Revista de Estudos Constitucionais, Hermenêutica e Teoria do Direito (RECHTD)
10(2):109-115, maio-agosto 2018
Unisinos - doi: 10.4013/rechtd.2018.102.02

The teaching of Philosophy of Law and the Case-Method: Some considerations on its challenges in Latin America[1]

O ensino da Filosofia do Direito e do Método do Caso: algumas considerações sobre os desafios na América Latina

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Abstract

The case-method became the main methodology for achieving significant learning outcomes in Law. The pedagogical and didactical advantages of this method for legal disciplines, such as criminal law, civil law, and contracts are well known. Nevertheless, the educational contributions of the case method for jurisprudence, legal theory or the philosophy of law are less examined. In this article, I will maintain that case method can actually make a significant contribution to teach and learn philosophy of law in the Latin-American educational context. I will argue the former by highlighting some preconditions for a meaningful learning and teaching experience on philosophical problems through case-method. Later, I will present three challenges of case-method education applied to the philosophy of law; that is, (a) recruitment of highly qualified teachers; (b) training on this teaching methodology, considering the peculiarities of legal philosophy; (c) considerations for implementing the case-method in large courses.

Keywords: case-method, legal training, legal philosophy, active learning methodology.

Resumo

O método do caso tornou-se o principal método para obter resultados de aprendizagem significativos no direito. As vantagens pedagógicas e didáticas deste para disciplinas legais, tal como o direito penal e o civil e contratos são bem conhecidas.

[1] A draft of this article was discussed in "VI Jornadas sobre Enseñanza del Derecho" (University of Buenos Aires, 2016); XXX Jornadas de la Asociación Argentina de Filosofía del Derecho" (University of Buenos Aires, 2016) and in the International Congress: "Constitución, Derechos Humanos y Fundamentación Jurídica" (University of La Sabana, Colombia, 2017). I am grateful to participants of those events for many insightful suggestions. I also thank Prof. Juan Cianciardo (University of Navarre, Spain), Pilar Zambrano (University of Navarre, Spain), Juan B. Etcheverry (Austral University, Argentina), Pedro Rivas (University of La Coruña, Spain), Fabio Pulido Ortiz (University of La Sabana), Paulo Nestares (University of Buenos Aires, Argentina) and Raúl Madrid (Pontifical Catholic University of Chile) for their helpful comments on a draft of this article. This work was supported by the National Agency of Scientific and Technological Promotion of Argentina under Grant PICTO-2016-0095 ("Coordinación y autoridad en el Estado Constitucional de Derecho. Desafíos teóricos y prácticos en un contexto de fragmentación moral").
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No entanto, as contribuições educacionais do método do caso para a jurisprudência, a teoria jurídica ou a filosofia de direito são menos examinadas. Neste artigo, considerarei que o método do caso pode efetivamente contribuir de modo significativo para ensinar e aprender filosofia do direito no contexto educacional latino-americano. Argumentarei o primeiro, destacando as condições prévias para uma experiência significativa de aprendizagem e ensino sobre problemas filosóficos por meio do método do caso. Posteriormente, apresentarei três desafios principais da educação no método do caso aplicado à filosofia do direito; isto é, (a) recrutamento de professores altamente qualificados; (b) treinamento sobre essa metodologia de ensino, considerando as peculiaridades da filosofia jurídica; (c) considerações para a implementação do método do caso em grandes cursos.

Palavras-chave: método do caso, formação jurídica, filosofia jurídica, metodologia aprendizagem ativo.

Introduction

The case method expanded from social to natural sciences (Freeman Herreid 2007, p. xii-xv). Nevertheless, the paradigmatic examples of implementations on case method are historically located in the fields of Management and Law (Freeman Herreid 2007, p. xii-xv). Regarding Law, the main contribution of this methodology is that it allows learning not just the content of concepts but also its application for to settle real or hypothetical problems. Even more, the case method can also be useful for evaluating legal solutions as better or worse and, in the same extent, it allows to elaborate the best possible solution for a case.

Legal education through case method took Harvard School of Law to quintuple its number of students (Kenny, 1916, p. 188). According to Fernando Toller, that was a consequence of the nature of legal education based in cases, as it makes possible to train future lawyers for a critical and reflective practice of the Law (Toller, 2010, p. 25). We shall straightforwardly notice that in legal disciplines such as criminal law, torts, bankruptcy law, contracts or criminal law. In fact, a possible way to demonstrate proficiency in those subject matters is by knowing how to settle cases on those fields. To summarize this position, as Kenny did, the case method trains students in reasoning just like judges do (Kenny, 1916, p. 189).

