

# LEGAL RESEARCH CRISIS IN BRAZIL: TRAPS AND ALTERNATIVES TO LEGAL FORMALISM<sup>1</sup>

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## **ABSTRACT:**

We have sought, in this article, to characterize and explain what we diagnose as a crisis in legal research in Brazil. The diagnosis of the crisis is based on the type of academic production predominantly conducted in Brazilian law schools. Two traps – one theoretical, the other institutional – have been identified as the main obstacles to innovation as far as legal research is concerned, which, in turn, renders extremely difficult a consistent and profound reform of how law is taught in Brazil.

## **I – Introduction: from a crisis in teaching to a crisis in research**

We persistently talk of a “crisis in legal teaching” in Brazil and in other Latin American countries, even after a recent wave of innovative experiences in many institutions in the region<sup>4</sup>.

The diagnosis of the crisis is not recent. Several works have been produced in recent decades that seek to map out the problems of legal teaching in Brazil. In these works, as in debates entered into in countless seminars on the theme, it is possible to highlight at least two central aspects of the diagnosis:

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<sup>4</sup> New schools or new cycles of innovation in traditional, established schools are arising in many countries in Latin America. Many members of these innovative schools participate regularly in SELA, making this forum especially interesting for the type of debate proposed in this article. Evidently, our main focus is Brazil, but we believe that many of our conclusions could be valid for other Latin American countries.

(i) the perception of an incompatibility between what are perceived as traditional practices of legal teaching (the absence of interdisciplinarity, the absence of grounding in empirical or applied research, failures of theoretical consistency, excessive formalism) and the needs of a market of legal practitioners in clear transformation in the view of the internationalization of many economic sectors, the reform of the State and the greater sophistication of social conflicts of various types;

(ii) the perception that the method of teaching exclusively based on lectures, by which professors articulate abstract dogmatic concepts from an essentially deductive perspective, has been very ineffective,.

What is new, therefore, is not the crisis, nor the diagnosis, but rather the persistence of the problem even in spite of some laudable initiatives.

Always beginning with this negative diagnosis, the proposed solutions to the problem to date have refuted the current approach centered, primarily, on questions of **form**: *no to formalism, no to lecture classes, no to legal manuals, no to legal opinions, no to part time professors, etc.*<sup>5</sup>

However, in none of the diagnoses or solutions that have been presented do we see a clear evaluation of the current disassociation between legal research and legal teaching. Nor, more specifically, do we see the conceptualization of what

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<sup>5</sup> The essentially negative character of the diagnosis had already been pointed out by J. Falcão, “O Projeto da Escola de Direito do Rio de Janeiro da FGV”, mimeo, 2002.

"innovation" in legal research actually is, considering the academic production that currently exists in Brazilian law schools.

Indeed, in our view, it does not seem reasonable to think about a reform of legal education without an accompanying cycle of innovation in legal research. Only with a profound change in the law professors' approach to their object of study and with diverse perspectives on this object will it be possible to imagine a consistent reform of legal teaching.

In this context, we assess the nature of a "new diagnosis", which is more focused on that what, to our mind, is a fundamental component of the problem of reforming legal education in Brazil: "the crisis in legal research".

## **II – The crisis in law research: two traps**

At present, the nature of legal research conducted in Brazil is predominantly **descriptive** of laws and of the dogmatic concepts that reside therein. Dogmatic reconstruction, based on categorizations and taxonomies aimed at the logical "organization" of laws is considered a necessary stage in legal research. Such reconstruction is generally conducted under the assumption that the legal system is closed and static and it does not incorporate (i) **explicative** elements of the (dynamic) conditions of the workings of law nor (ii) **normative** elements in such a way as to propose alternative design of the institutions that are connected to the workings of the law.

More specifically, when we analyze academic works produced in Brazilian law schools, we perceive that they are, for the most part, **(i)** works of doctrinal reconstruction on descriptive concepts of norms and normative systems (in general they inform the stance of various authors on each concept), **(ii)** legislative descriptions (they present the normative framework formed by the federal and state constitutions and laws and regulations) and **(iii)** descriptions of court decisions (legal or administrative decisions that affirm stand-points on the application of the normative framework)<sup>6</sup>.

