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Critical thinking inside law schools: An outline

RAQUEL MEDINA PLANA [*]

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Abstract

The intention of this work is to do the mapping of the many problems that critical thinking (CT) is confronted with in the inside of law schools, taking these in their institutional role as well as tangible manifestations of legal culture. I address the significance of CT, reflecting on its philosophical origins and its possibility in our time, a time that is marked by a crisis of paradigms. We will move from theory to a more pragmatic approach based on skills, only to find different sets of difficulties. Today's higher education institutional learning tradition is characterised by the conception and implementation of reforms which, in turn, are dominated by notions of business and commercial ethics, that are adding up to the positivist predominance that is still reigning upon legal education.

Key words

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

Resumen

Este trabajo pretende realizar una descripción de los numerosos problemas con que se encuentra el pensamiento crítico (PC) dentro de las escuelas de derecho, entendidas desde su papel institucional pero también como manifestaciones tangibles de la cultura legal. Se destaca la importancia del PC, reflexionando sobre sus orígenes filosóficos y su posibilidad en el momento actual, marcado por una crisis de paradigmas. Después de realizar un análisis teórico, se va a pasar a realizar un enfoque más pragmático basado en habilidades, sólo para encontrar diferentes tipos de dificultades. La tradición actual de la educación superior institucional se caracteriza por la concepción e implementación de reformas que, en cambio, están dominadas por nociones de ética empresarial y comercial, que se suman al predominio positivista que sigue reinando en la educación jurídica.

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[*] Raquel Medina Plana is Professor of Legal History and Legal Anthropology, Legal History Department, Law School, Universidad Complutense de Madrid. Universidad Complutense de Madrid, Facultad de Derecho, Departamento de Historia del Derecho. Ciudad Universitaria, s/n. 28040 Madrid. Spain rmedina@der.ucm.es

Palabras clave

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

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1. A theoretical frame in context

CT is considered as a core skill of a transversal nature: a concept which is responsible for dealing with a large proportion of the work related to the blending between concepts and their implementation (Dauer 1989, Facione 1990, Miller and Charles 2009, Schön 1991). Some would argue that the reception of CT in the curriculum is only purporting to explain a theoretical principle in a stronger way, which in reality does not mean a lot of change in the curriculum or the teacher's practice. Embedded in this skills approach, CT is transmuted into critical capacity - with more than a few problems to render it operational. The jump from CT to critical capacity is immense, it goes without saying, but it is not negative in all aspects. Admittedly, the notion is less reverential, more functional and mediated, but it is also more explicit and concrete, of a less intellectual stature perhaps, but more systematic. Also, it is more accessible to classroom practice. And, of course, more measurable, something that is of great importance, for example, in the students' assessment.

Even so, the theory/practice dichotomy keeps reappearing. Take, for example, the notion of "cognitive ability". In this sense, it can be said that CT is an intellectual process inherent in the human race, even an important part of the evolutionary resource. On the contrary, the cultural nature and historical contextualization of CT is highlighted when we approach this kind of reasoning as a theoretical frame.

At certain times and in certain cultures, the critical way of thinking seems to have prevailed over others: the Greek culture and the Socratic School are both obvious examples. They were the ones that gave us the adjective: κριτικός (*Kritikos*), "able to discern." However, our own concept of CT is the result of a very specific development.

What we now understand as CT is a much more concrete and definite way of thinking, even more deeply embedded in our Western culture and, at least by historical standards, surprisingly recent: its conception derives from the late enlightenment period (Waldron 1996, Rose 1984, Goodrich 1993, Douzinas 2005, Gearey 2007). It is in this context that Kant set down the foundation of critical thinking by trying to answer the question, 'what can I know?' His *Critique of Pure Reason* comes to formulate a type of knowledge that begins with experience but then exceeds it: an *a priori* knowledge, independent from experience, which would enable us to interpret things, and would come to constitute the *form* of knowledge. Thus, the cognitive ability which we call "critical thinking" sits halfway between empiricism and rationalism. As we shall see, this oscillation between the two philosophical conceptions still marks the epistemological applications that have found their way into the field of education.

