LEGAL SCIENCE IN A SMALL STATE

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1. Legal science as an academic discipline

In the larger part of Western Europe, ever since medieval times legal science has been accepted as being on an equal or nearly equal footing with (other) sciences.[1] This is closely related to the fact that as early as in the twelfth century, law became an academic discipline in the Italian law schools and later in most of continental Europe.

The relation between the standing of the study of the law and its acceptance as an academic subject is illustrated by the Anglo-American experience. In the common law countries, the law arrived late as an academic training and the existence of a legal science (more commonly referred to as jurisprudence) was therefore also late in being recognized.[2] This of course does not mean that the common law countries have not contributed substantially to legal science in earlier centuries; in those times, the philosophy of the law had not yet been recognized as a separate branch and common law countries have always had a fair number of general philosophers who occupied themselves with legal questions.

Even the present century furnishes proof of the contention that the standing of a discipline is furthered by its incorporation in university education, as may be illustrated by some examples taken from my own country, the Netherlands. Only in recent times have the notarial studies and tax law studies been accepted as university studies; this has no doubt enhanced their prestige (and enlarged the number of teachers,

who are supposed to spend 40 percent of their time doing research). On a smaller scale, one witnesses the introduction of new chairs for health care law, humanitarian law, construction law, consumer law, etc., which are usually paid for by professional organizations with the understanding that this may promote the scientific study of the subject concerned.

2. The universality of legal science

Not only did the rise of the academic law school elevate the standing of legal science, the rapid spreading of the Bologna model over most of continental Europe also made this science a common science (from the contemporary point of view of that time even a universal science). The graduates of the 50 to 60 Bologna-type law schools, well trained in Roman and canon law, had a common background, a common language (Latin) and often a common employer (the Church).[3)]

The law itself, which the academically trained lawyers had to apply (or to form), was not common in the various countries, regions and localities, apart from the canon law. But gradually, legal rules learned at the university got mixed with local and national rules and although they never succeeded to supersede these, they came to acquire the status of a subsidiary ius commune. There was a common legal literature written in Latin, which was used all over continental Europe.[4)]

3. Nationalization of the law

The nineteenth and early twentieth century brought a fundamental change. Most European countries introduced national codifications. The period of the ius commune was over (except in some remote countries such as South Africa). It would be wrong

to point only to the disintegration which the national codifications brought about, since at the same time they succeeded in unifying the law within the various states and, due to the unifying influence of the Code Napoléon, to some extent even internationally. Until then, the law had differed locally and regionally; to some extent, this is still the case in Switzerland.

In response to this development, legal education was nationalized and based on the national codes. Latin was gradually abolished as the teaching language and as a result also as the international lingua franca. This does not mean that all bonds were severed. In Roman law, the continental European legal systems still had a common heritage. There existed a common stock of legal concepts, rules and institutions. This was especially the case in countries which had either adopted the Code Napoléon in toto (as did Belgium) or had adapted it to the national needs and backgrounds (as did The Netherlands).

Moreover, by the middle of the nineteenth century the foundation of comparative law reviews furthered the forging of new ties.[5]

fr. Counter-trends in legal science

Even while the legal systems of the national states were increasingly drifting apart, legal scientists did not accept that legal science would follow this trend towards regionalism. Ihering's pessimism (`die Rechtswissenschaft ist zur Landesjurisprudenz degradiert, die wissenschaftlichen Grenzen fallen in der Jurisprudenz mit den politischen zusammen. Eine demütigende, unwürdige Form für eine Wissenschaft´)[6] was not shared by all. Many legal scientists stressed the universality of legal science, with comparative lawyers often serving as torch-

bearers.[7] The important role of legal writing in this regard has recently been stressed by Rodolfo Sacco, who submits that the circulation of models, far from being an exception, is the rule where legal literature is concerned.[8]

It cannot be denied that taking part in this transnational circulation of ideas nowadays is not as easy as it must have been in the ius commune era. First there is the input problem. The legal scientist who wishes to study the literature of other countries has to master one or possibly more than one foreign language. Since legal publications usually use examples of the author's own home country, the legal scientist must also learn something about the legal system of the country concerned. And finally, he may have to study the social economic and political conditions of such country as well. These problems and pitfalls are of course well known to the students of comparative law.[9]

Second, there is the even more difficult output problem. When one lives in a small state, there is the possibility that one speaks a small language. In order to disseminate one's ideas, these must be translated into one of the major languages. (This problem does not arise in those small states which share a language with one or more large states.) Structural outlets for translations, such as the Scandinavian Studies in Law or the Netherlands Yearbook of International Law, do not always exist. This is a difficult hurdle to take for young legal scientists from small countries. Once they have managed to take it, however, their arrears often turn into a lead: especially knowing at least three foreign languages (French, English, German) gives them an advantage over legal scientists from larger states.[10]

5. The role of the courts, the legislature and legal practice

In emphasizing the role of legal writing in the transnational exchange of models, I think Professor Sacco does not give sufficient credit to the accomplishments of what the courts, the legislatures and legal practice may achieve in the area of legal science. In a small state such as the Netherlands, where being a member of the Hoge Raad is considered to be the highest legal position in the country, the courts often introduce new theories or concepts from abroad - usually from Germany and Switzerland, witness the use in Dutch legal writing of words such as Schutznorm, Selbsteintritt, Obliegenheit, which have not yet received a generally accepted translation. The number of legal terms and concepts of French origin is still larger, but this is more a matter of heritage than of present exchange of ideas. The influence of other languages, such as English (undue influence, trust, factoring, leasing etc.) and Swedish (ombudsman), is smaller, although in specific areas of the law - international law, jurisprudence, legal sociology - English on the other hand seems to have become a new lingua franca.

