Review Copy Only - Not for Redistribution
Anne-Lise Sibony - Université Catholique de Louvain - 8/14/2017

'This new contribution to the debate on legal education in general and experiential legal education in particular is all the more valuable because it spans both the common law and civil law world; the latter being too often neglected in previous literature.'

—*Anthony Bradney, Professor of Law, Keele University, UK.*

Review Copy Only - Not for Redistribution
Anne-Lise Sibony - Université Catholique de Louvain - 8/14/2017

Review Copy Only - Not for Redistribution
Anne-Lise Sibony - Université Catholique de Louvain - 8/14/2017

Re-thinking Legal Education Under the Civil and Common Law

Whilst educational theory has developed significantly in recent years, much of the law curriculum remains content-driven and traditionally delivered, predominantly through lecture format. Students are, in the main, treated as empty vessels to be filled by the eminent academics of the day. *Re-thinking Legal Education Under the Civil and Common Law* draws on the experience of teachers, practitioners and students across the world who are committed to developing a more engaging and, consequently, a likely more effective learning process.

Little attention has, historically, been paid to the importance of the application of theory, the role of reflective learning, the understanding and acquisition of lawyering skills and the development of professional responsibility and wider ethical values. With contributions from across the global north and south, this book examines the history of educating our lawyers, the influences and constraints that may shape the curriculum, the means of delivering it and the models that could be used to tackle current shortcomings. The whole is intended to represent what might be desirable and possible if we are to produce lawyers who are fit for purpose in the 21st century, be that in either in civil or common law jurisdictions.

This book will be of direct assistance to those who wish to understand the theory and practice of legal pedagogy in an experiential context. It should be essential reading for academics, researchers and teachers in the fields of law and education, particularly those concerned with curriculum design and developing interactive teaching methods. It is likely to be of interest to law students too – particularly those who value a more direct engagement in their learning.

Richard Grimes is a senior consultant with Les Deux Ltd, a training and development service specialising in access to justice and legal education. He was, until recently, Director of Clinical Programmes at the York Law School, University of York, UK.

Review Copy Only - Not for Redistribution
Anne-Lise Sibony - Université Catholique de Louvain - 8/14/2017

Legal Pedagogy

Series Editor
Kris Gledhill, Auckland University of Technology, New Zealand

This series consists of high-quality monographs, each of which explores best practice in an aspect of the law school curriculum. Books will cover teaching methods and curriculum design in the main areas of law, how to integrate themes, areas of jurisprudential thought, and wider questions about legal education more generally. With contributions from around the world, this series explores innovative thinking and practice within the context of a generally conservative branch of academia, with the aim of promoting discussion as to how best to teach the various aspects of the law degree and ensure the ongoing validity of the law degree and vocational and continuing legal education as a whole. Typical topics addressed include the value of variety in teaching methods and curriculum design, how best to incorporate educational research, the role for more practical courses, and the need to ensure that law schools provide degrees of relevance to the needs of students and of society.

The books in this series will be of great interest to academics, researchers and students (undergraduates and postgraduates) in the fields of law and education, as well as teachers of law who may be interested in revising curricula and need guidance in doing so. In addition, the legal profession, and in particular those who regulate entry into the profession, will find much to interest them within the series.

https://www.routledge.com/law/series/LEGPED

Books in this series:

Re-thinking Legal Education Under the Civil and Common Law
A Road Map for Constructive Change
Edited by Richard Grimes

The Teaching of Criminal Law
The Pedagogical Imperatives
Edited by Kris Gledhill and Ben Livings

Review Copy Only - Not for Redistribution
Anne-Lise Sibony - Université Catholique de Louvain - 8/14/2017

Re-thinking Legal Education Under the Civil and Common Law

A Road Map for Constructive Change

Edited by Richard Grimes

Routledge
Taylor & Francis Group
LONDON AND NEW YORK

Review Copy Only - Not for Redistribution
Anne-Lise Sibony - Université Catholique de Louvain - 8/14/2017

First published 2018
by Routledge
2 Park Square, Milton Park, Abingdon, Oxon OX14 4RN

and by Routledge
711 Third Avenue, New York, NY 10017

Routledge is an imprint of the Taylor & Francis Group, an informa business

© 2018 selection and editorial matter, Richard Grimes; individual chapters, the contributors

The right of the editor to be identified as the author of the editorial material, and of the authors for their individual chapters, has been asserted in accordance with sections 77 and 78 of the Copyright, Designs and Patents Act 1988.

All rights reserved. No part of this book may be reprinted or reproduced or utilised in any form or by any electronic, mechanical, or other means, now known or hereafter invented, including photocopying and recording, or in any information storage or retrieval system, without permission in writing from the publishers.

Trademark notice: Product or corporate names may be trademarks or registered trademarks, and are used only for identification and explanation without intent to infringe.

British Library Cataloguing-in-Publication Data
A catalogue record for this book is available from the British Library

Library of Congress Cataloging-in-Publication Data
A catalog record for this book has been requested

ISBN: 978-0-415-79200-4 (hbk)
ISBN: 978-1-315-21207-4 (ebk)

Typeset in Bembo
by Apex CoVantage, LLC

Review Copy Only - Not for Redistribution
Anne-Lise Sibony - Université Catholique de Louvain - 8/14/2017

To Rebecca: best friend, wife and 'fellow' clinician

Review Copy Only - Not for Redistribution
Anne-Lise Sibony - Université Catholique de Louvain - 8/14/2017

Review Copy Only - Not for Redistribution
Anne-Lise Sibony - Université Catholique de Louvain - 8/14/2017

Contents

Foreword xii
NEIL GOLD

Opening thoughts xiv
RICHARD GRIMES

Contributors xviii

PART A
Context and concepts 1

Introduction 1

1 Celebrating the difference: a U.S. educator's perspective on legal education under the civil and common law 3
PHILIP M. GENTY

2 Experiential learning from the continental viewpoint: if the cap fits . . . 13
CRISTINA AMATO

3 Experiential learning: just for 'common lawyers' – really? 27
RICHARD GRIMES AND ANNE-LISE SIBONY

PART B
Content and careers 45

Introduction 45

4 Re-thinking the learning and teaching 47
Part 1 – A case study from York 47
RICHARD HEDLUND

Review Copy Only - Not for Redistribution
Anne-Lise Sibony - Université Catholique de Louvain - 8/14/2017

Part 2 – Don't talk at me, talk to me 60
TANYA WALKER

Part 3 – Clinic, employability and educational need 69
MEREDITH DANIEL

Part 4 – Shared potential despite the difference? 78
DAVID ROCCARO

5 Ethics and professional responsibility 87
Part 1 – Teaching and learning legal ethics: what, how and why? 87
DONALD NICOLSON

Part 2 – Teaching legal ethics under the civil law 96
JOSÉ GARCÍA-AÑÓN

Part 3 – Ethics, professionalism and the law 104
LAURA BUGATTI

6 Regulation and jobs – universities, the legal profession and other employers 114
Part 1 – Of tribes and territories – an employer and regulator perspective on re-thinking legal education 114
CHRIS MAGUIRE

Part 2 – Degree apprenticeships – a way forward? 129
STEPHEN LEVETT

7 Assessment in legal education: qualification or quantification? 135
JENNY GIBBONS

PART C
Countries and cases: examples of re-thinking 143

Introduction 143

8 The birth, growth and reproduction of clinical legal education in Spain 145
PILAR FERNÁNDEZ-ARTIACH, JOSÉ GARCÍA-AÑÓN AND RUTH M. MESTRE I MESTRE

Review Copy Only - Not for Redistribution
Anne-Lise Sibony - Université Catholique de Louvain - 8/14/2017

9 Re-thinking legal education in Central and Eastern Europe 155
MICHAL URBAN, LIUBOU KRASNITSKAYA AND KATARZYNA J. KOWALSKA

10 The same but different: what can we learn from Canadian attitudes to legal education? 171
SUE PRINCE

11 The civil law tradition . . . but with clinics – a case study from Chile 181
JUAN P. BECA

12 Making a real change: legal education in Nigeria – partly re-imagined? 192
ERNEST OJUKWU

13 A reform agenda for Indian legal education 202
SHUVRO PROSUN SARKER

14 Beyond the boom: prospects for Australian legal education 211
JEFF GIDDINGS

15 Re-thinking at the sharp end – examples of experiential teaching and learning practice 227
Part 1 – Mock-trials in an accusatorial and inquisitorial context 227
DAVID MCQUOID-MASON

Part 2 – Teaching EU law in an experiential way 245
KATARZYNA GROMEK-BROC

Final words 254
RICHARD GRIMES

Index 257

Review Copy Only - Not for Redistribution
Anne-Lise Sibony - Université Catholique de Louvain - 8/14/2017

Foreword

Re-thinking Legal Education under the Civil and Common Law seeks to establish through analysis, argument and example that learning and teaching, curriculum and course design and the structure and regulation of education are not determined by the organization and design of law, the attributes of the legal system, modes of legal reasoning or the nature of legal process. Arguments about the unsuitability of experiential legal education to scientific, theoretical, sophisticated understandings of law are confronted, dealt with and politely rejected. Nor, it is shown, is experiential learning uniquely qualified to facilitate the learning required for professional functions. Learning is learning – and the best learning always results from the best instruction, teaching and assessment. How we organize learning and teaching depends not on the structure of knowledge but on the goals of the curriculum.

Lest one think the authors have stirred a tempest in a teapot, be assured they have not!

