

# Economics of Legal Education in Brazil

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*Abstract:* - The work proposes an economic analysis of legal education in Brazil since the rational choice theory. First it is presented a general current status of legal education the straitjacket in which not only law schools but also academic legal publications was putted into. The first part (section two) describes then the interesting levels and grades plan created by the responsible authorities and how it in a certain way put in plasters the Brazilian legal education in general. The second part (section three) utilizes the theory of habitus (Bourdieu-Passeron) to demonstrate how authorities made their rational choices in terms of legal education and uses the critical pedagogy theory (Saviani) to criticize those choices. Finally, the conclusion (section four) proposes a less rigid and more dynamic model for legal education in Brazil.

*Key-Words:* - Law and economics. - Rational choice theory. - Legal education. - Pierre Bourdieu. - Jean-Claude Passeron. - Dermeval Saviani. - Habitus. - Critical pedagogy. - New model.

## 1 Introduction

There is a much repeated critic that the premises of the current legal education process in Brazil must be surpassed because out-of-date. The argument is that the knowledge directed only to legal techniques and to the legal texts must be replaced by a model which relates technical knowledge and social reality. This is pretty interesting because law is and always was a social phenomenon. Needless to say that there must be such a strong cause to isolate the social phenomenon from the social reality. And this cause is called dogmatic. Legal dogmatism while applied to legal education directs all the preoccupations of law students to a merely knowing of technical legal jargon, which does not have a strict standard, and of legal norms, inserted in uncountable laws.

However, here is not criticized the pure study of law. Dogmatism has nothing to do with positivism, but with the attachment to laws. The exclusive attachment to legal norms had by legal pedagogy at least in civil law tradition. But there must be also criticized the exclusive attachment to case law had by legal pedagogy at least in common law legal family. These both are the main methods of legal education, and when they are adopted in their ideal form, and usually they are, they tend, respectively, to knowing techniques but unknowing reality (or practice), and to being familiar with praxis without knowing theory. Indubitably there are aspects of both models that must be maintained, and to search this equilibrium is the aim here faced.

Developing this purpose takes up three steps. The first is to describe the problem, it is to say, to put black in white the levels and grades plan created by the government ministries which are responsible for creating rules for legal education and academic legal publication processes and for managing the approvals and disapprovals of law schools. The second is to present the theory of habitus reproduction created by Bourdieu and Passeron and to relate it with those government ministries rational choices in terms of legal education, employing the critical pedagogy theory to criticize such choices. The third comes like a conclusion, proposing a less rigid and more dynamic model for legal education in Brazil. But before doing so, it must be presented the methodology that was chosen.

An economic analysis of law assumes a methodology which is usually known as methodological individualism. The methodological individualism allows as a starting point a kind of understanding in which individual actions influence the resources allocation in society and also in social relations, or, as Arrow affirms, the individuals are like atoms, “whatever happens can ultimately be described exhaustively in terms of the individuals involved” [1]. Hodgson talks in pretty similar ways, saying that methodological individualism “proposes an *explanation* of social phenomena in individual terms” [2]. The methodological individualism is closely connected with the rationality principle, from which the individuals generally act through rational

choices maximizing utilities. This is, by the way, one of the basic postulates of public choice [3]. Taking on such methodology will permit that the work reaches the ends here proposed, once public policies, that is, public choices on education in Brazil are made, as elsewhere, by individuals, government people, which are utility maximizers, and which are supposed to be maximizing the society utilities.

## 2 The Current Status

Before discussing the problem, it is indispensable to describe the current status of legal education in Brazil. The pedagogical model adopted in almost every law schools in Brazil is the dogmatic one. By means of it, the law students usually learn only how to apply legal techniques while interpreting the legal order, without making a cross reading with the other fields of knowledge and with the social practices [4]. This is a very brief description of the current state of Brazilian legal education. Actually, there are some efforts for changes, however they come at snail's pace, and many times they take wrong directions. Legislatively, there are goals establishing the necessary interdisciplinary or multidisciplinary teaching, but as they are goals they can be reached or not, always depending on the law schools' pursued purposes, that is to say, if it is only to make a profit (most of particular law schools), or only to give superior education (some federal and state law schools), or only to establish a school of thought (generally the federal law schools, but also some state ones), or to reach these three goals (in extremely rare cases).

