Critical Writing Skills in Legal Education

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1. Legal Skills Course

In daily life, people have no problem with judging and criticizing the actions of other people, for example, 'How President Trump treats illegal immigrants and their children is outrageous!' Expressing a critical opinion seems to amount to a rejection: If someone passes a judgment, he or she disapproves of someone else's behavior. Criticism appears to be a negative and destructive enterprise. In legal education, however, criticism is conceived as an *academic* activity. As lecturers, we expect from students more than just the expression of their opinion; they have to evaluate and criticize a certain practice, building on a sound argumentation and provide suggestions on how to improve this practice. Criticism not only entails a negative judgment but is also constructive since it aims at changing the current state of affairs which it rejects (for some reason or other). In this article, we want to show how we train critical writing in the legal skills course for first-year law students (*Juridische vaardigheden*) at Vrije Universiteit Amsterdam. We start with a general characterization of the skill of critical writing on the basis of four questions: 1. Why should we train critical writing? (section 2); 2. What does criticism mean in a legal context? (section 3); 3. How to carry out legal criticism? (section 4); and 4. How to derive recommendations from the criticism raised? (section 5). This characterization is based on our own practical experience of conducting the course in its present form during the last 3 years.[1] Subsequently, we discuss, as an illustration to the last two questions, the Dutch *Urgenda* case, which gave rise to a lively debate in the Netherlands on the role of the judge (section 6). Finally, we show how we have applied our general understanding of critical writing to our legal skills course. We describe the didactic approach followed and our experiences with it (section 7).

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1 As a consequence, our references to literature are limited.

2. First Question: Why Should We Train Critical Writing?

Before we start teaching critical writing, we have to ask ourselves why lawyers have to be critical in the first place. Rightfully or not, lawyers appear to be law-abiding and service-oriented and not very critical toward established institutions and authorities. Usually, they want to advice and assist people in legal matters, for instance in the legislative process or in a court procedure. That is, of course, all very useful and important. However, this customer-service orientation has a downside. A classic and notorious example is the servile attitude of many legal professionals during the Second World War in the Netherlands and elsewhere in Europe.[2] More recently, one can think of the not very critical way in which lawyers supported financial organizations during the global economic crisis two years ago. As Jaap Winter, Professor of International Company Law at Vrije Universiteit Amsterdam, argues, 'We as lawyers got away with it for a very long time (...), but where was our integrity? What did we really do to prevent the problems? Too little, including myself.'[3] Academically educated lawyers may be expected to be critical and reflective when carrying out their tasks. From a social perspective, it is very important that lawyers do not take things for granted, because they play a key role in the design and development of society. In various ways, law intervenes deeply in people's lives, and lawyers have the task to ensure that this is done in a lawful as well as just manner. While a legal procedure ends (for the time being) with a court's decision or the legislature's acceptance of a bill, the academic and public debate continues. Legally speaking, the Supreme Court has the final word in the case at hand, but as lawyers we have to ask ourselves whether the decision of the highest judge is justifiable, not only in legal terms (Does it fit within the legal system?) but also in social terms (Is it acceptable to citizens?) and ethical terms (Is it just or fair?). In their contribution to the legal and public debate academically educated lawyers can offer other perspectives to a case or suggest alternative solutions that non-lawyers may have failed to see. Legal criticism aims at questioning the results of a legal procedure or process, for instance, a court decision or a bill passed in Parliament (or the lack thereof), and—from a legal perspective—criticizing its correctness or desirability. Is what has been decided or what is being proposed compatible with already accepted legal norms and principles? The person who expresses criticism is dissatisfied with the current state of affairs and intends to change and amend it. Since it cannot be presupposed that students have already mastered the skill of critical thinking and writing at an academic level, the relevant training has to be incorporated at the very beginning in the legal curriculum. That brings us to the next question: What does criticism mean in a legal context?

2 Jansen & Venema, 2012, discuss the role of the Dutch Supreme Court, which kept on applying the law under the Nazi regime. In other legal professions as well a critical attitude was lacking, for instance, in the notary (see Schütz, 2016) and the advocacy (see Meihuizen, 2010).

