

PEDAGOGY AND LAW: IDEAS FOR INTEGRATING GENDER INTO LEGAL EDUCATION

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I. INTRODUCTION

With a few distinguished and isolated exceptions, the integration of gender into legal education is a challenge that has yet to be met in most Latin American law schools. This challenge requires the analysis, implementation, evaluation, and monitoring of a series of reforms in the areas of the concept of law, the curriculum, the development of doctrine, the creation of new institutions and methodologies, faculty training and full time faculty commitment, the role of the university, teaching-learning methods, and most importantly, changed attitudes, practices, and beliefs.

Teaching law involves a complex, inter-related and inter-dependent system that begins with the concept of law and ideological precepts, and proceeds from there to pedagogy, methods and techniques. Pedagogy, in this case, refers to the theory underlying and guiding the teaching-learning processes. This theoretical basis deals with such questions as why, how, when, and to what extent one learns. Didactics are concerned with strategies, methods and concrete tools which serve as vehicles for the teaching-learning process.

Some believe that Latin American law schools lack a legal pedagogy because profound theoretical discussion of the subject, doctrinal development, and academic debate are missing. Similarly,

methodologies are obsolete, the training of law professors is non-existent or deficient, and professors do not teach full time.

Nonetheless, there is an underlying, implicit pedagogy, consistent with the ideological basis for the current legal system, which serves to perpetuate and reinforce this system and its fundamental premises. The most widely-used teaching methods and techniques serve this same purpose, even when they are not intentionally chosen to do so.

Education is a political act that goes beyond the building, transmission, and assimilation of knowledge. It creates a climate for the construction, perpetuation and legitimization of power even as it creates possibilities to deconstruct and transform power structures. This is the case whenever thought processes shape social relationships just as social relationships shape thought processes.

The teacher chooses to transmit a set of values, ideas, assumptions, experiences, perspectives, and information. In doing so, he or she excludes or omits another set of values, ideas, assumptions, experiences, perspectives, and information. Therefore, pedagogy, methods, and teaching techniques cannot be neutral in terms of values and aims, but rather exist in connection with certain objectives.

Feminist theories from different disciplines share the critique that most of women's life experiences and diverse perspectives have been omitted from the most widely-disseminated, popular, and academic interpretations. A widely shared premise is that learning is built upon a certain male point of view which is assumed to be universal. On the contrary, this is the point of view of certain men who have articulated their own particular vision of reality, but claimed that it has universal validity. This construct of knowledge hides, suppresses and makes invisible women's perspectives and voices.

Legal education has not been exempt from this form of building, transmitting and assimilating knowledge. The teaching of law, therefore, can and does perpetuate and reinforce the law as a means of social control that institutionalizes and legitimizes a system based on the social subordination of women and gender-based hierarchies. However, as in all constructs of knowledge and power, legal education also has significant potential to question and challenge the system and the daily reality of women in order to initiate and react to social changes.

II. LAW, ANDROCENTRISM AND TRADITIONAL TEACHING

The law is essentially a paradigm of authoritarian discourse; it is one of the discursive pillars of social control in modern societies. It is

a power structure through which social and cultural meanings, images, and customs are formed, reflected upon, processed, and reinforced. The law, therefore, transmits messages to the community about the proper ways to characterize social relationships, how people should behave, what is expected of them, and what happens when they fail to observe the rules. To do this, the law develops and employs concepts, categories, terminology, and a rationale through which it expresses itself, operates, and formulates symbolic meanings and representations. In this sense, the law has a particularly effective ability to shape public perceptions of certain social and political circumstances. The law not only illustrates certain opinions and conceptions, but also creates and reinforces specific ways of seeing and understanding the world.

The law has claimed to be an objective, neutral, rational and impartial entity of conflict resolution. It purports to be abstract and universal in nature. Moreover, the law has been conceived as a closed, complete, non-redundant system, consistent and free of vagaries and ambiguities, comprising standards that provide a ready answer to any conflict.

Furthermore, the law presupposes a mythical creature: a coherent, rational legal subject, capable of freely choosing and consenting to a wide range of options and capable, under normal circumstances, of being considered totally responsible for its actions. It is a subject that acts as an individual, with clear intentions towards itself and others based on assumptions of what a rational person would do in similar circumstances. The law also presumes that this subject shares the same circumstances with others, is essentially separate from others, and maintains an antagonistic relationship with society as a whole.