Let us briefly retrace the road of critical reason which Kant defined as judgment, thereby providing many a point of contact with legal thought, both metaphorical and material and direct: from the prescriptive "what can I know?", Kant's critique draws the boundaries that should not be crossed if we are to avoid mere 'speculation' (Waldron 1996).

In his first Critique Kant uses the metaphor of a trial. The judge represents reason as consciousness, the use of Roman legal categories by the tribunal of critical reason introduces the classical antinomy of law, i. e. 'the opposition and implication between law and fact, morality and legality, autonomy and heteronomy, good will and natural desire' (Rose 1984).

According to Douzinas (2005), the trial metaphor could be followed all through the contemporary Western development of critique. Less than 30 years after Kant, Hegel's notion of intersubjectivity takes its departure from the figure of the judge. Nowadays the critic is more like a witness in the court, a court that is now no more the tribunal of reason, but of history. And at the turn of the century the last

dramatis persona from the trial is finally appearing: the clerk, who is more performative than reflective who acts "outside the rule of law, external to the game of justice" and whose legislation "is not law but knowledge, his judgment not normative but epistemological". He is represented by Engels' depiction of the Young Hegelians as critics "who considered the object of their intervention external to their interpretative practice" (Douzinas 2005, pp. 53-54).

But our conception of CT is not only linked to particular philosophical developments. There is also a historic-political vinculation of this particular way of thinking that is clearly linked to the upheaval of liberal revolutions as well as being closely associated with the law, with courts and with judgment:

> "In the eighteenth century, history as a whole was unwittingly transformed into a sort of legal process…the tribunal of reason, with whose natural members the rising elite confidently ranked itself, involved all spheres of activity in varying stages of its development. Theology, art, history, the law, the State and politics, eventually reason itself – sooner or later all were called upon to answer for themselves" (Koselleck 1988, pp. 9-10).

It is through this particular context that CT developed and still maintains an intimate link to a critical agenda (Barcellona, Hart and Muckenbarger 1988, Boon 1998, Duncanson 1993, Gearey 2007, González 2009, Horkheimer 1995, p. 218).

There is a third aspect to the issue. The theoretical stance is also linked with the process of the constitution of national legal systems in the new European national states throughout the 19th century. The obsolescence of this legal scenario is nowadays marked by the so-called "legal explosion" (the actual globalized, pluricentered, multilevelled, soft law), which would have produced a new law, thus a new point of departure to study law, which largely escapes from traditional normative approaches and would demand a wholly new theoretical panoplia to (scientifically) study law (Berard 2009, Frug 1989, Lista 2002, Morss 2008, Posner 1987, Zamboni 2007).

2. Critical agenda and crisis of paradigms

But is that critical reason still possible/effective today? A pessimistic view on the question, certifying, if not the death, at least the "critical condition" of legal critique, or at least of the "Critical traditions", is predominant (Goodrich 1993, Douzinas 2005, Gearey 2007). Moreover, the proposition is seriously questioned by postcolonial theorists such as Gayatri Spivak (1999) who pursue the way the critical tradition envisaged "the other": this is to say, how Kant foreclosed the difference, how Hegel patterned as normative deviation outer European reality, how Marx negotiated difference. For these theorists there is not a unique reading of a text or of a social situation, but many different readings, and it is this difference that needs to be taken into account by every intellectual project. In our time any scientific project encounters an epistemological impasse, owing to the crisis of scientific paradigms that has come to be called Post-Enlightenment (Barton 1998, Schleifer 2004). This crisis leads to the difficulty, or even impossibility of defending a critical stance, as this would invariably be based on an authoritative concept of reason.

The application of a critical project to the field of education is specially problematic in such a scenario, as it presupposes the concept of progress and of the results of a process, here the process of learning. If the reading imposes itself over the text is everything, what can be the proof of the learning? The assessment of learning comes always from outside, and sometimes doesn't come at all. In order to incorporate a critical stance, we must retrace our steps to the Kantian project, and adopt Kant's attempt to widen the gap in the "dogmatic dream", which is marked by a kind of equidistance between rationalism and empiricism. If CT must emerge in the educational environment it shall be done after suffering a fundamental transmutation that reformulates it into "critical competence". It is this transmuted concept that forms the basis for our premises.

