

## LEGAL EDUCATION: “COFRADIA” OR “ARCHICOFRADIA”?

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### 1. Introduction<sup>1</sup>

The student wasn't doing very well in the exam that would allow her to graduate from law school. When the examiner told her that the exam was over, she requested to be asked an additional question:

- *“All right. Tell me what is a ‘cofradía’,”* said the examiner.

The student was surprised. The material she was supposed to be examined on related to contracts and criminal law and did not mention anything similar to a “cofradía.” She didn't have any idea of what the examiner was talking about.

The silence of the student prompted the examiner to ask her if she knew the answer.

- *“No sir,”* answered the student, *“... but I think I have the right to a last chance. The materials don't have anything to do with that topic.”*
- *“All right. You have another chance. What is an ‘archicofradía’?”* asked the examiner.

The student kept a long silence. After a while, she was just able to say:

- *“Sir, I think that in spite of all this I deserve a last chance. Please ask me a last question.”*
- *“All right. But this is the last one. What is the difference between a ‘cofradía’ and an ‘archicofradía’?”*

The student failed the exam.

On many occasions, law school makes students—and practicing lawyers—experience the same feeling produced by this anecdote (which, by the way, is real). There are questions and concepts taught at law schools, that don't have any relationship with the real world or any practical use.

But, additionally, these questions—irrespective of their lack of connection to the topic that was supposed to be the object of the exam—reflect the capacity of conceptualism to lead us to questions with no answer. It was evident that, after her answer to the first question, the student would be completely unable to answer the remaining questions. The game was not to find answers, but questions with no answer.

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<sup>1</sup> It is important to underline that this essay basically refers to traditional legal education in Latin America and it takes as a specific experience the case of legal education in Peru.

Legal education does not only fit into this conception, but it often contributes to reinforce it. To be sure, we cannot separate legal education from our conception of Law itself. Ultimately, a law school teaches lawyers to act like lawyers and we, as lawyers, act in the context of a legal system defined in a reality. But this must be a legal system that allows finding answers and not only questions without an answer.

Law almost changes as the world does. And the world has lately changed a lot. Moreover, the changes in the Law have affected its own foundations, what we think about it, and what Law thinks about itself. This in spite of the fact that Law is always behind reality, for reality changes faster than the capacity of Law to assimilate change.

Just as Law is behind reality, legal education is behind Law. Legal education would seem to be less capable of changing than Law—caught in the inertia of permanence—usually is.<sup>2</sup>

This essay offers a way of understanding reality, Law, and legal education in light of the relationship established in the institutional change of the last years. In other words, the essay seeks to answer the following question: How legal education should change in order to have the power to transform reality?

## **2. The “Law of Concepts” and the *Ius Imperium***

### **2.1. The “Jurisprudence of Concepts”**

Ihering, a German legal scholar, had a curious dream. He dreamt that he had died and he was brought to a special paradise where only legal scholars could go. In that paradise, one was face to face with many concepts of legal theory in their most absolute purity, free from the contamination of human life. There lived the incorporeal spirits of good and bad faith, of property, and possession. The logical instruments that allowed the manipulation and transformation of legal concepts were also there, so that one could solve the most fascinating legal problems. An hydraulic dialectic press for interpretation would allow us to extract by pressure an unlimited number of interpretations from any legal norm. A machine to build fictions and a machine to cut a hair in 999.999 equal parts, which, in the hands of the most skilled legal scholars, would be able, in turn, to cut any of these parts in another 999.999 parts. The possibilities of this paradise were unlimited for the most qualified legal scholars, provided that they drink a lactic liquid produced by the earthly things of humanity. But, for the most skilled legal scholars, this liquid was superfluous, for they didn't have anything to forget.<sup>3</sup>

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<sup>2</sup> Pathetic cases of this phenomenon happen very often in Latin America. On one occasion, there was an important reform of Peruvian bankruptcy norms. The changes were dramatic and the whole philosophy of the system was modified. A law teacher, however, decided to keep teaching the subject under the old statute because, in his view, it was better than the new one. The rest of the semester, the students analyzed a repealed statute.

<sup>3</sup> Cited by Felix Cohen, *El Método Funcional en el Derecho*, Abeledo-Perrot, Argentina, pp. 11-12.

Ihering's dream reminds us that, as lawyers, we tend to use—at least in Latin America—two concepts that have become some sort of a common place. The first is the concept of “legal science”<sup>4</sup> and, the second, is the concept of “legal nature.”

Both concepts reflect a specific vision of Law and, in so doing, they affect the way in which Law is taught in universities. On the one hand, there is the idea that Law is a science and that, as a science, it has its own object. Because of this fact, it is possible to discover “natural things” in the object of the Law, as it would happen with the discovery of a new chemical element, a new law of physics or a new animal or plant species. And this is the point where the concept of “legal nature” appears, as the discovery of a new object—able of being conceptually defined—in a reality.