There are many disagreements between legal positivists and natural lawyers in several topics. However, usually both agree that legal philosophy is a human practice or activity. More specifically, on one hand, for most analytical legal positivists the core of legal philosophy is to clarify the meaning of concepts and expressions used by lawyers and officials through conceptual analysis (Hart, 1958, p. 607). On the other side, the natural law tradition holds that the content of philosophy of law aims at grasping the ultimate purposes of Law, which are beyond positive law (Serna Bermudez, 1995, p. 295). Therefore, both holds that philosophy of law deals with a special kind of social practice regarding the aims of Law. Of course, the scope, limits and nature of philosophy of law are still a matter of dispute among them.

Thus, if we assume that legal philosophy is a practice, this suggests that is possible to teach that subject by the case-method. Morgan held that case-method is a desirable and possible mean, although not the only one, for building complex thoughts by solving moral problems (Morgan, 1998, p. 415). In a similar regard, but applied to legal philosophy, I will defend that the case-method can make an actual contribution for teaching philosophical issues regarding the Law.

Moreover, the case method will allow significant learning outcomes on that field of legal knowledge. More specifically, I will hold that case method is desirable for teaching philosophy of law as it allows students to realize that solutions for "hard cases" rely upon answers to the main philosophical questions. However, authors such as McGechan and Cavers rejected that position. They maintain that the very purpose of the case-method does not aim at elucidating the concept and ultimate purposes of law, but to educate and train lawyers for judicial practice (McGechan, 1999, p. 406; Cavers, 1943, p. 449). This position suggests that case method is useless for grasping philosophical or theoretical problems. Case method trains you on how to use concepts but not on recognizing the reasons, foundations or further justification of those concepts.

However, I shall mention that there is not a single solution in this regard. It would be insensitive to apply

nothing but a case-method for legal education —in general— and philosophy of law —in particular—. In fact, no single educational method will necessarily achieve significant learnings outcomes. My claim is mainly normative; that is, it is desirable to use case method for teaching the main topics of legal philosophy, but its meaningful and successful application requires fulfilling some pre-conditions[3].

Thus, one of the main aims of this work consists in identifying and arguing those preconditions, not for general legal education, but mainly for legal philosophy. The scope of this work intents on offering a contribution for improving Latin American teaching practices, mainly inspired in the Civil Law tradition, and dominated by traditional lectures (Gómora Juárez, 2017, p. 3). That is why I will address the topics of this article by the means of literature originated in the Common Law tradition. In fact, the justification of this blend is that in common law countries we may find the most systematic and significant approach to the problems related to teaching by case method. In consequence, an improvement from teaching practices centred in lectures to active learning methodologies —such as the case method—, as far as I understand, will be better appreciated by the means of American and English literature[4].

Briefly, I will summarize the aim of this article as it follows: what is required for a successful teaching on legal philosophy by the case-method? Second, what are the main challenges for applying that methodology in the field of legal philosophy? The next two sections of this article will address these topics.

Teaching solving problems: more similarities than differences among theoretical and practical disciplines

There are several definitions on what the case method is. I do not intend to offer a clear and definitive concept of the case method because, as Rundell noticed, instantiations of that methodology are very wide (Rundell, 1926-1930, p. 698). However, all those instantiations seem to share some features: the main purpose of that method is to put students in the position of arguing how to solve an actual or hypothetical legal problem (Rundell, 1926-1930, p. 698).

Nevertheless, the application of the case method in the field of jurisprudence and legal philosophy was slower than in other practical legal disciplines (Rooney, 1958, p. 173). In fact, after many years of consolidated practice of the case method in other legal subject matters, the first book that incorporated cases was Jerome Hall's *Readings in Jurisprudence* (1998). However, as Rooney had pointed out, it was not a work that included judicial decisions for to exam them in the light of a philosophical point of view (Rooney, 1958, p. 173).

Instead, *Reading in Jurisprudence* "was less of judicial opinions calling for philosophical analysis than quotations from Writers on jurisprudential subjects illustrative of the topics suggested by a carefully prearranged classification scheme" (Rooney, 1958, p. 173). In contrast, Lon Fuller's *Problems of Jurisprudence* (1949) offered a significant innovation in the teaching of legal philosophy as he incorporated three hypothetical cases. That intended to describe and evaluate the philosophical foundations of legal reasoning. Moreover, as Rooney suggests, Fuller was one of the first teachers who revealed the impact of legal philosophy in actual judicial decision (Rooney, 1958, p. 173).