3 See www.mr-online.nl/jaap-winter-vu-jurist-moet-verder-kijken-dan-de-regels/ (last accessed March 15, 2018) (our translation).

3. Second Question: What Is Legal Criticism?

Earlier, we argued that to express a negative opinion is not the same as to engage in criticism. An opinion does not equal a claim within a chain of reasoning, although in both cases a judgment is passed. An opinion consists of a *subjective* judgment that is not necessarily backed up by arguments; someone *simply* considers a certain behavior to be reprehensible, and that's that. In the setting of a pub that may be enough, but in the academic world it certainly is not. In the university you do not ventilate a personal opinion but you defend an academically acceptable claim. A claim is a *substantiated and therefore intersubjective* assessment, based on an argumentation in which convincing arguments in favor of the claim are provided and possible counter arguments against the claim are refuted convincingly. You are able to criticize how things are, only if you have a view of how they ought to be. Criticism thus presupposes a normative framework—that is, a set of standards used for evaluation—on the basis of which the current situation can be assessed and questioned and recommendations can be given.[4] What the normative framework consists of depends on the type of criticism that is put forward. For example, ideology critique evaluates existing power relations within society from a specific political point of view (see, for instance, Cooke, 2009). The German philosopher and political theorist Karl Marx dismissed capitalist society because, in his view, it preserves and reinforces social inequality: In the capitalist rat race, the rich get only richer and the poor get poorer. In literary criticism a novel (or some other literary work) is assessed on the basis of an esthetical view, for instance, because the story construction is too predictable or the characters are underdeveloped. In the case of legal criticism, as it is trained in our legal skills course, the democratic constitutional state (*rechtsstaat*) constitutes the normative framework. On the basis of legal norms and principles connected to democracy and the Rule of Law students have to reflect critically on a specific legal issue. That means they have to draw arguments, not from their personal sense of justice or political conviction but from fundamental principles widely shared within the legal academic community. It is not possible to block one's individual preferences entirely, but one must be able to present arguments that are generally accepted or acceptable within academia.

In order to characterize criticism we suggest looking at three aspects: a) the person who puts the criticism forward (the author or subject of the criticism); b) that what is being criticized (the object of the criticism); and c) the manner in which the criticism is uttered and the means used (the form of the criticism).

a) The subject of the criticism is the one who utters the criticism. Legal criticism is put forward by lawyers who, building on their legal expertise (in our course, in particular, concerning the legal norms and principles connected to democracy and the Rule of Law), evaluate a specific legal issue. For instance, a lawyer may find that the Dutch Organ and Tissue Act (*Donorwet*), recently passed by

4 Taekema, 2018, deals more extensively with the notion of a normative framework.

the Senate, contravenes the constitutional right of inviolability of the human body (as laid down in Article 11 of the Dutch Constitution). According to this Act, donorship is the default option: Unless one has explicitly indicated otherwise, he or she is considered to be a donor and the state can dispose of his/her body after death.

b) The object or target of the criticism can be acts or actions by people, institutions, and organizations (or the lack thereof) or, more generally, situations that are brought about through human action and decision making, for which actors can be held responsible and which they are able to undo or change. In other words, the object of the criticism is a state of affairs that is not given or fixed but susceptible to human intervention. It does not make sense to criticize a volcano for erupting, but one may blame the authorities for not evacuating people from the earthquake disaster zone in time. Legal criticism concerns legally relevant issues that follow from, for instance, a court decision, a bill submitted to Parliament, or an action carried out by a political or legal official (e.g., an attorney, a civil servant, or a police officer). The object of the criticism in these cases is, respectively, the verdict of the judge, the government's bill, and the behavior of the authority at hand.

