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Developing Identity for Lawyers: Towards Sustainable Lawyering

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Developing Identity for Lawyers



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HANDELSHØJSKOLEN

Developing Identity for Lawyers

Towards Sustainable Lawyering

Inger Høedt-Rasmussen

PhD Series 08-2014

LIMAC PhD School
Law Department

PhD Series 08-2014

Copenhagen Business School

LIMAC PhD School

Developing Identity for Lawyers

Towards Sustainable Lawyering

Cand.jur. et art. Inger Høedt-Rasmussen

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Preface

All big projects start with a dream. My dream is to contribute to the development of proactive European lawyering in a globalised world, with legal advisers, who take (or retake) societal responsibilities while supporting their clients' interests, lawyers who find joy and satisfaction in legal life and who care for sustainable lawyering.

What kind of people are lawyers and is it possible to depict their identity, or is it illusory to talk about a specific lawyer identity?

Are lawyers warriors fighting for social justice? Are they independent trusted advisers fighting for their clients within the law and with a consciousness of their societal responsibilities? Are practising lawyers members of a strong profession, with a collective vocation committed to ethical behaviour and access to justice for everyone? Is the ideal lawyer's professional identity built on the common values of the profession, reflecting charismatic, authentic and incorruptible characteristics of individual lawyers who maintain high standards in business and in public life?

These questions refer to an idealised image that may not portray the European lawyer of today, and indeed it may never have been the true picture. But what is the identity and role of the European lawyer today? Are lawyers businesspeople or consultants guided by the wants of their clients or are they idealists standing up for human rights and fundamental freedoms? Are they workaholics, struggling with disillusionment and a desire to escape from the profession? Or are lawyers in transition, leaving behind the old ideals to find new ways to train and develop sustainable lawyering in a proactive setting?

There are strong indications of changes both in the structure and content of professional lawyering. Has the profession become specialised and individualised into so many different fields with divergent values, so it is no longer relevant to talk about one profession or one identity? Lawyers as a profession have a privileged role in society based on some values and ideals which may no longer be relevant in modern society. Does the rule of law only exist in the minds of lawyers? Legal professions have always been related to nation states. As legal culture is in transition from a national level towards a supranational level, lawyers may need a new orientation and training for new ways of lawyering.

This thesis will focus on the identity of the individual lawyer and analyse their relation to the profession and to society. Strong professions, such as lawyers and doctors, tend to protect their professions to such a degree as to be counterproductive. A protective profession narrows the scope for individual action and frustrates individual satisfaction.

The time has come to look more closely at the identity, roles and tasks of lawyers in relation to society, the profession and the wishes of individual lawyers to have meaningful and satisfactorily working lives in legal practice.

Inger Høedt-Rasmussen

Content Table

Part I Introducing topic, theory and methodology	1
1 Introduction	1
1.1 Lawyers in contextual complexity	4
1.1.1 Globalisation, democracy and legal culture	5
1.1.2 Lawyers, the legal profession and society	7
1.1.3 Lawyers' specialisation and broader networks	7
1.1.4 The multi-layered democracy in Europe and the lawyers	8
1.1.5 Individualised proactive training	11
1.2 Aim of the study	14
1.3 Research questions and hypothesis	15
1.4 Scope and limitations	16
1.5 Terms and expressions	17
1.6 Structure	20
2 Theoretical paradigm and methodological foundation	23
2.1 The scientific landscape	24
2.1.1 Objectivism/positivism versus subjectivism/hermeneutics	25
2.1.2 The interpretive relations	26
2.2 The relevance of the structuration theory	26
2.2.1 Late modernity	27
2.2.2 Global framework of local lawyers	27
2.3 Societies and professions	28
2.3.1 The transformative character of a profession	30
2.3.2 Unintended consequences	31
2.3.3 Lawyers and legal philosophy	31
2.4 The lawyer as an agent for change	33
2.4.1 Self-esteem, fear, identity and lifestyle	34
2.4.2 From lawyer to expert	35
2.5 An interdisciplinary study open to interpretation	36
2.6 Reflectivity in the interaction between scientific fields	38
2.7 Structuration theory and empirical research	38

Content Table

2.8	Methodological width	39
2.8.1	Making methodologies operational	40
2.8.2	Methods related to sub question 1.....	40
2.8.3	Methods related to sub question 2.....	41
2.8.4	Methods related to sub question 3.....	42
2.8.5	Methods related to sub question 4.....	43
2.9	Critical and concluding remarks	43
Part II	Identity in transition	45
3	Conceptualising lawyers' identity	45
3.1	European identity in a legal setting.....	47
3.2	Identity, choice or assignment?	49
3.3	Identity, more than a self-image.....	50
3.4	Rituals – rites of passage	50
3.4.1	Professional oath.....	51
3.4.2	Identity shaped or supported by law	51
3.5	Between the self and the profession	53
3.6	Identity as an individual lifestyle project	54
3.7	Membership of the legal profession	54
3.7.1	A mandatory, formal, legal, academic education	56
3.7.2	A curriculum aiming at a specific job	56
3.7.3	Professional standards	57
3.7.4	Ethical rules adopted by the profession.....	57
3.7.5	Control of recruitment	58
3.7.6	Mandatory post-graduate training.....	58
3.7.7	Monopoly	59
3.7.8	Are the theoretical conditions for being a profession still fulfilled?.....	59
3.8	Developing identity as a social learning process.....	60
3.8.1	Becoming a lawyer	61
3.8.2	Apprenticeship and learning	63
3.9	Lawyers in communities of practice.....	64
3.10	Cyberspace identity.....	66
3.10.1	Agency and technology	67

Content Table

3.10.2	Developing identity in virtual bodies	68
3.11	Model analysis based on structuration theory	70
3.12	Reflections and sub-conclusion.....	71
4	The European identity ideal (artefact) for lawyers	73
4.1	'The lawyer' – a single concept covering multiple realities	74
4.2	What is a lawyer?	75
4.2.1	Independent lawyers and employed lawyers	76
4.2.2	Membership of or authorisation by a national bar and law society	78
4.3	Legal sources in a global community	78
4.4	Legal framework for the ideal identity of a European lawyer	80
4.4.1	UN Basic Principles on the Role of Lawyers	81
4.4.2	Council of Europe	83
4.4.3	The case law of the European Court of Human Rights	85
4.4.4	The European Union – directives, rules and recommendations.....	92
4.4.5	Council of Bars and Law Societies of Europe (CCBE).....	97
4.4.6	International principles for the conduct of the legal profession	100
4.4.7	The legal framework for Danish lawyers' identity, education and practice .	100
4.4.8	State recognition of legal science in Denmark.....	102
4.5	The identity ideal as depicted in legal sources.....	102
4.5.1	The spirit of the EU.....	102
4.5.2	What to do	104
4.5.3	How to act	105
4.5.4	Who to be.....	106
4.6	Reflections and sub-conclusion.....	108
5	Danish lawyers' identity perception	111
5.1	The choice of focus groups and individual interviews	112
5.2	Detailed research design for focus groups and interviews	114
5.2.1	Planning the focus groups	114
5.2.2	Choice of language	115
5.2.3	Number of groups, group sizes and demography.....	115
5.2.4	Appointing the group members.....	117
5.2.5	Introduction to participants and basic data.....	118

Content Table

5.2.6	Work-flow.....	118
5.3	Moderating focus groups	119
5.3.1	Developing questions in a semi-structured interview guide	120
5.3.2	The technical support of data selection and documentation	121
5.3.3	Triangulation	121
5.4	Participating lawyers' age and gender	121
5.5	Areas of expertise and professional skills	123
5.6	Empirical results related to structure	124
5.6.1	Views on the societal role or commitment – what to do	125
5.6.2	Views on the profession – how to act.....	126
5.6.3	Views on individual identity – who to be	129
5.7	Empirical results related to personal themes	130
5.7.1	Lifestyle indicators	131
5.7.2	'Billable hours' affects identity.....	133
5.7.3	Gender issues	134
5.7.4	Personal meaning and belonging	136
5.7.5	Fragmentation and individualisation	137
5.7.6	Law firm size influences identity.....	138
5.7.7	Authenticity.....	139
5.7.8	Identity and reputation	140
5.7.9	Work-life balance – Sustainable lawyering	140
5.8	Transformative capacity leads to several lawyer identities.....	142
5.8.1	Lawyer-businessman.....	144
5.8.2	Lawyer-performer	144
5.8.3	Lawyer-entrepreneur	145
5.8.4	Lawyer-humanist.....	145
5.8.5	Lawyer-integrator.....	146
5.8.6	Lawyer-statesman	146
5.8.7	Individual responsibility	146
5.9	Reflections and sub-conclusions	148
6	Challenges to identity in a structuration process	151
6.1	Societal obligations – the perspective of 'What to do?'	151

Content Table

6.1.1	European legal and democratic challenges.....	152
6.1.2	Law-making processes.....	152
6.1.3	Lawyers in the governance of services with proactive elements	153
6.1.4	Enforcement.....	154
6.1.5	The public purpose of the profession in the EU.....	155
6.1.6	Exercising controls on behalf of public authorities.....	155
6.1.7	The changing societal role of lawyers and the legal profession	156
6.2	The profession – the perspective of ‘How to act’?	157
6.2.1	Is the profession disappearing, being deconstructed or reconstructed?	159
6.2.2	The transition from a homogeneous to a heterogeneous profession	160
6.2.3	Unintended consequences.....	160
6.2.4	Lawyers in competition	161
6.2.5	Competent and critical clients	164
6.2.6	Legal services without lawyers.....	164
6.3	Individual identity – the perspective of ‘Who to be?’.....	164
6.3.1	Ethical behaviour and moral aspects of identity.....	165
6.3.2	From profession to individual experts	166
6.3.3	Individual lawyers’ agency in the change of the profession	167
6.3.4	Agency to create meaning and direction in life	169
6.3.5	ICT – as a contributor to the transformation of identities in law firms	170
6.4	The interaction between the three levels.....	170
6.4.1	An example of a legal source affecting identity and self-perception	171
6.4.2	The relation between the profession and the individual.....	173
6.4.3	Lawyers, social media and public reputation.....	173
6.4.4	Connecting ‘Who to be’ with ‘What to do’ in different ways	174
6.4.5	Clients in a clash of interests.....	176
6.4.6	Clients and the rule of law	177
6.4.7	Influencing the identities of others.....	178
6.4.8	Choices and constraints on the development of identity	178
6.5	Reflections and sub-conclusions	179
Part III	Education for sustainable lawyering	181
7	Structures for training lawyers’ identities in the EU	181

Content Table

7.1	The legal framework for postgraduate training in the EU	183
7.1.1	EU training stakeholders	184
7.1.2	Legal frame of education from national to supranational level.....	185
7.1.3	The internationalisation of education and training	186
7.1.4	Language supporting identity development	187
7.1.5	The relations between academic institutions and practice	187
7.2	The professional organisations and training	189
7.2.2	National training in Denmark.....	191
7.2.3	Mandatory postgraduate training.....	192
7.2.4	New communities of practice	194
7.2.5	Didactic structure: Teaching or learning? Learning or control?.....	194
7.2.6	Meaning and direction between the profession and the lawyer.....	196
7.3.1	An educational programme promoting new EU lawyering.....	198
7.3.2	Research design – participatory observation.....	198
7.3.3	Fields of observation	199
7.3.5	Mixed groups and interdisciplinary thinking and learning.....	200
7.3.6	How can training affect or create identity?	200
7.3.7	The identity of the profession is changing	200
7.3.8	Trainer feed back.....	201
8	Lawyering and lawyers in transition	205
8.1	Consequences of values linked to agents and not to structure.....	206
8.2	The trajectory aspects of training and identity development	207
8.2.1	Developing identity as a social learning process.....	207
8.2.2	Identity development as a trajectory of the self.....	209
8.3	The new lawyer in contemplative practices.....	210
8.3.1	Different labels for sustainable elements in lawyering.....	210
8.3.2	Sustainability at the societal level	212
8.3.3	Sustainability issues at the professional level.....	214
8.3.4	Sustainable lawyers.....	216
8.4	Transformative power in action	217
8.4.1	Inspiration from individual trajectories within the legal profession.....	218
8.4.2	Self-directed learning	219

Content Table

8.4.3	Lawyering includes self-awareness	220
8.4.4	Humanity in education and identity formation	221
8.4.5	Grounded body – physical well- being	222
8.4.6	Emotions and legal thinking	223
8.4.7	Meaning and direction in the individual life of a lawyer.....	225
8.4.8	A mindful practice	226
8.5	Curriculum – expanded interdisciplinary skills.....	228
8.5.1	How to become an expert?	229
8.5.2	Individual curriculum design	230
8.5.3	Training for sustainable lawyering	231
8.6	New communities of practice support identity development.....	232
8.7	Reflections and sub-conclusions	233
Part IV Conclusions, critical reflections and perspectives.....		235
9	Conclusions and critical reflections.....	235
9.1	Legal culture and lawyer identity	237
9.2	A common identity ideal for lawyers in Europe?	237
9.3	How do Danish lawyers define or perceive their identity?	238
9.4	Interaction between different levels of analysis.....	239
9.4.1	Societal level in expansion	239
9.4.2	Decreasing power at the professional level.....	240
9.4.3	The individual level – easier to be different.....	241
9.5	How will new communities of practice affect the identity development and professional training of lawyers?.....	242
9.6	Identity development for practising sustainable and proactive lawyering	243
9.7	Contribution to the scientific field	246
9.8	Shortcomings of the research	246
9.9	Tendencies without sufficient scientific proof.....	247
9.10	The new lawyer: a tool, a job, an identity or a lifestyle?	248
10	Implementation and future perspectives	249
10.1	Next steps and implementation.....	249
10.2	Further research options.....	249
10.3	Joint actions at the European scene	250
Bibliography		253

Content Table

Annexes.....	269
Danish summary - Dansk resumé	271
English summary	273
Thanks to all supporters, family and friends.....	275

Part I Introducing topic, theory and methodology

1 Introduction

This research project explores the identity of lawyers in Europe in a time of change. The European Union is developing a multi-layered legal order which will have a great impact on legal practitioners in all EU Member States. The starting point for this project is the aim to conceptualise identity and to portray the European ideal of practising lawyers through a legal dogmatic analysis of regulatory sources. This ideal seems to be formally upheld mainly by the professional organisations and it is not generally reflected in the actual professional practice and identity of lawyers. The ideal identity or ‘artefact’ refers to the concept of a ‘lawyer’ in terms of defining the characteristics by which lawyers can be distinguished from other agents.¹ An empirical study will document whether this abstract ideal may or may not be reflected in the actually perceived identity. The legal analysis is framed by the theory of structuration (Anthony Giddens)² and supplemented by social learning theory (Etienne Wenger),³ as it is difficult to explain fully the identity of lawyers in a mono-disciplinary setting. The aim is to find out how the identities and roles of lawyers are perceived and developed by lawyers themselves, and to consider how training and other tools can support a diversity of lawyers in new communities of practice. Thus, this is an explorative study based on recent original data collected for the purpose of this thesis.

The lawyers who are the subject of this study are practising lawyers in Europe. They are lawyers belonging to national bars and law societies which can be members of The Council of Bars and Law Societies of Europe (CCBE). The CCBE covers both EU Member States and non-Member States. The bars and law societies of 32 countries are full members, and the bars and law societies of 11 further countries are associate or observer members. The CCBE thus represents around 1 million European lawyers. In Denmark, where the empirical identity study has been carried out, there are approximately 5,900 members of the Danish Bar and Law Society who are entitled to use the protected Danish title of *advokat*. 4,800 of these are partners or employed in law firms, while approximately 1,100 work as in-house lawyers in corporate organisations.⁴ Lawyers can practice in any country in the EU under their national title.⁵ As iden-

¹ ‘Agents’ as in the terminology of Giddens in his agent-structure relation.

² Giddens, *Modernity and Self-identity – Self and Society in the Late Modern Age*.

³ Wenger, *Communities of Practice*.

⁴ The Danish Bar and Law Society, www.advokatsamfundet.dk (last accessed 9 August 2013).

⁵ Directive 98/5/EC to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained (OJ 1998 L 77/36), as amended by Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded (OJ 2003 L 236/33) and Directive 2006/100/EC adapting certain Directives in the field of freedom of movement of persons, by reason of the accession of Bulgaria and Romania (OJ 2006 L 363/141). Implemented in Denmark by Executive Order No 1431 of 11 December 2007 on EU lawyers’ establishment, pursuant to section 130 of the Danish Administration of Justice Act.

tity is also formed by language, it is significant that there is no common name for a European practising lawyer.

The profession is under pressure from various potential and sometimes contradictory developments. Some parts of the profession tend to build fences around its traditions and privileges, while others are willing to see new content and a new model for lawyering.⁶ Are lawyers losing their way or are they changing their identity? The tensions between globalism and nationalism must be considered, as well as the tensions between individual specialisations and general standards.

Preparatory studies of the literature indicate that there has not been an examination of the identity of lawyers, such as the focus of this research project, either in Danish, Nordic or European contexts. Thus this study aims to produce research results which can stimulate both Nordic and European interest in development and innovation in the field of legal services. There have been some studies into the roles and identity of judges, combining law and sociology⁷ and stimulating the conduct of an interdisciplinary study with a theoretical basis in sociology, legal studies and social learning theory.

To investigate actual perceptions of identity, field work has been carried out among Danish lawyers (*advokater* and *advokatfuldmægtige*). Ranging from a sole practitioner in the North of Jutland to the largest law firms in Copenhagen, lawyers have taken part in focus groups or in individual interviews about their own perceptions of their identity and their professional roles and commitments. The emphasis has been on the individual lawyer and their life related to the profession and its societal framework.

Depending on the legal setting, lawyers have had and still have an important role in upholding democratic societies under the rule of law, while taking care of their clients' interests and maintaining a meaningful and satisfying life within the profession. Now the legal profession is struggling with major challenges related to globalisation, new institutional frameworks, new demands from clients for efficiency, cost awareness, competition from other legal service providers, the sole practitioner's risk of isolation, and loneliness within big firms where, according to the legal framework, each lawyer is personally responsible for the legal advice they give. The billing system has become cumbersome and law firms do not sufficiently differentiate between the different kinds of legal service which range from one-to-one lawyer-client relations and high quality tailored legal solutions, to standardised or even commoditised responses to general legal problems and legal services that are easily supported by IT. Lawyers and law firms seem to be relatively late adopters of new technology.⁸

Traditional legal practice has generally been reactive to problems presented by clients. This is also the approach taught in law schools. First, the lawyer had to define a problem as a legal problem and then solve it in the light of the outcome of a hypothetical court case. The success

⁶ Macfarlane, *The New Lawyer: How Settlement is Transforming the Practice of Law*.

⁷ Hammerslev, *Danish Judges in the 20th Century*.

⁸ Susskind, *Tomorrow's Lawyers*, p. 53.

of today's lawyer depends on being a trusted adviser who can deploy their legal expertise in collaboration with other experts or with well-informed active clients. Nowadays, lawyers may be involved in all kind of issues at a very early stage. For example they may be involved in business negotiations with the task of detecting potential legal risks and promoting good business practice. This will require competences which a traditionally trained lawyer has not been taught.

In this situation, the lawyer's role becomes increasingly normative. When lawyers set up guidelines for best practice and/or rules for standardisation, they are contributing to the creation of norms. This extended normative role is seen in arbitration, mediation, restorative justice, proactive law, holistic lawyering, sustainable professionalism and other legal settings under the heading of comprehensive legal practice.

There is increasing awareness of the personal commitment in lawyering and this seems to divide and individualise the profession. Legitimacy and governing society by legal means still play a significant role. This is part of an ongoing transition from a national to an international level, which influences the identity and tasks of lawyers. The EU is a democratic political project in which law has played an important role in fulfilling political ideas and implementing a new legal order. Over the years, the implementation of the internal market, the right of establishment and the free movement of goods, persons, services and capital have been extended to social policy, fundamental rights, justice programs, security, external relations etc. In the early days of the common market, the Court of Justice of the European Union (CJEU) showed activism in its case law in order to implement the political ideas behind the EU. Similarly, the EU's staff lawyers have worked hard to transform political decisions into legal provisions. The term 'Euro-lawyers' has been used of lawyers involved in this process.⁹

Lawyers and their professional organisations are part of a European project. They are bound by the rule of law and must comply with both national and international ethical standards. However, there will be a problem if society gives lawyers the task of upholding democracy under the rule of law and securing fundamental rights if they have not internalised these values to such a degree that they are an integral part of their daily practice, or if their practice is based on other values than those of the profession. This raises the question of whether the individualisation and lifestyles¹⁰ of Danish lawyers are in accordance with the European ideal of a lawyer.

In this thesis the focus on lawyers is at the societal, professional and individual levels. The theoretical focus and the analysis of empirical data give priority to the individual level, as the societal and professional levels have already been described and analysed to some extent by other

⁹ Vauchez, *Brokering Europe, Euro-Lawyers and the Making of a Transnational Polity*, p. 1.

¹⁰ In this thesis, the term 'lifestyle' refers to a wider range of elements than what to eat, what to wear, and who to socialise with. Giddens includes behaviours, attitudes and beliefs. 'Lifestyles' may be seen as ready-made templates for depicting the self. Giddens states that the more post-traditional the setting in which an individual moves, the more their lifestyle will concern the very core of their self-identity, its making and remaking; see Giddens, *Modernity and Self-identity – Self and Society in the Late Modern Age*, p. 81.

scholars both in Scandinavia¹¹ and in Europe. However, the empirical studies include all three levels and the interaction between them. The study is based on a holistic approach to identity, from the perspective that professional and private identities intertwine in the lifestyles and daily routines of legal professionals.

The need for reflection, innovative and entrepreneurial thinking by lawyers is partly related to a new European judicial culture in which diversity is a condition, legal pluralism¹² a reality and where there is a need to strengthen professional and personal competences, including the physical and psychological aspects of identity. Not only must lawyers act within a complex normative environment, in some situations lawyers must master normative chaos.¹³

1.1 Lawyers in contextual complexity

There are indications of changes that influence the identity of lawyers are taking place. There are consequences for identity:

- when the point of reference is no longer solely the nation state;
- when fundamental rights move from individual rights to collective rights;
- when a wide range of possible models of lawyering is offered;
- when disputes are not necessarily taken to court, and justice is put in the hands of agents other than judges;
- when the tasks of lawyers increasingly include anticipating legal disputes, risk management and taking the initiative to provide solutions;
- when there is competition with in-house lawyers and other trusted advisers;
- when the drafting of contracts includes building up good and stable relationships and creating trust between business partners;
- when mere 'legal thinking' becomes too narrow for the needs of clients; and
- when practicing lawyers are still bound by legal obligations under the rule of law, while having to compete with other advisers who act solely from a business perspective and with other ethical standards and societal obligations.

Around the world scholars and practitioners are aware of this ongoing change. This is seen in Deborah Rhode's study of the legal professions' responsibility for justice,¹⁴ Anthony Kronman's writing about the failing ideal of the legal profession,¹⁵ Richard Susskind's analysis of the

¹¹ Dalberg-Larsen & Hammerslev in Denmark, Aubert in Norway and Brante in Sweden.

¹² Barber, *Legal Pluralism and the European Union*, pp. 306-329.

¹³ Petersen (ed.), *Globalisering, ret og retsfilosofi*, p. 152.

¹⁴ Rhode, *In the Interests of Justice – Reforming the Legal Profession*.

¹⁵ Kronman, *The Lost Lawyer – Failing Ideals of the Legal Profession*.

changes to legal services,¹⁶ Julie Macfarlane's study on transforming the practice of law,¹⁷ and in Steve Keeva's book¹⁸ exploring the meaningful life of the individual lawyer. In the business environment, some of these same aspects are found in the concept of proactive law¹⁹ and in the search for sustainable professionalism.²⁰

1.1.1 Globalisation, democracy and legal culture

Globalisation, democratic perceptions and changes in legal culture demonstrate that the identity of lawyers is dynamic and develops in an interaction with the surrounding society. The late Ramon Mullerat gave an overview of how the legal profession in the European Union is being integrated in a globalised world.²¹ His work is interesting and revealing as it reflects his experience as a law professor, practising lawyer and former President of the CCBE. He played a political role in the relations between the EU and the legal profession and argued that developments within the EU and the internationalisation of the economy require harmonisation of systems for training and access to the profession.

According to Mullerat, the CCBE has a vital role in the administration of justice and the protection and promotion of human rights and the rule of law. On behalf of lawyers in Europe, the CCBE demands from the EU and from national authorities that all citizens' fundamental rights and freedoms should be protected by the unconditional observance of the principles of democracy and the rule of law.

Democracies are not stable, either politically or economically. Internationalisation, or globalisation, is not new but it is moving at increasing speed. Technical developments and modern communications influence not only economies and cultures, but also legal regulation and legal practice. Globalisation has a transformative effect on both national and international societies²² and legal globalisation affects traditional western perceptions in which law has been related to the nation state and the lawyer's main point of reference has been the state and its institutions. The evolution and proliferation of international courts have led to 'a growing international judicialisation', with a significant legal and socio-political impact on global governance and on the practice of lawyers.²³

Globalisation, the complexity of the law, clients' demands, the impact of technology, increasing specialisation and the growth of international transactions have created a broader legal market. Among other things, these developments have led to the General Agreement on Trade in Services (GATS). To meet these challenges, European initiatives started the concept of the

¹⁶ Susskind, *The End of Lawyers?*

¹⁷ Macfarlane, *The New Lawyer: How Settlement is Transforming the Practice of Law*.

¹⁸ Keeva, *Transforming Practices – Finding Joy and Satisfaction in the Legal Life*.

¹⁹ Berger-Walliser & Østergaard (eds.), *Proactive Law in a Business Environment*.

²⁰ Farrow, *Sustainable Professionalism*.

²¹ Mullerat, *Law Practice in a Globalized World: The European Experience*.

²² Giddens, *Runaway World. How Globalization is reshaping our lives*.

²³ See the research project ICourts, Centre of Excellence for International Courts, at Copenhagen University, exploring the growing role of international courts, their place in a globalising legal order and their impact on society at large: <http://jura.ku.dk/icourts> (last accessed 1 November 2013).

'European lawyer', which requires the harmonisation of practice at all levels of legal work. Harmonisation measures have been implemented in particular by the Services Directive (1977), the Diplomas Directive (1988), and the Establishment Directive (1999). These will be analysed in Chapter 4. Civil justice in Europe should contribute to the EU's economic growth. If people and businesses are to take full advantage of the EU's internal market, they must have easy access to justice, on equal terms in all Member States.

The Member States are also encouraged to make their judicial systems ever more efficient and to implement judicial reforms as part of their economic recovery programs, thus contributing to the policy of the 'Justice for Growth'.²⁴ Establishing the EU changed the legal orientation from nation states to a supranational level. The EU challenges the importance of the nation state and changes the focal point for legal practitioners. The French philosopher Montesquieu (1689-1755) articulated his theory of the separation (or balancing) of the state's powers into the legislative, executive and judicial branches. This separation of powers has been implemented in many constitutions in the world.²⁵ However, globalisation of law creates new legal communities where law-making is not exclusively connected to state power, but can arise from other sources in a negotiated context, e.g. co-regulation and self-regulation where civil society takes over or participates in the setting of new norms. Some of these norms are legally binding and are enforced outside the traditional judicial systems. International courts influence national law-making, and executive powers have developed both legislative and judicial tasks.

Apart from states, agents include multinational corporations, religious organisations, NGOs, business organisations, professional federations, global civil societies etc. Fundamental rights have been developed so that there are more rights and more collective rights in a global perspective, such as sustainability in global governance. Large corporations can be important global actors for setting up norms like corporate social responsibility (CSR), legal standards, principles for contracting and ethical rules for specific groups or communities. Legal theories have started to incorporate CSR,²⁶ which includes both elements of human rights and sustainability.

Societal norm-setting becomes more and more diverse, and law-making, legal administration and extra-judicial conflict resolution are breaking with the traditional state-related separation of powers. A consequence of legal globalisation and normative pluralism in the EU²⁷ may be that Montesquieu's system of the separation of state powers, as codified in democratic constitutions in Europe and the USA, will be drastically changed or even fall apart.²⁸ This legal pluralism leads to further important changes in lawyers' identity in relation to European legal developments, creating new tasks and roles for lawyers.

²⁴ <http://ec.europa.eu/justice/dev/index>. Denmark has an opt out from the common justice program.

²⁵ Montesquieu, *L'Esprit des Lois* (The Spirit of the Laws).

²⁶ Nielsen & Tvarnø, *Retskilder & Retsteorier*, p. 458 f.

²⁷ Barber, *Legal Pluralism and the European Union*, p. 306 f.

²⁸ Petersen (ed.), *Globalisering, ret og retsfilosofi*, p. 148.

1.1.2 Lawyers, the legal profession and society

Lawyers and their professional organisations have played, and still play, an active role in supporting and developing democracy and defending fundamental rights and democratic principles.²⁹ History shows that, in European democracies, the legal professions' commitment to humanitarian ideals and democratic values has been an integral part of the identity of lawyers.³⁰ The legal profession is governed by detailed rules both nationally and internationally, and these may hinder or complicate making necessary changes to meet the changed circumstances. To some extent these rules determine what lawyers actually do or can do.³¹

On the one hand, the legal profession is a liberal, self-employed profession, and on the other hand, lawyers within the EU have to work within certain frameworks and comply with strict conditions. Legal and political frameworks for the legal profession have been developed by the UN, the Council of Europe,³² the EU,³³ the CCBE,³⁴ and other international professional organisations like the International Bar Association (IBA), the Union Internationale des Avocats (UIA), the American Bar Association (ABA) and by national bars and law societies. Alternative organisations such as the International Alliance of Holistic Lawyers, the Progressive Law Network, the Mindful Lawyer and similar groups or networks articulate new ways of lawyering.³⁵

The legal profession has upheld a strong identity ideal, but this ideal seems to be being challenged in practice. When there is a gap between the ideal of the profession and individual lawyers' perception of the professional identity, the time for change has come. Can the profession itself create a professional identity, which is adapted to the societal changes and balances relations between individual lawyers, professional organisations and society?

1.1.3 Lawyers' specialisation and broader networks

When the members of a profession specialise, it is necessary to look at the members, in this case practising lawyers, as more autonomous specialised groups. The former relation of a lawyer to only one national bar or law society is replaced by membership of several organisations, and with formal or informal networks at both national and international levels. It has been questioned by the CCBE whether it will be possible to maintain a single legal profession.³⁶ In Denmark, this question has been raised by Mads Bryde Andersen of the University of Copenhagen.³⁷ There could be developments towards more specific and individualised professional identities, replacing the more general characteristics of the traditional legal profession. This is not only true for Europe. Deborah L. Rhode of the Stanford Law School has observed:

²⁹ Luban, *Lawyers and Justice – an Ethical Study*.

³⁰ Cummings, *The Paradox of Professionalism, Lawyers and the Possibility of Justice*.

³¹ Lonbay, *Assessing the European Market for Legal Services*.

³² CEPEJ, *European judicial systems – Efficiency and quality of justice*.

³³ Building trust in EU-wide justice – a new dimension to European judicial training (COM(2011) 551 final).

³⁴ CCBE Recommendation, the Stockholm Programme (2010 to 2014) on the Further Development of the Union's "Area of Freedom, Security and Justice".

³⁵ www.themindfullawyer.com (last accessed 9 August 2013).

³⁶ Tyre, *The contribution of training and education to the identity of the legal profession*, p. 1.

³⁷ Andersen, *Advokatretten*.

‘Only at the most abstract level do lawyers rally around the same vision. Today’s profession has become too diverse and specialized, and its leadership too weak and divided, to enforce any unifying vision of professional ideals.’³⁸

Self-identity becomes an inescapable issue in today’s legal profession. Even lawyers who say they have never given any thought to or had anxieties about their own identity will inevitably have been compelled to make significant choices in their working lives. These choices range from everyday questions about dress, appearance and leisure time to high-impact decisions about relationships, partners in both private and professional life, beliefs and occupation.³⁹ Increased individual choices and less uniform career paths create new identities. New job roles in law firms such as managing partners, junior partners, associate partners, trainees etc. also create diversity, as do specialisation within a profession, and members of the legal profession joining with members of other professions in interdisciplinary networks. Bigger law firms recruit staff with backgrounds in auditing, HR management, organisation and management, ICT expertise and business management. Around the world new communities arise of lawyers or lawyers in collaboration with other professionals. Outside Europe, these are often called ‘the comprehensive law movement’, which includes many different initiatives. Some could be classified as small eccentric movements, while others represent a trend among lawyers that has attracted the attention of scholars like Susan Daicoff⁴⁰ and Artika Tyner.⁴¹ The various movements will be addressed in this dissertation, with a focus on their contribution to identity development.

1.1.4 The multi-layered democracy in Europe and the lawyers

Democratic societies under the rule of law have traditionally been dependent on trustworthy lawyers. Lawyers have played a major role in the development of Western democratic societies. The construction of the European Union is a result of globalisation or intensive internationalisation, where the legal point of reference, namely the nation state, has diminished importance. However, decisions at the supranational level are reflected in the regulations and in the case law at the domestic or national level. When legislation is displaced and the legislative processes become more complex and less transparent, both legal philosophy and legal practice will be challenged and the new legal context will require a new approach to curriculum and methods.⁴²

According to their professional identity and professional rules, individual lawyers and the profession are expected to live up to basic values in a society under the rule of law. Lawyers stress the basic value of independence, especially independence from the state or from public authorities. However, in contemporary society lawyers are sometimes given new tasks to carry out on behalf of the state or on behalf of the European institutions, such as administering the

³⁸ Rhode, *In the Interests of Justice – Reforming the Legal Profession*, p. 17.

³⁹ Giddens, *Modernity and Self-identity – Self and Society in the Late Modern Age*, p. 71.

⁴⁰ Daicoff, *The Comprehensive Law Movement*.

⁴¹ Tyner, *Planting People, Growing Justice: The Three Pillars of New Social Justice Lawyering*.

⁴² Neergaard, Nielsen & Roseberry (eds.), *European Legal Method – Paradoxes and Revitalisation*.

Money-Laundering Directive⁴³ or fulfilling obligations to support access to justice. Lawyers are also forsaking their traditional courtroom tasks and taking on new tasks like alternative dispute resolution, counselling and general business consultancy. It must be expected that these different roles will influence the traditional identity perception of the individual lawyer.

The multi-layered legal framework of the legal system of the EU has drastically changed the role of lawyers and the content of their work. In these new settings, some lawyers have changed their role from being technical appliers of the law to becoming important creators of norms. The interaction between those responsible for the legal order and legal practitioners applying legal norms has been transformed. When lawyers become more involved in creating laws or other legally binding norms, it draws attention to the foundations of their actions. There is a need for individual lawyers to consider whether their actions are in accordance with the law and their personal and professional responsibility to the societies or communities they are part of. Lawyers fulfil their obligations in different ways, all of which can be lawful. Legal choices depend not only on the valid sources of law or the interests of the client, but also on the way lawyers implement personal preferences, professional duties and societal responsibilities in other words: performed professional identity.

The traditional relation between society, profession and lawyer can be illustrated as follows:

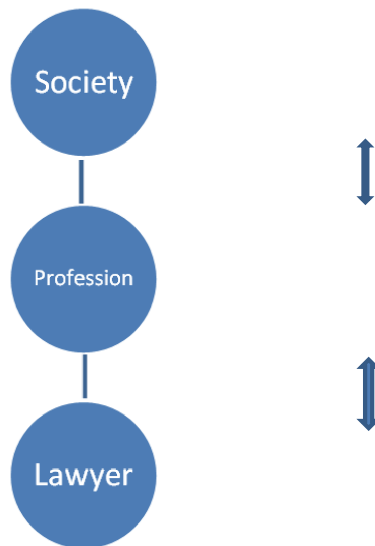


Figure 1-1. Traditional relation

This figure reflects a model which existed for a long time in Denmark. The legal profession is one of the classic liberal professions, which were called ‘status professions’ by Thomas Brante

⁴³ Directive 91/308/EEC on the prevention of the use of the financial system for the purpose of money laundering (OJ 1991 L 166/77).

and recognised as such back in the middle ages. It was only after 1800 that these professions started to establish professional organisations to build up their professional identity.⁴⁴

Organising a professional community, like the legal profession, is a constitutive act which establishes common norms, a common professional language and an agreed 'truth' about what is right and wrong, what is justice and what is to be sanctioned within the profession.

This was also the case in Denmark. The Danish Bar and Law Society has been the binding and controlling component between society and individual lawyers. It has had a strong and exclusive role, representing lawyers in relation to the public authorities. It has controlled admission to the profession, had a monopoly, has been responsible for professional training and served both as the public and private disciplinary control of the profession.

There are indications that the profession represented by the Danish Bar and Law Society, and in Europe by the CCBE, will be squeezed between the needs of society and the expectations of individual lawyers, not forgetting clients. This implies that the powers of professional organisations like bars and law societies will diminish and that there will be more direct interaction between the societal level and the individual lawyer. This development can be illustrated as follows:

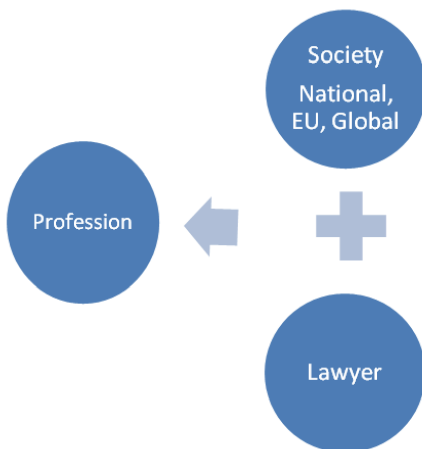


Figure 1-2. The legal profession under pressure

On one hand the identity of lawyers is linked to the profession, as an abstract system in transition; on the other hand, it is linked to the subjective identity of a real person. This enables the lawyer to act within a framework where policy-making, economy, culture, sociology and semantics influence both the legal order and legal practice.

⁴⁴ Brante, 'Staten og professionerne', in Eriksen & Jørgensen (eds.), *Professionsidentitet i forandring*, p. 18 f.

In Denmark, Dalberg-Larsen,⁴⁵ Hammerslev⁴⁶ and other legal sociologists have conducted research into the profession. Nevertheless, no larger studies have focused exclusively on the development of individual identity, while as mentioned above the identity of the legal profession as a whole has been researched thoroughly in the USA.

Education and training play an important part in identity development and are therefore matters of interest. Education has been examined in the Carnegie Foundation study on educating the legal profession,⁴⁷ and in 2012 a study of the education of European lawyers was published.⁴⁸

Danish lawyers might have a different perception of identity from the classic European ideal identity for lawyers. Thus, Chapter 4 concentrates on presenting the ideal identity of the European lawyer, while Chapter 5 covers empirical research, a field study in Denmark based on interviews and focus groups. This study has been conducted to determine how members of the profession perceive and develop their identities, and to identify any gap between the ideal and the practice. The old ideal of supporting the rule of law and democracy has been expanded. There will also be an examination of whether education and training support the ideal or some new practice or practices, and how new communities of practices can support identity development. In relation to this question, a participatory study was conducted in Brussels in the spring of 2012 to observe how an interdisciplinary curriculum in an international environment was organised with regard to content and learning methods.

1.1.5 Individualised proactive training

One perspective of this research looks at how education and training could integrate and affect identity and job satisfaction. The constant growth of interaction between European states, involving trade, competition, foreign investment, migration and culture, has led to an expansion of interaction between existing legal, judicial, political, administrative and new institutions.

The recognition of EU citizenship and the common protection of fundamental rights, which are developing and expanding into new areas, increase the interdependence of the legal systems in Europe, and new supranational regulations interact with national legislation. This has changed the legal order, has implications for state power, governance and democracy, and has a great impact on developments in Europe and on relations with other parts of the world.⁴⁹ This contextual complexity requires innovative formats for education and training to support sustainable and proactive legal solutions.

The changes influence the roles and identities of legal practitioners, as they are now acting in a new context which they have never been trained to practise in. Until now, legal education has not been very specialised and has mainly been focussed on traditional dogmatic legal

⁴⁵ Dalberg-Larsen, *Lovene og livet*.

⁴⁶ Hammerslev, *Studies of the Legal Profession*.

⁴⁷ Sullivan et al., *Educating Lawyers: Preparation for the Profession of Law*.

⁴⁸ Heringa & Akkermans (eds.), *Educating European Lawyers*.

⁴⁹ Højlund, *Frygtens ret*, p. 26 f.

knowledge. In Denmark, after obtaining a university degree, lawyers have completed their professional training by following a three-year model of apprenticeship. Due to their mono-disciplinary training, lawyers may have limited insight into complex problems and may not have the tools to deal with the complexity of their cases in the real world. Such complexity requires a multidisciplinary or even an interdisciplinary approach.

As will be seen in Chapters 5 and 8 legal practitioners individualise their lifestyles and identities. Lawyers label themselves the 'contemplative lawyer', the 'new lawyer', the 'transformative lawyer', the 'social justice lawyer' or the 'proactive lawyer'. They are active practitioners trying to include sustainable elements⁵⁰ in their lawyering and are adapting to a transformed perspective of the practice of law.⁵¹ New content and methods in the foundation training will support learning in new communities of practice.

Several different concepts of lawyering encourage legal practitioners to focus on how legal competences can be applied prophylactically. This is an unconventional mode of legal thinking and requires a set of skills, practices and procedures that help to identify opportunities in good time, to take advantage of them and to spot potential problems while preventive action is still possible. The proactive approach seeks to avoid disputes and litigation, and to use the law to create value, strengthen relationships and manage risks.⁵²

Developments in the legal profession in Europe appear to reflect the trends in American society. Transforming the practice of the individual lawyer is a development that has its roots in the USA. The characteristics and future perspectives of this transformation have been documented, analysed and commented on by Steven Keeva in his book published in 1999 by the American Bar Association. This book has inspired law schools and practitioners to integrate 'who you are' with 'what you do' in order to find meaning, joy and satisfaction in legal life.⁵³

Lawyers' roles and identities are moving into a new professional landscape, where a single strong profession is fragmented into groups of experts specialising in specific legal fields such as IT law, real estate, tax law, family law, IP law, human rights law and environmental law. Furthermore, lawyers are developing different lifestyles and identities, realising that complex issues and challenges may find more sustainable solutions in an interdisciplinary setting of agents with multiple competences. The development of this new professional landscape (see figure below) will be elaborated and analysed throughout the dissertation.

⁵⁰ Bosselmann, *The Principle of Sustainability: Transforming Law and Governance*.

⁵¹ Macfarlane, *The New Lawyer: How Settlement is Transforming the Practice of Law*.

⁵² Berger-Walliser & Østergaard (eds.), *Proactive Law in a Business Environment*.

⁵³ Keeva, *Transforming Practices – Finding Joy and Satisfaction in the Legal Life*.



Figure 1-3. Towards sustainable professionalism

The emerging legal professional landscape has challenged the organisation of the profession, its identity and the characteristic 'lawyers' way of thinking'. It has led to a different approach to lawyering in a context where interdisciplinary expertise and new communities of practice have further diversified the identities of lawyers.

Specialisation and collaboration in interdisciplinary networks will further influence professional identity and can create tension between individual lawyers and the bar or law society they belong to. Bar and law societies will often try to protect the classic ideal and standardise training. In order to meet challenges and pursue other ways of lawyering, such as sustainable lawyering or proactive lawyering, lawyers, their organisations and law schools have lately started to develop new ways of thinking and to set up innovative training formats which correspond to the values and chosen identities of individual lawyers. Similar initiatives have been taken by universities and in postgraduate training.

Developing identities for lawyers includes individual learning and social practices. This implies a dual focus, reflecting interaction between the lawyer as an individual and the lawyer as a professional member of a socio-cultural community.

For lawyers who have to deal with complex activities, theories of learning which involve the whole person, self-esteem, values, and performance in relation to the profession can help them perform new tasks and take on different functions, and enable them to master new insights and understandings. Even though many changes have already been implemented, the main focus of curriculums for lawyers is still on knowledge of substantive law and legal dogmatic argumentation. In England and Wales, the Lord Chancellor's Advisory Committee on

Legal Education and Conduct has recommended that a law curriculum should emphasise the legal values of justice, fairness and high ethical standards and that:

'...no amount of external regulation of professional practice will serve as an adequate substitute for the personal and professional values and standards that lawyers should internalize from the earliest stage of their education and training'.⁵⁴

The Carnegie Foundation report recommended that new practitioners should be taught or trained to think, to perform and to conduct themselves (i.e., to act morally and ethically) like professionals:

'This apprenticeship of professional identity should encompass issues of both individual and social justice, and it includes the virtues of integrity, consideration, civility, and other aspects of professionalism. The values that lie at the heart of the apprenticeship of professionalism and purpose also include conceptions of the personal meaning that legal work has for practising attorneys and their sense of responsibility toward the profession'.⁵⁵

The education and training of lawyers are important for developing identity, and can make it possible for lawyers to act proactively when practising in the European Union.

1.2 Aim of the study

Sociological and legal studies have already described and analysed crucial changes in the legal profession. However, the development of the individual identity of lawyers and the reflexivity between the individual, professional organisations and the societal framework, including the authorities and stakeholders such as clients and potential clients, have not been covered. The concept of *the European lawyer* will be addressed and, by reference to legal sources, the study will set out a European identity ideal for lawyers and relate this ideal to the identity perceptions and practices of Danish lawyers. A debate about transformation at the individual level started in the USA at the end of the twentieth century, and was supported by the American Bar Association (ABA). This has inspired scholars in the USA, but in the EU this is still a scientifically underexplored area.

The aim of this research is to contribute to theories about changes of identity development for a strong unified profession at a time when it is transformed into specialised groups of experts in new communities of practices. The dissertation will mainly address the identities of practising lawyers at the professional and individual levels, but it will also reflect the changes in society which are relevant for understanding the challenges to the profession. This includes finding out how lawyers develop their identities and practise lawyering in a time when the structure, tasks and commitment of the legal profession are changing.

⁵⁴ Advisory Committee on Legal Education and Conduct (ACLEC), *First Report on Legal Education and Training*, para. 1.19, London 1996.

⁵⁵ Sullivan et al., *Educating Lawyers: Preparation for the Profession of Law*, p. 132.

The legal order and legal practice are moving from national to international level, and a new multi-layered legal system has been created in the EU. This development affects relations between the state and the profession.⁵⁶ The many different types of legal practitioners challenge the traditional way of lawyering. This confronts the legal profession with requirements for innovative formats for education and training to support sustainable and proactive legal solutions in a new European context. Only very few lawyers have been trained to practise new ways of lawyering.

1.3 Research questions and hypothesis

The theoretical part of this dissertation will help explore and understand the blurred identity of the legal profession in practice. It will also create the framework for elaborating, structuring and making the empirical fieldwork operational.

The introductory chapter sets out the justification for formulating the hypothesis that the classic identity of the legal profession in Europe is in a radical transition. The profession is moving from being homogeneous to becoming a heterogeneous organisation of lawyers, with new roles at the societal (macro) level, within the profession (meso) and at the individual (micro) level. This movement has created a gap between the European identity ideal based on legal sources on the one hand, and the identities of lawyers in modern practice on the other hand. The societal obligations are expanding and the profession and individual lawyers are under pressure. Lawyers have started to work more closely with other professionals and to form new communities of practices. These trends are affecting the development of the identity of lawyers in Denmark.

From this perspective, the overall research question is:

How can the identity and competences of lawyers be developed so that they can practise sustainable and proactive lawyering in the European Union?

In order to answer this question, the following issues will be examined:

1. Is there a common identity ideal for European lawyers that can be depicted within the legal order in Europe? (Chapter 4)
2. How do Danish practising lawyers define or perceive their identity? (Chapter 5)
3. What are the changes and challenges to the role and identity of lawyers at the societal level, the professional level and the individual level? How do these levels interact? (Chapter 6)
4. How will new communities of practice affect the identity development and professional training of lawyers? (Chapters 7 and 8)

⁵⁶ Brante, 'Staten og professionerne', in Eriksen & Jørgensen (eds.), *Professionsidentitet i forandring*, p. 17.

1.4 Scope and limitations

The position of the researcher/author of this research can influence its results, as the constant interaction between the empirical work and the theoretical background of this study means that the researcher hardly can remain neutral or just be an objective observer.

It is relevant to know that the researcher has two academic degrees, in law and in pedagogics, has a Danish Bar and Law Society Diploma in mediation, has participated in a one year Bodymind training programme and has worked as R & D director for the Danish Bar and Law Society from 2001-2005. This background has made it easier to get good quality access to lawyers, their organisations and practices with the aim of obtaining a realistic perception of actual identities of active lawyers. At the same time, this proximity means there is the constant risk of being influenced or biased. The analyses, and especially the organisation and moderation of the focus groups, involves the researcher participating in the production of the research results.⁵⁷ However, the researcher's awareness of this context, the scientific methodology and the supervision in an academic setting reflect the efforts to take account of the researcher's personal background and to eliminate bias resulting from being close to the field of professional lawyering.

As the main topic is the development of identity, and as identity is perceived individually, the researcher is aware that writing about identity is part of the creation of identity.

Traditionally, legal science has been predominantly self-referential. Legal studies have often been conducted in isolation from other areas of science. A level of autonomy of legal methodology can be justified, for instance for analysing specific areas or developments of law or regulations. However, legal scholars have become increasingly aware that law should not be disconnected from its context. In Denmark, this has been argued by Hjalte Rasmussen (*EU-ret i kontekst*) in analysing the relationship between EU law and national law. In addition, legal sociologists and legal anthropologists integrate theories and methods from other scientific disciplines when analysing legal issues and developments. Throughout Europe, researchers are working to define and develop a European legal method, and are discussing the relationship between the legal order and legal practitioners. Danish researchers from the Copenhagen Business School have played a major role in this.⁵⁸ This study also relates to the integrative process of analysing lawyers and the legal profession in a European context.

Within the legal profession, gender is undoubtedly a relevant aspect. In the past, members of the profession have mostly been men and professional identity has therefore been linked to males. Now the objective social basis is changing. More than 50 % of law students are women. At Copenhagen University in 2012, 465 women and 348 men started to study law.⁵⁹ Change in the gender balance may be a factor inducing change in lawyers' identity. Some of the women interviewed said that they did not want to say too much on gender issues in order not to be

⁵⁷ Darmer, Jordansen, Astrup Madsen & Thomsen (eds.), *Paradigmer i praksis*, p. 166.

⁵⁸ Neergaard, Nielsen & Roseberry (eds.), *European Legal Method – Paradoxes and Revitalisation*.

⁵⁹ <http://studier.ku.dk/bachelor/ansoegning-og-optagelse/optagelsesstatistik/2012/anta-optagne-fordelt-paa-koen> (last accessed 1 November 2013).

considered weak or not capable of working as a lawyer. Surprisingly, several men referred to problems of finding gender role models. This confirms that gender is a relevant issue which has been the subject of research attention for some years.⁶⁰ Gender is an important issue, but it is not central to this study. Findings from the empirical research have been integrated when relevant to identity development.

ICT challenges that are relevant to identity will be touched on in section 3.10.

In classic sociology, a legal system is perceived as a social system of a special kind. In European legal practice, law is increasingly linked to many other fields. In the curriculums of universities, law schools and business schools, new combinations of studies are provided, such as Law and Economics, Law and Sociology, Law and Philosophy, Law and Literature, Law and Languages, Law and Emotions, Lawyers and Mindfulness, Lawyers and Life. Furthermore, there is a movement away from regarding law and legal work as reactive and towards focusing more on a proactive role.⁶¹ This development can be seen in Copenhagen University and Copenhagen Business School where, for example, Law and Economics is a well-established research area, creating an identity for legal practitioners, not as traditional lawyers or as economists, but as a new kind of professional within the legal profession. Kronman talks about the law-and-economics movement, which appeared in the early 1960s and has influenced the identity of lawyers in the construction of the EU.⁶² This research contributes to the 'Law and ...' movement. The aim is to carry out interdisciplinary work, in the sense that the legal field is the basic area, but is investigated and analysed by integrating theories and methods from sociology and social learning studies.

The two field studies incorporated in this dissertation, one among Danish lawyers (*advokater*) and a participatory study of new EU-initiated training, have been chosen in order to identify and understand the development or construction of identity.

1.5 Terms and expressions

This introduction gives some brief definitions or explanations. Certain terms and expressions are defined or clarified, and it is noted that some concepts and expressions are used differently by scholars in different scientific fields. Some terms will be explained more fully in their contexts later in the dissertation.

Agency is used as in the terminology of Anthony Giddens' structuration theory, where agency means the capacity of the individual to act independently and to make free choices, while structure is the patterned arrangement that influences or limits the opportunities and lifestyle choices of the individual lawyer. The interaction between individual lawyers, the profession and society is understood within this theory.

⁶⁰ Schultz & Shaw (eds.), *Women in the World's Legal Professions*.

⁶¹ Berger-Walliser & Østergaard (eds.), *Proactive Law in a Business Environment*.

⁶² Kronman, *The Lost Lawyer – Failing Ideals of the Legal Profession*, p. 50.

A community of practice is defined as ‘a group of people who share a concern, a set of problems, or a passion about a topic and who deepen their knowledge and expertise in this area by interacting on an on-going basis’.⁶³

Identity is defined as a social formation of the person, a cultural interpretation of body and performance and lifestyle markers of belonging to a certain group. The identity is a construction between the individual and groups of practice. The concept of identity will be based on the sociological identity research of Anthony Giddens, looking at the individual in relation to social structures, norms and rules – the structuration theory. Identity is seen as living, dynamic and under constant negotiation. Identity is a socialisation and learning process which combines multiple forms of membership, of families, private relationships and working communities. Identity has a global-local interaction and is related to practice. The development of identity is related to the theoretical concept of Etienne Wenger, who integrates identity in his social learning theory.⁶⁴

Lawyers in this study are, within the EU, lawyers bearing one of the following national titles:⁶⁵ Advokat, Avocat, Advocaat, Rechtsanwalt Advocate, Barrister, Solicitor, Δικηγόρος, Vandeadvokaat, Asianajaja, Avvocato, Avukat, Prokurator Legali, Odvetnik/Odvetnica, Abogado, Avogado, Abokatu, Komerčný právnik, Anwalt, Fürsprecher, Fürsprech, Avvocato, Ügyvéd. These titles are equally recognised in the EU, and allow the lawyer to practise in any Member State. In this study ‘practising lawyer’ is used to refer to all the titles mentioned above, except where it appears in quoted passages or where it is relevant to distinguish, e.g. between solicitors, barristers or in-house lawyers.

Mindfulness – bodymind refer to the relation between intellectual identity perception, inner peace and bodily performance. Training in mindful practice started in the USA more than 15 years ago⁶⁶ and has now also been applied in some law firms in Denmark including *Kammeradvokaten*, the Legal Adviser to the Danish Government in civil cases.

Proactive law is based on an *ex ante* view rather than an *ex post* view. ‘Proactive’ refers to *acting in anticipation of future problems, needs or changes*. The proactive law approach challenges the traditional backward-looking and failure-oriented approach to law by acting in anticipation of legal disputes, taking control of potential problems, providing solutions, and the lawyer taking the initiative rather than reacting to failures and shortcomings.⁶⁷

The rule of law is one of the basic concepts for common professional values and the identity of lawyers. It refers to a set of characteristics often referred to as the adherence to the principles of the supremacy of law or accountability to law. There is no universally agreed definition of

⁶³ Wenger, Dermott & Snyder, *Cultivating Communities of Practice: A Guide to Managing Knowledge*, p. 4.

⁶⁴ Wenger, *Communities of Practice*, p. 163.

⁶⁵ Directive 98/5/EC to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained (see footnote 5).

⁶⁶ Rogers, *Mindfulness for Lawyers*; and Rogers & Jacobowitz, *Mindfulness & Professional Responsibility*.

⁶⁷ Berger-Walliser & Østergaard, *Proactive Law – in a Business Environment*, p. 18.

the rule of law, but some principles have been laid down both by authorities and by professional organisations. In this context its scope is the relation between democracy and law, and the individual responsibility of lawyers to uphold the principle and to be critical of any linking of democracy to (state) law which may have the consequence of restricting the rule of law. The rule of law is not only a state matter but has been developed and maintained by other agents, especially organisations dominated by lawyers, e.g. the World Justice Project,⁶⁸ where the normative actions of lawyers are immanent.

The Secretary-General of the UN has defined the rule of law as:

‘a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.’⁶⁹

In guarding and helping to secure these principles, lawyers can rely on the UN’s Basic Principles on the Role of Lawyers,⁷⁰ in which moral and ethical issues are also addressed, giving lawyers special privileges.

Within the European Union there have been repeated references to the rule of law, also in relation to training.⁷¹ The rule of law is together with other fundamental values in Article 2 TEU, which is referred to in section 3.1.

Lawyers’ professional organisations, both at national and international levels, regard the rule of law as a part of their common identity and common values. The CCBE has approved a Charter of Core Principles of the European Legal Profession, which lists ten principles common to all European legal professions. The CCBE refers to the importance of the principle of the rule of law in relations between the profession and democratic society:

‘In a society founded on the respect for the rule of law the lawyer fulfils a special role. The lawyers’ duties do not begin and end with the faithful performance of what he or she is instructed to do so far as the law permits. A lawyer must serve the interests of justice as well as those whose rights and liberties he or she is trusted to assert and defend and it is the lawyer’s duty not only to plead the client’s case but to be the client’s advis-

⁶⁸ Initiated by the American Bar Association, <http://worldjusticeproject.org/>, the World Justice Project leads a global movement to strengthen the rule of law for the development of communities of opportunity and equity (last accessed 12 November 2013).

⁶⁹ Report of the Secretary-General, *The rule of law and transitional justice in conflict and post-conflict societies* (2004).

⁷⁰ *Basic Principles on the Role of Lawyers*, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

⁷¹ *Building trust in EU-wide justice* (COM(2011) 551 final).

er. Respect for the lawyer's professional function is an essential condition for the rule of law and democracy in Society'.⁷²

Sustainable lawyering is not a clearly defined term, though 'sustainability' was defined by the Brundtland Commission and has been widely applied. Sustainability is defined as the 'development which meets the needs of the present without compromising the ability of future generations to meet their own needs'.⁷³ Only few attempts to define 'sustainable lawyering' can be found. In the on-line magazine, *The Complete Lawyer*, it has been stated:

'A sustainable legal practice is one that provides services clients are seeking but does not deplete the energy or soul of the practitioner. Such a practice unfolds in the context of renewal.'⁷⁴

The concept will be discussed and developed further in Chapter 8.

This approach includes an aspect of democratic society based on an ideology of worldwide justice, where the framework of global governance includes general public needs in relation to nature and the economy. It also means that world society must fight poverty, reflect social awareness of groups with special needs and show a long-term concern for the rights of future generations to live in a balanced ecological system with access to natural resources.

In relation to lawyering, the aim is to follow and take part in a discourse for lawyers and the legal profession, seeking to become personally, politically, ethically, economically, and professionally sustainable. This is a discourse that makes meaningful space for lawyers' own principles, interests and life preferences by balancing them against other important interests.

1.6 Structure

The dissertation is structured in four parts:

Part I: Introducing the topic, theory and methodology (Chapters 1 and 2). This part sets the framework of the thesis; it explains the aim of the study and develops the argument for an interdisciplinary approach integrating legal studies, sociology and social learning theories. Chapter 1 includes the formulation of the research questions and gives a general overview of the approach and structure of the dissertation. This part also introduces a research plan which can theorise the changes to identity development when a strong unified profession is transformed into specialised groups of experts in new communities of practices.

The focus is on individuals' perspectives of development and their perceptions of lawyers' identities. In brief: how do lawyers connect the questions 'what to do' (societal level) and 'how to act' (professional level), with the question of 'who to be' (personal level)? These three questions frame identity in relation to the structuration theory and the theoretical work on identity

⁷² CCBE, *Charter of Core Principles of The European Legal Profession and Code of Conduct*, p. 10.

⁷³ Brundtland Report, *Our Common Future*, Chapter 2: 'Towards Sustainable Development', UN documents A/42/427.

⁷⁴ *The Complete Lawyer*, Online Newspaper for Lawyers, www.thecompletelawyer.com/a-mindful-practice-is-a-sustainable-practice.html (last accessed 10 December 2012).

by Anthony Giddens, in particular his analysis of developments of identity at macro, meso and micro-levels.

Part II: Identity in transition (Chapters 3 to 6). Chapter 3 contains the theoretical foundation for conceptualising the multi-layered identity (identities) of lawyers from sociological, educational and legal perspectives. One is not born a lawyer – one becomes a lawyer. Thus, identity can be developed. The development of identity for individual lawyers is linked to the profession. Lawyers have societal obligations and are subject to regulation by national laws, the ethical rules of the profession, disciplinary boards, and formal and informal self-regulatory instruments. Analysed from a sociological angle, the process of gaining access to the profession shows how the profession has had full control over the recruitment and socialisation of new members.

Chapter 4 presents the European identity ideal for lawyers, based on an analysis of legal sources. The main characteristics of this ideal are identified and elaborated. The analysis of the legal sources is structured in accordance with Anthony Giddens's approach, as set out in Part 1. This has been done in order to develop a systematic and logical connection between societal requirements (what to do), professional requirements (how to act) and legal and ethical expectations of specific lawyer-like behaviour, morality and good citizenship (who to be). The relevance of this ideal in late-modernity will be discussed. The chapter answers research question 1: *'Is there a common identity ideal for European lawyers that can be depicted within the legal order in Europe?'*

Chapter 5 presents the results of the empirical study conducted among Danish lawyers to answer research question 2: *'How do Danish practising lawyers define or perceive their identity?'* It analyses how meaning and direction in professional life includes the ability to experience the world and to engage in society in a way that is satisfying both in and out of professional working-hours.

A dynamic generative process in new communities of practice has led to there being a diversity of lawyer identities. In Chapter 6, the empirical findings will be analysed in the light of Giddens, in order to validate the findings, to analyse them more thoroughly and to interpret them by adding a level of understanding which would not be achieved by looking only at the results. Using Giddens for analysing the empirical work will not only enlighten the researcher but also give professional organisations a deeper understanding of the relations between society, the profession and the individual lifestyles of lawyers. Thus, Chapter 6 answers research question 3: *'What are the changes and challenges to the role and identity of lawyers at the societal level, the professional level and the individual level? How do these levels interact?'*

Part III: Education for sustainable lawyering (Chapters 7 and 8). Chapters 7 and 8 reflect a structure-agent relation, which might reunite lawyers' obligations and individual lifestyles with their wishes to find meaning and direction in lawyering. Training lawyers to become *real* lawyers and to *think like lawyers* is a part of the curriculum offered by the professional organisations. This training is still directed towards the traditional legal competences and skills. These

correspond to the European identity ideal, but they do not correspond to the perception of identity of today's lawyers. This gap might be bridged by initiatives at the societal level and by initiatives of individual lawyers searching for new lawyer identities. Chapter 7 thus analyses different structures for training and focuses on new ways of lawyering, especially within the EU. The chapter also reports on a three-week participatory study for training trainers for implementing new mediation techniques in high conflict cross-border cases. The experience and evaluation of this programme offer a relevant basis for developing a training format aimed at new communities of practice in which lawyers can develop their individual identities. Chapter 7 collects information that is relevant for answering research question 4: *'How will new communities of practice affect the identity development and professional training of lawyers?'*

This leads to Chapter 8, in which the central topic is the individual transformation related to each of the identities explored in the empirical part of this dissertation. The six identities reported in Chapter 5, together with the Giddens analysis in Chapter 6, demonstrate that (some) lawyers are committed to humanistic and societal ideals in a democracy. This has been expressed in legal terms as standing up for justice, a firm commitment to the rule of law, fair trials etc. Also at the societal level, the concepts of justice, democracy and the rule of law refer to crucial values that are ultimately concerned with securing the well-being of all people, as expressed in the EU Treaty. The Treaty also provides that the Union 'shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights.' These goals are proactive and to support these goals lawyers need new competences and identity. Chapter 8 explains what sustainable lawyering is and opens the perspective for the conclusions of the dissertation.

Part IV: Conclusions, future implementations and perspectives (Chapter 9 and 10). Chapter 9 concludes the research questions and answers the main question of the dissertation: *'How can the identity and competences of lawyers be developed so that they can practise sustainable and proactive lawyering in the European Union?'* In the globalised world, justice and democracy expand and merge with perspectives other than purely legal perspectives. At the societal level, the demand for a sustainable and proactive approach to lawyering is expressed in UN declarations, human rights conventions, EU documents and national regulations. The professional organisations at the EU and national level must adjust to these demands. At the individual level, lawyers with different identities connect very differently to societal goals and to the demands of the professional organisations. Finally, Chapter 10 explores new perspectives in order to propose a concept of professional identity development which is sensitive to dynamic subjective processes, instead of the normative standard of professional ethics.

The four parts of the study are followed by the bibliography, annexes, a summary in Danish and summary in English.

2 Theoretical paradigm and methodological foundation

This chapter discusses theory and methodology and introduces the scientific understanding and perspective of this dissertation. The choice and application of theories should make it possible to obtain an understanding of the characteristics of lawyers' multifaceted identity and the factors that have an impact on its development. This means there will be a focus on the identity of lawyers both as members of a profession with important societal tasks and as individuals, as well as on the interaction between these levels. The purpose of this approach is to establish a broad theoretical framework in which lawyers are analysed in relation to the concept of law framed in a sociological setting. This chapter presents arguments to justify why Anthony Giddens's thinking is given the main role in the theoretical part of this dissertation and how his theories will influence the structure of the analytical and empirical work.

It is recognised that, like natural science, the theoretical foundation of social science is based on neutrality, objectivity, relevance and validity. However, the two fields are fundamentally different, as objectivity in social science is weaker and constantly subject to individual interpretation. Researchers, who interpret society, in this case a profession, are members of the interpreted society in which other agents, such as the members of the profession, also interpret subjective life conditions and their own or other members' lifestyles. These subjective understandings will be reconstructed and interpreted by the researcher.⁷⁵

Many theories could be relevant for the framing of this project. Different disciplines have their traditions and methods for organising subjects and data. Organising and eliminating certain aspects from the research field can close the mind and be a hindrance to finding new or alternative understandings of a given phenomenon. Scholars and practitioners from different disciplines will always have a tendency to define problems to fit the scientific frameworks they are familiar with, using the tools that are well known to them.

The decision to base the analysis in this dissertation mainly on the theories of Anthony Giddens has been influenced by the fact that throughout his research career Giddens has worked both at the societal level and at the individual level in relation to society. One of his main books is dedicated to identity,⁷⁶ while others concern society.⁷⁷

Antony Giddens has developed and applied an interdisciplinary or non-disciplinary approach, as he has not only dealt with developments in sociology, but also in anthropology, philosophy, political science, economic history, linguistics and social work. He is thus a prominent sociologist in relation to the subject area of this thesis, which relates the individual lawyer's identity to the developing European Union with all its intertwining relations between political science, new legal methods, a common history, cultural differences, professional transactions and new citizenship.

⁷⁵ Andersen, *Videnskabsteori og metodelære*, p. 275.

⁷⁶ Giddens, *Modernity and Self-identity – Self and Society in the Late Modern Age*.

⁷⁷ Giddens, *The Construction of Society*.

Anthony Giddens's work covers a wide area, but this thesis will mainly apply his work on individuals' construction of identity in society. It is presumed that this theory can contribute to an understanding of how lawyers perceive and develop their identity in relation to their profession. However, lawyers' self-perceptions and perceptions of the profession are closely linked to the legal culture and its theoretical foundation, which makes it essential and fruitful to draw on insights from legal scholars.

Lawyers develop their identities individually, both within and related to the profession. Furthermore, in Giddens's theory the individual transformation process can be given a deeper understanding when combined with social learning theory, which can clarify and explain the process of becoming a lawyer. The theoretical social learning perspective is chosen as, through their education and training, lawyers have possibilities for initiating new actions in search of an identity that is meaningful and satisfactory in settings other than the traditional profession. The theoretical framework consists of sociology, law and learning theories.

Giddens's holistic approach makes it possible to combine the individual level, the professional level and society. It helps to understand that these levels interact and function as a whole and cannot be fully understood solely by analysing the component parts. The focus is the individual's perception and development of professional identity. How do lawyers connect the questions of 'what to do' and 'how to act' with 'who to be'?

These three questions frame identity in relation to Giddens's structuration theory and his theoretical work on identity.⁷⁸ According to Giddens, life is becoming more and more individualised and the importance of the previously strong professions, such as priests, doctors and lawyers, is diminishing. His theoretical standpoint is that new knowledge is created and new insights are gained via agents who shape understanding and explanations through interpretation. The scientific grounding is hermeneutic, as all elements of the study will be subjects for interpretation and not only for observation.

Based on the empirical data and stimulated by a desire to cross traditional boundaries in an interdisciplinary work, the aim of this research is to develop an original and relevant approach so as to place legal practice in a new universe of science in which law, sociology and pedagogics interact and complement each other. 'Relevance' has been a key word for the results of this research, which are not only 'true' but also 'worth knowing'. The intention is to elaborate and develop a better understanding of different aspects of the identity of lawyers and to understand the process of developing identity from a learning perspective.

2.1 The scientific landscape

Anthony Giddens offers a useful theoretical framework by focusing on ontological questions in order to understand what a community consists of. This includes the relations and interactions between individuals and the community or society they belong to, giving a duality of structure. A society is understood as a social practice which creates and recreates the society in a process

⁷⁸ Giddens, *Modernity and Self-identity – Self and Society in the Late Modern Age*, p. 70.

of structuration.⁷⁹ The structure is not perceived as deterministic but as rules and resources which can either enable or restrain the possibilities for change or development. In this context a profession can be treated as a society. In the duality of the structure, norms and values are linked to the agent and not to the structure.

2.1.1 Objectivism/positivism versus subjectivism/hermeneutics

Giddens attempts to bridge the problem of dualism between the objectivism of the philosophical foundation of positivism, and the subjectivism which is expressed in a hermeneutic approach to understanding the world. In a sociological setting, this positivism or objectivism is developed within the functionalism of structural systems, while the subjectivism or hermeneutic approach looks more at the actors or individuals in a more action-oriented sociology. Giddens perceives the dualism of these two approaches as an obstacle to the development of a new sociological theoretical approach. He sees the two approaches, objectivism/positivism versus subjectivism/hermeneutics as involving very different subjects and sociological methods.

To bridge this dualism, Giddens has developed the theory of structuration to create a social theoretical foundation which gives relatively consistent communication between on the one hand the subjectivist/ hermeneutic approach, and on the other hand the objective/positivist position in sociology and philosophy. This dualism is similar to the discussion of the role of legal philosophy in society.⁸⁰ The ontological approach focuses on the existing world of lawyers in society, and structuration theory can frame this research and contribute to further and deeper understanding of the development of identity in the legal profession.

The view of legal science depends on the perception of the world as a whole. Lawyers have witnessed dramatic changes in the concept of rationality. Rationality was closely linked to positivist perceptions in legal science, and legal science has played a major role in establishing modern society. The world has changed over the last 25 years, as globalisation and dialogue between East and West have affected management and education. Religion and the role of religion in setting society's norms conflicts with the values of the neutral legal system that has dominated the modern law.

Many lawyers in Denmark have been educated in the legal-scientific thinking of Nordic legal positivism, in which law is seen as a normative institutional phenomenon and, within this framework, a legal dogmatic analysis will aspire to be neutral and a normative analysis will be considered to be (legal) political. A legal dogmatic analysis will not include interviews etc.; it is a method of interpretation of legal sources based on a hermeneutic philosophy.⁸¹ Even though legal positivism, with its neutrality, is under pressure, the self-understanding thematic categories and concepts such as context-independent legal sources and principles of interpretation

⁷⁹ Kaspersen, *Anthony Giddens*, pp. 66-67.

⁸⁰ Dalberg-Larsen, *Retsvidenskaben som samfundsvidenskab*.

⁸¹ Nielsen & Tvarnø, *Retskilder & Retsteorier*, p. 329 f.

are still broadly recognised by Nordic lawyers⁸² and have an impact on their self-perception and identity.

2.1.2 The interpretive relations

Researchers and their research subjects (if these subjects are human beings) are interpreters. Linguistically both words and interpretations circulate. The lawyers who have been observed, understood and analysed in this research are members of a group that has already used a lot of effort to define itself, to create a common professional identity and to influence its reputation. As soon as such sociological concepts are formed, the sociological framework is reflected in everyday life and it changes the way people think and behave. Because social agents (in this study lawyers) are reflexive and develop ongoing activities and structural conditions, they adapt their actions to their developing understanding. As a result, the social scientific knowledge of a society will change its human activities.

Anthony Giddens calls this interpretive and dialectical relationship 'double hermeneutic', a two-way dialogue between social scientific knowledge and human practice. His ideas about double hermeneutics have been strongly criticised by other sociologists, for example by the Danish Giddens expert Lars Kaspersen.⁸³ In the present project this criticism does not have crucial influence on the interaction between society, the profession and the individuals.

2.2 The relevance of the structuration theory

Due to the constant interaction between its two constitutive elements, namely agent and structure, structuration is seen as a process and never as a product. This leaves out unchangeable and lasting elements. Given the element of constant interaction, it is presumed that Giddens's theories can be productively applied to the development of lawyers' identity and reproduction and change of the legal profession's structure.

The institutions of the profession can be seen as a reflection of the wider society to which the profession belongs. In other words, as a society a professional community will be affected by or changed as a result of its members' individually transformed lifestyles.

Anthony Giddens has written a comprehensive work on the self and society in the late modern age⁸⁴ which can broaden the understanding of identity development and construct the core line of theory which interacts with a legal frame and social learning, as illustrated in the following grid developed by the author, which can be read both vertically and horizontally:

⁸² Højlund, *Frygtens ret*, p. 42.

⁸³ Kaspersen, *Anthony Giddens*, p. 229.

⁸⁴ Giddens, *Modernity and Self-identity – Self and Society in the Late Modern Age*.

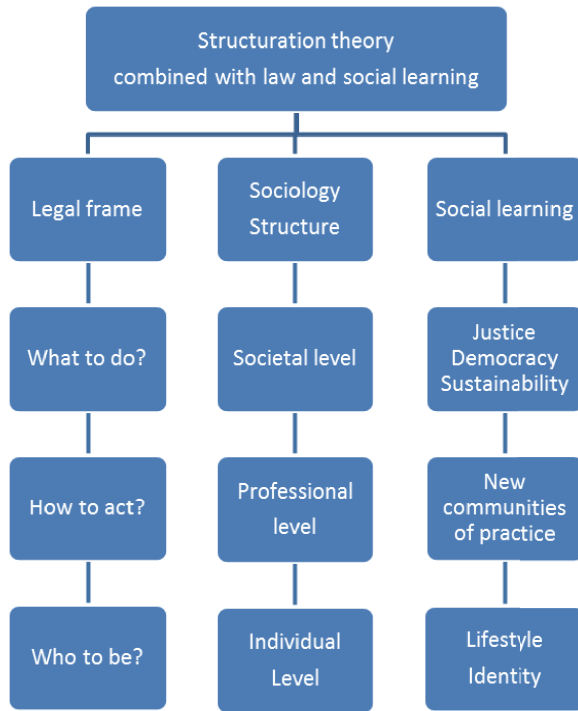


Figure 2-1. Theoretical framework

2.2.1 Late modernity

Modernity can be understood as roughly equivalent to the industrialised world. Anthony Giddens calls the present 'late modernity', which overlaps with the 'post-modernity' used by others. This study uses the term 'late modernity'. 'Post-modernity' will only be used in the context of references to other scholars who use the term. For analysing modern communities or the modern world, Giddens sees society as being produced by human beings and having no existence independent of humans. This approach applies to describing a profession, since a professional group is produced by the sum of its individual members.

2.2.2 Global framework of local lawyers

Legal professions have always had strong international parallels, and the themes of this research relate to scientific legal and sociological work in the USA. The European approach will therefore be supplemented by US theories on lawyers.⁸⁵ The validity of knowledge-transfer from one geographical area to another must always be considered. The foundations of the legal professions in the Western world are comparable, but there are differences, not only between Europe and the USA, but also within Europe. As trends within the legal profession often originate in the USA before being transferred to Europe, after some delay, it is relevant to look at the literature and practice in the USA to help understand the development of the

⁸⁵ Rhode, *In the Interests of Justice – Reforming the Legal Profession*.

identity of lawyers in Europe and to support the understanding of the empirical study. Giddens has been very much aware of global developments, especially of the constitutive aspects of the European Union and its consequences for the identity of the individual.⁸⁶

Theories about and effective methods for education can ensure that present and future generations of lawyers can be trained by means of a curriculum that enables them to act in a progressively complex world.⁸⁷ Thus, lawyers' ability to navigate in the international arena using an 'inner value compass' will be an increasingly important business parameter and will be a source for finding meaning and direction in legal life. Mindful practice, a firm identity, authenticity and self-awareness could influence the profession and support new proactive or sustainable lawyering. These new tools are already sometimes used by individual lawyers for reflecting on their lawyering.

2.3 Societies and professions

As mentioned above, Giddens states that a community is unique; it is the creation of human beings or the result of human beings' actions, intentions and interpretations. Furthermore, a society's members have a feeling of interconnectedness due to some specified or unspecified common identity.⁸⁸ A society is only the sum of its individuals and cannot exist independently of its members. The word 'society' is not reserved to a state or national group. A society will always be contextual and intertwined with other societies, such as the EU, the Member States or, at the professional level, the CCBE and national bar and law societies. As a community consists of people acting out their cultural values and identities, creating experiences and changing their behaviours and intentions, it seems possible to change a profession as well as a society.

This discussion is relevant for identity in respect of an individual lawyer's relation to the profession and to society.

A typical profession, as in the classic cases of lawyers, doctors, engineers and architects, shares a set of general characteristics and forms a community in the sense proposed by Giddens.⁸⁹ A member of a profession embodies *knowledge-based competence* based on a *formal academic education*. They have a *monopoly* of some specific tasks, they are *protected by formal regulation* and are *recognised (for good or ill) by society* at large. Members of a profession belong, by *mandatory membership*, to a collective organisation which sets *professional standards* for quality and conduct.

Each of these characteristics is a necessary criterion for a profession, and to some extent they are also intrinsically connected. Societal recognition is based on the assumption that profes-

⁸⁶ Giddens, *The Consequences of Modernity and Runaway World*.

⁸⁷ Morgan, *Educating Lawyers for the Future Legal Profession*.