But Fuller's positions was rejected by McGechan who had maintained that as case method entails training future lawyers, then it could not work for developing a better understanding of what the Law is (McGechan, 1999, p. 406). In my view, the former opinion fails to grasp the deep similarities between solving practical and philosophical or theoretical problems. In fact, as mentioned in an interesting article titled "11 Reasons to Ignore the Haters and Major in the Humanities", we shall identify several arguments for a common concern among practical and theoretical problems (Nisen, 2013).

For this work, I shall mention that education in humanities allows the following: (i) to think and to write in a critical way. (ii) To learn how to do what machines cannot perform —what is especially important in a service-centred economy—. (iii) To learn how to explain and argue for an idea and, in the same extent, this method teaches how to deal with the others. Indeed, case method may not usually aim at understanding the concept of —or the ultimate end of— the Law (Nisen, 2013). However, the former does not entail the impossibility of teaching and learning the main problems on legal philosophy by the Case Method. To put it in other

[3] The nature of this article is normative rather than descriptive or evaluative. For descriptions and evaluations on how Latin American education has applied the case method for teaching practical disciplines (*i.e.*, business administration, political sciences, applied ethics, etc.) and legal education: Toller (2010); Miller (1987) (for Argentinean legal education); Monroy Cabra (1999) (for Colombian legal education); Salles *et al.* (2015) (for Brazilian business education); Laux (2016) (for Brazilian legal and political education) and Leite *et al.* (2017) (for Brazilian bioethics education).

[4] For a critical approach on American law influence on Latin American legal education, see Gardner (1980).

words, teaching the philosophical foundations of Law may aptly resort to didactical methodologies centred in cases.

Thus, philosophy of law does not necessarily offer a set of sophisticated, dilettante and merely theoretical arguments for future lawyers. In fact, a deeper comprehension on what the Law is and its ultimate foundations may contribute to develop a better training on solving actual legal issues. The five steps usually implied in the resolution of a practical problem through the case method are the same for discussing a philosophical topic. That is, (i) to identify and diagnose a problem; (ii) to propose alternative solutions; (iii) to design a plan of action to tackle that problem; (iv) to implement that plan of action; (v) to keep the whole process open for further developments, ideas or new data (Hess and Friedland, 1999, p. 37).

Those five steps describe exhaustively what legal philosophers do in their academic practices. The phases of work are not entirely different between what a philosopher of law does and what a legal clinic performs. Both use a quite similar methodology for addressing problems. However, there are also some differences. More specifically, in practical or dogmatic legal disciplines such as torts or contracts, the learning outcomes aims at knowing *how to use* legal concepts and, then, *how to reason* with those concepts (Ogden, 1984, p. 657).

Unlikely, legal philosophy resorts to cases for to teach not how to use but *how to evaluate critically* the application and content of legal concepts. Accordingly, from the perspective of philosophy of law, the goal is not just to learn how to reason what is the law for the case, but, above all, to learn how to analyse the structure of the legal concepts and to propose a general justification for legal reasoning.

Some may hold that this is not a specific approach of legal philosophy. After all, in legal disciplines such as torts, contracts, criminal law, to learn how to use the concepts of those fields entails to know how to evaluate the use of those concepts as "correct" or "incorrect". Otherwise, to teach those legal disciplines will be just a transmission of how to perform some mechanical operations that will result, at best, in habits or routines, but not any kind of actual knowledge (Llano, 2011, p. 319).

Nevertheless, the scope of legal philosophy entails to grasp the ultimate ends or the foundations of legal knowledge. In consequence, the very core of teaching legal philosophical topics through case method should be to illuminate what is the ultimate purpose of Law and to evaluate critically the language used by legal propositions. For achieving the former aims, it is highly desirable to learn and teach philosophy of law by the case method. After all, if philosophy is an activity or practice, then case method shall function as a very beginning point for a deeper understanding on the philosophical problems of Law. However, this entails some significant challenges for a teacher who is willing to blend the case-method and the teaching of legal philosophy. I will discuss those topics in the following section of this article.

