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RETHINKING LEGAL EDUCATION IN LATIN AMERICA

*Ana Cecilia MacLean**

I. INTRODUCTION

THROUGHOUT Latin America, but specifically in Peru, the legal profession is in crisis. The legal system is inefficient and corrupt, the number of lawyers is extraordinary, and the ones that actually exercise their profession are themselves considered inefficient and corrupt.

For decades politicians have tried to overturn this conception of inefficiency and corruption by modernizing the legal system, buying more computers, making more modern laws, and raising the salaries of judges. As to the problem of the extraordinary number of unemployed, ill prepared, and corrupt lawyers, many politicians consider that the answer is to restrict the creation of new law faculties and to fix the curriculum of the existing ones, following the traditional legal education system. This, of course, has generated some resistance because law faculties are the most cost-efficient of a university. Although they require a lower investment compared to other faculties, they generate more revenue because of high enrollment.

Few have talked about a more intrinsic solution—to rethink legal education itself. This is what this article is all about: a mental exercise on what legal education offers and what it should offer to future lawyers and society in general.

After submerging myself into the vast amount of existing literature about legal education in the common law countries, I realized that a television commercial in Peru from the 1980s held the key to enlightenment on legal education. The commercial presented two characters, a wolf and a chicken, and they argued why Colonel Sanders' chicken tasted so good. The wolf said it was the secret recipe, and the chicken said it was the special way to prepare it. Of course the commercial ends without ever reaching an answer. Hopefully after this article we will have an answer.

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A. WHAT DOES TRADITIONAL LEGAL EDUCATION OFFER?

In order to talk about traditional legal education, we should first take a look at the concept of law and the role lawyers play in society, since these two notions have a great impact on legal education. The most traditional concept of law (we specifically refer to positivists) is that it is a body of rules emanating from a controlling authority of a state and having binding legal force.¹ On the other hand, lawyers have traditionally been viewed by themselves and by others as problem solvers. They have played a role of the all-knowing superhero with unique powers that appears as if from nowhere to protect the unfortunate and solve their conflicts. If we take into account that these notions are deeply embedded in the Latin American society in general and more particularly in lawyers, we cannot be surprised that our legal education bears this burden.

B. KNOWLEDGE-BASED EDUCATION

It is important to point out that, unlike American law schools, law in Latin America is studied at an undergraduate level, with knowledge-based lectures applying only deductive method reasoning. A knowledge-based academic formation prepares its students for a lab setting rather than reality. Upon graduation, new lawyers are thrown into the swamp of real life, which unfortunately for them is not as perfect as presented at school. In fact, for them the gap between one and the other is tremendous as they encounter situations not contemplated at school. Unfortunately, their legal education does not prepare them to deal with these kinds of unexpected situations.

This concept is captured in a cartoon that appears in the book *Lawyering Skills and the Legal Process* by Caroline Maughan and Julian Webb. This cartoon truly describes traditional legal education and its effects on students and future professionals.² This cartoon reflects how legal education is considered to be the greatest accomplishment for a student by placing the school high and mighty on top of a hill almost over the clouds. The part of the image that catches the eye is what happens to the new graduate after he receives his diploma. He is quickly thrown out into the real world, depicted as a swamp full of crocodiles ready to eat him alive, with mud and other students struggling not to be devoured.³ Only the fittest, the ones with experience in the real world, will be able to survive.⁴

Traditionally, the study of law has developed quite well in regards to the knowledge of the law and how experts interpret it. Knowledge is power, and each student must receive from each professor all the knowl-

1. Owen Fiss, *El Derecho Según Yale*, in *LA ENSEÑANZA DEL DERECHO Y EL EJERCICIO DE LA ABOGACÍA* 15, (Martin Bohmer ed., 1999) (English version available at <http://www.law.yale.edu/documents/pdf/powerpolicy.pdf>).

2. CAROLINE MAUGHAN & JULIAN WEBB, *LAWYERING SKILLS AND THE LEGAL PROCESS* 1 (Butterworth 1995).

3. *Id.*

4. *See id.*

edge the professor is able to transfer within the short period of class during their five or six years of studies, depending on the university. The methodology used in class is mainly lecture, where the professor comes to class and bestows on the students, eager for knowledge, all his wisdom on abstract concepts of law. The students have no idea how the professor's knowledge was acquired, nor if there is some opposition to his view. Most of the time, the students only understand these abstract concepts after several years of legal practice.

