

# THE LAW: AN ART OR A SCIENCE?

ALDA FACIO

I. MY INITIATION INTO THE ART OF NOT THINKING AND THE SCIENCE OF MEMORIZATION.....	355
II. THE BODY OF LAW AND OTHER INJURIES TO THE BODY.....	358
III. REVEALING THE SECRETS FOR A NEW PARADIGM.....	361
A. <i>Step 1</i> .....	362
B. <i>Step 2</i> .....	364
C. <i>Step 3</i> .....	366
D. <i>Step 4</i> .....	367
E. <i>Step 5</i> .....	368
1. <i>The Cultural Component</i> .....	369
2. <i>The Structural Component</i> .....	370
3. <i>The Formal/Normative Component</i> .....	371
F. <i>Step 6</i> .....	371

## I. MY INITIATION INTO THE ART OF NOT THINKING AND THE SCIENCE OF MEMORIZATION

I still have the notebook I used for my first exam as a law student. The course was called “Introduction to the Study of Law” and the exam consisted of a single question: “Is the law an art or a science?” I was fascinated by the question. I was convinced that, through my response, I could demonstrate not only that I had read more than the recommended texts, but also that I could develop my own ideas on the subject. I thought that I would definitely do well on the exam and I congratulated myself on my good fortune. How wrong I was!

I had good reasons to trust my ability. Prior to attending law school, my studies in Modern Literature trained me to critically analyze literary texts while learning to develop my own ideas through weekly essays. This was why I was so pleased with the question. I was certain that I could synthesize the professor’s lectures and the texts we had read during the first weeks of the semester, analyze them, and

then express my own views on the law. I remember thinking that even if law courses were totally boring compared to the stimulating classes on English, Greek, and Russian literature I had taken in what already seemed like another life, at least the exams were interesting.<sup>1</sup>

Although many weeks passed before our notebooks were returned to us, each day the professor began class with a monologue about how disappointed he was in us, how unprepared we were, and how hard it would be for us to learn to be good lawyers since we did not have what it took to become partners in one of the “prestigious” law firms in the country. As a matter of fact, the professor himself had not achieved this highly coveted goal—possibly because his last name was not among those that decorated the doors of those firms—but this did not stop him from believing himself to be an authority on the qualities needed to be a good professional in the legal field. Featured on his list of requirements was the ability to choose the proper tie for each occasion, the ability to behave like a gentleman at all times, membership in a country club, having a “dignified” hair cut, and a whole series of other issues that led us to understand that fellow students who were not from the “correct” social class, and all women regardless of our social class, were *a priori* ineligible to join the best law firms.

At last the day arrived for our exams to be returned. More than six weeks had passed during which time the anxiety of each student had approached ulcer-producing proportions, not to mention gastritis, and other somatic illnesses. The professor informed us that since some students did an excellent job on the exam, he was unable to use a curve that would improve the standing of the more mediocre exams. He obliquely led us to see the exam as a test of our intellectual ability, or lack thereof, compared to the other students, rather than simply a measure of what we had learned.

I remember that despite the professor’s comments, I remained fairly confident that I had done well on the exam. One can imagine my surprise when I heard my name among the worst exams. Still disbelieving, I retrieved my notebook and there was the grade. A five on a ten-point scale. It was the first time in my life I had received such a bad grade. But what I had the most difficulty believing was what the professor had written, or rather, not written, on my exam notebook. There was no explanation or comment on my synthesis of the ideas of the studied authors, only three large red Xs on the three

---

1. It would be interesting to investigate whether there is a direct correlation between how much students of a particular discipline or school are allowed to think and how much power they wield upon graduation.

pages where I had developed my thesis that the law was neither a science nor an art. At the bottom of the last page there was a terse comment, also in red: “no one asked for your opinion.”

After crying bitterly all night, I went to find him the next day to ask for an explanation. With the authority of knowing himself to be right, he answered that although he felt that my analysis was excellent, I had to understand that a first year student could not express opinions; she had to educate herself first. “It’s a shame,” he told me, “if you had just left it at your magnificent synthesis of the studied authors, I would have given you a ten.” He explained to me in a fatherly way that since it was his duty to teach me to be a “good professional,” he also had to teach me to respect the unwritten rules of our profession. He reiterated to me that despite the fact that I was a woman, I could become a good lawyer, perhaps in the area of family or labor law, if I first learned a little humility.

The following five years served to reinforce what this first professor taught us:

1. You will memorize rather than make any attempt at analysis, research, or questioning.
2. You will listen passively in classes erroneously termed “magisterial” [*magistrales*]<sup>2</sup> and will reproduce the material in exams.
3. You will study the norm without regard for social context.
4. You will read and repeat the one valid doctrine, which is the one dictated by your professor.
5. You will forget ethics and justice and you will adhere to the norm above all else.
6. You will accept the law as a science.
7. You will renounce the law as an instrument of social change.
8. You will employ reason as the only method of understanding reality.
9. You will assume a position of neutrality and you will commit yourself to objectivity.
10. You will renounce all that is personal.

I gradually became aware of many other messages that made many leftist colleagues, men and women, lose their desire for justice, replacing it with their unconscious acceptance of other values. I understood that even though I had been advised from the beginning that I must wait to learn more before expressing my opinions, what

---

2. The dictionary defines “*magistral*” as that which is accomplished with mastery or skill [*maestría*]. Most classes that I attended in law school were devoid of magisterial qualities.

was really required was a willingness to pretend not to see what was really being taught and to accept facts that were absolutely or relatively false, as truths. The truth was not that I should refrain from expressing ideas until I had more legal training in the final years of law school, but rather, I should remain silent until I had internalized the metadiscourse and values that are taught subliminally in most law schools to this day.

## II. THE BODY OF LAW AND OTHER INJURIES TO THE BODY

My involvement with a feminist group most helped me to preserve my critical judgement. Gender-based analysis helped me to understand, as clearly stated by Frances Olsen,<sup>3</sup> “that Western thought is a dichotomous structure composed of two opposing, hierarchical, and sexist/sexualized poles.”<sup>4</sup> According to Olsen, if we take one of these dichotomies as an example, “that of culture/nature, which holds that the world is divided into things, facts, and behaviors placed in the cultural setting or things, facts, and behaviors placed in the natural setting,” we can demonstrate that “for the patriarchal value system, not only are the things, facts, and behaviors situated in the cultural setting more important than those in the natural setting, but men are situated in the former context while women are ‘relegated’ to the undervalued natural setting.” And, of course, by placing men in the cultural setting, they become the parameter that defines humankind.

Years later I would realize that comments that I considered to be trivial or innocuous were laying the foundations for a professional identity based on mutual distrust and competition. The message was aimed at making us believe that a trial between two big companies, for example, was far more intellectually stimulating than defending families that had been evicted from a property. In this way, one could convince herself that if she chose to work at the service of the powerful, it was not for the money but rather for the challenge posed by difficult cases. Strategies like this forge in the student an admiration for lawyers who win difficult cases. From there, admiration for lawyers who earn lots of money is only a step away.

---

3. Unofficial translation of Frances Olsen, *The Sex of Law*, in *THE POLITICS OF LAW* 453 (1990).

4. I must add here that a classic example of dichotomous thought was given by Professor Rocio Villanueva who countered vigorously my critique of legal education based solely on the teaching of positive law. According to her dichotomous understanding of things, my critique was not only a critique of positivism but also included the proposal to eliminate the teaching of positive law. At no time did I advocate this. My critique absolutely did not imply a return to natural law. I think that it is possible to teach positive law and think ethically.