The three types of work exemplified here are, in general, labeled by critics as representative of a certain type of “legal formalism” and are negatively characterized.

However, we understand that the problem does not reside in the fact that they are “formalist” works. The central problem lies both in an absence of understanding, even on the part of the critics themselves, of the reasons that lead to the almost absolute prevalence of this type of work (and the research methodologies that guide them) in relation to all other types of work and in an absence of understanding of the negative consequences of such prevalence.

In our view, this current state of legal research in Brazil is caused by a vicious circle, which impedes the development of an innovative environment due to two traps: one theoretical, the other institutional.

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<sup>6</sup> The vast majority of doctoral thesis and dissertations produced in prestigious law schools represent one of these three types, or a combination of all three.

From the theoretical point of view, there is an epistemological trap. In Brazilian legal research *analytical/descriptive and hermeneutic/interpretative theories* prevail, which are centered on the reconstruction of legal dogmatics as a necessary element of academic investigation.

Research based on other methodologies, which seek to evaluate (from a substantive point of view) the conditions of the formation of the content of norms and the effects of the content of norms over different social spheres dynamics, tend simply to be ignored by legal academia because they are not considered “legal research” (i.e. because their starting point are research methodologies called “external” to the dogmatic reconstruction of laws).

From the point of view of the structure of the reproduction of knowledge and openness to innovation, there is also an institutional trap. Brazilian academia is structured in such a way as to stimulate the perpetuation of the analytical/descriptive and hermeneutic/interpretative methods of dogmatic reconstruction, as it has very few points through which it could be opened up to innovation. Accordingly, the institutions that house the law practitioners (i.e. the Judiciary, the Public Attorney’s Office, the Bar Associations) are not at all receptive to any works that eschew the prevailing method. These institutions reinforce the current crisis in law research by keeping innovations in research far from the nucleus of knowledge of the legal profession.

In light of this diagnosis, it is essential to understand the two traps and to think of alternative ways of escaping them, thereby breaking the vicious circle and opening

up a cycle of innovation in legal research. This cycle of innovation in research should be the main engine for the new reform initiatives in legal education.

Before moving on, we wish to make clear that it is not our intention to indicate which theory or model would be “best” to attack the legal research crisis in Brazil. To the contrary, our diagnosis is that the current crisis resides precisely in the hegemony of a single epistemological focus, based on analytical/descriptive and hermeneutic/interpretative models. Accordingly, our central argument is in favor of a pluralism of methods in legal academia and we emphasize how essential it is to discuss the viability of this type of pluralism in the current theoretical and institutional context.

Next, we will present a brief analysis of analytical/descriptive and hermeneutic/interpretative models that, to our mind, prevail in the methodological orientation of legal research in Brazil. After a brief reconstruction of these models, we will seek to show how the theoretical hegemony of these two models allows for no other methodological initiatives. Finally, we will propose an initial reflection on the institutional aspects of the research crisis.

## **II.1 – Theoretical context of the crisis: an epistemological trap**

In order to understand the persistent hegemony of legal formalism in Brazil, one must investigate the theoretical models that underpin it and that provide the foundations of a certain conception of epistemological unity as regards legal research.

Let us consider here, in the sphere of the theory of law, two distinct models: **(a)** the Hartian analytical model; and **(b)** the Dworkinian hermeneutic model. Based on these two models we are able to evaluate, from an epistemological perspective, two types of conception of investigation of legal phenomena that are present in the training of legal scholars in Brazil.

In the *postscript* of the publication of his main book, *The Concept of Law*<sup>7</sup>, Hart defends himself from Ronald Dworkin's criticism of the purely descriptive dimension of his analytical theories of law, reaffirming that legal investigation should be "general" and "descriptive" in nature.

