



CONTRADITÓRIO
think tank

Miguel Poiares Maduro | Legal Education and
the Europeanization and Globalisation of Law

Policy Paper 10/01 | February 2010



Legal Education and the Europeanization and Globalisation of Law*

Miguel Poiares Maduro

Policy Paper 10/01
February 2010

Contraditório
www.contraditorio.pt

e-mail: info@contraditorio.pt

The analyses, opinions and findings expressed here are those of the author(s) and not necessarily those of Contraditório.

Contraditório is a non-profit, independent and non-partisan think tank whose mission is to set out a better way to deliver best practices and innovative solutions. We combine the scientific approach of our policy papers with the virtues of freedom and knowledge and the engagement in civic intervention.

Contraditório's Policy Papers are circulated to encourage discussion and to establish a distinctive mind mapping in the scrutiny of ideas and policies.

Citation: Miguel Poiares Maduro, Legal Education and the Europeanization and Globalisation of Law, Policy Paper 10/01, February 2010, Contraditório, www.contraditorio.pt

Copyright: This is an open-access article distributed under the terms of the Creative Commons Attribution License (<http://creativecommons.org/licenses/by-nc-nd/2.5/pt/deed.en>)

* This paper has been published as an Editorial Note in the Croatian Yearbook of European Law & Policy.



ABSTRACT

Law is changing. Legal rules increasingly originate from European and global sources of law. Lawyers increasingly need to operate in the context of a plurality of jurisdictions and legal sources. The market for legal services is also increasingly integrated. Is European legal education addressing these changes and ready to cope with the challenges they bring to the teaching and learning of law? And how does the Bologna Declaration aim of creating a European education space impacts on that same legal education? These are perhaps the most relevant questions facing European legal education at the moment and yet they are surprisingly understudied. As a consequence, legal education is a "no man's land"; a subject that is practiced but not often reflected upon.

This paper identifies important trends for the future of legal education in Europe. These constitute a major challenge for European law schools and legal education. The law to be taught is different. The profile of the lawyer demanded by the market is also different. And European law schools will increasingly be competing in a European market. This requires a complete restructuring of legal education and even law schools. Furthermore, a truly European and international legal education can only take place in a truly European and international context. This requires a diverse and multinational community of learning with a diverse and international faculty and student body.

Keywords: Legal education; law schools; EU law; Bologna Declaration; European law; international law

Author: Miguel Poiars Maduro¹

e-mail: mpm@contraditorio.pt

¹ Professor at the European University Institute, Visiting Professor at Yale Law School and continues to teach at the Law School of the Universidade Nova de Lisboa. Until October 2009 he was Advocate General at the European Court of Justice. The views expressed are so at a purely personal title. I would like to thank Tina Cucic and Ana Abreu Ferreira for help in the research of the data used in this text.



Law is changing. Legal rules increasingly originate from European and global sources of law. Lawyers increasingly need to operate in the context of a plurality of jurisdictions and legal sources. The market for legal services is also increasingly integrated. Is European legal education addressing these changes and ready to cope with the challenges they bring to the teaching and learning of law? And how does the Bologna Declaration aim of creating a European education space impacts on that same legal education?

These are perhaps the most relevant questions facing European legal education at the moment and yet they are surprisingly understudied. One reason may be found on how lawyers have always dealt with legal education: on one hand, we don't "authorise" any other social scientists to research the study of law (the presumption being that legal education cannot be understood or questioned by non-lawyers); on the other hand, we tend to focus exclusively on how the law operates and consider issues of education as unworthy the attention of lawyers. In other words, while we consider legal education as a subject outside the province of the law we do not recognise anyone else the right to address it. As a consequence, legal education is a "no man's land"; a subject that is practiced but not often reflected upon. Apart from the usual curricular disputes, centred on either the relative importance of our different legal subjects or on their disciplinary borders, there is not much attention being paid to how we teach the law and how law degrees ought to adapt themselves to the changing context of the law.