Everywhere, experiential, active, student-oriented learning has faced obstruction and rebuff. There are many plausible reasons why the movement towards experiential learning in law has been bedeviled by detractors. Primary among these reasons are the many types and aspects of entrenched culture one finds in higher education, within legal regimes and among the leaders and practitioners of both legal education and legal practice. "We have always done it this way." "It can't be done that way." "They need to master substance, then process and much later, the how-to." "Universities are about advancing the study of theory and do not serve the interests of professional practice." "Law is not about clients and their needs; it's about ideas, their formation and elucidation."

Until recently both those engaged in tertiary education and those in the leadership of the law, courts, bureaucracies and the profession have had little if any background in learning theory, principles and practices. They learned and excelled through traditional university practices and honestly believe that what worked for them will work for others, if they are suited to the study. And while common law lawyers have long been comfortable with experience as a core to the development of law, this is less true for the development of lawyers. Civil lawyers have been much more comfortable with the cathedral of law and its

Review Copy Only - Not for Redistribution
Anne-Lise Sibony - Université Catholique de Louvain - 8/14/2017

jurisprudential and scientific magnificence: experience is for later, or at least for a different place from the academy.

In some common-law jurisdictions, the advent of clinical legal education (CLE) leapt over more conventional experiential learning models, including problem-based learning, role-play and simulation. It arose not only from an urge to improve student learning but also, and for the most part, to right the wrongs regularly occurring within a flawed, hierarchical and intrinsically discriminatory legal system. Law was to be used to achieve the goals in a cause. The educational rationale often followed the practice, to justify it on learning grounds. In a common-law tradition, trial and error, reflection and the search for theories, principles and practices by induction, both within and without CLE, have strengthened and justified the learning model. But experiential learning is not without its detractors to this day.

The civil law's commitment to intellectualism has long prevailed as the dominant reason for the dismissal of experiential learning from the instructor's armamentarium, as if to say that experience provides no pathway to learning, discovering or deducing general legal propositions. The law's majesty was traditionally experienced in the magisterial tradition, by the teaching provided by manifestly superior experts, whose words and phrases reflected learning of the systematically structured, if not provable, sets of theories, propositions and dictates. Nonetheless, clinical and other forms of experiential learning flourish in many civil law locations. In China, East Asia, South America and many parts of the civil law's ancestral home, Europe, legal educators daily demonstrate the utility of experiential learning to acquiring civil law concepts and principles – and much more.

Re-thinking Legal Education under the Civil and Common Law demonstrates and advances how experiential education deepens, broadens, reinforces and secures learning, not only of law, legal theory, legal skills and the values underlying each, but also of the discovery of self, other and society – and each person's individual comprehension.

Neil Gold
Professor Emeritus
Faculty of Law
University of Windsor
Canada

Review Copy Only - Not for Redistribution
Anne-Lise Sibony - Université Catholique de Louvain - 8/14/2017

Opening thoughts

Legal education has, for many years, seemingly struggled with its identity and purpose. Is it a liberal study intended to produce analytical, critical and reflective graduates, or is it one stage in the process of producing practising lawyers? To what extent do these academic and vocational foci lead to tensions in terms of the form, content and delivery of legal education?

This book is an attempt to examine some fundamental issues that may impact how we educate our lawyers and looks at ideas and initiatives across the globe, giving examples of how legal education may be improved and made more relevant to all stakeholders, be they students, universities, the legal profession, other employers, government and the public as ultimate consumer or subject of the legal education product.

Recent developments in curriculum design and development have resulted in more emphasis on the value of learning through application and reflection – experiential or 'hands-on' study. The presence of learning by doing and reflecting on that experience has been widespread (if not fully integrated) in some countries for many years – for example, and notably in the USA and in parts of South America. Experiential or 'clinical' education is now a common feature in the majority of law schools in the UK and Australia and in many countries of the former Eastern Bloc. In continental Western Europe, experiential learning has emerged in the last five years but is now to be found in at least half of the countries currently forming the European Union. Clinics and other forms of experiential learning too can be located in law schools in the Middle East, in Central and South East Asia and on the Indian sub-continent.

Following recent conferences, workshops and in wider debates, questions are now being asked as to what such learning methods have to offer from both the academic and vocational perspective and whether there are significant differences in terms of structuring legal study depending on the nature of the legal system concerned.

In 2013 I attended a workshop in Luxembourg. The topic for discussion there was how legal education in countries represented by delegates might be reformed and improved. Colleagues from a range of mainly Western, continental, European jurisdictions were present, along with invited speakers from the

Review Copy Only - Not for Redistribution
Anne-Lise Sibony - Université Catholique de Louvain - 8/14/2017

USA and the UK. Coming then from an institution (University of York) where experiential learning and clinical legal education was (and is) very much at the heart of the undergraduate and postgraduate curriculum I thought, naively perhaps, that delegates would be receptive to such concepts and interested in how these might be adapted for implementation under the civil law system.

Whilst I was politely listened to as I described the options and extolled the virtues of 'learning by doing', the majority of the audience appeared at best perplexed at and at worst sceptical, even highly critical, of the role of 'clinics' in legal education. From comments made at the workshop, it was clear that many attendees considered such common law models inappropriate in a civil law context.

Interesting discussions were had in the symposium sessions and afterward in various networking opportunities. In these exchanges, one frequent comment was that legal education under the civil law system was more about theory than practice and jurisprudential concepts rather than judicial decisions. Education under the civil law was said to be more akin to teaching a form of legal 'science'. Whilst, even then, I appreciated that there were significant differences in both philosophy and approach under the civil and common law, I was not convinced that the differences were as profound as were being suggested, at least in terms of pedagogy and effective learning and teaching. Of course, the common law relies heavily on the role of judicial precedent whereas the civil law traditionally does not (although interesting, the role of judicial decisions in shaping future interpretations is certainly not unknown under the civil law and has been said to be expanding, particularly so in the context of the European Union). Judges in the civil law system might be seen more as factual inquisitors and legal administrators applying codified principles than as interpreters of the law. When I pressed colleagues on how the suggested differences impacted on the legal education process, their overwhelming responses were that challenging underpinnings of principle could not be learnt by students without them having the benefit of direct instruction from experienced professors who were acknowledged experts in their particular fields. Only then could they be in a position to apply theory to practice. As attractive and persuasive a notion as this might be, especially from the professor's lofty position, the seemingly unquestioned presumption clearly was that basic concepts could only be understood if the students received imparted wisdom from above.

I asked for some specific examples of legal principles that had to be provided for students by academic staff. The first was the intention to create legal relations. Another was overlapping interests in land. A third was the idea of a trust, where one person holds property for the benefit of another. A further concept raised was proportionality under EU law.

Any law student, from a civil or common law position, has to come to terms with such basic principles. Contractual intent, land tenure, trusts and beneficial interests and possibly, proportionality are all issues that students are required to study in law schools in the common law world too.

Review Copy Only - Not for Redistribution
Anne-Lise Sibony - Université Catholique de Louvain - 8/14/2017

If the curriculum that is to be taught and learnt is perhaps not so far apart as might otherwise be thought, where might other differences lay, and how could these impact of legal education – both in terms of form and content?

The structure of the legal and related professions may be one area of significant divergence. Although rules vary from one jurisdiction to another under the common law, the route to qualification for a lawyer typically involves a university education, followed by a period of overt vocational training and/or a some work-based learning or apprenticeship. The recruitment of judges, other senior administration of justice officials and state-based lawyers (for example public prosecutors) are often from the ranks of the initially qualified lawyer. By contrast, in most civil law countries following a university law degree the aspirant lawyer is expected to complete further training in a setting specific to career destination – be that as a judge, notary or prosecutor. Given that there are at least structural differences here, how does that impact on legal education? As is explored and explained later in this book, I suggest relatively little.

If we are to consider changes to what and how we teach and learn the law, might the regulation of the legal profession in civil compared with common law countries have a bearing on what can be done? Similarly, the law school itself may have to follow wider university regulations and policies, and there may be an overarching obligation to meet statutory requirements in the form of rules that dictate what and how a subject can be taught and assessed. Any attempt to introduce a clinical component where members of the public are advised and possibly represented by law school staff and students may well require compliance with professional codes of conduct and possible legislative rules and/or institutional policy. The position here is likely to vary considerably from country to country.

That said, if the thrust of this book is that students engage with their studies and learn more effectively if they are actively involved in the educational process, as compared with those who sit passively and listen to the wise words of their 'olders and betters', reform to what and how we teach can be examined in the context of applicable regulation. Compliance may have to be assured, but having to be compliant should not be a reason for educational inertia and stagnation.

Following this introduction the book is divided into 3 parts – paraphrased here as Context, Content and Countries. In each section, authors with extensive experience of legal education as teachers, administrators, regulators and/or recent students explain the given subject matter on the basis of either a set themes or from the perspective of a particular jurisdiction. At the beginning of each section, there is a brief introduction explaining what each contribution covers.

The themes of parts, B and C have a common focus – how teaching and learning can or could be improved from the viewpoint of both the educator and the law student. The contributors to this book look at not only the study of the substantive law and legal doctrine but also the relevance of skills (legal

Review Copy Only - Not for Redistribution
Anne-Lise Sibony - Université Catholique de Louvain - 8/14/2017

and transferable) and the ethical context in which law operates – on philosophical/jurisprudential and practical or applied levels. The expectations of the legal profession and other prospective employers are also taken into account, as is regulation, be that imposed by the profession, government, federal or transnational bodies or the educational institution.

Specific examples are given of how legal education operates in particular jurisdictions and what steps have been or might be taken to improve provision in that context. Wherever possible, concrete examples, including sample scripts, are given of what re-thinking legal education can actually look like in practice and how challenges in achieving such change might be handled.