The Dutch legislature also takes into account what is happening abroad, at least when the Ministry of Justice is responsible. The explanatory memorandum to the draft book 6 of the New Civil Code (on obligations in general) reads like a comparative law treatise.[11] In the case of other ministries, the use of foreign materials is, unfortunately, far less pronounced.

Dutch legal practice seems to be more nationally oriented, but it should not be forgotten that attorneys before the Hoge Baad in their briefs often pave the way for new foreign-based solutions.

The problems with which the courts, the legislature, the legal

practice are confronted are of a similar nature as those met by academics.

6. Applied legal science

In yet another regard, university academics and legal science should not be fully equated. Much work done by law teachers consists of serving as members of state commissions or as honorary judge's and more specially of writing treatises for the legal practice. Such work is not always devoid of a scientific nature, as I pointed out above in part 5, but much of it may be qualified as applied legal science.

To this should be added that although many rules, concepts and institutions are still common as between European states, there is also a stock which is specific for the individual state. I am certain that the public trade corporation (publiekrechtelijke bedrijfsorganisatie)[12] is an institution which is known in few other countries than the Netherlands, as is the concept of binding advice as a quasi-arbitral award.[13]

The smaller a state, the larger may be the problems it has in providing legal practice with enough treatises,[14] providing the legislature and the administration with sufficient manpower to fill state commissions, and providing legal science with sufficient studies in depth of the own national rules, concepts and institutions. The manpower problem is of course not the only problem caused by smallness in these areas: an absence of sufficient cases to invigorate a system of precedents may cause problems where the judiciary is concerned.

7. Remedies for some disadvantages of small size

Now turning to some remedies for the problems caused by small-

ness, the easiest course seems to be a reharmonisation of the law. It may seem that this is drawing the cart before the horse,[15] but in The Netherlands it has recently been argued that drafting a new Civil Code should be disapproved of, because it would bring Dutch legal science out of line with that of other countries.[16]

Harmonisation and unification is of course taking place at a tremendous speed within the Europe of the Nine (value added tax, corporation law).[17] Still, unified law and harmonised law are fragmentary and the establishment of a European Law Commission and the introduction of a European Commercial Code already have been proposed.[18] If harmonisation is not possible on a global or regional level, cooperation on a smaller scale (Nordic Council, Benelux) may be a useful alternative.[19] In the long run such cooperation may lead to a common legal system, transcending the boundaries of the various states. I understand that this has happened in the United States and is in the course of happening in the Scandinavian countries (which at present only form a legal family, although legal science in the five states, owing to commonness of concepts and of linguistic background, may already be said to be unified).[20] A harmonised law provides legal science with sufficient manpower, cases and ideas to overcome the problems arising out of smallness.

Two other ways, which are usually pursued in this regard, are the loan of concepts and ideas from large states (France, Germany, Spain, Soviet Union) or, when for political reasons this is not feasible, from the common core of legal concepts which Western nations have.[21] It should be pointed out that legal science in a small country should not necessarily turn to legal science in a large country. Cooperation between small states may sometimes be an alternative; thus, both the Netherlands and the Nordic countries might benefit from an increased exchange of ideas.[22]

Harmonisation of the law is not always possible. There are areas of the law which are more nationally oriented than international trade law: family law, inheritance law, law of civil procedure. Still, this does not prevent legal science from evaluating these branches of the law from a more universal point of view. On the input side this may be furthered by teaching foreign languages at primary and secondary school level and comparative law at university level.[23] At the output side, small states have to provide linguistic facilities to foreign legal scientists: yearbooks as mentioned above in part 4, foreign language summaries in bills and doctoral theses[24] (the latter is compulsory under Dutch law) introductions to the legal system in a foreign language,[25] etc.

Very important in this regard is legal education. The universality of legal science can benefit immensely from a reorganization of the law school's curriculum on transnational lines.[26] Such reorganization should be an educational experience for both teachers and students. Courses and programmes in subjects which have already been internationalized, such as European law, law of conflicts, public international law, may provide the nucleus around which internationally oriented law studies may grow.

But let us not be carried away completely with the idea of a non-national law school. There are, once again, severe linguistic problems to overcome. Then there is the problem that a law school which is not oriented towards the legal system of the country concerned will probably not be able to offer degrees which give direct admittance to the bar. The ever increasing number of students also has as a consequence that many graduates will not enter into positions where the usefulness of a transnational law curriculum is self-evident and will claim for a more practice-oriented study.

8. Advantages of small size

Having devoted some attention to the problems of legal science, and especially of legal scientists, in a small state, I think it is fair to say that there are also some advantages involved. If one asks an American or a German lawyer whether he is content with the number of cases, the number of treatises, or the volume of legislation in his country, his answer will probably be that there are far too many cases (in the United States), that there exists a plethora of treatises and that the volume of legislation is a sever burden (in Germany). This makes it difficult to keep informed about what is going on. Lawyers in small states suffer from no such problems of plentiness. For legal scientists similar advantages exist. Insofar as deductive methods are used, it is still possible to study all relevant materials, all legislation, all cases. There are also fringe benefits: the numbers of students are not as overwhelming as in large states, the legal community is small enough to be in regular touch with one another. Small is not always a disadvantage; small is beautiful.

