TEACHING LABOR LAW IN LATIN AMERICAN UNIVERSITIES

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I. THE BEGINNING OF THE REFORM OF LAW TEACHING

In 1954, the Uruguayan student representatives in the university faculty pointed out that "the teaching in our Faculty is pure memorizing and a waste of words. A maximum of information is pursued forgetting that the primordial issue is to form the juridical mind, to teach the students to think law and consider juridically the facts. We know that examinations are a reward for memory. . . We want to bring our teaching nearer to human reality."[1]

In the same period, the jurist Eduardo Couture expressed the need to urgently promote a "line of teaching to which I will be permitted to assign an exceptional importance. . . to seek from the first day, the first year of studies, contact with juridical reality. It is not exactly about practical teaching. It is simply about contact with reality."[2] These statements indicate that, at the beginning of the 50s, the general will for reform in Latin American law schools, especially for promoting teacher-training and research as essential functions of these institutions.

The law school has not been in contact with reality, despite the principle that "Law in the final instance regulates, people's conduct and that there must therefore be a relation between it and reality."[3] As Jorge Avendaño Valdez, a pioneer in law teaching in Peru, has

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1. Sandres F. Martinez, *Cuestiones Universitarias y La Enseñanza del Derecho (Universitarian Issues and Law Teaching)*, *in* 19 LAW FACULTY NOTEBOOKS 11, 91 (2d series, 1993).

2. Dean Eduardo J. Coutre, Speech to the Professors of the Law Faculty of the University of the Republic of Uruguay (Dec. 1953).

3. Marcial Rubio Carrera, *Ideas sobre qué es Aprender (y Enseñar) Derecho en un Pregrado (Ideas on What Learning (and Teaching) Law Means in an Undergraduate Class)*, PONTIFICIA UNIVERSIDAD CATÓLICA DEL PERÚ [herinafter PUCP] Fondo Editorial 2001, Serie Magis (Feb. 2001).

pointed out, "law not connected to reality is taught in law lecture rooms; this occurs at two levels, the professional and, at a more extensive one, the social. At a purely professional level, the teaching for future lawyers at the university is opposed to the intellectual activity that professional practice demands of them.

The teaching imparted is a theoretical one of definitions, classifications, effects of extinction modes, among others. The system is thus mainly informative but not formative."[4]

Therefore, in Chile in 1971, at the Conference on Law Teaching and Development, the Commission agreed that "teaching law seems to have been oriented mainly towards giving legal information to students rather than preparing them to be jurists."[5] There has been a lack of adjustment of teaching to professional reality.

At another level, the social one, as Jorge Avendaño declares, "we have not taught the law of life, but the law of codes. . . We have not looked into the origins, purpose and effects of the law at the social level. We tend to say: the code says this and doctrine says that as a commentary on the code; now you must interpret that code, analyze the alternatives emerging from its interpretation, the diverse formulae suggested, the voids in the code. What does this author think about the code and what do codes from other perhaps more advanced countries say? Period. The teaching of Law ends there, without analyzing or searching into the origins, the purpose, and the effects of the law, the law at the social level."[6] This idea of reformulating university teaching, outlined in the 50s and 60s, was halted by a long period of institutional crisis in different countries in the continent and only in the 80s did we see the start of an active process of change that was consolidated in the 90s.

The process of reform that is being fostered in almost all Latin American universities has common general objectives.

- The university must be the promoter of a national educational reform, so that every teaching system in any country acquires the necessary rationale and responds to the global demands of society.
- There cannot be a development in educational policies, scientific research, or academic programs of

4. Jorge Avendaño, *Nuevos Conceptos en la Enseñanza e Investigación del Derecho (New Concepts in Law Teaching and Investigation)*, 27 L. MAG. (PUCP) (1969).

5. Synthesis of the Commission Debates (Apr. 5-9, 1971) (presented at the Conference on Law Teaching and Development, Andrés Bello, ed.).

6. Jorge Avendaño, Speech at the Closing Ceremony on Law Teaching and Development, Valparaíso, Chile (Apr. 1971).

great excellence (postgraduate, doctorate) without thorough reforms.

