

# Governing Governance: Organisation Law and Network-Process-Design

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## 1. The Art of Governance

### 1.1 Organisation law

More and more, education *is* the difference between employability and obsolescence. Consequently, on the one hand it is an economic necessity that public authorities take a political interest and considerable financial and legal responsibilities in education. They should, however, not assume this for the contents. Of that public authorities know very little and it remains debatable if quality councils and accreditation organisations are fit to assess more than minimum quality. The State has a responsibility for the main structure and the managerial system, as well as for the appropriate funding of education. In doing this it should attentively respect the academic freedom, as well as the freedom to design the educational system and the freedom to manage education. A wise and democratic State will apply modern, effective, efficient, therefore decentralised, management instruments and methods that provide for ex post quality assurance and avenues of multiple accountability to the public.

On the other hand, it seems that many managers, bad managers in particular, do not value the necessity of a solid organisational structure or acknowledge this too little too late. Also good managers often put this aside. After they have left, the chaotic situation inside the institution becomes visible.

This is why the following chapters on the issue of ‘governing governance’, treat a new and not yet well defined field of law which is: *organisation law*.

*Organisation law should be defined as:*

*The administrative, economical and juridical aspects of:*

- *how an organisation – public or private – is internally structured and governed;*
- *how it develops strategy and policy and translates these into action;*
- *how it is legally embedded in its working environment or/and its operational system;*
- *how it co-operates and communicates with external parties.*

Organisation law belongs neither to public nor to private law, and even only partially to the field of law. It is usually regarded – if it is considered at all – as subtypes of public administration or of administrative law, not even as a mix of this.

Organisation law, in public as well as in private organisations, should be considered as an archetype of a hybrid mode. Organisation law is a cross-fertilised field of economy, public and business administration as well as the art of policymaking, based on law. It is the backbone of good governance: a specialisation on general issues in different disciplines. A profession for which there exists no university study. In the following we elaborate on this.

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## 1.2 Governing governance

In ten years from now nothing will be the same, but the fact that we still have to prepare for the ever unknown future. Obstacles of a balanced development of a university<sup>1</sup>, as well as a turbulent environment, will always appear in various forms and at all levels of a higher education system. For example: corrections of the imbalance between innovation, entrepreneurship and academic values will have to be corrected over and over again. New impediments for innovation must be eliminated continuously.

Of course, the State should foster innovation of almost any kind through financial support, but because money is always scarce, good governance concepts are crucial. Good governance comes first especially when the money is truly short. Therefore, governors and managers should always make sure that they always create or maintain solid and democratic decision making structures. This is a main challenge of governance. It implies continuous innovation of the design of the system and the structures of governing. However, considering trends and incidents in governance, about the impact of legal and non-legal interventions, there is not yet much reason to be happy about their effectiveness. Nonetheless, governments still can and should guide social norms (Posner, 2000). But they should improve their ways and means considerably.

Like a country, a company, the human resources, the financial affairs, student affairs, curricula development and research, governance needs to be governed too. Yet, what embraces the art of governing governance? A concept like 'general management' is ideally an integrating action of those who (should) master and guide various aspects of the management, adding value to it in terms of strategy, vision, helicopter view, leadership, consensus building, mediation, co-ordination and accountability. This type of good governance requires worldwide rare abilities. Worse: these abilities are not well tangible. And above and beyond, strong visions of strong leaders regularly become the nightmares of their successors, their institutions, or their country. Hereinafter, nine principles of good governance are derived from some of the observations that are made here, to improve the governing of governance as a balancing act. Probably not by coincidence, these nine principles of good governance – in other words a guidance for how to govern governance – could all also be directly derived from the four virtues Aristotle mentioned already: justice, modesty, courage and respect. Consequently, these virtues should be implicitly embedded in legislation and regulation that has a social engineering nature, like education law has.

As governance needs to be governed too, concepts like democracy and checks and balances, are of the highest importance. It means first and foremost that in the light of this:

- the *mission and objectives* of an organisation or a system have to be carefully developed and maintained;
- the *structure* of the organisation or the system has to be shaped and continuously reshaped, adapting to the context and the circumstances. This concerns the organisational design: the democratic, yet effective, division of responsibilities for thinking, action and control, the division of role and tasks amongst good staff, and last but not least, loyalty to the mission (and not to the accidental supervisor);
- the working *culture* – the ways and means of daily internal and external co-operation – have to be cultivated and maintained, because every organisation, especially the successful, becomes perverted when self-correcting mechanisms are absent or fail (also In 't Veld, 1995);
- the management *style* must fit the manager, but first and foremost it should fit the nature of the organisation, its actual situation and its near future. It requires a special sort of modesty.

It is symptomatic that employees of NASA were put aside after they warned for serious safety problems caused by budget cuts, long before the Columbia crashed in 2003. Even without any evidence that the diminished budget and the reduction of NASA staff by approximately 30% caused this accident: it is indicative for the proposition that an internal democratic governance that is obliged to listen, is essential: in business as well in public service. The idea of UMTS-auctions – certainly one of the reasons of a world-wide crisis in and around the telecom business that spread out all over the worlds' economy – should probably also be considered as an example of bad governing of governance. When signs of this sort of reckless management or lacking direction are detected, it is almost too late to intervene.

This is the context in which a person with an attitude of a bookkeeper or a director of primary education is not likely the one who should be entrusted the visionary leadership of a university, a research institute or a governmental department responsible for the university sector. A university should rather hire – so to speak – the proverbial captain of a fishing boat.

<sup>1</sup> In this contribution, the word 'university' refers to the entire higher education and research sector, including the higher vocational education institutions.

*Subsequently, the first principle of governing governance is that modesty is the basis of good governance. Pride, vanity and uncritical attitude towards decisions of higher authorities must be considered as its biggest enemies.*

### 1.3 Taxonomy governance, management and administration

Neither the writing nor the reading of this article primarily serves the theory of university governance. It should link good ideas to the daily practice of operational activities, and identify trapfalls and deadlocks. However: very often in international comparative analysis, especially when it concerns legal concepts, a set of agreed definitions and an appropriate taxonomy, is painfully lacking. Subsequently, where improvement of mutual understanding is aimed at, misunderstanding is the result. In situations where the involved managers still think they agree with each other, they in fact go separate ways. This pattern is often seen in business as well, for example when holdings of a different business have merged or multinationals are created. Governors tend not to do what they preach, so they should be assisted to do so.

In this paper we seek to redefine principles – characteristics – of excellent governance. We do this partly because we detect an urgent international need to have definitions that facilitate discussions on for example: the loss of public and political interest, (un)democratic decision making, mismanagement, financial problems, the risks of uncontrolled borderless business education (CVCP report, 2000), the impact of the Bologna declaration of 1999, accreditation and other quality assurance systems.

A set of basic definitions is given by Kwikkers (1997):

<i>Administration:</i>	the detailed organisation and implementation of daily operations of a public or private institution.
<i>Management:</i>	the use of management methods that originate from the private sector, in particular concerning goal-setting, strategic decision making, initiating and monitoring.
<i>Governance:</i>	the concept of how a (semi-)public system is organised and managed, how authority is distributed and exercised, and how public accountability and assumed State responsibilities influence legal structures. It supposes additional dimensions: democracy and the pursuit of general public interest.

We will mainly deal with the latter two dimensions, and in particular with a fourth more abstract dimension: *the governing of governance*, or '*meta-governance*'.

For this objective, however, we will need a second set of definitions as well. This set of definitions is based on distinguishing four layers of governance. This set of definitions makes clear that the quintessence of governance is: decision making authority and factual and/or legal effect of decisions.

<i>System governance:</i>	the governance of a sector of society by national, regional or local public authorities, with a view to the weighing and setting of priorities for other sectors of public interest and public administration.
<i>Pseudo-governance, or intermediary governance</i>	the works of an intermediate organisation or an international organisation like an accreditation council, the Council of Europe, Unesco, etcetera. This type we should rather call pseudo-governance, as it often looks and acts like governance. In fact it is not. It is rather functions as a liaison, lobby, mutual advice, for control or as a platform for debate or negotiations between public authorities and institutions or between institutions themselves. Only in few cases intermediate governance is a type of real governance, but it can be highly influential.
<i>Institutional governance:</i>	the governance of the overall issues and institutional affairs by the general management of the institution as such, including the general communication with the various stakeholders as public authorities, business, trade unions, unions of students, and other institutions in education.

*Contents governance:* the governance of the primary processes – teaching and research – in terms of planning, developing and implementing the actual work at workplace-levels and cooperation with professional associations and other organisations, related to the actual teaching and research.

The subdivision according to this taxonomy is an important step before the phase in which the division of roles, competence, tasks, responsibilities, and subsequently labour, is made. This working order requires in paragraph 2 to start with the (re-)definition of the primary societal functions of a modern university.

There is a strong tendency to consider financial management – or better: ‘control’ – as a type of general governance. This view should be vehemently rejected. Control is necessary, for example to assure the continuity of the corporation, to assess whether objectives are met, or funds are legitimately and efficiently spent. Control in higher education is exercised through financial indicators, the percentage of GDP that is spend on education, a citation index, numbers of students enrolled or graduated, Nobel prizes won, average salary of graduates during their 40 years’ career. Higher education cannot – when public funds are used – use the indicator profit. Therefore control is exercised through interesting and important retrospective parameters, helpful for (inter)national comparative analysis. But they cannot tell us much about the decisions to be taken today and tomorrow, nor help the management to anticipate developments in science, society or the labour market.

Quality assurance models also have visible and invisible effects, the latter – so to speak – are often a form of ‘hidden governance’ (see also De Groof e.a., 1998). Consequently, accreditation is just another method of control, of pseudo governance. If one watches trends and incidents in governance and the impact of non-legal and legal interventions, it is obvious that the effectiveness of governance that is based on control mechanisms is low, and that the quality of a control-based governance is far below the suboptimal. *Control-based governance causes impediments for progress.* The answer to the question why (or when) the performance of a management is poor when it comes to anticipating – rather than solving – problems, is that control is only an advanced form of bookkeeping, and has nothing in common with governance. Nevertheless, much governance takes the form of control. I agree with Franken (2001) who underlines that regulating that functions as ‘control’ must be considered as feed-back (the French word ‘contre-rôle’ and not the English word ‘control’). Checks and balances between the parts of the system, as well as within each part, are imperative, because ‘power corrupts and absolute power corrupts absolutely’. This implies that we need a contra-structure within any governance system. Not just to check if the balance sheet is correct, but to maintain a fair, forward thinking and democratic governance.