9. What is small?

This brings me to a final question: what actually is a small state? Swedes tend to think of their country as a small state,[27] but as a matter of size, still it is the fourth largest country of Europe, nearly the size of the German Federal Republic and the United Kingdom combined. Or is it population which is the criterion? But then what about countries such as China and Indonesia; the latter country undoubtedly suffers far more from the problems set out above than smaller countries with a population of no more than one-tenth of that of Indonesia. What we have in mind then probably is not only a matter of size of population, but also has something to do with legal culture and legal tradition. What is the number of law reports and law re-

views, the number of publishing houses, the numbers of legally trained persons, of students? How many inches thick is the national output of legislation?[28)]

These elements are in turn influenced by not strictly legal data: the volume of international trade, the number of crimes and prisoners, the process-mindedness of citizens.[29)] It would take too much time to put all of these elements into one model and to figure which states should or should not be qualified as small. Taking into account the advantages and disadvantages of a state with regard to legal science I would venture to say that none of the medium-sized European countries should really be qualified as small. Denmark, Finland, Norway and Sweden, Belgium and The Netherlands, Austria and Switzerland, Hungary, Portugal, all seem to possess a sufficiently large legal culture to be autarchic if necessary. On the other hand, these states are not so large that their legal culture exercises a lasting influence on other medium-sized states.[30)] They seem to be in between the really small states, which are not self-sufficient in legal science (Luxemburg, Iceland, the Irish Republic; the dwarf states Andorra, Liechtenstein, Monaco, San Marino, the Vatican State; Malta, Cyprus, the Channel Islands) on the one hand,[31)] and the large (Italy, Spain) and super large (England, France, Germany) legal powers on the other.

All these statistics should not be given too much significance. Quantity does not necessarily mean quality. Small (or as I now tend to call them: medium-sized) countries have often produced great legal scientists - a Grotius, a Huber, a Kelsen, a Ross illustrate this point; the Athens of Plato and Aristotle is perhaps the best example of a small state making a lasting contribution to legal science.

10. Conclusions

In concluding this essay, I would venture the opinion that the (small) size of a state presents less problems for legal science than for the legislature[32] and the courts (legal practice also has larger problems, although the practitioners themselves probably enjoy the easy surveyability of their legal system). This is due to the universality of legal science: an absence of new ideas, concepts, rules, institutions in one's own state is made up by the availability of these in other states. Problems are chiefly of a practical nature: the language and the difference in legal culture. Where "applied legal science" is concerned, the problems are larger, as they derivate from the problems of the legislature, the courts and legal practice.

Remedies for the problems may be found in harmonising the law - on a global or a regional level or through adoption of foreign law - and in keeping legal science universal. The latter goal may be furthered by adapting the law school curricula to the tranenational character of legal science.

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1) The question whether or not it is correct to speak of legal "science" has of course been highly controversial in The Netherlands, as everywhere else in Western Europe. The arguments advanced in favour of or against legal science reflect the international dimensions of this question. In one of the last encyclopaedic introductions to Dutch law (L.J. van Apeldoorn, Inleiding tot de studie van het Nederlandse recht, 17th edition by J.C.M. Leyten, Zwolle 1972, pp 330-333; the introductions which are presently in use no longer are of a names-dropping nature), apart from many Dutch authors, several foreign writers are quoted in this regard. Among them are some representatives of "small states": Lundstedt, Die Unwissenschaftlichkeit der Rechtswissenschaft, Berlin 1932-36; Ross, Law and Justice, 1959; Folke Schmidt, Scandinavian Studies in Law 1957, p 162; Cornil, "Le droit n'est pas une science, mais il y a une science de droit", Bulletin de l'Académie royale de Belgique, lettres, 5e série, XXVI, 1940; Jean Dabin, Théorie générale du droit, 5e édition Paris 1969; René Dekkers, Le droit privé des peuples, Bruxelles 1953. As will be noticed, the Scandinavian authors are only quoted from their German- and English-language publications or translations. Therefore, untranslated studies, such as Ekelöf's Ä'r den juridiska doktrinen en teknik eller en vetenskap? (1951), seem to have remained unnoticed by Van Apeldoorn.

Far from being settled, the legal science controversy seems to have lost momentum in The Netherlands. The subject is now often referred to as algemene rechtsleer (allmän rättslära, jurisprudence).
An argument against the legal science proponents might be that,

unlike in other sciences, a common scientific language has not yet been developed - see Tullio Ascarelli, "Premesse allo studio del diritto comparato" in: Studi di diritto comparato e in tema di interpretazione, Milano 1952, p 5.

The law faculty is called fakulteit der rechtsgeleerdheid and not Fakultät der Rechtswissenschaft as in Germany. On the other hand, since 1960 legal education is regulated in an Act called the Wet op het wetenschappelijk onderwijs (scientific education act).

2) This may be illustrated by some quotations from an article by G. Edward White, "The impact of legal science on tort law, 1880-1910", 78 Columbia law review, pp 213-257 (1978):

"Law, like medicine and the ministry, had been regarded prior to the knowledge revolution, as a profession requiring specialized training. Yet one can see the same kinds of dramatic changes taking place in the legal profession after 1870 that occurred in academic disciples. The changes stemmed primarily from the pervasive infiltration of university law schools into the training patterns of the legal profession. Led by Harvard Law School under Christopher Columbus Langdell, university law schools sought not merely to set themselves up as an alternative to apprenticeship training, but to displace it. As in the case of the new professional academics of the late nineteenth century, the conviction of legal educators that they were best suited to train persons for the practice of law was based on their participation in the knowledge revolution, exemplified by their commitment to legal science." (P 220.)

"No single distinguishing characteristic of Harvard Law School under Langdell had a greater influence on the substantive growth of American law than the triumph of the scientific

method of legal study. While the method has been principally celebrated or criticized as a teaching device, it possibly had an even greater impact through legal scholarship, where its special concerns, as reflected in treatises and law review literature, helped reorient the analytical modes of litigatures and courts in the late nineteenth and early twentieth centuries." (P 225.)