- Avoid the duplication of services and courses in the different careers, allowing the students easy access to validation or subjects in other similar faculties that teach complementary courses.
- Organize university careers according to criteria that establish basic formative cycles common to all specializations and subsequent cycles that allow the student to expand his knowledge of the courses for which he has a special inclination or vocation.
- Lighten universities' bureaucratic and administrative load and begin internal processes of change that address issues such as continual evaluation, concepts of productivity, efficiency, academic excellence, scientific quality, etc.[7]

Another problem that many Latin American universities have had to face, and that widens the gap between university teaching and the reality to which it is directed, is the "massive teaching" phenomenon in public universities, where a policy of unrestricted and universal admissions causes a double imbalance: a) the maladjustment between "the demand for teaching" and the human resources and available materials to meet it at qualitative levels that are accepted in every country; b) the difference between quantity/quality of graduate students and the demand for professionals in the labor market.[8]

II. THE PRESENT EVALUATION OF THE REFORM

The educational reform project in the continent was consolidated by the appearance of the "Program for the Promotion of Educational Reform in Latin America" (PREAL) in 1996. The debate on university teaching and the need to reform study plans is strengthened with various projects in state and private universities. Some projects have already been or will soon be approved. In the 90s, the consolidation of new private universities that promote a real "university market," and compete to offer a great variety of educational products took place. Besides the traditional careers, there appeared the so called "short careers" (especially in the areas of communication and business administration) as well as special

7. Martinez, *supra* note 1, at 29-30.

8. SANDRES F. MARTINEZ & O.L. SARLO, LA FORMACIÓN DE JURISTAS EN URUGUAY (THE JURIST FORMATION IN URUGUAY) 123 (2001).

attention to post-curricular formation (post-graduate courses, master's degrees, etc).

In the study of law, traditional university teaching pursued the balanced training of the student in all of the juridical branches. The new reforms generally foresee a basic cycle with a thorough study of civil and public law and shorter courses on other disciplines (finances, trade, labor, etc.). A student in a second guided term will thoroughly study those disciplines that are of more interest to him. Then, post-graduate courses at different levels (seminars, post-graduate, professional, updating courses, and master's degrees) will permit a more profound formation of the student/graduate.

The Dean of the Law Faculty at the Pontifical Catholic University of Lima, Peru, established a commission to revise the curricular structure of the first cycles of law studies. This commission has been charged with gradually making the necessary adjustments to the structure. Currently, there is a syllabus common to all and common cases for students in the different sections. Therefore, we consider that, in teaching law, and especially in a matter so close to social reality as labor law is, a reasonable and careful combination of practical education and a critical-theorical one should be pursued. In other words, it is necessary to acknowledge that the university—in every sense—constitutes a social service for the community, where a critical, epistemological, and ethical understanding of reality should be insured, without disregard to training for market demands.

Hernando de Soto in his book *The Mystery of Capital* points out: "A lawyer cannot design a law and the administrative procedures to perfect it and then blame its failure on the unsuitability of the low level technocrats who carry out the law or the lack of education of those who use it. It is not enough to write elegant laws. These have to function also in the social and administrative reality for which they were written."[9]

Special relevance is assigned to the teacher in the new university reform plans. He is the definitive central figure of the teaching process. Traditionally, a teacher's training—especially that of a law teacher and, in our case, the teacher of labor law—was attained through his own practical experience of the content of the courses he was to teach. Professors with a recognized experience in research and with exceptional communicative skills have been the principal

9. HERNANDO DE SOTO, THE MYSTERY OF CAPITAL: WHY CAPITALISM SUCCEEDS IN THE WEST AND FAILS IN THE REST OF THE WORLD 222 (2000).

teachers who surrounded themselves with assistants who were trained in a practical and basically imitative apprenticenship.

As to the methodology used by the educators, the conception that the traditional Magisterial class—by which the student is informed of the dogmatic contents of the law, etc.—does not contribute in stimulating the creative and apprehensive capacity of the students in the development of the abilities needed by a lawyer, that is, in forming the juridical criterion. "Many universities trust more in the Magisterial lecture and in teaching systems that stress information about the contents of legal doctrine than in its use. Other teaching methods should be developed; methods that give importance to the participation of the student in the experience of learning and in the development of his professional and perceptive sense in the potential use of the law and legal system as a means for social change."[10]

In a survey carried out with 50 students of the Pontifical Catholic University of Peru about teaching and the preference for the Magisterial lecture or for lectures based on cases to be solved, 49 of the 50 declared themselves to be in favor of the teaching of the latter. This clearly implies a desire for an active and permanent participation of the students and, at the same time, greater knowledge and training on the teacher's part in matters related to the cases to be discussed.