This legal subject is modeled on a white, heterosexual middle to upper class male without handicaps. This subject disregards and considers as "other" anyone who fails to conform to this paradigm. This subject denies the "other's" values, experiences, points of view and voice because, by definition, the "other" is "voiceless." This is precisely how legal discourse has ignored gender conflicts, among other issues.

In essence, the rationale, structure and language of the legal system and legal interpretation have been based on the life experiences, socialization patterns, values and interests of certain males belonging to dominant groups, and have been characterized as universal standards. Presumptions of the neutrality and objectivity of legal discourse suppress the points of view of those who have not

participated in its development. In this framework, voices that question this supposed objectivity are considered biased.

The standard of "objectivity" is the means through which the law objectifies social structures. Legal proceedings reflect their own image, legitimizing themselves and acting as mirrors of the social order they help to create. In this way, male domination becomes invisible and institutionalized, concealing its nature as a partial construct imposed for the benefit of dominant groups and silencing the voices of the less powerful. This insistence on the supposed objectivity of legal interpretation ensures law's reinforcement of an unequal distribution of power.

The imposed discourse about universality and neutrality makes it possible to exclude the law from the debate over values, structures, and institutions and how these create knowledge, options, and the potential to transform social and political situations. Further, it masks the potential to generate critical thinking about power and systemic, and institutional domination.

This legal model is transmitted, perpetuated, and reinforced by traditional law school education. It is a system that requires a functioning and complicit teaching/learning process that eschews the development of critical consciousness, discussions about values, and the expression of different perspectives.

As Martín Bohmer said, legal tradition has permeated many Latin American law schools for nearly two centuries, in various conceptions of law, in both its meaning and its purpose as a legal science.¹ It is possible to identify phases of theological and rationalist *jus naturale*, as well as historicism and positivism. We have been exposed to Krausist and eclectic influence, anticlerical liberalism, analytical positivism, and even dialectical materialism. These disciplines differ greatly on many subjects, but none of them questioned the legal model under discussion here.

Bohmer describes the current education in Latin American law schools as having certain defining characteristics that essentially point to the monolithic presence of the prevailing Napoleonic concept of law.² This conception is based on a particular understanding of the law within the separation of powers model that asserts that the legitimate exercise of all power is derived from popular consent. This perspective understands democracy as a system of self-governance through which the people debate and decide what laws

1. See Martín Bohmer, *Actualización de la Enseñanza del Derecho: Métodos, Contenidos y Organización* (unpublished).

2. *Id.*

they will submit to in the future. According to this conception, the separation of powers ensures that the legislative branch will enjoy a position of privilege vis-a-vis the other two branches. The executive branch's responsibility is to maintain a monopoly over law enforcement in order to implement the will of the people, which is manifested clearly and unequivocally through legislators. The judiciary is charged with applying the law in case of conflicts, but lacks the autonomy and ability to modify legislation. It applies the regulation/standard through syllogistic reasoning and its function remains neutral in evaluative terms.

This conception culminates with the drafting of the Codes which comprise a series of truly civic manuals that enable all citizens, male and female, to understand the conceptual framework of their rights and obligations simply by reading them. Moreover, the role of judges presumably is limited to the mechanical, automatic application of these Codes without altering or interpreting them from their personal perspectives. In the same way, an attorney is simply an exponent of the law affecting his or her client as it is clearly outlined in the Codes.

Law schools play a role within this conception, as do the correlative mandates of the faculty. The faculty must impart the law, and the students learn the norms set forth in the Code. Schools are divided by subject (Civil Law to study the Civil Code, Criminal Law to study the Criminal Code, etc.). Subjects, such as Civil Law, are further divided into subtopics I, II, III, etc. These courses faithfully follow the organization and content of the respective Code. In effect, it is logical to assume that if law is characterized as a science whose objective is to describe positive regulations, then knowing law is equivalent to knowing the regulations. Teaching these regulations means explaining them, while learning requires repetition and rote memorization.

In effect, if the differences we find in real life are intrinsic too, then anyone can discern them. If there is an objective, unique and impartial reality, then any observer can pronounce judgements that are neither influenced nor biased by perspective or experience. Thus, once the rules are selected, they can be applied, explained and learned uniformly.

