

STATUS OF THE BRAZILIAN LEGAL EDUCATION

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1. 1. The Brazilian Legal System

Brazilian law follows the civil law system in which judicial decisions do not primarily create law but rather interpret the statutes in force. Statutes are enacted by federal, state and municipal legislators, who are limited in their law-making aptitude (jurisdiction to prescribe) by the rules set forth in the Federal Constitution enacted in 1988. In the absence of a specific rule of law, the judge's decision shall be based in analogy, customary law, and the general principles of law. Despite the increasing role played by the higher court decisions as persuasive precedents, these are not legally binding with respect to the inferior judge's decisions.

The 1988 Brazilian Constitution, also called the Citizen's Constitution (*Constituição Cidadã*) is the result of the continued redemocratization process started in the mid-eighties. The democratic system provided for in the Constitution establishes that the access to Courts is deemed to be a basic individual right or guarantee. Every citizen has the right to due process and its fundamental procedural guarantees: ample defense, dual adversary system, publicity of procedural acts, procedural fairness, written motivation of judicial decisions, and right of appeal, among others. Brazil has also ratified the main treaties on human rights of the Organization of American States, the declaration of human rights of the United Nations and the Refugees' Convention of 1951.

The Constitution has divided the Judiciary power into State and Federal Courts (each in two levels). Above both of them, the Federal Supreme Court shall proceed in the examination of constitutional issues, submitted thereto through extraordinary appeals. On the other hand the Superior Court of Justice has the mission to establish a uniform interpretation of federal law within the country, which is done by means of special appeals.

The Judiciary chooses its ranks through a public examination, which takes place at least once a year. There is presently a shortage of judges because the exams are highly complex and although there is a lot of candidates, not many of them pass it. One characteristic of the judicial career is that the job is for life and appointment to the appeals court is made through seniority and merits from the ranks below. The Appeals Court, however, has one fifth of its judges chosen among experienced lawyers and prosecutors. While the Superior Court of Justice is chosen in this way, the appointment to the Federal Supreme Court is different, and is done by the President with the consent of the Senate, among candidates with a reputation in public law. Most of them, however, have been judges before.

Brazilian public prosecutors and public attorneys are representatives of an independent institution - which almost amounts to a fourth branch of government -

known as the Public Ministry. This institution, organized both at federal and state levels, has its duties regulated in the Constitution and special statutes, playing a relevant role in both criminal and civil procedures. In addition to arguing the government's case in criminal suits, its members represent the public interest involved in ordinary civil cases, intervening in proceedings related to bankruptcy, labor-related accidents, consumers' liability (class actions), divorce proceedings, cultural, historical and environmental protection, among other subjects of general interest.

Civil procedure in Brazil is marked by German and Italian influence, and scholars such as Von Bülow, Liebman, Chiovenda, Carnelutti and Calamandrei are often mentioned by Brazilian law professors and judges. Civil procedure is essentially governed by the 1973 Code of Civil Procedure (Law no. 5,869 of January 11, 1973, as amended). However, some subject-matters such as alimony, divorce, writ of mandamus, and product liability are dealt with by special statutes. It is important to note that there is no civil jury in Brazil, and criminal juries' jurisdiction is restricted to intentional felonies against life.

The discovery principle applies only through express legal provision. There is no obligation from each party to disclose any relevant facts and documents to the other prior to the beginning of the proceedings, which may be relevant to the case's outcome, unless a specific provisory measure has been filed and ordered by the judge. The relevant provisions of the Code of Civil Procedure establish that all legally obtained evidence shall be accepted and have equal importance in the judge's decision-making process. The judge shall examine and appraise the evidence to his/her discretion. Moreover, the judge is empowered to question the parties and witnesses about facts, and to search for evidence. This distinguishing trait makes the Brazilian judges an important actor during the procedures, more than his/her American colleagues. Finally, all procedures are primarily written, following the principle of *quod non est in actis non est in mundo* ("what is not in the records is not in the world").