"If the production of massive conceptualist treatises represented one goal of the legal scientists, training students in the techniques of the scientific method represented the other." (P 229.)

"The `inductive' research techniques of the late nineteenth-century scientific method helped expose the `dogmatic' character of all encompassing legal principles."
"... a final limitation of legal science for twentieth-century critics was its tendency to generate substantive rules that were formed on an outmoded view of society. Beliefs such as the free will of the autonomous individual, the desirability of limited governmental involvement in human affairs, and the inherent justice of the law of the marketplace were antithetical to a twentieth-century philosophy of affirmative, paternalistic intervention by the state." (P 255.)

"With the demise of nineteenth-century legal science, the guiding analogy to the natural sciences was lost; but there arose in its place an equally tempting analogy to the social sciences, especially sociology and psychology." (P 256.)

3) The following has largely been taken from Helmut Coing's challenging paper on `European common law: historical foundations', read at a colloquium at the European University Insti-

tute in the Badia Fiesolana near Florence in 1977. The paper has been published in: Mauro Cappelletti (ed.), New perspectives for a common law of Europe, Leyden/Bruxelles 1978, pp 31-44.

Dutch legal historians have also contributed to the study of the historical foundations of the ius commune. See especially the foreign-language publications of E.M. Meijers, Etudes d'histoire du droit, I. Problèmes généraux d'histoire du droit de l'Europe occidentale; histoire du droit français; histoire du droit espagnol, 1956; II. Histoire du droit des Pays-Bas, de la Belgique et de l'Allemagne, 1973; III. Le droit romain au moyen âge/Première partie: A. L'enseignement du droit dans trois universités du XIIIe siècle. B. Histoire des sources, 1969; IV. Le droit romain au moyen âge/Deuxième partie: C. Aspects de l'histoire de quelques principes juridiques, 1966 (Leyden) and of R. Feenstra, Fata iuris romani/Etudes d'histoire du droit, Leyden 1974.

The Belgian/Dutch legal history review Tijdschrift voor rechtsgeschiedenis contains many articles in French, English and German.

M The influence in Europe of legal education at Leyden University has been traced by R. Feenstra and C.J.D. Waal, "Seventeenth-century Leyden law professors and their influence on the development of the civil law/A study of Bronchorst, Vinnius and Voet", Verhandelingen der Koninklijke Nederlandse Akademie van Vetenschappen, Afd. Letterkunde, Nieuwe Reeks deel 90, Amsterdam/Oxford 1975.

Outside The Netherlands Bronchorst's works were published (either in the Latin original or in translation) in Hanau,

Frankfurt, Rostock, Leipzig, Magdeburg, Paris, Antwerp, Marburg, Douai, Louvain, Calcutta, Granada de Nicaragua and Mexico. Vinnius was published in Jena, Leipzig, Frankfurt, Paris, Orleans, Vienna, Venice, Valencia, Lyon, Geneva, Nuremberg, Antwerp, Herborn, Naples, Barcelona, Cologne, Giessen, Marburg, Florence, Ancona, Montepulciana. Voet was published in Liège, Brussels, Basel, Naples, Venice, Bassano, Geneva, Halle, Paris, Besançon, Durban, Frankfurt, Leipzig, Turin, Louvain arid Cologne - cf. Feenstra and Waal (1975), op. cit., pp 111-115.

5) In The Netherlands somewhat later: in 1881 H.L. Drucker (then 24 years old) and W.P.L.S. Molengraaff (23 years old) started the Rechtsgeleerd magazijn/Tijdschrift voor binnen- en buitenlandse rechtsstudie, which published articles on foreign legislation. The review still exists, but it is no longer devoted primarily to comparative law. Before the Rechtsgeleerd magazijn was published, the earlier Bijdragen voor Rechtsgeleerdheid en Wetgeving (1826-) and Themis (1839-) already devoted considerable attention to foreign law.

Another developement which in The Netherlands took place much later than elsewhere, was the foundation of a comparative law association (1968), but this may be attributed to different elements. As the first president of the said association, Isaak Kisch, has expressed it in his introduction to the Netherlands reports to the VIIIth international congress of comparative law Pescara 1970, Deventer 1970, iii:

'A *propos* of the Netherlands Association, the reader may well wonder why it was founded at so late a stage—France e.g. being nearly a century ahead!—, considering, first, that the Netherlands lawyer has command, far above the average, of foreign languages, and, secondly, that Netherlands statutes, doctrine, and case-law have been influenced by, again far above the average, and inspired upon foreign legal systems and provisions.

Now, paradoxical as it may sound, the belated birth of our Association has been determined by the very two facts just mentioned: the knowledge of the foreign language and the relation to the foreign system have turned the Netherlands lawyer into a comparatist, though without him being aware thereof. As evidence I offer the papers and proceedings of the Netherlands Lawyers' Society —now in its hundredth year—, where it would be hard to find a subject, handled without reference to French, German, and English law, with, often, Swiss, Austrian, Scandinavian and Italian law thrown in for good measure.

Thus, the Netherlands lawyer, for five-score years, has been a comparatist *sans le savoir*. But then, just as it would be difficult to enlist M.Jourdain, after his finding that he has been talking prose all his life, with a society for the cultivation of prose, by the same token it has proved an arduous job to recruit Netherlands lawyers for the study of comparative law as a discipline by itself.

6) Ihering, Geist des römischen Rechts, 10th edition 1968, I, p 15.