In the United States there is a more developed tradition in this regard due, in particular, to the impact and reverence which is given to the "Langdell revolution". Langdell was the first non-judge made Professor and Dean at Harvard Law School in the late XIX century. He considered that a good law professor had first and foremost to be a good professor and his case-study method as forever shaped American legal education. For the present purposes, however, what is important is that the "Langdell revolution" has acquired such a central role in the narrative of the emergence of American law schools and their distinctiveness that it created a culture favourable to a constant questioning of the nature of legal



education and of different legal methodologies: how one teaches is as important as what one teaches. Still, even in the United States, and in spite of some recent studies at top law schools on the impact of globalisation on legal education, the literature on the subject is not particularly rich. An additional reason, common to the US and Europe, is that the phenomena itself of legal globalisation (and Europeanization) is difficult to study. While researching for this text I found it very difficult to come across specific statistics mapping the new character of the law, litigation and legal services. Still, the data and studies found highlight three important trends for the future of legal education in Europe.

First, the Europeanization of legal education will be a natural consequence of the Europeanization of the law. Such Europeanization is measurable by the extent to which the European Union has become a primary source of law for its Member States. Though this is certainly difficult to measure and there are no official statistics, the most conservative estimations indicate that the European Union is responsible for 50% of all new legislation applicable in the European States. This Europeanization of the law is already visible at the level of litigation. Every year, there are around 250 references from different national courts to the European Court of Justice on questions of validity and interpretation of EU law and on the compatibility of national law with EU rules. This number is, however, only a drop in an ocean of EU law related litigation. First, there is an even higher number of cases where EU law is pleaded directly before the two European Jurisdictions (the Court of First Instance and the European Court of Justice). Second, and most importantly, the (unfortunately) few existing studies measuring EU law litigation before national courts tend to establish that the cases referred to the European Court of Justice do not amount to more than 5% of the cases in which EU law related arguments are raised before those national courts. Furthermore, EU law related litigation will continue to grow, as a consequence of the expansion in the scope of application of EU law but, mostly importantly, of the increased familiarity with it of all relevant legal actors (lawyers, judges, etc.). The learning process of EU law is far from being concluded and the expectation is that it will tend to permeate almost all areas of litigation. An overview of the subject matters



already addressed in recent cases brought before the European Court of Justice underscores this point. Along side the core areas of EU law (internal market, competition and international trade), one finds subjects such as family law, contracts, sports law, tax law, consumer law, company law, environmental law, intellectual property, labour and social law, and even criminal law. Moreover, there is almost no area of national law that can't be challenged in the light of a possible conflict with EU constitutional law (in particular free movement rules and, increasingly, fundamental rights). Controversial societal issues involving freedom of expression, abortion rights, economic freedom, prevention of terrorism, among many others, have already found their way into the case load of the European Court of Justice. In a nutshell: national and EU law are becoming so intertwined that, in near the future, all litigation will increasingly raise both national and EU law arguments.

These developments must be reflected in the teaching of the law. It will not be sufficient, however, to increase the importance attached to EU law in the curricula of European law schools. A first step will be to "Europeanise" the teaching of the other legal subjects. It's no longer possible to teach contracts or consumer law, for example, without teaching EU law. However, simply to account for EU law sources won't be sufficient. In fact, EU law does not simply brings with it new rules. Such rules can only be properly interpreted and applied in the light of the particular nature of its system of law, its general principles of law and its own methods of interpretation. All legal subjects must not simply be taught in the light of a new body of rules, they must be taught in a different way, taking into account the integration of the national and EU legal orders.

To do this we must add the challenge arising from the increased multi-national character of the cases in which lawyers are called in to assist. In part, this is a consequence of the mutual recognition of national judicial decisions and other legal acts imposed by certain EU rules. This creates a context where judges and lawyers must learn to operate in a complex web of rules arising from their own legal order but also from other national legal orders and the EU legal order. In other part, this is a natural consequence of increased economic integration and its



legal implications such as the fact that companies are being set up and operate in different States and contracts and other legal instruments must be drafted in the light of their connection to different legal orders. As a consequence, a growing number of legal actors (in courts as outside courts and even in the legislative process) needs to operate in multiple jurisdictions and be comfortable "travelling" between different legal orders, so as to avoid the perils of some form of legal jet-lag. Though this challenge is particularly visible and important at the level of European integration, it also takes place at a global level. Increased global economic and social integration will promote some of the same phenomena at the global level even if in a more mitigated form and without amounting to the formidable impact of a new legal order such as in the European Union.

