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The New Civil Procedure Code and the Challenges for the Brazilian Legal Education System

Abstract: This article by Renê Francisco Hellman and Mariana Cesto aims to analyse how the New Civil Procedure Code will influence the Brazilian legal education system. The new Code is opposed to 'surprise decisions' and emphasizes the need for substantial opportunity to contradict the opponent's submissions. This will constrain judicial decision-making. On that basis, new challenges appear for teaching, and they must be faced and solved in order to make the new prescriptions effective. The proposal is to use an interdisciplinary approach to reformulate the legal education system. This would effectively provide better support to future lawyers regarding their development, making them better qualified to operate within the legal system.
Keywords: civil procedure code; legal education; legal teaching; interdisciplinary approach

INTRODUCTION

The New Civil Procedure Code was voted on, and approved by, the Brazilian Senate in December 2014 and the President's sanction in March 2015. It has led to much academic debate and scholarly writing which will help guide the interpretation and application of the new rules. It is undeniable that the new Code brings innovation in multiple ways, turning into law the doctrine that was already present.

In this New Code the word 'contradictory' is used so often, expressively and also implied in many articles. In Brazilian civil procedure, 'contradictory' is a principle and it means that the judge must give the opportunity to each party involved in the lawsuit to know about any issue that will be the object of a decision, so they can express their agreement, or disagreement, about that specific issue. This assures that parties can influence directly in the construction of a judicial decision. With the new Code there is urgent attention being given to a number of issues such as: ensuring that the chronological order of pleas is observed when it comes to deciding them; what indicates an attack to the judge's discretion; the use of multiple approaches to solve disputes; emphasising alternative methods and developing conciliation and mediation, originating now from the procedural negotiation which has achieved a new relevance; the importance of precedent, (which is growing everyday in Brazil), creating mechanisms that provide uniform treatment to identical, or similar, questions submitted to the judiciary in multiple lawsuits; and the search for rational motives in judicial decisions in order to legimate them in a democratic perspective.

These are the main paradigmatic changes brought by the new Code. This study, however, is focused on legal education and the main concern here is to analyse how all these changes will affect legal education, and then show new ways to make them operational in law schools.

MAIN INNOVATION IN THE NEW CIVIL PROCEDURE CODE

A new code brings, in a certain way, the need to reconstruct all the elements of the legal system involved. This is what has been happening following the President's and the Senate's announcement of the creation of a committee to work on the Project of the New Civil Procedure Code in 2009.

This committee was composed of law professionals from different branches; lawyers, judges, public attorneys, academics; therefore providing different theoretical backgrounds. This idea of plurality was also seen later in the process, when the bill was following its course through Congress and was reformulated by other eminently composed committees, that contributed to the construction of the New Civil Procedure Code. This was the first one in Brazilian history to be created in a democratic period, since the other two, from 1939 and 1973, were born in

dictatorship periods (first one was born in the Vargas Era[1] and the second one was during the Military Dictatorship[2]).

Thus, in spite of a few dissonant voices, we can say that the construction of this new code followed democratic criteria and represents not the view of a single person or a specific group, but it brings together, as much as possible, the ideas of many different concepts of Brazilian legal thinking.

The innovative ideas that directly influence teaching in the legal education system were mentioned above, in the introduction, and will be analysed thoroughly. In order to organise this study, they will be divided as follows: (a). the fight against excessive litigiousness; (b). the rationalisation of the judicial decision.

Today, the Brazilian Judicial Branch is suffering from a structural crisis. There are more than 95 million lawsuits in course, with an annual growth index of 3.4%[3]. The growth in the number of lawsuits has not been reflected in a corresponding enlargement of the judicial branch, which has caused an excess of work for the 16,429 judges[4] that are distributed in different branches and levels of courts.

The number of current lawsuits in the system indicates that Brazil, with more than 200 million inhabitants, has an excessively litigious culture. It is evident that this sociological factor will not change by making a change to the law, but the importance of the legislators' will to rationalise the work of the judicial branch cannot be underestimated.