⁸⁸ Kaspersen, *Anthony Giddens*, p. 70.

⁸⁹ Important works on the characteristics of the professions can be found in Dingwall & Lewis, *The Sociology of the Professions. Lawyers, doctors and other*, and in Freidson, *The Theory of Professions: State of the Art*. In Danish literature see Schlederman, *Juristerne – en profession under pres* and Dalberg-Larsen, *Lovene og livet*, p. 96 f.

sionals not only possess the necessary skills but that they are bound to act by a common commitment. Some professions even include elements of altruism: doctors must give assistance to the sick, while lawyers are legally committed to secure access to justice, as can be seen in Chapter 4.

Given the relations between society and the professions, there will inevitably be reference to Max Weber. Not only did Weber work with an ideal for lawyers, his legal sociological studies have framed the legal profession and described its rationale and professional bureaucracy, as well as the functions of the public and private sectors in supporting modern Western democracies. Thomas Brante considers this approach to be too simple, and emphasises the irrationalities and contingencies of history. He also stresses the activities of the profession itself, the obstacles it confronts, alliances within society and the ability of the members of a profession to create and uphold trust.⁹⁰ This confirms the thinking on agency.

The observations outlined above are in line with Giddens, who is a neo-Weberian sociologist, seeing the constitution of a profession as a limited group of people who try to establish a monopoly for the performance of certain expert functions, connecting them to special privileges and power in society. The agent is the deciding element in the process of fulfilling societal expectations with regard to the functions performed. This makes it possible for a profession to retain its specific privileges.

As the legal profession is traditionally subject to state regulations, it is important to know how Giddens is inspired by Weber's perception of the state. Weber set up three conditions for a state. It must have: an effective administration, within a certain territory, where it can uphold a monopoly of legitimised violence. Giddens defines a state primarily as a political organisation.⁹¹ This implies that a societal role for lawyers will often be politically infiltrated. Ellen Kuhlmann criticises both the neo-Weberian and the functionalistic ideal types of professionals, as they present themselves as white Western men in favour of liberal individualism.⁹² Gender issues are included in the empirical work.

Legal sociology is a relatively new discipline in a Nordic context. It started in the 1960s by applying sociological concepts to legal phenomena. Some scholars have a sociological starting point and others have a starting point in legal science, but all have the aim of establishing legal sociology as a defined, established and delimited field.⁹³ Anthony Giddens will be relevant to scholars who pay special attention to the sociology of professions, though Giddens writes more about 'experts' than about 'professions'. Legal systems are changing and legal practitioners are changing with them at an increasing speed in Europe. Transnational research teams

⁹⁰ Brante, 'Staten og professionerne' in Eriksen & Jørgensen (eds.), *Professionsidentitet i forandring*, p. 34.

⁹¹ Kaspersen, *Anthony Giddens*, p. 99.

⁹² Kuhlmann, *Post-modern times for professions – the fall of the "ideal professional" and its challenges to theory*, p. 84.

⁹³ Lemann Kristiansen & Storgaard, *Nordisk rettssociologi, Status – aktuelle udfordringer – visioner*, p. 2.

are trying to identify new European legal methods, but only occasionally approach the question of the identity of the individual.⁹⁴

Scholars of legal sociology have become aware of the diminishing importance of strong professions⁹⁵ as the societal framework that supports the legal (and other) professions has changed, especially in the movement from a nation-state orientation to an international level. As professions are also characterised by a high level of technical knowledge and skills, the creation of a profession is linked to this common body of knowledge. It becomes harder and harder to maintain a profession on the basis of this common body of knowledge with members possessing similar competences, as specialisation leads to a diversity of legal competences and the profession can be replaced by well-educated experts from different fields.⁹⁶

2.3.1 The transformative character of a profession

Either an individual or an organisation can have transformative capacity. According to Giddens, both will be agents as long as they have the power to change.

The classic professions have had a leading role in developing modern society, where divisions of work are based on rationality, effectiveness and a controlled relation between society, the profession and the individual, matching the construction of the modern state. Now the classic profession of lawyers (like doctors) seems to be being progressively diluted or changing into a much more diverse group. The professional monopoly cannot be upheld in the EU with its legal and political framework for competition, the knowledge-based profession has become specialised and diverse, and the legitimacy of the profession is constantly disputed.

Giddens understands that due to its unique construction by its members a community, in this case the legal profession, can be changed by the actions of individual members or groups of members. The stable and fixed framework of the legal profession can only be maintained by people who are able to fulfil the conditions for competence and are willing to develop a lawyer's identity. Giddens's theory leaves scope for identifying the self-understanding of the profession, whether rational or not, and for modification of a functional linear and progressive development within the legal profession.

Giving scope to the individual will include reflecting on subjective learning processes in the knowledge-based profession.⁹⁷ Lawyers and members of other professions have a subjective identification with their occupational role and a feeling of responsibility for the tasks related to that role.⁹⁸ This subjective engagement is crucial for reconstructing and developing of the working conditions which frame identity.

⁹⁴ Neergaard, Nielsen & Roseberry (eds.), *European Legal Method – Paradoxes and Revitalisation*.

⁹⁵ Georgakakis & de Lassale, *Where have all the Lawyers gone? Structure and transformations of the top European Commission officials' legal training*, EUI RSCAS 2008/38.

⁹⁶ Dahl, 'Fra en klassisk til en (post?)moderne opfattelse af professioner' in Eriksen & Jørgensen (eds.), *Professionsidentitet i forandring*, p. 40.

⁹⁷ Schön, *The Reflective Practitioner: How Professionals Think in Action*, p. 300.

⁹⁸ Wenger, *Communities of Practice*, pp. 4-5.

Giddens's structuration theory can also be applied to situations where the professional agent (a lawyer) has to interact with changes that have an impact on the tasks, norms and identity of the practitioner. These changes can often be linked to the values, ethics and knowledge of the profession.

There is interdependence between the lawyer and the profession, and at the same time all lawyers declare their independence. Even though a strong power relation may be established, the agent always has some resources which can contribute to changing the relationship. This power of change is highly relevant for lawyers who are in search of identities other than that of the classic lawyer.⁹⁹

2.3.2 Unintended consequences

In the interaction between a profession and its members, there will always be a lot of repeated actions and rituals to uphold the profession and distinguish it from other occupations. According to Giddens such processes can have unintended consequences, as even intentional actions with clear goals can have unintended consequences. One consequence can be that, in order to protect its values, the profession becomes so limited and protective that it cannot work effectively.

An example of an unintended consequence in the legal field is the almost automatic repetition of the importance of the rule of law both in legal sources and in the discussions of legal practitioners. Lawyers associate the rule of law with democracy, seeing a harmonious coexistence between law and democracy, while new democracies often challenge the existing legal order and its institutions. This implies that a democratic lawyer who wants the development of society in a globalised world must be reflective and critical of their legal perceptions and practices; see Chapter 8.

2.3.3 Lawyers and legal philosophy

One may ask whether lawyers find the values of their profession in legal philosophy. In their daily practice, many legal practitioners may not know the legal philosophical foundations of their lawyering, and conflicting norms coexist. This can be explained by the understanding of legal pluralism or legal polycentrism.¹⁰⁰ Within the EU, the judicial systems, lawyers' roles and identities in the Member States have been quite similar, at least formally, even though the practice in common law systems differs from that in civil law systems and even though EU law itself does not make this distinction.

Law still has an important role to play in supporting a fundamental perception of justice¹⁰¹ and in improving justice, fairness and equity in society. The relationship between law and morality has always been debated in legal theory. As a basic legal ethical theoretical question, what standards should lawyers be guided by? Should they be guided only by the law, or by the law and something else? To answer this question it can be helpful to consider the relationship be-

⁹⁹ Giddens, *The Constitution of Society*, p. 16.

¹⁰⁰ Zahle & Petersen, *Legal Polycentricity. Consequences of Pluralism in Law*.

¹⁰¹ Dworkin, *Law's Empire*.

tween the practice of law and legal philosophy. These considerations have added legal arguments to Giddens.

On the impact of the debate on ethics in legal philosophy in practice, when different legal theories give competing and incompatible explanations of the ethical foundations of the lawyer's role and identity, Alice Woolley says that a lawyer will not decide on a theory and from there choose a course of action

'A lawyer will rather be influenced by an ethical theory because that theory accords with the lawyer's own intuitions and existing moral commitments, and because the circumstances of the lawyer's practice make the theory meaningful and operative for the lawyer. Further, its accordance with his existing intuitions and practice circumstances will permit the theory to shape the lawyer's perceptions about, and responses to, ethical dilemmas that arise.'¹⁰²

Even though Danish lawyers are educated in a realistic and positivist paradigm, the positivist theory of Alf Ross is primarily nationally orientated. Even though the Nordic positivist legal tradition still has a strong influence, recent research into legal methods in Europe (by Ruth Nielsen, Ulla Neergaard and others) takes account of the broader perception mentioned above, including aspects of political, sociological, financial, cultural and fundamental rights in the further development of legal realism.¹⁰³

Legal research has followed the trend of research in other scientific areas. This has led to new approaches in legal science and to more diverse and elaborated scientific methods being applied in legal research. A recent example is legal business research, which combines economics and legal theory.¹⁰⁴ This development in legal research also moves legal theory away from its traditionally isolated position, in which the legal dogmatic approach imposed no preconditions for agents and appeared to be neutral. A broader humanistic approach can be found in the work of Dworkin. Besides his theoretical work, Dworkin has practiced both as a lawyer and a judge, and he is thus regarded as relevant in this research, as he has experience of combining theory and practice.

Dworkin regards legal philosophy as a universal theoretical method which can lead to different but equally valid laws in different cultures. Dworkin's analysis offers a pertinent basis for defining valid law and legitimate choice between legal sources. Henrik Palmer Olsen has summarised the work of Dworkin in the following illustration, which supports the understanding of the lawyer's position both in relation to a specific case and in relation to legal sources in society.¹⁰⁵

¹⁰² Woolley, *The Problem of Disagreement in Legal Ethics Theory*, p. 5.

¹⁰³ Neergaard, Nielsen & Roseberry (eds.), *European Legal Method – Paradoxes and Revitalisation*.

¹⁰⁴ Østergaard, *Metode på cand.merc.jur.studiet*.

¹⁰⁵ Jur-forsk seminar spring 2011. Videokonference Henrik Palmer Olsen.

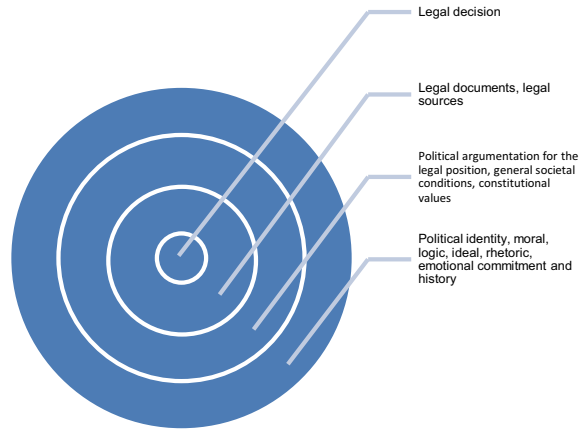


Figure 2-2. Dworkin's legal landscape

Theories (and theorists) of legal ethics seek to guide lawyers' codes of conduct in response to the ethical dilemmas of legal practice, to help lawyers achieve a well-lived life and sometimes to shape public policy on the regulation of the legal profession.¹⁰⁶ The idea of 'a well-lived life' concerns the intersection between legal practice and life, where lawyers are asked what kind of lawyers they want to be, or what they are, and can articulate criteria for knowing how and when to apply their law skills and for what purpose. This includes awareness that lawyers possess tools that can be used either for doing better or for doing worse.

2.4 The lawyer as an agent for change

Giddens's theory of structuration gives an understanding of the subjective agent. This agent (the lawyer) is a specially trained person who will be able to integrate himself into the profession by following a long strictly regulated procedure. The agent also understands the relation between the profession and the tasks and values of the surrounding society, in both the private and public sectors. Thus, social order is a result of pre-planned social actions and not of automatic evolutionary responses. (Legal) sociology looks at the profession in relation to society, which is useful and relevant. To consider the identity of the individual lawyer, it is necessary to integrate the subjectivity in relation to the profession, when lawyers identify 'what to do', 'how to act' and 'who to be' as a European lawyer of today.

To be an agent, in Giddens's terms, some conditions for agency must be fulfilled. Drawing on interpretative sociology, Giddens underlines the importance of agency in sociological theory, saying that to a certain degree human social agents are *knowledgeable* about what they are doing. This includes a practical consciousness, which means a capacity for taking action, without a specific ability to verbalise the logic behind it. In the field of social learning this capacity will be seen as 'tacit knowledge', an internalised practice that has been developed through

¹⁰⁶ Woolley, *The Problem of Disagreement in Legal Ethics Theory*, p. 2.

reflection in action. From this perspective Schön,¹⁰⁷ Lave and Wenger¹⁰⁸ supplement Giddens. Where practical consciousness covers internalised knowledge, which the practitioner cannot explain, Giddens adds discursive consciousness, referring to the possibility for agents to reflect and explain their actions and thus create a foundation for possible change. Lawyers in general tend to have strong personalities, due to their individualised socialisation process, long education and awareness of societal influence. Most lawyers fulfil the conditions for being knowledgeable, having a discursive consciousness and a transformative capacity.

Agency means subjectivity and includes processes that are internalised in the both the mind and the body of the agent, which implies: a) reflexive monitoring of actions, b) rationalisation of actions; and c) motivation for actions. All these elements are repeated processes which are embodied and can be thought over. The process of structuration understands most actions as intentional but without a beginning or an end, thus understanding them as part of a process. Individual lawyers are the agents and the professional organisation is the system which is seen as an institutional construction based on the subjective commitment of the lawyers. The profession as such can also have agency. In this interaction, the norms and professional identity will be under constant debate.

Members of the earlier professions were seen as experts, whose roles and identities depended on a chosen lifestyle leading to a diversity that could influence and change the professions.

This influences the curriculum, as learning to be a lawyer includes the important question: ‘what kind of lawyer do you want to become?’ Learning theories can support the understanding of a movement from a generic standard curriculum to individualised self-directed learning, and participation in interdisciplinary practices capable of dealing with complex challenges in both public and private law.

The aim of the empirical study is to frame the identity that Danish lawyers had developed at the time where they were interviewed or took part in a focus group, bearing in mind that Giddens sees identity as a constantly developing project, expressed in choices and changes of lifestyles. In late modernity social integration is less related to tradition and families than previously. This creates space for lawyers to develop more individualised lifestyles.

2.4.1 Self-esteem, fear, identity and lifestyle

Giddens grounds the values in the agent and not in the system/structure, and therefore the identity of the individual lawyer becomes decisive for the future of the profession. He builds the transformative capacity of the agent on psychology, and refers to the basic foundations of Eriksson and Freud on the development of identity in early childhood. The aim is to develop a firm identity with high self-esteem and to avoid fear.¹⁰⁹ This is established though a lifestyle of daily routines. For adults it is also very important for feelings of safety and security, and for having agency, that self-esteem should not be damaged by fear. ‘Fear’ has been framed by the

¹⁰⁷ Schön, *The Reflective Practitioner: How Professionals Think in Action*, p. 69.

¹⁰⁷ Kaspersen, *Anthony Giddens*, pp. 54-56.

¹⁰⁸ Lave & Wenger, *Situated Learning – Legitimate peripheral participation*, p. 47.

¹⁰⁹ Kaspersen, *Anthony Giddens* p. 61.

legal philosopher Højlund, who latest book on law and fear (*Frygtens ret*) indicates that new legislation often challenges fundamental rights, such as laws on data protection, data retention and anti-terrorism. This approach at both EU and national levels seems to be a result of an undefined fear in society. There is a risk that this fear will infect lawyers and influence their professional attitudes and personal satisfaction. Thus it is necessary to increase self-esteem and reduce fear, as pointed out by Giddens. Højlund shares this view of fear, and finds that combating and reducing fear, and developing a strong identity implies a need to change the curriculum for lawyers.¹¹⁰

The lifestyle creation of identity in Giddens's understanding of what to do, how to act and who to be, offers a way of studying the subjective dimension of this mediation.¹¹¹ He argues that these questions must be answered, either consciously or in day-to-day social behaviour, by all individuals or everyone living in circumstances of late modernity. The three questions of what to do, how to act and who to be are related to different levels of analysis:

'What to do' relates to the level of society (macro);

'How to act' relates to the level of the profession (meso); and

'Who to be' relates to the individual level (micro).

Giddens argues that everyone will link identity to a selected lifestyle, though different groups will have different possibilities. Wealth can certainly increase the range of options. 'Lifestyle' refers to a wider range of elements. Apart from choices about what to eat, what to wear, and who to socialise with etc., Giddens includes behaviours, attitudes and beliefs. Lifestyles might be seen as ready-made templates for depicting the self. Giddens states that the more post-traditional the setting in which an individual moves, the more lifestyle will concern the very core of self-identity, its making and remaking.¹¹² In this, Giddens draws a line back to Max Weber and his theories on how work makes the conditions for life chances, which can be interpreted as the availability of potential lifestyles. For lawyers and other strong professions, the job and the milieu around it form some of the fundamental elements of lifestyle orientations.

2.4.2 From lawyer to expert

In the empirical study in this dissertation, attention is paid to the actual identity as perceived by individual lawyers who are regarded as 'experts' in the terminology of Giddens.¹¹³ Where Giddens talks about experts, Schön emphasises the importance of being not only an expert but a reflective practitioner.¹¹⁴ As Giddens also stresses the implication of reflective processes, this difference does not influence the results. In a complementary method, Etienne Wenger com-

¹¹⁰ Højlund, *Frygtens ret*, p. 60.

¹¹¹ Giddens, *Modernity and Self-identity – Self and Society in the Late Modern Age*, chapter 3.

¹¹² Giddens, *Modernity and Self-identity – Self and Society in the Late Modern Age*, p. 81.

¹¹³ Giddens, *Modernity and Self-identity – Self and Society in the Late Modern Age*, p. 31.

¹¹⁴ Schön, *The Reflective Practitioner*, p. 300.

bines analysis of the individual's identity development with the evolution of the professional community of practice.¹¹⁵ This method matches structuration theory.

In the terminology of Giddens, the social change in the legal profession that has taken place over a longer period will be seen as the production and reproduction of social relations between different agents such as individual lawyers, professional organisations, states and international actors. These social changes are related to time and space, as when state territories expand to become part of the EU framework.

Lawyers' casework and other tasks become more and more specialised, redefining and changing the situations in which individuals and professional groups contribute to the development of legal practice and in which they take on new roles affecting their professional identity. The theoretical position of social learning implies neither that society has a mechanical influence on subjectivity, nor that there is merely a human shaping of society. Learning and experience are seen as complex change processes that have both subjective and objective dimensions – as understood by Giddens's logic in Etienne Wenger's elucidation.¹¹⁶ Personal interaction and socialisation within the profession are decisive traits of subjectivity, but throughout life different situations produce new insights revealed in new communities of practice which will change both the format and content of professional learning.

Demands for the qualifications of lawyers are moving from traditional lawyering at a national level to a supranational level or to new fields both nationally and internationally in 'one big European legal system'. This expansion makes fixed curriculums less relevant, as lawyers obviously no longer need the same knowledge as before or the same knowledge as their colleagues.¹¹⁷ Understanding the needs of curriculums will be developed in Chapter 8. Learning might beneficially focus on the inner dynamics of learning, creating space for lawyers to develop individual identities according to their chosen lifestyles.

Giddens does not say much about the meaning of culture, and especially legal culture, which can explain the differences of identity between lawyers, or between lawyers and other professions. This development process will be framed by social learning theories developed by Etienne Wenger. Thus, Giddens and Wenger are considered complementary for the purpose of establishing the overall theory.

2.5 An interdisciplinary study open to interpretation

The lives of lawyers, the development of their identities and their feelings of purpose and direction both in private and in professional life might not be questioned in a mono-disciplinary study without reflection. The challenge of interdisciplinary work is the risk of losing the overall view. However, the risk of a mono-disciplinary approach is that large areas of interest will be omitted, so the research question will not be answered.

¹¹⁵ Wenger, *Communities of Practice*.

¹¹⁶ Wenger, *Communities of Practice*.

¹¹⁷ Hewitt, *Understanding and Shaping Curriculum*.

It has been important to choose both theoretical and related methodological approaches to the identity of lawyers, and to be constantly aware that choosing one theoretical framework or method excludes others. On the other hand, the structuration theory in itself breaks¹¹⁸ down traditional barriers between structure and agent and includes many different scientific fields.

Thus, identity will unfold in the following combinatory setting so that the results of the empirical study can be analysed to answer the research questions and support identity developments for lawyers.

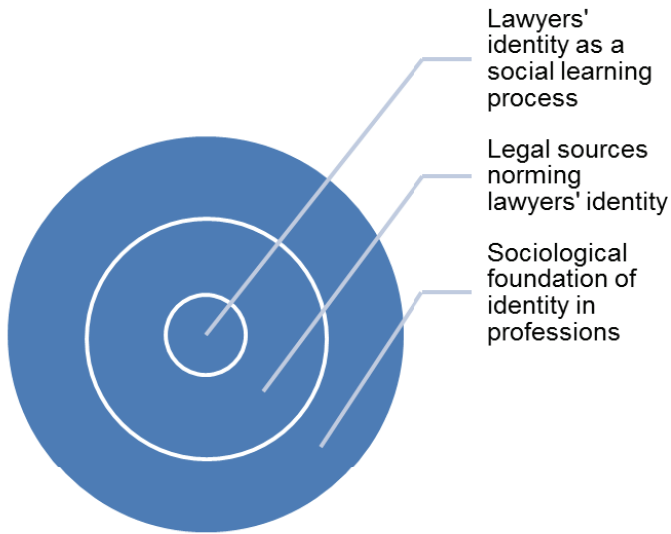


Figure 2-3. Norming identity

The *sociological approach* gives a deeper understanding of the interaction between the individual lawyer and the collective or surrounding community, whether the profession or society at large. A sociological approach can supplement the self-referential rationality of lawyers and their organisations. Analysis of legal sources and legal theories cannot explain the changes in the organisation of law firms, the specialisation by lawyers or possible conflicts between a societal role and identification with the needs and interests of influential business clients. A *legal approach* tends to perceive lawyers as a unity. A lawyer is a lawyer! Individualisation leads to specialised experts who develop their identities according to a fundamental choice of what kind of a lawyer they have chosen to be or envisage becoming. Professional learning processes thus seem to move from centralised curriculums, controlled by national bar and law societies, to less fixed communities of practice, or communities which include members with

¹¹⁸ Kaspersen, Anthony Giddens, p. 76.

many different educational backgrounds. An understanding of social learning is needed for observing, interpreting and analysing these developments.

2.6 Reflectivity in the interaction between scientific fields

In a traditional career, a lawyer will pass through different professional stages, from student to apprentice, to lawyer, to junior partner, to senior partner or out of the profession. Many of these transitions result from acquiring new skills or competences. All stages imply a new membership of a community and a reflective process in which the framework of a lawyer is related to Giddens's lifestyle choice, Schön's competence development and Wenger's community of practice.

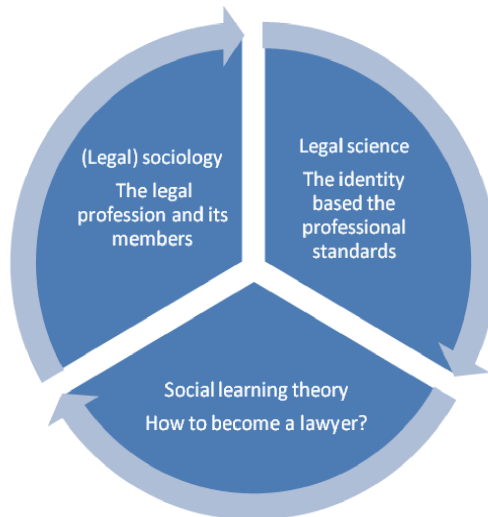


Figure 2-4. Theoretical combinations and interactions

The social learning process combines the perspectives of sociological analysis and legal science through the transformation from an individual lawyer to an agent of a profession with a societal role.

2.7 Structuration theory and empirical research

The theory of structuration is both highly complex and very abstract, and when it is used in relation to the empirical studies it applies both at the structural level and at the agency level. These two elements are inseparable and create the duality of structure¹¹⁹ which can be seen as reorganising the relationships between agent, action and structure that form the social practice, and which can bridge action and structure as well as subjectivism and objectivism.

¹¹⁹ Kaspersen, *Anthony Giddens*, p. 73.

An analysis of the changes in the legal profession based on Giddens must include both an institutional analysis and an analysis of strategic behaviour. The latter is given priority, but as every Giddens analysis must have elements of structure and agency, the work is structured by the interactions between society, the profession and the individual.

Scholars of sociology like Bertilsson and Gregson have criticised structuration theory as being problematic for empirical research due to it being very abstract.¹²⁰ To overcome this, more theoretical material from Schön, Lave and Wenger has been added.

2.8 Methodological width

The nature of the project requires methodological width. Many scientific disciplines have studied aspects of identity, such as biology, psychology, medical sciences, anthropology, cultural studies, the science of religion, sociology, pedagogics, criminology and other legal studies. The identities of today's lawyers might be far from the European ideal, which has mainly been created by the profession. Thus, a legal approach, applying legal methods, is not sufficient and it will be complemented by perspectives and methods based on sociology and social learning.

The research question and sub questions necessitate an approach that draws on law, sociology and social learning theories and the use of various methodologies. The different approaches must work together to support and validate the findings. By its nature, research into identity is interdisciplinary or cross-disciplinary. No one single science or methodology can claim to be the only valid one for studying identity. This makes a combination of methods desirable and can raise questions about 'how to act'.¹²¹

The research questions make it appropriate to integrate methodologies from different scientific fields and to combine them in order to seek valid and reliable answers and to get both a deeper understanding of the current situation and a broader perspective for future legal practitioners in a proactive law setting.

Choices of theories and methods are based on the recommendations for organisational research from Copenhagen Business School¹²² and on sociologically or anthropologically inspired methods for interviews, focus groups and participatory inquiries. As an introduction, the choice of methods can be illustrated as follows:

¹²⁰ Kaspersen, *Anthony Giddens*, p. 232.

¹²¹ Halleday & Schmidt, *Conducting Law and Society Research, Reflections on Methods and Practices*.

¹²² Darmer, Jordansen, Astrup Madsen & Thomsen (red.), *Paradigmer i praksis*.

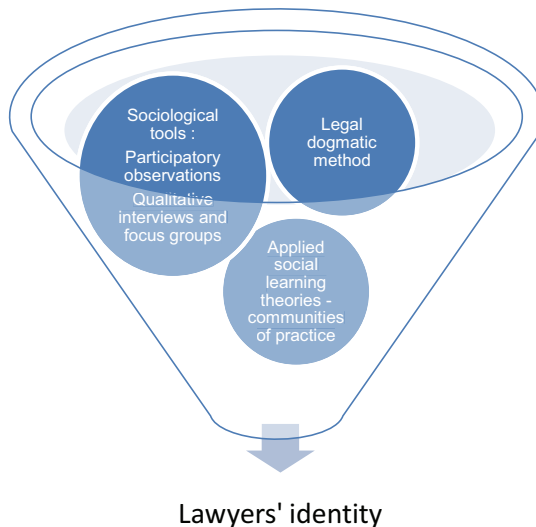


Figure 2-5. Combination of methods

The above methods relate to different chapters of the dissertation. In Chapter 5 a detailed roadmap will be given of the data collection in focus groups, individual interviews and participatory inquiries.

2.8.1 Making methodologies operational

Since the combination of scientific fields, each with its own logic and methods, does not make one form of roadmap markedly better than another, the empirical work draws on qualitative methods from sociology and anthropology. These highly subjective processes are difficult to apply in quantitative studies. They are, by nature, individual and do not necessarily follow a specific pattern related to professional norms. The norms and predictability of professional life may be fragmented into individual life experiences and self-directed learning processes, depending on the context of the individual lawyer.

As the methods of different sciences have been deployed in this research, it is relevant to relate them to each research question. The empirical study of Danish lawyers follows the theoretical perception that the legal profession is moving from being a classic homogeneous profession to become more heterogeneous separate groups of experts, related to the lifestyle choices and identities of individual lawyers.

2.8.2 Methods related to sub question 1

Answers to the question, *'Is there a common identity ideal for European lawyers that can be depicted within the legal order in Europe?'*, will be grounded in legal methods with a traditional legal dogmatic analysis based on legal realism, with no value judgement as to whether the results are good or bad. The aim is to determine the identity of the European lawyer of today, if possible. This includes studying and interpreting valid legal sources, primarily international

regulations and policy documents. The case law of the European Court of Human Rights on the identities and roles of lawyers will be included. The profession is governed by detailed regulations which create the social framework and determine the consequences for what lawyers actually do or can do.¹²³ Thus, a legal framework contributes to structuring the work-life conditions for lawyers.

It is relevant to include other sources such as soft law,¹²⁴ including ethical rules laid down by the profession itself, whether at national or international level by the CCBE. These rules are laid down by the profession itself and, from a legal perspective, could give information about the content of the framework, but cannot say anything about perceptions of identity by lawyers themselves. The legal dogmatic analysis will be connected to Giddens's three levels of society, the profession and the individual lawyer.

2.8.3 Methods related to sub question 2

Answers to the question, 'How do Danish practising lawyers define or perceive their identity?', come from the empirical work based on qualitative methods in field research, through interviews, focus groups¹²⁵ and participatory inquiries.¹²⁶ The empirical work includes different elements of the identity of the individual lawyer, in order to discover the perceptions of individuals doing their professional work either alone or in a community of practice. Data from focus groups might show how individual lawyers live their lives, their methods for getting through each day as a lawyer, how they came to be who they are, how they learn to act and interact, self-conception and individual identity. This perception will be connected to their individual fulfilment in legal life in the context of the profession. The analysis will be based on the work of Richard A. Krueger¹²⁷ who, together with David Morgan, has developed a well-structured and easy-to-operate guide to working with focus groups.

Investigating identity by means of a collection of individual written data and individual interviews has been the method chosen for getting access to the life-world of the individual lawyer, while the qualitative focus of group interviews has given empirical data on identity and lifestyle in the relations between the societal level, the profession, and the individuals. The data collection has closely followed the structure of Giddens. The detailed design for the empirical work in focus groups, the criteria for selecting lawyers for interviews and participation in focus groups, and basic information about the participants is given in chapter 5 on identity perception.¹²⁸ The interviews were conducted according to the framework for qualitative interviews proposed by Steiner Kvale, as narrative interviews based on qualitative research interviews.¹²⁹

¹²³ Lonbay, *Assessing the European Market for Legal Services*.

¹²⁴ Nielsen & Tvarnø, *Retskilder & Retsteorier*, p. 105.

¹²⁵ Morgan, *Planning Focus Groups*.

¹²⁶ Emerson et al., *In the Field: Participating, Observing and Jotting Notes*.

¹²⁷ Krueger, *Analyzing & Reporting focus Group Results*.

¹²⁸ Morgan, *Planning Focus Groups*, p. 16 f.

¹²⁹ Kvale, *InterView. En introduktion til det kvalitative forskningsinterview*. As professor of psychology, and head of the Center for Kvalitativ Metodeudvikling, Institute of Psychology, University of Aarhus Steiner Kvale has worked intensively on research into adult learning.

2.8.4 Methods related to sub question 3

The starting point for answering the questions, '*What are the changes and challenges to the role and identity of the lawyer at the societal level, the professional level and the individual level? How do these levels interact?*', is to research the development of lawyers' identity, which looks at lawyers in a complex web of relations at the three levels of society, the profession and the individual. The sociologists' analytic tool of 'the levels of analysis' is used, which involves focusing on micro (individual), meso (interactional) and macro (structural) levels. This method can prompt understanding of factors that create lawyers' identities, the impacts on others both inside and outside the profession, and interaction at the structural level with democracy under the rule of law.

At the *individual (micro) level* the focus is on aspects of lawyers' individual experiences that cause them to act and interact in a certain manner. Data from the focus groups and interviews, which explore personal experiences, modes of learning, issues of identity, lifestyle and personal attitudes, will be integrated. The reflexivity and constant interaction imply that individuals are the product of interactions with others and of their particular place in social structures. This part also posits that individuals *also* have an impact on others through their interactions, and can have an impact on social structures by changing their interactions in Giddens's agent-structure system.

The interactional (meso) level focuses on the ways in which lawyers contact and interact with others both inside and outside the profession. The focus is mainly on the interaction itself, rather than on the individuals who engage in the interaction. Here, the focus group data and a study of the literature help answer the question of whether the process of interaction has resulted in a movement from a homogeneous organisation towards a heterogeneous organisation of lawyers. In accordance with Giddens's theory, this method presumes that interactions are affected by individual attitudes and are manifestations of structural phenomena. Furthermore, it presumes that interactions *also* have an impact on individuals' self-conceptions and attitudes, and on social structures.¹³⁰ The concept of communities of practice is related to this level.

The structural (macro) level focuses on the structures of the profession, its social institutions, and patterns of social behaviour as formulated in ethical rules. This level of analysis only focuses on patterns, processes, hierarchies, institutions, and the generalised structural characteristics of the profession. The emphasis is on how the actions of professional organisations are transmitted to lawyers, and on reproduction and/or changes in a reflexive process. At this level it is presumed that social structures are transmitted through formalised interactions to individuals who are encompassed by such structures. The analytic tool implies that structures can also be affected by individuals and/or subgroups within the profession, whereby the structures can change.

¹³⁰ Inspiration from meeting with Professor Dirk Buyens, Vlerick Management School, Ghent, Belgium, July 2012.

2.8.5 Methods related to sub question 4

Answers to the question, '*How will new communities of practice affect the identity development and professional training of lawyers?*', are mainly based on empirical studies related to English and American literature on alternative ways of lawyering in relation to justice, democracy and professional work. This involves deskwork comprising relevant CCBE regulations and recommendations. Further results are drawn from a recent study from Maastricht University¹³¹ and participatory inquiries in an EU train-the-trainer programme on mediation. These inquiries were organised as total participation.¹³² The mediation training, under Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters which is a part of a common European education, took place in Brussels in the spring of 2012. These studies have been supported by literature studies on learning strategies, especially theoretical work on identity learning in communities of practice¹³³ and learning programmes in the legal field.¹³⁴ The question 'how' implies didactic reflections.

The participatory inquiries refer to the recent examples of European educational actions to support sustainable lawyering. The training standards and methods are connected to a new EU programme for training lawyers together with non-lawyers.¹³⁵ The answers to the above research questions should make it possible to answer the main question: *How can the identity and competences of lawyers be developed so that they can practise proactive and sustainable lawyering in the European Union?*

2.9 Critical and concluding remarks

In the theoretical framework, it has been necessary to add the profession as a layer in between the society and the individual. In this framework, the combination of 'who to be', 'how to act' and 'what to do' has structured the analysis of the identity of the members of a profession in transition. This approach has also been the starting point for the empirical work to verify or falsify whether Giddens's structuration theory and social learning theories can expand and include a legal approach so as to be useful for understanding the identity development of lawyers. This theoretical framework might also give an understanding of a more diverse identity or of a diversity of identities when societal change challenges the legal profession, especially the movement from a national to a supranational legal culture and the spread of specialisation.

In the process of collecting empirical data, it has been possible to explore patterns of behaviour or perceptions and to generalise observations in the chosen theoretical framework.¹³⁶ The question of lawyers' identity is connected to the purposes for which the question is being asked. Once the purposes are disclosed, the perspectives of the inquirer, the evaluator, the community, and the self-proclaimed identity become critical. Neither the perceptions of 'outsiders' nor the perceptions of 'insiders' (the lawyers as individuals) are objective. Each reflects

¹³¹ Heringa & Akkermans (eds.), *Educating European Lawyers*.

¹³² Andersen & Gamdrup, *Forskningsmetoder* i Andersen: *Videnskabsteori og metodelære*, p. 66.

¹³³ Wenger, *Communities of Practice* and Wenger, McDermott & Snyder, *Cultivating Communities of Practice*.

¹³⁴ Halpern, *Reflections on a new course: Effective and Sustainable Lawyering*.

¹³⁵ www.crossbordermediator.eu (last accessed 9 August 2013).

¹³⁶ Boolsen, *Kvalitative metoder*.

interests and positions, perspectives, a wish to give or to have a certain character with a specific identity. As mentioned earlier, it is relevant to reflect on the background and position of the researcher, as well as to pay attention to the diversity of the interests of the lawyers involved and the professional organisations.

Treating the legal system as a social system and seeing scholars from other scientific areas 'intervene' in the legal world has meant that the legal framework quickly became too narrow and the empirical study has become more sociologically and andragogically based. The definition of a professional identity related to the subjective identities for lawyers combined the three chosen scientific fields and fulfilled the intention of finding a theoretical framework that is open to new or supplementary interpretations.

A legal method can frame the ideal identity of European lawyers on the basis of legal sources, but the role of lawyers in society has traditionally been a sociological or legal sociological matter and the basis for developing identity has often been found in psychology or learning theories and practice. The aim is to create a fruitful meeting point.

Methodologically, it could be asked why a European ideal is related to national practice. Setting up a formal national ideal would include European values, given the references in the Danish code of conduct for lawyers and the EU regulations on legal services. Furthermore, all legal practitioners in Europe are primarily nationally educated, so that a purely European legal practitioner does not (yet) exist. However, researchers throughout the EU are researching legal methods,¹³⁷ while others concentrate on legal practitioners.¹³⁸ Given enough time, it would be interesting to investigate the practices in all 28 EU Member States and analyse the extent to which new cross-border communities of practice in Europe have already arisen or are about to change the profession.

¹³⁷ Neergaard, Nielsen & Roseberry (eds.), *European Legal Method – Paradoxes and Revitalisation*.

¹³⁸ Heringa & Akkermans (eds.), *Educating European Lawyers*.

Part II Identity in transition

In the four chapters of this part of the dissertation, Chapter 3 conceptualises the lawyers' identity in a theoretical interdisciplinary understanding. In Chapter 4 a legal approach is taken to depict the identity of lawyers, and Chapter 5 presents an empirical study of Danish lawyers' opinions and attitudes. The results of this study will be thoroughly analysed in Chapter 6 so as to identify the challenges to the profession at societal, professional and individual levels.

3 Conceptualising lawyers' identity

This chapter sets out the theoretical framework for analysing the multi-layered identity (identities) of lawyers and a theoretical understanding of how identity can be conceptualised. The theoretical framework is not only elaborated for academic reasons; it also aims to create a new understanding for practitioners, as lawyers and their organisations currently face external and internal changes that challenge the well-established legal profession.

In order to conceptualise identity, some assumptions are made:

- Identity can be developed; one is not born a lawyer – one becomes a lawyer.
- Lawyers, like all human beings, are social persons. Therefore, it is relevant to analyse and discuss learning in communities.
- The development of identities of individual lawyers is linked to the profession.
- Legal knowledge is a matter of competence, with respect for the values and the legal framework of the profession and of society.
- Both individuals and the profession as a whole have societal obligations.
- Meaning and direction in professional life include the ability to experience the world and engage in society in a way that is satisfying, both inside and outside professional life.

Identity can be approached from many different angles. The theoretical and methodological contours in chapter 2 frame the individual's identity development as a result of social interaction between society, the profession and the individual.¹³⁹ Developing identity is a social learning process which connects the legal setting of apprenticeship to the sociological understanding of how to become a member of a profession. Identity can be perceived as a social formation of the person, as a cultural interpretation and as a lifestyle marker of belonging to a certain group. In a theoretical learning perspective, identity is a construction between the individual and the group. Etienne Wenger has described this as an 'encompassing process of being

¹³⁹ Baron & Corbin, *Thinking like a lawyer/acting like a professional*.

active participants in the practices of social communities and constructing identities in relation to these communities'.¹⁴⁰

One can question whether this 'encompassing process', in which lawyers construct their identities in relation to their environment, is specific to lawyers and clearly distinct from the process in other professions. Clearly carpenters, teachers, pilots and nurses will also develop professional identities. Some of these have societal tasks and roles, ethical rules, professional disciplinary bodies etc., but the main difference is that the legal profession, like doctors, is one of the academic professions which, as classic professions, are treated differently from others. Giddens's approach can help in the conceptualisation of individual identities, but it cannot wholly encompass the dynamics of the profession and its impact on the individual lawyer's identity. However, theories of social learning and education, such as Etienne Wenger's theory on practice in communities¹⁴¹ and Donald A. Schön's reflective learning,¹⁴² can expand Giddens's theories and relate to lawyers and their practice. Hence, a sociological approach based on Anthony Giddens in combination with the social learning theory developed by Etienne Wenger on the basis of Albert Bandura¹⁴³ can more comprehensively frame the identity development of legal practitioners.

According to Giddens, identity is constantly interpreted and redefined. In an agent-structure setting this process combines the professional and private identity with the identity-relevant questions of 'Who are we?' adjusted to 'Who am I?'. The 'Who are we?' question refers to the profession as such. But it can also refer to the firm a lawyer works in. The feeling of belonging differs between small firms and big firms, and between firms with a very broad range of activities and firms offering highly specialised legal services. The composition of age, gender and lifestyles of the partners and staff of a firm will also have an impact on 'Who are we?', as part of the process of identity development of practising lawyers.

Lawyers develop identities that are strongly bound to their profession. It has long been accepted that this socialisation affects the mind-set of legal professionals and makes lawyers think like lawyers.¹⁴⁴ However, a new critical awareness is challenging the paradigm 'thinking like a lawyer' and is asking for a rethink,¹⁴⁵ because 'thinking like a lawyer' is based on strict rationality¹⁴⁶ and tries to suppress emotions in order to make law appear to be neutral and fair.

Social learning theories embrace relations between an individual and a community of practice. For lawyers, the community of practice will be a law firm, the total constellation of law firms, and/or the professional organisation of lawyers. The *sociological approach* explains how social

¹⁴⁰ Wenger, *Communities of Practice*, p. 4.

¹⁴¹ Wenger, *Communities of Practice*.

¹⁴² Schön, *The Reflective Practitioner: How Professionals Think in Action*.

¹⁴³ Bandura, *Social Learning Theory*.

¹⁴⁴ Perry, *Thinking Like a Professional*.

¹⁴⁵ Rhode, *Legal Education: Rethinking the Problem, Reimagining the Reforms*.

¹⁴⁶ Rationality in the understanding of Max Weber as rational-legal authority, where legitimacy is seen as coming from a legal order and from the laws that have been enacted in it.

circumstances directly influence relations between self-identity or professional identity and modern institutions. Thomas Brante has stated that the most important relation for a profession is (or was) their relation to the state.¹⁴⁷ In the movement of legal culture from the national level to a supranational level, it is precisely this relation that is in a transition. Forming the self becomes a reflective project that is also recognised in social learning theory and will challenge the more static perception of identity expressed in the legal framework.

3.1 European identity in a legal setting

As the relations between the legal profession and the state are in a process of change, and as the EU has taken over many national tasks and responsibilities, the development of a European identity must also be addressed. Chapter 4 contains a legal analysis of regulatory sources depicting a European identity ideal for lawyers. It shows how a collective identity is created at different levels, especially at the European level, as a basis for a shared identity of a group of people, setting rules for membership and prescribing crucial or ideal characteristics for membership of the collective community.

From a more general perspective, Marika Lerch has observed that the new European identity has both internal and external dimensions. There are internal dimensions within the EU and external dimensions in relation to global activities. The internal dimension can be thought of as citizenship of an imagined community. It refers to feelings of belonging to the European Union and creates the foundation for a European collective identity.¹⁴⁸ The external dimension focuses on the role of the EU in its relations with the wider world

This European identity is linked to values that are explicitly expressed in the Charter of Fundamental Rights of the European Union (the 'European Charter').¹⁴⁹ The internal dimension is comprehensively summarised in the European Charter's preamble:

'Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice.'

The Treaty on European Union (TEU) also expresses aspects of the internal dimension of Europe's identity. Article 2 TEU states that:

'The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in

¹⁴⁷ Brante, 'Staten og professionerne' in Eriksen & Jørgensen (eds.), *Professionsidentitet i forandring*, p. 17.

¹⁴⁸ Lerch, *European Identity in International Society*, pp. 5-6.

¹⁴⁹ The Charter of Fundamental Rights of the European Union of 12 December 2007 reaffirms the text of the Charter proclaimed on 7 December 2000 (Nice European Council). Since 1 December 2009, the date of entry into force of the Treaty of Lisbon, the Charter has the same legal value as the EU Treaties, by virtue of the first subparagraph of Article 6(1) of the Treaty on European Union.

which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.'

The importance of respect for and promotion of human rights is highlighted in Article 6(1) TEU: 'The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.'

Article 6(3) TEU emphasises this approach:

'Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.'

Article 3(1) and (2) TEU clarifies that:

'The Union's aim is to promote peace, its values and the well-being of its peoples', and that 'The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime'.

The last part of Article 3(2) refers to the external dimension of the EU, mentioning external border controls and measures for asylum, immigration and the prevention and combating of crime coming from outside the EU.

The external dimension of identity, as reflected in several provisions of the TEU, implies that the EU acts as an agent in the globalised legal community, in the sense of Giddens's theory.¹⁵⁰ This international identity is constituted by rules negotiated and accepted by the Union and/or the Member States.

In this regard, Article 3(5) TEU expresses a broad set of aspirations, not only protecting EU citizens, but also contributing to peace, mutual respect amongst peoples, the protection of human rights and the development of international law, and including 'the sustainable development of the Earth'.¹⁵¹

It is striking that some of the basic characteristics and goals of the European Charter and the TEU refer to matters that are very much related to the legal profession and legal practice. The repeated or emphasised references to the rule of law in a democracy, justice, respect for hu-

¹⁵⁰ Giddens, *Modernity and Self-identity – Self and Society in the Late Modern Age*, p. 15.

¹⁵¹ Art. 3.5: "In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter".

man rights and constitutional traditions and the observance and development of international law are deeply connected with the roles and actions of lawyers in society. It is also interesting that the TEU has introduced innovative policy concepts, such as contributing to 'the sustainable development of the Earth'. However, many of these principles may not figure largely in the daily practice of many European lawyers.

It can be difficult to distinguish between global norms and EU-specific norms, especially in respect of democracy, the rule of law and fundamental freedoms. However, these issues particularly need the services of legal practitioners who are firm in their personal and professional values and who are prepared to meet conflicts of identity, interdependence, global responsibilities, peace and reconciliation, and issues of sustainability and demands for justice.¹⁵² It is remarkable how sustainability and international justice are becoming more and more interconnected. Legal education at universities, including post-graduate studies, has only recently started to include training to meet these challenges. When Giddens talks about globalisation in relation to the transformation of self-identity, he states that: 'Changes in intimate aspects of personal life ... are directly tied to the establishment of social connections of very wide scope'.¹⁵³ Globalisation and the development of the EU breaks down the protective and transparent framework of the nation state to which lawyers have traditionally related their work and replaces it with much larger supranational organisations. Lawyers have global networks trying to unify and brand 'lawyers' as a professional group with special privileges.

Organising a professional community like the legal profession is a constitutive act, which establishes common norms, a common professional language and an agreed truth about what is right and what is wrong, what are the basic principles of justice and what standards should be upheld by the profession. The identity of lawyers was developed over a long period as a collective national identity, linked to the state or jurisdiction where the lawyer was active and established. Nationality was important to lawyers' identities, as developed and reflected by the national bar and law societies. The names of some bar and law societies refer to their national character, such as the Danish Bar and Law Society. European citizenship however, gives a new identity or extends existing identities into a sphere where norms, legal standards, values, morals, principles and traditions are no longer exclusively national and are constantly negotiated in a European or globalised context.

3.2 Identity, choice or assignment?

In a research project that aims to identify and analyse the development and perception of the identity of lawyers, it is important to consider the distinction between choice and assignment. When Giddens talks about lifestyle 'choices' one can ask: who chooses a given identity, and who is assigned it? This dichotomy plays an important role when investigating the actual identity perceptions of individual practising lawyers. Individual lawyers choose a lifestyle and form a practice related to professional organisations like bar and law societies. These impose a set of national and international regulations that have a clear impact on individual lawyers.

¹⁵² Petersen, *Globaliseringer, ret og retsfilosofi*, p. 153.

¹⁵³ Giddens, *Modernity and Self-identity – Self and Society in the Late Modern Age*, p. 32.

This means that a lawyer's identity is framed in a constantly shifting context, including the networks that lawyers are active in, the economic conditions they work and live in, their cultural environment, the political institutions and ideologies they are influenced by, their clients etc. Furthermore, the identities of lawyers are surrounded by questions of power, politics and justice.

When focusing on lawyers as agents of change, identity becomes more a matter of choice than of assignment. Even though it is necessary to comply with some ritual to become a lawyer and (in Denmark) to be nominated by the Ministry of Justice, the kind of lawyer a person aims to become may be a lifestyle choice of the individual.

3.3 Identity, more than a self-image

Identity has often been perceived as consisting of characteristics connected to an individual's self-image. However, human beings are always identifying themselves with or in contrast to others. Talking about ourselves and about others is a part of identity development, and the way a lawyer engages in life or in legal practice defines their identity. Who we are is closely related to our day-to-day lifestyle and our lived experiences. Identity becomes a product of this specific lifestyle and of participation or non-participation in specific groups. Identity can neither be understood as an isolated phenomenon, nor as formally connected to membership of a certain professional group. Both influence each other interdependently.

Etienne Wenger, who relates his learning theory on identity development to Giddens, states:

'Identity exists – not as an object in and of itself – but in the constant work of negotiating the self. It is in this cascading interplay of participation and reification that our experience of life becomes one of identity, and indeed of human existence and consciousness.'¹⁵⁴

The interconnectedness of identity makes it a broader concept than individuality. Membership of a group will generalise and stereotype the members so as to eclipse the dynamic complexity of individuality. This does not necessarily mean that there will be a conflict between the individual and the group, but it does mean that an identity as a member of one specific professional community may differ from an identity unfolded in other communities of practice.

The concept of 'identity' refers both to the expression of the inner values of an individual and to others' perceptions of the individual. This second aspect of identity is called 'reputation'.

3.4 Rituals – rites of passage

A traditional culture often shapes the 'rites of passage' in society. This is easily recognised in the legal profession. In social learning as well as in sociology a 'rite of passage' refers to a ritual event that marks a person's transition from one status to another. It means that communities have ritualised traditions which stay more or less the same from generation to generation. Rites of passage indicate when a certain transformation takes place, such as from student to

¹⁵⁴ Wenger, *Communities of Practice*, p. 151.

lawyer. Within the community, the legal profession, the change of identity is clear.¹⁵⁵ In Denmark, an example is the transformation of an apprentice to lawyer accompanied by a letter from the Ministry of Justice or, formerly, the right to a new professional title, when the lawyer is permitted to conduct a Supreme Court case.

3.4.1 Professional oath

In some academic professions, such as lawyers and doctors, entrants to the profession take an oath. Individuals become members of the profession by the performance of some rituals following an organised or complex selection system. In return the members are loyal to their peer-group and will fulfil certain expectations of the group. The meaning and relevance of swearing an oath, such as the oath taken by lawyers which dates from 1736,¹⁵⁶ is connected with creating a new identity. Swearing an oath can be seen as a transformative action, distinguishing lawyers from laypersons who manifest respect for the law through their actions. The rite of passage confirms that the individual becomes recognised as a practising lawyer. In their turn the new members of the profession will dedicate themselves to defending, contributing, promoting and helping to realise the rule of law. One becomes a lawyer: 'In and through performing an act or a series of acts'.¹⁵⁷ The rituals and ceremonies of Danish universities have differed between places and over time, but all lawyers have the oath printed on their university diploma.

The importance of rituals is recognised by Wenger. Wenger situates and explains the role of rituals in terms of community formation, stating that:

'Rituals connect local practices and identities to other locations across time and space. They are a form of engagement that can bolster imagination – by cultivating the sense of others doing or having done the same thing – by channelling an investment of the self into standardized activities, discourses, and styles.'¹⁵⁸

3.4.2 Identity shaped or supported by law

As referred to above, Denmark institutionalised the oath for becoming a lawyer by a decree in 1736. This is an example of the law playing an important role in shaping a professional identity. This will be further explored in the next chapter, in which the legal framework for the European identity ideal for lawyers will be described and analysed. The importance and impact of law for establishing and developing identity is emphasised by Schaumburg-Müller, who states:

'The identity in relation to a group – and ethnical group or a people – seems to be an internalized characteristic for the human being, and law plays the role as the rights of this specific community and as a mark for the identity of this community. The integration of

¹⁵⁵ Giddens, *Modernity and Self-identity – Self and Society in the Late Modern Age*, p. 33.

¹⁵⁶ With a decree dated 10 February 1736 it became possible to graduate in law and leave university with an oath promising to promote justice.

¹⁵⁷ Hussey Freeland, *What is a Lawyer?*, p. 439.

¹⁵⁸ Wenger, *Communities of Practice*, p. 183.

this identity constructing aspect, that law is a part of an identity process, is such an important part of the understanding of law that it cannot be omitted.¹⁵⁹

In relation to lawyers' identities, this means that sets of rules, laws, administrative acts, codes of conduct etc. contribute to the personal identities of lawyers. The rules contribute to the shaping of the professional identity and establish an interaction between the actual and the normative. Among its other purposes, having a legal framework for the profession distinguishes lawyers from other professions or lay citizens. A law for lawyers will create images of lawyers, not so much describing what lawyers actually are, but more normatively or prescriptively of what lawyers ought to be. What lawyers 'ought to be', implies norms for behaviour, morals and ethical attitudes where it becomes impossible to totally separate the human being behind the lawyer from their professional role. From this perspective it is relevant to attempt to define the lawyers' identity as presented in the legal sources.

Martha Minow has done work on identities in a legal setting. She has attempted to clarify the complex environment in which the identities of judges and lawyers are formed:

'When lawyers and judges neglect the dynamic negotiations over questions of identity, and treat identity as simply something that exists innately and can be uncovered, they risk producing not only unfortunate results, but also unconvincing reasons for the results. If lawyers and judges treat identity as something discoverable rather than forged or invented, they hide the latitude for choice and struggle over identity.(...) Translation into legal categories and attention by legal authorities transforms the law and lawyers themselves into additional participants in the negotiations over identity. Lawyers and judges need to pay attention to their own contributions to the constraints within which the identities of others are negotiated and assigned.'¹⁶⁰

The legal profession and individual lawyers are governed by laws, including soft law. These are normally known by lawyers and mostly followed. Some behavioural norms are promulgated by the profession as self-regulation. Internalising these rules may improve the understanding of the normative values on which the regulation is based. Teaching identity is not part of the regular university or law school curriculum, nor is it part of the post-graduate training for lawyers. However, creating awareness and developing understanding of identity is important in the context of ethical reasoning, identity development, professional responsibility and decision-making following the rule of law. By connecting identity to professionalism, individual lawyers will be forced, stimulated or invited to reflect on what difference their individual contributions in the legal field will make and how they contribute to the overall perception of justice.¹⁶¹ With this in mind, it is certainly pertinent to connect self-identity to professional work.

¹⁵⁹ Schaumburg-Müller & Vedsted-Hansen (red.), *Ret, individ og kollektiv*, p. 50 (translated).

¹⁶⁰ Minow, *Identities*, p. 16.

¹⁶¹ Martin, *Role, Identity, and Lawyering: Empowering Professional Responsibility*, p. 46.

3.5 Between the self and the profession

In relation to the identity of lawyers, it is relevant to analyse and consider both the 'Who am I?' question and the 'Who are we?' question, as developing a professional identity is an ongoing process in the relations between the self and the group. The group, in this case the legal profession, functions as a kind of sounding board for the individual. An individual will either align their identity with the group or differ from it, signalling either accordance with or distance from the professional norms. The constant interaction between 'Who am I?' and 'Who are we?' can be seen as a reflection of roles and tasks. This interaction supports the development of new competences, of individuals or of the profession, and affects the identities both of individuals who are aligned with the group and individuals who distance themselves from it. This process can be understood within Schön's theory of three steps for the reflective practitioner:¹⁶² reflection, reflection in action and reflection on reflection-in-action. It can also be explained within Giddens's double hermeneutic theoretical perception of identity as constant interpretations by the self.

The emphasis on the 'Who am I?' question is relevant, as the education, training and development of a lawyer is primarily an individual process, and lawyers are not only lawyers as professionals and legal experts, but also as human beings. The 'Who are we?' question is relevant in relation to the profession in order to examine whether the profession has a common identity and intrinsic or substantive characteristics giving it a recognisable profile. These aspects will be further explored in the next chapter, defining the ideal of the European lawyer.

The identity development processes of professionals are significant examples of the constitution of subjectivity in late modernity. Lawyers are individuals but not just individuals; they are professionals who engage in several contexts which influence their identity. They have a common body of knowledge and engage in knowledge production, they are involved in the challenges of their work, and they relate to the firms and people they provide services to. Subjectively, they are constituted by their involvement in professional practice, by belonging to and identifying with the profession. This means that the societal status of the profession and the individual's identification with the identity of a lawyer are interrelated and sometimes the same. Identity is connected to practice in two interrelated ways: as the practice itself, and as a resource that may be invested in being successful in life. Furthermore, the state, the profession and communities should not only be perceived as entities existing 'out there', independent of human actions, but rather as entities which are continuously being produced and reproduced, or constructed and reconstructed by practice. This means that the internal creation of identity influences the external contexts of life and vice versa, not only in manifest actions, but also more importantly as an integral part of day-to-day practices.

Legal scholars who study these developments, such as Kronman, have described how identity has this dual aspect of having both a personal and a professional side. This process includes

¹⁶² Schön, *The Reflective Practitioner: How Professionals Think in Action*, p. 49 f.

making identity-defining choices with far-reaching implications for an individual's whole life and not only for professional life.¹⁶³

3.6 Identity as an individual lifestyle project

According to Giddens, the self is perceived as internally referential, where personal integrity is seen as the achievement of an authentic self. Lawyers might be seen as the embodied mediation between societal tasks and subjective orientation. On this basis, Giddens talks about 'lifestyle', which can be defined as a more or less integrated set of practices which an individual embraces. This lifestyle project is very important to the self-identity of lawyers. In this context, lifestyles are to be understood as:

'routinised practices, the routines incorporated into habits of dress, eating, modes of acting and favoured millieux or encountering others; but the routines followed are reflectivity open to change in the light of the mobile nature of self-identity'.¹⁶⁴

In the relation between lifestyle and work, work strongly conditions life chances and life changes. Giddens is inspired by Weber's typology, which has also inspired Hammerslev in his research about judges. Giddens's concept can be understood in terms of the availability of positioning potential lifestyles which can frame the intensive efforts of lawyers to become lawyers with a specific and more individualised lifestyle.¹⁶⁵

Legal work requires strong involvement from the individual lawyer, not only in terms of expertise and content but also with regard to interpersonal relations in the sphere of legal practice. A lifestyle perspective, like that of Giddens, connects the subjective dynamics of the professional learning process with the learner's practical reality through experience gained during apprenticeship as legitimate peripheral participation. Lave and Wenger take the perspective of the learner, which transcends the systematic didactic thinking of academic disciplines and focuses on the person and identity in learning connected to working life.¹⁶⁶

3.7 Membership of the legal profession

Although Giddens is more occupied with the identity of experts than the identity of professions, it is relevant to understand the structures and logic that have formed the professions. The importance of the traditionally strong professions, such as priests, doctors and lawyers, is diminishing, displaced by the increasing importance of other professions¹⁶⁷ or by groups of experts. To understand the changes to structure and the influence of the legal profession it is useful to look at the findings of research into the development and identities of other professions. This can help identify some sociological characteristics of the legal profession, which will in turn help understanding of the position and strength of obtaining identity as a lawyer within the profession.

¹⁶³ Kronman, *The Lost Lawyer – Failing Ideals of the Legal Profession*, p. 65.

¹⁶⁴ Giddens, *Modernity and Self-identity – Self and Society in the Late Modern Age*, p. 81.

¹⁶⁵ Giddens, *Modernity and Self-identity – Self and Society in the Late Modern Age*, p. 82. See also section 2.4.1 where the notion 'lifestyle' is introduced and clarified.

¹⁶⁶ Lave & Wenger, *Situated Learning – Legitimate peripheral participation*, p. 52.

¹⁶⁷ Eriksen & Jørgensen (eds.), *Professionsidentitet i forandring*, p. 58 f.

In the literature on the professions, including the legal profession, Dingwall's and Lewis's 'The Sociology of the Professions. Lawyers, Doctors and Others' is a leading resource.¹⁶⁸ There has been a debate about the degree to which it is possible to define a profession. As mentioned above Weber, Parsons and Freidson have contributed to the development of classical theories of the professions. To understand the current changes, the starting point taken is Freidson's attempt¹⁶⁹ to elaborate a definition. This is necessary in order to find out whether a profession can continue to exist or develop without major modifications, or whether it is undergoing a process of radical change. Freidson refers to professions as:

'a fairly limited number of occupations which share characteristics of considerably greater specificity than higher education alone, and which are distinctive as separate occupations.'

Furthermore, Freidson states that in order to analyse a profession, a frame for research and parameters must to be set up. Due to the differences between professions in Denmark and professions abroad, it has been relevant to refer to Danish literature that analyses the legal profession when setting these parameters. Hammerslev's studies on the legal profession are certainly relevant¹⁷⁰ combined with Dalberg-Larsen's legal-sociological approach in his analysis of the legal profession.¹⁷¹

On a theoretical basis, it is possible to justify considering only 'practising lawyers' (advocates), as members of the legal profession, as specifically this group of lawyers is characterised by a set of common standards and similarities, such as :

- A mandatory formal education resulting in a university degree from a faculty of law
- A curriculum aimed at a specific job
- Professional standards
- Ethical rules drawn up by the profession
- Control of access to the profession
- Mandatory post-graduate training
- A monopoly of the provision of legal services and/or of representing people in court

This theoretical functional approach must be supplemented by the process of socialisation and the interactions between members of the profession. These aspects are included in the theoretical social learning theories of Lave, Wenger and Schön. In the discussions of the conditions for entering a profession, one must be aware that sociologists debate the development from a

¹⁶⁸ Dingwall & Lewis, *The Sociology of the Professions. Lawyers, Doctors and Others*.

¹⁶⁹ Freidson, 'The Theory of Professions: State of the Art' in Dingwall & Lewis, *The Sociology of the Professions. Lawyers, Doctors and Others*, p. 23.

¹⁷⁰ Hammerslev, *Studies of the Legal Profession*, p. 325 f.

¹⁷¹ Dalberg-Larsen, *Lovene og livet*, p. 96 f.

classical to a post-modern perception of professions.¹⁷² In the following, the conditions for membership of the legal profession relate to the reality for developing professional identity today.

3.7.1 A mandatory, formal, legal, academic education

Whether pursuing a career as a practising lawyer, judge, civil servant or other professional with a legal background, until recently it was necessary to obtain the same university degree from a faculty of law. The first condition for joining the legal profession was that all members should have the same formal education, with a university degree from a faculty of law.

Today, university studies are much more diverse, offering a wide range of elective courses. As a result of the Bologna process for ensuring comparability in the standards and quality of higher education qualifications between European countries, and with Erasmus exchange programmes, students have the possibility of adding an international dimension to their law studies, leaving university with law degrees obtained by following very different curriculums. The efforts of the EU to promote mutual recognition of university degrees leads to even more diversity in the curriculums followed and the legal backgrounds of new lawyers. Furthermore, it is possible to substitute half a year of university studies with work experience, which can be either at national or international level. These developments lead to greater differences between lawyers who, despite formally having the same degree, leave university with very different knowledge and skills, based on widely differing curriculums.

3.7.2 A curriculum aiming at a specific job

In former times, a three years apprenticeship in a law firm normally led to a permanent job as a lawyer, either in the firm where the apprenticeship was served or in another firm. The financial pressures and working conditions in law firms have meant that today many young lawyers treat their apprenticeship as a post-graduate education which can lead to many other jobs or careers, either in the public or private sectors. Even though the profession has considerable influence on recruitment, as more and more lawyers leave the profession its control over a growing group of people with law degrees is diminishing. This issue will be further investigated in the empirical work of this study.

Historically, lawyers were educated as generalists and their legal practices covered many different legal topics. With the development of the sector, law firms are establishing profiles in specific fields of expertise and specialising in certain areas of law, and lawyers are thus becoming more narrowly specialised. As a consequence, more specialised legal education is demanded, and this in turn will influence further individualisation and specialisation and will fragment the profession. It is even possible to own a law firm without having a law degree,¹⁷³ as the profession recognises that there is a need for new competences and that other experts must have the same career possibilities as lawyers to work in a law firm.

¹⁷² Dahl, 'Fra en klassisk til en (post?)moderne opfattelse af professioner' in Eriksen & Jørgensen (eds.), *Professionsidentitet i forandring*, p. 36 f.

¹⁷³ This is regulated in a separate administrative regulation: Bekendtgørelse nr. 1426 af 11 december 2007 om pligtmæssig deltagelse for ejere af et advokatselskab, der ikke er advokater, i en prøve i de regler, der er af særlig betydning for advokaterhvervet (partnerprøven).

3.7.3 Professional standards

In Chapter 4, which examines the regulatory environment for the European identity ideal for lawyers, there is a reference to the Danish Administration of Justice Act (*Retsplejeloven*). This Act contains all the rules specifically applicable to lawyers, their profession and their professional organisations. The Act is supplemented with Executive Orders and rules that are implemented and upheld by the profession. Apart from this, the legal profession imposes professional standards in specific areas, such as lawyers' and law firms branding, advertising and professional communications to the public or their clients. Lawyers increasingly like to give their professional communications and websites a personal touch, and their corporate communication is inspired by marketing and advertising techniques. Until a few years ago advertising was prohibited, but more recently the profession has recognised the need for more personal and commercial branding. These developments make it even more difficult to maintain a common image of the legal profession.

For a long time the Danish Bar and Law Society has been the sole representative of lawyers in Denmark. This organisation still controls the Disciplinary Board for lawyers, dealing with complaints about work or fees, and it is still mandatory for practising lawyers to be members of the Danish Bar and Law Society.¹⁷⁴ However, in January 2008 the Association of Danish Law Firms (*Danske Advokater*) was established to promote the interests of Danish law firms, their owners and employees.¹⁷⁵ The Association's primary goal is to represent its members and promote the practice of law and the use of lawyers in society. The Association has no public tasks or responsibilities like the Danish Bar and Law Society, as it serves as a special interest organisation. However there has been friction between the two organisations over the right to represent Danish lawyers in national or international settings, over legal education and on taking part in public consultations on legislation concerning the legal profession. Such fragmentation of the professional organisation is indicative of an era in which institutions are losing their former powers and becoming less stable.

Lawyers have traditionally been a reasonably homogeneous group with common norms for interpersonal relations and for their conduct both inside and outside the courts. Internationally some of these norms will be challenged, for example with questioning of the need to wear a wig, a robe or some special gown in court. At the same time, unwritten rules of conduct are changing and new sub-groups of lawyers are being created, as analysed in Chapter 8.

3.7.4 Ethical rules adopted by the profession

Traditionally it has been the role of the lawyers' professional body to develop and adopt the ethical rules for lawyers. In Denmark the Code of Conduct has been regularly modified and brought up to date; the latest version is from October 2011. In this latest version, the language has been modernised and more attention has been paid to lawyer-client relations and conflicts

¹⁷⁴ www.advokatsamfundet.dk (last accessed 9 August 2013).

¹⁷⁵ www.danskeadvokater.dk (last accessed 9 August 2013).

of interests, and there is less focus on obligations towards the state, relations to justice or the judiciary and the moral responsibilities of lawyers.¹⁷⁶

The new version of the Danish Code of Conduct also makes a direct link between the European ethical rules for lawyers and the national rules.¹⁷⁷ It contains a provision stating that: 'The Code of Conduct for Lawyers in the European Union adopted by the Council of Bars and Law Societies in Europe (CCBE) shall likewise apply to the cross-border activities of lawyers within the EU'.

It can be questioned whether a profession as large and varied as the legal professions of the EU's 28 Member States can be framed within a unified regulatory structure. However, the CCBE now has a strong influence on the formulation of national ethical rules for lawyers.

3.7.5 Control of recruitment

In some European countries, for instance Spain, it is possible to set up a law firm immediately after obtaining a law degree from a university. In most other European countries it is only possible to practice as a lawyer after training in a law firm for three years. In Denmark private firms can choose the candidates they find best suited and recruit them for training and employment. The Ministry of Justice must approve the legal qualifications and good public reputation of the candidate, which must be considered a formality as the real selection is made by the law firm. Recruitment can be based on social background, personal behaviour, the expertise or specialisation acquired, the candidate's ideological or political profile or the grades obtained in law studies at university. Larger firms employ summer trainees or make a number of student jobs available, which means that before entering the profession a student or trainee has already gone through a process of socialisation within the law firm.

3.7.6 Mandatory post-graduate training

A fundamental characteristic of a profession is its focus on training and continuing education. The aim is to help to develop higher skills levels of its members, and at the same time it is a tool for influencing admission to the profession and promotion of its members. The Danish Bar and Law Society and the Association of Danish Law Firms have paid increasing attention to continuing professional education. The CCBE itself is also strongly committed to supporting and developing mandatory training.¹⁷⁸ Already in 1994, regulated mandatory post-graduate training was suggested by the Danish Bar and Law Society. This training programme is now formally in force,¹⁷⁹ though many lawyers still regard the mandatory programme as more of a limiting factor than an aid to competence. Given the very diverse needs of the members, due to their specialisations, it is difficult to offer relevant training for all lawyers.

¹⁷⁶ The Danish Bar and Law Society, *Code of Conduct for the Danish Bar and Law Society*, see www.advokatsamfundet.dk (last accessed 9 August 2013).

¹⁷⁷ CCBE, *Charter of Core Principles of the European Legal Profession and Code of Conduct for European Lawyers*.

¹⁷⁸ CCBE, *Recommendation on Training Outcomes for European Lawyers 2007*.

¹⁷⁹ Bekg. 1474 af 12 december 2007 og bekg. 820 af 25 juni 2010 om løbende obligatorisk efteruddannelse for advokater og advokatfuldmægtige.

3.7.7 Monopoly

Formerly, lawyers were the exclusive providers of legal services. This exclusivity no longer applies to a number of services, such as real estate conveyancing which stopped being a task reserved to lawyers in 1997. Under national and EU competition law, and due to deregulation, the area over which lawyers have a monopoly has become smaller and smaller. Lawyers still have the sole right to represent clients in court, and there are still important areas where traditional legal competence is required, such as administration and probate and bankruptcy proceedings. However, the general trend is for lawyers to be under pressure from other professions or experts, while their exclusive rights, monopolies and privileges are diminishing. In particular, law firms compete with estate agents, banks, mortgage lenders, insurance companies, mediators and family counsellors.

3.7.8 Are the theoretical conditions for being a profession still fulfilled?

After relating the basic characteristics of a profession to the current status of the legal profession, it is relevant to ask how far the legal profession still fulfils these conditions.

The requirement for a lawyer to have a formal education with a university law degree still applies but as observed in section 3.7.2, the contents of curriculums have become more diverse with flexible options for students, including international exchange programmes and a wide range of elective, specialised courses. Today, two young lawyers in the same law firm can have followed very different curriculums.

Training as an apprentice is still aimed at a specific job (advocate), but in reality many leave the profession shortly after qualifying or after a few years of practice for a job outside the traditional legal profession. On the other hand, it is now possible for a non-lawyer to become a partner in a law firm. Both practice specialisation and the possibility for non-lawyers to be partners in law firms will make lawyers more diverse, affecting the uniformity of the profession. The possibility of becoming the owner of a law firm with a background other than a law degree¹⁸⁰ shows that it is possible to be active and even influential in the legal profession without a law degree. So far, few have used this possibility.

Professional standards are still developed and applied within the legal profession, but they are often supplemented or replaced by the norms and standards of sub-groups of lawyers, such as tax lawyers or mediators. The ethical rules of the profession still exist, but sub-groups or groups associated with specific areas of law or expertise have started developing their own ethical rules. Many lawyers have connections with experts from other professions in communities of practice, and have set their own professional standards or ethical guidelines. Professional and corporate communication by lawyers and law firms has appeared in new forms of advertising and marketing, and this too influences professional standards.

¹⁸⁰ The Danish legal Act, BEK nr 1426, 11 December 2007, is called: *Bekendtgørelse om pligtmæssig deltagelse for ejere af et advokatselskab, der ikke er advokater, i en prøve i de regler, der er af særlig betydning for advokaterhvervet (partnerprøven)*.

Control of recruitment is still effective, but the law firms play an increasing role in the selection and recruitment of lawyers, not the profession as such. Ensuring competences through mandatory post-graduate training and continuing professional education, also within a European framework, is essential for the profession and still receives a lot of attention. This is an effective way to control the admission of new members to the profession. As a result, paralegals or experts in other fields are excluded from entering the legal profession.

Lawyers' monopolies and privileges have become less important, but the profession still maintains considerable status, influence and power.

It is concluded that the legal profession may not be able to continue as a homogeneous strong influential group as before, but this creates opportunities for strong identities to be developed by lawyers, challenging the professional framework and making it possible to develop personal potential in a new setting.

3.8 Developing identity as a social learning process

With the theory of structuration in mind, the existence and development of a professional society such as the legal profession depends on subjective processes of learning and the identities of the individual lawyers. In sociological discussions on professional identity, it is presumed that there is a homogenous, legitimate knowledge base and a useful function. The development of identity as a lawyer can be seen as materialisation as a professional. This means that the lawyer existed as a person before being transformed into a member of the legal profession, but they did not exist as a lawyer with all a lawyer's abilities and responsibilities. As a layperson, they could not represent others in litigation and thus materialise as a lawyer in court.¹⁸¹

The subjective condition for professionalisation is that a group of people should identify with a knowledge base and function at a high level, take responsibility, and develop their own practice and lifestyle where identity relates to moral and ethical questions and to a functional system. Lawyers only become a profession as a result of self-perception and lifestyle, which includes membership of a group.

Dealing with moral questions requires emotional and spiritual competences, which have not been part of legal education, training and thinking. 'Emotional competence' has been defined by Goleman as: 'a learned capability based on emotional intelligence that results in outstanding performance at work'.¹⁸² Dismissing emotions as irrelevant to legal thinking and practice will promote a neurological impossibility and ignore the emotional values of lawyers that create meaning in their lives. The neglect of emotions hinders the ability of lawyers to develop a solid, profound or genuine professional identity. The Carnegie Report states:

¹⁸¹ Hussey Freeland, *What is a Lawyer?*, p. 439.

¹⁸² Goleman, *An Emotional Intelligence-Based Theory of Performance*, pp. 27-28.

'Ethics rightly includes not just understanding and practising a chosen identity and behavior but, very importantly, a grasp of the social contexts and cultural expectations that shape practice and careers in the law.'¹⁸³

The inconvenient truth is that effective lawyering requires emotional competence,¹⁸⁴ because emotional competence will help develop essential lawyering skills such as good judgment, sound perspective, and effective relational skills. These important qualities of lawyering demand at least a certain level of emotional competence across four basic domains:

- 1) Self-Awareness (including emotional awareness);
- 2) Self-Management (including control of one's emotions);
- 3) Social Awareness (including empathy); and
- 4) Relationship Management (including the ability to persuade and influence others, and to manage conflicts effectively).

Since emotions give meaning to abstract thoughts, they can serve as a meaningful moral tool for making lawyers reflect on their values, and help them find their own way in line with their goals, needs or interests. The need for emotional awareness is contrary to the traditional perception of lawyers.

In social learning terms, professional identity development can be understood as a subjective effort of lifelong learning and identification.

3.8.1 Becoming a lawyer

While Giddens's theory can explain the close interaction between the individual and society, it is still necessary to recognise the social learning process by which lawyers become lawyers and learn to think like lawyers. According to social learning theory, people learn within a social context. The social learning theoretical approach aims to explain how to integrate 'Who to be' with 'What to do' as a lawyer.

One is not born a lawyer, and social learning theory can help understand how a lawyer's identity is developed. From this perspective, identity is seen as relational and connected with the interaction between the individual and their reference group, which in this case is the lawyer and the profession with common ethical and behavioural norms grounded in a European legal framework.

Professional identity research, exploring how to become a lawyer, must include considerations of the relationship between the agent and the knowledge. In order to understand the subjective elements of professional identity, it is relevant to ask: does knowledge form the lawyer or does the lawyers possess common professional knowledge and is only thereby constituted as a

¹⁸³ Sullivan et al., *Educating Lawyers: Preparation for the Profession of Law*, p. 31.

¹⁸⁴ Wellford Slocum, *An Inconvenient Truth: The Need to Educate Emotionally Competent Lawyers*.

lawyer? Here too, structuration theory can clarify that the lawyer is a creation of the interaction between the individual and the knowledge. For example, once a lawyer has obtained comprehensive knowledge of tax law and tax administration, the decision to become either a legal adviser for the state tax administration or a business adviser specialising in tax fraud is connected to the lawyer's personal lifestyle choice.

The Carnegie Report explicitly focuses on how 'to initiate novice practitioners to think, to perform, and to conduct themselves (that is, to act morally and ethically) like professionals'.¹⁸⁵

Training and educational issues relate Giddens to Donald A. Schön, Etienne Wenger and Jean Lave, who played a major role in setting up a theoretical framework for the training and development of identity in professional communities. Also several legal scholars, like Charlotte Alexander,¹⁸⁶ Neil Hamilton¹⁸⁷ and Larry Krieger, have studied the process of development from human being to lawyer.

Becoming a lawyer is a long learning process. It not only includes theoretical learning but also learning as doing, reflected in the lawyer's three years of training after finishing university. Only through this training and practice, does a lawyer acquire the necessary experience to practice law. This basic assumption differs between the European countries; for example in Spain it is possible to set up a law firm immediately after obtaining a law degree.

When Wenger talks about the 'encompassing process of being active participants in the practices of social communities and constructing identities in relation to these communities',¹⁸⁸ the components of this learning theory, where 'identity' means learning as becoming somebody, consist of:

- practice, which means learning as doing;
- community, which means learning as belonging; and
- meaning, which means learning as experience.

The legal profession possesses these characteristics of a process developing identity, which implies the transformative capacity. Where Giddens connect this to structuration, Wenger talks about cultivation communities of practice. Organising or re-organising a community, like a law firm, provide a welcome 'home for identity', where practitioners can connect across organisational and geographical borders and focus professional development.¹⁸⁹

¹⁸⁵ Sullivan et al., *Educating Lawyers: Preparation for the Profession of Law*, p. 22.

