directive on unfair commercial practices. In my personal recollection, when the Dutch Consumer Council discussed the *draft* directive, we had grave misgivings about the directive's possible effect on contract law. From this paper, it turns out that these misgivings – at the time contradicted by the drafters of the directive – were well founded. According to the author, the directive has influenced and shaped contract law.

19 http://scholarsatrisk.nyu.edu.

20 http://microjustice.org.page.

Thereby, he suggests, the directive has contributed to the Europeanization of contract law.

6. Such Europeanization would no doubt have been promoted by the proposed Common European Sales Law (CESL). However, in December 2014, the proposal was dropped from the working programme of the European Union. Is the paper by Paloma de Barrón from the University of Lleida on *Prescription in the Proposal for a CESL* therefore still appropriate? The answer is yes, for two reasons. First, it is not at all impossible that parts of *CESL* will be resuscitated, this time on the basis of the EU's policy for a *digital single market* (http://ec.europa.eu/justice/newsroom/contract/opinion/150609_en.htm). Second, even without CESL, the 'show must go on'. Prescription will remain high on the agenda of legal phenomena requiring our attention. The author concludes that more clarity is needed. She argues that the application of the rules on prescription should be enlarged so as to include any contract, not just sales contracts and related services. Suspension and postponement of expiry should also be addressed. Finally, the two general periods of prescription are confusing.

7. Another paper emanating from Spain was written by Celia Martinez-Escribano from the University of Valladolid. Of the three most popular specific contracts, the contract of rent or that of landlord and tenant is the one least visible on a European level. Tenancy and right to housing are much less the focus of harmonization than sale of goods – in particular consumer sales – and the employment contract. We are therefore glad with the paper by this author, in the wake of Christoph Schmid's research project and Sergio Nasarre-Aznar's paper in *ERPL*.[21] A well-known predicament in consumer protection is that if the protection ranges too far, business will retract from the market. A similar problem can be seen in tenancy, and the author seeks a balance between protection and freedom.

8. Some decades ago, fundamental rights and private law were two wholly different subjects. Now, this has changed fundamentally, witness the article by Olha Cherednychenko (Groningen) and Norbert Reich (Bremen). Yet many questions still exist as to how and to what extent EU and national private law can and should be influenced by fundamental rights enshrined in the EU Charter of Fundamental Rights. The two authors explore gateways to the EU constitutionalization of private law, constraints thereon, and challenges posed thereby, with a particular focus on contract law in the consumer, employment, and financial services context. After a methodological introduction explaining the special nature of the fundamental rights protection in the EU legal order, they

21 S. Nasarre-Aznar, 'Leases as an Alternative to Homeownership in Europe/Some Key Legal Aspects', 6. *ERPL* 2014, pp 815–846.

develop a general framework within which the EU constitutionalization of private law takes place. Subsequently, they proceed to examine the fundamental rights scrutiny of EU law and national laws within the scope of EU law, the interpretation and application of EU law and national law within its scope in conformity with fundamental rights, as well as the controversial concepts of the positive obligations to protect fundamental rights in private relationships and the direct horizontal effect of fundamental rights. Norbert is one of the Founding Fathers of European Consumer Law. Olha is also a well-known author for our readers. Her most recent publication on *Public and Private Enforcement of European Private Law in the Financial Services Sector* was published in *ERPL* 2015-4, an issue emanating from a conference in Groningen that she organized.

9. Chris Hodges has long been on our list of most wanted authors. Having had a double nomination to chairs in Oxford and Rotterdam, Chris naturally has needed some time to answer our call. But now, just in time for the oncoming ADR and ODR tide, he has been so kind as to write for *ERPL* on mass collective redress. What he calls a silent revolution has occurred in the delivery of mass consumer redress through the adoption of redress powers by public regulatory authorities in some EU states. The author targets Denmark and the United Kingdom. He concludes that regulatory redress techniques are particularly powerful and extremely effective.

10. Finally, Rufat Babayev from Leicester University, who holds degrees from Baku State University, the Central European University (Budapest), Durham University, and Leiden University, analyzes contractual discretion and the limits of free movement law in a contractual realm. The author explores the interplay between the principle of freedom of contract and free movement law. The former is not only expressed in the freedom to choose with whom to enter into a contract and shape its content, but it is also manifested in the freedom to decide whether or not to *opt out* of non-mandatory contract law rules. In this regard, the author examines the extent to which the boundaries of free movement law in a contractual context could be considered to be essentially defined by the reach of such forms of contractual discretion. In addressing this query, it draws a distinction in the role of contractual discretion in the context of individual ways of coordination of contractual relationships in the form of individual contractual preferences and national ones in the form of non-mandatory contract law rules. Unlike the former, the author submits that contractual discretion should not be taken as a decisive factor in determining the scope of free movement law as regards non-mandatory contract law rules. In particular, he suggests to consider these rules to fall outside the scope of free movement law because of them themselves not having an effect on free movement as such, rather than due to contracting parties' discretion over their applicability.

11. Case notes, according to Hein Kötz, Member of our Advisory Board, are the trademark of *ERPL*. We are therefore glad with the annotation by Paul Verbruggen from Nijmegen's *Radboud University* and Barend van Leeuwen from the *University of Groningen* in Groningen of the ECJ case of *Boston Scientific Medizintechnik GmbH* v. *AOK Sachsen-Anhalt and Betriebskrankenkasse RWE.* This case deals with liability for defective pacemakers under the Product Liability Directive. According to the annotators, this is an important decision, which extends the scope of application of the directive.

12. This issue of *ERPL* carries a book review by Bernard Koch (Innsbruck). He reviews the PhD thesis defended by Martin Weitenberg at the University of Münster. The thesis bears on the notion of causation in tort liability and more specifically the coherency of EU tort liability systems. The reviewer shows his *Begeisterung* for this voluminous work, so brush up your German.

13. Finally, there is a number of personal changes to be mentioned. First, after 23 years, I will step down as the Co-Editor in Chief of *ERPL*. André Janssen has consented to take over my position. Together with Matthias Storme, he will act as the Co-Editor in Chief. We are very glad with André's willingness to do so. In the past years, he has shown himself an excellent editor.

The Board of Editors will be completed with Harriët Schelhaas, Professor of Civil Law at the Erasmus University Rotterdam and a former attorney with Stibbe in Amsterdam. Harriët read law in Leyden, pursued her PhD degree in Utrecht (on penalty clauses), and at Stibbe has had a lively commercial practice.

Finally, Martijn Hesselink will step down as a member of the Advisory Board. He will be replaced by Chantal Mak, Professor of Private Law and Human Rights at the University of Amsterdam, who already has a record of publishing in *ERPL*. We are grateful to Martijn for his work on the Board and welcome Chantal.

On the publisher's side, Lisa Zoltowska will step down to deal with other law journals in the Kluwer concern. Lisa's place will be taken by Niki de Bruin, who already worked for *ERPL* in the past, and Christine Robben.

You may have missed the name of one Dutch editor: Jessy Emaus, our Managing Editor. Well, fortunately for us, Jessy for the time being will remain on the Board.

Ewoud Hondius*

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