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# Editorial

In its efforts to revive the European Journal of Legal Education (EJLE) and to transform it into as useful a tool as possible for all the members of ELFA, the Board of ELFA has decided to publish it online. This decision was prompted by serious problems affecting the printed edition of EJLE, but also by the fact that the modalities of having a printed edition automatically delayed the publication of papers. At a time characterized by various time-sensitive reforms that pertain to the field of legal education, the delay between the submission and the publication of the papers was probably an important limitation of the EJLE. The Board hopes that by putting it online, the EJLE will thus also be better placed to allow for a swift reaction to important events in the field of legal education, and to facilitate the communication between the members of ELFA wanting to share their expertise in this field.

The online edition of EJLE will have two parts. For those interested in the more researched and scholarly discussion, there will be a peer-reviewed part where all the articles will be reviewed and published only if the peer-review will be positive.

For those wanting to share their thoughts with others without a previous peer-review, however, another part of EJLE will be made available. Here, the papers will be published as originally submitted, undergoing but a formal examination by the editors.

The reason for this double nature of EJLE is obvious. It wishes to simultaneously serve two purposes: to allow for a more scholarly and research-oriented examination of processes going on in the field of legal education on the one hand and to provide for a more practically-oriented exchange of information on the other.

The present issue of EJLE contains the papers presented at the AGM in Hamburg. They are being published as originally submitted by their authors and presented at the conference in Hamburg. The papers presented at the conference in Fribourg will follow once they have been submitted.

We hope that the new practice and opportunity will encourage all those wanting to share their problems, expertise or experience of potential interest with the other members of ELFA or those interested in legal education and processes going on in their law schools to submit them to the EJLE. We kindly ask all the potential authors submitting their articles to clearly indicate if they want their texts to be peer-reviewed or not.

We would also like to encourage all the members of ELFA to publish in the EJLE other texts of interest for other members of ELFA, such as the announcements of important events, invitations to co-operate etc.

Let me conclude by reiterating our hope that the new EJLE will prove to be a useful tool to all the members of ELFA. Let me also thank all the authors as well as Ms. Helena Ferro de Gouveia for having brought the texts to fruition in the present shape.

Janez Kranjc

President of the Board of ELFA (2009)

# Teaching Law in Spain under the Bologna Process. Challenges of innovation rooted in a particular educational tradition.

*By María Concepción Molina*

## **Abstract**

The European Credit Transfer System (ECTS) offers the instruments required to understand and easily compare the different education systems; therefore, it constitutes one of the basic reference points for the achievement of the harmonisation of graduate and postgraduate university qualifications.

The Spanish State formally established the ECTS system by Royal Decree 1125/2003 of September 5, and this Decree announced that the European credit had become the unit of measure of academic acknowledgement of official university education in our country. In 2005 the official postgraduate education was modified using the ECTS credits as a measure of academic acknowledgement, but it was necessary to wait until October 2007 for the recent legislation on the planning of graduate education using this system.

The adoption of the ECTS system involves a conceptual reformulation of the higher education system, which goes from being focused on teaching hours to revolving around the work of the student. At our University (Universidad Pontificia Comillas), a university directed for over a century by the Society of Jesus, we have always known how to combine the educational experience gleaned from our tradition (based on the *Ratio Studiorum*) with the continual updating required by social change. Therefore, even before the new legislation on the planning of education was approved, at the Faculty of Law we have endeavoured to approximate our teaching system to the methodological change required by the ECTS system.

## **1.- The Spanish legal framework and the “Bologna process”.**

### **1.1. The demands of the European Higher Education Area (EHEA)**

Everyone knows how the “Bologna Process”, an initiative which seeks to create a European Higher Education Area by 2010, is faced by the difficult and complex challenge to achieve that the students can be capable of choosing education in a wide range of high quality studies in several countries and that they can use simple procedures for the recognition of these studies. This process responds to the need felt throughout Europe to modernise the university institutions, *aggiornamento or updating*, which is undoubtedly necessary if we wish to approximate to the functioning of educational systems, such as those of the North America and Asia, which, as show by

the data, have better results than the French, German or British systems, in principle, the European leaders.

The three priorities of the Bologna process are: a) the introduction of the system of three cycles (graduate/master/doctorate); b) the guarantee of quality; and c) the recognition of qualifications and periods of study.

The first consequence of the Declaration of Bologna was the political decision of the Ministers of Education to carry out the convergence of the educational systems, which led to these systems entering a process of transformation. In order to contribute to this process, among other initiatives, the so-called *Tuning Project*<sup>1</sup> was approved with the intention to design a methodology for the understanding of the curriculum of the students in such a way that this was comparable.

In order to reach this goal, among other objectives the *Tuning* project put forward the objective to encourage transparency in the academic and professional profiles of the degrees and syllabuses, while leaving room for diversity, liberty and autonomy. In the opinion of the Tuning team, the objective sought involved accepting the ECTS as a single European system of accreditation and perfect this as a system for the transfer and accumulation of credits and developing professional profiles, results of learning and the desirable for competences, in terms of generic and specific competences<sup>2</sup>, as instruments for understanding, apprehending and easily comparing the different educational systems, thus facilitating the process of harmonisation of university teaching at the graduate and postgraduate levels which will permit the approximation of the different systems.

In my opinion, it can be said that the *Tuning* Project has achieved at least part of its objectives as today the European Credit Transfer System (ECTS) is a reality that the European university systems begin to accept, as happened at least in the Spanish system as we will see later, that the degrees be defined in terms of results of learning and generic competences (instrumental, interpersonal and systematic) and competences which are specific to each thematic area.

## **1.2. The controversial response of the Spanish legislator to the new system**

### **A) THE REGULATION OF THE EUROPEAN CREDIT SYSTEM ECTS**

The Spanish State formally established the ECTS system through "Royal Decree 1125/2003 of September 5, whereby the European Credit System was established<sup>3</sup>", with the announcement that the European credit had become the unit of measure of academic assets in official university education.

According to article 3 of this Royal Decree "the European credit is the unit of measure of academic assets and represents the amount of work of the student in order to comply with the objectives of the syllabus and is obtained by passing each of the subjects which make up the syllabus of the studies leading to the obtaining of official university degrees valid throughout Spain. Theoretical and practical studies are integrated into this unit of measure, as well as other guided academic activities, with the inclusion of the amount of study and work which the student must carry out in order to achieve the educational objectives proper to each of the subjects of the syllabus".

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<sup>1</sup> J González and R. Vagenaar, *Tuning Educational Structures in Europe. Informe Final. Fase I.* (Universidad de Deusto, Universidad de Groningen, 2003).

<sup>2</sup> The specific competences would be those concerning each area of studies including skills, knowledge and content by thematic areas.

<sup>3</sup> BOE n° 224 of September 18<sup>th</sup> 2003.

Article 4.5 of Royal Decree 1125/2003 also sets out that “the minimum number of hours per credit will be 25, and the maximum will be 30”. In article 4.3 the Spanish legislator considers that between 25 and 30 of these hours must be integrated into theoretical and practical teaching, as well other guided academic activities, with the inclusion of hours of study and work which the student must complete in order to achieve the educational objectives proper to each one of the subjects of the corresponding syllabus. It should also be pointed out that article 4.1 of this same law includes a specific provision concerning the maximum credit load per academic year: 60 ECTS credits.

#### B) THE REGULATION OF POSTGRADUATE PREVIOUS TO GRADUATE LEVEL OR “HOW TO BUILD A HOUSE FROM THE ROOF DOWN”.

Once the ECTS credit system was established, which was to be the basis for the reform of graduate and postgraduate studies, it was necessary to wait until 2005 for the Spanish State to begin a timid reform of the university system. Royal Decree 55/2005, of January 21, established that university education leading to the obtaining of official titles valid throughout Spain would be structured in three cycles, termed graduate, master and doctorate<sup>4</sup>. This law announced that the ECTS credit system, contained in Royal Decree 1125/2003, was going to be used in the design of Spanish university degrees. On January 21, Royal Decree 56/2005 was promulgated, whereby the official postgraduate was modified using the ECTS credits as a measure of academic assets<sup>5</sup>.

This legislation also included a minimum regulation in article 8 of the Royal Decree which established that the official master degrees would involve a minimum of 60 credits and a maximum of 120<sup>6</sup> of an advanced education of a specialised or multidisciplinary nature aimed at academic or professional specialisation or at promoting research. As regards the doctorate, it required the student to have achieved a minimum of 60 postgraduate credits or to have a master degree (article 10.3 of the Royal Decree) in order to access the phase for writing the thesis.

Criticism was almost immediate; it did not seem to make sense that postgraduate education should be modified before addressing the appropriate reforms at graduate level. Despite this criticism, the modification came into force and the Spanish universities set about creating official master degrees, which began to compete with the unofficial private titles which were the only ones which had existed on the market until then. Royal Decree 56/2005 entrusted the responsibility for the organisation of the master and doctoral programmes to the autonomy of the universities, and these were not subject to general directives from the State, although procedures were established in order to guarantee quality.

#### C) THE NEW REQUIREMENTS TO ACCESS THE LEGAL PROFESSIONS

With regard to the professional practice of the law through Law 34/2006, of October 30, “on access to the professions of Lawyer and Court Attorney”<sup>7</sup>, the system of access to these professions was radically transformed. It can be said that a spectacular turnabout has taken place in this area as previously it had been sufficient to be a graduate in law, with no additional prerequisites, in order to join the Spanish Bar and practise these professions. However, articles 1.2 and 1.3 of Law 34/2006, which will not come into force on October 31, 2011, imposed the obligation to obtain

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<sup>4</sup> BOE nº 21 of January 25<sup>th</sup> 2005 which has been revoked.

<sup>5</sup> BOE nº 21 of January 25<sup>th</sup> 2005, which has been revoked.

<sup>6</sup> One or two academic years as stipulated in article 4.1 of Royal Decree 1125/2003.

<sup>7</sup> BOE nº 260 of October 31<sup>th</sup> 2006.

the professional title of lawyer or court attorney in order to supply assistance as a lawyer and legal representation in those courts or out of court proceedings where legal regulations require this. In order to obtain these titles, it is necessary not only to have a degree in Law (article 2.1) but also to have acquired a specialised training (article 2.2). The training referred to in this law is regulated education of an official nature, which the law does not refer to as a master degree, but which must consist of training courses organised by the universities (article 4.1) and accredited jointly by the Ministry of Justice and the Ministry of Education and Science (article 2.2). The training courses will consist of 60 credits and it will be necessary to carry out external practical training which will be assigned 30 credits (articles 4.3 and 6.1).<sup>8</sup> Finally to be accredited for these professions, the graduates in law who have completed this training period, will have to pass a state examination (art. 7).

#### D) THE FINAL REGULATION OF THE GRADUATE STUDIES OR “HOW TO END THE HOUSE WITH THE FOUNDATIONS”

As regards the studies of graduate, it was necessary to wait until 2007 for the new regulation of university education through Royal Decree 1393/2007, of October 29<sup>9</sup>, whereby the official university education system is established using the ECTS credit system.

The system for regulating graduate university education which derives from the conjunction of the norms laid down in Royal Decree 1393/2007, of October 29 and Royal Decree 1125/2003, contains the following guidelines<sup>10</sup>:

A) The title of graduate involves 240 credits (article 12.2 of Royal Decree 1393/2007), divided into four academic years of 60 credits each (article 4.1 Royal Decree 1125/2003).

B) The minimum number of hours per credit will be 25 and the maximum number 30, taking as reference a student engaged in university studies full time for a minimum of 36 and a maximum of 40 weeks per academic year (articles. 4.4 and 4.5 Royal Decree 1125/2003).

C) Among other criteria, the regulation of official education involves the ideas of diversity, the encouragement of intra-university and inter-university mobility and the orientation of education towards the learning of the student and the employability of the graduates, which are reflected in several requirements of the composition of the syllabus:

1) A minimum of 60 credits for basic subjects is established, and of these, at least 36 must be linked to some subjects of the particular branch of knowledge<sup>11</sup>.

2) It is possible to incorporate practical training into the syllabus, with a maximum of 60 credits.

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<sup>8</sup> The law does not clarify whether the credits of the external practical training are included or not within the 60 credits referred to in article 4.1. It does state that the duration of the training will be one academic year or one and a half academic years. This point must be clarified in the Implementation Rules stipulated in Law 34/2006, which have not yet been published.

<sup>9</sup> BOE n° 260, October the 30<sup>th</sup> 2007.

<sup>10</sup> Royal Decree 1393/2007 derogates Royal Decrees 55/2005 and 56/2005, therefore, it not only regulates graduate education but also establishes a new legislative framework for postgraduate education.

<sup>11</sup> Law is integrated into the branch of knowledge of the Social and Legal Sciences whose basic subjects are: Anthropology, Political Science, Communication, Law, Economics, Education, Business Administration, Statistics, Geography, History, Psychology and Sociology.

3) There is an obligation to incorporate an end of degree paper to the syllabus with between 6 and 30 credits.

4) A “system for the transfer and recognition of credit” is regulated in order to encourage the mobility of students.

5) It is proposed that the objective of the configuration of the education be the acquisition of competences.

D) The Royal Decree (articles 24-6) also includes a process to verify the titles before its public approval, verification which will be responsibility of the ANECA<sup>12</sup> and also a evaluation process which will be carry out every 6 years since its first approval to maintain the official accreditation.

The legislative block constituted by the aforementioned Decrees modifies considerably the existing Spanish university regulation and the adoption of the ECTS system entails a conceptual re-formulation of the higher educational system, which passes from being focused on class hours to being centred on the work of the student.

## **2.- The Law Faculty at Comillas and the “Bologna” revolution**

### **2.1. The teaching tradition of the Jesuit Universities and the challenge of Bologna**

The challenge which the Spanish university addresses has been considered by UNIJES (Association of Jesuit Universities in Spain) as an exceptional opportunity to revise the ultimate objectives of its presence in the university world in the light of its identity and mission. Thus, a framework-document was drafted, “i+m orientations for the new curriculum designs”<sup>13</sup> which essentially addressed the “reason why”, it is to say the ultimate specific objectives of the universities of the Society of Jesus. As we will see below, these objectives are very close to the “spirit of Bologna”.

As regards the “reasons why” UNIJES points out that “the objective of all education is the formation of the person”, taking into account that Jesuit teaching encompasses it is the “complete person” which involves four dimensions: “*utilitas, humanitas, iustitia et fides*”.

1) *Utilitas*: In the words of Father Kolvenbach, “Jesuit education is eminently practical and is intended to provide students with the knowledge and skills required to excel in any area they might choose”. Within the Jesuit paradigm, the fact that their students aspire to professional competence involves two important factors: on the one hand, qualifying the professional competence with *categories of excellence*, academic quality, rigor..., and on the other, alerting against the reduction of ‘*competence*’ to ‘*skill /dexterity*’ or to ‘*pure technology*’. In my opinion, the professional competence which the European Higher Education Area also aspires, includes not only “*knowledge*” (knowing) and “*skill-ability*” (knowing how) but also “*value references*” (knowing how to behave, knowing how to be) such as creativity and innovative capacity, critical thought and personal maturity, leadership and orientation to achievement, which ties in perfectly with the Jesuit *utilitas*.

2) *Humanitas*: A Jesuit university will be highly practical as it continues to insist on integral formation (in the sense of forming persons capable of a harmonious development of their professional, personal and social life) and a holistic focus on education. In short, it is not possible to educate excellent professionals who are uncultured or illiterate in humanity.

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<sup>12</sup> National Agency for Quality Evaluation and Accreditation.

<sup>13</sup> <http://www.unijes.net/web/ppal/Reflexiones%20im-UNIJES-PlenoNov.'071.pdf>

3) *Iustitia*: Throughout their education, the students must allow the disturbing reality of this world to enter into their lives in such a way that they learn how to feel this, to think critically, to respond to suffering and to commit themselves to it constructively. They will have to learn to perceive, to think, to judge, to choose and act in favour of the rights of others, especially the more disadvantaged and the oppressed.

4) *Fides*: In addition, UNIJES Universities must be able to offer their students courses and services which facilitates the growing of the faith but always respecting religious freedom as a value and assuming religious pluralism as a fact.

## 2.2. The Universidad Pontificia Comillas and the new European challenges

At our university (Universidad Pontificia Comillas), directed for over a century by the Society of Jesus (the private institution which has most universities in the world) we have always known how to combine the excellence of educational experience provided by our tradition with the continual updating which social changes require. Thus, even before the new law on the regulation of graduate education was approved, at the Law Faculty (ICADE), we have endeavoured to approximate our teaching system to the methodological change required by the ECTS system.

The methodological change was adopted after a previous analysis of the equivalences between the actual credit system and the real working charge that the student has in each course. This analysis was adopted after a survey made to professors and students about the time needed to prepare each subject, survey which was made through the intranet. The result, as expected, showed that not only that professors and students didn't agree about the time assigned to each course, but also that the differences were very deep. These results explained the decision taken by the University authorities in the year 2004/5 to demand all the University Departments to work on new courses guides in which Departments must included not only the academic program and bibliography, but also all the learning activities and the evaluation system. These guides are now an essential tool for the tutors to organize the students work and to observe, for example, if there are too many activities concentrated in some weeks. All the control of academic activities is done by our intranet system.

Now, the legislation also obliges us to revise the university titles and to redefine the academic syllabuses. The objectives proposed by UNIJES are backed up by the norms of our University<sup>14</sup>.

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<sup>14</sup> In fact, the General Regulations of the Universidad Pontificia Comillas establish the following in article 47: "*1. Education in the Universidad Pontificia Comillas proposes:*

*a) To help the students to objectively and critically acquire the particular ideas, knowledge, doctrine and systems of scientific, humanistic and technological knowledge corresponding to the studies it cultivates.*

*b) To facilitate the student with the acquisition of sufficient mastery of the theoretical and methodological resources and skill in the use of instrumental resources so that they can create, revise and permanently renew this knowledge.*

*c) To develop the intellectual capacities involved in the creation, analysis, relation, synthesis and oral and written presentation.*

*d) To prepare the student for the competent exercise of qualified professional activities.*

*e) To provide the student with integral formation, base on the principles of justice, truth, liberty, peaceful coexistence and cooperative service to society, ethical commitment of the professions and a sense of the particular Christian humanistic life.*

### 2.3. The teaching of Law in the Universidad Pontificia Comillas: *what and how.*

Within this objective framework, the Law Faculty (ICADE) undertakes the reform of its current graduate degrees: Degree in Law and Diploma in Business Studies -“E-1 Business”-; Degree in Law and Diploma in International Relations -“E-1 International”-; Degree in Law and Management and Business Administration<sup>15</sup> -“E-3”- and Degree in Political Science and Sciences of the Administration. The official postgraduate qualifications include the Inter-University Master in Business Law, a Master in International Taxation a Master in International Affairs and a Doctoral Programme on the Foundations of Law, Economic Law and Business Law.

The list of our current qualifications clearly shows that our Faculty has a dual vocation: legal-business studies (which have been taught for many years) and legal-international and political studies (which commenced only a few years ago). The new syllabuses we are drawing up are intended to continue and intensify these areas of work.

As I have explained *what* we teach at our Law Faculty, I now wish to explain *how* we teach.

In consonance with the words of Father Kolvenbach, the motto chosen by our University is “the value of excellence”. This motto is the expression of the “Ignatian *magis*” that our Institutional Declaration explains as follows: “The university endeavours to achieve quality as a distinctive feature, precisely at the historical time in which quality is so often proclaimed rhetorically while it collectively declines”. One of the reasons why our students choose our Faculty is this “quality” which has always provided prestige to our studies and to which we permanently tend<sup>16</sup>.

However, quality is only achieved with the continual effort to self-improvement, achieving what is “even more difficult” has always been a distinctive feature of Jesuit teaching. The *Ratio Studiorum*, a fundamental document of Jesuit teaching, put into practice in teaching since the middle of the XVI century, continues to be present in our teaching method and, in my opinion can be considered to be precursor of what

2. The University assumes the following criteria which inspire its education:

a) *Qualification and differentiation of the graduate and postgraduate educational offer, adapted to the needs of society and fostering the relations with the professional world and exchanges with other universities. (...)*

b) *Quality, maintaining a demandingly high level: (...)*

c) *Quality control of the teaching and the education through a permanent evaluation of the institution, its Centres and Services; the quality of the teaching staff (selection, formation, recycling) and of its students (selection, control of periods and years into university).”*

<sup>15</sup> This double degree has been taught at ICADE for forty years and it combines a sound legal training with a broad training in the areas of business. The programme consists of combining the Degree in Law and the Degree in Management and Business Administration over six years through the combined study of the subjects of each degree. During the first five years, the students depend on the Law Faculty and in the sixth year, once they have graduated in law, they finish their studies of Management and Business Administration dependent on the Faculty of Economic Science and Business Administration.

<sup>16</sup> We consider that a significant factor in this regard is that the Programme of “Excellence Scholarships” of the Autonomous Community of Madrid, which are granted to students from all of Spain who chose the Autonomous Community of Madrid to study, during the academic year 2006/07, 11% were granted to students of our University, a percentage which exceeds those granted to students from other public and private universities in Madrid (85% of these scholarships were granted to 7 public universities and the remaining 4% to 6 private universities).

Bologna is and represents today<sup>17</sup>. For example: the new ECTS system in which the learning process and the way of measuring the credits doesn't depend mainly on the assistance to the courses but also in the personal and collective work of the student guided by the professor, has been one of the main principles of the *Ratio Studiorum* system. The protagonist of the learning process is the student and his work not the teacher and his knowledge in a quite "unilateral" way of understanding the education.

Our particular pedagogy is characterised by the following three points:

1.- Teaching founded on values and based on a particular vision of the world and on the centrality of the human being on it (*Hominum causa omne ius constitutum est*), who only achieves meaning in relation to others<sup>18</sup>. In order to implement this objective, we intend that our graduate syllabuses do not focus exclusively on knowledge of positive law and on learning the techniques for its application. This approach entails the risk of converting the law into an instrument in social life and in professional practice rather than focusing on what is proper to law: the just regulation of society. Thus, we intend to draft programmes which start from a dimensional conception of law, which involve legal norms, the social reality and values. At teaching level, our objective is to place emphasis on general legal concepts regarding the institutions and the underlying interests concerning these, and the practical consequences of choosing one or other technical-legal solution in their regulation. The knowledge of positive law, which has changed so much recently, is reserved for the Master degree as this will qualify the person for professional practice.

2- Teaching with its own theory of knowledge, which, in accordance with the so-called Ignatian Pedagogical Paradigm, consists on the interaction between *experience, reflection and action* or as *seeing, judging and acting*. As stated in our Institutional Declaration "Comillas aspires to the systematic approximation to reality in all its complexity, to interdisciplinary methodology in the statement and search for solutions to the problems of man and society". That is to say, we teach from experience and to transform reality. The *Ratio studiorum* proposes a pedagogical method in which the practical application of the studies through the class exercises, students debates and practical cases solved in group were one of the main instruments<sup>19</sup>. These are nowadays very common educational tools used in our Law Faculty but we also achieve this objective through the Programme of External Practical Training where our students are encouraged to contact with the environment through immersion in the daily life of the most prestigious institutions, firms, companies and non-government organisations<sup>20</sup>. In fact, all our students are obliged to take part in this external training as part of their education.

3- Teaching which incorporates its own theory of education, and here I underline only one of its points: the insistence on the formation of a critical sense and

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<sup>17</sup> A very good Spanish translation of the original text with an historical introduction is C. Labrador, M. Bertran-Quera, A. Martínez Escanciano and J. Martínez de la Escalera *La "ratio studiorum" de los jesuitas* (Universidad Pontificia Comillas de Madrid, 1986).

<sup>18</sup> P. Morales. *La educación en los valores*. (Universidad Pontificia Comillas, Madrid 1997).

<sup>19</sup> C. Labrador. *El sistema educativo de la Compañía de Jesús. Continuidad e Innovación*. (Universidad Pontificia Comillas de Madrid, serie II, lecciones inaugurales, 13, 1987) p 20. C. Labrador "Aportaciones de la *Ratio studiorum* a la educación superior" in J.C. Torre Puente and E. Gil Coria (Eds) *Hacia una enseñanza universitaria centrada en el aprendizaje. Libro homenaje a Pedro Morales Vallejo, s.j.* (Universidad Pontificia Comillas, Madrid 2004).

<sup>20</sup> Our Faculty has signed agreements for External Practical Training with 52 collaborating entities. To cite only a few: Ashurst, Baker & McKenzie, BBVA Bank, Colegio de Notarios y Registradores, Cuatrecasas, Deloitte, Freshfields, Garrigues, KPMG Abogados S.L., Landwell, Linklaters, Lovells, Ministry of Justice, Pérez Llorca Abogados, Tribunal de Cuentas, UNICEF...

the openness to diversity. As stated in our Institutional Declaration, “the sound basis of a critical sense requires science, the interdisciplinary search for truth, the assimilation of the fundamental values and a profound knowledge of the social reality.” This theory of education flees from two temptations of the present time, dogmatism and relativism, in order to propose an education based on experience rooted in reality. One of the instruments which we use to achieve this objective are the exchange programs in which we encourage very much our students to participate in them with a flexible system of recognition of courses and credits. In the academic year 2005/6 Comillas was, in relative terms, the Spanish University with the highest participation in Erasmus program with a 4,16% of its students<sup>21</sup>.

### **3.- Final remarks**

The European Higher Education Area is a very good opportunity to revise our university educational system and to focus it mainly in the learning process rather than in the teaching methods. Finally the ECTS is a practical translation of this change of perspective and approach.

Perhaps, European Law faculties, even if law is a “national product” of the “Volkgeist”, can make this effort of approach not only on the way of measuring the credits but also on the matters studied, recognizing, as Savigny stated, that in the origin of their respective legal systems, cristianism and canon law are the common roots in all our countries which form a Juridical Community<sup>22</sup>.



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<sup>21</sup> AGENCIA NACIONAL ERASMUS. Secretaría general del Consejo de Coordinación Universitaria *Datos y cifras del programa Erasmus en España. Curso 2005/6. Avance 2006/7*, p.4.