¹⁸⁶ Alexander, *Learning to Be Lawyers: Professional Identity and the Law School Curriculum*.

¹⁸⁷ Hamilton, *Assessing Professionalism: Measuring Progress in the Formation of an Ethical Professional Identity*.

¹⁸⁸ Wenger, *Communities of Practice*, p. 4.

¹⁸⁹ Wenger, McDermott & Snyder, *Cultivating Communities of Practice*, p. 20.

In Giddens's terms, identity development or individual transition involves considering how learning creates 'Who to be' in practice, community and meaning:

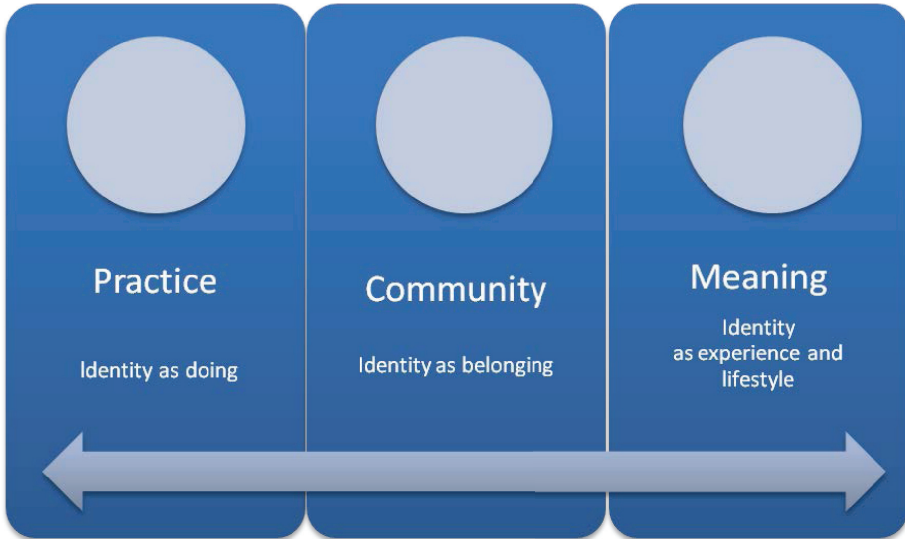


Figure 3-1. Social learning process

With the modern diversity it is necessary to find out what constitutes a lawyer,¹⁹⁰ as well as finding out whether some lawyers today have developed an identity which no longer accords with the ideal or characteristics of a European lawyer.

3.8.2 Apprenticeship and learning

According to the theory of structuration, becoming a lawyer in the sense of developing identity takes place in the interaction between the individual and the profession. For young lawyers, this training still takes the form of apprenticeship, with elements of both formal and informal learning. In *Educating Lawyers*, the Carnegie Foundation identified three forms of apprenticeship necessary for entry into and advancement in professions:

- (1) cognitive or intellectual apprenticeship in the profession's unique analytical skills applied to the profession's doctrinal knowledge;
- (2) practical apprenticeship in the other skills necessary for professional life; and
- (3) apprenticeship in professional identity formation.¹⁹¹

In this study, the third form of apprenticeship is especially important and can be made operational by applying Wenger's thought. He states: 'Identity: a way of talking about how learning

¹⁹⁰ Hussey Freeland, *What is a Lawyer? A Reconstruction of the Lawyer as an Officer of the Court*.

¹⁹¹ Sullivan et al., *Educating Lawyers: Preparation for the Profession of Law*, p. 28.

changes who we are and creates personal histories of becoming in the context of our communities.¹⁹²

The theory of learning, especially concerning apprenticeship, has been developed by Jean Lave and Etienne Wenger in the concept of legitimate peripheral participation, where the master/pupil relationship is developed through changing participation and identity transformation in a community of practice.¹⁹³ This theoretical approach applies to practising lawyers. Lave and Wenger state that learning is conceived as a trajectory in which learners move from *legitimate peripheral participant* to *core participant* in the community of practice. Lawyers should appreciate that they are entering the legal profession's community of practice and that all aspects of their conduct relevant to professionalism – not only professional identity and academic integrity, but matters such as time management, teamwork, relationships with peers and staff – relate to this transition into a legal professional community, and a professional community subject to radical change.

3.9 Lawyers in communities of practice

According to Wenger's theoretical framework, the focus is participation. For individuals this means that learning involves engaging in and contributing to the practices of their communities. For the communities, it means confirming or redefining practice and ensuring that the specific community will have new generations of members.

'Practice' is a term which can have different meanings in different scientific fields. In relation to law firms and the development of identity, 'practice' refers to the social structure that reflects shared learning and common norms. This is always a social practice. According to Wenger it includes:

'the language, tools, documents, images, symbols, well-defined roles, specified criteria, codified procedures, regulations, and contracts that various practices made explicit for various purposes. But it also includes all implicit relations, tacit conventions, subtle cues, on tool rules of thumb, recognizable intuitions, specific perceptions, well-tuned sensitivities, embodied understandings, underlying assumptions and shared world views. Most of these may never be articulated, yet they are unmistakable signs of membership in communities of practice and are crucial to the success of the enterprises.'¹⁹⁴

Lawyers, like others, belong to several communities of practice, but the communities one belongs to will change over a lifetime. Communities of practice are integrated in daily life, and can be formal or informal. Family life and leisure-time often take place in communities of practice, and working life takes place in another community of practice. If the legal profession is understood as a community of practice, certain formal conditions must be fulfilled to become an accepted member of the community, but it has informal sides where members of the formal community interact in various informal ways.

¹⁹² Wenger, *Communities of Practice*, p. 5.

¹⁹³ Lave & Wenger, *Situated Learning – Legitimate peripheral participation*.

¹⁹⁴ Wenger, *Communities of Practice*, p. 47.

Inspired by Wenger, the theories of this study of identity development can be framed in the following model:

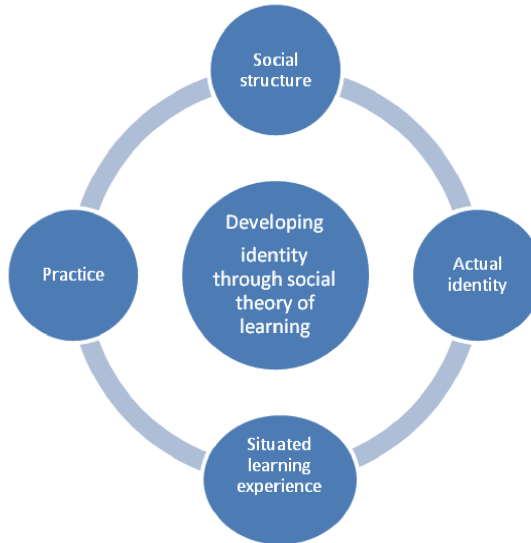


Figure 3-2. Meeting point of Giddens and Wenger

In this figure, Giddens's theory on structuration and identity development has circular connections, while Wenger's theory of learning connects horizontally and vertically.

Becoming a lawyer ultimately means obtaining membership of the professional organisation and submitting to its legal and ethical rules.¹⁹⁵

The legal profession does not only develop identity in the interaction between the individual and the profession. A common professional identity is established in the constellation of interconnected practices in Europe.

Lawyers in the same law firm constitute a community of practice, and all Danish lawyers who are members of the professional organisation form another community of practice or 'constellation'. Each law firm, with its own practice and specific focus, contributes to the constitution of the profession as an overall constellation. Using the term 'constellation' rather than 'profession' about a new community of practice is linked to the fact that the profession has become too broad and too diverse to engage all lawyers in the same way and with the same commitment as in many local communities of practice.

¹⁹⁵ Lavesen & Økjær Jørgensen, *Advokatetik – ret og rammer*.

Wenger states that both the medical profession and the legal profession have the characteristics of a 'constellation', which include:¹⁹⁶

- Sharing historical roots
- Having related enterprises
- Serving a cause or belonging to an institution
- Facing similar conditions
- Having members in common
- Sharing artefacts (the European lawyer)
- Having geographical relations of proximity or interaction
- Having overlapping styles or discourses
- Competing for the same resources

All these characteristics are shared in the profession of practising lawyers, of course with some differences related to a law firm's size, area of business, special competences etc., but enough to see that the similarities and interdependence will support an identity development in the relation between the lawyer, the firm and the profession.

Within the multi-layered legal order in Europe, it can be debated whether a new community of practice, consisting of all legal practitioners in Europe, constitutes a supranational community of practice or whether some lawyers make cross-border communities of practice, while the international harmonisation of bars in Europe is more likely to constitute a constellation.

If the CCBE is perceived as a constellation rather than as a community of practice, the continuity of the constellation can only be understood in terms of interactions between practices, in this case national law firms held together by mandatory membership of the national bar and law society. In the interactions, which will include cross-border interactions, individual trajectories will make boundary practices which overlap or differ. Elements of style can coalesce or spread as people copy, borrow, imitate, import, adapt and reinterpret ways of behaving and codes of conduct in the process of constructing an identity.¹⁹⁷ Law firms connect internationally and form alliances and perspectives for acting in a competitive market in the EU. In this process, elements of style can both be imported and exported and influencing the identity development of all the lawyers involved.

3.10 Cyberspace identity

In the contemporary era of social media and virtual organisation, lawyers increasingly materialise themselves by means of blogs, images, social media profiles and tweets. As they leverage digital material to present themselves in multiple settings, they increasingly become 'cyborgs'

¹⁹⁶ Wenger, *Communities of Practice*, pp. 127-129.

¹⁹⁷ Wenger, *Communities of Practice*, p. 129.

(cybernetic organisms). Giddens states: 'In conditions of modernity, in sum, the media do not mirror realities but in some part form them'.¹⁹⁸

Lawyers start using the internet to confirm that 'I am like the others' or 'I am absolutely not like the others'. Becoming a lawyer is a form of performativity, the unconscious repetition of norms, which can be supported in cyberspace.

3.10.1 Agency and technology

This part concerns the performativity aspect of identity in order to gain insight into the practices that users of virtual worlds (a particular kind of social media technology) rely on to perform a virtual identity. How is digital material used to perform a chosen identity, which is a virtual embodiment and materialisation of identity? Lawyers (and other ICT users) have an identity not only in their physical bodies but also in their virtual bodies. The distinction between the physical and the virtual identities can diminish and lead to there being no distinction. The distinction is between:

1. A representational view of online identity – to represent your 'self', the 'Who am I?' and 'What am I like?', and
2. A performativity or socio-materiality view – created by reflections that can be understood in the light of Giddens. An earlier separation between technology and the social world has started to narrow.

Agency's relation to technology is entwined in practice. People do make a separation between technology and social life; it is not a fixed, but a relative relation to be reflected upon. A mobile telephone is an extension of the self when it is in the hand and in use. When it cannot be found and is searched for, it is separated and is only a technical device. Some lawyers personalise their PC screens, mobile telephone covers etc. and show their new electronic 'toys' to each other and to clients etc., in order to gain status. Other lawyers do the opposite, refusing to use any technical tools other than the Dictaphone.

The term 'cyborg' is often applied to an organism whose abilities are enhanced by technology, and whose bodies and senses are extended through technology. They have to manage their identity in a liminal zone where the boundaries between actual and virtual reality and between physical and digital identities are blurred.

Even though users increasingly experience their identities as socio-material entanglements, most research into online identity draws *a priori* distinctions between the real and the virtual and between the physically embodied user and their technological representation. Looking at how law firms have started to create their lawyers' identities on their websites, it seems relevant to address the performance of cyborgian identity. Inspiration for this comes from Ulrike Schultze in combination with Suskin.

¹⁹⁸ Giddens, *Modernity and Self-identity – Self and Society in the Late Modern Age*, p. 27.

The *We, the Web Kids* manifesto was originally written in Polish by Piotr Czerski, and has been published in a number of translations. Some Web Kids will doubtless become or have already become lawyers, with an identity intertwined with high-tech performance. The English translation of the manifesto by Marta Szreder¹⁹⁹ gives the following self-definition of those Web Kids:

'We, the web kids'.

'The Internet to us is not something external to reality but a part of it: an invisible yet constantly present layer intertwined with the physical environment. We do not use the Internet, we live on the Internet and along it. If we were to tell our bildungsroman to you, the analog, we could say there was a natural Internet aspect to every single experience that has shaped us. We made friends and enemies online, we prepared cribs for tests online, we planned parties and studying sessions online, we fell in love and broke up online. The Web to us is not a technology which we had to learn and which we managed to get a grip of. The Web is a process, happening continuously and continuously transforming before our eyes; with us and through us.'

Scholars like Deborah Rhode and Richard Suskind²⁰⁰ focus on the impact on identity²⁰¹ and how ICT changes working conditions. This aspect is included in the empirical study.

3.10.2 Developing identity in virtual bodies

Identity not only subsists in physical bodies and souls, the inner self, but also in virtual bodies. Both individual lawyers and firms/the profession increasingly materialise their identities in multiple settings using digital resources. This is seen in websites, e-mails, blogs, tweets, social media profiles (avatars) etc.

Together with Giddens, Schultze's discussion of ICT developed and ICT supported identity can be a basis for a new understanding of the development of lawyers' identities in private and professional life.²⁰² Schultze has studied how (cyborgian) identity is performed in virtual worlds. This work helps understanding of the role of digital material in constructing identity for lawyers.

Traditionally, identity questions to the self are: 'Who am I?' and 'What can I do?'. When working via the internet, lawyers tend to create a cyborgian identity, where the questions of who they are and what they can do are increasingly entangled with technology.

¹⁹⁹ WEB kids manifesto, www.techdirt.com/articles/20120229/04124217912/we-web-kids-manifesto-anti-acta-generation.shtml (last accessed 26 August 2013).

²⁰⁰ Suskind, *Tomorrow's Lawyers*, p. 144.

²⁰¹ Rhode, *In the Interests of Justice – Reforming the Legal Profession*, p. 29.

²⁰² Schulte's work develops a socio-material understanding of identity in increasingly technology mediated reality can be seen at www.cox.smu.edu <http://liferay.cox.smu.edu/web/ulrike-schultze>. Ulrike Schultze PhD is Associate Professor in Information Technology and Operations Management. Her research explores the impact of information technology on work practices. While her initial research focused on knowledge work and knowledge management technology, her more recent research projects are in the area of Internet-based technologies and their implications for customer co- and peer-production. As part of this research program on digital innovation, she is exploring the use of "synthetic worlds" (online games and virtual reality environments) as media for organisational communication.

Are lawyers becoming cyborgs in how they construct identities in cyberspace where the distinction between reality and the virtual is blurred? Does it mean that, by exposing competences and roles, identity is extended by technology? The understanding of cyborgian identities for professional lawyers and the material nature of virtual environments is recent. Normally, online identity is regarded as disembodied and associated with the immaterial, nevertheless it affects identity, and how and what lawyers expose virtually.

Lawyers, like everyone else, are recognisable by what they say and what they do. A major question is whether the cyber starting point is *representative*, exposing identity on the internet as a kind of business card, or whether it is *performative*, creating a new identity. In other words, this is the question of being a lawyer or doing a lawyer. Giddens's thoughts on structuration and the double hermeneutic view can be related to the reflection between the real life figure and the web-exposed self. These two will be in a constant dialogue and the question is whether they will be so entangled that they will fully overlap and create a cyborg in which professional roles and private roles are blurred.

Changes that affect lawyers include:

- digital reputation becomes the prevailing form of personal reputation, with new characteristics;
- traditional reputational networks have been superseded by online networks;
- therefore, the ways in which individuals can establish, maintain and defend reputations are different in the new environment; and
- many of the traditional social functions of personal reputation have been challenged by the development of digital reputation.²⁰³

In the interaction between identity and reputation, Zhao understands reputation as being a social-moral judgment of the person based on the facts that are considered relevant by a community; such facts include personal acts and characteristics. Personal reputation exists in complex social networks, has certain characteristics and performs certain social functions. The openness, accessibility and unprecedented liberty of the cyber world have substantially changed many aspects of personal reputation. A lawyer often has a reputation among people he knows nothing about.

Without online information, a law firm or lawyer has no public identity, which is a clear indication of their marginalised social status in general. A proper digital identity or reputation seems vital for individual success, and online social networks go beyond geographical and chronological limits (Giddens). Presenting large amounts of personal data online benefits those seeking information and will affect the professional reputation of a lawyer. Digital reputation becomes the prevailing form of reputation, and online social networks are an unavoidable part of social

²⁰³ Zhao, *An Analytical Note: How the Internet Has Changed Our Personal Reputation*, p. 39.

life. This has fundamentally changed the nature of lawyers' personal reputations, with considerable consequences for identity.²⁰⁴

3.11 Model analysis based on structuration theory

Data will be analysed within the model of structuration theory developed by Giddens. His work is very broad and open to interpretation and can include the structure of the three levels of society, the profession and the individual, which is used in Chapter 4 to identify the artefact of the European identity ideal based on legal sources.

The same structure is retained throughout the dissertation, but in Chapter 5 it is combined with a thematic analysis of data on learning to become a lawyer, the lawyer's lifestyle, agency, meaning and belonging, and transformative capacity to develop sustainable lawyering. The thematic analysis makes it possible to go deeper into the results of focus groups and qualitative interviews for analysing identity in practice.

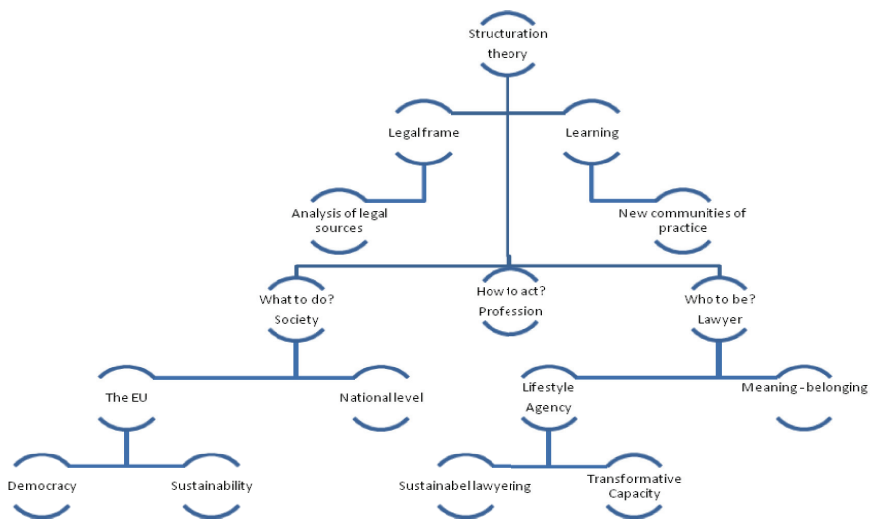


Figure 3-3 Model of analysis

²⁰⁴ Zhao, *An Analytical Note: How the Internet Has Changed Our Personal Reputation*, p. 45.

3.12 Reflections and sub-conclusion

This chapter sets out the theoretical framework for the analysis of the multi-layered identity (identities) of lawyers and a theoretical understanding of how identity can be conceptualised.

On the question of a European identity for lawyers, there is an internal EU perspective and an external global perspective. The internal dimension can be seen as citizenship of an 'imagined community'. This refers to feelings of belonging to the European Union and creates the foundation for a collective European identity.²⁰⁵ The European legal framework creates an identity which can either replace or supplement the national identity of a lawyer.

Identity includes the question of how job identity relates to the legal culture and to personal identity choices, including emotional and lifestyle choices. There is a question of whether identity is chosen or assigned. The analysis in this chapter leads to the conclusion that identity is more than self-image. This confirms the dynamic process between the individual and their surroundings in identity development. As seen in section 3.6, the choices made have implications for the whole life and not just for professional identity. Legal scholars like Kronman indicate that these choices are not made consciously, but are nevertheless fundamental decisions.²⁰⁶

The development of identity as a lawyer takes place in an increasingly independent and individual dynamic context.²⁰⁷ Constituting a professional identity is a subjective process which includes identification with the norms of a profession or a professional group of experts. Unlike natural scientists, sociologists (and lawyers) have to interpret a social world which has already been interpreted by the agents that inhabit it. This interpretative process also takes place in the interaction between the individual lawyer and the profession both nationally and internationally, and it relates to civil society including the demands of clients. The lawyer is formed and their identity is developed in the interaction between the individual and the profession. The profession has rituals and routines which control the recruitment of new lawyers, following the tradition of a strong profession. Forming a profession is itself a social practice.

'Social practice' is Giddens's principal unit of investigation with a structural and agency component, a duality of structure. The structural environment will constrain individual behaviour and at the same time make space. When Giddens talks about the importance of power, this refers directly to the actions of every person who has a transformative capacity to change the social and material world. Thus the empirical work of this dissertation includes reflections on individuals finding new ways of lawyering.

The theory of structuration explains that the individual is competent and reflecting. This means that the individual can make choices to act in one way or another. Not all members of a society will have the level of Giddens's expectations of capability. Nevertheless, the lawyers who are the subject of this thesis have all been capable of gaining a university degree and can be con-

²⁰⁵ Lerch, *European Identity in International Society*, pp. 5-6.

²⁰⁶ Kronman, *The Lost Lawyer – Failing Ideals of the Legal Profession*, p. 65 f.

²⁰⁷ Alexander, *Learning to Be Lawyers: Professional Identity and the Law School Curriculum*.

sidered to fulfil the conditions for being competent and reflexive as stated in Chapter 2. This implies that lawyers fulfil the condition for having transformative capacities.

A social learning perspective of identity development indicates that lawyers can be defined as 'knowledge workers'. Over a long period their professional knowledge has been internalised and includes ethical rules, moral values and ethical behaviour. On this basis it is difficult to distinguish between professional and personal identities. The theoretical approach of social learning aims to explain how lawyers integrate 'Who to be' with 'What to do'. Acquiring an identity as a lawyer consists of: *practice*, which means learning as doing; *community*, which means learning as belonging; and *meaning*, which refers to learning as experience. Learning theory supplements the understanding of individual transition in the terms of Giddens, and this implies considering how learning creates 'Who to be'.

Hitherto, identity has been related to the lawyer as a physical person, but it must be considered whether performance in cyberspace extends or transforms a lawyer's identity, and whether some lawyering will be replaced by interactive ICT solutions. Giddens does not explicitly mention cyberspace, but talks about self-identity in modern social life, which includes the social media, as lawyers pay increasing attention to their online image and its creation.

4 The European identity ideal (artefact) for lawyers

The word ‘profession’ comes from the Latin *proficere* which means to advance, to make progress, to help and contribute, to be useful. In the European tradition a ‘profession’ refers to a group of persons who share loyalty and commitment to a set of values or ideals. From this perspective, it will be examined whether there is a common identity ideal for European lawyers that can be depicted within the European legal order. The analysis will be grounded in legal methods, using a traditional legal dogmatic approach in combination with a sociological approach, based on the structuration theory of Anthony Giddens. The combination of sociological and legal approaches will follow internal-external perspectives that have been applied in legal sociology in Denmark, for example in a study on Danish judges.²⁰⁸

The decision to use legal sources to define the European identity ideal for lawyers has been based on the idea of looking at lawyers from an *internal perspective* in combination with an *external perspective*; internal in the sense of the legal framework as a closed system with its own logic, and external in terms of using sociological theory to situate and contextualise the legal reality in a broader context. This chapter contains the internal legal perspective and Chapters 5 and 6 contain the empirical sociological approach and an analysis based on the theoretical choices.

The starting point of the analysis is the observation that the values of the legal profession are codified in a European legal identity ideal linked to the national bar and law societies. Studying documents and making interpretations of valid legal sources is related to the societal level (‘What to do’), the professional level (‘How to act’) and the individual level (‘Who to be’). The question of ‘Who to be’ is closely connected to aspects of development and learning and the relationship between the individual and the profession – in Giddens’s terms: the structure-agent relation. According to Giddens, individuals will shape their identity and lifestyle in relation to societal changes and will influence and set conditions for the institutions that influence their daily lives.²⁰⁹ This means that a stable lawyers’ identity, embedded in a legal framework, can be changed by the members of the profession or by the professional organisation. There is a relationship between the perception of law as a moral idea and the constructed identity both of the profession and of the individual lawyer.

The Carnegie Foundation’s research into lawyers’ education has questioned professional identity as follows:

‘Who am I as a member of this profession? (...) What place do ethical-social values have in my core sense of professional identity?’²¹⁰

The legal documentation used for this project has been selected primarily from international regulations adopted through democratic processes by the UN, the Council of Europe, the EU

²⁰⁸ Hammerslev, *Danish Judges in the 20th Century*.

²⁰⁹ Kaspersen, *Anthony Giddens*, p. 64.

²¹⁰ Sullivan et al., *Educating Lawyers: Preparation for the Profession of Law*, p. 135.

and national legislatures. The national regulations are limited to Danish law, as the empirical identity study has been carried out with Danish lawyers. Both hard law and soft law sources are included, the soft law being in particular the ethical rules and policy documents of the profession itself.²¹¹ Some of the soft law sources are national, while others are international, particularly from the Council of Bars and Law Societies in Europe (CCBE).²¹² The legal profession perceives itself to be liberal and independent, but at the same time the profession is highly regulated, in great detail in some respects.

From a legal perspective, the rules of the profession itself can give information about the content of the formal framework, but they give little information about the lawyers' perceptions of their own identity. The aim of the analysis of legal sources and of the statements of lawyers' organisations is to define and depict the ideal identity of the lawyer as reflected and prescribed in the legal order in Europe. The legal analysis investigates, describes and interprets the legal conditions and identity framework that is valid for lawyers in Europe. How lawyers in Denmark perceive, experience or develop their identity is analysed in the next chapter.

The starting point for this chapter is international conventions and recommendations. Some of these regulations are internationally binding and have been implemented in the Danish regulation of the legal profession or adapted to Danish legal conditions in a multi-layered combination of regulations and rulings. These regulations and court rulings give guidance for lawyers' professional conduct, as they are binding and are enforceable by society and/or by the profession itself.²¹³

In addition to depicting the ideal, the empirical study of Danish lawyers exposes lawyers' actual identities. The analysis will show whether this ideal is integrated or internalised in whole or in part in the professional identity of Danish lawyers, or whether individual lawyers are in transition towards establishing new identities (Chapter 6).

4.1 'The lawyer' – a single concept covering multiple realities

The profession and its members must be defined, as lawyers in the different jurisdictions of Europe have different functions and are organised in different ways. This makes it necessary to look at the terminology and to consider how to define 'lawyer' for the purpose of this study.

One main distinction can be made between trial lawyers and non-trial lawyers. In the United Kingdom, for instance, there is a long tradition of dividing work between solicitors (non-trial lawyers) and barristers (trial lawyers). It has also been debated whether, to sharpen their profiles, the professional organisations should only admit independent lawyers as members. The

²¹¹ Nielsen & Tvarnø, *Retskilder & Retsteorier*, p. 105.

²¹² CCBE, *L'histoire du CCBE*, p. 5. The CCBE was conceived in September 1960 during a congress of the Union Internationale des Avocats (UIA). After the European Economic Community was founded by the Treaty of Rome in 1957, European lawyers perceived a threat to their independence. A body was needed to represent the interests of lawyers within the European Community. The CCBB was established with the aim of being the voice of all European lawyers.

²¹³ Andersen, *Advokatretten*.

CCBE published a report on this in 2004,²¹⁴ and there is an ongoing debate and reflection on the impact of this distinction.

Litigation work has less importance in the daily work of practising lawyers (advocates/solicitors etc.), and those who do it seem to be litigation specialists. Instead of being servants of justice, largely involved in court cases, many lawyers and law firms are now increasingly involved in legal advice, consultancy, out of court dispute settlement etc., often in competition with other operators such as real estate agents, auditors, insurance companies, mediators and others. This development may lead to a less privileged role and to new professional identities. It is also a challenge for developing such identities and supporting them in education and training. The process has started with new ways of lawyering, where individual lawyers are engaged in re-shaping their professional roles and identities and are looking for a new paradigm in which societal responsibility, corporate social responsibility (CSR), sustainability and individual satisfaction can co-exist with private business in a competitive market.

New approaches to the identity of lawyers have also been debated in lawyers' professional organisations in Europe, referring to the need for appropriate training and education, and the challenge to lawyers of these new roles and identities. The former CCBE President Colin Tyre has observed:

'Is the legal profession nowadays simply a subset of business? What is a lawyer? What is the difference between a lawyer and a businessman? These are questions which are coming sooner or later to every member state in Europe. And we have to ask ourselves whether there should continue to be an identifiable profession of lawyer which is separate from other types of profession, or business, or other means of earning a living.

And it seems to me that if, like me, you think the answer to that question should be yes, then the solution lies here in legal education and training. If the legal profession is to survive as such, then it must, in my view, be through appropriate education and training. I want to look at the contribution which each of these can make in turn, taking them the opposite way round and beginning with the question of professional training.'²¹⁵

While lawyers are defined relatively clearly, the legal sources do not define the profession equally clearly. Several sources refer to the right to form and join local, national and international professional associations which, alone or with other bodies, have the task of improving professional standards and safeguarding the independence and interests of lawyers.²¹⁶

4.2 What is a lawyer?

In this study the concept of 'lawyer' is limited to practising lawyers who belong to or are authorised by a national bar or law society which is a member of the CCBE. This definition of 'lawyer' – a legal formalistic approach – can be applied in Europe, while globally this is geo-

²¹⁴ Fish, *Regulated legal professionals and professional privilege within the European Union, the European Economic Area and Switzerland, and certain other European jurisdictions*.

²¹⁵ Tyre, CCBE speech to the training committee.

²¹⁶ R(2000)21 on the freedom of exercise of the profession of lawyer, p. 5, principle V, 1.

graphically too narrow, so a definition from the Committee of Ministers of the Council of Europe is included (see below).

The formalistic approach makes it possible to estimate the number of lawyers referred to in this study. The number from the CCBE differs from the number based on a calculation by the European Commission. The CCBE claims to represent around 1 million lawyers in Europe,²¹⁷ while the Commission calculates the number of lawyers, including solicitors and barristers, to be 868,615.²¹⁸ The difference can be accounted for by the fact that the EU figure includes 27 Member States,²¹⁹ while the CCBE has 32 full members (national bars, including those of Iceland, Liechtenstein, Norway and Switzerland, and 2 associated members, Montenegro and Turkey).

In its the Recommendation No R(2000)21 on the freedom of exercise of the profession of lawyer, the Committee of Ministers of the Council of Europe defined a lawyer from a similar perspective to that of the CCBE. According to Recommendation No R(2000)21 a lawyer is:

‘a person qualified and authorised according to the national law to plead and act on behalf of his or her clients, to engage in the practice of law, to appear before the courts or advise and represent his or her clients in legal matters.’²²⁰

In this definition the condition ‘authorised according to the national law’ to plead, to represent clients in legal matters, to appear before court and to engage in the practice of law, is crucial and mandatory. Recommendation No R(2000)21 not only refers to being authorised, but also to being ‘qualified’ to engage in the practice of law.

4.2.1 Independent lawyers and employed lawyers

Do the rules of professional privilege apply to the activities of legal professionals who are employed in a company or organisation, often referred to as ‘in-house lawyers’? These lawyers can be members of bar and law societies, but as they work in a hierarchical employment relation, they cannot be considered independent from their employer. The independence of lawyers can be questioned in general, as lawyers can be dependent on important or powerful clients. However, the profession itself maintains the basic principle of independence.

Some decades ago the relationship of in-house lawyers and the legal profession was brought before the Court of Justice of the European Union (CJEU).²²¹ In this case the Court had to consider whether there is legal privilege in Union law and decide whether this privilege extended not only to lawyers in private practice, but also to employed lawyers. However, the Court did

²¹⁷ www.ccbe.eu/fileadmin/user_upload/NTCdocument/2012_table_of_lawyer1_1356088494.pdf (last accessed 11 August 2013).

²¹⁸ COM(2011) 551, *Building trust in EU-wide justice*, p. 4.

²¹⁹ This was in 2011, on the moment the EU released the study “Building trust in EU-wide justice”. Since 1 July 2013 the EU contains 28 member states, Croatia became the 28th EU country.

²²⁰ Council of Europe, Committee of Ministers *R(2000)21 on the freedom of exercise of the profession of lawyer*, p. 2, section 11 of the preamble.

²²¹ Case C-155/79, *AM & S Europe Limited v Commission* (1982 ECR 1575).

not rule clearly on the issue.²²² This case was very important for the CCBE, as there was disagreement about the legal position of employed lawyers.²²³ Today the CCBE takes a pragmatic view and there are conflicting results in the case law. Some recent cases will be analysed in a subsequent chapter on professional identity.

Directive 98/5/EC to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained (the 'Establishment Directive') has not clarified or at least has not finally settled the issue. Although Article 8 of the Directive refers to salaried practice, it leaves it to the Member States to decide whether employed lawyers, outside a law firm, can be registered as professional lawyers. Article 8 provides:

'A lawyer registered in a host Member State under his home-country professional title may practise as a salaried lawyer in the employ of another lawyer, an association or firm of lawyers, or a public or private enterprise to the extent that the host Member State so permits for lawyers registered under the professional title used in that State.'²²⁴

As the Establishment Directive applies both to self-employed practising lawyers and to lawyers practising in a salaried capacity, both categories of lawyers can fulfil the conditions for obtaining a CCBE identity card. This card is recognised by the CJEU, and facilitates access to courts and institutions for lawyers acting outside their home jurisdiction.

In the CCBE's 2004 report,²²⁵ three categories of legal professionals were proposed:

1. The expression 'regulated legal professional' means any person who is authorised by a competent authority in the relevant jurisdiction to pursue his/her professional activities under one of the recognised professional titles in the jurisdictions covered by this Report;
2. A 'regulated salaried legal professional' means one who is a regulated legal professional but who provides legal services on a salaried basis for an employer; and

²²² The ECJ confirmed that the confidentiality of written communications between lawyer and client was only to be guaranteed when, on the one hand, such communications are made for the purposes and in the interests of the client's rights of defence and, on the other hand, they emanate from independent lawyers, that is to say, lawyers who are not bound to the client by a relationship of employment. The Court however also found that the protection of confidentiality of written communications "must apply without distinction to any lawyer entitled to practise his profession in one of the member states (...)", hence leaving it to the member states or the national bars and law societies to decide on the issue who was entitled to practise the profession of lawyer.

²²³ CCBE, *The history of the CCBE*, p. 36.

²²⁴ Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained (Art. 8).

²²⁵ Fish, *Regulated legal professionals and professional privilege within the European Union, the European Economic Area and Switzerland, and certain other European jurisdictions*.

3. a 'non-regulated salaried legal professional' means any person, who provides legal services but who is neither a regulated legal professional nor a regulated salaried legal professional.

Some 'non-regulated salaried legal professionals', or 'in-house lawyers', are not registered as members of their national bar and law society. Hence, they are not considered as professional lawyers according to the Establishment Directive.

4.2.2 Membership of or authorisation by a national bar and law society

In European jurisdictions, and as reflected in the Council of Europe's definition, legal practitioners (in Denmark: *advokater*) are only entitled to carry on their profession if they are registered or authorised by a bar and law society in the relevant jurisdiction. Regardless of whether they are sole practitioners, members of a law firm or in-house lawyers, the applicability of the rules on professional privilege is principally determined by whether the legal adviser is registered with the relevant bar and law society.

The Establishment Directive also links qualification as lawyer to membership of or authorisation by a national bar and law society, stating that:

'lawyer means any person who is a national of a Member State and who is authorised to pursue his professional activities under one of the following professional titles'.²²⁶

There then follows a list of all different titles for EU legal practitioners, as mentioned earlier.

It follows both from the Establishment Directive and from Council of Europe Recommendation No R(2000)21, together with the relevant national law provisions and the regulatory framework of the national the bar and law society, that the definition of and qualification as lawyers in the EU is conditional on their membership, recognition or authorisation by a national professional organisation of lawyers.

4.3 Legal sources in a global community

It is first necessary to define and select the relevant legal sources on the valid regulatory framework for lawyering in Europe. A few sources have a wider geographical scope than the European Union. The measures of both the UN and the Council of Europe regulate the legal profession more broadly than the EU, which underlines the international character of lawyers' professional identity. It is thus relevant to base the European ideal identity for lawyers not only on the legal regulations and recommendations of the EU, but also of the UN, the Council of Europe, national law, and the legal documents and regulations of professional bodies that are binding on Member States, bar and law societies, and individuals.

²²⁶ Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained (Art. 1, 2.a).

The legal sources include:

- International conventions and treaties
- International recommendations and policy papers
- EU law
- National laws
- Administrative orders
- Case law of European and national courts
- Rules and decisions of disciplinary bodies
- Ethical rules, codes of conduct and best practice

The aim is to have consistency and coherence in the legal framework. Not all sources are enforceable through the courts, but they all contribute to the interpretation of the tasks, roles and identities of lawyers in the European Union.

In the hierarchical structure of the legal sources it is relevant to start at the international level, with the UN, the Council of Europe and the EU. Lawyers are linked together by their membership of both national and international organisations, which also provide continuing legal education. European bar and law societies have close relations with other national and international organisations such as the IBA (International Bar Association), the UIA (Union Internationale des Avocats), the ABA (American Bar Association) and others.

This network affects the definition of lawyers' professional identity in a global context and influences the future regulation of the legal profession. It is both necessary and relevant to analyse the identity of lawyers in a broad international setting. For example, non-governmental organisations (NGOs) like the International Center for Not-for-Profit Law²²⁷ and international networks of lawyers, such as the International Association of Democratic Lawyers²²⁸ or Lawyers Without Borders,²²⁹ influence the identity of lawyers and relations between civil society, the profession and individual lawyers.

The case law of the European Court of Human Rights (ECtHR) is included in the analysis to support the understanding of professional identity of lawyers. It also shows the broad 'margin of appreciation', giving national authorities a wide discretion to interpret the professional obligations and responsibilities of lawyers and to protect their professional rights and freedoms.

²²⁷ ICNL is a source for information on the legal environment for civil society, philanthropy, and public participation. Since 1992, ICNL has served as a resource to civil society leaders, government officials, and the donor community in over 100 countries www.icnl.org (last accessed 4 November 2013).

²²⁸ IADL, International Association of Democratic Lawyers, is a Non-Governmental Organization (NGO) with consultative status to ECOSOC and UNESCO, www.iadllaw.org (last accessed 4 November 2013)

²²⁹ Lawyers Without Borders is a global group of volunteer lawyers who offer pro bono service to rule of law projects, capacity building and access to justice initiatives, www.lwob.org (last accessed 4 November 2013).

The Danish legal framework for the legal profession is included, both for understanding the interaction between the national and supranational levels of regulation and because of its relevance to the national empirical study.

The legal dogmatic analysis gives a picture that appears to be static. However, by integrating policy documents of the European Parliament, the Commission, the CCBE and the Council of Europe in the regulatory framework, either as soft law or as aids to legal interpretation, it becomes clear that there is development of or even transformation of the identity ideal which has not yet led to a change of the formal legal framework.

When the professional life of lawyers is put in the context of a legal framework in the EU or globally, it shows how identities and characteristics shape the external contexts of a chosen lifestyle. This dynamic can be embedded in structuration theory, according to which the transformative capacities of practices cannot be contained within a fixed stable distinction between the individual and society.²³⁰

4.4 Legal framework for the ideal identity of a European lawyer

In what follows, the study focuses on the relevant regulatory sources in relation to lawyers' identity. The selected legal sources will be allocated according to the following scheme:

Legal Source: Directive, Recommendation, Code of Conduct		
What to do Society level	How to act Professional association	Who to be The individual

The scheme is structured to relate the individual provisions, articles, sections or paragraphs of a legal source either to the societal level (national or international), professional level or individual level. By analysing and elaborating the regulatory framework in such a structured way, the different legal provisions can be related to 'What to do' (society level), 'How to act' (professional level) and 'Who to be' (individual level).

This scheme reflects the application of Giddens's theory to a legal reality. This combination has been chosen in order to relate legal sources to different levels of analysis. This determines what is the structure or division of work (the first column), what is the legal framework of behaviour (the second column), and when and how legal sources define the personal characteristics for professionals linked to moral attitudes and core traits of identity (the third column). Identity development takes place in the interaction between these levels, and new identities can influence and change the legal framework.

Finally the ideal will be portrayed on the basis of the analysis and interpretations of the selected sources, which will now be presented.

²³⁰ Giddens, *Modernity and Self-identity – Self and Society in the Late Modern Age*, p. 12.

4.4.1 UN Basic Principles on the Role of Lawyers

The UN Basic Principles on the Role of Lawyers²³¹ present a concise overview of the international norms of professional lawyering. The Basic Principles were unanimously adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders in Havana, Cuba on 7 September 1990. The UN General Assembly then adopted the Principles in its 'Human rights in the administration of justice' resolution, which was accepted without a vote on 18 December 1990 both by the Third Committee and in the plenary session of the General Assembly. The Basic Principles appeal to Governments to respect the principles and to take them into account in their national legislation and practice.

The 'Basic Principles' is a soft law instrument, which means that it is not legally binding. Nevertheless, the Basic Principles are broadly accepted and can be classified as a material source of law, or even as a reflection or expression of customary international law. The Basic Principles are often referred to both by national and international authorities and by NGOs. To a large extent the rights expressed in the Basic Principles are included in binding international or regional human rights treaties like the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR). Several of the legal sources analysed refer to the UN Basic Principles on the Role of Lawyers.

The following scheme shows how the UN Basic Principles on the Role of Lawyers comprises norms at the three levels of the society, the profession and the individual.

Legal Source UN Basic Principles on the Role of Lawyers, 7 September 1990		
What to do Society level	How to act Professional association	Who to be The individual
<p>Governments shall ensure that efficient procedures and responsive mechanisms for effective and equal access to lawyers are provided for all persons within their territory.²³²</p> <p>Governments shall ensure the provision of sufficient funding and other resources for legal services to the poor and, as necessary, to other disadvantaged persons. Professional associations of lawyers shall cooper-</p>	<p>Professional associations of lawyers have a vital role to play in upholding professional standards and ethics, protecting their members from persecution and improper restrictions and infringements, providing legal services to all in need of them, and cooperating with governmental and other institutions.²³⁷</p>	<p>Governments, professional associations of lawyers and educational institutions shall ensure that lawyers have appropriate education and training and be made aware of the ideals and ethical duties of the lawyer and of human rights and</p>

²³¹ UN, *Basic Principles on the Role of Lawyers - Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders*, Havana, Cuba, 27 August to 7 September 1990, principles 24-25.

²³² Principle 2.

²³⁷ Preamble section 10.

<p>ate in the organization and provision of services, facilities and other resources.²³³</p> <p>Governments and professional associations of lawyers shall promote programmes to inform the public about their rights and duties under the law and the important role of lawyers in protecting their fundamental freedoms. Special attention should be given to assisting the poor and other disadvantaged persons so as to enable them to assert their rights and where necessary call upon the assistance of lawyers.²³⁴</p> <p>Governments shall ensure that all persons are immediately informed ... of their right to be assisted by a lawyer of their own choice upon arrest or detention or when charged with a criminal offence.²³⁵</p> <p>Any such persons who do not have a lawyer shall, in all cases in which the interests of justice so require, be entitled to have a lawyer of experience assigned to them in order to provide effective legal assistance, without payment by them if they lack sufficient means to pay for such services.²³⁶</p>	<p>Codes of professional conduct for lawyers shall be established by the legal profession through its appropriate organs, or by legislation, in accordance with national law and custom and recognized international standards and norms.²³⁸</p> <p>Lawyers shall be entitled to form and join self-governing professional associations to represent their interests, promote their continuing education and training and protect their professional integrity. The executive body of the professional associations shall be elected by its members and shall exercise its functions without external interference.</p> <p>Professional associations of lawyers shall cooperate with Governments.²³⁹</p>	<p>fundamental freedoms recognized by national and international law.²⁴⁰</p> <p>Lawyers shall at all times maintain the honour and dignity of their profession as essential agents of the administration of justice.²⁴¹</p>
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Figure 4-1. UN Basic Principles

The UN Basic Principles explicitly refer to the important role of lawyers in protecting the fundamental freedoms of citizens and emphasise that governments and lawyers' professional associations should promote programmes to inform the public about their rights and duties under the law, and provide for effective legal assistance for all. The Basic Principles also state that lawyers' professional associations should be self-governing. Such organisations must represent lawyers' interests, promote their continuing education and training and protect their

²³³ Principle 3.

²³⁴ Principle 4.

²³⁵ Principle 5.

²³⁶ Principle 6.

²³⁸ Principle 26.

²³⁹ Principles 24-25.

²⁴⁰ Principle 9.

²⁴¹ Principle 12.

professional integrity. The executive bodies of the professional associations should be elected by their members and exercise their functions without external interference. Lawyers should maintain the honour and dignity of their profession, and be aware of their societal role and act as essential agents of the administration of justice. Lawyers should also act according to the 'ideals and ethical rules' of the profession.

4.4.2 Council of Europe

The Council of Europe (COE) operates with different legal and political instruments; its Parliamentary Assembly and Committee of Ministers being its central political actors. Policy documents of the Parliamentary Assembly and recommendations of the Committee of Ministers, such as Recommendation No R(2000)21 on freedom of exercise of the profession of lawyer (25 October 2000), are not directly enforceable in its member states, but they contain authoritative guidelines both for national authorities and often also for professional organisations.

The recommendations of the COE Committee of Ministers are also often taken into consideration by the ECtHR or are referred to in its judgments as relevant non-Convention material, including Recommendation No R(2000)21.²⁴² Furthermore, Recommendation No R(2000)21 itself refers explicitly to the UN Basic Principles, thus integrating the UN principles in the COE's regulatory framework.

COE Recommendation No R(2000)21 sets out six basic principles guaranteeing the freedom of exercise of the profession of lawyer in Europe. In its preamble it emphasises: 'the fundamental role that lawyers and professional associations of lawyers (...) play in ensuring the protection of human rights and fundamental freedoms'.

The aim of Recommendation No R(2000)21 is to promote the freedom of exercise of the profession of lawyer 'in order to strengthen the Rule of Law, in which lawyers take part'. Interestingly, the Recommendation also emphasises the desirability:

'of ensuring a proper exercise of lawyers' responsibilities and, in particular, of the need for lawyers to receive sufficient training and to find a proper balance between their duties towards the courts and those towards their clients.'²⁴³

The Recommendation demands action from the Member States and their professional organisations in order to achieve these aims. The principles formulated in the Recommendation can be related to the societal level, the professional organisations and individual lawyers.

²⁴² See e.g. ECtHR *Sialkowska v. Poland*, 22 March 2007, § 55 and ECtHR *Staroszczyk v. Poland*, 22 March 2007, § 72. For more recent examples, see ECtHR *Nagla v. Latvia*, 16 July 2013, § 23-33 and 81 (referring to and applying the Committee of Ministers' Recommendation R(2000)7 on the right of journalists not to disclose their sources of information, 8 March 2000) and ECtHR *Delfi AS v. Estonia*, 10 October 2013, § 40 (referring to the Committee of Ministers' Declaration on freedom of communication on the Internet, 28 May 2003).

²⁴³ R(2000)21 on the freedom of exercise of the profession of lawyer, p. 2, preamble section 8.

Legal source: Recommendation of the Committee of Ministers of the Council of Europe to member States on the freedom of exercise of the profession of lawyer, 25 October 2000		
What to do Society level	How to act Professional association	Who to be The individual
<p>Underlining the fundamental role that lawyers and professional associations of lawyers also play in ensuring the protection of human rights and fundamental freedoms;</p> <p>Desiring to promote the freedom of exercise of the profession of lawyer in order to strengthen the Rule of Law, in which lawyers take part.²⁴⁴</p> <p>Considering that access to justice may require persons in an economically weak position to obtain the services of lawyers.²⁴⁵</p> <p>All necessary measures should be taken to respect, protect and promote the freedom of exercise of the profession of lawyer without discrimination and without improper interference from the authorities or the public, in particular in the light of the relevant provisions of the European Convention on Human Rights.²⁴⁶</p>	<p>All necessary measures should be taken in order to ensure a high standard of legal training and morality as a prerequisite for entry into the profession and to provide for the continuing education of lawyers.²⁴⁷</p> <p>Bar associations or other lawyers' professional associations should draw up professional standards and codes of conduct and should ensure that, in defending the legitimate rights and interests of their clients, lawyers have a duty to act independently, diligently and fairly.²⁴⁸</p> <p>Bar associations ... Should ... :</p> <p>a. promote and uphold cause of justice</p> <p>b. defend the role of lawyers in society and, in particular, to maintain their honour, dignity and integrity;</p> <p>d. promote and support law reform and discussion on existing and proposed legislation;</p> <p>e. promote the welfare of members of the profession and assist them or their families if circumstances so require;</p> <p>f. co-operate with lawyers of other countries in order to promote the role of lawyers, in particular by considering the work of international organisations of lawyers and international intergovernmental and non-governmental organisations;</p> <p>g. promote the highest possible standards of competence of lawyers and maintain respect by lawyers for the standards of conduct and discipline.²⁴⁹</p>	<p>Aware of the desirability of ensuring a proper exercise of lawyers' responsibilities and, in particular, of the need for lawyers to receive sufficient training and to find a proper balance between their duties towards the courts and those towards their clients.²⁵⁰</p> <p>Lawyers should enjoy freedom of belief, expression, movement, association and assembly, and, in particular, should have the right to take part in public discussions on matters concerning the law and the administration of justice and suggest legislative reforms.²⁵¹</p> <p>Legal education, including programmes of continuing education, should seek to strengthen legal skills, increase awareness of ethical and human rights issues, and train lawyers to respect, protect and promote the rights and interests of their clients and support the proper administration of justice.²⁵²</p> <p>The duties of lawyers include ... endeavouring first and foremost to resolve a case amicably; ... not taking up more work than they can reasonable manage.²⁵³</p>

Figure 4-2. COE Recommendation

²⁴⁴ R(2000)21 on the freedom of exercise of the profession of lawyer, p. 2, preamble section 5+6.

²⁴⁵ R(2000)21 on the freedom of exercise of the profession of lawyer, p. 2, preamble section 9.

²⁴⁶ R(2000)21 on the freedom of exercise of the profession of lawyer, p. 3, principle I, 1.

²⁴⁷ R(2000)21 on the freedom of exercise of the profession of lawyer, p. 3, principle II, 2.

²⁴⁸ R(2000)21 on the freedom of exercise of the profession of lawyer, p. 4, principle III, 1.

²⁴⁹ R(2000)21 on the freedom of exercise of the profession of lawyer, p. 5, principle V, 4 a, b, d, e, f and g.

²⁵⁰ R(2000)21 on the freedom of exercise of the profession of lawyer, p. 2, preamble section 8.

²⁵¹ R(2000)21 on the freedom of exercise of the profession of lawyer, p. 3, principle I, 3.

²⁵² R(2000)21 on the freedom of exercise of the profession of lawyer, p. 4, principle II, 3.

²⁵³ R(2000)21 on the freedom of exercise of the profession of lawyer, p. 4, principle III, 3 b and e.

It is clear that some of the principles and values promoted by the Recommendation refer to or are derived from some of the fundamental rights and freedoms of the ECHR.

For this study, Principle I.3 of the Recommendation is a relevant illustration of this, as it refers to the intellectual freedoms of belief and expression and the right of association and peaceful assembly, which are guaranteed by Articles 9, 10 and 11 of the ECHR. The Recommendation states:

'Lawyers should enjoy freedom of belief, expression, movement, association and assembly, and, in particular, should have the right to take part in public discussions on matters concerning the law and the administration of justice and suggest legislative reforms.'²⁵⁴

From a strict legal point of view, it can be argued that these rights and freedoms are derived directly from the ECHR so that it is redundant to repeat them in a Recommendation. However, by explicitly referring to these principles, Recommendation No R(2000)21 emphasises their importance, thus reducing the margin of appreciation of national authorities to intervene in the rights and freedoms of lawyers.

4.4.3 The case law of the European Court of Human Rights

The relevance of Recommendation No R(2000)21 can indeed be seen in the case law of the ECtHR, which shows that in many cases national authorities²⁵⁵ and bar and law societies, as regulatory or disciplinary bodies,²⁵⁶ have a tendency to restrict the practices and performances of lawyers and thus the expression and development of their identity. The ECtHR has held that restrictions on registration as a member of the legal profession can affect a lawyers' ability to develop relationships with the outside world and 'undoubtedly' falls within the sphere of their private life. In cases on the right to privacy related to employment and business activities, on several occasions the ECtHR has reiterated that Article 8 of the Convention 'protects a right to personal development, and the right to establish and develop relationships with other human beings and the outside world', and that the concept of 'private life' does not in principle exclude activities of a professional or business nature.²⁵⁷ In *Bigaeva v Greece*, the ECtHR held that Article 8 can also include the right of access to a profession, namely that of a lawyer.²⁵⁸ In

²⁵⁴ R(2000)21 on the freedom of exercise of the profession of lawyer, p. 3, principle I, 3.

²⁵⁵ ECtHR *Incal v. Turkey*, 9 June 1998; ECtHR *Nikula v. Finland*, 21 March 2002; ECtHR (Grand Chamber) *Kyprianou v. Cyprus*, 15 December 2005; ECtHR *Ayhan Erdoğan v. Turkey*, 13 January 2009; ECtHR *Alfantakis v. Greece*, 11 February 2010; ECtHR *Gouveia Gomes Fernandes and Freitas e Costa v. Portugal*, 29 March 2011; ECtHR *Mor v. France*, 15 December 2011 and ECtHR *Reznik v. Russia*, 4 April 2013. With regard to "commercial speech", such as branding and advertising by lawyers or law firms, the Court has recognized that this is also part of the lawyers' freedom of expression protected by Article 10 ECHR, leaving however a very wide margin of appreciation for the member states' authorities, including the national bar and law societies, to regulate advertisements and commercial speech by lawyers : ECtHR *Casado Coca v. Spain*, 24 February 1994.

²⁵⁶ ECtHR *Ezelin v. France*, 26 April 1991; ECtHR *Steur v. the Netherlands*, 28 October 2003; ECtHR *Veraart v. the Netherlands*, 30 November 2006 and ECtHR *Kabanov v. Russia*, 3 February 2011.

²⁵⁷ ECtHR *Niemietz v. Germany*, 16 December 1992, § 29; ECtHR *Pretty v. the United Kingdom*, 29 March 2002, § 61 and ECtHR *Mateescu v. Romania*, 14 January 2014, §§ 20-22.

²⁵⁸ ECtHR *Bigaeva v. Greece*, 28 May 2009, §§ 23-24.

Mateescu v Romania the ECtHR found that there was a breach of Article 8 by a lawyer being refused access to the bar because he wanted to combine his legal practice with that in another liberal profession, namely that of a doctor.²⁵⁹

The case law of the ECtHR also shows that the Articles 9, 10 and 11 ECHR have been invoked by or applied to lawyers, with reference to the specific situation of lawyers in their relations to the administration of justice and duties within the legal profession.

On many occasions the ECtHR has recognised that lawyers can indeed invoke their rights of freedom of expression and information, and on several occasions the Court has found that national authorities, and sometimes national bar associations or their disciplinary bodies, have breached the Convention's rights. In *Amihalachioaie v Moldova* the ECtHR recognised that:

'lawyers are entitled to freedom of expression too and to comment in public on the administration of justice, provided that their criticism does not overstep certain bounds. Furthermore, Article 10 protects not only the substance of the ideas and information expressed but also the form in which they are conveyed. In that connection, account must be taken of the need to strike the right balance between the various interests involved, which include the public's right to receive information about questions arising from judicial decisions, the requirements of the proper administration of justice and the dignity of the legal profession'.²⁶⁰

When choosing a (plat)form for expression, lawyers automatically relate to their identity as a lawyer. Recommendation No R(2000)21 expresses the crucial importance of these rights and freedoms for lawyers, impressing this on the national authorities of states in which these rights and freedoms are (still) not sufficiently guaranteed or respected. The Recommendation specifically emphasises the right of lawyers 'to take part in public discussions on matters concerning the law and the administration of justice and suggest legislative reforms'. This is a clear message to the authorities of Member States to refrain from interfering and not to limit lawyers' freedom to take part in public debate or collective forms of freedom of expression (such as peaceful demonstrations).

The reference in Recommendation No R(2000)21 to the importance of the rights of lawyers to participate in debates on matters of public interest is also reflected in the case law of the ECtHR. Already prior to 2000, the ECtHR had occasion to clarify that participation by lawyers in public debates and peaceful demonstrations deserved a high level of protection under the Convention, 'having regard to the special importance of freedom of peaceful assembly and freedom of expression, which are closely linked in this instance'.²⁶¹ The Court stated that the pursuit of a just balance between the purpose of the restrictions or limitations listed in Article

²⁵⁹ ECtHR *Mateescu v. Romania*, 14 January 2014, §§ 20-22 and 27-33.

²⁶⁰ ECtHR *Amihalachioaie v. Moldova*, 20 April 2004, § 26.

²⁶¹ ECtHR *Ezelin v. France*, 26 April 1991, § 51.

10(2) and Article 11(2) of the ECHR²⁶² and those of the free expression of opinions by word, gesture or even silence ‘must not result in avocats being discouraged, for fear of disciplinary sanctions, from making clear their beliefs on such occasions’. It also considered that:

‘the freedom to take part in a peaceful assembly - in this instance a demonstration that had not been prohibited - is of such importance that it cannot be restricted in any way, even for an avocat, so long as the person concerned does not himself commit any reprehensible act on such an occasion’.

In the *Ezelin v France* case, the ECtHR concluded that a disciplinary sanction imposed on a lawyer by his national Bar Council, amounted to a breach of his right to take part in and to express his opinion in a public demonstration protesting against two court decisions. The Court considered that the disciplinary penalty imposed on Ezelin was not necessary in a democratic society, even though it did not entail ‘any ban, even a temporary one, on practising the profession or on sitting as a member of the Bar Council’.²⁶³

The reference to the freedom of expression of lawyers and their participation in public debate is specifically relevant to this dissertation, as this right can only be exercised actively by a personal decision, based on a person’s will, voluntarism, identity and choice of how to perform a lawyer’s identity. The expression of one’s ideas and opinions is linked to personal performance and perception of identity.

Freedom of expression is indeed a way of performing one’s identity (representative or performative). It is relational and covers expressions in court, in writing, in participation in professional and public discussion or interviews in the media.

The principle in Recommendation No R(2000)21, referring to the right of lawyers ‘to take part in public discussions on matters concerning the law and the administration of justice’, is also reflected in a more recent decision of the ECtHR, showing the Court’s awareness of the importance of this principle. In *Reznik v Russia* the Court reiterated that:

‘the special status of lawyers gives them a central position in the administration of justice as intermediaries between the public and the courts, and such a position explains the usual restrictions on the conduct of members of the Bar. However, as the Court has repeatedly emphasised, lawyers are entitled to freedom of expression too and they have

²⁶² Note that the ECtHR evaluated in this case the disciplinary sanction of a lawyer because of his participation in a demonstration from the perspective of Article 11 of the Convention. The right of freedom of expression and information (Article 10), which was also invoked in this case, was, according to the Court, to be regarded “as a *lex generalis* in relation to Article 11, a *lex specialis*”, so that it was unnecessary to take the alleged violation of Article 10 separately into consideration. According to the Court however “the protection of personal opinions, secured by Article 10, is one of the objectives of freedom of peaceful assembly as enshrined in Article 11”.

²⁶³ ECtHR *Ezelin v. France*, 26 April 1991, §§ 51-53.

the right to comment in public on the administration of justice provided that their criticism does not overstep certain bounds'.²⁶⁴

The ECtHR unanimously found that the applicant lawyer was entitled to state his opinion in a public forum on a matter of public interest and that his statements had a factual foundation. Therefore, by interfering with Reznik's right to freedom of expression, the Russian authorities were in breach of Article 10 ECHR.

In *Mor v France*, the ECtHR was of the opinion that giving an interview to the press was a legitimate part of a lawyer's defence of their clients, given that the case had aroused interest in the media and among the general public. In this case, in their third party interventions the CCBE and the French *Conseil national des Barreaux* argued strongly that the French authorities had infringed the lawyer's right to freedom of expression.²⁶⁵

The ECtHR has explicitly and persuasively highlighted the importance of the right of lawyers to participate in debates on matters of public interest. On several occasions the Court has found that a sanction imposed on a lawyer for taking part in a discussion of public interest has a 'chilling effect', being dissuasive of participation in future actions. In *Reznik v Russia* the Court stated:

'As regards the sanction imposed on the applicant, the Court recalls the "chilling effect" that the fear of sanction has on the exercise of freedom of expression (...) This effect, which works to the detriment of society as a whole, is likewise a factor which concerns the proportionality of, and thus the justification for, the sanctions imposed on the applicant, who, as the Court has held above, was entitled to bring the matter at issue to the public's attention. Although the penalty of 20 Russian roubles was negligible in pecuniary terms, the institution of defamation proceedings against the President of the Moscow City Bar in the context of the present case was capable of having a chilling effect on his freedom of expression.'²⁶⁶

Judgments regarding the freedom of expression of lawyers in court proceedings also demonstrate the high level of freedom of expression allowed lawyers in defending the rights of their clients.²⁶⁷ Other decisions of the ECtHR indicate where the limits to a lawyer's freedom of expression lie, for example in relation to defamatory statements, criticising judges or revealing confidential information.²⁶⁸ These judgments also give important guidelines for the behaviour,

²⁶⁴ ECtHR *Reznik v. Russia*, 4 April 2013, § 44.

²⁶⁵ ECtHR *Mor v. France*, 15 December 2011, § 38-40.

²⁶⁶ ECtHR *Reznik v. Russia*, 4 April 2013, § 50. See also ECtHR *Mor v. France*, 15 December 2011.

²⁶⁷ ECtHR *Nikula v. Finland*, 21 March 2002, § 54, in which the Court clarified that a violation of a lawyer's right to freedom of expression can also affect the right to a fair trial of his client under Article 6 of the Convention. See also ECtHR *Panovits v. Cyprus*, 11 December 2008, §§ 94-101 and Casadevall, 'L'avocat et la liberté d'expression' in Casadevall, Myjer, O'Boyle & Austin (eds.), *Freedom of expression. Essays in honour of Nicolas Bratza*, pp. 235-244.

²⁶⁸ ECtHR *Kabanov v. Russia*, 3 February 2011 and ECtHR *Lopes v. Portugal*, 22 February 2011. See also Addo, *Freedom of Expression and the Criticism of Judges. A comparative study of European legal standards*.

practice and identity development of lawyers in Europe.²⁶⁹ In *Furuholmen v Norway*, for instance, the Court emphasised that ‘the applicant was under a particular duty as an advocate’ to respect the domestic court’s refusal to admit certain evidence in a case and that, as a lawyer, he was expected ‘to display restraint in order to hinder undue influence on the jury’. The ECtHR considered that the lawyer’s ‘impairing of the information at issue to the press at the relevant time posed a real threat to the authority and impartiality of the judiciary’. According to the Court, ‘the lawyer’s conduct could hardly be regarded as compatible with the contribution that it was legitimate to expect lawyers to make to maintaining public confidence in the judicial authorities’.²⁷⁰

The ECtHR has recognised that lawyers’ advertising of their practices is protected by Article 10 ECHR, and that advertising by lawyers or law firms is a form of ‘commercial speech’. However, the Court has made clear that it is mainly up to bar and law societies and national authorities to regulate this public communication by lawyers. It considered that:

‘because of their direct, continuous contact with their members, the Bar authorities and the country’s courts are in a better position than an international court to determine how, at a given time, the right balance can be struck between the various interests involved, namely the requirements of the proper administration of justice, the dignity of the profession, the right of everyone to receive information about legal assistance and affording members of the Bar the possibility of advertising their practices’.²⁷¹

The case law of the ECtHR on lawyers’ rights to freedom of expression and their ‘duties and responsibilities’ shows how, in their public communications, lawyers have to take into consideration the interests and rights of their clients, the maintenance of public confidence in the administration of justice, the dignity of the profession, their individual rights and freedoms and their role in society. The approach and the reasoning of the ECtHR is sometimes difficult to predict, because the ECtHR applies the Convention as a dynamic and living instrument of human rights protection in response to new challenges and developments in society. An interesting case involving the lawyer’s right to freedom of expression is pending before the Grand Chamber of the ECtHR. The Grand Chamber’s judgment in the case of *Morice v France* will certainly have a significant impact on how lawyers can exercise their right to freedom of expression by bringing failings in the administration of justice to public attention. On 11 July 2013 the Fifth Section of the ECtHR found that the conviction of a lawyer, M. Morice, for defamation of a judge did not breach Article 10 ECHR. The conviction was based on an article in the daily newspaper *Le Monde*, stating that M. Morice, in his capacity as a lawyer, had ‘vigorously’ challenged a judge before the Minister of Justice, accusing the judge of ‘conduct that was completely contrary to the principles of impartiality and loyalty’. The ECtHR considered that the national courts could have been satisfied that M. Morice’s comments in *Le Monde* were serious and insulting to the judge in question, that they were capable of unnecessarily undermin-

²⁶⁹ ECtHR *Shöpfer v. Switzerland*, 20 May 1998; ECtHR *Schmidt v. Austria*, 17 July 2008; ECtHR *Ioan Szabo v. Romania*, 23 October 2012 and ECtHR *Karpetas v. Greece*, 30 October 2012.

²⁷⁰ ECtHR (decision) *Furuholmen v. Norway*, 18 March 2010.

²⁷¹ ECtHR *Casado Coca v. Spain*, 24 February 1994, § 55.

ing public confidence in the judicial system and, lastly, that there were sufficient grounds to convict Mr. Morice of public defamation. However, the chamber judgment is not final: on 9 December 2013 a panel of five judges referred the case to the Grand Chamber. Under Article 43 ECHR referral to the Grand Chamber implies that the case raises ‘a serious question affecting the interpretation or application of the Convention (...) or a serious issue of general importance’. In her dissenting opinion, annexed to the judgment of 11 July 2013, Judge Yudkivska found that the majority of the Chamber did not take sufficiently into account the possible *chilling effect* of the criminal conviction of M. Morice. She also emphasised the role of lawyers to criticise failings in the administration of justice and to inform the public of such. Indeed lawyers are qualified to do so and the public expects them to do so, as lawyers ‘représentent l’affaire au tribunal et possèdent une qualification indispensable pour voir les fautes et les défauts du procès que le public attend de recevoir des informations’. Judge Yudkivska argued that the possibility of lodging a disciplinary complaint by a lawyer against a judge is not an adequate exercise of a lawyer’s freedom of expression when the issue necessitates a public debate. From this perspective, whatever the outcome, the judgment of the Grand Chamber promises to have an impact on the development of the lawyer’s identity and responsibilities towards society.²⁷²

Another aspect of the public roles and acts of lawyers is that in some circumstances lawyers must accept sharp, robust, harsh and sometimes even offensive criticism of their professional acts. However, the ECtHR has made it clear that lawyers have a right to have their professional reputation protected, their reputation being the external side of their individual identity as perceived in the society in which they live and act. This relation between identity and reputation is a central issue in several of the Court’s judgments, such as in *Dichand a.o. v Austria*,²⁷³ *Backes v Luxembourg*,²⁷⁴ *Bodrožić and Vuijn v Serbia*,²⁷⁵ *Aquilina a.o.v Malta*,²⁷⁶ *Semik-Orzech v*

²⁷² ECtHR *Morice v. France*, 11 July 2013 (not final, case referred to Grand Chamber on 9 December 2013).

²⁷³ ECtHR *Dichand a.o. v Austria*, 26 February 2002 in which a politician was criticised for mixing his role as a member of parliament and lawyer and using his law firm and chairmanship of the Legislative Committee to influence law making in the interest of his clients. The Court found that the injunction order against the newspaper’s article violated the freedom of expression of the editor in chief and publisher. The article was considered as “a fair comment on an issue of general public interest” and the Court considered that when “a politician is in a situation where his business and political activities overlap (this) may give rise to public discussion, even where, strictly speaking, no problem of incompatibility of office under domestic law arises”. Although there was only “a slim factual basis”, the Court accepted the tone and style of the newspaper article written “in strong, polemical language”.

²⁷⁴ ECtHR *Backes v. Luxembourg*, 8 July 2008, in which the Court referred to a lawyer’s “undisputed right to protection of his honour and of his reputation as a lawyer”. The Court considered that it was open to the author of a book to contribute to a free public discussion of the problems described in the book, without claiming however that a lawyer, identified in the book, was “suspected of having forged ties with organised crime, particularly in the United States”. The Court held that there was no sufficient factual basis entitling the author of the book to write that the named lawyer was suspected of having ties with criminal organisations.

²⁷⁵ ECtHR *Bodrožić and Vuijn v. Serbia*, 23 June 2009, in which the Court found that the conviction of two journalists for insult and defamation of a well-known lawyer amounted to a breach of Article 10 ECHR. The Court was of the opinion that comparing a male lawyer with a blond woman is in itself not defamatory, considering also that the litigious article was ironical and humorous in content, and was to be understood as a joke rather than a direct statement maliciously aimed at offending the lawyer’s dignity.

Poland,²⁷⁷ *Węgrzynowski and Smolczewski v Poland*,²⁷⁸ and most recently *Print Zeitungsverlag GMBH v Austria*.²⁷⁹

The lawyer-client relation and the public-private relation, especially regarding privacy and confidentiality, has been profoundly analysed in *Roemen and Schmit v Luxembourg*.²⁸⁰ Also in the case of *Michaud v France* the ECtHR clarified the importance of, as well as the possible limitations to, the crucial aspect of lawyers' duty of professional confidentiality. The Court observed that lawyers' obligations under the EU Money Laundering Directive (see sections 4.4.4 and 6.4.1 below) to report suspicions of money laundering "form part of a series of international instruments intended to prevent activities which constitute a serious threat to democracy". The Court agreed with the French authorities that requiring lawyers to report suspicions did not amount to an excessive interference with their duty of professional confidentiality, as protected by Article 8 ECHR. The Court referred to the general interest served by combating money laundering and to the exclusion from the scope of the obligation of information received or

²⁷⁶ ECtHR *Aquilina a.o. v. Malta*, 14 June 2011, in which the Court found that the conviction of the applicant journalist, publisher and printer for defamation of a lawyer amounted to a breach of Article 10 ECHR. In an article a lawyer had been sharply criticized as a journalist had reported about a court hearing during which the lawyer received a reprimand for contempt of court. Only afterwards it became clear that the judge had not effectively sanctioned the lawyer. The Court stated that "to limit court reporting to facts reproduced in the records of proceedings, and to bar reports based on what a journalist has heard and seen with his or her own eyes and ears, as corroborated by others, would be an unacceptable restriction of freedom of expression and the free flow of information". The Court also took into consideration that the newspaper published an apology two days after the publication of the impugned article.

²⁷⁷ ECtHR *Semik-Orzech v. Poland*, 15 November 2011, in which the Court recognized that an allegation of improper professional conduct on the part of an advocate representing defendants in a criminal case, that was published in a newspaper, "was serious as it undermined the lawyer's professional integrity and called his diligence into question (...), and thus called for thorough research on the part of the applicant". The Court found that the author of the article had not shown due diligence in attempting to verify the facts and the newspaper had also refused to publish a rectification on request of the lawyer. Because the allegations lacked a solid factual basis, the conviction of the author of the defamatory article was in accordance with Article 10 ECHR.

²⁷⁸ ECtHR *Węgrzynowski and Smolczewski v. Poland*, 16 July 2013. The case concerns the complaint by two lawyers that a newspaper article damaging to their reputation – which the Polish courts, in previous libel proceedings, had found to be based on insufficient information and in breach of their rights – remained accessible to the public on the newspaper's website, breaching their right of reputation. The Court observed that it would be desirable to add a comment to the article on the website informing the public of the outcome of the civil proceedings in which the courts had allowed the lawyers' claim for the protection of their personal rights, rather than to order the removal of the press article, with disrespect of the integrity of the online news archives.

²⁷⁹ ECtHR *Print Zeitungsverlag GMBH v. Austria*, 10 October 2013, in which the Court accepted the finding by the national courts in favour of two claimants, C.M. and J.M. being defamed in their capacity as practising lawyers. The Court explicitly mentioned that the litigious newspaper's article was a gratuitous attack on the lawyers' reputation and that the national courts "referred to the negative repercussions C.M. and J.M. had experienced in their professional lives as practising lawyers". The Court concluded that the sanction imposed, namely the order to pay compensation of EUR 2,000 to each of the claimants and to publish the judgment confirming the defamatory character of the article at issue, did not amount to a violation of Article 10. The right of reputation of the lawyers, as protected by Article 8 ECHR, prevailed over the right of freedom of expression in the light of the concrete circumstances of the case.

²⁸⁰ ECtHR *Roemen and Schmit v. Luxembourg*, 25 February 2003. See also Voorhoof & Høedt-Rasmussen, *The Confidentiality of the Lawyer-Client Relationship Under Pressure? Analysis of the Judgment in the Case Roemen and Schmit v. Luxembourg*.

obtained by lawyers when acting as legal counsel or in the context of judicial proceedings (unless the lawyer is taking part in money laundering activities, or the legal advice is provided for money laundering purposes, or the lawyer knows that the client is seeking legal advice for money laundering purposes).

The Court accepted that the obligations did not amount to an infringement of lawyers' rights, and found that 'the obligation to report suspicions does not therefore go to the very essence of the lawyer's defence role which, as stated earlier, forms the very basis of legal professional privilege'. The Court reached the conclusion that 'regard being had to the legitimate aim pursued and the particular importance of that aim in a democratic society, the obligation for lawyers to report suspicions, as practised in France, does not constitute a disproportionate interference with the professional privilege of lawyers'.²⁸¹

This shows how the ECtHR's case law contains important principles and guidelines for the authorities, for lawyers' professional and disciplinary organisations and for individual lawyers in their relations to their clients, their profession, the judiciary and society at large.

4.4.4 The European Union – directives, rules and recommendations

Within the EU, two directives are important with regard to the regulation of the legal profession. These are Council Directive 77/249/EEC to facilitate the effective exercise by lawyers of freedom to provide services (the 'Services Directive')²⁸² and Directive 98/5/EC to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained (the 'Establishment Directive').²⁸³ Both directives have been implemented in Danish law by Executive Orders of the Minister for Justice.²⁸⁴

The Services Directive is intended to facilitate the effective freedom of lawyers to provide services. The Directive does not contain many provisions related to the tasks, roles and identity of lawyers, but it stresses that lawyers are a limited group of professionals, and that they only act under the Directive when they are recognised as lawyers in their respective Member States. The powers of lawyers' professional organisations and their relation to nation states are specified in Article 4(1), which states that:

'Activities relating to the representation of a client in legal proceedings or before public authorities shall be pursued in each host Member State under the conditions laid down for lawyers established in that State, with the exception of any conditions requiring residence, or registration with a professional organization, in that State.'

²⁸¹ ECtHR *Michaud v. France*, 6 December 2012, §§ 121-131.

²⁸² Directive 77/249/EEC, Official Journal of the European Communities 1977, No L 78, p. 17.

²⁸³ Directive 98/5/EC, Official Journal of the European Communities 1998, No L 77.

²⁸⁴ Bekendtgørelse om *EU-advokaters etablering her i landet* - 1. januar 2008, Bekendtgørelse om *EU-advokaters tjenesteydelser her i landet* - 1. januar 2008, Bekendtgørelse om *ændring af bekendtgørelse om EU-advokaters etablering her i landet mv.* - 5. juli 2010

In addition Article 7 states that:

'1. The competent authority of the host Member State may request the person providing the services to establish his qualifications as a lawyer.

2. In the event of non-compliance with the obligations referred to in Article 4 and in force in the host Member State, the competent authority of the latter shall determine in accordance with its own rules and procedures the consequences of such non-compliance, and to this end may obtain any appropriate professional information concerning the person providing services. It shall notify the competent authority of the Member State from which the person comes of any decision taken. Such exchanges shall not affect the confidential nature of the information supplied.'

In the creation of a European lawyer, the national authorities still play a major role in controlling access to the profession. The Establishment Directive goes further than the Services Directive, as it intended to facilitate lawyers who are qualified in one Member State practising in another Member State. Analogous to the Services Directive, few of its articles refer to or have an impact on the identity of lawyers. However, Articles 6 and 7 highlight the supranational character of lawyers' work and of the rules applicable to professional conduct and disciplinary sanctions.²⁸⁵

Article 6:

'1. Irrespective of the rules of professional conduct to which he is subject in his home Member State, a lawyer practising under his home-country professional title shall be subject to the same rules of professional conduct as lawyers practising under the relevant professional title of the host Member State in respect of all the activities he pursues in its territory.

2. Lawyers practising under their home-country professional titles shall be granted appropriate representation in the professional associations of the host Member State.' Such representation shall involve at least the right to vote in elections to those associations governing bodies.'

Article 7:

'Disciplinary proceedings - 1. In the event of failure by a lawyer practising under his home-country professional title to fulfil the obligations in force in the host Member State, the rules of procedure, penalties and remedies provided for in the host Member State shall apply.'

In 2012 the Commission initiated an evaluation of the two directives and their effect on the establishment of law firms in the EU, whether the directives promote or prevent the establishment of law firms in other Member States and whether the directives meet consumer's

²⁸⁵ Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained, Articles 6 and 7.

needs for legal assistance in cross-border transactions. The Commission also wanted to obtain more information on the cross-border use of the professional titles. The focus on the legal profession is current and concrete and indicates a need for change, especially when interpreted in line with other initiatives to develop a European legal profession.

In the area of soft law, the recent Commission Communication, 'Building trust in EU-wide justice',²⁸⁶ will also be integrated in the analysis of developing identity through education and training. It is remarkable that in this communication the Commission deals with education and training of both lawyers and judges as members of a group with common responsibilities for managing court cases. This represents a new trend in training activities which is also seen in relation to Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters (the 'Mediation Directive').²⁸⁷ It upholds the idea that, like judges, lawyers are important agents in the protection of a democratic society, and it underlines a societal commitment.

The European Parliament has also expressed its policy goals for the development of the legal profession. It has emphasised that any reform of the legal profession will have far-reaching consequences, going beyond aspects of competition law and relating to freedom, security and justice. From a societal perspective, the reform of the legal profession is crucial for maintaining and protecting the rule of law in the European Union. Of particular importance in this regard is the European Parliament Resolution of 23 March 2006, on the legal professions and the general interest in the functioning of legal systems, which refers to issues that are relevant to the identities and roles of lawyers.