Law schools tend to be divided into departments, department heads, and subjects. Departments encompass a particular branch of law. There are Private, Public, and Procedural Law Departments, Philosophy of Law, Social Sciences, etc. These divisions tend to be arbitrary, leading to replicated problems and overlapping and

contradictory standards. Each department is responsible for a series of subjects that are supervised by different department heads. These subjects are typically introduced by a discussion of their theoretical and institutional autonomy in an attempt to assert their epistemological independence from other areas. This translates into the assertion that they deal with methods, contents, and conceptual tools that are essentially different from the others. Moreover, specific professors teach the individual subjects with their own textbooks, substantive approaches, and criteria.

For example, substantive norms are presented as independent of procedural norms. Procedural aspects supposedly only serve an instrumental function. Their role is to ensure an efficient and neutral resolution of conflicts by helping to investigate and apply substantive norms. Accordingly, procedures are neutral for litigants and in substantive terms. The ideal of procedural neutrality parallels the vision of judges as impartial arbiters who apply substantive rules to the facts presented by the parties. Expressly procedural rules are not associated with the primary purposes of judicial function, the appropriate dimensions of the system, or the distribution or allocation of costs and benefits. Likewise, procedural rules are not related to the particular institutional structures and methodologies which substantively impact those liable to be judged.

Bohmer likens this teaching/learning process to a Chinese box game. The university betrays its universal vocation by physically splitting schools into separate buildings that do not interact. These schools are divided by departments, the departments by subjects, the subjects by department heads, and the department heads by classes taught by assistant professors with varying degrees of autonomy. Even individual courses are divided into groups led by assistants or practicum leaders who, in the absence of the assistant professors, have varying degrees of decision-making ability.

These airtight compartments can hardly respond to the challenges presented by respecting principles of equality and non-discrimination. Problems do not emerge divided into subject areas and answers are not found in the tables of contents of professors' textbooks. The claim of autonomy among the different branches of law conspires against the possibility of seeing these branches as tools to address complex social problems that require a multifaceted approach.

Traditional legal education has focused on training students to litigate. Worse yet, it has served to train attorneys to concentrate on translating the unreasoned will of clients into legal lexicon and to

shun debate over the best grounds or arguments. Similarly, those who become judges do not supply the reasoning behind their decisions, but merely cite their supposed neutral application of the standards. Legal education does not inspire imagination, creativity, the possibility of drawing from other disciplines, the possibility of dialogue, or the need to consider the context in finding answers to political and social problems. It is premised on the existence of a single truth which can be easily accessed by consulting the text of the Codes, which is considered the learned dogma.

In effect, professors parrot the department head's textbooks which themselves reproduce the Code's norms. Professors treat discussion as superfluous or irrelevant, and therefore exclude it. Case analysis is limited to presenting the facts and finding the correct answer to a hypothetical normative problem. Evaluation is limited to exams that merely verify the degree of retention and repetition of the transmitted knowledge. The only skill considered is memorization.

Legal educators view students as isolated personalities who think individually. Professors ignore the potential and richness of collective debate as a tool to build and assimilate knowledge. This method of legal education encourages the acceptance of hierarchies, ignores and obscures diversity, and conceals the social context in which norms are conceived and applied. Recognition of the underlying ideological assumptions which inform the development, interpretation and application of these norms is unlikely.

These methods determine substantive outcomes based on premises that conceal rather than enable free thought. For instance, a vision which places great weight on precedents upholds the status quo over and above the interests of those seeking recognition of new rights. Those who claim to keep law separate from political considerations reinforce existing power structures, thus masking exclusion and the law's disregard of diverse viewpoints. The law thereby preserves its supposed objectivity, rationality, universality, neutrality and impartiality.

III. INTEGRATING THE GENDER PERSPECTIVE INTO LEGAL EDUCATION

Considering that women have historically been excluded from the creation and transmission of formal legal knowledge, integrating the gender perspective implies something more than integrating women into the existing system and transforming them into new objects of knowledge. Integrating gender into education entails a complex process of comprehensive reform of the law and legal education so that women's diverse experiences and perspectives become primary

subjects of knowledge. It requires viewing women as active agents in legal development and education, and considering gender issues as fundamental components of articulating knowledge. Concretely, it requires a multidimensional deconstruction and reconceptualization of law and its teaching.

There is no single formula to achieve this objective. Just as feminists have learned to value diversity among women, and have understood the need to examine different perspectives, legal educators must be open to multitudinous possibilities, methodologies, and techniques in our search for solutions. Necessary to integrating the gender perspective into legal education, and adopting a pedagogy consistent with this aim, is the inclusion of one or more of the feminist methodologies developed to analyze legal phenomena. These methods attempt to expose legal issues that traditional methods have ignored and concealed. In this vein, Katharine T. Bartlett has identified three widely disseminated methods³ applied by feminist legal theorists.