3. CT as skill: a complex capacity

The ability to critically analyze any situation, theoretical assumption or body of knowledge in order to produce an informed opinion, which is understood and recognised as a skill, is a central responsibility for all university studies and especially for those related to social sciences and therefore to law. The mainstreaming of this skill extends to the heart of the teaching/learning concept, as it is based on processes to do with questioning, learning and thinking rather than the accumulation of information. This is a complex skill which requires the mobilization of a multitude of skills, knowledge and aptitudes. Because of this complexity, it is difficult, if not impossible to define.

To start with, there is not even a unified term: developed by philosophers as part of Logic, the term "Critical Thinking" appears next to others such as "Practical Logic", "Applied Logic", and since the 1980's also "Informal Logic." Other concepts which are closely linked to this are those of discussion and rhetorical thinking, as developed by S. E. Toulmin and Chaim Perelman. They argue that a number of separate elements can only be established from a cognitive point of view, including elements of intellectual and volitional reasoning emerging from a speaker's attitude. Cognitive reasoning involves a dual stream of thought: analytical on the one hand and evaluative on the other. Hence, they are branched elements of analysis and inference, such as interpretation and evaluation. Beyond these processes, there is also the consideration of contextual elements. Among the latter there may be subjective or attitudinal factors. An attitude which is questioning, flexible, open, honest, prudent, and willing to reconsider and clarify issues is key to this skill. In terms of concrete actions, one could point to identifying the problem, defining the context, analyzing the alternatives, considering the reasons and arguments that support each side, evaluating, self-correcting etc. Since the classic exposition of John Dewey (1910) *How we think* the cognitive approach has been developed in the direction of a cognitive disintegration (Facione 1990, 2000, Dauer 1989), and also from the argumentative schools, directly related to the legal field (Walton 1987, 2002, 2006, 2008).

However, even within this cognitive disintegration there is a lack of agreement. The weight that is to be given to each element can significantly alter the course and nature of the procedures carried out, even more so when taking into account the intentional elements, which are subjective by nature, and whose implementation is therefore extremely variable (Miller and Charles 2009). From a general point of view, neither teachers nor psychologists agree on the abstract processes involved in critical reasoning: among teachers of differing knowledge areas, the discrepancies are obviously much higher. Given this lack of agreement, CT - the reverential treatment that is dedicated to it and the practical difficulties of its educational treatment - often appears in pedagogical approaches as a clear case of "rhetoric versus reality".

4. Can you teach being critical? Teaching and assessing the most sublime of capacities

There is not even a consensus from the viewpoint of its transmission: because of its complexity, again, the teaching of this kind of reasoning can be approached from very diverse perspectives: from a purely cognitive point of view, CT is considered a sum of objective procedures, based on the correct evaluation of the premises: a defined set of argumentative structures that can be learned and taught. From a constructivist perspective, however, CT cannot be decontextualized, since it consists of a composite of social practices which are tacitly transmitted and highly dependent on context. From the Vygotskian perspective, if CT can be transmitted to students, it would only be through a teacher/student relationship, focusing on the socialization of the novice, who has to be introduced into the world vision of the teacher (Vygotsky 2005, p. 37). The different areas of study oscillate between

these different approaches, hardly ever opting completely for either one or the other.