## 2. What Quality and Good Governance have to do with Checks and Balances, and Laws and Contracts?

### 2.1 Trends, priorities and changing structures

What quality of teaching and research has to do with checks, balances, laws and contracts is a leading question that, unfortunately, is rarely asked. The reason might be that *professional managers*, who have replaced to a large extent the professionals, have learned to manage the process, whereas the *professional as manager* underlines the substance. This bias generates a wealth of communication problems; wide gaps between the managers of the contents, and the managers of the process. Bargh, Scott, Smith (1996) support this observation, based on a sophisticated string of arguments. To bridge this gap and in a continuing quest for a juridical shadow model (Kwikkers 1997), it is sometimes worthwhile to introduce three-tier organisation and contractual performance indicators. These should replace the traditional four-tier organisation, regulations and policy documents. Of course, a practical approach to governance of systems or institutions, to be applied in specific situations and also applicable outside the world higher education and research, is needed.

A careful selection of the playing fields that are relevant to the governance and management of institutions may also provide multidimensional images of existing and desired organisations. Application of these concepts, and the simultaneous translation into organisational structures, is, unfortunately, less easy. The juridical shadow model is a method to translate governance models into workable processes, assisting managers of change to find an intelligent mix of public and private, and legal and non-legal, instruments of governance, in a consciously

designed complex organisation. Developing legal rights and obligations is like doing magic with responsibilities. It concerns the regulation of power of people, financial interests and high stakes. This always means tension. Few stout-hearted people try to counteract difficult problems, as this often involves personal vulnerability as well. Therefore, it is much more convenient just to deal with the hard-enough daily management problems, administration and control. According to Aristotle, we plea for courage to fight for intelligent ideas on implementing good structures of governance.

Problems in governance are always multi level and multi dimensional and always concern partly legal dilemmas. That is why we need to discuss juridical structures for co-operation in order to be able to translate governance concepts or new policies in legal terms like laws, statutes, and contracts, and non-legal terms as a code of conduct or a public relations campaign. *This is in fact in abstract terms what governance embraces: changing policies and changing institutions, through the building of consensus.* Building consensus implies in particular the organisation of the consensus building process. *In other words: it is management by co-operation that solves and prevents management problems.* This is hard work, neither trendy nor glamorous, but certainly worthwhile. Governance is not the noisy behaviour of trophy-CEOs that is, mistakenly, often considered as leadership or vision. Leadership and vision are probably not the skills that are required most: wisdom and modesty are better.

For the application of this approach some external guidance is advisable, as there is no change without prisoners' dilemmas and deadlocks that are difficult to overcome in internally petrified structures. Before we go into this, we need a brief look at the context: Trends, Priorities and Changing Structures in higher education.

## 2.2 Major trends: the inevitable

We should pay attention to the impact of four main trends and some main priorities (para. 2.3):

- *Globalisation.* The global world leads to an evaporation of geographical borders, but these boundaries are being replaced by even more compelling ones, as for example between the rich and the poor, the well educated and the less educated, through ethnic and/or religious divides and especially the (hidden) intolerance of some of their representatives, and through the digital divide: the disparity in access to ICT.
- *Technology.* ICT changes the social structures of society (Castells, 1996). As a consequence, the structures of governance change, whereas formal (juridical) instruments remain unchanged. We must be deeply aware of the fact that information technology creates a completely different type of society, other sorts of communication, and subsequently other organisations. The Internet can make distributors, marketeers and other mediators like universities, at least partly superfluous. It seems democratic, but only if the general public is able to find 'it' on the web, and is able to purchase, handle and use the information, this really is democratic.
- *Individualisation.* This furthers deregulation and self-regulation, and vice versa. Legal certainty, legal equity, democratic organisation are -then- subordinate issues. In spite of everything, we must not forget to protect the weak and the honest from the strong and the hypocrite: a noble assignment for university.
- *The Grey Wave.* The retired – and the early retired in rich countries – will cause major distortion in society. In poorer countries, this also stands for a division between rich and poor, and for a knowledge gap in the application of new technologies.

Any organisational designer must consider this four major trends seriously and thoroughly, matching them with the actual circumstances. A trend, unlike other kinds of societal development, cannot be made or bent. Trends are facts of a multiple sort, being the effect of a combination of developments that forms the inevitable environment of decisions. Trends must be distinguished from pseudo-trends, in other words: policies, tendencies and hypes. Pseudo-trends can have great influence, but they are only short-term circumstances, and can be bent if one is determined to do so. They are evitable facts for organisational designers.

An example of a pseudo-trend is the brutal attack upon the World Trade Centre set free a worldwide new mode, being called the war on international terrorism. This policy has a yet unknown, but it appears a treacherous, influence on the global economy, the co-operation between nations, and the trust and co-operation between ethnical

and religious groups. It set free propaganda-machineries that remind us of dark times. Nonetheless, it seems that this sort of – emotional – events may cause new trends. University is not only part of the global society; an open, democratic, tolerant and global society is its fruitful soil. Consequently, the academic community will experience yet unknown consequences in the playing field of academic competition versus academic co-operation if it does not pay attention to the deeper effects of major events in the national and international society. The issue of competition or co-operation, we will consider hereinafter.

A second pseudo-trend that should be considered is regionalisation. For nation states as well as for supranational organisations like the EU, the trends globalisation and individualisation are significant, because they inevitably pull politicians and citizens in opposite directions. Is this why in this vacuum a slippery path of regionalisation, even a perfidious kind of regionalism or ‘splendid isolation’, is reappearing? More regional awareness often creates a milder degree of Balkanisation or inconsiderate foreign policy. Having noticed how countries vote for the Eurovision Song contest (Mediterranean votes Mediterranean; Nordic votes Nordic; Baltic votes Baltic), this is not what we need in governing higher education. Neither is an ‘Alleingang’ without the acknowledgement of international agreements, the UN, GATS, etc. Underbelly preferences should neither rule countries, nor university; regional awareness must not prevail. Rector/president Frans van Vught of Twente University, stating in a morning newspaper that his university is an ‘entrepreneurial research university in the region’, is right to strongly underline the research identity. Also in Sweden and Finland, a strong regional identity is found at some institutions. The USA and Australia show a different development, as historic and cultural patterns of the labour market differ significantly. However: higher education and research, also when it is efficiently rooted in a region, and it should, belongs to the global village and should be a guard against evitable pseudo-trends that wounds democratic and economic development, peace and security for everybody. *Higher education is never less than a nationwide service, and always more than that.*

It is essential to acknowledge that universities have the moral power to make a difference. They have the obligation to bend treacherous developments, to leading the opinion and to making the people and their politicians think, where- and whenever this is necessary. As a role-model they should have an impeccable governance.

*The second principle of good governance that must guide governors and system designers in higher education is that making people think (and not learning people how or what to think) is the principal mission of university.*

### 2.3 New priorities: the university governors' playing field

- ICT brings about important challenges, other than the adaptation of structures of governance. The so-called virtual university forms also a thundercloud to what university stands for. A technology that creates mainly virtual universities endangers democratic organisation, live debate and discourses. The Internet is not democratic in itself. University governors have the task to accommodate the *Fast Moving Digital Network Economy* while preserving the mission of university: making people think and through that the fostering of progress and democracy.
- Increasing staff mobility also implies shorter career steps and brain drain. The organisation of work is very different nowadays. Organisations concentrate more and more on core business, branding and outsourcing. Telework and telestudy require another type of human resources management, but also provide opportunities to fight brain drain and offer good teachers and researchers a dual career if this helps to keep them affiliated to the institution.
- A leading question became how to react to international competition when a virtual university like the e-Universities in the UK, ‘corporate’ universities, the private US-branches, or a borderless business education shark gets active in your turf that was unchallenged and unrivalled before. Further liberalisation of the trade in services (GATS), will widely open the market of state funded higher education for institutions of foreign origin (see also Blunkett, 2000).
- Quality driven policy is a reaction to the fact that consumer rights become paramount, also in higher education and research. The new mandarins, professional quality evaluators and peers, gather power that was earlier vested in politics and collegiate university management. Quality has to be pursued, but being part of the nature of academic workers, is must be questioned if democratic governance and academic freedom are not forced back into second and third position by the strong quality assurance instruments and accreditation systems that rapidly gain ground in the form of control mechanisms rather than of quality improvement instruments.

- Alvin Toffler (1970, 1980) wrote extensively about the accelerating speed of social and technical developments. Since then this continued at an even greater pace. You need anticipating governors and advisors if you want to survive this. You also need a formal corporate structure that steers the (informal) corporate culture toward forward looking policies.
- An economic law is that all goods are scarce and that there is a strong competition for all sorts of resources. This also holds true for the public as well as private funding. This implies that institutions must diversify resources, at the same time being prudent if this could affect their academic freedom, as – just to mention one reason – companies that contract research can negotiate lower prices and tougher conditions than a State ever could. Universities need to learn how to negotiate.

Dealing with these new priorities becomes less difficult if the ultimate priorities are pursued. Only good quality of teaching and research provide the value for money that strengthens the institution's position. To do this well, largely depends on good and intelligent governance at all system levels.

The four trends and the ultimate priorities of university imply for the art of governing higher education and research that university should adapt to the inevitable increase of knowledge and what this does to society. On the other hand it should assure that those who graduate are critical citizens of a world of peace, prosperity and democratic awareness, even if they have to give a good example during difficult times.

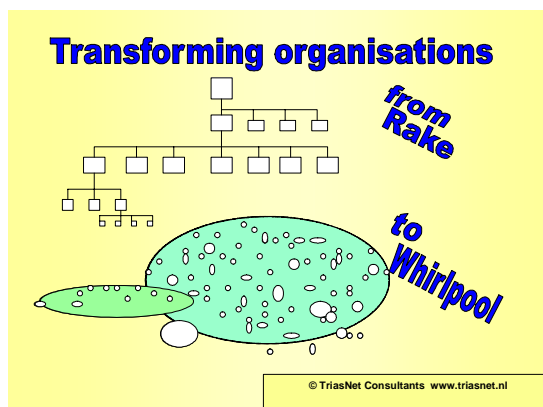
*This leads to the third principle of good governance: the conviction that teaching and research (making people think) is the core business, and not their governance. The latter is a just a service; a service however, that requires most intelligent, honest and courageous people.*

#### 2.4 Changing structures

Teaching and research always remain the bottom-line priorities of higher education. How to pursue these when the academic community is distracted by all sorts of business problems all the time, and creating more bureaucrats and bureaucracy than scientific articles and books? In daily practice, we encounter a full transition from the classic organigramme to the loosely coupled systems as analysed by Weick (1979). This transition is illustrated in Figure 1.

The classic rake shaped organigram still is the blueprint for governors and designers of organisational structure. There is – also in terms of legal organisation – no real alternative as decisions have to be taken at the adequate level and in time. Dynamic and hybrid organisations however, have an informal structure as well. This informal structure makes them mean, lean and – most important – creative. Managers and workers know this. Consequently, the formal and the informal structure (the latter is a better description of ‘organisational culture’) will diverge considerably, and at the end exponentially. This inevitable organisational development makes working in or dealing with these organisations increasingly difficult, hazardous even, for both external parties and their own staff.