Contributions include the North and South American experience, encompassing the USA, Canada and Chile, the situation in Western Europe, legal education in the countries of the former Soviet Bloc, reports from West and South Africa, legal education in India and the current position in Australia.

In both instances – Content and Countries – the authors develop their arguments to show what the historical legacy of legal education has been from their perspective and how matters might be improved in the future for the benefit of all. Many contributors have vast experience in legal education and have been highly influential in effecting change. Some have a background in both the civil and common law worlds. Others have more limited experience and in many instances only of one particular system and jurisdiction. To make greater sense of the whole and to give the book the necessary 'fit', I have provided brief commentary at the start of each section attempting to make the link between the contributions and the salient points raised by the relevant contributors as obvious as possible. I hope I have done justice to the richness and value of the individual submissions.

This juxtaposition of contributions from the civil and common world in many of the chapters is designed to illustrate both differences and similarities and to promote a discussion on constructive ways forward. The result is intended to inform a wider debate on what we (whoever that might be) want from our lawyers in future and importantly, how we can we get that.

Richard Grimes

Review Copy Only - Not for Redistribution
Anne-Lise Sibony - Université Catholique de Louvain - 8/14/2017

Contributors

Cristina Amato, LLM, PhD in comparative law, Esquire Milan Bar Association, is associate professor of comparative law at the Brescia Law Faculty, Italy. Her areas of expertise are private comparative law, continuing education training for the legal profession and clinical legal education. She has been a visiting professor in several European and South American law schools and has published widely on civil law, particularly around consumer protection, civil liability, contract and damages.

Juan Pablo Beca is a qualified lawyer in Chile. He holds a master's in law from the Università deglistudi di Genova (Italy) and at Universidad Católica de Temuco (Chile), where he is associate professor.

Katarzyna Gromek Broc teaches at the University of York, Law School at undergraduate and postgraduate levels. She was appointed in 2008 to develop postgraduate programmes in law. She obtained her PhD from EUI/Florence and has other postgraduate qualifications from Paris II (Panthéon/Sorbonne). She has taught widely in Europe, Asia, Australia and South America and has held visiting professorships at the Institute of European Studies of Macau; Golden Gate University, San Francisco and Stetson College of Law, Florida. Her research has attracted numerous grant awards, including from the Arts and Humanities Research Board (2003) and the British Academy (2004). She won the Strategic Fund Competition in 2006 for her research on discrimination and has been sponsored by the Sir Reckitt Foundation on several occasions. Her research interests include European law, comparative law, labour law, cross-border insolvency law, bioethics and human rights. She has published widely in these areas.

Laura Bugatti holds a PhD in comparative law. She is currently a research fellow at Brescia Law School, Italy. She is a supervisor in the Brescia Legal Clinic specialising in civil liability. Her main fields of research interest are: professional liability (with a particular focus on legal profession), the regulation of lawyers and legal education. She has published several articles on professional and civil liability and not-for-profit legislation. She has been involved in national/international research projects, mainly in collaboration with the Center of European and Comparative Studies in Brescia.

Review Copy Only - Not for Redistribution
Anne-Lise Sibony - Université Catholique de Louvain - 8/14/2017

Meredith Daniel studied for her undergraduate law degree at the University of York, becoming the first person to be awarded first-class honours (with distinction) in law. Her engagement with clinic as an undergraduate sparked an interest which led to her undertaking her LLM in the theory and practice of clinical legal education, providing experience of interacting with clinic as both a student and a supervisor. Now undertaking the Bar Professional Training Course, Meredith has continued her interest in clinical legal education by taking a position as a student director in the Housing Clinic at the law school, BPP.

Pilar Fernández-Artiach, PhD, is an associate professor of labour law and Social Security at the University of Valencia, where she is Director of the Migrants' Law Clinic. She is a member of the Global Alliance for Justice Education (GAJE) and the European Network of Clinical Legal Education (ENCLE). She has published extensively in her fields of interest.

José García-Añón is professor in the School of Law and researcher in the Human Rights Institute at the University of Valencia. His main research interests and publications are around human rights, especially minorities' rights, migrant rights, women's rights; discrimination and the law; racial and ethnic discrimination (specifically racial profiling); multiculturalism and human rights (specifically female genital mutilation); innovation and methods on teaching and learning law (specifically using ICT tools for teaching, and clinical legal education). He is member of the board of directors of the Global Alliance for Justice Education (GAJE) and a member of the Steering Committee of the European Network for Clinical Legal Education (ENCLE)

Philip M. Genty is the Everett B. Birch Innovative Teaching Clinical Professor in Professional Responsibility at Columbia Law School. He teaches professional responsibility, civil procedure and the Incarceration and the Family Clinic. His research interests are in legal ethics, prisoners' rights, family law and clinical education. He has taught and consulted on legal ethics and clinical legal education in Central and Eastern Europe the Middle East. He received a Columbia University Presidential Award for Outstanding Teaching in 2014, and Columbia Law School's Willis L.M. Reese Prize for Excellence in Teaching in 2008.

Jenny Gibbons is a lecturer at the University of York. She is responsible for the delivery of public law and employment law modules and is actively involved in the ongoing design of the law curriculum. She qualified as a solicitor in 2003 and continues to supervise live cases in the York Law Clinic.

Jeff Giddings is a professor of law at Monash University, Melbourne, Australia. He has written extensively on experiential learning, and his book *Promoting Justice Through Clinical Legal Education* was published in 2013. Jeff developed the clinical programme at Griffith University, Brisbane, where he worked for 22 years. He also teaches and researches in the fields of access to justice and alternative dispute resolution.

Review Copy Only - Not for Redistribution
Anne-Lise Sibony - Université Catholique de Louvain - 8/14/2017

Richard Grimes qualified as a solicitor in 1977 and worked initially in a law centre and later as a full-equity partner in a law firm, handling a wide range of, principally, publicly funded cases. He has retained an interest in law teaching and research as well as legal practice in the belief that the one informs the other. In 1990 he joined Sheffield Hallam University, where he established an in-house solicitors' practice in which undergraduate law students handled real cases under professional supervision. He was seconded to the University of the South Pacific from 1995–1997, where he became the Director of the Institute for Justice and Applied Legal Studies. In 1998 he was appointed Head of Law and Professor of Legal Education at the University of Derby and in 2000 joined The College of Law as Professor and Director of Pro Bono Services and Clinical Education. From 2006 to 2010 Richard acted as an independent consultant on a variety of legal education projects, including in Afghanistan, Georgia, Iran and Nigeria, working with national governments, donor agencies, law schools, the legal profession and NGOs. He was Director of Clinical Programmes at the York Law School, University of York, from 2010 to 2016 and helped to pioneer a fully integrated clinical approach to study using problem-based learning. He has now returned to a consultancy role. He has published widely on clinical legal education issues and in the legal skills field and remains committed to learning by doing and to improving access to justice more generally.

Richard Hedlund has recently been awarded his PhD from York Law School (YLS) at the University of York, where he also worked as a part-time PBL tutor and a mentor in the Law Clinic. He had previously graduated from YLS with an LLB and LLM, both studied using PBL methods. Richard has now secured his first academic position as a lecturer with the Law School at the University of Lincoln.

Katarzyna J. Kowalska, PhD, is an assistant professor in the Legal Clinic at the University of Warsaw. She is also a legal practitioner, trainer and author of various publications devoted mainly to clinical legal education, access to justice and the pro bono movement in Poland and Eastern Europe. She is also a member of the board of the European Network for Clinical Legal Education (ENCLE).

Liubou Krasnitskaya graduated from the Belarusian State University with a law degree and has been appointed supervisor and manager of the legal clinic there. Having gained the experience in clinical legal education in the USA, Poland, Russia and Belarus, she was invited to Vietnam to support the establishment and development of the legal clinics in 2012–2013. Currently she is studying for a PhD University of Bialystok in Poland under the title: "Higher legal education through the prism of the human right to education".

Stephen Levett is a solicitor and former deputy dean at the University of Sunderland, and previously set up and ran Student Legal Advice Centres at the University of Law in York and in London. He has spoken at a number

Review Copy Only - Not for Redistribution
Anne-Lise Sibony - Université Catholique de Louvain - 8/14/2017

of clinical legal education conferences and is a former steering committee member of the Global Alliance for Justice Education. He is now the Director for the newly established law clinic at the Dickson Poon School of Law, Kings College London.

Chris Maguire is Professor of Professional Education and Dean of Academic Affairs and proctor at BPP University, London. He has worked for a number of regulatory and professional bodies, including the Bar Standards Board and the Solicitors' Regulation Authority. He is a Quality Assurance Agency assessor and was formerly the chair of the Association of Law Teachers. He has acted as a consultant to the World Bank and the British Council in several countries worldwide. His research interests lie in professional identity, quality and the affective domain.

David McQuoid-Mason is a professor at the Centre for Socio-Studies, University of KwaZulu-Natal, South Africa; an honorary visiting law professor at Strathclyde University, Scotland; an adjunct professor of Law at Griffith University in Australia and President of the Commonwealth Legal Education Association. He has published more than 150 articles in law and medical journals, written two books, co-authored 20 books and manuals, contributed more than 70 chapters to books and delivered over 300 papers at national and international conferences. He has visited over 120 countries and drafted legal aid legislation, helped establish law clinics and Street law programmes and conducted numerous clinical legal education training sessions in 60 of these.

Ruth M. Mestre i Mestre is a professor of jurisprudence and legal theory at the University of Valencia and member of the Human Rights Institute. She holds a master's in legal theory (Brussels, 1995) and master's in sociology of law (Oñati, 1997). Ruth has been Marie Curie Fellow at CRER-Warwick University (2003–2004). Her research interests are in feminist legal theory, equality and non-discrimination, citizenship, multiculturalism, women's rights and clinical legal education. Ruth is currently the director of the Clínica Jurídica per la justicia social at Valencia.