<sup>22</sup> F.C. Savigny. *Sistema de Derecho romano actual*. 2ª Ed. Madrid, 1878.

# Teaching Negotiation at the Faculty of Law of the Sorbonne University

*By Lionel Bobot*

## **Abstract**

It has now been 50 years since negotiating skills were introduced into legal education in the USA. However, a course on negotiation is uncommon in French law faculties.

Law professors have produced about a dozen books tailored exclusively for courses in legal negotiation or for other courses that include a segment on negotiation. Taken as a whole, they have much in common with one another, but some distinguishing themes do occur.

The major goal of the negotiation course is to give our students a general idea about the impact of negotiating in society, and especially of the role lawyers play in avoiding and settling disputes through negotiations.

Most of the class time was dedicated to negotiating exercises. Every week, the class met for three hours. Half or more of that time was originally dedicated to exercises; the rest of the time we discussed the actual negotiations.

Finally, the negotiation course succeeds in offering our students the opportunity to see other than legal aspects relevant in dispute settling. On top of that, the course offers the students an opportunity to relate the world of law to the world of negotiating. They learn to see that solving disputes can be influenced by using non legal skills, although the law usually plays an important role in the background of the kind of disputes that lawyers are expected to help solve.

Key words: negotiation, simulations, negotiation teaching

## Introduction

It has now been 50 years since negotiating skills were introduced into legal education in the USA (Williams and Geis 2000). According to published sources, the first teachers were Professors Mueller and James at Yale Law School, who taught negotiation as part of a case presentation seminar, and Professor Robert Mathews at Ohio State University, who taught the first course dedicated exclusively to legal

negotiation (Mathews 1953; Mueller and James 1948; Williams and Geis 2000). These forward-looking educators were considerably ahead of their time. There is a lapse of 20 years before we find the next published descriptions of negotiation courses, one of them taught by Professors James J. White and Carl P. Malmquist at the University of Michigan (White 1967) and the other by Professors Cornelius J. Peck and Robert I. Fletcher at the University of Washington (Peck 1972). At this point, negotiation began to enter the U.S mainstream. Reports of negotiation courses appeared at an increasing rate and published teaching materials proliferated. Today, teachers can choose from nearly a dozen textbooks on legal negotiation; from several books on lawyering skills and alternative dispute resolution that include useful chapters on negotiation; and from a number of excellent books written for broader audiences. Many of these resources are discussed later in this chapter and are also listed in the references.

However, a course on negotiation is uncommon in French law faculties. In professional practice, settling disputes through negotiation instead of through litigation is becoming more common place. Increasingly, lawyers strive for negotiated settlements. Consequently, five years ago the faculty decided to start offering a course on negotiation.

Originally, the course could be taken during the last year of the Master curriculum at the Faculty of Law of the Sorbonne University . Our students may take the negotiation course as a part of the moot court course. The negotiation portion contributes about a two ECTS (on 60 credits / year). In part, the popularity of the course is probably due to the fun of the experience. We should add that the other part of its popularity is probably due to the fact that students consider it an easy way to meet part of their obligations.

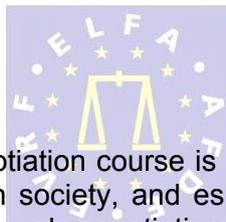
#### Objectives of the Course

The major goal of the negotiation course is to give our students a general idea about the impact of negotiating in society, and especially of the role lawyers play in avoiding and settling disputes through negotiations. Recognizing the huge impact of negotiating in society is rather new for law students, who during their training are encouraged to look at society through exclusively legal glasses. Every dispute and every question is taken as a legal dispute, to be solved by legal means. This (mis)representation of reality is the predictable result of the emphasis given in the curriculum to the law.

Therefore, the course on negotiating primarily is meant to give our students a new, non legal perspective: it is worth-while to examine whether disputes, although abundant with undoubtedly legal elements, can be solved through non legal means. Most students are not aware of the psychological, economic, and social elements that play an important role in the settlement of, for instance, injury damages, divorce cases, or applications for a license.

Another major course goal is to give students insight into the process, tactics, and phases of negotiating. Students must acquire knowledge about the theoretical aspects as well as develop some competence and effectiveness in basic negotiating skills. In particular, they must become more sensitive to and aware of their own personal style of communicating with clients and other parties to the negotiating process.

In gaining this insight, other subgoals are met: the students acquire knowledge of the theoretical aspects of the art of negotiating and develop personal negotiating skills, or at least get experience-based knowledge about the kinds of skills that may suit each person.



### Methods of Negotiation Teaching & Design

Mathews (1953) gave the first description of a course devoted exclusively to legal negotiation. In a class of 12, students are assigned in groups of two and are further assigned to take the role either of lawyers or of clients. After extensive preparations, two teams attempt to reach a negotiated solution while the instructor and the rest of the class observe. The class period that follows is dedicated to critiquing the two negotiators' performances, sharing lessons learned from the exercise, and discussing ways to improve (Mathews 1953:93-101). Elements of this approach are skill used, in whole or in part, in most negotiation courses today (Williams and Geis 2000).

The next advance in simulation methodology in law schools was to apply the concept of a duplicate tournament to negotiations (Peck and Fletcher 1968). In this model, rather than have some students negotiate while others observe, all students in the class are assigned to negotiate the same problem simultaneously (White 1967). Galanter (1984) sees limitations in the use of simulation games, such as the lack of ongoing relationships between the negotiators, inadequate time for things to develop, artificial deadlines which prevent using time as a sanction or reward, and the inability to use normal lawyering moves such as filing of actions, discovery, and so on.

Today, methods of negotiation teaching are multiple: simulations, discussions, concourses, videos or internet negotiations (Bobot 2007; Gardner 1993; Mc Kersie and Fonstad 1997; Lempereur 2002; Weiss 2005; Manwaring 2006; Wheeler 2006), but simulations prevail as teaching methods.

Concerning our course at the Faculty of Law of the Sorbonne University, most of the class time was dedicated to negotiating exercises. Every week, the class met for three hours. Half or more of that time was originally dedicated to exercises; the rest of the time we discussed the actual negotiations. Presently, we take more time for theoretical viewpoints, which means that the time for negotiating exercises has decreased.

During the early years, almost all of the course consisted of a series of simulated negotiation assignments, in which students were the negotiators. The design of those assignments has not been changed: starting off with very small and rather simple disputes (in the beginning hardly with a legal context), the exercises become more and more complex, and the students increasingly need to use their legal knowledge and legal skills to handle them. We move from such subjects as a case of traffic damages, to divorce, a dispute on positive discrimination, and finally even to unfriendly takeovers of companies by stockholders and to negotiations about European negotiations (directives,..).

Student preparation for the negotiations in our course does not differ from other negotiation courses we know of. In advance, each team receives a written instruction containing a general description of the case and an agenda for specific items (contract negotiation,..). In addition, each team receives confidential materials not disclosed to the other party. Within each team, the students read the (legal) materials pertinent to the subject matter of the case and prepare the negotiations by setting goals to be reached and outlining a strategy. They also decide which member of the team will be the negotiator and which the observer. Afterward, they evaluate their performance, first within their own team and next with the members of the adversary team.

In this evaluation, the feedback about the players' negotiating style from the observers of course plays an important role. This is followed by a general discussion

with all the participants in the course and the teachers about the results obtained and the process followed.

All teams simultaneously negotiate the same problem in different parts of the room.

During the five weeks, the exercises become more and more complex and difficult. First, the number of parties involved in the negotiation process increases. The course starts with two-party exercises and ends with a five-hour simulation game in which twelve parties are involved. Second, the legal subject matter involved becomes more complicated with each session. Starting with quite simple exercises not requiring specialized legal knowledge, the course ends with a rather complicated case concerning the introduction of a reform bill. For this, the students have to study statute and case law in order to handle the content adequately.

Finally, with each session, more and different aspects of the negotiation process are discussed and taught. Students are forced to feel the atmosphere, to gauge the balance of power between the parties, and to apply the empirical rules and procedures pertinent to each negotiation. During one of the exercises, for example, students experience the real difficulties of the role of the advocate, positioned between his client on the one hand and legal constraints on the other. Sometimes they get a sense of the importance of atmosphere and feel the shadow of the future. The exercises are designed to emphasize these various aspects, which we discuss following the exercises:

| Session n° | Content  |
|------------|--|
| Session 1  | Session 1: Preparation of Negotiation<br>Preparation Methodology, BATNA, Positions and Interests, Communication, Options         |
| Session 2  | Session 2: Process of Negotiation<br>Integrative & Distributive bargaining, Strategies, Argumentation, Listening, Creating value |
| Session 3  | Session 3: Difficult Negotiations<br>Management of stress situations, Tensions with the client                                   |
| Session 4  | Session 4: Multilateral Negotiations<br>Preparation within a negotiation team, Coalitions, Lobbying                              |
| Session 5  | Session 5: Alternative Disputes Resolution<br>Alternative Disputes Resolution processes (mediation, arbitration, ..)             |

Figure 1: Negotiation Course Program

### Developing a Body of Negotiation Theory and Practice

Pruitt and Carnevale (1993) define a negotiation as a discussion between two or more parties with the purpose of resolving a divergence of interest and escaping social conflict.

From the perspective of today, we might wonder why these early teachers didn't draw from the bodies of theoretical and experimental work on negotiation we are familiar with today and which was summarized many years ago in such works as Walton and McKersie (1965), Rubin and Brown (1975), Young (1975), and Zartman (1976). The answer, of course, is that negotiation was an equally new topic in other disciplines as well.

The discovery of negotiation as a discrete object of study in these disciplines actually occurred during these same years, the late 1940s and early 1950s. The early teachers of legal negotiation faced the daunting task of developing a substantive basis for the study of negotiation as they went along.

Law professors have produced about a dozen books tailored exclusively for courses in legal negotiation or for other courses that include a segment on negotiation. Taken as a whole, they have much in common with one another, but some distinguishing themes do occur. For example, Edwards and White (1977) were the first to deal systematically with issues of culture, race, and gender in legal negotiation. In his book, Williams (1983) reports extensive empirical research about the negotiating patterns of lawyers. Bastress and Harbaugh (1990) go the furthest to integrate negotiation with client interviewing and counseling. Bunker, Rubin and associates (1995) in *Conflict, Cooperation, and Justice* discuss three forms of social justice, based on either equity, equality, or need, and explore situations where one form seems to dominate. Garrett (2005) in *Contract Negotiations: Skills, Tools and Best Practices*, features a proven effective contract negotiation process, supplemented with numerous tools, forms/templates, case studies and best practices.

No list of teaching materials would be complete without including several additional works generally written by scholars outside the legal profession for use in a variety of educational and business settings and which are frequently adopted or recommended in courses on legal negotiation. Among these are several classics, including Fisher, Ury, and Patton, *Getting to Yes* (1991), Raiffa, *The Art and Science of Negotiation* (1982), Breslin and Rubin, *Negotiation Theory and Practice* (1991), and Lewicki, Saunders and Barry, *Negotiation* (5th edition) (2006).

### Evaluation of the Negotiation Course

One of the areas of greatest variation among negotiation teachers is how they assign grades in their courses. It is also one of the most important. Grading policies strongly influence what students learn from the class (Williams 1984). There is a continuing tension around using outcomes as a basis for part or the entire grade. At one end of the spectrum are teachers who base most of the grade on their observations of their students' performances in negotiation. For example, Mathews (1953) evaluated negotiation performance using subjective criteria such as command of the facts, perception of limits on bargaining position, manner, organization, and order of presentation. His assessment of the student's negotiation performance counted for 46 percent of the grade, written critiques of other students' in-class performances made up 36 percent, and a self-critique made up the remaining 18 percent. Moberly (1984) is the most vigorous advocate of professorial review. Nevertheless, in his course, student performance counts less than 35 percent of the grade, and outcomes count 65 percent.

It is interesting that despite the emphasis Moberly puts on the professorial review of the student's performance, he assigns much greater weight to outcomes than performance in the grading process.

One concern raised by rating student performances is the subjectivity of a teacher's evaluation. To address this problem, Fisher and Siegel (1987) have developed a "process grading scale" with explicitly delineated criteria by which they rate students while viewing videotapes of student performance. Their method probably results in the most consistent instructor feedback .

At the other end are teachers who use outcomes as the determinant of most or all of the grade. Professor White (1967) uses the outcome as the primary determinant of the student's entire course grade. White's method focuses on creating an objective standard for grading student performance. Consistent with this goal, students are compared only with students negotiating the same side of the problem. Craver (1986) also uses duplicate tournament method and compares students only with other students negotiating the same side of the problem. Students are ranked and assigned points after each negotiation problem. For example, if 15 students negotiated the same side of the problem, the one with the highest score receives 15 points, the one with the second highest score receives 14 points, etc. The scores are tallied at the end of the semester and ranked. Two thirds of the grade is determined by ranking the outcomes of the negotiation exercises, while the remaining one third comes from a 12- to 15-page term paper describing the impact of theoretical factors on the students negotiating experience.

Concerning our evaluation of the course:

- 10% Attendance and participation in class discussion
- 40% Case study of a business contract
- 40% Participation and performance in two or more simulated bargaining exercises
- 10% Final exam based on required readings

When and in What Context Should Negotiation Be Taught?

There is a healthy variety in the ways negotiation is taught in law schools. One of the basic choices is whether to teach negotiation as a stand-alone course or to include it in the context of a larger substantive or skills-oriented offering (Balachandra & al. 2005). For example, at the University of Missouri-Columbia School of Law, negotiation is included as part of a program that integrates alternative dispute resolution across the entire first-year curriculum (Riskin and Westbrook 1989). Even in the absence of a comprehensive program such as Missouri's, individual teachers have taken the initiative of incorporating negotiation skills into their courses, both in the first year (Barken 1990; Little 1981) and in upper-division classes (Balachandra & al. 2005; Moore and Tomlinson 1969).

Aside from substantive courses, negotiation skills are typically included as part of lawyering skills courses, where they are taught in the context of a wider range of skills, including interviewing and counseling, pretrial practice, trial advocacy, and others (Bellow and Moulton 1978; Haydock et al. 1996; Mauet 1995).

The most sustained and intense exposure to negotiation comes in courses devoted exclusively to the topic. Some readers may worry that there is not enough content or substance to sustain, say, a two-credit course in negotiation. Experience is to the contrary. Those who teach such a course admit that the work amounts to more than is normally required for two credits (Craver 1993). Some law professors who began teaching negotiation as a two-credit course have now moved it to three (Ortwein

1981; Wheeler 2006), and negotiation is currently taught as a three-credit class in several law schools.

Based on the literature, it appears that all of the stand-alone courses on negotiation are offered as upper-division elective courses. Some teachers have restricted enrolment to third-year students on the theory that third-year students are closer to graduation and are beginning to feel a keener interest in preparing for the practice of law (Sabin 1987; Tremblay 2006; Williams 1983). Otherwise, there appear to be no prerequisites for taking the course, although it has been suggested by at least one teacher that a prerequisite course in professional responsibility should be required of students taking the negotiation course (Ortwein 1981; Wheeler 2006).

Obviously, it would be wrong to suppose that negotiation should only be taught as part of other courses or that it should only be taught as a course in its own right. It is clear that students who are first exposed to negotiation, say, as a small unit in a first-year contracts course would benefit from later taking a course devoted exclusively to negotiation. It is also apparent that students who have had a free-standing negotiation course would also gain from revisiting negotiation in the context of some other course in the curriculum. As a basic rule, we could say that some exposure is better than none, and the more the better.

### Conclusion

All of us negotiate every day, but lawyers negotiate more than most people. Negotiation pervades the life of a lawyer. Lawyers negotiate on behalf of their clients in deal making and dispute resolving situations. They negotiate on a professional level with other lawyers, clients, employees, and law firm vendors. Lawyers also negotiate with friends, family, and others in their personal lives. Without a doubt, better negotiation and conflict resolution skills make for a better law practice and a better life (Barkai 1996; Bastress and Harbaugh 1990; Bunker, Rubin and associates 1995; Edwards and White 1977; Garrett 2005; Williams 1983).

The negotiation course is both fun and directly related to issues that are important to our students. The last role-play, for example, focuses on the question whether a new European Directive (the EU Chocolate Directive ) should be introduced or not, which has been quite an issue in Europe for the past decade. All the students are involved in playing one of 12 different roles, ranging from the foreign ministers of European countries, and members of the European Commission, to different lobbyists and members of the press. The role play requires considerable knowledge of the subject matter, calls upon all kinds of negotiation skills, and demonstrates the influence or lack of it of the different players. Each time this role-play, which lasts an entire day, is performed, the participants are exhausted at the end. But they also feel good about their participation and the fun of playing: it is an experience that few forget easily. In many respects, that is the best that can happen in education.

Moreover, our students do not have enough experience to relate negotiation theory to the practice themselves. All this means is that the course is too large on the one hand (with respect to student numbers) and too short on the other hand (lasting only three hours per week during eight weeks plus a few hours for preparation) to really influence the negotiation skills of the students.

Finally, the negotiation course succeeds in offering our students the opportunity to see other than legal aspects relevant in dispute settling. We are convinced that this is important: we offer law students, with their primarily legal perspective, another pair of glasses through which they can observe the world. With these they become better prepared to tackle disputes. Once again, we stress that our course offers only a starting point for obtaining the experiences necessary to becoming really skillful at

negotiating. But it offers more than only the beginning of experience: it also offers some tools (and their theoretical background) to work with. On top of that, the course offers the students an opportunity to relate the world of law to the world of negotiating. They learn to see that solving disputes can be influenced by using non legal skills, although the law usually plays an important role in the background of the kind of disputes that lawyers are expected to help solve.

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# The Role of Law Schools in Continuing Legal Education (CLE)

## “Law Schools Facing the Challenge of CLE The German Perspective”

By **Hans-Jürgen Hellwig, Frankfurt am Main**

### 1. Introduction



CLE in Europe is a topic not only at national member state level but also at European level. The Council of Bars and Law Societies of Europe (CCBE) on November 28, 2003 has adopted the “CCBE Recommendation on Continuing Training” and on November 25, 2006 the “CCBE Model Scheme for Continuing Professional Training” . These resolutions are not binding on the CCBE Member Organisations and therefore CLE in some countries, including Germany is lacking behind the CCBE standard. However, the fact that both documents found the necessary majority in CCBE clearly underlines the direction in which CLE is moving in all of Europe – more CLE.

The CCBE intentionally speaks of continuing professional training (CPT) because the term CLE is ambivalent. Its meaning sometimes differs from country to country, depending on the prevailing structure of legal education. In countries which have a two stage legal education already the second stage is sometimes called CLE. This explains why Master courses subsequent to the Bachelor degree are sometimes referred to as CLE. My presentation will not deal with this type of CLE. I will rather limit myself to CLE of the “finished product” lawyer, both in the form of updating CLE (equivalent to CPT) and of specialising CLE.

### 2. CLE Legal Framework for Lawyers in Germany

#### a) Lawyers in general

The term “lawyer” in the following means “Rechtsanwalt” which in Germany is an independent instrument of justice and as such the independent counsel and representative of clients in all legal matters in court and out of court . Section 43 a Federal Lawyers Act is entitled “Principal duties of a lawyer”. Its para. 6 says “The lawyer has the duty of continuing education”. This looks tough but it is a tiger without teeth: Failure to do CLE has no professional consequences – there is no revocation of bar admission, i. e. of the license to practice, there is not even any disciplinary measure whatsoever. This does not mean that there is no CLE at all. CLE does take place although for practical purposes on a voluntary basis only.

This means that there is at the moment no systemic assurance that the quality level which exists at the time of bar admission, will be maintained throughout bar membership, i. e. through the professional life of a practicing lawyer. This systemic deficiency has recently been severely criticized by the EU Commission and by the German Monopolies Commission on the ground that the legal profession in Germany has a far reaching monopoly on representation in court and advice out of court, that there is a high barrier of access to this profession which is quality based (two state examines) and that after market access the system permits quality to go down the drain without any professional consequences. I am convinced that sooner or later the system will be changed by subjecting failure to do CLE to professional consequences, in particular disciplinary measures, since otherwise the quality based monopoly cannot be defended any longer. Therefore, in my view, there is a huge CLE potential in the future as far as lawyers in general are concerned .

The professional organisations of lawyers in Germany have taken measures to induce lawyers to do CLE. These organisations are Bundesrechtsanwaltskammer (BRAK – German Federal Bar) and Deutscher Anwaltverein (DAV – German Bar Association). Both of them issue CLE certificates which the lawyer in question may exhibit in his office. The BRAK certificate requires 36 CLE points (equalling more or less 36 hours) over three years, i. e. for all practical purposes 12 hours per year. The DAV certificate requires 10 hours of CLE per year. Thus, both certificates by and large have the same requirements. Statistics show that lawyers applying for the DAV certificate have done an average of 20 hours of CLE per year. It is up to the lawyer to select the areas of law in which he/she wants to do CLE.

#### b) Certified expert lawyers

There are 19 areas of law for which a lawyer can obtain a certificate of certified expertise, namely administrative law, tax law, labour law, social law, family law, criminal law, insolvency law, insurance law, medical law, lease and condominium law, traffic law, construction and architect law, inheritance law, transportation law, commercial property rights law, commercial and company law, copy right and media law, IT law and bank and capital markets law .

If a lawyer with at least three years of practice can demonstrate to the local bar that he/she has practical experience and special theoretical knowledge in one of the aforesaid areas of law he/she will be given the title “Fachanwalt” (“certified expert lawyer”) in such area of law .

Practical experience requires that in court and out of court a minimum number of cases which depends on the area of law, has been handled during the preceding three years. There is no review of the whether the case was handled properly or not, relevant is only the number of cases handled.

In order to demonstrate the special theoretical knowledge the lawyer must have participated for at least 120 hours in special education classes and at the end thereof must have successfully passed three written tests .

The aforesaid specialising education courses can be organised by anyone. There are no minimum qualification or license requirements. Even non-lawyers can organise such courses. This is why all providers in the market of such courses are commercial companies and why most of them are owned and operated by non-lawyers. The teaching personnel however usually consists of lawyers, judges, prosecutors, civil servants, and professors or assistant professors from universities.

Each provider sets for himself the level of difficulty for the three written test at the end of each course – there is no minimum requirement nor any supervision. In practice, basically every participating lawyer successfully passes these tests.

The local bars set up small commissions to review the incoming applications for the certified expert lawyer title. I am a member of the review commission of the Frankfurt Bar in the area of commercial and company law. We do not have the right to look into the cases handled, nor to question the quality of the theoretical education class nor the quality of the three written tests. In other words we have no right of review on the merits, we can only do a formal review whether the necessary papers have been submitted – click against the box. This system leads to differences in quality which in the medium and long term are not tolerable. There must be a certain minimum quality in the bottle if you put the label “certified quality” on it. The aforesaid problem in the meantime has been diagnosed, and considerations are under way how to reform the system.

What I have presented so far is systematically speaking specialising CLE. Updating CLE is applicable once the lawyer has been given the title of certified expert lawyer in one of the 19 areas of law mentioned. Such lawyer must do at least 10 hours per year updating CLE by attending CLE classes in the area of expertise in question. No written tests at the end are required, mere physical presence is sufficient. Alternatively the lawyer must publish in his/her area of special expertise .

As regards the updating CLE classes just mentioned, the same applies as above in the case of the theoretical knowledge education classes. There are no requirements of licence nor of minimum quality levels. Usually the providers of the minimum 120 hours specialising CLE also offer the minimum 10 hours annually updating CLE.

Failure to do the annual updating CLE has severe consequences for the certified expert lawyer in question – he/she will lose the title.

Now some numbers in order give some flesh to the bones. Germany has close to 150,000 lawyers. About 28,000 certified expert lawyers certificates have been issued. Some lawyers are certified experts in two areas of the law which is the maximum permitted . All 28,000 certified expert lawyers do their annual updating CLE for their area of expertise. This leads to the question how many of the remaining 132,000 lawyers do their general updating CLE? There are no statistics available however people knowledgeable in this field estimate the percentage at not more than 20 %.

The updating CLE courses do not distinguish between certified expert lawyers and general lawyers, they are open to both kinds of lawyers.

### 3. Players in the CLE market

#### a) Specialising CLE

The two organisations of the legal profession have set up special subsidiaries for CLE. In the case of the BRAK it is the Deutsche AnwaltInstitut (DAI) which operates many of its classes in a new education centre near Frankfurt am Main and partly in other cities, including Berlin. In the case of the DAV it is the Deutsche AnwaltAkademie (DAA) which operates its courses in Berlin and in other cities. In addition quite a few private providers offer specialising CLE classes.

#### b) Updating CLE

Players in this market are not only DAI and DAA but also local bars and local bar associations, acting either themselves or through special CLE subsidiaries. Some of them cooperate with DAI and DAA. In addition there are many private providers in the updating CLE market, more than in the specialising CLE market. Most private providers have a local or regional profile, only a small number of them has a national profile, e. g. Forum Management and RWS in commercial and company law.

### 4. Whom do the CLE providers use as teachers?

The teachers come from all parts of the legal profession, namely

- judges working in the respective area of law
- prosecutors in criminal law
- civil servants in administrative law, and
- lawyers, notaries and university professors specialising/publishing in the respective area of law, and

CLE organisers with national profile (DAA, DAI, Forum Management, RWS etc.) often use supreme court judges and leading law professors. Their list of teachers reads like a "Who is Who" in the respective law area. The fees paid to such teachers are quite attractive. Quite high are also the fees charged to course participants by some national profile providers. High participation fees, first class hotels in attractive places, ceiling on number of participants – all of this gives these courses the air of exclusivity.

### 5. Legal framework for law faculties

Law faculties that wish to go into CLE must consider various possible legal obstacles and limitations or requirements.

## a) Purpose clause restrictions

Law faculties usually are not independent entities but part of a university with one or several faculties, the university as such being the legal entity. Most universities are entities under public law, primarily public law corporations, which have been set up by legislative act of the German State in which they have their seat. Only few universities are entities under private law, namely private law corporations which have been set up by private act of their founders. The articles of incorporation/association of both public law corporations and private law companies usually cover only primary legal education of students and not CLE of practicing lawyers. Therefore specialising and updating CLE of lawyers would lie outside the corporate purpose unless the same is modified.