In Brazil, there are two federal Ministries involved with the educational matter. One is the Ministry of Science and Technology, represented by two organs, the National Research Committee (CNPq) and the Superior Education Coordination of People Improvement (CAPES), and the other is the Ministry of Education and Culture (MEC). These three organs can be listed as the main ones in terms of national education, having, of course, specialized commissions on legal education. Commissions which, reporting to those organs, had established an interesting levels and grades plan.

For law schools, they established a sequence of seven grades, from 1 to 7: the institution with grade 1 is reprovado and must be closed; the one with 2 is reprovado but can appeal; the following five grades, from 3 to 7, are classificatory. In the graduation level, the top grade is 5, because grades 6 and 7 are exclusively reserved to the programs with PhD, while the minimum grade that allows opening a

Master of Laws is 3, and a PhD of Laws is 4, being grades 6 and 7 owned by the institutions that have PhD of Laws and present a performance similar to the international centre of excellence in the area, and have a performance level highly differentiated in relation to the other programs in the area. In general there are five requirements that must be fulfilled to the concession of a grade: graduate or post-graduate program proposal (coherence, consistence, all-embrace, update of the concentration areas, research projects, projects in line, curricular proposal, program planning, and infra-structure), teaching board (title of the docents, diversification in their superior formation, improvement, experience, compatibility of their research line to the program, correctness, dedication), students, theses and dissertations (ratio between the quantity of theses and dissertations defended and the permanent docent board, and also between that quantity and the dimension of students board, distribution of the orientations, quality of the theses, dissertations, and student production, efficiency of the program), intellectual production (qualified publications, diversity of authors of publications, technical and art production), social insertion (regional or national impact of the program, integration and cooperation with other programs and research centers, visibility, transparency).

But, there is a simple question: why this levels and grades plan was created? The response is very simple: politics, or more exactly, maximization of profits through lobbies. Actually, the federal organ of legal profession has a seal approval, but MEC, which is the responsible organ for approving the opening of law schools, treats it only as merely indicative opinion. The consequence is the creation of those levels and grades. Much more interesting and rational, in terms of making reasonable public choices for reaching the constitutional goals in education, would be if politics and lobbies were putted aside, and that MEC only allowed institutions that really care with the legal education, not the ones which really care with the profits from legal education.

In these terms, another grades and levels plan is also interesting. It is the Qualis, a label created initially to journals, and now expanded to books. It establishes a "qualificação", from A to C, in eight levels, A1 receiving 100 points, and C worthless. Thus, since the Qualis label, C is the level and the grade to the worst journals, and A1 to the best. Here the question involves politics again. In Brazil, and elsewhere, journals are periodicals, but interestingly the qualification does not consider the periodic publication; regarding the periodicity, it is only

considered a minimal periodicity, which is different from periodical publication. That is, in this system, a journal can be published twice a year – so it has a minimal periodicity (the requirement is fulfilled) –, but only appear one or two years later – it has no periodical publication.

Thus, if your journal is periodically published, without delays, and have quality (variety in the board of members, variety in the works published, respects the double blind peer review, etc.), then your journal can receive a lower or the same grade of a journal which is published with delays, does not have any variety, and publish only works signed by authors with PhD. Now imagine this label applied to books. The grades/levels will vary from LNC (non-classified book, worthless) to L4 (higher), and the parameter will be the books, entries, and chapters (in case of collective books) titles; manuals and books of questions or for civil service examinations will receive the worst grades will be on the worst levels. In terms of academic life, the qualification seems very plausible for books, but it is not, because will create monsters, like hybrid books with best quoted issues with, for example, an appendix with questions for public administration examinations. The same is valid to the qualification of journals (periodicals).