7) See for instance M. Ancel, Utilité et méthodes du droit comparé, Neuchâtel 1971, p 119: "Le droit comparé moderne développe donc bien, de par un consensus général, une vocation, et aussi un esprit universaliste. Sa mission finale, dans la mesure où il dépasse les technicités nationales et même les particularismes régionaux, eet sans doute de servir d'expression à la conscience juridique universelle, ou du moins - quelque soient leurs régimes autonomes d'organisation ou leurs idéologies - de dégager la conscience juridique des Nations évoluées et parvenues à un niveau analogue de civilisation, à un moment donné de l'histoire de l'humanité."

8) This role of legal science is stressed by Rodolfo Sacco, "Droit commun de l'Europe, et composantes du droit", in: Mauro Cappelletti, New perspectives for a common law of Europe, Leyden/Bruxelles 1978, pp 95, 101-102:

En revanche la circulation des modèles — une circulation très intense — est la règle dans le secteur de la doctrine. Le juge tranche la plus importante des questions sans savoir ce qui se fait à l'extérieur. Mais le théoricien n'écrit pas un ouvrage d'importance sans connaître ce que l'on dit dans les autres pays.

Dans une certaine mesure, la doctrine n'est pas seulement la composante du droit la plus ouverte à l'imitation. Elle est aussi, dans une large mesure, l'organe de transmission qui permet la circulation de modèles légaux et jurisprudentiels. C'est la doctrine' qui diffuse — dans son pays — la connaissance des lois étrangères et des grands arrêts des pays voisins. Si un modèle voit le jour dans un tribunal d'un Etat donné et que la doctrine de cet Etat lui assure la publicité qu'il mérite, la doctrine de l'Etat voisin en aura connaissance et le diffusera chez elle: il pourra donc pénétrer dans le système juridictionnel du second pays.

En d'autres termes la doctrine d'aujourd'hui, surtout en sa qualité de « droit enseigné », peut devenir le droit appliqué de demain, ou être à la base du droit codifié de l'avenir. Les tâches que la doctrine peut assumer, les procédures qu'elle peut adopter, sont multiples. '

The importance of legal writing is also stressed by Geoffrey Sawer, International encyclopaedia of comparative law, II, chapter I-79. According to Sawer, the actual development of the law, both in its detailed daily adaptation to the changes in social organization, and in its more macroscopic changes as by legislation and codification, has been strongly influenced by the classifications and concepts of the legal specialists. At various times major legal changes have been brought about by the direct intervention of political forces from outside the realm of the specialist, but the absorption of new developments which they began, have usually been due to the constructive legal logic of the specialised profession.

9) See M.C. Burkens, Methodologie van staatsrechtelijke rechtsvergelijking, Deventer 1975, and J.G. Sauveplanne, De methoden van privaatrechtelijke rechtsvergelijking, Deventer 1975. In another "small state" (from the legal science point of view), Turkey, these problème have been dealt with by Ergun Özsunay, Karşilaştirmali Hukuka Giriş, Istanbul 1976, pp 137-160 (with an English summary).

10) This may partially explain why legal scientists from "small states" so often serve as general editors for comparative monographs or series. For The Netherlands, recent examples are: H. Cohen Jehoram (ed.), The protection of know-how in 13 countries, Deventer 1973 (with contributions from Belgium, Czechoslovakia, Germany, Italy, Japan, The Netherlands, Poland, Rumania, Spain, Sweden, Switzerland, USA, Yugoslavia); J.S. Sauveplanne (ed.), Security over corporeal movables, Leyden 1974 (with contributions from England, Wales, Scotland, USA, Canada, France, Italy, The Netherlands, Germany, Switzerland, Sweden, Asia); T. Koopmans (ed.), Constitutional protection of equality, Leyden 1975 (with contributions from USA, Canada, German Federal Republic, France and USSR); J.C.L. Huiskamp (ed.), International tax avoidance, Deventer 1978.

11) As evidence I offer a sample from the translation edited by the Ministry of Justice, Leyden 1977: the footnotes to the explanatory memorandum concerning section 6.1.4 (alternative obligations). It should be borne in mind that the draft was originally published in 1960, and that meanwhile a revised draft has been approved of (in April 1977) by the Second Chamber of Parliament.

The footnotes will be found on pp 276-277 of the translation:

SECTION 6.1.4

Introductory Remarks

140. Cf.: Asser-Losecaat Vermeer-Rutten p. 67-69; Hofmann-Van Opstall p. 200-203.
141. So also: Germany 262 et seq.; Greece 305 et seq.; Italy 1285 et seq.; Egypt 275 et seq.; Japan 406 et seq.; Hungary 230, 311.
142. So also: Germany 262 et seq.; Egypt 275 et seq.; Japan 406 et seq.; Hungary 230, 311.

Article 6.1.4.1.

143. Cf. a.o. Larenz I p. 106 et seq..
144. Cf. Hofraann-Van Opstall p. 197.
145. Compare with article 1 para. 2: Germany 262; Greece 305; Switzerland, O.R. 72; Italy 1286 para. 1; Egypt 275; Japan 406, all with the same purport.

Article 6.1.4.2.

146. See: Asser-Losecaat Vermeer-Rutten p. 64-65. Aliter however Hofraann-Van Opstall p. 199 where the view is taken that the person who has the power to opt is entitled to change his mind so long as the obligation has not been performed and subject to the duty to make good the damage resulting from the change. In agreement with the draft: Germany 263; Greece 306 para. 1; Italy 1286 para. 2; Japan 407. Aliter; the Franco-Italian draft 122 para. 2.

Article 6.1.4.3.