"It does not make sense, therefore, that the professor should explain in class what is already written. It is preferable that the student read the author. The lecture time can then be dedicated to more productive academic work: the search for and collective increase of juridical knowledge and the development of the students' skills and aptitudes that a lawyer must have."[11]

In relation to the law professor's task, it must be pointed out that in many Latin American universities, in spite of the present reform trends, full-time professors are scarce. "Many universities are endowed with a large number of professors whose dedication to science and legal education is on a part time basis and whose preparation for legal education in the world today can be limited. . ."[12]

Finally, we would like to offer some reflections we consider important to go along with the transformation process in the universities in a world that is going through a continuous process of change.

10. Legal Education in a Changing World; Report of the Committee on Legal Education in the Developing Countries (Int'l Legal Center, 1973).

11. JORGE V. AVEDAÑO, LA LLAMADA METODOLOGÍA ACTIVA (THE METHODOLOGICAL ACTIVE CALL) (2001).

12. *Supra* note 10, at 19.

A. The Need for Fostering Self-Knowledge

The continuous evaluation of university law education and its links with the social reality for which it is intended in order to achieve its objectives is absolutely indispensable for its improvement. Every educational process requires an appropriate diagnosis and for that it is necessary that the universities have services to reinforce their "self knowledge." Statistics, surveys, and university censuses are indispensable tools for access to university self-knowledge. It is urgent that each university have an up-to-date X ray with the different aspects of the faculties and careers that illustrates the realities that need to be understood in order to design and obtain improvements and advancement.[13] Self-knowledge and self-criticism are indispensable attitudes "for fostering change."

B. The Use of New Technologies

It is evident that the new technologies offer new possibilities for professional training. The possibilities of access to Internet, video conferences, or education at a distance increase—sometimes in a virtual sense—the contact with reality or with educative experiences in other countries or other regions of the same country.[14] "With regard to how to teach and how to control the quality of teaching, we need an important change. Seminars, symposiums, lectures, tutorials, and the sensible use of information media applied to teaching are called on to play a substantial role. But progressive integration of the new technologies in teaching demands equanimity and particular attention to the differences among studies."[15]

13. MARTINEZ & SARLO, *supra* note 8, at 12-14.

14. In Latin America, the system of video conference is still incipient, which allows university teaching to reach many interior regions in countries where it was completely absent before.

15. F. Fernandez Buey, *Sobre la Calidad de la Enseñanza en la Universitaria*, EL PAÍS J. Nov. 21, 2001, at 17.

III. PROBLEMS ENCOUNTERED IN TEACHING LABOR LAW IN LATIN AMERICA[16]

A. The Link Between Theoretical Teaching and Reality

In spite of advances in teaching in a number of universities in recent years, while new ones do not meet the required standards, there is still a gap between theoretical teaching and practice in labor law discipline. In a recent study carried out by researchers at the law faculty of the State University of Uruguay, the demand of the graduates "for stronger links between university study and the reality of professional practice" has much relevance.[17] Moreover, in the specific case of Peru, there were years in the past decades when legislation changed so rapidly that at the end of the course the students found themselves facing situations for which they had not been trained.

A rational and suitable attitude to academic ethics implies opening up to discussion all points of view and not justifying all our assumptions. Any other attitude means deceit or concealment and is not a guarantee against gross errors. The social role of the university is to be the alert conscience of a society, so that we don't fall into the myopic vision of pure practice."[18]

We live in a time of profound transformations of reality; university studies of labor law should begin a debate on diverse themes in labor policy. A debate on flexibility, non-regulations, unemployment, etc. superimposes itself on the formal juridical analysis.[19]

Therefore, although there is a tendency to reaffirm the protective role and autonomous nature of labor law, and although the existence of methodological "excesses" like "hyperfomalism" has been denounced as a "threat to the very existence of Labor Law" and, according to Professor Alonso García's wise judgement, they have even threatened at times to undermine juridical reasoning, smothering

16. We thank the contributions to this paper by various researchers including Jorge Avendaño Valdez (Peru), Susana Corradetti (Argentina), Oscar Ermida Uriarte (Uruguay), Cecilia Guzmán (member of the research team headed by Carlos Aldao Zapiola [Argentina]), Humberto Jaramillo (Columbia), Carlos Livellara (Argentina), Hector Lucena (Venezuela), Flavia Meleras (an Uruguayan colleague now in Spain), Raúl Saco Barrios (Peru), Wilfredo Sanguinetti (Peru), Francisco Tapia (Chile), and Anna Vilela Espinosa (Peru).

17. MARTINEZ & SARLO, *supra* note 8, at 12.

18. Interview with O. Sarlo, Director de la Unidad do Apoyo Pedagógico de la Universidad de la República de Uruguay, in Montevideo, Uruguay (Feb. 20, 2001).

