

# Chilean Juridical Culture: Trends that Force us to Rethink our Way of Teaching Law

By:

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## 1.- The observance of human rights and the new dogmatics on the fundamental rights.

There can be no doubt that the 20<sup>th</sup> Century should be remembered for its experience of gross violations of the rights of people, what causes an impact on our juridical culture that can be seen in the increasing interest in studies of human rights issues and the weight they have in the interpretive framework from the Constitutional level, and even the international law. So, there is new dogmatics on fundamental rights, marking a trend of change, both in the way of understanding and interpreting the Constitution, and in the way of understanding its interaction with lower rules. The direct application of the Constitution is thus a new aspect, due to the valuation matrix imposed by the rights of individuals, and that is undoubtedly a very important element which marks a break with previous legal culture. In recent years this issue has been making an impact in practical terms, because on the one hand we have a very determined new Constitutional Tribunal to look at the Constitution evaluative perspective. Thus, today we have judgments that have declared unconstitutional some rules destined to regulate private contracts, such as judgments that declare unconstitutional article 38 ter of Law No. 18.933<sup>1</sup>, which allows to modify health insurance contracts by invoking certain risk factors, including age and sex<sup>2</sup>. Other judgments have estimated unconstitutional Article 2331 of the Civil Code, because it prevents the right to claim compensation for moral damage, which is contrary to an effective protection of the individual enshrined in the Constitution<sup>3</sup> and that for 150 years was estimated that does not violate the Charter. Moreover, we have found people who, not satisfied with a particular decision of our Supreme Court, have resorted in protection of certain fundamental rights, both to the Commission and to the Inter-American Court of Human Rights. Chile has had to accept decisions of the Court to modify our legislation, as well as to receive reports from the Commission on the same line.

## 2.- The massification of Law studies.

An undeniable trend now is the massification of the legal profession; since the university reform of 1981 the number of programs and careers of Law has grown dramatically<sup>4</sup>.

It is difficult to avoid a deterioration of the teaching of Law itself and of the professional practice, when the number of people studying Law has grown and expanded geographically so impressively and in such a short time. It constitutes nowadays a challenge to improve this situation, at least as far as ethics and forensic quality of the lawyers appearing

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<sup>1</sup> Today, Article 199 of DFL N°1/2005 of the Ministry of Health, which sets the consolidated, coordinated and systematized text of Decree-Law N°2763 of 1979 and Laws N° 18.933 and 18.469.

<sup>2</sup> There are several judgments, the last docketed under N° 1348-09.

<sup>3</sup> Last judgment docketed under N° 1185-08.

<sup>4</sup> Cfr. GUZMAN BRITO, Alejandro, "La Enseñanza del Derecho Historia y Perspectivas", in *Anales del Instituto de Chile*, Vol XXV, *Studies La Educación Superior II*, 2005-2006 (pp. 273-382). explained that until 2006, 111 programs in Law had been created by universities established since 1982, which the 5 programs already existing in 1981 must be added, in order of seniority: Universidad de Chile, P. Universidad Católica de Chile, P. Universidad Católica de Valparaíso, Universidad de Valparaíso and Universidad de Concepción.

before the courts are concerned; it seems to me that this is an issue that cannot ignore the common good<sup>5</sup>.

Although some universities have undertaken reforms in three crucial areas, namely, curriculum, methodology and evaluation, in general most of them have been timid. The tension is always the same, inasmuch as in front of the need for reform, the thought is that the traditional system has worked, so there is no sound reason to radically change things and that if you want to improve the gravity of the lawyer in society, what you have to do is to give more training in substance, that is what is required for a degree, including the training in the humanities. It seems to me that a renovation is essential, rescuing the need to form lawyers, and the need to create incentives for achieving training focused on skills and abilities that do not rely only on the student's memory, keeping in mind the urgent need to catch up with the rhythm that carries the Law education elsewhere. Finally, I note here a challenge for our juridical culture, which has taken long to be confronted, but I have no doubt that it will certainly be addressed<sup>6</sup>.

### **3.- The crucial question: a methodology that goes beyond skeptical legalism.**

Our main challenge, as a country, is to leave a skeptical legalism in order to establish a dispute resolution methodology more functional to a society that rejects judges who remain unmoved when they see that their decisions are unfair, but legal. Law must be understood more openly and with a more functional sense, i.e., breaking the legal monism and realizing that to be interpreted and applied to a rule, its effects and consequences should always be taken into consideration<sup>7</sup>. Furthermore, it is imperative to understand that the abstraction of the rules requires a job application from the judge, which necessarily is creative, so the pure formal logic, Cartesian if you wish, is not enough. The pure subsumption work is not enough because the application of a rule requiring a more comprehensive analysis that looks at the whole reality is being heard. When solving a case, one takes a position on values, purposes and functions, all of which must be justified. It is true that the criterion is in the law and that the judge has often no alternative but to follow its guidelines, but a different issue is to give up a model of justification.

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<sup>5</sup> The April 2010 issue of the *Revista del Abogado*, published by the Chilean Bar, brings an interview with the President of the Supreme Court, who confirms this fact. A topic, furthermore, on which there is consensus among those versed in the matter.

<sup>6</sup> On this point, it seems interesting the interview with Prof. Claudio Grossman, Dean of the School of Law of the American University, entitled, "The Modernity and the Need of Justice require to critically review the contents and methodology", Magazine ABOCH, Year XXIV No. 037, December 2008, pp. 13-17.

<sup>7</sup> I find inspiration in ZAGREBELSKI, Gustavo, *Intorno alla legge, Il diritto come dimensione del vivere comune*, Einaudi, Torino, 2009.