This brings us to the issues related to the daily practice of the law professor: how can CT be integrated into everyday teaching? In general, the fact that educational innovations are implemented randomly without a deep understanding of their function and only to comply with existing regulations is recognized as a clear danger of the Bologna Process (Reichert and Tauch 2005, p. 21, Sursock and Smidt 2010), dangers that are bigger when dealing with a skill so difficult to articulate. Its complexity, obviously, makes it difficult in the evaluation of the students' progress, but the real obstacle is to be found in the admiration that academics seem to profess for CT: an admiration halfway between obscurity and the sublime, which lets appear as correct, or even desirable, the development of non-explicit assessment standards that are at the best unspecific. At worst, they constitute the perfect place for co-optative operations, oriented towards a practical sense of selective affinities:

> "What the operation of co-option transaction must disclose and education should transmit or reinforce, in this case, is not just a snippet of knowledge, a collection of snippets of scientific knowledge, but a know-how or, more accurately, the art of implementing knowledge, and doing it with purpose, in practice, which is inseparable from a global point of view, an art of living, a constitution... Responsible and respectable member of the elite, inextricably committed to an inseparably technical and social role that involves a full set of administrative and political responsibilities, the professor of medicine [who previously assimilated that of law] often owes his success, at least as much to (?) his cultural capital, his social capital, the ties of birth or alliance, and also to provisions such as seriousness, to the recognition by teachers and respectability in the conduct of his private life ... the docility with regard to disciplines more than schooling ... or even the rhetorical skills, which are valued above all as guarantees of adhesion to the social values and virtues" (Bourdieu 1984, English ed. 1990, pp. 57 ff).

At this level of practices, designed evaluation and grading systems are central to the teaching/learning process. The difficulty for teachers to assess skills, which by definition can only be fully appreciated in their development, is amplified in skills as wide and complex as this one. Therefore, one of the first aims of this analysis would be to dissect this complexity and define the different skills, and at a lower level the abilities and sub-skills that compose them. This dissection would facilitate the link to specific categories: a series of indicators to assess and grade the students' performance. As it has been noted, the more elements are isolated, the more complex – and therefore the better - the teaching practice would be (Maharg 2007).

Nevertheless all these operations and indicators are not general, objective and interchangeable. They do not constitute a given material from which it could develop a general evaluation matrix that serves to structure the processes of assessment and grading on the development of critical capacity for every professor, in every course. In fact, building a sort of template with unmovable and closed categories does not seem to be the best way to take into account the diversity of students and the variety of learning achieved in normal university classrooms, as the plurality of professorial and academic approaches is a defining feature of higher education.

However, it is also necessary to take control of the need to curb the discretion of the teacher in the assessment:

> "Students can, with difficulty, escape the effects of poor teaching, but they can not escape (by definition, if they want to graduate) from the effects of a bad assessment" (McDonald *et al.* 1995, p. 8).

The assessment is, effectively, a central element of the quality of learning processes because it conditions their depth and level.

The treatment of a complex skill such as CT involves precaution: as teachers as well as scientists, we can not forget the dangers of excessive compartmentalization and systematization in the assessment of such an important skill, since the way in which the evaluation is carried out determines to a large extent the depth of learning. An absolute partitioning of CT, understood exclusively as the sum of a series of separate provisions and skills, is to destroy a large part of its potential (Schön 1991, Burton and McNamara 2009). It is therefore necessary to be aware of the limits and compensations of the operationalization of a form of reasoning, which relates to a central concern of the faculty regarding educational innovation.

5. Reasons for the diversity of approaches to CT: the eye of the hurricane

The diversity of the approaches to CT responds, to a large extent, to the nature and historical settings of higher education (Becher and Trowler 2001). It seems impossible to agree on anything but the very core of CT: to examine the structure of reasoning and understand and evaluate the arguments of production contexts. There seems to be no way to go beyond this, precisely because the diversity of these contexts prevents it. It is this diversity that makes it impossible to get a universal definition of this skill, and it would also be useless to try it. There is no sense in a general broad definition of CT, because its importance derives precisely from its particular anchor in every sphere of knowledge. The notion of what CT is and what its goals are, differs in each discipline. So it can be said that there is no sense in "teaching CT" in general, partly because the learning will be minimal. This lack of agreement on the definition and mode of transmission of CT goes far beyond the inability of professors in different areas to agree on something: CT is in the eye of the hurricane of change in higher education, which is definitely departing form the university ideal of the pursuit of knowledge *per se*, and in which CT was included in all studies, up to new forms of study that primarily develop technical and professional skills (Barnett 1997).