One of these methods formulates "the woman's question." It has been considered that a question that is posed regularly becomes a method. Feminists from different disciplines formulate a series of questions to identify the gender implications of rules and practices that appear to be neutral and objective. For example, Heather Ruth Wishik poses these questions:

what have been, and continue to be, the expectations of all women with respect to the life situation referred to by the doctrine, process, or area being examined? What assumptions, descriptions, affirmations and/or definitions of experience —male, female, or ostensibly gender-neutral— does the law offer on this issue? What is the area of negation, distortion, falsehood created by the differences between the life experiences of women and the assumptions made by the law or imposed structures? What are the patriarchal interests served by this negation, distortion or falsehood? What reforms have been proposed in this area of law or life situations of women and, if these proposals were to be adopted, what would be their practical and ideological impact on women? In an ideal world, what would be the life situation of this woman and what relationship, if any, would the law have to this future life situation? How do we arrive at that situation from this point of departure?⁴

3. Katharine Bartlett, *Feminist Legal Methods*, in *FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER* 371 (Bartlett & Kennedy eds., 1991).

4. See Heather Ruth Wishik, *To Question Everything: The Inquiries of Feminist Jurisprudence*, in *FEMINIST LEGAL THEORY: FOUNDATIONS* 26 (Weisberg ed., 1993).

This method has been adapted to analyze other types of exclusion.

A second method identified by Barlett is practical feminist reasoning. This reasoning seeks to expand traditional notions of legal relevance to make legal decision-making more sensitive to the characteristics of a case not reflected in legal doctrine.⁵ It is based on the Aristotelian model of deliberation that contemplates ends, means, and actions. This reasoning poses open-ended questions to be considered based on concrete issues to determine both the problem's solution and what should be considered a problem in the specific situation. It approaches problems not as dichotomous conflicts, but as multifaceted dilemmas, rife with contradictions and inconsistencies set in a specific context. Practical feminist reasoning challenges the legitimacy of those who claim to speak through certain standards in the name of the community. It holds that there is not one, but a series, of overlapping communities to take into account when seeking explanations. It attempts to identify perspectives that are not represented in the dominant culture.

Consciousness-raising is a third feminist methodology employed to broaden perspectives. This is an interactive and cooperative process in which women share and compare their personal experiences. Participants build knowledge through exploration of common experiences and patterns.

Alda Facio has combined several of the methods described here to develop a unique, six-step methodology.⁶ It includes a formal-normative component, a structural component, and the political-cultural component of law. The first step is consciousness-raising, which builds awareness through sharing personal experiences of women's subordination to men. The second step deepens understanding of sexism and its manifestation in legal doctrine, legal principles and fundamentals, and the research underlying them. The third step identifies the woman that the male-centered law sees as "other" and analyzes its impact on all women, taking their diversity into account. The fourth step seeks to find practical answers to women's exclusion and to women's problems and needs by looking for the conception of "woman" that informs the text. The fifth step analyzes the text from the perspective of its political-cultural and structural components. The final step brings other views into the analysis to enrich it and continue the consciousness-raising process.

5. *Id.*

6. Alda Facio, CUANDO EL GÉNERO SUENA CAMBIOS TRAE: METODOLOGÍA PARA EL ANÁLISIS DE GÉNERO DEL FENÓMENO LEGAL 7 (1996).

These methodologies allow us to design teaching-learning processes that will, in turn, require appropriate instructional materials and techniques. Once again, each of these methodologies must be evaluated on their proposed objectives. Even those that might be inappropriate under most circumstances could be ideal in certain contexts. Conversely, other generally effective methodologies might not be appropriate for certain purposes, contents, or particular groups of students.