c) There are many different ways in which criticism can be put forward and various means that can be used for it. *Means* to express criticism are a demonstration, a silent march, a strike, a newspaper column, a blog on social media, and so on. In the critical writing course, students write in pairs a paper for an audience of lawyers, in which they develop legal criticism on a legally relevant matter. Criticism can be put forward in various ways, with variations in intensity and weight. These *modes* of criticism, as we call them, can be put on a scale, ranging from relatively mild criticism to heavy moral condemnation. It is a gliding scale; the distinction between the different modes is not always clear in actual practice. We distinguish five modes:
    - *Problematization*: The author raises the question of whether the responsible authority has acted rightfully in the case at hand. For example, was it legally correct—in the light of Article 11 of the Dutch Constitution (which protects the inviolability of the human body)—that Parliament accepted the Organ and Tissue Act (*Donorwet*) in the Netherlands? The author postpones a definite assessment and only poses some critical questions that eventually may lead to a negative assessment.
    - *Questioning*: The author puts forward some considerations for why the responsible authority has possibly not acted rightfully in the case at hand. As in the case of problematization, he or she refrains from a definite assessment, but argues that there are good reasons to call into question the authority's action.
    - *Challenging*: The author is convinced that the authority in this case has not acted rightfully and gives reasons for why he or she thinks so. He or she does not just consider the *possibility* of legally incorrect action (as in the previous modes) but intends to demonstrate its incorrectness.
    - *Denial*: The author openly takes sides in the debate on the current legal issue. He or she denies forcefully that the responsible authority has acted

rightfully in this case. For example, it could be argued that the Dutch Supreme Court had remained too passive under Nazi rule and should have protested against the dismissal of Jewish judges. Obviously, as in the other modes of criticism, this claim has to be substantiated with strong arguments.

- *Rejection*: The author not only qualifies the authority's action as legally incorrect but also dismisses it as highly objectionable. The rejection is loaded with moral condemnation. For example, it may be argued that Donald Trump is unworthy of being the president of the United States because he is lying and insulting people all the time. His lies and insults not only harm his own credibility but also undermine public trust in American politics.

In our critical writing course, we focus on the first two modes: the problematization and questioning of a certain action on the basis of the normative framework of the democratic constitutional state. Since students in our course have just started studying the law, they cannot be required to make a fully substantiated assessment. They are, however, perfectly capable of raising critical questions and casting doubt on the authority's action from a legal perspective.

4. Third Question: How to Carry Out Legal Criticism?

As argued earlier, criticism comprises three elements: (i) a *description* of the state of affairs (on the basis of the information available); (ii) an *assessment* of the present situation that is meant to demonstrate that the situation as it is, is not right (on the basis of arguments); and (iii) a *proposal* for how this situation could be improved (by means of specific suggestions). Criticism thus shows that there is a gap between how things are and how they ought to be. This gap follows from a discrepancy either (i) between an existing norm and a higher, possibly more desirable norm (for instance, it may be argued that the Organ and Tissue Act (*Donorwet*) violates the fundamental right of self-determination); or (ii) between different systems of norms, such as law and morality (the Organ and Tissue Act may be considered immoral, since it does not respect the sanctity of the human body); or (iii) between a fact and a norm (e.g., the illegal trade in human organs is a violation of the law). In order to reveal the discrepancy the present situation has to be compared with the ideal situation. For that purpose students need, to begin with, to gather information. This information informs the students of both the existing and the ideal (or least, better) situation. One has to know first what the current state of affairs is, before one can question it. Subsequently, a comparison has to be carried out that demonstrates that there are significant differences between the present situation and the ideal situation. Because criticism aims at providing an evaluation (possibly followed by recommendations), it does not suffice to describe both situations and compare them; the state of affairs has to be assessed according to some normative standard. In the final step, the present

