Legal teaching in France

Authors: Michel Miaaille
          Fernando C. Fontainha

Received: July 09, 2009

Approved: July 19, 2010

DOI: http://dx.doi.org/10.1590/S1808-24322010000100004
Legal teaching in France

Michel Miaille and Fernando de Castro Fontainha

Abstract

This article aims to analyze the legal teaching in France. Our approach is guided by a double perspective: the distinction between critical and mundane schools and the notion of crisis, brought from political science. After a brief historical introduction, we will demonstrate how, in the twentieth century, the legal teaching evolved and produced what we call “classical legal teaching model”. Our focus, from that double perspective, aim to a dynamics where great social transformations cause a strong impact on french universities and, on the other hand, how the body of law scholars, to keep their dominant position, manage to transmit throw the crisis the elements that guarantee that domination, on the “legal science specificities” pretext. Heritage is the political science brought key-concept to understand that dynamics and the classic model production. Our conclusion is an attempt to confront that dynamics with the issues that the legal teaching faces nowadays – specially the discipline loss of centrality – asking the question of how this new crisis will be faced by the law schools.

Keywords

Legal teaching; political crisis; mundane schools; political heritage; university field.

Introduction

The theme legal teaching could be object of several logics and disciplines, such as History, Education Sociology or Political Sciences. Likewise, the Law subject to this teaching may be seen from several perspectives, such as the traditional perspective (legal subjects, where law would explain itself), Sociology or Political Sciences. In this brief essay, we do not intend to address all the aspects; however, we intend to provoke discussions capable of serving as a guiding line from a double perspective:
a) According to the distinction prepared by Kant (1973) and resumed by Bourdieu in his book *Homo academicus*, the critical and mondane colleges must be distinguished. Among the critical colleges, we could mention the courses of Liberal Arts, Philosophy and Natural Sciences. They receive this denomination due to their nature of freedom and intellectual autonomy. On the other hand, the mondane colleges, such as Law and Medicine, are deeply marked by the consolidation of a framework always connected to the established power, as shown by Arnaud in his book *Les juristes face à la société* — what refers us to the idea of crisis.

b) We take from Michel Dobry the concept of crisis developed in his book *Sociologie des crises politiques*. For the author, crisis means every moment in which the continuation and stability of the social organization reproduction, especially the one that seems “automatic” to us, are threatened.

We intend to demonstrate how, in order to serve the interests of the domineering parties, legal teaching is compelled to reformulate its survival conditions and its destination amidst an entanglement of obstacles which destroy former ways to proceed, not clearly appointing the future possibilities available.

1 Brief history of legal teaching in France

Dated back the 11th and 12th centuries, legal teaching had in Paris and in Montpellier its first colleges (in Europe, we also mention Bologna and Oxford). In the Middle Age and in the Ancient Regime, Law schools, extremely related to canonic law and attached to Roman texts, educated the elites, especially the State-related elites.

The 1789 Revolution extinguished the existing colleges, and Napoleon I reestablished higher education teaching under an authoritarian basis: just like the army, the Imperial University was a whole entity ruled in a strict and uniform manner, just like all the other imperial institutions. The universities of the Ancient Regime are replaced by monodisciplinary and autonomous colleges from the intellectual point of view. The administrative union of four colleges received the name of university. Law schools specifically were assigned the role of rendering a technical and practical academic instruction, especially after the unification of the national Law by the Napoleonic coding.
Therefore, the French legal teaching in the 19th century was characterized by a double monopoly: that of the Law schools with a state apparatus — monopoly based on the exclusiveness of certification of Law professionals — and that of “pure” and “strict” disciplines, such as the civil law and the Roman law.

From Middle Age to the revolutionary period, the French legal teaching has undergone crisis. Our focus will be on the 20th century; the previous description was necessary for understanding how this type of teaching reaches the beginning of the century.

2 The 20th century crisis (first half)

The first half of the 20th witnessed two minor, yet important reforms, although they have not significantly changed the former model.

The first of them occurred between 1905 and 1924 and brought along as the main innovation the mandatory use of oral and written examinations for the purposes of evaluation, being important to point out that, since the Middle Age, Law schools used oral exams as the only evaluation method (except for dissertations). Despite the fact that evaluating a student from the social, economic and ethnic point of views is more difficult in a written test than in an oral examination, jurists were reluctant to accept this innovation on the account of the “specific nature” of legal teaching. Despite this reluctance, the new idea was incorporated into Law schools. What could be observed was the assignment of younger or minority professors to correct written examinations.