147. Compare: Germany 264; Greece 308, 309; Italy 1286 para. 3, 1287; Egypt 276; Franco-Italian draft 122 para. 4 and 5; Japan 408, 409 para. 2; Hungary 230. In these codes - with the exception of the Japanese code - the regulation has become unnecessarily complicated because the rules which apply when the creditor is entitled to opt (and which are different in the various codes) are based on a system completely different from what applies when the debtor is entitled to opt. The regulations embodied in the Italian, Egyptian and Hungarian codes have the additional drawback that the court must set the term if the option is vested in the debtor; the creditor is therefore obliged to apply to the court even if he is entitled to effect execution without a court judgment. In Egypt the above rule also applies when the option is vested in the creditor. In the Franco-Italian draft the rule applies only if the creditor is entitled to opt.
148. Compare the regulation incorporated in the draft with Hofmann-Van Opstall p. 198. Unlike Hofmann, Asser-Losecaat Vermeer-Rutten p. 66 is of the opinion that under existing law the court would have to determine the option in such a case.
149. Cf. Italy 1287 para. 3. Aliter Japan 409 para. 2 which provides that in that case the option passes to the debtor.
150. Cf. Italy 1286 para. 3; Egypt 276.

Article 6.1.4.4.

151. The same distinction and the same solution may be found in the modern codes in so far as they provide for the case where the option 'is vested in the debtor. See a.o.: Germany 265; Greece 310-312; Italy 1288, 1289 para. 1; Japan 410; Hungary 311.
152. Cf. Germany 265; Greece 314; Italy 1289 para. 2, sentence 2; Japan 410 para. 2; Hungary 311 para. 2; the Franco-Italian draft 125 sub 3°.
153. Cf. the Dutch C.C. 1312 para. 1; Germany 265; Greece 310; Italy 1288; Japan 410 para. 1; Hungary 311 para. 1; the Franco-Italian draft 125 sub 1°.
154. The special rule of article 1496 C.C. with regard to purchase has not been adopted by the draft.
155. Germany 265; Japan 410; Hungary 311 para. 1.
156. This regulation was incorporated in the Hungarian draft of 1928 (article 1144 para. 2) but it has not been adopted in article 311 of the Hungarian code.
157. Greece 313; Italy 1289 para. 2, sentence 1; the Franco-Italian draft 125 sub 2°.
158. Cf., besides the articles 1311, last sentence, and 1312 para. 2 C.C., a.o.: Italy 1290; Egypt 277; Greece 311; the Franco-Italian draft 124 para. 2 and 126.

12) In D.C. Fokkema et al. (eds.), Introduction to Dutch law for foreign lawyers, Deventer 1978, 499-500, E.C.A.M. Boot and E.P. de Jong give the following description of the public trade corporations (or business boards, as they prefer to call them):

' The business Boards are instituted by virtue of an Act or a decree which in turn, is based on the Act *BO*. They are administered on the basis of parity by an executive committee appointed by the employers' and employees' organizations. The President of a Product Board is appointed by the Crown, whereas the President of a Trade Board is chosen by its executive committee. The Product Boards are 'vertical' organizations grouping enterprises which are active in the different stages of the production and distribution process of individual products or groups of products. The Trade Boards are 'horizontal' organizations in the sense that they group enterprises of the same or similar function in industry or business. These Boards have been given the competence to make binding rules for the enterprises over which they are, set under the preventive supervision of the Minister concerned, of the *SER* and of the higher institutions in general. The Boards are also competent to emit ordinances in execution of regulations of a higher order, such as statutes, decrees, etc. (co-administration). If their rules are contrary to the law or the general Public interest they can be suspended or annulled by the Crown. The areas in which the business Boards are competent are: production, outlets, distribution, and use of goods, services rendered, social, economic or technical enquiries, competition, mechanization and rationalization of companies, training programmes, unemployment, wages and salaries, vacations, overtime, and other working conditions. Their rules or ordinances may not restrict free competition.

It is chiefly in a limited number of sectors that the Product and Trade Boards work satisfactorily, these are: agriculture, food supply, retail trade, and the manual trades and professions. Since the Act came into effect, 58 business Boards were created in these sectors but 10 of them have been discontinued during the last few years because of structural changes such as the gradual merging of the different branches of industry or business, and the rapid expansion of the markets caused by the creation of the European Common Market.

In general, the lack of viability of the business Boards may be explained by the shift in economic policy whereby more emphasis is laid on global control over macro-economic cycles rather than on the mandatory planning of each economic sector. It has, nevertheless, become clear that many of the agricultural Boards now have extensive responsibilities in carrying out the Common Market's agricultural regulations. We have already mentioned that the business Boards are subject to preventive supervision by the government, with regard to the rules they make or emit. This supervision is important since the government bears the responsibility for the correct execution of the obligations assumed in the framework of the EEC.[3]

13) See P. Schlosser, Das Recht der internationalen privaten Schiedsgerichtsbarkeit, Tübingen 1975, I, pp 22-25 (only the Italian arbitrato irrituale shows some resemblance).

14) The Uniform law on international sale (ULIS), which has been in force for some six years in The Netherlands, has not yet been treated in any monograph - the first treatise (by F.J.A. van der Velden) is expected to be published in 1979. In a large state such as the German Federal Republic some 10-15 treatises have already been published with regard to the Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen (1976).

15) K.H. Neumayer, "The role of a uniform legal science in the harmonisation of the continental legal systems", in: Essays in jurisprudence in honour of Roscoe Pound, New York 1962, pp 649-670 describes just the reverse.

16) P. Zonderland, "Nieuw vermogensrecht als hamerstuk?", Nederlands Juristenblad 1977, pp 410, 412.