situation (how it is) is evaluated in terms of, for instance, correct/incorrect, lawful/unlawful, desirable/undesirable, or just/unjust (how it ought to be).
What makes criticism a challenging activity is not only that one has to give an opinion—people tend to be quite opinionated and judgmental toward others—but also that one has to support one's opinion with convincing arguments. Criticism presupposes a normative framework and the selection of the appropriate standards is no easy task, for beginning and more advanced students alike. The standards used for criticism cannot be subjective (springing from an individual emotion or intuition) but have to be acceptable to a wider audience. Taekema (2018, p. 7 ff.) makes a distinction between standards derived from an internal or an external normative framework. In the case of legal criticism, the standards are derived from the legal systems itself, consisting of legal norms and underlying legal principles. Obviously, standards can also be drawn from frameworks external to the law, for instance, from an economic, political, psychological, ethical, or religious perspective. From a religious perspective, one may argue, for example, that decisions on life and death are not to be taken by men but only by God. Building on this standard, the new Dutch Organ and Tissue Act may be criticized, since it is meant to save more lives through donorship. The distinction between an internal and external normative framework is not always clear-cut; there may be overlaps. Legal principles make it possible to include moral and ethical standards in the law. In our critical writing course we have selected the democratic constitutional state as the normative framework because it offers a set of generally accepted standards, not only in the legal community but in the society at large. The democratic constitutional state provides an argumentative framework that has much persuasive force in political and legal debates. However, lawyers do disagree over which legal norms and principles exactly constitute the democratic constitutional state and, even more, over how these norms and principles have to be applied to concrete cases. For instance, according to some legal scholars, the freedom of speech can be limited only if someone incites other people to commit a violent crime, such as fire-raising or murder (i.e., there must be serious material damage), while others claim that the freedom of speech can already be restricted if someone insults other people on the basis of their political conviction or religious belief (i.e., in case of non-material damage). Because the democratic constitutional state, as every ideal construction, is open to diverging interpretations, students have to make explicit which definition of the applicable standard (in this example, the freedom of speech) they use in their assessment and why they have chosen this definition over other possible definitions. The democratic constitutional state offers standards that can be interpreted from an internal legal perspective (positive law) as well as from external, non-legal perspectives. According to Dutch law, the freedom of speech may be limited if someone insults a group of people on the basis of their belief. Liberal scholars are usually more permissive. John Stuart Mill, for instance, argues that the freedom of speech can be restricted only if someone incites other people to cause physical damage.

5. Fourth Question: How to Construe Recommendations?

It is very important, both for the academic exchange of ideas and the functioning of society, that lawyers engage themselves in critical thinking and critical writing. It is equally important that they, after having criticized something, reflect on how to change and amend the present situation. After the destructive phase, in which problems within the present situation are identified, the constructive phase starts, where possible solutions for the problems are suggested. Students often experience difficulties moving from the destructive to the constructive phase. How and where to find recommendations? As lecturers, we stress that the criticism of how things are already contains an idea of how they ought to be. In other words, you criticize something because it differs from how you think it should be. Someone may, for instance, reject the Dutch Organ and Tissue Act because it presupposes that people are willing to donate their organs and tissue after death, unless they have indicated otherwise. As can be argued, this contravenes the fundamental freedom of people not to make a choice. The state cannot dispose of our bodies without our explicit consent. Given this criticism, a recommendation is easily made: The legislature has to revise the Act, so that people who have not made a choice are not automatically considered to be a donor; they can become a donor only if they have explicitly agreed to. In order to find a recommendation one has to clarify what view of the ideal situation underlies the criticism of the present situation.

In the case of legal criticism, a recommendation, which offers a suggestion on how to improve the law as it is (as laid down in, for instance, a statute, a bill, or a court decision), has to meet various requirements:

1) To begin with, the recommendation has to follow from the criticism put forward and thus be consistent with it. If you argue that the Dutch Organ and Tissue Act provides not enough room for individual choice, then your proposal must, obviously, give more room for individual choice.
2) The recommendation has to fit the current legal system, which means it cannot contradict already accepted legal norms and underlying principles. This does not imply that positive law is immune to change, but the proposal must somehow be compatible with the law as it is—in Luhmann's terms, it must be '*anschlussfähig*,' or 'connectable' (Luhmann, 1987, pp. 62 and 140). There can always be discussion on whether a proposal fits the existing legal system; the new has to find and fight its place into the old structures.
3) Moreover, the recommendation cannot violate generally accepted convictions in the field of ethics, morality, and politics. For example, a proposal that forces people to donate their organs by death is highly questionable from a moral perspective (considering current notions of what the state is allowed to do in our liberal societies) and from an ethical perspective (on the basis of current theories of justice). A proposal may, in some respects, be controversial, as long as it remains within the limits of what generally is considered to be socially acceptable. What has to count as socially acceptable can itself be the object of discussion.