But Law doesn't have any natural object, for Law, more than a science, is primarily a system for the regulation of conducts. Its object, far from being natural, is created by human minds. Law is created by humanity and its “nature,” as well as the nature of institutions, changes as soon as legislators change the law that regulates them. As Kirchmann puts it, *“three rectifying words from the legislators, and whole libraries become trash.”*<sup>5</sup>

Lawyers (or “legal scholars,” who aren't anything more than lawyers with scientific aspirations) are, thus, envious that other sciences have an object that preexists the knowledge that studies this object and try to “neutralize” their envy by inventing nonexistent “legal natures.” This is because, in the end, the object of our “science” does not preexist the knowledge, but it is a consequence of that knowledge. And, in this world, things change and may be manipulated, as if a physicist could repeal the Law of Gravity with an administrative order or a chemist could, at will, add a dozen of new elements to the Periodic Table of Elements.

In his presentation to Eugenio Bulygin's *The Legal Nature of the Bill of Exchange*, Genaro R. Carrió commented on the efforts to try to find “legal natures”:

*“The balance is devastating: These undertakings—the searches for ‘legal natures’—are, with no exception, doomed to fail from the very beginning. Because, among other reasons, what it is being looked for, and how it is looked for, does not exist.”*<sup>6</sup>

Law, therefore, becomes a sort of blend between a metaphysical religion and a science where concepts themselves are the object of study of other concepts. As Felix Cohen puts it:

*“Legal reasoning expressed in these terms is necessarily circular, for these terms are legal creations. This sort of reasoning adds to our knowledge exactly the*

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<sup>4</sup> The introductory course to law at the Catholic University of Peru is called “Introduction to Legal Sciences.” This name shows how we have chosen to qualify law not only as a science but—as the plural “sciences” indicates—as a set of sciences.

<sup>5</sup> Cited by Antonio Hernández Gil, *Problemas Epistemológicos de la Ciencia Jurídica*, Editorial Civitas, Madrid, 1981, p. 17.

<sup>6</sup> In Eugenio Bulygin, *Naturaleza Jurídica de la Letra de Cambio*, Abeledo-Perrot, Buenos Aires, 1961, p 7.

*same as Molière's doctor discovery that opium makes people sleep because it contains a somniferous principle.*

*However, the proposition that opium makes people sleep because it contains a somniferous principle is scientifically useful if 'somniferous principle' is defined physically or chemically. Otherwise, it just obstructs the access to the understanding of a false knowledge.*

(...)

*Legal concepts (...) are supernatural entities that only have a verifiable existence before the eyes of faith.”<sup>7</sup>*

In this sense, legal reasoning is often a kind of supernatural and circular reasoning, for it uses concepts created to define and create other concepts. In short, we are used to include the defined element in the definition (as when we try to establish a difference between a “cofradía” and an “archicofradía” without knowing what a “cofradía” and an “archicofradía” are for), because the elements of reality are scarce (or nonexistent) in the everyday practice of legal scholars.

A clear example of this is the concept of legal act or transaction. Once, I tried to explain this concept to an American professor in order to help him understand better—or so I believed—the difficult notion of “consideration” that we just had discussed in class. The legal act or transaction is a beloved and very complex theoretical construct of Civil Law systems that endeavors to find a common conceptual ground for all cases in which the expression of will of a person creates an obligation or a legal relationship. Contracts, wills, marriage, unilateral promises, the recognition of children, adoption and, pursuant to the Civil Code, the administrative orders of the Executive and even judicial opinions, all fall under the notion of legal act or transaction. We try to find a single theory that explains everything.

When I finished my explanation, the professor told me: “*Very interesting. What is it useful for?*” After a brief discussion about the practical use of the concept, I didn't know what to answer because its only use was to make concepts more complex. Indeed, the legal act isn't even a concept, but a “supraconcept,” a concept of concepts. It seeks to explain what a bunch of completely different things have in common. Its rules, instead of helping us to find practical solutions, just create more distance between the language of lawyers and the language of ordinary people. It does not create science, just metaphysics.

In spite of this, it isn't unusual for law schools in Latin America to include a course on the legal act or transaction as part of their curricula (in Peru, more than one law school offers the course). But the worst part of this story is that this course is taught in the first semesters of law school, forcing the students to understand what a legal act is without knowing what a contract or a will are. They learn the supraconcept before understanding the concept. For them, the legal act is an “archicofradía.”

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<sup>7</sup> Felix Cohen, *El Método Funcional en el Derecho*, Abeledo-Perrot, Buenos Aires, pp 46-48

This conception has an important impact on law teaching, for it privileges the skills to engage in “conceptual engineering” over the skills to solve practical problems. In this context, the best student is the one who answers the exam with the most circumvented and complex answer and not necessarily the one who finds the most practical solution.

This phenomenon results in a modality of legal education that is impractical, very abstract, and with few referents to reality. The students, in turn, although very skilled in “conceptual mathematics,” seem to be far from understanding the real problems that concepts seek to regulate and understand.

This situation also explains the resistance expressed by many law schools in Latin America to interdisciplinary legal education. Indeed, fields such as Law and Economics, Legal Sociology, or Legal Anthropology usually tend to generate resistance. When they are taught, they are just offered as optional courses.

In this sense, Kantorowicz suggests an interesting mind exercise:

*“With respect to every proposition we should ask ourselves if social life would suffer any harmful consequences if the proposition were to be substituted by its opposite. Then, we should examine all the treatises, the articles, the comments, and the judicial opinions reporters in order to see how many questions of this sort are answered and how many of them are even asked.”*<sup>8</sup>

Are our students systematically trained to ask themselves and, above all, to answer these questions? The answer seems to be a clear no.