According to Hart: "My account is descriptive in that it is morally neutral and has no justificatory aims: it does not seek to justify or commend on moral or other grounds the forms and structures which appear in my general account of law, though a clear understanding of these is (...) an important preliminary to any useful moral criticism of law".<sup>8</sup>

From this perspective, and in contrast to Dworkin, Hart rejects as the object of a general and descriptive theory of law the consideration of interpretations on the meaning of the normative content with regards to concrete cases.<sup>9</sup>

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<sup>7</sup> H.L.A Hart, *The Concept of Law*, 1961, 2<sup>nd</sup> edition with a Postscript edited by P.A. Bulloch and J. Raz, Oxford, Oxford University Press, 1994, pp. 239-244.

<sup>8</sup> H.L.A. Hart, *The Concept of Law*, cit., p. 240.

<sup>9</sup> H.L.A. Hart, *The Concept of Law*, cit., p. 244.

The Hartian analytical model to some extent takes up once more the distinctions that Kelsen made in his theory of law between *normative science and causal science*, between *form and content* and between *purity and syncretism*.

As concerns the first distinction, Kelsen makes a separation between explicative disciplines, or rather, disciplines concerned with the “being” and its causal explanation in terms of natural laws, and normative disciplines, concerned with the “ought” and the norms.<sup>10</sup>

Based on this separation, Kelsen maintains that law, as a social fact, should be the object of a causal legal science. However, as a social fact, the law cannot also be considered a norm, mixing the explicative point of view with the normative one. Accordingly, as a normative discipline, the object of the analysis is the norms considered in their own right and within normative systems.

This first separation leads to the separation and the dualism between *form and content* in the theory of law and, lastly, to the distinction between *purity and syncretism*.

According to Kelsen, *form* is everything related to the structure and the nature of legal norms, to their internal relations within a normative system and to their mode of production. *Content*, on the other hand, is that which is established by the norm or that which could be established, such norm being a specific dimension and object of explicative/causal studies.

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<sup>10</sup> H. Kelsen, *Problemi fondamentali della dottrina del diritto pubblico*, p.8

Kelsen observes that, from the epistemological point of view, there should be a separation between *methodological purity* and *methodological syncretism* in order to establish clear limits between *normative problems* and *empirical problems*.<sup>11</sup>

Diametrically opposed to Hart (and, therefore, to purely descriptive analytical models influenced by Kelsen), Dworkin formulates a theory of law that is (i) interpretative, (ii) particular and (iii) necessarily value-based.

The theory of law formulated by Dworkin assumes as its object *normative propositions* and not an actual norm or a normative system isolated from social facts or from the empirical dimension of the workings of law.

According to Dworkin, “normative propositions (...) establish that legal practice is best understood if it is assumed as means through which the principle and the rule that the propositions explain are developed and applied. Judges develop, throughout their careers and in response to their own convictions and instincts, theories on the best interpretation of several levels and parts of the legal practice in their jurisdictions”.<sup>12</sup>

Accordingly, *normative propositions* have an interpretative nature. And, in this context, the researcher’s object of analysis is, from the hermeneutic point of view, interpretation itself.

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<sup>11</sup> H. Kelsen, *Problemi fondamentali della dottrina del diritto pubblico*, p. 9.

<sup>12</sup> R. Dworkin, *Legal Theory and the Problem of Sense*, p.14.

The explicative (and not, therefore, merely descriptive) reconstruction of interpretative processes is one of the tasks that must be undertaken by researchers who base themselves on hermeneutic models of the Dworkinian type.

From a methodological point of view, such explicative reconstruction entails the same type of activity as that performed by law practitioners when they formulate normative propositions facing concrete cases. In the preliminary phase, or pre-interpretative phase, the legal elements that make up the object of interpretation are identified: constitution, laws, regulations, precedents etc. In the interpretative phase, the operator extracts from the previously identified legal elements the moral principles that represent the fundamental values of positive law (“positive political morals”). Lastly, in the post-interpretative phase, the initially identified legal elements are re-interpreted, thereby conferring an explicative sense thereto, and excluding the aspects, in the face of the concrete case, considered contrary to the fundamental values of the legal order under analysis.