19. O. ERMIDA URIARTE, LA ENSEÑANZA DEL DERECHO LABORAL IN URUGUAY (TEACHING LABOR LAW IN URUGUAY) (2002).

it beneath a mass of (more or less vigorous) postulates of an economic, political, or sociological nature, etc.[20] At the same time, there is recognition of the fact that economic and political reality plays an important part in the system of labor relations, a fact that must be considered in teaching labor law. As Montoya Melgar expresses it, "if the essence of Labor Law has, from the outset, reflected a defined model (in which the regulated object is personal, voluntary and dependent work performed for another party, the central juridical entity in the labor contract, and together with it a constellation of complementary relations (already mentioned) which we may call 'existential' aspects of Labor Law, are dependent on the changing political, economic and social reality."[21]

And as María Emilia Casas Baamonde points out, "the teaching of labor law will leave its habitual isolation among legislative and jurisprudential issues and indoctrinal constructions, in order to reveal the juridical phenomenon in its reality as a constitutive element and an institutional factor in economic and social life, with all of its changes, transformations and contradictions."[22] In the same way, Trazegnies remarks, "A Labor Law course will not be reduced to explaining law or developing some 'doctrinaire' themes but will explicitly explain the set of interests involved, the implicit enterprise 'models' that constitute the basic suppositions of workers, managers and legislators and the social costs of the different means of solving labor disputes, etc."[23]

B. The Role of Labor Law Teachers

The responsibility that falls on labor law teachers to determine what sort of jurist the university and society want to form can obtain an answer insofar as they are ready to face it; that is why, in university reform plans, special relevance is assigned to the teacher's formation, which is the central figure in the process of transmitting knowledge and teaching. "We have already said that the Labor Law investigator and teacher has to be, naturally, a Law technician but not only that.

20. Alonso García, *Peligros de Disolución del Derecho del Trabajo*, 35 CUADERNOS DE POLÍTICA SOCIAL 47 (1957).

21. Alfredo Montoya Melgar, *Sobre el Derecho del Trabajo y su Ciencia (Related Labor Law and Its Science)*, 58 SPANISH MAG. LAB. L. 176 (1993).

22. María Emilia Casas Baamonde, *Sobre las Exigencias de una Metodología Funcional y Crítica en la Onseñanza del Derecho del Trabajo (About Exigency of a Functional and Critical Methodology in the Teaching of Labor Law)*, *in* II JORNADAS HISPANO-LUSO-BRASILEÑAS OF LABOR LAW 390 (1985).

23. Fernando Trazegnies, *Teaching of Law as a Subversive Activity*, Conference on Teaching Law and Development, Pontificia Universidad Católica del Perú (1975).

We have also said he must be a critic or 'censor' (in Bentham's terminology), who assesses Law 'from outside'—from his moral, political, economic or social perspective. Such an evaluation "implies in the evaluator a certain degree of knowledge about social, economic, and other realities in which the juridical phenomenon is inserted and on which it exerts its effect."[24]

Another matter that is of great concern in teaching labor law in Latin America is the ideological approach to the course, since it is evident that labor law is loaded with ideological and value options. We consider—beyond all professorial license—that it is indispensable for the teacher to know how to transmit the products of his scientific work and to avoid social rhetoric.

As Goldin has remarked, "the criterion of success of a committed teacher does not consist in achieving that students think as he does, but simply that they think. So it is important that the students perceive in the lecture hall, that the professor is performing an exercise in critical thought in freedom. . . I think it is evident that the teacher cannot impose his ideas as it is impossible to try to change a right-wing student into a left-wing one or vice versa; he has to succeed—here again the criterion of success in teaching in getting his right-wing student to think critically from his right-wing point of view; and the left-wing one from his left-wing position, also critically."[25]

C. Updating the Syllabus of Labor Law Courses

It is not possible, therefore, to operate in this complex reality without knowing about it with the greatest accuracy possible. Bringing labor law studies up-to-date is an indispensable condition to operating in the labor field and finding answers that will enable us to solve the problems that arise daily.

The teaching of law, and especially labor law, should seek the "equilibrium between theoretical and practical knowledge, stressing the solution of problems."[26] Thus, the Latin American lawyer not only must be formed as a jurist, but also as an expert who can solve practical problems rapidly.