## **2.2. *Ius Imperium* and Coercion**

A second element of this argument is that legal education has been decisively influenced by the idea of a coercive law. Coercion, indeed, is a central element reflected in law teaching. Everything of a legal nature implies the capacity of using force in order to enforce a norm. This is perhaps the difference between legal norms and other norms such as those of an ethical, moral, or religious nature.

The presence of a state able to enforce the Law is presupposed by every legal norm. This factor, which is clear in the case of Public Law, is also applicable to Private Law, where it is clearly understood that Law without the state is not Law.

In this sense, legal education adopts a structure that is primarily geared toward confrontation and conflict. This factor leads law schools to privilege those lawyering skills aimed at “fighting.” Most of the curricula of law schools in Latin America include more than a dozen courses in procedure and litigation. Moreover, first semester students are forced to take a procedure course. In contrast, courses in negotiation, settlement, and alternative dispute resolution mechanisms are seldom taught and, if they are, they are offered as optional courses the students might choose in their last semesters, when they have already absorbed a culture and a strategy of conflict.

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<sup>8</sup> Cited by Cohen, *op. cit.*, pp 131-132.

The lawyer, therefore, is often trained to induce fear instead of trust, and her professional qualities are often measured with respect to her capacity to become an uncomfortable presence for the other party.

The main problem Law confronts in these days stems from the notion of border. The borders of a country define the monopoly of the state over the decision making power in a certain territory. Borders control the traffic of goods, people, and information. Under such control, and because the use of force allows it, it is possible to create a law shaped in coercive terms. This also explains why “national sovereignty” is so important in political and legal discourses and why virtually all wars originate in a territorial problem.

Additionally, it explains the conception of law as a unity. Law is one as one is the state. The establishment of alternative systems for the regulation of human conduct, such as informal groups, indigenous or peasant communities, systems of private auto-regulation and so forth, are seen as alien and, in fact, they are almost never included in the curricula of law schools. Accepting the existence of legal orders that compete between them contradicts, at a foundational level, the notion of a state that holds the monopoly over coercion and, hence, over law.

### **2.3. What Happens When the Jurisprudence of Concepts and the Coercive Vision of Law are Combined?**

The combination of extreme conceptualism and the coercive vision of law generates the kind of law that we know in our countries. Battles are fought with conceptual weapons as arbitrary and ephemeral as the norms that create—and undo—them. Every procedure and lawsuit isn't anything more than a chess game in which the pieces and the moves—which do not have any natural substrate—are known and manipulated by a golden few: lawyers. In this conceptual game, it is decided who must go to jail, who must pay to whom, who will have the custody over the children after a divorce, or who must pay taxes. Flesh and bone human beings are, therefore, subjected to this conceptual whim and the right of defense becomes a bunch of terms in Latin that nobody understands or is able to clearly explain. The fate of human beings is decided under such rules of confrontation and debate. Constitutional rights become something as malleable as clay, thereby allowing those who can pay the fees of good “conceptualists” (lawyers, in other words) to win and those who can't afford them to lose.

Insofar as the state is the one that can modify “legal natures,” citizens are in brutal disadvantage to confront somebody who can change the battlefield at will. Sometimes, conceptual manipulation isn't even necessary. An act from the legislators is enough to turn into trash not only entire libraries—as Kirchmann said—but also the rights of citizens.

This has an evident impact on legal education. Lawyers are trained to be conceptual fencers, but, because the concepts they use don't have a referent in reality, these concepts become arbitrary and unpredictable weapons and rules of the game. Legal education isn't only influenced by this conception of Law, but it fosters it in classrooms, it accepts it, and prizes it according to those criteria of evaluation used to grade students.

The “cofradía” and “archicofradía” anecdote with which we began this essay is a good example of this phenomenon, for it shows how concepts may be arbitrarily used. The question game used by the examiner—who probably lost his patience when the student wasn’t able to answer the questions—shows the capacity to use concepts and supraconcepts to ask questions with impossible answers.

In any case, this phenomenon has an evident impact on legal education and it pervades our law schools.

### **3. The Change**

Many things have changed lately. Law and legal education have been deeply influenced by these changes.

In the first place, globalization has brought an increasing interaction that forces us to establish ties not only with people from other places, but also with people from other fields of knowledge. Conceptualism makes this interaction difficult, for reality sometimes clashes with “legal natures.” It is difficult to understand telecommunications law without being acquainted with the technology it involves. It is impossible to be a counsel for big financial operations without understanding finances. An antitrust or an economic regulation lawyer is out of place if she doesn’t have a working knowledge of economics. And this also applies to more traditional areas of the law such as civil, criminal, or administrative law. In order to interact it is necessary to bring the law back to reality. And it isn’t enough that we bring law to an inch from reality, it is necessary that law touches the worldly mud and gets dirty from it.

In spite of this, interdisciplinary education in our law schools is in short supply and isn’t necessarily of good quality. Courses in other disciplines are taught without adjusting the curricula to the needs of a lawyer. And this is when we get flooded by Molière’s doctor-like definitions.

Highly abstract languages tend to encumber communication and globalization implies the capacity to communicate between us. The Jurisprudence of Concepts makes conversation difficult, because it adds different and even contradictory meanings to already difficult words.