Some challenges for teaching legal philosophy by the case-method

First challenge: To recruit highly qualified teachers

The successful implementation of the case method requires more than a descriptive or informative knowledge regarding the main topics on legal philosophy. Kenny holds that success in the application of that methodology in Harvard Law School was a consequence of its attractiveness for recruiting the best teachers of the country (Kenny, 1916, p. 190). In fact, Langdell, who was the Dean of the School of Law when Harvard decided to apply the case-method as a distinctive trademark of their educational practices, was committed to professionalize as much as possible the work of their law professors and to recruit the best teachers of the United States of America. In order to do so, Langdell hired not just prestigious graduates from Harvard or Yale, but also from many other universities (Chase, 1980, p. 342).

The recruitment of law professors highly qualified was not just convenient but strictly necessary for a successful implementation of the case method. In fact, the case method requires a very high proficiency in, at least, some legal disciplines. A teacher who uses the case method must answer questions and discuss arguments proposed by students. Unlikely traditional lectures, the student does not just participate in the classroom with some questions on topics of the presentation. The case method is quite more demanding for teachers and students. It requires a professor who is able to develop a critical and reflective knowledge on what the Law is in order to be able to discuss, propose and evaluate the solutions and answers offered by its students. To put it differently, the case method is more challenging as it demands not just good lecturing skills to teach what the law is but to be able, most of all, to criticize actual or hypothetical solutions for legal problems.

Thus, the application of the case method entails to stimulate critical thinking by making questions. This, on students' side, requires confronting what they think know —whether that is sound or not— on a certain topic, just like Socrates used to do (Weaver, 1991, p. 548; Kerper, 1998, p. 367). In consequence, to use the case method requires teachers who do not just describe the contents of the syllabus. Instead, it is necessary to develop a deep understanding on their subject matter. In other words, the teacher should be able to expound a critical view of the topics it teaches. Even more, the teacher shall be able to offer or, at least suggest, an alternative approach for its contents.

This entails to rethink the recruitment processes for law professors and teachers. In fact, this requires putting the critical or reflexive knowledge on the subject as a top priority. However, some prestigious universities do not pay attention to that. For instance, the administrative procedure for hiring tenured law professors in the University of Buenos Aires provides an extensive detail of issues for to be taken into consideration. Indeed, the tenure committee shall address the following issues for every single candidate: (i) academic grades; (ii) publications; (iii) research and teaching plan; (iv) personal interview; (v) competition of lectures among candidates: (vi) other relevant elements (Universidad de Buenos Aires, 2012). Indeed, as there are no specifications on how that teaching plan or lecture must be structured, aptitudes of the candidate for developing a critical or alternative view of the content are not necessarily relevant for that committee.

In contrast, as case-method goes beyond lecturing on some fixed topics, then it requires from law teachers to develop a complex, critical and sound reflections on the topics of syllabus with students in real time. Thus, if any institution assumes the commitment to apply the case method —as well as any active learning methodology— for teaching subjects such as Legal Philosophy, it becomes necessary to evaluate a prospective candidate in its aptitudes for developing and articulating a sound critical approach on the content of its subject.

Second challenge: To train teachers for implementation of the case-method in Legal Philosophy

The case method requires from teachers a fundamental knowledge of the basic criteria for the successful application of this methodology. Indeed, as I have mentioned before, the case method involves a learning and teaching methodology centred in solving problems by following five steps. (i) To identify and diagnose a problem; (ii) to propose alternative solutions; (iii) to develop a plan of actions; (iv) to implement a plan of actions; (v) to keep the whole process open to new data and ideas (Hess and Friedland, 1999, p. 37).

What can link those steps within the case method applied to teach legal philosophy? The Socratic Method. In fact, as Toller highlighted, the former method is one of the main historical roots of case method (Toller, 2010, p. 42). In a few words, the Socratic Method involves understanding and evaluating arguments delivered by the adversary in order to justify a certain decision (Toller, 2010, p. 42). That methodology structured the classic dialectics as the most appropriate way to recognize the truth when arguing with somebody. Even more, this method allowed many generations of law professors to communicate the legal knowledge by a critical thinking and by means of the patient and difficult art of articulating sharp and persuasive arguments. Finally, the Socratic Method was very useful for training lawyers in identifying the weaknesses or unsoundness in adversary's arguments (Toller, 2010, p. 42).