Legal Source The European Parliament resolution on the legal professions and the general interest in the functioning of legal systems, 23 March 2006		
What to do Society level	How to act Profession	Who to be The individual
1. Recognises fully the crucial role played by the legal professions in a democratic society to guarantee respect for fundamental rights, the rule of law and security in the application of the law, both when lawyers represent and defend clients in court and when they are giving their clients legal advice.	3. Notes the high qualifications required for access to the legal professions, the need to protect those qualifications that characterise the legal professions, in the interests of European citizens, and the need to establish a specific relationship based on trust between members of the legal professions and their clients.	4. Reaffirms the importance of rules which are necessary to ensure the independence, competence, integrity and responsibility of members of the legal professions so as to guarantee the quality of their services, to the benefit of their clients and society in general, and in order to safeguard the public interest.

Figure 4-3. EP Resolution on legal professions

²⁸⁶ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions (COM(2011) 551): *Building trust in EU-wide justice: a new dimension to European judicial training*.

²⁸⁷ Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters.

There is emphasis on the crucial role played by the legal profession in a democratic society, in relation to guaranteeing fundamental rights and respect for the rule of law. In addition, the requirement for 'high qualifications' for access to the legal professions (in plural) is indicated 'in the interest of European citizens'. The Resolution also refers to the need for 'trust' in the lawyer-client relationship and the need to ensure lawyers' independence, competence, integrity and responsibility, not only to guarantee the quality of their services for the benefit of their clients, but to benefit 'society in general and in order to safeguard the public interest'.

Other EU legal documents frame the activities of lawyers, such as:

- Council Directive 2003/8/EC to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes.
- Directive 2005/36/EC on the recognition of professional qualifications.
- EU Parliament Resolution of 5 April 2001 on scale fees and compulsory tariffs for certain liberal professions, in particular lawyers, and on the particular role and position of the liberal professions in modern society.
- EU Parliament Resolution of 16 December 2003 on market regulations and competition rules for the liberal professions.

Directive 2012/13/EU on the right to information in criminal proceedings should also be mentioned. This Directive guarantees certain rights of suspects, accused persons or their lawyers, such as the right of access to the materials of the case (Article 7). Most importantly it guarantees suspects and accused persons a right of access to a lawyer (Article 3(1)(a)) and entitlement to free legal advice (Article 3(1)(b)). Article 4 of the Directive requires Member States to ensure that suspects or accused persons who are arrested or detained are promptly provided with a Letter of Rights. According to the indicative model of a Letter of Rights, the first principle to be mentioned is that arrested or detained persons have a right to the assistance of a lawyer and are entitled to legal aid. The model Letter of Rights states that detained or arrested persons 'have the right to speak confidentially to a lawyer. A lawyer is independent from the police'. Hence, both the principles of the confidentiality of the client-lawyer relation and the independence of lawyers are emphasised. Article 9 of the Directive requires the Member States to request those responsible for the training of 'judges, prosecutors, police and judicial staff involved in criminal proceedings' to respect to the objectives of the Directive. This requirement does not extend to those responsible for the training or education of lawyers. The fact that those responsible for training lawyers are not included in this EU-imposed obligation for the Member States in itself confirms the independent character of the legal profession.

Most recently the EU has adopted Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty. In its preamble, the Directive clarifies that the term 'lawyer' refers to: 'any person who, in accordance with national law, is qualified and

entitled, including by means of accreditation by an authorised body, to provide legal advice and assistance to suspects or accused persons' (recital 15). It also confirms that: 'the lawyers of suspects or accused persons should be able to secure without restriction, the fundamental aspects of the defence' (recital 12). Apart from respect for the principle of a fair trial, this Directive also emphasises the confidentiality of the client-lawyer relation:

'Confidentiality of communication between suspects or accused persons and their lawyer is key to ensuring the effective exercise of the rights of the defence and is an essential part of the right to a fair trial. Member States should therefore respect the confidentiality of meetings and other forms of communication between the lawyer and the suspect or accused person in the exercise of the right of access to a lawyer provided for in this Directive, without derogation' (recital 33).

Article 3 of Directive 2013/48 confirms the right of access to a lawyer by suspects and accused persons, with a reference to the practical and effective guaranteeing of the right of defence:

'Member States shall ensure that suspects and accused persons have the right of access to a lawyer in such time and in such a manner so as to allow the persons concerned to exercise their rights of defence practically and effectively'.

Article 4 guarantees the confidentiality of the client-lawyer relation, by providing that:

'Member States shall respect the confidentiality of communication between suspects or accused persons and their lawyer in the exercise of the right of access to a lawyer provided for under this Directive. Such communication shall include meetings, correspondence, telephone conversations and other forms of communication permitted under national law'.

Again the role of lawyers in relation to the right to a defence and a fair trial is emphasised, together with their independence and the confidentiality of communication with lawyers.

Directive 2001/97/EC on prevention of the use of the financial system for the purpose of money laundering (the 'Money Laundering Directive') is relevant to the portrayal of the European identity of lawyers. The Directive prescribes that the Member States must impose obligations on 'notaries and other independent legal professionals', under certain circumstances, to identify and report suspicious financial transactions. This reporting obligation, which can also involve lawyers' professional organisations (see section 6.4.1 below), can conflict with the lawyers' duty of professional confidentiality. This important issue has far-reaching consequences for the identity development of lawyers, and will be further discussed in Chapter 6, more precisely in section 6.4.1. The Money Laundering Directive and its implementation have been viewed as a breach with the traditional lawyers' independence from the authorities, as well as affecting lawyer-profession relations and lawyer-client relations. On the other hand the lawyers' obligations pursuant to the Money Laundering Directive confirm the expectations of society that lawyers should contribute to combating money laundering, fraud and corruption, and help to identify financial transactions that support terrorist activities. However Directive

2001/97/EC also clearly emphasises the importance of the principle of confidentiality in the legal profession, as it recognises that:

‘where independent members of professions providing legal advice which are legally recognised and controlled, such as lawyers, are ascertaining the legal position of a client or representing a client in legal proceedings, it would not be appropriate under the Directive to put these legal professionals in respect of these activities under an obligation to report suspicions of money laundering. There must be exemptions from any obligation to report information obtained either before, during or after judicial proceedings, or in the course of ascertaining the legal position for a client. Thus, legal advice remains subject to the obligation of professional secrecy unless the legal counsellor is taking part in money laundering activities, the legal advice is provided for money laundering purposes, or the lawyer knows that the client is seeking legal advice for money laundering purposes’ (recital 17).

The conditional obligations imposed on lawyers in the Directive reflect this concern and the Directive tries to find a balance between lawyers’ professional privileges and their societal obligations.

The CJEU also plays an important role and it has recognised that independence, absence of conflicts of interest and professional confidentiality are core values of the legal profession that are in the public interest. Regulations protecting the core values are necessary for the proper practice of the legal profession, despite the inherent restriction on competition that may result from this. There is indeed a conflict between free competition in the EU and the protection of the legal profession’s privileges. The case law of the ECtHR and the CJEU, and in particular the judgment of CJEU in the case C-309/99 *Wouters v Algemene Raad van de Nederlandse Orde van Advocaten*,²⁸⁸ has influenced the mobility of lawyers in Europe and favoured increased competition. This can be seen as one more step towards a European lawyer identity.

4.4.5 Council of Bars and Law Societies of Europe (CCBE)

In 1988, the CCBE adopted a Code of Conduct for European Lawyers which applies to cross-border cases. The national bar and law societies have an obligation to take the Code into account in every revision of their national codes of conduct. The aim is to harmonise codes and regulations within the European Union. Furthermore, the CCBE has published several documents that reflect the norms of the legal profession or highlight the history of European common actions for upholding, developing and protecting the profession.²⁸⁹ In 2009 the CCBE published a manifesto under the title ‘The right kind of justice for Europe’, and prior to that it had adopted a ‘Charter of core principles of the European legal profession’ (November 2006). This

²⁸⁸ Fejø, *Konkurrenceret*, p. 58 & p. 71.

²⁸⁹ CCBE, *The History of the CCBE. Conseil des barreaux européens – Council of Bars and Law Societies of Europe*.

Charter, which was unanimously adopted, lists 10 principles common to all European legal professions and refers to the Code of Conduct for European Lawyers.²⁹⁰

In its manifesto, the CCBE expressed a political request in relation to the upcoming European elections and the establishment of the new European Commission under the Swedish Presidency in the second half of 2009. The CCBE called on EU decision-makers to ensure proper policy coordination and coherence in the justice sector. The manifesto urged the establishment of: ‘a separate Directorate General for Justice at European level because it is vital to maintain separation of powers and to avoid conflicts of interest, and because there needs to be better co-ordination of legislation affecting the justice sector.’²⁹¹

The other principles expressed in the 2009 manifesto all reflected the ‘aim to defend the fundamental legal principles upon which democracy and the rule of law are based’, as ‘European lawyers believe that these principles are at the heart of the European Union’.

The Charter of core principles of the European legal profession and the Code of Conduct for European Lawyers express obligations and expectations of society, the profession and individuals. The 10 main principles of the Charter can be categorised in the light of these three levels:

Legal source: CCBE Charter		
What to do Society level	How to act Professional association	Who to be The individual
(c) avoidance of conflicts of interest, whether between different clients or between the client and the lawyer; (i) respect for the rule of law and the fair administration of justice.	(b) the right and duty of the lawyer to keep clients’ matters confidential and to respect professional secrecy; (f) fair treatment of clients in relation to fees; (h) respect towards professional colleagues; (j) the self-regulation of the legal profession.	(a) the independence of the lawyer, and the freedom of the lawyer to pursue the client’s case; (d) the dignity and honour of the legal profession, and the integrity and good repute of the individual lawyer; (e) loyalty to the client; (g) the lawyer’s professional competence.

Figure 4-4. CCBE Charter

The CCBE Code of Conduct is one of the most detailed sources of the identity of the European lawyer and it has an obvious and direct impact on lawyering practice in Europe. Its authority is widely recognised, it is implemented and enforced by the national bar and law societies and it is also reflected in the case law of the ECtHR. In several judgments the Court has referred to

²⁹⁰ CCBE, *Charter of Core Principles of The European Legal Profession and Code of Conduct for European Lawyers*, www.ccbe.eu/fileadmin/user_upload/NTCdocument/EN_CCBE_CoCpdf1_1382973057.pdf (last accessed 11 July 2013).

²⁹¹ CCBE, *Manifesto 2009*, www.ccbe.eu/fileadmin/user_upload/document/Manifesto/manifesto_EN_web.pdf (last accessed 3 November 2013).

the CCBE Code, and on numerous occasions the CCBE has filed third-party interventions which have been referred to in the Court's judgments.²⁹²

Legal Source CCBE Code of Conduct ²⁹³		
What to do Society level	How to act Professional association	Who to be The Individual
<p>1.1. The Function of the Lawyer in Society. In a society founded on respect for the rule of law the lawyer fulfils a special role. A lawyer must serve the interests of justice as well as those whose rights and liberties he or she is trusted to assert and defend and it is the lawyer's duty not only to plead the client's cause but to be the client's adviser. Respect for the lawyer's professional function is an essential condition for the rule of law and democracy in society.</p> <p>2.3.1. ... The lawyer's obligation of confidentiality serves the interest of the administration of justice as well as the interest of the client. It is therefore entitled to special protection by the State.</p> <p>2.6.1. A lawyer is entitled to inform the public about his or her services provided that the information is accurate and not misleading, and respectful of the obligation of confidentiality and other core values of the profession.</p>	<p>1.1. The lawyer's duties do not begin and end with the faithful performance of what he or she is instructed to do so far as the law permits.</p> <p>2.1.1. The many duties to which a lawyer is subject require the lawyer's absolute independence, free from all other influence, especially such as may arise from his or her personal interests or external pressure.</p> <p>2.4. Respect for the Rules of Other Bars and Law Societies.</p> <p>2.5.3. A lawyer established in a Host Member State in which he or she wishes to participate directly in commercial or other activities not connected with the practice of the law shall respect the rules regarding forbidden or incompatible occupations as they are applied to lawyers of that Member State.</p>	<p>1.1. A lawyer's function therefore lays on him or her a variety of legal and moral obligations (sometimes appearing to be in conflict with each other).</p> <p>2.2. Trust and Personal Integrity. Relationships of trust can only exist if a lawyer's personal honour, honesty and integrity are beyond doubt. For the lawyer these traditional virtues are professional obligations.</p> <p>2.6.2. Personal publicity by a lawyer in any form of media such as by press, radio, television, by electronic commercial communications or otherwise is permitted to the extent it complies with the requirements of 2.6.1.[see column 1].</p> <p>5.1.2. A lawyer should recognise all other lawyers of Member States as professional colleagues and act fairly and courteously towards them.</p> <p>5.8. Continuing Professional Development. Lawyers should maintain and develop their professional knowledge and skills taking proper account of the European dimension of their profession.</p>

Figure 4-5. CCBE Code of Conduct

The CCBE Code of Conduct reflects several values, characteristics and conditions that are considered crucial for the legal profession, both in its relation to society and especially with regard to individual lawyers. The Code refers to lawyers' 'legal and moral obligations' and their inde-

²⁹² See e.g. ECtHR *Sialkowska v. Poland*, 22 March 2007; ECtHR *Staroszczyk v. Poland*, 22 March 2007; ECtHR *Mor v. France*, 15 December 2011 and ECtHR *Michaud v. France*, 6 December 2012.

²⁹³ Adopted at the CCBE Plenary Session, 11 November 2007. The national codes of conduct are published on the CCBE website: www.ccbe.eu.

pendence, trust, honesty and integrity as ‘traditional virtues and professional obligations’. A reference is also made to the ‘lawyer’s personal honour’ and their duty to act fairly and courteously towards other members of the legal profession. And there is a reference to the obligation of continuing professional development, taking ‘proper account of the European dimension of their profession’.

4.4.6 International principles for the conduct of the legal profession

European lawyers are also linked to global networks such as the International Bar Association (IBA).²⁹⁴ The American Bar Association (ABA) also plays an important role in setting global norms for lawyers. The Preamble to the ABA’s Model Rules of Professional Conduct state:

‘As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice, and the quality of service rendered by the legal profession.’²⁹⁵

Bar associations can be seen as agents in Giddens’s theoretical agent-system framework, so their regulatory frameworks influence both the societal level and the individual level. These interactions are analysed in detail in section 6.4.

4.4.7 The legal framework for Danish lawyers’ identity, education and practice

National law and other regulations in Denmark with an impact on the legal profession will not be analysed in depth here, as the aim of this chapter is to identify the (‘artefact’ of the) identity of the European lawyer. Nevertheless, lawyers in Denmark are not solely regulated pursuant to the Danish Administration of Justice Act (VII. Lawyers, Part 12, Admission to practise law).²⁹⁶ Several regulatory instruments govern the legal profession within the framework of this Act, including:²⁹⁷

- The Executive Order on calling lawyers ... for an interview with the district committee.
- The Executive Order on professional corporations of lawyers.
- The Executive Order on the compulsory participation of owners of professional corporations of lawyers who are not lawyers in a test on the rules of special importance to the profession of lawyer (the partner test).
- The Executive Order on mandatory continuing education for lawyers and assistant attorneys.
- The Executive Order on mandatory basic education as a condition for admission to practise law.

²⁹⁴ IBA, *General Principles for the Legal Profession*, Adopted on 28 May 2011, www.ibanet.org.

²⁹⁵ ABA, *Model rules of professional conduct (2010)*.

²⁹⁶ The Danish Administration of Justice Act, Consolidated Act No. 1008 of 24 October 2012: *Title VII. Lawyers, Part 12: Admission to practise law*.

²⁹⁷ All laws and Orders referred to are accessible via the website of the Danish Bar and Law Society: www.advokatsamfundet.dk (last accessed 8 November 2013).

- The Executive Order on the activities of the Disciplinary Board and of the district committees when considering complaints about lawyers, etc.
- The Executive Order on EU lawyers' establishment in Denmark.
- The Executive Order on EU lawyers' services in Denmark.

These legal sources do not explicitly define the identity of lawyers, but they demonstrate the interconnection with the supranational level (the last two bullet points), the importance of continuing professional training and the protection of the profession, such as the 'partner test'. Success in this test entitles persons without a legal background to be a partner in a law firm, which was unthinkable just few years ago. At the same time it demonstrates how modifications to the legal framework can have an impact on lawyers' identity.

The Disciplinary Board of the Danish Bar and Law Society has the competence to lay down a code of conduct reflecting the standards developed in case law. The regulation of the activities of Danish legal practitioners is based on the rulings of the Disciplinary Board²⁹⁸ and the courts. This shows how agent-structure interaction is decisive for the development of behavioural norms.

The CCBE Code of Conduct was first adopted by the Council of the Danish Bar and Law Society in November 1999. The Code of Conduct, as amended at the CCBE Plenary Session in May 2006, was adopted by the Council of the Danish Bar and Law Society in August 2006 and entered into force in October 2006. The CCBE Code of Conduct has the same legal status as the national Code of Conduct. To a wide extent, the provisions of the national Code of Conduct are based on the CCBE Code of Conduct.

The Disciplinary Board decides in accordance with the provisions of the Administration of Justice Act which state that lawyers must always act in accordance with good professional conduct. According to the Act, the Disciplinary Board is not bound by the Code of Conduct when deciding on cases of alleged breaches of the Code.²⁹⁹ The Board may find that what is expressed in the Code of Conduct is not in accordance with what it perceives to be good professional conduct. This again is an example how the agent-system develops new practice.

²⁹⁸ The Disciplinary Board ("Advokatnævnet") is the independent part of the Danish Bar and Law Society that handles complaints against lawyers. The Disciplinary Board has 21 members. The chairmen are three judges, one from the Supreme Court, one from High Court and one from the City Court. The judges are appointed by the President of the Supreme Court. Nine members are lay members, appointed by the Ministry of Justice and nine members are lawyers, appointed by the members of the Danish Bar and Law Society.

²⁹⁹ The Danish Administration of Justice Act, Art. 144 f. This is also reflected in Article 3.1. of the Code of Conduct of the Danish Bar and Law Society, laying down the requirements "which, out of regard for the special position of lawyers in society and on the basis of the Disciplinary Board's practices and the practices of the courts of law express the General Council of the Danish Bar and Law Society's understanding of the professional standards and ethics to be observed by lawyers in practising law under the professional title of lawyer", hence recognizing the crucial and discretionary role of the Disciplinary Board.

4.4.8 State recognition of legal science in Denmark

The birth of the legal profession in Denmark is associated with the University of Copenhagen, which founded a faculty of law in 1479 with one law professor.³⁰⁰ The University of Copenhagen awarded its first law degree following a decree of February 1736. According to section 8 of this decree:

‘law professionals shall never knowingly abjure law and justice, never advise needless actions, nor shall they through advice or in any other way promote any unjust actions or intentions.’³⁰¹

With the introduction of the lawyers’ oath in 1736, which is still printed on the University diploma, a lawyer is committed (at a societal level) to promote law and justice. With the dominance of legal positivism, these natural law-inspired normative formulations have been eclipsed by more rational approaches, focusing on legal methods and legal sources.³⁰²

4.5 The identity ideal as depicted in legal sources

In relation to identity, having analysed the legal sources using Giddens’s structuration approach, it is clear that the European identity ideal still supports the idea that the lawyer is *a lawyer* and not many different lawyers. In most regulations and recommendations, and in case law, the ideal of the independent practitioner still survives, despite the specialisation and the variety of tasks, roles and cases a lawyer is involved in. The formal picture of the lawyer’s identity does not reflect differences of clients, geographical locations, legal specialisations or levels of technical support. The focus is still on the identity of the lawyer and the legal profession. Only in the European Parliament’s Resolution of 2006 is there a reference to ‘legal professions’, which probably refers to countries like the United Kingdom and the Republic of Ireland with more than one legal profession like solicitors and barristers, or countries like France and Belgium where notaries and advocates are separate professions.

4.5.1 The spirit of the EU

To understand the values behind the identity of a European lawyer, it is relevant to focus on the ‘spirit’ and ideological goals of the development of the EU. These are embedded in the Treaty on European Union, which expresses the fundamental goals of democratic rights, human rights and new collective rights such as combating poverty, contributing to peace, solving political conflicts, protecting the environment, dealing with natural disasters, and promoting sustainability. At the same time, the development of the internal market has massively increased the number of cross-border transactions which involve lawyers. As seen above, the

³⁰⁰ Tam, *Rethistorie*.

³⁰¹ Vinni von Benzon (translator), original text: ”Den juridiske embedseksamen ved Københavns Universitet indførtes ved forordning af 10. februar 1736. Ifølge denne forordnings § 8 må juridiske kandidater aldrig vidende vige fra ret og retfærdighed, aldrig råde nogen til uforholdne processer og ej heller ved råd eller på anden måde befordre nogen uretvis sag eller intension”.

³⁰² Højlund, *Frygtens ret*, p. 87.

Services Directive³⁰³ and the Establishment Directive regulate the activities of lawyers involved in transnational business.³⁰⁴

The development of the European Union implies the development of a 'European legal method' based on a common European ideal. Such developments and changes in the concept of law make it necessary to modify the curriculum.³⁰⁵ European integration has spread to more and more areas. After an initial attempt to cover three areas with political, defence, and coal and steel treaties, only action in the economic area was realised initially. Now the EU's policies and regulations are affecting further areas of life and society. This has a huge impact in these areas, sometimes in ways other than the Member States would have chosen themselves. European legislation, administration and judgments are creating further developments in the light and spirit of the European ideal. The Danish opt-out from EU field of justice and home affairs (*Retsforbehold*) also affects the role of lawyers. This is a political decision, but one with far-reaching legal consequences. The question is not what kind of legal system we want, but what kind of society we want to live in.

To understand how a commitment to the European ideal influences legal practitioners and is integrated in the development of their professional identities, the European legal system could be interpreted in the light of the thinking of legal philosopher Ronald Dworkin (see section 2.3.3) who frames lawyers and their decisions systematically, including the three levels of analysis, society, the profession and the individual.

When a legal culture is performed in a new context which is no longer directly related to a nation state, legal sources will become interdependent in a new way. Not all EU Member States are equally wedded to the dominance of positivistic thinking, as in the Scandinavian tradition. In some countries religion plays a more dominant role, affecting their relations with the EU. Within the EU, norms and regulations are related to other normative groups or organisations, in addition to the EU institutions and the Member States.³⁰⁶

The EU Treaties respect different national identities, which must be broadly interpreted. The EU subsidiarity principle clearly reflects this. For the legal profession, this includes respecting differences in the organisation of national bar and law societies and their members. However, this respect may conflict with fundamental principles of the EU, and the establishment of the internal market in which the free movement of goods, services, capital and persons is ensured and in which European citizens are free to live, work, study and do business. As for lawyers, the common rights of the profession are secured in the legal sources referred to in this chapter.

Ramon Mullerat, former President of the Council of the Bars and Law Societies of the EU (CCBE), made important contributions to portraying the European lawyer as a 'good lawyer'

³⁰³ Directive 77/249/EEC, Official Journal of the European Communities 1977 No L 78, p. 17.

³⁰⁴ Directive 98/5/EC, Official Journal of the European Communities 1998 No L 77.

³⁰⁵ Heringa & Akkermans (eds.), *Educating European Lawyers*.

³⁰⁶ Petersen, *Globalisering, ret og retsfilosofi*, p. 147.

committed to a global responsibility.³⁰⁷ He encouraged lawyers to contribute to the betterment of the world and emphasised the important role of lawyers in the modern globalised society. Mullerat saw lawyers' tasks as being to smooth out difficulties, relieve stress, correct mistakes, take up others' burdens and contribute to peaceful life in a peaceful state. Mullerat criticised the fact that too often the ideal model that law schools, bars and law firms present to students and young lawyers is of lawyers being functionally and worldly successful, of lawyers if not as 'sharks' at least as 'hired guns' who adapt to whatever requirements the client may have. Mullerat disagreed with presenting lawyers as 'gladiators' fighting to annihilate their adversary, prepared to defend any cause depending on the fee. He argued in support of the model of a lawyer as a solution-finder or peacemaker. Being aware of the differences between lawyers in the different Member States, Mullerat stated:

'In spite that the fundamental mission of all lawyers in the world is the defence of the rights and liberties of the citizens and that their fundamental functions are legal representation in court and legal advice, the reality is that the identity, training, ethics, organization and methods of practice vary significantly from one country to another. With regard to Europe, a classic error, particularly when viewed from the outside, consists to consider the European Union (EU) as a full political and economic unit'.³⁰⁸

In the development of a new legal system in Europe, where both fundamental democratic rights and practical day-to-day commercial transactions must be supported, there are many legal tasks for lawyers. There is still room for identity development, but this will either split the profession or bring it together, as the lawyers who work for fundamental democratic rights may not be the same as those who work on day-to-day commercial transactions.

4.5.2 What to do

It is shown that society has expectations that lawyers will uphold and protect democracy, connected to the rule of law and the ideal of justice based on the traditional division of power in society. European and national case law gives evidence of the special role of lawyers in society. This includes their role in relation to the courts and their contribution to building trust and confidence in the rule of law. When judging or lawyering, judges and legal practitioners have to take account of moral elements based on humanism. The ECtHR has confirmed this more than once. With reference to Article 6(1) of the ECHR, it has emphasised the well-known principle that 'justice must not only be done; it must also be seen to be done'.³⁰⁹ This was first developed by the ECtHR in the *De Cubber v Belgium* case in 1984, and it was repeated in the case of *Micallef v Malta* in 2009.³¹⁰ The ECtHR has reiterated this approach on many occasions in its objective test of the impartiality of the Court and its judges, supporting the fair trial principle set out in Article 6(1) ECHR. The issue of 'justice' is high on the EU agenda, and the fun-

³⁰⁷ Mullerat, *Law Practice in a Globalized World: The European Experience*, pp. 1-8.

³⁰⁸ Mullerat, *Law Practice in a Globalized World: The European Experience*, p. 5.

³⁰⁹ ECtHR *De Cubber v. Belgium*, 26 October 1984, § 26.

³¹⁰ ECtHR (Grand Chamber) *Micallef v. Malta*, 15 October 2009, § 97. See also ECtHR *Peruš v. Slovenia*, 27 September 2012, § 36.

damental rights of the ECHR have recently been incorporated in EU law. Thus these values and principles must be made effective by practitioners such as lawyers.

In relation to their public role and societal tasks, the legal sources framing the ideal of the lawyer clearly emphasise the lawyer's role as a servant of justice. On several occasions the ECtHR has emphasised the various characteristics of the lawyer's role in society, referring to the rights and specific obligations of lawyers acting in courts or taking part in public debate (see section 4.4.3 above). Specifically with regard to the confidentiality of lawyer-client relations, the Court has recognised that the:

'legal professional privilege is of great importance for both the lawyer and his client and for the proper administration of justice. It is without a doubt one of the fundamental principles on which the administration of justice in a democratic society is based'.³¹¹

It is this important role in society that legitimises lawyers' professional privileges. This relates to Giddens's question of 'What to do'. However, the ideal of 'What to do' may no longer be the dominant characteristic of lawyers' own perceptions of their role and identity, as the provisions in the left-hand columns of the legal sources analysed above seem to be more related to the classic identity of a lawyer than to the actual practice of lawyers. This will be further analysed in Chapter 6.

4.5.3 How to act

In relation to the professional level, 'How to act' is expressed in behavioural and ethical rules. Apart from the concrete examples in the case law, the CCBE's ethical framework is supplemented by national rules and enforced by national bar and law societies. These rules contain detailed and increasingly harmonised regulation throughout Europe. In Denmark, the Danish Bar and Law Society has changed its rules to bring them more into line with a business-oriented approach to lawyering.³¹²

The individual lawyer has moral and legal obligations towards their clients, the judiciary, the profession and society. The CCBE Code of Conduct places lawyers' obligations at several levels:

'the client, the courts and other authorities before whom the lawyer pleads the client's cause or acts on the client's behalf; the legal profession in general and each fellow member of it in particular; the public for whom the existence of a free and independent profession, bound together by respect for rules made by the profession itself, is an essential means of safeguarding human rights in face of the power of the state and other interests in society.'³¹³

The regulations analysed in this chapter focus on the 'What to do' and 'How to act' questions, but the individual identity of a lawyer (the 'Who to be') has received little attention apart from a few general references to some vague characteristics. However, the individual lawyer's iden-

³¹¹ ECtHR *Michaud v. France*, 6 December 2012, § 123.

³¹² Lavesen & Økjær Jørgensen, *Advokatetik – ret og rammer*.

³¹³ CCBE, *Code of Conduct*, preamble 1.1.

tity will be constructed in professional practice, combining the application of the professional rules with an individually chosen lifestyle. The CCBE Code of Conduct and the CCBE Charter impose a moral ethical framework and legal obligations which affect behaviour and thus the identity and reputation of a lawyer. These obligations can involve conflicting obligations, requiring the lawyer to make personal decisions. These decisions are based on the lawyer's professional and personal identity and on the honour and dignity they are supposed to respect and express in legal practice and private life.

4.5.4 Who to be

Defining the ideal of lawyers, as an artefact based on or derived from legal sources, does not much affect the development of the personality of lawyers. However, the constructed ideal creates a realistic starting point for looking at the various dimensions of the lawyer's life and creates awareness of the intersection of professional obligations and personal identity.

According to recent research, the 'Who to be' question can only be understood with 'whole brain thinking', i.e. a more holistic view not exclusively based on rationality. From this perspective the assumption is that lawyers must also reflect how their feelings and emotions play an important or even crucial role in their professional life.³¹⁴ The positivist-based education of many lawyers has taught them to act as rationally dominated human beings who are able to suppress feelings, not letting them influence their lawyering. This approach conflicts with new theories and educational practices of whole brain thinking. The human brain cannot disregard feelings and psychological signals or reactions, but lawyers are expected to internalise ethics and moral considerations. Ethics and morals can only be understood in connection with emotions and with internalised values and feelings of justice and fairness. This insight comes from different scientific fields, as described by scholars like Hanne Petersen who writes about the need to focus on confidence, politeness, trustworthiness, generosity, vigour, commitment, empowerment and sense of balance.³¹⁵ Mullerat, both in his capacity as spokesman for the CCBE and as a law professor, addressed the intersection of emotion and law. Mullerat clarified how being a 'good lawyer' plays an important role in identity development:

'A good lawyer is a good man, a virtuous man, an honourable man, benevolent, kind, patient and loving. A good lawyer is a peacemaker, who believes that the best litigation is the one that is avoided, who has the courage to say no when his conscience so demands. The one who exhibits goodness and correctness of character and behaviour, who loves others and treats them as he would like to be treated an agent of goodness by working for the well-being of his/her clients and society in general, who refuses simple hedonist happiness and seeks happiness in the development of his responsibilities.'³¹⁶

³¹⁴ Wellford Slocum, *An Inconvenient Truth: The Need to Educate Emotionally Competent Lawyers*.

³¹⁵ Petersen, *Retfærdighed, godhed og lykke* and *The Language of Emotions in the Language of Law* in Petersen (ed.), *Love and Law in Europe*.

³¹⁶ Mullerat, *Law Practice in a Globalized World: The European Experience*, p. 15.

This statement can be seen as an interpretation of the CCBE rules and recommendations and it breaks with the perception that reason and rationality are separable from emotion and empathy and that law rightly privileges and admits only the former.

In the case of the confidentiality of the lawyer-client relationship, it is not enough to find a legal solution.³¹⁷ This question is much more refined, including the lawyer's consideration of what they can do while still maintaining congruence between their personal integrity and professional obligations. In such circumstances the lawyer needs to consider whether a breach of confidentiality would be a criminal offence or a matter of social responsibility.³¹⁸ It is not the law but the ethics and the personal attitude and identity of the lawyer that will influence decision-making on these matters.

Such dilemmas demonstrate how lawyers have power and authority, and how the response to the 'Who to be' question has a clear impact on 'What to do' in specific situations where ethical decision-making is based on identity and personal commitment. The power balance between the lawyer and the client can go either way. The client may be in a very weak situation and fully dependent of their lawyer, or the lawyer may be financially dependent on keeping a client, even though all lawyers defend the principle of independence as one of the main characteristics of lawyers.

Being a responsible lawyer unquestionably requires compliance with legal rules and ethical standards, but it also demands the capacity to exercise sound judgment in relation to democracy, human rights and fundamental freedoms while under the pressures of contemporary law practice, professional responsibilities and personal interests. There must be an environment in which these kinds of decisions can be taken optimally. This will require new and proactive ways of lawyering, which are even more relevant in the current economic climate.³¹⁹

This chapter has shown that there are only few norms that focus on the relation between a lawyer's professional and private roles. However, there is a specific reference in Council of Europe Recommendation No R(2000)11 on freedom of exercise of the profession of lawyer (see section 4.4.2 above). Article 4e of the Recommendation provides that the profession must 'promote the welfare of members of the profession and assist them or their families if circumstances so require'. This provision reflects a traditional form of private life, as a life with a fami-

³¹⁷ Voorhoof and Hoedt-Rasmussen, *The Confidentiality of the Lawyer-Client Relationship Under Pressure?* See also ECtHR *Michaud v. France*, 6 December 2012 and section 6.4.1.

³¹⁸ The Danish Supreme Court has accepted that a breach of confidence by lawyers can be justified due to the interests of society. In the Grønberg case, in a 4-3 decision, the Supreme Court acquitted a Danish lawyer for having breached his duty of confidentiality as he had given information about his client to a public authority. See www.business.dk/oekonomi/hoejesteret-frifinder-advokat-groenborg (last accessed 9 November 2013). In a recent judgment the Belgian Constitutional Court annulled the possibility to lift the duty of professional secrecy by a lawyer and report to the authorities imminent danger of abuse of minors or vulnerable persons, based on information from a client and possibly incriminating the client. The Constitutional Court emphasised the importance of the professional secrecy of lawyers as a fundamental principle on which the administration of justice and a democracy society are based on: Court Constitutionnel 26 September 2013, nr. 127/2013, www.const-court.be (last accessed 22 November 2013):

³¹⁹ Martin, *Role, Identity, and Lawyering: Empowering Professional Responsibility*, pp. 46-50.

ly, and suggests that both the profession and individual lawyers have to care for their families. It is as if lawyers and their families are considered as members of a (legal) brotherhood.

4.6 Reflections and sub-conclusion

The sources analysed in this chapter answer in the affirmative the research question of whether there is 'a common identity ideal for European lawyers that can be depicted within the legal order in Europe?'

Society's expectations of the legal profession and of lawyers' tasks are expressed in several of the preambles to international regulatory instruments and in political statements. The Services Directive and the Establishment Directive confirm the development towards the evolution of a European lawyer. The EU legal sources recognise that European lawyers are organised in national bar and law societies, and affirm the influential position of the professional organisations.

The most elaborated ideal of identity is defined and upheld by the CCBE in its Charter and Code of Conduct. The ideal reflected in these documents is fully in accordance with documents issued by the UN and the Council of Europe. It confirms the responsibilities of the CCBE and the national bar and law societies to organise the profession, to install, manage and enforce regulation of the profession and to organise continuing training for lawyers. This demonstrates the important, indeed essential, role of the professional organisations. Nevertheless, the EU institutions have challenged some of the characteristics of this formal ideal by stressing the needs of society to engage lawyers for certain services and to impose obligations on them, such as control functions on behalf of public authorities. This approach conflicts with the essential characteristic of the independence of lawyers.

In the past, the principal role of the lawyer was that of an advocate, and the legal profession was organised around the courts, each bar being associated with a specific local court. Lawyers were required to be physically established in the jurisdiction of the court to which their bar was connected. The European ideal is reflected in the Establishment Directive 98/5/EC which aims to balance this right with the freedom to provide services in the internal market.

The legal sources analysed in this chapter create and shape an identity of a lawyer who has obligations to society as an officer of justice, for which reason lawyers have some professional privileges. The most important of these is the extended right of confidentiality, which is a fundamental principle for the lawyer-client relation, the right to a fair trial and the proper administration of justice.

Professional organisations will tend to protect their legal privileges and the free and independent character of the profession which is bound up with respect for rules of the profession itself. This raises the question of whether the European ideal is upheld by the profession in order to protect it from competition from other legal or paralegal experts or business advisers.

The legal sources analysed in this chapter contain few indications for 'Who to be' as a lawyer, but it is clearly stated that a lawyer acts with honour and dignity and with some altruistic char-

acteristics. CCBE documents also refer to concepts such as ‘kind’, ‘benevolent’, ‘trustworthy’ and ‘empathic’ for lawyers as individuals, both in their relations with others and with society.

From the legal sources on individual lawyers, three provisions in particular might conflict with the practices and lifestyles of lawyers:

- ‘Lawyers shall at all times maintain the honour and dignity of their profession as essential agents of the administration of justice.’³²⁰
- ‘The duties of lawyers include ... endeavouring first and foremost to resolve a case amicably.’³²¹
- ‘... not taking up more work than they can reasonable manage.’³²²

The values behind these rules are closely related to the identity of the individual. The norms of *honour and dignity*, the need to *resolve cases amicably* and to have a *manageable workload* will be constantly interpreted. The fulfilment of or change to these norms depends on the actions of the individual lawyer, which means that individual and collective agency, as depicted in the light of Giddens’s structuration theory in Chapter 3, becomes vital.

Honour and dignity, as expressed in UN Basic Principles on the Role of Lawyers and the CCBE Code of Conduct, are difficult concepts to define, as ‘honour’ and ‘dignity’ connect to the inner life and demand a reflection of the lawyer’s moral and ethical foundation.

It is possible to frame an EU ideal identity for lawyers whose content is normative and societal and can be related to the identity structuration of Giddens. This ideal expresses the concepts for ‘What to do’, ‘How to act’ and ‘Who to be’ for approximately one million European lawyers. It is an ideal, an artefact, which tries to frame all lawyers, whatever the area of law they work in, whether criminal law, family law, commercial law, M & A, or any other area of law. The characteristics are the same for the litigation lawyer, legal business consultants, experts in trusts, or mediators. Whatever their subject and whatever their function, they are lawyers with the same identity ideal, at least according to the discourse of the legal sources. This sub-conclusion indicates that a legal approach is not sufficient to depict the identity of lawyers, as it seems improbable to assume that around one million lawyers have a single common professional identity. Scholars have suggested that the creation of professional identity, consciousness, confluence of mind, attitudes and activities that make a lawyer complete should be examined in a self-reflective and transformative way.³²³ This reflective process will be addressed in the empirical study reported in Chapter 5, and in the analysis of the characteristics of transformative lawyering in Chapter 8.

³²⁰ UN Basic Principles on the Role of Lawyers, 7 September 1990, principle 12.

³²¹ R(2000)21 on the freedom of exercise of the profession of lawyer, p. 4, principle III, 3 b.

³²² R(2000)21 on the freedom of exercise of the profession of lawyer, p. 4, principle III, 3 e.

³²³ Timmer & Miller, *Reflections of a Lawyer’s Soul*.

5 Danish lawyers' identity perception

This chapter presents the empirical study of Danish lawyers. The chapter is based on primary data collected by the researcher in an empirical nationwide study of Danish lawyers. The aim was to collect information relevant for answering research question 3: *How do Danish practising lawyers define or perceive their identity?*

More specifically, the aim of the empirical study was to identify a reality as a narrative practice, where each 'small story' in the study presents a modest but realistic contribution to the broader picture of lawyers' identities. The study provides an informative description of each lawyer's identity, combined with reflections on the complications and challenges of working life and ways of handling them in everyday practice. Data are derived from basic written information from each participant and from qualitative research in focus groups and individual interviews. The number of focus groups and individual interviews, the selection of the participants and the qualitative structured interviews are designed to guarantee valid results, giving an accurate picture of how lawyers in Denmark perceive and develop identity in their daily practice.³²⁴

The empirical study has investigated individual identity processes. Furthermore it reports the perceptions that lawyers have of other firms and other lawyers. The aim was to discover the narratives that Danish lawyers make of their own professional identity and to understand how this identity has been developed. Because of the existing and new choices of possible identities, many lawyers seem to reach a higher level of reflection by reflecting on their actions, both in action and in subsequent reflection on their practice.³²⁵

The vital interaction between lawyers, law firms and their professional organisation is recognised in the Carnegie Foundation's research into professional legal identity which recommends lawyers to reflect on: 'Who am I as a member of this profession? What am I like, and what do I want to be like in my professional role?'³²⁶

This approach corresponds with Giddens's structured analysis which divides the trajectory of the self-identity into three areas:³²⁷ what to do, how to act and who to be. These questions structured the focus group meetings and the individual interviews in the same way that they are structured Chapter 4 in depicting a European identity ideal of a lawyer.

This means that both the empirical study and the subsequent analysis mirror structuration theory and the approach to self-perceptions of identity and lifestyle developed by Giddens. In section 3.4 this identity development or self-realisation is related to the lawyer's lifestyle. The concepts of 'lifestyle' and 'lifestyle politics' are defined as follows:

³²⁴ The level of representativeness of the results obtained with a qualitative method and focus groups is certainly different from the representativeness that can be reached with a quantitative survey. The choice for a qualitative research method and the organisation of focus groups is explained in the next pages.

³²⁵ Schön, *The Reflective Practitioner: How Professionals Think in Action*.

³²⁶ Sullivan et al., *Educating Lawyers: Preparation for the Profession of Law*, p. 135.

³²⁷ Giddens, *Modernity and Self-identity – Self and Society in the Late Modern Age*, p. 71.

- lifestyles are 'routinized practices, which are recognised in habits of dress, eating, modes of acting and favoured milieu or encountering others; but open to change in the light of the mobile nature of self-identity'.³²⁸
- lifestyle politics are 'political issues which flow from processes of self-actualisation in post-traditional contexts, where globalisation influences intrude deeply into the reflective project of the self, and conversely where processes of self-realisation influence global strategies'.³²⁹

The identities of lawyers are developed in the interaction between these levels and in this process. Wenger's social learning theory supplements Giddens's framework of analysis and gives a deeper understanding of the ongoing trajectory. The development of multiple identities may change professional standards and create an understanding of how the movement towards a more heterogeneous profession is reflected in practice and how individual members of the profession initiate this movement.

The structure of Chapter 5 is based on the choice of focus groups and individual interviews as the methods for investigating the perception of identity; this is further explained in section 5.1. Section 5.2 describes the detailed research design for the empirical study. In section 5.3 the moderation process is described. In section 5.4 the presentation of data is related to areas of work and expertise, while in section 5.5 the data analysis is related to age and gender.

In section 5.6, the data are examined and organised in relation to the structure of the three levels. In section 5.7 there is a thematic discussion of 'soft' areas such as lifestyle, gender issues, work-life balance, job satisfaction and purpose and direction in life. Section 5.8 defines and explores the various identities recognised in the study.

The results will be analysed more thoroughly in Chapter 6, and placed in the theoretical framework in relation to changes and challenges at the societal, professional and individual levels.

5.1 The choice of focus groups and individual interviews

As legal dogmatic studies only rarely integrate qualitative sociological or anthropological methods, this section introduces the methods and workflow of the qualitative study reported in this chapter.

The use of focus groups is one of the qualitative methods that is considered to be efficient for the exploration and discovery of a new area of research. Focus groups are relevant when things need to be seen in context and in depth, and they can be open to different interpretations. The aim of using focus groups in this study was to collect qualitative data about individual lawyers' lifestyles and identity perceptions through group discussions. Selecting and constituting focus groups within law firms has the risk and the opportunity of finding that a specific

³²⁸ Giddens, *Modernity and Self-identity – Self and Society in the Late Modern Age*, p. 81.

³²⁹ Giddens, *Modernity and Self-identity – Self and Society in the Late Modern Age*, p. 214.

firm has a particular corporate identity which will be in constant interaction with the identities of the individuals and the ideal of the profession.

While there is no fixed format for working with focus groups, it is possible to select participants with the profiles needed for a particular study, as has been done in this study by forming a group of apprentices. The questions prepared for focus groups allow a degree of flexibility, and different groups can be asked to concentrate on specific topics. Focus groups are more open-ended and less predetermined than quantitative surveys, which affects the analysis of the results. As the meetings with the focus groups were spread over several months it was possible to observe the process and learn from the initial experiences. This made it possible to adjust and improve both the content and the process as part of the ongoing quality control and self-reflection of the research project. It was planned that each focus group should last no more than two hours.

Individual interviews were planned and carried out in parallel with the focus groups. These were also based on semi-structured qualitative interviews, focusing on how Danish practising lawyers perceive and express their own identities.³³⁰ In this more intimate setting lawyers more openly expressed their perceptions of the profession and its members, and related their own identity to the identities of others. In individual interviews there are also better possibilities for discussing questions in greater depth and for interviewees to elaborate and clarify personal or private matters. The individual interviews took between 45 minutes and one-and-a-half hours; most lasted about one hour. One of the interviews was conducted by telephone and one by Skype.

The composition of the interview guide is explained in section 5.3.1. There was a dual motivation for structuring the guide similarly for individuals and for the focus groups. This approach ensured that Giddens's structure was followed closely and it made it possible to use the guide as a means of getting closer to sensitive personal areas. Since many lawyers are educated to give priority to logic and rationality and to separate their feelings from their professional work, they are unaccustomed to talk about personal matters, or at least they express themselves more fluently about things that are at some distance from their personal lives. Thus the initial questions about society and the profession were warming-up questions, but the answers to these questions nevertheless produced interesting information for the researcher. In the more intimate one-to-one setting of the individual interviews it was easier to jump more directly into personal matters while still following the semi-structured format of the interview.

Given the time constraints and the limited resources available for data collection and examination, it was necessary to impose strict guidelines on the participating lawyers to ensure that the information is compiled in an organised and focused manner. Richard Krueger suggests that, if resources are restricted and it is not possible to employ an assistant moderator or assistant for full-text transcription, it is acceptable to use a combination of recording the interviews and making field notes, not necessarily making full transcripts of the interviews.³³¹ Given the

³³⁰ Krueger, *Developing Questions for Focus Groups*, pp. 45-47.

³³¹ Krueger, *Analyzing & Reporting Focus Group Results*, pp. 83-84.

limited resources this combination has been chosen, supplemented by a small data sheet filled out by each of the lawyers interviewed (see Annex).

5.2 Detailed research design for focus groups and interviews

The focus groups were composed according to criteria for geographical breadth, individual experience, area of legal practice, age, gender and size of firm. The sample of focus groups represents the legal profession as a whole, reflecting the diversity of the Danish legal profession of *advokater*.

5.2.1 Planning the focus groups

The planning took place in the spring of 2012. The most important question was to determine how comprehensive a study was necessary to provide valid and relevant information.

The respondents were limited to practising lawyers (*advokater*) and trainees (*advokatfuldmægtige*). In-house lawyers, paralegals and assistants were not included. In this research 'lawyers' includes both partners and employed lawyers, even though the interests of owners (partners) may influence their identities.

It was important to arrange focus groups reflecting the demography of law firms in Denmark.³³² Each year the Association of Danish Law Firms (*Danske Advokater*), publishes data about the location of law firms in Denmark. According to these data, more than half of Danish law firms are located in Copenhagen and the surrounding area.³³³ Thus, half the focus groups for this study were located in the Copenhagen area.

The Association of Danish Law Firms has also defined some categories (archetypes) of law firms, mainly for benchmarking. There are the following categories: sole practitioners, small law firms, medium-sized law firms and big law firms. The selection of the lawyers and the law firms for the interviews and the focus groups reflects this categorisation.

Focus group meetings were conducted between August 2012 and February 2013. The next choice to be made was whether this should be a small or a large focus group study. To be able to cover the field it was felt necessary to make a larger focus group study with the following characteristics: more than four groups with multiple participants and no ready-made recruitment source; recruitment across several sectors or geographic locations; detailed data analyses; possibly requiring full transcription of tapes and an extensive written report plus an oral report.³³⁴

After deciding to do a large study, geographically spread over Denmark, with different types of law firms, it was necessary to decide on the language, the number of groups, the size of the groups and the members of groups.

³³² Travel expenses were costly and have required some sponsoring from CBS and private foundations. Some practical assistance was needed during the interviews to make sure that everything was recorded and to identify the respondents in notes afterwards.

³³³ Danske Advokater, *Branche i tal*, 2012.

³³⁴ Morgan, *Planning Focus Groups*, p. 16.

5.2.2 Choice of language

While English has been chosen as the language for this research project in order to obtain wider exposure and reach an international readership, it has been felt important to conduct all focus groups and individual interviews in Danish.³³⁵ It has been a challenge to translate and define terms, words or expressions, from English to Danish for the purpose of the empirical study, and to translate the lawyers' statements from Danish to English, as there are many references to local circumstances. Translations of longer quotations have been approved by the lawyer who is quoted. There is always a risk of error when the language of data collection differs from the language of analysis and communication. However, the decision to conduct the interviews in Danish was made so as not to create a language barrier or give an advantage to lawyers who are more fluent in English. It was also assumed that, when discussing private matters, lawyers would respond more accurately and in more detail in their native language.

5.2.3 Number of groups, group sizes and demography

In the relevant literature, it is pointed out that focus group studies can be done typically with three to five groups.³³⁶ This will normally be enough when the participants are only moderately diverse and when the topic is only moderately complex. In this case, the participants were considered as belonging to a quite homogeneous group of well-educated persons with the same university law degree.

Nevertheless, as the aim of the study was to look for differences between the members of the legal profession according to demography, individual lifestyles, size of firm, age, gender, special legal interests and international experience, it was decided to set up at least eight groups, and this became nine with the addition of a group of young lawyers/apprentices. Morgan explains: 'having more groups does more than just reveal the range of diversity in what people have to say. Having more groups also yields insights into the sources and comparisons across groups'.³³⁷ However, increasing the number of groups is both expensive and time-consuming, and the results are potentially more difficult to analyse and interpret.

It was also important to decide the size of each group. According to Morgan, the average size for a focus group is between six and ten participants, but there are several situations where bigger or smaller groups will better fulfil the purpose of the study.

³³⁵ For the translation of legal terms into Danish and English, the website of the EU has been the main source. In this study legal sources and soft law in Danish and English have been collected and analysed, while the scientific literature is based on books, articles, documents and reports in English, Danish, French and Flemish or Dutch.

³³⁶ Morgan, *Planning Focus Groups*, p. 77.

³³⁷ Morgan, *Planning Focus Groups*, p. 79.

The use of smaller groups is suggested in the following circumstances:³³⁸

- When participants have a high level of involvement in the topic
- When participants are emotionally caught up in the topic
- When the participants are experts or know a lot about the topic
- When the topic is controversial
- When the topic is complex
- When the goal is to hear detailed stories and personal accounts
- When recruitment factors limit other options.

Essentially all these conditions are met in this research. Questions of identity are very personal and the topic must be considered one in which the interviewed lawyers are emotionally involved. Lawyers can be seen as experts on the lawyers' role and identity in society. The topic is controversial and complex as lawyers have status and privileges related to their legal practice or lawyering style and, as mentioned, their status, privileges and the whole profession are under pressure. The aim of the focus groups and interviews was also to hear the personal stories and heartfelt opinions of each participating lawyer and to collect data from the interactions between the participants. The last condition, that recruitment factors limit other options, is highly relevant when sole practitioners or small family firms are included in the empirical study. Given these considerations, there were four to seven people in each focus group, apart from a very small firm and the sole practitioners taking part in the empirical study.

Of the nine focus groups, eight were set up in relation to law firms, also the very small firm and the sole practitioner. One focus group consisted of apprentices from different firms. Given the geographical distribution of law firms, five of the groups were in the Greater Copenhagen area; one of these with a branch in Jutland (Århus) was also represented in one of these five focus groups. One focus group involved a firm located in Funen and two involved firms located in Jutland, of which one had two subgroups as the firm has branches in several towns in North Jutland. A cross-firm focus group of apprentices was formed to explore and highlight perspectives on the identity of future lawyers.

For practical reasons it was decided to select and constitute the focus groups in connection with law firms, as identity is often related to the work culture of a specific firm. This also reflects the diversity within the sector, including both sole practitioners and the largest law firm in Denmark. The selection of firms was partly based on earlier professional relations.

³³⁸ Morgan, *Planning Focus Groups*, p. 73.

In the literature it is recommended that existing relations should be built on. As Morgan puts it: 'Build on existing relations whenever possible (...) 'Cold calls' take the most effort'.³³⁹ Only the selected firms and not all the participating lawyers were known in advance.

5.2.4 Appointing the group members

The success of a focus group is heavily dependent on its participants. Thus the sampling strategy was crucial for engendering a fluent and productive conversation between participants capable of providing useful data. The participants had to be drawn from a population of approximately 5,500 Danish lawyers. The first question was whether it was necessary to use a random sample to minimise bias. The Association of Danish Law Firms offered to help in the selection of firms. By supporting the whole project, the Association of Danish Law Firms helped open some doors, but the Association did not take part in selecting which firms to include in the study.

Next, it was decided that both genders should be represented in each group and that there should be representatives of different groups according to age, legal experience and career profile. Thus the sampling strategy was defined as selecting according to objective criteria.³⁴⁰ Having informed the selected law firm of the criteria, the contact person in the law firm was free to appoint the concrete members of the group.

Compatibility was a key concern in composing the focus groups.³⁴¹ The groups were all composed of lawyers who had quite a lot in common according to their external characteristics. In addition to a shared academic background, they also shared a postgraduate education and a common obligation to comply with the national and international ethical rules of the profession. This created consistency and group identification. However, all these are external characteristics, while the purpose of the focus groups was to make the lawyers define for themselves their individual identities within the profession. This required the generation of a good group dynamic, based on the compatibility of the participants. This was supported by the fact that in nearly all groups the participants had worked together or at least knew each other, so that nobody was really unknown to any of the others. Of course, former relations can also cause friction. Most law firms are hierarchically organised, which might influence how freely each participant felt able to answer questions or take part in the discussion. To overcome this problem it seemed relevant to adjust the group composition and let different groups discuss different segments.³⁴² Following a pilot project it was clear that apprentices were reluctant to express themselves in front of lawyers who were their employers, so a cross-firm group consisting of six young apprentices was formed to focus on the values and identities of the next generation of lawyers.³⁴³

³³⁹ Morgan, *Planning Focus Groups*, p. 110.

³⁴⁰ Morgan, *Planning Focus Groups*, p. 57.

³⁴¹ Morgan, *Planning Focus Groups*, p. 59.

³⁴² Morgan, *Planning Focus Groups*, p. 80.

³⁴³ As one fell ill, only five persons finally took part in that focus group.

It is important to stress that all participants participated voluntarily and were not paid for their participation. The participants were promised anonymity and a confidentiality agreement was made in each focus group and with all individual participants.

5.2.5 Introduction to participants and basic data

All participants received a letter of introduction in advance, with a link to a short audio-visual presentation and an article about the project from the official magazine for lawyers, *Advokaten*.³⁴⁴ The aim of this was to create trust in the project. The letter was in Danish and contained mostly practical information: timing, venue, process and promise of confidentiality.

Finally, 54 participants filled out a form giving basic information about themselves. Two respondents were omitted as they were not lawyers but held administrative posts in a law firm. One participant did not participate in the meeting of their focus group due to maternity leave, and one participant fell ill on the day of their focus group session.

Data were collected on the following: name, title, age, year of graduation, length of service in the law firm, key legal competences, membership of professional organisations, groups and networks, three self-selected identity markers (words chosen to characterise the identity of the respondent),³⁴⁵ a professional picture and the lawyer's profile on the law firm's website and on any social media.

5.2.6 Work-flow

The work-flow of the focus groups was arranged as a sequential process following six systematic steps:

1. The questions were put to the focus groups in the same order. Each participant was given an ID number to make sure that opinions, notes and quotes could be related to the right person.
2. Basic information about the participants was given by the participants themselves. The discussions of all focus groups were audio-recorded and additional notes were taken during the sessions by an assistant and/or the moderator.
3. All information about the participants was put in a (confidential) database so as to be able to sample the participants according to their firm, geography, gender, age, legal area, virtual presentation and identity indicators. The electronic records of the focus groups and individual interviews have been locked and securely stored electronically at Copenhagen Business School (CBS) in accordance with its internal rules on research data protection. Field notes contain quotes, observations and references to the tapes.³⁴⁶

³⁴⁴ *Advokaten* 3/2012, p. 38.

³⁴⁵ Melcher, *The Creative Lawyer*, p. 27.

³⁴⁶ The interviews on the protected database at Copenhagen Business School are considered to be raw data to be analysed in relation to the theoretical framework.

4. To verify all the data collected, participants have been encouraged to supply their statements and, when they have been individually quoted, they have been given the opportunity to confirm that they have been quoted correctly. Utmost efforts have been made to transcribe and report correctly and to eliminate any errors or inaccuracies. However, in order to ensure uniformity and a common understanding, some degree of adaptation, summarising and simplification has been inevitable.
5. After each focus group session the moderator, who was the researcher, and the assistant had a short debriefing session to discuss impressions of the group dynamic, body language, non-verbal communication and incidents that were difficult to understand.
6. The method and format of the empirical study made it possible to adjust the process in a corrective feedback,³⁴⁷ and to discuss these adjustments with experts and participants in an ongoing process.

It must be emphasised that there is a difference between legal and sociological approaches to interviews. For this research the respondents were not seen as witnesses, so that who said what is of minor interest; the main point is that it was said in a focus group or at an interview. Quotations are used to illustrate tendencies or ideas found in other sources. Mostly for practical reasons and to reduce costs the focus groups met in venues belonging to law firms, except for the group of apprentices which met at Copenhagen Business School.

5.3 Moderating focus groups

The role of the moderator was defined in advance as that of a facilitator asking open-ended questions and encouraging all participants to take part and contribute by referring to their own experiences. Consideration was given to whether it was necessary to have a trained moderator, experienced in conducting focus groups. In this research, the moderator (the author of this thesis) has been trained as a mediator and has used mediation skills to conduct each focus group through the different phases, starting with some general questions about the profession and focusing increasingly on personal issues of identity and lifestyle. During each focus group moderation techniques, such as active listening, repetition, reframing, moderating, non-verbal communication, empathy, silence, open body language etc. were used in order to optimise the work of the group and balance the participation of each group member.

Open-ended and broad questions do not require a moderator to be in fully control during the process, and they encourage the participants to share their thoughts, feelings and experiences. In order to achieve this, each session started with an open question on the general perception of the profession as such. The relation between the moderator's style and the structure of questions made it possible for more individual perceptions of identity to be reported or referred to, though this also presented challenges to the moderator to maintain a flexible approach to creating a productive group dynamic.³⁴⁸

³⁴⁷ Krueger, *Analyzing & Reporting Focus Group Results*, p. 15 f.

³⁴⁸ Morgan, *Planning Focus Groups*, p. 48.

However, even though the moderator/interviewer had sufficient skills, the advantages and disadvantages of the moderator/interviewer also being the researcher must be considered. Although there is a risk of being too close to the respondents and manipulating the discussion in a certain direction, the advantage of being able to go deeper into a spontaneous expression on an interesting topic was considered to outweigh the disadvantages. Personal involvement and knowledge of the contextual complexity allows prompt reaction to the unexpected, though it can also restrict new approaches. The researcher's role as moderator was a properly considered choice, though it is recognised that this choice was also influenced by financial considerations. To control what actually happened, all the discussions of the focus groups and most of the individual interviews have been audio-recorded, allowing the influence on the discussion of voice, pitch, volume, irony etc. to be heard.

5.3.1 Developing questions in a semi-structured interview guide

The interview guide had a three-level structure reflecting societal, professional and individual perspectives. It was important to find the balance between on the one hand, an interview guide with a detailed structure to meet the needs of the researcher, and on the other hand, a less structured guide which would allow more flexibility and be in the interests of the participating lawyers. To balance this, a semi-structured interview guide was developed (see Annex 1). The focus group questions were intended to be clear, brief and meaningful for the participants, with open-ended questions so as not to lead the participants in a particular direction.³⁴⁹

Questions for individuals in the focus group and in the one-to-one interviews included topics such as: How do you consider your role and identity in society? What characteristics do you think describe yourself? How do you perceive your individual identity in relation to the profession? How is your professional identity developed? Do you have one identity or several identities? Do you have a virtual identity on a website or on social media, and if so does it differ from the real one? Can you describe your lifestyle? Are you satisfied with life and with your work-life balance? Are there things you would like to change?

For of several questions, such as '*How did you develop your identity?*', the reflection was more important than the answer given.

Compared with questions that are predetermined and fixed, even though with some flexibility, the interview guide had the advantage of enabling the process to be speeded up. It also made the questions more spontaneous and informal. This was important for dealing with very personal questions, though this has made it more difficult to analyse and compare the results.³⁵⁰

Before conducting the first focus group, a pilot project was elaborated and a pilot session was organised with other PhD students, all with a legal background, in order to test the questions and timing and to obtain familiarisation with the setting and format.

³⁴⁹ Krueger, *Developing Questions for Focus Groups*, p. 9.

³⁵⁰ Krueger, *Developing Questions for Focus Groups*, p.11.

5.3.2 The technical support of data selection and documentation

To achieve faster and more accurate documentation during the fieldwork, all focus group sessions and individual interviews were audio-recorded.³⁵¹ Software for data analysis and qualitative content analysis³⁵² has been investigated.³⁵³ As data for this research have been collected in both Danish and English, and as the participants have not been consistent in their use of terminology, using many synonyms, it would have been too uncertain and too time-consuming to make analyses electronically. It was decided to collect the data in Excel files, not for analysis but to organise and manage the data, especially the quantitative data about the participants.³⁵⁴

5.3.3 Triangulation

Following the data collection, triangulation has been used to support the empirical findings from other sources and to verify the results from both the individual interviews and the focus groups. Inspiration has been drawn from research using group interviews with self-employed engineers³⁵⁵ and the results have been related to results from scholars primarily outside Europe, where similar developments have been seen.

Some trends are well documented by the focus groups and interviews. However, further documentation and verification have been found in other sources, such as the surveys and observations of other researchers. As pointed out by Morgan: 'The value of triangulation goes well beyond studies that use only one focus group ... For projects that involve important decisions or sensitive issues, it is often wise to rely on more than one type of data'.³⁵⁶

The main part of the triangulation will be discussed in Chapter 6, while shorter references will be related directly to the observations elaborated in this chapter.

5.4 Participating lawyers' age and gender

The age categories of the participating lawyers have been measured in decades. The average age of the interviewed lawyers is below that of the general population of lawyers, though there is insufficient recent data to substantiate this more accurately. Some years ago the average age of practicing lawyers in Denmark was 47. This figure is based on 2004 statistics of the Danish Bar and Law Society, but today's statistics on Danish lawyers do not include their ages. However, it was a deliberate choice that most lawyers interviewed should be under 50, as the future orientation of today's lawyers is very important.

³⁵¹ Records were made on Olympus DS 2000 system and partly transcribed with an Olympus AF 2400 system, which made it possible to analyse qualitative data in a quantitative way. A speech recognition program, 'Flying Dragon' has been used.

³⁵² Krueger, *Analyzing & Reporting Focus Group Results*, p. 89.

³⁵³ A recommended programme called HYPER research was tried. Another program called Nvivo, which is available for phd-fellows at CBS has been inspected and tried out in a small pilot project.

³⁵⁴ When data cannot be detected automatically as in this case, it would require a data programming effort to work with advanced tools, which would not in accordance with the amount of data. Excel software has been used to present data in simple graphics.

³⁵⁵ Andersen (ed.), *Vidensarbejde og Stress, mellem begejstring og belastning*.

³⁵⁶ Morgan, *Planning Focus Groups*, p. 83.

The processing and analysis of the data has revealed a remarkable difference related to age. The younger part of the profession has an individual lifestyle that is different from their perception of traditional lawyers. They can quickly adapt their lifestyles to changes in their surroundings. Many, if not all, the young lawyers in the apprentices' focus group said that they will not be in the legal profession for the rest of their professional careers. The conditions are so unattractive that they are thinking about leaving the profession. This focus group was conducted in September 2012. Less than one year later half the participants were in other jobs.³⁵⁷

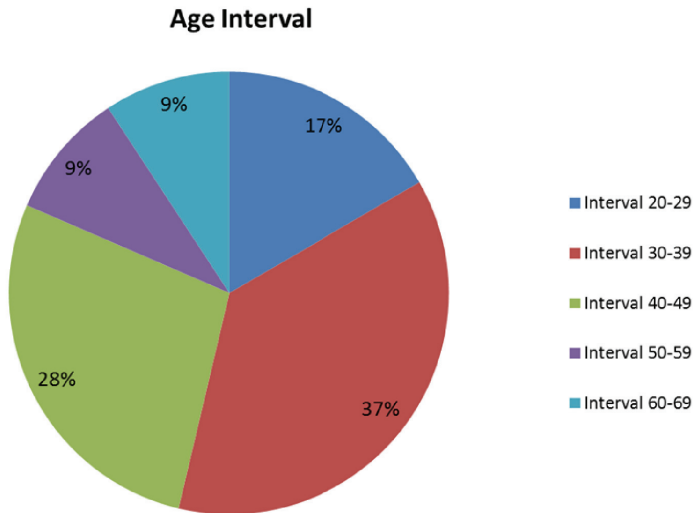


Figure 5-1. Age of participating lawyers n=53

Many lawyers over 45 say they feel trapped in a job, but they indicate that they cannot leave the profession as their identity is so closely linked to their job. Hence, they choose to continue as a practicing lawyer, even though it gives them no personal satisfaction. They fear leaving even though they have appropriate skills for many other jobs.

Some of the older lawyers (60+) interviewed expressed fundamental happiness in being a lawyer. They explained that the division between working life and private life has been essential, that they did not have too many domestic obligations and that they had meaningful commitments outside work. One had an international commitment, while another had a life as a farmer outside the legal profession and is still running a family farm.

Of the lawyers in the study, 57 % were male and 43 % were female. That the interviewees were somewhat younger than the general population of lawyers is reflected in the balance between men and women. The lower in the hierarchy of a law firm the greater the proportion of women. Results and opinions on gender issues are included in section 5.7.3 on lifestyle and section 5.7.9 on work-life balance.

³⁵⁷ Information is given by the participants by telephone or mail.

5.5 Areas of expertise and professional skills

An attempt was made to include as many subject areas of legal practice as possible, to ensure that the identity study covers more than just a very specialised group of lawyers. The sample of 53 lawyers in the empirical study indicates that altogether they are working in 56 subject areas. These have been clustered in the following 10 areas. There was a total of 140 references to areas of practice, as many lawyers indicated they practise in more than one area. The figures do not pretend to be a quantitative study, but are a graphic presentation of the indications of the respondents.

The following table illustrates the different areas of work of the interviewed lawyers as a percentage of all the areas indicated.

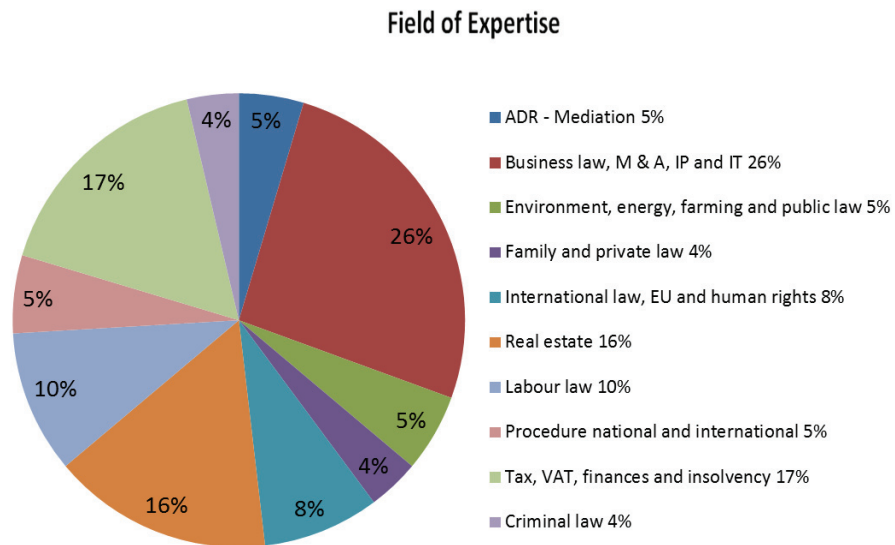


Figure 5-2. Areas of expertise n=140

These figures have been compared with the official website for finding a legal practitioner (*Advokatnøglen*), where it is possible to search using 36 key words for lawyers' competences. Since many lawyers indicate several core areas it is not possible to get an exact number of the lawyers in each legal area.³⁵⁸

³⁵⁸ The website www.advokatnoeglen.dk contains information about all Danish lawyers. It is possible to search a specific lawyer by name or search for lawyers in the chosen geographical area. To search on the basis of the lawyers' expressed area of interest, one can choose the legal topic from a drop down menu with 36 possible areas. These categories are available in Danish only (last accessed 14 November 2013).

To investigate the relation between age and area of expertise, the total sample was split into smaller groups relating to different ages. This shows that there is a diversity of working areas in each age category. This is relevant to relating identity to different ages. The figures below do not give any quantitative evidence as the sample size is too small for that, but the purpose is to show that the areas of expertise are not linked to a specific age group, for example that all family lawyers very young or old. In each of the 4 sub-groups some areas are not represented, presumably because of the limited number of lawyers.

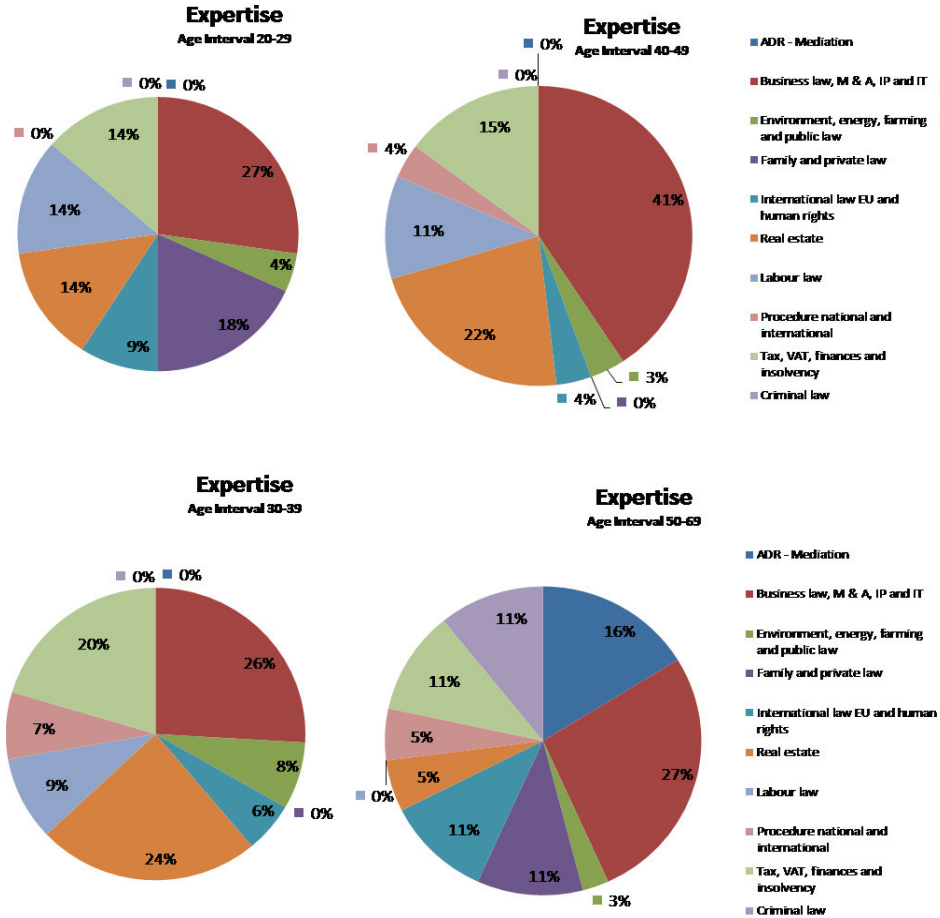


Figure 5-3. Age and expertise

5.6 Empirical results related to structure

The transcripts, audio files and personal data of the participants have been processed and analysed by looking at the structures and at the important themes in the lives of the individual

lawyers to understand their identity processes and how they are rooted in life experiences, recent as well as more distant.

Although the empirical results are derived from verbal and written statements of lawyers as individuals, and while their referential meanings are individual, their interpretation focuses on the professional and collective nature of subjectivity. What happens in individual lives affects the professional setting and, according to the theory of structuration, can shape legal, economic, cultural and administrative transformation and vice versa.

Two levels of contextual interpretation have been addressed in the study of practice. One level addresses how professional conditions shape lawyers' everyday practices. The other level recognises that the researched professional communities are already constituted as meaningful.³⁵⁹

This study of identity is closely related to practice, as it is based on original data collected through the empirical study in focus groups and individual interviews. The relation between practice and theory is both complex and interactive, and implies constant development or change in the perception of self-identity.

5.6.1 Views on the societal role or commitment – what to do

Both in the focus groups and in the individual interviews many respondents said that the process of discussing society, the profession and the individual lawyer was useful and that they had not thought about their own values and preferences for too long. Many participants said they had never dared openly express their dissatisfaction before. A few stated that in CLE (continuing legal education) it should be mandatory to deal with questions of commitment, identity, meaning, satisfaction and happiness in legal life.

In the largest firms the societal obligations are understood and acted on in pro bono arrangements, often mentioned on the firm's website as a part of its branding and CSR profile.

Lawyers from the largest firms explain that their focus is the business, billable hours and acquisitive activities:

'We are very business oriented (...) If you're a legal realist, then you won't join in many of those wider social debates. We are back in the age of skilled artisans'. (F 5.4)

Some express distance from a societal commitment, as seen in the following quotation from a lawyer in a big law firm in the Copenhagen area:

'One has not gone into the legal profession to save the world. It was not the reason I joined this company - for me it was a matter of understanding business and not the 'soft' subjects such as in the Institute for Human Rights'. (F 5.3)

³⁵⁹ Giddens, *The Construction of Society*, p. 284.

International orientation is not dominant, but many lawyers referred to cases with an international dimension, such as international trade or international family law cases. Lawyers expressed insecurity in dealing with these cases and when they have only a few of them each year they see them as 'learning-by-doing' projects. None of the participating lawyers consider the societal level as a supranational level, though they recognise that the EU has a substantial impact on the legal framework.

Lawyers who work in the area of criminal law have a clear awareness of a societal role which dominates their relations with their clients. In order to defend their clients they must be very suspicious of and vigilant towards all law enforcement bodies, state authorities and institutions. Criminal lawyers see themselves as defenders of fair trials and access to justice.

On the question of justice and an obligation to contribute to society there seems to be a relation between the size of the firm and the identity of the lawyer, where employed lawyers in big firms consider that societal obligations are a matter for the firm not for the individual. Apart from influencing the relation to society, the size of the firm also affects identity, as seen in section 5.7.6. With regard to the perception of their societal role as agents of justice, lawyers from small and medium-sized firms report:

'We have an obligation to act in situations where we have an insight into something wrong'. (F 1.1)

'You don't wake up every morning and think 'justice', but I wouldn't mind taking on such a case without a fee!'. (F 1.4)

'If you can do something, you should probably act, but I don't think it is particularly lawyer-like!'. (F 1.1)

Lawyers in small firms openly say that income is not the incentive for their legal practice. They also have no problem revealing their annual incomes. They keep down costs and are engaged in either local or global networks. Their postgraduate curriculum is broadly oriented, as reflected in focus groups 3 and 8. Lawyers in small firms express commitment to society, for example saying:

'You owe something to society when you've got a good education. I have started a local legal service, and 23 years ago I have started a centre for abused women. Also some customers cannot pay and I can say: "Well, I'll help you". There *must* be room for this (in my head). The professional organisations and other law firms disagree'. (F 3.1)

All lawyers see themselves as having a special role in society, but not all feel a commitment to work in the interests of society or to connect such a commitment to their identity.

5.6.2 Views on the profession – how to act

According to the theoretical framework, a professional identity develops in an interaction between the individual and their professional surrounding, related to the questions 'Who am I?' and 'Who are we?'. According to the theory of structuration, both the individual lawyer and

the professional organisations have a transformative power.³⁶⁰ The influence of this power depends on the resources it controls. The interaction between the individual lawyer and the professional organisations is relevant for making conclusions about the identity of lawyers today.

Therefore, information about 'Who are we?' is relevant to the profession in order to see whether the profession has a common identity. The 'Who am I?' question is relevant to the education, training and development of a lawyer, primarily as an individual process, as lawyers are not only lawyers but also individual human beings. This theme will primarily be examined in section 5.8 and followed up in Chapter 8. Section 5.6.2.1 shows the perceptions of lawyers of the characteristics and role of the profession.

5.6.2.1 *Old fashioned profession*

The general perception is that the term 'legal profession' reflects a historical and partly outdated reality, as expressed in the following statements:

'It is hard to relate to the "profession". I associate it with an old barrister who was one of the bourgeois citizens (...) A profession very closed to the surrounding community'. (F 5.1)

'The old perception of the profession is of a lawyer performing in court. I don't go to court, but I'm a lawyer'. (F 5.5)

These are quotes of members of big law firms. In a medium-sized firm the profession is viewed as a community that makes the life and career of the individual lawyer much easier. Some respondents added that a common identity only exists in smaller specialised groups which are a result of the fragmentation and specialisation analysed in section 5.7.5. In focus group 8 there was a discussion about whether doctors and lawyers are forced to redefine their roles. It was observed that redrawing a professional role and identity leads to uncertainty, stress and sometimes to conflict. When roles and identities change, the obvious mentors or role models disappear. This information from the empirical study is in accordance Macfarlane's perception of transition and pressure on the legal profession.³⁶¹

5.6.2.2 *Lawyer or consultant?*

The most business-oriented lawyers openly said that they have more in common with consultancy firms than with other lawyers or law firms which are not specifically business-oriented. The two following statements clearly illustrate this:

'I have more in common with an accounting firm than with a lawyer in Frederikshavn!'. (F 9. 4)

'We can serve as consultants or as sparring partners and provide more than purely legal solutions'. (F 5.4)

³⁶⁰ Kaspersen, *Anthony Giddens*, p. 100.

³⁶¹ Macfarlane, *The New Lawyer: How Settlement is Transforming the Practice of Law*, p. 196.

