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Things left unsaid: notes on the teaching methodology debate in Brazilian Law schools[1]

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Abstract: Debates on teaching methodology have been conspicuously absent from Brazilian Law schools. While the alleged "crisis of legal education" has deserved considerable attention over the past decades, only a remarkably small portion of scholars has focused on the problem of how to teach Law. This paper argues that the silence surrounding teaching methodology in Law schools is doubly problematic. First, because it seems to implicitly assume the highly controversial stance that the way we teach Law is irrelevant to the way we think about it and make students perceive it and think about it. Second, because it can be understood as a byproduct of an even more serious problem: the lack of a much-needed debate on broader, conflicting readings of Law and the function of universities within Brazilian society.
Key-words: legal education; teaching methodology; Law school; Law.

Resumo: O debate sobre metodologia de ensino tem merecido escassa atenção dentro dos cursos de Direito no Brasil. Muito embora a chamada "crise do ensino jurídico" tenha sido bastante discutida nas últimas décadas, apenas fração muito pequena desse debate é voltada ao modo de ensinar o Direito. Esse artigo sustenta que esse silêncio sobre metodologia de ensino é duplamente preocupante. Em primeiro lugar, ele parece assumir, implicitamente, a premissa questionável de que o modo como ensinamos o Direito é irrelevante para a forma como o pensamos e levamos os alunos a pensá-lo. Em segundo lugar, porque tal silêncio pode ser lido como índice de ausência de debate real sobre leituras conflitantes do Direito, da universidade e de sua função dentro da sociedade brasileira.
Palavras Chave: educação jurídica; metodologia de ensino; cursos jurídicos; Direito.

I

Debates on teaching methodology have been conspicuously absent from Brazilian Law schools. While the alleged "crisis of legal education" has deserved considerable attention over the past decades, only a remarkably small portion of scholars has focused on the problem of *how to teach* Law. By any standard one may want to choose – number of books and articles published, seminars, courses offered, master theses and PhD dissertations presented – teaching methodology seems to be (in practice, if not in discourse) a non-issue, something that does not really matter to our Law schools. Or at least – and this is another way of saying the same thing - it certainly seems to matter less than virtually every other area of academic debate in

[1] A preliminary version of these ideas was presented during the II Workshop Internacional de Metodologia de Ensino de Direito, which took place at Direito GV-SP, on 9-10, March, 2009.

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Law. Today, the involvement of legal scholars on the debate on teaching methodology in Brazil is peripheral, at best. [3]

This article argues that this silence surrounding teaching methodology in Law schools is doubly problematic. First, it is disquieting in itself, as it seems to implicitly assume the highly controversial stance that the way we teach Law is irrelevant to the way we think about it make students perceive it and think about it. Second, it is equally troubling because it can be understood as a byproduct of an even more serious problem: the lack of a much-needed debate on broader, conflicting readings of Law and on the function of universities within Brazilian society. This silence, and the things it leaves unsaid, works to prevent the emergence of a healthy debate on politically diverse views of the role that Law schools should play in the country.

This paper explores some possible reasons for the relative neglect of teaching methodology in the vast majority of Brazilian Law schools, and advances the argument that the debate on this topic is elemental to any attempt at substantially improving legal education in the country.

II

Since the underlying point of this paper is that methodology matters for legal education, it may be useful to start it by examining, maybe somewhat paradoxically, the tenets of the contrary view. That is to say, it may be wise to begin by looking more closely to those arguments in favor of the belief that methodology does not really matter, at least not for legal education. I am of course aware that this is a statement that very few – if any – would be prepared to make, at least in such blunt terms. On the contrary. Much lip-service is paid to the relevance of rethinking the way we teach Law and of finding ways of helping Law professors improve the quality of their classes. In fact, it would be highly unlikely to find someone ready to subscribe to the notion that methodology is irrelevant.

