

Insider/outsider perspectives on a divide: theory and practice of critical thinking

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Abstract

An account of the premises on which the workshop that gave way to this volume was organized, with an overview of the development of the sessions. A review of the papers is included.

Key words

Critical thinking; legal education; positivist paradigm; critical traditions; higher education reform

Resumen

Se explican las premisas a partir de las que se organizó el seminario que ha dado lugar a este volumen, ofreciendo una visión general del desarrollo de las sesiones. Asimismo, se incluye una reseña de los artículos incluidos en el mismo.

Palabras clave

Pensamiento crítico; enseñanza del derecho; paradigma positivista; tradición crítica; reforma de la educación superior

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1. Introduction

Being a professor in a law school as well as a social scientist interested in legal education entails an approach which simultaneously has something of the insider and of the outsider. This field of study adopts a detached perspective of issues that at the same time are constituting the daily work of the researcher, sharing both an *emic* and an *etic* point of view on these issues. The articles that are presented here entail a reflection which deals with theoretical and scholarly issues; they put forward theoretical considerations and at the same time endorse practical direct action in the legal education field. Undoubtedly this is a difficult, tricky exercise that needs a clear explanation of the points of departure, the objectives and the premises of the approach.

This was the first exercise of the workshop, who met under the title "Critical Thinking Inside Law Schools": to make explicit what kind of insiders we were, and the measure in which our insider views were taken into account in our reflection, or were modelling it. As I am an organizer of the workshop, the exposure of my own approach to this particular subject of the legal education field, marked by specific personal experience as it is, is made only on the premise that this explanation is needed to understand the way in which the workshop that led up to this volume was conceived.

The context of this enquiry into critical thinking in law schools is the global reform of higher education, and most particularly legal studies, approached both from knowledge and from experience. For European law schools this global project can be identified with the implementation of the Bologna project, but the global strength of this reform has been acknowledged and confirmed by the participants coming from outside Europe. Our analysis of this confluence is that major changes such as those brought about by the Bologna process in this kind of higher education institution have less to do with change and more with the maintenance of the structural status quo, including academic hierarchies, academic identities, professional identifications, educational issues... As insiders, therefore recognizing the importance of contextualization of the analysis at a certain moment and in a certain place, we fully acknowledged the separation between different types of institutions. If we are to follow Charles Twining's categorisation of ideal types of legal schools, the divide between Rutland and Xanadu (Twining 1998) can apply in many ways to the analysis of the way in which the implementation of reforms is taking place. One of the main objectives of the workshop that gave birth to this volume was the need to confront this somewhat pessimistic analysis and find ways of change. And effectively some of the premises were duly contested, although many others were shared even by colleagues from more optimistic "Xanaduian" institutions.

The enquiry into CT that gave way to this volume has been sparked off by a simple enough discovery based on an insider perspective as a professor: the reverence shown by law faculties, as a whole, for the term CT. Indeed, it almost came as a shock to find this empirical discovery confirmed by exploratory research in the context of the reform of the law degree and the implantation of skills as the base of the courses. Law faculties were discovering the term and, by the time CT came along, its translation as skill was accepted without questions and with the same sense of reverence. Suddenly, CT was everywhere, rendered essential in all our curricula, but as yet with no thought given to its implementation in classroom practice. An analysis of the spreading "grey literature" over the new degrees takes us to another simple but striking discovery: the critical divide between law faculties' big, general statements and the more modest and *practical* syllabi, teaching guides or student programmes. At the level of faculty statements, CT appears as the subject of great respect, it is frequently showered with praise and considered the main attribute of a lawyer, at least of an academic lawyer. But, as these grand declarations trickle down from the upper levels of the white papers'

recommendations to the lower more practical levels of teaching guides, schedules for students, etc, mentions of CT appear quite diluted, if not completely missing. Both our experience and our research showed us the progressive reduction of a skill which in white papers and in our faculties' general statements is invariably presented to us as the transformation of intellectual experience. In short, CT, while being widely recognized and even revered as a concept, has remained a theoretical issue with little evidence of any systematic impact on higher education teaching practice.