Figure 1



## 2.5 'Janus management'

For example, an accident at the nuclear power plant in Tokaimura, Japan, in September 1999 reveals the risk of differences between formal and informal organisation. The formal safety procedures were according international standards. If they would have been followed, there would not have been any accident. However, the informal (actual) procedures were unsafe and an infringement of the law and regulations. It was not checked what was happening in reality. This caused a serious accident. A similar situation occurred in the Netherlands where warnings of cracks in the nuclear reactor and advice to turn it off, were put aside by the management, whilst firing the civil servant who discovered it.

The numerous cases of bad accountancy driven by overambitious managers who wanted to provide better figures to the shareholders and were not blocked by internal checks and balances, are a camel nose. Names such as Enron, Arthur Anderson and Ahold became proverbial for the problems that large corporations have and cause with their behaviour. Only after the shareholders noticed what was happening and dropped their assets, people started to ask how this could happen. The Ahold supermarket chain lost 6 billion euro of its value in one day, which caused a 4% drop of the Amsterdam stock exchange index, dragging some large banks and their shareholders with it in its fall. Bad management can cause immeasurable chain reactions in society.

A world wide study by the accountants of Ernst & Young (2003), shows that in 55% of the reported cases of fraud, a manager was the offender. In 30% it was other staff. It is obvious, however, that the amount of money concerned must be a substantially higher than this 55%. Thus, the unmanaged risk of fraud and organisational perversion is highly underestimated, almost a taboo, knowing that the amounts of money involved were:

- less than	10.000 euro	in 17% of the cases
- between	10.000 and 100.000 euro	in 30% of the cases
- between	100.000 and 1.000.000 euro	in 36% of the cases
- more than	1.000.000 euro	in 17% of the cases.

The study indicates that having a code of conduct (68% of the responding organisations had it, whereas two years before this was only 33%), or similar instruments, is not of any relevance. This is clearly the wrong legal instrument: the good guys will be good without it; the bad guys laugh about it. It is, after all, obvious that the celebrated creative bookkeeping with which governors increased their status on the golf courses, is nothing more than an exercise in misleading the public: attempted fraud. Accordingly, the abuse of public funding or funding models, cannot be considered as good governance. We know that everyone is capable of illegal or illegitimate behaviour, even when self-interest is not evident or the stakes are relatively low.

*Bad management does not only happen because people are vicious, incompetent or unqualified. Bad management only happens when the internal environment is not allowed to co-control the organisation. The conclusion can only be that not only fraud but also other forms of mismanagement are facilitated by a poor organisational structure, and especially by insufficient or worn out internal checks and balances of power.*

Bill Clinton should have said: 'It's the structure, stupid', although he surely referred to the economic structure when he said that it was the economy.

In 85% of the biggest cases of fraud in the above mentioned study, the manager was less than a year employed by the organisation. However, there is no trace of evidence that there is a professional group at work. Is it relevant in this respect, that also in business the professional as manager is replaced by a fast moving member of the new guild of professional managers (see paragraph 2.1)? And: as it has to be kept in mind that fraud is a serious gradation of disloyalty: should this be a reason to consider a revised policy on how to appoint or elect the governors of universities before loyalty problems really proliferate higher education governance?

This supports the conclusion that loyalty is an important governance problem. Improved internal checks and balances, a renewed attention to the democratisation of governance, and putting co-operation first, are methods for a counter-attack. They also provide ways for the prevention of mismanagement.



In principle, private business management does not differ much from the governance of ministries and universities. When the formal and the informal structure begin to lose their similarity, and this is endorsed or even stimulated, it perverts any organisation with a double morale, false reports, and dishonesty. The organisation becomes a menace for society and itself.

*Many disasters, as consequences of disloyal or just bad management, are caused by the type of manager that plays games with the divides between formal structures and informal procedural loopholes. This type of 'double management' I call 'Janus management', after the ancient Roman God of all beginnings and passages such as doors, gates and bridges, king of Latium. It is said that Saturn gave him the gift to look into the past as well as the future. It should be kept in mind, however, that these abilities only exist in myths and in the minds of charlatans.*

## 2.6 Solid structures

The informal (real) structure of an organisation at work nowadays looks like a whirlpool. Despite its disadvantages, undiscovered features and hideaways, the whirlpool has become the reality in governance structures. There is also a good side to it, as otherwise it will not be possible to produce much added value, especially not in the service sector. The classic rake shaped model does not provide sufficient solutions for acceleration and the complexity of modern society. *The managerial problem thus becomes: how to manage the bubbles in the whirlpool.* To facilitate hybrid co-operation, the legal instruments that we have available, should be mixed in a more sophisticated way than we usually do. We might even need new ones.

Unfortunately, the loosely coupled systems – having a Janus management by definition – are less transparent, show a tendency of inefficiency, and are usually not very democratic either. As a consequence of the shift from rake to whirlpool, organisations become rather more autocratic and authoritarian. Managers become hands on, chaotic, and psychotic. Corporations suffer from high overhead costs, an overload of meetings, information stress, fear of change, head hunters, brain drain, and many more business diseases. Research shows that managers come and go at an increasing pace.

Furthermore, the combination of the trend of individualisation and increasing (also internal) competition is a much bigger risk than we assume. Together they destabilise a solid organisational structure as they weaken co-operation and internal cohesion. Under such circumstances the organisation needs a higher prescribed amount of co-operation, especially a higher dosage of vertical co-operation: between supervisor and subordinate and between experience and newcomers.

*Therefore, a solid and reliable structure that brings about trust and mutual respect is needed more than ever before.*

A good reaction to organisational perils is to design self governing units. However, for this trust and courage are needed and – most important – an organisational design that interconnects the formal divisions of role, responsibility, competence and tasks with the efficient informal daily practice. For legal people and managers this is difficult to understand and extremely hard to handle, because roles and responsibilities become volatile and cannot be described anymore in classic legal terminology. The legal toolkit is rather filled with hammer and thumbnails, which are not necessarily the proper tools to fix complex organisations. Thus, to overcome The Fear of Change, a solid organisation and transition law are also important, not in the least because stakeholders usually fear for their position or their power after minor or major change. In this light one should compare the relatively mild changes in OECD-countries, with the daring ones in a number of central and eastern European states (In 't Veld e.a., 1996 and De Groof e.a., 1998). The latter gave formidable examples of management skills.

It is also essential to adapt the current legislation on institutional governance and governance structures, as it does not fit any longer to the new logic in organisational behaviour. Better legislation on governance implies a regular evaluation of the real existence and effectiveness of internal checks and balances: *public accountability for the internal structure.* This will prove more effective than additional control and a higher administrative burden.

## 2.7 A solid process

If there is no reliable process, only few skilful people in the heart of the organisation, and no political determination to reform, conscious and effective reform is impossible. Under such circumstances, the outside world will impose its changes on the institution. Even mere survival will become difficult. The stakeholders must feel that changes also (re)create confidence in the newly designed processes. This is only possible through building a win-win consensus: showing the future improvements for all parties involved, which is usually to be done through a policy mix and simultaneous strategies. For example, the question how to face the new challenge of inevitable interregional competition and the other challenges and priorities, is easily asked, but difficult to answer. An organisational structure that combines all internal strengths is necessary. Such is a structure that creates intelligent patterns of reflective communication between all stakeholders in a good dosage, communication to share knowledge, communication inside a lean organisational structure that facilitates taking and implementing decisions. *It is the structure that creates the process.*

Nevertheless, we still design systems, thinking that the traditional rake is still a valid paradigm. For legal structuring of responsibilities and competency the rake is indeed still a useful basic tool for a quick analysis. In practice we do not work any longer in rake-like structures, but in whirlpools of professionals.

Then, how a communicative structure is designed in such whirlpool? It is:

- network-like;
- loosely coupled;

and it should be:

- open: containing inside out and outside in communication patterns;
- consistent and respectful;
- clearly designed, transparent, so that everyone understands the (regular) machinery, as well as (and that is important) the projects that need a deviating working mode;
- never stopping;
- always redesigning and renewing its forms.

The formal organisation and the so called informal organisation should not differ too much, as this hinders co-operation, makes organisations unreliable and is an obstacle for good policy. It is a high priority of the higher education and research system, that the State fosters innovation through the innovation of culture shaping organisational structures. It will be interesting to closely monitor the achievements in Austria on the ambitious 'Black Book' on system-redesign, which was developed by a mixed committee in 1999. The main question is: does Austria create the necessary communicative structure?

Throughout the world, there are alarming tendencies of fuzzy thinking on organisational legislation, organisation law. This is partly caused by forms of deregulation, partly by the guild of modern managers and their training.

Designers of higher education systems do a better job when they would concentrate on the modelling of 'a learning environment', instead of undermining it with an immoderate market mentality, consumerism, borderless business education, policies that stimulate institution hopping, and other untested policies. The State should not be regarded as a business. It would be better to design and maintain an open system, guided by good but not too many operational and procedural rules.

The combination of trends, new and real priorities, and changing structures, makes a new logic of public and private law essential. Hybrid organisations means in fact that there is public responsibility vested *in* private responsibility. It is not by accident that in many countries the major problems of the government, are in health, education, infrastructure and public security. The bad governance in the public sector is a natural consequence of old fashioned legal instrumentation. The regular juridical instruments that are used to regulate organisations are either in public or in private mode. They fit insufficiently into the emerged sorts of hybrid and multidimensional organisation. We need organisation law that fills the wide vacuum between private and public. This is the technical reason why we also need a hybrid legal mode in organisation law. It is in the daily practice indispensable to improve governance: to avoid the much criticised soft compromises, the paralysis, and the mismanagement, fraud and other scandals. It is crucial, with improved tools, to:

- design a delayed network-process;

- create processes for a responsible product development and -sale;
- enhance non-authoritarian communication based on openness, genuine mutual respect and trust;
- strengthen the internal democratic decision making;
- make a wider use of management by agreements.

*The fourth principle of good governance is to apply an appropriate and tailor-made juridical and procedural logic to the organisational structure. In short: we need network-process-design.<sup>2</sup>*

## **2.8 Making black boxes transparent**

Educational researchers usually analyse political elements or educational objectives. About the inside of the black boxes of building and instrumenting strategic decisions they, and civil servants who know more about it, seldom write. The Weberian bureaucrats in these black boxes create all sorts of barely visible legal and crypto-legal instruments, often without being aware of this. Whether they then reinvent the wheel is of lesser importance. The introduction of a mixed ex post-ex ante quality control in the Netherlands through accreditation and a quality assessment of planned new curricula, instead of the previous system of programming freedom, ex-post selfassessments, visiting committees, controlled by the Inspectorate of Education, is an example of the reinventing of wooden wheels.

We should have a look inside the black boxes, especially because effects that applied Quality Assurance models have on governance, requires thorough knowledge about them. Black boxes have common features other than being black and closed.