The application of the deductive reasoning method as the sole reasoning method creates more problems than imagined. The deductive reasoning method is the adaptation of a specific premise to a general premise. What will happen when the lawyer encounters an extraordinary situation? He will be unable to respond to a situation that is not contemplated in a general premise, and he will be unable to conceptualize and come up with his own ideas to find a solution.

C. WHAT SHOULD LEGAL EDUCATION OFFER?

We have seen how the traditional notion of law has driven legal education towards the development of knowledge. The consequence, the descent into the swamp, is where the recent graduate realizes the divorce between his academic preparation and reality.

Instead of thinking of law as a set of rules emanating from a controlling authority of a state, we should think of it as a set of rules emanating from a controlling authority of a state or from the individuals themselves, in order to live in harmony within a society. This will prevent as well as solve conflicts, and we realize that we must develop legal education from a holistic perspective. This means looking at law from three dimensions: knowledge, skills, and attitude.

This new vision of law does not take for granted that the student will learn the skills he needs during his pre-professional and professional practice. Instead, it presents a systematic methodology, which promotes the case study method, also known as the inductive reasoning method. We do not pretend to say that the case study method resembles reality in an exact manner, but it does shorten the gap between academic preparation and real life. Furthermore, this new vision develops the attitude dimension, which includes considering idiosyncrasies, culture, interests, and attitudes of all people involved.

A new paradigm of legal education seems to focus not only on what happens within the legal profession, but on what is happening across other disciplines. Mainly, the change has been to focus on the major changes that have occurred in the discipline of education. Experts like Fiona Cownie, Julian Webb, and Caroline Maughan have been promoting for quite some time the concepts of teaching legal skills, learning as opposed to teaching, formative assessment to promote learning, learning from experience, learning outcomes, analysis of competencies, and teach-

ing design.⁵

The basic rationale for this change of paradigm is the change in the way the lawyer-client relationship is considered today. Different lawyers may deal with different elements of a legal case. Each of these people will need, therefore, a different level of understanding of law and other skills.

Lawyers must stop feeling like all-knowing superheroes with unique powers who solve the problems of the less fortunate. The advent of new technology will bring the opportunity to change their approach from solving problems to preventing them.⁶

D. COMPETENCY-BASED EDUCATION

Competency-based education has been treated as an organizing principle for education at all levels in the United States, Australia, and Europe, and is now catching on worldwide. In legal education in particular, it is useful because it has the ability to link all the different elements of legal education and because it provides practical and intelligent coherence for an entire legal system. Furthermore, it allows for a better understanding and harmonization of the different legal systems across the world.⁷

We should probably first answer the question: what is competence? It is basically the sum of knowledge and skills.⁸ Competency added to the correct attitude equals performance.⁹

As we can see, this is another way to talk about the holistic approach referred to above. What is this all about? It is about learning to live in the swamp. Giving the student the skills to create his own strategies that will enable him to live in the swamp, anticipating and confronting in the best possible way problems he may encounter, so he can be successful personally and professionally.

Perhaps we should explain the reasons behind this new competency-based education. Basically, the reasons relate to economics and personal development. Globalization and the technological revolution have changed the way firms are structured. Firms are now more horizontal due in part to the change from the concept of job description to the concept of area of occupation. The individual must now focus on keeping himself employable, that is to say to have the possibility of finding a job and keeping it until he decides that it is time to move on to another job, which will allow him to develop new competencies.

5. *See id.*

6. Christine Clossen & Veronica M. Smith, *New Technology – Implications for Legal Research Methodology* 3 (12th BILETA Conference, The Future of Legal Education, University of Durham, Mar. 25, 1997), available at <http://www.bileta.ac.uk/97papers/97-6.html>.

7. Avron Sherr, Professor, Inst. Of Advanced Legal Studies, Univ. of London, Wolf Chair Inaugural Lecture: Legal Education, Legal Competence and Little Bo Peep 9 (Nov. 2000), available at <http://ials.sas.ac.uk/research/woolf/inaugpub.htm>.

8. Donald Clark, *Introduction to Competencies* (Sept. 5, 1999), <http://www.nwlink.com/~donclark/hrd/case/compet1.html>.