The process of explicative reconstruction of interpretative processes would allow the (normative) formulation of a system of ultimate principles that underlie the “positive political morals” in a given society. This system would represent the “best interpretation” of the existing legal elements, identifying and supplying a value-based parameter for the analysis of the legal propositions with regards to each concrete case.

In this way, Dworkin affirms that this hermeneutic model of constructive interpretation of legal elements of a particular legal experience necessarily involves a value-based

dimension on the part of the interpreters, as concerns the fundamental principles that underpin a given legal system.<sup>13</sup>

The Dworkinian model is, in this way, explicative (not purely descriptive) and particular (relative to specific laws). In opposition to the Hartian model (or to Kelsenian or post-Kelsenian analytical models), there is in Dworkin a clear and explicit mixture of the explicative point of view with the normative point of view. Something that Kelsen would probably describe as an example of methodological syncretism and that Hart would criticize as a method at once interpretative and value-based that renders impossible a neutral description of legal practice.<sup>14</sup>

From the epistemological point of view, it is possible to say that the Dworkinian model has an explicative dimension of empirical aspects of legal practice that the Hartian model lacks. On the other hand, the Dworkinian model entails, methodologically, the participation of the actual theorist in the interpretative process. As the law practitioner, the researcher ends up placing a value-based meaning on normative propositions in the reconstruction of the interpretative or jurisprudential practice of the cultural environment into which it is inserted.<sup>15</sup>

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<sup>13</sup> R. Dworkin, *Law's Empire*, pp. 46 ss., 49 ss., 86 ss. In the German debate, Josef Esser and Robert Alexy follow a similar model, analyzing the *institutionalization of political jurisdictions in Courts* with power to positivize principles, indeterminate legal concepts, *standards* and general clauses.

<sup>14</sup> H.L.A Hart, *The concept of law*, pp. 241 ss. Dworkin, however, in response to Hart's criticism, understands that Hart would not escape the interpretative elements aimed at justifying the validity of law. According to Dworkin: "a general theory about how valid law is to be identified, like Hart's own theory, is a not neutral description of legal practice, but an interpretation of it that aims not just to describe but to justify it – to show why the practice is valuable and how it should be conducted so as to protect and enhance that value". Cf. R. Dworkin, *Hart's Postscript and the Character of Political Philosophy*, pp. 1 e ss.

<sup>15</sup> "Interpretative theories are in their nature addressed to a particular legal culture, generally the culture to which their authors belong". Cf. R. Dworkin, *Legal Theory and the Problem of Sense*, p. 16.

The risk of Dworkinian-type models lies in the extrinsic transposition of solutions and in the possible abuse of the speculative method, whereby the models lose consistency from the epistemological point of view.

Despite these important distinctions between the two models under analysis, when applied as the basis of legal works in Brazil, both methods assume dogmatic reconstruction as a necessary stage in research. In practice, this entails the affirmation of the scientific status and the specificity of legal research in opposition to other research methodologies used in social sciences.

In the Brazilian case, this type of affirmation of the scientific status of law has significantly limited the potential of legal research to present a critical analysis of the operating conditions of the law and of the effects of the norms on various social spheres. Likewise, discussion of institutional reforms from legal works is very restricted.

In this context, we understand that legal research must be epistemologically opened up to methods other than the analytical/descriptive and hermeneutic/interpretative ones. Such opening up does not entail an outright opposition to the above-mentioned methods of investigation; it does, however, entail the acceptance of the fact that law, as an object of research, may be investigated using methodologies that do not have dogmatic reconstruction as a fundamental stage in research.

The question that we put, therefore, is whether the absence of dogmatic reconstruction in legal research would entail a loss of specificity of law as a science.

We believe it would not. We understand the law and legal phenomena more broadly as objects of research. Accordingly, a plurality of methods of investigation becomes possible, provided they contribute to the understanding of the legal phenomena.