Enforcement of a foreign judgment subjects to its prior (review) process of homologation by the Federal Supreme Court and on a subsequent autonomous executory proceeding. Foreign judgments containing coercive measures are not accepted without their previous transit *in rem judicatam* (final judgment) abroad, and homologation by the Supreme Court. Moreover, direct intervention of a foreign judge in cases under Brazilian jurisdiction is not accepted, although letters rogatory are widely accepted in Brazil.

2. History of Brazilian Legal Education

Brazilian Law Schools were the first graduate institutions to be established in the country, five years after the country became independent from Portugal in 1822. Olinda's Law School and São Paulo's Law School, both founded in 1827, became the main centers for the intellectual, administrative and political elite during the 19th century and the first decades of the 20th century.

Law teaching and study had a broad scope, basically directed for public office rather than to legal practice. Rapid industrialization, especially after 1930, determined a critical evaluation and change on the lawyers' formation. Almost a decade after World War II, in, 1955, Professor San Tiago Dantas, in a thereafter classical text, formulated

and outlined the reforms of Brazilian legal studies in view of the new political, social e economic arena.

At faculty level, reforming initiatives were taken during the sixties in order to adapt legal studies to the post 1964 Brazil (military régime), and put in force through Resolução nº 3/72. This statute instituted a rigid model of legal studies that did not address the professional and more practical needs of lawyers. Worse, it eliminated general disciplines from the old curriculum, without introducing new ones, such as Environmental and Consumers' Law. In the early eighties Brazil experienced a newly attempted change, with the proposal of including an obligatory internship with no success.

The nineties saw the recurrence of critical appraisal about the 1972's curricular model. Efforts in this direction were sponsored mainly by OAB (the Brazilian Bar Association). A new project was proposed taking in consideration the market's needs, and finally Portaria MEC nº 1886/94 was enacted. Among other changes, courses such as Roman Law, International Law and Philosophy of Law (Jurisprudence) became mandatory, and new courses such as Consumers' Law and Environmental Law were introduced as elective courses. Furthermore, in order to fulfill the requirements to graduation, every law student must develop and write a research paper that is later presented orally to a board composed of three law professors. These new rules establish some flexibilization on complementary activities required to graduation, which include lectures, seminars and other activities. Mandatory professional internship is also required in the last two years of Law School.

The reintroduction of International Law in the basic curriculum carries significant importance not only for its traditional categories— Private International Law and Public International Law — but also for a new teaching system that is being envisioned under the title “International Law ”. This change will allow an ample program review, with the introduction of contemporary relevant themes such as International Human Rights Law, Integration Law, and International Trade Law.

3. 3. The Legal Curriculum

The Ministry of Education is empowered to regulate the curriculum of all graduate courses, including Law School. Portaria 1886/94 determines mandatory disciplines, and the minimum required hours for graduation in Law, which cannot be completed in less than a five-year period of studies. Mandatory courses are Civil Law, Procedural Law, Criminal Law, International Law, Constitutional Law, among other courses.

Classes usually take place in the morning or at night, because most of the students work part-time at law offices or as clerks at governmental agencies, such as Public Ministry or the Public Defenders' Office, where they work is limited and supervised. However, these internships are very good, because the students are able to perform most tasks of lawering under supervision. Usually there is one or two student per supervisor while in law offices their duties tend to be more bureaucratic.

The Ministry of Education is also responsible for doing periodic evaluations on Law Schools, monitoring faculty academic credentials, courses, infrastructure, and

schedules. Every two years a special committee is mandated to oversee the fulfillment of all the requirements according to a pre-set report, and makes visits to Law Schools within the country. Once a year the Ministry promotes a national exam for fifth-year law students, that is used as a guide to a national ranking of law schools.

4. 4. Students' Profile and Selective Process

In Brazil, following high-school, students go directly to a professional course, which lasts 5 years and covers both college-type courses and graduate work. Thus, Law School is a traditional five-year course following high school. One can say that the first two years seems more like undergraduate work and the last three, more professional, **although** all the courses are geared to law from the beginning.

