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The case study in learning law

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Abstract

The present study is a reflection on the method of case study in learning law. To achieve this purpose we will discuss the traditional method and its limitations to the challenges of law in the era of globalization. We will emphasize the urgent need to implement the case study method in Portuguese law schools, as an instrument that enhances the active participation of the student, protagonist in the process of learning and knowledge acquisition. It is intended that students develop critical thinking and be able to reflect on their own learning process. A review of the literature will be carried out, which will seek to contextualize, at present, the reflexivity with the pedagogical objective. Use shall be a deductive reasoning, based on the general reality of teaching to learning the law, underlining the importance of the case study method for the development of didactic and pedagogical dimension. At the end of this tour we will be able to discern the extent of the right learning, seeking a methodological model capable of mobilizing students for their new role, participatory and critical.

Keywords: education; teaching; case; method.

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1. Introduction

Education in Europe, under the Bologna Process, has been the scene of major changes that deserve attention by all those who contribute to the diffusion of knowledge. The Bologna Declaration marks a strategic change in higher education policies, fostering a European Higher Education Area from the commitment of all the signatory countries. The aim is to raise the international competitiveness of the European higher education system, making it as attractive as its traditional and cultural components that are already millenary. The change of the educational paradigm centered on the acquisition of competences should foster greater cultural sedimentation and mental flexibility. It should be able to provide better adaptability to life situations, (IPA, 2008). It is intended, therefore, that higher education "establish a close link between knowledge and professional competences or, in another formulation that translates knowledge into professional competences" (Damião, Helena, 2015).

We found that the coordinates of today's world require great restructuring in education, rethinking the individual student in the social context.

The teaching learning of law cannot pass unchallenged to these new challenges. The current world, inspired by ideologies based on democratic principles, demands, in the educational context, the promotion of greater equality of opportunity (Barreto Filho, Oscar, 1967) and the awareness of education as a propelling vehicle for the integral development of the human person in all its dimensions, (Boeira, Marcus, 2012).

In short, teaching based on the transmission of knowledge gives rise to a model based on the development of both generic and specific competences, directed towards the training area in question. The classical methodologies, adopted in the teaching of Law, must naturally articulate with others, centered on the student, extoll the active role that is claimed.

2. The current state of law teaching

The failure rates in the examinations of access to the Portuguese Bar Association, as well as access to the judiciary demonstrate two realities: one concerning the high number of law graduates - massification of university education due to Democratization policies on access to higher education and its inevitable consequence, concerning the implementation of highly selective criteria for access to these professions.

The methodological question of learning necessarily emerges from the current state of higher education in the teaching of Law. The wide range of Law degree programs has, as an unavoidable consequence, the enrolment of students with basic weaknesses.

The reduction of the number of years in post-Bologna degrees has encouraged, and continues to feed, the creation of new postgraduate courses and a great proliferation of master's degrees (Venturi & Glitz, 2014). Such instruments prove to be real means of recycling, trying to bridge the structural failures of the first cycles.

The lecture method in the teaching of Law, focusing on the role of the trainer who speaks orally on a subject, lecturing the content, expressing an initial view of the problem, expressing his/her reasoning and intending to achieve a result, also contributes to this reality (Ferro, 2004).

This teaching methodology, besides limiting the professor-student dialogue, endorses the image of the authoritarian educator, who goes beyond the knowledge he/she possesses, thus becoming one of those responsible for the success or failure of the students (Santos, Isabel, 2014).

In the context of law, this attitude is based, on the one hand, learning concepts, a mechanical apprehension of the rules applicable to situations and the blind resolution of problems presented, and on the other hand, autism on possible professions (Venturi & Glitz, 2014).

By examining and analyzing reality, we consider that today's teaching of law constitutes a process of "acquisition of adequate responses, thanks to a mechanical process of positive or negative reinforcements. The educators are convinced that the attitude they want from the students (the good answer) can be determined externally, using the use of premium or punishment, that is, student rankings" (César Coll et al., 2001, p. 76).

It will be important for Universities, in their law schools, to face the new challenges, to enable students to exercise a legal profession in its multiple dimensions. Nowadays, the practice of advocacy is developed not only in the competent forum, through legal patronage, but in other areas, a namely consultancy.

Education-learning of the Law must be guided by the integration of the individual in his/her social environment, (Barreto Filho & Oscar, 1967), optimizing the skills for the multiple functions that the legal profession can assume, in the context of challenges and according to the evolution of reality.