In this sense, "the jurist's formation and his function in modern society is the main theme that must dominate any reflection on Law

24. Montoya Melgar, *supra* note 21, at 186.

25. Interview with Adrian Goldin, Professor of labor law at the University of Buenos Aires, in Buenos Aires, Argentina (Feb. 18, 2002).

26. MARTINEZ & SARLO, *supra* note 8, at 134.

teaching.[27] The labor law teacher must be able to answer the question as to what kind of jurist does the university (and society) want to form."[28]

As the Chilean professor Witker has stated, "the **desideratum** is to imprint a problematical character to teaching. Law cannot be portrayed as immutable knowledge, constituted in a system, but as a group of problems arranged in a variable way, for which there are more or less temporary answers or attempts at answers, which obey value options in a particular situation. This implies that active learning of law is inscribed in a fundamentally problematic conception. The class, then, becomes a collective search (group or course), linked to a social situation in which the juridical phenomenon operates by reproducing in the lecture hall the real mechanisms of generating law."[29]

In Latin American faculties, as well as theoretical subjects, there are special courses in forensic practice. The first remark to be made is that the forensic practice courses are separated from the theoretical ones: that is, professors, programs, and methodology of "teaching practices" are completely independent from the theoretical courses.

In the specific case of labor law, the practical courses are carried out independently, generally without provision for cooperation between labor law professors and forensic practice teachers, who are limited in a general practical course to teaching contract models and judicial demands lawsuits in a few hours. It should also be pointed out that forensic practice teachers sometimes have a general civil law or procedural formation that does not include a real "labor" training.

The second remark that must be made to the forensic practice courses is that they are not a concrete approach to the reality of life, but constitute disciplines "that are supposed to be practical: civil lawsuits practice, penal practice, labor law practice, etc."[30] The original idea when creating these "practical" disciplines was to link theoretical teaching with the practical side of university formation. Thus, it was sought to overcome the historical difference in Latin American universities between knowledge learned in lecture halls and life in court. It was not a bad idea, but the results, in general, were poor, because what was intended as practice became theory.

27. Casas Baamonde, *supra* note 22.

28. Montoya Melgar, *supra* note 21, at 185.

29. J.V. WITKER, METODOLOGÍA DE LA ENSEÑANZA DEL DERECHO (METHODOLOGY OF LAW TEACHING) 43-44 (1987).

30. J.W. SOBRINHO FERREIRA, METODOLOGIA DO ENSINO JURIDICO E AVALIA VAO EM DIREITO 68 (1997).

Today most law faculties have, therefore, courses in "theory of legal procedure practice" in which professors teach models of lawsuits and have students use books that contain prescriptions on judicial matters. It is unusual for a professor to take a student to a court hearing or visit a labor union and be present at a collective bargaining session between workers and employers. There is no time and the professor must fulfill his teaching duties. The appearances of lawsuits are substituted for their reality.[31]

D. Present Day Teaching of Labor Law

It can be affirmed, in general terms, that the trends of Latin American reforms strive to reduce the study of labor law to a basic semiannual course or to two "modules" of four months each, completing the training (for the students oriented to it) with a second or more optional courses (in some of them, Social Security is included as a separate course). The post-formation courses may, in turn, be more specialized (individual or collective laws, labor laws for government employees, Social Security, etc.).

The idea of this new teaching model, with a general part common to all and an optional one chosen by the student, evidently contributes to stimulate the making of decisions and, therefore, the vocations of future professionals. Besides, this pyramidal structure, with a broad base common to all, decreasing in the guided courses and culminating at post-graduate level, allows for more personalized teaching (there is a closer link between the teacher and student in guided courses) and, consequently a more intense contact with reality.

Nevertheless, often with this teaching model, the first basic and general cycle is not enough to stimulate the interest and vocation for labor law. When Goldin refers to the teaching of labor law in the Argentine model, he says that the course in the basic cycle—"Labor Law Elements" (lasting four months)—is a "superficial and synoptic view of positive Law" and for many students it is the only approach they will have to this subject all through their career studies. The second stage is much more profound: General Theory of Labor Law (two months), Law of Individual Labor Relations (four months), Law of Collective Labor Relations (three months), and Social Security (four months), but "unfortunately, every year there are fewer students

31. *Id.*

choosing Labor Law, precisely due to the superficial teaching of the basic course."[32]

As a conclusion, the university career should be apprehended as a formation process that allows the student to acquire a solid theoretical base, to know a method to reason legally, and to investigate new realities. A transformation should take place in the approach of the teaching of labor law looking for the appropriate balance between the magisterial class and the active class.

32. Interview with Adrian Goldin, *supra* note 25.