The second trend of relevance to the future of legal education relates to contemporary changes in the market for legal services. The practice of law is increasingly international and law firms reflect that. Law firms have reacted to the Europeanization and globalization of law by becoming European and global themselves. Many law firms (particularly the most important ones) have expanded into other States, merged with law firms from those other States, acquire them or established cross-national partnerships. An increased percentage of top law firms have lawyers from multiple nationalities and their revenue is increasingly of foreign origin. This is favoured but not dependent on the liberalisation of cross-border legal services that has taken place in Europe and is currently being promoted by the WTO at the global level. A recent survey conducted by the magazine *The European Lawyer* on the European legal landscape give us an interesting, albeit tentative, perception of the recent developments in the European legal market. There is a moderated but growing number of multi-national law firms operating in a variety of European states. British, American, Spanish and, more recently, French law firms appear to be those most active in setting up branches or acquiring law firms in other states. There appear to be some "regional strategies" in this respect. Examples abound in the analysis undertaken by *The European Lawyer*: Spanish law firms see Portugal as part of an Iberian Market, Austrian law firms invest heavily in Eastern Europe, Swedish and Finish law



firms establish themselves in Baltic countries. But the tendency is for the scale to become increasingly European following the patterns of economic and social integration. There is an even broader and already well established tendency to create partnerships between law firms of different states at the European level. Networks continue to be the most disseminated form of internationalization but so called 'organic internationalization'² is increasingly gaining terrain even leading to the emergence of truly global law firms. Another emerging tendency is for European law firms to foresee market opportunities in emerging markets (such as Russia, China or India). Furthermore, all law firms, even mid-size ones, stress the increasingly international character of their work.

Studies on the sociology and history of the legal profession have highlighted that the precise role of the legal profession is historically contingent and that that role also impacts on the style of lawyering.³ It's inevitable that the changes in the structure and character of the market for legal services will affect the recruitment policies for lawyers and the legal training expected of them. This is already visible. Another survey of *The European Lawyer* notes that there is increased competition in the recruitment process for top lawyers with firms recruiting at an increasingly early stage and hiring external consultants to help them in the recruitment process. They also look for lawyers with an international training, preferring people with a diverse and multi-national training. Hendrik Haag, from a top German law firm, has remarked that German firms travel to US Ivy League universities to interview and recruit students attending the American LL.Ms.⁴ It appears that it has become a common practice for business Law firms to require a foreign law degree as part of the entry requirements for young lawyers.⁵ But this

² According to Glenn Morgan and Sigrid Quack this refers to 'firms that have gradually developed their own overseas offices through a mix of methods'. See 'Institutional Legacies and Firm Dynamics: The Growth and Internationalization of UK and German Law Firms', *Organization Studies* 26(12): 1765-1785, at 1775. See also: W. Calkoen, 'The European Perspective' in *The Internationalization of Legal Practice*, Jens Drolshammer and Michael Pfeifer (eds.), Kluwer Law International, The Hague, 2001, 137-149, at p. 144

³ See Lawrence Friedman, *Lawyers in Cross-Cultural Perspective*, in *Lawyers in Society – Comparative Theories*, pp. 1-26, at p. 8.

⁴ Quoted in *The European Lawyer*, Issue 79, June 08.

⁵ Glenn Morgan and Sigrid Quack, 'Institutional Legacies and Firm Dynamics: The Growth and Internationalization of UK and German Law Firms', *op. cit.*, at 1772.



is not exclusive of law firms: international masters are now a usual requirement to access legal jobs at international organisations and, increasingly, for in-house positions at large companies. It's also increasingly common for law firms to offer, encourage and even require their lawyers to spend some time in practicing or training in another State.

All this is linked to a third noticeable trend: the emergence of a European and global market for legal education. The top American Law Schools have already been developing for some time strategies to meet the demand for global legal education.⁶ They have specifically tailored their LLM programmes to fit such search for global legal education (most famously NYU and its Global Law School). That reflects itself in its faculty and course offerings but, most notably, in the composition of their student body which is, at the LLM level, overwhelming (if not exclusively) composed of foreign students. The number of international students at US law schools increased five-fold between 1980 and 2000 and the number of LLMs being offered increased from a few dozen in the early 1990s to 102 in 2003/2004.⁷ Some American Law Schools have also, de facto, created franchises of their law degrees at foreign universities and, in some cases, are even considering opening foreign branches.