9. *Id.*

The International Labor Organization has prepared a manual that develops the subject of labor competencies and competency-based education, so it may serve as a guide to all employers around the world. There are three basic models of competency-based education: behaviorism, functionalist, and constructivist.¹⁰

1. *Behaviorism*

This model focuses on the performance of an individual's discrete task. This model is criticized because it ignores the following: the connection between different tasks, the connection between different areas within the firm, the knowledge and attitudes behind the tasks, and the ethical aspects.¹¹

This model has been the most promoted because it is easier to implement than others. This model requires minimal effort to specify task-based behavior rather than describe the knowledge and attitudes required to perform such tasks, as well as requiring minimal effort on the part of the worker. This model is considered too simplistic and demotivating for the worker because of its checklist approach, which considers whether a person is capable or not to perform a particular task.¹²

An example of this model would be a legal counsel of a company, whose job is to ensure that the internal and external legal procedures are followed. The lawyer does not know how he is contributing to the development of the company. He just applies the law and steps up when there is a problem. He usually chooses outside counsel to solve the problem and to aid him in collecting information. The job is simple and boring.

2. *Functionalist*

This model analyzes the role of an individual as a worker. It looks for the elements that contribute significantly to a better performance by the worker. This model looks for the essential functions that the worker must prove his performance capacity in order to acquire or maintain a job.

Taking the same example as before, the legal counsel acknowledges what the company's objectives are and looks to participate in a way that efficiently meets these objectives within the parameters of the legal procedures. In this way, the lawyer stops behaving like a robot, which may be replaced at any time.

3. *Constructivist*

This model promotes the individual's own learning. This model suggests that people are capable of passing judgment, reflecting on it, and changing behavior constantly by reconstructing relevant and useful infor-

10. Sandra Kerka, *Competency-Based Education and Training* (1998), <http://www.calpro-online.org/eric/docgen.asp?tbl=mr&ID=65>.

11. *Id.*

12. *Id.*

mation as they interact.¹³ The individual is able to incorporate and contribute to the analysis and solution of problems he or the firm encounters, guaranteeing continued learning.

Continuing with the same example, the legal counsel acknowledges what the company's objectives are and uses his abilities to participate in the company by being in constant communication with other areas of the company to prevent problems as well as to solve them when they arise. There is added value to the firm and to himself.

This last model of competency-based education is the most accepted because it ensures a continuing education of the individual, allowing him to decide what competencies he wants to develop in order to keep himself employable. Moreover, with this model everyone participates in the education process, learning never stops, and most importantly, the student knows from the start of his career what he will be able to do at the end of it.

E. HOW TO INTRODUCE COMPETENCY-BASED EDUCATION

The first thing we must understand when speaking of competency-based education is that it does not imply the creation of new institutions. On the contrary, it is about a mechanism that binds existing educational institutions and regulates the nature and quality of what they offer. A serious attempt to change towards a competency-based education system requires the state to play a pivotal role in the promotion of rules, policies, and directives for the execution of this education system. The competency-based education system requires a structure of three basic levels: the political level, the executive level, and the operative level.

1. *Political Level*

This level is in charge of the definition of the rules, policies, reach, priorities, and resources of the system. In general, it creates the necessary conditions for this system to work out. This level should be integrated by people with actual power and decision, such as the Secretary of Education, The Bar Association, businesspeople, academics, and workers, to guarantee its orientation to the creation of policy and consensus.

2. *Executive Level*

This level is in charge of defining the rules of competence and coordination for a specific economic sector. This level is also in charge of defining the rules of labor competence for the occupations within each sector. These rules become common language between the educational institutions and the marketplace. This guarantees that the competencies are in touch with the real need of each economic sector. This level needs the participation of the Chamber of Commerce and organizations of each ec-

13. *Id.*

onomic sector in order to better define the rules of competence, academic preparation, and certification.

3. *Operative Level*

This level is conformed by all institutions, public or private, dedicated to education, certification, and evaluation. Individuals within this level work with clearly defined rules established by each economic sector, such as rules of competence, efficiency and quality indicators, methodology, clear criteria of certification, and a system of costs and prices, which may or may not be contemplated with the presence of subsidies for the less fortunate groups.

Certification is centered on demonstrating results, no matter how these are achieved. There is ample liberty for applying different methods of self learning, for learning from experience, and for the flexibility of learning.

Each institution, within this level, needs to structure itself much in the same way to better implement this competency-based education system. The political level could be composed of the rector and the department of education psychology, the executive level could be composed of the dean of each school and a consulting committee, and the operative level could be composed of full-time and part-time professors.