2. The theory and practice divide

The structure of this issue, as of the workshop that led up to it, seems to presuppose a divide between theory and practice. But the contributions that follow will demonstrate that, on the contrary, an exclusively theoretical or an exclusively practical approach is bound to lead to difficulties and problems. This introduction argues that the theory/practice divide represents the main obstacle for law schools to properly deal with critical thinking.

The real significance of CT in our varied, diverse law schools is addressed along these articles, which share a realistic yet somewhat optimistic view on the topic. The obstacles to be found are not only of a theoretical order, in a time that is marked by a crisis of paradigms. If we move from theory to a more pragmatic approach based on skills, we find another set of difficulties. Today's higher education institutional learning tradition is characterised by the conception and implementation of reforms and, more specifically, by the positivist view taken of legal education which, in turn, is dominated by notions of business and commercial ethics.

But, what do we mean when we talk about CT? Admittedly, this is an all-embracing question, likely to be the most controversial we will broach here. To begin with, it can be approached in two different ways: one is focused on the consideration of CT as a general, theoretical framework; the other regards CT as a cognitive ability. From here other dichotomies follow: CT as philosophical / pedagogical concept; CT as part of human culture / human nature; CT as a political agenda / an intellectual skill. The binary opposition between theory and practice runs through all of these dichotomies and seems to be inescapable. Nonetheless, as we stated before, this volume offers many examples that the theory/practice divide is the main obstacle to properly dealing with CT in law schools.

The apparent nature of this divide is addressed in the outline to this volume, titled as the volume and the workshop that led to it, and written with the intention to do the mapping out of the main issues of the question. These are broadly drawn into three parts. In the first a broad historical outline is offered of the basis of our current notion of CT, as a philosophical attitude born out of the enlightenment and the 19th century socio-political developments in Europe. The paper moves then to an analysis of issues surrounding CT in our age of post-enlightenment and the concomitant crisis of paradigms, where reason ceases to represent the ultimate authority. If progression towards a clearly defined goal can no longer be assumed, CT, while continuing to be central to all learning, needs to be redefined as a skill, or perhaps more specifically as an attitude presupposing intellectual openness, flexibility and balance. Drawing on insights from both social science and law (and the respective teaching of these), the argument tackles the question of the practicalities of introducing CT into an academic curriculum, acknowledging that each academic discipline has to adapt the content and assessment of its teaching of CT to its own needs. Current global educational policies are seen to favour an emphasis on skills as opposed to a transfer of knowledge. Academic institutions, on their side, seem unwilling to engage productively with the process of transition and to take responsibility for making it work for students, the legal profession and society at large. The final section addresses the specific scenario of CT in today's

law schools. This is characterised as dominated by four forces: regulations emanating from the Bologna process, the socio-political changes in the nature and composition of the student body, the mutually contradictory demands flowing from the positivist as opposed to the critical tradition of law teaching, and the divide separating academic and professional requirements.

With a profound drive, the presentation from **Paul Maharg** (Northumbria University) proposed a genealogy of Legal Education as a civilian tradition. From Kant's essential search for universals from which moral judgments can be deduced as long as there exists a universal categorical imperative, through Arendt's thinking on willing as part of the human condition, the teaching of law has been expected to take part in this search. Fostering knowledge shall not marginalize morality. Dewey's approach to education makes visible the links of this project with democracy, promoting interaction as the primal form of learning. In this genealogy, marked since its very beginnings by a wide terminological variety, the contribution of discursive theorists, such as Paul Ricoeur's cognitive circles, could help to conceive the process of creation of discourse needed for the internal dialogue that is the condition of CT.