Nevertheless, deeply-rooted practices in Brazilian Law schools convey exactly this message, the message of the irrelevance of methodological debate. Saying that methodology matters is a long shot from acting as if it did. Odd perhaps in discourse, the notion that methodology is a lesser issue appears very clearly in everyday academic life.[4] Within Brazilian Law Schools, methodological debate is either remarkably scarce or non-existent. Precious little time, if any, is spent on discussing *how* Law is taught, *how* it should be taught or *why* it is taught in such way or another. The rare debates, when they do exist, usually revolve around *what parts of Law* have to be taught or *how much* of this or that area has to be presented to the students. Should we teach Philosophy of Law to freshmen or is this a subject more suited to senior students? How many semesters does one need to adequately teach the meanders of Brazil's Procedural Law?

[3] Which is not to say unimportant. Those working in this field will be familiar with the important attempts that have been made, notably from the 1990s on, to change this. Current examples include the seminars and research projects promoted by the Associação Brasileira de Ensino do Direito - ABEDI, the new methodological approach adopted by Direito GV-SP and the efforts by the Brazilian's Bar Legal Education Committee, among others. Important as they undeniably are, these initiatives are still far form mainstream and point to the consensual perception that there is much to be done on the field.

[4] As exemplified, for example, by the virtually absolute absence of curricular topics focusing on legal teaching methodolology in the over 1000 Brazilian Law Schools. Direito GV-SP's Ensino do Direito course is a pioneer example that so far has few – if any – counterparts on undergraduate and graduate programs around the country.

Thus, serious discussions typically focus on which chunks of substantive Law one should teach, not on the ways to do it. As a result, curriculum gets some sporadic attention – which is not to say it is a frequent topic for discussion – but reflections on classroom practices and strategies are all but inexistent. The *what* to teach has consistently taken precedence over the *how* or *why* one does it.

There must be a reason for this. There must be a reason for the clear gap between the relevance attached to methodology in discourse and the scant attention it gets in practice. If we fail to understand why that happens within our Law schools, we lose the opportunity of learning a lot not only about the way we think about legal education, but about the way we perceive (and lead our students to perceive) Law and its role within Brazilian society. We risk going on deploring the shameful low level of legal knowledge displayed by most Brazilian Law graduates (with the fail rates of the Bar Exam serving as undisputable evidence) and repeating well-meaning principles without effectively contributing to changing things and improving legal education. Powerful denunciations of the poor state of our legal education system have been heard for decades and still, for all the insightful, detailed diagnosis they offer of the problem, the perception remains that the overall quality of courses is more to be lamented than celebrated.[5]

That is why it is relevant to understand the reasons for methodology apparently not mattering in practice, in spite of the fact that it seems such an obviously important way of helping overcome the problem of poorly-prepared Law school graduates. I believe it is possible to suggest that, in Brazil, this relative disregard for *the way* Law is taught may have to do, at least in part, with the origins of Law schools and with the social role they have played throughout our history. Rooted far back in the past, the logic that has shaped the first institutions for legal education in Brazil seems to still govern a good portion of its present day dynamics.

As it is widely known, Law schools in Brazil were created for the social elite and responded to the strategic interests of the governing group. Having then recently become an independent country, Brazil badly needed professionals to craft and run its Justice system once Coimbra was no longer an unproblematic option. Students who attended them were usually the children of the ruling sectors of society, something which, from the very beginning, contributed to blurring the boundaries between political bonding and legal education. Students were there not just to learn Law but to prepare themselves (and put themselves in a position) to occupy key posts in government (and not only, not even primarily, in the Judiciary). Mirroring, to some extent, what happened in the English Inns of Court of the sixteenth and seventeenth centuries, Law schools worked, for these élite youngsters, as a place to develop the networks necessary to their future professional and political success.

It is thus no accident that so many of Brazilian most important politicians have come out of Law schools. Scores of presidents, governors, mayors, Congressmen proudly display a Law degree in their CVs. It is also no accident that many of them have never actually worked as lawyers, nor have ever really had to use their skills in a court of Law.