If there is any specificity in law, such specificity resides in the object and not in the method of research. As an object, in the face of the necessity for regulation of the social spheres, the operation of law has decision-making as a characteristic and a requirement. A law is formed and reformed insofar as the (dynamic) conditions of the social spheres demand norms to resolve conflicts and institutional organization. In this sense, dogmatic reconstruction is one of the elements necessary for decision-making. It is, therefore, an approach one may apply in order to analyze Law as an object, but it is not a fundamental stage in all and any legal research.

At this point, it seems important to discuss alternatives to the conception of legal research that break the formalist methodological unity. In Brazil, a historic example that is being cited with ever-increasing frequency in debates on research and legal teaching is the American realist movement and its many ramifications.

Realism can be generally described as a movement that criticizes legal formalism in the United States, but more specifically as an intellectual movement that criticizes the use of purely descriptive analytical models to understand law from an abstract categorization<sup>16</sup>.

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<sup>16</sup> For an in-depth discussion on the realist movement and its importance to the history of American legal thought, read Morton J. Horwitz, *The Transformation of American Law: 1870-1960*, pp. 169 e ss.

The criticism of formalism worked, initially, more as a statement of the absence of research on actual operating conditions of the legal system and on how normative systems effectively work in a given society or in specific cultural environments. In this sense, the realist movement was a reaction to the fact that law had become out of touch with the reality that surrounded it<sup>17</sup>.

However, the formulation of new theoretical models from realist criticism gained more structure and body in later years, with theoretical movements such as *law and economics* and *critical legal studies*.

Both movements became prominent in prestigious American law schools as of the mid 1970s, partly because each of them represented a direct attack on the hitherto predominant model of research and teaching: self-centered and closed to other areas of the social sciences, ostensibly pragmatic and anti-theoretical, focused on procedural aspects of law and oriented to the study of cases.

On the other hand, both movements can also be understood as a reaction to a type of case law production that gained strength in the United States during the 1960s, which assumed adjudication as a process of interpretation and protection of a public morality present in the form of internal principles and values of the legal system.<sup>18</sup>

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<sup>17</sup> *Id.* p. 187 (“All realists shared one basic premise – that the law had come to be out of touch with reality”).

<sup>18</sup> “Both movements can be understood as a reaction to a jurisprudence, confidently embraced by the bar in the sixties, that sees adjudication as the process for interpreting and nurturing a public morality. Both law and economics and critical legal studies are united in their rejection of the notion of law as public ideal. One school proclaims ‘law is efficient’, the other that ‘law is politics’. Law and economics has a descriptive dimension and as such might be understood as a continuation of the social scientific tradition in the law that began with Roscoe Pound and the realists. It seeks a patterned description of the case law. The most prominent hypothesis generated by such an inquiry asserts that the law is efficient, or more particularly, that in defining or shaping rights, judges have tended to create rules that maximize the total satisfaction of preferences”. Cf. O. Fiss, “The death of the law?” in *Cornell Law Review*, v. 72:1, 1986, p. 2-3.

We can identify a normative side in the *law and economics* movement, which presents a pre-determined view of how the state should function and of how public policy should be more efficiently implemented, or implemented in such a way as to maximize the economic welfare of a given society. On the other hand, we can also identify a *theoretical descriptive model of legal practice*, assuming the methodological requirements of the social theory adopted by the realists when they criticized the type of legal research implemented to that date in the United States.<sup>19</sup>

In turn, the *critical legal studies* movement was set up as a denial both (i) of the understanding of law as a closed normative system that can be described with logical and methodological coherence and (ii) of the understanding of law as a system that develops and gains explicative meaning from the rational construction of normative propositions arising from interpretative processes performed by the Judiciary.<sup>20</sup>

The *critical legal studies* movement emphasized the openness and the indetermination of normative concepts and, consequently, the impossibility of forcing judges to make decisions according to a given understanding of the law or to determine whether a decision is, or is not, correct in terms of the application (and interpretation) of the law.<sup>21</sup>

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<sup>19</sup> M. Kelman, “Legal Economists and Normative Social Theory”, cit. pp. 326-327.

<sup>20</sup> R. M. Unger, *The Critical Legal Studies Movement*, 96. Harv. L. Rev., 1983, p. 561.