## b) Public funding

Public funds made available to a faculty/university are subject to the limitations following from the corporate purpose of the recipient and sometimes also to more specific limitations set up for the funds in question by the public provider. The use of public funds outside the general university/faculty purpose or outside the specific fund purpose is not permitted and might constitute a breach of fiduciary duties under criminal law. The use for commercial CLE activities runs the risk of being treated as illegal public aid.

## c) Taxation



Law faculties/universities have a tax exempt status either because they are public law entities or because as private law entities they pursue a recognised not for profit/non-commercial activity – education of students. CLE however is a commercial activity. Public law faculties/universities when doing CLE therefore for tax purposes would have a taxable commercial operation which would even require commercial accounting. Private law faculties/universities doing CLE would even run the risk of losing their tax exempt status entirely.

This is why private law faculties/universities that want to engage in CLE, would be well advised to set up a subsidiary company, mostly in the form of a company with limited liability (“GmbH”) which has its own articles of association where the purpose clause covers CLE activities, and which has its separate commercial accounting for the CLE and other activities.

Such subsidiary companies to my knowledge have not yet been set up by public law faculties/universities for CLE purposes although they could so be set up just like GmbH subsidiaries have been set up by public law universities for other purposes. It must be noted however that the setting up of a subsidiary GmbH by a public law faculty/university usually would require government approval.

The CLE subsidiary GmbH is a taxable entity, and therefore all dealings between such entity and the faculty/university must be on an arm’s length basis.

A very interesting structure that has been used by the law faculty of the University of Münster, a public law corporation, for its Master classes, could be of interest also for CLE activities by law faculties . In Münster it was not the faculty/university but rather a group of friends of the faculty that founded JurGrad

GmbH. The purpose of such company includes the running of Master programmes. The GmbH has its own offices including personnel etc. The teaching personnel comes from the faculty and from outside members of the legal profession, in particular lawyers, notaries and judges. The accreditation of the Master classes with the competent authorities and the taking of the examines is in the hands of the faculty. The company is financed from the dues by the students participating in the Master programme. The profits of the company, to the extent distributed and not retained, are divided not to the shareholders but to the faculty. On this basis JurGrad GmbH seems to have been able to obtain a tax exempt status.

## 6. Examples of law faculties engaged in CLE

One example under public law universities engaged in CLE seems to be the University of Augsburg/Bavaria. The CLE activities are carried out through the Zentrum für Weiterbildung und Wissenstransfer (ZWW – Centre for Continuing Education and Skills Transfer) which is legally a part of the University. ZWW does general CLE for BRAK and DAV certificates. The teachers are mostly professors from the Augsburg Law Faculty. Lawyers doing CLE at ZWW come from the larger Augsburg area. In order to ensure a constant flow of participants ZWW has concluded cooperation agreements with the Augsburg Bar and the Augsburg Bar Association.

Another example of a public law university doing CLE activities is Fernuniversität Hagen which is a distant learning/online learning university in Northrhine-Westphalia. Specialising and upgrading CLE for expert lawyers in criminal law is provided by the university itself through its Institut für Juristische Weiterbildung (Institute for Continuing Legal Education). In other areas of the law specialising and upgrading CLE is provided through Hagen Law School which is a separate GmbH (Firm GmbH). The teachers are mostly assistant professors from Fernuniversität Hagen.

The sole private law faculty/university doing CLE to my knowledge is Bucerius Law School GmbH/Hamburg which does updating CLE for certified experts and general lawyers through its subsidiary Bucerius Education GmbH. It has a cooperation agreement with DAI. Teachers are prominent professors, judges, lawyers and notaries from all of Germany.

Thus only few law faculties have gone into CLE so far. Most law faculties seem to concentrate on the many aspects of the Bologna process – how to fight it or how to implement it through BA and Master/LL.M. curricula. Another reason seems to be the reluctance of the various State governments as far as public law faculties/universities are concerned. Augsburg University and Fernuniversität Hagen could not be doing CLE without the strong support from their respective States, Bavaria and Northrhine-Westphalia.

The fact that only one private law faculty is engaged in CLE is easily explained: Bucerius Law School is the sole law faculty in Germany organised under private law.

## 7. Some practical aspects

Law faculties cover more areas than are relevant for CLE, e. g. Roman law, history of the law etc, and some CLE areas not at all, e. g. mediation, ethics, drafting of

contracts etc. Therefore outsourcing into a separate institute or properly a better subsidiary GmbH seems advisable if a law faculty wants to go into CLE.

The organisation of traditional law faculty teaching activities on the one hand and CLE activities on the other hand require different skills and therefore different personnel. A CLE activity must strongly focus on the market which has already many players – where does it see its own place, locally/regionally, or does it – at least in the medium and long-term – aspire for a national profile? All of this is another reason why outsourcing is advisable.

Some faculty members may already have been lined up by existing CLE providers and therefore may be available not at all or only to a limited extent. Also personal relations among faculty members may sometimes be a bit difficult, and the CLE activities can suffer therefrom. All of this is another reason for outsourcing.

## 8. Concluding remarks

The title that I have been given for my presentation includes the words “Challenge” for law faculties. I would rather speak of “Chance of CLE”. I see a chance for law faculties and their members for various reasons.

Most important to me is the chance to make law faculties and the participating faculty members more aware of the needs to be met in competition. This is important because the competitive element is becoming stronger and stronger also in primary teaching of students.

Second, CLE gives the law faculty and the participating members more visibility in the legal profession and therefore in the public at large. It can have a networking effect for the teaching faculty members – they meet practicing lawyers who from time to time in difficult cases on their desk need an outside legal opinion and who will then remember a good CLE teacher from the law faculty.

And last, but not least, there is the chance for the faculty members and the faculty itself to make money.

On the other hand, a faculty considering to go into CLE should realise that this is indeed a challenging project. There are already many players in the CLE market. To gain national profile in all areas of the law from the beginning will be almost impossible. After all, the faculty itself is likely to have different levels of reputation in the various areas of the law. This may make it advisable to put the focus on the strengths of the faculty. Apart from that the setting up of a CLE activity requires considerable front-end work and financial investment.

On balance, the chances in my opinion prevail. Our society of today as we all know is skills based, and therefore continuing learning in all aspects becomes more important every day. The law is no exception. The faculties in CLE have a competitive edge over many competitors that is the most important of all: It is the quality of their teaching personnel. There are excellent legal scholars, and many of them are also excellent teachers. This makes an ideal basis for engaging in CLE activities.

# Credit Allocation to Courses at the Faculty of Law Masaryk University

## Challenges in Credit Implementation at Law Schools in the Czech Republic

*By Naděžda Rozehnalová, Michal Radvan*

### **Abstract**

The article deals with credit allocation to the courses taught at the Faculty of Law, Masaryk University in Brno and challenges in credit implementation at law faculties in the Czech Republic in general. At the beginning the ECTS principles are described and the Faculty of Law is introduced. There are several words about accreditation process in the Czech Republic as it is a fundamental prerequisite for implementation of degree programmes. The main part of the text informs about credit allocation process at the Faculty of Law, MU and connected problems like a high proportion of core courses in the programmes of studies, a high proportion of courses, multi-semester courses and their interrelationship, internal cohesion of programmes of studies, traditional construction of courses with regards to the completion and requirements of the ECTS system etc. We believe, that as far as further development is concerned, it is important that other law faculties in the Czech Republic start allocating credits to courses within their programmes of studies

### **I. Introduction**

The European Credit Transfer and Accumulation System (thereinafter ECTS) was developed in 1989 as the pilot project within the framework of Erasmus. The main goal was to facilitate the recognition of study periods undertaken abroad by students via credit transfer and thus enhance the quality and volume of student mobility in Europe. ECTS has expanded to over 30 European countries and has been introduced in more than one thousand higher education institutions. In consideration of the fact that the recognition of studies and diplomas is a prerequisite for creating an open European area, ECTS is thus considered to be one of the fundamental constitutive elements in creating an open European area for higher education. ECTS also belongs to the priority areas of the Bologna process.

Since 1995 ECTS has progressed through a successful pilot project with the participation of 145 European universities from all the EFTA member countries. On the basis of this experience ECTS has been made available for a wide use. Many countries

have introduced ECTS into their national legislation; ECTS is often used as a prerequisite for accreditation.

The Trends V Report of the European University Association (EUA) concludes that the ECTS credit system is now widely used in the Bologna process member countries whereby 75 % of higher education institutions use this system as a credit transfer system and 66 % of the institutions use it also as a credit accumulation system.

ECTS is based on three core elements:

- 1) Information (on degree programmes and student achievement)
- 2) Mutual agreement (between the partner institutions and the student)
- 3) The use of ECTS credits (to indicate student workload)

The above stated three elements, on which ECTS is based, are made operational through three key documents:

- Information Package
- Application Form/Learning Agreement
- Transcript of Records

ECTS is based on the following principles:

- ECTS credits. They represent numerical values allocated to courses (units) to describe the student workload required to complete the course unit.
- Information Package. This package provides written information for students and staff concerning institutions, departments/faculties, the organisation and structure of studies and programme of studies.
- Transcript of Records, which shows students' learning achievements in a way which is comprehensive, commonly understood and easily transferable from one institution to another,
- Learning Agreement, this consists of the programme of study to be taken and the ECTS credits to be awarded for satisfactory completion, committing the home institution and host institution as well as the student himself/herself.

The objective of this paper is above all to introduce the credit allocation to courses at the Faculty of Law, Masaryk University, and the challenging issues within the Master degree programme in the study field 'Law', which the faculty has been facing.

## II. Brief Introduction of Institution

The Law Faculty of Masaryk University (thereinafter "MU") is one of four law faculties in the Czech Republic. It is seated in the second largest city in the country – Brno. As a high number of higher education institutions and universities are seated there Brno holds also the epithet "The City of Universities". The faculty's "genius loci" is undoubtedly influenced by another fact. Brno is the seat of the supreme legal bodies (The Constitutional Court, The Supreme Court, and The Supreme Administrative Court) as well as a number of other central bodies, such as the Office for the Protection of Competition or the Public Defender of Rights. This manifests itself not only in the academic and research interrelationships but also by the intake of graduates to the positions at these institutions.

As far as further characteristics of the faculty are concerned, this paper shall present the facts regarding academic matters. With regards to further information let us

refer you to the documents presented at [www.law.muni.cz](http://www.law.muni.cz), particularly to the sections presenting faculty annual reports and long-term plan.

As far as the academic characteristics of the faculty are concerned, it is possible to state the following:

- The core study field is 'Law', which creates the faculty's graduate profile. Graduates in this field are prepared for lawyer professions. It is a one-level programme offered as full-time study. 2510 students are currently registered on this programme,
- Bachelor-level study fields are offered within the 'Legal Specialisations' programme. This originally rather departmental education programme opened in 1992 and has gradually gained significance. Approximately 818 students are currently studying in seven fields. As of the 1st January 2008 the accreditation of the master programme was prepared. This programme is only offered as a distance-learning study,
- The faculty also offers doctoral studies. Upon the rector's decision the credit allocation to courses in this programme commenced in 2006. The credit allocation in this area is challenging due to the differences in individual study fields. The credit allocation is expected to end in 2008,
- It is also important to mention the implementation of the LLM programme. This programme is implemented on the basis of an agreement with Nottingham Trent University.

### III. Accreditation Process in the Czech Republic as a Fundamental Prerequisite for Implementation of a Degree Programme

For a better understanding of the issues that the faculty has been facing in the credit allocation it is important to make several observations with regards to the accreditation process in the Czech Republic.

The accreditation process in the Czech Republic is regulated at the legal level. Degree programmes are subject to accreditation awarded by the Ministry. The accreditation is reviewed by the Accreditation Committee of the Ministry of Education, Youth and Sports and is granted upon the Ministry decision.

The higher-education institution applies for the accreditation of the degree programme at the Ministry of Education, Youth and Sports. The application must contain the information on the type, form and objectives of the programme, structuring of the programme into the study fields, their characteristics and combinations, graduate profile, courses characteristics, rules and conditions for creating the programme of studies, possibly also the length of practical work, standard study period, conditions for fulfilling study and completion requirements, including the content of the state exams, the academic title awarded, relations to other types of degree programmes in the same or related study field. It is also required to submit documentation regarding the personnel, financial, material, and technical and information provisions of the degree programme for at least the standard period of study, the long-term plan for the programme development. It is not required to state the course credit values.

After receiving the standpoint of the Accreditation Commission, the Ministry makes its decision on whether or not to award accreditation. The Commission takes into consideration the general policy of the higher education institution with regard to its teaching, scholarly, scientific, research, development, artistic or other creative activities of as well as an assessment of its activities. Accreditation of a degree programme is granted for ten years at most, the validity of a particular accreditation may be repeatedly extended.

It is allowed to deviate from the given rules and conditions regarding the creation of the programme of studies (agreed programme of studies) only very slightly. In principle only the structure of the compulsory non-core and optional courses is not restricted. The structure of compulsory courses, which obviously create the core of the programme of studies, can be changed very restrictively. The deviation is only possible under the condition that the structure of core courses and graduate profile remain intact. As shown further on, this very fact is a problem as it is to a certain extent with difficulty compatible with the credit allocation process. This problem is amplified by the content of the degree programmes at law faculties in the Czech Republic. Traditionally, the graduate profile in the field 'Law' (i.e. in the only field that prepares for lawyer profession) is universal. There is therefore a wide structure of core subjects at all law faculties in the Czech Republic. For example, in the academic year 2007/2008, there have been 106 core courses and 128 compulsory non-core and optional courses taught in the Master level study field 'Law' at the MU Faculty of Law. Approximately 75% of core courses are considered fundamental, which consequently leads to the situation that it would be hardly at all possible to obtain the accreditation for the field 'Law' if the courses were not included in the programme of studies. The similar situation can be found at other law faculties in the Czech Republic.

It is necessary to conclude this chapter with one more remark. Neither the Higher Education Act nor any other legal norm (for example, a decree defining in details the content of the degree programme accreditation application) states the credit allocation as the compulsory part of the accreditation materials. The higher education institution is not even asked by the Accreditation Commission to submit the information in the process of degree programme accreditation.

#### IV. Several Remarks on ECTS Credits

ECTS credits are a numerical value (between 1 and 60) allocated to individual courses according to the student work required to complete them (student workload). They reflect the quantity of work a given course requires in relation to the total quantity of work necessary to complete a full-year programme of studies in the given field. ECTS credits should be allocated to all available courses – core as well as optional. The credits should also be allocated to work on projects, thesis and practical work.

With regards to the expected student workload it is necessary to state that each module is based on the number of study activities. They include different types of courses (lectures, seminars, practical tutorials, laboratory work, self-study etc.), study activities (attending lectures and seminars, reading books and articles, writing seminar assignments etc.) and assessment (oral, written exam, tests, final thesis etc.). The task of the course teachers/guarantors is to estimate the time needed for all the activities in each course/module. The student workload expressed in hours will be subsequently transferred to credits. It is however necessary to provide teachers with "a guide" stating how to estimate the time needed for the successful completion of the course.

A seemingly easy process may be rather complicated. It is typical for so-called "big fields" (including the 'Law' field) that is a course taught by several teachers (in lectures or seminars) who may have different requirements and demands on students (for example, check tests, seminar assignments etc.). The same complication may occur regarding the completion of the course. In this case it is necessary to assign a guarantor to the course whose responsibility is to enforce uniform conditions. This statement may sound very simple, it is however often hard to implement in practice.

ECTS credits should be allocated by using the "top – down" method. The starting point should be a comprehensive programme of studies consisting of all courses a student needs to complete in the given academic year in order to complete

the studies in the given field within the official study period. Using the “down - top” method is quite complicated and may lead to the accumulation of more than 60 credits per year with the result of aggravating credit transfer. The “top - down” method requires effective communication at the level of university – faculty, faculty – faculty, faculty – department, department – department. Not only for the above purpose there should be responsible persons appointed with the responsibility for the communication and work with ECTS credits (ECTS coordinators).

There is no relationship between ECTS credits and the level of challengingness (complexity) of the given course. Similarly there is no relationship between ECTS credits and the status or prestige of the course or teacher. The same course is sometimes a component of various degree programmes but is allocated in a different category, with a different credit value in dependence on the given degree programme. For example, the same ‘Sociology’ course has a different credit value in the programme of studies of ‘Business’ and ‘Law’ on the basis of relative student workload related to the given programme of studies. Such a situation should not occur. The only exception may occur in the case of two students in the same study field who already have preliminary knowledge and skills and thus need less time for self-study. It is the responsibility of the institution to ensure the necessary consistency in credit allocation and in deciding what credit value is more appropriate for the incoming student.

With regards to credit allocation it is necessary to have a regulation at the institution level specifying the credit allocation methodology (if there is no other established norm in this respect). This was also the experience of Masaryk University where after five years of experience with the credit allocation a process was started towards the unification at the university level.

The Office of Studies at the MU Rector’s Office published on 24. 1. 2005 “A Tool for Accreditation – how to proceed”. The third chapter presents rules for credit allocation expressed in a formula

$$T * k + z,$$

i.e. number of hours per week \* constant expressing the extent of necessary self-study for the tutorials, which in the ratio 1:1 equals 1, at zero self-study 0,5 + constant determining the complexity of the completion (credit = 0, colloquium = 1, exam, where  $T \leq 4 = 2$  and where  $T \geq 5 = 3$ ).

Although the Tool serves well for the purpose of the unification of the university academic environment, there is certain negative aspect of the tool with regards to the fact that the Tool is not a binding norm for the university bodies.

#### V. Credit Allocation Process v. Faculty of Law, MU

As it has been already stated, that the credit allocation process as implemented at the Faculty of Law has encountered certain (and still existing) problems. A summary follows with the aim to present the challenging issues and their influence in the given area. It would also be valuable to promote a discussion, which could help in solving the problematic issues. The problematic issues are as follows:

a) a high proportion of core courses in the programmes of studies. This issue in the ‘Law’ field is a result of tradition, as well as professional demands on the positions of judges, attorneys-at-law, notaries, advocates and other legal professions. Despite the fact that programmes of studies will develop towards a greater specialisation of the graduate, it is unlikely to expect that opinions in this area will significantly change in the future,

b) a high proportion of courses (particularly in case of core courses) where several teachers are involved. In the fields such as ‘Law’ where there are 500 students

in a year and where courses consist of compulsory seminars and practical tutorials, it is unlikely to expect that a course would be taught by one teacher. On the contrary, it is usual that a course is taught by 5 or more teachers. These teachers are naturally different in personal characteristics and apply different teaching methods. This affects their demands on students – the students' ongoing preparation, the content of the course completion etc. The position of the guarantor has been already discussed. Yes, a certain pressure must exist and a certain pressure must be applied towards the unification of requirements. At the same time, there must be objective sources of information available regarding a course. The result will however never be uniform, only perhaps similar. Academic freedoms also cover the educational area: professors, associate professors and after all also assistants are individuals with their own opinions and in a way also craftsmen whose joint masterpiece is a faculty graduate – future judge, advocate, attorney-at-law, notary etc.

c) multi-semester courses and their interrelationship. Traditionally, the majority of the disciplines at the Faculty of Law have been taught as multi-semester courses. Although each semester would end separately, it was not possible to interrupt the course and continue after a certain period. The final completion – usually an exam – was the deciding factor. The existence of multi-semester courses has also demonstrated the faculty's ability to provide a deeper insight in the taught subject. The majority of fundamental disciplines taught at the Law Faculty, MU, such as civil law, commercial law, criminal law etc., are thus distributed over three semesters. Only a few core courses (but the overwhelming majority of compulsory non-core courses) last one semester. Therefore, an internal cohesion is required (for example, Civil Law I, Civil Law II and Civil Law III). There is the possibility of using so-called "prerequisites" for course registration: for example, Financial Law III can be registered only after a successful completion of the Financial Law I and Financial Law II courses.

d) internal cohesion of programmes of studies. There is also another issue deserving our attention and that is the internal cohesion of the courses. The creation of a programme of studies is based on the condition that some disciplines must be preceded by other courses. Typically in the Czech legal academic environment it is the Commercial or Labour Law courses that must be preceded by the Civil Law course. Positive legal disciplines must be preceded by the course in the field of 'History of Law' etc. There are undoubtedly more examples of this procedure. It thus happens that the important disciplines accumulate in the programme of studies towards the second half of the studies.

e) traditional construction of courses with regards to the completion and requirements of the ECTS system. Traditionally, core subjects had the "lecture – seminar – credit – exam" structure. The introduction of credits suspended this structure. Particularly with regards to the course completion the traditional structure eliminates the requirement for a single form of completion of courses. Therefore, it is necessary to separate complete courses in order to fulfil all the requirements.

The following resources have been used for the credit allocation at the Faculty of Law:

- the Masaryk University "top - down" method,
- the following formula has been used:

$T * k + z$ , i.e. number of hours per week \* constant expressing the extent of necessary self-preparation for the tutorials + constant determining complexity of the completion (see above).

- Other requirements have of course been also observed, i.e. gaining 300 credits after completing the whole degree programme, completing every course with a required form of completion.

What effect have the aspects described above had on the credit allocation process? In order to use the above presented formula and observe also the other requirements (300 credits, respectively 30 credits per semester) and with the aim to create space for the completion of compulsory non-core courses, it will be necessary to work with one of the values in the formula. The value would be handled in the direction "top - down" because first calculations made in the direction "down - top" showed a significant overreach in the required 300 credits. A question as to which value could be worked with was easy to answer – the only subjectively determined value is the constant expressing the extent of self-study for the tutorials. The objectively determined values are the number of hours per week and the complexity of completion. It was not necessary to work with the values in all the courses, nevertheless it was necessary to solve this problem in the so-called "very challenging" courses. The course was thus given a lower credit value than it would have deserved with regards to the student workload. The reason was:

- to keep the required 300 credits distributed over the academic years and semesters within the recommended programme of studies,
- to retain space for the development of compulsory non-core courses.

The formula in its existing form could not be used without corrections. With several courses the corrections were carried out downwards, i.e. they were in fact disadvantaging the student who despite greater workload receives a lower number of credits. This was particularly evident with courses where students were required to complete the course with a difficult exam after three months.

A further finding was discovered. The finding was concerned with the comparison of programmes of studies at faculties with a low number of courses. Where there is no need for an artificial reduction of the self-study value, more credits can be assigned to the courses at the faculty with a lower number of courses than at the faculty with a wider programme of studies, tradition, well established staff structure and high ratings coming from the legal community or various national comparisons.

## V. Conclusion

Based on the facts stated above it could be concluded that the credit allocation system at the Faculty of Law, MU, has certain challenges, which are related to the requirement of assigning a completely objective value to student workload in a given course. Quite paradoxically, with the aim to enhance the course quality and the overall educational quality the system may lead to the undervaluation of student workload through credits.

As far as further development is concerned, it is important that other law faculties in the Czech Republic start allocating credits to courses within their programmes of studies. It means that the credit allocation should not be used only for the purposes of international mobility.

## Importance of standardizing law education - Polish experience

*By Piotr Girdwoyn*

When considering the potential for harmonization of at least crude basics of knowledge gained by the graduates of faculties of law at European universities, it would be necessary to focus on the experiences of respective countries. Encountered difficulties or proposed solutions could serve as arguments in future discussions.

It seems that this poses one of the most difficult, and at the same time, ambitious tasks that one could envision. At the present moment, no clearly defined need for such consolidation practice can be ascertained. Knowledge of law is usually of local scope. Body of information gained solely through studying law is not principally sufficient for pursuing professional practice; it enables a general professional orientation and therefore the question of meaningfulness of introducing uniform standards for high education often arises. On the other hand, it does not mean that such need would not occur in the future, especially in the light of the European integration process reaching deeper levels than it would seem at present.

Basing on Polish experience deriving from a system transformation, including such manifestations as change of regulations concerning high education, commercialization of education system, emergence of a wide range of private high schools, introduction of paid study programs in numerous public schools, and the difficulty in providing an appropriate level of offered didactic services, the Author of this paper briefly summarizes Polish views, both pro and contra, on the idea of introducing uniform educational standards in the law education, which are contained within the scope of the following questions:

1. Is there any need of standardizing education at all?
2. What specifically needs to be standardized?
3. Who is about to undertake the task of standardization?
4. What methods can be used to accomplish it?

The idea of standardizing high education in Poland undoubtedly belongs to the one of more controversial solutions laid down in new regulations on high education. The idea, introduced by an act of 2005, on one hand appears as a reaction to the proliferation of private universities eligible to grant Master credentials (also in law) necessary to pursue professional career (including admission to the bar); on the other - it may induce inevitable associations with the past, when state authorities, failing to

respect traditional autonomy of universities, tried to intrude the contents of syllabus, number of classes etc.

The intention to provide an appropriate level of education, being the reason for the introduction of minimum standards, was about to serve – according to its proponents – as an answer to the commercialization of educational services. Commercialization in Poland took a twofold path. Public schools launched paid studies as an alternative form of education (free education in high schools was guaranteed by the constitution, however paid studies were partially allowed as well). Due to a remarkable demand, new private high schools were established, focused primarily on so-called didactic services (largely detached from scientific research). While the former were functioning by virtue of their tradition and were controllable within the framework of existing legal regulations, regarding the latter – there was lack of mechanism for effective monitoring of at least the quality of provided didactic services.

In consequence, after long discussion, eligible public authorities (primarily the Ministry of Education, Main Council of High Education and State Accreditation Committee) clearly supported the necessity of introduction of uniform educational standards, guaranteeing at least minimum level of education offered by universities nationwide. While, as it usually happens, the arguments for introducing standardization could be deemed rational, its implementation aspects give rise to further questions and doubts.

A primary argument for the introduction of minimum teaching standards in context of law education is an immediate need to provide an appropriate level of education as well as tools to monitor educational process provided by both public and private entities. It is emphasized that, in the time of high education being commercialized, intention to gain profits from educational services sometimes surpasses the care for appropriate educational level, whereas in legal profession, belonging to the so-called public trust professions, any lack of control over education and “mass production” of graduates might entail disastrous social consequences, and could largely undermine public trust for law as well as values it guards.