The pre-selection (vestibular) process plays a very important role in Brazil. It is an exam organized by the schools that considers all high school's courses according to a curriculum previously established by the Ministry of Education. Public universities are highly regarded because they are free and ranked among the best in the country. Thus, the exam to enter it is very competitive. For instance, the ratio for entrance to the Rio de Janeiro State Law School (UERJ) last year was of 35 students to 1 place, whereas in the Catholic Law School (PUC), ranked as the best among private universities, the ratio was 5 to 1. Some lesser considered private schools may even fight for students because lately many new courses have started. Therefore, best students tend to be in the public schools and perform better at the exam at the Ministry of Education, in the 5th year, contributing for the better rank the public schools get.

A student who cannot afford to pay for his/her courses or did not enter a public school will opt in favour of the night shift, in such a way that he/she can work during the day (night classes usually begin at 7PM and end at 10:30 PM). Usually the morning shift enjoys better-prepared students while the night shift tends to have the more tired ones, who do not have time to prepare as much for class.

The classes are usually a group of 60 students and professors will lecture according to a syllabus, but do not have time to call on students. Also, it is not a habit to stay in Law School after hours. Only now libraries are improving as a result of the Ministry of Education's annual inspection, but cannot be yet compared as their American counterparts. Very few have unlimited access to technological wonders as lexis and west law. It is important to note that there is no such system of research in Brazil, although it is possible to research through the internet at the Federal Supreme Court, the Superior Court of Justice and most appeals courts, but not all.

The grading system cannot be evaluated in a similar way as the American one, because it differs among law professors, who generally benefit from large discretion in grading their students.

Very few schools have special research programs that allow students to stay longer and work with a professor. The Catholic University has its special training program called "PET Program". Such scholarship is structured as a three-year study program focused in the following three main areas: 1st-year, legal interpretation and hermeneutic; 2nd-year, origins of the Civil Law through the Roman tradition; 3rd-year, Civil law, with focus on tort cases, and conflicts of laws, with focus on transnational

cases. The program was conceived to prepare a limited number of outstanding students for academic careers after graduation, encouraging them to later apply for LL.M programs. In order to continue in the program, students must maintain their average grades above the required punctuation for pass/fail (which is 5/10), and at least 7/10. Usually the required average for PET's students is 8/10, and they are not supposed to fail in any course. If a PET student fails a course the scholarship is cancelled. PET's results have been very good, and most of old students are in the academic career. However the program is very small, with a group of 12 students only, while PUC has around 1.800 law students. Also, there are only five PET programs in Brazil, financed by the funding agencies, and a few more scholarship for young students, that he/she must apply with a specific project and a Professor as supervisor.

5. 5. Faculty Characteristics

In the past most of law professors were usually judges, public prosecutors and state lawyers. Having a public job was a credential to teach law. Because courts functioned only in the afternoon, classes were in the morning and at night. Thus, teachers were all part-time and members of the legal profession.

Only recently Brazil has experienced a new trend towards full-time faculty, and also to a more qualified type of professor, with a mandatory quota of one third of the law faculty to have master and doctoral degrees, also being more dedicated to research and other programs in the Law Schools.

Selection of the teachers in Public Schools is mostly done through very competitive exams while private schools decide differently and may or may not hold a public exam. However, because of the quota established by the new law, all law schools are preferring to hire professors with master or doctoral degrees at the moment.

Thus, it is important to describe the state of post-graduate programs in Brazil at this time. Post-graduate programs in law went through diverse phases since their inception. These programs have greatly developed during the past twenty years. However, even before that the teaching career had its degree system already regulated by the same law that instituted legal courses in Brazil.

During this century we have used the Portuguese model, inspired in the French model, in which faculty degrees are awarded according to certain exams, as *livre docência* and tenure exams. Therefore, the teaching career has a degree system that determines its structure. This system is mainly used in public universities.