The profile of a substantial portion of our first elite Law students is not a historical curiosity, but a relevant piece of the puzzle regarding the place of methodology in legal education. It helps us understand that Law schools were not exclusively – probably not even primarily – a place for legal training. They were, for

[5] San Tiago Dantas famous class on Legal Education and the Brazilian crisis dates of 1955; the CEPED movement, with its strong proposal for changing the teaching of Law in Brazil started in 1966. From that time on, a number of important scholars, such as Jose Eduardo Faria (A Reforma do Ensino Jurídico, 1987) have discussed the dismal quality of legal education in the country.

better and for worse, a space for a much broader, more complex training for the future ruling generations. They were a *locus* for political action, in its broad and petty sense. In them, political allegiances were forged, many of which would prove long-lasting and influential.

Within this context, the *legal* education *per se*, that is to say, the understanding of Law, its context and functioning, could not but be one aspect among many, and one that had to compete – not always very successfully - for the attention of students. Hence, the relative (un)importance of the classroom and of the processes occurring in there. The technicalities of Law (as they were sometimes called) were understandably secondary to the socio-political exchanges in the courtyard. The *environment* of the Law school was paramount; that was the thing not to be missed.

This structure could not fail to have an impact on the role of teachers, on the way they saw themselves and the role they played, and on the way they were perceived. Their legal scholarship and lawyering expertise were relevant factors but not at all the only ones, nor perhaps the most defining. The professors' role within the complex social exchanges taking place in and through Law school was also of paramount importance. Their social status in and out of the university, and the expectations society had of them, were viscerally connected to their parading of broader political skills. Strengthened by the prestige of their position as lecturers, many Law school professors played prominent roles in key events in our history and arguably gave major contributions to the country. But their very success in other arenas stressed the fact that their relevance lay much beyond the more pedestrian everyday reality of the classroom.

This process reinforced the perception that, in Law schools, the classroom was not everything. Over time, this perception seems to have grown to mean that not only the classroom was not everything: it was not much at all. As a result, professors increasingly felt justified in handing over to assistants their lecturing duties, so that they could more freely pursue and explore other, arguably more important, dimensions of academic and extra-academic life. Once this was the pattern in the top Law schools, it served as a paradigm for the social representation of legal education in general and helped set the stage for an undeclared shared belief that, at Law school, methodology did *not* matter.

Times have greatly changed. Brazil is no longer *o país dos bacharéis*, nor do lawyers enjoy the same prestige they once did. Students graduating today from Economics and Business schools arguably enjoy the same social status of their Law school counterparts. The very function of Law as a means of designing and defining policies, and of solving social conflict has undergone gigantic, irreversible transformation. The mid-boggling proliferation of Law schools in Brazil, particularly from the 1990s on, has made this complex process even more problematic and has done much to substantially change the way society perceives legal education. Still, and in spite of such profound changes, that notion of the lesser relevance of the classroom remains.

Not only that. To a degree, it seems to have been reinforced. The rapid, unplanned expansion of courses offered and the exponential growth in student numbers have resulted in a perceived loss of academic quality. Many professors now see their students as utterly unprepared for critical thinking and intelligent debate (given the perceived serious flaw in students' primary and secondary education), so they tend to stick, even more, to the lecturing on statutes as their preferred method of teaching. The argument implicit in this methodological choice seems to be that students' intellectual inaptitude is so appalling that concepts and legislation have to be minutely presented and explained to them.