There are already European law schools strongly embracing the path of internationalization. A notable example is Bucerius Law School in Hamburg which has developed a fully fledged international profile. The law school of the Universidade Católica Portuguesa in Lisbon is also taking steps in that direction. Overall, however, the internationalization of European law schools has been rather limited, often focusing on student exchanges in the context of the Erasmus program. Their teaching of law continues to be largely insulated and their faculty, student body, courses offerings and teaching methods reflect this circumstance. Still, things are starting to change in European law schools. One first step has

⁶ See David S. Clark, 'Transnational Legal Practice: The Need for Global Law Schools', 46 AM. J. COMP.L., 261, 273(1998).

⁷ David Nelken, The Globalization of International Law, available at http://topuniversities.com/gradschool/grad_school_news/article/the_globalization_of_international_law



been the development of joint degrees and, in recent years, we have seen the emergence of a real European market for LL.Ms. More than 100 European law schools now offer some form of LL.Ms open to foreign students. However, only a few of these are fully international in character. The international character is mainly visible in the adoption of English as the language of instruction and in the increased offer of EU law subjects. With the exception of Germany and France, English is the dominant language. In fact, even in Germany and France things are changing in that respect. One of the most prestigious French law schools (Paris II) is now offering an LL.M taught in English. Law schools offering these programmes are attracting an increasing number of foreign students (around 50% of their LL.M student body). The large majority comes from other European States but other relevant markets are Asia, the US and Latin-America. Within Europe, students from former Eastern European countries are among the most mobile. European LL.M programmes are thus an undisputed trend and, to a large extent, they simply answer to a market demand. In the Netherlands, one of the few European States with an increased offering of law degrees aimed at international students (particularly European) the number of foreign students undertaken a master degree in law was already of 817 in the academic year of 2002/2003.⁸ The other example would be the United Kingdom which attracts a substantial number of foreign students to its legal programmes but, unfortunately, the available data does not allow us to distinguish the number of law students from other social sciences. On total there were 100.357 foreign students attending law, social sciences and business degrees in the U.K. in 2002/2003.⁹

However, as the European Law Faculties Association as noted in a declaration entitled 'For a European Space of Legal Education': 'if European legal education wants to compete with the highly successful US-American system of education for lawyers, a number of additional and more courageous steps have to be taken'. One of these steps will entail a clear division between the objectives to be achieved by legal education at the bachelor and the master levels. The proposal of

⁸ Source: CBS, mentioned in the EURODATA Project.

⁹ Source: EUROSTAT, mentioned in the EURODATA Project.



ELFA, at this stage, is to focus bachelor training on national law while the master should offer a European and International legal education. I couldn't agree more but I would add that the pressures arising from the mobility of students and lawyers, the developments in the mutual-recognition of law degrees in Europe and the informal harmonization of legal studies inherent in the Bologna declaration will promote, by themselves, such steps. In reality, the two degree model (bachelor and master) of legal education inherent in the Bologna process fits perfectly the current market demand for a two-fold legal education: national and European (and/or international). The expectation, in the short/medium term, is for students to continue to do their bachelor studies in their home State. But at the master level an increased competition will emerge among European law schools. Students, particularly the best ones, will look around Europe for the best European and international legal education. It may be possible, at least in the short term, for law schools to continue to go on as usual at the level of the bachelor degrees but, at the master level, a European market will emerge and formal or informal rankings will emerge regarding the different master programmes and law schools. That European market for legal education at the master level will increasingly look like the American legal education market.

The three trends highlighted constitute a major challenge for European law schools and legal education. The law to be taught is different. The profile of the lawyer demanded by the market is also different. And European law schools will increasingly be competing in a European market. To answer to these trends requires more than simply open up the traditional national degrees to foreign students. It requires a complete restructuring of legal education and even law schools. A European and international law degree can only be properly developed where there is a law school with a European and international culture. It will not be enough to Europeanize the legal curricula. Teaching more European and international law subjects will not suffice; it is the teaching of law itself that must change. Learning to work with the law in a context of multiple legal sources and jurisdictions requires new legal tools and not simply more legal information. This presents an opportunity to rethink the legal methodologies and pedagogical



approaches currently employed in European legal education. Furthermore, a truly European and international legal education can only take place in a truly European and international context. This requires a diverse and multinational community of learning with a diverse and international faculty and student body. Only the European law schools that take seriously these challenges will have access to the future "Champions League" of legal education.