The discussion about being a lawyer and/or a management consultant is a very sensitive one. While many lawyers see business consultancy as a future identity within the legal profession, others situate the role of consultant outside the legal profession. The latter opinion was only expressed in the individual interviews.³⁶²

5.6.2.3 *Monopoly to protect the profession*

Investigating practising lawyers' relations to their work and exploring their professional identities involved questioning their identification with legally codified professional norms. This identification might be a condition for being recognised as a lawyer with a special competence, skills and commitment to traditionally monopolised work. The subjectivity of the lawyer involves *being* the competence, more than just *having* the competence. The lawyer is a professional who transmits an insight into and a commitment to certain working processes between clients and systems – an engineer of transaction.³⁶³ The empirical study confirms that many lawyers are concerned about upholding the profession's monopoly, not for reasons of justice or for the benefit of the quality of their services to society, but mostly as a protectionist measure. The following statement of one of the participants clearly illustrates this:

'We must not lose our monopoly of conducting proceedings in court because then we will lose our profession, even though we don't bother going to court!'. (F 5.1)

Other lawyers see no problem in ending to legal profession's monopoly, though they confirm that many lawyers do not share this view:

'I do not see the legal profession as something special in consulting. I think it is rather artificial for lawyers to say that they are something special and that others should stay out of the legal domain. For me such an attitude is almost comical and old-fashioned. It is more a matter of keeping others out with some fine arguments. When a colleague in the firm switched to Deloitte, why shouldn't she call herself a lawyer? She knows exactly the same and is doing the same. Let the best company, best man or best woman win! I think the legal profession is lazy and doesn't dare to try new things'. (F 5.6)

As mentioned above in section 4.1, this perception of a dichotomy between the lawyer and the businessman can be seen as dominating the discussion about the future lawyer in Europe. Colin Tyre, a former president of the CCBE, asks whether the legal profession is now simply a subset of business, moving away from the classic identity ideal in the EU.

5.6.2.4 *Common code of conduct*

Some participants in the empirical study referred to unethical behaviour by colleagues, such as 'fishing' for clients in jails, taking on cases without having sufficient professional skills or making a public display out of a court case. Most criticisms were not very concrete, and only few referred to specific events.

³⁶² Individual interview (Ih1).

³⁶³ Howarth, *Law as engineering – thinking about what lawyers do*.

One of the lawyers interviewed significantly changed his use of the personal pronouns between 'I' and 'we' to indicate his inside-outside relationship to the firm and the profession. He indicated he was partly a member of the firm and partly a member of the profession. In-between he defined himself out of the profession, referring to his own ethical standards and limits of tolerance. He was talking about giving up the profession as he wanted to improve his work, and create greater satisfaction for his clients and for himself. He expressed the view that the present professional setting prevented him achieving these goals.

In general, problems in the profession are covered up. As one participant expressed it: 'As a lawyer you don't foul your own nest'. However, collegiality is not very strong and the interests of clients come first:

'I am the client's extended arm. As a lawyer you frequently find that you confront the counterparty with something unpleasant, but that is to serve the interests of your client. You become an informer if there are mistakes. Collegial behaviour? (...) but if your client can get a better result, you may need to highlight the errors made by the other's lawyer'. (F 7.4)

Generally lawyers feel stigmatised if a complaint is made to the Disciplinary Board. A ruling of the Board becomes one of the means by which lawyers adjust their identities. Many stress that the bad reputation of one lawyer affects the whole profession, which indicates the relevance of talking about a common identity or at least a common reputation.

5.6.3 Views on individual identity – who to be

In this section individual identity is seen as the product of different professional roles. In sections 5.7 and 5.8 identity is closely linked to personal choices and lifestyles, but lawyers working in different areas of the law and have referred to the competences or roles in daily practice that are necessary for the work of a lawyer. Few of these roles are a part of today's curriculum and all affect identity.

Lawyers merge into other professional networks and must adjust their identities to new roles, such as trusted advisors in a broader business sense, mediators, team players together with other advisors or experts etc. They like to cope with complexity, but at the same time they express quite some professional dissatisfaction. The following roles, which contribute to identity development, have been identified:

The lawyer as legal expert

Legal expertise is referred to as a major aspect defining identity, but it is difficult to determine when a lawyer knows enough to be an 'expert'. This often gives a feeling of insecurity. A legal expert needs training to help develop technical legal skills, often in a multidisciplinary context. However, due to the high levels of specialisation of many lawyers their needs cannot be fulfilled by ordinary training programmes.

It is important to keep existing knowledge up to date. It is also important to diagnose problems so as to sort out which issues should be solved within the legal framework and which issues

could better be solved by supplementing legal knowledge with expertise from other areas. This is another challenge to lawyers as legal experts working in a multidisciplinary context.

The lawyer as a team member

The 'lawyer as a team member' refers to the lawyer being able to relate their legal knowledge to other specialists or agents in dealing with a problem. The lawyers in the empirical study often expressed a perception of being 'lone riders'. When they relate to others it is often as opponents, with mistrust or adversarial behaviour. A similar observation is made by Macfarlane.³⁶⁴ With the rise of new communities of practice, which demand respect for other approaches and acceptance of the others' integrity, training and working in team can support fruitful knowledge development and the identity awareness of the lawyer.

The lawyer as a communicator

Communication is an important part of lawyering. Lawyers are often unaware that different contexts require different ways of communicating, even though they are very much aware that they must build trust through communication. Nevertheless lawyers pay increasing attention to media-exposure and communication on several media platforms. Lawyers must learn to express themselves both on social media and in news or current affair programmes. They must also learn to use effective tools if they want to avoid media contact or public exposure. The issues of lawyers' identity, social media and public reputation are further elaborated in sections 3.10 and 6.4.3.

The lawyer as manager and administrator

Lawyers fulfil many administrative or managerial tasks. There is an ongoing discussion in law firms about how this affects the identity of a lawyer. Many new job titles have been created to distinguish between legal experts and managers. Small and medium-sized firms cannot afford to employ specialist staff for personnel management or other administrative tasks, though they will normally have professional help for accounts management.

Taking on different roles contributes to the fragmentation of the legal profession. Being a managing partner in a large firm embraces a very different set of tasks from those of the sole practitioner. The empirical study draws attention to this situation and to the need for specific training for such tasks.

5.7 Empirical results related to personal themes

Having shown how lawyers perceive their professional identities in section 5.6, this section relates the empirical findings to themes identified by study of Giddens's work on identity³⁶⁵ such as lifestyle, gender, personal meaning, individualisation and fragmentation. A number of themes surfaced immediately in all interviews. For example, most respondents referred to feeling constantly under time pressure, to experiencing limitations, and to how the system of billable hours limits innovation and creative lawyering etc. Many narratives and reflections related to feelings of inadequacy or dissatisfaction in concrete situations or in relation to par-

³⁶⁴ Macfarlane, *The New Lawyer: How Settlement is Transforming the Practice of Law*, p. 106.

³⁶⁵ Giddens, *Modernity and Self-identity – Self and Society in the Late Modern Age*.

ticular tasks. For many participants this leads to serious consideration of leaving the profession or radically changing their working conditions. Others expressed satisfaction in being a lawyer, as a liberal profession with lots of possibilities, a well-lived life with meaning and direction. During the sessions with the focus groups it became very clear that 'the lawyer' does not exist.

5.7.1 Lifestyle indicators

Giddens describes how identity is based on lifestyle and how shortcuts to identity are made through lifestyle markers. Lifestyle typically reflects an individual's attitudes, values or world view. Thus, a certain lifestyle shapes a sense of self and creates a personal identity based on fundamental values and beliefs, positions, and personal appearance supported by habits of dress and eating, modes of conduct, favourite environments and ways of encountering others.³⁶⁶

Participants in the empirical study spoke of the need to support identity development. This was very clearly expressed in one of the individual interviews:

'I want to say something ... which I think is really important when we talk about identity. I believe that when things go wrong in the legal profession, it is because people just do not take account of their identity. So there is basically no room for being human'.³⁶⁷

An important lifestyle indicator for many lawyers is money. Others pay more attention to the professional title, a house with or without servants, their relations with their children, or their clothes. These indicators will be further examined below.

5.7.1.1 Money

Many lawyers expect to have a high income, though this picture is changing, especially as time seems to be the resource that many lawyers need more of. Nevertheless a substantial income is important. This was explicitly expressed in focus group 9:

'We are awfully big bon vivants. I won't hide it and I feel entitled to it. I think you should spend your money and enjoy it. I am quite clear about this; we have a lot of money. The challenge is that we must be careful not to flash the money. I don't like to show we have it, but I enjoy spending money'. (F 9.3)

Giddens's lifestyle perception corresponds to Rhode's findings about lawyers' attitudes to money and confirms the findings of the empirical study. The more direct exposure lawyers have to a luxury lifestyle the more natural it seems to them, and they start scaling up their lifestyle in general. When housing is scaled up furnishing will be scaled up, and when business dinners are scaled up, clothing will be scaled up accordingly.³⁶⁸

³⁶⁶ Giddens, *Modernity and Self-identity – Self and Society in the Late Modern Age*, p. 81.

³⁶⁷ Individual interview (Iøh).

³⁶⁸ Rhode, *In the Interests of Justice – Reforming the Legal Profession*, p. 32.

The discussions about money and the spending of money on a luxury lifestyle differed between Copenhagen and Jutland. It seems that status symbols are valued more highly in the capital area.

5.7.1.2 Title

The importance of the title of 'lawyer' is under discussion. Some lawyers defend it as an indicator of quality, some hide behind it, while some use it to claim a higher salary. Some firms brand themselves as legal advisors, rather than as lawyers. To be addressed as 'lawyer' means having high status. (F 1.5.)

'You can take a higher fee. There is no doubt that others who are not lawyers, but who are doing the same job, are not as highly paid'. (F 6.6)

Section 120 of the Danish Administration of Justice Act provides that a lawyer can continue to use their title of 'lawyer' after retirement. This indicates the very strong identification between professional and personal identity and that the profession recognises that the job and private life of a lawyer are melded together in one identity. One of the interviewees spoke of his old uncle who still uses his professional stamp with his title when sending Christmas cards and birthday invitations.

While the title of 'lawyer' has been of great importance, there is now a movement at the individual level ('who to be?') from *advokat* to 'legal adviser'. This was reported in focus group 7. That firm's lawyers present themselves, in English, as 'legal advisors'. 'Legal advisor' is part of the firm's name and branding.

5.7.1.3 Housing

It was pointed out in focus groups 1 and 9 that many Copenhagen lawyers live to the north of the city or in Frederiksberg and very often have an *au pair*. One of the participants said, as if it was a matter of note, that he does not live where the other lawyers live. Lawyers from Jutland see the issue of living in a specific area as a typical Copenhagen phenomenon. In focus group 2 it was explained that this is about prestige, which is less important in Jutland. (F 2.1)

5.7.1.4 Dress code

Dress codes differ according to the size of the firm, but there is a consensus that dress codes have changed with individualisation. In larger firms the dress code is more uniform, and one respondent said about his former work place:

'Employees in the big law firm where I worked previously started to wear brightly coloured socks to be individual and trousers too short so the socks could be seen. It was ridiculous!'. (F 2.5)

'There is an expected standard for clothing style, but it depends on which lawyer you are'. (F 1.5)

'Flip-Flops and shorts are not allowed'. (F 1.3)

These quotations show that clothes are used to support individualisation and that dress gives some identity, but with limitations.

5.7.1.5 *Performativity through pictures*

Sustaining identity as a narrative affects the body as a part of the self. Today, determining 'who to be' includes a bodily dimension as an important part of identity.³⁶⁹ A significant part of self-realisation can be seen in the way that the pictures of staff on law firm websites are styled to present the personality of the lawyer next to their skills (see further in Chapter 8).

5.7.2 'Billable hours' affects identity

The oldest (67),³⁷⁰ recently retired, lawyer taking part in the empirical study said that the billable hours approach takes away the virtue of the profession and forces lawyers into a kind of 'salary-slave system'. It certainly does not produce better outcomes and is often more costly for clients.

'We've got an extra meta-layer, looking at the business. This layer doesn't care what I sell, but only looks at coverage and utilisation, etc. They don't care about me. I only deliver a legal performance'. (F 5.4)

As lawyers become increasingly experienced and specialised they are able to work more efficiently and deliver an excellent solution in less time. Even though hourly rates are graduated according to who is providing the service, lawyers admit that when they have a good case for a wealthy client they ask themselves 'how big a fee can this case generate?'. Lawyers see it as 'unfair' if a client pays a small amount for advice, a contract or a solution that is of great value for the client. Lower costs and greater efficiency will help increase the earning of the lawyer rather than lower the fees of the client.

'Many clients/people expect that it will be expensive consulting a lawyer, so the salaries are high indeed. Lawyers have profited from this expectation'. (F 6.2)

Young lawyers have another problem. Nearly all the young lawyers or apprentices interviewed explicitly admitted that they 'cheat' when calculating the fees or costs per hour. As they do not want to appear stupid or slow, they declare fewer hours than they have actually used for working on a specific task. Of course, this results in less income and so to meet the expectations of a certain number of billable hours, they work very long hours.

Another way to increase income is in the selection of clients accepted. Focus group 5 indicated that, besides business clients, only rich private clients are welcome.

Apprentices are paid for their potential and not for their experience.³⁷¹ However, salaries have risen to a level where partners complain that apprentices are too expensive and do not earn

³⁶⁹ Giddens, *Modernity and Self-identity – Self and Society in the Late Modern Age*, p. 186.

³⁷⁰ Individual interview (Ihs)

³⁷¹ Susskind, *Tomorrow's Lawyers*, pp. 140-141.

enough. Nevertheless, in one focus group it was pointed out that the incomes of senior lawyers and partners have increased more than the incomes of young lawyers.

Apprenticeship is a period during which it should be allowable to make mistakes, to learn and explore, but young lawyers and apprentices experience it as a fearful period, during which they are under enormous pressure. A middle-aged lawyer explained:

'The values are different. 13 years ago we also had to earn money, but the focus was more on the legal skills and on being a good lawyer. This has been pushed to one side now; the focus is on earning money for the firm ... When I was an apprentice you got credit for being legally skilled – it isn't like that anymore'. (F 9.1)

The billable-hour system seems to have 'unintended consequences' (Giddens). It has an impact on the education of new lawyers who must work rapidly be cost effective and it also has a negative impact on innovation. As one of the participants said:

'The biggest enemy - hindering innovation in the profession of practicing lawyers - is the incessant time-billing system - that we must constantly explain our hours and they must be chargeable, and there is simply no room for innovation'.³⁷²

5.7.3 Gender issues

As mentioned in the introduction, some of the women interviewed said they did not want to make too many comments on gender issues so as not to be considered weak or incapable of working as a lawyer. One smaller firm (focus group 1) with three female partners out of five and with two employed female lawyers said: 'we don't want to be recognised as a "female office"'. It is problematic that more than a few of the participating lawyers indicated reluctance to refer to gender aspects, for fear of being seen as weak or being considered a second-rank lawyer because their sex.

Surprisingly, several men raised the problem of finding gender role models. This confirms that gender is a relevant issue that has been the attention of research for some years.³⁷³ In particular, men in search of a new identity related to gender have become an issue of interest to scholars, and it is a subject deserving more attention.³⁷⁴ Individual lifestyle choices, such as lawyers wanting to take paternity leave, can change identity perceptions and lead to discussions of work-life balance that women have tried to cope with individually.³⁷⁵

In focus group 5, with seven participants (four women and three men) from a large firm in the Copenhagen area, there was a long discussion of gender issues. The following quotations illustrate the discussion:

³⁷² Individual interview (Iøh).

³⁷³ Schultz & Shaw (eds.), *Women in the World's Legal Professions*.

³⁷⁴ McGinley, *Introduction: Men, Masculinities, and Law*, pp. 316-318 and 326.

³⁷⁵ Collier, *Rethinking Men and Masculinities in the Contemporary Legal Profession: The Example of Fatherhood, Transnational Business Masculinities, and Work-Life Balance*, pp. 411, 416, 420, 425 and 426.

'I think it depends on whether you have family or not. I have both a husband and children and I think it is difficult to function on all fronts equally when I get squeezed at both ends and in the middle (...) Most men's answer to this problem is that day care institutions just have to have longer opening hours, but most women who have children will say that this is not why they have had them'. (F 5.6, woman)

'There are definitely fathers who spend more time with their children than I do, but I think I'm doing well. But I don't spend enough time with my wife'. (F 5.4, man)

'I have a husband, but no children. I'm not young, but I'm a senior lawyer and 'I'm a woman without whining about it' - this because I think that is a choice'. (F 5.5, woman)

'I think it's interesting to see that the higher up you go in seniority, the smaller the proportion of female lawyers. It may well be that you start with a 50/50 gender balance as apprentices, but quietly, progressively the women disappear'. (F 5.4, man)

'I chose to skip many career opportunities when my children were small. This has had great impact on my work and my career development ... but I don't regret it even though it has affected my career, because I have got my kids instead. But I think it's been pretty hard'. (F 5.1, woman).

'Your priorities mean that you haven't achieved partner status, and thus there are some things that are incompatible'. (F 5.4, man).

'I cannot think of a woman at my work who has a child and who is not on reduced hours (...) I think it's crazy that you can't work full time as a lawyer when you have a child. Of course, 40 hours is still a lot!'. (F 6.1, woman)

It is broadly recognised in the empirical study that, especially for women, having children and full time work as a lawyer are incompatible.

Like other strong professions, the legal profession has traditionally been mainly a male profession. The composition of the legal profession has changed and more women have entered it. However there is still significant under-representation of female lawyers at the decision-making level and as partners in law firms.

The possibly subjective aspects of the gender issue have been addressed in the empirical study in order to explore whether they have influenced professional conduct and work-life balance. Danish scholars like Hammerslev also confirm the existence of gender problems among lawyers.³⁷⁶ What Rhode wrote in 2000, about the dichotomy between being a mother and a lawyer, seems to be experienced in the daily life of Danish lawyers. Mothers are often criticised for being insufficiently committed in their professional role. Mothers who are willing to sacrifice their family life for work appear to be 'bad' mothers, while those who want extended

³⁷⁶ Hammerslev, *Studies of the Legal Profession*.

leave or reduced working hours for family reasons appear to be 'inadequate' lawyers.³⁷⁷ The only development is that these mixed messages are now also affecting young fathers.

5.7.4 Personal meaning and belonging

Giddens mentions personal meaninglessness and feelings of dissatisfaction as lifestyle conditions or characteristics of modern life, and this theme has been integrated in the empirical study. Several interviewees indicated that the study and information material in itself gave them an opportunity to reflect and to have a fruitful debate. They reported that this reflection and debate also made them aware of the 'heavy' or 'dark side' of a lawyer's identity.

Many lawyers are preoccupied with techniques and strategies for managing their time and the feeling of being under pressure. Sometimes this feeling is manifested in general complaints about working conditions. In other cases it appears to explain acute irritation, sometimes even aggression with clients, principals, colleagues or judges. This continuous irritation often occurs when their values and their daily practice conflict. Values are not the same as ethics or morals when related to the individual. While a code of conduct can say how lawyers *ought* to behave, individual values guide how a lawyer *likes* to behave. It is not a question of doing right or wrong in a normative sense, but of doing what *feels* right for the individual lawyer. Identifying values is an effective way of striving for authentic professional satisfaction.³⁷⁸

The lack of leadership or mentors was expressed in terms of searching for meaning and direction, and a concern for the future. While senior lawyers said they have had a rewarding and fruitful life, they are also aware that the profession is in transition. Many express the hope that they can carry on doing 'business as usual' until their retirement. This means that they risk hindering necessary innovation connected to the traditional values of the profession. As mentoring has always been an integral part of apprenticeship, there can be problems for those who need mentoring if the 'wisdom' that is passed on is outdated. This development is not solely a Danish problem; it has also been described in an international context by Macfarlane.³⁷⁹

Only the focus group of young lawyers spontaneously discussed the possibility of leaving the profession. However, in the individual and more intimate interviews many young lawyers expressed a wish to quit the profession due to dissatisfaction or the lack of inspiring role models who look happy. They were asked if they knew any happy lawyers and one answered:

'Yes, my boss is happy because the only thing that counts for him is money'.³⁸⁰

Identification with a wider spectrum of professional opportunities may result in less commitment to the profession and more migration to other fields. The legal professional organisation is losing control over its members. Hitherto, good practice, professional norm setting and disciplinary actions were stimulated, monitored or organised by the bar and law society.

³⁷⁷ Rhode, *In the Interests of Justice – Reforming the Legal Profession*, p. 40.

³⁷⁸ Melcher, *The Creative Lawyer*, p. 19.

³⁷⁹ Macfarlane, *The New Lawyer: How Settlement is Transforming the Practice of Law*, p. 41.

³⁸⁰ Individual interview (Irf).

As mentioned in section 5.4, the empirical study shows that young lawyers express a wish to leave the profession³⁸¹ and talk about mismatch of lifestyle and identity. Many refer to new practice developments aimed at more sustainable ways of lawyering.

It seems difficult to find new professional ideals, and as mentioned in section 5.7.3 both men and women lack role models. Many respondents said they are searching for a new identity. A few reported they have found such an identity, saying that when one can see meaning and direction the long working days are no problem (F 4 A.1).

5.7.5 Fragmentation and individualisation

The increasing diversity of the profession can be seen in the organisation of different associations, interest groups, networks etc. To be a practicing lawyer, one must be a member of the Danish Bar and Law Society. However, lawyers also take part in many other communities which they consider relevant for their working and/or social life. Many have international connections.

The profession has a growing number of sectoral organisations, based on shared interests with other lawyers in the same legal area. These sectoral organisations (communities) of lawyers have their own profiles, logos and codes of conduct. Their administrative support is often provided by the Association of Danish Law Firms (*Danske Advokater*).³⁸²

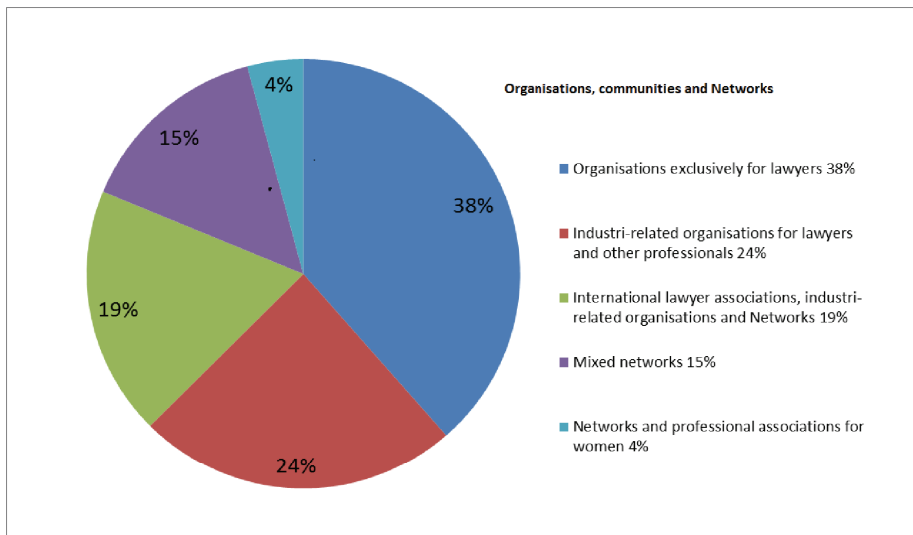


Figure 5-4. Organisations and networks

The approximately 5,500 practising lawyers in Denmark have organised themselves in many subgroups such as:

³⁸¹ Focus group where all members were young lawyers.

³⁸² See www.danskeadvokater.dk/Specialforeninger.aspx?ID=19067 (last accessed 12 November 2013).

Employment lawyers, tax lawyers, the Danish Arbitration Association, the Association of Danish Law Firms' trade group for commercial property and construction, lawyers as board members, housing lawyers, family lawyers, the Association of Danish IT Attorneys, agriculture lawyers, the Danish Association of Mediation Lawyers, environmental lawyers, business lawyers, property management lawyers, insolvency lawyers, claims and insurance lawyers, litigation practitioners, competition lawyers, immigration lawyers, probate administrators and defence lawyers.

Some sectors or communities of lawyers (practice areas) are administered under more private and less formal arrangements.

It is interesting that there is also an association for litigation practitioners (*Procedureadvokater*), a sector of the Association of Danish Law Firms. While all lawyers used generally to be considered as being involved in litigation, at least sometimes, lawyers involved in litigation now consider themselves a subgroup of the legal profession.³⁸³

Specialisation is broadly recognised and supported by the participating lawyers, confirming that the old broadly skilled lawyer is disappearing and that specialisation is necessary to cope with complexity.

Two important studies have been carried out by the Association of Danish Law Firms.³⁸⁴ These confirm some of the findings of the empirical study. One sectoral analysis supports the findings of this study on the identities and typologies of lawyers, and the second, a study of excellence, confirms the ideals of the profession but does not discuss whether these ideals are still attractive to the next generation of lawyers.

In 2012, the Danish Association of Lawyers and Economists (DJØF) carried out another study, on leaving the profession.³⁸⁵ The study showed that 50 % of lawyers wish to leave the profession. This finding is in line with the information from the focus groups and individual interviews in this study. What is especially revealing is that it is the young generation that wants to leave the profession and is actually doing so.

5.7.6 Law firm size influences identity

Modern conditions may break down the protective frameworks of firms, professions and traditions and replace them with much larger impersonal organisations. This development is ongoing in the profession of practising lawyers³⁸⁶ and has been confirmed by the legal-sociological research of Michael Rask Madsen from Copenhagen University.³⁸⁷ Nevertheless, the empirical study demonstrates that lawyers wish to have a closer commitment to their clients. Some describe their law firm as a 'sausage-factory'. (F 5) According to Macfarlane, the dominance of

³⁸³ See www.danskeadvokater.dk/Procedureadvokater.aspx?ID=19184 (last accessed 12 November 2013) and www.procedureadvokater.dk (last accessed 12 November 2013).

³⁸⁴ Danske Advokater, *Segment analyse and Excellence study*.

³⁸⁵ The Danish Association for Lawyers and Economists (Union).

³⁸⁶ Danske Advokater, *Advokatbranchen i tal*, 2012 and 2013.

³⁸⁷ Madsen, *Return to the Copenhagen 'Magic Circle': First Elements of a Longitudinal Study of Large Law Firms*.

the mega-firms in the lawyers' landscape has a profound impact on professional identity,³⁸⁸ and confirms the findings on the relationship between identity and the size of firm. The large firms already market themselves at the universities as successful places to work, but many young lawyers do not realise the impact of the working conditions and how the financial constraints limit their professional autonomy and individual responsibility for handling their cases. This quotation from a young lawyer illustrates how the problem of getting enough billable hours stresses the working day.

'I cannot quite describe what I was expecting. I note that I fight a lot ... for 1 hour out of 7 I can be dealing with internal corporate tasks that should not be billed. (...) Typically on an ordinary working day there will be 2 hours' work I cannot account for. So I work maybe 10 hours a day, as it is difficult to catch up the lost time'. (F 6.1)

The empirical study shows that lawyers have a concern for keeping or developing a personal identity and a fear of losing personality in larger law firms. This affects job satisfaction. The relationship between the lawyer's job and the enjoyment it provides has also been researched by Steven Harper, who refers to an American Bar Association survey which shows that in small firms (2-20 lawyers) job satisfaction is 57 %, in medium-sized firms (21-100 lawyers) it is 58 %, and in large firms (101 + lawyers) satisfaction drops to 44 %.³⁸⁹

5.7.7 Authenticity

'Authenticity' may be important for the legal profession as well as for other professions where relations to clients, patients or students play an important role. Courage also plays a role in developing a strong identity. There is a need to develop a firm identity if society is to have lawyers with authenticity and charisma to defend fundamental rights and to protect and develop democracy in accordance with the European ideal, while still being able to have a critical approach to the European Union and its legal institutions and practice.

Giddens refers to authenticity as a special value for self-actualisation. Authenticity is based on being true to oneself. Personal growth will depend on getting rid of the emotional blocks and tensions which prevent people from understanding themselves. Morality or authenticity is reflected in some universal moral criteria.³⁹⁰ For Giddens, it is evident that lifestyle choices will also raise some moral questions and that the local-global interrelationship will inevitably raise these moral questions. A lawyer who is a partner in a firm is in a better position than an employee to identify and express the goals of the firm and to support everyone in the firm in finding meaning and direction in working life. Some lawyers are aware that they use their identity as a strategy. One stated that he tries to present the identity that the client requests. Subsequently, he asked rhetorically whether this is a form of cheating. He concluded that it is essentially a business strategy, where ethics and morals do not prevail:

'I think I just cut off some of my personality. You must know that we have some clients whose affairs are ethically not that fine; they just have to be handled'. (F 7.4)

³⁸⁸ Macfarlane, *The New Lawyer: How Settlement is Transforming the Practice of Law*, p. 5.

³⁸⁹ Harper, *The Lawyer Bubble*, p. 58.

³⁹⁰ Giddens, *Modernity and Self-identity – Self and Society in the Late Modern Age*, p. 79.

5.7.8 Identity and reputation

The dynamics of identity construction occur not only between the individual lawyer and the profession, but also between lawyers. This is also shown by the empirical study. Lawyers' identities are affected by the picture they form of their position in society. According to Wenger, lawyers see themselves as participants in social processes and configurations that extend beyond their own practice. Lawyers, however, do not have access to all lawyers' practices, and therefore they use their imagination to create a full picture of the profession.³⁹¹

Asked where and how they have integrated the values of the profession, several lawyers referred to their childhood. They spoke of how traditional values influence their professional life. One said:

'I am child number four, born into a farming family. You need to be trustworthy in how you treat people and animals'. (F 3.)

There were also questions on how reputation is a construction of the identity of the profession. The interviewed lawyers often defined their own identities by referring negatively to other lawyers whom they do not want to resemble. 'I am not a lawyer like ...' was a repeated statement. Often identity references were expressed negatively:

'Goddamn it. Same tie, same shoes'. (F 4B.3)

'In our firm there are many outstanding personalities, while at (name of a big Copenhagen law firm) they might have 20 penguins'. (F 4B.4)

When lawyers talk about identity they are sometimes trying to persuade others of their real identity. Reflecting on and discussing identity also seemed to help them constitute the identities of themselves and others. This dynamic is also recognised by Wenger who sees how people in a specific area of work extrapolate from their own work experiences to imagine the lifestyles of others. This affects identity in the process of expanding the self into a member of a profession, imagining how other lawyers behave and perceive the world. This process means transcending time and space to create new images of lawyers in a future setting.³⁹²

5.7.9 Work-life balance – Sustainable lawyering

The flow of the discussions of the focus groups showed that the structures of law firms and of the profession are reflected in the individual lawyers' perceptions and identity. However, it could be observed that identity can still be developed personally. This does not mean that lawyers' practices and emotional involvement are entirely explicit and transparent to themselves. The empirical study reveals anxiety, fear and doubt about the ability to meet the expectations of partners, managers and clients, and even of colleagues. Some structural problems are perceived as an individual lack of capacity.

³⁹¹ Wenger, *Communities of Practice*, p. 173.

³⁹² Wenger, *Communities of Practice*, p. 176.

Dissatisfaction, lack of hope and meaning in life, stressful working conditions and fear of losing the job were often referred to by the younger lawyers. These findings are not only a Danish phenomenon and not only connected to the legal profession. They merely confirm Giddens reflections on a general disorientation in modern life.

There were discussions about whether the new generation of lawyers lacks the ability to take care of themselves and thus have problems taking care of others. Behind a tough façade, self-esteem seems to be low. Several participants expressed feelings of loneliness, always feeling fearful of not to being good enough both in relation to legal knowledge and personal competences. Many felt a lack of autonomy, especially in big firms, while sole practitioners stressed the positive aspects of independence from boards, partners etc. Many felt a lack of security. This could either be related to working conditions or to the fundamental question of keeping the job. These concerns consume time and energy in everyday life. The empirical study shows that many law firms intrude on the private lives of their lawyers, with attractive offers of food or catering, laundry support, fitness-facilities, leisure activities, theatre or film clubs. While this creates a team spirit, it also makes it more difficult to take part in other activities outside the professional environment. The younger generation points out that patterns of family life have changed and that for young families it is normal now for both partners have a career. At the same time there is also pressure to give greater priority to family life (see also section 5.7.3 on gender). In focus group 2 there was a discussion about divorce, single life and having no children to cope with, because of the heavy workload. The conclusion was that by making individual choices it was possible to change lifestyle. One of the participants expressed it as follows:

'If somebody tells me to work 70 hours per week, I tell them to get lost!'. (F 2)

This statement was made by a lawyer from a big firm outside Copenhagen in central Denmark. All the participants in the focus groups in Jutland (F 3 and F 4A) made robust statements about the possibility of creating a good work-life balance. It was observed that there are significant regional differences and that one must be willing to refuse a case or refer it to somebody else (4 A.1).

In the Copenhagen area technology was mentioned as a major stress factor:

'There are high demands on availability, also at weekends, as it is considered normal to work at the weekends as well. Technological change creates opportunities, leading to increasing demands (...) It was not like that earlier. Initially, I was not interested in getting a PC or mobile phone for working at home, but after a short while I had no choice'. (F 5.4)

Permanent availability has been established, mainly to generate income. However, there is more awareness of the health implications.

As seen from the focus groups and interviews, the members of the profession seem to agree that there are serious problems, but few see a possibility of changing their professional situation and accepting the consequences of change.

'It's all about hours and about income. If you have a high turnover, you'll be attractive - if you have less revenue then you're not attractive. The human dimension disappears in such a system so I believe fundamentally that many lawyers, including partners in major firms, are risking burn-out'.³⁹³

Even though many lawyers are aware that the financial returns do not in themselves provide happiness, having achieved a certain lifestyle it is very difficult for them to give up their standard of living in exchange for a more satisfying life. There is a pattern of compensatory consumption which can become self-perpetuating. Asked how much they wanted to earn as a lawyer, many participants answered 'as much as possible'. On the other hand, they often added that their satisfaction would depend on knowing about the incomes of the lawyers they compared themselves to. And they indicated they felt trapped by this.

The risk of burn-out is real. Many participants referred to friends and colleagues who had had total breakdowns, and some admitted that they have emotional problems or disorders related to sleep, food or sex, but still the attraction of an unhealthy lifestyle persists. This observation is also made by Rhode, who states that lawyers tend to overvalue income as a means to fulfilment.³⁹⁴ However, there are clear indications that new ways of proactive and sustainable lawyering will be a part of the change in the profession.

5.8 Transformative capacity leads to several lawyer identities

In this section, six lawyer identities are depicted on the basis of the focus group work, the written data and the individual interviews. This reveals self-realisation in an individualised setting. Lawyers tend to create a lifestyle linked to the norms of the profession, such as long working hours, the focus on billable hours, and identification with the classic ideals. Nevertheless, this lifestyle is in competition with a transformative role in search of a new identity to support the creation of proactive, sustainable or other ways of new lawyering as discussed in Chapter 8.

As the profession becomes more specialised it is necessary to look at practising lawyers in more autonomous specialist groups with new identities.

Some lawyers have identities committed to humanistic ideals of justice, with specific and important tasks in a democratic society under the rule of law.³⁹⁵ Others are businessmen whose main aim is making good business. These are recognisable identities or profiles,³⁹⁶ but they are not the full picture. There are several other identities which are neither reflected in the humanistic profile of servants of the rule of law, nor in the profile of businessmen.

³⁹³ Individual interview (løh).

³⁹⁴ Rhode, *In the Interests of Justice – Reforming the Legal Profession*, pp. 32-33.

³⁹⁵ Pearce and Wald, *The Obligation of Lawyers to Heal Civic Culture*.

³⁹⁶ Kronman, *The Lost Lawyer – Failing Ideals of the Legal Profession*, p. 370.

The identification of different types of lawyers is based on their written identity markers from the questionnaires, combined with the same lawyers' statements in the focus groups and interviews. For example, if as one of three identity markers a lawyer indicates they are a 'mother' or 'father', 'farmer' and 'nature lover', they will be placed in the *lawyer-integrator* group of those who have important parts of their lives outside the law. The data collection is based on qualitative methods, so the percentages given below cannot be extrapolated to cover all lawyers. This will require further investigation.

The categorisation of identities is based on social learning theory, where identification plays a major role. The interviewed lawyers relate to the classic European ideal of lawyers, but in the process of becoming a lawyer they constitute new identities. This is a dynamic generative process, with individual and collective elements leading to a diversity of lawyer identities.³⁹⁷

The individual goes through a development in which many lifestyle choices are made to identify or assimilate with the legal profession. At the same time the lifestyle choices are limited if the lawyer wants to be recognised as a member of the professional community.

The figure below presents the distribution of the different identities. The importance of the data is that, despite the European perception of '*the lawyer*', they confirm that there are already several identities. Lawyers with very different identities all perceive themselves to be real lawyers. However, lawyers with different identities also have different purposes for labelling themselves 'a lawyer'.

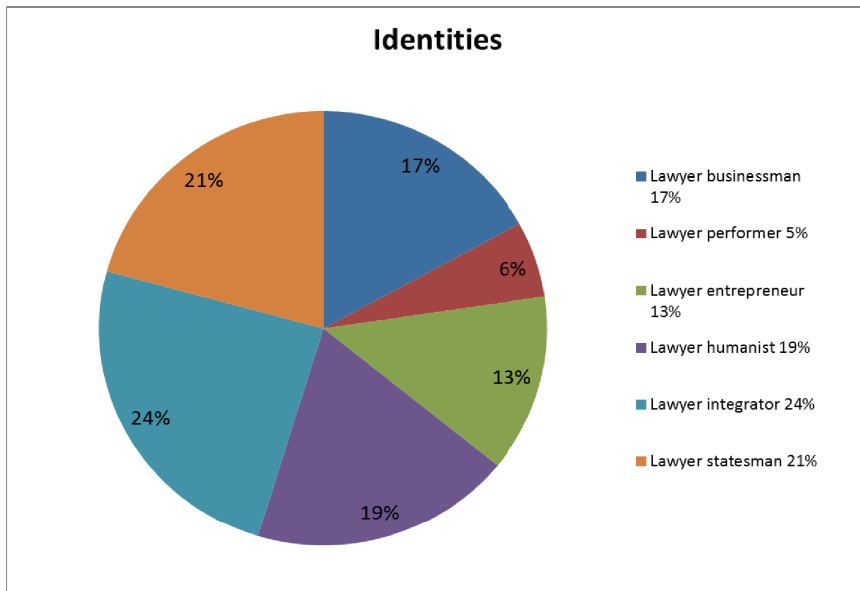


Figure 5-5. Identities n=53

³⁹⁷ Wenger, *Communities of Practice*, p. 191.

There are gaps between people's understanding of themselves and what they know about what others think of them. There are also gaps between the identities lawyers think they have and the identities they would like to have. And there are tensions between the identities people feel they have been assigned and the identities they would like to define for themselves. Lawyers struggle with the gap between 'who we are' and 'who we are thought to be'.³⁹⁸

Six different identities have been derived from the empirical study. Each has its own characteristics, although it is inevitable that some of the identities partly overlap:

1. Lawyer-businessman
2. Lawyer-performer
3. Lawyer-entrepreneur
4. Lawyer-humanist
5. Lawyer-integrator
6. Lawyer-statesman

The different identities have the following characteristics.

5.8.1 Lawyer-businessman.

The *lawyer-businessman* is motivated by the desire for profit. They look on the law firm as a business. This lawyer type has big problems with the system of billing per hour. As they are motivated by getting more money they want to work more hours, though they would probably prefer simply to raise their hourly rate. The billing per hour system is not in the legal profession's long-term interest. When a lawyer performs better and more efficiently they can get through the work faster. This raises the question of whether this should benefit the lawyer or the client. The values for this type of lawyer are efficiency and income. They use identity to get a higher income.

Significant quotation:

'Our former managing partner said: "Whether you sell refrigerators or legal services, it doesn't matter as long as it's good business". One can ask how it affects us?' (F 5.1)

5.8.2 Lawyer-performer

The *lawyer-performer* aims to work on court cases or other performance-related tasks. They get a kick out of performing well in court, though they also have to spend quite a lot of time at their desks. Research and desk work give them less satisfaction than performing in court. These types are highly competitive and they love the 'game'. However, they are much better winners than losers. They cultivate an appearance as Superman or Superwoman and enjoy being known as a lawyer. They reflect a quite narcissistic approach to identity.

Significant quotation:

'A mature lawyer unfolds his personality'. (F 4B.3)

³⁹⁸ Minow, *Identities*, p. 35.

5.8.3 Lawyer-entrepreneur

The *lawyer-entrepreneur* wants to give reliable answers and their clients often seek advice about future business or the possible outcome of a potential court case. This forces the *lawyer-entrepreneur* to think proactively, which implies risk-taking. The avoidance of risk is a basic characteristic of the practice of law. In many ways this is contrary to the personality of the *lawyer-entrepreneur*. Thus they will often have another kind of business in addition to being a lawyer, where other personal interests or potential can be developed.

This can be an accessory business, such as a real estate lawyer combining lawyering with running a business administering real estate. Or it can also be something totally different, like being a wine trader or running an import business. The essence is that a lawyer with the personality of an entrepreneur will have a chance to be creative and exploit visionary ideas. These activities may not be part of traditional legal practice, but they may fit in perfectly well with a proactive law practice. The *lawyer-entrepreneur* uses the identity of a lawyer to build confidence and for extensive networking.

Significant quotation:

'Our vision is to make the client aware of the value of us entering into the process early. We are proactive and don't only act as the fire brigade.' (F 7.1)

'We want to be project managers, so we control all the others and become the trusted advisers'. (F 5.6)

5.8.4 Lawyer-humanist

Lawyer-humanists will do their lawyering from the perspective of saving or improving the world. They connect to fundamental values, such as human rights, the rule of law, fair trials, etc. The *lawyer-humanist* is a peacemaker and many of them have been trained as mediators or work with ADR. Some of these lawyers will also have an altruistic attitude to lawyering.

They fight for the oppressed, the poor, the handicapped, women, children and vulnerable groups. Others will try to combine logical left brain thinking with emotions. Justice is a top value and the lawyer-humanists act as spokesmen for the good life. Their professional identity includes idealism and an ideological foundation for their lawyering.

Significant quotation:

'A measure of success is to change the refugee board's practice - the goal is not money. My cases take very long time and may go to the Court of Human Rights or the UN. It is law and politics and about the rule of law. I have a constitutive role in developing a good practice'. (F 8.1)

5.8.5 Lawyer-integrator

The *lawyer-integrator* has a holistic approach to life and they distinguish themselves from other practitioners in choosing a lifestyle in which they integrate work and leisure time, family, career, home and community. These types look for role models.

There is an interesting discussion as to whether they try to separate private and professional life or whether they try to integrate the different dimensions of their life in order to be uncompromisingly present wherever they are. They may use technical devices to create space for leisure time.

Significant quotations:

'Integrity is important. People who have power are well-balanced and are not afraid to expose their personality'. (F 1.5)

'I think this firm is different. We focus on the whole person and try to adapt ourselves to the people we work with'. (F 9. 2)

'Does it have value that the lawyers in this firm have activities other than work? It has a great importance and provides a more relaxed atmosphere.'(F 3.2)

5.8.6 Lawyer-statesman

Lawyers in the *lawyer-statesmen* group not only see themselves as members of the profession, they also see themselves as members of a global society with a responsibility to support the values of a democratic society. They still talk about the old code of honour and they know, without thinking, what it means. They detest the 'Rambo' mentality, and they do their lawyering with distance and dignity. They can be political when it comes to fighting for the rights of the profession or for fundamental legal principles. They often engage in global networking. They are regarded as an old-fashioned archetype of lawyer, as stated by Macfarlane.³⁹⁹

Significant quotation:

'I cannot have different ethical values. The lawyer in society should have legitimacy, in other words a figure worthy of trust. I think it is important that you should not be willing to do anything just because the client wants it'. (F 7.1)

5.8.7 Individual responsibility

Role models have always been important in identity development in a profession, as identity is developed in a social setting. But it is becoming increasingly difficult to find relevant role models and many, especially young lawyers, are looking outside the legal profession as they cannot find people within the profession who can meet their ideals.⁴⁰⁰

³⁹⁹ Macfarlane, *The New Lawyer: How Settlement is Transforming the Practice of Law*, p. 40.

⁴⁰⁰ Macfarlane, *The New Lawyer: How Settlement is Transforming the Practice of Law*, p. 41.

Identities develop throughout life, as seen in the figure below where dividing the data on identity into four groups related to age shows a trend in identity development.

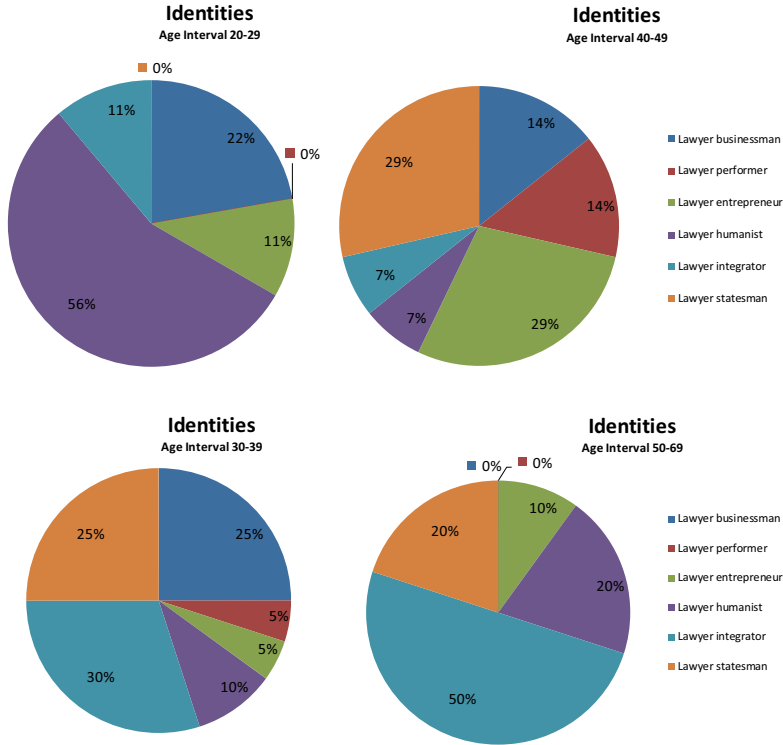


Figure 5-6 Identities related to age

The youngest group has no *lawyer-statesman* or *lawyer-performer*. This could be interpreted as meaning that these identities are disappearing, but it could also indicate that it takes time to develop such identities, as they are closely related to practice. What is also notable is the number of *lawyer-integrators* and *lawyer-humanists*. In the groups of 20 to 29 year old lawyers and 50 to 69 year old lawyers, more than two thirds have one of these identities. There are no *lawyer-performers* or *lawyer-businessmen* in the group of older lawyers. The biggest diversity is seen in the two groups from 30 to 39 and 40 to 49 years old. All six identities are present in both groups. Compared with the figures relating age to area of expertise in section 5.5, it seems there is much more stability in lawyers' areas of expertise than in their identities. This confirms the theories of Giddens and Wenger, that identity is under constant negotiation.

Talking, reflecting and debating more explicitly about how to negotiate identity and how to make choices within the constraints of relationships with others and the patterns of power gave the participants new perspectives on the roles and tasks of lawyers.

As one of the participants expressed it:

'We are human beings and we only live once, so we must be honest to ourselves in our working lives. Those who fit into my business have the same approach to life (values) – we can be different but when you have the attitude that life is good, you have to contribute to the community as the economy must be solid and it's not just fun and games. You have to find the balance where you can retain identity and autonomy while doing business – and it means you have to be constructed in a particular way.'⁴⁰¹

5.9 Reflections and sub-conclusions

In the empirical study it has been important to understand identity as a lifestyle embedded in practices and in the lawyers' immediate social interactions in everyday life. It has also been important to highlight the implications of subjective elements for the profession and for professional identity. The focus groups combined with individual qualitative interviews has made it possible to collect individual perceptions and assemble them into a broader picture of general, recognisable trends. The guided interviews made it possible to follow a structure while being loyal to individual differences. In Chapter 4 it was concluded that a European identity ideal can be derived from a set of legal and regulatory sources in relation to the concept of 'a lawyer'. However, the investigation into how Danish lawyers define their identities reveals that this unity of shared professional values at the European level no longer exists. Hence, what has been depicted as the European identity ideal contrasts with the variety of very different practices at the national level in Denmark.

The analysis of the data is based on the factual information presented in sections 5.4 and 5.5 on the participating lawyers' age and gender, their areas of expertise and professional skills. From here, the empirical results have been related to structure corresponding to the earlier chapters, namely the societal, professional and individual levels. From the statements on societal commitments in this chapter, it is concluded that lawyers have the perception of having a special role in society, but they do not all feel a commitment to work in the interests of society or to connect such a commitment to their identity.

The empirical study proves that the profession is under pressure. The legal profession needs to find a new way to include future generations, and to accept and deal with the diversity of lawyers in new communities of practice. In competition with management consultants the profession is described as old fashioned. Other advisers provide legal services or are doing the same work as lawyers, and this makes it more difficult to maintain the special identity of the lawyer. When the boundaries between professions dissolve, converge or blur, identities become increasingly individualised. The legal profession's monopoly and its common code of conduct are

⁴⁰¹ Individual interview (Iøh).

under pressure, and some lawyers no longer see a need to keep the exclusive privileges of lawyers.

In section 5.7 the empirical results are connected to themes inspired by Giddens's identity studies, based on lifestyle indicators. Lifestyle and identity in the legal profession develop from a collective identity into an individual identity, given the focus on subjectivity and specialisation in the profession. Money, the professional title, housing and dress codes are key indicators of a chosen lifestyle. Other issues relating to the identities of lawyers have been investigated and highlighted, such as how excessive billable hours and highly competitive behaviour, even within a firm, obviously affect identity. When analysing gender issues it became clear that both male and female lawyers lack role models. This leads to the difficulty of finding personal meaning and a feeling of belonging to a community, as discussed and analysed in section 5.7.4. Fragmentation and individualisation of the profession are also modern conditions and are broadly recognised by lawyers. Real-estate lawyers do not have much in common with family lawyers for example, and some lawyers, especially in large firms, say they have more in common with consultancy firms than with smaller law firms outside the Copenhagen area. In this way, law firms' size and working conditions influence lawyers' identities.

Not that many years ago, many lawyers worked in small firms with a broad business profile, dealing with all aspects of a case, negotiation or problem, and working in a range of legal areas. Such firms still exist, but legal specialisation is diminishing their number. The interviewed lawyers are doubtful or disagree as to whether this development is splitting the profession and whether it is to be considered a positive evolution.

At the individual level, lawyers value authenticity and integrity, which relate to how lawyers address their own deeper human needs and aspirations. Some feel under pressure from clients and question how to meet clients' needs without putting their own values or principles aside and without doing their clients' every bidding. Many lawyers see identity and reputation as two sides of the same coin and use the reputations of others to define themselves.

In contrast to their original expectations of becoming free self-employed persons, many lawyers say they have spent years as wage slaves and that this situation seems set to continue. The focus group of young lawyers clearly expressed the need for change, but did not dare to raise the issue at work so as not to be considered weak or unable to fulfil the expectations of the firm. The meaninglessness and lack of direction is recognised in the empirical study. The need for a work-life balance and for sustainable lawyering is not only a national need but is recognised in theoretical work and in ABA publications. There are lawyers who live a life of balance and harmony, but many express fears and doubts about their ability to meet the expectations of partners, managers, clients and even colleagues. The conditions, which are mostly structural problems, are perceived as individuals' lack of capacity such as the problem of finding role models, lack of guidance, the pressure of billable hours and general individualisation in society.

In section 5.8, the results relating to the transformative capacities of individuals are set out in six recognisable identities. The classic ideal identity, similar to the European ideal, does exist but is no longer dominant. Individual responsibility has led to lifestyle choices. The empirical study shows that sole practitioners and lawyers in small firms, both in Copenhagen and in North Jutland, have a commitment, a work-life balance, a focus on professional ideals and societal tasks which influence their daily practice. These elements also affect their incomes. These lawyers earn less, but they generally enjoy a more balanced life.

Comparing the different age groups shows that the diversity of areas of expertise is stable, but that some identities are more dominant in some age groups than others. This supports the theories that identity develops over a lifetime. The empirical study shows no significant relation between age and areas of expertise, but it shows a significant relation between age and identity. The young and the old lawyers care more about living an integrated life, humanity and values, and less about business and performance. To test whether this is correct it would be necessary to follow the same lawyers over a long period.

The empirical study and the analysis of its results in this chapter make it clear that the legal profession is increasingly heterogeneous. Many lawyers are searching for a more meaningful or sustainable life and for a value-based individual identity, with more focus on happiness, accountability, democratic responsibility and satisfaction in both personal and legal life. When a person has more than one identity ideal and these identities have conflicting values, there is a need for reflection. Many do not relate to the professional organisations, and loyalty to the profession is diminishing. Many take part in new networks and interdisciplinary groups of experts and are loyal to new communities of practice which give them new identities. Also, the problems of increasing dissatisfaction and of work-life balance call for reflection on the chosen lifestyle.

The findings in Chapter 5 are the basis for more detailed analysis in Chapter 6, concerning the identity challenges in a structuration process. The aim of the next chapter is to identify challenges at the societal, professional and individual levels and to investigate the interaction between these three levels.

6 Challenges to identity in a structuration process

The two previous chapters have shown that the legal profession is undergoing a profound transition. This chapter contains a deeper analysis built on Giddens's structuration theory. This diagnoses the implications of an identity shift in relation to society and in relation to the profession. This chapter will thus provide answers to research question 3: What are the changes and challenges to the role and identity of lawyers at the societal level, the professional level and the individual level? How do these levels interact?

Some lawyers have developed, or may always have had, identities that may be far from the European identity ideal. Nevertheless, whether derived from the national level or from the EU level, some of the classic elements are recognisable in today's diversity of identities. However, there is no common fixed identity among lawyers. A triangulation process, as presented in section 5.2.5.3, will connect the findings in Chapters 5 and 6 to other sources to verify or support the results. This is possible because the theoretical framework also structures and supports the collection of data, and it can both validate data and help explore beyond what the data alone can tell.

The transformation and development of several identities cannot be explained by looking only at the individual level. Lawyers' individual lifestyles change the profession and the profession focuses on new areas that are fed back to the individual lawyer. Lawyers take on new roles and tasks in society, and society can impose new tasks on lawyers. An example of this, which is developed in section 6.4.1, is the active role of lawyers in the prevention of money laundering, even though this may not be in the interests of the client.

This chapter follows the structure of the three levels of analysis. Section 6.1 looks at the societal level, with the legal cultural movement from a national to a supranational level. Section 6.2 looks at the professional level in transition from a homogeneous towards a heterogeneous profession. Section 6.3 considers the identities and agency of individual lawyers. And section 6.4 considers the interaction between the three levels.

6.1 Societal obligations – the perspective of 'What to do?'

Considering the challenges at a societal level immediately raises the question of how to define the societal level. Societal obligations go further than the nation state and include the European and, in part, also the global level in so far as the European Union can be seen in a structuration process as an agent in a global setting. Previously the state, from where the legal sources were derived through a democratic process, was the focal point for lawyers. International treaties and conventions only played a role when they were implemented by parliaments or state authorities, acting in accordance with political decisions and national policy. This situation has drastically changed as part of an ongoing globalisation process, and internationalisation (which need not be global) has a massive and direct impact on law and regulation at national level. In an agent-structure perspective, change takes place in the interaction between the societal level, the professional level and individual agents.

6.1.1 European legal and democratic challenges

The EU is facing a range of democratic challenges. When the laws and legal norms of states lose their importance and central role, positivist legal philosophy and traditional legal methods come under pressure. The role of lawyers becomes a part of the discussions about the relations between law, religion, democracy and moral values. Some of the major global conflicts of today are linked to religion. There is a discussion about whether Western legal systems should recognise Sharia law or simply deny its relevance in a democratic society under the rule of law. There are discussions in various political and religious forums, in firms or corporate organisations, as well as in trade unions. Lawyers take part in these debates and they affect their work. There can be a question of the extent to which employees in the private and public sectors can claim to have their religion respected in the work place, and especially the traditions linked to it. These discussions influence general agreements and individual contracts and lawyers play an important role in negotiating, drafting and enforcing agreements and contracts.

There are many conflicting interests, shifts of power and fights for fundamental rights, while various norm-setting institutions exist side-by-side, each trying to legitimise its practices. At all these levels and in every institution, lawyers play active roles, whether as *lawyer-statesmen*, *lawyer-humanists* or *lawyer-integrators*. It is a characteristic of a globalising society, such as the European Union, that a pluralistic legal philosophy can explain why several different agents can claim different rights while being convinced that their rights are valid law. Professor Hanne Pedersen from Copenhagen University recognises that:

'State determined law and positivistic legal science and legal philosophy play apparently not the same central role for the growth and legitimation of the post-modern globalised societies.'⁴⁰²

Nevertheless, in the empirical study several lawyers mentioned their connection to a positivist-based legal perception⁴⁰³ as having a neutral tool, while others referred to their personal inner sense of justice when lawyering.⁴⁰⁴

6.1.2 Law-making processes

The Danish Bar and Law Society has a long tradition for submitting written statements to the Danish Parliament as part of its consultations on new legislation. But the national orientation will be diminished as some influence has already shifted to lobbyists at the EU level. This implies that some of the power of national bars has shifted to the CCBE which in many cases is now the professional voice of all European lawyers. Examples of its hearings or position papers can be found on the CCBE's website.⁴⁰⁵ The CCBE was founded in 1960 in response to the Treaty of Rome in 1957, which some European lawyers perceived as a threat to their independ-

⁴⁰² Petersen, *Globalisering, ret og retsfilosofi*, p. 139. My translation of: "Statsfatsat ret og positivistisk retsvidenskab og retsfilosofi spiller øjensynligt ikke samme centrale rolle for fremvæksten og legitimeringen af de postmoderne globaliserede samfund".

⁴⁰³ Focus group 5.

⁴⁰⁴ Focus groups 1 and 3.

⁴⁰⁵ www.ccbe.eu (last accessed 12 November 2013).

ence. They felt the need for a body to represent the interests of lawyers.⁴⁰⁶ The CCBE is recognised by the EU institutions and has certain privileges in consultations.

As the law-making process shifts to a supranational level, the traditional connection between national parliaments and the profession is changing and national professional organisations will lose power. Law is a multi-layered system, consisting of law as a legal order and law as legal practices, where the legal order is described as a symbolic, normative phenomenon, and legal practices are a set of specific social practices. Ruth Nielsen and Ulla Neergaard have analysed how law and legal practice interact. They have explained that:

‘The two aspects of law – law as a legal order and law as legal practices – are in constant interaction. Legal practices could not exist without legal norms’.⁴⁰⁷

These two aspects of law seem to be in a constant interactive developing dialogue. The more proactive and norm-setting roles that lawyers take or get, the more they will not only be legal practitioners but also contribute to changing the legal order.

The law-making process has more agents than ever before. In the modern multi-layered structure, society is regulated at a supranational level, a national level and a local level.⁴⁰⁸ In addition, the relation between public and private law has changed and new partnerships have been established. Laws and regulations are also derived more frequently from private firms, professional organisations and NGOs. This is reflected in general agreements or contracts between private parties, in public-private partnerships (PPPs) and in the ethical rules of certain professions such as doctors, lawyers and journalists. Corporate social responsibility (CSR) is increasingly important to the concept of proactive law with sustainable elements. Lawyers play an important role in this; they not only apply the rules of society made by others, they are an integral part of the law-making process. CSR applies to a growing number of self-regulatory systems.

6.1.3 Lawyers in the governance of services with proactive elements

Many lawyers are involved in new forms of governance, as the private sector appears to become less and less dependent on the nation state, with deregulation, self-regulation or new forms of co-regulation.⁴⁰⁹ Best practice and the demand for ethical behaviour force business advisers to implement normative decisions based on their own professional and private values. Both from a professional and a private perspective, lawyers who take part in new forms of governance have to reflect on whose interests they are serving. Lawyers need criteria to determine how, when and why to use their legal expertise or how to combine it in new communities of practice either with clients or other experts.

⁴⁰⁶ CCBE, *The History of the CCBE*, p. 5.

⁴⁰⁷ Nielsen & Neergaard, *European Legal Method*, p. 101.

⁴⁰⁸ Neergaard, Nielsen & Roseberry (eds.), *European Legal Method – Paradoxes and Revitalisation*, p. 184.

⁴⁰⁹ Smits, *Towards an Interactive and Multi-Level System of Private Law for Europe*, Paper at ELM, (European Legal Method(s)), Conference CBS, Law Department 2011.

In many areas there are some universal, fundamental values behind the actions and activities that lawyers are involved in, such as agreements prohibiting child labour or contractual provisions guaranteeing the protection of nature, promoting decent working conditions or implementing rules against discrimination and for equality. There are characteristics or elements of sustainable or proactive lawyering in some traditional law practices. This can be seen, for example, when family lawyers search for lasting solutions in divorce cases, with shared custody of the children of the marriage; or when real estate lawyers draft agreements or general rules of governance for co-ownership; or when lawyers help the HR departments of commercial organisations draw up staff policies, administrative rules or integrate CSR rules in business plans.

All these examples are derived from the empirical study for this thesis, and these concepts of proactive law and of lawyers as contemplative practitioners, which will be discussed in greater detail in Chapter 8, will challenge the profession and stimulate the development of a new professionalism in interactions in new communities of practice.

6.1.4 Enforcement

The general picture has also changed in relation to enforcement. Law enforcement has traditionally been associated with the court system and civil and criminal litigation. The Court of Justice of the European Union (CJEU) in Luxembourg in particular has been heavily criticised for being too proactive and too dominant in interpreting Union law in favour of the European Union. The proactive role of the CJEU has changed both in academic perception and in the perception of a representative of the CJEU.⁴¹⁰ Judging is no longer left exclusively to the courts as parties have often delegated the governance of their relations or the solving of conflicts between them to alternative forms of dispute resolution, such as arbitration, mini-trials or mediation. The development of amicable settlements and the expanding practice of mediation also change the focus for lawyers and force them to redefine themselves in relation to this new environment. In this broader framework lawyers' traditional skills are too narrow. As one of the lawyers in a focus group stated: 'Lawyers can solve a task but cannot see a problem and are not trained to anticipate risks. Lawyers are educated to be conservative in handling their cases'.⁴¹¹ This identifies the reactive rather than proactive approach of many lawyers to their work.

The new forms of conflict resolution make enforcement more individualised, probably with lower transaction costs, and may produce more satisfactory results for the parties and keep their relations intact. The disadvantage is that legal practice becomes more obscure and the legal system lacks transparency and the other guarantees of a fair trial. It will become increasingly difficult to say what the valid law is in a given legal area. This development will result in pluralism in law-making, implementation and enforcement.

⁴¹⁰ Ruth Nielsen at ELM seminar, CBS, November 2012 and Lecture by the Vice-president of the CJEU, Koen Lenaerts, European Court of Justice, Luxembourg, Study tour, November 2012.

⁴¹¹ Focus group 1.

Lawyers find satisfaction when they help parties to individual tailor-made solutions, though there is a risk of neglecting some of the long-term interests of society. According to the classic European ideal of lawyers' identity, lawyers have always had some responsibility for supporting a democratic society.⁴¹² In their daily practice this responsibility can conflict with the short-term interests of their clients. However, keeping a business going rather than having it closed through litigation can also have some positive societal aspects, like maintaining jobs and the livelihoods of taxpayers.

6.1.5 The public purpose of the profession in the EU

Building up a new legal order in Europe will demand practitioners who are able to support and develop legal and political ideas. In this respect, Giddens refers to the sociological theories of Weber and Luhman, who both had law degrees and whose works are regarded as having made influential contributions to the sociology of law and socio-legal studies. EU law is part of a multi-layered interactive system with a broad social and humanistic approach and a political role. The Lisbon Treaty includes European Union values such as freedom, equality, democracy, fundamental human rights, the rule of law, justice etc. According to the EU Treaties, these values make a common European identity understood as a normative reality of a European constitution.

When human rights develop to recognise more and more collective rights such as sustainability in society, in economics and in caring for the rights of future generations, this affects the identity of lawyers (and, of course, of other practitioners) as lawyers are supposed to have a role in fulfilling societal goals. The European Union enlarges and emphasises the importance of democracy and fundamental human rights. The complex relations between fundamental rights, Union law and national law and practice are monitored by the European Commission for the Efficiency of Justice.⁴¹³ The European Union Agency for Fundamental Rights also plays an important role,⁴¹⁴ especially with its links to the justice programme.⁴¹⁵ When both the legal order and the profession are in transition, this affects the attitudes of lawyers who construct diverse identities as legal practitioners. In the European legal framework, many lawyers are taking on societal responsibilities in a new setting, while others perceive themselves as businessmen who can operate any kind of business as long as it is lucrative. However, much of business life today calls for consultation on diverse matters including attitudes, ethics and behavioural expectations, and these expectations are often framed or developed by lawyers.

6.1.6 Exercising controls on behalf of public authorities

The European identity ideal for lawyers includes societal obligations. Union law has transferred some new control tasks to lawyers on behalf of national authorities and European institutions,

⁴¹² *R(2000)21 on the freedom of exercise of the profession of lawyer*, p. 2, preamble.

⁴¹³ CEPEJ, *European judicial systems, Efficiency and quality of justice*.

See www.coe.int/t/dghl/cooperation/cepej/default_en.asp (last accessed 8 November 2013).

⁴¹⁴ See <http://infportal.fra.europa.eu/InfoPortal/caselawFrontEndAccess.do?id=514> (last accessed 12 November 2013).

⁴¹⁵ See <http://fra.europa.eu/en/theme/access-justice> (last accessed 12 November 2013).

such as lawyers' obligations under the Money Laundering Directive⁴¹⁶ or the obligation to support access to justice through legal aid.⁴¹⁷ These explicit societal tasks affect lawyers' identity perceptions and their fundamental feelings of being independent from state authorities.

The impact of the Money Laundering Directive is a striking example of the multiple effects of Union law on lawyers' identity, and the controversy over the Directive deserves closer attention, especially from the perspective of the legal profession. Under the rules on the prevention of money laundering, in Denmark the Danish Bar and Law society is responsible for enforcement. Section 6.4 will illustrate the interaction between three levels of analysis.

6.1.7 The changing societal role of lawyers and the legal profession

When national bar and law societies are given control over societal tasks, this affects the division of powers and the independent position of lawyers. Many of the founding fathers of the European Union were lawyers or had law degrees (among other degrees); these included Robert Schuman (1886-1963), Joseph Bech (1887-1975), Walter Hallstein (1901-1982) and Paul-Henri Spaak (1899-1972). There are still politicians with legal backgrounds in the European Commission and the European Parliament, but increasingly people with other educational backgrounds now influence the development, modernisation and expansion of the EU. The division of powers and how institutional powers relate to each other is considered a prime characteristic of modern democracies. In Montesquieu's political system of the separation of legislative, executive and judicial powers, lawyers (in the sense of people with a law degree) have a dominant role in all three areas. More recently the lawyer is under pressure or is being replaced by other agents in all these areas.⁴¹⁸ The empirical study for this thesis confirms that lawyers feel this pressure and that this development makes lawyers more competitive.

While lawyers were integrated in the European Commission's administration and had important roles from very early on, their ability to retain a dominant position has been challenged by the rise of other bureaucratic agents, especially economists.⁴¹⁹ Many people with a law degree have worked and still work in civil administrative positions both at national and international level, but more and more civil servants have other university degrees, in subjects such as political sciences, public administration and economics.⁴²⁰

National and international courts still have judges with legal backgrounds, but legal educations vary widely throughout Europe and there are demands for professional judges with other

⁴¹⁶ Directive 91/308/EEC *on the prevention of the use of the financial system for the purpose of money laundering*. The reporting obligations for the legal profession have only been introduced in a later version in 2001: Directive 2001/97/EC of 4 December 2001 amending Council Directive 91/308/EEC *on prevention of the use of the financial system for the purpose of money laundering* inserting a new Article 2a. imposing the directive's reporting obligations on "notaries and other independent legal professionals").

⁴¹⁷ Directive 2003/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes. See also Recommendation Rec (2000) 21 of the Committee of Ministers of the Council of the Council of Europe to member States on the freedom of exercise of the profession of lawyer, 25 October 2000.

⁴¹⁸ Hammerslev, *Studies on the legal profession*.

⁴¹⁹ Georgakakis & de Lassale, *Where have all the lawyers gone? Structure and transformations of the top European Commission officials' legal training*.

⁴²⁰ Hammerslev, *Danish Judges in the 20th Century*, pp. 92-97.

backgrounds to judge on technical and complex commercial matters. In other forums, like alternative dispute resolution (ADR) institutions, lawyers work together with experts in other domains, such as telecommunications engineers, economists, financial advisers, insurance experts, consumer advocates, labour representatives, and experts on the environment etc. This development puts further pressure on court systems and judges.

Scandinavian socio-legal studies which focus on developments in the judiciary, such as the research carried out by the Norwegian Professor Vilhelm Aubert,⁴²¹ have shown that judges are losing their central position to other professions. This is due to emergence of ADR, arbitration and mediation, and because administrative councils and regulatory bodies or agencies have the competence to make final rulings, as discussed in section 6.1.4.

Margareta Bertilsson has examined similar developments in the legal world in Sweden, and has found striking similarities with the developments described by Aubert. In Denmark Dalberg-Larsen has studied the influential role of lawyers in society and has also come to the conclusion that judges in particular have lost influence in society. He observes, however, that they are finding new roles, especially in the context of internationalisation.

Similar developments can be seen among lawyers. The empirical study for this thesis shows that the legal profession is taking on new roles and developing new identities. Changes in society will determine which kinds of roles will remain and which will disappear. Some tasks may remain but may not be kept in the hands of lawyers. Also new tasks may arise and be taken on by innovative or 'hungry' lawyers, while others stick to their traditional tasks.

Academic literature⁴²² and practice confirm that lawyers cannot maintain their former influential position in society. In the private sector, practising lawyers are under a considerable pressure from other groups in trying to retain their position as the primary trusted adviser of their clients.⁴²³ Lawyers are exposed to more and more competition, an issue that will be further elaborated in section 6.2.4.⁴²⁴

6.2 The profession – the perspective of 'How to act'?

The next sections focus on the transformation processes both within the profession and in individuals. Lawyers are affected by the fact that problems become increasingly complex and difficult to solve from an academic perspective. The legal issues are often specialised and must fit in with technically feasible solutions. Thus, expert lawyers must interact with other high-level experts. In such a context a major issue is how to define a problem and choose the right experts to solve it, with or without lawyers. The profession must also realise the new threats or opportunities derived from ICT-based developments. To a certain extent these make it possible to provide legal services either without or with fewer lawyers; see section 6.2.6.

⁴²¹ Aubert, *Rettens sosiale funksjon*.

⁴²² Kronman, *The Lost Lawyer – Failing Ideals of the Legal Profession*.

⁴²³ Danske Advokater, *Vision 2020*.

⁴²⁴ Hammerslev, *Konvergensstudier: Jurister erstatter af andre professioner*.

The profession protects the professional characteristics that it still finds important in a democratic society. These are: the rule of law, confidentiality, independence, self-employment, a monopoly of representation of clients in court, the priority of client interests, professional confidentiality, mandatory insurance and a set of ethical rules enforced by the profession itself. When lawyers are no longer the only agents in the domain of legal or para-legal services, these characteristics can no longer be taken for granted. Some of these characteristics already exist in other professional fields, so they are not exclusive to lawyers. Lawyers integrate other principles and values in their practices, such as social justice, sustainability, global risk awareness, integrity, transparency, extension of human rights, CSR etc. and these change and expand their obligations. An example from the empirical study can be seen on the website of *Forum Advokater*:⁴²⁵

'The following statement expresses the values that express our CSR policy.

- We comply with and promote human rights
- We create the best environment for our employees
- We minimise our contributions to climate change
- We contribute positively to the communities in which we operate.

In our implementation of these values, we emphasise the need for a balance between, on the one hand, the goals of our CSR policy and, on the other hand, the need to operate an effective law firm where we do not compromise on quality and our clients' needs'. (Translation)

Professional organisations seem to be aware of these challenges, but they may not have recognised these as challenges to the traditional protection of the profession and taken account of the diverse and increasingly individualised identities and practices of lawyers.

The appearance of several identities of lawyers in the empirical studies for this thesis is explained and reflected in numerous books and articles about lawyers outside Denmark. There is an influential and interesting critical approach in Rhode's⁴²⁶ work on reforming the legal profession and in the ideas developed by Susskind on the need to rethink the nature of legal services.⁴²⁷ Also Kronman's theory about the failing ideal of the legal profession⁴²⁸ and Daicoff's studies⁴²⁹ reflect on the need for alternative ways of lawyering related to the interaction between society, the profession and lawyers. Their reflections are included in Chapter 8 in relation to individual identity development and are only referred to here in support of the empiri-

⁴²⁵ www.forumadvokater.dk (last accessed 26 November 2013). Some law firms submitted to FN's Global Compact program. Around ten law firms in Denmark integrate CSR in advising clients. Morten Mark Østergaard Advokat (L) informs, that a firm advising in the area of CSR, must "walk-the-talk".

⁴²⁶ Rhode, *In the Interests of Justice – Reforming the Legal Profession*.

⁴²⁷ Susskind, *The End of Lawyers? and Tomorrow's Lawyers. An Introduction to Your Future*.

⁴²⁸ Kronman, *The Lost Lawyer – Failing Ideals of the Legal Profession*.

⁴²⁹ Daicoff, *Expanding the Lawyer's Toolkit of Skills and Competencies: Synthesizing Leadership, Professionalism, Emotional Intelligence, Conflict Resolution, and Comprehensive Law*, p. 803.

cal conclusion that the profession is undergoing significant change, where individualisation, fragmentation and diverse identities have already transformed it.

6.2.1 Is the profession disappearing, being deconstructed or reconstructed?

The legal formalistic approach for defining lawyers (see section 4.2: Who is a lawyer?) may change so that legal agents may not necessarily be professional lawyers in the terms of the legal definition and the conditions for being considered a lawyer. Law firms have started to employ staff members who have different educational backgrounds. However, it is not the regulation of the profession that will change the role of lawyers in Europe, but changes in technology and competition from other professions taking over parts of lawyers' traditional tasks. Professor Jan Smits (Maastricht University) has investigated these changes in daily problem-solving involving lawyers. He has observed how new circumstances and new professional environments create new competences.⁴³⁰ The tendencies in Denmark are very similar to developments in the legal domain in Europe at large.⁴³¹ Changes in the structure of the profession, increased competition, specialisation, fragmentation, and the creation of new roles all prompt the question: Is the legal profession is confronted with an identity crisis? Giddens regards crises as a part of everyday life. A crisis exists:

'whenever activities concerned with important goals in the life of an individual or a collectivity suddenly appear inadequate. Crisis in this sense becomes a normal part of life, but by definition they cannot be routinized'.⁴³²

This quotation illustrates the ongoing development in the legal profession where lawyers' equilibrium in practice has changed, including a fixed lawyers' identity. Lawyers face constant changes that demand rapid changes in attitudes and actions whereby they develop different professional and private lifestyles. The days have gone when a lawyer could build a practice on general standardised services. These services have been taken over by other operators or by technology-supported self-service systems. Susskind⁴³³ supports Giddens's perception that the legal profession is facing a professional identity crisis.

A lack of a common identity is also recognised in the Carnegie report on the education of lawyers. The report emphasises that law firms should empower young lawyers to:

'encounter appealing representations of professional ideals, connect in a powerful way with engaging models of ethical commitment within the profession, and reflect on their emerging professional identity in relation to those ideals and models'.⁴³⁴

The idea of the profession as a homogeneous group of lawyers, with the same university degree and common values, has changed. The profession is in the process of reconstruction and

⁴³⁰ Smits, *Towards an Interactive and Multi-Level System of Private Law for Europe*, Paper at ELM.

⁴³¹ Tvarnø, *Udtalelse om cand.merc.jur.-uddannede i advokatbranchen*, Magasinet Advokaten, December 2012.

⁴³² Giddens, *Modernity and Self-identity – Self and Society in the Late Modern Age*, p. 184.

⁴³³ Susskind, *The End of Lawyers? Rethinking the Nature of Legal Services*.

⁴³⁴ Sullivan et al., *Educating Lawyers: Preparation for the Profession of Law*, p. 135.

some scholars like Macfarlane discuss whether it is undergoing a paradigm shift.⁴³⁵ As confirmed in the empirical study, we are not witnessing a revolution but rather an evolution of several new identities.

6.2.2 The transition from a homogeneous to a heterogeneous profession

The institutions of a profession have a tendency to support the maintenance of the status quo of the professional identity and pass it on to the next generation. To preserve its values, the legal profession actively upholds a specific identity and a specific way of lawyering, as codified in legal sources, and it presents itself as a profession with a stable and homogeneous identity. However, the members of the profession act in accordance with their individual identities, which have become diversified.

When the surrounding society changes and legal tasks develop, individual legal practitioners will adapt to the new complex and differentiated reality, learn new skills and develop broader competences. This will influence their identities. According to Giddens, social circumstances cannot be separated from personal life and are not merely external to it. New generations will be concerned about their free will and unique self-realisation. This is fully in accordance with the findings of the empirical study conducted among lawyers who recognise that the profession is constructed by the members of the profession itself and who generally consider that their self-realisation as more important than sharing and realising common values. Differing lifestyles, combined with specialisation and fragmentation, make it difficult to maintain the profession as a unified association of lawyers.

At the organisational level, the balance between defensive and innovative strategies can be seen in the relations between the established Danish Bar and Law Society, and the modern business-focused Association of Danish Law Firms (*Danske Advokater*). While the members of the Danish Bar and Law Society are individual lawyers, the members of the Association of Danish Law Firms are law firms and not individual lawyers. This creates a distance to individuals and underlines the impersonal business perspective, but at the same time the Association of Danish Law Firms is aware that business is carried on by individuals and therefore it offers programmes to support talented young lawyers, excellence programmes etc. The question is whether the diversity of lawyers is taken sufficiently into consideration.

6.2.3 Unintended consequences

The consequence might be that the professional organisations unintentionally⁴³⁶ hinder the development of adequate professional identities to meet the needs of individualised and specialised practitioners to become members of a heterogeneous professional group, in which people with different skills can work together to solve complex problems.

The collective image of the lawyer is under discussion. All debates between lawyers about their roles and career scenarios will nurture the collective concept of what the legal profession is and how it can develop. As a profession with a long and stable history, any concept of future

⁴³⁵ Macfarlane, *The New Lawyer: How Settlement is Transforming the Practice of Law*, p. 17.