In a black box like a ministry, much goes wrong, and if it doesn't, things go different in terms of e.g.:

- unbalanced instrumentation;
- misjudging of main, side- and psychological effects;
- creating a mismatch of instruments, structure and culture;
- system errors and technical errors.

Reasons for this backfiring are often:

- an insufficient legal technique;
- mono-disciplinary approach to organisation design;
- unforeseen (however predictable) and neglected strategic reactions of stakeholders;
- a management that does not always listen very well, or lacking wisdom or courage;

It is rather rarely a lack of money, although this is often used as an excuse.

Literature on public governance supports the observation that limited effective and failing policies are standard situations in the public and private sector. Inside the black box much superfluous and irritating paperwork is made or caused: laws, by-laws, white, black and green policy papers, good practices, agreed policies, contracts, circular letters, evaluations, etc. Instead of concentrating on the making of teaching and research, civil servants pile intervention upon intervention without measuring their combined effects.

Obligatory national masterplans like in the Netherlands and Slovenia for example, are fine instruments for a dialogue on any subject, but are not a form of governance as some seem to think. Both plans are published every fourth year. Such long intervals are an obstacle for making the necessary small steps, as the policymaker is busy with the new 'grand design', which after all is not that grand. Making ambitious plans is not necessarily a waste of time. A world at accelerating speed needs master plans for global problems like poverty, sweet water supply and emission of CO<sub>2</sub>, but not necessarily for regional specific fields as a national higher education system. Subsequently, it may be advisable to write specific policy papers, whilst making sure that the setting in which they should be implemented is carefully assessed. The Dutch Higher Education and Research Plan in 2000 contained more challenging ideas than ever, but most of them had many loose ends. This sort of policymaking is a risk for the transparency of the system, legal certainty, and viability. Furthermore, problems of presumed abuse of the funding mechanism, a change in the coalition and the rapid fall of it, the global crash of the stock exchange, were incidents that changed the playing field entirely. A master plan that loses focus because of rapidly changing circumstances is lost time and is an impediment for progress. Loose ends of policy-proposals become smoke screens for the untouched real problems like the formation of a real open international system of higher

<sup>2</sup> See paras 2.11 and 2.15.

education and research. These loose ends impede innovation. What remains is a giant black box filled with administrators and – financial – controllers.

It is essential that planning is done with a well chosen scope and for a well argued period. It is advisable that plans are made for the things that belong to the authority of the planning agency, and not for other legal persons. Your colleague certainly will not appreciate if you tell him how his career plan should look like; probably he has other things in mind. It is especially this kind of mistake that ministerial masterplanners continuously make. Open dialogue on honest plans reduces the size of black boxes.

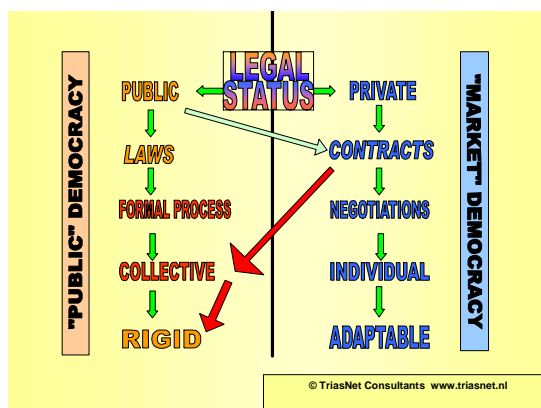
*Consequently, the fifth principle of good governance is: make your own plans, try to make sure others make theirs and start an on-going open discussion with them on the real issues.*

### 2.9 The relevance of the legal status

Figure 2 shows consequences of the differences in the legal status of the public democracy and the private market democracy, which are terms of Lindblom (1977). Both statuses – public as well as private – can be made more or less democratic, but the choice has important consequences for the operational activities: the informal structure and behaviour (culture) of the organisation. Figure 2 also shows that charters, statutes and internal institutional regulations are *always* in the public mode.

The public and private domains are different in terms of – amongst others – objectives, legal structures and legal instruments. In daily practice it is a problem that the theoretical foundation for modern action oriented legal instrumentation is poor. The higher education lawyers – if there are any – seldom cross the borders of their specialisation in public or private law or student issues. A better mix of public and private legal instruments is needed. There is no need for privatisation or for nationalisation. The public-private antagonism is a major obstacle for the governance and the management of hybrid organisations in higher education. This is one reason that the choices between public and private modes of social engineering are not deliberately taken. The choice is founded in political sentiment rather than in rational argumentation and discussions on this dilemma are often rather based on political prejudices, not on facts. To overcome this, it is necessary that the (legal) staff in ministries and institutions first learn to understand educational policy and governance structures. The second step is to engage them as co-makers of policy and governance. This advice is equally valid for other public sectors as well as for business. The flip-side of this coin is the lacking awareness of governors and policymaking staff of the subtlety of organisation-legal matters.

Figure 2



An interesting trapfall appears when a (semi-) public organisation uses contracts. Legal equality demands that contracts become collective, which implies that, then, we are straight back at the rigid left side of Figure 2. But then we have lost parliamentary control, and the democracy of, and societal influence on, the contracting parties. A usual reflex of the public institution is to use top-down regulations in contracts. This is a real ‘system error’. A concrete type of system error seems the introduction of accreditation – that has its roots in private law – in continental rule of law systems that have a tradition of public institutions which are regulated by public law.

Accreditation by an independent cryptoprivate organisation for example, only replaces the former 'State accreditation' without making any difference but the loss of public democratic control. If this control is not lost, this independent – or rather half independent – organisation is in fact superfluous. Assessment organisations are competitive free-market organisations. The institutions they assess are their clients.

*These arguments underline the sixth principle of governance: no policy borrowing without proper legal and organisational translation and transition into your own system.*

### 2.10 Academic freedom or institutional autonomy

It is useful to look at the essence of academic freedom and institutional autonomy before we design a system, an institution or any other cooperative structure.

If we determine the magnitude of these academic freedoms, institutional autonomy is the total educational freedom minus the sum of all legal provisions applied to university, minus the freely made contracts.

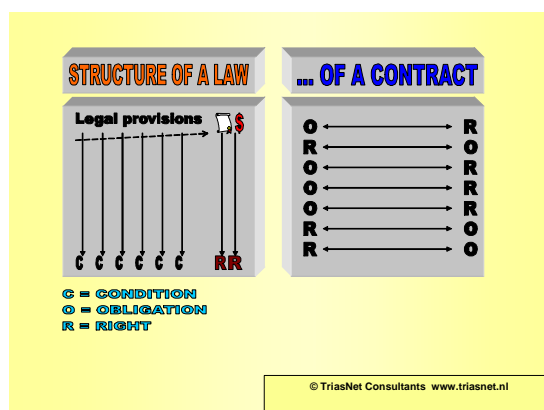
Academic freedom is a forerunner – a species – of freedom of speech, which is one of the strongest universal legal concepts at all. It forms in fact the legal foundation of the institutional autonomy as a collective State-guaranteed expression of the primary individual freedom. For research workers and students academic freedom is an underestimated and therefore watered-down right. It not only protects the university from the State, but also protects the individual scientist from his superiors, peers, accreditation organisations and a conservative university bureaucracy. In countries with an increasing amount of research service for business, the level of curiosity driven research finally became an issue. The individual – contractual – academic freedom may serve as an instrument for staff and students, but only to the extent that it is not exchanged for the institutional autonomy by a coalition of university administrators and ministries.

Yet, institutional autonomy became a paramount protector of the university, degrading the magnitude of academic freedom. What institutional autonomy is, is hard to define and hardly defined. As being said: institutional autonomy is technically: total freedom minus the sum of all legal provisions applied to university. This is why the academic community should be advised to make a wider use of the academic freedom of staff and students. Academic freedom – a derivative as well as the specification of the freedom of speech as constitutional right– has a wider legal span. At times this is more effective than its collective, weaker and watered down institutional sister, even if it seems safer to seek shelter together and it takes courage to fight an individual fight. Subsequently, academic freedom is also an underestimated vehicle of governance by which we could make university as a whole more alert and dynamic.

### 2.11 The structure of laws and contracts

The public sector is regulated by laws and by-laws. In the civil sector the contract is the main legal instrument. Figure 3 illustrates the top-down character of public law, and the principle of equal contract partners that guide civil law.

Figure 3



Thus, Figure 4 gives characteristics of contracts and public regulating:

Figure 4

Civil law		Public law
mutuality	instead of	top-down, one-way
equity	instead of	hierarchy
negotiating	instead of	directives
rights and obligations	instead of	conditions
dynamic relationship development	instead of	bureaucratic relations
party and judge control	instead of	political, administrative and judge control

At the individual level contracts are often more democratic than rules. It enhances considerate individual choice, whereas in laws there only is an indirect type of democracy through representation and voting. As the devil is in the detail, but not all details in the law, flaws have to be patched up by interpretation, judges, or .... parties. Whereas the gap between the public and its politicians becomes rather big, contracts could reduce the gap between the individual and the organisation. It should be said, however, that also in contracts one finds many top-down relations: read the conditions when you buy a car or computer soft-ware: long disclaimers and limited liability. However: in many countries staff of public institutions already have a contract, so here it will not be a big step.

On the other hand, for students education contracts – or derivatives like vouchers – between student and institution seem not a good idea, at least not yet, because:

- there is no natural equality, so many legal provisions are required to restore the necessary delicate balance between contracting parties;
- contracts undermine the legal certainty of the more vulnerable groups than, for example, staff.
- contracts undermine the position of students as members of a democratic academic community. They become just a consumer, and will be treated as such. They will become experts in university hopping, which – for a university – will make it rather difficult to bear responsibility for the issued diploma’s.

Consequently, student unions should not seek to negotiate collective agreements between them and institutions (Kwikkers, 1999). This will end at the rigid side of the Figure 2, having lost democratic control and jeopardising quality. Laws and statutes should be preferred here.

Contracts are an interesting complementary option at institutional level. An example is the Olympus College, a secondary school in downtown Rotterdam, which abolished the school regulations and introduced basic contracts with parents and kid. The terms are: in exchange of behaving well and doing your best, you get care, attention and class. However: at a closer look, the positive effect at the Olympus does not depend on the choice of the instrument, but on the ways and means of implementation. Sending away from school or getting in touch with the parents can be a contractual sanction, but has exactly the same effect in a regime of regulations if you apply the same standards evenly strict. Nonetheless, it seems that contracts between schools and parents are becoming an official policy. It will prove not being without risk: schoolboys and -girls cannot be party to such contracts.