17) A special problem for small states in this regard may be that they lack political leverage to have their ideas respected. This problem, however, is shared by larger states. When the United Kingdom joined the Common Market, British civil servants often experienced difficulties in making "the others" understand the British point of view.

18) In 1976 a conference of European law faculties held under the auspices of the Council of Europe proposed that an opportunity should be created for the discussion within the wider framework of the Council of Europe of "the possibility of forming a group to consider the problems which should naturally go to a body of the nature of a European Law Commission". Proceedings of the fourth European conference of law faculties, 6-8 October 1976, on the contribution of comparative law to research and law reform, Strasbourg 1977, p 92.

On the second subject see Ole Lando, "Unfair contract clauses and a European Uniform Commercial Code", in: Mauro Cappelletti (ed.), New perspectives for a common law of Europe, Leyden/ Bruxelles 1978, 267-288.

19) Legal co-operation between the Benelux countries (Belgium, Netherlands, Luxemburg) has led to the adoption of a number of uniform laws (on trademarks for instance, but also on less important matters such as commorientes) and to the establishment of a common Supreme Court to guarantee uniformity of interpretation of these laws - on the latter cf. S. Swartenbroux-Vanderhagen, Het Benelux-Gerechtshof, thesis Eeuven 1973.

On the methode of co-operation see Anne Limpens, "L'unification du droit dans les pays de Bénélux/Les organes compétents et leur mission", in: Rapports belges au Ville Congrès international de droit comparé, Bruxelles 1970, 139-155.

On the private level, there is an Association for the study of Belgian and Dutch law, there are several law reviews such as Sociaal-Economische Wetgeving and Tijdschrift voor rechtsgeschiedenis with a Belgian-Dutch board of editors.

20) See Jacob W.F. Sundberg, Fr. Eddan t. Ekelöf/Repetitorium om rättskällor i Norden, Malmö 1978, pp 19-23.

21) Rudolf B. Schlesinger, Formation of contracts/A study of the common core of legal systems, Dobbs Ferry/London 1968, I, 17 contends that even for the solution of purely domestic problems an examination of the "common core" of legal systems may be useful. This is particularly the case in new countries faced with the task of creating their own systems of law. See in this regard Lev. "The lady and the banyan tree/Civil-law change in Indonesia", 14 American journal of comparative law 282 (1965).

22) A precedent for such co-operation might be the Oslo Convention (1930), as was pointed out during the discussion by Ulf Bernitz.

23) The teaching of comparative law at Dutch law faculties is very much in need of improvement - cf. my article "Teaching and research in comparative law in The Netherlands", *2k* Netherlands international law review 560-577 (1977).

The Netherlands international law review (formerly the Nederlands tijdschrift voor internationaal recht) is one of several English-language reviews published in The Netherlands. Others are Abstracts on criminology and penology, Abstracts on police science, Air law, Common market law review, Legal issues of European integration and the Review of socialist law.

24) An interesting idea, put into practice by Ulf Bernitz, Marknadsrätt/En komparativ studie av marknadslagstiftningens utveckling och huvudlinjer, Stockholm 1969 pp 476-499 ie to provide foreign readers with a nearly full-length translation of the more fundamental parts of the book, limiting oneself to a traditional-length summary of the other parts of the book.

25) See the Introduction to Dutch law, quoted in footnote 12 above.

26) See Coing (footnote 3 above) at p 44:

> We should fight for an organization of academic training in the field of law at our law schools in Europe, which instead of dividing the lawyers in Europe, tries to further mutual understanding. We must revise the idea which dominated legal education in the 19th century, that national legislation must be the basis of legal training. The curricula of our 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. What is necessary and what we must aim for is a curriculum where the basic courses present the national law in the context of those legal ideas which are present in the legislation of different nations, that is, against the background of the principles and institutions which the European nations have in common.

Yet another possibility to strengthen the ties is for the

governments to adopt a programme of legal co-operation.

The Treaty of co-operation between Denmark, Finland, Iceland, Norway and Sweden of 1962 in its Preamble speaks of the governments of the five states as "desirous of furthering the close connections between the Nordic nations in culture and in juridical and social conceptions ..." (my italics, EH). The introductory article 1 provides: "The Contracting Parties shall endeavour to maintain and further develop cooperation between the countries in the juridical, cultural, social and economic fields ...." The juridical cooperation is then worked out in articles 2-7.

The above (unofficial) translations have been taken from a publication by the Nordic Council, Cooperation agreements between the Nordic countries, Stockholm 1978, pp 7 ff.

27) See for instance Leif Sjöberg, Pär Lagerkvist, New York 1976, 3: "In a small modern country like Sweden writers tend to become public persons ...."

28) Let me give you some figures, for all they are worth. Kluwers agenda voor de rechtspraktijk 1979 lists some 79 law reports and law reviews which are at present being published in The Netherlands. The review with the largest circulation (22,500) is the student law review Ars Aequi; the Nederlands Juristenblad only has some 8,500 subscribers. There are specialised law reviews for such diverse areas as agricultural law, air law, company law, construction law, copyright law, environmental law, family law, health care law, insurance law, labour law, maritime law, military law, notarial law, social-economic law, traffic law, etc.

There are thirteen large publishing houses in The Netherlands (some of which are controlled by the same holding companies) - see the list in D.C. Fokkema et al. (eds), Introduction to Dutch law for foreign lawyers, Deventer 1978, 672. Some of these (Elsevier, Kluwer, Nijhoff, Samson, Sijthoff) have an international reputation.