4) The recommendation must be feasible and achievable. Someone could suggest, for the sake of environmental protection, to ban cars from all cities in the world with immediate effect. Most certainly, this measure would cause a drastic reduction of carbon emissions worldwide. However, it would probably also lead to massive social protests and would create a serious health problem, since the supply of basic necessities such as food, drinks, and medicines is threatened. Moreover, it would have a dramatic effect on local and global economies since the production of cars is hampered and, as a result, many people would lose their jobs. This requirement also entails that the recommendation is financially viable and realizable on a logistical and organizational level.
5) Finally, the recommendation must preferably be interesting and innovative. It usually makes little sense to only repeat what others have already proposed. The challenge is to find something new and surprising that can improve an undesirable situation. This is not a strict requirement but more of an aspiration, in particular, for less experienced students.

So it is not sufficient to just give some recommendations; it also has to be demonstrated, in case it is not obvious, that the proposal 1) follows from the criticism given; 2) is legally justifiable; 3) ethically, morally, and politically acceptable; 4) feasible and achievable; and 5) ideally adds something new to the ongoing discussion.

6 An Example: The *Urgenda* Case

To illustrate how you can criticize a court decision from a legal perspective and draw recommendations from this criticism, we discuss in this section the verdict of the District Court of The Hague in the *Urgenda* case.[5] We use this example in the course, first, because it is an interesting and controversial case and, second, because it is not related to the freedom of speech about which students have to write their paper (so they have to apply it to their own case instead of reproducing our criticism). In its verdict, the court decided that the Dutch state has to take more measures to reduce the carbon emission in the Netherlands than the Dutch government has declared to do. The court ordered that the state has to secure that the emission level in 2020 in the Netherlands is at least 25% lower than in 1990. The case was brought to court by the Urgenda foundation, a Dutch pressure group or, in its self-description, a citizen's platform that is engaged in activities and making plans to prevent climate change. From a legal perspective, this is an interesting and controversial verdict because the court appeared to be quite creative in interpreting the applicable law. On the one hand, the court argued that from the

5 District Court of The Hague, June 24, 2015, ECLI:NL:RBDHA:2015:7145. Recently, the Court of Appeal of The Hague has confirmed this decision; see ECLI:NL:GHDHA: 2018: 2591.

various legal norms and principles invoked by Urgenda, no legal duty for the state can be construed. In its view, these provisions—as can be found in, for instance, Article 21 of the Dutch Constitution (which sets a duty of care for the state to protect and improve the environment) and several climate treaties (e.g., the UN Climate Treaty)—constitute no more than a political commitment and citizens cannot appeal to them directly. On the other hand, the court claimed that Dutch tort law (as laid down in Article 6:162 of the Dutch Civil Code) involves a duty of care for the state to prevent harm caused by climate change: 'Because climate change has serious effects and dangerous climate change will probably occur if no mitigating measures are taken, the court concludes that the State has a duty of care to take mitigating measures.'[6] So what was first conceived as a mere political commitment has, through the backdoor of the duty of care in Dutch private law, turned into an enforceable legal duty.

In the academic debate that followed, the court's decision was criticized severely by Dutch legal scholars. According to Roel Schutgens, Professor of Jurisprudence in Nijmegen, the court should have shown more restraint in applying the duty of care to the state. It is a highly sensitive matter politically, in which the political authorities responsible already have taken a well-considered decision and, therefore, as Schutgens argues, the court should not reconsider this decision (Schutgens, 2015, p. 2275). Lucas Bergkamp, emeritus Professor of Environmental Liability Law in Rotterdam and practicing attorney, denies the court has the competency to carry out a review in cases like this: 'By deeming himself competent to carry out such a review, the judge can compel the State on the basis of a general clause of private law to adopt a certain government policy and to issue public law legislation in accordance. Following the current legal doctrine, this is a step too far' (Bergkamp, 2015, p. 2281; our translation). He even believes that this verdict endangers the Rule of Law: 'In the first Dutch climate case the court allowed itself to be used by the green movement. For this movement the judge is a political tool now. However, when everything is turned into politics, there is no law anymore. Therefore, the court decision in the *Urgenda* case is a danger to the Rule of Law' (Bergkamp, 2015, p. 2281; our translation).