Five conclusions could be based on the different structures of laws and contracts:

- The choice of the type of instrument is often but not always relevant. The effects can be only psychological and temporary. Instruments that work well for a time, but then wear out or become perverted. Output oriented funding models suffer from this phenomenon as well. So, to a large extend, legal instrumentation is an exercise in psychology. Subsequently: not so much the technical arguments, but the societal context must guide the co-operation of governors and the draftsmen of laws, statutes and contracts.
- Contractual thinking fits well in the design of relationships between organisational units of both the public and the private type. Mixing these concepts well, however, demand an advanced level of professional skills in public and private law as well as in public and business organisation.
- Contracts serve well in complex relationships and in a dynamic professional environment, when hybrid communication patterns are paramount, and results cannot be guaranteed and only best effort could be promised. Furthermore, contracts should only be used when the contractors are also personally in touch with

each other, so that they can build a relationship. Only then, it is advisable to import the contractual approach into the drafting of laws and by-laws, and to combine the appropriate public and private legal options. If there is no personal relationship, managers will try to unfasten the terms of the contract to which their organisation is formally bound. Therefore, contracts between large organisations in the public sector, especially when the State (politics) is involved, must be applied reluctantly, be designed most intelligently, and be applied with great care and attention.

- Demand, supply, structure and staff, are cornerstones for the design of a product oriented higher education system. For product design one could use a strong contractual model. Statutes and by-laws are rather useless to regulate the quality of teaching and research, or substance in general.
- Criterion for choosing the main steering instruments is democracy through:
  - mixing of laws and contracts to enhance:
    - effectiveness, because it is taxpayers money, and
    - viability, because the lightest intervention mix provides the best results,
    - and subsequently foster long term intrinsic value.

### 2.12 Network-process-design

This analysis aims at demonstrating that governance implies management; that management needs regulation; and that regulation is on the mind, and not on the paper it has been written on. Effective legislation and good contracts function under the same sort of human psychology. Therefore, it is not true that laws are inferior to contracts. Legislation is essential in an open democracy, and has to be preferred for democratic security, legal certainty, avenues of appeal, defining the system, establishing bodies, to regulate task and responsibility. Legislation mixed with contractual thinking forms the technical foundation for the design of a network-process. This technique is advised.

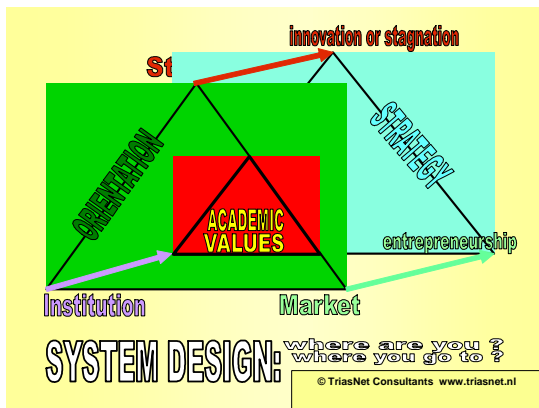
The principal features of network-process-design are set out throughout this chapter. In paragraph 2.15 we elaborate further on this approach. Network process design should be regarded as a rather difficult legal-organisational technique based on practical experience, concentrating on human communication and the interdependencies between work processes, responsibilities, roles and functions. It fosters transparent and open game rules of an organisation or a system. It may also be a tool to analyse how the State can function in order to foster innovation and stimulate institutions to become output oriented. Deliberately, it does not deal with content and good quality, but only with the process of how to achieve this.

*Accordingly, the seventh principle of governance is to apply organisational network-process-design by mixing public and private legal instruments. This will assist the governors as well as the managers to 'shape' decisions in cooperation with the professionals at the work-face as if this would concern the art of making sculptures.*

### 2.13 A triangle for system design

Anglo-Saxon legal systems and its higher education systems differ considerably from those on the European continent. National systems differ both in terms of philosophical foundation, historical development and the detailed (legal) regulations. This is why policies from abroad can only be integrated into the home system, after meticulous 'translation'. The following triangle and pentangle are helpful in such process (figures 5 and 6).

Figure 5



The Carpenter’s Pentangle of figure 6 (p. 90) is used after deploying Burton Clarke’s (1983) famous triangle that provides information on to which extent a system is market-, institution-, and state-oriented in an international comparative perspective.

Policymakers and politicians should have answered the questions ‘where are you’ and ‘where do you want to go to’ convincingly before they start changing things. Flow charts that reveal the actual functioning of decision making processes are helpful to avoid a new design of system that, for example, leads to endless talking until consensus is reached, that kills vision and creativity, or impedes clear strategic decisions to be taken or implemented, or leads to the obstruction of academic freedom and democracy. Doing this, one needs to denominate the nature and quality of the juridical communication patterns at strategic levels between Markets, Institutions and the State. This is essential preparatory work before starting to change any public or semi-public system.

Regulations are used for process organisation and the division of responsibility. Despite this rather obvious rule-of-thumb, public authorities continually congest the playing field with a policy mix of directives, incentives and other policy instruments, like trading or public relations-campaigns, as they try to steer the shop floor, the market, or both in terms of substance. As we have seen in paragraph 2.10, the State always intervenes at the *rigid* left side of figure 2, in the structure, in staff contracts, and through specific incentives somewhere in decision trees that are owned by the members of the academic community. Furthermore, the policymakers in the black box of decision making often tend to change the rules during the game, whilst intervening in the o-so vulnerable network-process: at the flexible *right* side of figure 2. This attitude makes stalemate and uncertain what should be dynamic, lean and yet secure.

Burton Clark’s triangle, which is meant for the classification of the orientation of national higher education and research systems, can also be applied at the institutional level. The position within the strategy triangle (at the right hand) should be similar to the position within the orientation triangle at the left side of figure 5, that is if the appropriate information has been compared.

The natural relations between the angles of the two triangles are obvious:

- The market wants universities to serve him, profit from their knowledge, but pay as little as possible. How ‘market’ is exactly defined in the national context depend on the (political) environment. This is in itself already a difficult question.
- The State fosters equality, welfare and prosperity by spending tax money. It needs well developed universities. The State usually stimulates innovation, but despite good will, it is hard to develop and implement a good policy.
- Institutional staff nurses academic values like teaching and research, academic freedom and institutional autonomy.

If a State – or the institutional policy – does not synchronise the positions in both triangles to a minimum extent, it will be almost inevitable that implementation backfires. This is why a university is highly dependent on the strategy and policy of its competitors. A higher education system is highly interdependent, which makes a



consensus on change highly difficult. Instead of creating parallel developments in both triangles, we implement policies which let the subject, direction, speed and power of developments compete or even diverge, instead of cooperate or converge. Consequently, this causes a situation of persistent paralysis.

If we look more closely, we see that:

- Markets are markets. Markets do not create entrepreneurs, but opportunistic managers who use or create opportunities. Charles Lindblom (1977) found much democracy – in terms of choice – in market mechanism. One cannot consider the communist type of economy very profitable for its citizens, but a civilised degree of market regulation should be sought.
- Public policies often impede innovation. It takes a combination of vision, political courage, democratic disposition, money, and a minister and a group of university governors who are innovative. Such combination is rare; usually at least one link is missing.
- University governors undermine traditional academic values when they think that they sell products to students and companies, or – even worse – when they consider students as products. This is perverse: universities should render services to society.

The question is: where inside this triangles, are your – dynamic – balances? For the benefit of students, research, the economy and society at large, universities have multiple responsibilities and pursue multiple objectives. Matching these objectives and responsibilities is good governance. Therefore, well-balanced ways and means of the governors, managers and administrators, are important preconditions for a successful implementation of any strategy.

## 2.14 The Carpenter's Pentangle for organisational design

Figures 6-8 outlines the Carpenter's Pentangle for organisational design. The good old carpenter estimated with his eyes whether all fits straight, before using a levelling instrument or a folding-rule. This Pentangle is applicable to any combination of stakeholders. With this imaging tool, a good and quick picture and analysis can be made of any organisational situation in any system and organisation. The Pentangle is an imaging tool to describe and analyse the specific features, the character, and 'warmth and quality' of relationships and communication. In doing this with the appropriate parameters, the stakeholders can be meticulously defined at any level of the system. Furthermore, it makes it easier to (re)design the main features of a better organisation. In a way this is what Gareth Morgan means in 'Images of an organisation' (1986): that a thorough analysis is needed before starting any intervention in any field:

- for choosing and finetuning the instruments,
- for forecasting effects and side effects,
- for forecasting effectiveness.

The equilibrium of figure 6 symbolises the ideal, stable, good and dynamic relations between the stakeholders. However, if applying the Pentangle, the images usually become rather fuzzy (figure 7). It should, as this enables to find the best intervention.

In a deteriorated situation however (figure 8), there is confusion and bad management. The circle of relationships is broken, obscured. When new policies are being introduced or new conditions come up, like for example international competition, accreditation or an economic crisis, or new stakeholders like the sharks of borderless business education enter your domain, you can visualise where your future substantial problems lie.

Figure 6

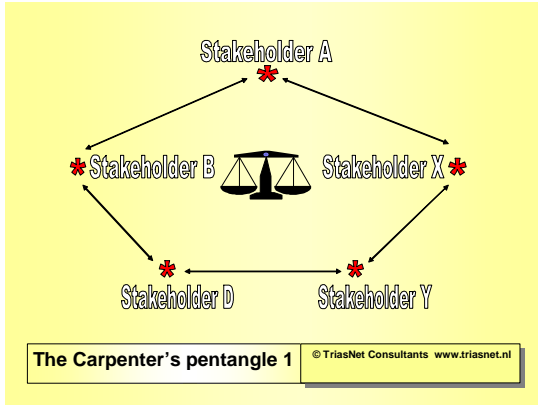


Figure 7

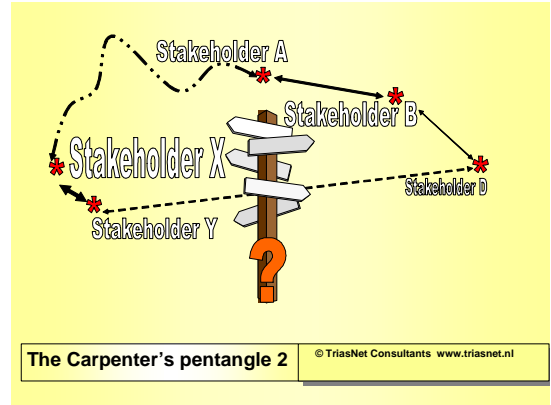
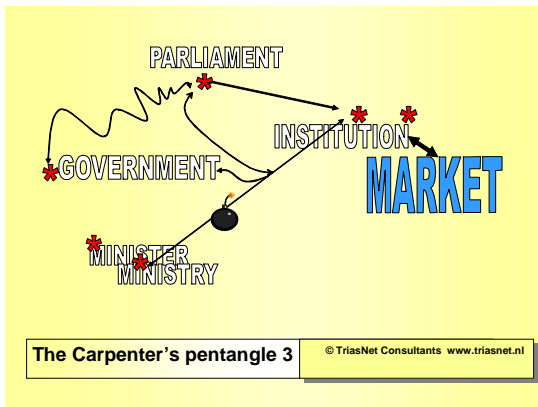


Figure 8



Good governance is making and maintaining a balance of power. In its turn, this means the maintaining and improving of a democratic governance, neither allowing a purely market driven, nor a socialist planning type of management. This requires at least, and regularly, a thorough analysis of the strength, position, interest and psychology, of the stakeholders. Both organisations, units and key persons involved, inside and outside university, should be structurally engaged in discussions on strategy, organisational structure and operational priorities. Not allowing them to block change, but to initiate and stimulate development. Using tools like the triangle and the pentangle, market forces can be introduced, without the risk that the market drives out public responsibility. A balance between market, state and institutional influence for output oriented institutions and their main steering instruments, can thus be better found and maintained. Likewise, the policy mix of directives, incentives, conditions, guidance (persuasion as the public type) and demand (as the market type), can be better designed and implemented.