The New Civil Procedure Code has a new approach that tries to bring new models of litigation resolution, prominently arbitration, mediation and conciliation. Here, the influence of American law is clear, since they introduced the multi-door model present in article 165 of our New Code. It is an association of the traditional route (the litigation process provided by the State) with alternative methods of dispute resolution.

Recognising the excessively litigious culture is the point from which the new process begins, moving the litigant away towards a consensual solution to the dispute that previously managed by the State. It was, "a necessity, in this time when everything is taken to courthouses, to find an adequacy"[5].

The second great innovation refers to the construction of a judicial decision. The judge must listen to the parties regarding everything that occurs during the procedure, and therefore avoiding 'surprise decisions'. These decisions are those based on reasons that were not brought by, or to, parties previously, meaning the litigants had no early opportunity to know and talk about these reasons, including decisions of public interest. There are new mechanisms to rationalise decisions in repetitive litigation, encouraging uniformity and, now, there are also specific rules that will guide judges when elaborating on a decision.

These changes, doubtless, bring the necessity of a new position in the legal education system so as to take into account alternatives to the state litigation process. Once the dispute is under judicial process, teaching should reflect this new approach so that future lawyers understand that the judicial branch is democratically legitimate by the quality of its decisions, which cannot be accepted if they are discretionary or arbitrary. On that ground, 'contradictory' rises as a special principle, bringing the necessity for effective dialogue between those who participate in the judicial game.

THE GENERAL PANORAMA OF THE BRAZILIAN LEGAL EDUCATION SYSTEM AND THE SEARCH TO DEVELOP CIVIL PROCEDURE TEACHING WITH THE NEW CIVIL PROCEDURE CODE

The education system has been in crisis at every level for many years. This has been as a result of the lack of solid public education policies, which have led to a lack of organisation and appropriate valuation of the system. The intention of this article is not to have a proper analysis of the political problem attached to the education issue, but some context is necessary to understand the nature of the Brazilian legal education system.

Part of the problem is caused by the number of authorisations that are granted by the Brazilian Department of Education to law schools. According to data obtained by the Department for Education, there are 1,200 authorised law schools in Brazil[6]. According to the experts this amount of law schools makes it impossible to ensure an effective quality control over the Brazilian legal education system[7].

On the other hand, it is important to mention that over the recent decades there has been an exponential development of higher education. In many cities where people could not study in Professional Schools, there are now both private and public universities that offer professional courses in many fields.

The high number of authorised law schools must be seen in the context of the vast geographical area of Brazil, since the country is of continental proportions – ie. 8,515,767.049 km^2, with 26 states plus the Federal District. There are 5,570 cities, with a population of more than 200 million inhabitants.[8]

The cultural differences between the regions require an equal distribution of universities around the country in order to guarantee access to higher education for everyone. It is clear that deficiencies in Brazilian education, which were caused by centuries without concrete and qualified public policies, will influence the legal education system. That is why it is very difficult for higher education institutions to retain qualified teachers. There is a particular difficulty in hiring teachers who have graduated with a Masters Degree in institutions located far away from the big cities.

Legal education faces many problems that are caused by the underrated importance given to law teachers. While legal professionals such as judges and public attorneys have a monthly income of R$25,000, by contrast a college teacher earns R$10,000[9], according to recent research that considered data associated with the São Paulo region.

All these factors impact negatively on the quality of Brazilian legal education. The development of public

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policies and the universalisation of higher education access that has already started can have a positive effect on the situation. However, the difficulties do not end with the above mentioned issues. There is a concern about the lack of study of didactic-pedagogic questions within legal education.

Although the education laws, and the rules from the Department for Education, stimulate and even make professional qualification necessary in order to teach, Brazil still suffers from the lack of a deep study of legal education and the related pedagogic questions.