A competency-based education system is not solely focused on students. Each institution must promote a learning environment for its professors to spend some time learning how to perform better, not as professionals, but as teachers. Both new and old professors need continued development in this area. This continued learning could focus on new approaches, such as in Law and Economics, on methodological tips on how to get across difficult concepts, or on how to encourage student participation in and out of class.

Another aspect that needs to be given careful thought within each educational institution is the use of information technology, such as virtual libraries, CD ROMS, online systems, internet, distance learning, and so on. The advent of new information technology has and will have an even greater impact on the nature of many disciplines and must not be overlooked.

How do we incorporate this model into the curriculum design? First, a profile of the future professional must be established, structuring formative contents into professional modules with competency units, which in turn will have general and specific objectives. The challenge this model of education presents is that one must be constantly aware of where the labor market is going. This will improve the relevance of the courses in the curriculum, furnish the integration of the course contents and practice, promote the individual's independence, and change the professor's role from a merely expositive method to a more Socratic method where the professor promotes questions and discussion.

II. INTERDISCIPLINARY EDUCATION

Two critical aspects for the success of introducing this model of competency-based education is the development of interdisciplinary courses and lawyering skills in the law school curriculum.

It is a well known fact that lawyers are known for their inability to understand the rest of the world outside of their own discipline. Of course this is true for other disciplines as well, but should we not benefit from what other disciplines have to offer? Is law not supposed to consider the various disciplines it touches? We cannot ignore the context of law. The sociological and economic impact of law gives the students the possibility to view the law from a more holistic perspective in order to analyze whether a particular law has reached its objective.

Today's demand in society for lawyers with a more ample and interdisciplinary education is such that to respond to such demand, faculties of law will be compelled to include technical and scientific analysis in their curriculum. This is the case of Law and Economics, Finance, Accounting, modern techniques in Business Administration, Management, and Information Technology, among others.¹⁴ Lawyers in bigger law firms need to become managers. They need management of work, staff, clients, finance, risk, and marketing among others things. Yet this area has long been missing in the law school curriculum.

The nature of legal practice has changed in such a way that it has become necessary for lawyers to have knowledge and skills of competence to be able to make business decisions, finance their law firms more efficiently, and define access to trial or negotiations depending on a cost-benefit analysis. It is this view of the law that will give lawyers the ability to act in a comprehensive, relevant, and reliable manner for their clients.

III. LAWYERING SKILLS¹⁵

The lawyering skills approach was created as a reaction to the traditional legal education, where the student would receive an enormous amount of information he did not understand without knowing how his courses articulated with one another. Additionally, he did not know what was expected of him, what kind of lawyer he would end up being, or what he would be able to do and where.¹⁶

Another important aspect of law that made it necessary to shift to a skills approach was the constant change in legislation. As soon as a law student graduated, most of the laws he had studied and learned did not exist anymore. This is especially true in Latin America, where a new government would undo whatever the previous government did and start all over again.

14. Sherr, *supra* note 7.

15. See Ana Cecilia Mac Lean, *Toma el Atajo Joe*, NEWSLETTER DE LA FACULTAD DE DERECHO DE LA UNIVERSIDAD PERUANA DE CIENCIAS APLICADAS, Nov. 2000 (Univ. Peruana de Ciencias Aplicadas).

16. Sherr, *supra* note 7, at 8.

The constant change in the law and the amount of laws being passed by congress made it necessary to specialize in practice. So when specialization became essential for lawyers, knowledge of the fundamental legal principles, philosophies, and skills that make the lawyer a flexible learner and practitioner became essential for legal education.

The challenge law schools face when shifting towards the development of lawyering skills is that the method involves a great deal of time and effort on the part of the professor. It is hard to break the habit of professors who dedicate only a few hours a week out of their practice to teaching.

The most important lawyering skills are: research, drafting, interviewing, advocacy, and negotiation. The development of these skills relies on realistic situations that the students learn by doing, not just listening.¹⁷

A. RESEARCH

Research, including the legal reasoning necessary to develop it, is the backbone of a lawyer's work. This skill will determine whether a lawyer will do a good job and if the client will be satisfied with his service.

Law requires logical reasoning. As such, it is important that the law student not only learns the different logical reasoning methods but also learns how to apply them in the first year of his career. Traditional legal education left this important skill to fate, hoping that at some point the lawyer would catch on to it. Such an important skill should not be left to fate.