This argument seems to be relevant, at least partially so. To use vivid examples, undereducated lawyer can cause equally negative results as an undereducated medical doctor. On the other hand, one cannot be sure that the standardization is a step in the right direction, and certainly it cannot be said that the introduction of standards solves a problem itself. Aside that, those controlling mechanisms (reasonable in principle) can evolve into the process that would solely ascertain the compliance with the standards, and therefore the introduction of institution would force in the appointment of controlling authorities whose main task will be to justify their own existence, i.e. to control the performance of minimum requirements of curriculum, which - in its degenerated form - could have nothing in common with a factual care for appropriate level of education, ultimately leading to purely administrative, least to say bureaucratic, assignment.

Opponents to the idea of standardization point, among others, to the fact that “it would greatly restrict the autonomy of universities and their faculties of law, petrify the curricula and education plans, simultaneously blocking the possibility of flexible shaping of the educational offer” . However, some weaker points in this line of reasoning can be found as well. After all, the autonomy of universities is not based on an unlimited arbitrariness of conveyed matter and form of classes. Beyond any doubt, modern universities are autonomous, however not sovereign, and a lawmaker may – for the sake of social interest and in a form envisaged by law – impose certain obligations connected with teaching. Also, it does not appear that the idea of standards, understood as a certain minimum to be applied in practice, could hinder a flexible shaping of educational offer. To use an example, high schools employing

appropriate staff and infrastructure, will be able to go beyond this minimum and offer high level of education, while other subjects, often functioning within solely commercial domain, would be at least forced to start caring for basic educational level of their graduates.

Considering all the factors discussed above, answer to the question whether introducing standards makes sense at all, would require considering the following :

- a. what needs to be standardized?
- b. who would undertake this task?
- c. in what way?

These problems need to be focused upon in a wider, pan-European, perspective.

The idea of standardization presented above roughly sketches two basic standpoints of its followers and opponents. While the former ones seem (theoretically at least) to talk about the need for introduction of common basics or educational minimum, the latter are afraid of defining the whole educational course in administrative terms. As it can be seen, one of the focal points of this argument is the scope of standardization. It can be defined by indicating the syllabus contents, which should be taught during studies, the duration of respective classes or some additional premises can be introduced. Nevertheless, even finding some common grounds seems highly controversial. Losing utter seriousness for a while, a common consent would be expected only in relation to teaching Roman law and classical philosophy, maybe European law as well, as Latin creates problems as a field of study. This prospect does not seem to be exceedingly optimistic when considering cross-border standardization, and it markedly hinders its accomplishment.

Polish experience of creating standards points to one more threat. Another trend can be observed, even among persons averse to the process of standardization, i.e. to extend the scope of compulsory classes . It would be difficult to establish whether this is caused by a care to guarantee level of education to young professionals, or by a particular interest of lecturers, however the Polish discussion on common minimum appears to lead to the conclusion that the work on discussed problems should not start with "What is necessary during study?" but with "What a modern European lawyer cannot live without?".

Establishing such a minimum could constitute the first step towards possible harmonization of the number of classes, their duration or ECTS grading system. Various problems arise here as well, since, as one can assume, standardization does not stem (I hope) from the need of introducing a uniform time span for lectures in a given subject matter, but from developing skills which will enable an individual graduating in one country to specialize in any given field of law existing in this country, or in case appropriate criteria have been met – also in any other country of choice. Therefore the question: what needs to be standardized is of utmost importance. In Poland, an attempt to define such a minimum was undertaken in course of the Conference of Deans of Faculties of Law in 2005, where the so-called profile of a graduate of law studies was elaborated. Among others, such a graduate should master "the ability to understand legal texts, thoughtfully employ rules of logical reasoning, interpret rules, and be able to continue specialization in any given field of law. Graduates of law should master a foreign language on B2 level of the European Council Language Education Description System, and use specialized terminology from the domain of law. Graduates should be prepared to undertake any kinds of legal training necessary to perform legal professions or functions in all state and non-public

institutions or organizations requiring legal expertise as well as to further deepen the knowledge during postgraduate or Ph.D. studies.”

On the other hand, the above statement is quite general, and it would be hard to convert it into specific syllabus recommendations. After all, the duration of classes and grades are easiest to become standardized.

The problem of “who is about to perform standardization” is also important. Ideally, this process should be conducted by those people directly involved in the process (if they consider it meaningful), i.e. from bottom-end and on greed harmonization of syllabuses in the agreed range. However, it seems difficult to incorporate in a real life, in a wider scope at least. Transferring this task to public authorities (both national and community-based) would result in an already identified danger of introduction of regulations deviating from the expectations of scientific community (needless to say - its majority), and secondly – non harmonizing with the realities of academic life. This phenomenon became prominent in Poland in relation to creating standards in law and administration studies. In both cases, only one person was tasked with developing respective projects. Depending on the attitude of project’s author, the outcome has been or not, the matter of extensive consultation.

It should be therefore stated that if the idea of standardization becomes accepted, a parallel identification of form of involvement of individual universities in the whole process will become a matter of primary importance. Whether this would be undertaken by ELFA (what seems a natural solution), or other form of partnership is considered, remains an open question. Nevertheless, it is beyond doubt that we, as the representatives of European faculties of law, should be prepared for standardization, even if we oppose this idea. Realistically, a growing tendency of harmonization and standardization is expected rather than decentralization.

The most difficult question, conditioned by positive answers to questions: whether we should standardize, what needs to be standardized, and who should do it, is connected with the very nature of standardization. In this case, several basic models can be outlined as well.

The first one, undoubtedly easiest one to be accomplished, although least satisfactory of all, involves a harmonization of syllabus contents of selected subjects, with prospective inclusion of duration of classes and ECTS ratings. This can be necessary, especially with the view to students’ and lecturers’ mobility, or the existence of Bologna system .

If this system is to be accepted at all, I would advocate to keep it as low-profile as possible. After all, the development of own methods and forms of education is a distinctive value of respective scientific centers, having been elaborated for centuries . Using an exaggerated comparison again: we do not need educational McDonalds, but clean sheets and polite service only.

Another model that can be worked upon would involve the definition of a series of necessary outcomes of education expected from a contemporary legal professional. Developing of such “graduate profile” should be in wake with leaving a possibly wide-range autonomy of forms and methods of teaching, syllabus and study modes to respective schools or university departments. Looking from the perspective of introducing standards in Poland, we can rather agree on what the graduate of law studies should be like, than on what his or her studies should look like. On this occasion, it is worthwhile mentioning that accepting such a solution would also imply the need (or even necessity) to consider opinion of representatives not only of scientific community, but also that of practitioners (law corporations, public administration etc.) After all, majority of our graduates do not remain on universities in order to conduct

scientific research, or to lecture students, and sometimes one can get the impression that study curricula (not only at faculties of law) are focused on producing scientists.

Summing up it needs to be noted that lack of common standards presently does not pose the biggest problem of the faculties of law as they function by the European well established, common academic tradition. This is why one can already state that teaching law is standardized in a very general scope. Nevertheless, the discussion on further harmonization of basics seems to be necessary, due to high mobility of students, staff and employees, and having in mind the harmonization of European law. The views presented above point to the possibility of “soft” standardization, i.e. defining a goal we should all striving at, while preserving traditional freedom in defining methods and means. Naturally this, as well as every other opinion, is also open to all kinds of criticism.



# Coming Out: Legal Education and the Wider World

By Nick Johnson

## Abstract

The verb “coming out” is commonly used to describe the disclosure of a clandestine gay orientation to a potentially hostile heterosexual world. The world of academic legal education is, if not clandestine, largely still closed and not understood by the world beyond the University. This paper explores the pains and gains of the University Law school coming out into the wider world of the professions and business.

Continuing Legal Education signifies an educational regime both physically and temporally beyond the normal confines of the University and one where the University Law School will be engaging with the world of work. University Law school have not traditionally been successful-at least in the United Kingdom- in engaging with this world. However, over the last decade, each of the three variables in this relationship; University Law Schools, the professional workplace and the pedagogies of education and training have been transformed. This paper will examine the key features of this transformation and consider the prospects for a new and productive network of relationships for law schools.

## Paper

The now rather dated English phrase “coming out of the closet”, signifies the difficult and often painful processes involved in disclosing a (usually gay) sexual identity to others who may not be aware of that identity. The imagery of the phrase suggests a closed, homogenous gay community with its own culture and practices – “the closet” – while the wider community is assumed to be at least dominantly heterosexual; and at worse homophobic. Since the coinage of the phrase in the 1970s the processes it describes have changed in a number of different ways. The antithesis of the two opposed worlds, with mutual stereotypes, has given way to a more organic culture in which gayness operates both as a style but also as a distinct subculture within a more fluid and, hopefully, more tolerant society. In this context, Ramussen says

Peoples' ability to continuously negotiate their identity is necessarily mediated by varying circulations of power relating to age, family background, economic position and race.

This Gemeinschaft- Gesellschaft development of sexual cultures can throw into relief shifts in other cultural forms, even that of academic culture. Universities, including University Law Schools are having to leave their closeted world in search usually of new sources of finance.

Those of us who still espouse a liberal University education would associate with the ideals of the 19th century theologian, John Henry Newman and his idea of a University:

An assemblage of learned men, zealous for their own sciences, and rivals of each other, are brought, by familiar intercourse and for the sake of intellectual peace, to adjust together the claims and relations of their respective subjects of investigation. They learn to respect, to consult, to aid each other. Thus is created a pure and clear atmosphere of thought, which the student also breathes, though in his own case he only pursues a few sciences out of the multitude. He profits by an intellectual tradition, which is independent of particular teachers, which guides him in his choice of subjects, and duly interprets for him those which he chooses.

A similar emphasis on the separation of the University from civil society and the State was developed in Germany by Von Humboldt and later by Karl Jaspers. The "ivory tower" community of the University enables disciplines to be elaborated and developed in isolation from the external world and for the University to develop a distinct, independent discourse and system of values from the outside world. In its isolation, its view of the world is mediated through its own disciplinary framework, creating distance and perhaps distortion.

The current conception of the University, in the age of post modernism, is in sharp contrast. "...the western University is at an end", "the University is in ruins" proclaim the theorists. The nature of University knowledges has changed from knowledge for its own sake to knowledge for value (performative knowledge). Stronger public policy which recognises more clearly the macro-economic role of the University and private sources of research funding, has prioritised the use value of knowledge to the point that the earlier form is near extinction.

The essential differences between the pre-modern University and the post-modern University are as follows. Firstly, the dependence of the University on the State and state agencies for research have restructured both the ideals and values of the University and the purposes of knowledge production. Secondly, the University no longer has a fixed habitus, the Bourdieuan conception of location both in space, culture and economy. It is both global and local with weaker boundaries with the external worlds of politics and business. In many areas, particularly the sciences, the degree of interpenetration with extensive links, joint ventures and start up companies has meant that the University has become integrated into a broader framework of public or private enterprise. Developments in ICT and the internet render the physical boundaries of the University nugatory.

Let us consider the implications of these changes on the Law School. In England at least, the isolation is doubled. In England, the legal academy has maintained its distance from the legal profession firstly by delineating a distinct academic stage of legal education largely free from professional control and maintaining that independence by reference to the fact that only around 50% of law students enter the legal profession. Ironically, the perception of other disciplines within the University fails to recognise this relative autonomy. Law lecturers and students are

seen, particularly by the social scientists whose intellectual company they cultivate, as essentially vocational in outlook and direction.

Secondly the legacy of this isolation has been the elaboration and evolution of a distinct academic discourse for law. Its terrain is vast, rich and variable and generalisation would be both idle and superficial. But one can speak more accurately about “academic law” than one can about “academic medicine” and crucially the legal profession itself recognises the distinction between the academic approach and that of the legal practitioner. The role of the Jurist is one more established in civil law jurisdictions than in the common law but the profession does recognise and value - on one level at least - the rigorous, disinterested commentary of the legal academic. The busy practitioner working directly with the client often takes a different and less positive view of academics.

So, my question is this. What happens when the Law School, with its distinct culture and discourse, comes, or is forced, out of the closet and is obliged to engage with the “real “ world”? Over the past twenty years, most professions have adopted rules making a certain amount of continuing professional development (CPD) , usually expressed as a number of hours, compulsory. This has created a market which at some time or other, most University law schools have sought to exploit. Many early attempts by English law schools were amateurish to the point of being laughable. Lectures were arranged-usually in the middle of the day- on recent cases and the few practitioners who attended were treated to ponderous analyses which had little relevance to their client work. The market for Continuing Legal Education (CLE), by which I mean the education and training of the legal profession after the point of qualification, is now largely in the hands of private sector providers or, in the case of the larger firms, has been brought in house. A few University Law Schools have engaged sufficiently with a particular sector of the profession to develop viable CLE input but in the main the involvement of academia in CLE has been through individual initiatives by entrepreneurial Professors seeking to supplement their meagre University incomes. Most practitioners, when asked, say that the last thing they want from a CLE course is an “academic approach”.

Since those early forays into the market, some Universities have taken stock and looked at their assets in a different way. The first asset of the University, whether pre or post modern, is its brand. Association with that brand is gained by buying the product or, as you might prefer it, obtaining a qualification issued by that University which is recognised by the wider world. The University will (or should be) jealous of the brand and will exercise careful quality control over the product. The ability to gain a University qualification ought to be a huge market advantage for a Law School in the CLE market but in my experience, only a minority of lawyers feel the need for further qualifications. In fact when I was responsible for approving CLE in a large law firm, I was often suspicious of those looking to gain further qualifications rather than seeking more focussed training. My first thought was that they were enhancing their CVs in order to get another job. I was often right.

The higher the status of the profession, the less need its members feel for further qualifications. There are other professions apart from the legal profession who need a substantial legal input and which see the advantages of a University qualification. At the University of Warwick, we tendered for and won a contract to develop a postgraduate Diploma which all Health and Safety Inspectors must complete. I want to use this course, which I direct, as an exemplar to illustrate a number of points about the CLE and CPD markets. These Inspectors conduct their own prosecutions and have substantial investigatory powers. Many will act as expert witnesses. In all cases, Health and Safety Inspectors must establish their credentials in

the eyes of the court and often withstand cross examination. A qualification from a well respected University will give that status and credibility. However, even here there are dissenters. Some within the sponsoring body, the Health and Safety Executive (HSE), have questioned both the expense and the need to “gold plate” their training with a University qualification.

The second advantage of the University in the market ought to be its pedagogical experience. Although earlier generations of law students suffered under a stultifying regime of semi audible lectures, there is now much greater emphasis on and expertise in, pedagogical technique. Most Universities have educational methods units who by a combination of persuasion and funding exist to modernise teaching techniques. The innovative techniques developed in the professional law schools are beginning to influence the academic schools. The Warwick Diploma uses a highly innovative work based learning model where the learning outcomes for the course are met both in the work place and by Warwick and HSE courses. In the course development, we benefited enormously from the experience of others, particularly in the medical school and from the intellectual depth of understanding of the educationalists in the University who we consulted.

Dealing with a work based learning course with students located throughout the UK has only been possible with good ICT and, more importantly, new habits of communication. Whilst most British Law Schools use ICT and web based applications in their internal teaching through an intranet, there hasn't been much extranet development in Law Schools making CLE available on line. However, for CLE to busy professionals, the greater availability of capital to the private sectors has made them leaders in this potentially lucrative market.

Thirdly, what of the highly prized rigour of academic legal analysis and discourse? Most law teachers have a commitment to an intellectual method which they are trying to inculcate into their students:

“I'm trying to get them to think like a lawyer- I don't mean a lawyer in practice”

This posits a set of internal academic skills which are not for practice and not even intended to be transferable. In conversation, a seasoned training partner at a major English law firm rejected this view:

I want them to be like a lawyer. I want them to think like a client.

It is clear that the disinterested analysis of the academic lawyer is not what the mainstream CLE market wants. It may not even be what the young lawyer needs. Senior law firms in England recruit large numbers of non law graduates into their firms. Their view is that young lawyers do require a rigorous intellectual method but this can be gained through the study of other disciplines as well as law.

The legal practitioner has had to gear his or her service to the needs of the market. Mindful of the competition from other professions, tax lawyers tend not to give raw expositions of new tax statutes to clients but to offer them tax efficient business structures or models. The competition lawyer does not expound on the intricacies of EC competition law to the haulage contractor, he sells him a competition compliance policy which in practical terms keeps him out of trouble. At the other end of

the professional spectrum, throughout South America popular lawyers engage in struggle on behalf of the oppressed which link both legal and political action.

The legal academic dealing with CLE will have to perform similar acts of intellectual integration. CLE and CPD does not mean bringing your academic wares into the outside world. It means engaging with that world. It is the natural extension of contextualism. The Warwick Diploma's courses on evidence and criminal procedure, besides covering the analysis of statutes and case law, deal with the practice of health and safety enforcement including practical sessions on notebook discipline, bagging and tagging exhibits for court and the use of cumbersome police tape recording equipment. The courses work on extended case studies drawn directly from practice, which require the students to engage with their roles and practice at many different levels.

Many academics would see the intellectual content of such courses as essentially less rigorous, even less noble than their traditional calling in the closeted University. Descending from the *begriffshimmel*, the heaven of concepts, to the mundane world of ordinary mortals can be unpleasant but it has its own intellectual stimulus. The descent is not to the level of craft skills or mechanical application, it involves beginning with the application and disclosing by critical analysis, the hard body of principle underneath.

For the gay community, the process of coming out does not simply mean entering an alien new world. Culture is fluid and ever changing. The culture from which they came and to which they go, both are transformed by the process. So the closeted world of the traditional Law School must recognise these developments as an essential change of ethos. In respect of Warwick's foray into the outside world, dissenters on both sides still exist: old guard academics regard us as going down market (though they welcome the extra income), the opposition within HSE regards us as academicising training. We are unapologetically basing the training on a new foundation drawn in large measure on the traditional values of academia: rigorous research skills; evidence based practice; understanding of the nature of discretion; consciousness of the complexity of decision making and, perhaps most importantly, the habits of critical reflection. We are, hopefully, producing rounded enforcers with sophisticated legal skills and the balance of engagement and detachment which characterises the true professional.

# Challenging Exchange Programs: Studying the Common Law and Civil Law Systems in a joint law degree

*By Marie-Luce Paris-Dobozy*

## CHALLENGING EXCHANGE PROGRAMMES: STUDYING THE COMMON LAW AND CIVIL LAW SYSTEMS IN A JOINT LAW DEGREE



I am a citizen of the world, known to all and to all a stranger (Erasmus)

### Introduction

Apart from foreign languages, most academic subjects be they economics, history, sociology, philosophy, chemistry, marketing, and so on, need to incorporate an international approach to the study of the subject. It is incumbent on tertiary academics to ensure that their teaching and scholarship are in contact with the best international studies in their field . Even the study of law, which may be regarded as the most country-specific discipline of all, naturally offers an international perspective. The demands of globalisation have put greater pressure to internationalize the curriculum in order to prepare students and future lawyers for global citizenship. This is particularly relevant in the context of the European Union where the Erasmus and other exchange programmes have been particularly successful in transforming the mind-set of participating students and staff towards legal studies and giving the law curriculum a truly European dimension. A particularly challenging type of programmes has been regarded as a potentially useful tool to help further the internationalization of European higher education and to make the European Higher Education Area (EHEA) a reality: these are joint degrees generally defined as degrees being awarded on the basis of completion of a study programme established and provided jointly by two or more higher education institutions, normally located in different countries .

The object of the paper is to offer a case study on a particular joint law degree which involves the study of the two major legal systems of common law and civil law – namely the University College Dublin Bachelor of Civil Law/Maîtrise (Irish/English law

and French law) . The first part is general and deals with the relevance of joint degrees in legal education in the European context in view of recent developments within the EHEA and the European Judicial Area. The second part focuses on the challenges and benefits of teaching and learning in the degree with a focus on programme and curriculum design, as well as teaching methods. The experience of setting up and running the BCL/Maîtrise is put into perspective with the existence of two other exchange programmes, namely the Bachelor of Civil Law with French Law Programme and the Erasmus Exchange Programmes with French speaking universities. Beforehand, preliminary observations on the object of study are presented.

#### Object of Study: The Bachelor of Civil Law/Maîtrise

The Bachelor of Civil Law/Maîtrise Degree was put in place in 2005 and the first cohort of students will graduate in September 2009. It is a four-year full-time degree, and a dual degree in that it offers students the opportunity to obtain qualifying law degrees in two jurisdictions, namely a Bachelor of Civil Law Degree from University College Dublin (Ireland) and a primary French Law Degree, the Maîtrise (Master 1 in the LMD structure ), from the University of Paris II Panthéon-Assas (France). Students spend the first two years at the UCD Law School studying for the BCL where they take the normal range of legal subjects offered in the programme; in addition, they take French Public Law and French Private Law subjects in first and second years respectively as a preparation for their studies in France. The final two years of the programme are spent in the Faculty of Law at Paris II studying for the Maîtrise . The programme does not involve a simultaneous exchange of students between the two institutions and does not fall within the Erasmus framework. It is nevertheless a type of exchange programme as it involves a flow of students from one institution to the other between year 2 and 3 of the programme.

It must be noted that the BCL/Maîtrise has been preceded by the putting in place, in 1999, of another degree which allows for the study of French Law. The Bachelor of Civil Law with French Law is also a four-year full-time degree which curriculum is designed to give students grounding in Irish Law together with a general education in French Law. It gives them a critical understanding of legal institutions in both Ireland and France along with the scope and application of legal rules and principles. The first and second stages include most of the core modules of the Bachelor of Civil Law Programme, as well as subjects in French Law. The third year focuses exclusively on French Law and is spent at one of the French university partners (where students enjoy the status, administratively speaking, of Erasmus students). The final stage of the programme includes a range of options in Irish Law, as well as two semester-long compulsory modules in French Law . All these kinds of programmes – dual degrees and Law with French Law (or even Law with French language) degrees – have been in existence for quite some time in some other British and Irish universities .

Some aspects are common to both programmes in terms of teaching. While students follow the Irish Law courses together with all the other students in the standard Bachelor of Civil Law, they are taught French Law subjects in smaller groups which group together in the same class students in the BCL/Maîtrise and students in the BCL Law with French Law. These are indeed selective degrees and the maximum number of places is sixteen in the BCL Law with French Law and ten in the BCL/Maîtrise – the particularity being for the latter that five students are selected via the CAO process and the five others by the partner university, Paris II . Thus, there is a mix of nationalities with a class made up of Irish and French nationals . The other aspect worth of note is that French Law topics are taught through French by qualified French lawyers. The aim of both programmes is obviously to broaden the law

curriculum by exposing future common lawyers to civil Law (and vice et versa in the case of the BCL/Maîtrise) and enabling them to acquire key competencies in another European legal system and terminology. The School of Law also offers the normal range of Erasmus Programmes with a number of agreements with French speaking universities in France, Belgium and Switzerland as well as the possibility to study French language as an elective in the standard BCL.

#### Relevance of Joint Law Degrees: The European Context

Even though it did not influence directly the decision to set up the BCL/Maîtrise and the other French Law exchange programmes, a range of policy initiatives taken by the European Union institutions and other actors certainly created an encouraging, if not pressing, context. There are three key aspects which come out of the different commitments undertaken in this regard in which the strengthening of the European dimension in the sector of higher education is the pervasive objective : first, the imperative to reach excellence in teaching and learning; secondly, the necessity, especially in terms of diversity of programmes offering, to learn languages; thirdly – and directly concerning law – the importance of learning about other legal systems.

#### Targeting excellence

First, targeting excellence is set out in general terms in the Lisbon Strategy (March 2000) which is Europe's response to globalisation. The European Union has committed itself to becoming by 2010 "the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion". Concerning education in particular, the ministers of Education agreed on shared objectives and, together with the European Commission, endorsed a ten-year work programme with the overall goal being that the European Union becomes a world leader in terms of quality of its education and training systems. In this framework, three major goals are to be achieved for the benefit of the citizens and the European Union as a whole – to improve the quality and effectiveness of European Union education and training systems, to ensure that they are accessible to all; and to open up education and training to the wider world. Concerning tertiary level institutions, the European Commission has also put the emphasis on the imperative of quality and excellence in higher education as an element of modernisation and attractiveness that would enable universities to make their full contribution to the Lisbon Strategy. More specifically, mobilising all Europe's brain power and applying it in the economy and society will require much more diversity than hitherto with respect to target groups, teaching modes, entry and exit points, the mix of disciplines and competencies in curricula, etc.

These developments are in line with earlier European initiatives aimed at promoting greater cooperation and harmonisation of programme frameworks in higher education. The Sorbonne Declaration (25 May 1998) first stressed the Universities' central role in developing European cultural dimensions. Emphasizing the creation of a European Higher Education Area (EHEA) as a key way to improve external recognition of degrees and facilitate student mobility as well as employability, it encouraged the harmonization of the architecture of the European education system. As the other, and most well-known, intergovernmental initiative in this area, the Bologna Declaration (19 June 1999) saw the ministers of Education of twenty-nine European countries commit themselves to more specific objectives of primary relevance in order to establish the EHEA and promote the European system of higher education world-wide. The Declaration initiates the so-called Bologna process, which is designed to introduce a system of academic degrees that are easy to read and compare, to promote the

mobility of students, teachers and researchers and to ensure quality in education; it is also designed to take into account the European dimension of higher education, particularly with regards to curricula developments, inter-institutional co-operation, mobility schemes and integrated programmes of study and training.