*The eighth principle of good governance is the making and maintaining of the checks and balances within the system and inside each individual institution.*

**2.15 Delaying the organisation**

Many problems described in the literature are a result of poor legal input during development, conceptualisation or implementation. These are favourite, but needless and expensive mistakes. The purpose of legal and non-legal system design is simple enough: to create a process that rewards good teaching and research. A network-process creates and maintains checks and balances, and sets the right priorities. This requires a legal technique, but no legalistic thinking. Then, governance means bearing responsibility for:

- the structure of the system;
- the definition of clear goals and objectives for a system or an individual institution;
- juridical translation of the strategic mission and the interrelated organisational vision;

- the division of responsibilities, competence, role and tasks;
- working conditions for researchers and students;
- instruments for intervention in corporate relationships;
- mind-setting of the calculating legal subject;
- continuous dialogue on effectiveness, efficiency, legality and legitimacy of the system;
- avenues of mediation, conflict management and appeal.

Classic governance comprises of more than four levels that exchange many policy documents which are only read by small numbers of administrators. We make life much simpler, more transparent, more democratic and more dynamic, if we delayer both the system and the organisation. It makes policies more viable and governors more reliable if the number of organisational interfaces is sliced down to three or even two communication levels. Then, for instance, an intermediate level cannot limit the space for initiatives anymore. The work-face automatically gets also more room to move and opportunity for creativity.

In such process the following pitfalls are to be avoided:

- deranged internal checks and balanced;
- too wide a span of control at the remaining levels;
- flaws in the span of control of bodies inside the organisation;
- too long communication lines between the levels;
- poor support and/or insufficient policy staff at decentralised levels for finances, human resources management, legal support, strategic and educational policy).

## 2.16 More about network-process design

Pitfalls of governance can be avoided by an intelligent legal design. Cutting down the number of managerial levels reduces the number of useless meetings, rumble, and loss of productivity in teaching and research. Such an intervention could easily save 5 million euro per year in an average university. Consequently, staff and students get more attention and get happier.

If at the same time 4 to 5 (not more) suitable performance indicators are developed and embedded in contracts, internal entrepreneurship, shared responsibility, flexibility, and mutual respect between equal partners will be enhanced. Consequently, at each level only a simple process is needed to develop and maintain the contractual indicators. Contractual thinking brings formal and informal closer together, creates faith, and makes relationships more dynamic and usually more democratic and profitable. Concepts as non-performance, breach of contract, product liability, consumer rights are valuable in governance, and signing a contract make parties aware of their responsibilities.

Making this kind of governance system is a multidisciplinary job, but requires professional guidance. As far as the legal-administrative work is concerned, the 'interpreters' who translate policy into governance, are hardly trained for such a job, or operate in a field that is not their own, or they are not senior enough, or too authoritarian or are too legalistic. The necessary feeling for governance in practice, the availability of a good theoretical framework of organisation law, and sufficient experience to 'play' with policy and governance concepts and the specific regulations throughout the whole policy cycle, seem very rare. Combined with the often detected bad legal drafting, this causes problems at the interfaces (which is another reason to reduce the number of interfaces by cutting the number of organisational layers). Technical errors cause a paralysed organisation, permanent bad relationships, and endless law suits.

Another technical problem to be solved is this. To gain power or to achieve more enlightened goals, managers often want to deregulate laws and regulations and to regulate the informal internal patterns (the organisational culture). This is usually a bad idea. One could build an organisation on informal patterns, but if you want to get hold on the substance, the informal patterns change and governance suffocates in quicksand (also Scott Morgan, 1994). So, to imply a new policy, at least some rules must be reset, before the grip on the substance can be (re)gained. This is a dilemma for many governors, not only the democratic ones. A solution for this dilemma is network process redesign, especially in the form of mixing formal and informal structuring and mixing contracts and regulations. Because this necessarily implies an intervention in the formal structure only, and because network-

process-design is not the easiest technique to apply, many governors skip this stage. This is why they will never understand why they fail in the end.

Freedom increases, and interdependencies too. Designing a network process in a loosely coupled system is much more difficult than in a rake-shape design. Nonetheless, every organisation needs basic game-rules but they are more difficult to invent and deploy in a whirlpool-organisation. Game-rules are necessary to:

- make sure that people know how things work;
- create an environment in which people can trust and rely on each other;
- arrange that the management can monitor progress and forecast emerging problems;
- maintain a conflict- and problemsolving managerial process;
- enhance fun, creativeness and a, swinging, business.

Managerialism, the mechanical application of business management theories and -methods without understanding the nature of the work of the organisation that is governed, sometimes seems a trend in governance. Managerialism creates bad and uncreative working conditions for any intelligent workforce. Modern leadership – being open to advice – should give guidance; it does not just take decisions. Only then, it adds a dimension to governance. Again this is management by co-operation. This sounds perhaps somewhat old fashioned, slow and sluggish. Indeed: decisions *are* needed, even at an increasing speed. But this does not mean that good governance cannot be democratic. To catch up with the accelerating society, it is needed to join forces and knowledge, also, but not only, through a regulatory system that obliges to take decisions, and clarifies responsibilities. An increased professionalism of the academic management seems counterproductive. It should be acknowledged that democratic governance is a prerequisite of intelligent and well-balanced higher education governance. This stimulates continuous adaptation and updating of structure and culture of your organisation. This depends on the quality of modern democratic organisational concepts, legal and non-legal instruments, and the quality of the translation into daily practice. If a leadership is not honest or not democratic, its organisation will become perverted and withers away. It is important to play according the rules. If this is true indeed, rules and regulations should be changed in an open process. If not, everybody will act according his or her own rules in no time. Professional management, in more extreme forms this get the characteristics of managerialism, is not the recipe: professionalisation of the academic management is.

A continuous development of the legal and non-legal structures, and the culture of any systems and any individual institution, is essential. The alternative is to wait until your performance is bad, and you need for a long time to engage expensive external consultants and interim-managers to get rid of the weariness and fatigue. Trends, university's mission, and the new priorities, especially those concerning quality, accountability and new management techniques, require a continuous modification of the structure of the organisation, but not a state of constant total business redesign. Only then it is possible to overcome the impediments of a process of change or an adjustment to new circumstances. This is also why – in university of a normal size – two institutional layers are not sufficient. This is why I conclude that governors, managers and staff should 'lead the evolution'. When people feel that they must start using the instruments in Gary Hamel's *Leading the revolution* (2000), an organisation is well underway to perversion. Revolutionary instruments of change are only advisable as ultimum remedium: when nothing else worked.

*The ninth principle of good governance of systems or institutions is to realise a continuous fine-tuning of a democratic juridical structure and the non-legal working methods.*

## 2.17 11 general observations for governors

- i. In many decisions an implicit strategic choice is made to act on the basis of (institutional) autonomy or (academic) inter-institutional co-operation. In management terms this strategic choice bring about opposite driving forces that must be counteracted:
  - autonomy leads to fragmentation, sluggishness, tunnel views and competition.
  - co-operation leads to stalemate, sluggishness, confusion, soft compromises and monopolies.
- ii. System designers disregard that governance concerns co-operation at at least 4 levels:
  - general vs. specific issues (like ICT-policy versus the development of a new curriculum);
  - internal vs. external patterns of interaction;
  - units vs. the persons the units are comprised of;

- formal vs. informal organisation (P. Scott-Morgan, 1994).
- iii. Poor network process design causes distorted interaction between State, institution, and market. Mismatches between education and labour market, the playing of political games, the wasting of money and time, and short-circuiting policies, are inevitable.
  - iv. A dense policy mix confuses and paralyzes promising policies. Especially funding models with many inbuilt incentives are vulnerable, as one will be unable to forecast effects, and even making a simple correction will be technically highly complicated. Assumed fraud in the Dutch funding model in 2002, proves the dependence on honest governance. When the stakes are high it is profitable to gently bend or break the rules. On the other hand: innovation and legitimate acting requires sometimes more than just doggedly complying with the rules.
  - v. Regulations that enhance communication on strategic, tactical and operational plans before decisions are taken reduce the need for ex ante control and governance by detailed orders. Unfortunately, types of hands-off regulation using the value of self-governance, are rarely detected.
  - vi. Taking advantage of the self regulating potential of work-face level reduces the energy needed for governance of the primary functions of the institution.
  - vii. In higher education institutions and public bodies, like in business, professional managers took over from the professional as manager. Not incidentally, this coincided with the increase of double management (see paragraph 2.5), double caps (one body, two lines of responsibility), double binds (two equal stakeholders giving two different guidelines), devils' matrices (one authority, given to two authorities) and even fraud (Kwickers, 1997; Ernst & Young accountants, 2003);
  - viii. Change through removing obstacles for innovation is rarely a management priority. The State is often only interested in quick interventions for specific goals. This necessarily means the creation of legal obstacles. Policy-owners (civil servants who designed a specific policy) often frustrate innovation when this undermines their 'property'.
  - ix. One Advisory Body suffices. Debating Clubs with a formal position are an expensive sort of window dressing. A board of trustees of former politicians and captains of industry that oversees and only appoints the executive board, obscures responsibilities and easily obscures the broader public interest, or the interests of the funding parties.
  - x. Predicting the future is wasting time; anticipating the future is an on-going process. Maintenance of organisational structure and culture requires permanent updating and the absence of societal blueprints. A stepwise evolution based on intelligent scenarios is the way forward, and the only recipe to improve the effects of State intervention.
  - xi. To facilitate autonomous development, to give guidance to the working process, and to alleviate the effects of superfluous and redundant interventions, the political leadership should build a legal system that ensures individual organisations to develop and prosper with a minimum of State intervention. A modest State has a legislation that allows modest general intervention, but confines specific measures.