<sup>21</sup> “The purpose of this exercise is to deny the distinctive claim of law as a form of rationality. Law is not what it seems – objective and capable of yielding ‘right answers’ – but rather simply politics in another guise. Judges speak the way they do because that is the convention of their profession and is needed to maintain their power, but their rhetoric is all a sham”. Cf. O. Fiss, “The death of the law?”, p. 9.

In the United States, these two ramifications of the realist movement resulted in the prevalence of one over the other in terms of impact on legal culture. The *law and economics* movement clearly went on to exert enormous influence as a theoretical model for the analysis of law not only in terms of academic production, but also in terms of the influence it had on practice outside the law courts in the United States. More than this, the *law and economics* model was established as a methodological alternative to descriptive analytical models and hermeneutic ones.

However, in the sphere of theories of law, the *law and economics* model ends up denying the existence of a public morality that informs the normative content. The idea of public morality does not make sense insofar as values are transformed into preferences and each preference is assumed as having the same weight as a claim for individual satisfaction. The Hartian analytical-descriptive model does not deny such morality as a legal element; it merely separates the analysis of normative structures from the analysis of specific social facts and from the value judgements inherent in the interpretation of law in a given society. In turn, the Dworkinian hermeneutic/interpretative model places public morality as the object of analysis and as an element of the formation of normative propositions from the interpretative practice performed by law practitioners and scholars.

In this context, the *law and economics* model is accused, by theorists like Owen Fiss<sup>22</sup>, of being a denial of the very specificity of law.

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<sup>22</sup> O. Fiss, “The death of the law?”, p. 14.

From this perspective, both *law and economics* and *critical legal studies* would be very limited alternatives if they were taken as opposite methodologies of legal research to the analytical/descriptive and hermeneutic/interpretative models. Neither of them would offer the epistemological conditions in which dogmatic reconstructions are considered relevant, nor, accordingly, would either give meaning to laws and to the application of such laws in a given society.

However, if we assume the perspective of the methodological pluralism that we are advocating in this article and abandon the dogmatic reconstruction as a necessary stage in research, the possible models of investigation put forward by *law and economics* and *critical legal studies* could be accepted, from the epistemological standpoint, without fear of losing the specificity of Law as a science. This does not mean, however, that a critical analysis on the limits of the methods of investigation derived from *law and economics* and *critical legal studies* in order to understand the legal phenomenon cannot be made.

In our understanding, the *law and economics* and the *critical legal studies* movements should not be understood as complete alternatives to the analytical/descriptive and hermeneutic/interpretative models, much less as solutions to the crisis of legal research in Brazil, as seems to be the case in some circles<sup>23</sup>.

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<sup>23</sup> In Brazil, *law and economics* and *critical legal studies* once again exerted great influence over the debate on the creation of new law schools. The former is being proclaimed as the great methodological innovation capable of "opening up" legal research to other forms of knowledge in the field of the social sciences. The latter continues to be used in the field of legal sociology as a form of diagnosis and criticism of the workings of the institutions and the conditions of the formation and operation of law in Brazil.

They are, rather, lines of reasoning that can inform new research methodologies but that must not completely substitute other methods, including the analytical/descriptive and hermeneutic/interpretative methods themselves.

In each case, one should simply evaluate the analytical limits and conditions offered by each research methodology, assuming law as the object and eliminating dogmatic reconstruction as a necessary stage in legal research.

## **II.2. Structural context of the crisis: an institutional trap**

The current crisis in legal research is not limited to the theoretical difficulties surrounding a certain prevailing conception regarding the unity and the autonomy of legal science. In reality, the hegemony of the formalist method and the resistance to methodological innovation in legal research also presents an important institutional component little discussed in Brazil<sup>24</sup>.

This institutional component has two sides to it. On the one hand, the structure of the Law Schools and the publishing market of legal works operate as filters that contribute to the prevalence of formalist works. On the other, the various institutions that make up the professional circles (i.e. Courts, the Public Attorney's Office, the Bar Association) reinforce the central position of formalism based on the analytical/descriptive and hermeneutic/interpretative methods.