Donald Nicolson (BA, LLB, PHD) is a law professor at the University of Strathclyde, Scotland. He is founding director of the school's law clinic and was also founding director of the University of Bristol Law Clinic. Donald has written extensively on legal ethics and ethical education, as well as on evidence, criminal law, clinical education, evidence theory, affirmative action and adjudication. He is on the editorial board of *Legal Ethics* and the *International Journal of the Legal Profession*, a trustee of Law Works Scotland established to promote voluntary legal work and of the Clinical Legal Education Organisation and a member of Law Society of Scotland's Access to Justice Committee.

Ernest Ojukwu is a senior advocate of Nigeria and partner at OFY-Lawyer Abuja. He is president of the Network of University Legal Aid Institutions

Review Copy Only - Not for Redistribution
Anne-Lise Sibony - Université Catholique de Louvain - 8/14/2017

(NULAI) Nigeria; Professor of Law Baze University Abuja Nigeria; and was deputy director-general and head of quality assurance at the Nigerian Law School (2013–2014), deputy director-general and head of Augustine Nnamani Campus Enugu, Nigerian Law School from 2001 to 2013 and dean, Faculty of Law Abia State University (1995–2000). He established the Nigerian Bar Association's Institute of Continuing Legal Education and designed the rules and guidelines that drive the mandatory continuing legal education programme for the legal profession and was its director 2007–2010 and 2012–2014. Ernest has a deep interest and experience in legal education. He was alternate chairman of the Nigerian Bar Association's Summit on Legal Education 2006 and secretary of the federal government of Nigeria Committee on the Reform of Legal Education in Nigeria, 2006–2007. He is at present the Secretary of Nigerian Council of Legal Education Committee on the Review of the LLB Programme of Nigerian Universities. He has published widely on legal education including: *Legal Education in Nigeria: A Chronicle of Reforms and Transformation under Tahir Mamman*. He is editor-in-chief of *African Journal of Clinical Legal Education and Access to Justice*.

Sue Prince is an associate professor at Exeter University. She has extensive research interests in alternative dispute resolution, clinical legal education and pro bono, particularly in a Canadian context. Sue led the establishment of a student advice clinic, the Community Legal Helpdesk, at her university, which won the LawWorks Attorney-General's Pro Bono award in 2013. She is currently reviewing online dispute resolution processes in British Colombia and has developed a Canadian Negotiation Competition, in conjunction with a global law firm, aimed at contextualising skills, practice and education.

David Roccaro is a graduate in law from the University of Palermo with a dissertation on the clinical legal education under civil and common law. He is co-author of the first handbook in Italian on legal clinics, *Clinica legale. Un manuale operativo* (2015). He gained experience abroad under the Erasmus scheme at the Georg-August-Universität in Göttingen and has undertaken an internship in a law office in Wien and worked in a legal clinic, the Escritório de prática jurídica, at the Universidade de Fortaleza (Unifor) in Brazil. He spent time researching clinical legal education at the York Law School Clinic and is now undertaking his studies in theory and practice of law.

Shuvro Prosun Sarker is a Researcher at the Center for Regulatory Studies, Governance and Public Policy at the West Bengal National University of Juridical Sciences (NUJS), India. He holds an LL.B from Calcutta University, LL.M and a PhD from NUJS. He is an Assistant Editor of *Asian Journal of Legal Education*.

Anne-Lise Sibony is Professor of European law at the University of Louvain. She read law and economics in Paris, graduated from the École Normale

Review Copy Only - Not for Redistribution
Anne-Lise Sibony - Université Catholique de Louvain - 8/14/2017

Supérieure (Paris) and holds an MsC in regulation from the London School of Economics. Anne-Lise wrote her PhD on the judicial use of economic reasoning in competition law. Her main research interest lies more broadly in how scientific knowledge (mainly economics and psychology) is used in the legal sphere. Her current focus is on behaviourally informed law making at EU level. She is a visiting professor at University Paris II and at the European Law and Governance School.

Michal Urban, JUDd, PhD, is a senior lecturer in the Faculty of Law, at Charles University in Prague, Czech Republic. He also runs the Street Law programme there (see www.streetlaw.eu) and participates in other clinical education programmes (simulations and externships).

Tanya Walker completed her postgraduate degree in the theory and practice of clinical legal education at York Law School, University of York, having studied for her LLB there under the PBL method. This followed a lengthy career as a civil servant and trade union officer. She is currently working as a freelance researcher with an interest in clinical pedagogy and ethics prior to finalising her PhD research proposal (please see the postscript to "Final words" at the end of this book).

Review Copy Only - Not for Redistribution
Anne-Lise Sibony - Université Catholique de Louvain - 8/14/2017

Review Copy Only - Not for Redistribution
Anne-Lise Sibony - Université Catholique de Louvain - 8/14/2017

Chapter 3

Experiential learning

Just for 'common lawyers' – really?

Richard Grimes and Anne-Lise Sibony

3.1 A starting point

In the Introduction to this book, a symposium is mentioned. One of us (Grimes) shared his experience of clinical teaching in various settings (literally from **A**fghanistan to **Z**imbabwe) and explained more broadly the benefits he saw in experiential learning. As explained earlier, many civil law participants at this event expressed considerable concern and in some stages showed overt resistance to the idea of developing experiential learning methods in the civil law world. Meanwhile, the other author of this chapter (Sibony), who was educated and teaches in a civil law environment, albeit with limited 'clinical experience', felt a strong urge to disagree with these apparent opponents. Her intuition was that the civil/common law distinction was not in fact the relevant dividing line between experiential learning enthusiasts and experiential learning sceptics. Clinical legal education may have seemed foreign territory to these continental colleagues, but this was perhaps bedded less in the differences between the two systems and more in a lack of familiarity and specific cultural contexts and perceptions found there.

A core of delegates showed sufficient interest to explore this hypothesis, and Grimes hosted a further meeting in York in June 2014. The purpose of the *Cooks, kitchens and the law*[1] workshop was to analyse the potential of learning by doing across the two legal worlds. Delegates from a wide range of Western and Eastern European countries along with representatives from South America, Australasia and Asia came together to exchange views. The deliberations at that gathering further convinced us of the potential for major reforms and consequential improvements in legal education in our respective countries using clinical and other experiential learning and teaching methods.

This chapter seeks to flesh out this intuition, which other contributions in this volume then put to the test.

We first attempt to expose the thesis of the accusation ("clinical legal education is good for common lawyers – only") and then seek to rebut it. In the process, we attempt to critique the notion that learning must start with

Review Copy Only - Not for Redistribution
Anne-Lise Sibony - Université Catholique de Louvain - 8/14/2017

idées reçues (received wisdom), which appears to be the case at present in both (predominantly) civil and (to a lesser extent) common law education systems.

Here we look at a set of themes that lie at the heart of the form and content of legal education in any jurisdiction. To what extent does legal knowledge and do skills and values matter? What is the role of a law school, and to what extent should other stakeholders with a vested interest in what law schools produce be recognised and their agenda served?

In addressing these important concerns, we ask whether and how the legal environment of a civil or common law system affects the design of a legal curriculum. Do the acknowledged differences between the civil and common law worlds impact on how legal education is structured and delivered? Is there a role for experiential learning, and if so why and how?

Our short answer to these questions is that, contrary to a widely shared notion among civil law professors, teaching methods based on experiential learning are not good just for 'common lawyers'. Rather, we argue that experiential learning brings benefits that enhance the learning and teaching experience in any subject and under any system, including legal ones.

This assertion is founded both on personal experience and educational theory. Personal experience will be alluded to at various points in this and following chapters. Educational theory pertaining to experiential learning is briefly reviewed in section 3.2 below. Section 3.3 is devoted to reflecting on contact points between experiential learning and legal education under the civil and common law traditions. Importantly, we find connecting factors in both. Section 3.4 offers our views on why there is room for convergence between civil and common law educational methods around experiential learning, namely because the value of experiential learning is not linked to content. Section 3.5 briefly concludes.

3.2 A theoretical framework

The recognition of the value of learning through observation and practical application is nothing new. Confucius is credited with saying: 'By three methods we may learn wisdom: First, by reflection, which is noblest; Second, by imitation, which is easiest; and third by experience, which is the bitterest.'[2] Whilst we might agree neither with the proposition and order nor with the idea that experience is necessarily a painful encounter, it is interesting to see the concepts of reflection, imitation (role-play and simulation) and experience mentioned at such an early point in history and linked together in this way.

The following quotation is also attributed to Confucius: 'I am told, I forget; I see, I remember; I do, I understand'.[3] Learning by doing is seen (rightly, we say) as a fundamental stepping stone to learning, especially when integrated

Review Copy Only - Not for Redistribution
Anne-Lise Sibony - Université Catholique de Louvain - 8/14/2017

with other forms of educational delivery – yes, even we see a place for more traditional forms of learning!

Whilst dwelling on some of the world's influential thinkers, it is worth mentioning what Einstein apparently said: 'Information is not knowledge. The only source of knowledge is experience'.[4] Whether these words were uttered by the great man we cannot be certain, but as a pithy saying, it fits well with what early writers have recorded and what subsequent scholars have written. We will be more specific on sources shortly, but the above quotations, whatever their true origin, accord with the gist of our arguments and a host of personal and reported anecdotal evidence. They also set the scene for a more thorough analysis of pedagogic theory.