In general, especially in the context of legal philosophy, the Socratic method can only give birth ideas of students. This requires an intelligent guidance of the teacher through sharp and challenging questions (Areeda, 1996, p. 915). Thus, the teacher performance requires a sound and reflective level of knowledge on its subject. Therefore, it is not enough with delivering a clear and sound lecture on what some authors have held on what the Law is. The teacher shall guide a collaborative construction of the knowledge among students.

More specifically, by the art of making challenging and accurate questions, teachers will confront what students think on what the law is and what are its ultimate purposes, with explanations and justifications of the main authorities on the field. The outcome of this process will put teachers in a position of "obstetrician of ideas"; that is, teachers will not bring to the world new ideas in its students. Instead of attempting to do so, the teacher will assist students in process of delivering their own sound and complex thoughts or set of ideas.

For any philosophical discipline, the art of making accurate questions is one of the most significant means for a learning or teaching methodology centred in solving cases. The relevance of questions consists in, as Llano had mentioned, revealing a chiaroscuro. That involves some light to notice that we lack some knowledge and also some shadow that does not allows us to see the problem clearly (Llano, 2011). To put it in other words, a chiaroscuro entails that we do not know something,

but we have noticed that lack of knowledge. Indeed, to realize that we do not know everything, but also more than nothing, is being situated in the very starting point for a philosophical reflection.

The teacher who centres its classroom practice in solving of cases shall guide a critical reflection through questions that connects what the student thinks he knows (or actually knows well) with the content on the syllabus, in order to solve a real or hypothetical problem. It is important to highlight that teachers, under no circumstances, shall make the student feel like he or she knows nothing. The purpose of teaching legal philosophy shall be to communicate how to think sounder and clearer what the Law is. Indeed, the teacher should make feel the student that, in some way, he already knew the answers but not as clear as possible. Collaborative work among students and the teacher shall cause that clarity (D'Auria, 2010, p. 31-38).

Third challenge: How to use the case-method in large groups of students

A typical question or objection regarding application of case method is the following: is it possible to apply the case method in large courses with more than thirty students? The answer is "Yes"; but as long as the students work with the same material, questions and instructions, as Llewellyn suggested (Llewellyn, 1948, p. 215). Of course, in that scenario it will be more challenging for teachers to organize discussions of the case. However, before large courses, the teacher shall control that by requesting the answers to some specific students, and not only to those who are usually involved in the discussion. That suggests the convenience of keeping records on the participation of each student.

However, it is desirable to incentive some independent workload —outside the classroom—. That will allow students to know not only information regarding on *how to* solve the case but also on the philosophical topics involved. In that context, it is highly recommendable to deliver the texts and case, instructions, and the question in advanced and to complement the teaching with some traditional methods such as lectures (Llewellyn, 1948, p. 215). Thus, the work in classroom will be able to focus on the discussion of the case between students and them with the teacher.

In consequence, the question on implementations of case method for large groups of students is not whether it is possible or not, but *how to* do so. More specifically, the challenge of the case method before large courses is how to implement it without undermine it. To put it in other words, the question is how to keep the case method as a mean —not an end in itself— for teaching the ultimate purposes of Law.

Conclusions

The case method is a useful didactical tool or mean for building significant learning outcomes in the field of legal philosophy. It is not just possible to use the case method when teaching philosophical topics on what the Law is and its ultimate ends. Solving cases provides an opportunity for developing a significant learning on not just what some philosophers said but on how to better structure and defend a philosophical argument. This usage of case method enables to develop almost the same aptitudes and skills that are required for solving more operative and practical legal problems.

However, teaching legal philosophy through the case method entails three main challenges. First, to recruit teachers able to develop critical and reflective knowledge on the contents of legal philosophy. Second, to train teachers of legal philosophy for implementation of the case method. Third, before large groups, it is desirable to complement the case method with independent workload and traditional methods of teaching such as lectures. This will allow to focus the work in classroom on the discussion of solutions for the case among students, but with the guidance of teachers.

By these means, the outcome of learning legal philosophy by the case method will develop skills and aptitudes that will be useful not just for thinking more sharply the main philosophical issues, but also more operative legal disciplines such as criminal law, torts, contracts, etc. This is why Bertrand Russell used to say, "There's nothing more practical than a good theory". If we move that statement to our field, we shall state the following: "legal philosophy is useful as it allows a reflective and critical approach to the foundations of our actual legal practices".

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Submetido: 06/03/2018
Aceito: 19/07/2018