The transition from a university which is focused on knowledge transfer to another that concentrates on skills is key to the crossroads at which institutions find themselves in having to define their academic identity in a commercial and threatening context. The commodification of education (Thornton 2008) is just a part of it. The change in higher education is seen as a sign of decline in the autonomy and quality of the work of the university. We have moved from being institutions *in* society, to institutions *of* society: universities have gone from being separate and specialised institutions in society, to being large institutions, central to the development of the societies of which they are part. Skills –it is said- can not guide our curriculum development, because

> "(…) Skills, however they may be, will continue to be behaviours and capabilities that act in particular ways that have been defined by others. In this sense, they reduce the authenticity of human action" (Barnett 2001, pp. 121-122).

Of course, there is a certain elitist perspective in these arguments which for example consider that the loss of autonomy entails the "proletarianisation" of faculties, which would be subjected to takeovers such as teaching by problems (Barnett 2001). However, the underlying problem is still considerable (Cowney and Bradney 1996), i. e. that instrumental mentality that encourages learning skills is oriented to dominate the reality and not to reflect on it.

The university community is aware of these risks in the restructuring of studies through skills, but it is assuming a passive attitude. Not much information has been given to them, nor are they very interested in obtaining it. So, who will benefit from this abdication of responsibility on the part of the university community?

6. Academic lawyers and professional identity of law schools

The relationship between legal education and the related professional practice is a central concern that we have seen permeating developments so far. One of the loci in the field of legal education is that of the dichotomy between academic and professional lawyers. Like all dichotomic categories, they are often described as an opposition to overcome instituting formulas of communication between them. However, the building of these bridges tends to be left to the academy, and their content has much of a subordination of academic to professional interests.

At least in continental Europe it can be said that the successive reforms of higher education – including or starring the so-called Bologna process - represent a technification of studies, conveyed by a rigid professionalization aimed at better preparing university students for their entry into the professional world (often synonyms of business, tout court). This is particularly true of legal education.

The series of binary oppositions (formative / specialized, cultural / professional) that can be found in law schools reveal two key aspects: the positivist predominance and the doctrinal crisis of academic law. The positivist predominance (see below) is of course related to the academic identity crisis arising from the dual function of university teachers of law: they are meant to be academics reflecting on the coherence of legal knowledge while also being actors within that legal system, so that the divide between academic and professional stages in legal education is continually reinforced.

These processes tend to conform a "professional" scenario that is entirely based on assumptions regarding the definition of what actually constitutes a "legal professional". The new curricula are to be based on the proof of the academic, professional and scientific interest of law studies, and the objectives and skills of the enrolling and graduating students, and both sides are to be intertwined. For example, if it is assumed that legal studies are directly related to the value of justice and the resolution of conflicts, the curriculum is to contain among the skills to be demonstrated by students at enrolment certain qualities such as social sensitivity, oral and written communication skills. Graduation depends, to a great extent, on the contents of previous studies, that is student profiles. Alas, professional graduates' profiles which are adequately compiled and of sufficiently high quality are still very scarce, at least in European universities (Olgiati 2005). This is certainly the case with regard to Spanish universities. In 2007, when directly confronted with the need of providing these data for the production of the new Law Grade Report (the White Book), the state agency ANECA itself used the only existing reports, that is one from the University Pablo de Olavide de Seville on graduate employment in 2001-2003, and another report, initiated in 1996, from the University Carlos III of Madrid, "aimed at knowing the reality of work which graduates face ... in order to facilitate access to the labour market" (ANECA 2007).

Of course, graduate skills should meet the needs of the labour market, but as we have seen, universities are largely unaware of what these needs are and therefore rely largely on hearsay which, in turn, is principally based on the needs of large law firms. As we shall see, these processes of substitution and attribution of a professional identity have an importance which is crucial for the future of legal education, and particularly for the development of any approach to CT in law schools.