In this criticism, the principle of separation of powers (*trias politica*) is taken as a standard to evaluate the court's decision. This is an internal legal standard, which is generally accepted both in legal practice and legal doctrine as an authoritative principle for the distribution of power between the legislature, the administration, and the court. On the basis of this principle Schutgens and Bergkamp argue that the court in the Urgenda case has transgressed its boundaries. According to them, the court has entered the political arena by ordering the administration to reduce the carbon emission level and to promote legislation accordingly. The court is well aware of the politically sensitive nature of its decision. In its verdict, it discusses at length the principle of separation of powers. It stresses that this principle is open to various interpretations and that in Dutch law no strict separation is implemented. Instead, the court aims at reaching a balance between the state

6 Consideration 4.83 (our translation).

powers. At the same time, the it argues—in line with a stricter interpretation of the *trias politica* principle—that it only applies the law and that the administration still has the possibility to decide for itself how it intends to achieve the carbon emission reduction ordered by the court. This is, however, a not very convincing line of reasoning because the court clearly does more than just *applying the law*. It does not so much apply the existing law, which seems to offer nothing but a series of political commitments; it actively creates new law by transforming these predominantly soft law provisions into hard, legally enforceable norms.

Van Gestel & Loth (2015) offer a more principled defense of the verdict of the District Court of The Hague. According to them, it is the court's task to check whether the administration has implemented its policy in a consistent way. Since the Dutch government committed itself several years ago to a more serious reduction of the carbon emission level, the judge may remind the administration of its earlier commitment. Due to the urgency of the climate change issue and the slowness of politics, an intervention by the court is 'possibly' justified, 'not so much to reach an all-encompassing solution, but to speed up developments and to make a small but possibly decisive difference' (Van Gestel & Loth, 2015, p. 2605; our translation). Moreover, in their view, the decision fits the changing role of the judge. While the judge in the past had to choose between various forms or methods of interpretation ('legal interpretation 1.0,' or traditional hermeneutics) and, at a later stage, had to continue the story of the law in a coherent manner ('legal interpretation 2.0,' which seems to equal Dworkin's constructivism (see Dworkin, 1986)), the judge nowadays operates in a different context, the 'multilayered legal order' (Van Gestel & Loth 2015, p. 2604; our translation). Within this context, the judge has to construe a normative framework on the basis of a great variety of legal sources, drawn from national, European, and international law. These different sources have to be brought together and interpreted coherently in such a way that the legal protection of citizens is secured on a transnational level. Van Gestel & Loth consider the court's verdict in the *Urgenda* case as a good example of this new type of legal interpretation—'legal interpretation 3.0' as they call it (Van Gestel & Loth 2015, p. 2604; our translation)—since the court had to answer a very legally complex question that transcended territorial, generational, and disciplinary boundaries (Van Gestel & Loth, 2015, p. 2605; our translation). On a critical note, it may be argued that this new type of interpretation gives too much leeway to the judge to bend the law to her own liking and to enter the political arena. Should a judge, who is not democratically chosen but appointed, have the power to revise and reverse decisions from democratic institutions with a mere appeal to the *legal protection* of citizens? Given the complexity and political sensitivity of this issue, a restrained approach would be more appropriate.

From the criticism put forward, subsequently, recommendations can be drawn. A possible recommendation is that the court in future cases has to exercise more restraint. The judge may point to the state's responsibilities in the case at hand, but she should not construe a legal duty if a clear legal basis to this effect is lacking. Another possibility is that the court requires the administration to reconsider its environmental policy and to give a better justification for why it has lowered its earlier ambitions regarding the carbon emission reduction.