The second reform, in 1954, intended to change the Law course curriculum, in order to make it more “critical”. In fact, what occurred was a change in the name of the subjects. For instance: Constitutional Law became Constitutional Law and Political Sciences; instead of Administrative Law, the name Administrative Law and Administrative Sciences was adopted; and Criminal Law became Criminal Law and Criminal Sciences. We may call the changes brought about by the reform as false criticism. It was not enough to produce the multidisciplinary discussion from the top; professors had to embrace it as well. The fact is that, to the contrary, the faculty was extremely resistant to the subjects they considered as “ancillary” to the Law course. An interesting demonstration of this resistance may be given from the teaching practice of the jurist Jean Carbonnier, one of the most progressive thinkers of his time. When he was teaching his course of civil law, he wore the robe; however, he did not wear it when he taught Legal Sociology.
However, the 1954 reform did not have demerits only. It also established the guided papers for the course. It is worth highlighting that the course traditional model through magisterial courses was being kept since the Middle Age, being a magisterial course a class in a crowded amphitheater, in an impersonal, formal and theatrical environment. Guided papers, on the other hand, occurred in an environment where more closeness and dialog were present. If the magisterial courses still existed in France, it is still common nowadays that graduate students are recruited to instruct the guided papers.

Not even these two reforms were enough to manage a crisis, caused by a teaching model not adapted to the new human structure.

3 The 20th century crisis (second half)

The great crisis of the 20th century was due to the confrontation of a model that changed little since the 19th century with the phenomenon of massification of higher education teaching in France.

From all the changes the post-war brought to the French society, the enormous increase in the number of students is one of the most significant changes. The “democratization” of access to university in France, which was not due to any reform or formal act and lasted for the whole century, could be noticed by impressive figures. As an example, we have the Montpellier’s Law School, a renowned cradle of the restricted local elite: in the 1960s, it received the amazing number of three hundred students per year and it currently receives more than two thousand. However, this massification did not bring only quantitative changes to students. Two important qualitative changes occurred and brought violence to the coexistence of the former model with the new human structure. There was a huge diversification of the students’ class origin. The formation environment of a small group of elite children of aristocracy and bourgeoisie observe the massive admittance of the small bourgeoisie and the working class into the classrooms. Therefore, a major sector becomes a minority, and the university has to face new habits, values and worldviews.

At the same time, a change regarding gender also occurs: feminization. A universe which was predominantly male, is suddenly taken over by women, who, nowadays, occupy the crushing majority of chairs in Law schools. One of the impressive figures which serve to illustrate and demonstrate the consequences from this phenomenon is worth being mentioned: more than 80% of the French Bench is comprised by women, although at the Court of Cas-
sation — its highest court — they account for less than 20%. To have an idea of the male nature of this social environment, there was a saying which was commonly used “robe over dress is not worth” (robe sur robe ne vaut),\(^2\) which is no longer used, in view of the performance of the ladies in the distribution of awards (in Montpellier, less than 10% of the laureate were male), including in the most prestigious of them: the award for dissertation. It is worth pointing out that the awards by university merit, traditional in Law schools, have gone through an “oblivion” period after 68.

From all public protests, riots and popular movements which excited France in the 20th century, none can be compared to the one that occurred in May 1968. In a reaction to more than ten years of Gaullist hegemony, in May 13, 1968 the Parisian student movement organized great public protests all over the city. Their target: capitalism, imperialism, the values of old society, the Gaullist ruling and the “old university”. This movement is portrayed by some as spontaneous, as it has quickly gained unexpected dimensions, promptly receiving the massive adhesion of the labor union movement and soon gathering several sectors of the society in the whole national territory. May 68, as it was known, made immortal slogans such as “It is forbidden to forbid”. In addition to several others, the movement also adopted the slogan “End of the University”.

From all those changes that occurred in France as a result of the May 68, those concerning the universities are the most significant ones (and, unquestionably, the most relevant to this essay). It did not take long until the old structure of the universities was radically changed. In November 1968, the Edgard Fauré Act enters into force, changing the architecture of the French higher education teaching. At first, the national system is abolished and the universities are endowed with financial, administrative and, above all, intellectual autonomy. Colleges also see their end, as the universities became multidisciplinary centers. To replace colleges, the act creates the Instruction and Research Units — Unités de Formation et Recherche (UFR).

Once again, the jurists tried to escape the new general rule for universities under the excuse of legal teaching “specific nature”. That was useless. What is practiced, however, is a management agreement in which one UFR does not interfere with the other (or does not dialog with the other). Christophe Charle (1994) even states that the Fauré Act made it clear the fact that the Law faculty sees itself and behaves as a separate entity, rather than as a member of new universities, and this makes it impossible to insert Law schools into these new institutions.

Regarding the faculty members, an important change must also be described: the turning of assistant masters into conference masters. Unlike
their predecessors, they are assigned hourly loads equal to those fulfilled by *associate professors*, to whom they are not subordinated, although they had fewer prerogatives, such as supervising dissertations. This change, as well as the nationalization of competitive examinations to recruit associate professors, enabled the Law teaching career to be gradually followed by the small bourgeoisie and even by more popular layers, replacing a faculty comprised almost exclusively of children from renowned families.

May 68 and its consequences changed the French university, but not to the point of preventing a “classical” legal teaching model from reaching the 1980s and our days.

4 The Law Teaching Classic Model (The Heritage)

Just like Pierre Victor Tournier, in this study we also use the concept of *heritage* in politics. As opposed to what occurs in the current use of the term, in descent law, what is transmitted from generation to generation neither are “things”, nor remain the same. In Tournier’s view, heritage may also refer to habits, uses, ideas and feelings transmitted through generations, even if this transmission causes a certain degree of modification in the object being transmitted. This is the reason why the current French legal teaching model can be referred to as classical model. This classical model may be better demonstrated under two points of view: that of the organization of studies and that of the *summa divisio*.