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<sup>24</sup> On this question, the literature is practically non-existent, and this essay is merely an initial and exploratory attempt at reflection on the institutional aspects that reinforce the hegemony of formalism in Brazilian legal research.

In the case of Law Schools, a wide variety of incentives stimulate the reproduction of the hegemonic method instead of stimulating innovation and methodological pluralism. Indeed, from undergraduate studies onward, students from prestigious schools are taught to reproduce in examinations the opinions of their professors with regards the abstract articulation of dogmatic concepts. This experience extends to graduate courses, where master and doctoral students prepare theses and dissertations that follow the same lines as the works of their advisers. In this sense, the tutorship system and graduate panels stimulate the reproduction of works with a formalist slant, leaving little room for methodological innovation.

In important universities, the structure of entry into the faculty, and the career progression thereafter, also tends to channel energy toward formalist works of the type mentioned above. Indeed, the most prestigious universities generally recruit and promote their teaching staff by requiring that they both sit in examinations and present theses to panels of experienced professors, who expect precisely that kind of formalist work that contributes to the "doctrine", with an abstract discussion on dogmatic concepts. Works that involve some degree of empiricism are regarded with suspicion and are the target of censorship of some kind or other.

The Legal publishing market, in turn, does not seek methodological innovation. To the contrary, demand is focused on works that are descriptive or interpretative of legal dogmatics, directed at students attending the hundreds of legal courses<sup>25</sup> and at professionals interested essentially in quotations that can support their arguments. A large part of the demand for legal books is directed to general "manuals" with

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<sup>25</sup> Currently there are over 1,000 Law courses in Brazil recognized by the Ministry of Education. In Brazil, approximately 45,000 bachelors at law are formed annually (cf.– Ministry of Education).

abstract discussions on entire branches of legal doctrine (i.e. Constitutional Law, Private Law). With this, instead of rewarding innovation and pluralism, the publishing market stimulates the reproduction of the same types of works that were prevalent in the past.

Together with this educational and publishing environment, the various institutions that make up the professional legal circles (i.e. Courts, the Public Attorney's Offices, the Bar Association) reinforce the central position of formalist works with a descriptive slant. Indeed, most of the time, judges use abstract analytical and interpretative reasoning to give grounds to their decisions. Additionally, the courts cite such formalist works as the basis of intellectual authority to justify decisions. As such, the relevance of these works to the all legal professions that interact with the courts is reinforced.

In this way, an institutional ecosystem that ascribes enormous utility to analytical/descriptive or hermeneutic/interpretative legal research is created. At issue, here, is a “lawyer elite”, which produces and reproduces the so-called “doctrine” in the form of legal manuals, legal opinions and legal decisions and influences the legislative production of the country, given its specialized technical knowledge and its “network of professional relations”<sup>26</sup>.

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<sup>26</sup> We do not intend to explore this idea here. However, the research that Yves Dezalay and Bryant G. Garth conducted in Brazil seems particularly significant, demonstrating, with the strong methodological influence of Pierre Bourdieu, the existence of a “network of relations” between players that command the main institutions of operation of Law in Brazil, in the private sector, in the public sector and in academia. Using such network as their starting point, the authors seek to explain the reproduction of institutions, normative systems, workings of law and form of understanding of the dynamics of the workings thereof. The research was conducted by interviewing the main partners of law firms in Rio de Janeiro and São Paulo, judges of the Supreme Federal Court, team members of the justice ministries, members of the economic teams of the treasury ministries as well as members of important government agencies such as the Brazilian equivalent of the Securities and Exchange Commission (CMV), the Brazilian Central Bank, the National Bank of Economic and Social Development (BNDES) and, lastly, members of university and research centers of excellence. Part of that research results was

This academic and professional environment creates an institutional trap, which reinforces formalism's almost absolute hegemony in opposition to all other methods of research in social sciences, which could contribute toward a better understanding of the conditions in which the content of norms are formed and their effects on social spheres. This environment creates a context that is decidedly unfavorable – not to say hostile – towards innovative research, which seeks new ways of regarding Law.