Charles S. Rhyne (ed.), Law and judicial systems of nations, 3rd ed., Washington, D.C, 1978, gives the following numbers of lawyers in the European and some non-European countries. These figures are sometimes somewhat misleading, since some relate to numbers of practising attorneys, others to the numbers of law school graduates. Nowhere is this more apparent than in Hungary, where Rhyne estimates the number of practising attorneys being 1,500 and the number of law school graduates at close to 30,000.

The statistics on the numbers of lawyers will be supplemented with those of law students studying within the various states. The figures for the latter have been taken from the Compendium of law studies in Europe, Strasbourg 1974 (some of these data go back to 1970). For the non-members of the Council of Europe, the numbers of students are those as stated by Rhyne.

State	lawyers	students	State	lawyers	students
Albania	400		Malta	156	147
Andorra	several		Netherlands	2,743	14,039
Austria	2,643	4,423	Norway	1,800	3,180
Belgium	5,000	10,531	Poland	3,786	15,503
Bulgaria	2,250	2,622	Portugal	3,350	5,486
Cyprus	364		Spain		25,096
Denmark	2,500	4,628	Sweden	1,400	8,500
Finland	7,000	3,108	Switzerland	2,827	4,465
France		97,843	Turkey		10,687

State	lawyers	students	State	lawyers	students
German Fed. Rep.	21,000	35,572	UK	39,700	7,630
Greece	14,000	4,300	Yugoslavia	3,286	29,763
Holy See		412			
Hungary	1,500		Canada		5,000
Iceland	200	235	Israel	6,400	1,438
Ireland		947	Japan	10,179	186,700
Italy	25,000	93,214	USA	424,980	122,492
Lichtenstein	less than 20	-			
Luxemburg	200				

As to the number and length of statutes, a brief glance at the stacks of the Peace Palace gave the following results. Austria in 1977 made 689 laws on 4502 pages of print; the German Bundesgesetzblatt of 1977 contained 3188 (national laws) and 1492 (international treaties) pages; the French Journal Officiel of 1977 numbered 6400 pages, to which should be added the 8854 pages of the numéro complémentaire (lois et décrets); Italy's Gazetta ufficiale délia Republica italiana of 1976 had 9710 pages; Monaco in 1976 made 13 laws; New Zealand passed 169 national acts, printed on 2293 pages; Sweden's SFS 1977 contains 1191 numbers, divided over three volumes; the UK Law Reports 1976 contain 86 Acts and 4 Measures on 2158 pages of print; the US Statutes at large 1973, finally, contain 1265 pages - this does not include state laws, of which the State of New York, to give one example, passed 983 in 1977.

29) International trade figures for some "small" states, represented at the colloquium, and of some "large" states (for reasons of comparison, the gross domestic product, if known, is also given):

(in billions of US$)	1976 imports	exports	1975 gross domestic product	
Austria	11,523	8,507	37,574	
Belgium-Luxemburg	35,368	32,847	64,442	
Denmark	12,419	9,113	35,451	
Finland	7,393	6,342	26,586	
Hungary	5,528	4,932	?	
Norway	11,109	7,917	28,302	
Sweden	19,333	18,440	69,367	
Netherlands	39,574	40,167	81,202	
Canada	37,910	38,127	159,707	
France	64,404	55,816	335,744	
German Federal Republic	87,782	102,032	424,835	
Italy	43,425	36,697	149,809	(1974)
Japan	64,797	67,224	455,302	(1974)
Spain	17,463	8,727	85,526	(1974)
United Kingdom	55,986	46,271	228,820	
United States	128,872	113,323	1,513,800	
USSR	38,108	37,169	7	

Source: United Nations, Yearbook of International Trade Statistic 1976, New York 1977; United Nations Statistical Pocketbook, World Statistics in Brief, second edition New York 1977.

As will be seen from these statistics, the 'small' Netherlands and Belgium-Luxemburg rank 7th and 10th among the major trading countries of the world.

The number of immates in Dutch prisons at 31 December 1976 was 2,946 (1,350 of whom were awaiting trial) - Centraal bureau voor de statistiek. Statistisch zakboek 1978, 348. As H.v.Hofer, "Dutch prison population", Scandinavian Research Council for Criminology 1975 has pointed out, the total input of the criminal justice system is apparently consistently lower in The Netherlands than in Sweden.

30) Apart from the influence of a colonial power on its colonies (Belgian Congo, Ceylon, Dutch East Indies, Netherlands Antilles, South Africa, Surinam) or of foster country on its adopted daughter (Switzerland-Turkey).

31) In political sicence, the studies which deal with the problems of small states usually only cover these mini-states, although they often refrain from defining smallness. D.P.J. Wood, "The smaller territories: some political considerations, in: Burton Benedict (ed), Problems of smaller territories, Commonwealth Paper X, Bristol 1967, 27, 29: "it proved impossible for the seminar to decide what `smallness´ means with any precision. It is a comparative and not an absolute idea. Whatever scales of magnitude are employed seem arbitrary, and it is difficult to pick out on them where smallness begins or ends." Jacques Rapaport, Ernest Muteba and Joseph J. Therattil, "Small states & territories"/Status and problems, New York 1971, pp 30-31 also refrain from defining smallness, but in fact limit their study to states and territories with a population of 1,000,000 and less. In an Annex to this book, Charles L. Taylor comes to the conclusion that "the use of the three most obvious measures of territorial size (i.e. population, area, gross national product, EH), weighted equally, seem to be sufficient for drawing up a workable listing" (p 199).

32) In some instances the size of a civil service may set limits to what a legislature may take up, but on the other hand this argument should not be invoked to quickly - as is sometimes done for political reaone, for instance to prevent the legislature from taking up legislation dealing with standard terms (cf. J.H. Dalhuisen, Preadvies Nederlandse Juristen-Vereniging 1979).