By the end of the sixties post-graduate programs were restructured in Brazil. Through CEPED^[1], an American model has been introduced with the purpose of

^[1] For more information, see Gardner, James A., *Legal Imperialism – Americana Lawyers and Foreign Aid in Latin American*, The University of Wisconsin Press, specially the chapter on Brazil, pp. 61/125. The CEPED (Center for studies and research in legal education) was created in 1966, by a group of American teachers and lawyers, with sponsorship of Ford Foundation, AID, and was associated with the State University of Rio de Janeiro (UERJ). Many of its teachers also worked at PUC. David Trubek, one of the program's leader has done an extensive report on

changing the lecture approach of classes into a Socratic one, including pre-selected case study in law classes. PUC's post-graduate studies were the first to be installed in Rio de Janeiro, in 1972, and remained practically alone in the Rio de Janeiro's legal scene. However, its program had only a master program. Its doctoral program began only in 1999. UERJ, the Law School of the State University, started its program only in 1995, and its doctoral program two years later.

Presently, although post-graduate programs courses for masters are more numerous, doctoral program are only a few, forcing law schools in some regions to invite visiting professors for their courses and competing for the few teachers that graduated in other states or in foreign countries. Thus, it is not uncommon to see the same teacher in more than one institution if he/she has a doctoral degree.

Nowadays there is a "cry" (call) for professors with doctoral degrees. Private schools, which are more numerous than the public ones, historically have resisted in investing in its faculty body, preferring to hire mostly part-time teachers with professional experience. Only in Public Universities – where promotion depended on degree --, one could find a faculty concerned with academic improvement. However, the new regulation has changed this situation because all schools now need a minimum of professors who bear post-graduate diplomas, and there are only a few of them in the market. Thus, post-graduate programs are booming, with the opening of new programs.

New programs depend on the Federal Agency in charge of monitoring all post graduates programs in Brazil – CAPES' authorization to function and this last is based on a peer-type inspection through designated committees by this federal agency.^{2[2]}

Lately, many new post graduate programs have asked CAPES for authorization, and many of these were granted. This practice has lead Brazilian academic community to express its concern on the methods followed by the adopted evaluation criteria and on the controls that are needed to prevent the chaotic increase in the number of courses without the proper structure and research development.

the state of legal education in Brazil and suggested the introduction of the Socratic method in post-graduate studies in Brazil. Many young Brazilian lawyers went to the US to study and brought back the American style on their return, especially to PUC.

2[2] The historic purpose of evaluation in Brazil has been to select graduate courses for the financial support of the Federal Government, mainly through scholarships. It continues to play this role of validation and rating but also serves as a source of critical advice for institutions. Last year, an international team was summoned to evaluate the CAPES process. In their report, the team concluded that based on their individual and collective evaluation of the CAPES process, it is agreed that the system has worked well, and has led to the increased quality and quantity of graduate programs in Brazil, and an increased number and faculty with PhD degrees. It also described the system as a peer-review, using measures of production of quality in research and teaching, and that strives to induce each program to reach international standards. Thus, the team has recommended that the process continue in its present form, but that the recommendations in the report be given consideration as mechanisms to improve it.

6. 6. Evaluation by the Federal Agencies

In Brazil, two specialized federal agencies are empowered to grant scholarships and evaluate post-graduate studies: CAPES and CNPq, which is the Council for Research. While the first is dedicated only to post-graduate work, the second also deals with graduate students, through scholarships and sponsorship of research projects under a law professor's supervision. Only lately have they begun to cooperate and make joint decisions on scholarships. It used to be common to be awarded a scholarship from both institutions. While to apply to CAPES' scholarship one has to do it through an established program, at CNPq the students apply for themselves. CAPES is also responsible for the ranking of Post-Graduate courses and supervises their functions, curriculum, projects, thesis, etc. Its evaluation system was created to give them data in order to provide financial support of programs. Today, it is also a provider of critical advice for the institutions.

The Ministry of Education's mandate includes the establishment of the ranking of law students, including a one-day national exam, which takes place at the end of the course of all students. The evaluation is composed of two sections: infrastructure of the school (both physical and the faculty), the student's exam and its performance.

7. 7. Association of Law Schools

There is no organization that congregates the law schools. In the last ten years, a commission on research only for post graduate work was set up (CONPEDI) composed of all post graduate programs. Its annual meetings are beginning to drive more people to it. However, its scope is still limited and its functions depending on the volunteer sponsor that offer to hold the conference. It meets in October, and the next one will be held at PUC-Rio.