In addition, economic traffic and the rapidity brought by the media to social relations make conceptualism ill-suited and too slow to explain and, above all, to solve, many problems. Traffic can’t wait for the lawyer to find the legal nature of things. The lawyer, therefore, more than an alchemist must be a practical individual with an answer to concrete questions. This conception is bolstered by positivism, which formalizes the concept and, at least in theory, makes it resistant to time. According to Fernando de Trazegnies:

*“Law tries to capture time by inserting it in a formal order that establishes the criteria of periodicities. It denies time its role as the pattern of rhythms and measures and tries to force it to be ruled by the routines and sequences of the legal order. From a radical positivist perspective, every norm even intends to paralyze time, which is equivalent to its elimination, for time isn’t anything other*

*than movement, change. The period during which law is in force is seen as a box, placed between the enactment and the repeal, inside of which nothing happens, there is no time. Positivism wants the norm to be immutable during all its period of validity. The history of law—or, at least, the positivist ideology of legal history—has a cataclysmic character: it isn't constituted by a gradual evolution in which things modify their color little by little, but it only manifests through the big convulsions of the birth (the enactment) and the death (the repeal) of the norm. This is why, from a positivist perspective, it is possible to say that every norm is a moment with the vocation of eternity or a provisional eternity.”<sup>9</sup>*

If we extrapolate the main idea of this citation to our argument, it is possible to say that conceptualism sees legal natures as timeless, for the norms that ultimately define these “natures” are also timeless. Law and concepts are affected by time, especially when time purports to set their rhythms. And when these rhythms are implacable and dynamic, as they are in the modern world, the capacity of a “conceptualist” lawyer to give answers is also affected. Educating lawyers with such a profile makes them less capable of reacting to the challenges of the modern world.

In a similar vein, flexible answers are also required. This is a world defined, at the same time, by uniformity and diversity. Change, as well as stability, is a sign of our times. The situations that may arise are infinite and all problems may not be solved with a single answer. In Carrió's words:

*“When legal scholars ask themselves about the legal nature of any institution, I think they are pursuing an impossible task: a single justification for the solution of all cases that clearly and precisely fall under a certain set of rules. In other words, they hope to find the ultimate criterion of justification that is applicable both to typical and atypical cases. Of course, such a thing does not exist.”<sup>10</sup>*

Extreme conceptualism forces lawyers to answer problems according to nonexistent legal natures that, however, condition the answers to these problems. This distances the lawyer from the possibility of using two different concepts to solve two similar problems. It also explains the puzzlement of laypeople with the stubbornness of a lawyer who refuses to include a clause in a contract because it “denaturalizes its legal nature.” This answer is just a defense of a conceptual purism that turns upside down the Platonic allegory of the cave and presents reality as imperfect and concepts as perfect.

Extreme conceptualism, therefore, turns the lawyer into an impractical being in a world that demands practicality.

But the issue is not limited to the crisis of an absurd conceptualism in front of the demands of the real world. The notion of coercion has also been undergoing huge modifications. Above in this

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<sup>9</sup> Fernando Trazegnies, “El Derecho Civil Ante la Post-Modernidad,” in *Derecho*, No. 42, December 1991, Pontificia Universidad Católica del Perú., pp. 287-288.

<sup>10</sup> In Bulygin, *op. cit.*, pp. 7-8.



essay, we explained that the foundation of state coercion lies in the concept of border. But technology is making disappear this concept, as we know it.

Technology has important impacts on power. The most important of these impacts has been putting sophistication and capabilities in the hands of everyone. From the unaffordable 500 dollars Texas Instruments' calculators of 25 years ago with screens that showed little green numbers, we have switched to more sophisticated calculators with liquid crystal screens that only cost 5 dollars. Today, a calculator is affordable to everyone and, by this means, so is the power to do secure and accurate mathematical operations. On the other hand, the lowering cost of computers is also an example of this trend. To be sure, we now have more sophisticated computers at lower prices.

Computers and information science have given to the ordinary citizen a great power over the state. Public authorities fail to control the traffic of people and goods across its borders by trying to control information. In the Internet, information has no borders, travels freely, and is highly affordable (in Peru, you can surf the web for an hour for just one dollar).

Until a few years ago, it was possible for a dictator to control information and tell us that we lived in wonderland. Today, this isn't possible anymore, for truth is at everyone's reach at a very low cost.

Cable and satellite television have achieved a similar effect. Today, we have access to hundreds of television channels with no real censoring power from the state. To be sure, it is virtually impossible to control Brazilian or Chinese publicity that doesn't conform to Peruvian advertisement law.

The coercive capacity of the state has, thus, become weaker and weaker. Exchange means trust and, therefore, part of the role of lawyers is to generate trust in these exchanges. Supposedly, this trust is brought about by the system of coercion. When a lawyer advises a client, she seeks to make sure that the goals of the client are met by designing formulas that allow him to benefit from the coercive system of the state. This happens, for example, with contracts. When designing and drafting a contract, lawyers will include mechanisms of enforcement that reflect their knowledge that courts may be used to enforce the contract. In this sense, a great deal of the trust produced by lawyers stems from their knowledge to use a system of enforcement where the state plays the role of an impartial umpire.

But when the coercive capacity of the state begins to dissolve in the midst of uncontrolled transactions across borders, lawyers lose their capacity to generate trust; at least in the way trust has generally been understood.