7. Critical Writing in Practice

After having expounded our view of legal criticism, we will now show how we have put our general view of critical writing into practice in our course. The critical writing course follows on a training in argumentation theory, which is part of the same legal skills course. It consists of two lectures, two working groups, and two walk-in-hours. The materials provided consist of a very detailed syllabus and handouts. During the first lecture we inform the students about the general purpose of the course and explain what legal criticism is and how to engage in it. The assignment is introduced and, after the lecture, handed out to the students. Last year, we selected five recent court decisions (from the European Court of Justice, the Dutch Supreme Court, or a lower national court) concerning the freedom of speech. The assignments are randomly distributed. The students are required to write in pairs a legal commentary on one of the five cases. In the second lecture, we discuss the freedom of speech and show how it is implemented in national, European, and international legislation; applied by the various courts; and debated in legal and political theory (e.g., in John Stuart Mill's *On Liberty*). On the basis of the information provided in the two lectures and detailed instructions in the syllabus, students are expected to start with their research, gather relevant information, and reflect on the case at hand. To begin with, they have to write the first part of their commentary, including the introduction and a short analysis of the case), which is assessed by us and discussed in the first working group. Subsequently, students write a concept version of their commentary, which is peer reviewed by another pair of students. The results of the peer reviews are discussed in the second working group. Finally, within two weeks after the last working group, students finish their commentary. Before they have to hand in the first part of their commentary and the final version, students have the opportunity to ask the lecturer questions during walk-in-hours.
In order to structure the writing process, we give students the instructions below. These instructions are elaborated in greater detail in the syllabus. Ideally, the students follow the instructions step-by-step, but in reality it usually is a more circular process.

1) *Problem description*
   The research starts with a quick scan of the main relevant sources. This will give you a general idea of what is going on and the problem you want to address. In addition, you adopt a provisional position in the current debate, which you may have to alter after having studied the material more closely. In the description of the problem you state your position on the issue at hand, for example, the court has limited the freedom of speech possibly on unjustified grounds. The problem description follows from the comparison mentioned earlier between the present and the ideal situation. By comparing what is the case and what ought to be in your view, you form your opinion. You approach the case from an internal legal perspective—as a lawyer, not as a politician, activist, or, more generally, citizen.

2) *Information collection*
In the next step, you gather more detailed information on the case, which helps you grasp the problem and form your opinion. In the collection of information, you need to be selective; you have to focus on generally accepted academic legal sources and publications from the so-called serious media. Moreover, you should not take everything you read for granted. (We realize that this is a somewhat paradoxical instruction, which raises the question of whether you should take the previous sentence for granted. That is entirely up to you!)

3) *Knowledge acquisition*
In step 3, you study the collected information more closely by comparing the information provided in the various sources and establishing in which respects they supplement, confirm, or contradict each other. In this way, you acquire knowledge on the topic at hand. It is very important to study the literature thoroughly and critically. A precondition for critical writing is critical reading. Critical reading is an active form of reading (see Steel et al., 2016). It does not suffice to superficially scan or reproduce the information gathered; you have to engage yourself in a close reading of texts. In this close reading you can ask critical questions such as the following:

- Is the information provided in the text confirmed by other sources?
- How does the author substantiate his or her factual claims? What evidence does he or she put forward?
- What normative position does the author take in the current debate, and how does he or she justify this position?
- Is the reasoning valid and are the arguments given convincing?
- On what normative framework does the author rely when elaborating his or her position? Are the standards used for the assessment widely shared and clearly described?

So it has to be checked whether the information given is correct and whether the argumentation supporting the overall claim is sound.

4) *Normative framework*
Subsequently, in step 4, you identify and describe your normative framework. That means that you have to clarify on the basis of which standards, drawn from the democratic constitutional state, you are going to evaluate the case and—not to forget—how you interpret these standards. For that purpose, you identify which fundamental principles are at stake in the issue at hand. What may be wrong with the current situation? For example, does the court decision restrict the freedom of speech unjustifiably? Or does it, on the contrary, grant too much freedom at the cost of other possible interests? In this step you do not give a full assessment but you select the legal principles that, in your view, might be violated.