⁴³⁶ See *Unintended consequences*, Section 2.3.2.

possibilities will also be influenced by its shared heritage. In his work on identity, Wenger expresses it this way:

'The creative character of imagination is anchored in social interactions and communal experiences. Imagination in this sense is not just the production of personal fantasies. Far from an individual withdrawal from reality, it is a mode of belonging that always involves the social world to expand the scope of reality and identity'.⁴³⁷

Differences between the problem-solving case-work of advocacy and more innovative activities are important for developing new competences. Several lawyers, as in focus group 1 of the empirical study, recognise the need for more radical changes in the practice of running a law firm, but the profession is formed and protected in a way that limits development and innovation.

Regardless of their diverse identities and daily practices, it seems that lawyers still recognise themselves and each other as lawyers belonging to the same 'brotherhood'. However, collegiality can hinder critical self-reflection and open discussion, leading to an attitude of 'Don't foul your own nest', as one of the interviewed lawyers expressed it. The empirical part of this study and other research and legal literature confirm that the professional life of lawyers suppresses the individualised value-based choice of identity which concerns happiness, accountability, democratic responsibility and satisfaction both in personal and in legal life.⁴³⁸

From this perspective, imagination can be counterproductive if it is used in a professional setting to confirm and disseminate stereotypes of lawyers' identity which are no longer in accordance with reality.

6.2.4 Lawyers in competition

Lawyers are in competition both with each other (internal competition) and with other service providers (external competition). Ole Hammerslev points out that lawyers 'are competing with business economists to be primary advisors of large corporations ... new markets have opened for advocates. Commercial disputes are resolved outside the courtrooms'.⁴³⁹ The advice that clients seek increasingly relates to the future. As well as in the empirical study, this tendency is seen in the annual reports of the International Association for Contract and Commercial Management (IACCM).⁴⁴⁰ Clients seek to avoid conflicts rather than to solve them. One of the central concerns in proactive law is to include legal considerations in managerial processes, with the input of business-oriented legal advice and cross-professional and interdisciplinary collaboration. Rhode describes analogous challenges confronting lawyers from other providers of legal services and their reactions, for example in establishing multidisciplinary practices, giving

⁴³⁷ Wenger, *Communities of Practice*, p. 178.

⁴³⁸ Levit & Linder, *The Happy Lawyer*.

⁴³⁹ Hammerslev, *Danish Judges in the 20th Century*, pp. 224-225.

⁴⁴⁰ IACCM, The International Association for Contract & Commercial Management is a non-profit membership organization that supports innovation and collaboration in meeting the demands of today's global trading relationships and practices, www.iaccm.com (last accessed 3 December 2013).

access to justice without legal representation, and educating non-lawyer specialists – paralegals etc.⁴⁴¹

Some multidisciplinary practices have been established in Europe, especially in the UK. This in itself is an indication that lawyers are influenced by professionals and experts in other fields and vice versa. For example, lawyers working in shipping law need to know and understand about ship construction. Lawyers working in the environment protection sector may need professional input on environmental technologies, energy consumption and CO2 emissions. Family lawyers have started to work closely with psychologists. IT lawyers work in teams with engineers and economists and their interpersonal communications and the validity of their solutions depend on mutual understanding. Taking part in expert groups or new communities of practices requires new competences and behavioural skills which differ from the traditional tasks of lawyers. Much depends on how individual lawyers wish to practise law, but the profession as such must take clients' value-for-money expectations into consideration when re-thinking legal services. According to Macfarlane, these changes have taken place outside Europe.⁴⁴²

▪ *Competition with external agents*

While lawyers seek to enter the market as consultants, national bar and law societies are trying to avoid competition from consulting firms and in-house lawyers specialised in certain legal fields.

In Denmark the professional organisations of lawyers have so far been quite successful in protecting their position and privileges.⁴⁴³ Nevertheless, other legal actors are gaining ground. Since 1 July 2006, under the Act on Legal Counselling it has been permitted to market and provide legal services in Denmark, regardless of educational background.⁴⁴⁴ Legal advisers must comply with best practice for legal counselling, but what is best practice for those not bound by a lawyer's ethical rules is not obvious. Marie Jull Sørensen has analysed the Act and concluded that, together with other developments within the EU, it stimulates more competition for legal services.⁴⁴⁵

In-house lawyers have obtained some legal privileges. However, legal privileges such as the rules on confidentiality can complicate working together with non-lawyers. The regulation of professional confidentiality is in Article 170 of the Danish Administration of Justice Act.⁴⁴⁶

⁴⁴¹ Rhode, *In the Interests of Justice – Reforming the Legal Profession*, pp. 136-140.

⁴⁴² Macfarlane, *The New Lawyer: How Settlement is Transforming the Practice of Law*, p. 23.

⁴⁴³ Deloitte closed their legal service after pressure from the professional organisations, who argued that clients could not be guaranteed to have an independent advisor, when the advisor was employed in a business company, and not in a law firm. Also insurance companies have been represented in court cases by in-house lawyers and they have been sharply criticized. www.business.dk/diverse/advokater-i-strid-om-klienter (last accessed 14 November 2012).

⁴⁴⁴ Act on Legal Counseling, Act. no. 419 of 9 May 2006.

⁴⁴⁵ Jull Sørensen, *God skik for juridisk rådgivning - en retlig standard*, p. 265.

⁴⁴⁶ The Danish Administration of Justice Act provides in Article 170: "Subsection 1: Clergymen, doctors, defence advocates and lawyers (*forsvarere og advokater*) may not be required to give evidence on matters which have come to their knowledge on the practise of their profession against the wish of the person who

In-house lawyers are also subject to these rules; the obligations of professional confidentiality also apply to legal professionals who are employed in a firm or organisation. They are special staff members, authorised to pursue their professional activities under the professional title of *Advokat* provided they are members of the Bar and hold a practice certificate issued by the Bar. Danish Employment Law states that persons in employment owe a duty of confidentiality to their employer.

Two recent cases show that in-house lawyers have privileges as legal practitioners, even though they are employed and are thus not independent practitioners. These important judgments in Belgium⁴⁴⁷ and in the Netherlands⁴⁴⁸ deal with the legal privilege, i.e. the confidentiality of legal opinions expressed by in-house lawyers. The cases are interesting as CJEU has earlier denied professional legal privilege to in-house lawyers, and they show that the traditional privileges of the legal profession, in the form of independent lawyers, is under pressure.

▪ *Competition within the profession*

‘On behalf of the client’ is a kind of mantra for a law firm. A law firm differs from many other businesses in that everything is paid for by the clients. Unfortunately the clients do not necessarily benefit when the work on their case is rationalised and in strong competitive situations this may lead to clients looking for other advisers.

Examples of these developments have been described and debated in the Danish press⁴⁴⁹ and in the professional periodical for lawyers, *Advokaten*.⁴⁵⁰ In *Advokaten*, Sysette Vinding Kruse, a member of the Danish Bar and Law Society, has reported that lawyers often ‘steal’ clients from each other and that this makes the clients feel insecure. It is also blatantly contrary to the ethical rules of the profession. The individual lawyers who participated in the empirical study also mentioned the problem of ‘client fishing’.

‘Greed’ is one of the keywords in this debate, and members of the board of the Danish Bar and Law Society have firmly condemned ‘client fishing’. Nevertheless, it seems to be an increasing problem due to the very high salary expectations in the legal profession.

has the right to require that secrecy be maintained. Subsection 2: The court may order doctors or lawyers, other than defence advocates in criminal cases...”.

⁴⁴⁷ In Belgium the Brussels Court of Appeal confirmed that the legal opinions expressed by in-house lawyers are confidential. This confidentiality is established by the Law of 1 March 2000 on the Institut des juristes d’entreprise (In-House Lawyers’ Institute). This is the principal conclusion pronounced by the Brussels Court of Appeal on 5 March 2013, in a case between Belgacom and the Belgian competition authorities, in which the In-House Lawyers’ Institute (IJE) intervened voluntarily Brussels Court of Appeal 5 March 2013.

⁴⁴⁸ Dutch Supreme Court confirms legal privilege for in-house attorneys. In a landmark case decided on 15 March 2013, the Dutch Supreme Court firmly established a legal privilege for in-house attorneys who have been admitted to the bar and comply with requirements guaranteeing their independence, *Rechtbank Groningen, 126861/ HA RK 11-171, LJN: BV7149, www.rechtspraak.nl* (last accessed 13 November 2013).

⁴⁴⁹ Vinding Kruse, *Klientfiskeri (fishing clients)*, *Politiken*, 27 May 2012, Section 2, p. 25, and in *Advokaten* 01/12, p. 8.

⁴⁵⁰ Lai Raben, *Kampen om advokatens sjæl*, *Advokaten* 3/2012, p. 25.

6.2.5 Competent and critical clients

Lawyers' identities are also influenced by the fact that the distance between the technical knowledge of experts and lay knowledge is diminishing, as expert knowledge becomes more easily accessible to all, especially through more consumer-oriented online information. In principle, knowledge of the law is available to all who have the necessary skills, time and energy to get it. An expert's problem-solving often starts with defining and clarifying problems, but as lawyers are primarily trained to see legal problems, it is easy for them to neglect surrounding areas of knowledge. By adopting a mono-disciplinary approach, lawyers may not be able to foresee the consequences of their contributions beyond their own particular sphere.

With specialisation, what is good quality advice or best practice is less unified and less recognisable. This means that lawyers' services are less comparable and their pricing less transparent, and the awareness of clients will increase in relation to the cost-benefit of legal services.

6.2.6 Legal services without lawyers

Lawyers' identity is under pressure from ICT-based services, where high-level legal advice is provided electronically and without any contact between a lawyer and a client.

The 'omniscient lawyer' will be challenged by free web-based services, by subscription-based online services from traditional law firms, or by paid-for services from other businesses, e.g. real estate agents, mediators etc.⁴⁵¹

New generations expect to find answers to all kinds of questions on the internet and most clients have access to search engines. When it is possible to conduct transactions with banks, insurance companies and municipalities on line, clients will also expect lawyers to be able to deal with 'normal' cases on line.⁴⁵²

Lawyers must be aware that younger generations are used to using the internet to find solutions to day-to-day problems. The internet can give a wider public access to legal insight, and this means that lawyers may be questioned on how they have reached a result that differs from the one the client has found himself. Just as doctors are becoming used to patients who make their own diagnoses, lawyers will be confronted by self-aid clients and the authority derived from having specialist knowledge will be challenged.

6.3 Individual identity – the perspective of 'Who to be?'

In post-traditional societies, individuals, including members of a strong profession, have to define their identities individually and may constantly revise or redefine them according to the changing environment. In a European setting, expertise and professionalism replace professions.⁴⁵³ Earlier societies, with a social order firmly based on tradition, provided individuals with more or less clearly defined roles. The legal profession fitted into this framework as a reactive agent in society. Developing identity is a dynamic part of life and is influenced by many sources both in private and professional life. According to structuration theory, the nar-

⁴⁵¹ Susskind, *Tomorrow's Lawyers*, p. 88.

⁴⁵² Susskind, *Tomorrow's Lawyers*, p. 87.

⁴⁵³ Rask, *Professions and postmodernity*.

rative self-identities framed in Chapter 5 will be constantly rewritten in response influences from families, mentors, working conditions and ongoing education and training.⁴⁵⁴ The actual source is not as important as the fact that the individual lawyer possesses agency in their choice of lifestyle. A chosen lifestyle expresses an identity at the individual level, and professionally this will include a relation to the profession. The fragmented profession still includes lawyers who confirm their identity as lawyers, though they are constantly changing their identities. Their identity as a lawyer is strong, and they prefer to change its content and characteristics and to define themselves as lawyers rather than leave the profession. They use the title *lawyer* either as an identity marker or as a brand which can support several different purposes. This perception is supported by Wenger in relation to new communities of practice. In such communities the individual lawyer feels 'safe' being a lawyer, as it makes it easier to find a self or an identity in relation to new social patterns. Bridges between these relations must be sustained by the practical world in which the lawyer acts.

There are exceptions, such as the firm in focus group 7 which presents its lawyers as legal advisers rather than *advokater*, in order to sharpen their international profile and create new patterns in the lawyer-client relation.

6.3.1 Ethical behaviour and moral aspects of identity

The European identity ideal includes moral and ethical attitudes, and the empirical results confirm the moral concerns of individual lawyers. In addition to codes of conduct, lawyers express some core personal beliefs that guide their professional work. Many of the decisions of lawyers are taken, not on the basis of their legal background, but on the basis of their individual moral and ethical foundations, their personal perceptions of justice and fairness, their goals in legal life and their identities. Ethical professionalism is not a fixed quantity. It can be enhanced and developed across the span of a career. Codes of conduct are important but they are not sufficient to establish good behaviour, and most codes ignore the fact that many ethical decisions are taken in the course of a decision-making process. Macfarlane states that 'Codes are more significant in theory than in practice and may be a substitute for "real thinking" about the development of professional roles and identity'.⁴⁵⁵

This corresponds to the results of an empirical study conducted in the USA by Neil Hamilton and Verna Monson.⁴⁵⁶ They identified the content of professional ethics on the basis of interviews rather than on legal sources. They agreed on four general themes, three of which have sub-themes:

- 1) a moral core or moral compass, including a deep sense of responsibility to others; trustworthiness in relationships with others (including clients, colleagues, the profession, the justice system, broader society); and honesty with the self and with others as an important basis of trust;

⁴⁵⁴ Macfarlane, *The New Lawyer: How Settlement is Transforming the Practice of Law*, p. 25.

⁴⁵⁵ Macfarlane, *The New Lawyer: How Settlement is Transforming the Practice of Law*, p. 46.

⁴⁵⁶ Hamilton & Monson, *Ethical Professionalism (Trans)Formation: Themes from Interviews About Professionalism with Exemplary Lawyers*.

- 2) counselling the client, including giving independent judgment; honest counsel informed by the lawyer's moral core; and the lawyer as facilitator in identifying the client's long-term interests, growth, or movement towards healing and forgiveness;
- 3) ongoing reflection and learning from mistakes or failures, and about the limitations of the present state of legal practice; and
- 4) self-assessment of how the meaning of professionalism has evolved, including continuous dynamic growth in understanding and internalising the meaning of professionalism.

These themes go behind the ethical rules of lawyers and, together with the empirical results, they will be an integral part of supporting identity development in individual transition, as presented in Chapter 8.

6.3.2 From profession to individual experts

When ethical rules relate to a professional organisation that has an increasingly individualised structure, this implies that the common values will be individualised to relate to the professional roles and tasks. New professional functions will arise, such as junior partners, specialists, knowledge managers, managing partners etc., and as lawyers merge with other professional communities, as in the case of in-house lawyers and consultancy firms with partners who have other educational backgrounds than a law degree. The empirical studies confirm that some big firms have departed from the traditional identity of a lawyer and replaced it with that of a business consultant. This is especially the case for the *lawyer-businessman*. The *lawyer-performer*, who performs in negotiation rather than in litigation, has also been transformed in this way.

There are several indications that the importance of 'professions' is declining and that they are being replaced by 'experts'. Giddens does not talk about 'professions' as such; he refers to 'expert systems'.⁴⁵⁷ The main difference between a member of a profession and an expert is that experts are not a clearly distinguishable stratum of the population. This contrasts with a basic characteristic of a profession which can clearly identify its 'members'. An expert with a narrow specialist area may pay little attention to the broader consequences or implications of their work.⁴⁵⁸ Expert systems can separate time and space by using advanced knowledge systems which have a validity independent of practitioners and their clients. Law firms or any other firms in Europe may work together with people in India or in the USA, for example, so that people can work on the same task without working in the same place or at the same time. According to Giddens, such systems are not limited to technological areas, as they penetrate virtually all aspects of modern social life. Furthermore, on expert systems in relation to lawyers he states that:

⁴⁵⁷ Giddens, *Modernity and Self-identity – Self and Society in the Late Modern Age*, pp. 15-18.

⁴⁵⁸ Giddens, *Modernity and Self-identity – Self and Society in the Late Modern Age*, p. 31.

'They extend to social relations themselves and to the intimacies of the self. The doctor, counsellor and therapist are as central to the expert systems of modernity as the scientist, technician or engineer. Both types of expert systems depend in an essential way on trust.'⁴⁵⁹

Looking at the different identities in Chapter 5, it is obvious that this basic trust has always been essential for the *lawyer-statesman* and the *lawyer-humanist* and that they have used their title as a 'lawyer' to guarantee honesty, trust and dignity. They defend the title 'lawyer' and will have difficulties in joining a group of experts without immediately being recognised as lawyers. Theoretically, everybody has basic skills, resources, time and energy to acquire knowledge, and should be able to reach an expert level in a specific field. Expert knowledge does not of itself create stability such as a profession, but the modern characteristics of experts are themselves a threat to the traditional professions. It is a characteristic of experts that, while they possess a high level of specialist knowledge in a specific area, they risk having too narrow a world view and not being sufficiently aware of their position in society.

According to Ellen Kuhlmann, who has studied the origins and characteristics of new professional identities, the autonomous and independent professional, like the traditional lawyer, no longer exists. Integrated concepts, networking, 'managed care', 'case management' and clients' participation are some of the key words in a development where professional tasks and working methods are in the process of being reorganised. These changes produce a new type of professional. Although, as yet, their voices are only faintly heard, 'post-modern' professionals seem to be more open to teamwork and interdisciplinary problem-solving, and to put less emphasis on their independence and autonomy.⁴⁶⁰ These characteristics can give objective advantages to the new professionals in their competition with the members of a professional organisation. Some members of the legal profession have already adapted their identities to these conditions. The empirical results show that the *lawyer-entrepreneur* and the *lawyer-integrator* have identity characteristics which make it easier for them to take part in a collective interdisciplinary network.

6.3.3 Individual lawyers' agency in the change of the profession

In order to describe and understand social behaviour from a sociological perspective, Giddens relies on hermeneutic abilities to create meaning and direction and to frame life. At the same lay persons create meaning and direction in their own lives, producing or reproducing their social world. From this perspective, all lawyers make their own contributions to the understanding of the professional society. Some scholars value the undefined concept of 'the lawyer's soul' in order to identify the relation between the individual and the profession.⁴⁶¹

Since the profession enrolls new members in accordance with its traditional patterns of learning and development, innovation is difficult and individuals' desires for self-realisation may conflict with the general picture of the lawyer. There is a complex relationship between pro-

⁴⁵⁹ Giddens, *Modernity and Self-identity – Self and Society in the Late Modern Age*, p. 18.

⁴⁶⁰ Kuhlmann, *Postmodern Times for Professionals*, p. 84.

⁴⁶¹ Timmer & Miller, *Reflections of a Lawyer's Soul*.

fessional knowledge and the legal and organisational framework of the profession on the one hand, and the individual lawyer with their life experiences, lifestyles, education and career plans on the other hand. Modern life can be seen as a series of transitions. These transitions are not necessarily sequential; they are transitions in life and are dependent on interaction with risks and opportunities.⁴⁶²

As mentioned above, the agent (the individual lawyer) is the deciding element in the process of fulfilling societal expectations to the extent where professional functions are satisfactorily accomplished so as to make it possible for the profession as a whole to maintain its privileges. With increasing diversity, with different personal backgrounds, greater specialisation and diverse practice settings, lawyers have confirmed their agency in the process of change. The differences between lawyers' identities are easily observable in the empirical study presented in Chapter 5.

However, there are no actions to support the development of several identities. Education and training do not relate to the lifestyles and identities of individual lawyers who create varied working conditions, have very diverse tasks and take on different obligations towards both society and clients. Rhode has stated that 'our current one size fits all model of legal education and professional regulation badly needs revision'.⁴⁶³

It is important to underline that the search for self-identity is closely related to Western individualism and the idea that each person has a unique character and a special potential. In dealing with the question of 'Who to be', Giddens takes the therapeutic perspective of counselling when he addresses agency. He refers to Janet Rainwater and asks: 'What do I want for myself?' In Rainwater's work awareness of the present is crucial, as it is in mindfulness theories that have found their way to legal training. Mindfulness is seen in questions such as: 'What is happening right now?', 'What am I thinking?', 'What am I doing?', 'What am I feeling?' and 'How am I breathing?' The inclusion of breathing extends reflectivity of the self to the body. This approach has been brought into the field of law by Leonard Riskin and Scoot Rogers.⁴⁶⁴ Steven Keeva has also developed breathing exercises for lawyers to improve satisfaction in legal life.⁴⁶⁵ These new approaches will be integrated in Chapter 8 as a didactic tool for life-satisfaction based on a more holistic ideology to find sustainability in life with purpose and direction.

Self-actualisation implies control of time and especially establishing personal time, which means time that is not occupied by others. In the empirical study, the *lawyer-integrators* put self-realisation high on the agenda and, through a reflective process, they will balance opportunity and risk, which means letting go of the past. Many lawyers say that their work-load and the demands for billable hours create a stressful lifestyle. However, the reflectivity of self-identity is continuous and opens possibilities for change.

⁴⁶² Giddens, *Modernity and Self-identity – Self and Society in the Late Modern Age*, p. 75.

⁴⁶³ Rhode, *In the Interests of Justice – Reforming the Legal Profession*, p. 20.

⁴⁶⁴ Rogers, *Mindfulness for Lawyers*.

⁴⁶⁵ Keeva, *Transforming Practices – Finding Joy and Satisfaction in the Legal Life*, pp. 71-73.

The empirical study shows potential ways of acting in terms of experimental involvements that individuals are able to initiate. This practice breaks with or conflicts with the traditional framework of the legal profession, but it confirms the lawyers' position as agents for change.

6.3.4 Agency to create meaning and direction in life

Dissatisfaction and lack of meaning and direction seem to be a constant for many lawyers. As found in the empirical study, young lawyers in particular express a wish or need to leave the profession. These problems are not exclusively Danish; they were also found by Rhode, who says:

'Yet no profession creates a wider gap between the expectations it raises and the experiences it provides. Recent changes in the conditions of practice have left many attorneys in a state of wistful resignation. Competition and commercialisation are accelerating, while collegiality and civility are heading in the opposite direction'.⁴⁶⁶

Giddens argues that feelings of personal meaninglessness, that life has nothing worthwhile to offer, are a big problem in modern life. Life as a lawyer with no ideals can lead to an unfulfilling existence, as described by Kronman in *The Lost Lawyer*.⁴⁶⁷ Young lawyers⁴⁶⁸ leave the profession due to a feeling of the lack of possibilities for leading a happy and satisfactory life. This was clearly confirmed in the empirical study and further confirmed in a survey conducted by the Danish Association of Lawyers and Economists (DJØF).⁴⁶⁹

As stated above, the individual identity or subjectivity for lawyers' self-realisation includes soft and immeasurable aspects such as happiness, accountability, democratic responsibility and satisfaction both in personal and in legal life. To Macfarlane this integration is crucial for future lawyers.⁴⁷⁰ In Denmark, Professor Hanne Petersen is one of the few who has addressed individuals' happiness in professional life and has developed some new theories on justice, happiness and a good life that are relevant for framing the virtues of law and lawyers.⁴⁷¹

To create the self in the new professional setting, lawyers, and especially *lawyer-integrators*, have pointed out the necessity of presenting different identities according to the actual setting. This corresponds with Giddens's perception that an individual has many selves and 'may make use of diversity in order to create a distinctive self-identity which positively incorporates elements from different settings into an integrated narrative'.⁴⁷²

The empirical study suggests that satisfaction in both private and professional life in Denmark seems greater in Jutland than in the Copenhagen area. There is no indication of whether this can be explained by differences in expectations or different working conditions or lifestyles.

⁴⁶⁶ Rhode, *In the Interests of Justice – Reforming the Legal Profession*, p. 23.

⁴⁶⁷ Kronman, *The Lost Lawyer – Failing Ideals of the Legal Profession*, p. 371.

⁴⁶⁸ Focus group 6.

⁴⁶⁹ Djøf, *Vandringen fra advokat branchen 2012*, www.djoef.dk (last accessed 27 January 2014).

⁴⁷⁰ Macfarlane, *The New Lawyer: How Settlement is Transforming the Practice of Law*, p. 46.

⁴⁷¹ Petersen, *Retfærdighed, godhed og lykke*.

⁴⁷² Giddens, *Modernity and Self-identity – Self and Society in the Late Modern Age*, p. 190.

The overall picture of the lawyers' landscape is highly fragmented, and their discontents vary across national borders and according to the nature of their practice.⁴⁷³

6.3.5 ICT – as a contributor to the transformation of identities in law firms

Technological development has much to do with the instability of law firms. People come together and organise, but ICT makes it much easier for lawyers to move from firm to firm which often means adopting a new identity and building up a new status. Rhetorical tools, including the use of pictures, videos etc., are parts of social activity which help lawyers present themselves with their chosen identity. How lawyers present themselves on the internet can be fully in line with their real life self-perceptions or can differ from them. It is both a constitutive and an interpretive process.

When a lawyer tries to find their identity in a new firm it will often be supported by ICT, which is used for creating identification with the firm. Identification is understood as a symbolic social process which also means separating persons from other persons or firms. It provides answers to the questions: 'Where do I belong' and 'Where do I not belong and why?'. Professional organisations frequently facilitate this more technical part of the identity process.

6.4 The interaction between the three levels

Having analysed the challenges at the societal, professional and individual levels, section 6.4 focuses on the interaction between these levels in order to understand the development of lawyers' identity. This can help lawyers and their organisations see new possibilities for developing identity as well as new styles of lawyering. Questions of identity in society are both a consequence and a cause of changes at the institutional level. Giddens sees connections between the most 'micro' aspects of society, individuals' internal sense of self and identity, and the 'macro' picture of the state, multinational enterprises and globalisation. These different levels, which have often been treated separately, are interdependent and cannot be understood in isolation, or at least they will be understood differently in a context including all levels.

Changing the tasks and obligations of lawyers at the societal level means changing what Giddens calls 'What to do'. Changes at this level often affect the level of the profession; the 'How to act' in Giddens's terminology. Examples of this are the Money Laundering Directive, which assigned a public authority role to the profession, or court mediation, which involves the profession in educating mediators.

Interaction between these two levels will influence the identity of the individual, either by changing their role or by creating a new lifestyle that will affect the self-perception of the individual lawyer. When a lawyer starts to change their self-perception it affects their identity. Affecting identity changes the 'Who to be' in Giddens's terms. Changes at the societal level also have impacts on the private, self-employed legal profession of practising lawyers. 'Who is who?' becomes a difficult question at the societal level and this insecurity is reflected in the lawyers' individual identity development to identify 'Who am I?'

⁴⁷³ Rhode, *In the Interests of Justice – Reforming the Legal Profession*, p. 24.

It is also possible to put this the other way round. When a group of lawyers changes their lifestyle, for instance due to new business plans, this will change or at least influence the profession as such, and this in turn may lead to changes at the societal level where the tasks and obligations of lawyers are framed. These constant interactions create faster developments in professional life. As the profession becomes increasingly specialised and divided into smaller groups, the changes will become apparent in different environments according to the professional groups they are connected to, and the profession will rapidly become more heterogeneous. At both the individual and the societal levels changes are fast, pertinent, unconscious and impossible to reject. Changing 'Who to be' means reconstructing identity, so that even though today's lawyers were educated a long time ago, have followed the same educational path and have the same career pattern, they have developed different identities.

6.4.1 An example of a legal source affecting identity and self-perception

As already mentioned, the Money Laundering Directive influences the identity of lawyers. The Directive has had an impact on the legal profession as it requires the Member States to give a role to national bar and law societies, as regulatory bodies of the legal profession, in the reporting of suspicious transactions that may involve money laundering. This has led to a new kind of cooperation in a specific legal setting, between the bar and law societies and the authorities responsible for combating money laundering. This manifestly affects relations between individual lawyers and the profession and between the profession and the authorities.

The new tasks of the members of the legal profession have another consequence, as there are competitors of independent legal professionals who provide legal or quasi-legal services but who are not covered by the Money Laundering Directive. As has been observed by lawyers' professional organisations, other professionals, financial institutions, accountants or experts can be involved in real estate or financial transactions without being qualified as a lawyer or notary. It means there may be loopholes in the system to prevent money laundering where services are provided by persons who are not subject to the Directive.

The Money Laundering Directive and its implementation have been seen as breaking with the traditional lawyers' independence from the authorities, not only affecting lawyer-profession relations, but also lawyer-client relations. In 2006 the EU Commission published a working document on the application to the legal profession of Directive 91/308/EEC on the prevention of the use of the financial system for the purpose of money laundering. The legal profession's concerns are clearly reflected in the working document, which states:

'The reporting obligation is the most controversial element of the Directive, in particular from the lawyers' perspective, as it has an important impact in the relationship between the legal professional and his/her client (...) This breach of confidentiality has a certain impact on the relationship of trust between legal professionals and their clients.'⁴⁷⁴

⁴⁷⁴ SEC(2006) 1793 Commission Staff Working Document. *The application to the legal profession of Directive 91/308/EEC on the prevention of the use of the financial system for the purpose of money laundering*, par. 19.

The working document clearly reflects the view of lawyers and their professional organisations that they should be exempt from the obligation to identify and report suspicions of money laundering. Lawyers consider that the traditional professional rules of conduct are sufficient and even more effective tools in the fight against money laundering. In the view of the CCBE, a lawyer can best contribute to the prevention of money laundering when a client can freely consult their lawyer on all kinds of legal-financial issues without fear of being denounced.

The Commission has released a new proposal⁴⁷⁵ in response to which the CCBE has again emphasised the importance of the independence of legal professionals and respect for professional confidentiality. The CCBE underlines the importance of the general principles of law as well as Articles 6 and 8 of the European Convention on Human Rights, and states that both the CJEU and the European Court of Human Rights (ECtHR) have recognised the special character and essential principles of the legal profession, particularly in relation to the protection of professional confidentiality as a principle inseparable from the independence of lawyers.⁴⁷⁶ The CCBE argues that some of the EU provisions on money laundering⁴⁷⁷ which impose obligations on lawyers and their professional organisations 'conflict with basic core values of the profession'.⁴⁷⁸

The arguments of the legal profession opposing the obligations of the Money Laundering Directive, as implemented in national law, have not been considered sufficiently persuasive by the ECtHR. In *Michaud v France* the ECtHR agreed with the French authorities that requiring lawyers to report suspicious financial transactions did not amount to an excessive interference with their right or obligation of professional confidentiality, as protected by Article 8 of the Convention.⁴⁷⁹ The ECtHR also referred to the guarantee in the French legislation which had 'introduced a filter which protects professional privilege'. Lawyers did not have to report directly to the authorities, but 'to the President of the Bar Council of the *Conseil d'Etat* and the Court of Cassation or to the chairman of the Bar of which the lawyer is a member' (paragraph 129). This means that bar and law societies have not only become part of the reporting system for suspicious financial transactions, but they also legitimise the obligations imposed on individual lawyers as 'necessary in a democratic society'.

It can be seen from this development that even though the professional organisations question the acceptability of imposing reporting obligations and public control functions on lawyers, it has now become a legal reality which will impose a new way of lawyering and a changed professional lifestyle.

⁴⁷⁵ CCBE response to the proposal for a new anti-money laundering Directive, 18 May 2013, www.ccbe.eu.

⁴⁷⁶ Proposal for a Directive of The European Parliament and of the Council on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, COM/2013/045 final 2013/0025 (COD).

⁴⁷⁷ The Money Laundering Directive have been changed several times and implemented in Denmark. The Danish implementation of the EU directives refers to the changes over the year. See LBK nr. 353 af 20/04/2012 om forebyggende foranstaltninger mod hvidvask af udbytte og finansiering af terrorisme.

⁴⁷⁸ CCBE response to the proposal for a new anti-money laundering Directive, 18 May 2013, www.ccbe.eu.

⁴⁷⁹ ECtHR *Michaud v. France*, 6 December 2012. See also Section 4.4.3.

6.4.2 The relation between the profession and the individual

In order to understand whether the profession can act independently of its individual members, it is necessary to consider whether the function creates the identity. At the professional level a lawyer is a lawyer, but at the individual level a lawyer is a unique human being. In Giddens's perception, identity cannot be specified independently of the context where it unfolds. Clients will see some differences between different lawyers and partners will see other differences of competences, backgrounds, professional positions etc. A lawyer is only special in the way in which they are interpreted in a special context by different agents.⁴⁸⁰ Practice can never be disregarded if one will understand how and why systems change. Giddens is also inspired by the approach of the reflexive agent, but he has a very broad concept of reflexivity, understanding it as a capacity for constant reflection on one's actions. Here it is fruitful to integrate Wenger's identity model and Schön's learning theories, 'reflection on reflection in action', in order to see how the social world is produced and reproduced by creative acting individuals. As conceptualised in Chapter 3, lawyers' identity develops in the interplay between the structure of the profession and the individual; sometimes this interplay will open up new possibilities and sometimes it will be perceived as limiting. This is confirmed by an article in *Advokaten*, when in spring 2012 the Danish Bar and Law Society interviewed a group of young lawyers, and the chairman of the group of young lawyers, Martin Cumberland, said that 'young idealists are hindered by hidden structures within the profession.'⁴⁸¹

The profession is no more than the sum of its individuals, unless the organisation grows so strong that it starts to function independently of its members or only acts in the interests of some members. The complexity and specialisation of practices have complicated relations between the individual and the profession and, when it is not mandatory, the motivations for being a member of a professional organisation can be many, as documented by the organisation itself.⁴⁸²

6.4.3 Lawyers, social media and public reputation

The mass media influence individuals' perceptions of their relationships. The news and factual media inform about the findings of lifestyle research, and actual social changes in family and professional life. Information and ideas from the media not only reflect the social world, but contribute to shaping it and are central to modern reflexivity. The importance of the media in propagating diverse lifestyles should be obvious. In the empirical study lawyers were asked about their identities in cyberspace; see Chapter 5. The range of lifestyles – or lifestyle ideals – offered by the media may be limited, but they are usually broader than those seen in everyday life. Thus, the media offers possibilities and diversity, but it also offers narrow interpretations of certain roles or lifestyles in which lawyers risk being stereotyped.

Lawyers present themselves or their firms on social media, some more than others. This influences both their identity and public reputation.

⁴⁸⁰ Kaspersen, *Anthony Giddens*, p. 101.

⁴⁸¹ Martin Cumberland, *Grøde blandt unge advokater*, *Advokaten* 03/12, p. 18.

⁴⁸² Danske Advokater, *Excellens i advokatbranchen*, p. 51.

In the UK, the Law Society is aware of the overlap between professional and private cyberspace activities, and it has issued guidelines on the use of social media. Social networking sites are often used for both personal and professional purposes, and it is not always clear where the boundaries lie between the personal and the professional. Lack of clarity about where professional obligations start and end can sometimes cause difficulties in distinguishing between informal interactions and more formal communication. The Law Society states that the same professional ethical obligations apply to the lawyers' online and offline activities, that it is important not to confuse personal and professional use of social media, and to choose the most appropriate medium for a given activity. Lawyers are advised to consider whether they may be associated with activities which may be visible online and which could be viewed by other professionals or clients.⁴⁸³ This may include price comparison systems.

ICT also helps clients choose their lawyer by means of online reputation systems. Susskind compares such systems to websites that offer online feedback on hotels and restaurants. Such systems provide information on the experiences of other clients of a particular law firm and its lawyers.⁴⁸⁴ This online reputation plays back into self-perception and affects identity development. A number of lawyers use personal identity for branding, e.g. using personal blogs to present or construct the person behind the lawyer.⁴⁸⁵ Social media is increasingly an agent in the change of identity as lawyers use social media to present their profiles, but social media also provide responses. Most lawyers consider Facebook to be a private forum, but some firms have a corporate presence on Facebook. Some lawyers use Twitter or blogs, where the picture is often more blurred. Is it the person or the firm that is presented?

Social media activities contribute to changing or transforming identity. The audience will post comments, publicly and often anonymously, and this will influence and form the perception of the individual lawyer as well as of the firm. Personalising company communication can confuse identity when a lawyer presents themselves on Twitter as representing one firm, and they then move to another firm. The followers may follow the lawyer rather than the firm, so many of the lawyer's clients will move with them. The relation between a firm and a lawyer is particularly interesting in law firms, many of which are named after individual lawyers who may be long dead.

Whether a cyberspace identity develops next to a personal identity, and supports it or conflicts with it, is very important.

6.4.4 Connecting 'Who to be' with 'What to do' in different ways

According to Giddens, the self-identity must be created and more or less continually reordered against the shifting experiences of day-to-day life and the fragmenting tendencies of modern institutions. The contextual complexity requires innovative forms of education and training to

⁴⁸³ www.lawsociety.org.uk/productsandservices/practicenotes/socialmedia/5049 (last accessed 22 December 2013).

⁴⁸⁴ Susskind, *Tomorrow's Lawyers*, p. 89.

⁴⁸⁵ Advokat Allan Ohms's blog, <http://www.allanohms.dk>.

ensure that the development of different identities can be supported in the diverse processes connecting 'What you do' to 'Who you are'. New ways of lawyering have arisen, such as expert trusted advisers, mediators, what Macfarlane simply calls the 'new lawyer' the enhanced practitioner, the legal knowledge engineer, the legal hybrid, the legal risk manager, the technologist and other kinds of lawyers presented by scholars like Macfarlane and Susskind.⁴⁸⁶

Different scholars have very different views on lawyering. For some it is a practical form of work similar to engineering, but framed in the emotional and moral concept of the individual. This metaphor or comparison is proposed by David Howarth,⁴⁸⁷ while L. Fuller refers to lawyers as architects of social structures.⁴⁸⁸ Both can be right, but what they are actually addressing are different identities. The lawyer as an instrumental problem-solver is recognised by Susskind when he predicts how more advanced technologies will transform the role of lawyers. Kronman still expects lawyers to have ideals and a firm societal position; in his ideal of the *lawyer-statesman* he states that a lawyer 'possessed a great practical wisdom and exceptional persuasive powers, devoted to the public good but keenly aware of the limitations of human beings and their political arrangements.'⁴⁸⁹

Susskind admits that there is still a societal need for the traditional *lawyer-statesman* but that their number will diminish.⁴⁹⁰ Kronman sees the movement from *lawyer-statesman* to *lawyer-businessman* and focuses on the change in ideals.⁴⁹¹ The empirical study confirms that some lawyers focus on technical skills while others are primarily committed to ideals.

For the *lawyer-businessman* business is business; it is the aim of business lawyers to add value for their clients and for themselves, and to have as many billable hours as possible. From a business point of view one must be aware that business lawyers create transaction costs, including their own fees, while being very good at reducing them. Business clients buy non-contentious legal services for rational reasons. Lawyers will be used in business as long as the savings they make in transaction costs are greater than the costs they generate themselves.⁴⁹²

The *lawyer-performer* has a classic role, where the focus is on the development of charisma and performance in court.⁴⁹³ The extrovert identity of the *lawyer-performer* also extends to the *lawyer-entrepreneur*, whose identity conflicts with some of classic ideals but supports a proactive role which includes awareness of markets, competition and risk management.⁴⁹⁴ Both the *lawyer-humanist* and the *lawyer-integrator* run their businesses on a conscious moral and ethical basis as analysed by Rhode.⁴⁹⁵

⁴⁸⁶ Susskind, *Tomorrow's Lawyers*, pp. 109-117.

⁴⁸⁷ Howarth, *Law As Engineering*.

⁴⁸⁸ Fuller, *The Lawyer as an Architect of Social Structures*.

⁴⁸⁹ Kronman, *The Lost Lawyer – Failing Ideals of the Legal Profession*, p. 12.

⁴⁹⁰ Susskind, *Tomorrow's Lawyers*, p. 109.

⁴⁹¹ Kronman, *The Lost Lawyer – Failing Ideals of the Legal Profession*, p. 50 f.

⁴⁹² Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, pp. 239-313.

⁴⁹³ Tamm, *Bag kapperne*.

⁴⁹⁴ Susskind, *The End of Lawyers?*

⁴⁹⁵ Rhode, *In the Interests of Justice – Reforming the Legal Profession*.

6.4.5 Clients in a clash of interests

Within the profession, there is an ongoing debate about the obligations, tasks, roles and identities of lawyers in relation to clients. There is often a clash of interests between justice in society, professional responsibility, the interests of the client and the interests of the individual lawyer. Statements made in the empirical study confirm that the main focus for lawyers is their clients. Thus, this section concentrates on clients in relation to justice, the profession and lawyers.

It has been clearly stated that lawyers are bound by the special task of upholding the rule of law in support of a democratic society and that serving clients comes first. Stephen Gillers states: 'Lawyers are willing to discuss fairness and justice with a client when the situation invites it. But, in the end, it is a client's decision whether to subordinate her legal rights and goals to other values, which may differ from the lawyer's values.'⁴⁹⁶



Figure 6-1 Conflicts of interests?

According to the concept of justice, creating norms often requires a balance to be struck depending on what is possible at a certain time in a specific context. Responsibility for enforcement will be that of public authorities, the bar and law societies and the individual lawyer. There is a question of whether clients have a role, though not a legal obligation in upholding the rule of law. However, norms change and new rules emerge.

Clients can be regarded as a population and not only as individual clients of a lawyer. Lawyers have a duty to identify the ethical duties which all lawyers owe to all clients. Lawyers are the agent-intermediaries between clients and the rule of law, which means that bar and law societies and the CCBE have a collective or institutional interest in the rules that govern lawyers.⁴⁹⁷ The content of those rules will affect, but not decide, lawyers' behaviour and identity, and may lead to conflicts within the profession at a time when individualisation prevails over a collective identity.

⁴⁹⁶ Gillers, *How to Make Rules for Lawyers: The Professional Responsibility of the Legal Profession*.

⁴⁹⁷ Gillers, *How to Make Rules for Lawyers: The Professional Responsibility of the Legal Profession*.

A clash between the interests of justice, lawyers and clients as a group requires reflection on the possible outcomes of such a clash in order to determine the importance of the identity-related decisions of individual lawyers. First, the profession's professional responsibility should require it to subordinate its own interests and those of its clients to those of the justice system, even when the first two are aligned. The justice system and the rule of law should prevail over the other two. However, in a new European legal order dominated by a pluralistic legal culture, it will be difficult to identify the interests of the justice system.

6.4.6 Clients and the rule of law

When the interests of lawyers and the interests of clients conflict, the presumption should be in favour of the client. However, in some circumstances the risks for clients may be less than the advantages to lawyers as officers of the legal system and prime supporters of the rule of law.

Lawyers can find themselves in situations where the ethical rules or other legal duties present them with a dilemma where, in the end, their decision depends on their conscience and moral stance. In the interviews conducted for this thesis, several lawyers pointed out that clients decide but that, if a lawyer realises that their client is dishonest in court or in a negotiation, action must be taken. A lawyer may be unaware that a document submitted is a fake or they may learn that the client has lied in making a statement or as a witness. The client's interest is clear and understandable. In their perception, the lawyer's duty of confidentiality should be higher than any duty to the tribunal or a counterparty. The lawyer's interest may be similar, so as not to reveal that their preparation has been insufficient.

While the lawyer may be outraged at the client, they may not enjoy giving the judge information that could support an investigation and possible prosecution of the client for fraud or obstruction of justice. Lawyers may argue that the greater the number of exceptions to the duty of confidentiality, the greater is the likelihood that clients will conceal information the lawyer needs to represent the client competently. But the interests of the justice system may require disclosure in order to avoid a judgment being given on the basis of fraud.

There may not be rules requiring mandatory disclosure in court or in negotiation, but there may be rules which require the lawyer to withdraw. If the lawyer does withdraw, this may satisfy the client who would not wish to have their fraud revealed. And the lawyer, who may prefer not to disclose the fraud, has an easy way out of a dilemma based on their personal and professional morality and identity. However, does such withdrawal honour the goals of the justice system and the rule of law? If the client succeeds in their fraud after the lawyer's withdrawal, their opponent will be a victim of injustice. That will undermine the rule of law and offend common feelings of justice. On the other hand, requiring the lawyer to disclose the fraud might have an even worse effect on the rule of law, because it will discourage client honesty and an uninformed lawyer will be unable to persuade their client to stop.

According to the legal framework, lawyers are obliged to fulfil societal tasks. In fulfilling their public responsibilities, lawyers are friends of the court and supporters of the rule of law. The

question that remains is whether this obligation is a part of a lawyer's identity and includes all lawyers in all their different tasks? An example from the empirical study shows that lawyers can feel caught between their professional obligations and their obligations to their clients if correcting a mistake and upholding the rule of law conflicts with the short-term interest of the client or would give the client a weaker legal position.⁴⁹⁸

6.4.7 Influencing the identities of others

Professionals with such powers as lawyers have may influence the identities of others and in so doing may shape and sharpen their own identities. Lawyers constitute themselves in the course of defining others as distinct from themselves, but their performed identities are also influenced by these others and are thus transitional and not stable or fixed. To engage with these relations also means exploring the potential tension between the moral implications of a role and the moral commitments embodied in one's character.⁴⁹⁹

6.4.8 Choices and constraints on the development of identity

With individualisation it becomes difficult to balance individual identity and group identity. How much individual choice can be allowed members of a professional society which is trying to establish a common identity? Little attention has been paid to how identities are constructed in relationships and how societal changes influence both the possibilities for individual choice and the implication for the autonomy of professional organisations in a process of division into subgroups.

The European ideal of lawyers includes honourable principles that could disappear through the diffusion of the profession. Or perhaps these principles will only be relevant for some lawyers. Social circumstances will help determine the identity of lawyers and these circumstances are part of the external environment of the personal lives of lawyers. When constructing the self-identity, individual lawyers or any other individual will also actively construct or reconstruct a universe of social activity around themselves.⁵⁰⁰ This mechanism follows from the understanding of Giddens, but it also reflects Wenger's perspective of the dual nature of identity.⁵⁰¹ From a Scandinavian perspective, Dalberg-Larsen writes about legal science as a science of legal transitions.⁵⁰² This includes a legal-political perspective, focusing on the possibilities of influencing the evolution of legal developments and jurisprudence. This is a practical and relevant alternative to legal-dogmatic thinking, which can have a tendency to understand law as a static phenomenon. Dalberg-Larsen's thoughts comprise individual lawyers and are in accordance with Giddens's idea that transition takes place in the vital interaction between the three levels of analysis.

⁴⁹⁸ Focus group 1.

⁴⁹⁹ Sichel, *Moral Education: Character, Community, and Ideals*, pp. 226-245.

⁵⁰⁰ Giddens, *Modernity and Self-identity – Self and Society in the Late Modern Age*, p. 12.

⁵⁰¹ Wenger, *Communities of Practice*, p. 207.

⁵⁰² Dalberg-Larsen, *Retsvidenskaben som samfundsvidenskab*, p. 513 f.

6.5 Reflections and sub-conclusions

Chapter 6 seeks to answer research question 3 by analysing the changes and challenges to the role and identity of lawyers at the societal level, the professional level and the individual level, and the interaction of these levels. Challenges and transformations take place at all levels.

At the *societal level* the focus moves from a national practice to supranational practice, where obligations and tasks are influenced by the processes of globalisation, specialisation, the market economy and business and by the lifestyle changes of lawyers. From a legal perspective, lawyers in Europe still have a set of societal obligations linked to several of their professional tasks. The rule of law, the right to a fair trial, freedom of expression, freedom of association, the right to privacy and other fundamental rights have expanded. Lawyers' societal responsibilities have traditionally addressed the alleged failures of democracy,⁵⁰³ but now some societal obligations take new forms, where lawyers are required to act on behalf of public authorities.

The impact of the Money Laundering Directive on the legal profession and on lawyers' identity illustrates how some of the vital characteristics and fundamental values of the legal profession are under pressure or are already in a state of transition. These developments spring from what society, as expressed in EU policy and national legislation, expects from lawyers in the current context of changes in the economic, social, political and legal environment. The profession resisted the Directive, but individual lawyers have adapted to it. The Directive has not only had an impact on the development of the identity of lawyers in relation to their clients and obligations to society, it has affected the relationship between bar and law societies and the individual lawyer. The judgment of the ECtHR in the *Michaud v France* case made it clear that the involvement of the bar and law societies in the reporting of suspicious financial transactions is considered justified, in terms of a procedural legitimisation of the reporting obligations of lawyers (see section 6.4.4.3 above). However, the obligations imposed by the Directive are perceived by lawyers and their professional organisations as conflicting with lawyers' professional privileges. This example illustrates the interaction between the three levels.

At the *professional level* the lawyer moves from being 'just a lawyer' to become a specialised lawyer, and from there to become a legal hybrid interacting with specialists who have complementary competences. Many cases are parts of complex problems which cannot be dealt with solely within a legal framework. Furthermore, lawyers cannot have sufficient knowledge and expertise in all legal subjects. There are at least six different identities which professional organisations must take into consideration in deciding whether diverse individuals should be admitted as members of their organisations. The profession as such consists of its individual members and only as a whole will it shape the identity of the profession. Individualisation can create difficulties for this. Furthermore, the profession is under pressure from both internal and external competition. Business has taken on new (legal) advisers and consultants who are not lawyers. This further blurs the picture of roles, tasks and professional responsibilities.

⁵⁰³ Padilla, *Lawyering Against Power: The Risks of Representing Vulnerable and Unpopular Communities*.

Some lawyers have adjusted to this development and some have 'adjusted' themselves out of the legal profession as traditionally understood.⁵⁰⁴

On the relation between the *individual lawyer* and the profession, the empirical study confirms Giddens's thoughts that the individual only feels psychologically secure in their self-identity in so far others recognise their behaviour as appropriate or reasonable.⁵⁰⁵ Individual happiness is under pressure, many complain that they lack meaning and direction, and the segmentation of the profession makes more lawyers feel like outsiders.

The analysis explains how lawyers constantly adjust their identities and how the narrative self-identity is rewritten in relation to where lawyers are now. Individualisation becomes increasingly significant, and the interaction between the individual, the profession and society means there is a development from a homogenous profession to a heterogeneous profession. This heterogeneous profession will still include lawyers who confirm their identity as lawyers, though they are constantly changing their identity. Individual heterogeneity cannot be encompassed by in the profession today. It has become easier to be different but this means the profession becomes fragmented. This leads to the question: What do members of the profession have in common besides an ethical code, which is interpreted very differently by different agents?

Attention to choice and constraints in the construction and expression of identity could help lawyers gain a better insight into their roles and responsibilities. The identities of lawyers are neither more nor less constructed than those of other people who negotiate their identities in the course of their work and daily lives. However, with the sometimes powerful positions and societal roles, the potential conflicts between lawyers' perceptions of their roles and their own characters must be aligned. New self-identities are both shaped by and shape the institutions. In Giddens's words:

'The self was not a passive entity, determined by external influences; in forging their self-identities, no matter how local their specific context of action, individuals contribute to and directly promote social influences that are global in their consequences and implications'.⁵⁰⁶

As long as lawyers want the privileges of being lawyers, this requires reflection on the fundamental values for lawyering and on how to build up an identity, which will give the meaning, direction and satisfaction in legal life that correspond to lawyers' lifestyles and the private and professional sides of their identities.

There is a need to reunite the identity at all three levels in the way in which lawyers choose what to do in relation to society, how to act within their professional framework and who to be as a human being in order to define: Who am I as a lawyer?

⁵⁰⁴ Focus group 5 as reported in Chapter 5.

⁵⁰⁵ Giddens, *Modernity and Self-identity – Self and Society in the Late Modern Age*, p. 191.

⁵⁰⁶ Giddens, *Modernity and Self-identity – Self and Society in the Late Modern Age*, p. 2.

Part III Education for sustainable lawyering

Changes to the societal framework and the legal profession have been explored and analysed in Parts I and II. Lawyers have developed diverse identities, but training to support identity development and to meet the new challenges in a globalised world with a heterogeneous legal profession (as analysed in Chapter 6) has only recently been initiated. This part of the dissertation relates to research question 4: *How will new communities of practice affect the identity development and professional training of lawyers?* Part III also helps answer to the overall research question: *How can the identity and competences of lawyers be developed so that they can practise sustainable and proactive lawyering in the European Union?*

As explained in Chapter 2, various methods are used to answer these research questions. This chapter builds on literature studies of learning strategies, in particular those based on theoretical work on identity-learning in communities of practice,⁵⁰⁷ and learning programmes in the legal field.⁵⁰⁸ Part III includes fieldwork consisting of a participatory study of a new EU-supported initiative for the training of lawyers, judges, psychologists and others to develop a new lawyer-mediator. There are observations referring to recent examples of European educational actions to support sustainable lawyering. The training standards and methods are connected to a new programme for training lawyers together with non-lawyers in EU law.⁵⁰⁹

To follow the logic of structuration theory, Chapter 7 focuses on structures while Chapter 8 focuses on agency. Megatrends in the globalised world bring about transitions in the legal world, but changes in the legal world also depend on individual lawyers, their lifestyles and identities. A strong, classic profession is in transition and is becoming fragmented, while individual lawyers are developing diverse identities. These identities are, to a certain degree, supported by educational programmes. However, individual lawyers, the legal profession and society are faced with radical changes and different needs which demand new approaches in the education and training of lawyers.

7 Structures for training lawyers' identities in the EU

As pointed out in section 1.1.5, many legal practitioners now act in a context different to that they were trained to practise in. The contextual complexity of contemporary lawyering therefore requires new formats for education and training. A helicopter pilot cannot simply take the controls of a Boeing 777 without any training.

This chapter follows the structure of the three levels of society, the profession and the individual, and includes the fieldwork study from the EU-supported initiative for training lawyers, judges, psychologists and others to develop a new European lawyer-mediator.

⁵⁰⁷ Wenger, *Communities of Practice* and Wenger, McDermott and Snyder, *Cultivating Communities of Practice*.

⁵⁰⁸ Halpern, *Reflections on a new course: Effective and Sustainable Lawyering*.

⁵⁰⁹ www.crossbordermediator.eu (last accessed 4 December 2013).

Nowadays, academics as well as practitioners have an integrated perception of legal principles as parts of a multi-layered legal system, whether they are derived from a national legal system or from a supranational level. The impact of 'direct effect'⁵¹⁰ and the principles of interpretation which give priority to EU law are changing the legal orientation of lawyers.

The interaction between the national and supranational levels contributes to the emergence of new types of rules and cannot be explained by the traditional theory that law-making is largely based on the dominant role of nation states. For a nationally oriented Danish lawyer, this means becoming a part of a legal culture that actively works to realise a political and economic social idea, as seen in the early judgments of the Court of Justice of the European Union (CJEU).⁵¹¹ The increasing impact of EU law means that legal practitioners have some fundamental challenges in forming their professional and personal identities within this dynamic legal framework. This new legal framework creates a globalised plurality of norms⁵¹² in which lawyers must have a sense of justice and openness to values, new types of norms and cultural diversity. Lawyers' postgraduate training has begun to be more internationalised in response to the EU, international professional organisations and participation in international legal services networks. Many law students have international experience already at university, as analysed in Section 7.1.3. This means that the challenges of internationalised lawyering differ for different generations of lawyers.

Whether a lawyer has an identity as a *lawyer-businessman*, *lawyer-performer*, *lawyer-entrepreneur*, *lawyer-humanist*, *lawyer-integrator* or *lawyer-statesman* (the lawyer identities identified in Chapter 5), they have chosen a lifestyle with corresponding educational needs. Lawyers are in search of new patterns of practice, new jobs or new functions. Whatever a lawyer is called (expert, trusted adviser, mediator, enhanced practitioner, legal knowledge engineer, legal hybrid, legal risk manager or simply 'new lawyer'), they have to conduct their lawyering in a way that corresponds to their individual values and lifestyle.

The European identity ideal does not provide the lawyer of the future with a role, identity and competences to cope with the coming challenges to the legal and professional landscape identified in Chapter 6. Lawyers' education and training during their apprenticeship period is still related to the classic ideal described in Chapter 4 and further elaborated in section 7.2.2. Lawyers' training is still based on the study of court cases and ethical rules, but litigation is no longer the most significant field of lawyering and many other professions have ethical rules too, so clients who want an adviser with ethical rules has many possibilities. This does not detract from the importance of ethical rules, but other groups of people apply them so they are not a unique characteristic for lawyers.

⁵¹⁰ CJEU 5 February 1963, *NV Algemene Transporten Expeditie Onderneming van Gend en Loos v. Nederlandse Administratie der Belastingen*, Case 26/62 .

⁵¹¹ Case 43/75, *Defrenne v. Sabena* and Case 120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)*.

⁵¹² Petersen, *Globalisering, ret og retsfilosofi*, pp. 148-151.

Lawyers are not supported in choosing and developing an identity in more diverse and specialised fields of legal work. Lawyers increasingly relate to experts in other fields with complementary competences. Both in the empirical study for this dissertation and in the works of other scholars there is evidence that lawyers are involved in new and quite different businesses.⁵¹³ The business world might not care whether their trusted adviser is a lawyer or some other professional, as long as problems are solved or prevented efficiently and at a reasonable price.

Section 7.1 identifies the legal structure that frames the educational needs of lawyers in Europe. The societal obligations of lawyers in the European Union are derived from the global level, as codified in the UN's basic principles for lawyers. In section 7.2, the role of professional organisations in mandatory programmes is analysed. Section 7.3 reports on the interdisciplinary training of mediators observed in Brussels. This training is an example of the development of new communities of practice, where lawyers are expected to merge legal knowledge with other expert fields and to draw enlightenment from other professionals.

7.1 The legal framework for postgraduate training in the EU

Developing the identity of European lawyers requires constant focus on training and education, as identity is also shaped through education. European lawyers are cross-border lawyers. They have different national backgrounds but are bound together by EU, UN, Council of Europe and Council of Bars and Law Societies of Europe (CCBE) regulations. The societal focus has moved from the national level to a supranational level in the EU, with a globalisation perspective. At a global societal level, it is relevant to refer to the statement in the *UN Basic principles on the role of lawyers 1990*, which stipulates:

'Governments, professional associations of lawyers and educational institutions shall ensure that lawyers have appropriate education and training and be made aware of the ideals and ethical duties of the lawyer and of human rights and fundamental freedoms recognized by national and international law.'⁵¹⁴

What *appropriate education* means will differ over time but, according to this legal norm and the other norms analysed in Chapter 4, every lawyer has an obligation to be aware of ideals, ethical duties, human rights and fundamental freedoms. Human rights have developed over the years. The first generation of human rights focused on the protection and the rights of the individual, but human rights and fundamental freedoms now include global collective rights such as a sustainable life, social responsibility and extended democracy, as seen in the EU Treaty. At the global level Mary Robinson, former United Nations High Commissioner for Human Rights, has underlined the connection between human rights and sustainable development in relation to poverty, social integration, gender equality and workers' rights.⁵¹⁵ This implies that, within a global legal framework, lawyers are obliged to obtain knowledge and apply it to promote broad fundamental democratic rights.

⁵¹³ Susskind, *Tomorrow's Lawyers*, p. 127. See also Chapter 5.

⁵¹⁴ *UN Basic principles on the Role of Lawyers*, principle 9.

⁵¹⁵ Robinson, *The Human Rights Approach to Sustainable Development: Environmental Rights, Public Participation and Human Security*, <http://unac.org> (last accessed 29 November 2013).

A similar connection is made between human rights and sustainability in the EU Treaty,⁵¹⁶ and initiatives for training lawyers to fulfil societal obligations can also be based on the Lisbon Treaty, which provided the EU with a specific legal basis for taking action on judicial training in civil and criminal matters.⁵¹⁷ In the Stockholm Programme adopted in December 2009, the European Council invited the Commission to propose an Action Plan for substantially raising the level of European judicial training.⁵¹⁸ This followed a Council Resolution of December 2008 highlighting the importance of Member States' support for the training of judges, prosecutors and judicial staff in the EU.

The Commission has supported European projects for judicial training since the creation of the European Area of Justice, Freedom and Security in 1999. In 2006, the development of European judicial training for all legal professions was promoted⁵¹⁹ and on several occasions the European Parliament has said that judicial training is an important tool for creating a common judicial culture. These general actions are supplemented by initiatives for the mutual recognition of diplomas and further educational integration; see section 7.1.3.

Training and education are instruments for implementing political change in the EU, but they are also important for identity development. Societal actions at EU level may conflict with the traditions of the professional organisations which have had the power to define the practice, relevance and scope of postgraduate and mandatory education and training.

7.1.1 EU training stakeholders

The aim of this section is to give a brief overview of the structure and institutional framework of legal training, where a myriad of private and public agents influence the market. In the structure-agent understanding the creation of new institutions will not by itself transform national lawyers into European lawyers. The European Judicial Training Network (EJTN)⁵²⁰ was established by the EU's national judicial training institutions and it is financially supported by the European Commission. While national training is often initiated without a specific goal, the EJTN training curriculum is aimed at contributing to the development of a genuine European judicial culture. Its activities cover criminal law, civil law, legal language and trainers/ methodology. The EJTN coordinates cooperation between the national judicial training institutions and organises exchanges between judges and prosecutors.

European judicial training projects are also developed by groups of national judicial training bodies and by the European Academy of Law (ERA) in Trier, the European Institute of Public

⁵¹⁶ Consolidated Version of the Treaty on European Union, Official Journal of the European Union C 83/47, Article 3 (5), <http://eur-lex.europa.eu/LexUriServ> (last accessed 29 October 2013).

⁵¹⁷ Consolidated Version of the Treaty on the Functioning of the European Union, Official Journal of the European Union C 83/47, Articles 81 (2) and 82 (1), <http://eur-lex.europa.eu/LexUriServ> (last accessed 29 October 2013).

⁵¹⁸ European Council, *The Stockholm Programme. An open and secure Europe serving and protecting citizens*, 2010/C 115/01.

⁵¹⁹ COM(2006) 356 final, *Communication from the Commission to the European Parliament and the Council on judicial training in the European Union*.

⁵²⁰ The European Judicial Training Network (EJTN), <http://www.ejtn.eu> (last accessed 12 November 2013).

Administration (EIPA) in Maastricht and Barcelona and its European Centre for Judges and Lawyers (ECJL) in Luxembourg, the European University Institute (EUI) in Florence, and the College of Europe in Bruges.⁵²¹ These institutions provide training for lawyers or participants with a legal background⁵²² so that, with their range of activities and variety of participants, they are agents for the development of new communities of practice. Furthermore, professional organisations such as the CCBE, the Council of the Notariats of the European Union (CNUE), the International Union of Judicial Officers (UIHJ) and the Association of European Administrative Judges (AEAJ) are important agents for establishing the norms for the qualifications and competences of legal practitioners.

Setting up new institutions will not in itself create European lawyers. In a study from Maastricht University on European legal education, Willem Heringa has pointed out that there are immense differences between Member States in the lengths of curriculums for law students, the admission of students, access to professional bodies, who sets the curriculum and whether there is any bar or state exam after graduation. There are similar differences in professional postgraduate training.⁵²³ The late Ramon Mullerat, former law professor and president of the CCBE, divided lawyers into three groups.⁵²⁴ The first group consists of the Latin countries (France, Italy, Portugal and Spain), in which a classical legal culture based on the Roman law heritage is taught. In the second group, the Anglo-Saxon and Nordic countries, training is mainly on the practical aspects of law and procedure. The third group contains the Benelux countries which reflect a combination of the two systems. The differences in content, format and culture are obstacles that must be overcome in order to build trust in EU-wide justice. This was also noted in the 2001 EIPA report on judicial training, which is referred to in the next section.

7.1.2 Legal frame of education from national to supranational level

Measures have been adopted for harmonising systems for training and for access to the profession. Council Directive 89/48/EEC on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration is an important tool for developing comparable lawyers within the EU. This Directive, together with the Directive on the recognition of professional qualifications,⁵²⁵ supports the formation of European lawyers on the basis of their national education.

In response to the new obligations in the Charter of fundamental rights of the European Union and the Treaty of Lisbon, and in order to implement the priorities established by the Stockholm Programme in the field of judicial training, the European Commission has issued a Com-

⁵²¹ European Academy of Law (ERA), www.era.int, European Institute of Public Administration (EIPA), www.eipa.nl, European University Institute (EUI), www.eui.eu and College of Europe, www.coleurop.be (last accessed 30 November 2013).

⁵²² See e.g. EIPA's 2014 programme "EU Environmental Law for Non-Lawyers", at <http://seminars.eipa.eu/en/activities09/show/&tid=5358> (last accessed 24 November 2013).

⁵²³ Heringa & Akkermans (eds.), *Educating European Lawyers*, p. 3.

⁵²⁴ Mullerat, *Law Practice in a Globalized World: The European Experience*, p. 9.

⁵²⁵ Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications.

munication: Building trust in EU-wide Justice, a new dimension to European judicial training.⁵²⁶ At the societal level, closer cooperation can be seen between the judiciary and lawyers. The aim of this Communication is to add a new dimension to European judicial training and to enable an even greater number of legal practitioners to have access to high-quality training in European Union law or in the national law of another Member State by 2020. The Communication followed a resolution of the European Parliament of 25 November 2010,⁵²⁷ calling for judicial training to be enhanced to ensure the correct implementation of EU law and to improve mutual trust between legal practitioners in different Member States. This will contribute to a sense of common identity among legal practitioners, while at the same time national identities are respected under the Treaty. A report produced by the EIPA in 2011 on progress towards reaching the target refers to the big differences between the Member States and between the different legal professions in the levels of participation in training. According to the report, 'this indicates that further European judicial training is needed in some Member States more than in others, particularly for lawyers, court staff and bailiffs'.⁵²⁸

The quantitative goal, to train half of legal practitioners, as set out in the Commission Communication, is very ambitious. There is also a need for good quality training and for close relations between the Commission and the training providers.

While many political and legal actions have been taken at EU level, internationalisation was not mentioned as a primary challenge in the empirical study. The focus groups show that some big law firms have adapted well to the international business world and that some lawyers have been involved in cross-border family law cases. Nevertheless, many lawyers have very local and strictly national practices. However, there are indications that there is growing awareness that this situation will change; for example, one firm that participated in a focus group has focused its practice on international work, and all its lawyers are trained in more than one EU Member State.

7.1.3 The internationalisation of education and training

Universities and law schools are changing and developing their educational programmes to reflect and support the internationalisation of the legal profession, for example by offering more classes in English (for non-native speakers) and courses in European law. Within Europe it is now possible to combine bachelors and master degrees cross borders, and substantial efforts have been made to harmonise university law degrees as a three year bachelors programme followed by a two year masters programme.

At the structural level, law faculties and law schools are adapting their curriculums to emphasise and stimulate thinking outside narrow national legal frameworks. The Bologna process and the Erasmus and Socrates programmes manifestly support this development. University education pays increasing attention to EU law, to the European dimension of law studies

⁵²⁶ COM(2011) 551 final, *Building Trust in EU-Wide Justice. A New Dimension to European Judicial Training*.

⁵²⁷ EIPA, *Report on European judicial training 2011*, p. 2.

⁵²⁸ EIPA, *Report on European judicial training 2011*, p. 8.

and to exchanges between students and between professors. A wider range of elective courses of law in combination with other subjects is offered. Law schools also pay greater attention to the kind of education needed to appropriately equip today's lawyers to serve the needs of clients, employers and society at large. Many curriculums include interdisciplinary teaching both within law schools and between law and other disciplines. More interdisciplinary certificate programmes are being developed. EU programmes encourage law students to take courses in other Member States and encourage non-law students to take courses in law and vice versa. Other courses include more international and interdisciplinary elements. New professional identities are also created or supported through these new educational formats, some of which are directly oriented towards becoming legal advisers in private firms and businesses.

Interdisciplinary elements in education raise the participants' levels of competence, but at the same time they create uncertainty about the key competences that can be expected from young lawyers. While the academic world often sees interdisciplinarity as a welcome and necessary development, the legal profession controls access to the profession through educational requirements, and it does not necessarily support extending interdisciplinarity in the training of lawyers; see section 3.7.

7.1.4 Language supporting identity development

Structural differences, cultural dissimilarities and language barriers give different opportunities for lawyers in Europe. Many lawyers feel challenged in an international environment if their native language is not English, and during their law studies they will mainly have focused on national law and domestic legal culture and traditions. It is necessary to address such obstacles for Danish lawyers and firms so as to compete in representing major clients in competition with the UK and the major international law firms in Brussels. It may not be possible to solve this through education.⁵²⁹ Danish lawyers have often solved the problem by using translators, which is a very expensive solution. Younger lawyers regard fluency in English as a key competence which they obtain before entering the legal profession, and hence they are better prepared for competition with international firms. In the Europeanisation of the law, both lawyers and civil servants need a common language and this language has become English, a trend that has been reinforced by the expansion of the EU. English is now the *lingua franca* of the EU. Many EU initiatives, like the Bologna, Socrates and Erasmus programmes, support the development of a common European identity, including a common language. However, Heringa and Akkermans' study shows that national bar and law societies are very reluctant to adapt and to make the necessary changes for foreign language training and use.⁵³⁰ Language and identity are closely related, so that changing the language used in one's professional life will automatically affect identity.

7.1.5 The relations between academic institutions and practice

In a traditional perception of science, research is the basis for an academic education and training. Universities value research-based teaching and postgraduate training which is trans-

⁵²⁹ Heringa & Akkermans (eds.), *Educating European Lawyers*, p. 6.

⁵³⁰ Heringa & Akkermans (eds.), *Educating European Lawyers*, p. 6.

formed into a social practice. This perception is challenged by new theories (Giddens and Wenger) which are more pragmatic in their approach to the development of new competences and evolving new practices.⁵³¹ The strict boundaries between science and expert practice are eroded in the interconnected relation between science and social practice. Constant interaction leads to production and reproduction of knowledge in many social settings.

While the academic world has worked to provide research-based education, also in postgraduate training, practice has focused on identity development in pragmatic actions. Lawyers become lawyers with individual identities in the interactions between the lawyer and their clients. Performing knowledge also produces new knowledge in a constant interplay between substantive legal science, ethics and the codes of conduct of the profession and process and performing activities. This contributes to the development of several identities for lawyers and can support individual lawyers in stabilising or rethinking their identities.

Academic researchers and members of the profession have developed their expertise, insight, skills, competences and reflection in different contexts and with very different goals. This does not mean that one is a better lawyer than the other. A closer connection between the practice of the legal profession and scientifically based academic educational programmes could benefit both sectors. Such a closer connection will also establish a new community of practice.

While the traditional perception of science is that it is independent of the subjectivity of individuals and from social context, newer theories underline a more pragmatic and praxis-related dynamic of knowledge expansion. Minow calls identity development a: 'shift from the question of identity to the question of who decides any question of identity ... how does the language used for decision-making itself constitute the players, their identities and self-understandings now and in the future?'.⁵³²

Assuming that lawyers have an identity that includes responsibility for developments in society, they should have special training linked to an academic world as universities are often the leaders in theoretical developments in societal issues. There has been fruitful corporation between universities or law schools and the legal profession in the USA; see the Harvard Law School Program on the Legal Profession. This programme, analysed by Susskind, prepares lawyers for practice in a socio-legal perspective.⁵³³ In Denmark too, close cooperation between the legal profession and the universities and business schools has been developed over the years from a similar perspective.

Learning strategies in ongoing training, bridging the gap between legal scholarship and legal practice, involves more than merely legal training. Developing a firm identity or becoming an expert who can contribute to new methodologies and critical legal thinking demands new structures and facilitators. In Denmark there has been research into this in professional areas such as engineering, where there are similar identity challenges, but as yet there has not been

⁵³¹ Polkinghorne, *Postmodern epistemology of practice*.

⁵³² Minow, *Identities, Yale Journal of Law and the Humanities*, p. 33.

⁵³³ Susskind, *Tomorrow's Lawyers*, p. 138.

such research for lawyers. Anders Buch and Vibeke Andersen⁵³⁴ confirm that professional work is often performed in ambiguous contexts. Uncertainty, unpredictability, indeterminacy, and recurrent organisational transformations are an integral part of modern work in a professional practice. These conditions challenge engineers, lawyers, business consultants and other professionals. These characteristics of professional work have implications for how professionals make sense of their work and their own identities. Academic research into professional practitioners can give more insight for a professional group than they could generate for themselves. Professional organisations are becoming more open to postgraduate university training, even though it affects their dominant position as trainers of lawyers.

7.2 The professional organisations and training

The identity work of professionals is interwoven with their professional training and career backgrounds. With an academic education and a professional career, the individual typically identifies with the profession's values and adopts a certain way of seeing and approaching the world. Success or lack of success at work is established in a complex work context where various goals, interests and perspectives are mediated and negotiated in a process of making sense of the whole. The work context is heterogeneously populated by various agents, like clients, partners, professional and public authorities and colleagues. Lawyers navigate in a complex environment where the authority, control and power bases are far from stable.

The professional organisations consider that their main tasks include training their members to deliver a quality service and being in control of maintaining and developing the profession. This is intended ensure a certain quality and to protect the profession, but it can have unintended negative consequences for innovation. Thus, professional organisations (in Denmark the Bar and Law Society and the Association of Danish Law Firms) must be aware that their members are developing diverse identities and that this must be included and supported in the concept of training.

The CCBE has taken many different initiatives to support the development of a European identity for lawyers through education and training and to address identity questions.⁵³⁵ The CCBE has substantially contributed to this by its Recommendation on Training Outcomes for European Lawyers.⁵³⁶ The continuing professional development requirements are spelled out in the rules of the national bars and law societies and in section 5.8 of the CCBE Charter of Core Principles of the European Legal Profession and Code of Conduct for European Lawyers of 2010. The International Bar Association's Policy Guidelines for Training and Education of the Legal Profession, of 3 November 2011,⁵³⁷ are also a source of competence and identity development for practising lawyers.

⁵³⁴ Buch & Andersen, *(De)stabilizing Self-Identities in Professional Work*, p. 155 f.

⁵³⁵ Tyre, *The contribution of training and education to the identity of the legal profession*.

⁵³⁶ CCBE Recommendation on Training Outcomes for European Lawyers (2007).

⁵³⁷ IBA Policy Guidelines for Training and Education of the Legal Profession, Adopted by the IBA Council, 3 November 2011, http://www.ibanet.org/barassociations/bar_associations_home.aspx (last accessed 22 November 2013).

The professional organisations define and endorse the professional values and they are organised so as to keep power and control over the profession. They also educate lawyers to maintain the privileges of the profession. As seen in section 6.2, authority is not questioned as long as it is believed that the profession has special knowledge and guarantees a level of quality and expertise which cannot immediately be replaced by others, and as long as there is basic trust in the individual members of the profession.

The following sections discuss the role of professional organisations in training and education in order to frame the current structure of mandatory training and the curriculum in Denmark.

7.2.1 The formation of professional identity

The norms of the profession influence the behaviour and norms of the individual lawyer. However, the depicted identity ideal of the European lawyer, as framed in legal sources, is very different from the practice of today. When there is a gap between the European ideal of the profession and the perception of the identity of the profession or the identities of individual lawyers, it is important to look at the conditions for creating professional identity. Despite the EU's intense focus on promoting legal education and training, there is a gap between the desired identity at the societal level and the self-perception of the profession and its members. For example, there is a gap between the lawyers' role in the control of money-laundering⁵³⁸ which brings their role as servants of society into conflict with their role of representing their clients' interests. Here, identity and training have confusing or contradictory aims.

There are training challenges in the increasingly diverse and individualised identities and practices of lawyers which create value disorientation within the profession. In this context it is not enough to defend the traditional lawyers' values, though it is still necessary to uphold some of them.

It is unlikely that the profession will disappear, but legal agents will not necessarily be lawyers as presently understood. Lawyers who extend or change their identities need support to develop their profiles according to their identities. In many cases lawyers will broaden their domain of expertise. In Suskind's words: 'If commercial lawyers want to be strategy consultants, if corporate lawyers aspire to be deal brokers, and if family lawyers wish to be psychologists ... then this must be supported by comprehensive and rigorous training that they undertake willingly.'⁵³⁹

Another training strategy is to teach lawyers to work in teams with skilled practitioners from complementary fields. Learning in a law firm is not solely cognitive. In the logic of lawyers all emotions are seen as disturbing rational analysis, and legal rationality is built on the perception that emotions can be suppressed.⁵⁴⁰ However, research proves that it is impossible to suppress the emotional sides of identity. Thus new training formats take account of emotions

⁵³⁸ Section 6.4.1 contains an analysis of the regulation of money laundering in the EU.

⁵³⁹ Suskind, *Tomorrow's Lawyers*, p. 113.

⁵⁴⁰ Wellford Slocum, *An Inconvenient Truth: The Need to Educate Emotionally Competent Lawyers*.

and of empathetic behaviour as an integral part of the learning process. This will be further elaborated in section 7.3.

7.2.2 National training in Denmark

Most training for lawyers involves practical tools and skills. These are relevant, as lawyering will most often lead to practical decisions. Nevertheless, the role of the lawyer is related to his or her personal identity. The individual lawyers' fulfilment of their role depends on the founding of their identity.

The education of Danish lawyers is generally based on Nordic legal realism, which can be seen as a democratic legal philosophy linked to the Scandinavian social democracies. It is connected to the homogeneous values of the Scandinavian peoples and their widespread confidence in democracy and legislation. It is an anti-metaphysical ideology.⁵⁴¹ However, the founding of the EU and the impact of globalisation has established a more pluralistic legal culture, with diverse value systems. Some of these systems integrate religion in the legal framework, which affects legal ideology and legal practitioners. Nordic legal realism is challenged in this context.

The identity of Danish lawyers has traditionally and predominantly been related to bringing cases to court and defending clients in judicial proceedings. In the UK the work of lawyers has been divided between barristers and solicitors. Moving away from litigation, a range of methods for alternative dispute resolution (ADR) is already changing lawyers' self-perception of their role and identity. As lawyers' tasks change and legal work becomes more preventive and proactive, lawyers' traditional training risks becoming less relevant or even counterproductive. However, the reactive and controlling approach to lawyering is still reflected in the curriculum for postgraduate studies, and the basic training of apprentices after a university degree is still closely related to court work.

Training for apprentices starting in 2010 or later⁵⁴²

Course 101	3 days	Preparing a court case
Course 102	2 days	The lawyer-client relation in legal work
Course 103	3 days	Negotiation, clients' accounts and money laundering
Course 104	3 days	Communication
Course 105	2 days	Understanding accounting
Course 106	2 days	Ethical rules and ethical behaviour
Course 107	2 days	Court procedure
Course 108	3 days	Ethical rules and ethical behaviour II

⁵⁴¹ Lehmann Kristiansen, 'Refleksivitet, pluralisme og konkret retsanvendelse' in Nordisk Retssociologi.