### Learning languages

Developing the European dimension in education is also achieved through the learning and dissemination of the languages of the Member States, as well as the promotion of cooperation between educational establishments. The ministers of Education expressed a specific commitment to that aim when they declared, also in the Sorbonne Declaration, that students should be encouraged to spend at least one semester in universities outside their own country and that they should have access to a diversity of programmes including, among others, development of a proficiency in languages. The commitment has been reiterated on several occasions by the different institutions – in a Europe which will always be multilingual, learning languages opens doors. For individuals, it can open the door to a better career, to the chance to live, study or work abroad, even to more enjoyable holidays! For companies, multilingual staff can open the door to European and global markets. The European Commission declared in its 2004-2006 Action Plan for Promoting language learning and linguistic diversity that higher education institutions played a key role in promoting societal and individual multilingualism. All students should study abroad, preferably in a foreign language, for at least one term, and should gain an accepted language qualification as part of their degree course. The European dimension in studies has become an increasingly attractive option and course pairings such as a European language combined with business, economics or law have indeed become more popular.

### Learning about other legal systems

Lastly, recent developments in the European Judicial Area with the introduction of the European arrest warrant, the development of Family Law and Civil Law in general at European level, as well as the principle of mutual recognition of judicial decisions, have made it necessary for legal practitioners (judges, prosecutors and lawyers) to develop mutual knowledge of the different judicial systems in order to establish genuine mutual trust. The European Union has thus been focusing on judicial training in specific areas, including the improvement of mutual knowledge of the judicial systems of the Member States and improvement of language training.

Legal academics and other actors in law schools widely acknowledge the necessity to develop the comparative dimension in legal studies, and comparative law is regarded as the challenge for legal education in Europe. According to the European Law Faculties Association (ELFA), “[w]ith the development of European law, including European private law, it is important that students throughout Europe develop a comparable understanding of methods of interpretation of statutes, of the content of other national laws and especially of the general principles of law on the European level”. Evidently, curricula in law schools must not be restricted to the study of national law, and not even to national law combined with a certain seasoning of comparative law. Professor Storme of the University of Ghent goes further when he asserts that law schools must offer “a curriculum where the basic courses present the national law in the context of those legal ideas that are presenting the legislation of different nations, that is, against the background and the principles and institutions that the European nations have in common”. His perspective on the comparative dimension is interesting as for him “it has to be applied, not for the purpose of European unification, but for that of improving the national law” as “it is through the exploration of foreign systems of law

in the EU that a country's own rules can be improved and sharpened up". In this regard, there is a strong encouragement towards double degrees as a way to give concrete realization to the comparative dimension in legal studies. Studies on joint degrees in general show that their development "is relevant to virtually all the goals of the Bologna process and will boost the development of joint quality assurance, recognition, and the transparency and convergence of higher education systems throughout Europe, as well as student and staff mobility, graduate employability, the European dimension of studies and the attractiveness of European education all around". The question whether it is to be promoted at bachelor/undergraduate or master's/postgraduate level remains open, although some authors argue that the master's curriculum provides the ideal time for foreign language programmes and joint degrees with other universities.

After these general considerations, I now turn to more specific developments about the double degree in question. The aim is to give an overview of the challenges and benefits involved in teaching and learning in the programme.

### Double Exposure: Challenges and Benefits of a Dual Law Degree

#### Pedagogical and existential challenges

The experience of the BCL/Maîtrise, as well as, for a longer period of time, the BCL Law with French Law, has involved different kinds of challenges. The difficult tasks of administrative and practical nature, such as recruiting staff (French qualified lawyers and tutors) or dealing with fees and accommodation matters are left aside. Two types of issues will be concentrated on: first, teaching and learning issues with mainly concerns about programme and curriculum design, and secondly, more 'existential' issues relating to the *raison d'être* and sustainability of the degree programme.

First, concerning the programme, the choice was deliberate to set up the BCL/Maîtrise as a dual degree which completion leads to the award of two degrees that are two separate national qualifications in two different legal systems (even in three, if we consider that students are able to practice in England and Wales when awarded the BCL/Maîtrise) – one representing the common law system, the other the civil law system. This is one of the main "marketing" arguments about the programme. What about the recognition of the degree? While acknowledging the recognition problems of joint degrees, the BCL/Maîtrise will be recognized for its two components parts, the BCL and the Maîtrise, or Master 1. Other specific issues have arisen though, especially regarding the BCL component, in terms of degree classification and feasibility of a joint transcript where marks/grades obtained in both degrees will appear.

In terms of curriculum design, it is first of all worth reminding that Irish universities enjoy academic freedom with regard to their course provision, course content and the design of their curricula. Even though quality control parameters seek to ensure the quality of what is being proposed, and whether there is a legitimate need for any proposed courses and curricula, no guidelines exist regarding a minimum common curriculum for tertiary level. Yet, a certain number of constraints have had to be taken into account in the case of the BCL/Maîtrise. These are twofold: those relating to the choice of French Law courses, on one hand, and those relating to the language requirement, on the other hand.

The French Law courses to teach are to be carefully selected so as to offer an adequate balance with Irish Law subjects. This is not only important in terms of workload, but also in terms of academic consistency. Concerning the workload, French Law topics are taught in addition to Irish Law subjects – many of these being in fact imposed in the first stages of the study programme because of the requirements of the

professional bodies: the Law Society of Ireland and the King's Inns . This has been most problematic in the case of the BCL/Maîtrise because students have to study in two years (instead of three in the case of the standard BCL programme), not only the core subjects required by the professional legal bodies , but also the required subjects which will give them their basic grounding in French Law to be able to catch up in year three in France. The danger in selecting courses is to cover too much as it is well acknowledged that "the greatest enemy of understanding is coverage" . The preferred option has been to select courses for which students are offered the equivalent in Irish Law like, for instance, Constitutional Law in year one, and Law of Tort and Law of Contract in year two. French Family Law is not offered for example, and the curriculum content instead insists on French Law of Tort and Law of Contract which will give the substantive and methodological background to understand other topics like Company Law, Business Law, and Banking Law etc. This is not only important as a preparation for studying in France, it also allows – and this is the second point about academic consistency – for 'correspondence' with Irish Law. The kind of parallelism created in the curriculum allows the comparative dimension between the Irish and French legal systems to emerge. Students should be able to compare and contrast legal concepts, principles and rules of both systems hence reaching a rather high level of understanding in the topics taught . While certainly limiting the flexibility of course content, these constraints can also be regarded as useful elements to formulate and clarify curriculum objectives.

Another major constraint is obviously the language requirement. Students in the BCL/Maîtrise have to attain a certain level of written and oral legal French to be able to follow increasingly complex and demanding French Law courses at UCD and at the French partner institution. The study of law is intrinsically linked to the language through which it is taught for it is true that learning about another legal system is a matter of becoming acquainted with the jargon that goes with it. This is quite different from other disciplines: a student will learn the same mathematics, medicine or even philosophy, whether studying in France, Ireland, or elsewhere, even though the approach and methods used can be slightly different. Teaching and learning French Law in the context of a common law degree obviously requires the offering of a solid grounding in French legal terminology and methodology. It is not the object of the present paper to give a detailed account of this particular question, but the author's experience of the degree represents a good example of how curriculum design is an evolving matter and how in particular the teacher has to be able to corner down students' profiles and needs in this regard (particularly regarding the different levels of French at entry in the programme and levels of progress, as well as the fact that the class is bi-national).

Apart from the selection of topics, including the language element, curriculum design also implies the issue of how to teach and learn the selected topics. Limiting again the scope of the developments in this respect, attention is drawn to legal cultural differences between common and civil lawyers. Indeed, the way to think about law and develop legal rules is very different in each system. The best example is the method of analyzing a case. This is a fundamental skill to acquire in a common law system based on judge-made law where decided cases are binding for the future according to the rule of precedents. In Irish Law schools (as in British Law schools), the teaching and learning method is a bottom up approach which consists in examining a certain amount of case law in order to determine how the rules and principles of law are applied to the facts of the case under scrutiny and see if these will give an acceptable solution in similar cases. On the contrary, the French legal system is characterized by a rigid, legalistic and rule-oriented approach to law and legal sources. It is a top down approach to the study of law which consists of learning about laws, rules and

principles, in the first place, and apply them to the legal issue at hand, in the second place. In other words, the study of Irish Law begins with the study of case law from which to derive principles, whereas the study of French Law starts with the learning of principles that can be applied to concrete situations. The interesting finding coming out of the teaching experience in that matter is that students certainly benefit and appreciate being taught according to two different methods – either case-based (in the case of Irish Law subjects) or rule-based (in the case of French Law subjects) – as this might suit various learning styles in legal studies. Looking at theoretical underpinnings of curriculum design, our experience has led to reflect on different kinds of approaches in this regard – from a discipline-based approach in core French Law subjects in the first years of study where the curriculum follows the structure of knowledge in the discipline, to what is referred to as a “socially critical approach”, in which the curriculum is designed to develop a critical consciousness of society and its institutions – in our case, situating knowledge at the crossroads of two different cultural legal systems.

These observations about programme and curriculum design necessarily prompt more existential issues, especially when the dual degree in question is put into perspective with the other exchange programmes offered by the School involving French legal studies. Two main questions are considered here: why was the dual degree put in place in the first place? What about the sustainability of a whole range (or gamme) of French Law programmes in a Law school?

First, about the *raison d'être* of the BCL/Maîtrise, it implies to dig a little bit into a strategic decision made back in 2005. When the BCL/Maîtrise was put in place, two other exchange programmes allowing for the study of French Law were already in existence – namely the BCL Law with French Law and the Erasmus exchange programmes with French partner institutions. The setting up of the dual degree was regarded as a “natural” development of already strong links with French partner universities and the presence of three full-time French qualified lawyers in the School (at the time). There was definitely a competitive advantage to develop such a degree allowing the School to come into line with the most prestigious British Law Schools (to our knowledge, the UCD Law School is the only one to offer such a dual degree in the Republic of Ireland). Dual degrees are indeed highly regarded as they attract the best students. Learners and future practitioners are attracted by the fact that it offers the possibility to practice in two different systems in two languages. There is undoubtedly a professional aim to the degree which is to produce double skilled lawyers. About the academic aim of the degree, there is a little bit of a paradox though. It is true that studying two legal systems (in parallel during the first two years and then focussing more intensively on French Law in the last two years of the programme) is academically challenging and allow for deeper understanding of both systems. However, the curriculum is heavy but limited in scope as students must achieve in two years what the others do in three. There is no room for options and electives (that could lead to more interdisciplinary learning) or research projects at the later stage of the BCL degree part. This is quite paradoxical as students in the dual degree are high achievers and would be perfectly suited for more challenging academic topics. It seems that the BCL/Maîtrise, like other dual degrees in other institutions, reflects this tension between the different types of legal education – professional or academic. The setting up and running of the UCD dual law degree, even though limited to two jurisdictions and to a small number of selected students, has necessarily entailed a wider reflection on the nature of legal education. The issue revolves around the delicate balance to be implemented between the outcomes or skilled-based approach to legal education and the content approach – both have to be found for this kind of degree to be really meaningful, professionally and academically speaking.

Secondly, about sustainability, one issue in this regard is the language and the ability to recruit students with a sufficient level of French to follow the course. Whereas French students have done rather well in understanding common law subjects through English, Irish students have generally struggled more in French Law, not because of the Law but because of the French. This observation has to be put into perspective and the fact is that Irish students are somehow quite gifted for language learning or, at least, prepared for it; they indeed learn another language from a very young age and some of them are already totally bilingual in Irish-English when they get into the degree. This is an interesting element to take into account when reflecting on students' ability to think and conceptualise in a foreign language .

Another issue concerns the sustainability, in the long term, of the whole range of exchange programmes involving French Law studies. The game can be described as follows: the BCL with one Erasmus year spent at a French university could be branded as an Irish Law degree + (the "plus" being the study of the foreign legal system abroad – on location so to speak); the BCL Law with French Law as an Irish Law degree ++ (involving four years of French Law studies of which one year is spent studying only French Law); finally, the BCL/Maîtrise which could be branded as a +++ degree with four years of French Law studies, two of them intensively at the French partner institution. The legitimate question came up as to whether the BCL/Maîtrise was to replace the BCL Law with French Law as a more interesting opportunity for students and more prestigious degree for the institution. Various issues underline this concern. These will not be discussed in details here but relate, among others, to resources, teaching staff, size of classes and teaching methods, diversity of subject offerings and discrepancies in curricula (between the BCL Law with French Law and the BCL/Maîtrise), etc. However, we would argue that all three degrees must be maintained including the BCL Law with French as they form a coherent framework of programmes with valuable advantages; one of them is the choice they offer which suits different levels of achievement (in terms of number of points for entry in the different programmes), different academic interests (in terms of the depth of learning French Law) as well as different career prospects (obtaining an Irish degree or a dual qualification). These comments logically lead to more general considerations about the benefits of teaching and learning in a dual degree programme.

#### Multifarious benefits

The idea here is not to provide vain comments, but rather to end up on a positive reflective note. The benefits gained from the existence of such a programme can be considered from a triple point of view: from the student's point of view, from the lecturer's point of view and from the institution's point of view. (Some points have already been mentioned above).

First, from the student's perspective, the advantages are threefold: in terms of teaching format, students benefit from small group teaching; in terms of substance of the course, students benefit from the comparative dimension; they also gain career advantages by being awarded a dual qualification. Students certainly benefit from small group teaching which allows all the support they need to learn in another language. Reflecting on this kind of teaching has led to a certain degree of innovation in teaching methods and more focus on learning. In this regard, as the traditional combination of lecture/tutorial cycles was deemed not satisfactory, an overhaul of the French Law courses offered in the BCL/Maîtrise was undertaken (to be put in place next academic year). The methodology of the review (which also included the BCL law with French Law curriculum) took into account not only formal (mainly students' questionnaires) but also informal feedback received from various interlocutors, in particular the former Director of the Dual Degree in Paris II, Professor Fauvarque-Cosson. Two main

sources were looked at to redesign the course: first, the offering of French Law subjects in British (Hull, Leicester, Norwich, Edinburgh, Cambridge, King's College London, to name a few) and other Irish universities (Trinity College Dublin and University College Cork); secondly, the courses offered in years 1 and 2 in Paris II to French students – this was used to determine what the BCL/Maîtrise students ought to be studying if they were studying over there. Then, courses were cross-checked and the common denominator of what ought to be taught in French Law could be determined. The most radical change brought about was the adoption of a seminar format of teaching to allow for more students' participation and group work.

In terms of substance of the course and career prospects, a short data gathering aimed at students in the BCL/Maîtrise (as well as those in the BCL Law with French Law) reveals that they “appreciate” the comparative dimension of the course which makes their degree different from others. Although first year students admit that this is too early in their education to be considering in depth the differences between the two legal systems, second year BCL/Maîtrise and final year BCL Law with French Law are more assertive. The findings show two types of responses: (1) students who acknowledge the “intellectual” benefits of being taught two legal systems, (2) and students who identify the “career” benefits. In the first category, students acknowledge that “the differences between the systems have enhanced [their] interest in certain areas of Irish Law, e.g. Constitutional Law” or that they “can compare and evaluate Irish Tort Law with the more liberal notion of “delictual” responsibility in France (sic.)”. Some also say that it was useful for their understanding of European Union Law which they study in second year. In the second category, students stress that “the ability to compare in Irish Law exams and essays allow [them] to differentiate [themselves] from the majority of the class”. For most of them, it will – hopefully – offer further alternative avenues in terms of employment. Studying in another language certainly diverts students from the other national-law based subjects, but in a positive way giving them a “change of scenery”. Academically speaking, it also develops a sense of tolerance, getting them acquainted not only with different methods in teaching and learning, but also with different approaches about the content and development of their discipline. That is certainly an important aspect to take into consideration when preparing students for European and global citizenship in the changing world of higher education.

Secondly, from the academic's perspective, the existence of the two French Law programmes has certainly encouraged my reflection as a teaching practitioner, but also as a lawyer. In educational terms, connecting teaching, learning and research in the area of legal education has led me to research into the “transsystemic method” which is a creative and challenging new approach to legal education put in place by the McGill University Faculty of Law (Canada). The curriculum proposed in the law degree “prepares students for careers that increasingly require knowledge of more than one legal system”. In this sense, it quite resembles what is offered in the BCL/Maîtrise. However, it is quite innovative in that it explores the common law and civil law systems in an integrated fashion, encouraging students from the very first year to compare and critically evaluate the two traditions. This is an area which deserves further exploration in the sense that it points out the expanding possibilities of teaching and learning in joint law degrees – but on a more global scale which is not limited to the European context.

From a scientific point of view on the other hand, the experience of the two degrees has reinforced the belief that students' circulation and exchanges are crucial to the development of law/Law. The knowledge of other legal systems contributes to the coming closer of the different legal systems in Europe which, eventually, contributes itself to the renewal of a sort of European *jus commune*. This European “common law” is based on common reasoning and interpretative methods which will allow for innovative perspectives on common legal issues likely to arise in all the Member States

of the European Union . This also in line with a more general evolution of the teaching and practice of law which seeks to adopt a “global” approach. Due to world-wide interactions between legal systems, the constitutive elements of domestic law cannot be envisaged and understood without knowledge of other legal systems and transnational solutions . It is a scientific issue about the quality of knowledge in law, but also an issue for the practice of law. Future lawyers must be prepared to practice on a world-wide scale and adapt to different contexts .

Lastly, from the institutional point of view, there is undeniably a competitive advantage for UCD School of Law as pointed out above. Indeed, the commitments and measures taken at EU level have led to some fierce competition between European universities as far as the training of future lawyers – and hence future judges and prosecutors – is concerned . And when one observes that, in the United Kingdom which is the only other common law country in Europe, over half of law faculties provide courses or programmes in French Law in some form , it is quite clear that the promotion of civil law degrees in Irish universities is an interesting opportunity . Yet, competition for competition’s sake is meaningless. The positive side in the expansion of this kind of programmes is the fact that it can foster exchanges between students and lecturers of the different institutions involved in the different countries.

### Conclusion

Today, “no European country can be isolated legally and judicially speaking” . In an European Union aiming at fully taking up the challenges of globalisation, it is crucial to train a body of practitioners of which each member has at least a basic grounding in a legal system which is not his or hers . There is therefore a pedagogical and professional responsibility to open the teaching of law to Europe and international perspectives, and not to concentrate on domestic law .

Although involving different challenges, especially in terms of programme and curriculum design, as well as in teaching methods, the BCL/Maîtrise gives a European dimension to legal studies. It seeks to offer to students a unique training addressing the specific demand arising out of the creation of a European legal culture, but also giving them an opportunity for a more global career at international level with the knowledge of both common law and civil law systems. When one observes that the process of globalisation too frequently leads, or is susceptible to lead, to uniformity, the fact that both degrees operate in the European context is interesting as it is bound by this continuous tension between enhancement of mobility, on one hand, and respect for diversity, on the other hand.

# External Examiners as Quality Assurance Mechanism in Legal Education

By Jack Osimiri, Maureen O'Sullivan, Nlerum Okogbule, O.V.C. Okene

## **Abstract**



This paper appraises the regulatory framework governing the external examiners system as a quality control mechanism in legal education in Nigeria in contradistinction with UK, Ireland and New Zealand. It examines the enabling legislation, subsidiary instruments and academic rules made by the Senates of different Universities in order to formulate applicable benchmark. Utilizing the experiences of the authors as internal and external examiners in the LLB degree examinations, it attempts to articulate comprehensive academic practice guide for neophytes undertaking the job of external examining and also for the experienced seniors who have to rehearse the techniques clarified/highlighted. It posits that external examining is a unique and indispensable final stage of assessment--a form of catalyst facilitating the observance of the quality assurance standards stipulated by the regulatory professional bodies of National Universities Commission (NUC) and Council of Legal Education (CLE). The academic practice guide; would facilitate greater understanding of the operation of the system by ensuring that the decision-making responsibilities of external examiners comply with international benchmarks and policies on legal education. Although, this paper concentrates primarily on the above jurisdictions but comparative materials from USA, Canada, Australia, Malaysia, Zambia, Lesotho, Europe, Germany, Netherlands etc shall be utilized to identify the differences, similarities and to assist the growth/development of legal education. It would further highlight the merits and demerits which would assist legal educators realize the quality Assurance objectives and strengthen academic justice delivery system. It concludes by suggesting the retention of this "umpire mechanism of moderation" which ensures the maintenance of "even balance" in academic assessment and advocates effective reform through the use of more responsive external examiners moderations at all levels of the LLB Degree like the UK as opposed to the present practice of limiting it only to the final year.

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## I GENERAL INTRODUCTION TO THE HISTORICAL ORIGIN

Historically external examiners' system is a practice hallowed in the British educational system; first introduced with the establishment of High College 1930-1947 in Nigeria, which later metamorphed into the premier University<sup>1</sup> of Ibadan-- formerly a College of University of London<sup>2</sup> It later gained autonomous<sup>3</sup> status<sup>4</sup>. The origin of the external examiners system is traceable to the regulations of the University of London. Prior to this time, Fourah Bay College<sup>5</sup> Sierra Leone West Africa enjoyed the similar affiliation with University of Durham. It is therefore significant that the rules governing external examiners system originated from academic practices imported from Durahm and London.

The above rules<sup>6</sup> and regulations governing external examiners' system<sup>8</sup> are a mixture of academic traditions and practices although imported from UK; where blended to suit the local circumstances.

## II LEGAL INSTRUMENTS ESTABLISHING EXTERNAL EXAMINERS' SYSTEM.

There are domestic statutes, subsidiary legislations and rules passed by the Senates of individual Universities that merit scrutiny as legal instruments justifying its existence. S.10 EDUCATION (MINIMUM ACADEMIC STANDARDS) ACT 1985 provides

..... "National Universities Commission (NUC) is to lay minimum academic standards for all the Universities in the Federation of Nigeria and accredit their degrees and other academic awards .... in accordance with such guidelines as may be laid down and approved by the NUC from time to time" <sup>9</sup>.

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1. University of Ibadan 50 years anniversary Bulletin (1948 to 1998) pp. 128 titled-- Historical Notes & Development plans of Nigerian Education 1930's to 1980's.
  2. University Colleges in Singapore and West Indies were established in 1948 as Colleges enjoying special relationship with University of London.
  3. University of Ibadan Act 1962.
  4. See brief history of University of Ibadan (2000-2001) Faculty of Law Prospectus pp. 7-9.
  5. Fourah Bay College established in 1864 by University of Durham, was initially to train priests- See Alumni Association News Bulletin (1971) pp. 10-18. University of Durham was established in 1459. Fourah Bay College metamorphed into University of Sierra Leone
  6. University of Nigeria Law (1955) passed by Eastern Nigeria Regional House of Assembly in 1955. The University with campuses at Nsukka and Enugu commenced academic activities in 1960.
  7. University of Lagos Act 1963. Late Prof. Gower was the Pioneer Dean of Law University of Lagos (1963-1966).and was the unofficial Deputy Vice Chancellor.
  8. SS. 9.00 and 9.10 of the NUC course system & Grade Point Average in Nigeria Universities July 1989 pp. 8-9.
  9. Ahmadu Bello University Law 1963 passed by the Northern Nigeria Regional House of Assembly headed by Sir Ahmadu Bello its then Premier.
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By virtue of the above, NUC formulated minimum academic standards for all the courses taught in Nigerian Universities and accredited or re-accredited the degrees in accordance with such guidelines. The role of external examiners<sup>10</sup> is one of the minimum standards<sup>11</sup> stipulated in the APPROVED MINIMUM STANDARDS IN LAW<sup>12</sup>. This requirement is elaborate and provides thus: -

....."Most Universities use External Examiners to moderate examinations and final year projects and to assess programmes of study. In the professional programmes like medicine, veterinary medicine and pharmacy, External Examiners are used in all the major subject areas such as pharmacology, Theriogenology, Community medicine etc. With the introduction of the course credit system, most examinations will now be semesterly and at the end of the course. It will be inexpedient to invite External Examiners at the end of each of those examinations considering rising costs and dwindling financial resources"<sup>13</sup>.

The above subsidiary legislation made by NUC pursuant to S. 10 Education (Minimum Academic Standards) Act 1985 recognize the validity of the use of External Examiners for all courses in Nigerian Universities. The corollary of this requirement is that any result not moderated by external examiners as "Umpire holding even balance" is not valid for the purpose of the award because the requirement of the law has not been fulfilled. In essence NUC recognizes the essence of giving statutory backing to the functions and use of External Examiners. As regards what stage the External Examiners' should be used in the LLB degree examination, the NUC approved thus:-

..... “External Examiners should be at least only in the final year of the undergraduate programme to assess final year courses and projects and to certify the overall performance of the graduating students and as well as quality of facilities and teaching. However, the existing practice of using External Examiners for major subjects areas in the professional programmes should be continued”<sup>14</sup>.

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10. Cap. 16 (1985) as amended by Cap. 49 (1988).

11. See Jack-Osimiri U, and Okogbule N.S.-“Role of External Examiners and NUC Minimum Standards”-unpublished paper presented in Nigerian Bar Association summit on the Future of Legal Education (2006) 02-04 May pp. 5-6. Sheraton Hotels Abuja.

12. Approved in July 1989 with the commencement date from the 1990/91 academic session till date.

13. All other disciplines like Accountancy, Medicine, Agriculture, Engineering, sciences, social societies etc were similarly dated July 1989.

14. SS. 9.20 Appendix 1 (3) NUC Course Units System & Grade Point Average (1989) pp. 8-9.

The purport of the above subsidiary legislation is that the use of External Examiners is mandatory at least for the final year LLB degree programme. Final year embraces first and second semesters of 500 LLB examinations. It is however very surprising that some Nigerian Universities are interpreting this wrongly to mean only second semester examination. It is submitted that such parochial interpretation does incalculable injustice to confine external examiners only in the second semester would restrict the clear wordings of the statute. This line of jurisprudential reasoning is supportable by the application of the legal maxim “*expressio unius est exclusio alterium*” which literarily means that the express mention of one thing of a particular class may be regarded as silently excluding all other member of that class not mentioned<sup>15</sup>. In the case of *OGBUNIYA V. OKUDO*<sup>16</sup> the Supreme Court of Nigeria held that an express provision in an enactment excludes any stipulation which would otherwise be implied with regard to the same subject matter under this maxim. From the foregoing, it is clear that the External Examiners must cover first and second semesters in the final year in order to be purposeful, meaningful and fulfill the requirement of Law. This line of interpretation is in consonant with S.4 (3) (a) of CRUTECH EXAMINATION REGULATIONS 2000<sup>17</sup> which provides that External Examiners shall moderate examinations for both semesters of the final year. The NUC minimum academic standards have the status of subsidiary legislation or delegated legislation and its observance is strictly mandatory<sup>18</sup>. Accordingly, the academic regulations of some Universities<sup>19</sup> which confine External Examiners’ jurisdiction to only second semester contravenes S. 10 Education (Minimum Academic Standards) Act 1985. By the doctrine of covering the field; where the Federal Government of Nigeria validly legislated on a matter, any other component state legislation on the same matter<sup>20</sup> is void<sup>21</sup> to the extent of the inconsistency<sup>22</sup>.