The development of this skill, which includes the recollection and classification of information using the new information technology, should invite the law student, through class dynamics, to discover that legal reasoning is an adaptation of common human reasoning. A critical aspect of research is the recollection and classification of information. A lawyer needs to keep up to date with the changes in law and procedure. It also involves the ability to know where to look for information, and how to classify and organize the information in a way that it would be easy to access.

As information technology advances in importance, there will be a need for information specialists who dedicate their time to keep up to date with changing technologies. The amount of information one can access is increasing so much that a practicing lawyer is not able to handle it.

B. DRAFTING

Once we have researched and analyzed a subject matter extensively, the next step is to communicate it to the proper venue. This communication must, in certain opportunities, be in writing.

Traditionally, lawyers have learned how to draft using old models of writing they found in the archives of older lawyers. This has only perpet-

17. Cnossen & Smith, *supra* note 6, at 1.

uated the classic mistakes in drafting and communication that lawyers are so famous for.

In the development of this skill, one must analyze the importance of written communication for the practice of law. There are two issues of great importance that should be studied closely. One is the basic difference between written and oral communication. The other is organization.

When drafting, a lawyer must take into account his objective and the public that he is directing the document to so that he uses the appropriate style and language to transmit his message. Lawyers play several roles in their practice and so do their documents. There are legal documents that inform, others that defend client's interests, and others that propose new laws. Each and every one of these documents tries to clearly transmit a message and ideas. It is necessary, then, that a lawyer knows how to communicate what he has researched in each case.

C. INTERVIEWING

In addition to written communication, a lawyer needs to develop the skill of oral communication. Interviewing implies a process of communication between the lawyer and a client, a judge, a witness, the lawyer of the other party, or whomever he needs to talk to during the research and development of a case.

Traditionally, lawyers have informed their clients of their actions without even caring if the client understands what he is being told or if he agrees with them. This barrier of communication extends to other people, making it impossible for the lawyer to fulfill his objectives or his role properly.

To change this reality, this skill involves realizing what factors may constitute a barrier and then drawing bridges in communication. Special emphasis is put on making the law student understand the importance of non-verbal communication, particularly body language and gestures.

D. ADVOCACY

Advocacy includes written and oral communication, but in both cases the most crucial skill the lawyer must have is the ability to argue his position in a clear, concise, direct, reasonable, and logical manner. In this way, he will be able to convince whomever he is before that his reasoning is the correct one.

The traditional lawyer uses arguments only he understands; his argument consists of an endless repetition of laws and doctrines with no clear explanation of their applicability to the case in point. He beats around the bush instead of getting to the point he wants to make. The natural consequence of this behavior is the loss of interest of the audience or readers. This could bring about a negative result for his client.

To develop this skill, the law student must have complete experience in analyzing cases, writing letters, writing briefs, writing memorandums, and

making oral presentations in front of a panel of judges depending on the role he has been assigned.

E. NEGOTIATION

A lawyer must be able to know and apply efficiently the different dispute settlement methods; he should favor negotiation. In order to achieve this goal, the law student must be familiar not only with the structure of each of the dispute settlement methods, but also with the techniques used in each one to reach the solution that best satisfies the interests of the parties involved.

The development of this skill must emphasize hands-on training and promote the assimilation of different techniques through constant practice. This practice should be developed through exercises that should be filmed and then discussed in class with the purpose of analyzing the strengths and mistakes made by each in order to reflect upon them and correct them.

Furthermore, with the development of this skill, the law student will analyze the process of negotiation and its ethical implications. Special interest is paid to the capacity to examine creative strategies of negotiation and decide what strategy is appropriate for each situation.

It is clear to us that the labor market needs a critical thinking, creative, and versatile professional. In our vision the competency-based education, under the constructivist model, guarantees this by narrowing the gap between academic preparation and real life.

IV. CONCLUSIONS

After careful analysis of both the knowledge-based and competency-based education, one can conclude that these two models do not exclude one another. In fact, the latter requires a wider, more holistic perspective on education and law than the former.

Knowledge-based education is based on the premise that knowledge equals power. This may have been enough at some time but is clearly not enough to develop professionally and personally today. Competency-based education, on the other hand, is based on the premise that knowledge plus abilities and attitude equals performance, which is translated into employability.¹⁸

As we can see, the wolf and the chicken were both right after all: it's not only the secret recipe, but also the special way to prepare it that makes something good.

18. See Clark, *supra* note 8.