## 2.18 Quality

Knowing all this, but not knowing what quality is, a better knowledge of the functionality of quality assurance indicators or performance indicators has to be sought after. Efficiency and quality are the paramount interests of the State. Academic quality is it of the academic community. This strategic alliance is strong enough to rely on intrinsic (more natural) management structures. Nonetheless, the impatient State designs its governance mechanisms usually using indirect instruments like substantial external quality assessment and financial incentives. This is often ineffective, sometimes undemocratic, and usually both. It should be understood that society as well as university should largely govern themselves, and that, technically, self-governance and management-by-exception usually work better. Furthermore, the academic community usually understands its responsibilities quite well. Therefore, what university needs, is a solid structure, a fair system of accountability and ex post control, and a fair share of the State expenditures. Such methods of governance make the Rule of Law even more important as a countervailing power. In a Dutch example: policy makers relied on the student seeking quality, but a yellow card (disclosure of poor quality of a curriculum) rather had positive effects on new enrolments! It doesn't have to be good news.

Definitely, governing a university should be about quality thrust. As legal provisions materialise values and norms, clear norms and qualitative and quantitative indicators can provide the honesty and certainty that a university needs. A management needs clear managerial indicators for itself and its academic community. It needs parameters

at operational level. This is why the main quality indicators should appear in laws and contracts as these indicators are – to date – in fact concealed and unnoticed legal norms. Democratically agreed and well chosen norms must be revealed, and not developed by the new mandarins of quality assurance, or deployed by them in a mechanical manner. Codification will improve the reliability of the indicators, and improve their sometimes questionable validity as well. Indirectly, this will improve the quality and legitimacy of government policies concerning higher education and research.

### 3. Academic Value for Money

#### 3.1 Academic business or business enterprise

Regarding an educational system from the point of view of a State, the core business of a university is being a powerhouse of the economy. However, it should in any case also be a free port that fosters culture, civilisation, welfare and academic values, as having a well-trained and high educated population is a public goal in itself. The mission of higher education is a multiple one: *to provide academic value for money in terms of a contribution to quality of life, culture, human values, economic prosperity, welfare and many more, for the general public.* This is in fact also laid down in treaties like the Universal Declaration on Human Rights (Paris, 10 December 1948) and the International Covenant on economic, social and cultural rights (New York, 16 December 1966).

University produces merit goods and no industrial products or business services. Therefore, teaching, knowledge transfer and free research require a somewhat restricted institutional autonomy and even a restricted academic freedom. Open access and public availability of research results, must be legally assured. Whether this implies low tuition fees (or none at all), seems to be a matter of system design, political discretion and attitude of society, despite the obviously forgotten but still up-to-the-minute article 13, section 2, under c and e, of the Treaty of New York.

Article 13 stipulates:

1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of Peace.
2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:
  - a. Primary education shall be compulsory and available *free to all*;
  - b. Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, *and in particular by the progressive introduction of free education*;
  - c. Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, *and in particular by the progressive introduction of free education*;
  - d. Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;
  - e. The *development of a system of schools at all levels shall be actively pursued*, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.

University is doing academic business. But is it an enterprise? We should reconsider the legal and societal position of the higher education system, and we should make a choice.

#### 3.2 Citizens or customers

The main stakeholders of higher education are:

The State:	to foster welfare, economic and democratic stability
Students:	to make a good start and to contribute to life long employability
Citizens:	to satisfy the needs for learning in its own right
Employers:	as they need an adequately educated workforce + knowledge
University itself:	a free port for people who work together in peace and security, where good things come together, new inventions are made, democratic revolutions started, but never a war.

A State has no customers, but citizens (Minzberg, 1996). This is a critical difference. You can treat your customers badly: the worst that can happen is that they just go to another shop. Not so in a State. If a State treats its citizens badly, they need to emigrate, or worse, refuge from their country. This is why we expect the highest standards of the State. If higher education and research are indeed of public interest, universities neither have customers. Consequently, the old idea of an academic community of staff and students (and administrators as humble facilitators) is not old fashioned at all. The academic community is a nursery for a life-long innovative behaviour and new ideas, as well as for preserving valuable norms and values. University is only strong and governable if it binds people as if they were citizens. It should treat its citizens better than a State does; it can. *The academic community is the university.*

*University is neither State nor Market; it is not even hybrid; it is – being a role model as well – a Third Organisational Species.*

This, the State must remember when drafting laws and when developing another policy mix again, and the international academic community must assist the State if it wants to survive. This is another pivotal reason to apply other avenues of decision making than to date: according parameters like:

- a mean and lean system design;
- a well balanced mix of the lightest possible policy instruments;
- a flexible network-process-design and – as much as possible – self governing units;
- a delayed organisation, as each organisational level adds problems and tension on its interfaces;
- an intelligent mix of management through regulations and contracts (regards form) and mix the steering instruments (regards the type);
- open communication patterns that create a cooperative culture through the right organisational structures, in other words: culture shaping structures;
- well conducted services to society, high quality curricula, free research, and intensive knowledge transfer.

### 3.3 Enterprise or public legal person

If a government underfunds higher education and research or mistreats the academic community in other ways, the universities are driven into the arms of others. This confronts us with at least two strategic dilemmas:

- services to the private sector of society, drives out public money: institutions can only serve one headmaster;
- competition competes with academic co-operation.

These concrete and tangible dilemmas cause a trend of a diminishing political interest. Along with the effects of competition law, it also leads to a stricter separation of public and private funds for higher education and research. This will be bad for the strategic and operational decision making in institutions; it splits the mind and creates a binary agenda, bringing about two universities inside one.

A precise answer to the in academic circles apparently forgotten question to what extent a university legally belongs to the public domain or must be considered as a business, will have a big impact on the policy of the institution, and the entire higher education system. It will effect for example:

- corporate governance structures;
- human resources management;
- ICT-supported competence and knowledge management systems (Kwikkers e.a., 2001);
- financial management,

and competitive elements like:

- diversification of financial resources;
- selection at the gate/dismissing of students;
- differentiated tuition fees;
- curriculum development;
- investments in infrastructure;
- internationalisation.

Even if higher education is situated in the public domain, it is still important to know whether a university is – legally – an enterprise. This depends partly on the laws of the country, in Europe more and more on EU law, and on a global level on the General Agreement on Trade in Services (GATS). The legal situation of a specific university in terms of GATS, EU and national competition law is unclear, differs from country to country, and is dependent on the exact factual situation the university finds itself in. If the governors of a university do not know which rules apply, how can they develop an adequate strategy?

We should acknowledge that an open global market is a blessing, but for universities this is a challenge for which they are not yet well prepared. It could happen that one fine day, after a good night sleep, universities suddenly wake up as full enterprises. Are there reasons for a university to conscientiously become an enterprise, cutting the umbilical – some say golden – cord with the State? The question is not easy to answer. When universities are legally considered as enterprises, much will be different:

- the university shifts from being an academic community to being a manufacturer;
- a different legal relationship with students will develop after the shift from public law to civil law: students become customers instead of members of the academic community;
- other legal structures are applied, which will lead to other types of legal obligations;
- another type of legal certainty causes another cooperative working culture: the academic democracy becomes an academic business in which making money must be paramount, and not always making substance;
- other avenues of appeal;
- other avenues of accountability;
- general tax law that differs for private companies, individuals and public bodies;
- Value Added Tax;
- other labour law and pension schemes (for example, below 51% of public income, a public university drops out of the second largest public pension funds in the world: the Dutch ABP, according to article 2 of the law regarding it);
- fully applied competition law and regulations to assure fair competition, whereas universities now form a cartel. The cartel and competition authorities are on the alert;
- the EU-ban on state support, which – in principle – forbids the public funding of enterprises.

Two rulings in 1993 of the Luxembourg EU-Court (Poucet and Pistre; C-159/91 and C-160/91) on unfair competition give as criteria for not being considered as an enterprise:

- that there exists a legal framework that:
  - stipulates and regulates the general interest of the state;
  - strictly regulates the governance of the institution;
  - stipulates strong public influence;
  - gives little freedom for policy development and implementation by the institution;
  - stipulates the not-for-profit character of the institutions.

Considering the characteristics of the modern relationship between the State and the university in the light of these criteria, it is obvious that we are close to the edge. Occasionally demanding cost price or making profit, is not – yet – sufficient to make a university legally an enterprise. The institution as a whole is judged. The allocation of the earned income is relevant; spending profit of business activity to regular independent research programs is probably safe. Paid services that fit in the public mission and serve the general interest should also be safe, but it will need political protection. If the income comes for more than 50% from public sources, this fact will be considered as juridically relevant. To what extent the work of the university belongs to the academic freedom should be relevant as well. It must be kept in mind, however, that all these criteria are legally still rather undetermined and unstable.



The entrepreneurial universities in Europe are only an inch away from becoming an enterprise. A minister, ministry and parliament, as well as a university, that does not pay attention here, must eventually answer difficult questions like whether the institutions still falls under public authority, feeling the pressure that the State support should be ended.

*The question remains: do we want universities to be, or to become, enterprises? Will they then be able to fulfil the societal claims and expectations? Will they do this better than today?*

### 3.4 Managing international academic competition

Being a public or a private legal person is one issue. Managing (international) competition is another not yet major issue for university governors. It is high time this is discussed. Although one finds universities on the marketplace since the year 1088, the again urgent question: 'enterprise or university' regards almost every aspect of governance in terms of, for example:

a. legal provisions on higher education governance about:

- the managerial structure;
- influence of staff and students on strategic and operational decisions;
- control and accountability;
- collegiate management versus professional management.

b. system issues like:

- the level playing field of State funded and recognised, but not State funded institutions;
- the impact of GATS;
- the Bologna declaration, the introduction of bachelor and masters degrees on the European continent and the related issue of maintaining or abolishing the binary divide;
- programming freedom, and accreditation instead of alternative public or self-controlled avenues of quality assurance;
- the strategic choice for competition and/or co-operation;
- the choice for a unified, binary or spectral system or institution;
- the virtual university as a future perspective and as related issue: borderless business education. The CVCP report is alarming in terms of level playing field, unfair competition, fighting with unequal arms, unquitable legal provisions, and 'sharks' skimming the milk;
- possibilities and obstacles for phenomena like outsourcing, branding, and licencing.

Of the latter an example of a strategic – yet unanswered – question. A full daughter of a large multinational multimedia publishing house sells curricula without making and maintaining them. It buys courses from other recognised institutions, nevertheless it is State accredited. Does this institute acts in conformity with Article 6.9 of the Dutch higher education and research act that stipulates that the institution *shall provide* higher education in the way the legislator envisaged?

### 3.5 The enterprise

We know that there are units in university that, through service activities, made themselves for their existence almost 100% dependent on non-state funds. In the Netherlands in 1999 universities drew approximately 23% of their total income from 'non-state sources'; in the non-university higher education this was 10%; in vocational and adult education 7%. In 2001/2002 universities owning stocks, lost a considerable capital on the bear market. Did they not lose public money? Furthermore, there are also units that have almost no opportunities for additional earnings. For the faculties of theology and languages, poverty is the standard, whereas the medical school usually drives the Mercedes-Benz of the university. How to manage this divide?