The political issues stemming from the confrontation of a reflective paradigm with the positivist paradigm are addressed in the contribution from **Martine Kaluszynski** (Université de Grenoble) (2012): "The Changing Face of Law after the Events of 1968... Or: when law meets politics", which offers an accurate description of the *Mouvement Critique du Droit* (MCD), a critical legal studies movement which brought together French barristers and political scientists. The MCD, of Marxist inspiration, tried to promote its own conception of law, defining a scientific and educational project which distanced itself from the research and teaching which prevailed in the law faculties of the day. The evolution of the movement through several decades, progressively organised –mainly around the publication of the journal *Actes*, is traced in this article, which attempts to connect the movement with the social, political and even cultural determinations which led to its birth. Through this contextualization the movement can be understood as an attempt to mobilise resources in order to create new operating conditions for law teaching and research, some of which can be of good use even today.

While the feminist perspective is generally recognised as one of the most important approaches to conform critical thinking on law, feminist issues were specifically addressed by the contributions of **Ulrike Schultz** (FernUniversität, Hagen) and **Rosemary Hunter** (Kent University). Schultz confronted the tradition of dogmatic, behaviouralist approaches to teaching in law schools, specializing in throwing knowledge to students, with almost no discussion, in which current legal issues are usually neglected, and professors specialize in presenting to the students a rigid set of patterns structuring legal reasoning. The need of "gendering the curriculum", first by reintroducing gender aspects in legal subjects, and secondly by attempting a structural change in the orientation and relevance of knowledge and practice in law schools, has to be paired with a new approach to didactics. Denying the "neutrality" of men colleagues in their approach to teaching, and recognizing the difference of *habitus* between male and female, could be the first step to be taken to foster this transformation of the teaching practice in law schools. **Rosemary Hunter's** paper (2012) discusses feminist judgments as a teaching resource, encouraging students to scrutinise court decisions and to write alternative judgments as a way of operationalising critical perspectives on law and of thinking critically about legal doctrine and judicial decision-making in particular subject areas, as parental law, family law, criminal law or commercial law. Part of the Feminist Judgment Project, and available in the net, these feminist judgments are attempts to confront students with equality arguments in any kind of circumstances.

Finally, the subjective aspect of critical thinking, its intimate relation with the person who approaches it, was duly addressed in the presentation of **Anja Rudek** (FernUniversität, Hagen), underlining the importance of the personal theoretical commitment of the tutor in the fostering of CT in legal culture. Understanding education as a socialization process, law schools appear as the lieu of reproduction of a field of power, in which novices internalize a world view. Therefore one of the most important roles of law schools is that of defining a social identity for their students and academic staff; an identity which complies with a set of expectations while serving a rigid separation of operative and normative approaches. The falsity of the divide, through which propedeutics are separated and marginalized in law schools, while being part of the legal culture, must be recognized in order to overcome it.

As we said, this volume's main contribution is focused in the interweaving of teaching practice and educational planning and theoretical reflection. Unfortunately, this volume is lacking the contributions of the more "practical" side of our workshop with a session dedicated to the teaching methods focused on the development of critical skills: **Antoni Font Ribas** (Universidad de Barcelona), who presented a paper on the fostering of critical thinking through problem-based learning, and **Roberto Corrada** (University of Denver), on the use of simulations in the classroom. Through their descriptions of what was taking place in their classrooms, they were addressing the need of substituting the professor central role in the classroom by a "community of knowledge" with the students. Promoting the self-autonomy of the students, their engagement and the improvement of their communication skills could be important in fostering critical thinking.

Also intrinsically practical, the contribution of **Manuel A. Bermejo Castrillo** (Universidad Carlos III de Madrid) was describing the Bologna experience in one of the most important "new" Spanish universities: the Universidad Carlos III de Madrid. With a different drive, **Cora Hisae Monteiro da Silva** (University of Coimbra) was offering a broad panoramic of Law Schools in Portugal, through the analysis of the syllabus of the most important ones, such as the University of Coimbra, the University of Lisbon, the New University of Lisbon and the Catholic University of Lisbon. Hisae's contribution attempts to map interdisciplinarity inside Portuguese Law Schools, in an attempt to reconstruct the history of the Sociology of Law in this country.

All in all, we think this volume represents an important development in the field of legal education in which this critical project can and must be defended. In that sense, it can be read as a contribution to a much needed debate, providing support for the strengthening of the teaching of CT in law schools, taking into account its changing nature and function in today's society.

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