Under the point of view of organization of studies, what can be observed is the *initial path*, and a progression, in the transmission of knowledge, from the simple to the complex. We refer to it as initial path because the Law course curriculum is organized in a strict and structured manner. Strict because the student may go from the first year of license to pursue his doctorate almost not having to make choices about his instruction. The college confronts him with “what it takes” to be a jurist; and structured because the subjects are linked in such a manner that one is a prerequisite to the other, as if they were a *basis* to the others. This allegedly logical sequencing and cohesion between the subjects — where the private law and, especially the civil law are the central pillars — ensured the consistency, the seriousness and the “specific nature” of the diploma in Law. Moreover, in the “base-disciplines” of this chain is where we find the so-called progression from the simple to the complex. In the Law course curriculum, the subjects referred to as introductory were intended to introduce “key” concepts, such as the fam-
ily or the State, so that these could be dealt with “in a analytical manner” in more advanced, more technical disciplines. This false simplicity — grounded on the Cartesian method — had already been reported by Bachelard in his book *Le nouvel esprit scientifique*.

Our other point of view goes back to the Roman time: the traditional *summa divisio*, fundamental division of the law into public law and private law. The current French legal teaching model goes beyond the issue of using this difference as an explanation of things, as a view of the world and as an obligation imposed by a rightful order; it goes beyond that. Pedagogically and administratively speaking, this is the basic division in Law schools. Despite the existence of the Political Sciences and Law History departments, students, from the very beginning, begin to form an identity of public or private law followers, which is consolidated among professors. Only in some research activities in Law, in the last few years, we can notice the modest initiative which gather public and private law followers.

Turning “simple” categories, such as the family and the State, into complex ones, as well as *summa divisio* not being a sufficient and plausible explanation for the complex issues which are brought to us nowadays, point out to a contemporary crisis in the legal teaching in France.

**Conclusion: a contemporary crisis in legal teaching?**

Whenever they face a crisis, the Law course faculty uses the discourse of “specific nature” of the subject in an attempt to reduce as much as possible its changing potential. Even if professors are compelled to incorporate the change, the daily resistance will privilege the old habits and the *status quo*. The teaching of Law, therefore, is sentenced to experience crisis, or to live in a constant crisis. Perhaps, this is its specific nature: a very particular type of conservativeness which is moved forward. A conservativeness which tries to be preserved within itself, being a system which, besides existing essentially to explain itself, tries to refer the issues of its time and space to its logics.

In a world where economy, religion, family, the State, work, among many other categories traditionally dealt with by Law have been undergoing deep changes, another crisis scenario is announced. One of the symptoms of this crisis is the loss of centrality of Law. This is noticed not only by the breach of monopoly by the jurists in the production of discourses about Law, but also when other areas of knowledge become groundbreakers in the production of discourse about categories traditionally assigned to jurists.
We see economists as groundbreakers and hegemonic regarding the discussion about regulation, as well as the administrators in relation to the management of private and public institutions, political scientists about the State organization and the right of integration, and the sociologists regarding the interpretation and use of legal rules and about the new work organization manners, including legal work. An interesting case which confirms this hypothesis is that of the legal training which is taught at the Institutos de Estudos Políticos (Political Studies Institutes - IEPs), especially the one in Paris, the Sciences Po Paris. For a long time, the IEPs have devoted to teaching and research in Political Sciences. In the last few years, they have also started to instruct highly competitive jurists, when one analyses the results of the latest examinations to enter the French Bench. No wonder that, since 2004, the Sciences Po Paris has received authorization to issue diplomas in Master of Laws, and since 2007, graduates may be approved in admittance examinations for the profession of attorney, which causes a certain embarrassment among jurists.

It seems that the answer to the “specific nature” of the teaching of Law will make it plunge into anachronism. Not only the opening to multidisciplinarity, but also the revision of the basis of legal teaching seems of the essence to us.

Notes

1Based on the course having the same name taught by Michel Miaaille in Rio de Janeiro (2007), in Rome and in Istanbul (2008)

2It is worth pointing out that the original saying was “robe sur robe ne vaut” (“robe over is not worth worth”, in a literal translation), with the word robe being used, in French, to refer both to a female dress and to the robe of the justice and the Law professors.
References


---

Michel Miaille
Juris Doctor in Public Law, Université de Montpellier 1.
Emeritus Professor at the Université de Montpellier 1.
Team Leader of the Recherche sur l’Identité et la Citoyenneté - ERIC,
related to the École Doctorale da Faculte de Droit.
E-mail: michel.miaille@univ-montp1.fr

Fernando de Castro Fontainha
Master in Sociology and Law, Universidade Federal Fluminense.
Graduate student in Science Politique, Université de Montpellier.
Fellow Researcher at CAPES.
Team Leader of the Recherche sur l’Identité et la Citoyenneté - ERIC,
related to the École Doctorale da Faculte de Droit.
Lawyer.
E-mail: fontainha.fernando@gmail.com