The conclusion is thus only one. Both the law schools in general and the public administration are employing the rationality principle in the same way, maximizing individual utilities. Nevertheless, the correct should be the maximizing by the latter of public/collective utilities, individual choices to maximize collective expectations. This is what is going to be discussed in the next topic, explaining, by means of methodological individualism, why public choices, in spite of being made by individuals, cannot maximize only individualistic utilities, but must to maximize firstly collective ones, especially in terms of legal education.

### 3 A Habitus to Defeat

Habitus is a philosophical notion which is dated back by Bourdieu to construct a theory of action based on the agents' ability to invent, being assumed as the way in which the society is settled in persons under durable dispositions [5]. According to Bourdieu, he retook the notion of habitus as a trend to react against a tendency of describing the social world since a normative language, highlighting that the legal rules are nothing more than the register of social occurrences produced since the habitus' principles, which is a practical dispositional system, an objective basis of regular conducts, what makes people behavior in certain way in determined

circumstances [6]. In this sense, the critic formulated by Bourdieu in this coauthored book with Passeron *The Reproduction* is the repetition of certain practices automatically, or specifically the reproduction in the rules that manage legal education the same problem faced by legal education itself: its politicization, becoming so dogmatic that to most of the graduated students, do not know the meaning of basic legal institutes.

In the Bourdieu-Passeron book the critic falls on the school system and the question of the mere reproduction of contents in this system. The essential critic is that the reproduction model utilizes a symbolic violence power. In the case of legal education, such critic can be made on the trends to “qualifying” journals and books; and to establishing grades to institutions, including the worst one, in spite of stopping things going from bad to worse. Such grades and levels plans hold a symbolism made by the government bureaucrats, homogenizing conducts, formalizing them putting them in the pre-established and imposed forms, and making them calculable and predictable to the cost of abstractions and simplifications [7]. Thus the systems of Qualis and CAPES, and the approvals of MEC can be regarded as a kind of symbolic violence against the legal education, because legal education, as education in general, cannot be reduced grades and levels plans. The imposition of symbolic systems through symbolic action occurs by a symbolic power, a homogenization of legal education, while it cannot be viewed as a homogeneity thing [8]. This symbolic power employs symbolic tools – the grades and levels plans, for instance – to impose or to legitimate certain symbolic system, imposing a definition of the social world which better represents the interests of whom retain the symbolic power, whom monopolize it, and thus have the power to impose an arbitrary habitus to the society [9]. In other words, there are the people who decide how the system will work, and there are the people who can choose between participating or living in ostracism.

Actually, there is no option, because self-ostracism means closing the business. So, all law schools must to accept the rules of the game, and participate in the system. And playing the rules means interestingly playing politics in legal education. The gaps and failures in the CAPES system can be observed, for instance, in the triennial evaluations to which each institution is submitted. In such cases, much of the institutions, notably the private ones, which are only preoccupied with making profits, search, for example, for people with high titles (PhD professors), paying for their

signatures in these institutions degree course plans for some period while the grade is defined by CAPES. Many other examples could be cited, as the rent of libraries just for the time of evaluations by CAPES, or the specific preparation of classes to the National Examination of Legal Courses (ENADE). The aim is very simple: obtain the highest level or grade. Thus, one can find law schools with CAPES high grades and with no compatible structure at all. This habitus comes from a problem created by the government, specifically by MEC, which authorizes almost every institution to open the doors to a legal course, what explains, in part, the maintenance of the Bar Examination. To the post-graduate programs the question is even more complicated, because raising the grades/levels depends, among many other conditions, on the academic publications. This is where Qualis gets in. When a Master or a PhD candidate and the teachers publish on well-qualisfyied journals, the institution make points; just like those games of Super Nintendo, PlayStation, and Facebook. Each coin makes a point. Here the utility maximized are points, Qualis' points, CAPES' points.