There are 87 academic Master of Laws courses that are recommended by the Department of Education in Brazil[10]. Of these only 12 offer an optional discipline in which teaching issues in higher education are discussed and 17 treat it as a core discipline. There is not a dedicated module about higher education teaching in any of the other 58 courses. Many of these courses require the graduating student to have a period of internship in the teaching field, however, practical experience alone is not enough to guide the student-teacher in the development of teaching skills.

This warning has already been made by Antonio Carlos Gil, who says that, although many Master of Laws programmes are considered as the main way of preparing a person to be a teacher in the higher education system, the pedagogic formation of the students is neglected, due to a lack of time to be able to offer this kind of discipline beyond the specific to field of study and research[11].

Criticism of the legal education system grows. The idea that the 'talent' of teaching is natural and that there is no need to develop it by studying pedagogic doctrine, entrenches a system that was built on the concepts of lecture classes where the teacher only comments about the law[12]. Another problem that has been highlighted is when teachers merely repeat jurisprudence about a judicial question in their classes and confuse one sole decision about an issue with the whole jurisprudence of a court.

All these problems are a result of the incorrect concept that law is built of different and unrelated branches. Even in this time of constitutional supremacy there are those who believe that two different law fields are disjoined and have no common elements.

This fragmentary system of teaching, where there is a great value placed on the lecture, followed by the memorisation of the content, must be replaced. For that to happen, an integrated knowledge between disciplines must be constructed, so that is possible to make an effective connection of theory and practice.

This paradigmatic change to teaching strategy will reflect on the whole legal education system. Nowadays we hear about criminal problems and the incapacity of criminal law to solve them; procedure law is concerned about excessive litigiousness, effectiveness of decisions and the democratic legitimacy of the judicial branch to decide due to the inadequacy of the form; constitutional law is seeking effectiveness of fundamental rights still forgotten. And, it seems that all these theoretical problems, as well as many others, will find their solution on the reconstruction of legal thinking, and that will only be achieved with the reconstruction of legal teaching.

The greatest difficulty relates to where to begin the process of reconciliation between the disciplines and, as possible, avoid the current specialisation of knowledge.

It is known that this specialisation at a professional level is not a problem. It is even expected. The problem is when it occurs during the process of developing the law student. The specialisation of the student must be avoided, so the student can understand law as an integrated system. This will be possible when the study of the *theory of law* gains fundamental value in law schools.

It seems that this paradigmatic change in legal teaching should be immediate, so that propaedeutic disciplines gain relevance, what would certainly reflect in a better achievement of civil procedure studies and the changes brought by the New Civil Procedure Code.

Teaching in civil procedure is entirely based on state judicial function and the specific techniques used to solve conflicts by judicial interference. In the education of the law student, relevance is given to judicial ways to solve conflicts, which contributes and reinforces the idea that a judicial decision is the best way to achieve social peace. It is very important that the old model, based on the state intervention, is surpassed by new models, so that law students can comprehend that social conflicts can be solved by other ways. Then when they become law professionals, they will be well versed in alternative dispute resolution methods such as mediation, arbitration, and so on.

It is necessary that law schools rethink their curricula. The study of civil procedure must be re-evaluated, by the doctrine and by the academic field, so that the theory behind alternative methods to solve conflicts is studied more deeply. Also, teachers need to look to and learn from other fields, such as sociology, philosophy and psychology. On that basis, knowledge about this issue can be effectively diffused by the use of the correct pedagogic techniques.

The excessive use of lecture strategies for classes, in which the student is in a passive position as a mere receiver of information must be surpassed by different methods, where true interaction takes place between teachers and students for the discovery of knowledge. This is why it is necessary to keep a permanent link between the three axes of the Brazilian higher education system: teaching, research and extension.

Teaching that is detached from research limits the capacity to develop the students' critical analysis and restrains the possibilities to find new solutions to problems faced by law professionals. Likewise, when extension is left aside the student cannot recognise the link between theory and factual situations, preventing students from promoting changes in their social environment.