Students, this practice seems to say, are unable or unwilling to read and prepare themselves before classes so as to be able, for example, to engage in active debate (not passive listening) in the classroom. They cannot be trusted to work on their own education because, for a variety of reasons - work engagements, immaturity, poor educational background, etc. – they are helpless to consistently do so. As a result, teachers have no option but to patiently lecture to them on every relevant topic of Law (usually understood primarily as a compilation of statutes) and doctrinal points. There is no real methodological alternative, proponents of this perspective seem to suggest, when one considers the poor quality of the student body. Thus, the Coimbra method, as it is dubbed, lives on is still hailed by many as the only real means of teaching Law. Either because students are elite, or because they are not elite, methodological options are seen as irrelevant, or impossible, in many Brazilian Law schools.

Therefore, even in face of a drastically altered social reality, there arguably remains a belief that it is pointless to discuss what we do in the classroom, *how* we teach Law. It seems that to do so, to focus on the practical realities of everyday teacher-student exchange would be irrelevant, at best. At worst, this methodological debate, driving away from more substantive legal topics, would somehow lessen the importance of Law schools. A perception of this kind may go a long way to explain the silence with which the calls for methodological debate have often been received. Debating methodology would do injustice, perhaps even downgrade, the status of Law schools as social institutions.

But it is possible to argue exactly the contrary position – discussing methodology would help increase the quality of Law schools and help them regain some of the prestige they seem to risk losing. I think it is possible to argue that discussing methodology is a privileged way to rediscover and renew Law schools both as a place for meaningful intellectual debate and as a *locus* for relevant political action. Discussing methodology implies, first and foremost, discussing what exactly it is that we want with university, what exactly it is relevant to teach and not to teach, what exactly it is the idea of Law that we underlies and shapes our ways of presenting it.

It is possible to say, for instance, that the implications of adopting student-centered methodologies (*v.g.* role-playing, simulations, PBL) which require active participation of students and which transfer to them a substantial part of the responsibility for their own education, go far beyond the learning gains such methodologies can generate (and there are numerous studies showing that these are not negligible).[6] They may bespeak the purpose of also leading students to become active, responsible professionals and citizens, women and men who do not passively wait for things to be handed over to them but that competently go after and fight for what they believe to be right. Particularly in Law schools and in democratic countries, the debate on how to foster this kind of attitude seems very far from being irrelevant.

In *The Post-Modern Condition*: *A Report on Knowledge* (1979), Jean François Lyothard has pointed that the crisis of the great narratives – the collapse of social belief in the modern renderings of the key social institutions of our time - has corroded the metaphysical foundations of traditional university models.

In the realm of Law, such crisis reveals itself in the collapse of key categories to the construction of legal discourse, *v.g.* – the concepts of *State, subject, sovereignty.* In tandem with that, social perceptions of Law and of its function within society have (understandably) greatly changed over the past decades. The role of legal

[6] See, for instance, STUCKEY, Roy - Best Practices for Legal Education: A Vision and a Road Map, CLEA, 1st edition, 2007.

professionals – and the skills they need to proficiently respond to their challenges – has likewise undergone gigantic transformation.

Given this new theoretical and practical framework it is more than possible to argue that we have to change the way Law is taught; it is possible to say that it cannot but be taught differently. This requires discussing teaching methods, their philosophical tenets and practical implications. It requires that we acknowledge that the way we teach is not neutral; that it bespeaks our views on exactly those crucial issues (the role of the State, the idea of Justice, the desirable functioning of the Judiciary, etc.) which Law schools are meant to deal with. Discussing methodology – *how* to teach - requires that we rethink and re-signify not only the role of Law schools but of the university, in general.

In Brazil, as elsewhere, universities represent an enormous social investment. Not only financial – though it is true that they receive funding from governments, which pass on to them sizeable portions of taxpayer money. They are invested above all with the symbolic role of devising new forms of life, of decisively contributing to better the lot of those societies they are part of. And this matters. And it matters a lot insofar Law schools are concerned. To responsibly and effectively respond to such huge expectations, it is absolutely elemental that we discuss what kind of knowledge we are building up, what kind of student we are creating, what kind of professional we want. It is crucial that we define our goals, our principles, our choices, our legal teaching methodology.

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