⁵⁴² Danske Advokater, Mandatory Training Programme (Denmark).

The national training relates to an identity ideal that is close to the European ideal that all lawyers should have a common identity or shared general characteristics, as depicted in Chapter 4. This includes a focus on the traditional reactive role of the lawyer. In this way, however, the professional organisation loses power or influence as the need for specialist training is greater than ever. Furthermore, as the empirical study has shown, the identity of lawyers has become diverse and fragmented. The EU ideal identity is not dominant in Denmark and is probably not so in other Member States. Therefore training should not aim to fulfil this ideal, but must be better adapted to meet the needs of the identities of today's lawyers.

The overview of recent postgraduate training for apprentices in Danish law firms shows that the programme includes training in ethical rules (Courses 106 and 108). Other than this, there is no training in a traditional value approach to identity development. Courses 101 and 107 focus on court procedure and litigation. This does not seem a proper balance, since the empirical study shows that many lawyers never appear in court. The growth of ADR is not at all reflected in the programme. It is recognised that communication is important (Course 104), but its content is described as training in technical rhetoric.

One-size-fits-all curriculums become less relevant, as lawyers obviously no longer need the same knowledge as before or the same knowledge as their colleagues. The current curriculum contains no identity training and the perception remains that a lawyer is a lawyer. Lawyers are taken into the profession on the basis of both formal academic qualifications and an informal learning system based on traditional apprenticeship, but the former relation between master and apprentice has changed, as apprentices will often be mentored by several 'masters' during their three years of training.

The aim of the curriculum set out above is explained by the responsible member of the Danish Bar and Law Society, Pernille Backhausen, who argues that: 'more professional lawyers (...) are conscious of the special characteristics and demands of the profession – that is the aim of the new education for lawyers. ... What, for me, is absolutely right is that we can use more time on litigation and ethics' (translation).⁵⁴³ The board that approved the new curriculum has apparently not identified the actual characteristics of modern practice.

The interviews and focus groups of the empirical study included discussions on how the identity development of Danish lawyers is supported by education and training. As the curriculum does not reflect the fact that fewer and fewer lawyers do court work the gap between training and identity has grown. The empirical study shows that lawyers solve this problem individually or in additional training based in and organised by their firms.

7.2.3 Mandatory postgraduate training

It becomes difficult for a bar and law society to monitor mandatory postgraduate education for lawyers when new communities of practice arise and learning will be related to these new

⁵⁴³ Interview in Advokaten about the new education for lawyers with a member of the Board of the Bar and Law Society, Pernille Backhausen.

and often fast-changing relations.⁵⁴⁴ In Denmark mandatory postgraduate legal training is provided by one of the professional organisations.⁵⁴⁵ This training does not sufficiently take account of the needs of today's legal advisers, as it is still dominated by the perception of a single identity but with several roles and tasks. Lawyers have expressed their lack of confidence in the mandatory training; it is seen more as a burden than as a help to learning. One member of a focus group put it thus: 'Everything is accepted. Neither content nor level is monitored. What is monitored is participation, not learning' (translation).⁵⁴⁶ There is a need to establish a connection between a chosen identity/lifestyle and continuing legal education programmes in order not to waste time and money. The existing mandatory training focuses more on control than on learning and by its nature it cannot be proactive and experimental. Even the control is problematic as what is controlled is participation and not necessarily learning.

Expert lawyers say they learn more from interdisciplinary networks or networks connected to their specific expertise and fields of interest. An example of this is the Danish association for housing law, which is preparing to provide postgraduate training in order to contribute to the development of legal experts in this field.⁵⁴⁷

The empirical study shows that there are many different educational motivations, and participation in training is often based more on impulsive choices than on rational decisions. Some lawyers need to earn training points, others need a break from day-to-day work and others take the opportunity to network. Many educational needs are not covered in the training currently offered by the profession. This leads to lawyers' participation in other activities, as reported in the empirical study. The complexity of problems in which lawyers are involved suggests the need for a multidisciplinary approach to postgraduate training.

The emphasis on personal subjectivity and self-examination or reflection is important, while some general social and cultural implications are also significant.⁵⁴⁸ For postmodernist thinkers, topics such as gender issues, multiculturalism, changes in institutional powers and globalisation affect thinking about curriculums and go hand in hand with the subjective need for self-directed learning. For providers of postgraduate training it becomes increasingly difficult to formulate general training systems and to fulfil the personal expectations of lawyers. There can be contradictions between the need of professional organisations to standardise training in measurable units, and individual lawyers' demands for unique or at least more tailored training which can support their identity. These demands may be in line with societal needs for high-level professional experts, but this process diminishes the importance of the professional organisations and their authority over training.

⁵⁴⁴ Baron & Corbin, *Thinking like a lawyer/acting like a professional*.

⁵⁴⁵ www.danskeadvokater.dk (last accessed 27 August 2013).

⁵⁴⁶ Focus group 1.

⁵⁴⁷ Focus group 1.

⁵⁴⁸ Hewitt, *Understanding and Shaping Curriculum*, p. 117.

7.2.4 New communities of practice

According to Wenger,⁵⁴⁹ communities of practice have a set of characteristics. First, they reflect and develop an identity defined by a shared domain of interest in a joint enterprise. Second, there is interactivity in terms of joint activities and discussions, information sharing and mutual support. And third, there is a development of shared routines, words, tools, ways of doing things, stories, gestures, symbols, genres, actions, or concepts.

For educational purposes, Wenger has proposed the idea of a community of practice as a theory for learning.⁵⁵⁰ He recommends that individuals should learn in the context of lived experiences of participation in the world. In other words, learning is a social and experiential phenomenon, where individuals negotiate meanings as they experience everyday life. This can be directly related to the model of apprenticeship learning that has been dominant in the training of lawyers – a model that is under pressure. Lawyers construct knowledge through experience and reflection. Also, the Carnegie report states the necessity of learning in communities, as students 'need access to forms of social interaction that embody the basic understanding, skill, and meaning, that, together make up the professional activity'.⁵⁵¹

The monopoly of lawyers over the training of lawyers and the dominant positions of the CCBE and national bar and law societies have limited and narrowed the educational framework. This contrasts with the societal level where there are changes and actions towards a broader approach and new communities of practice, creating an environment where lawyers are trained together with other practitioners.

Education and training in new communities of practice can help lawyers develop the competences and identities necessary to practise sustainable lawyering in the European Union. The development of training can be seen directly from John Dewey (learning-by-doing theory) to Donald A. Schön's reflection and practices, leading now to Etienne Wenger's situated learning or new communities of practice.⁵⁵² A case study on interdisciplinary training will be described in section 7.3.

7.2.5 Didactic structure: Teaching or learning? Learning or control?

Structuring education, learning and training includes reflecting on content, structure and tools. There are differences between what is taught and what is learned. There is also a distinction between learning and control, where control can hinder learning in the sense that if learning has to be intensively controlled, only subjects that can be controlled will be taught. This means that many interesting topics will be squeezed out of the curriculum.

In the present study, adult learning models are seen as being different from children's learning programmes, as adults already have accumulated knowledge and experience. However, this distinction and its relevance are subject to debate both in theory and in practice and it influences curriculum planning. Curriculum planning for individual lawyers' identity development

⁵⁴⁹ Wenger, *Communities of Practice: Learning, Meaning and Identity*, p. 77.

⁵⁵⁰ Wenger, *Communities of Practice: Learning, Meaning and Identity*, pp. 82-83.

⁵⁵¹ Sullivan et al., *Educating Lawyers: Preparation for the Profession of Law*, p. 28.

⁵⁵² Kochan, *Thinking' in a Deweyan Perspective*.

will be discussed in section 8.5. In adult learning models (andragogy) the main focus is on building on existing knowledge and skills. This corresponds with the situation in the legal profession, where individuals have a university degree and hence have already acquired a solid basis of knowledge.⁵⁵³ As with other adults, lawyers may have a problem accepting the need to be 're-educated'. Very often they will not accept instructions and will favour self-directed learning; see further in section 8.4.2. As the training mostly takes place during lawyers' working time they will be more interested in learning practical skills and acquiring knowledge that is immediately applicable.⁵⁵⁴

Accelerated learning systems focus on learning and not on control. Because there is no fear of being controlled, a learning environment is created in which errors are allowed and this in turn expands receptivity to new information.⁵⁵⁵ This dynamic can be understood as an unintended consequence of mandatory measurable postgraduate training systems. The Council of Europe has made a lot of progress in developing and implementing didactics to support effective and affective learning. A special training guide, providing detailed recommendations for training, has recently been published by the Council of Europe.⁵⁵⁶

In teaching and learning, there is evidence of the effectiveness of integrating simulated experiences of practice into new or existing courses, such as moot courts and negotiation competitions.⁵⁵⁷ Also, in legal training in Europe it has been shown that if training involves a range of participatory training techniques it will engage the audience much more than merely 'didactic' lecturing.⁵⁵⁸ In Denmark the didactic tradition has incorporated interaction and participation so as to engage students' attention and help achieve the aims of the training. Merely talking to an audience will achieve little, though this is still the approach in post university education and postgraduate training in some Member States.

Students gain experience from being trainees in law firms and by dealing with a wide variety of matters. This kind of training focuses on practice-oriented skills, including law office management and professional skills. Simulations of actual legal transactions, with experienced lawyers acting as clients and judges in a virtual environment, have been introduced as effective didactic tools. Online lectures like those provided on TED⁵⁵⁹ can be part of powerful online training. E-learning and simulated legal practice stimulated by 'real' lawyers can create a learning environment with all kinds of facilities such as virtual offices, institutions and networks, including a wide range of documentary materials, photos, video and internet resources.⁵⁶⁰ In these simulated surroundings there can be risk-free training in drafting documents, negotiation and developing other skills. A recent example is the 'Training Lawyers' website, which is an EU pilot

⁵⁵³ Knowles, *What is Andragogy?*

⁵⁵⁴ Hewitt, *Understanding and Shaping Curriculum*, pp. 70-71. (it must be noted that in English pedagogics refers to the training of children, while andragogy is the science of teaching adults).

⁵⁵⁵ Vos, *The Learning Revolution*.

⁵⁵⁶ Council of Europe, *Training Manual on the European Convention on Human Rights*, p. 44.

⁵⁵⁷ Kolb, *Experiential Learning. Experience as the Source of Learning and Development*.

⁵⁵⁸ Guidelines from the Council of Europe, p. 44.

⁵⁵⁹ www.ted.com (last accessed 10 July 2013).

⁵⁶⁰ Susskind, *Tomorrow's Lawyers*, p. 145.

project that was put on line on 22 July 2013. It is an interactive website allowing participation in the state-of-the-art training in EU Law for lawyers in the 28 Member States.⁵⁶¹

All new didactics tools must support the aim of the training. Training in the drafting of a new employment contract will differ from setting up a code of conduct for a public-private partnership. The relations between societal, professional and personal values have been examined by W. Wesley Pue, raising the possibility of educating the 'total jurist'.⁵⁶² Pue discusses a discontinuity between how legal education has historically sought to reconstruct the 'soul' of lawyers in training and the contemporary conceit that legal education can be 'value-free'. As different lawyer identities are based on individual values, and as education and training must interact with these values, the training of lawyers cannot be value free.

One method for developing different identities is to recruit a group of teachers with significantly different identities that reflect the diversity of the legal profession. For postgraduate training, teachers are recruited from among practitioners. The professional organisation should be aware that teachers should be distributed by age, gender, geography, academic subject, company size and individual identity. Today's postgraduate training is often dominated by men, mostly from influential law firms. Recent postgraduate training brochures confirm this.

Developing the professional identity can only be successful when it matches the aspirations of the individual lawyer. Therefore, the next section focuses on bringing meaning and direction to identity development.

7.2.6 Meaning and direction between the profession and the lawyer

Lawyers have been taught to see their work as a stable practice with predictability framed in a positivist ideal. This ideal is under heavy pressure and lawyers are confronted with orientation problems when the fragmentation of legal practice means that the results of a specific previous case will not necessarily hold good for future cases with similar facts. Giddens understands 'the real' not as a single, integrated system, but as a disunited, fragmented accumulation of unequal elements and events. Even the self is not a unified whole but a complex of imbalanced images and events. Giddens's view is supported by Polkinghorne, who states: 'Reality is not a static system underlying the flux of experience, but is itself a process of continuous change'.⁵⁶³

The fundamental assumption of modernism was that science could uncover a logical and ordered universe and could be used to stop wars, prevent environmental crises and save humanity from poverty, famine and disease. Giddens's reflections on late modernity suggest a general perception of the insufficiency of the modernist project. The deconstruction of the modernist epistemology engages some basic themes such as foundationlessness, fragmentariness, constructivism and neo-pragmatism.⁵⁶⁴ The late modernity paradigm can be perceived as sup-

⁵⁶¹ http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/EN_PR_0213pdf1_1375079175.pdf and <http://training-lawyers.eipa.eu/> (last accessed 30 November 2013).

⁵⁶² Pue, *Educating the total jurist?*

⁵⁶³ Polkinghorne, *Postmodern epistemology of practice*, p. 149.

⁵⁶⁴ Polkinghorne, *Postmodern epistemology of practice*, p. 148.

porting change and being brought into action as a positive transformation of the identity development and training for lawyers. It is through a lifestyle choice that lawyers, and others, make choices, complete projects and accomplish meaningful purposes in the world. This means that lawyers can anticipate to a certain degree what response their actions will bring. No lawyer in the empirical study said that they saw their identity development as being linked to the conditions of late modernity, but even though their practice is not self-conscious it demonstrates these principles. Opponents of this view might express some reluctance to accept modernist deconstruction, especially in relation to identity development. Not all challenges can be related to the contemporary period. Already in 1914, the Danish legal scholar Viggo Bentzon stated: 'Life is unsystematic. Also the life of the law, the rules which purport to regulate life must adjust to life's diversity and plurality.'⁵⁶⁵

Apart from the institutional frame that sets the ideological goals for the lawyer, as described in Chapter 4, the job of a lawyer itself will typically constitute the basis of the individual's expectations in relation to fulfilment, self-realisation and job satisfaction. The construction of self-identity and the individual's understanding of the self are closely related to being a lawyer in a profession. It implies ambiguity, as work becomes a potential strain on identity construction, while it is also a potential source of enthusiasm and self-fulfilment.

As well as the identity studies of Danish lawyers, observatory studies have been carried out at European level in order to understand the educational challenges of unforeseen and complex cross-border issues.

7.3 The trajectory of identity between agent and structure

The empirical study of Danish lawyers confirms that, consciously or unconsciously, they support their identity development with diverse learning activities. Postgraduate training has expanded and is no longer a monopoly of the professional organisations. The professional organisations do not have the resources or knowledge to meet the diverse needs, and individual lawyers are interested in taking part in activities in new settings. The figure in section 5.7.5 illustrates lawyers' membership of various associations, interest groups and networks which they consider relevant for their working and/or social life. Many of these communities are relevant for training and thus for identity development. Some support international relations.

Research question 4 asks how new communities of practice will affect the identity development and professional training of lawyers. Within the EU, current activities demonstrate how new training communities are initiated not by the profession but within the EU institutional framework. The participatory study involved a training programme initiated by the European Commission in cooperation with Leuven University, MiKK (an NGO based in Germany dealing with mediation in cases involving children) and Child Focus (a Belgian foundation for missing and sexually exploited children). The training programme, which shows the interaction between structure and agent, was a cross-European activity aimed at mediators. About half the

⁵⁶⁵ Schaumburg-Müller, Tamm & Cederström, *Debate on the Interdependency of Law and Language*, RELINE research notes, <http://jura.ku.dk/reline> (last accessed 27 January 2014).

participants had a legal background. This training programme has been subject to research for this dissertation in the form of a participatory observation study.

The following sections will illustrate a new concept of lawyering. Section 7.3.1 deals with the research design and fields of observation. Sections 7.3.2-7.3.4, analyse interdisciplinarity and identity. Sections 7.3.5-7.3.8 concentrate on how training affects the individual and section 7.3.9 looks at the relationship between new lawyering and sustainable solutions.

7.3.1 An educational programme promoting new EU lawyering

The recent Directive on certain aspects of *mediation* in civil and commercial matters⁵⁶⁶ and a new European format for legal training supports the development of training for sustainable lawyering and proactive solutions in an interdisciplinary setting. It is an example of an asymmetric or pluralistic European legal act, as Denmark is not subject to the Directive due to its opt-out from EU justice and home affairs. The training programme took place in Brussels in the spring of 2012.⁵⁶⁷ Its aim was to smooth the implementation of the Directive. It was an integrated training programme giving lawyers the possibility of training in a broader approach which gives lawyers, clients and other parties a solution with meaning and a positive direction and avoiding negative and destructive emotions. It offered a proactive participatory model of a client-centred professional service. Such models can also be found in other training for the *new lawyer*.⁵⁶⁸

Here it is not the content of mediation that is interesting, but the development of a new identity for legal advisers and the development of legal advisers without a legal background.

According to Dr. Jamie Walker, who was responsible for the programme, it had three goals:

1. To acquire advanced mediation skills.
2. To have a European train-the-trainer programme to facilitate similar training in all European countries.
3. To establish a European (and later a global) network of mediators.

All three goals have been met and the network is working. The Network of Cross-border Mediators gathers together family mediators from the EU Member States who are trained to deal with cross-border family conflicts.⁵⁶⁹ There are two Danish members of the network who continuously mediate and train and thus become part of a new community of practice.

7.3.2 Research design – participatory observation

Participatory observations and first hand collection of information are the basis for connecting identity development with the behaviour and practice of mediators. The training was paid for by the European Commission. The selection of participants and group formation was based on written applications, interviews and signed contracts. Nearly all EU Member States (then 27)

⁵⁶⁶ Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters.

⁵⁶⁷ Dates and duration in 2012: Part I, 13-17 February; Part II, 19-23 March and Part III, 23-26 April.

⁵⁶⁸ Macfarlane, *The New Lawyer: How Settlement is Transforming the Practice of Law*, p. 24.

⁵⁶⁹ Network of Cross Border Mediators, www.crossbordermediator.eu (last accessed 4 December 2013).

were represented by two participants at the three sessions. Half the participants had a legal background as lawyers or judges, while the other half were psychologists or social science graduates. All were nationally trained mediators prior to the EU training. The training programme included legal issues and cases on The Hague Conference on private international law and the legal principles relating to child abduction. Other issues dealt with included culture, efficiency, finance, language barriers, differences between legal aid and mediator aid, practical support for parties and cross-border complications. Participatory observation gives an opportunity to investigate the attempts to harmonise curriculums, behaviour and the search for a common identity as European mediators.⁵⁷⁰

7.3.3 Fields of observation

The observations from the training programme are not reported in full, but are organised according to the themes of identity development corresponding to the theoretical framework and empirical data in Chapter 5. These themes are: language challenges, mixed groups and interdisciplinary thinking, creation of identity in training, identity changes of the profession.

7.3.4 A common language

With participants from almost all EU Member States, language was a challenge. While all communication was meant to be in English, there were widely differing abilities to communicate in English both among participants and trainers. Language and identity are connected and many had difficulties expressing nuances and cultural differences. Just as language and identity are connected, so are language and law. Inspiration for finding new methods for overcoming barriers can be found in the recent research of the Legal Linguistics Network RELINE, which is an international research network based in Denmark that promotes interdisciplinary studies in the interaction of language and the law.⁵⁷¹ The use of English confirms Heringa's statement in section 7.1.5, that English is the *de facto* language of the EU.

During the intensive training, there was awareness that not all communication relates to the content. The way in which things are said, the extra-verbal communication, is very important. How the voice is used, accent, pace of speech, clarity, pitch, volume and tone can change the outcome of a case. The non-verbal signals of body language, such as eye contact, facial expression, posture, movement, gesture and appearance also seem closely related to outcomes. Non-verbal signals can include physical objects which are brought to a meeting, such as a cycle

⁵⁷⁰ The first hand observations have been supplemented with information from post training questionnaires sent out by the organisers after each session to assess the quality and impact of the training and to make further improvement. These questionnaires were also used to inform the European Commission of the results of the training projects. The participants were informed that the questionnaires are treated confidentially by the project managers. For the purpose of this research the material have been presented under supervision of one of the project managers.

⁵⁷¹ RELINE. The network includes scholars from all parts of the world representing a great variety of disciplines and interests: jurists, linguists, rhetoricians, communication scholars, philosophers, political scientists and anthropologists and is a living example of a new community of practice, <http://jura.ku.dk/reline/dansk> (last accessed 5 December 2013).

helmet or a cup of coffee. Simple communication, focusing on integrating visual, auditory and kinaesthetic tools seemed to be very useful during the training.⁵⁷²

The importance of both spoken language and body language was clearly demonstrated.

7.3.5 Mixed groups and interdisciplinary thinking and learning

What was significant in the training in Brussels was how participants from different backgrounds contributed to finding solutions. While lawyers generally looked at conflicts as external to themselves, people with pedagogical or psychological insight looked at conflicts as an integral part of life which does not necessarily lead to a dispute. When the participants entered each other's fields (e.g. psychologists learning about legal matters and lawyers learning about psychology or conflict management), not only did everybody learn something new, but the process of absorbing new knowledge and using it in one's own practice meant there was import and export of terms and concepts related to a group of practitioners who had a specific perception of the terms and concepts and for whom they had a special meaning. When other practitioners use these terms and concepts they may have given them a special meaning or change the meaning in a way that affects the practice and thus the role and identity of the lawyers and psychologists involved in the training. Understanding this change of practice, discourse and style can be related to Wenger's theory of perceiving learning, meaning and identity.⁵⁷³

7.3.6 How can training affect or create identity?

As stated above, the aim of the training programme was to train advanced mediators to train mediators in a national setting. However, the identity of a mediator was never discussed. Encountering new competences from other countries altered the pattern of relationships and showed how much a mediator's identity and sense of place could be altered by relationships with new people from other backgrounds, institutional systems, legal frameworks and educations. When there are new entrants to the legal family (the profession) others must remake their relationships with one another as well as with the new arrivals. In the Brussels training programme, lawyers and judges were in the same 'legal family', while psychologists, therapists and family advisers formed a 'social-psychological family'. However, over the three weeks of the training programme all became 'Timmys', the nickname for European trained mediators.

The training seemed to create a European identity for mediators, which could support identities as *lawyer-entrepreneur*, *lawyer-humanist* and *lawyer-integrator*.

7.3.7 The identity of the profession is changing

The move away from litigation in the courts to diverse forms of ADR is already changing the self-perceptions of lawyers and the legal profession. During the training programme lawyers were confronted with their lack of a systematic understanding of the underlying processes involved and of the ability to learn these vital skills in a purposeful manner. The training provoked emotional responses, so that psychological processes became conscious and could be

⁵⁷² Høedt-Rasmussen, *Juridisk Gennemslagskraft*, pp. 41-49.

⁵⁷³ Wenger, *Communities of Practice*, p. 129.

recognised. Conflict management and resolution skills are crucial for effective lawyering, but many lawyers receive no training in these skills. The soft skills of mediators, empathy and active listening, conflict with the professional picture of a logically thinking lawyer, cool, calm and collected, and they force the lawyer to make some choices of performance.

7.3.8 Trainer feed back

The team of trainers consisted of former family court judge Eberhard Carl, psychologist and mediator Sybille Kieseewetter, educator and mediation trainer Dr. Jamie Walker, and practising lawyer and mediator Christoph Paul. They have supported these participatory observations.

Based on the observations during the weeks of the training programme the following statements have been presented to the trainers in order to validate whether they agree or disagree with them. On behalf of the trainers, Christoph Paul⁵⁷⁴ has confirmed the statements derived from the study. All the statements relate to the movement from a classic ideal of a lawyer, as expressed by the CCBE, in national codes of conduct etc., to the 'new lawyer' combining the classic virtues with empathy, understanding and seeking individual sustainable solutions in a broader framework.

Statement	yes	no
Legal practice becomes increasingly interdisciplinary in the European Union	X	
Training can create a European identity for lawyers	X	
The train-the-trainer programme affects the identity of the individual lawyer	X	
European lawyers interact with a new identity including soft law (ADR etc.)	X	
Training in mixed groups supports new lawyering including interdisciplinary thinking	X	
The identity of the profession is changing	X	
A European democracy must support the development of a European identity ideal for lawyers	X	

Figure 7-1. Validated statements

The observations as well as the answers of the trainers demonstrate that it is possible to train lawyers in an interdisciplinary setting in a way that will develop their identities.

⁵⁷⁴ Christoph C. Paul, Lawyer, Notary, Mediator and Mediation Trainer, Chair of MiKK e.V. (Mediation in International Conflicts involving Parents and Children), Member of The Hague Advisory Group on the Guide to Good Practice on mediation under the Hague 1980 Child Abduction Convention, Concept Development of TIM Training, Berlin.

7.3.9 New lawyering and creating sustainable solutions

A big question is how to choose between court litigation and ADR. Lawyers must make this choice in the interests of their clients. According to the European ideal, lawyers have an obligation to try to reach an amicable settlement, as pointed out in Chapter 4. From this perspective the participatory study can be interpreted as revitalising a classic ideal. The emphasis was on understanding the multiple factors that will contribute to effective resolution of conflicts, consideration of the tactical choices and strategic decisions available, and the ability to develop awareness of interests and sustainable and proactive solutions. Changing methods improved competencies such as self-awareness, inter-personal skills, communication using all kinds of facilitating systems, contextual reflection and the ability to cope with complexity.⁵⁷⁵ When searching for excellence in solutions it was necessary to combine intuition, emotion, logic, intelligence, the senses and the body to make both left brain and right brain work together. This was recommended and trained as whole-brain thinking; see further in section 8.4.6.

In lawyering via mediation, lawyers must accept that even though generalisations are possible and make successful actions thinkable, mediation cannot predict that the same actions will work in new situations. According to the late modern understanding of specialisation and individualisation, each situation is different and embodies the uncertainties of its specific location and time. This means that there can be more than one way to reach the goal. The same outcome can be reached in different ways and the same mediation process can lead to different outcomes. Both break with the traditions of the legal profession.⁵⁷⁶ The value of an action depends on whether it fulfils its purpose, not whether it follows a particular recipe.

According to Schön, during the reflection process lawyers may construct a new sense of the situation of uncertainty or individuality that they may experience in their identity development. In the lifestyle reflection and transformation process lawyers can change from thinking through patterns to a meta-cognitive awareness where they focus on their possibilities.⁵⁷⁷ Through such experiences, an expert practitioner generates or changes identity in a new body of knowledge.⁵⁷⁸

7.4 Reflections and sub-conclusions

Because of the increasing impact of EU law, the EU is establishing a firmer structure for the education of European lawyers, with new institutions and more intense collaboration with existing institutions. The multi-layered societal framework creates a pluralism of norms,⁵⁷⁹ which give rise to new institutions or stakeholders. Legal developments in Europe make it necessary to change legal teaching curriculums. Harmonisation is taking place both at universities and in postgraduate training, and lawyers have been making some fundamental changes in

⁵⁷⁵ Høedt-Rasmussen, *Mindfulness - Et helhedssyn på liv og ledelse*.

⁵⁷⁶ Polkinghorne, *Postmodern epistemology of practice*, p. 152.

⁵⁷⁷ Knights & Clarke, *It's a bittersweet symphony, this life: fragile academic selves and insecure identities at work*.

⁵⁷⁸ Polkinghorne, *Postmodern epistemology of practice*, p. 157.

⁵⁷⁹ Petersen, *Globalisering, ret og retsfilosofi*, pp. 148-151.

forming their professional identities as well as their personal identities within this dynamic legal framework.

Legal culture is moving from a national framework to an international or global setting, where justice issues expand to become global and are expressed in terms where the rule of law, fair trial, democracy and fundamental rights are connected to sustainability, corporate social responsibility and global awareness of peace and security. The legal language has become English.

Universities and legal practice each have their own way of producing knowledge. A future there could be a combination of the logical and theoretical approach of academia with the identity and practice development of legal practitioners to support a more individualised training curriculum based on the identity and lifestyle choice of the individual lawyer.

In essence, the national professional organisations in Denmark provide training in relation to an ideal that is close to the European ideal in a mandatory three-year programme to qualify as a lawyer. This training mostly relates to bringing cases to court and defending clients in litigation, as seen in section 7.2.2. The move away from litigation to a diversity of forms of ADR is already changing the self-perception of the lawyer's role and identity. The ideal of the profession is dominated by rationality and logical thinking. This ideal is still valid from a legal perspective, but the empirical study carried out among Danish lawyers shows that this ideal is not dominant in legal practice and that it will be challenged in structure-agent interactions.

There is a risk that mandatory postgraduate training will become merely a system for collecting qualifying points rather than a system for learning. The more individualised and specialised legal work becomes, the more problematic it becomes to uphold a profession based on common education and training. The level may not be high enough for specialised practice and the current form of training risks becoming merely the transmission of basic knowledge. In Giddens's terminology, this is an unintended consequence of establishing mandatory training.

It can be concluded that neither the basic postgraduate training for becoming a lawyer, nor most of the continuing legal training correspond with the identity perception of today's lawyers, nor do they support individualisation, specialisation or individual lifestyles. This means that there is a gap between the training provided in the national mandatory training and the needs of today's lawyers. In Chapter 8 there will be a discussion of what kind of educational activities or changes to practice are needed to fill that gap.

There is some inspiration for a future-oriented European legal education in the training initiatives of the EU Commission and other EU institutions and organisations. These could moderate or align the European ideal and the many identities for practising lawyers. New European activities break with both the form and content of postgraduate training. The case study of international mediator training (TIM training, section 7.3) demonstrates a structure of a new community of practice with interdisciplinarity and cross-border training. The content builds on training lawyers to work for long-term proactive and sustainable solutions. Individual agency of participants and mutual influential actions make people change their normal behaviour and thereby

develop new ways of lawyering. Common training in the EU is already affecting identity development and may support new identities. Skills in communication, managing, building trust, relational and interpersonal skills to overcome impasses are supported. Adopting whole-brain activities or training that includes a bodily dimension is not part of traditional legal training. Complementary competences can be acquired either by the individual lawyer's continued legal training (including practice) or by developing skills to draw on the competences of other experts.

Education and training often have the purpose of improving life and supporting the identity development of individual lawyers. An identity or lifestyle is based on values. As values are crucial for the choice of a professional as well as a private identity, the training providers should support participants in discussions of values and how to connect them to daily practice.

Individual responsibility for fundamental values is a precondition for making them work. Chapter 8 examines further the expanded democratic values related to the ongoing transition in lawyering and lawyers' identities.

8 Lawyering and lawyers in transition

As presented at the start of Part III, '*lawyering* in transition' relates to the *functions* of lawyers, while '*lawyers* in transition' relates to *individuals* and their lifestyles. Chapter 7 focuses mainly on structure in the structure-agent relation; the starting point for this chapter is the agency of the individual in connection with societal and professional changes and is based on Giddens's theory of structuration, under which agency is connected to the individual (section 8.1).

It is shown in Chapter 7 that membership of the EU includes a commitment to a democratic ideal. The EU is connected to a framework of global governance.⁵⁸⁰ This includes awareness of the needs of the general population in relation to the economy, combating poverty, social awareness of groups with special needs, and the longer-term rights of future generations to live in a balanced ecological system with access to natural resources, as stated in the first articles of the Treaty on European Union (TEU). A globalised economy needs transparency and accountability, whether or not it is sustainable. Lawyers have traditionally been involved in the fulfilment of societal ideals. Changes at the societal level therefore affect the identity of lawyers and their personal lifestyle choices.

In this chapter the political aim of supporting sustainability will be related in particular to lawyers in transition. Sustainable development is one of the stated aims of the TEU⁵⁸¹ together with other global ideals, and this changes the aspects of lawyers' identities that are connected to the question 'What to do?'. The professional organisations are changing their 'How to act' in response to new challenges, and sustainability in the individual lawyer's life changes the 'Who to be' of lifestyle and identity.

The use of the term 'sustainability' in relation to lawyers and other professionals is relatively new.⁵⁸² As mentioned in Chapter 1, the Brundtland Report⁵⁸³ introduced the idea that sustainability involves democratic societies being based on an ideology of worldwide justice. How lawyers form their identities and adapt to the emerging realities of sustainability deserves greater attention. Will society expect authentic and charismatic lawyers to defend fundamental human rights, and to protect and develop democracy within the European ideal, or will society accept the fact that some lawyers have other tasks?

The idea of running a sustainable business requires there to be sustainability in the lives of lawyers to satisfy their needs and future work-life expectations. This was expressed in the focus groups and individual interviews conducted for this dissertation, where most lawyers formulated visions that went beyond their personal interests; see Chapter 5. The practising lawyers in this study point out that there are parts of their professional lives that are not sustainable in the sense that 'this cannot last', and this is confirmed in the literature studies. The em-

⁵⁸⁰ *The Treaty on European Union*.

⁵⁸¹ Art. 3.5 in the EU Treaty, as unfolded in section 3.1 in this thesis.

⁵⁸² Farrow, *Sustainable Professionalism*.

⁵⁸³ Brundtland report, *Our Common Future, Chapter 2: Towards Sustainable Development*, UN documents A/42/427.

pirical research shows a need for change at the individual level. An increasing number of young lawyers are leaving the profession, as seen in Chapter 5. This is confirmed in a survey conducted by the Association of Danish Lawyers and Economists.⁵⁸⁴ Many lawyers reflect deeply on their identity and role in society in order to find new and more sustainable ways of lawyering.

These considerations result in a wish to take action, or a 'need for agency' in the terminology of Giddens, as seen in section 8. The structure of Chapter 8 continues with the training aspects of identity in a structure-agent relation in section 8.2. New ways of lawyering arise from new actions as analysed in section 8.3, and the transformative power and the tools that make changes possible are investigated in section 8.4. These changes have curriculum implications and often take place in new communities of practices, as described in sections 8.5 and 8.6.

8.1 Consequences of values linked to agents and not to structure

Unlike the theories of other sociologists such as Parsons, Giddens's theory anchors values and norms in the agent rather than in the system. Giddens thereby makes it clear that it is necessary to empower individual lawyers to change the profession. According to structuration theory, changes will develop in the constant interaction between agents and systems, and this will include aspects related to sustainability.

At the highest societal level, the UN represents global society in connection with sustainability, the rule of law, democracy etc. These norms mostly take the form of soft law regulation, as explained in section 2.8.1, and they influence the European agenda and the agents who are expected to implement them. In this respect, the EU can be perceived as both an agent and a structure.

The legal profession still plays an important role in the EU, and the Council of Bars and Law Societies of Europe (CCBE) has confirmed that lawyers have societal tasks. These tasks include upholding a democratic society where sustainability affects the work of lawyers and thus their identities, most significantly in corporate social responsibility (CSR). Without common values, sustainable and proactive governance in private sector regulation might only aim for short-term goals to maximise profit for the parties involved.

Both Giddens and Wenger write about the trajectory of the self and the interaction between the individual and the group; see section 3.8.2. Individual choices are made about education, academic postgraduate training and jobs. These are all subjectively important areas of experience. Competences are acquired through education, and a job is a basic condition for social existence, influencing lifestyle choices and hence contributing to the development of identity. Lawyers do not seem to be given the possibility of reflecting on identity to support the development of a consistent and considered perspective of their roles and identities, either at university or in postgraduate education and training. The application of law is often seen as externally derived, but by means of a guided self-reflective process it becomes clear that legal solutions are frequently internally derived, requiring lawyers to consider their own ideals, identities and moral views in order to unravel ethical dilemmas. This requires a great deal of

⁵⁸⁴ Djøf, *Vandringen fra advokatbranchen 2012*, www.djoef.dk (last accessed 27 January 2014).

authenticity, courage, trust and honesty. These characteristics not only relate to working life, they are also connected to the whole person. In the Carnegie Foundation's report identity is seen holistically.⁵⁸⁵ It is said that professional and moral identity development requires a holistic approach to the educational experience connected to identity development to become a lawyer.

The new form of lawyering, referred to in this study as proactive, sustainable lawyering, connects lawyers to societal policy norms. This means that there is pressure on the professional organisations to accept that a multiplicity of types of lawyer has replaced 'the lawyer'. Each of these new identities needs a different kind of support to develop the identity necessary for lawyering in a European setting.

8.2 The trajectory aspects of training and identity development

Having chosen a lifestyle as a lawyer, knowing 'who to be' will make it possible for an individual to take part in educational activities that will cultivate and further develop the chosen identity. In the following sections the individual approach will be presented as a trajectory process, starting with the social learning process discussed in section 8.2.1, and based on the individual needs described in sections 8.2.2.

The interaction between society, the profession and the individual means there must be knowledge about the values on which professional decisions are based. Most, if not all, lawyer identities referred to in Chapter 5 include regard for values beyond personal satisfaction. These values can include fulfilling the expectations of the client, a proactive vision, sustainability, human rights, CSR or goals which may or may not relate at all to lawyering.

Many lawyers work with their individual identities but do not relate these to the institutionalised profession. They do not necessarily follow the CCBE's positive training recommendations and they engage in practical self-directed learning – knowing what they want and what they need to know more about.

8.2.1 Developing identity as a social learning process

In the present theoretical setting, identity development is perceived as being a social learning process supported by identity formation and training. Social learning theory has moved on from ideas about acquiring knowledge and skills to a broader idea about learning as an ever-present aspect of everyday life, whether the learning is intended or unintended, formal or informal. This understanding is in accordance with how the lawyers who participated in the empirical study reported in Chapter 5 say they learn.

Thus learning theories recognise the structure-agent relation in which self-identity is achieved reflectively. The identity of the profession or firm is related to a system, while individual identity comprises the whole person, a holistic approach to human beings.⁵⁸⁶ Identity includes char-

⁵⁸⁵ Sullivan et al., *Educating Lawyers: Preparation for the Profession of Law*, p. 160.

⁵⁸⁶ Kolb, *Experiential Learning. Experience as the Source of Learning and Development*.

acteristics or traits like authenticity, courage and the development of basic trust. Over the course of a life these can secure the self in shifting social contexts.⁵⁸⁷

Whatever knowledge a lawyer has and whatever the nature of the problem presented to them, they must have a professional education and training that includes attitudes, ethics, personal courage and authenticity in decision-making. Lawyers need criteria for the application of their knowledge, and they must accept responsibility for how, when and for what purpose they use their knowledge. This is an underdeveloped field in current training.

Identity formation is both an individual and a social process, giving the lawyer entrance to the common professional society and culture. Like other skilled adults, lawyers are drawn to self-directed learning systems.⁵⁸⁸

With reference to the legal profession, Deborah Rhode talks about an era of postmodern professionalism with increasing diversity according to personal background, substantive specialty and practice setting. This means there is an urgent need for a revision of the current one-size-fits-all model of legal education and professional regulation. Lawyers with different identities and practice-contexts need different preparation and guidance.⁵⁸⁹ Susskind asks whether we are preparing the next generation of lawyers to be more flexible, team-based hybrid professionals, able to transcend legal boundaries, but he concludes: 'My fear, in short, is that we are training young lawyers to become 20th century lawyers and not 21st century lawyers.'⁵⁹⁰ That this fear is shared by many young lawyers is shown in the empirical study. They are afraid they will not get support for their individual needs for other ways of lawyering. They try to bridge the gap by joining interdisciplinary communities, as depicted in Chapter 5.

Thomas Morgan supports this view by saying that today's lawyers will not be unemployable, but that for significant parts of their careers they will be required to develop specialised expertise both in an area of substantive law and in non-legal aspects. He states:

'If they fail to develop both kinds of expertise, they will find at almost every turn that clients will take their problems to those prepared to deliver what the clients need at a higher level of quality, a lower cost, or both'.⁵⁹¹

The dichotomy between the pressure for individualised curriculums and the desire to maintain a unified profession can be understood from theories on situated learning and legitimate peripheral participation. The theories developed by Jean Lave and Etienne Wenger have the same element of interaction between agent and system as Giddens's structuration theory and identity work, and they complement Giddens in the area of education and training. Thus identity development is directly connected to working conditions. However, in the light of Gid-

⁵⁸⁷ Giddens, *Modernity and Self-identity – Self and Society in the Late Modern Age*, p. 182.

⁵⁸⁸ Knowles, *Self-directed learning*. See also section 8.4.2

⁵⁸⁹ Rhode, *In the Interests of Justice – Reforming the Legal Profession*, p. 2.

⁵⁹⁰ Susskind, *Tomorrow's Lawyers*, p. 136.

⁵⁹¹ Morgan, *The Last Days of the American Lawyer*, p. 2.

dens's thinking, maintaining a unified profession can have the unintended consequence of being an obstacle to necessary individual training activities (see section 2.3.2).

In the mandatory education and training for lawyers and the process of becoming a lawyer, professional qualification and social integration form the identity in parallel. Professional qualification refers to the attainment of knowledge and skills in relation to job performance. Social integration refers to absorbing standards of behaviour, ethics and morals in adapting to the social environment and to the tacit as well as explicit rules of the legal profession. Training and accreditation systems and structures do not sufficiently recognise this development. The empirical study for this dissertation, with focus groups and individual interviews, reveals a legal profession with diverse values, goals and kinds of business, which in turn creates at least six different lawyer identities and goals. Knowledge of the ethical rules does not necessarily mean they are followed.⁵⁹²

8.2.2 Identity development as a trajectory of the self

Lawyers with some of the identities explored in Chapters 5 and 6 have difficulty in finding support for developing their identities. This applies in particular to lawyers who have chosen the lifestyle of *lawyer-integrator* or *lawyer-humanist*; see Chapter 5. Together they comprise 43 % of the respondents. The *lawyer-statesman* adds 21 %, so that more than half of the lawyers in the study perform an identity which includes some explicit societal commitment. The *lawyer-businessman* and the *lawyer-entrepreneur* are also affected by demands from clients or society for CSR programmes or other societal commitments.

In order to support individual identity development it is relevant to identify the incentives for the different identities. From the characteristics of the six identities depicted in section 5.8 it is possible to condense their characteristics in a few words. This does not express the full motivation of each lawyer, but it supports an understanding of the fragmented profession.

Identity 1	Lawyer-businessman:	Money
Identity 2	Lawyer-performer:	Admiration – traditional procedure
Identity 3	Lawyer-entrepreneur:	Excitement – creation of legal knowledge
Identity 4	Lawyer-humanist:	Commitment to societal or humanistic ideals
Identity 5	Lawyer-integrator:	Holism as a legal hybrid
Identity 6	Lawyer-statesman:	Justice

Forming the identity of lawyers through education will embrace fundamental emotions and a morality that cannot be separated from the personality. The Carnegie Foundation's work on legal education expressed this as follows: 'Because law schools represent a critical phase in the transition into the profession, it is inevitable that it will influence students' image of what kind of lawyers they want to be.'⁵⁹³ In section 3.5 the relation between 'Who am I?' and 'Who are we?' was analysed, as the development of a professional identity is an ongoing process involv-

⁵⁹² Macfarlane, *The New Lawyer: How Settlement is Transforming the Practice of Law*, p. 45.

⁵⁹³ Sullivan et al., *Educating Lawyers: Preparation for the Profession of Law*, p. 135.

ing the relationship between the self and the profession, but from an educational view this process begins earlier, at university level.

8.3 The new lawyer in contemplative practices

Many lawyers express awareness of an increasingly holistic approach, in which lawyers wrestle with legal and business issues while striving for sustainability. This development has attracted a lot of attention in the USA where organisations such as the International Alliance of Holistic Lawyers,⁵⁹⁴ and Lawyers for a Sustainable Future⁵⁹⁵ promote new ways of lawyering.⁵⁹⁶ In this section some of the emerging professional networks will be analysed with respect to relations between the individual lawyer and societal challenges.

‘Contemplative practice’⁵⁹⁷ has been used as an umbrella term for a range of diverse new directions. It is not an unambiguous concept, but the diverse new directions mentioned below indicate that ‘contemplative practice’ breaks with traditional practice. The Carnegie Report recognises this movement and recommends ‘moving contemplative practice *from* margin to center.’⁵⁹⁸

Section 8.3.1 looks at the many contemplative practices that are future-oriented and aimed at sustainable solutions. In Chapter 7 it is shown how sustainability is connected to fundamental democratic rights or human rights. Many lawyers still see themselves as upholding these rights, and in sections 8.3.2 to 8.3.5 there is further analysis of lawyers’ relations to sustainability as an integral part of societal commitment.

8.3.1 Different labels for sustainable elements in lawyering

The term ‘sustainable lawyering’ is relatively new and its use is closely connected to the rise of a contemplative practice⁵⁹⁹ or the comprehensive law movement which cannot be disconnected from the lawyer. Some of the legal modalities practised by lawyers include: collaborative law, restorative justice, problem-solving courts, community lawyering, transformative mediation, preventive law and therapeutic jurisprudence. These are all alternative ways of lawyering. There are some matching trends in education, such as the network for humanising legal education.⁶⁰⁰

Sustainable lawyering seems increasingly to be a condition for fulfilling societal and individual conditions for conducting a legal practice. These changes are not only significant in practice. Scholars have started doing scientific research in this field. For example, Susan Daicoff sees the comprehensive law movement as a part of the answer to the malaise affecting the legal profession and the ills affecting society as a whole.

⁵⁹⁴ www.cuttingedgelaw.com (last accessed 3 July 2013).

⁵⁹⁵ <http://www.earthleaders.org/programs/lawyers-for-a-sustainable-future> (last accessed 25 January 2014).

⁵⁹⁶ Keeva, *Transforming Practice*, p. 149.

⁵⁹⁷ Daicoff, *The Comprehensive Law Movement: An Emerging Approach to Legal Problems*.

⁵⁹⁸ Sullivan et al., *Educating Lawyers: Preparation for the Profession of Law*, p. 56.

⁵⁹⁹ Magee, *Educating Lawyers to Meditate? Sustainable lawyering or contemplative practice*, pp. 4 and 6.

⁶⁰⁰ Krieger, *Human Nature As a New Guiding Philosophy for Legal Education and the Profession*, p. 101.

'At its best, the comprehensive law movement offers approaches to resolving conflicts and legal matters that help, not harm, people, relationships, and society and ultimately provides a new model for lawyering and conflict resolution. At the least, it simply offers lawyers more tools for their toolkits. Either way, it appears to be a development that is sorely needed in the legal profession and for society in general, with a vast potential to transform law and society for good.'⁶⁰¹

What can be seen is a transformation towards sustainable lawyering that includes the capacity for self-reflection, emotional intelligence and moral discernment. Rhonda V. Magee states that a new approach to the foundation of legal education can 'instil in young lawyers an abiding sense of an inspiring professional identity, embodying self-reflective civic engagement and practical, ethical judgment by broadening their ways of learning what they need to know to practice and to lead effectively in a changing world.'⁶⁰²

Scholars have started to analyse comprehensive ways of lawyering. Therapeutic jurisprudence is a holistic, interdisciplinary perspective that focuses on the impact of law on the emotional and psychological health of the participants, including clients, lawyers and judges. The goal of therapeutic jurisprudence is to bring sensitivity to legal practice and to focus on listening to participants with an awareness of the psychological and emotional issues, including stress, confidence and trust. David Wexler, one of the leading scholars in this field, has written an easy accessible introduction to therapeutic jurisprudence.⁶⁰³

Social justice lawyering also has elements of sustainability. Social justice lawyering is said to be analogous to artistic creativity since 'art is not a mirror to reflect the world, but as a hammer with which to shape it'.⁶⁰⁴ A lawyer can put their legal training into practice as a tool for proactively empowering individuals and communities. By serving in this way, lawyers have the power to transform systems. Some lawyers have the identity for carrying out these tasks.

The organisation Lawyers for a Sustainable Future (LSF)⁶⁰⁵ is a network originating in the USA to encourage leadership and involvement in the legal profession for creating a sustainable future. LSF believes the legal profession both has a responsibility and an opportunity to contribute in substantial and varied ways to the societal endeavour to create a sustainable future. In its mission statement, LSF refers to the Brundtland Report⁶⁰⁶ and the reference to: 'Lawyers using professional skills and knowledge in service to future generations and the earth.'⁶⁰⁷

⁶⁰¹ Daicoff, *The Comprehensive Law Movement*, p. 129.

⁶⁰² Magee, *Educating Lawyers to Meditate?*, pp. 4-3.

⁶⁰³ Wexler, *Therapeutic Jurisprudence: An Overview*, <http://www.law.arizona.edu/depts/upr-intj/intj-o.html> (last accessed 5 July 2013).

⁶⁰⁴ Ascanio Piomelli, *Appreciating Collaborative Lawyering*, 6 *Clinical L. Rev.* 431 (2000).

⁶⁰⁵ <http://www.sustainablelawyers.org> (last accessed 5 July 2013).

⁶⁰⁶ Our Common Future: "Sustainable development is meeting the needs of the present without compromising the ability of future generations to meet their own needs."

⁶⁰⁷ www.sustainablelawyers.org (last accessed 5 July 2013).

LSF has identified several areas of engagement for promoting sustainability.⁶⁰⁸ These include the lawyer in the practice of law, as a business adviser and as a user of resources, as well as lawyers using legal skills in a non-lawyer setting and lawyers making time for sustainability initiatives. More traditional professional legal organisations also promote sustainable lawyering. For example, the Boston Bar Association refers to three areas of sustainable lawyering: identifying best practice for law office sustainability, highlighting ways in which individual lawyers can lead more sustainable lives, and pro bono work for organisations advocating sustainability.⁶⁰⁹ The second of these in particular will be discussed in the following, as it may give inspiration for fulfilling the unsatisfied needs expressed by individual lawyers in the empirical study for this dissertation.

The aim of such sustainability initiatives is to facilitate the shift of the collective talent, influence and resources of the legal profession more into line with the goal of a sustainable future. This stimulates awareness both of individual lawyers and the profession as a whole. There are two aspects to lawyers as participants in sustainability initiatives, an external aspect and an internal aspect. The external aspect concerns how lawyers contribute to sustainability initiatives, and the internal aspect concerns how lawyers develop identities to live a sustainable individual life. At the individual level sustainability takes different forms in relation to different identities, but it will include a lifestyle with awareness of finances, a concern for the special needs of individual lawyers and concern for work-life balance to protect lawyers from burn-out. Sustainability in legal life involves a happy, joyful legal life where the old ideal of working for the community and for common values, as well as fulfilling the needs of clients, can merge with finding solutions for future generations.

Contemplative practice focuses on a more holistic, humanistic, solution-based approach to resolving legal problems. It is future-oriented and aims at sustainable solutions. However, contemplative practice can conflict with a traditional legal dogmatic approach and it therefore needs support from legal scholars.⁶¹⁰ The terminology is not yet clear and further delimitations and definitions are needed. However, all these variants of new lawyering express a need for future-oriented lawyering which includes meaning, direction, wellbeing, health and happiness for individual lawyers. How to initiate this transformation will be developed in section 8.4.

8.3.2 Sustainability at the societal level

It is clear from Article 3.5 of the EU Treaty that lawyers should associate lawyering with democratic values, and that these values include sustainability. Sustainability is already important in many fields. People buy hybrid cars, build green houses, and find new ways to use and recycle resources. In Chapter 7, section 7.1, it was concluded that at the societal level justice and sustainability are already connected. In a recent UN report, justice and sustainability seem to merge, when it is stated that:

'Good institutions are ... the essential building blocks of a prosperous and sustainable future. The rule of law, freedom of speech and the media, open political choice and active

⁶⁰⁸ http://www.sustainablelawyers.org/assets/seven_levels.pdf (last accessed 11 July 2013).

⁶⁰⁹ <http://thesustainablelawyer.wordpress.com/> (last accessed 3 July 2013).

⁶¹⁰ Hydén, *Att tänka rätt är lätt, att tänka nytt är svårt. Om att gå från ett idésystem till ett annat*, p. 91.

citizen participation, access to justice, non-discriminatory and accountable governments and public institutions help drive development.’⁶¹¹

Article 3.5 of the EU Treaty also refers to contributing to ‘the sustainable development of the Earth’:

‘In its relations with the wider world, the Union shall ...contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.’

Lawyers who perceive themselves as agents of justice will have their professional identities bound to sustainability in this model:

	Justice in sustainability – when needs meet satisfaction			
Field for law-yers	Economic needs of everybody	Social awareness of needs of specific groups	Ecological needs of future generations	Institutional framework
Ex.1. Housing Real estate	Develop rational construction practice	Social housing projects	Use recyclable materials or ‘cradle to cradle concepts’	Networking, private-public partnerships, participation
Ex.2 Employment and unemployment	Fundamental right to be self-supportive	Caring, flexibility and security in the labour market Health approach	Resource awareness - reproduction	Labour market organisations and public authorities
Ex.3 Dispute resolution. Alternative Dispute Resolution (ADR) Arbitration	Promoting peace through fast and cheap processes	Free professional support for access to justice	Holistic approach expanding the legal framework	Judges, lawyers, mediators and arbitrators in complementary actions

Figure 7-1. Justice and sustainability

Sustainability has the historical, conceptual and ethical quality typical of a fundamental principle of law. The traditional concepts of law and governance are being redefined in the light of ecological reality. In Scandinavian studies sustainability and law are connected, and law is seen as a translation of sustainable developments, supporting not only ‘what to do’ but also ‘defining who is going to act and how to proceed when taking a legal decision’.⁶¹² A new model is

⁶¹¹ UN Report, *A New Global Partnership: Eradicate Poverty and Transform Economies through Sustainable Development*, p. 4.

⁶¹² Hydén, *From Sustainability to Reality via Law*, p. 372.

concerned with the whole community of life and is grounded in value-based norms such as ecological justice, ecological human rights and ecological citizenship interpreted in the light of the principle of sustainability.⁶¹³

Lawyers who perceive themselves as participators in a democratic process will use their skills proactively to find sustainable solutions. This is seen in CSR and the 'cradle to cradle' concept, supported by the sustainable professionalism of individual lawyers. The late Ramón Mullerat was an important voice in the debate on lawyers' global responsibility, saying that our present world is still unjust, violent and selfish, where one third of its population lives in poverty, where social order fosters inequality and ignores the need for human freedom, where too often the law supports the will of the victors or the powerful. He stated that:

'Lawyers must contribute to globalization with the values of justice, peace and equality. We are six million lawyers in the world. All of us, in different times, places, and languages, have sworn to defend these values. If all of us could unite and get together, we would make the world a better place and would be proud to be lawyers.'⁶¹⁴

This is a grandiloquent statement, but it was still said by a European lawyer, who was the president of CCBE and it articulates an important perception of lawyers' role in society.

Clients' concerns are increasingly global. They face competition that is increasingly global and they are likely to value lawyers who understand the non-legal aspects of their problems, but they still need a lawyer to identify whether their problems have a legal dimension and can benefit from legal support. In Susskind's words, better access to justice should: 'embrace improvements not just to dispute resolution but also to what I call dispute containment, dispute avoidance, and legal health promotion.'⁶¹⁵

Dispute containment can prevent existing disputes escalating, while dispute avoidance prevents conflicts arising in the first place. This goes beyond risk management and can be likened to putting a fence at the top of a cliff rather than an ambulance at the bottom. This leads to the promotion of legal health, understood as 'preventive lawyering' where the lawyer ensures that clients benefit from the advantages and improvements that law can offer, and in a sustainable framework they can do so without damaging the interests of others.

Like proactive law, preventive law is a sustainable way of lawyering.⁶¹⁶ It underlines the agency of lawyers and the individual's responsibility for change.

8.3.3 Sustainability issues at the professional level

The agent/structure relation is expressed by Farrow as a need for lawyers to redefine their symbiosis with law and to look at legal life as a profession or a job and not as a life.⁶¹⁷ Many are concerned about the wellbeing of lawyers and their work-life balance or sustainable life.

⁶¹³ Kim, *The Principle of Sustainability: Transforming Law and Governance*, p. 310.

⁶¹⁴ Mullerat, *Law Practice in a Globalized World: The European Experience*, p. 16.

⁶¹⁵ Susskind, *Tomorrow's Lawyers* p. 85.

⁶¹⁶ Berger-Walliser & Østergaard (eds.), *Proactive Law in a Business Environment* p. 28.

⁶¹⁷ Farrow, *Law: A Profession, Not a Life*, pp. 218-220.

Some scholars frame the wellbeing of the practitioner in terms of legal ethics, stating that theories (and theorists) of legal ethics seek to guide lawyers' responses to the ethical dilemmas of legal practice, to help lawyers achieve a well-lived life and, at least sometimes, to shape public policy with respect to the regulation of the legal profession.⁶¹⁸ The profession can only survive if its members legitimise it, and its members must therefore have either a business idea or a personal interest in being a part of a profession.

If lawyers have a genuine understanding of what sustainability means for business, they will have an opportunity to play a more positive role as strategic enablers of an organisation's growth and influence its market behaviour. In particular, the *lawyer-businessman* and the *lawyer-entrepreneur* have already started to see possibilities for expanding their practice or support existing activities. Issues of corporate and commercial law affect businesses on everything from employment to corporate governance, energy to waste management, taxation and financing models, and the law has a fundamental influence on the development of key sustainability themes. Attorney Thomas Bourne,⁶¹⁹ who is a member of the Bond Pearce LLP firm's sustainable law steering group, says that lawyers can enhance sustainable business. Changes of tasks and business structures are a matter of ongoing debate within the profession.⁶²⁰

CSR is seen as a part of the global sustainability agenda. It is an area where the traditional role of the lawyer is challenged and an example where it is obvious that the supranational level imposes new activities and new challenges on the traditional lawyer. As seen in the empirical study in Chapter 5, some law firms have signed up to the UN Global Compact, a number of firms publish annual CSR reports and a few follow the Global Reporting Initiative (GRI) guidelines.⁶²¹ The definition of CSR used in this project is: 'How companies manage their economic, social and environmental impacts as well as their relationship in all key spheres of influence'.

Like other professional organisations and associations, national bars and law societies are also regarded as enterprises, and are subject to CSR requirements in a wider sense.⁶²² What is important is not so much the content of each principle, but the fact that the professional organisations express a commitment to sustainable elements and act accordingly.

In Europe, CSR is now seen as important and the CCBE has published a position paper on CSR and the role of lawyers, noting that companies that have adopted CSR increasingly impose CSR requirements on their suppliers, including law firms. In order to avoid a client's code of conduct becoming part of the contractual terms between the law firm and the client, and to avoid a multiplicity of potentially conflicting policies and requirements, law firms have gradually

⁶¹⁸ Woolley, *The Problem of Disagreement in Legal Ethics Theory*, p. 2.

⁶¹⁹ <http://www.guardian.co.uk/sustainable-business/blog/sustainable-business-development-law> (last accessed 12 November 2013).

⁶²⁰ Alternative Business Structures (Abs) New forms of practice for lawyers, Conference 1 November 2012 in Dresden, Germany.

⁶²¹ In Denmark, Forum Advokater, Roskilde, Denmark.

⁶²² The first CSR report was published on 2 January 2012 by The Association of Danish Law Firms (Danske Advokater), who have assigned to UN's CSR project, Global Compact in order to fulfill ten Global Compact-principles in strategy, culture and daily practice.

started to develop their own CSR policies.⁶²³ This can help lawyers keep their professional identities unaffected by others' norms. Lawyers in private practice, as well as in-house lawyers, are sometimes asked to join auditing teams whose task is not only to examine compliance with locally applicable laws and regulations, but also compliance with a globally applicable company policy.

Lawyers risk falling short of giving their clients comprehensive advice on the potential risks and liabilities of a given situation unless they take account of CSR aspects. As seen, the professional organisations and law firms are concerned with sustainability, CSR etc. in external relations. This concern can extend internally in law firms and support a mind-set for guiding the lifestyle and identity of the individual.

The adoption by a law firm of CSR policies may increase its attractiveness and enhance its ability to recruit talented young lawyers. The empirical study shows that some higher ideals in lawyering are demanded, especially by the youngest lawyers. This development has been seen in the USA and is now being integrated in the sustainable lifestyles of individual lawyers; see further on branding in section 8.3.5.

Following the discussion of sustainability at the societal and professional levels, the relationship of sustainability to the individual lawyer's identity will be analysed in sections 8.3.3 and 8.3.4.

8.3.4 Sustainable lawyers

Identity development, in the sense of a growing personal conscience, has been the focus of more attention and activities in the USA than in Europe. In its Model Rules of Professional Conduct, the American Bar Association (ABA) includes elements of sustainable professionalism, including personality issues for each lawyer. These principles have been analysed by Hamilton who states that, as the first element of professionalism, personal conscience is an awareness of moral goodness.⁶²⁴ As mentioned in the introduction, Trevor C.W. Ferrow has also explained the concept sustainable professionalism in relation to lawyers that has found its way to European law journals.⁶²⁵ 'New lawyering' or 'sustainable lawyering' are terms used to highlight change and to conceptualise what lawyers are doing differently and how they are doing it. Trust, openness, multicultural respect and awareness of religious norms and other traditions are part of new or sustainable lawyering included in the many concepts analysed in section 8.3.1.

In the empirical study in section 5.8, lawyers who are represented by the identities of *lawyer-humanist*, *lawyer-integrator* and *lawyer-statesman* are also reflected in Ferrow's observation that lawyers are looking for ethically sensitive ways to practise law in a way that assumes greater responsibility for the welfare of parties other than their clients and that increasingly

⁶²³ CCBE, *Position Paper on Corporate Responsibility*.

⁶²⁴ Hamilton, *Assessing Professionalism: Measuring Progress In The Formation Of An Ethical Professional Identity*, p. 113 f.

⁶²⁵ German Law Journal, online version www.germanlawjournal.com (last accessed 17 December 2013).

amounts to a plus for society and for the world's succeeding generations. In particular, the *lawyer-integrator* can be characterised by the statement that:

'Lawyers are also seeking ways to practice law that allow them to get home at night and on weekends, see their families, work full or part-time, practice in diverse and "alternative" settings, and generally pursue a meaningful career in the law rather than necessarily a total life in the law'.⁶²⁶

A sustainable legal practice still provides clients with the services they seek, but it does so in a setting that it does not drain the energy or soul out of the lawyer or others. Sustainable legal practice is proactive lawyering, leading to revitalisation and not just survival and avoiding burn-out. Sustainability is also about continuously renewing the lawyer's spirit, and contributing to physical, emotional and spiritual wellbeing. Practitioners have started to express new ways of lawyering in the branding of their firms. This is seen in Denmark and in other European countries, and examples of this are given in the following section.

8.3.5 Examples of how a sustainable life is expressed as a brand

In Denmark there is an example of the expression of sustainable lawyering in the branding of the law firm Winsløw, where the website gives a humanised image of the firm, stating: 'We work intensely for you as clients, but we also focus on a life that is more than work. Therefore we care for our leisure time and our lives with friends and family. In this way we generate the energy to work.'⁶²⁷ In an interview, a partner also stressed that the firm gives priority to work for the Danish Bar and Law Society,⁶²⁸ meaning the firm has a commitment to the profession and not just to the firm.

The law firm of Kennedy Van der Laan⁶²⁹ in the Netherlands expresses sustainability as social engagement: 'we also form a company, which is part of society. As a company we know that we are responsible for our surroundings and society, and for the sustainability of our environment. We are happy when our clients share our opinion'. About its clients it says: 'In our circle of clients we have a number of organizations that devote themselves fully to a better world. We admire their drive and their focus on those things in life that really matter'. The firm also supports local art and has a policy of being completely CO2 neutral, with solar panels, office bicycles and more, and it compensates for its remaining carbon emissions by buying certified emission rights for the support of green projects.

For many lawyers, living a professional life to fulfil a commitment to sustainability includes focusing on the transformative power of the individual, as described in the next section.

8.4 Transformative power in action

In a complex network of political, financial, cultural, religious and social forces, lawyers struggle to find out *who to be* in order to find their way in the mesh of dilemmas that a case can

⁶²⁶ Farrow, *Sustainable Professionalism*, p. 1002.

⁶²⁷ www.winlaw.dk (last accessed 1 July 2013).

⁶²⁸ Iben Winsløw in *Advokaten* 8/13.

⁶²⁹ www.kvdl.nl/en/socially-engaged (last accessed 7 November 2013).

give rise to. In the words of N. Martin, the aim of training ‘who to be’ is to focus ‘on training lawyers who lead by the power of their person, not by the privilege of their positions as lawyers in society’.⁶³⁰ The empirical study confirms that the move towards new ways of lawyering is in happening and that individual lawyers are ready to move, either to find new ways of practising or to leave the profession. Do legal practitioners have the possibility of depriving their self-concepts, routines, and institutions? Can lawyers work in the interests of a more collaborative practice in which meaning and direction, societal responsibility, and the expressed wish to belong overrule the immediate desire for money? The choices and constraints of identity development were analysed in section 6.4.

Section 8.4 concentrates on transformative power and its various elements in relation to identity development. Individualised learning, greater awareness, humanism, bodily wellbeing, emotions and empathy are all elements that support the development of an identity within or outside the legal profession. Individual identity, or subjectivity, includes happiness, accountability, democratic responsibility and satisfaction in personal and in legal life, and it is not limited to the rational side of legal life. Lave and Wenger, who look on identity development as a learning process, perceive a trajectory in which learners move from legitimate peripheral participants to core participants of a community of practice.

Given the increasing discontent among lawyers and the sense of meaninglessness which is observed in the empirical study, a trajectory to connect individual lifestyles to societal goals has started. Many of the lawyers interviewed expressed a feeling that they cannot control their lives and need inspiration for transformation to reconnect their lawyer identity to a societal level, to the professional level and to their personal desires for purpose, meaning and direction. These topics will be developed in sections 8.4.1 to 8.4.10.

8.4.1 Inspiration from individual trajectories within the legal profession

In the USA, about 10-15 years ago the ABA became aware of increasing personal discontent among lawyers and decided to take action. One thing it did was to employ Steven Keeva, who had a vision of how to transform law and find new ways of lawyering that could restore personal and professional satisfaction and improve practice.⁶³¹ Steven Keeva paved the way for transforming the profession by helping identify a direction for new lawyering. He expressed the thoughts and gave them words and prompted many important people to adopt life-changing attitudes.⁶³² He talked and wrote about the humanity of lawyers and how lawyers need to be nourished to do lawyers’ work. Keeva influenced the profession and opened the door to the inner lives of lawyers under the auspices of the ABA. The information he collected showed the many ways in which lawyers tried to integrate ‘who you are’ with ‘what you do’. Part of Keeva’s work was to identify varieties of lawyers in order to let many find a role model.

⁶³⁰ Martin, *Role, Identity, and Lawyering: Empowering Professional Responsibility*, p. 54.

⁶³¹ Keeva, *Transforming Practice*.

⁶³² Steven Keeva died in 2012. After a stay in the USA, Pepperdine University in 2002, I had a meeting with him in Copenhagen in 2003. He gave permission to translate and use some of his exercises in my book *Mindfulness – et helhedssyn på liv og ledelse*, Djøf 2005.

Keeva pointed out the lawyer's role as an agent of change, how lawyers can do things differently and can make a difference and find joy in legal life. He developed a theoretical foundation and gave voice to lawyers who had been transformative. His work has served as a model in law schools on how to find meaning, satisfaction and purpose in law and it is constantly referred to.⁶³³ Keeva was not alone in pointing to the relation between how lawyers live and a societal commitment,⁶³⁴ but he was one of the first and was supported by ABA.

The development of different collective contemplative practices has grown from focusing on individual awareness. The ABA has published a book by Kim Wright that explores the question: What if lawyers were peacemakers, problem-solvers and healers of conflicts?⁶³⁵ She teaches lawyers new ways of finding satisfaction in law practice and of providing comprehensive, solution-oriented services to clients, finding the best possible answer for everyone involved.⁶³⁶ She gives advice on how to incorporate holistic lawyering in law practice,⁶³⁷ emphasising the contextual complexity that makes it crucial for the individual to know how their individual purposes and the purpose of law fit together. According to Wright, when lawyers work with clients whose values align with theirs, they will be more effective and happier. Lawyers should take time to understand their clients and the reasons they seek legal advice. Part of building a good client relation means that the lawyer takes care of their personal wellbeing. As Wright points out, a stressed-out lawyer cannot serve their clients well. The Carnegie Report refers to personality development as a need for lawyers to 'think, to conduct and to conduct themselves'.⁶³⁸ This is an individual process, so it is important to find learning strategies that take into consideration that the end-product, the transformed lawyer, has many manifestations. While Keeva started with the individual, Wright and the Carnegie Report include the relation between the lawyer and the profession.

8.4.2 Self-directed learning

The power of agency influences the choice of learning strategy. Giddens has no applicable theory on education, but he emphasises individualisation which is in accordance with theories of self-directed learning. When well-educated adults learn, it is important to base the learning on their own motivations and choices and to choose learning goals that relate to the individual's needs and visions. The characteristics of a self-directed learner have been repeatedly highlighted in European learning environments, where life-long learning and continuing legal education emphasise the role of the individual. The individual expert potentially includes appearing as a moral and responsible individual. Individualism differs from selfishness because an individualist must respect and manage other people's rights as individuals. S. Malcolm

⁶³³ Baron & Corbin, *Thinking like a lawyer/acting like a professional: communities of practice as a means of challenging orthodox legal education*, pp. 100-119.

⁶³⁴ Pearce & Wald, *The Obligation of Lawyers to Heal Civic Culture*.

⁶³⁵ Wright, *Lawyers as Peacemakers: Practicing Holistic, Problem-Solving Law*.

⁶³⁶ www.abajournal.com/legalrebels/ (last accessed 5 July 2013).

⁶³⁷ www.abajournal.com/news/article/five_ways_to_incorporate_holistic_lawyering (last accessed 5 July 2013).

⁶³⁸ Sullivan et al., *Educating Lawyers: Preparation for the Profession of Law*, pp. 33-34.

Knowles's self-directed learning theories, which can supplement Giddens, have the following characteristics.⁶³⁹

- The individual moves from a dependent to a self-guided, independent (self-directed) personality.
- The individual acquires an ever greater sum of experiences that make up a growing learning resource.
- Readiness to learn increasingly includes tasks for the development of social roles that are already carried out.
- The time perspective is shifted from the postponed application of knowledge to its immediate use.

The ultimate goal of self-directed learning is self-actualisation or the development of identity by putting the learner at the centre. The professor, teacher, mentor or coach is a facilitator. The process is not the goal but only a means for realising a chosen lifestyle. The goal is reached only when the lawyer is self-directed and their personal potential emerges. Even though the development of the individual's potential is at the centre, the objective of the learning must be linked to participation in public or professional life by maintaining the interpersonal aspect that cannot be acquired without human relations. For example, the *lawyer-entrepreneurs* depicted in Chapter 5 do innovative work and are pioneers. They learn from a self-directed individualised learning style and content, often in new communities of practice, which may conflict with the established standards or professional curriculum. Many other legal practitioners need to be self-directed learners when acting proactively in areas where the legal framework is changing.

8.4.3 Lawyering includes self-awareness

Lawyers must develop a basic trust in themselves in order to fulfil the goal of being a trusted adviser for others.⁶⁴⁰ Risk assessment is crucial for individual lawyers who must take risks on behalf of others while being open to opportunities and ready to open the self to the unknown. A self-aware lawyer is tuned into how they are influenced by and influence the situation.

Individualised practice still contains responsibility for the whole – a holistic approach that is reflected in many of the new identities, especially identity as *lawyer-humanist*, *lawyer-integrator* and *lawyer-statesman*. From the empirical research in Chapter 5, it can be seen that many lawyers have changed their way of lawyering to approach new conditions.

A modern self-identity project will contain a range of elements to depict the self. First, the self is a reflective project and self-understanding is subordinate to the more inclusive and fundamental aim of building or re-building a coherent and reporting sense of identity.⁶⁴¹ The disconnection between lawyers' inner lives and their professional lives makes it all too easy for them

⁶³⁹ Knowles, *What is Andragogy?*

⁶⁴⁰ Giddens, *Modernity and Self-identity – Self and Society in the Late Modern Age*, p. 215.

⁶⁴¹ Giddens, *Modernity and Self-identity – Self and Society in the Late Modern Age*, pp. 75-77.

to lose their moral compass when they ultimately become a settled member of the profession.⁶⁴² Therefore, lawyers' self-awareness, including their awareness of how their emotions affect their thinking, behaviour, and have an impact on others, should be trained. That it is possible to do so is confirmed in the observations of the participatory study of the European mediator training for lawyers and psychologists; see section 7.3.

8.4.4 Humanity in education and identity formation

Attitudes and behaviour are linked to education and identity formation in a given cultural, national or political setting which shapes identity. For lawyers, contextualisation and critical reflection about the choices they can make may reveal the existence of a grey zone. In this zone they can more or less consciously transgress the border of good lawyering and risk a disciplinary sanction. Relating this to identity means being aware that lawyers would not normally embark on a career with unethical intentions or preferences, but that anyone can fall short of the standards of the profession.⁶⁴³

Based on their identities, lawyers can choose individually to act with good intentions or bad. Lawyers also have the challenge of setting up the criteria for what is good and what is bad. In the empirical study several lawyers pointed out that their moral foundation is more closely connected to the ethical standards of their families than to their professional training.⁶⁴⁴ Giddens recognises the importance of intimate relationships and states that the fulfilment of an identity is in some part a moral phenomenon, because it means 'fostering a sense that one is "good", a "worthy person": I know that as I raise my own self-worth, I will feel more integrity, honesty, compassion, energy and love.'⁶⁴⁵

The empirical study shows a need for a more 'humanised' legal life, which makes it relevant to attempt to determine what this means. A 'humanised' legal life includes a persistent motivation to experience happiness, contentment, or wellbeing; the desire and capacity to grow and expand in multiple dimensions of life; and the need to be with other people in ways that allow for understanding and being understood, helping and being helped, caring and being cared for. Again Giddens's theory cannot explain how to humanise, but it can be complemented by the work of other scholars like Larry Krieger who defines a 'humanising' social environment or context as:

'one that promotes these experiences of an optimally functioning person. Such an activity or context would incorporate an understanding of human nature and would therefore maximize meaning, positive motivation, well-being and performance ... experiences of

⁶⁴² Riskin, *Awareness and Ethics in Dispute Resolution and Law: Why Mindfulness Tends to Foster Ethical Behavior*, as referred to by Wellford Slocum, *An Inconvenient Truth: The Need to Educate Emotionally Competent Lawyers*. Riskin contends that teaching students how to cultivate the ability to step back from their emotional responses fosters ethical behaviour.

⁶⁴³ Martin, *Role, Identity, and Lawyering: Empowering Professional Responsibility*, p. 4.

⁶⁴⁴ Focus groups 1 and 5.

⁶⁴⁵ Giddens, *Modernity and Self-identity – Self and Society in the Late Modern Age*, p. 79.

personal growth and increasing integrity, through the integrated expansion of authenticity, conscience, morality, and social awareness.⁶⁴⁶

Krieger describes the general core human qualities of a psychologically healthy, thriving person. A lawyer who leads a humanised legal life will experience their activities as chosen and authentic, as personally endorsed rather than controlled, and will have regular feelings of competence and relatedness to others. While experiencing the typical ups and downs of life and events, they will generally feel that life is good, vital and meaningful. Krieger has connected the academic world to the problems of the profession at the individual level and he makes the problems that are currently perceived as individual more general, and turns them into an educational issue that universities must integrate in their teaching.

It is not only Larry S. Krieger who has done pioneering work on new programmes for humanising legal education.⁶⁴⁷ Two particularly important points in the recent research should be emphasised. One is the significance of an internal, autonomous and authentic point of reference for choices and experiences. As previously mentioned, autonomy includes authenticity or internal consistency, and hence relates strongly to one's character and integrity. This emphasis on autonomy is therefore critical for professionalism, since morality and integrity are central to professionalism.⁶⁴⁸

The second point is the overarching importance of subjective well-being. Probably the single feature that is most characteristic of a good quality of life is a sense of well-being. Life then feels pleasant, meaningful and 'right'. However, Krieger's research demonstrates that every other marker of a psychologically well-lived life, including personal and interpersonal values, internal motivation, a sense of self-esteem, competence, autonomy, relatedness to others, and ongoing growth and maturation, contribute to subjective wellbeing. Very few lawyers in the empirical study indicated that they had an overall feeling of wellbeing, which is why this will be the focus of the next sections.

8.4.5 Grounded body – physical well-being

Giddens's trajectory of the self includes the body and awareness of the body⁶⁴⁹ in reflexivity and the shaping of identity. The reflexivity of the self extends to the body and the body gives indications of the state of mind of the lawyer. Depression, sleep disorders, food, sex and a 'fake-it-till-you-make-it' attitude is almost accepted as an integral part of a lawyer's life. There is not much documentation of such dysfunctions in Europe, but in the USA researchers,⁶⁵⁰ individual lawyers⁶⁵¹ and the professional organisations⁶⁵² have addressed the problems and suggested solutions.

⁶⁴⁶ Krieger, *Human Nature as a New Guiding Philosophy for Legal Education and the Profession*.

⁶⁴⁷ Humanizing Legal Education website was launched in 1999 at Florida State University College of Law, http://www.law.fsu.edu/academic_programs/humanizing_lawschool.html (last accessed 10 October 2013).

⁶⁴⁸ Hamilton, *Professionalism Clearly Defined*.

⁶⁴⁹ Giddens, *Modernity and Self-identity – Self and Society in the Late Modern Age*, p. 77.

⁶⁵⁰ Gerarda, *Deeply Contacting the Inner World of Another*, p. 199.

⁶⁵¹ Benjamin, *Reclaim Your Practice, Reclaim Your Life*, p. 30.

In the empirical study lawyers, especially *lawyer-integrators*, pointed out that in the midst of the burdens of legal work there are ways to sustain physical wellbeing. The *lawyer-performers* also talked about monitoring cholesterol levels, avoiding trans fats and eating only dark chocolate for health reasons. Nutrition, diet, and exercise seem important for many lawyers. Significant studies confirm that mindfulness and meditation⁶⁵³ improve the functioning of the immune system and actually produce 'happiness' as measured by brain-wave activity.

Giddens includes the body in self-actualisation, and the whole body is becoming an area for options and making choices.⁶⁵⁴ There are many ways to individualise the body, such as by the cut and colour of hair, being slim or developing muscles, getting tattoos, piercings and other decorations which only few years ago would have been unthinkable among academics. Common physical activities like football, tennis, running etc. also integrate body and work.

All the lawyers in the empirical study revealed styled images, often with some identity markers that can brand both the firm and the individual. For lawyers, fashion is not only a theme for lunchtime discussions, it is also a topic in serious magazines.⁶⁵⁵ Lawyers and their bodies could be studied in depth, but the aim of this section is to note that identity is also embodied in the body of the lawyer.