5) *Assessment*
Building on the normative framework presented in the previous step, you assess in step 5 the present situation. You have to determine whether court decision X, bill Y, or an action Z by some legal or political official is in accordance with the applicable legal norms and principles connected to the democratic constitutional state. Avoid personal criticism: Legal criticism does not concern the people involved, but addresses the legal issue at stake (as reflected in the verdict, the bill, or the action). When assessing a case, it is useful to make a list of arguments. In a list of arguments, you collect arguments for and against a certain position (in the case at hand a fundamental norm or principle is, or is not, violated). The following questions may help you to construe a list of arguments and thus to arrive at a good assessment:

- Which arguments support the claim that X, Y, or Z is in accordance with the applicable legal norms and principles connected to the democratic constitutional state?
- Which arguments can be raised against the claim that X, Y, or Z is in accordance with the applicable legal norms and principles?
- How do you weigh the arguments? Which arguments for or against this claim should prevail in your view and why?

Take care that you present the arguments in favor of or against a certain position as convincingly as possible, before you decide which arguments should prevail.

6) *Revision of one's former position (optional)*
As a result of the previous step, your may have to revise your former position. It is possible that, on the basis of the arguments raised, you are convinced against your first inclination—that in the case at hand no fundamental legal norms and principles are violated. There is nothing wrong in that. As is commonly said, it is better to stop half way than to persevere in an error. A scholar should face the world with an open mind and should also be prepared to look critically at his/her own judgments and prejudices.

7) *Recommendations*
After having established that the present situation is at odds with the democratic constitutional state, you have to think in the final step about how this situation could be improved. What has to be changed in your view in the court decision, the bill, or the official's action? Indicate as precisely as possible how the present situation could be brought into accordance with (what you consider to be) the ideal situation.

In our creative writing course, we intend, already in the first year, to activate students by making them, to a large extent, responsible for their own learning process. Looking back at last year's course, we can conclude that we were partly successful. On the one hand, students were really engaged in the cases we

provided them with. Some students put a lot of effort in gathering information, not only on the Internet (as if Dr. Google knows all) but also by consulting colleagues from other departments and the library. Generally speaking, they carried out the peer review of each other's concept versions very seriously. With limited support from our side, they managed to finalize their texts. Although older people often complain that young people cannot write anymore, the overall language proficiency (in terms of spelling, grammar, and ordering) was surprisingly good. Given the lack of experience in academic writing, that really is an achievement. On the other hand, the commentaries did not always meet our expectations. In many cases, a normative framework was lacking or not sufficiently developed. The claims made were not sufficiently substantiated by arguments. Possible counter arguments were not taken into account. We required students to use at least two court decisions, two pieces of legislation, and two academic publications. Students took that mostly as a formal requirement and failed to see how useful sources are for finding relevant information on their case and arguments pro and contra their position. Some students could not make a difference between an academic research question (which they were supposed to answer) and the legal question in the case at hand (which the judge had to answer). The assignment was meant to evaluate the court's decision, not to play judge in the case yourself. The recommendations given were not always interesting and relevant for the case at hand. Possibly, we were expecting too much on this point, since it was for students the first exercise in academic legal writing. In our view, students became active too late in the course, so there was too little time left to amend their commentaries.

On the basis of our mixed experiences, we have decided to revise the course in some respects. Most importantly, we want to practice more in the working groups and in an earlier stage with (i) finding and evaluating relevant sources of information; (ii) the development of a normative framework; and (iii) the building of an argumentation structure. Moreover, we plan to assess, besides the first part of the commentary, also the full concept version (instead of letting students peer review each other's concept texts). Hopefully, these and some other amendments will contribute to improving the quality of the commentaries.

As noted in our introduction, criticism is a common human activity. In daily life, people comment on other people's actions continuously. However, academic criticism is a much more demanding exercise. Though not always easy, engaging oneself in critical thinking and writing is very important, for society as well as for the academic world. Society benefits from the exchange and clash of ideas, because criticism helps to identify social problems and to discover possible solutions. The university thrives on critical thinking and writing. To foster the development of knowledge, opinions have to be tested in the marketplace of ideas. As the French say, '*Du choc des opinions jaillit la vérité*' (in the clash of opinions truth emerges). With our critical writing course we support students in acquiring this essential skill and encourage them to develop and use it for the benefit of all in their future careers.

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