Conditions should be created so that the student can identify the problems and their changes, according to certain coordinates, encouraging analytical reasoning by social changes. To paraphrase, we will say that "there is a great mismatch between the teaching of law, the existing law and the very society where this right is taught, taught or not taught" (Junior, 2002, p. 207).

It is urgent to re-establish the teaching of Law in Portugal, exalting its protagonists and faculty, for a reflexive activity on the methodologies in learning Law. The Bologna process and the implementation of the goals to be achieved favor the change of mentalities and the focus in the education-learning of the student. The latter, as an agent of analysis and criticism, must discuss and reformulate the guiding principles of the concrete case (under analysis) and the legal system in which it operates, by social requirements. Only in this way will we exalt the acquisition of the skills necessary to solve new problems, many of which are still without a juridical-legal reception.

3. The influence of positivism in the teaching of Law

When we seek to apply the law to a case, we inevitably have to proceed with a link between the facts and the rule. We start from the positive reality, even though it is contextualized within the system itself. This will give us the dimension of the "just".

Law, as a normative legal system, appears to us as a set of "correlated and harmonious legal norms" (Mendes, 1992, p. 41), revealing a certain society. This entails their understanding and, in the last ratio, the perception of the legitimacy of power. It is stated that one of the characteristics of the system tends to be its completeness (each case has a predetermined solution) (Mansur & Rezende, s.d.). However, conceptual plurality, for some, determines that legal phenomena have only one normative dimension (Kelsen, 1996). These would be reduced to a strictly normative view.

In their generality, the positivists view the law as a complete normative order and whose regulatory capacity goes far beyond morality and ethics. The dogmatism that emerges from such reasoning justifies pointing out certain characteristics to the juridical order (coercibility, plenitude and perfection), meaning "the context of social life, (...) legally valued" (Mendes, 1992, p. 42).

The idea of a science of law is unquestionably linked to legal positivism as a method. It seeks to establish a dichotomy between fact and axiology, seeking to draw the boundaries of law

impenetrable by morality and ethics. Also, legal science deals with legal rules. Their knowledge is circumscribed to these and to the articulation between normative facts and emerging facts of social life (Kelsen, 1996.).

The legal rules, in disciplining human conduct, use words, expressions, which, however, technical they may be, approximate common sense, commonly internalized. However, the meaning of words is not univocal, imposing a hermeneutical activity, capable of tracing the real dimension of concepts.

The positivist view of Kelsen, Canaris, and Bobbio provokes a true mismatch between Law and social reality, not contemplating "normative adaptability" when it comes to the new realities, a fruit of the evolution of the times.

Law acts through norms elaborated and assumed by man as a human being, which has revealed, over time, as a mechanism of social control. We will say that the positivist thesis has served the purposes of the hegemonic domination of certain political classes, at certain times, thus justifying situations of misuse of the law, acts against humanity, authoritarianism and "pseudo" humanized rationally unacceptable behaviors.

The law cannot be reduced to a simple logical and systematic comparison. It involves other dimensions: sociological, political, economic and historic and it should also embrace the democratic values of contemporary society refuting the abstractionist and the dogmatic constructions whose valuation rests on canons capable of hypothetically legitimizing power.

The interpreter cannot blindly assume the alleged legal neutrality. Being the objective of the system to promote social peace, it cannot behave like a true automaton of the Law. In its hermeneutic activity, it must perceive the factual reality, the experience, never forgetting the social purpose.

The teaching of law is not immune to this reality. Legal positivism was reflected in the faculties of law, propitiating a memory based study of law and doctrine (Mansur, Rezende, s.d.). The educator, in the positivist model of teaching, assumes himself as "a reproducer of ideas, passing far from the memory of a reflective, cultured, critical and capable human being to reason and establish links between ideas and theories" (Mansur, Rezende, s.d. p. 21).

4. The participatory model in learning law

Discussions about active, student-centered strategies have recently acquired a reflective dimension that needs to be analyzed. Among the possible methodological strategies, we will highlight the case study as an alternative means, capable of filling the identified gaps, primarily to enable students to solve the problems concretely.

Starting from a humanist view of reality, we say that learning should focus on the analysis of everyday life. In the context of law, this will entail an exploratory activity on the *modus operandi* of the courts. The case study method imposes a concerted dialogue between the private and the universal (general). Throughout history, ideologies have been built that impelled a close look at concrete reality. However, the deductive method was elected for decades, especially in the area of legal science, constituting a slavish instrument of legal positivism; induction and empiricism should somehow return to legal science. In short, bring students to learning the law "in action".