The words of the day in Brazilian legal education are grades and quantity, not knowledge and quality. But generalization is not welcome. Many good law schools produce knowledge with high grades, and have quality even in quantity. However, these examples are few. While CAPES, Qualis, and MEC are imposing arbitrarily the rules, such few law schools are playing the game, and in snail's pace changing them. Regard, the changes do not come from the authorities, but from the law schools. So the habitus is still very present in legal education. To say with Bourdieu and Passeron, the process of inculcation has a sufficient duration to produce a durable formation, that is, a habitus as a product of the internalization of a cultural arbitrariness that can be perpetrated [10]. The process of reproduction has consequences to both parties of the process: the owners of the symbolic power believe that their system is the best, and the subjects to that power when cannot or when do not want to resist to the system accustom on it, allowing freely the inculcation, with no resistance. In this sense, the work of inculcation developed by the authority produces more and more objective conditions to the parties unknowing of the cultural arbitrary [11].

There must be thus a movement to stop this routine of inculcation. The habitus must be revisited. And such revision must be done together by authorities and the legal education institutions (law schools). Here it can be used, complementing the critic to the habitus, the historical-critical pedagogy,

developed by Saviani [12]. According to Saviani, the critic that Bourdieu and Passeron made only putted black in white the problem of the habitus repetition, lacking in terms of practical intervention. Thus, the Saviani theory will make a swerve, adding to the critic on the habitus a practical aspect.

In doing so, Saviani employs the term habitus in two senses. The first can be summarized as including what in the cultural arbitrary must be maintained. It is to say that the criticizer must know very well the object which is being criticized. Transferring to the problem here faced, one can say that the CAPES and Qualis grades and levels plans could be maintained only if they are indispensable to the regulation of legal education. In fact, the CAPES and the Qualis plans have a point from which it can took advantage. It is the requirements to get higher grades or to reach higher levels. For instance, in the case of journals, it is needed in some hypotheses a percentage of published articles first appearance, in other cases, the journal must have national or international impact. The same is valid to legal educational institutions, to reach certain grades or levels they must have national or international insertion. Such habitus deserves to be maintained. Institutions and journals must be required to improve their quality constantly. However, the problem is that as utility maximizers human beings are prone to improve only in a profitable way, that is to say: the institutions will only ameliorate their own structures if the higher level/grade is worthwhile, the same, in a certain way, for the journals. Being CAPES 5 in terms of Graduate law programs or obtaining the higher degree in ENADE or a high percentage of approvals in the Bar Examination consequently will raise the demand for the institution. The number makes the money; so the institutions, in general, will fight for numbers, not for better superior education, or for the formation of thinking mass. And Brazilian authorities are being conniving with it.

The second sense Saviani gives to the word habitus is contrary to the necessity of reproducing something, the minimum habitus. In this point, Saviani leaves the Bourdieu-Passeron critical-reproductive pedagogy, and assumes a new understanding. To Saviani, there must be a dynamical interaction among the agents involved in the educational process, that is, not only the authorities responsible by ruling legal education must do it. Also the law schools (and the publishers of journals) must interfere in the ruling processes. It is required an implicational relation [13]. One could talk on a habitus of transformation, the transformation of the society, not its maintenance, its perpetuation. Alternatives must be presented and

evaluated to the system in vogue. The quality in education, including legal education, cannot be an exchange of points for coins, neither a simple question of politics. Being under somebody's wings cannot be one requirement to raise higher grades or levels. MEC and CAPES should establish sanctions for institutions that act like that; however, the problem is that even CAPES and MEC seem to be interested in points to make coins.