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15. Cross on Statutory Interpretation (1995) (Butterworths) pp. 120-125; Maxwell on Statutory Interpretation 12th Edition pp. 293-299 (Sweet & Maxwell London).

16. (1979) 6-9 SC 32 at 49. Tofi V. United Bank for Africa Ltd (1987) 3 NWLR (pt. 62) 707.
17. CRUTECH (Cross Rivers State University of Technology Calabar Nigeria).
18. International Bank for West Africa Ltd.. V. Imano (Nigeria) Ltd. (1988)3 NWLR (pt. 85) 633 at 638.
19. See for example S. 9 (1) (7) Enugu State University of Science & Technology (1992) Academic Regulations. ESUT is a State University under the proprietorship of the government of Enugu State of Nigeria by virtue of the Law passed by its House of Assembly and assented by the Governor.
20. Onyike V. Eastern Nigeria Assets & Liability Agency (1974) 10 SC 77.
21. Military Governor Ondo State of Nigeria V. Adewumi (1988) 2 NWLR (pt. 82) 280 at 285 (SCN).
22. Attorney General Ogun State of Nigeria V. Aberuagba (1985) 1 NWLR (t. 8) 20 (1997)1 NWLR (pt. 1)51 at 55-56.

The NUC subsidiary instrument making External Examiners mandatory for all Nigerian Universities being a Federal legislation passed by the Nigerian parliament (National Assembly) consisting of Senate and House of Representatives and assented by the President would override and prevail<sup>23</sup> over states Laws passed by Enugu State House of Assembly/assented by the Governor in case of conflict on the same subject<sup>24</sup>. In line with this, most Universities in Nigeria retain External Examiners for both first<sup>25</sup> and second semesters of the final year LLB degree<sup>26</sup> examinations.

Under S. 70 Further & Higher Education Act 1992 (UK) and S. 39 Further & Higher Education (Scotland) Act 1992 now S. 13 (1) FAHESA 2005 require all the Universities to establish the Academic Audit Unit-a function later assumed by Higher Education Quality Council (HEQC) which established Quality Assessment Committee (QAC) concerned with enhancement and assessment of quality. The Quality Assurance Agency for Higher Education (QAA) was established in 1997 the successor to the QAC. In discharge of its public statutory duties to safeguard sound standard in higher educational qualifications, continuous improvement in the management of the quality of higher education, it advises Government on grant of degree awarding powers or status to Universities and higher educational establishments. It used peer review processes utilizing teams of academics, eminent persons drawn from industries, professional bodies to conduct audits, reviews, and institutionalized external examiners as watch-dog to ensure standards are even across Higher Educational Institutions (HEI's) using Performance-indications. This is QAA Code of practice for the assurance of academic quality and standards:- a guidance for good practice for Universities and Colleges relating to the management of academic standards and quality<sup>26A</sup>. The code of practice has 10 sections covering postgraduate research programmes, collaborative provisions dealing with flexible, distributive learning (including E-learning), students with disabilities, external examiner, academic appeals, students complaints on academic matters, assessments of students, programme approval, monitoring, reviews, career education, information, guidance, placement learning, recruitment and admonishing. This is a subsidiary legislations made by QAA which like the minimum academic standards in Law made by NUC in Nigeria; have similar effect. External examining mechanism is an important feature of European Higher Education Association (EHEA) and QAA is a member of the International Network of Quality Assurance (INQA).

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23. Lakanmi V. Attorney General Western Nigeria (1970)6 NSCC 143 (1970)1 UILR 201 (1970) 4-8 SC 1(1974)4 ECSLR 713.
24. Campaigne General De Geophysique V. Etuk (2004)1 NWLR (pt. 853)20 at 27-28, Rector Kwara State Polytechnic (2007) 15 NWLR (Pt. 1056) 42 at 51 (CA).
25. S. 2 (i) (iv) (a) University of Ilorin Examinations Regulations (2002) (UNILORIN).
26. S. 50 (1) Examinations Regulations University of Maiduguri Nigeria (1989) Calandar pp. 68-69, SS. 11 Examination Regulations Abumadu Bello University Zaria Nigeria (1986 -1990) Calendar pp. 54 at 59-60, S. 11 (pt.2) Examination Regulations University of Lagos Nigeria (1986-1992) Calendar pp. 180-181, S. 16 Examination Regulations University of Agriculture Makurdi Nigeria Calendar (1988-1991) pp. 37-38.
- 26A. Farrington & Palfreyman-Law of Higher Education (2005) pp. 64-69 Oxford Universities Press.

The Council of Europe Legislation for Higher Education & Research (CELFHER) (1991-2000) TABLE 28.1 provides for the legal framework for Higher Education in Europe and external examiners is one of the detailed mechanisms for accreditation and quality assurance. The historical origin of external examiners in New Zealand (NZ) and legal instrument establishing it is traceable to its legal educational development<sup>26B</sup>. Between 1841 and 1930, the legal education was regulated by the Judiciary pursuant to Colonial Ordinances and Acts of Parliaments. In 1930 NZ Council of Legal Education (NZCLE) was established. Under S. 38 Law Practitioner Act 1982 now repealed by Lawyers & Conveyances Act 2006 (operational mid-2008) NZCLE is charged with the duties to preserve uniformity across Law degrees, maintenance of standards, defining, prescribing course of study, arranging and providing practical training/balances between academic and professional legal interests, administering/conducting of certain examination; in addition to moderation and assessment of the law degrees. In the NZ Universities, NZCLE provide annually updated rules governing the operation of external examiners who are called moderators/assessors<sup>26C</sup>.

### III QUALIFICATIONS OF APPOINTEES EXTERNAL EXAMINERS AND TENURE OF APPOINTMENTS

To be appointed External Examiners, the appointees must be distinguished academic with considerable experience/competence in teaching and research at the University and high standing/peer respect in the particular discipline<sup>27</sup>. Usually, such academician must be known for expertise and professional competence over many years usually of the rank of Professor<sup>28</sup> or a Reader but not below the rank of a Senior Lecturer or its equivalent in another University of high repute<sup>29</sup>. This is similar to the requirement in the UK where external examiner must have wide experience and capacity in higher education reasonably acceptable to their peers. It is pertinent to mention here that UK Centre for Legal Education University of Warwick now maintain electronic website (data base) where external examiners can be chosen from the list or panel of senior academics. At the time of their nomination and appointment, their curriculum vitae must evince their degrees, relevant professional qualifications<sup>30</sup>, University titles, previous and current academic appointments<sup>31</sup>.

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26B. New Zealand Council of Legal Education (NZCLE) 15th Report 1st January- 31st December 2005) pp. 9-13.

26C. NZCLE Moderators' Information Booklet (2007) pp.3-8.

27. SS. 3(10)(1) (i) (ii) Ebonyi State University General & Academic Regulations (1999) pp. 33-35, S. IV (3) (6) (ii) (iii) University of Nigeria Nsukka Regulation (1975-1976) pp. 137-138.

28. S. A(iv) Imo State University Owerri Nigeria (1998/99) Students Handbook pp. 299-300, S. 3 (10 (i) (iv) Ebony State University Regulations (above)

29. SS. 3 (10) (i) (ii) (iii) Ebonyi State University General & Academic Regulations (above). S. A (iv) Imo State University (Supra) IMSU,S.A (iv) Abia State University Uturu Nigeria (1999-2001)

30. S. 12 Ahmadu Bello University Zaria Nigeria Examination Regulations (1986-1988) pp. 54-60.

31. S. 48 University of Maiduguri Nigeria (1982-85) Academic Regulations pp. 68-69, S. 12 Ahmadu Bello University Examination Regulations (above) p. 60.

They must be external in every sense of it—they must normally be neutral independent academicians serving or domiciled in another institution<sup>32</sup> unconnected with the host institutions by virtue of full-time, part time, adjunct or visiting appointments. Persons who previously taught in the University cannot be external examiner if any student whom he taught is a candidate in the examination concerned<sup>32A</sup> They are usually appointed on the recommendation of the Faculty Board of Studies/or Departmental Board or the Dean/Head of Department and approved by the University Senate after appraisal of their professional/research works and accomplishments gleaned from the submitted curriculum vitae<sup>33</sup>. Strictly the appointment of External Examiners is initially for 2 years<sup>34</sup> duration, but this could be extended for a second tenure of one more year. The total must not exceed 3 years<sup>35</sup> and no more for a particular individual until 3 years have elapsed<sup>36</sup>. This is in contrast with UK where the appointments are normally for 2 years subject to renewal for further 2 years totaling 4 years and no more. The Senate of any University in Nigeria may, in exceptional circumstance extend the tenure of the external examiner to 4 years. In New Zealand external examiners are called Moderators/Assessors. They are drawn not only from academic staff/law teachers of NZ Universities Faculty of Law but consist of Judges and leaders of the practicing Barristers and solicitors including the Queens Counsel-(QC). They are nominated based on their academic ability and legal experience and the appointment approved by NZCLE. Their appointment may be for indefinite duration provided moderators who wish to continue with the work give notice every August each year to confirm availability for subsequent year(s). Moderators may terminate their arrangement any time by 2 weeks notice to Chief Executive of NZCLE. The justification of the requirement for high academic standing as the criterion for appointment has been defended as necessary to eliminate mediocrity in the quality control/assurance system and promote excellence, which the External Examiners represent. Only those who have attained vital maturity in terms of learning, teaching, research and achieved competence as internal examiners, chief internal examiners etc for so many years in institution(s) of comparable status can better appreciate the academic problems of another host institution(s) where they serve as external

examiners. Knowledge of practical field of experience in the ivory tower would definitely equip them to perform the tedious job.

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32. S. 10 (i) (vi) Ebonyi State University Examinations Regulation (above) p. 34, S. IV (6) (i) University of Nigeria (1975-1976) pp. 178-179.

32A. SS. 12 & 13 Revised Examination Regulations University of Benin (UNIBEN) (1985-1987) Prospectus pp. 170-171

33. S. 49 University of Maiduguri Examinations Regulations (above) p. 68, S. 10 (i) (v) Ebonyi State University Examination Regulations (above) pp. 34-35 (EBSU).

34. S. 111 University of Benin Examinations Regulations (1978-1980) p. 115 (UNIBEN).

35. S. 48 University of Maiduguri (1982-1985) prospectus pp. 68-69 (UNIMAID).

36. S. A (V) Imo State University Examination Regulations (above), S. 11 Ahmadu Bello University (ABU) Examinations Regulations (above) p. 59.

The appointment of external person to moderate the academic performance of students in another University ensures “blind review” and balanced assessment of individuals not familiar with the lecturers and students. Only a neutral, external, independent person with the status of an external moderator can improve justice delivery system to the academic world. This offers insight into the quality of teaching, academic management proficiencies, evaluation, of the adjudicatory techniques of internal examiners, chief internal examiners etc.

The limitation of the tenure of external examiners to a maximum duration of 3 or 4 years is vital to eliminate undue familiarity with the host institution(s) by a particular external examiner, which may possibly destroy the independence so necessary for this assignment. If they have to exercise their skills to scrutinize meticulously, too much familiarity built up in excess of 3 or 4 years could be dangerous. In UK Universities, external examiners moderate all levels of all the courses. In Nigeria, 2 or 3 external examiners moderate all final year courses. In NZ, they moderate only the 5 compulsory law subjects viz:- Contract Law, Public Law, Criminal Law Property Law (including Land Law, Equity and Law of Succession) tort, and legal ethics/professional responsibility and the applicability of the ethical analysis to legal practices in relation to the conflicts of interest, confidentiality, duties of court, loyalty, fidelity etc. The group 3 deals with NZ Law and practice<sup>36E</sup>. While in Nigeria, 2 or 3 external examiners may moderate all the 500 final year LLB subjects, the NZ counterpart is not so limited as they moderate only the core courses which may be in the 1st, 2nd, 3rd or 4th years of the LLB degree examination. In Nigeria, while they are appointed by individual Universities in NZ moderators are appointed not by any of the Universities but by the NZCLE. While the set or group of external examiners serve a particular University that appointed them in Nigeria, the NZ counterparts are responsible for a particular subject throughout the 5 Faculties of Law of NZ Universities and they are strictly appointed to serve a particular subject where they are specialists, since NZCLE has the statutory duty to regulate external moderation/assessments only in the core/compulsory Law subjects outlined above. Invariably, NZ Universities can appoint their own external

examiners in the non-core Law subjects. This by deduction leads to two moderations- one by NZCLE and the others, imposed by the individual Universities.

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36E. See note 36 (above)

#### IV ROLE OF EXTERNAL EXAMINERS

The external examiners<sup>37</sup> system is one of the quality control mechanism designed to facilitate innovative assessments with the aim of getting the best out of the students. In most Universities of the world, there must be external examiner as safeguard to ensure that particular standards are attained or maintained and guarantee that justice is done by an independent umpire scrutinizing the assessments carried out by the internal examiners<sup>38</sup>. They have the responsibilities to moderate, scrutinize, survey, and evaluate examination question papers, answer scripts, assessments, appraisals, ratings, marking schemes set by the internal examiners.

Although, Senates- made academic regulations of various Universities are comprehensive and similar, each and every one of them have something significant. External Examiners have wider roles of implementing the standards set by the NUC, professional bodies, Universities and other stakeholders in the legal education industry. The NUC regulation provides that the external assessment of the students works should be retained at least for the final degree examination and warned or admonished thus:

..... “Efforts should be made to imbue Law Teachers appointed external examiners with the courage and sense of responsibility necessary for them to take their assignment seriously”<sup>39</sup>. From the above, it is apparent that the onerous role of external examiners in holding the balance to ensure maintenance of standard and justice is highly appreciated by the stakeholders of Legal Education. By the precarious nature of their role, they must be painstaking, meticulous, exhibit boldness, audacity, fearlessness in order to discharge their responsibilities. This is the attribute necessary to dispense justice with impartiality, valiantly and resolutely with hardihood. Their components roles need careful analysis. From their highly knowledgeable position and competence acquired over many years, external examiners must have eagle eyes to scrutinize, inspect, investigate and study each answer scripts, student’s projects, exhibiting independent volition and expert academic judgment. Secondly, their onerous task is to use critical evaluation to ensure that the standards set for the award of the degrees are appropriate and cross check compliance by the host institution(s) by reference to national benchmark, hosts Institutions specifications and other relevant information<sup>40</sup>.

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37. SS. 3 (28 (i) (ii) (iii) (iv) (v) University of Calabar Examination Regulation (1986-1990) pp.100-101, SS. 10-14 Ahmadu Bello University Zaria Nigeria Examination Regulations 1986-1990 Calender pp. 54 at 59-60, S. 11 (part 2) University of Lagos Nigeria Examination Regulations (1986-1992) Calendar pp.181-185, S. 16 University of Agriculture Makurdi Examinations Regulations (1988-1991) pp. 37-38 and S. 11 (i) University of Benin Examination regulations (1978-1980) Calendar pp. 144-145.

38. SS. 45,48,49 & 50 University of Maiduguri Nigeria Calender (1982-1990) pp. 67-73.
39. S. 2 (11) NUC Approved Minimum Standards in Law July 1989.
40. Basting, Nigel-External Examining: A view from the Profession paper presented at workshop June 2003 (UK Centre for Legal Education UKCLE) University of Warwick England.

In the NZ jurisdiction, NZCLE regulations prescribe that in order to achieve a measure of consistency of standards in the assessment, there must be a system for examination whereby academic staff of another Faculty of Law; will assess the examination contents and results of another University. All the 5 Faculties of Law in the NZ Universities administer this system on rotational basis. This involves a peer review of the examination assessment papers by someone with expertise in that field, reviews of the samples of answers scripts, advice on grading and attendance at examination meetings.

Neither the NUC nor the Nigeria Council of Legal Education (NG. CLE) saw the necessity to stipulate the comprehensive criteria governing the roles of the external examiners. In England, Wales, Scotland and Ireland there is also no benchmark regarding how the external examiners can exercise their functions, apart from few consultation papers<sup>41</sup>. In view of this lacuna, the various Universities through their Senates formulate their own individual standards. All the examination regulations enacted by the Senates of many Universities collated and appraised show similarities and differences. None of them is comprehensive. In this paper, reliance is placed on precedents and practices identified as good over the years; experienced by academics or learnt from the experiences of colleagues through interactions. The external examiners scrutinise<sup>42</sup> and certify the draft examination questions papers<sup>43</sup> and satisfy themselves that the questions<sup>44</sup> are appropriate having regards to the approved syllabus for the course being examined<sup>45</sup> and the level of the examination(s)<sup>46</sup> before all such examination would take place<sup>47</sup>. In NZ, the moderators' roles in this respect are similarly three-fold viz: ensure that the examination question papers are of satisfactory standard; that there has been adequate coverage of the prescriptions in the syllabus of the course taught by faculty in the particular year and finally satisfy themselves that the standard of the examination paper is comparable between Faculties<sup>47A</sup>. This presupposes that examination questions are settled by the University teachers and certified by external moderators both in NZ and Nigeria in respect of Law subjects.

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41. Bar Council & Law Society of England & Wales (2002) titled "Academic Training of Students for Entry into legal profession" standards & contents:-A consultation paper with the Law Faculties see Bar council Education and Training Website.

42. S. 50 (1) UNIMAID Examination Regulations (1982-1990), S. B (ii) University of Lagos (UNILAG) Examinations Regulations (2000-2004) pp. 157-159.

43. S. 13 (a) ABU Examinations Regulations (1986-1990) Calender pp.56-61.

44. S. 3 (28) (a) University of Calabar (UNICAL) Examinations Regulations (above).

45. S. 3 (10) (4) (i) Ebonyi State University (EBSU) Examinations Regulations (above).
46. S. IV (1) UNN Examinations Regulations (1970-1973) pp. 107-108 (1975-1976).
47. S. B(i) IMSU Examinations Regulations (above) p. 300.
- 47A. S. 2 (1) (i) (ii) (iii) Procedures & Guidelines for NZ Moderators & University Examiners (2007) P. 5-8.

This ensures the maintenance of good standard. Vetting the examination draft questions<sup>48</sup> is a very good quality control mechanism ensuring justice to the students to make sure questions either above or below their levels of studies are not set by internal examiners to frustrate them or give them undue advantage. This vital function ensures preservation of good, standard practices and the external examiners would comment, certify and recommend such alteration(s) or modification(s) as they think fit or desirable and at the end sign and certify the modified question papers<sup>49</sup>. In the exercise of this function, the external examiner ensure equal balance between essays and problem questions which are divided into sections A and B and students are encouraged to answer or attempt questions from both sides of equal relevance. The external examiners as a matter of prudence alter, modify, vary, change or, re-shape examination questions which defy or violate good practice stipulated by NUC and CLE and Universities directives on academic standards. In the performance of these duties, the external examiners act as catalysts, quality control/improvement agent to promote quality learning and assessments. With the decline of societal values and moral decadence attributable to pervasive corruption, and its possible influence in the process of delivering and return of moderated question papers, this function is less in use to avoid leakages of question papers. The Chief Internal Examiners, i.e.- Dean of Law, Heads of Departments, Professors, Readers and other Senior Lecturers now exercise much of these functions to maintain secrecy because of the fear of questions papers leakages through clerks/typists, messengers, lecturers and other intermediaries engaged in the transmission of drafts questions papers to and fro external examiners. With the improved Information and Communication Technology (ICT) and electronic mailing systems now, this role has been resuscitated, as there is direct communication with external examiners. See appendix for the specimen of the moderation of Examination questions by the external examiner. The second role of the external examiner is to mark or moderate<sup>50</sup> the marking<sup>51</sup> or review the marking of the answers scripts<sup>52</sup> and research projects of all the candidates', in the academic discipline involved<sup>53</sup>. This is the most significant quality assurance mechanism ensuring no miscarriage of justice to the candidates as the external examiners in the exercise of their powers could scrutinize candidates answer scripts and appraise the scores assigned to the examinations questions by the respective internal examiners.

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48. S. 4(5) UNIBEN Examination Regulations Handbook (1978-1980) p. 115 (1996-1998) p. 24.

49. S. 14 (a) UNIBEN Examination Regulations Handbook (1985-1987) p. 170.

50. S. 3 (28) (ii) UNICAL Examinations Regulations (above). In Magit V. University of Agriculture Makurdi (2004) 19 NWLR (pt. 959) 211 at 219-227 the external examiners evaluation of examination papers, assessments of the contents of the work and determination of the suitability for the award of the degree and appraisal of the academic soundness of the work of the student were adverse. Based on adverse report, the Senate's refusal to award the degree and this was upheld by the SCN

51. S. 50 (ii) UNIMAID Examinations Regulation (above).

52. S. 13 (ii) ABU Examinations Regulations (above).

53. S. B(ii) (iii) IMSU Examinations Regulations (above), S. 111 UNIBEN Regulations (above).

In exercise of their duties, external examiners hold the balance as neutral "umpires" and could alter, review, inspect, upgrade, re-grade, change, vary, convert, modify or adjust the scores awarded by internal examiners, where appropriate, using their discretions. As a matter of good practice, they revisit cases of the highest scores and verify their credibility to eradicate possible nepotism and favouritisms. This good practice also makes it incumbent on external examiners to check-mate possible discrimination, victimization of candidates by the internal lecturers and they look at the honest failure grades to determine their credibility and authenticity. The review process in NZ involves reconsideration of the assessment. The NZ system provides for appeal where moderators review controversial cases and recommend to NZCLE for the award of aerostat, compassionate or compensation passes as laid down by the regulations administered and determined by NZCLE53A. The NZ external moderators do not have the power to change the grade but only NZCLE can, unlike their Nigerian counterparts. The grading system are checked, consistently and fairly explained with reference to marking scheme containing the knowledge of the processes and assumptions on which academic judgments are made about performance. Lawyers are procedure conscious professionals and meticulous about application and misapplication of processes and precedence. Marginal failures are adjusted or upgraded to pass marks and in so doing, their maintenance of standards. Thirdly, the External Examiners act as the highest Academic Appeal/Supreme Court. The ordinary courts abstain from the judicial scrutiny<sup>54</sup> of EXPERT ACADEMIC JUDGEMENT<sup>55</sup> i.e. matters relating to setting of questions, sitting and marking examination papers including what grades to assign to a particular piece of work and publication of the results<sup>56</sup>, whether to pass, fail or exclude a student from graduation for insufficient progress leading to--WAF (withdrawal for Academic failure) these are within the expertise and domestic jurisdiction of Universities<sup>57</sup>.

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53A. Overview of the work of NZCLE (2006) pp. 3-9.

54. Ojo, J. D. Law of University Administration in Nigeria (1981) pp. 152-160,.Varnham, Sally & Kamvounias, Patty—The Courts & University Academic Decisions (2006) April NZLJ 105-107 Harris, Nerville (Prof) Resolution of Students Complaints in Higher Education Institutions (2007) Legal Studies Vol. 27 (No.4) p.566-603 at 580

55. Farrington, Dennis & Palfreyman, David---Law of Higher Education (2006) PP. 303-306 (Oxford University Press UK).

56. Akintemi V. Onwumechili Vice Chancellor University of Ife (1981) OYSHC 457 Aff'd by CA (1989) 1 NWLR (pt. 1) 68 at 86 where Ademola JCA held that the court will not usurp or interfere with the functions of the Senate, Council and Visitor of a University in the selection of fit and proper candidates to pass and for the award of degrees, diplomas and certificates. However, if in the process of performing the functions under the law, civil rights and obligations of the students or candidates are breached, denied or abridged, the court will grant remedies of mandamus, certiorari, prohibition for the protection of these rights and obligations i.e. if the principles of fair hearing and natural justice was shown to have been violated by the Senate Council or Visitor of the University-see Garba V. University of Maiduguri (1986 )1 SC 330.

57. In the case of Esiaga V. University of Calabar (1997)) 4 NWLR (Pt. 502) 719 at 742 (CA) Aff'd by SCN (2004) 7 NWLR (pt. 872) 366 at 387 the Supreme Court of Nigeria (SCN) held that in so far as the examinations are conducted according to rules, regulations duly approved and ratified by the University Senate, the court has no jurisdiction over the matter. Tobi JCA (as he then was) at 742 held...a court of law which dabbles or flirts into the arena of the University examinations; a most important and sensitive aspect of University function should remind itself of being a party to the destruction of the University and that will be bad not only for the university but for the entire nation. Let that day not come.

Expert academic judgment include purely academic decisions concerning marking/grading of exam papers, academic merit of a thesis, the contents of courses, time tables, style of teaching, viability of research project and matters of the students application for admission<sup>57A</sup>. In the case of WEST AFRICAN POSTGRADUATE MEDICAL COLLEGE V. OKOJIE<sup>58</sup> P disputed that the results issued to her by D do not represent the ones she allegedly earned and merited. It was held that academic matters relating to admission, examinations etc are within the exclusive domestic jurisdiction. The court refused declaratory remedy as matters relating to examinations results are not justiceable because Universities are governed by men of impeccable character and learning; men whose sense of justice, fairness are of higher standard. The Court of Appeal was emphatic that academic community works within University statutes or charter, decisions are made by those in charge of these institutions which turn on their views of events of peculiar nature which they have come to be accepted as experts in their field of operation, they exercise their discretion on those matters, and it is wrong to ask court in civil suits to overrule the decisions of these experts<sup>59</sup>. The Senate is the supreme, ultimate academic authority to the exclusion of any other organ(s) in the University and the custodian of the integrity of the degrees; it has the discretion to award or refuse to award degrees to students in connection with examinations held and the court will not intervene because Senate cannot be said to have acted capriciously or whimsically in its decision to withdraw a particular student for academic failure/dishonesty<sup>60</sup>. In the case of MAGIT V. UNIVERSITY OF AGRICULTURE MAKURDI<sup>61</sup>. Pats-Acholonu JSC had this to say in support of the attitude of court not to question expert academic judgment thus:

..... "University as Ivory tower is a place for great learning and research and it cannot be stampeded to award degree where it does not see it fit to do so, the court cannot fully appreciate the nuances taken into consideration to award or withhold a degree. I would view with consternation and trepidation the day the court would immerse itself into the cauldron of academic issues which is an area it is not equipped to handle. Alarming for any court worth its salt to enter into the arena of questioning why University refused to award degree....the danger posed by such venture can better be imagined than expressed. It is not the business of the court to question, let alone compelling it to award degree.