The Internet and electronic commerce are the clearest example of this trend. People enter into contracts through the Internet knowing that it would be difficult that an impartial umpire enforces these agreements. In the Internet, the mechanisms that generate trust are of another sort: prestigious domain names, the signs of prestige and honesty, the signature certification mechanisms, and other systems designed by non-traditional and imaginative lawyers (freed from legal natures).

This isn't new. When credit cards first appeared, a similar phenomenon developed. A business in China doesn't accept a credit card issued by a Peruvian bank because it knows or has evaluated the cardholder or because it has an idea of the capacity of Peruvian courts to enforce the cardholder's obligations. The Chinese business grants the credit because it believes in the Visa logo and the dove's hologram.

If a conflict arises, it isn't solved by a state system. The web created between issuing banks and business people who accept credit cards generates a sort of trust that doesn't depend on the state's system of coercion, but on the Visa Arbitration Council that, via fax and in few days, solves any conflict at a low cost. Trust is, therefore, generated by a system designed with creativity and not by any state monopoly.<sup>11</sup> It would be possible to ask us if the education provided by law schools is useful to design similar systems.

In this context, confrontational legal education, based on the idea of a lawyer able to use the coercive capacity of the state in one sense or the other, undergoes a crisis because its foundation has weakened. The reduction of the capacity of the state to do many things is more a practical than an ideological issue and this fact affects the way we think about lawyers and what we look for in them.

#### **4. What Has Traditional Legal Education to Offer vis-à-vis this Perspective? The Descent Into the Swamp**

In order to be able to address traditional legal education, it is necessary to first take issue with two factors that have a decisive influence on its structure. The first factor is the conception of law and, the second, is the role lawyers play in society.

As we explained above in this essay, the more traditional conception of law (and by traditional we don't mean positivism) sees it as a set of general norms enacted by the state in order to be followed by every citizen. In turn, legal education must exclusively concentrate on the study of these norms.<sup>12</sup>

Similarly, it has been traditionally thought that lawyers should only play a role in solving conflicts. They are some kind of superheroes with unique "supernatural powers" and with a knowledge directly aimed at helping the bewildered to solve their problems. These powers are the capacity to move in the "unknown dimension" of concepts and to use the coercive power of the state to carry out the goals of the clients.

These conceptions are so rooted in the idiosyncrasy of society and, especially, in the minds of lawyers, that it is not surprising that legal education is tightly related to them.<sup>13</sup>

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<sup>11</sup> For further details, see Robert Cooter & Thomas Ulen, *Derecho y Economía*, México, Fondo de Cultura Económica. 1998, p. 515.

<sup>12</sup> Owen Fiss, "El Derecho según Yale," in Martín Bohmer (ed.), *La Enseñanza del Derecho y el Ejercicio de la Abogacía*, Barcelona, Gedisa, 1999, p. 15.

<sup>13</sup> Caroline Maughan y Julian Webb, *Lawyering Skills and the Legal Process*, Butterworths, London, 1995, p.1.



The cartoon shows how law schools with traditional legal education see lawyers who have just graduated. Legal education and knowledge are highly abstract and when law students graduate they have to descent into a swamp for which they have not been prepared. This phenomenon becomes more acute when we assume that conceptualism has been isolating reality (the “swamp”) from what is taught in the classroom. This is simply because reality has changed and legal education hasn’t, at least at the same pace.

Legal education is very strong in teaching black letter law and its interpretations by legal scholars. This is consistent with the idea of a “jurisprudence of concepts.” Knowledge is power and the student will have to absorb all the knowledge he or she can get from every law teacher during the short period of law school.

It should be clear, however, that the role of the teacher—and of education, generally speaking—is informative and formative. It is informative because it provides information to the student. It is formative because it provides competencies and capacities. The conceptualist vision privileges the informative side of legal education and focuses the formative side on the development (not even very well) of a confrontational capacity based on the use of concepts.

The methodology used in this type of legal education is basically expositive. The teacher comes to the classroom and “spills” all her wisdom over avid-for-knowledge students. The student never knows how the teacher got that wisdom and if there are other teachers with opposing views on the matter. On many occasions, students only understand the concepts after many years of practicing law. In this sense, law schools teach students to know rather than teaching them to learn.

Another important issue is that law teachers—especially in Latin America—have limited themselves to see problems exclusively from the standpoint of a deductive form of reasoning. This vision is consistent with the notion of law as the paradise of concepts envisioned by Ihering where the solutions to all legal problems may be found. Trying to find out the appropriate “legal

nature,” rather than trying to find out a new solution for a problem, is the way in which almost every legal conflict is solved. The lawyer, more than a creator, is a discoverer of concepts.

This is also consistent with the vision of law as a unity; that is to say, as the existence of one and only law. There is not much to create, for law is already condensed in the legal natures that constitute it. This vision radically contradicts the idea of several legal systems competing between them to gain legitimacy and the capacity of lawyers to create different legal systems. Legal education often eliminates the concept of diversity from the minds of lawyers.

What is it going to happen when a lawyer of this kind faces a situation that is off routine? The consequence will be her incapacity to act in the face of a situation for which she doesn't have a norm or a concept specifically suited to deal with that situation. She will be unable to conceptualize in a different way and try to find concepts in an instrumental rather than in an axiological sense. Her legal education will make difficult for her to find her own ideas to find a solution.