The question of how legal knowledge serves to the creation of an identity is a very broad one (Barcellona, Hart and Muckenberger 1988, Elkins 1978, Laperrière 1997, Strathern 2008). Although there seems to be no conflict on the academic identity to be conveyed by legal training, the professional profiles are not as consistent as they should be. In fact, at closer inspection many of these professions do not even require prior legal training. On the other hand, we must recognize that what professional lawyers do, in many cases has little to do with the law as it is

understood in academic circles. These traits, if added to the difficulty of distinguishing between expert and lay discourse, point to a high level of folk categorizations or ideologies in the professional identifications used by law schools (Mertz 2007).

But what is more striking is not the professional profiles per se, but the way in which these profiles are marked throughout by a vocabulary that seems to betray another set of interests and objectives. One of the more striking examples is the use of the term "quality" or "excellence". These words seem touched by an irresistible aura, but when we ask for a definition, criteria become increasingly more quantitative, and clearly related to market conceptualizations: the quality of the students' training appears related to customer satisfaction standards (Harvey and Green 1993). It is the stakeholders' approach (Cowney 2010, Collier 2010), progressively applied to legal academics and even students. The subordination of the academy to certain particular interests that correspond to business and commercial ethics is then a process that is becoming more evident every day, and is giving form to a professional nomenclature (Toddington 1994) that is proving successful.

The consequences of these identifications for the teaching of law are substantial. But they are even greater for the teaching of CT. As long as they primarily constitute a folk ideology, law students are banned from questioning such established conventions on professions or the role of the legal profession in society, as these are closely connected with a certain corporate establishment. There seems to exist a direct relation of this with the (non)exposure of students to critiques of legal doctrine. The ban of critical reflection on such issues as the professional status quo goes further and further in the learning process and extends to the banning of questioning prevailing legal doctrine.

7. The positivist tradition and its impact in legal education through propedeutics

If we are to follow another of the *loci* of the legal education field, this banning has much to do with the positivist tradition and its reception in legal education. In this legal education tradition, the law professor does not originate or create any argument: he/she does not "give opinions" but only quotes others, so that the teacher's job is essentially descriptive. In front of the teacher, a student is not only deprived of the skill of criticism, but even of his specific language, his own experience. In this paradigm, as Gadamer points out, the learning of law is not comprehension, as the subject, alienated from his/her experience, is confined to the mere differentiation between several authoritarian significances (Gadamer 2002).

Legal language is not only descriptive, it is also prescriptive, and so is the teaching of law, as it is dependent on the texts to which the student is exposed: doctrine or regulations, their relation with the exercise of power is always certain. So it can be said that "teaching law produces professionals who are occupied with telling their fellow citizens what to do" (Correas 2000).

The positivist tradition can also be seen as a device to conceal the ideological nature and function of law, and even more so of legal doctrine. This identifies legal education as being

> "closer to indoctrination than to education, in the sense that they not only teach ideology, but they conceal from the students th ideological nature of the knowledge they are learning" (Berard 2009).

The exclusion of moral and political elements of law in legal education has been highlighted (Sarat 2004, Mertz 2007). The vehicle for this tends to be the differentiation between "pure" legal contents and "extra"legal elements, thereby inducing in the students the view that manipulating the law is morally or politically

neutral - a process that has been called a "cynical education" (Economides 1997, pp. 26, 29).

To achieve this exclusion, legal education has traditionally enforced a propedeutic approach, a propedeutic tradition. By it I mean the privileged position occupied by basic or propedeutic courses taught prior to all others, such as Legal Philosophy, History of Law or Sociology of Law in legal studies. This tradition represents an apparently amicable but unequal sharing: it relies on a particular division of tasks, which allocates to propedeutic courses all the responsibility for an "alternative" approach to law while leaving the rest, indeed the vast majority of the positivist or doctrinal disciplines unconcerned with this task. Although it seems a quite logical and friendly sharing out, the reality is that the price is high, resulting in the marginalization of these disciplines in law faculties and a progressive reduction of their importance in the curriculum, making them subject to the "outer" forces of market and the ever increasing demands of "professionalization".