Among potentially useful methods is the case study, which develops diverse skills. Case study includes class discussion of cases students are already familiar with. Professors combine this discussion with the Socratic approach of quizzing students about the facts of the case and the judge's decision, which generates diverse hypotheses. What would have happened if a particular fact had been different, or if the judge had been aware of an ulterior consequence? Beginning with a seemingly straightforward conclusion, students introduce additional issues that demonstrate the difficulty of arriving at final solutions. This method allows for class participation, develops rhetorical skills, provides the opportunity for public speaking, helps to distinguish between effective and poor arguments, raises awareness about the difficulty of normative interpretation, and demonstrates the onus of responsibility on those who work in the legal field. Further, it introduces a degree of realism to learning, encourages creativity, enhances decision-making skills, and enables students to understand how the law operates in real life. In addition, forming small working groups to analyze, discuss, or solve specific topics or problems posed by the faculty increases participation and team work, and stimulates discussion and a more profound development of ideas from diverse perspectives. It fosters the use of creativity and imagination in resolving concrete conflicts. This methodology engenders debate, which develops the skill of defending and attacking arguments based on solid reasoning. This methodology also encourages students to consider problems in depth, and encourages intellectual and professional receptivity and flexibility.

To foster commitment to the work of the profession and to encourage the assumption of responsibilities vis-a-vis the concrete situation of the affected parties it is essential to coordinate "theoretical" classes with the substantive practice of law in order. Substantive practice both builds skills, and promotes the development of practical criteria based on the social context. It leads to an understanding of the law's functions in daily life, which helps to change attitudes.

In this area, experiences such as public interest law clinics are important. These clinics offer pro bono assistance to cases with high public impact, such as those which expose unconstitutional practices or the systematic subordination and discrimination against women. Students in these clinics work on cases that demonstrate the law's role as an agent of social change. Taking on real causes is a highly motivating tool that awakens and cements a sense of responsibility.

In effect, the study of law should be "socially relevant." In India, for instance, legislative reform contests are held.⁷ Participating teams live in a community for three months to learn about its problems. Without preconceptions, the team selects one of the community's problems and return to the university to research how existing laws deal with that problem. The students propose legislative change which may be considered by the legislature. These types of experiences encourage sensitivity to listening, identification of problems, and the capability to critique standards. They foster creativity, constructive imagination, and decision-making while increasing realism, social sensitivity, practical knowledge, and the development of a professional ethic.

It is also important to stimulate practical experiences or supervised internships in which students participate in a real work situation, guided by one or more people. This allows for the gradual acquisition of experience during which students must adapt to real work situations. It serves to awaken and deepen the student's sense of responsibility.

Another model used in India is the organization of contests relating to law student participation in the legal education of the community. Students develop programs and activities, and create and disseminate informational materials to educate people about their legal rights and the tools and mechanisms available to protect those rights.

To make these pedagogies and teaching methods viable, the traditional system of "subjects" must be transformed and replaced with "issue-based" courses. These "issue-based" courses tackle real life problems without facile distinctions between supposedly "autonomous" subjects. This approach breaks from the model of subjects, departments, and even schools or disciplines into which law is divided. A multidisciplinary approach, then, becomes an epistemological necessity given that the resolution of concrete

7. See Iqbal Ishar and Menon, *Socially Relevant Education* (presented at the American Association of Law Schools Annual Meeting, International Conference on Clinical Legal Education, Miami, Florida 1996).

problems requires seeking solutions unfettered by rigid disciplinary compartmentalization.

IV. CONCLUSION

Legal education is more an experience than the mere acquisition of knowledge and the transmission of legal standards. It involves a combination of abilities, affective and value-based objectives, and skills in certain areas of knowledge. It also involves the ability to combine different types of knowledge, evaluate alternatives, develop innovative strategies, debate and persuade, find new arguments, listen empathetically, discern underlying ideological assumptions, promote change in attitudes, develop objectives in keeping with a certain affective value system, and recognize and respect diversity.

There is no single recipe for the best way to integrate the gender perspective into legal instruction. Instead, there are different pedagogies, methodologies, and techniques. Each group of students is unique, non-replicable, and presents certain characteristics that must be taken into account. Similarly, each professor must choose the path that most suits his or her perspective, experience, and personality. Each historical context presents different challenges.

In a society with a legacy of discrimination, legal education becomes a critical arena for inclusion. Academia is a forum that must be opened to debate about competing realities and diverse perspectives, experiences, and values. It is an ideal venue to enrich public debate and create space for dialogue about values and rights. Such dialogue will enable more people to participate and will allow those on the periphery of the system to break the silence of an imposed perspective and become empowered to find and make their voices heard.

There is not one truth that must be obeyed unquestioningly. To the contrary, we must leave the door open to new questions, new challenges, new perspectives, and the richness of diversity. The search for new paradigms involves a constant and continuous building process. We know where we began, but we cannot identify a fixed destination, only a road to travel.