Additionally, it is of great importance that teaching in law schools observes what UNESCO has defined as the four pillars of education:

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"The four pillars of learning are fundamental principles for reshaping education:

Learning to know: to provide the cognitive tools required to better comprehend the world and its complexities, and to provide an appropriate and adequate foundation for future learning.

Learning to do: to provide the skills that would enable individuals to effectively participate in the global economy and society.

Learning to be: to provide self analytical and social skills to enable individuals to develop to their fullest potential psycho-socially, affectively as well as physically, for a all-round 'complete person'.

Learning to live together: to expose individuals to the values implicit within human rights, democratic principles, intercultural understanding and respect and peace at all levels of society and human relationships to enable individuals and societies to live in peace and harmony".[13]

These pillars must be seen as mandatory and will shape the direction of the construction of legal education (in this concept, teaching, research and extension are included), so that the future lawyer effectively knows the *theory of law*, being able to act in the social environment, turning theory into actual justice and cooperate with society and the individuals within it. In this way the lawyer sees himself as a part of the environment and also a change agent, using creativity to exercise liberty.

On that basis, it is necessary that the approach in more technical disciplines, such as civil procedure, also leads the student to cultural elements that reinforce sensibility. Literature, music, cinema, and all arts can contribute to that. The study of law combined with art can enhance the creativity of the student and makes it easier to develop the required sensibility for dealing with the power attached to law. This will determine if law is going to be used as an instrument of oppression or of emancipation.

It is very important to understand that legal teaching currently fails when it comes to the construction of the judicial decision and the judge's position in the procedure. This comes from a concept of subservience of citizens to the State. Law and jurisprudence lectures do not have a critical approach, and so legislators and judges appear to do no wrong.

Every year, the interest in public careers grows, because of the stability of these careers. To access a public job, a lawyer must succeed in admission tests. However, these tests are the object of strong criticism because the exams are objective and the questions have a low theoretical density. Students that are better at memorising and are trained to answer what is expected are most likely to be approved in spite of their lack of complex knowledge of legal thinking and theory of law.

This has caused serious consequences in relation to legal teaching. It is impossible to know what came first: the lack of quality in transmitting information or deficiencies in admission tests for public careers!

The uncritical formation of a lawyer in Brazil is historically problematic. Since Brazil was a colony, pedagogic strategies in law schools were "compromised with economic and political exploitation processes", inhibiting lawyers' critical thinking[14]. This pedagogic deficiency is still observed today.

This is why it is so important that we rethink teaching. It is not enough that law students study philosophy, sociology, theory of law, theory of the state, political science, anthropology, etc. in their first year of college. It is necessary that the content is constantly revisited when they are studying specific disciplines. Compartmentation in law teaching must end to ensure that the students have a rounded education.

Therefore, teaching civil procedure cannot be far from analysing questions concerning the democratic state of law, theory of the state and political science. If there is constitutional exigency to motivate every judicial decision, the student must understand that this is a democratic imperative.

In Brazil, while executive and legislative members are elected by popular vote, members of the judicial branch are selected by admission tests. Thus, the requirement to motivate judicial decisions is a democratic exigency that legitimises the existence of the judicial branch, with the main goal being to solve social conflicts.

Although there has been a constitutional imperative to motivate judicial decisions since 1988, so far, many violations to this commandment have occurred. The great number of lawsuits and the inefficient structure of the judiciary caused the misconception that a poorly constructed, but fast, decision is better than a well elaborated decision that analyses every element of parties' allegations but takes longer to be built.

The low quality of judicial decisions has contributed to the increase of litigiousness. In a certain way, this granted that judges could decide as they think, and avoided discussions about conformation of a decision to fit the general context of judicial decisions and, particularly, the constitution and laws. This has led to insecurity, decisions that had a low constitutional content and contributed to the increase of lawsuits, since the result of a lawsuit became a lottery[15], in which the result itself would rely much more on chance than on law.