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57A Kamvounias, P. and Varnham, S.-In House or In Court? Legal Challenges to University Decisions. (2006) vol. 18 (No.1) Edu & the Law PP. 1 at 2, see also S. 20 (3) (a) Higher Education Act 2004 (UK) and Rules 4 (1) (2) Rules of the Students Complaints Scheme (2006) Office of Independent Adjudicator (OIA) (UK)

58. (2004) 2 NWLR (pt. 857) 232.

59. Ibid at 237.

60. Magit V. University of Agriculture Markurdi (2004) 19 NWLR (pt. 959) 211 at 219-227.

61. Ibid at 257-260.

The University subjects the work of the students in its portal of learning to merciless scrutiny naturally to carefully evaluate the academic quality of the work. It alone possess the power to state whether a particular work is below standard or not....i.e. appraise academic soundness of any work of the scholar ....is the court going to substitute its standard with that of the University? I think not. In support of the public policy consideration as the yardstick of non-interference with the University operations, His Lordship went on and held thus:

..... "University is the bastion of learning, research, reservoir of scholarship and think tank of the society and should be allowed leeway to operate with independence unshackled by the inanities or such humbugs that might compromise its stature and dignity without necessarily trying to hamstring it with decisions that would adversely affect its duties in maintaining excellence in scholarship. Let us pray that there shall never come a time when the court shall use its powers to constitute itself into a Senate of a University or degree awarding body...the court should exercise caution knowing fully well that it is not versed in the University method of assessing intellectual work of a scholar...when court unwittingly invest itself with powers to compel University to award degrees, then we should say good bye to academic pursuit and excellence and cause to be reeled out from our Universities half baked people and ignorance masquerading as intellectuals and scholars-that would be the beginning of systematic obliteration of our Univerisities<sup>62</sup>.

The immunity of expert academic judgment from judicial scrutiny is peculiar to all the common law jurisdictions of Malaysia<sup>63</sup>, Canada<sup>64</sup>, Australia<sup>65</sup>,

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62. Ibid at 260 Italics supplied.

63. Suppiah V. Lembaga Kelayakan Profession Undang-Undang (1997) 5 MLJ 237 at 237 where P who failed Bar final examination alleged D (Malaysian Qualifying Board) acted ultra-vaires by setting questions on areas not contained in the syllabus. The court held P's action was frivolous, vexatious and an abuse of court's process because the contents of students' booklet did not constitute course of instructions within S. 5 (E) Malaysian Legal ProceSSION Act 1976 as D did not provide any but referred candidates to courses run by private Educational institutions.

64. *Blasser V. Royal Institute for Advancement of Learning* (1985) 24 DLR (4th) 507 where it was held that academic disputes are internal matters best decided by academic community conveniently, quickly and accurately by those who are specialists in educational matters of that kind; rather than the courts. See also *Hostton V. University of Saskatchewan* (1994) 117 Sask. R. 291, *Mikketsen V. University of Saskatchewan* (2000) SJ NO 115 (Sask. QB, *Kane V. University of British Columbia* (1980) 110 DLR (3rd) 311 (Supreme Court of Canada), *King V. University of Saskatchewan* (1969) 6 DLR (3rd) 197 the Canadian Courts for public policy reason do not risk undue interference with academic affairs which may compromise the essential independence of the Universities and their academic freedom.

65. *Griffiths University Brisbane Queensland V. Tang* (2005) 213 ALR 724 at 767, *Ivins V. Griffiths University Brisbane Queensland* (2001) QSC 086 (2001) QCA 393- Australian courts decline to review purely academic decisions pertaining to the intimate life of every independent educational institution. But in the case of *Simjanoski V. La Trobe University Victoria* (2004) VSCA 125 the court intervened where there was arbitrariness or bias in the exercise of academic judgment or procedural regularity or process misapplication like the Nigerian court in the case of *Garba V. University of Maiduguri* (above) for denial of fair hearing.

New Zealand<sup>66</sup>, United<sup>67</sup> Kingdom<sup>68</sup> and United<sup>69</sup> States<sup>70</sup> of America<sup>71</sup> and it is in line with the Anglo-American tradition of non-interference with academic matters.

One of the difficulties faced by the court dabbling in academic assessment is revealed in the case of *NELSON V. LINCOLN MEDICAL COLLEGE*<sup>72</sup> where expert witnesses called to testify to academic assessments awarded marks ranging from 57 to 94 percent for the same piece of work; causing more confusion. Since the students' examination grading systems and the results are matters of expert academic judgment not subject to judicial scrutiny, the external examiners therefore have greater responsibilities in holding the balance of academic justice<sup>72A</sup> i.e. "performance related assessment", evaluation exercise based on the proficiency of marks awarded by the internal examiners.

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66. *Norrie V. Senate University of Auckland* (1984) 1 NZLR 129, where NZCA held that purely academic judgment is not subject to judicial scrutiny, and therefore declined judicial review to P a medical student whose application for enrolment in the final year was refused for insufficient academic progress. Similarly, *Elis J. in Grant V. University of Wellington* (1997) CP 313/96 dated 13 November refused to intervene in respect of students grievances over course standards.

67. In UK, the office of Independent Adjudicator (OIA) is precluded under S. 12 (2) Higher Education Act 2004 (UK) to handle students' complaints on purely academic/pastoral matters.

68. Clark V. University of Lincolnshire & Humberside (2000) 1 WLR 1988 (2000) 3 ALL ER 345 CA held that on issues of academic or pastoral judgment, University is equipped in the breath and dept and the judgment of the courts would be jejune and inappropriate. See also the cases of Varma V. Duke of Kent (2004) EWHC 1705 (Admin) (2004) ELR 616 and Higham V. University of Plymouth (2005) EWHC 1492 where court held that the decision of the students fitness for professional practice was an area of academic expert judgment and given its complexity, the court should abdicate review.

69. Andre V. Pace University 655 NYS 2nd 777 (NY APP Term (1996) where Court declined to review expert academic judgment involving the adequacy, quality of textbooks and effectiveness of the pedagogical method chosen by the Professor to teach. It was held that such enquiry would constitute clear judicial displacement of complex educational determination best left to the educational community.

70. Gruttar V. Bollinger & University of Michigan (2003) 123 SCR 23-25 where it was held that courts will not interfere with academic decision making on purely educational matters provided Higher Educational Institutions (HEI's) followed the criteria and procedures published in the students handbook.

71. Gratz V. Bollinger & University of Michigan (2003) 123 SCt 23-25 US Supreme Court held judgment on academic decision on purely educational matter lies primarily within the expertise of HEI's because University occupies special niche in USA Constitutional tradition. In Mohale V. National University of Lesotho (1982-84) Lesotho LR 302 P sought declaratory order that having satisfied the requirements, he was entitled to the award of LLB degree was refused by Molai J. as that was within the domestic governance of the Senate. Similarly in Lesuthu V. National University of Lesotho (1982-84) Lesotho LR 341, P. dissatisfied with the marks awarded by the external examiner, applied to court to direct the University to include certain marks he obtained in the supplementary examination. Kheola J. held that the computation of results is an internal matter and the Senate was justified to confirm external examiners grades.

72. 81 Ned 533, 116 NW 294. In Germany and Netherlands evaluation of knowledge or grading of scripts in HEIs examinations are domestic matters and courts normally decline interference-see Marice V. Netherlands (1986) 8 EHRR 483 and Herbst V. Germany (Application No. 20027102) judgment dated January 2007. Although academic immunity is being challenged as academic victimization, it is outside the scope of this paper. Details should be sought elsewhere-see Davis, M. Challenges to Academic Immunity: the Beginning of a New Era (2004) vol. 16 (No. 213) Edu. & the law pp.75-96

72A. Justice and efficiency go hand in hand so long as the Law does not impose excessive refinement-see Wade, H.W.R & Forsyth, C.F. Administrative Law (2004) 9th Edition pp. 242-248

The adjudicatory role of external examiners enables them to settle grievances or disputes over academic matters, which the court would decline to entertain. External

examiners guarantee due process, fairness and prevent arbitrariness and capricious actions in the system. An external examiner enhances public confidence as per their role as umpire and impartial arbiter in the development of academic justice delivery system. The court may nevertheless, be inclined to review the decision of the University where it involves disciplinary matters which centre on academic malpractices such as plagiarism in assessments, cheating in examination etc or where the rules of natural justice were violated. The same applies where procedural irregularities have been perpetrated or administrators have acted arbitrarily or in breach of fundamental human rights guaranteed by S. 36 of Nigerian Constitution 1999 and S. 27 Bill of Rights Act 1990 (New Zealand)<sup>72B</sup>. This is the most controversial of all the duties, because the external examiners must act as “umpire, arbiter, judge to investigate allegations of vindictive influences, hiding of answer scripts of students or any<sup>73</sup> other case(s) of disagreements amongst the host University<sup>74</sup> internal examiners<sup>75</sup>. This is a judicial function to adjudicate and must be exercised judiciously, impartially and dispassionately. In this regard, external examiners have to exhibit tremendous courage, candour, display of discipline, unbiased, consummate volition and independent judgment. The first author has seen the operations of the system from the standpoint of an insider both as an internal examiner - Law Teacher of over 22 years at old Imo State University Okigwe (now ABSU Uturu), Head of Department of Private Law University of Ado-Ekiti, Foundation Dean Ebonyi State University Abakaliki and currently the Dean Faculty of Law Rivers State University of Science and Technology, Port Harcourt and also as external examiner/assessor to neighbouring institutions of higher learning. Other authors have had similar experiences too. This paper draws extensively from these practical experiences in addition to published documents of the individual institutions and good practices acquired from interactions with colleagues.

Ironically, the criteria on which external examiners exercise this important duty of adjudication are not stated in any document. For effective performance, guidance is provided by the British Quality Assurance Agency (BQAA)<sup>76</sup> guidelines containing radical suggestions as to the revised role and the use of external examiners registered with BQAA. However, these guidelines were resisted by several institutions and Association of Law Teachers (United Kingdom) and consequently the proposal has since been withdrawn.

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72B See USA decision in *Susan M. V. New Yoke Law School* (1985) 106 S. Ct 507 and Nigerian case *Garba V. University of Maidugiri* (1985) 5 SC 12 and the English case of *RV Cambridge University Experte Persaud* (2001) EWCA Civ 534.

73. S. B (iii) UNILAG Examinations Regulations (above), S. 10 (4) (ii) EBSU Regulations (above), S. IV (2) iv (3) UNN Examination Regulations (1970-1973), (1997-1976). S. 14 (b) UNIBEN Examinations Regulation (1985-1087).

74. S. 47 (iv) University of Ado-Ekiti (UNAD) conduct of Examinations Regulation Calendar 1996-1999.

75. S. 50 (iv) UNIMAID Examinations Regulations (above).

76. Dearing Commission Reports 1997 (England).

The most effective guidance is provided by ALISON BONES EFFECTIVE USE OF EXTERNAL EXAMINERS.

..... “How much of the students’ work should the external examiners see? This is a length of string-type question. The external examiners need to see sufficiently large samples to make informed opinion as the standard of to the students work. The

practices vary from institution to institution. Do the external examiners see all the summative assessments regardless of the form? Some external examiners are sent samples of course works, video of presentations, interviewing skills, advocacy skills etc. Others are sent a much-limited diet, perhaps only of written examinations taken at the end of the year and referred scripts.

The role of external examiners as far as individual institution is concerned is normally set out in some centrally published document and should be given to the external examiners before he or she agrees to adopt the role. In what other jobs do you get a job description after you have started but practices vary and it would be a useful research topic. Such job descriptions do not normally give any detail as to how external examiners are to conduct the moderation or assessment processes. Do the external examiners get to see range of works from the whole cohorts? All borderline cases, shown to them? Get all the failed scripts? All the first class scripts? Before the advent of modular courses and the more recent rapid growth of "two-tier" examination boards, it was possible for external examiners to comment about the assessment regime, since they were in position to give an overview having moderated a wide-cross-section of assessment. Some courses have managed to keep the number of external examiners down (thus giving the unfortunate external examiners the responsibility of moderating large numbers of subjects) while others have fragmented the task, allocating different subjects to different external examiners, who may meet only once at the final examination Board meeting or not at all if for example it is a minor subject in a combined degree award. Opportunities for comparisons by external examiners of assessment practices which affect students on the same course can thus be minimal and with the rising students numbers it may be realistic to say external examiners priorities are to ensure that rules are being adhered and standards being upheld rather than whether the methods of assessments per se are effective"<sup>77</sup>.

From the above commentaries, it is clear the roles of external examiners are substantially similar both in United Kingdom, Nigeria and the rest of British Commonwealth of nations. In acting as umpires whose duties are to adjudicate, five aspects of the responsibilities are discernible in "holding the even balance".

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77. Bone, Alison:- *Ensuring Successful Assessment* (1999) pp. 48-50 Edited by Roger Burrige and Tracey Vanava UK Centre for Legal Education (UKCLE) University of Warwick England.

Firstly, large samples of students' course work; examination scripts, projects, records of other skills testing materials must be sent to the external examiners to enable them make "informed opinions". This promotes social justice as they wield necessary checks and balances over academic assessments making the internal examiners no more the ultimate decisions makers. The common weaknesses in the course design<sup>78</sup> are detected in the link between outcomes, learning opportunities and methods of assessments<sup>79</sup>. Secondly, the centrally published documents containing job descriptions are not detailed enough or do not specify the mode or processes which provide benchmark basis for assessments or re-assessments. Consequently, the external examiners have to rely on good assessment practice and avoid bad assessment methods acquired, discovered and mastered over the years from their own experiences or learnt from their senior colleagues. Thirdly, the materials for the moderation which the host University must send to External Examiners must not be selective but embrace all failed scripts, scripts which the internal examiners graded as

first class, borderline cases. This is advantageous and will promote uniformity of standards because the failures, first class graded scripts and borderline cases will be revisited and have second opportunity of reconsideration, remarking or revision of the marked scripts in order to discover whether the internal examiners are unduly high handed, mean, stingy, or too liberal or generous with the mark assessed or graded. Fourthly, the external examiners are to comment generally on the assessment regime based on the overview having moderated a cross-section. The essence of this is to aid planning and quality control measurements and whether standards are maintained or falling and in the latter case measures to be put in place to arrest the perceived decline. This overview of the assessment regime must be comparable with similar works nationally and internationally, as the overall performances of the students are rated in comparison with their peers in local and foreign institutions. Fifthly, the external examiner's paramount duty is to ensure compliance with the rules and uphold standards stipulated in the curriculum, syllabus, teaching methods and resources available. In NZ jurisdiction, the external moderators ensure that the prescribed syllabus in each law subject is adequately and consistently covered, taught and assessed. In Nigeria, there are standards stipulated by NUC, CLE and other professional bodies. The external examiners in pursuit of justice and quality assurance ensure compliance with rules viz: whether continuous assessment<sup>80</sup> conducted by the tutorial lecturers as essential factor in the evaluation of the students' performances, were aggregated to the total scores. The Nigerian National Policy on Education 1981 (NNPE) provides that the educational assessments and evaluations<sup>81</sup> shall be liberalized by basing them in whole or part on the continuous assessments of the progress of Students.

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78. See note 58 (above) at p. 49 italics supplied.

79. Brown, G.-Assessment of learning: its Implications for Quality (1994) Open University UK Conference paper under the then-changing patterns of students Assessment & Examination.

80. Brown, G., Bull J. and Pendlebury M.-Assessing the students learning in Higher Education (1997) pp. 33-35 (London Rout edge publishers).

81. Nigerian National Policy on Education (1981) pp. 6-7.

All the Universities in Nigeria have implemented this NNPE because the continuous assessments form 30 percent while the actual examination scores have been scaled down to 70 percent<sup>82</sup> examination grading. University of Wales and many tertiary institutions in UK also in corporate continuous assessments, seminars and tutorials scores of 30 percent into 70 percent examination score. This is in view of the 6:3:3:4 educational system in Nigeria<sup>83</sup> copied from the model existing in Scotland where graduates spend 6 years in the secondary school education leading to the award of Scottish Senior Schools Certificate and 4 years in the University totaling 10 years. In England it is 5 years O/levels, 2 years A/levels and 3 years in the University totally the same 10 years. The NNPE policy of mandatory minimum 75 percent attendance to all lectures, tutorials, seminars, practical works, clinical have been incorporated as internal regulation of all the Universities<sup>84</sup> in Nigeria<sup>85</sup>. Those are the criteria which external examiners must cross-check compliance to insure the set of students whose examinations results are being moderated are not inferior to their peers in Universities nationally to ensure justice. This aspect of the external examiners' role of ensuring observance with stipulated standards often results into direct confrontation, conflict, unhealthy rivalries, resistance with the internal examiners who see this quality control and justice enhancement mechanism as interference and threat to their perceived autonomy and omnipotence.

The first author's encounter with some internal examiners in one of the Universities illustrates this frustrating aspect and oftentimes "enemies-creating" functions of external examiners. In the course of the latter assignment, the first author discovered non-compliance with the standards laid down by NUC and CLE (while performing the roles of external examiner in a neighboring University) because Assistant lecturers were entrusted with the teaching of important core subjects like Jurisprudence, Legal theory, Legal system, Human Rights and even allocated project topics to themselves for supervision. These are roles that are usually reserved for Lecturers of senior cadre. These super Assistant Lecturers hid the answer scripts of the failed students and efforts to get the withheld scripts resulted into petitions/protest letters/acrimonies to cover their wrongdoings. The sacrosanct Assistant lecturers allowed to act in excess of their jurisdictional capacities were not forthcoming with the marked answer booklets or scripts to facilitate the determination of cases of allegations of victimization, pursuit of personal vendettas, grudges, settlement of personal scores, vengeance, sexual harassment etc levied against them through students authored and anonymous petitions smuggled into the hotel room of the external examiner.

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82. Nigerian Higher Education, Administration & Planning Policy (NHEAPP) (1999) 43.2 and 1, 2, 3, 7 & 6.

83. University of Uyo Nigeria (1998) Student Handbook pp. 14-16. Ambrose Ali University Ekpoma Students Handbook (2007-2010) pp. 22-24 and Delta State University Abraka Students Handbook (2007-2009) pp.31-36.

84. Rivers State University of Science & Technology Port Harcourt Nigeria (2001-20003) Faculty of Law Student Handbooks pp. 53-57.

85. Imo State University Owerri Nigeria (2005) Faculty of Legal Studies pp. 31-32 (Academic programmes Brochure).

The Dean could not help as he appeared weak and unable to exercise his powers but from his discourteous utterances, it was clear by implication, that he belonged to the powerful clique of conspirators with tacit support of some University dons who are perceived as sacred cows discretion was exercised and the victims failure grades/scores were upgraded and converted into passes placing reliance on S. 149 (d) Evidence Act which provides thus:- the court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of events, human conducts, public and private business; in the relation to particular case and in particular, the court may presume...that evidence which could be and is not produced; would if produced be unfavourable to the person who withholds. There is a presumption that evidence withheld would be unfavourable to the person(s) withholding it<sup>86</sup> if the evidence had been produced. These types of suspicious circumstances create distrust and the external examiners are justified to presume that the failure to produce the scripts of the candidates affected were against the lecturers/internal examiners and so had to elevate purported failure scores to pass grades<sup>87</sup>. If the scripts were brought, the external examiners could have still confirmed or varied the failure grades awarded by the internal examiners. There was strong intention to include this adverse observation in the external examiners reports to the Vice Chancellor but the former Acting Dean who was instrumental to the appointment of the first author; cautioned against it as he would not like to be seen indicting his colleagues. This is one of the good practices of external examiners identified by the authors as worthy of emulation by other external examiners. All the Universities in Nigeria by virtue of NUC and CLE Minimum standards and other subsidiary instruments and enabling academic rules enunciated by Senates; still operate the supremacy of External Examiners<sup>88</sup>. S. 3 (28) UNIVERSITY OF CALABAR EXAMINATIONS REGULATIONS provides:-

.....“In case of disagreement between internal examiners and external examiners over marks or other related matters, the views of the external examiners shall prevail”<sup>89</sup>.

Similarly, S. 3 (A) (I) (IV) GUIDELINES & REGULATIONS FOR EXAMINATION PROCEDURES provides:-

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86. S. 149 (d) Evidence Act Cap. 148 Laws of Federation of Nigeria (LFN) 2004.

87. Ani V. State (2003) 11 NWLR (pt. 830) 278 at 280, Musa V. Yerima (1997) 7 NWLR (pt. 867) 27 and Uzoho V. Imo State Hospital Management Board Task Force (2004) 5 NWLR (pt. 867) 627 at 631-632.

88. Jack-Osimiri, U. & Okogbule, N.S.-External Examiners conflicts Arising--paper presented at Nigerian Bar Association summit on future of Legal Education 02 May 2006 at Sharaton Hotel Abuja Federal Capital Territory (FCT).

89. UNICAL Calender (1986-1988) S. 4. (3) (f) Crutech Examinations Regulations (2000) p.12. See the case of Magit V. University of Agriculture Makurdi (2004) 19 NWLR (pt. 959) 211 at 209-227 (SCN), Mwisiya V. University of Zambia (1981) ZLR 247, Mohale V. National University of Lesotho (1981-1984) Lesotho LR 302 and Lesuthu V. National University of Lesotho (1982-1984) Lesotho LR 341.



..... “The marks/scores awarded by the external examiners at the end of the exercise shall be final”<sup>90</sup>.

Furthermore, S. 2 (A) (2) (IV) RSUST PORT HARCOURT EXAMS REGULATIONS provides:-

..... “The mark(s)/grades(s) awarded by the internal examiner shall normally be final except through reassessment of the scripts by the External Examiner”<sup>91</sup>.

This appears to be a universal rule of good practice peculiar to all common law Universities particularly United kingdom, South Africa, Kenya, Tanzania, Ghana, Australia, West Indies etc. Strictly, if there is conflict between the grades awarded by the internal examiner and the external examiner, the latter shall prevail. This is the area where external examiners have to manifest even balance of judgment and fairness to cushion the effect of high-handedness or undue generosity of the internal examiners in the award of marks. Depending on the rate of failures, the external examiners have discretion to prop-up or pad-37-39 percent into pass mark(s) of 40; and 49, 59, 69 percents into the next grade(s) of passes.

89.

In New Zealand, the external moderators are not involved or used to resolve conflict of grades/marks between internal examiners. NZCLE resolves such conflict

using other mechanism of external review. Despite the variations that appear from the rules/academic standards enunciated by Senates of the various Universities as subsidiary legislations, the supremacy of external examiners as quality assurance is guaranteed. This is because the NUC minimum standards made pursuant to S. 10 EDUCATION MINIMUM STANDARD(S) ACT 1985 being a federal legislation would override any inconsistent rule which derogates the omnipotence of the external examiners.

The fourth function of the external examiners is to conduct or, participate in the conduct of final degree examination, determine the overall results or assessment of practical test or oral examinations (where such examination are given) and attend the meetings of the Faculty Board of Examiners. The oral defence of LLB projects has been suspended in many Universities in Nigeria due to logistic problems. The joint meeting of the internal examiners with the external examiners is very advantageous providing forum for interactive discussions on the strength and weakness of the examinations and areas of future improvements.

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90. Revised Regulation (2003) made by Senate of the Rivers State University of Science & Technology Port Harcourt Nigeria, Magit V. University of Agriculture Markurdi (above). Mwisya V. University of Zambia (above).

91. See note 90 (above).

91A. S. A (f) (ii) University of Ibadan Prospectus (1978-1980) PP. 166-117.



This very important meeting is oftentimes ignored by the internal examiners who could profit in terms of practical experience from external examiners. The Board of examiners meeting is an occasion for reflections-sharing good practices and warning against bad ones adopted comparatively across different institutions which the external examiners have experiences<sup>93</sup>. This exchange of information on their experiences at various institutions-a form of "peer best practices models" improves, sustains and acts as quality assurance mechanism.

## EXTERNAL EXAMINERS' REPORTS

"External Examiner shall moderate draft examination questions, marking of students answer scripts, assess student's long essay or research project, submit reports to the Vice Chancellor on the examination and general comments on the works of the school (faculty) etc". At the conclusion of their duties, the external examiners must write<sup>94</sup> and submit confidential reports to the Vice Chancellor<sup>95</sup> or the Chief Executives or the equivalent on the general standard of the examination and the performance of the candidates, the standards of internal examiners' marking and suggestions for improvements on the future occasion<sup>96</sup>. Strictly, the report of the External examiners shall be in a form provided for in the letter<sup>97</sup> of appointment<sup>98</sup>. Most institutions state clearly the various roles, powers and responsibilities assigned to the external examiners through the letter(s) appointing them. These are very much like the stipulations contained in the Quality Assurance Agency code of practice in UK (QAACP). The samples of external examiners' report(s) requirements vary from one

University to another but in their substance they are very similar. In Nigeria, the reports<sup>99</sup> must incorporate the standard of the entire examination especially- outcome of the assessments or marking by internal examiners or moderations of written examination papers, examination of the thesis (LLB Projects) to discern their qualities, the portion of the answers booklets or scripts marked or remarked the standard of the course work, the pass list honours classifications and observations on them.

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92. S. 13 (c ) (e) ABU Examination Regulations (above). S. 3 (28) (iv) UNICAL Examination Regulations (above) S. B (iv) University of Lagos Examination Regulations Faculty of Law prospectus (2000-2004).