Much of what has been written and debated in this realm relates to education generally, rather than to legal education specifically. As we show below, it is only in relatively recently times that those responsible for the design and delivery of legal education have focused on how teaching and learning might be improved based on a relevant theoretical framework.

At the turn of the 20th century John Dewey, an American philosopher and educational reformer, extolled the virtues of using practical experience as an integral part of learning and teaching.[5] Seeing the education process as very much a shared experience between teacher and learner, Dewey broke new and, at the time, radical ground in his attempts to improve students' education and the educational system. The use of an application context also accords with longer-established practices, of practical training periods for lawyers under the common law system as, also, in many civil law countries.

Much more recently, Donald Schön's seminal work on experience and reflection (remember Confucius) describes what effective learning can look like using the analogy of the swamp. Schön suggests that, in order the make sense of the world or specific aspects of it, one needs to descend into the swamp and take what might now be referred to as a 'reality check'. That experience alone, however, is insufficient to extract and digest the relevant learning. One then needs to retreat to higher ground in order to have both the distance and time to deconstruct and make sense of what was encountered down below. The obvious setting here, in the context of this book, would be the classroom – where the student and teacher can engage in an in-depth discussion of what happened and why, what could have happened and how this might inform future action and analysis.[6] In other words and in educational terms, one needs to retreat to higher ground to analyse and make sense of the 'mess' that is life.

Around the same time (early 1980s), David Kolb developed similar ideas. Although Kolb has subsequently been criticised for presenting an over-simplistic and one-dimensional model for learning,[7] we suggest the learning cycle originally presented in Kolb's work is a very helpful representation of the nature and process of learning (Figure 3.1).

Review Copy Only - Not for Redistribution
Anne-Lise Sibony - Université Catholique de Louvain - 8/14/2017

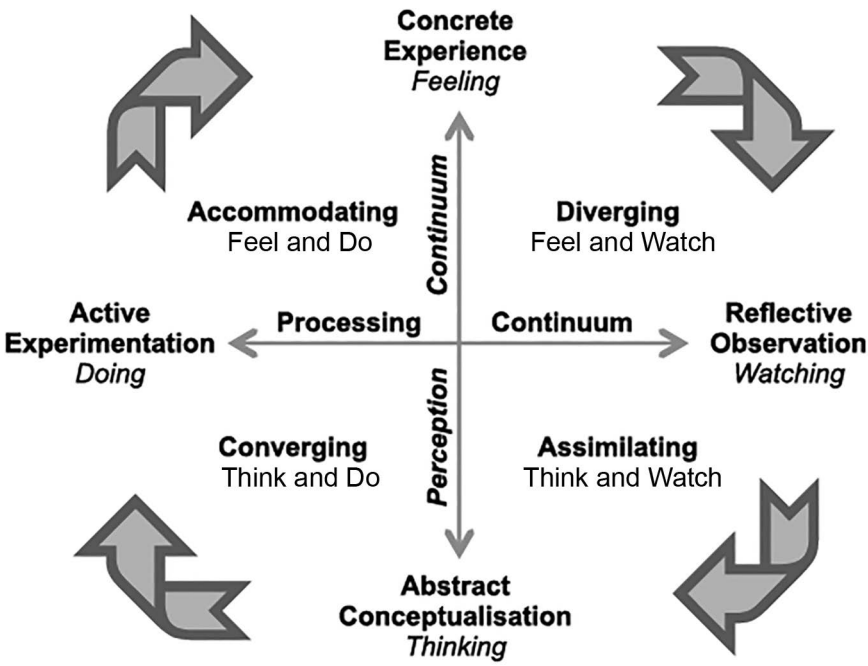


Figure 3.1 Kolb's learning cycle

This cycle encompasses, at various points, the acquisition of experience, reflections on that experience, abstraction to identify the issues/theory at stake and then application (or further application depending on how often the cycle is repeated) of theory to practice.[8] As the process is circular (albeit not necessarily sequential as described above), one stage may well inform another and the learning process may see several, if not more, revolutions of the circle as understanding advances. Anyone who has considered the value of continuing professional development (CPD) will be familiar with this concept.

Further important work can be found in the publications of Graham Gibbs. Gibbs coins the terms 'surface' and 'deep learning'. The former fits with the early stages of development shown in Bloom's taxonomy as remembering and understanding.[9] Deeper (and by implication, more effective) learning[10] is more likely to occur if the learner is exposed to a process of structured reflection where initial knowledge acquisition is scrutinised through discourse between learners and teachers – a facilitated reflective process.[11] Gibbs not only gives us the pegs on which to hang the proverbial hats in terms of concepts but then provides us with a set of tools for ensuring that the pegs stay on the wall – even down to the nuts and bolts (or possibly screws) for ensuring effective facilitative pedagogic practice.

Review Copy Only - Not for Redistribution
Anne-Lise Sibony - Université Catholique de Louvain - 8/14/2017

The continued mention of reflection perhaps suggests an intuitive exercise – think about it and you will think 'deeper' as a result. We suggest this is not the case and reflection needs, as all aspects of learning and teaching do, content, form and the relevant expertise, in order to maximise the learning opportunity.[12] It is also not a one-way street – reflection 'in' and 'on action'[13] can inform all participants in the learning process. We are all never too old or wise to learn. To assist with this, Jennifer Moon's more recent work on strategies for reflection is worth mentioning here.[14] Moon discusses both the why and how of reflection, providing not only a theoretical framework for understanding the principles for effective learning and teaching but a set of resources for putting reflection into practice.

As can be seen, experience as a starting point for knowledge acquisition (and, as we later argue, skill and value development) is clearly underpinned by educationalists. A structured and facilitated reflective component is said to enhance the process and maximise the learning potential.

What about theories of experiential learning specifically in legal education?

As suggested above, learning about the law and the legal system is surely no different in principle from learning anything else. It is perhaps not surprising that academics in the generic education field have historically given more thought and published space to the process of learning and how we might learn more effectively. That is, after all, their business. Over the past decade, however, legal educators have been catching up with extensive writings on learning in general and experiential learning in particular. Much of this has been spearheaded by Julian Webb, many of whose publications have focused on learning by doing and the need for theory as a basis for development and change.[15] Several journals of international standing now focus on how we learn the law rather than what we learn in terms of substantive rules and doctrine.[16]

Recent publications have looked at the development of clinical legal education,[17] the use of simulation as a basis for education and reflective practice[18] and the use of e-technology in the context of experiential learning.[19] Most of the source materials cited so far have emerged from common law jurisdictions. The civil law world may have been slower to pick up this particular baton, but it is catching up and developing its own discourse, as evidenced by Jamin's book referred to above (who also notes the general paucity of legal education scholarship in France) as well as in several other recent and peer-reviewed publications.[20]

The scene is therefore set. We maintain that what makes up 'good' education – that serves the interests of all concerned by promoting and supporting a deeper, contextual and socially relevant learning – is not determined by country, region, history or culture. Of course, all of these variables may colour what legal education looks like, but in the light of educational theory, there are no longer any excuses for ineffective educational systems and processes. We maintain that we (as educators) owe it to society (including our students, present and future

Review Copy Only - Not for Redistribution
Anne-Lise Sibony - Université Catholique de Louvain - 8/14/2017

clients, the legal profession, other employers and the wider public) to educate to the highest standards and using established best practice.

This does not mean homogenising the product or process. As law is largely a reflection of societal values, this will necessarily impact on the content and form of legal education. Nonetheless, any of the stakeholders with an interest in how lawyers are educated and trained should have regard to how the curriculum is designed and delivered to ensure it is as effective as possible.

The specific features of civil law system do not detract from this very general position. In this chapter, we criticise the claim that the intrinsic nature of civil law systems justifies the traditional model of legal education with its emphasis on doctrinal content, a lecture-led student interface, extensive rote learning focused on written examinations, a narrow syllabus that ignores or devalues a range of legal and transferable skills and an overt ethical/professional practice consideration.

In the next section, we review a number of potentially sensitive issues. We start with the position taken by Kronstein, who in the 1950s identified and then dismissed the argument that if the case method were introduced into continental Europe's legal education curriculum, it would inevitably transform the 'scholarly' law faculty into a school for practitioners.[21] For us, introducing interactive experiential learning and teaching methods is no less likely to corrupt the doctrinal purity of the civil law faculty than any other form of pedagogy. To the extent universities in civil law countries deem it appropriate to emphasise doctrinal content, that content – like any other – can be more effectively taught experientially than in a traditional top-down manner. Indeed, if students are not familiar with how the principles of the law apply to practical problems, is that not indicative of a lack of understanding of the relevant doctrine or theory?

3.3 How does experiential learning fit with the civil and common law traditions?

It is common perception in many common law jurisdictions and most civil law ones that legal education is *not* about experiencing learning. To understand why the concept seems so foreign, we need a historical perspective.

Experiential learning and the common law tradition

In the UK and many other common law countries, legal education, such as it was, was largely based on work-related experience. The Inns of Court (the organisations through which one side of the legal profession – barristers – operate) provided an effective apprenticeship coupled with instruction from more experienced practitioners. Other legal professionals (solicitors) also worked through a period of supervised practice – then termed articles of clerkship.[22] It is only in relatively recent times (around 100 years ago) that the route to qualification for a lawyer required completing a course at university. For better or worse the

Review Copy Only - Not for Redistribution
Anne-Lise Sibony - Université Catholique de Louvain - 8/14/2017

divide between the 'academic' and the 'vocational' is now a key feature of UK legal education although this is currently under review. Both within the UK and throughout the former British colonies, legal education systems display variations on that theme.[23]

Whilst some universities in the UK, particularly the longer-established institutions, maintain that law is a subject of liberal study, the reality is that the majority of students enrolling in a university law degree programme have the intention of qualifying as legal practitioners – at least at the start of their studies.[24] In other common law countries, notably the USA, the academic and vocational stages of legal education are not separated in the same way – law is not taught as an 'academic' subject but rather as a discipline for those wanting to become lawyers. Law school in the US is graduate-only entry and aimed at producing practitioners.