The actual function served by propedeutic disciplines, some of which hold a privileged position in law schools curricula, could serve as a reminder for anyone who thinks that there are different disciplines: dogmatic and non-dogmatic. As Bourdieu has shown, legal academics teaching the propedeutic subjects, particularly legal historians, are those most likely to cultivate a specialist field discourse, as their main attribute is to maintain the illusion of law as a closed autonomous universe (Bourdieu 1986).

This privileged position has been explained by the weakness of positive law in the late nineteenth century when legal curricula were drawn up -a weakness which in Spain was still the main characteristic of law curricula during Franco's era. The absence of a political system and a legal ordinance founded on freedom and sustained by democracy required a certain conception and teaching of law, full of ideologies and other legal doctrines unsupported by any constitutional or democratic features (Clavero 2009). More generally, the propedeutic approach has been identified as an "external" perspective of legal education: it is the approach of the (again) Kantian "should be", too often translated as the "utopian" "unpractical" "idealist" approach, therefore rejectable (Conklin 1993).

8. Law schools and critical agenda

Due to these intellectual traditions, and also to their structural characteristics, law schools can be seen as a particular island, not only in relation to the university in general but even to their own legal culture. Even when the necessity of opening up the concept of law is widely acknowledged by legal academics from any field and almost any school of thought (Posner 1987), the incorporation of this project into teaching and learning activities has as yet failed to occur (Berard 2009).

As we have seen, legal education research shows evidence that law schools tend to resist any change of paradigm, remaining firmly anchored in positivist defence. These schools are not only latecomers, but they are historically and structurally "pre-illustration" and must remain so to better implement their function as providers of a bureaucratic hierarchy (Kennedy 1998). The ideal of the closedness of the legal field is still loyally serving this function, a function that is constantly revisited and thus confirmed. Indeed, the new demands of professionalization on the universities are translated, as we shall see, into a new argument for the defence of the positivist approach.

In this climate, the development of CT does not seem to be one of the most valued skills. Neither by professionals dominated by a business ethic in which there is no room for CT, nor by legal academics who, as we have seen, only support CT in principle but promptly lose any enthusiasm for it when it comes to university practice, both for teaching as well as for research. And yet, here we defend its

crucial character as a central skill in the law school, the starting-point of active reflection on the future of the curriculum and its structure.

Given the current weak position of the university torn between the two forces, it is important not to lose more ground. Law schools must not turn their backs on the profession, they must integrate their needs into their curricula while not assuming that these needs are just those of the corporate sector. Subjection from the academic to the professional is not "the" way to the modernization of studies. It is all about maintaining a share of reflection, a place able to accommodate a critical capacity in all areas of law. Rather than regarding the notion of skill as something related essentially to practice, and therefore not in need of theorisation or even reflection, law faculties need to, and on the contrary, apply careful thought, promote discussion and debate between the disciplines.

Open discussion about the skills to be taught at law school is likely to open the 'Pandora's box' about the concept of law itself, because the discussion of the means (skills, strategies, capacity) presupposes an understanding of the purpose they serve. And the different positions on the purposes of education are closely aligned to a context of openly ideological conflict. One example is the implementation of certain general statements, such as those promoting values of tolerance and pluralism, by academic bodies which are more concrete and closer to the educational act. Academic departments tend to reject the assumption of these tasks, with arguments that are openly ideological, they justify them through pragmatic criteria. Dewey's link between education and democracy is not really met by academia (Santos 2010).

9. Legal academic identity and opening up the concept of law

Given this reality, the skills approach is not sufficient by itself, nor is it possible from the outset if it does not imply a less formal and more contextualized concept of law.

The reflection on the skills approach advocates in itself a more fluid concept of law, a law based on less categorically closed argumentation and reasoning techniques. Of course we know that proposing such a graded aperture goes directly against the legal paradigm *par excellence*: law as an autonomous field, closed and independent, which remains the principal foundation of the traditional conceptions of law, and also of law teaching.