93. S. 14 (c ) (e) UNIBEN Examination Regulations (1985-1987) p. 170.

94. Alison Bone, Op.cit pp.50-51.

95. Reid, Colin-Account of Experience of a professor acting as External examiner Titled Thirteen ways not to treat External Examiner (1998) 17 July Times Higher Education p. 10. Under SS.22 (i) (ii) & 23 NZCLE Guidelines For Moderation 2007, the moderators owe duty of confidentiality and the report is forwarded directly to NZCLE.

96. S. B(iv) part 1 University of Lagos Examinations Regulations (above) p. 158, S. 14 (f) (i) (ii) (iii) (iv) (v) UNIBEN Examination Regulation (1985-1987) p. 170. In Magit V. University of Agriculture Makurdi (above) based on the adverse external examiners' report the Senate refused to award the degree. In Mwisiya V. University of Zambia (1981) ZLR 247 based on the external examiners reports, Senate refused to award LLM degree and ordered P to re-write his dissertation/thesis.

97. S. 3(10 ) (4) (iv) Ebonyi State University Abakaliki General & Academic Regulations (1999) pp. 35-36.

98. S. 47 (v) (a) (b) (c ) University of Ado-Ekiti Calendar 1991/1996 as amended in 1999/2000.

99. S. 2 (iv) (f) Regulation Governing the conduct of Examinations pp. 37-39 University of Ilorin Academic programmes (1997-2002) published by the Senate curriculum committee.

Strictly, the external examiners reports in Nigeria must address the following pertinent questions:-

(a) Do the assessments tasks or questions in the various examinations in the department or faculty or school link closely with the learning objectives of the course? If so what are the evidence for such linkages?

(b) Do the assignments (continuous assessments and examinations) provide opportunities for students to apply their knowledge and understanding to different problems and contexts?

(c) Is the oral/written feedback provided to the students meaningful and helpful?

- (d) Is there a system for checking the consistency of the marking of the assignments and examination papers?
- (e) Is the marking accurate and consistent?
- (f) Are the students aware of the criteria or marking schemes used for marking assignments and examinations? 100.

In the light of the above, the learning objectives, which the external examiners must reflect, are those stipulated by the minimum academic standards set up both by the NUC and CLE. Others are evidence of the application of the knowledge deduced from the quality of question papers, testing of the internal examiners adherence to the syllabus, answer scripts manifesting students understanding or lack of understanding of the subjects and research projects. Furthermore, the use of marking schemes to facilitate consistency in the marking or grading of answer scripts is also an ingredient, which must be included in the reports. In New Zealand, NZCLE receives the yearly reports of external moderators/assessors directly and like other Commonwealth countries, provide valuable information advising what appropriate measures/actions required to remedy academic, professional and administrative deficiencies or inadequacies. Instead of joint report of external examiners in other jurisdictions, each external/assessor in New Zealand is required to report on the moderation processes in their subject area and the exams generally. The reports of NZ assessor must appraise whether the courses are generally taught in a manner which conform to NZCLE requirements and policies. Under S. 23 of the PROCEDURES, GUIDELINES FOR NZCLE MODERATORS & UNIVERSITY EXAMINERS REGULATIONS 2007, the report may highlight particular concern and detailed assistance to solve problems. External Moderators

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100. S. 3 (10) 4(4) (v) Ebonyi State University Academic Regulation (1999) p. 36.

Reports are analyzed by NZCLE in order to provide benchmark for future revision of guidelines. The exploratory performances-related report must present findings of the external examiner's observations/moderation/adjudicatory exercise conducted with a view of improving the proficiency of lecturers/students and the efficiency of system. In the United Kingdom, the external examiners' report's must have the followings:-

- (a) The general standard of the work assessed and comparability with similar levels of work nationally.
- (b) The overall performance of the students in relation to their peers in other institutions.
- (c) The strengths and weaknesses of the students.
- (d) The quality of knowledge and skills (both general and subject specific) demonstrated by the students,

- (e) The structure, organization, design and marking of all assessments.
- (f) The quality of teachings as indicated by the student's performances.
- (g) The lessons of the assessments for the curriculum, syllabus, teaching methods and the resources.
- (h) Any other recommendations arising from the assessments<sup>101</sup>.

It is clear from the comparative materials outlined above, that the ingredients to be reflected or manifested in the external examiners reports are identical both in UK, Nigeria, New Zealand and other commonwealth countries, which share the British academic traditions by virtue of colonial ancestry. specific or individual courses and the lecturers maturity, innovations, skills, experience in handling the course(s) and satisfactory evidence of the coverage of the syllabus, course contents, relevant statutes, case laws, precedents and their applications to the legal problems reflecting inputs and outputs. These would include the general review and identification of the relevant performance indicators including measures of added values-data showing how well they do it and direct observance of proficiency i.e. students' performances as manifested through the level of achievement reached as reflected in the quality of answers to various examinations questions, quality of continuous assessments, practical works, the degree research projects and the evidence of the students readiness for the level of man power he/she is being trained for after graduation as well as the prospect of the applicability of the benefits to the society.

The reports must highlight the external examiners review of the progress made to ensure uniformity of approaches in the promotion of effective teaching and learning-whether the students/graduates displayed attainment of minimum, maximum or excellent level of understanding and competence. The report would also indicate deficiencies noticed by the external examiners and suggest remedial measures.

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101. Bone, Alison op. cit. page 50. where the learned author adopted the guideline about what the external examiners' reports should contain, extracted from the University of Brighton cover letter sent to the external examiners dated September 1998.

The external examiners reports will also indicate the level of the competence exhibited by the lecturers based on the scope of the coverage of the topics as contained in the examination questions, the balance between essay/theoretical and problem questions and the time allocated to each question.

Strictly, the external examiners' report must document whether the various quality assurance criteria were manifested and reflected in the course of the performance of their duties as "unbiased unpire". In England and Northern Ireland the academic review at subject level must be indicated to enable the host HEI know how to implement the results by its academic audit unit. In Wales, it is similar and the academic review is at subject level against the broad aims of the subject provider<sup>101A</sup> and the external examiners can make judgments about the academic standard and quality of learning opportunities available to the students. In Scotland, the quality assurance criteria which the external examiner must document in

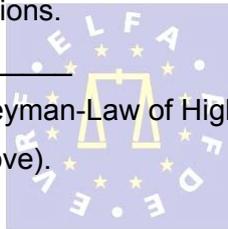
his report is the enhancement-led institutional review (ELIR) in managing the quality and standard focusing on the deliberate steps taken by HEIs to continually improve students-teaching experiences<sup>101B</sup>. Generally, external examiners must state in the report how effective is the quality of teaching and supervision-how can it be objectively measured or arrived at based on assessment carried out by random sampling of the students answers booklets. Under the BQAA specification, the external examiners reports must specify the ways they tested, the documents they worked on, how the students-consumers of higher education fare and how well the learning opportunities available assisted the students achieve their qualifications. The report must contain the measurement of the effectiveness or quality of the products in the present globally competitive market.

The external examiners' report must state explicitly whether standards they observed are utility-oriented-a form of consumer-producer paradigm. In Nigeria, this is called "EMPLOYERS RATING OF GRADUATES" and the NUC awards accreditation score marks on it. From the above, it can be seen that the importance of external examiners' reports can hardly be over emphasized. It forms the basis of proposals for improvement and reform of the entire examination system as well as the categories of the lecturers to be assigned particular courses. In appropriate cases, it can also be the basis for the Vice Chancellors or Chief Executive's exercise of disciplinary powers over lecturers in cases of gross-misconduct in the handling of assessments of students' scripts and degree research projects. In practice however, external examiners do not write much in their reports due to friendly and often time cost relationship existing between them and the host institutions.

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101A. Farrington & Palfreyman-Law of Higher Education (above) at 66.

101B. See note 101A (above).



In fact, they are very cautious and oftentimes sensitive over what they put into external examiners' reports as these could trigger adverse and uncomplimentary reactions<sup>102</sup>. Some of them may be seen as impugning the academic integrity of their colleagues; if they write indictable reports. Specimen Report of the External Examiners is reproduced below in Appendix 2 to guide neophytes on the duties and challenges of the assignment and for the experienced colleagues to consolidate the techniques acquired over the years.

## IMPORTANCE OF EXTERNAL EXAMINERS

The role of external examiners in maintaining, sustaining and improving the quality and quantity of academic work is recognized as vital<sup>103</sup>. It is strictly a quality assurance mechanism designed to ensure that the quality of University graduates do not fall below the acceptable standards stipulated by the professional bodies of NUC and CLE. They ensure that the standards stipulated for the award of LLB qualifying degree are adequate and satisfy the initial academic requirement is prescribed as entry into the vocational stage of the legal profession<sup>104</sup>. In England and Wales, both the Bar Council and Law society issued joint consultations paper which highlighted the general worries and anxiety about the quality standards and perception that some law

degrees awarded by some higher educational institutions, are of inadequate standards to equip the students/graduate to progress to the vocational professional career in law<sup>105</sup>. The external examiners system is viewed as one of the ways to demonstrate the confidence that quality and standards are still maintained in law degree programmes and that deficiencies, where they exist shall be identified and remedied with vigour by some academics appointed independent external examiners<sup>106</sup>. The Council of Europe Legislation for Higher Education & Research (CELFHER) (1991-2000) TABLE 28.1 provides for the legal framework for Higher Education in Europe and external examiners is one of the detailed mechanisms for accreditation and quality assurance.

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102. Birmingham, Vera & Broadbent Graeme-External Examining: Isolation or community? Paper presented at UK Centre for Legal Education University of Warwick (2005) January LILI Vocational Teachers Forum.

103. Birmingham, Vera & Broadbent Graeme-External Examining:- closing the Feedback Loop-Directions in Legal Education Autumn (2004) issue No. 9 University of Kingston Law School UK.

104. Bastin, Nigel-External Examining:- A View from the Profession: paper presented at workshop June 2003 (UK Centre for Legal Education University of Warwick).

105. Bar Council & Law society (2002) titled-"Academic Training of Lawyers for Entry into Legal Profession"-Standards contents-Joint Consultation paper with the Law Faculties (Bar council Education & Training Websites).

106. See 104 (above).



Owing to globalization, the European Union produced the above legislation with framework placing greater responsibility on the HEI's in order to regulate their teaching and research objective. External examiners is one of the processes provided by INQA, EHEA, QAA NZCLE and NUC to ensure quality assurance for global market of skilled workforce universally for the international community global market rather than the needs of one country. It is also one of the criteria in the world ranking of Universities. In all jurisdictions, external examiners reports are relied upon by the CLE, NZCLE, NUC, Bar Council, Law Society, Medical Council as one of the grounds for according full, interim, partial, or temporary accreditation. The accreditation panel of these professional bodies cross check the external examiners' reports, if there are complaints identified and if they are not remedied, sanction of the withdrawal or denial of accreditation may be imposed on the erring University. The external examiners are therefore indispensable because they are saddled with the responsibilities of ensuring that Law degrees are of sufficient standards in quality and in contents to enable the graduates progress to the vocational training at the Law School and eventual entry into the legal profession. In Nigeria the NUC and NGCLE and the Senates of the Universities imposed subsidiary legislations making external examiners the watchdog

in ensuring compliance with the standards and to arrest deficiencies detected. In New Zealand the Council of legal Education (NZCLE) is the statutory body<sup>107</sup>, which not only approves the qualifying degrees awarded by the NZ Universities but directly appoints moderators<sup>108</sup> as external examiners to moderate and approve the examination papers in the core Law subjects<sup>109</sup>. The NZCLE approves LLB degrees programmes and the syllabus for core law courses and impose external assessments of answer scripts to arrest anticipated deviation from the standards. The external examiners approve the examinations questions, monitor coverage with the contents, syllabus, compliance with the standards and national benchmark set for legal education generally<sup>110</sup>. The importance of the external examiners is vivid in all jurisdictions. In Canada there is active Ombusperson <sup>110A</sup> operating in the Universities system like the UK's Office of Independent Adjudicator (OIA) which respectively have jurisdictions to arbitrate, mediate and promote conciliation over disputes between students and Higher Educational Institutions (HEIs) without recourse to litigation<sup>110B</sup>.

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107. SS. 38 & 39 pt. 2 Law Practitioners Act Cap. 1982 which repealed the original Act of Cap. 1930 as amended in 1961 (New Zealand).

108. Mackinnon, Kenneth-Regulating Legal Educations: - the New Zealand Model-paper presented at Association of Law Teachers conference dated 1-3 April 2007 at University of Plymouth UK.

109. SS. 3-16 part 8 Lawyers & Conveyancers Act 2006 (New Zealand). This Act is expected to be operational in mid-2008

110. Jackson, Norman-Academic Regulations in UK Higher Education (1997) 5 QA In Education 120.

110A. Association of Canadian Colleges & Universities Ombusperson Accuo (<http://www.uwo.ca/ombols/occuoeng>).

110B. Schd. 2 para. 5 Higher Education Act (UK) 2004.

Matters relating to expert academic judgment are excluded from the jurisdiction of OIA and Ombusperson<sup>110C</sup>. External examiners and Assessors are not only indispensable but sacrosanct because HEIs use them to resolve disputes with students over expert academic judgment. Strictly, the results assessed by the internal examiners must have been vetted, moderated, scrutinized and approved by the external examiners before the University Senate could finally approve. Consequently, if the external examiners decline, to approve a particular result, the Senate would also and the affected candidate would be deemed to have failed the degree examination. The supremacy of external examiners is restated in the case of *MAGIT V. UNIVERSITY OF AGRICULTURE MARKURDI*<sup>111</sup> where P appellant was given opportunity to defend MSc thesis before the Board of Examiners comprising internal and external examiners. Errors were discovered but he was recommended for the award subject to necessary corrections. While making the corrections, P employed unacademic means to arrive at the results in the thesis because he changed the co-efficient of the subject matter of the thesis i.e. potatoes from negative in the original thesis to positive in the corrected/amended thesis. The Board of Examiners reviewed this as academic dishonesty and unacceptable. The external examiners refused to issue full certification and attestation of the thesis-a condition precedent to the earlier recommendation in the report for award made to the Senate. Based on this, Senate withdrew his candidature. The Supreme Court of Nigeria dismissed the action instituted by P for mandamus and

held that it cannot question the powers of the Senate to award or refuse to award its degrees as it thinks fit; in connection with the examinations. Mohammed JSC has this to say:-

..... “the University Senate has the duty to ascertain the quality of the thesis before it. A bad, dishonest and fraudulent thesis is ipso facto a failed thesis. In the instant case, the decision of the Senate to withdraw the appellants’ candidature was administrative/academic act intended to ensure good and stable administration of the University. The recommendation is not mandatory as the Senate has the last say and if for some valid reasons, the award of the degree to a candidate is not justified it will not award it. The Senate is competent to ask a dishonourable student like the appellant to withdraw from the University and refuse awarding the degree for academic dishonesty stated in the letter of withdrawal tendered as Exhibit 6. In considering a student’s corrected thesis by the Senate, his presence is not necessary. Where dishonesty and un-academic practice is discovered, the thesis can be rejected by the Senate, it means he has failed the examination<sup>112</sup>.

Similarly in the case of MWISIYA V. UNIVERSITY OF ZAMBIA (9181) ZLR 241 based on the external examiners report, the Senate refused to award LLM degree to P who was directed to re-write his thesis/dissertation.

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110C. R.V. Office of Independent Adjudicator *exparte* siborurema (2007) EWCA Civ. 1365 at 1369 per Pill L.J.

111. (2005) 19 NWLR (pt. 959) 211 at 219-227 (SCN).

112. Ibid at 260-261.

With the increasing autonomy of Universities, the external examiners’ are therefore the monitoring instrument used to resolve academic disputes between HEIs, promote quality, ensure accountability, effective training governance, protection of the students who will eventually graduate into and compete in the global labour/human resources market<sup>113</sup>. Under NUC programmes Evaluation form (PEF) of the 5 years accreditation exercise, Nigeria Universities are awarded marks where there is evidence of the use of highly qualified assessors as external examiners and the work done is of good standard. The Universities could be penalized and their scores reduced where the quality of assessors is poor and the scheme of external examiner is not effective<sup>113A</sup>. This is because NUC perceive the external examiners as necessary as they help Universities to obtain inputs from outside persons on how well the Universities are meeting national standards laid down for the level of certification. The external examiners being qualified persons can make judgment on the standard of work, quality of facilities and teaching having regard to the type and level of manpower to be produced<sup>113B</sup>. Furthermore, colleagues of the rank of Senior Lecturer/Reader who served as external examiner earn 3 points credits units for ever year and these are aggregated into total scores in their assessments for promotion to full Professorial chair.

On a general level, the external examiners' system has been said to be fraught with a number of problems and challenges as external moderations are oftentimes very conservative, creates potential for conflict of interest as it threatens or derogates University autonomy<sup>114</sup> and academic freedom<sup>115</sup>. Among the Universities developed from Anglo-American tradition<sup>116</sup> academic<sup>117</sup> freedom means members of University community or scholars<sup>118</sup> independence to teach and follow their own research enquiries<sup>119</sup>. In UK, it ensures academic staff freedom within the law to question, test received wisdom and put forward new, controversial, unpopular views or opinion<sup>120</sup> without placing themselves in jeopardy of losing their jobs or the privileges they enjoy in the institution<sup>121</sup>.

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113. Farrington & Palfreyman Law of Higher Education (above) pp. 6-7.

113A NUC Performance Evaluation form (PEF) 2005-2007.

113B NUC/PEF 2007 S. 1. 9 (page 12). The first author served as Chairperson NUC Accreditation Panel Western Zone A September 2007. Scanty (not detailed/not comprehensive enough) external examiners reports attract penalty on the erring institution(s) and consequently their scores were reduced..

114. Basting, Nigel-External Examining closing the Feedback loop (above).

115. Farrington & Palfreyman Law of Higher Education op. cit pp.374-377.

116. In New Zealand Higher Education it is guaranteed by S. 161 Education Act 1989 (New Zealand) see the case of Rigg v. University of Waikato (1984) 1 NZLR 149.

117. First Amendment of USA Constitution.

118. See also article 29 Constitution of Russian Federation.

119. In Germany, it is called "Lehrfreiheit" meaning professional freedom to research and present findings.

120. S. 202 (2) Education Reforms Act 1998.

121. In Rigg V. University of Waikato (1984) 1 NZLR 149 it was held that academic freedom extends to criticisms of HEI generally and not simply within specific decision provided the criticism is reasonable, fair, expressed with integrity, scholarship and sense of responsibility.

In USA, both the youngest member of the Faculty of Law and the seniors like Professors have jealously guarded academic freedom to teach the course allocated to them and, grade the examinations. Although a faculty committee or mentor may be appointed to guide but no faculty member is under the direction of the other<sup>122</sup>. In spite of this limitation, academic freedom must meet the requirements of accountability<sup>123</sup> within the in-built machinery of checks and balances<sup>124</sup>. Since expert academic judgment is not subject to judicial scrutiny, it is therefore necessary that external examiners fill this vacuum to exercise supervisory responsibility in respect of the much taunted or revered expert academic judgments passed by internal examiners omnipotence. It is logical for someone who is external to the University system to neutrally address or resolve students' academic grievances. This is part of the constitutional due process enshrined in USA Constitution which prevents perceived arbitrariness and probability of capricious action by subjecting the assessments made by the internal examiners to neutral persons in observance of rules of natural justice. Secondly, the external examiners are poorly remunerated as only a pittance is paid for

the voluminous job. Thirdly, there is no formal training or orientation and there is an abysmal lack of books, reports etc containing comprehensive benchmark guiding the external examiners. Fourthly, the confidentiality or secrecy of the external examiners reports is a great inhibition. Although the Deans or Heads of Departments are communicated, the report is kept officially secret and its contents cannot be published even anonymously to enable others learn and implement. Consequently, there is no forum where external examiners could discuss experiences. Fifthly, external examiners are reticent and do not document all that are discovered in the course of their assignment for fear that it may trigger adverse reactions from colleagues and are internal examiners who may feel their integrity is being impugned. Sixthly, external examiners do not get formal recognition from their home institutions nor do their home institutions make use of the experiences gathered by them in the course of their duties as external examiners<sup>125</sup>. In spite of this, in Nigeria, external examiners at the status of Readers and Senior lecturers are entitled to receive three points yearly for the number of years acted as external examiners in the hosts institutions in terms of their assessment to the rank of full professorial chair. This is advantageous because grade the points gained from each year of external examining are aggregated and used to gain the required points for promotion to professorial position. In Nigeria, a full Professor as such though cannot get further promotion but nevertheless earn a lot respect from the peers increasing their national reputation. This could count in the assessment for appointment into the position of Vice Chancellor, Deputy Vice Chancellor and other top Higher Educational institutions appointments.

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122. Farnsworth, Edward Allen-Introduction to the Legal system of USA (1996) 3rd Edition pp. 30-31.

123. SS. 18-28 Higher Education (General Provisions) Act 1993 (Queensland Australia).

124. SS. 11-14 University Legislation (amended) Act 2004 (New South Wales Australia).

125. Bermingham Vera & Broadbent Graeme External Examining isolated or community? op. cit.

Other advantages associated with external examining are as follows. Firstly, the little honorarium paid makes it a service to the legal profession. This participation in the public interest facilitates motivation of occupational or professional birth reproduction. This is because if external examiners insist on the market value for the services, the legal profession may soon go extinct. Secondly, they ensure uniform coverage of the subjects, parity of grading facilitating assessment standards nationally and internationally imposed by stake holders and operators of legal education are maintained. Thirdly the problem areas like academic misconduct, plagiarism etc are referred to the external examiners. Finally an external examiner moderation helps to cure disparities in grading and subsequent grievances over scores through this self regulatory system thus assuring all the stakeholders; parents, employers, public that the quality balance has been maintained. Accountability is assured through external umpire holding even balance checkmating the likelihood of dangers or excesses in the pursuit of academic freedom and institutional autonomy.

## VIII CRITICISMS & PROPOSALS FOR REFORMS

One of the challenges of the external examiners system is how to formulate and internationalize the identified good practice of external examiners system identified, there is overwhelming need to ensure uniformity of the criteria or approaches to make the system more effective. The external examiners reports are made confidential to the Vice Chancellor and Faculty Board of studies. In New Zealand, external examiners' duty of confidentiality disable them from disclosing any information or knowledge acquired in the course of their activities. They are rarely disseminated to enable other members of the academic legal community or other Universities to read and where appropriate adopt what is likely identified to be universally acknowledged as "good practice". The lack of dissemination of external examiners reports prevents the cross-fertilization of ideas, as there is no opportunity for neighbouring Universities to learn from each other. This is the general short coming as external examiners need to meet to hold workshops share experiences, compare notes on assessment practice and methods and catalogue what constitute good standard of practice. The problem of the protection of the University autonomy and the traditional confidentiality of external examiners' reports disable fellow academics learning adverse or favourable comment there from. We advocate the publication of external examiners report even if anonymously to facilitate universal standards and the adoption of new innovations. It may well be useful to invite all academics who had experiences or participated in external examining ship to come together for a workshop in order to formulate what they deemed fit to be good practice which they encountered or experienced in the course of their assignment for the purpose of providing guidance. This would be similar to the code of practice of the Quality Assurance Agency in UK. The poor remuneration associated with it is a great disincentive and very few external examiners devote the time and attention required in this meticulous and energy sapping exercise.

We advocate a more robust external examiner's system as the only peanacea that will assist in the sustenance of standards in the legal profession. Since the NUC minimum academic standard defines the floor only with the roof unlimited; it could be extended not only to the final year but also from 100-400 levels of the LLB degree like the UK system. This is because individual Universities could adopt the minimum or above average or maximum academic standards. If external examiners are engaged at all levels to certify the results and ensure the implementation of the graduation requirements, this would cure the problem of delayed results now common in Nigeria universities. The external examiners could also check evidence of victimization, ruthlessness, extortion and nepotism in the lower classes, namely 100-400 levels LLB degree examination. There is nothing abnormal in extending external examining ship to first, second, third and fourth year' students in addition to the final year. Other professions like medicine maintain external examiners both from the first to final year of their professional degrees. There is also the problem of numerical explosion in the population of law students which makes the task of external examining Herculean. It is suggested that law faculties should stick to their admission quota as occupational birth control measure in the legal profession, to ensure that the external examiners system is made more functional and beneficial. We also advocate the maintenance of comprehensive database of eligible candidates like the New Zealand and UK Centre for Legal Education where external examiners can be chosen or existing ones replaced. Since 1990's, the LLB degree in Nigerian Universities is conceived and nurtured as liberal educational qualification. Although, it is intended primarily for lawyers but those intending to pursue careers in public service, industries etc are also accommodated through the introduction of non-law compulsory courses like computer application, Psychology, Sociology, Entrepreneurship, Political economy etc. Regrettably, the external examiners only moderate Law courses. It is suggested the proposed reform should extend external examiners' (who are specialists in these non-law courses) to scrutinize non law courses to strengthen the system.

# About ELFA

The European Law Faculties Association (ELFA) was founded in 1995 in Leuven by more than 80 Faculties of Law located in different universities across Europe. The organisation now has over 180 members from countries within the E.U. and beyond.

Currently, the most important focus of ELFA's activities is the reform of legal education in Europe. Through this website and the European Journal of Legal Education (EJLE), it provides information about the current state of legal education in Europe and an international forum for the discussion of the impact of the Sorbonne-Bologna Declaration on the study of law.

ELFA places particular emphasis on accreditation and quality assessment as a condition for the Europeanisation of the study of law. ELFA is also active in developing new models for the use of ICT in legal education and provides information and support for its member faculties in this rapidly evolving area.

ELFA co-operates with other professional associations in the field of legal studies in order to further promote activities relating to legal education.

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# European Journal of Legal Education



## Notes to Contributors:

Articles should be submitted in English, French, German or Spanish and must be accompanied by an abstract in English of 100-400 words length. The length of the articles should usually not exceed 7000 words including abstract and footnotes

All contributions should be sent to

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