Regardless of these differences in some common law countries, the role of the legal profession and its regulators is key to the form and content of legal education. Let us take two examples. In the USA, the American Bar Association (ABA) accredits law schools. Graduation from a non-accredited law school may prevent a student from qualifying to sit for a state bar examination. The ABA dictates much of what is taught and to an extent how legal education is carried out. For instance, there is currently a requirement that a law school has a defined programme of pro bono/work-based experience – an in-house clinic (the norm) or some alternative, for example placements with organisations external to the law school.[25]

In the UK, at present (this is currently under review) students must acquire a 'qualifying law degree' (QLD) before entering the overtly vocational stage of the Legal Practice Course (for would-be solicitors) and the Bar Professional Training Course (for barristers). The joint statement by the relevant regulatory bodies governs what is required for a programme to qualify a QLD. This is largely content and resource/facility-driven and does not address the way in which legal education is actually delivered. Subject to the above, law schools are largely free to present programmes as they think fit – provided they comply with requirements in terms of assessment and consider guidance of the UK Quality Assurance Agency and the Benchmark Standard for Law.[26]

This can be contrasted with situation in continental Europe.

Experiential learning and the civil law tradition

Although the situation varies from country to country, it is largely the case that law schools are solely responsible for curriculum design, without interference from the bar. A university degree is a prerequisite for applying to the bar, but practitioners typically do not consider that a law graduate is equipped for practice after five years of law school. Bar associations usually organise a period of work-based study and in many jurisdictions, additional training, notably on matters not covered at all in the university curriculum, such as professional ethics.

Review Copy Only - Not for Redistribution
Anne-Lise Sibony - Université Catholique de Louvain - 8/14/2017

The divide between the academic study of law and the professional training is the product of historical evolution.[27] In France, the 19th century is a crucial period to understand to make sense of the current situation. Legal education was completely revamped after the revolution. In the early years of the 19th century, under Napoleon, the mission of law school was very clearly to teach the (then novel) civil code and train practitioners.[28] This imperial model is criticised for instrumentalising law schools, denying academic freedom and downgrading the teaching of law to professional training, as opposed to the study of a 'science'.[29] By the turn of the century (after the defeat of France against Germany in the 1870 war), France emulated the German model, where the study of law is seen as 'truly scientific'. Arguments of (internal) consistency are highly valued in scholarly discussions (more than consequentialist arguments). As far as teaching is concerned, the emphasis is on giving students an orderly overview of the whole legal system and its various branches. Law professors write treaties and construct their lectures as sections of a cathedral.[30]

To prepare students for the practice of law, the focus is on developing the ability to link particular situations to general principles.[31] This occurred (in France only in the second half of the 20th century) by means of introducing class teaching in addition to lectures. Two types of exercises are practiced under the supervision of teaching assistants: dissertations and case comments (but still no practical problems). Students do develop argumentative skills about the law and useful writing skills but are not exposed to professional-like situations. With the exception of some specific programmes, for which there is a selection process (otherwise prohibited by law to French universities), emulation of professional situations is left for after law school, for the training organised by professional bodies (or in the case of judges, by the state but in a specific professional school). While many agree this is not a satisfactory state of affairs, innovation in legal education is slow and takes place in part outside of universities.[32]

This being said, we do not want to paint too negative a picture of experiential learning on the continent. To be sure, it constitutes the fringe rather than the core of legal education, but there are two reasons to think the situation could evolve and is indeed evolving towards a greater role for experiential learning. First, experiential learning actually fits well with an existing tradition in continental legal education (although this may not be immediately apparent). Second, the current EU-wide shift towards a skill-based approach helps to bring this good fit to the fore.

Experiential learning and desired outcomes

To illustrate the first point, let's take the German example. Arguably, Germany is, within continental Europe, a country where traditions are particularly strong in legal education, so much so that Germany refused to implement the 'Bologna process' (so named after the city where the blueprint of an EU-wide

Review Copy Only - Not for Redistribution
Anne-Lise Sibony - Université Catholique de Louvain - 8/14/2017

harmonisation was agreed among education ministers, but on a voluntary basis, outside of the EU framework). The main features of the Bologna agreement are that university studies have the same two-tier structure: a bachelor's degree (three years) followed by a master's degree (two years), with each course carrying a certain number of credits (ECTS). Both elements aim to facilitate free movement of students and mutual recognition. While this has been largely implemented across Europe,[33] including in Law, Germany resits the change: it would jeopardise the all-important *Staatsexamen*, a set of two state exams, which students take at the end of their studies and need to pass if they want to join any legal profession. While the exams were initially devised to select public legal officers (judges, prosecutors and civil servants), they constitute a must-pass not only for public legal offices but also to join the bar. Needless to say, the requirement for these exams exerts a considerable influence on what is taught in law schools and how it is taught.[34]

In the words of Lehmann, the ideal candidate for the *Staatsexam* is a modern Renaissance man (or – more often – woman), with a broad knowledge spanning across all areas of law. However, the exams are not designed to test abstract knowledge of legal principles or command of doctrinal scholarship. Rather, the exams test the ability of the candidate to genuinely understand the law and apply it.[35] The tests, therefore, are quite practical. In the first state exam, students are asked to solve problems applying rules they do not know (often invented statutes). The aim is to test their ability to reason their way in novel situations. To prepare for this, university education emphasises reasoning techniques. More precisely, four methods of interpretation are traditionally – since Savigny –[36] considered to constitute the basic toolkit of any self-respecting German lawyer: literal, systemic, historic and teleological interpretation. In the second state exam, candidates are confronted with a hypothetical case (a traditional exercise theorised by Jhering, another revered German law professor of the 19th century). Candidates are asked to draft a court order or an act of accusation (but rarely submissions on behalf of a party).

This brief overview of the German situation suggests that, even in continental countries where the legal education system is very attached to the national tradition, there may be elements within that tradition on which to build when it comes to introducing experiential learning in the legal curriculum. In the German case, while it is unlikely that the idiosyncratic state exams will go,[37] the requirement that these exams test a genuine understanding of the law and the ability to apply could in our view only be well served by injecting a dose of experiential learning in the curriculum. Indeed, this is what is beginning to happen in several continental European countries.

Ongoing innovations in continental Europe

There is a myriad of local initiatives which seek to introduce some experiential learning in the law curriculum. At the time of writing, a French-speaking

Review Copy Only - Not for Redistribution
Anne-Lise Sibony - Université Catholique de Louvain - 8/14/2017

network of law clinics comprises 22 members of which 16 are located in France and one in Luxembourg.[38] In Belgium too, some law schools offer law clinics.[39] In addition to clinics, other ways of channelling teaching innovation should be mentioned. Some examples from Belgium may be used to illustrate this point. Although they owe in some respect to common features of Belgian universities, these examples tell a story which could resonate in other continental jurisdiction because they are directly linked to the shift towards a skill-based approach, which is a pan-European evolution.[40]

A skill-based approach is characterised by the fact that aims of the curriculum are explicitly formulated in terms of skills (what a law graduate should be able to do) rather than in terms of content. Implementing a skill-based approach usually requires revamping curricula initially structured to accumulate knowledge. The guiding principle of such reform, once the skill set has been agreed upon, is to ensure the curriculum as a whole provides enough learning opportunities for students to acquire target skills. Skills are normally not subject-specific. Writing skills, for example, may be acquired by writing a paper on contract law just as well as on constitutional or environmental law. Under this approach, teaching still covers specific contents, but a list of contents taught is no longer considered sufficient to define the curriculum. The skill-based approach facilitates mutual recognition of diplomas and qualifications. When the focus is on content, it is enough that subjects taught differ, as they usually do in Europe, for a graduate from Germany to be refused full recognition of her degree in Belgium. If the focus shifts to skills, it becomes easier to recognise that two diplomas that attest to the same skill set are equivalent even if the contents of the curricula differ. For this reason, the skill-based approach is promoted by the European Union.

In Belgian universities, law schools have all started a transition to a skill-based approach (usually prompted by national quality evaluation bodies). In this process, they may count on support offered by learning labs. Learning labs (whose appellation varies across universities and over time) are resource centres which are part of each university and whose mission it is to offer pedagogic training to young recruits as well as continuing professional development modules to anyone holding a teaching position. They are not attached to any faculty or school and provide cross-subject methodological support for teaching innovation. The training sessions offered in this framework create opportunities for law professors (those who choose to attend) to realise that many of the issues they face are not specific to the teaching of law. These issues include, of course, depth of learning and ability to use the new methodologies and technology. In this regard, one particularly important contribution of these trainings is that they equip participants with a conceptual framework. It makes a world of difference to learn – even only the basics – of a language that enables one to speak about the core issues of course design, which would otherwise remain unformulated in the shadow of solitary course preparation.