The earning capacity of a normal university is not as large as policy makers often seem to think. The price tag of university products is not only the result of the rules of the market. Clearly: demanding the cost price is a guiding principle. Making some profit is still legally allowed, even for not-for-profit organisations, at least as long as they use the revenues for their original mission. If university or general interests are involved, the tagprices sometimes are way below marginal costs. A legitimate question is: under which conditions may the price be

less than marginal costs, in the light of cost efficiency, the fact that taxmoney is involved, the obligation of fair competition, and the EU-ban on state support for market activity. There seem to be rules of thumb on how to act. Yet, higher education institutions often have no idea of the cost price of their efforts. Funding models are based on assumptions, and the work process is a black box where budget items cannot be uncovered. Consequently, costs calculation is often only estimating the fixed costs of one unit.

This analysis provides also a view to the diversification of funding.

- Donations, legacies, sponsorships and alumni are unchallenged sources of money for institutions.
- In education almost everything is, without much additional restriction, legally allowed. However: market conditions are difficult. High tuition fees are politically not popular on the European continent, where one finds traditionally State oriented systems. Countries like the UK, USA, Australia are the home of the ‘sharks’, institutions that aggressively entered the business of borderless education, that more and more near the European continental coasts. The CVCP report on borderless business educations (2000) addresses this issue well. This phenomenon should open a discussion on the sustainability of expensive and cheap studies and rarities like Sanscrit, etcetera. Who owns what and who pays what? Should the national taxpayers pay the expensive natural and medical sciences and rarities, and should private borderless business education institutions make a profit from the popular but cheap studies like law and economics? For developing countries the risk of damage to its knowledge infrastructure caused by international universities is even greater.
- Research and consulting services are quickly regarded as business, especially by private competitors. Interesting is when a university starts a business on the basis of its intellectual property rights, like a chip factory, a high tech TV production-line, or a nail factory. These are debatable ventures, whereas co-developing a new motor for a car on the basis of a research contract with a car manufacturer, seems quite acceptable.

### 3.6 Common interests or joined forces

Figure 9 is a matrix of the main focal points of the State, the university and the market, which explains that a university is indeed more than just a hybrid organisation, rooted in the public as well as private domain, but also having its own kind of roots as well. Therefore, and for many more reasons mentioned here as well, a university must be granted a special position in society.

Figure 9

	<b>STATE</b>	<b>UNIVERSITY</b>	<b>MARKET</b>
priority:	economy	knowledge	profit
main interest:	democracy	free port	existence
labour force:	educated	intelligent	professional
driving force:	public interest	learning	shareholder value
task:	everything (in principle)	teaching/research	doing business

Considering this unrefined matrix shows that nothing serious blocks the combining of interests of the State, the market and university itself. This is a feasible strategy – perhaps even the only viable strategy – for any higher education institution. Anyway, the State should be invited to reconsider continuously whether it has set adequate preconditions in its legislation on higher education, public service, and governance at large. Or better: the State should completely reconsider the societal and legal position of higher education. At first as an academic – secure – exercise, and followed by a legislative reform. Then, questions like ‘value for money’ or ‘value or money’ are not the dominant moral dilemmas. They just concern relatively simple strategic dilemmas that just require a clear course. Consequently, the question is *not* ‘enterprise OR university’, although this matter should also be settled. University is for students, business as well as society at large. It should be manoeuvred into a proper position to carry out its mission. Policymakers and politicians need to re-examine the general role of the State, develop policies to foster the strength of higher education, and implement policies to reduce the obstacles for its development. Species of innovation through State intervention are:

a. First order theoretic typologies:

- |     |                  |  |
|-----|------------------|--|
| aa. | political:       | attitude-oriented                              |
| ab. | strategic:       | mission and tasks                              |
| ac. | organisational:  | legal structure and stipulated working culture |
| ad. | human resources: | knowledge management                           |
| ae. | technology push: | ICT investments                                |
| af. | infrastructure:  | housing, expensive equipment                   |

b. General roles of the State:

- bb. funding
- bc. facilitating
- bd. system governance
- be. implementation

c. Fostering policies:

- ca. financial investments
- cb. building/maintaining learning capacity
- cc. deregulation
- cd. delayed decision making

d. Pitfalls:

- da. lacking vision
- db. absenteeism of the government
- dc. losing opportunities, no time to market
- de. conservatism: holding on to what you have got
- df. political or managerial unwillingness to invest in knowledge
- dg. lacking determination and perseverance
- dh. inadequate structures of governance and management
- di. and many more.

## 4. Final Remarks

### 4.1 Similarities

Countries, organisations, universities, people all over the world, face similar strategic dilemmas. However the legal, economic, political and strategic situations vary in subtle ways per institution, region, country, educational system, and continent. This implies that no solution can be the same if one pursues a strategic governance that does justice to the similarities and the differences of the situation. Nonetheless, we need to understand and accept that there is a widespread need for more change than our organisations and managers usually can handle without destabilising their organisation.

At macro-level, there are many unanswered questions and new dilemmas in the governance of higher education systems and institutions. For instance: the external impression is that English universities are still mentally damaged by the Thatcher administration and that they have not yet recovered from the series of budget cuts in that time. As a result they exported *their* solutions to *their* problems to other countries that did not have problems before the British told them about theirs.

***Serious questions are:***

- *how to prevent that the rich get richer and the poor poorer?*
- *how to assure equal access to knowledge and economic welfare?*

- *how to make clear that global changes do not only require response to market demand but also a legal engineering and the creation of partnerships to pursue public interests?*
- *why is it that universities often wait for State incentives of whatever kind?*
- *how to find a strategic response to questions like whether higher education institutions are sisters, competitors or colleagues?*

***And the key question:***

- *how can university contribute to solving the big issues in society like: the environmental pollution and destruction, lack of equal opportunities, economic and social instability, and political corruption?*

#### **4.2 An International Convention**

It has been tried many times to formulate an international declaration of universities, some of which like the Bologna Declaration in 1999, seem quite successful, probably because of its limited scope. Surprisingly, there exists no general International Convention on higher education and research, only some Conventions of lesser significance and Covenants like those mentioned in paragraph 3.1. However, in this situation accelerating change, we perhaps can find common ground and direction in some sort of symbolic legislation (see Peter Noll, 1973): an International Convention that should give guidance to the public authorities when clear and firm agreements lack, fail or are impossible. The following is a kick off for debate and, therefore, somewhat unorthodox:

**Preamble:** This International Convention shall foster international agreements and national legislative innovation and remove impediments for development of higher education institutions, banish any excuse for undemocratic and sluggish higher education governance and management of it, stimulate the adequate funding of higher education and research, and enhance the co-operation between the nation state, university, students and business.

**Section 1:** Higher education institutions shall have as mission their contribution to prosperity and welfare for all.

**Section 2:** The national legislator shall ensure the democratic decision making process and shall establish a refined monitoring and information system in higher education and research, both being based on internationally agreed standards.

This section ensures the necessary democratic features of university, as well as being it an open institution analogous to Popper (1966). It is also important that true democratic governance is rediscovered by employers and unions as an essential labour condition.

**Section 3:** The national legislator shall neutralise the negative effects of market competition as well as excessive influence of private and public parties on higher education and research institutions, especially with a view to the availability of apt human resources for higher education institutions.

As often is the case in symbolic provisions, the meaning of this section depends on the situation. To implement this, the information system of section 2 is pivotal. Institutional autonomy and academic freedom are – as principles – ensured here too. The special position of human resources stipulates that both the private sector and the national authorities of (especially) the developed countries bear the responsibility to ensure that recognised universities all over the world are properly staffed.

**Section 4:** Enterprises shall not receive public funding for higher education and research. Universities are allowed to mix funds from public and private sources. Unfair competition between universities is prohibited.

The first sentence of this section only applies to business enterprises, not to entrepreneurial universities. The competent court will decide whether an institution is an enterprise; establishing a supreme international court should be considered. The choice of freely becoming a university enterprise is open, but enterprises should not receive state funds for higher education and research. This provision, implying that public money must be spent

on public objectives only, will not be undisputed. It forms, however, a foundation of fair competition. In fact this is already legally the case but often forgotten. It should be said that unfair competition is difficult to prove in court. The last sentence stipulates to foster academic co-operation, it does not rule out competition.

**Section 5:** The maximum number of State funded universities is regulated by law.

This provision ensures a focussed State policy and efficient and effective allocation of public funds to universities of a good quality. A certain degree of concentration is required in order to guarantee that the high investments in higher education and research are well spent.

**Section 6:** The price of service products of the university shall not be more than five times of cost price, and not less than free of charge.

Product pricing is an underdeveloped skill in higher education. A wide spread is needed in order to be able to pursue the public goals as well. Being a public facility, these products should be available for a larger clientele, for example small or new business, as well. Pricing is also a matter of matching university's motives, mission, buying power and earning capacity of clients and citizens.

**Section 7:** Responsible and responsive universities shall be granted institutional autonomy, the freedom to regulate its corporate governance, and shall receive a fair share of the public budget, being no less than x% of the countries Gross Domestic Product. Their academic communities shall be granted unrestricted academic freedom.

A free space for academic work, independent thinking, and the assurance of sufficient funds for this is needed. When university is able to match the interests of society at large, students and business in a balanced way, it is worthy of our trust. When it meets the demand for academic values and services, it will be free from State intervention, as long as the governance includes proper representation of staff, students and external stakeholders. Main criterion for being responsible and responsive is: the university is of good and reliable academic quality and is innovative. It is naive to think only of funding. The State steers on behalf of the citizens. Higher education is not a towering political issue, but it is of high interest to all so the State must be an active innovator. Consequently, a State should oblige itself to invest a minimum percentage of its GDP in higher education and research.

**Section 8:** Results of research and full annual reports on teaching, research and services are made public.

Of course, institutions are held responsible for how they spend public money. They are accountable to the general public. As to make results public, legitimate reasons as registering the intellectual property rights can postpone the publication of new knowledge. Such provision is necessary to transfer knowledge to poorer countries in order profit for example to improve their environmental policy and health care. We know this is urgent.

**Section 9:** An International Advisory Council and Observatory (HERACO) shall be established to assist the international, national and institutional authorities to resolve issues in the domain of higher education and research.

#### 4.3 Final remark and tenth principle

*There is no choice: universities are organisations of the Third Kind, that serve the State, the Citizens, as well as Business. This implies that governing higher education and research is governance beyond the edges of the public as well as the private domain. This demands a balancing act between academic and businesslike behaviour, uniting the most different mentalities that exist in working life, in one unified organisation. This is a highly difficult, yet honourable, assignment, but it will be an impossible one if no adequate structure can be given to the higher education systems and institutions of tomorrow.*

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