One of the characteristics that defines any discipline or field of knowledge is the fact that its intellectual framework (the object of research, the conceptual and methodological tools that are available and the way they establish the autonomy of the field research) tends to be autonomous and self-validating. Consequently, any discipline produces the only available validation of its own declarations. One of the inherent problems in any attempt to challenge the intellectual hegemony of a discipline consists, therefore, in establishing the intellectual space from which to undertake such a challenge. Inasmuch as the disciplines are constituted as an effect of a way of investigation that is self-validating, it follows that efforts to achieve a paradigm shift within a discipline involve challenging not only the intellectual foundations of a particular disciplinary tradition, but also the social and institutional conditions in which these statements are produced and legitimized (Cotterrell 1992).

In this article we have discussed professional classifications that are appropriate to the entire legal field. Affirming the autonomy of law entails a legitimizing discourse of professional specificity and an invocation of scientific quality and neutrality on the part of this profession. The cultivators of law tend to emphasize autonomy and self-referencing in their field, but this image is largely an idealization of their own academic and professional identities. Since the texts of Durkheim on the nature and development of professions, the relation between the different types of knowledge

and professional identity is well known. The sociology of professions has deepened in these processes of the construction of prestige from the defence of an exclusive area of skills and knowledge as components of their social position (Strathern 2008, Schultz and Shaw 2003).

As a field of study, legal education tries to contrast the paradigm of autonomy of law, with a general call for a categorical opening up, in order to keep law schools within the university (Maharg 2007), to align their studies to a framework which is not so strictly dogmatic and therefore to achieve adapting them into effective "teaching skills" whilst not selling schools to the demands of a supposed "profession" dominated by strictly commercial criteria. The professor of law should teach his/her students a considerable amount of expert technical knowledge, as well as the mastering of a specialized language. But it should never make them forget that they must also teach their students ways of reasoning, mechanisms and attitudes that would allow them to manage such knowledge from a true understanding of law in society.

10. Control on academic skills: the students are at the centre

Skills are, if anything, directly related to students. The breakthrough of skills in law schools was the result of the phasing out of internship and other apprenticeship processes, but above all, of an increased social and cultural diversity among students. The Langdell era, when professors could expect all students to be *gentlemen*, and when it was also assumed that their professional lives were always to be lived among "gentlemen" (Kennedy 2004, Guinier, Fine and Balin 1997), therefore making worries about teaching skills redundant, has long passed. Legal education is no longer closely related to a code of conduct derived from the sameness of social-economic origins shared by all members of the profession. Only a homogeneous university - in terms not only of social, economic and cultural matters, but also in terms of race and gender-, could assure that all students had similarly developed basic skills.

"Basic skills", as we understand them and which include CT, are not only intellectual practices, such as a proper understanding of written texts and an acceptable oral expression, but also other even more basic ones, such as being a good listener. The fact that such a simple act is also culturally constructed has profound implications for the practice of law teaching (Weisberg and Peters 2007). Their social, economic and cultural heterogeneousness is one of the main reasons why current students show great differences in the control of those "basic" skills (LaPiana 1994, pp. 170 ff, Barnett and DiNapoli 2008).

We are no longer in a monolithic university. Universities are becoming global, and the studentbody's composition has changed fundamentally. However evident, this is never taken into account sufficiently. Pluralism is not, in fact, a value in itself but increasingly a reality. Let this reality be incorporated as an attitude of flexibility and openness towards a changing and ever demanding concept of citizenship.

Turning our attention back to the students, to their experiences and foreseen ideas, and striving for an open concept of legal education, we find that there are two paths that intersect in the search of CT in law schools. From the outset, the disciplines that, at least in principle, are considered non-dogmatic, are the ones which are the most prepared to develop this approach. However, in my view they neither can nor should do it on their own, given the magnitude of change and their diminishing weight of influence. The responsibility for these disciplines is to dialogue with the dogmatists, to propose multidisciplinary approaches, and to leave scholarly ivory towers.

We have seen again and again how the focus on teaching practice and educational planning has to start from theoretical reflection. Legal education offers a field in which this critical project can and must be defended. Plus, this field can be the

subject of active critique: the exposition of substantial legal actors "in formation", as are the law school students, to legal diversity can have direct effects on the way law is conceived and used. By doing so, the field of legal education is in harmony with the aspiration of intentional action in the direction of a contribution to civil society.

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