Review Copy Only - Not for Redistribution
Anne-Lise Sibony - Université Catholique de Louvain - 8/14/2017

For instance, discovering Bloom's taxonomy (the different stages of learning referred to above) allows one to make sense of the otherwise abstract requirements of the skill-based approach which the dean is pressing with more, or less, enthusiasm upon faculty. It might be useful here to recall, at least in outline, what this attempts to show. In this seminal work, Bloom and his colleagues attempt to classify stages in learning in the cognitive, affective and sensory domains by setting out a hierarchical structure, with 'knowing' at the foot and evaluation at the apex and with increasing levels of sophistication and complexity, in terms of learning, being demonstrated as one moves along the learning axis. The process of development involved includes, in ascending order, the recall of knowledge, application, analysis, synthesisation, evaluation and innovation or creation.[41]

The distinctions between the learning stages may allow one to realise, for example, that all that is implicitly required from students for a course as it stands is merely to remember and understand, but not to apply (rules to real cases) or analyse (rules, discourses about the rules), far less to evaluate (an opponent's statement about the correct interpretation of rules) or to create (write own opinion on rules/draft alternative rules). This may prompt revision of the course's aims and even more importantly, makes those aims explicit in a concrete manner. Indeed, the formulation of expectations, which is the cornerstone of good practice in general and in a skill-based approach in particular, is a necessary first step in realising what experiential learning can bring. It is from there that clinics and all other techniques that require students to actively do something with the knowledge rather than passively receive it turn from pedagogic gimmicks to meaningful tools to achieve a goal defined by the teacher him or herself (taking into consideration the target skill set defined for the programme).

Directly or indirectly (through word-of-mouth between teachers), such training, which includes hands-on sessions on various active teaching tools, contributes to instilling student activity in an otherwise traditional setting typical of law schools in civil law countries.

3.4 Convergence?

In spite of cultural differences between the UK and continental Europe (as well as other manifestations of the common and civil law worlds), the requirements imposed on the law curriculum and the relationship between universities and the relevant professional bodies is not, we suggest, so very different. We accept that in some specific instances there may be regulations that impact on this relationship and the nature of legal education in consequence. Where this is the case it is noted in the text. We maintain, as do many of the book's other contributors, that there are no principled reasons linked to the role of universities in legal education that would explain why what works for university

Review Copy Only - Not for Redistribution
Anne-Lise Sibony - Université Catholique de Louvain - 8/14/2017

education under the common law should not apply equally to the education of 'civil lawyers'. Practical differences (numbers of students, resources, bar association rules, higher education regulation) may create *obstacles* to the expansion of experiential learning in civil law contexts – indeed they do – but that needs to be distinguished from any sustainable *objection*.

Order vs. cases: can one experience a system?

We feel obliged, because of the strength and frequency that the matter is raised, to deal with one particular objection to experiential learning in the civil law context. We both heard an extraordinary expression of this objection at the previously mentioned conference in Luxembourg. A civil law colleague who was afraid neither to offend nor to amuse common lawyers in the room objected with great force and conviction: "But you see, in civil law, we have *principles*, we have *concepts*!" The self-evident consequence of this assertion seemed to be that, therefore, experiential learning could not possibly be suited to legal education under the civil law. Likewise, there was the inference that such fundamental issues were not applicable or not as prevalent under the common law to which experiential learning may, in consequence, be more suited. Our colleague's remark was very much in keeping with what might be termed the 'traditional view' that the core mission of a law professor in civil law countries is to teach *structures* (i.e., how the law on a subject matter is divided and sub-divided). The emphasis on the systematic aspects of the law (the civil code as a cathedral) is a longstanding feature of legal culture in civil law systems and a value that shapes professional attitudes to this day.

A crucial step in making the case for experiential learning in civil legal education is, therefore, to adduce evidence that concepts, distinctions and systems can be taught experientially. We claim this is the case and the reader will find examples of this in subsequent chapters of this book.

As a preliminary point, it may be worth stating the obvious, namely that common law too, of course, has structures and concepts. As mentioned at the beginning of this book, concepts such as co-existing tenures in land ownership or the intention to create legal relations in forming binding contracts are just two examples. The common law may well display peculiarities, but like any law, it operates on the basis of concepts. Certainly, the common core of legal education in any jurisdiction is to acquaint students with such legal principles and underlying notions and introduce them to how these concepts are applied to facts.

More fundamentally, our French colleague was assuming that the one and only way to teach concepts and structures is a lecture where knowledge is effectively handed down from expert to novice. In our view, this is a serious error in both principle and practice. Structures and distinctions can very well constitute the learning outcomes of teaching modules in which students are active participants rather than passive recipients of words of wisdom – in much

Review Copy Only - Not for Redistribution
Anne-Lise Sibony - Université Catholique de Louvain - 8/14/2017

the same way, a guided tour of Notre-Dame Cathedral in Paris is not the only (or best) way to learn about French gothic buildings. To extend the analogy, one can invite visitors to compare different shapes of lancet windows, the motives of cross-shaped vaulting or the sophistication of stain glass. In other words, one can create opportunities for students to experience differences. What is true of architecture works for legal concepts too. Designing a law course for adults, be it about a highly structured civil law content, need not be very different from designing a children's programme in a museum albeit that objectives, language and testing comprehension may differ depending on the age, level and ability of the learner.

The real difference between civil and common law context is not the degree to which the law is structured or conceptualised. It is to do with the dominant view about how one becomes a lawyer – academic, practising or otherwise. The historical differences between the two legal traditions, the approach to the practice of law and the implications for legal education under common and civil law systems is well described elsewhere.[42] In a previous publication one of this book's contributors, Philip Genty, takes up this discussion further when he compares what he sees as the 'bottom-up', inductive approach taken in the former (with judges acting as arbiters and social engineers) with the 'top down', deductive method found in the latter[43] (where the judges act as technicians and operators of what Genty refers to (in discussing Merryman's analysis of civil law as social science) as a 'machine built by others'.[44]

Cultural traits respectively associated with common/civil law worlds – rather than intrinsic features of the legal systems – may help to explain why common law environments are more receptive to experiential learning. But one should not overstate the link between common law and experiential learning on the one hand and civil law and lecturing on the other. This is both because, positively, experiential learning can equally well be associated with civil law and negatively, because the association with common law is not always present. As we have shown above, the value of experiential learning is to do with the learning process itself, not with the content taught. Therefore, active learning is also better learning when, as in civil law countries, the focus is on teaching the architecture of the legal system. Conversely, the association between experiential learning and common law ought not be overstated. In case it be thought that the common law world uniformly uses an interactive pedagogy as a matter of course, let us dispel that notion. The Socratic method, so often raised and praised as being central to learning the law,[45] especially in the USA, may be more spoken of than acted upon. In other countries of both the common and civil law persuasion (including the UK and France), a discourse on the law using pure Socratic techniques is, in our experience, largely missing or replaced by lecture-driven and content-led delivery.

Both in civil law and common law countries, therefore, there is room to expand experiential learning.

Review Copy Only - Not for Redistribution
Anne-Lise Sibony - Université Catholique de Louvain - 8/14/2017

3.5 Conclusion

European countries, including civil law jurisdictions, are experiencing pressure for a change from purely knowledge-based content to more of a skill-based approach in education generally. This is reflected by developments at specific educational institutions, political and strategic initiatives (for example, as initiated by the Bologna process) and globalisation of commerce and (in consequence) the law and the legal profession. The move for change is also fuelled by employability and the realities of an ever-increasingly competitive job market.

Jurisdictionally, specific factors such as the introduction of student fees in the UK may also have had an impact – the student being seen and reacting more as a consumer than traditional learner. In addition, one might think that advances in educational theory have had an effect with the knowledge, skills and values dimensions of learning being seen more holistically and the application of these educational objectives now recognised for their worth.

As will be seen elsewhere in this book, countries further afield, from the Far East and Indian sub-continent to Australasia and across to South America similarly are responding to demands for change from a range of stakeholders.

These development are specifically hitting legal education. The inclusion of a target skill set as part of the law curriculum constitutes an excellent opportunity for law schools in both systems to conduct a thorough review of existing provision – in terms of both content and delivery. In particular, the implementation of an integrated and more skill-based approach invites law schools to reflect on whether current provision is suited to achieve the goals and aspirations formulated by the academy, the legal profession, government and the wider public. Producing lawyers fit for purpose in the 21st century has been discussed extensively elsewhere.[46]

We argue that the transition to a curriculum where the subjects studied and the methods used to study them require a degree of application of legal principle, lawyering skills and ethical awareness, will only be effective if at least some measure of experiential learning is introduced into the law school. We accept that there are major differences in the legal process under the civil and common law. We have suggested in this chapter that those differences neither explain nor justify why there needs to be such a rigid adherence to traditional means of curriculum delivery. The nature of the lawyer/client relationship and role of lawyer or judge in the fact-finding process, for example, do not, in principle, mitigate against suggested improvements to legal education through the inclusion of structured experiential opportunities.[47]

Let us now widen the discussion and turn to some concrete examples of rethinking legal education

Notes

1 So named not because it had anything to do with the rules regulating cooking or chefs but because of the pioneering work of Christophe Jamin, set out in his book: C. Jamin,

Review Copy Only - Not for Redistribution
Anne-Lise Sibony - Université Catholique de Louvain - 8/14/2017

La cuisine du droit, Paris, Lextenso, 2012. This title was inspired by the criticism of other academics in France that a more hands-on focus to legal education would simply produce technicians and those versed in practical skills – like cooks in a kitchen! The 'legal' kitchen seemed to use a very good analogy for a forum in which the application of theory to practice could occur and one that gave the York workshop its own working title.

2 See: Confucious, The sayings of Confucious, Barnes and Noble, 1994 and available at www.gurteen.com/gurteen/gurteen.nsf/id/X0055C026/, accessed 4 January 2016.

3 Ibid, but see: http://english.stackexchange.com/questions/226886/origin-of-i-hear-and-i-forget-i-see-and-i-remember-i-do-and-i-understand, accessed 4 January 2016.

4 This quotation has no definitive citation. See: https://answers.yahoo.com/question/index?qid=20141227074325AA1nTxw, accessed 4 January 2016.