Aware of all the damage this deficient judicial practice brought, and concerned about democracy, the New Civil Procedure Code dictates an adequate construction of a judicial decision, prescribing exigencies and prohibitions, that will allow parties to obtain a complete answer to questions they submit to the State.

This can only happen if civil procedure teaching values the important issues that are part of a judicial decision. The student needs to be taught the true origin of the theory of the state, of the necessity to justify a decision, the structure of rules, the theory of law, to interpret and apply the theory and the rules, and to understand psychology and understand how the human mind works. Beyond that, civil procedure teaching should

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be concerned with important issues about philosophy and sociology, so that the student can build critical and integrated knowledge, creating the ability to change society.

CONCLUSION

To end this article, but not the debate, here are the following conclusions: (a). legal teaching must change with the New Civil Procedure Code; (b). it is important that law schools initiate curriculum changes, so that themes like alternative methods of conflict resolution and the construction of a judicial decision as a democratic factor are studied connecting propaedeutic disciplines with specific disciplines, permanently revisiting the content of the former ones; (c). it is necessary that the legal education system be concerned with scientific research and college extension activities that allow the student to study theory more profoundly and apply it to factual situations, producing social changes; (d). to promote the four pillars of education. It is important that legal teaching values other fields of knowledge that connect to human sensibility, since the lawyer is a social change agent and must be completely capable of creating methods to solve problems that appear and, at the same time, be able to deal with human soul dilemmas.

Footnotes

[1] Getulio Vargas was the President of Brazil from 1930 to 1945 and from 1950 to 1954. In 1937, he led a coup and ruled as a dictator until 1945. The first unitary Civil Procedure Code was released in 1939.

[2] From 1964 to 1985, Brazil was under Military Dictatorship. The second unitary Civil Procedure Code, which is used until today (the New Code will start to be used in 2016), was released in 1973.

[3] Brazilian National Council of Justice, Justiça em números 2014: ano-base 2013 (2014) 34.

[4] Brazilian National Council of Justice, Justiça em números 2014: ano-base 2013 (2014) 33.

[5] Humberto Theodoro Junior et al., *Novo CPC: fundamentos e sistematização* (Forense 2015) 220.

[6] Brazilian Department for Education, 'MEC e OAB assinam acordo para aprimorar cursos de direito' (*Ministério da Educação*, 22 March 2013) <http://portal.mec.gov.br/index.php?option=com_content&view=article&id=18533:mec-e-oab-assinam-acordo-para-aprimorar-cursos-de-direito&catid=212> accessed 22 March 2015.

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[8] Brazilian Geography and Statistics Institute (Instituto Brasileiro de Geografia e Estatística, 22 March 2015) <http://www.ibge.gov.br/home/> accessed 22 March 2015.

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[10] Brazilian Department for Education, 'Cursos Recomendados/Reconhecidos' (CAPES, 1 April 2014) <http://www.capes.gov.br/cursos-recomendados> accessed 22 March 2015.

[11] Antonio Carlos Gil. *Didática do ensino superior* (Atlas 2012) 20.

[12] Vladimir Oliveira da Silveira et al. *Educação Jurídica* (Saraiva 2013) Juliana Ferrari de Oliveira Pagani, A pós-graduação stricto sensu em Direito no Brasil: a formação dos professores das disciplinas pedagógicas oferecidas em seus programas 258.

[13] UNESCO, 'The four pillars of learning' (UNESCO) <http://www.unesco.org/new/en/education/networks/global-networks/aspnet/about-us/strategy/the-four-pillars-of-learning/> accessed 22 March 2015.

[14] Sergio Adorno, *Os aprendizes do poder: o bacharelismo liberal na política brasileira* (Paz e Terra 1988) 159.

[15] Eduardo Cambi, 'Jurisprudência lotérica' (2001) 786 Revista dos Tribunais 108.

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