As we explained above in this essay, this vision sees the lawyer as a “superhero” who gets her powers from the capacity to deal with concepts and to use the coercive power of the state. But reality makes this vision inappropriate when concepts begin to fail to provide the solutions for all problems. And the power of the state, upon which this vision is based and that enforces its acts, becomes weaker. Lawyers' training is therefore based on powers and capacities that, without being completely useless, don't allow them to face many of the problems posed by the modern world.

## **5. What Should Legal Education Offer?**

We have explained how the traditional conception of law forces legal education to develop a form of knowledge based on concepts. In turn, this type of legal education implies that once law students graduate, they find that the practice of law is not the paradise they imagined but a swamp they didn't know it existed. They become aware that there is a divorce between what they were taught in law school and the practice of law.

If instead of seeing law as a set of norms enacted by the state we see it as a set of norms created both by the state and individuals, the traditional vision of law should change. According to this new vision, law should be understood not as a unity but as a diversity of systems. In this sense, the system backed up by the coercive power of the state would just be one among other systems.

The role of lawyers is to generate trust. Trust, however, is not generated by state norms, but by the capacity of lawyers to come up with solutions able of substituting even the incapacity of the state to act.

We should look for a form of law that allows us to live in harmony. This means that we should seek to prevent conflicts in addition to solving them. In this sense, legal education should be focused from a holistic perspective that sees law from three dimensions: the knowledge, the practice, and the personal perspective.

This new vision of legal education doesn't trust anymore that students will learn the practical dimension after leaving law school. Now, students will have to solve cases allowing them to experience the real world. Although reality will never be exactly replicated, these cases will narrow the gap existing between legal education and reality. In addition, this new version of legal education will not exclusively teach concepts leading to an incomplete understanding of problems, but will also develop a personal dimension that takes into account the idiosyncrasy, the culture, the interests, and the attitudes of all parties involved.

Lawyers must stop trying to be “superheroes,” because their “superpowers” are less and less reliable. On the contrary, they must assume the task of providing a service to their clients and society through legal counseling or the defense of their interests. In addition, they must also try to make sure that norms—both state and private—really promote social harmony.

## **6. Competency-Based Education**

Legal education mustn't be limited to teach concepts to lawyers, but it also needs to train them in competencies.

What is a competency? It is simply a sum of acquired knowledge and skills. This, added to the right attitude, will bring about the performance we are looking for.<sup>14</sup>

This is just another way of framing the holistic approach we were referring to in the previous section of the essay.

What is this all about? It is about learning to live in the swamp, a swamp that is very different to the world of concepts taught in the classroom. It is about providing the students with an education that enable them to create strategies allowing them to survive in the swamp, to foresee and confront in the best possible way the problems that may arise. It is also about understanding that concepts have an instrumental value and that the weapons that should be used are not limited to the ability of calling on the coercive power of the state for protection.

What are the reasons that support a competency-based education? It is basically an economic and a personal development reason. To be sure, globalization and the revolution in technology have transformed the structure of companies. This structure has become more flat because the notion of job has been replaced by the notion of field of occupation. People now need to keep themselves employable; that is to say, to have the possibility of finding a job and keep it until they find a new job allowing them to develop new competencies. In other words, we should replace a static vision of education (as a stock of knowledge) with a dynamic vision (as a flow of competencies).

The International Labour Organization has prepared a Manual—aimed at guiding employers around the world—that deals with the issue of labor competencies and competency-based education.

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<sup>14</sup> Donald Clark, *Introduction to Competencies*, <http://www.nwlink.com/donclark/hrd/case/compet1.html>, September 1999.

There are three basic models of competency-based education:<sup>15</sup>

### **a. Behavioral Model**

This model focuses on a specific task to be developed by a person. It ignores the connection between the different tasks, knowledges, and attitudes that are developed by the company. Insofar as the performance required from the employee is the bare minimum, this model is deemed to be too simplistic and lacks any motivation.

An example of this model is the employee of a bottling factory who puts the caps on the bottles. This task just requires the employee to put the caps, without requiring from her any special knowledge or devotion to her work, let alone any interest in knowing how her work contributes to the company. Work, therefore, becomes simple and boring.

### **b. Functional Model**

This model analyzes the role of the person as a worker. It seeks to pinpoint those elements that will bring about a higher performance; that is to say, which are the tasks in which the employee needs to prove her performance capacity.

Under this model, the employee at the bottling factory not only puts the caps on the bottles, but, additionally, she knows that the content of the bottles is a soft drink and puts the caps so that the gas doesn't leak out of the bottle. The employee is not anymore an automat who can easily be replaced by a machine.

### **c. Constructivist Model**

According to this model, every person develops her own learning process and constructs her own capacities. The employee becomes involved in the analysis and solution of the problems she and/or the company confronts. This guarantees a continuous learning process.

Under this model, the employee in charge of putting the caps on the bottles not only knows what is their content, but she is also acquainted with the details of the whole bottling process and uses her own knowledge to find new information or technology that would bring more efficiency to the process. In this case, there is an added value for the employee and the company.

The constructivist model is widely accepted because it guarantees continuous training and allows the person to decide what competencies she wants to develop so she can keep herself employable. In addition, in this model everyone is involved in the education process, the learning process never ends, and, more importantly, the student knows from the very beginning of her studies what she will be able to do after she graduates.