It is important to recognize that the method under analysis - case study - is not the work of critics of positivism and its various manifestations, but a return to Classical Antiquity (Flores, 2011). The Roman jurists already used the casuistic method to analyze the concrete case in its multiple variants.

Law emerged from a concerted reflection going through generations and adapting to the new realities.

It is important to mention that the term "casuistry" was used in "the twentieth century to designate a part of moral (Catholic or Protestant) theology, or rather a way of conceiving of frequent moral theology from the thirteenth century. (...). At the end of the sixteenth century, the Jesuits decided to divide the course of moral theology into two: a theoretical part, in which the professor quickly passed the general principles (the fundamental moral), and then a practical part centered on case analysis (Casuistry) and presumably showed how to apply the general rules to concrete cases. (...) The theoretical part (law, conscience, virtues, etc.) has become less important for a more detailed casuistry (...)" (Durand, 2010, p. 79)

These are concrete cases, from which an analogical and comparative process is initiated in the face of new realities. It is not possible to apply in a dogmatic and general way the principles that shape a given system without taking into account the reality that surrounds them. We need to interpret axiologically the densifying principles and rules thereof within their respective social context.

Originally, the method of the case study arose at Harvard University at the end of the 19th century. Its contribution to the study of Law was due to Langdell, director of the Law School of that University, who introduced in the course of contracts that taught the so-called "Cases on Contracts" (Casebook), where he explained the purpose of this methodology. This is based essentially on the analysis of the *modus operandi* of Law.

A century later, Yin states that the case study is an empirical investigation, focused on a given reality (phenomenon), taking its context into account. It warns, however, that the boundaries between this phenomenon and the context are not at all evident (Yin, 1994, p. 1). It is intended to apprehend the Law through the methods of Natural Sciences, especially the method of analysis.

Currently, the vision about teaching/learning requires that the interaction between theory, rules and their application in society is developed. Thus, it provides the student with an experiential and integrative learning of the various dimensions of the problem. Although Legal Science is not an exact science, it needs to establish a dialogue that enables discussion, listening to different points of view and reaching the appropriate result, at least the most appropriate to the social dynamics. The problem that arises must be analyzed in several dimensions, not only legal but e.g. the economic. Law and Economics reveal themselves as total social phenomena (Roque, 2015) participate in realities that allow the understanding of individuals. Society in general presents social structure and productively. The Law behaves as a true infrastructure for the Economist allowing the conceptualization of certain institutes, e.g. Property and contract (Batista, 2010).

The expositive discourse about the integration of facts in the prediction of an (abstract) rule has fomented purely technical behaviors, limiting the factual and social reality. The case study method proves to be an important tool for the development of critical thinking, allowing the understanding of reality, and the possibility of transforming it and, perhaps, reversing social asymmetries.

Conclusions

The methodological question of learning and teaching methods necessarily emerges from the current state of higher education in the teaching of Law. To this reality is not at all strange the expository method in the teaching of Law. It will be important, given the new challenges, that universities, in their law schools, will enable students to pursue a legal profession in its multiple dimensions.

It is urgent to re-establish the teaching of Law in Portugal, exalting its protagonists, students and educators, for a reflexive activity on the methodologies in learning Law. The idea of a science of law is unquestionably linked to legal positivism as a method.

The legal rules, in disciplining human conduct, use words, expressions, which, however technical they may be, approximate common sense, commonly internalized. However, the meaning of words is not univocal, imposing a hermeneutical activity, capable of tracing the real dimension of concepts. In recent times, discussions around active, student-centered strategies of learning have acquired a reflective dimension. Among them, we highlight the case study as an alternative, capable of filling the identified gaps, primarily to enable students to solve problems in concrete terms.

This method imposes a concerted dialogue between the private and the universal (general). These are concrete cases, from which an analogical and comparative process is initiated in the face of new realities. The question asked should be analyzed in various dimensions, not just legal, e.g. the economic one. We cannot forget, today, the interpenetration between the economy and the law and reality must, therefore, be assimilated within a wider context, to perceive and value all the premises of the case.

The case study method proves to be an important tool for the development of critical thinking, allowing the understanding of reality, and the possibility of transforming it and, perhaps, reversing social asymmetries.

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