### **III – Conclusion: the way ahead**

As we have sought to explain in this brief essay, the crisis in legal teaching in Brazil has roots that go much deeper than the discussions so far. The facts that formalist teaching is out of touch with the increasingly dynamic reality and that the lecture method has been very ineffective are only the most visible aspects of the problem. Underlying these aspects is a chronic crisis in legal research.

The research conducted today in the Brazilian legal academia is derived from descriptive analytical models (accused of being formalist) or interpretative speculations (apparently without grounding in consistent empirical research) using Dworkinian-type models. Realistic alternatives, such as, for example, those inspired on the *law and economics* or *critical legal studies* schools of thought, end up being

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described in Y. Dezalay and B. G. Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order*, Chicago: The University of Chicago Press, 1996; and Y. Dezalay and B. G. Garth, *Global Prescriptions: The Production, Exportation, and Importation of a New Legal Orthodoxy*. Michigan: The University of Michigan, 2002.

characterized simply as a denial of the specificity of research in law and ignored in academic debate.

The theoretical and institutional environment in Brazil has prevented innovation in Law research insofar as it maintains the hegemony of legal formalism as the only perspective available to researchers. Accordingly, it is essential to overcome the traps described in this essay, opening up space for the application of other methods and creating incentives to innovation and experimentation.

As regards the epistemological trap, a first step would be the acknowledgement of the coexistence of several methods of legal research, including, specifically, realist methods and empirical analyses on the workings of the legal system, with greater explicative concern. In the same way, it should be acknowledged the relevance of research with a normative slant that seeks to evaluate the workings of the legal system and propose alternatives of institutional design.

Accordingly, the specificity and the unity of legal research would be achieved not by dogmatic reconstruction of laws as a necessary research step but by the actual object of analysis. Many methodological perspectives could co-exist in equal conditions to the extent that they contributed to the understanding of laws and its effects in different social spheres.

This change in perspective on legal research would open the doors to a new cycle of innovation and experimentation in academia. Evidently, at the beginning, works based on new methodologies would be more experimental in nature and could be

considered less robust or desirable. However, simply opening up space to new types of questions, new methodologies and new approaches to the legal phenomena would tend to stimulate an academic debate that goes beyond the description or expert interpretation of logically structured and supposedly complete legal systems.

With regards the institutional trap, overcoming it depends on reforms that guarantee a greater permeability of institutions to innovation. In the first place, law schools must be opened up to experimentation with new methods, especially with legal research performed with methods used in other areas of the social sciences. Innovative works should be stimulated and not rejected as though they were not “legal research”. Undergraduate examinations, works produced by those pursuing masters or doctoral degrees and public examinations for the recruitment and promotion professors should encourage new angles of analysis of the legal phenomenon, not reinforce the hegemonic formalistic approach.

This cycle of innovation could expand outward from the law schools to other institutions, including the Judiciary, professional circles, and policy makers.

Evidently, this would require a reformulation of the mechanisms of reproduction of these institutions (i.e. academia, courts, the Public Attorney’s Office). Reflection on the rules of entry and promotion in careers would be required with a view to altering the incentives to repeat the formalist approach that currently exist, something that is beyond the limits of this essay.

In sum, in our view, it is essential to associate the diagnosis of the crisis in legal education with the diagnosis of a crisis in legal research, the latter arising from the almost absolute hegemony of the formalist methods. Without a profound transformation in the current approach to research, which would provide a fertile theoretical and institutional environment for innovation and experimentation, any reform of legal teaching will be superficial, ascribing new colors and some dynamism to classes that will continue, essentially, to be the reproduction of a formalist view of law. In this context, new methodologies of teaching law (e.g. case or problem methods instead of lecture classes) and career formal changes (e.g. full-time professors instead of part-time ones) could end up being merely palliative in the absence of research that allows the creation of new conditions for explanation and for the transformation of normative contents and of the institutions related to the operation of law.