This model is consistent with breaking the idea of a conceptual "paradise" where everything is established beforehand. Additionally, it implies the development of the capacity to find solutions

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<sup>15</sup> Sandra Kerka, *Competency-Based Education and Training*, Office of Educational Research and Improvement, U.S. Department of Education, <http://www.ericacve.org/docs/cbetmr.htm>.

when the coercive power of the state doesn't work. A lawyer trained under this model is not anymore an automat who just applies conceptual tools, for her knowledge goes beyond knowing and understanding how legal reasoning works. The lawyer is now capable of creating new processes through the combination of existing tools and the tools she herself develops.

How would it be possible to include this model in law school curricula? Basically through defining the professional profile we want to achieve; that is to say, through establishing what the student will be able to do after she graduates. For example, it will be necessary to establish that students should be able to work in companies where the communication with professionals of other disciplines is a need. It will also be necessary to divide the curriculum in professional topics that are related to the type of professional profile a law school wants to achieve. For example, tax law should be separated from civil and criminal law and it should be established if this area of the law contributes to achieving the professional profile sought by a law school.

The challenges to be confronted by this endeavor are:

- It will be necessary to know the state of the labor market at every moment, so the education offer may be adjusted to the existing demand. In other words, it will be necessary to design legal education in function of the “swamp” and not the paradise of concepts.
- It will be necessary to improve the relevance of what is taught; that is to say, it will be required to teach a knowledge that is useful to solve concrete problems.
- It will be necessary to teach law not as an isolated discipline, but as a field that interacts with other fields of knowledge.
- It will be necessary to foster the autonomy of students, so they don't become dependent from teachers. Students should develop their own views, which might even oppose those of their teachers.
- The teacher should be a facilitator and not of a mere lecturer. She should teach to learn rather than teaching specific knowledge.

An interdisciplinary education and the development of legal skills are, however, two crucial aspects of the successful inclusion of the competency-based model into legal education.

- **Interdisciplinary Education**

Insofar as the modern world requires lawyers with a broader and more interdisciplinary knowledge, law schools will be forced to include in their curricula scientific and technical topics. This is the case, for example, of the economic analysis of law, finance, accounting, modern techniques of business management, information technology, and so forth.<sup>16</sup>

In fact, law schools in the United States have been including this type of courses in their curricula for many decades.

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<sup>16</sup> Avron Sherr, *Legal Education, Legal Competence and Little Bo Peep*, Wolf Chair Inaugural lecture, Institute of Advanced Legal Studies, University of London, 2001.

Legal practice has changed to such extent that, today, it has lost some of its professional character. A lawyer needs to have some notion of competition in order to be able to take business decisions, to finance her law firm, to define the cost/benefit of initiating a lawsuit or a settlement, among others. The new vision of law will provide the lawyer with the capacity to serve her clients in an understandable and reliable way, in a world where mere legal knowledge is not enough to be realistic.

- **Legal Skills**<sup>17</sup>

Legal education is moving toward the development of legal skills such as research, writing, interviewing, defense, and negotiation. The development of these skills requires that students be presented with almost real situations through which they learn by doing and not by listening.<sup>18</sup>

### Research

Legal research and reasoning are the foundation of a lawyer's work. Both the satisfaction of the clients with a lawyer's work and the quality of this work depend on this legal skill.

Law requires logic reasoning. Students must, therefore, become familiar with this type of reasoning and learn how to use it right from the start of law school. This important task mustn't be left to luck as it usually happens with traditional legal education, which trusts that students will learn legal reasoning when they begin practicing law.

The development of legal research skills (which include gathering information skills and the use of information technology) must lead the student to discover—through several dynamics—that legal reasoning is just a modality of the regular forms of reasoning developed by any human being.

### Writing

Once a legal topic has been exhaustively researched and analyzed, the next step is to communicate the results to the appropriate person. On certain occasions, these results must be presented in written form.

Lawyers traditionally learn to write through the use of pre-established models. This way of learning just perpetuates the classic writing and communication mistakes for which lawyers are famous.

To develop this legal skill, it is necessary to analyze the importance of written communication for the practice of law and to study the basic differences between oral and written language. It is also necessary to work on another crucial aspect of a lawyer's work: organization.

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<sup>17</sup> Ana Cecilia MacLean developed this issue in her article *Toma el Atajo Joe*, published in the Newsletter of the Universidad Peruana de Ciencias Aplicadas Law School in November, 2000.

<sup>18</sup> Christine Cnossen y Verónica M. Smith, *New technology – Implications for legal Research Methodology*, 12<sup>th</sup> BILETA Conference, The Future of legal Education, University of Durham, March 1997.



When drafting a document, a lawyer must have a clear picture of the goal of the document and the audience to which it is addressed, so she can use the appropriate style to convey the message.

As the lawyer assumes a diversity of roles, her documents must also reflect this diversity. There are legal documents that seek to inform, others that defend the interests of a client, and others that propose new norms. In every case, the document seeks to convey a message and clarify certain ideas. For this purposes, it is necessary that for the lawyer to learn to communicate the results of her research and analysis in every case.

### Interview

In addition to written communication, a lawyer needs to develop oral communication skills.