5 See: J. Dewey, *How we think: a restatement of the relation of reflective thinking to the educative process*, Lexington, D.C. Heath and Company, 1933.

6 See: D. Schön, *Educating the reflective practitioner*, San Francisco, Jossey-Bass, 1987.

7 For example see: R. Miettinen, *The concept of experiential learning and John Dewey's theory of reflective thought and action*, International Journal of Lifelong Education, 19 (1), 2000, 54, 61–62.

8 D.A. Kolb, *Experiential learning: experience as the source of learning and development*, New Jersey, Pearson Education, 2015. This relatively recent (and second) edition of his 1984 classic text importantly contains a revision of his theories and in particular addresses the critiques of his earlier work.

9 We are referring to the amended Bloom taxonomy (L.W. Anderson, D.R. Krathwohl, P.W. Airasian, K.A. Cruikshank, R.E. Mayer, P.R. Pintrich, J. Raths and M.C. Wittrock, *A taxonomy for learning, teaching, and assessing: a revision of Bloom's Taxonomy of Educational Objectives*, New York, Pearson, Allyn & Bacon, 2001. In Bloom's original formulation, the first two stages of learning were termed 'knowledge' and 'comprehension' See: B.S. Bloom (ed.), *Taxonomy of educational objectives, handbook i: the cognitive domain*, New York, David McKay, 1956.

10 In the terminology of the above taxonomy: applying, analysing, evaluating and creating.

11 G. Gibbs, *Teaching students to learn*, Milton Keynes and Philadelphia, Open University Press, 1981.

12 R. Grimes, *Reflection in teaching, learning and practice*, in C. Ashford and J. Guth (eds.), *Legal academics' handbook*, Basingstoke, Palgrave, 2016, 106.

13 See, D.A. Schðn, *The reflective practitioner: how professionals think in action*, Farnham, Ashgate, 1983.

14 See: J.A. Moon, *A handbook of reflective and experiential learning: theory and practice*, Abingdon, Routledge Farmer, 2004.

15 See for example: J. Webb, *Ethics for lawyers or ethics for citizens? New directions for legal education*, Journal of Law and Society, 25 (1), 1998, 134.

16 For examples of relevant peer-reviewed journals see: The Journal of Legal Education (USA), The Law Teacher (UK), The Asian Journal of Legal Education (India), and the Clinical Law Review (USA).

17 K. Kerrigan and V. Murray (eds.), *A student guide to clinical legal education and pro bono*, Basingstoke, Palgrave Macmillan, 2011.

18 See: C. Strevens, R. Grimes and E. Phillips (eds.), *Legal education: simulation in theory and practice*, Farnham, Ashgate, 2014.

19 In particular see: P. Maharg, *Transforming legal education*, Farnham, Ashgate, 2007.

20 See Jamin, op cit., 29; Elise Poillot (ed.), *L'enseignement clinique du droit: experiences croisées et perspective pratique*, Brussels, Larcier, 2014; and Xavier Aurey and Marie-Joelle Redor-Fichot, *Les clinques juridiques*, Caen, Presse universitaires de Caen, 2015. P. Ancel and L. Heuschling (eds.), *La transnationalisation de l'enseignement du droit*, Brussels, Larcier, 2016.

21 See: H. Kronstein, *Reflections on the case method – in teaching civil law*, Journal of Legal Education, 3, 1950, 271.

Review Copy Only - Not for Redistribution
Anne-Lise Sibony - Université Catholique de Louvain - 8/14/2017

22 For a helpful overview of the history of legal education in the UK and further afield, including continental Europe see: Mary Ann Glendon, William P. Alford and Lionel Astor Sheridan, *Legal education*, available at: www.britannica.com/topic/legal-education, accessed 6 October 2016.
23 LETR, *Setting standards: the future of legal services education and training regulation in England and Wales*, IPS, BSB and SRA, 2013 and available at: www.letr.org.uk/wp-content/uploads/LETR-Report.pdf, accessed 6 May 2016. The impact of this report can be seen on the relatively recent promulgation of the Quality Assurance Agency for Higher Education in the form of the new QAA, *Benchmark Standard for Law*, 2015, available at: www.qaa.ac.uk/en/Publications/Documents/SBS-Law-15.pdf, accessed 6 May 2016. The outcome of the all-important consultation process, conducted over the past 2 years, of the Solicitors' Regulation Authority (SRA) is currently awaited. This will most likely result in a re-shaping of legal education at least to the point of recognising the importance of applied learning and an assessment process that is linked to outcomes and competencies established over a defined period of time and most probably centrally controlled. The last of the SRA's consultative papers, dealing in particular with assessment, is: SRA, *Training for tomorrow: assessing competence,* 2015 and available at: www.sra.org.uk/sra/consultations/t4t-assessing-competence.page#, accessed 6 May 2016. Note: since the above was written the SRA has committed itself to the principle of a centralised bar examination although the details of exactly what this will consist of and who will conduct it are yet to be published (April 2017).
24 Well under half of all undergraduate law students in the UK currently end up as qualified practitioners – a reflection, we suggest, more of the state of the employment market than perhaps career aspiration. See: Law careers - becoming a solicitor, Law Society, 2016, available at www.lawsociety.org.uk/law-careers/becoming-a-solicitor/entry-trends/, accessed 6 October 2016.
25 American Bar Association, *Standards and Rules of Procedure for Approval of Law Schools*, Rules 303–304, ABA, 2015.
26 QAA, *Benchmark Standard for Law*, 2015, available at: www.qaa.ac.uk/en/Publications/Documents/SBS-Law-15.pdf, accessed 6 May 2016.
27 On which, see Jamin, op cit., chapter 1 (focusing on France with and drawing comparisons with both common law jurisdictions and with Germany).
28 Jamin, op cit., 38.
29 Ibid., 60.
30 Ibid.
31 Ibid., 57.
32 In France, Science Po is a case in point. The creation of Sciences Po law school is narrated by Jamin (op cit.). For (one of many) critical comments, see L. Vogel, *L'Université, une chance pour la France*, Paris, PUF, 2010.
33 See: The Bologna Process and the European Higher Education Area available at: http://ec.europa.eu/education/policy/higher-education/bologna-process_en, accessed 6 October 2016.
34 The following account draws on Matthias Lehmann, Examen d'État (Staatsexamen) en Allemagne – Un obstacle insurmontable à la transnationalisation du droit?, in P. Ancel and L. Heuschling (eds.), *La transnationalisation de l'enseignement du droit*, Brussels, Larcier, 2016.
35 In the original: '*das Recht mit Verständnis erfassen und anwenden können*', v. § 2 II Juristenausbildungsgesetz Rheinland-Pfatz (legal education statute of the state of Rhineland Palatinate), cited by Lehmann, op cit.
36 F.K. Von Savigny, *System des heutigen römischen Rechts*, vol. 1, Veit und comp, 1840, 213sq, cited by Lehman, op cit.

Review Copy Only - Not for Redistribution
Anne-Lise Sibony - Université Catholique de Louvain - 8/14/2017

37 In this regard, Lehmann notes, somewhat cheekily perhaps, that the express wish of Chancellor Merkel to see the German education system brought in line with the Bologna process, vested interest at State (Länder) level makes it an unlikely development. See Lehmann, op cit., 162.
38 For the website of the network of these legal clinics see: www.cliniques-juridiques.org, accessed 6 October 2016.
39 To our knowledge, the Human Rights Clinic in Gent was the first in the country. For an overview of the activities of this clinic see: www.hrc.ugent.be/human-rights-law-clinic, accessed 1 October 2016. ULB offers an Equality Law Clinic, available at: www.iee-ulb.eu/fr/equality-law-clinic. The law school in Leuven has a 'clinic' programme but the word is used to refer to seminars with practitioners rather than hands-on work done by the students themselves.
40 Recommendation of the European Parliament and of the Council of 23 April 2008 on the establishment of the European Qualifications Framework for lifelong learning (OJ C 111, 6.5.2008, 1–7). For more details, see A.-L. Sibony, 'La transnationalistation de l'enseignement juridique: et si c'était (aussi) une question de pédagogie?' in P. Ancel and L. Heuschling, op cit.
41 A very helpful description and slight modification of Bloom's taxonomy can be found in R. Modaniel, *Bloom's revised taxonomy - a framework for assessing student learning* available at: https://cft.vanderbilt.edu/guides-sub-pages/blooms-taxonomy/, accessed 10 January 2017; and see fn 9.
42 See: G. Bell, The US legal tradition among the legal traditions of the world, in J. Ginsburg (ed.), *Legal methods: cases and materials*, St. Paul, Foundation Press, 2004, 66.
43 See: P.M. Genty, *Overcoming cultural blindness in international clinical collaboration: the divide between civil and common law cultures and its implication for clinical education*, Clinical Law Review, 15, 2008, 131.
44 Op cit, 137 and 139.
45 As dramatically portrayed by a professor and his students in John Jay Osborn Jr., *The paper chase*, Houghton Mifflin, Boston, 1971.
46 See: R. Grimes and C. Smith, *Reviewing legal education – what do we want from our lawyers and how do we get it?* (with C. Smith), Delhi Law Review, XXVII – XXIX, 2007, 1.
47 See: J.H. Merryman, *The Civil Law tradition: an introduction to the legal systems of Europe and Latin America*, Redwood City, Stanford University Press, 2007 generally and in relation to the examination of witnesses (something normally done by civil law judges in private and in a non-adversarial way) at 55.

Review Copy Only - Not for Redistribution
Anne-Lise Sibony - Université Catholique de Louvain - 8/14/2017