In 1955, in an inaugural class, San Tiago Dantas talked about the crisis of Brazilian legal education, highlighting the pointless bureaucratization of law schools [14]. More than half a century after, the critic is still valid, and the crisis did not pass away. The same can be said on the evaluation of law institutions through the time. Actually, the CAPES and MEC systems are the result of the accommodation of these authorities in improving better the high education in Brazil, regarding quality and knowledge, not quantity and politics. The consequence is a deficit on legal education in general; for instance, many theories in legal field come from Europe (German and Italy, for example) and from United States. But not only, the Brazilian legal academic life, with some punctual exceptions, crawl in relation to the discussions that are being made in the global context. The reason is very simple: the attraction is still the public service careers (judges, prosecutors, bureaucrats, public advocacy, etc.); the academic profession is only secondary, when it is.

There is the urgent necessity of changing the utility to be maximized. Legal education does not need points to make coins, but knowledge to make thinkers. Better than quantity is quality, and if it comes in quantity it could be even better. Thus, it is time to install a dynamic order in terms of legal education in Brazil. And, in doing so, the international model must be regarded, do not copied. The authorization for opening law schools could only be gave to institutions with a serious structure, that is, which allows the formation of legal professionals who have the tools to face the everyday demands giving them the best legal solutions whether it be as private lawyers, public lawyers, prosecutors, judges, or academics. The point is to form legal knowledge, not masses of merely bachelors in law.

Some, but few initiatives are being made. In fact, they are being made since the gaps left by the current CAPES, MEC, and Qualis systems. There are some law schools that are trying to defeat the habitus of legal education, and there are others that already made it. But some are in a half-light zone, and the large majority is in the dark. The problem is

that in a country governed by rules, when the majority decides to support a bad rule the result is the maintenance of a bad habitus.

## 4 Conclusion

Considering the critics here made, and the existence of possibilities to change the current evaluation system of legal education in Brazil, the conclusion cannot be another than a proposition to ameliorate it.

The first change that is needed to be done is to cut down the system of points. Law students should not be evaluated through grades (or concepts, which is the same thing in other clothes), and this is also valid to law schools, and journals. Students should be evaluated through their comprehension and their apprehension of legal content and its application in the everyday life, not in didactical situations elaborated by teachers. The same to the law schools, to which must be required structural improvements, high quality academic publications and researches, and high performance in the use by its students of legal tools to resolve everyday problems. And also to the legal journals, which need to be published periodically (not only have a periodicity), with real contributions to legal thought. The suggestion is then that in spite receiving grades by CAPES such as CAPES 1 to 7, the legal education institutions only obtain authorization to function if they have a minimal structure and political-pedagogic plan, with a well-structured curriculum, an updated library with certain amount of books and periodicals, study rooms, etc. In what concerns to journals, the attribution of the ISSN (International Standard Serial Number), of the DOI (Digital Object Identifier), or another similar identifier and its respective maintenance be given to journals which are published regularly, which analyses works in the double blind peer review system, which counts with heterogeneous board and contributors, and which publish contributions, not repetitions to legal thought, with this is believed that Qualis C to A1 – or LNC to L4, in the case of books – system could be defeated.

The second change is the way institutions are evaluated. They usually know when the evaluative process will occur, so they forge a structure to attend to the CAPES requirements, for instance, and, voilà, they obtain a high grade during the next three years. Here the suggestion is for surprised visits by the responsible commissions to the law schools. Well, if a law school obtained an authorization to function because it has the required structure, so during all the year it is assumed that it has the same structure; if not, so the authorization must be disfranchised,

and applied heavy sanctions to the institution, its directors, and to the professionals who had participated on the simulation.

As it can be seen, these two proposals are in the way to the creation of a better system of education, especially legal education, treating it not only as a public policy that must exist because is prescribed by the constitution, but as a right of individuals and society, and as a duty of them and the state, that must be implemented, followed, and ruled by all the agents involved as a fundamental aspect to the exercise of the citizenship. Thus, the utility to be maximized through legal education is citizenship.

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