An interview implies a process of communication between the lawyer and another person, which may be a client, a judge, a witness, the lawyer of the opposing party, or any other person with whom the lawyer needs to communicate with during the process of research and implementation of a case.

Lawyers have traditionally informed their clients about their actions without caring if the clients understand or if they are satisfied with the service provided. This barrier also extends to the other people with whom the lawyer needs to communicate with, thereby making difficult for the lawyer to perform her role and accomplish her goals.

In order to improve this situation, it is necessary to develop oral communication skills that take into account those factors tending to make communication difficult. It will be required to especially emphasize non-verbal communication; that is to say, gestures and body language.

### Defense

Defense skills include both oral and written communication, but, in both cases, the essential matter is the capacity of the lawyer to argue in a clear, concise, reasonable, and logic way. Learning to prove—that is to say, persuading with facts—is also an essential component of defense skills that is not usually taught in law schools. A lawyer who knows how to prove will be able to convince the appropriate authority that her reasoning is the most appropriate to solve the matter at hand.

Traditional lawyers use arguments only they can understand. These arguments are basically conceptual “fencing.” The defenses prepared by these lawyers are endless repetitions of legislative and doctrinal sources that do not explain their applicability to the case at hand and that never go to the point under discussion. In short, this sort of defenses just offers a “tour” of the paradise of concepts. The natural consequence of this phenomenon is that listeners and readers lose interest and this may have a negative impact on the interests of the client.

For example, traditional courses in evidence just explain to the student the theoretical and conceptual foundations of this topic from a procedural perspective, instead of training the student

to organize the evidence in order to be persuasive and to understand the impact on the judge's psychology.

In order to develop her legal skills, the student needs to analyze cases; draft letters, requests, complaints, claims, and reports; and make an oral presentation of her case before a jury, assuming the roles she is assigned to play.

### Negotiation

A lawyer must know and use efficiently the available forms of dispute resolution and, especially, negotiation. To achieve this goal, lawyers must not only become familiar with the structure of every mechanism of dispute resolution, but also with the tools used by these mechanisms to reach a solution that fully satisfies the interests of the parties.

The development of this legal skill must emphasize an experiential training and promote the assimilation of the different tools through constant practice. This practice must be conducted through exercises that should be videotaped and then discussed in order to learn from the analysis of the mistakes and accomplishments.

The development of this legal skill should also lead to the analysis of the process of negotiation and its ethical implications. The capacities to examine creative strategies of negotiation and to choose which strategy is appropriate for each situation should be enhanced. In sum, the capacity to generate trust should be developed as a competency. This trust, however, should stem from the capacity to convince the parties that a solution is the best one for everyone involved and not from the ability to manipulate the coercive power of the state in the benefit of the client.

For us, it is clear that the market is looking for professionals with a critical stance, creative, versatile and capable of doing their job in multiple settings. In our view, this type of professional is the result of a competency-based education focused through the constructivist model. To be sure, this is the model that guarantees the narrowing of the gap between academic training and labor market, between the "paradise of concepts" and the "swamp of reality."

## **7. Conclusion**

A "cofradía" is a religious congregation or brotherhood—formed by devotees and duly authorized by a public authority—that seeks to accomplish pious deeds.<sup>19</sup> In contrast, an "archicofradía" is an older "cofradía" that has more privileges than the others.<sup>20</sup>

When the student wasn't able to answer what a "cofradía" was, it was pretty evident for the examiner that she wouldn't be able to answer what an "archicofradía" was either. And it was even more evident that she wouldn't be able to answer the question regarding the difference

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<sup>19</sup> This is the definition given by the Dictionary of the Royal Academy of the Spanish Language. Other meanings of the word are guild, company or union of people who want to pursue a specific goal. It also means a union of people or towns congregated in order to participate in certain privileges, or a union of robbers or thugs. But, for purposes of this essay, we will be using the definition indicated in the text accompanying this note.

<sup>20</sup> This is the definition given by the Dictionary of the Royal Academy of the Spanish Language.

between these two concepts. In the examiner's strategy it was enough to find a concept without content in order to ask a set of questions that nobody could answer.

Why did the examiner pick out the "cofradía" and the "archicofradía" to prove the ignorance of the student? It was perhaps a coincidence. But maybe the question was hiding something more sophisticated. A "cofradía" is a religious organization in which the cohesive factor is a bunch of mysteries that only faith can explain. Belonging to a "cofradía" means to be a witness of the religious mystery that inspires it. This membership, however, does not mean that the members understand the mystery. It just means that they know how to perform the rites without understanding what they are useful for. An "archicofradía" is an older brotherhood, with more privileges, and perhaps with deeper mysteries.

But perhaps the questions of the examiner had a deeper symbolic meaning. Maybe the examiner was trying to ask the student if she knew to which type of organization she was going to belong in case of passing the exam. The examiner was perhaps asking the student if she wanted to belong to the "cofradía" (or the "archicofradía") of lawyers. In this "cofradía," legal education is just a rite of initiation with mysteries that can never be solved. The secret of the mystery is what keeps the members together. Solving the mystery would be the end of everything. This is why the rite must be kept far from reality, in order to preserve its mysterious character. It must be obscure and distant. But it must seem real in order to inspire fear.

The challenge is to free ourselves from the "cofradía" and the endless discussions to solve unsolvable mysteries. It would be better to use the same energy to solve people's problems. Finally, this is what law is for.