8.4.6 Emotions and legal thinking

Scientific thinking is based on the philosophy of Descartes. However, just as Montesquieu's societal structures have been challenged, the separation of rationality and emotion has also been challenged. Daniel Goleman has pointed out that, without access to emotional memory 'everything takes on a gray neutrality', making it virtually impossible to engage in decision-making. Goleman refers to Antonio Damasio, 'Descartes' Error: Emotion, Reason, and the Human Brain' (1994).⁶⁵⁶

Rational understanding that is based on a 19th Century understanding of the human brain has been fundamentally weakened and is contradicted by modern neuroscience. Today's science makes it clear that thinking is only possible because the limbic region of the brain (the 'emotional' brain) interacts with the cerebral cortex (the 'thinking' brain). It is outside the scope of this thesis to go more deeply into neuroscience, but the following quotation summarises the essence:

'The ideal of a dispassionate analytical mind untainted by emotions and personal biases is a fiction (...) The emotional brain is an integral partner with the thinking brain in the way that we process and assess information, for it is the emotional brain that assesses

⁶⁵² ABA Commission on Lawyer Assistance Programs (COLAP).

⁶⁵³ Riskin, *Further Beyond Reason: Emotions, The Core Concerns, and Mindfulness in Negotiation*.

⁶⁵⁴ Giddens, *Modernity and Self-identity – Self and Society in the Late Modern Age*, pp. 99 and 100.

⁶⁵⁵ DJØF-bladet from The Association of Lawyers and Economists.

⁶⁵⁶ Goleman, *Emotional Intelligence*, p. 28.

the value and meaning of the information we appraise and that determines its significance'.⁶⁵⁷

In the field of rhetoric and communication, since ancient times⁶⁵⁸ writers have recognised that to argue a case effectively and convincingly an appeal must be made to different aspects of the audience, including the use of logos, ethos and pathos. In legal training the latter two have lost their power or have been excluded from the basic law school curriculum in Denmark. This process starts long before the lawyer is recognised as a lawyer. According to Mertz,⁶⁵⁹ in university education language will be a crucial factor for identity development by training in language for a special way of thinking. Other ways of relating (or not relating) are analysed by Perry, who argues that law schools must be careful to 'avoid giving students the false impression that the law exists in a vacuum'. He notes that being a 'legal professional' concerns the lawyer's ability to relate to people 'as much, maybe more as it is about engaging theories and facts'.⁶⁶⁰ These competences are linked to the individual identity. In legal communication approachability is often a neglected instrument.⁶⁶¹

The rule of law and the interpretation of the law require developing skills in legal analysis and logic. In this there is some meaning in disregarding emotions. The emotions can undermine the ability to reason clearly, so law schools and legal practitioners have unanimously agreed to suppress or exclude emotions and mainly train lawyers to reason analytically. However, logic-based lawyering requires an input from the emotional brain.⁶⁶² Developing identity in the sense of constructing 'who to be' cannot separate logic from emotion or make a split between left brain and right brain. Empathy, curiosity, imagination and self-awareness can be trained.⁶⁶³

Many lawyers confuse empathy and sympathy. Sympathy can mean offering a tissue when someone starts to cry or comforting them when they are upset. Empathy is defined here as the ability to share someone else's feelings or experiences by imagining what it would be like to be in their situation. Empathy is a life-skill that is not taught as part of a legal education. In training for mediators, both in Denmark and in the Brussels training analysed in Chapter 7, it appears essential to learn more 'soft' skills and internalise them as a part of practice and lifestyle. The Danish Bar and Law Society has published advice to lawyers to be more empathetic⁶⁶⁴ and many initiatives are promoted for which there is no scientific evidence as to the effectiveness

⁶⁵⁷ Siegel, *The Developing Mind: Toward A Neurobiology Of Interpersonal Experience*, pp. 158-159, quoted by Robin Wellford Slocum in *An Inconvenient Truth: The Need To Educate Emotionally Competent Lawyers*.

⁶⁵⁸ Aristotle and Cicero.

⁶⁵⁹ Mertz, *The Language of Law School: Learning to "Think Like a Lawyer"*.

⁶⁶⁰ Perry, *Thinking Like a Professional*.

⁶⁶¹ Høedt-Rasmussen, *Juridisk Gennemslagskraft*, p. 66.

⁶⁶² Baron & Corbin, *Thinking like a lawyer/acting like a professional: communities of practice as a means of challenging orthodox legal education*, pp. 100-119.

⁶⁶³ Brown, *Deeply Contacting the Inner World of Another: Practising Empathy in Values-Based Negotiation Role Plays*, p. 203.

⁶⁶⁴ This article was first published in *Managing Partner* (www.managingpartner.com). Later it was translated and rewritten in the Danish magazine for Lawyers, *Danske Advokater*, September 2012.

of these tools. Nevertheless the professional organisations seem to respond to a wish or need expressed by their members related to the emotional or personal sides of lawyering.

Many of the lawyers interviewed regard empathy as a desirable skill and wish they had more empathy, but during their legal studies they have not had any training on how to link empathy to legal thinking. According to the empirical study, empathy is often lacking in law firms or is considered to conflict with legal thinking.

8.4.7 Meaning and direction in the individual life of a lawyer

The Carnegie Report on Educating Lawyers highlights the need for more robust professional integrity. A significant disconnection between values and practice is not sustainable. Scholars have developed tools to support training for new proactive and sustainable ways of lawyering,⁶⁶⁵ but many lawyers still feel a lack of purpose and pride in their work. In addition to the findings of the empirical study for this dissertation, this perception is documented by Macfarlane, who states that 'this situation is merely a symptom of a wider malaise – a concept of professional identity that is at best frozen in time and at worse increasingly inchoate'.⁶⁶⁶

The Carnegie Report notes that law students are often told to put to one side their desire for justice. Putting aside one's deeply held values is not a sustainable way to live or to practise, and the costs of doing so are too high both for the lawyer's professional life and their lifestyle in general.⁶⁶⁷

Some lawyers have an identity which makes it easier for them to form a community and to harmonise the various levels they relate to. *Lawyer-humanists* in particular emphasise the importance of harmony and peace. Being able to communicate their desires in relations with others gives influence, meaning, direction and elements of control to their professional lives. In the empirical study such lawyers say they feel happy, which gives some hope as several studies show that lawyers are not generally happy.⁶⁶⁸ Happiness is not solely a matter for the individual. 'The pursuit of happiness' was thought by the framers of the US Declaration of Independence to be an unalienable right. However, in 1776 the definition of 'happiness' was different from its meaning today. When the framers of this historic document wrote about 'Life, Liberty, and the Pursuit of Happiness', the concepts of civic responsibility and *happiness* had other resonances in the minds of the political thinkers of the 18th century than in 21st century minds. Many of the Founding Fathers of the USA were lawyers. Anthony Kennedy⁶⁶⁹ has explained this sense of happiness. For the framers of the Declaration of Independence 'happiness' meant the feelings of self-worth and dignity that might be acquired by contributing to the community and to its civic life. In the context of the Declaration of Independence, 'hap-

⁶⁶⁵ Daicoff et al., *Expanding the Lawyer's Toolkit of Skills and Competencies: Synthesizing Leadership, Professionalism, Emotional Intelligence, Conflict Resolution, and Comprehensive Law*, pp. 807 and 837.

⁶⁶⁶ Macfarlane, *The New Lawyer: How Settlement is Transforming the Practice of Law*, p. 64.

⁶⁶⁷ Sullivan et al., *Educating Lawyers: Preparation for the Profession of Law*, p. 129.

⁶⁶⁸ Seligman, *Why are lawyers so unhappy?* and Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*.

⁶⁶⁹ US Supreme Court Justice Anthony Kennedy explained this often forgotten sense of happiness in his 2005 lecture at the National Conference on Citizenship.

piness' was about an individual's contribution to society rather than the pursuit of self-gratification.

In Denmark, Petersen has stimulated the debate about justice, goodness and happiness,⁶⁷⁰ related to individual responsibility for global activities. This perception is in line with structuration theory but it is rarely reflected in today's postgraduate training which seldom treats identity development, meaning, direction and happiness in depth. Some programmes on mindfulness are available in the market for education, and the empirical study shows that lawyers are moving away from strictly mechanical, linear, left-brain driven training to more integrated learning processes. This is seen especially by how ADR and CSR are being integrated in daily practice as a *lawyer-entrepreneur*, *lawyer-integrator* or *lawyer-humanist* (see Chapter 5).

8.4.8 A mindful practice

Mindfulness training is one of the tools which have been used to develop intuition and for taking intuition seriously. Lawyers often have problems fully recognising this rather insubstantial form of intelligence. Leonard L. Riskin is one of the pioneers of integrating legal practice and mindful practice.⁶⁷¹ Mindfulness involves a holistic approach to lawyering and it is an easily applied technique for increasing wellbeing and developing a new kind of consciousness. Hitherto, mindfulness has mostly been used in ADR systems. The basic idea is to shift one's consciousness from 'doing' to 'being'. When mindfulness is analysed more deeply, as a tool for transforming or developing identity, it is based on the idea that lawyers need tools to promote their individual transformation. To a certain extent mindfulness can support this process and unite individual aspirations with societal expectations of sustainability.

Mindfulness means completely focusing on the 'now', both physically and mentally.⁶⁷² At its simplest, mindfulness is about observing a moment, experienced through respiration, and trying to capture the precise moment through breathing. The sole aim is to be attentive and observant, which creates opportunities for finding new solutions. Mindfulness programmes, body-mind programmes and similar have become widespread in academic circles,⁶⁷³ including in law schools. These programmes can be used to develop awareness of responses and conflict patterns and to prevent falling into the usual traps. Mindfulness is inspired by ancient meditation and absorption of Eastern Buddhism transformed into Western practice.⁶⁷⁴ The techniques can be applied without involving any religious element. Mindfulness *can* become a way to support sustainable lawyering. In Denmark, mindfulness has been adopted more by managers than by lawyers, but at least one influential law firm (*Kammeradvokaten*) provides mind-

⁶⁷⁰ Petersen, *Retfærdighed, godhed og lykke*, p. 218.

⁶⁷¹ Riskin, *Further Beyond Reason: Emotions, the Core Concerns, and Mindfulness in Negotiation*.

⁶⁷² Rogers & Jacobowitz, *Mindfulness & Professional Responsibility*, p. 83.

⁶⁷³ Symposium on Mindfulness in Law and ADR, *Harvard Negotiation Law Review*, May 2002.

⁶⁷⁴ Magee, *Educating Lawyers to Meditate?*, p. 6.

fulness training for its lawyers.⁶⁷⁵ A few fundamental mindfulness principles can support new ways of lawyering:⁶⁷⁶

1. The principle of not being judgmental – to be observant without evaluating

Lawyers must practice waiting to make their own evaluations until they have heard what the parties say, and keep an open exploring mind.

2. The principle of patience

Lawyers must focus on many different interests and remember that conflicts, which they may categorise as legal problems, can involve strong emotions or core values for those directly involved in the conflict. It will often be the process rather than the result that resolves a conflict, and sometimes a process takes a long time which is not subject to the rational application of time.

3. The principle of openness

The idea of mindfulness is to work with unlimited possibilities now, to cultivate self-understanding and optimise presence. This means seeking a common solution right now, in the presence of the parties involved rather than seeking or manipulating a result which the lawyer finds expectable or predictable.⁶⁷⁷

4. The principle of aversion and attraction

A basic principle of mindfulness is to relate professionally and privately to aversion and attraction, in other words to those things one is either repelled by or attracted to. Other than material things, lawyers can be attracted to non-material services, as well as acknowledgement and a good name and reputation. On the other hand lawyers can be repelled by the fear of losing something material, being a victim of criticism or blame, or getting a bad reputation. 'Is this going to be the kind of case that will ensure me a thriving business from now on?' (attraction); 'I would be so happy if my client gets sole custody' (attraction); and 'My colleagues will despise me if I agree to that solution' (aversion).⁶⁷⁸ These are normal reactions. With mindfulness one can practise not being controlled by aversion and attraction, so that it will not be the lawyer's aversion or attraction that determines the outcome of a case.

Being a competent lawyer in a professional field can limit attempts to find new ways of lawyering. Few parties experience their problems as legal problems. A problem only becomes a 'legal problem' when the person with the problem contacts a lawyer. In the USA, there have been many positive results in the legal field based on the principles of mindfulness mentioned above. This development is described in the work of Magee.⁶⁷⁹ The experience of lawyers using mindful practice is that they feel more alert at work and that their empathy grows. At a

⁶⁷⁵ Høedt-Rasmussen: *Mindfulness – et helhedssyn på liv og ledelse*, (Mindfulness – a holistic approach to life and management).

⁶⁷⁶ Høedt-Rasmussen, *Mindfulness i mediationsforløb*.

⁶⁷⁷ Rogers & Jacobowitz, *Mindfulness & Professional Responsibility*, p. 74.

⁶⁷⁸ Høedt-Rasmussen, *Mindfulness i mediationsforløb*.

⁶⁷⁹ Magee, *Educating Lawyers to Meditate*, pp. 15-17.

personal level, lawyers have experienced reduced stress and a deeper feeling of obligation to the basic principles of justice and a will to work for them.

As the practice of mindfulness also strengthens inner feelings of happiness, effective work becomes more satisfying. The mindfulness techniques can be used to 'scan' other people in a room, both physically and mentally.⁶⁸⁰ A mindful practice is a sustainable practice where the mind and heart are harmonious.⁶⁸¹

Having new tools to support a transformation, it becomes important to rethink the curriculum of postgraduate training, to expand interdisciplinary skills and to develop identities that can fulfil both societal expectations and individual aspirations to find meaning and satisfaction in legal life. In section 8.5 it is assumed first, that there is a need for lawyers to have common general competences, then there is a need for an individualised curriculum and finally there is a need for special training for sustainability.

While section 8.4 has identified some tools that can have transformative power and their relation to individual agency, section 8.5 discusses curriculum planning for a heterogeneous profession.

8.5 Curriculum – expanded interdisciplinary skills

To initiate the discussion on curriculum design, the lawyers in the empirical study were encouraged to identify common roles or competences which affect their identity. A curriculum based on humanism has a classic orientation towards learning with a fixed curriculum that is often referred to as rational humanism. Its goal is to prepare people (lawyers) who will be rational citizens in a society ruled by reason.⁶⁸² A main problem of traditional legal education is that it fosters or fails to foster the values of professional responsibility and professional identity. There is renewal of the longstanding concerns about the marginalising of legal ethics.⁶⁸³ The new movement to humanise legal education refers to the classic values but it cannot relate to a fixed curriculum because of the specialisation, individual lifestyles and international elements of lawyering. Some of the statements in Chapter 5 show that lawyers describe their identity development as a process of learning-by-doing. John Dewey's learning-by-doing theory⁶⁸⁴ supports the individualised curriculum and has been a stepping-stone to social learning theories, primarily based on the work of Albert Bandura⁶⁸⁵ and now developed by Jean Lave and Etienne Wenger who argue for the importance of learning in communities. In many ways becoming a lawyer is a learning-by-doing process in a community setting. In Chapter 3 the structured process of becoming a lawyer was analysed in more detail. Legal rationality is not the only aspect of learning to be a lawyer. The lawyer's curriculum is increasingly integrated in 'law and ...' concepts like law and mediation, law and literature, law and legal performance,

⁶⁸⁰ Keeva, *Transforming Practice*, p. 71.

⁶⁸¹ www.the completelawyer.com/a-mindful-practice-is-a-sustainable-practice.html (last accessed 3 July 2013).

⁶⁸² Hewitt, *Understanding and Shaping Curriculum*, p. 116.

⁶⁸³ Rhode, *Legal Education: Rethinking the Problem, Reimagining the Reforms*, p. 450.

⁶⁸⁴ Dewey, *Democracy and Education*.

⁶⁸⁵ Bandura, *Social Learning Theory*.

law and ethics, law and economics, law and philosophy, law and learning. Legal scholars are attentive to law in different settings.⁶⁸⁶

Section 8.5.1 analyses the curriculum implications for lawyers to become experts in a heterogeneous profession, and section 8.5.2 discusses the need for individualised curriculum planning. Because of the expanded societal obligations related to sustainability, section 8.5.3 studies the special needs of training for sustainable lawyering.

8.5.1 How to become an expert?

Developing the expertise that will form an expert is a matter of curriculum, but it may be difficult to identify experts. To have an identity as an expert involves a reliance on personal knowledge, skills, experience, training and education. As said by Thomas Hewitt: ‘they are experts by virtue of what they know and have done’.⁶⁸⁷

In order to determine the cognitive functions needed for the trajectory from being a beginner to becoming an expert, the individual learning process itself must be analysed. Is that possible? Individualisation and specialisation within the legal profession means that a lawyer’s expert knowledge is in part learned in unconventional ways. Therefore it may not be possible to generalise expert learning across legal domains and persons, either in the content or in the process. As expert knowledge is both dynamic and transitional and shifts over a short period, there is no common route for developing identity as an expert.

Studies show that novices have different cognitive processes to those of expert practitioners. Novices see the source of knowledge as external to them, whereas experts use their own experience as their main source of knowledge.⁶⁸⁸ This means that professional lawyers grow into their identities and that the personal and professional identities merge. Schön has also found that in the development process the mental patterns of expert practitioners are constantly adjusted in the light of their professional experiences and reflective thought. Reflection is usually prompted by the unexpected that occurs in the course of practice. Reflection-in-action is the capacity to reflect without stopping in the middle of an action to consider several possible solutions.⁶⁸⁹ For the experienced practitioner Schön adds a further layer of reflection on reflection-in-action. In this process an expert practitioner is able to imagine a response to a client’s new approach, such as a demand for sustainable and proactive solutions, and expand from merely clarifying an existing problem. Nevertheless, an individual reflection process to promote the development of identity or competences is important. Thomas Hewitt refers to this process as being essential to curriculum considerations.⁶⁹⁰

A major part of the identity development of lawyers is participation in communities of practice, so the social learning approach must be included in the curriculum for becoming an ex-

⁶⁸⁶ Schaumburg-Müller (ed.), *Retlig mangfoldighed*.

⁶⁸⁷ Hewitt, *Understanding and Shaping Curriculum*, p. 69.

⁶⁸⁸ Polkinghorne, *Postmodern epistemology of practice*, p. 156.

⁶⁸⁹ Schön, *The Reflective Practitioner: How Professionals Think in Action*, p. 49 f.

⁶⁹⁰ Hewitt, *Understanding and Shaping Curriculum*, p. 78.

pert. When lawyers are in practice-related learning situations,⁶⁹¹ each group is unique and one group cannot give a learner in another group equivalent learning conditions. This is another element of individualisation in the ongoing education and development of competences and identity which will affect curriculum work at all levels. It has already been observed that individual lawyers and law firms organise specific job-related training for individuals or smaller groups, often in cooperation with others. This leads to new communities of practice and makes curriculums non-comparable. The empirical study shows that this development leads to different identities where lawyers use their specialisations to distance themselves from some lawyers and to assimilate with others. This process also takes place across borders.

8.5.2 Individual curriculum design

In its content and methods, the basic training provided by the Danish Bar and Law Society is still related to the classic perception of a lawyer. Having identified six different lawyer identities from the empirical study, it is relevant to look at the training provided to become or acquire one of these identities. At the society level, in the EU the tasks and functions of lawyers have changed and are not specifically related to the profession as such. From the perspective of Giddens, experts are replacing professionals and the different lawyer identities can be perceived as different lawyer experts with different training needs. The professional organisations are aware of the changes but still provide training that sustains the classic perception of a lawyer. Many aspects of the characteristics of the European artefact of the lawyer are recognised by Danish lawyers.

Lawyers, who have been trained to practise law in the traditional manner, may require additional training to develop proficiency in practising a more comprehensive approach to law, whether practised as mediation, restorative justice or other kinds of alternative lawyering. The skills necessary for comprehensive lawyering often differ from those emphasised in the training and personality of lawyers.⁶⁹² The development of new identities in training can take many forms. Identity perceptions are also derived from previous experience with its combined cognitive and emotional aspects that are the preconditions for of the perception of present situations. As most lawyers are intelligent people who have been able to acquire complicated knowledge and can cope with complexity, they will undoubtedly be able to learn more from other disciplines. Unfortunately there are some actions that lawyers cannot take as members of the profession according to its code of conduct, even if to do so would advance the interests of the clients they represent or advise. The interpretation of 'conflicting interests' has led to the situation where multitalented practitioners who break with the traditional perception of the legal profession are excluded from it. Such a conflict of interest was the key issue in a recent case before the European Court of Human Rights. In its judgment of 14 January 2014 the Court found that the refusal of the Romanian Bar and Law Society to admit to the legal profession a medical doctor with a law degree was in breach of Article 8 of the Convention.⁶⁹³ This

⁶⁹¹ Lave & Wenger, *Situated Learning – Legitimate Peripheral Participation*.

⁶⁹² Daicoff, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, p. 46.

⁶⁹³ ECtHR *Mateescu v. Romania*, 14 January 2014.

judgment can be interpreted as the acceptance of hybrid professionals acting with interdisciplinary skills, and it underlines the need for individualised training and education.

The training for the *lawyer-businessman* is supported in programmes like those for talented young lawyers which focus on the ability to earn money. The CCBE is aware that this identity is very different from that of the classic lawyer, but for the *lawyer-businessman* this training is in accordance with their identity. The *lawyer-performer* is supported and trained in procedural skills and communication. There are many courses available in negotiation, communication, ADR and rhetoric for litigation.

The *lawyer-entrepreneur* has to find their continued training outside the profession, often in networks with other professionals. *Lawyer-entrepreneurs* in particular focus on consciousness of progress or lack of progress over time, based on a sense of change in knowledge, competencies, relational/social experiences, overall self/life assessment, and the level of satisfaction they generate.

The *lawyer-humanist* and the *lawyer-integrator* share some characteristics, which may allow some similar training programmes. They relate to the classic ideal of the European lawyer by recognising the goal of amicable settlements and using their lawyering to make peace in the world and defend fundamental democratic principles and human rights. These two groups of lawyers are very much concerned with democracy and a more sustainable and proactive legal practice. They share some values with the *lawyer-statesman*, but in the empirical study the *lawyer-statesman* seems to be a little older than many of the others, and the honour and dignity of the classic ideal seem to be upheld by the *lawyer-humanists*, so the *lawyer-humanist* and the *lawyer-statesman* share some values. The identity of the classic lawyer comes closest to that of the *lawyer-statesman*.

The Carnegie Report calls for 'key settings (...) to integrate (...) the cognitive, practical and ethical-social facets of lawyering'.⁶⁹⁴ This means integrating legal knowledge and professional identity. Alexander⁶⁹⁵ proposes systems for implementing this. These can be simulation-based placements in a variety of practice settings, complemented by structured reflection or live-client legal clinics. Such settings can stimulate humanity in education, support and develop self-awareness, and integrate body awareness and emotions in legal thinking with the overall intention of providing meaning and direction in legal life, while performing important societal tasks connected to European democracy in a globalised world.

8.5.3 Training for sustainable lawyering

The perspectives of proactive and sustainable elements of lawyering are regarded as supporting and extending justice, and as being fundamental for global democratic development and thus they are recognised as a societal need. There is a gap between societal needs and the training needs formulated by the professional organisations. However some individual needs coincide with societal needs, as seen in the training programme to implement the Directive

⁶⁹⁴ Sullivan et al., *Educating Lawyers: Preparation for the Profession of Law*, p. 160.

⁶⁹⁵ Alexander, *Learning to Be Lawyer*, pp. 479-481.

2008/52/EC on certain aspects of mediation in civil and commercial matters. This is not the only initiative, but it is the only one that has been studied by participation.

When sustainability is perceived as an integral part of global democratic development, sustainable lawyering can support a peaceful, democratic development as a part of the lawyers' identity and this may be included in new formats of training. What gives meaning and direction to legal life is much more the emotional part of legal work than its logical aspect.

Sustainable lawyering may be a new field of expertise that contributes to non-violent communication, social skills and life capacity both in daily life and at the global political, financial and democratic levels, as well as fulfilling the expectation of supporting a good individual life and peace in the world. In their daily practice most lawyers will meet some expectations to practise proactive sustainable lawyering to meet new societal needs and political aims.

Legal education faces challenges in producing lawyers who are capable of functioning in a global society, respecting and promoting a sustainable democracy. The individual lawyer must be trained to be responsible, self-directed and to reflect on the balance between their autonomous role, new demanding and autonomous clients, and the demands of society either at a global or a local level.

8.6 New communities of practice support identity development

Professional identity or identities can be seen as expressing long-term relations between lawyers and their participation in several communities of practice. The lawyer can acquire legal knowledge and skills by taking part in new communities of practice. In a proactive setting, the lawyer will develop closer relations to in-house lawyers and other experts. Training to become a trusted adviser includes having a client focus, which requires the lawyer to be very close to clients and their businesses. Social integration in such a setting will probably differ from a mono-disciplinary legal setting and give access to new knowledge and skills that affect identity. This development can be understood through the theory of legitimate peripheral participation where, through an interactive structured process of participation, apprentices develop increasingly complex competences and socialise in a professional group. Identities change when professional qualification and social integration take place in parallel.⁶⁹⁶

New communities of practice also arise when new people enter the profession. There is a change in attitude towards people without a legal background. Law firms are taking on increasing numbers of staff who do not have a traditional legal background, or have not graduated from a traditional law school. One of the leading firms in Denmark, *Kammeradvokaten* (the Legal Adviser to the Danish Government), has recently started recruiting and training graduates from Copenhagen Business School who have a mixed background in law and economics. Theories about professions may explain why efforts have been made to keep such people out of bar and law societies, and how professional protectionism means that talented and well educated people have found it difficult to be accepted in the legal profession. At the individual level, specialisation has led to a diversity of organisations and networks for lawyers, as seen in

⁶⁹⁶ Lave & Wenger, *Situated Learning – Legitimate peripheral participation*, pp. 52-53.

figure 5-4, and in these new settings lawyers adjust their identities to that of a group of experts.

Lawyers who participate in inter-professional communities must have a clear identity to play a role in relation to other professional partners and to know what they bring to their clients that others cannot deliver. Macfarlane sees this process as a negotiation in which lawyers cannot autonomously decide their roles.⁶⁹⁷

8.7 Reflections and sub-conclusions

Chapter 8 is based on Giddens's theory that the agency of the individual lawyer is decisive for initiating changes in lawyering and for establishing new communities of practice. In section 8.2, the identities are related to professional identities and it is concluded that education should embrace fundamental emotions and morality which cannot be separated from the personality.

In section 8.3, new lawyering conceptualises and frames the rise of contemplative practice,⁶⁹⁸ or the comprehensive movement in law initiated by lawyers with shared interests. If legal education is to support sustainable lawyering and be sustainable itself, it needs to move away from its traditional intellectual abstraction towards a more integrated approach that acknowledges the 'human implications for individuals and society'.⁶⁹⁹ Such an approach will bring a closer alignment between the legal professional, their intuition, moral commitment and sense of purpose. Substantial research shows that lawyers are finding new ways of lawyering which includes developing expertise in non-legal issues. With new lawyering, proactive law and sustainable lawyering, lawyers are exploring new fields, new methods and new approaches to lawyering where quality, obligations and results will be subject to new norms.

Section 8.4 concentrates on the transformative power of individual lawyers, their tools for transformation and identity search. It is no longer sufficient for lawyers to acquire theoretical knowledge and apply their analytical skills. They also need the ability to see things in context and have high levels of emotional intelligence. These skills have been recognised for some time in management (see Daniel Goleman).⁷⁰⁰ More and more lawyers have awareness of the need to develop soft skills, mindfulness, active listening and empathy. With these skills lawyers show care and support, motivate staff through difficult or uncertain times, particularly in the current economic climate, and they can be effective when negotiating or mediating. They can be the key to stimulating motivation and enthusiasm. A holistic mind-set, including both left-brain and right-brain thinking and spiritual wellbeing, is an essential competence for identity development.

Section 8.5 looks at the consequences for curriculum planning when lawyers increasingly become individualised experts. Lawyers have developed new identities connected to new tasks,

⁶⁹⁷ Macfarlane, *The New Lawyer: How Settlement is Transforming the Practice of Law*, p. 242.

⁶⁹⁸ Magee, *Educating Lawyers to Meditate? Sustainable lawyering or contemplative practice*, pp. 4 and 6.

⁶⁹⁹ Perry, *Thinking Like a Professional*, p. 161.

⁷⁰⁰ Goleman, *Emotional intelligence, why it can matter more than IQ*.

where they extend their capabilities by becoming increasingly multidisciplinary. The challenges of mediation or other ADR methods have increased the pressure on lawyers' identity.⁷⁰¹ Susskind confirms this development by describing how lawyers have insight into neighbouring disciplines and already act as strategists, management consultants, business advisers, HR experts, market experts, organisational psychologists etc.⁷⁰² But the training provided in national systems does not yet sufficiently focus on new roles and identities.

Section 8.6 points out how new communities of practice are formed and can frame and stimulate learning. At the same time such communities contribute to further individualisation and make the picture of a lawyer increasingly blurred. One way forward is to introduce continuing education that creates possibilities for lawyers to learn how to define their professional identity with a sustainable perspective. The EU Commission supports experimental forms of continuing education, such as training to implement the Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters which involves learning from experiences in new interdisciplinary networks and new communities of practice. A modern perspective focuses on the more subjective and individualised development of identity as a constant reflexive process, which develops in interactions between participants in a less stable and changing community, where new communities of practice create new knowledge and develop the identities of participating lawyers.

⁷⁰¹ Keeva, *Transforming Practice*, pp. 53-54.

⁷⁰² Susskind, *Tomorrow's Lawyers*, p. 113.

Part IV Conclusions, critical reflections and perspectives

This study has investigated how lawyers' identities develop in interactive processes. The starting point has been that one is not born a lawyer, one becomes a lawyer and therefore research should be able to identify what makes a person a lawyer. An interdisciplinary approach can grasp the individual life stories, societal tasks and professional obligations of lawyers. Training that includes reflection on identity can be a determining factor for the development of new lawyer identities in an increasingly heterogeneous profession. As lawyers are increasingly involved in more diverse tasks and develop competences in different areas, their educational and training curriculums should be individualised, more self-directed and less connected to the model of apprenticeship under the supervision of national bar and law societies. The national bar and law societies' monopoly of approving postgraduate training is threatened when, in cooperation with private or public providers of legal or paralegal services, international authorities establish new institutional frameworks and standards for the content and methods of training aimed at fulfilling the goals of the EU.

This part of the dissertation brings the thesis to a close. Chapter 9 contains the conclusions and reflections on the content of the dissertation and its empirical results, methods, shortcomings and tendencies. Finally, Chapter 10 concentrates on future measures and perspectives on the identity development of lawyers in a globalised world, in which justice and democracy expand and merge with non-legal perspectives.

9 Conclusions and critical reflections

The combination of the findings of the empirical study and the theoretical framework make it possible to answer the main question of the dissertation: 'How can the identity and competences of lawyers be developed so that they can practise sustainable and proactive lawyering in the European Union?'. The answer to this question builds upon the following four research questions:

1. Is there a common identity ideal for European lawyers that can be depicted within the legal order in Europe? (Chapter 4)
2. How do Danish practising lawyers define or perceive their identity? (Chapter 5)
3. What are the changes and challenges to the role and identity of lawyers at the societal level, the professional level and the individual level? How do these levels interact? (Chapter 6)
4. How will new communities of practice affect the identity development and professional training of lawyers? (Chapters 7 and 8)

The first delimitation of the study was to make sure that the investigated group of lawyers could be clearly defined and objectively identified. Therefore, in Chapter 1 the term 'lawyer' is defined in accordance with the definition in the European Directive to facilitate practice of the

profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained.⁷⁰³ As the project aims to be exploratory, the next step was to conceptualise identity in a theoretical setting open to new interpretations. The approach used is interdisciplinary, both in theory and in methods, in order to develop a contextual understanding of subjective processes. Giddens's structuration theory made it possible to follow structures and agents throughout the study and to analyse how both have changed. A legal dogmatic approach has made it possible to define lawyers in a mono-disciplinary understanding and social learning theories have completed the understanding of the processes of identity development. This insight may help the profession and individual lawyers understand themselves and the process of developing identity and help more reflective practitioners in the ongoing transformation processes.

Throughout the dissertation the three levels of *society, the profession and the individual* have structured the work in relation to Giddens's systematic identity perception in the combination of *what to do, how to act* and *who to be*. Giddens's theories can be applied to the reproduction of and changes to the legal profession and its institutions, as the institutions of the profession can be seen as a reflection of the wider society in which the profession is situated. The empirical study has shown how a profession is affected or changed by its members individually transforming their lifestyles and practices in new settings.

The analysis has shown:

- It is possible to identify a European identity ideal derived from legal sources.
- Lawyers do not form a homogeneous group and the profession is increasingly fragmented.
- Lawyers have taken on new roles and have developed identities in a proactive concept of lawyering.
- Many lawyers want to leave the profession and the younger ones are doing so.
- Individual lifestyles and identities do not accomplish the professional identity but may change it.
- New identities call for new competences and skills. Emotional education, such as mindfulness programmes, has successfully been introduced in continuing legal education.
- Tomorrow's lawyers will probably have to be more specialised than their predecessors, and many will provide services that are less personal, more commodified and less financially rewarding.
- Interdisciplinary or multidisciplinary skills must be supported by joining new communities of practice, as legal expertise merges with other expert fields.

⁷⁰³ Directive 98/5/EC, Official Journal of the European Communities 1998, No L 77.

- Individual lawyers choose their own way of lawyering and ‘who to be’ as a lawyer, and the profession must decide whether to encompass all lawyer identities.
- Societal ideals at the international level include sustainability. Lawyers have a societal obligation to initiate sustainable lawyering and personal desires to live a more sustainable life.

9.1 Legal culture and lawyer identity

This dissertation does not define the legal culture that lawyers are a part of, but it looks at lawyers’ identities in society through different perspectives. Identity research includes questioning how professional identity relates to the legal culture and to personal identity choices, including personal emotional and moral foundations and lifestyle choices. In Chapter 3 there is a discussion of whether identity is chosen or assigned. It is concluded that lawyers choose a lifestyle and form a practice related to professional organisations, like bar and law societies. These impose a set of national and international rules that have a clear impact on individual lawyers. A lawyer’s identity is framed in a constantly shifting context, including the networks in which lawyers are active, the economic conditions they work and live in, their cultural environment, and the political institutions and ideologies they are influenced by. Furthermore, the identities of lawyers are affected by questions of power, politics and justice. This dynamic process between the individual and their environment has a major impact on the identity development of lawyers, not only influencing their professional identities but also their personal lifestyles. Many lifestyle choices are not made consciously, but are nevertheless fundamental decisions.

There is an important difference between the identity of the profession and the identity of the individual, as individual identity also includes characteristics such as courage, authenticity and all kinds of emotions or needs such as the need to be good, recognised, loved and appreciated. As can be seen from the empirical study, these needs are not only expressed in private life but also in connection with professional life. These findings are in accordance with Giddens’s perception of the important elements in identity development.

9.2 A common identity ideal for lawyers in Europe?

The European legal culture is associated with the ideal of the European lawyer and supranational institutions or organisations. Both the European ideal and the national framing of lawyers see lawyers as possessing a specific set of characteristics. A legal dogmatic study can frame the ideal identity of European lawyers on the basis of legal sources, but a legal approach is not sufficient for depicting the identity of lawyers. It is unlikely that Europe’s one million lawyers have a single common professional identity. However, it is an important basis for understanding lawyers to characterise a European identity ideal in a legal frame and analyse it by the logic of structuration theory.

Chapter 4 identifies an almost global lawyer identity. Based on documents published by the UN and the Council of Europe, the EU has elaborated an ideal identity for lawyers which is defined and upheld by the Council of Bars and Law Societies of Europe (CCBE). It confirms the respon-

sibilities of the CCBE and the national bar and law societies for organising the profession, for installing, managing and enforcing the regulation of the profession and organising continuing training for lawyers. This demonstrates the essential role of the professional organisations. However, the EU has challenged some of the characteristics of this formal ideal by engaging lawyers for certain services and imposing obligations on them, such as exercising controls on behalf of public authorities. The legal sources are quite detailed on societal obligations (*'What to do'*) and on the role of professional organisations (*'How to act'*). However, few norms frame *'Who to be'* as a lawyer, though it is clearly stated that a lawyer must act with honour and dignity and with some altruistic characteristics. Some of the norms in the legal sources on lawyers may be contrary to the actual practices and lifestyles of lawyers. The norms of *honour* and *dignity*, the need to *resolve cases amicably* and to have a *manageable workload* will be constantly interpreted. Fulfilling or changing these norms depends on the actions of individual lawyers, which means that, as depicted in Giddens's structuration theory in Chapter 3, individual and collective agency becomes vital.

Professional organisations will tend to protect their privileges and the independent character of the profession which is associated with respect for the rules of the profession. This raises the question of whether the European ideal is upheld by the profession in order to protect it from competition from other legal or paralegal experts or business advisers. The profession is protected by supervising its members in various ways. One way is to develop the identity of the lawyer through education and postgraduate training. However, as legal work becomes more individualised and specialised, it becomes more problematic to uphold common professional education and training. The level of education and training may not be high enough and it risks being merely the transmission of well-known knowledge. In Giddens's terminology this is an unintended consequence of establishing mandatory training with the aim of unifying the profession, but which risks being counterproductive (Chapter 2).

The ideal is under pressure, both from the EU which is trying to create a market for legal advice in a broader context, and from individual lawyers who seem to seek a wider role with greater congruence of individual and professional goals.

9.3 How do Danish lawyers define or perceive their identity?

Constituting a professional identity is a subjective process which includes identification with the norms of a profession or a professional group of experts. It is in itself a social practice. 'Social practice' is Giddens's principal unit of investigation with both a structural and an agency component, a duality of structure. The structural environment of a profession will constrain individual behaviour and at the same time making space, as lawyers possess the capacity to change and are powerful when working together.

The empirical study shows that the common European identity ideal of *'the lawyer'* has been replaced by several identities. It shows that lawyers' identities are created and recreated in constant interaction between communities and individuals. It also shows that professional unity only relates to a few areas, while individual lawyers insist on forming their own identities through a chosen lifestyle consisting of a broad set of sometimes conflicting elements. Given

the diversity of their interests and lifestyles, lawyers will influence the universal perception of a 'lawyer', creating a more blurred image of the profession. Money, the professional title, housing and dress codes are key indicators of a chosen lifestyle. Other issues relating to lawyers' identities have been investigated. These include how excessive focus on billable hours and highly competitive behaviour, even within one's own firm, affect identity, disturb well-being and work-life-balance and generate difficulties in finding personal meaning and a feeling of belonging to a community. The analysis of gender issues indicates that both male and female lawyers lack role models (see Chapter 5).

There are lawyers who live their lives in balance and harmony, but many express fears and doubts about their abilities to meet the expectations of partners, managers, clients and even colleagues. Conditions that are mostly structural problems, like the problem of finding role models, the lack of guidance, the pressure of billable hours and the general individualisation of society are ascribed by individuals to their lack of capacity. Nevertheless, both the theoretical study and the empirical study confirm that lawyers do have transformative capacities and do use them. However lawyers are not always conscious of their powers. The interviews confirm that some lawyers seem more afraid of their potential than of their limitations (Section 5.4). They go on living in circumstances that conflict with their values and this increases their dissatisfaction. Some lawyers give the impression that they are unnecessarily restricted by the professional authorities. The interviews (see Chapter 5) confirm that there is a gap between expectation and reality in legal life. As a consequence, some lawyers lose the passion and commitment they had when they entered the profession.

9.4 Interaction between different levels of analysis

Lawyers shape and reshape their identities in the three levels of society, the profession and the individual. Some are defensive towards and others show an innovative approach to societal changes. As members of a classic strongly established profession, lawyers have had authoritative power and influence in society, and their power and influence has been legitimised by the institutions of society. Their authoritative power is not questioned as long as it is believed that the profession has unique and valuable knowledge and expertise which is not replaceable by others, and as long as there is basic trust in the individual members of the profession. There is a connection between identity and reputation. When professional authority is under debate or the profession loses credibility, the scope for autonomous action and professional self-governance will be less.

The next three sections summarise the answers to research question 3, concerning the changes and challenges to the role and identity of lawyers at the societal level, the professional level and the individual level and how these levels interact (Chapter 6).

9.4.1 Societal level in expansion

At the *societal level* the focus is moving from national to supranational practice, where obligations and tasks are influenced by globalisation, specialisation, the market economy and by lawyers' lifestyle changes. From a legal perspective, lawyers in Europe still have societal obligations linked to some of their professional tasks. The rule of law, the right to a fair trial, the right

to freedom of expression and association, the right to privacy and other fundamental rights expand. Lawyers' societal responsibilities have been to redress the alleged failures of democracy, but some societal obligations have taken on new forms where lawyers act on behalf of the public authorities.

Democracy, in its classic form of interaction between the State and the individual, has expanded to include more collective rights, including sustainability, humanism and global concern for future generations. When the fundamental values of society expand, lawyers have to adjust to the new values.

Changes in society produce new conditions for lawyering, where training will be less organised by the profession and more linked to the individual in self-directed learning. The analysis of the interviews shows that lawyers organise their professional lives in subgroups, often including people with other professional background but still working in the same field, like real-estate or the maritime sector.

9.4.2 Decreasing power at the professional level

At the *professional level* the lawyer is becoming less an all-round lawyer and more a specialist, and from there becoming a legal hybrid interacting with specialists with complementary competences. The business sector has taken in new legal advisors and consultants who are not lawyers (*advokater*) in the traditional sense. This has caused a blurring of roles, tasks and professional responsibilities and liabilities. Some lawyers have adjusted to new ways of lawyering and some may have 'adjusted' themselves out of the legal profession as traditionally understood (see Chapter 5).

The profession needs to find a new way to include the next generation and to accept and deal with a diversity of lawyers in new communities of practice. In the empirical study the profession is described as 'old fashioned' by lawyers who face competition from management consultants. When the borders between professions dissolve, identity becomes increasingly individualised. The training provided by the profession will support it by focusing on core lawyering activities, while more specialist lawyers with a diversity of identities extend their competences in training activities in new communities of practice. However, training and identity development activities are still mainly linked to the classic ideal of the European lawyer.

Particular organisational pressures were identified in the empirical study. Clients' expectations have changed; they want lawyers to broaden their services to areas that lawyers have not been trained to practice in. In their self-descriptions and codes of conduct lawyers state that they have obligations to the whole justice system. Ethical rules and provisions in codes of conduct, as monitored by the bar and law societies, imply that there are activities that are incompatible with being a member of the legal profession. Some bar and law societies prevent lawyers being active in other areas of expertise, even though this could be in the interests of their clients or of society. A conflict of interest of this kind was the crucial issue in a recent case before the European Court of Human Rights. In its judgment of 14 January 2014, the Court found that the refusal by the Romanian bar and law society to admit to the legal profession a medical

doctor with a law degree was in breach of Article 8 of the European Convention on Human Rights. Hence the admission or exclusion of a member of the profession can conflict with the aim of delivering the best legal advice. Lawyers could benefit from having financial insight, knowing more about human resources, advanced administrative systems and proactive solutions. It is possible to add new competences or to merge into new expert groups with complementary skills, and some lawyers take the opportunity either to become better lawyers or to qualify for a job in another sector.

At present it is difficult to see the common goals of the profession in which lawyers with diverse identities use the title of 'lawyer' for many different purposes. The profession could sharpen its profile by narrowing the group of its members or it could broaden its membership and decide that all chosen lawyer identities can be members of the bar and law society.

9.4.3 The individual level – easier to be different

On the relation between the individual lawyer and the profession, the empirical study confirms Giddens's assumption that the individual only feels psychologically secure in their self-identity when others recognise their behaviour as appropriate or reasonable. Individual happiness is under pressure and many complain that they lack meaning and direction in their life as lawyers. The segmentation of the profession makes more lawyers feel like outsiders.

The analysis shows how lawyers constantly adjust their identities and how the narrative self-identity will be rewritten in relation to where the lawyer is now. Individualisation is increasingly significant, and the interaction between the individual, the profession and society makes the traditionally homogenous profession more heterogeneous. The profession still includes lawyers who affirm their identity as lawyers, though they are constantly changing their identities. It has become easier to be different, but it is precisely for this reason that the profession is becoming fragmented. What does the profession have in common, other than an ethical code which is interpreted very differently by different agents? There is no reason to expect that lawyers will not be needed, but it must be recognised that tomorrow's lawyers will be engaged in very different businesses.

Apart from legal skills, the tools that lawyers need are those that can equip them to fulfil the roles in section 5.6.3, making them excellent communicators, creative problem solvers, strategic thinkers, clever negotiators and trustworthy authentic personalities. These tools will be easier to develop in interdisciplinary settings, supporting identity developments in new communities of practice in which not all participants are products of the same educational culture.

Is it part of a lawyer's identity to have a critical approach to the European Union and its legal institutions and to practise in the same way as lawyers in a national context were expected to, defending the individual from the power of the state? No lawyer discussed this in the empirical study, but it may be tacitly acknowledged that a lawyer has a special obligation, as an agent of justice, to point out when the legal system is in danger, damaged or acts contrary to its own values. If such a perception is an internalised element of being a lawyer, it was not mentioned in the empirical study. With the increasing complexity of a multi-layered legal setting, expert

insight is necessary for having the skills and courage to criticise the system and to act as a ‘public watchdog’. This was slightly touched on in focus group 8 by a lawyer working with refugees and human rights, as a part of a lawyer’s societal responsibility.

So far, identity has been related to the lawyer as a physical person, but it is necessary to consider whether performance in cyberspace extends or transforms a lawyer’s identity, and whether some lawyering will be replaced by interactive ICT solutions.

9.5 How will new communities of practice affect the identity development and professional training of lawyers?

The empirical study includes data on the variety of organisations and networks that lawyers take part in. The participatory study, in an EU-supported new interdisciplinary postgraduate training, demonstrates that lawyers are engaged in new settings. Wenger sees identity development as a social practice and professional identity is a collective production of social meaning, and thus negotiable and changing. The new communities of practice demonstrate that legal practice is becoming increasingly interdisciplinary in the European Union, changing the identity of the profession. Training in mixed groups supports new lawyering, including interdisciplinary thinking, and creates a European identity for lawyers. European lawyers interact with a new identity which includes soft law (ADR etc.) and the study of the development of European mediators shows how the identity of the individual lawyer is affected, as seen in Chapter 7.

Reflections about ‘who we are’ always imply that there are others who are different. Judging from the comments made by the majority of lawyers in the focus groups, it seems to be very important for lawyers that there are ‘non-lawyers’ or ‘other lawyers’ for them to assimilate with or to differ from. In the participatory study the ‘we’ moved from being lawyers to become mediators. It demonstrates the possibility for the lawyer to construct what kind of a lawyer they would like to be; some continued to be lawyers, others wanted to be lawyer-mediators and some just mediators.

This transformation process follows the structure and systematic approach of Chapter 3, which looks at identity as *doing*, which means practice as alternative conflict solutions, identity as *belonging* to a community, in this case the community of mediators, and identity as experience and *lifestyle* and the joy of living a professional life that gives meaning and direction to the individual lawyer in daily practice. This conclusion could only be made by combining structuration theory and social learning in challenging the legal framework. Practices which support corporate social responsibilities (CSR) and training for dispute resolution, as seen in Chapter 7, all move towards proactive and sustainable lawyering as developed in Chapter 8.

9.6 Identity development for practising sustainable and proactive lawyering

Before answering the main question of this dissertation, it is relevant to relate it to the four research questions answered above and justify why sustainability is an important value in the development of lawyers' identities and new practices of lawyering.

Lawyers are struggling to find an identity in order to achieve individual happiness, meaning and direction in life. The building of an individually-oriented identity is a part of understanding life in the Western world. This process is not unique to lawyers, as it relates to modern life in general. What is special about lawyers is that they have an identity as a lawyer, which includes an important societal commitment. This ideal is part of the law in the European Union, as explored in Chapter 4. It has also been shown that Danish lawyers have a variety of identities, some of which are far from the European ideal. However, nearly all lawyers have a self-perception that includes a special role for lawyers in society (Chapter 5).

Sustainability is important for society, and it is manifested at all three levels of the analysis. It can connect lawyers' individual needs for meaning, direction and work-life-balance to the democratic societal goal in order to support the global sustainable development referred to in the EU Treaty. The demand for a sustainable and proactive approach to lawyering is also expressed in UN declarations, human rights conventions, other EU documents and national regulations (Chapter 4 and 8). National and EU professional organisations must adjust to these demands. Individual lawyers with differing identities have very different commitments to societal goals and to the demands of the professional organisations. For the individual lawyer 'sustainability' has at least three meanings: support for societal goals, running a firm or the profession sustainably and promoting and adopting a sustainable individual lifestyle. Giddens's agent-structure relation theory supports the perception that sustainability issues are raised at several interacting levels.

By taking part in new networks and interdisciplinary expert groups, lawyers may become squeezed by conflicting professional values. Consequently, loyalty to the profession is decreasing or is shared with loyalty to new communities of practice in which the individual lawyer cultivates their identity. Lawyers develop their identities in increasingly independent, individual and dynamic contexts. In Chapter 7, the analysis of mandatory training showed the gap between the existing training and the need to support transitions of lawyer identities. Based on the answers to the four research questions it is now possible to answer: *How can the identity and competences of lawyers be developed so that they can practise sustainable and proactive lawyering in the European Union?*

Identity as such can be developed through training activities. But developing a specific identity implies awareness of the values the identity is based on. As values are crucial for the choice of both professional and private identities, training providers should support participants in discussions of values and how to connect them to daily practice. Education can embrace fundamental emotions and morality and will often have the aim of improving life and supporting the identity development of the individual lawyer. Lawyers value authenticity and integrity, which

relates to how lawyers address their deeper human needs and aspirations. With increasing dissatisfaction and problems of work-life balance, many lawyers are seeking a more meaningful or sustainable life. This calls for reflection on the chosen lifestyle. Sustainable lawyering includes living a sustainable life with greater focus on happiness, accountability, democratic responsibility and satisfaction in both personal and legal life. This can be achieved by whole-brain activities or by education including body-dimensions.

Policy-making and the administration of justice in the EU can be understood in a pluralistic perspective, where the law can be interpreted and applied in different ways and legal truth can take many forms. This can lead to contradictory decisions and judgments existing simultaneously. Thus it is not meaningful to look for a single solution to a problem, based upon one valid interpretation of law.

Accepting the idea of coexisting truths gives endless opportunities for reaching different solutions for the same case, all of which can be fair and sustainable. Lawyers can be trained to find multiple outcomes of a conflict which can be equally legally valid. In such a situation reflection will be based more on societal goals, the legal profession's norms and individual identity. In ADR, mediation lawyers have seen that parties find solutions that are clearly different from a legal judgment, though these solutions are also legal and enforceable. At the professional level, great efforts have been made to involve lawyers in CSR solutions for their clients or for their own law firms. A number of law firms have signed up to promote sustainability in this way. It seems that what was formerly called 'justice' today includes CSR considerations.

It has also been shown how new European training activities break with both the form and content of traditional postgraduate training. The participatory study on international mediator training (TIM training, Section 7.3) demonstrates a structure of a new community of practice with interdisciplinary cross-border training. The content builds on training lawyers to work for long-term proactive and sustainable solutions. The individual agency of the participants and their mutual influence made people change their normal behaviour and develop new ways of lawyering and a new identity or lifestyle based on values. The participatory study, combined with literature studies, shows that the need for complementary competences can be fulfilled either by the individual lawyer's continued legal training (including practice) or by developing the skills to draw on the competences of other experts.

At the individual level, sustainability will take on different forms in relation to different identities. It will include a lifestyle with awareness of finance, a concern for the special needs of individual lawyers and a work-life balance to prevent lawyers burning out. Sustainability in legal life includes a happy, joyful legal life. In such a life the ideal of working for the community, for common values and for fulfilling the needs of clients can be realised, while ensuring legal solutions for future generations.

Training lawyers to be proactive and to have a sustainable perspective requires finding new ways to integrate or supply legal expertise with other experts' knowledge. It means that generic postgraduate training for lawyers must be differentiated according to individual tasks and

needs, based on theories of adult learning such as self-directed learning and learning in new communities of practice. Ultimately, it is suggested that there should be further individualised education and training. Lawyers' identities could be more individually developed in a 'self-assembly' concept.

The first step for an individualised programme under the mandatory format for postgraduate training is to identify individual training needs corresponding to the identity chosen by each lawyer. If the professional organisation still claims a role in approving training, it must confirm that the chosen identity falls within the norms for being a member of the profession. It can be debated whether such a power should be located at national or EU level. Keeping decisions on membership of the legal profession and the content and format of mandatory postgraduate training programmes at the national level is in accordance with the principle of subsidiarity, but it conflicts with the attempts to harmonise the legal profession in the EU.

Thus it is up to the lawyers themselves to determine their desired training outcomes and to sign up for the relevant training, courses, programmes or self-directed learning activities, supervision or pair-work. In this it is relevant to consider the available resources and methods before choosing. Some law firms have the size and competences to conduct their own training, including the skills to evaluate and analyse the results of the training. This makes it possible to focus on learning, whereas the evaluation of today's training courses mainly focuses on control of participation.

According to the information from the focus groups, a critical reflection process seems to make a direct connection between ethics and self-examination. This self-integrative approach becomes a pathway to understanding what motivates lawyers in how they shape their daily practice towards a new identity.

Reflection can also be integrated in training programmes to stimulate and sharpen lawyers' identities. Several options and tools for this have been described in Chapter 8. One such critical reflection exercise, inspired by Natasha Martin, poses the identity question thus: 'If I close my eyes and imagine a lawyer, I expose myself to a role. If I close my eyes and see me, I expose myself to an identity. If I close my eyes and see myself as a lawyer, I expose myself to eventual conflicts between my role and my identity'.

In such a reflective process the lawyer considers their personal values, background and life experiences that have shaped the person they are today. If the 'what to do' and 'how to act' conflict with the 'who to be', action should be taken. Many lawyers assume that if they are dissatisfied at work, the only options are to carry on and suffer or to quit the practice of law (Chapter 5). The use of some of the tools presented in Chapter 8 can help analyse what is producing lawyers' inner tensions and feeling overworked, discontented or unhappy. In order to give guidance for how to change, a set of questions can be asked, such as: 'Are the problems related to the level of responsibility?'; 'Is more training needed for the kind of work in question?'; 'Does the job include tasks which conflict with personal, moral and professional attitudes?'; and 'Are there unresolved conflicts with colleagues at work?'. By applying and devel-

oping the reflection process the lawyer will be able to find an integrated identity, combining societal commitment, professionalism, ethics, happiness, integrity and business understanding.

9.7 Contribution to the scientific field

The study makes it clear that lawyers' development of their identity cannot be understood by legal science alone. If such an attempt were made the result would be very different from what is seen when theories and methods are combined. There is no established tradition in legal studies for interdisciplinary work, so this study contributes to the understanding of a fruitful interdisciplinary union of legal studies, and sociological and andragogical (pedagogical) theories and methods.

When identity development is framed in theories of social learning, the classic dichotomy between the individual and the group will change. By linking the lifestyle dimension to the context of a profession, it becomes relevant to look at professional identity as a desired individual construction. Such a construction implements the characteristics of the professional ideal of the European lawyer through mandatory participation in practice. It is mandatory in the sense that it is only possible to become a lawyer through apprenticeship and continued legal training.

Working with identity can help the individual develop and sharpen their lawyering and bring harmony to their tasks, ethics, commitment and work-life balance. This goes far beyond the rational legal approach, though legal analysis is necessary part for understanding the next steps for the profession and its members.

The empirical study has verified that Giddens's structuration theory, in combination with Wenger's social learning theories and Schön's work on the reflective practitioner, could expand and include a legal approach to the understanding of the identity development of lawyers. The fruitful union of theories and practice developed in the empirical study has contributed to an understanding of the legal profession in radical transition. The transition has been initiated by the fragmentation of lifestyles and identities. This makes it inevitable that the professional organisations must take far-reaching steps if lawyers with many different identities are still to be recognised as lawyers. In spite of the fragmented identities and lifestyles, lawyers are still expected by society to support the implementation of the political ideals incorporated in international treaties or in national laws according to the rule of law principle. Ideally, lawyers are protecting and supporting values and fundamental rights in a collective setting directed towards global responsibility.

9.8 Shortcomings of the research

Methodologically, it could be asked why a European ideal (Chapter 4) is related to national practice (Chapter 5). On the one hand, setting up a formal national ideal would include European values, given the references to the CCBE in the Danish code of conduct for lawyers and the EU regulation of legal services. On the other hand, all legal practitioners in Europe are primarily nationally educated, so that a European legal practitioner does yet not exist. It would

have been useful to research the legal profession in several Member States, but for practical reasons such a broad approach has not been feasible within the frame of this study.

As this research programme has been conducted under the auspices of an industrial PhD programme, there has been constant interaction between academia and practice. This dual perspective has undoubtedly inspired and nourished both the theoretical and the practical work. On the other hand, this could also divert the process and influence the impartiality of the researcher. It must be emphasised that the researcher has never received any instruction from her employer concerning the research or the presentation and analysis of the results. Another potential objection to the methodology for the empirical study with the focus groups is the absence of independent observers and the fact that the researcher was the moderator in all focus groups. Both objections have been considered in Chapter 5, and sufficient precautions have been taken to secure the validity of the results.

One of the most important elements of the research, both in terms of theory and empirical methodology, relates to its interdisciplinary context. Special efforts have been made to elaborate a frame of analysis, a methodology and a terminology in order to create bridges between the different scientific fields dealt with in the dissertation and reflected in the different areas of expertise of the dissertation's supervisors. It has been important to contribute to future-oriented practices with a focus on a more holistic, humanistic and solution-based approach to resolving legal problems. Inspiration has been found in Nordic legal sociology, where in particular Ole Hammerslev and Hanne Petersen in Denmark have broadened the field of research for lawyers.

9.9 Tendencies without sufficient scientific proof

There are tendencies for which there is insufficient evidence within the framework of this study, but which are mentioned as significant indicators of a profession in transition. It is quite common that, after some delay, developments in the USA are mirrored by developments in Europe. In 2008 Macfarlane predicted that there would not be only one type of new lawyer, stating that: 'diversity rather than conformity is embedded in the concept of the new lawyer'.⁷⁰⁴ There is a need for a diversity of lawyers, and it seems that new generations are aiming for a different style of working life and are influenced by a new gender balance.

Danish lawyers leave the profession, but perhaps they would rather change it. There are indications that many law firms have dismissed staff members. However, this is very difficult to verify as there is considerable stigma attached to such matters in the profession and people are advised to keep quiet about the reasons for leaving a job or changing firm. This tendency has been confirmed by the Danish Association of Lawyers and Economists (DJØF).

The diversity of identities includes many holistically oriented personalities and even lawyers in the most business-minded settings are aware of the advantages of living a sustainable life and of the consequences of neglecting basic physical and psychological needs for a longer period.

⁷⁰⁴ Macfarlane, *The New Lawyer: How Settlement is Transforming the Practice of Law*, p. 244.

9.10 The new lawyer: a tool, a job, an identity or a lifestyle?

In proactive and sustainable lawyering, as identified in Chapter 8, lawyers see lawyering and the lawyers' identity in the context of a bigger picture of society. They develop identity through learning, which is a subjective process, but in a professional setting – a combination of formal and informal learning, with the goal of becoming a lawyer. However, identity development does not stop when the sought-after title of 'lawyer' is obtained. When understood as a result of constant reflection, both in Giddens's structure-agent logic and Donald A. Schön's reflective process of learning (Chapter 7), identity development continues in daily lawyering practice throughout professional life. Schön emphasises that 'knowing in practice' tends to become increasingly tacit, spontaneous and automatic and that this means there is a risk that the critical attitude that lawyers should maintain can fall into disuse. However, in a new format of training in communities with other practitioners, the risk of critical attitudes fading is diminished, as the reflection process becomes broader and the lawyer can more easily maintain their critical approach as a watchdog of justice.

10 Implementation and future perspectives

Chapter 10 explores new perspectives and research options in order to propose a concept of professional identity development that is sensitive to dynamic subjective processes, rather than being based on the normative standards of professional ethics.

The classic professions are in transition in the sense that they have lost some of their monopolies of well-defined societal functions in the national state. Professions can be seen as limiting individual possibilities for identity development. Competition law is an obstacle to continued monopolies, collective ethical rules are related to specific fields of practice, and basic education is becoming increasingly individualised and international. As a consequence, professional organisations are seeing a reduction of their impact and powers.

10.1 Next steps and implementation

A detailed plan for implementing the research results of this study is to be coordinated with universities, business schools and private postgraduate educational organisations. Some results of this thesis have already been presented to law firms in Denmark and Belgium, at Copenhagen Business School and at training activities of the Association of Danish Law Firms (*Danske Advokater*). These activities have confirmed both the feasibility and the challenges of such implementation. Universities and professional practice each have their way of transmitting knowledge. A future perspective is to support reflection, combining the logical and theoretical developments of academia with the identity and practice development of legal practitioners.

The empirical study of Danish lawyers and the participatory study demonstrate the transformations in lawyering and lawyers' identities. They also confirm the need to enable lawyers to answer the question: 'Who am I and which professional identity would I like to develop?'. The answer to this will make it possible to develop an individualised training programme. The next step is to find the practical solutions to how the development of the different identities can be supported.

The empirical study shows a dual strategy where some lawyers start learning new competences and exploring new practices, while others are fighting to protect the traditional professional identity. There is an old Chinese proverb: 'When the wind of change blows, some build walls while others build windmills'. Will the profession, under influence of its classic protectors, act defensively or will it be pushed forward by individual lawyers who have the innovative energy to create new possibilities for a meaningful and satisfying professional legal life?

10.2 Further research options

A number of interesting research questions emerge from this study.

First, it would be interesting to build further on the data of the empirical study. This can be done by strategic research on a concept of professional identity development that is sensitive to dynamic subjective processes, rather than normative professional ethics. To give more qualified explanations of identity development over a lifetime it would be useful to repeat the interviews and focus groups in 5, 10 or 15 years' time.

Second, the original data could also be used as a basis for investigating gender issues which have not been thoroughly investigated in this study. In particular, there is a question of how to find role models or how to act without such models. The legal profession has traditionally been a male profession, like other strong professions. The gender composition of the profession has changed as more women have entered it. However, there is still a significant underrepresentation of women as partners and at the level where the major decisions are taken (Chapters 5 and 6). The empirical study has shown that the career path favours men, but that both male and female lawyers experience problems of work-life balance and are looking for role models.

Third, a supplementary investigation focusing on the conditions of legal practice in different EU Member States could be fruitful. This would require a comparative study exploring and identifying how lawyers generate their different identities and new ways of lawyering. It would be interesting to investigate the practices in all 28 Member States to analyse the extent to which new cross-border communities of practice in Europe have already arisen or are about to change the profession.

Last, it would be inspiring to research individual learning contracts which could make it possible to support sustainable lawyering. Such a learning contract would require a diagnosis to be made of needs and should integrate societal needs and the expectations of lawyers and would open up for a redefinition of the tasks of the professional organisation. This process should lead to a specification of goals and objectives, the identification of learning strategies and resources, and an evaluation of progress which would focus more on learning and less on control of participation.

10.3 Joint actions at the European scene

As with the European lawyers' identity ideal, the classic lawyer ideal combines global awareness, professional responsibility and individual balance, but many lawyers live very locally oriented lives in practices solving the day-to-day problems of local people.

At the European level, it is now recognised by the national bar and law societies together with the universities that societal challenges will force the profession to make radical changes as: 'les nouvelles fonctions de l'avocat imposent une nouvelle organisation du travail en cabinet qui en modifie la forme, voire la nature, et dont l'examen ... révèle à lui seul les tensions qui agitent le droit contemporain autant que l'ampleur des transformations d'une profession en pleine mutation.'⁷⁰⁵

As long as lawyers want the privileges of being lawyers, they must reflect on the fundamental values of lawyering and on how to build up an identity which will give meaning, direction and satisfaction in legal life and correspond with their lifestyles and their private and professional identities. Satisfied and effective lawyers have a clear sense of professional identity and purpose.

Future lawyers will have to be more specialised and more capable of responding to changes than earlier generations. Lawyers who have spent most of their lives responding to the questions of their clients must learn to be risk managers who can anticipate the legal needs of their clients in a complex interdisciplinary structure.

⁷⁰⁵ Université Libre de Bruxelles (ULB) et Barreau de Bruxelles, *Cycle de conférences du Centre Perelman de Philosophie du Droit, Les Nouveaux Métiers de l'Avocat*, p. 3.

In the dynamic process of identity transformation the narrative of self-identity has to be shaped, altered and reflexively sustained in relation to the rapidly changing circumstances of social life and lawyering, both locally and globally. When sustainability is framed in legal sources, the lawyer must coherently integrate information derived from diverse sources in a way that makes it possible to connect future projects with past experience. This reflection must reunite what lawyers chose to do in relation to society, how to act within their professional life, and who to be as a human being in order to define: *Who am I as a lawyer?* This essential question calls for reflection that will force the lawyer to adopt criteria for when, how and for what purpose they practise law, and to choose a sustainable lifestyle in which their legal practice provides the services their clients seek in a societal framework, but which does not deplete the energy or soul of the practitioner.

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Justitsministeriets bek. nr. 747 af 11/06/2010 om ændring af bekendtgørelse om EU-advokaters etablering her i landet m.v.

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Annexes

Focus Group

Virksomhed:

Dato:

Starttidspunkt:

Lokale: Mødelokale

Varighed: 1½ til 2 timer

Sluttidspunkt:

Deltagere:

Forberedelse: Læs velkomstmil og tidligere information om fokusgruppeinterview

15 min	Velkomst og Introduktion Baggrund for projektet Tidsramme	Inger Høedt-Rasmussen
20 min	Advokatprofessionen i dag Profession og professionalism What to do (Societal level) How to act (Norms of profession)	
40 min	Deltagernes egen identitetsopfattelse Who to be (Individual identity) Grundlæggende værdier - Mening og retning i livet Arbejdsglæde og balance Livsstil Præsentation på elektroniske medier 3 ord der betegner din identitet: Jeg er Hvordan fik du din advokat-identitet? Uddannelse, træning, mesterlære, andet?	
10 min	Afslutning Spørgsmål og svar	

Yderligere instruktioner:

Vi er i virksomhedens lokaler. Der vil være kaffe og andre forfriskninger samt pen og papir. Fokusgruppens arbejde optages og der noteres undervejs. Alle oplysninger bevares til forskningsdokumentation men udleveres ikke og i den færdige ph.d. afhandling citeres deltagerne kun med navn efter godkendelse. Har du efterfølgende spørgsmål kan du få dem besvaret hos Inger Høedt-Rasmussen på mail ih.jur@cbs.dk eller mobil 40 21 05 85.

Deltagerdata Focus Group

Virksomhed:

Dato:
Starttidspunkt:
Lokale: Mødelokale

Varighed: max 1½ time
Sluttidspunkt:

Navn
Titel
Nr. ID (skilt)

Alder
Kandidatår
Anciennitet i
virksomheden

Fagområde(r)

Professionelle
faggrupper og
foreninger

3 ord der siger hvem
jeg er:

- 1.
- 2.
- 3.

Profil på sociale
medier (sæt x)

Hjemmeside
Virksomhed
Privat
Andres hjemmesider
LinkedIn
Twitter
Facebook
Blog
Andre

Danish summary - Dansk resumé

Ideen til dette ErhvervsPhD-studium opstod efter mange års samarbejde med og træning af advokater. Store ændringer på det samfundsmæssige plan, udviklingen af en pluralistisk europæisk retskultur og et større fokus på globale problemer påvirker advokathvervet. Nogle advokater opfatter sig som garant for demokrati og retssikkerhed, mens andre opfatter sig som juridisk-tekniske eksperter, som skal drive den bedst mulige forretning. En klassisk stærk profession er ved at udvikle sig til en heterogen gruppe af advokater med stærkt divergerende opfattelser af, hvad en advokatidentitet er, og hvad der karakteriserer advokathvervet. Den Europæiske Union udvider begreberne demokrati, menneskerettigheder og grundlæggende rettigheder til at omfatte flere kollektive rettigheder og sociale forpligtelser, der inkluderer bæredygtighed og globalt ansvar. Der sker en forrykkelse af retskulturen fra det nationale til det supranationale plan.

Afhandlingens hovedspørgsmål er: *How can the identity and competences of lawyers be developed so that they can practise sustainable and proactive lawyering in the European Union?* Det vil sige, hvordan kan advokaters identitetsdannelse og kompetencer udvikles, så de bliver i stand til arbejde proaktivt for bæredygtige løsninger i EU.

Afhandlingen består af fire dele: Del I indeholder introduktion, begrebsafklaring, det teoretiske grundlag og metode. Del II vedrører identitetsbegrebet og dets forandring. Del III omhandler træningsaspekter i forhold til begrebet "sustainable lawyering". Del IV indeholder konklusioner, kritiske refleksioner og perspektivering.

For at besvare hovedspørgsmålet er følgende forskningsspørgsmål undersøgt i del II og III:

1. *Is there a common identity ideal for European lawyers that can be depicted within the legal order in Europe?* Spørgsmålet er om det, i en retsdogmatisk analyse, er muligt at udsondre et fælles identitetsideal for europæiske advokater (kapitel 4).
2. *How do Danish practicing lawyers define or perceive their identity?* Med henblik på at afgøre, hvorledes danske advokater definerer eller opfatter deres identitet, foretages en større empirisk undersøgelse (kapitel 5).
3. *What are the changes and challenges to the role and identity of lawyers at the societal level, the professional level and the individual level? How do these levels interact?* Forandringer og udfordringer på samfundsplan, på professionsplan og på individplan for identitet undersøges, og samspillet mellem disse niveauer kortlægges (kapitel 6).
4. *How will new communities of practice affect the identity development and professional training of lawyers?* Der spørges til, hvordan nye praksisfællesskaber vil påvirke identitetsdannelsen og den professionelle træning af advokater (kapitel 7 og 8).

Afhandlingen bygger både teoretisk og metodisk på et interdisciplinært studium, hvor retsvidenskab, sociologi og læringsteori spiller sammen. Den gennemgående teori er Anthony Gid-

dens' strukturteori samt hans identitetstanker, specielt som de optræder i værket '*Modernity and Self-Identity – Self and Society in the Late Modernity*'. Inspireret af Giddens analyseres gennem hele afhandlingen, hvordan advokater forbinder spørgsmålene "*what to do?*", "*how to act?*" og "*who to be?*". De tre spørgsmål relateres til udfordringer på samfundsplan (makro), professionsplan (meso) og individplan (mikro). Omdrejningspunktet er den enkelte advokats identitetsdannelse som et refleksivt projekt; en række livsstilsvalg som bidrager til at fastholde en sammenhængende, men konstant skiftende opretholdelse af selvidentitet i forhold til det demokrati og de retfærdighedsideal, der er knyttet til advokatrollen.

Metodemæssigt er spørgsmålene undersøgt gennem retskilde- og litteraturstudier, retsdogmatiske analyser og en kvalitativ, empirisk undersøgelse foretaget blandt advokater i Danmark samt deltagerobservationer i et tre ugers interdisciplinært træningsforløb for europæiske mediatorer.

Resultaterne af forskningsprojektet viser, at det gennem en retsdogmatisk analyse er muligt at identificere et europæisk advokatideal, men at danske advokater har udviklet mindst seks forskellige identitetstyper. En retsdogmatisk analyse alene ville ikke have afdækket denne diskrepans. Med udgangspunkt i de empiriske studier sat ind i en sociologisk og pædagogisk forståelsesramme har det været muligt at differentiere advokatidentiteten. På denne baggrund er opstillet følgende advokatidentiteter: *Lawyer businessman*, *lawyer performer*, *lawyer entrepreneur*, *lawyer humanist*, *lawyer integrator* og *lawyer statesman*. Hver identitet besidder et sæt af genkendelige karakteristika knyttet til livsstil. Alle advokater siger, at de har en væsentlig samfundsmæssig rolle, men ser den meget forskelligt, og det er derfor vanskeligt at opretholde forestillingen om "Advokaten".

Det empiriske materiale viser, at der i advokaternes identitetsdannelse og obligatoriske uddannelse fortsat lægges vægt på de klassiske advokatdyder og -opgaver. De nationale advokatorganisationer ser ud til at undervurdere betydningen af den identitetsmæssige diversitet og det forhold, at specielt unge advokater enten forlader branchen eller har ønske om en anden måde at kombinere liv og arbejde på. Det er dog markant, at både de unge og de ældste advokater giver udtryk for flere ideelle værdier og ønsket om et sammenhængende liv. Advokater optræder mindre isoleret end tidligere og indgår i tværfaglige sammenhænge, der påvirker deres identitet. Mange ønsker en proaktiv rolle som rådgiver for store klienter, og corporate social responsibility vinder indpas i advokatbranchen. Kravet om proaktivitet og bæredygtighed har for den enkelte advokat mindst tre betydninger: Understøttelse af samfundsmæssige, politiske og retligt formulerede krav, ønsket om at drive en advokatvirksomhed bæredygtigt og et ønske om selv at leve et meningsfyldt, velafbalanceret og bæredygtigt liv.

Fragmenteringen af professionen, større krav om specialviden, øget individualisering og deltagelse i nye praksisfællesskaber kræver, at den enkelte advokat reflekterer over sin identitet og opstiller kriterier for, hvad, hvornår og hvordan han eller hun vil bruge sine advokatkompetencer. Hvis dette skal lykkes, må advokaternes identitetsdannelse og kompetenceudvikling i højere grad bygge på self-directed learning eller individuelle læringsplaner, hvor advokatidentiteten forener et samfundsmæssigt ansvar med arbejdsglæde og livsmod.

English summary

The idea for this study arose from experience of cooperation with lawyers and of responsibility for training lawyers. At the societal level, a multi-layered legal culture has developed within the European Union. Internationalisation and globalisation has also affected lawyering. Some lawyers see themselves as agents of justice, while others see themselves as technical legal experts running a business. The role of the lawyer is in transition and the formerly predominantly homogeneous profession has become a heterogeneous group of lawyers with diverging perceptions of the lawyer's identity and of the main characteristics of the profession. The European Union has extended the perception of democracy and the fundamental rights that lawyers have an obligation to support so as to include more collective rights, social concerns, global responsibility and sustainability. The role of the lawyer has come under pressure in the movement towards a supranational legal framework with global relations.

The main question which the dissertation seeks to answer is: *How can the identity and competences of lawyers be developed so that they can practise sustainable and proactive lawyering in the European Union?*

The thesis is in four parts. Part I contains the introduction, sets out the research questions, and describes the theoretical and methodological framework. Part II conceptualises identity, depicts a European identity ideal and integrates an empirical study. Part III focuses on education and training for sustainable lawyering, and Part IV includes the conclusions, critical reflections and perspectives. To answer the main question, the following four research questions have been analysed in Parts II and III:

1. Is there a common identity ideal for European lawyers that can be depicted within the legal order in Europe? (Chapter 4)
2. How do Danish practising lawyers define or perceive their identity? (Chapter 5)
3. What are the changes and challenges to the role and identity of lawyers at the societal level, the professional level and the individual level? And how do these levels interact? (Chapter 6)
4. How will new communities of practice affect the identity development and professional training of lawyers? (Chapters 7 and 8)

Theoretically as well as methodologically this research constitutes an interdisciplinary study, where legal science meets sociology and social learning theories. The study builds on Anthony Giddens's structuration theory and his discussions of identity mainly set out in his book: *Modernity and Self-identity - Self and Society in the Late Modern Age*. The focus is on the individual's perspective for the development and perception of identity as a lawyer. This involves looking at how lawyers connect the questions 'What to do?' (societal level) and 'How to act?' (professional level) with 'Who to be?' (personal level). These three questions frame identity in rela-

tion to structuration theory, and in particular Giddens's analysis of developments of identity at macro, meso and micro levels. Identity development is perceived as a reflective project; there is a range of lifestyle choices which contribute to a composed but constantly shifting maintenance of self-identity in relation to democratic principles and the ideal of justice connected to the role of lawyers.

Several methods have been used to answer the research questions. Legal sources have been connected to original empirical data collected in qualitative studies in focus groups and interviews, involving more than 50 practising lawyers in Denmark. Furthermore, a participatory study has been made in Brussels in a new training setting, teaching lawyers and other experts to be mediators in international high level conflicts.

The study demonstrates that it is possible to depict a European identity ideal based on legal sources, but from the empirical data it is possible to identify six different identities among Danish practising lawyers. This would not have been revealed by a purely legal dogmatic analysis. From a sociological and andragogical perspective it is possible to recognise the following identities: *lawyer-businessman*, *lawyer-performer*, *lawyer-entrepreneur*, *lawyer-humanist*, *lawyer-integrator* and *lawyer-statesman*. Each identity possesses an identifiable set of lifestyle indicators or characteristics. The intention has been to elaborate and develop a better understanding of different aspects of the lawyers' identities and to understand the process of developing identity from a learning perspective.

Training lawyers to become 'real' lawyers and to think like lawyers is part of the curriculum offered by the professional organisations. This curriculum is still directed towards the traditional legal competences and skills, but these do not fully correspond with the perception of identity, tasks and functions of today's lawyers. However, EU initiatives at the societal level support new training formats where lawyers can take or are given new identities, often in new communities of practice which include an international dimension. The empirical studies show that young lawyers in particular tend to leave the profession as they cannot find meaning and direction, or adequate or acceptable conditions within the profession. It is notable that old lawyers and young lawyers share ideals and that both groups want to live a meaningful life and find joy and satisfaction in legal life. Today's lawyers participate in many interdisciplinary activities and seek proactive consultancy functions. For individual lawyers sustainability has at least three meanings: supporting societal goals as laid down in legal sources, running a firm or the profession sustainably, and finally sustainability in their individual lifestyles. The aim of sustainability is expressed either as the headline of a business profile, or in terms of corporate social responsibility, a policy of work-life balance or the need for an integrated life.

The fragmentation of the profession, with greater demand for specialist knowledge, increased individualisation and participation in new communities of practice, requires each lawyer to reflect on their identity and establish criteria for what, when and how they will use their lawyering skills. For this to succeed, lawyers' identities and competences will depend more on self-directed learning and individual learning plans, where the legal identity combines (global) societal responsibility with job satisfaction, authenticity and adherence to personal values.

Thanks to all supporters, family and friends

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