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Foundations for a Revival of the Case Method in Civil Law Education

Fernando M. Toller

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FOUNDATIONS FOR A REVIVAL OF THE CASE METHOD IN CIVIL LAW EDUCATION*

Fernando M. Toller[†]

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I have a priceless debt to the late Professor Litvinoff, who kindly attended my presentation, for his mastery, his leadership, his nobleness and humanity, and especially for his friendship. I was honored to be a speaker in this series, in that special and last homage to the remembered and illustrious Argentinean professor, a true legend, in his home law school. There at the LSU Law Center, Common Law and Civil Law are compared in real life. I am also thankful to the participants in that workshop for my enrichment with the vivid and fruitful discussion that took place after my presentation. I think that it would have been difficult to have a better public to share and discuss the topic of this article with the blend in the Louisiana faculty of American and foreign professors.

I have an especial debt with Professor Olivier Moréteau, another true master in law and life and a permanent source of inspiration. He encouraged me to deliver my presentation and to write about the present topic, and provided priceless aid and suggestions to this article—particularly regarding the examination of current legal education in Europe. Another acknowledgment is due here to Agustín Parise, for his permanent advises and patience and for the superb job of him and his staff in the edition of this article.

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ABSTRACT

The article explores the origins, foundations, and present development of the case method in the Civil Law tradition. It supports the idea that, properly defined, this methodology is very suitable for law, and not only in Common Law jurisdictions, but also the Civil Law and is even more appropriate in Continental law schools. There are indeed some undisputable common roots between Common Law and Civil Law regarding this pedagogical tool.

The misunderstandings and skepticism about the usability of this method in Civil Law education are challenged and answered. The article proves that the case method is a serious and useful scholarly tool; it is not a new pedagogical technique, but is rooted and was nourished in ancient educational tradition, especially in humanities and law; it fits law as well as business, not only in the Common Law but also in the Civil Law tradition; it is deeply related to the entire history and development of the Civil Law.

The author claims that it is not accurate to affirm that the case method is inherent and exclusively bound to a system using case law as a primary legal source, such as the Common Law tradition. He points out that it can be a fertile method in the Civil Law tradition.

The work encourages a rebirth of this methodology for the teaching and learning of the Civil legal system, demonstrating that the Civil Law was taught with this methodology in the past and that present experience in contemporary law schools proves that it is an outstanding teaching tool in Civil Law jurisdictions.

The case method is not an exotic flower having no place in the garden of Civil Law, but an important pedagogical element for the renovation of the Civil Law, the revival of which ought to be encouraged.

I. INTRODUCTION:
WHY A *REVIVAL* OF THE CASE METHOD
IN THE CIVIL LAW TRADITION?

Currently, the case method is—especially in the Anglo-Saxon world—a pedagogical tool used in a wide variety of disciplines—if not all—both in social and “hard” sciences.¹ Cases are used in exact sciences to illustrate a physical principle or to train students

1. See MICHAEL MASONER, AN AUDIT OF THE CASE STUDY METHOD 1, 11, 41-42, 46 (1988); MICHAEL R. LEENDERS & JAMES A. ERSKINE, CASE RESEARCH: THE CASE WRITING PROCESS 4 (2d ed. 1978).

in the use of the algebraic method—e.g. “exercises” or “problems.” For instance, cases are used in naval academies: students analyze the possible courses of action that Nelson had in Trafalgar, learning the use of tactics and strategies. Case methodology is also used to analyze agricultural, governmental, or engineering problems. Although not referring to them as “cases,” many schools and universities present students with problems of logistics, journalism, and architecture. Furthermore, it is well known that the case method is widely used in business and legal studies, especially in the United States.

The operation and functioning of this methodology is different depending on the discipline. The methods used to teach accounting are not the same as the ones used in teaching political science. Nevertheless, in every example cited the educational device used is the case method. In these fields, this methodology consists in some kind of analysis of a real or hypothetical situation, an examination of the different forms of scrutiny and alternatives available and an evaluation and discussion of possible correct solutions and sometimes trying to find the best one. In this article, sometimes I use the concept of “case” and “case method” in this broad sense—for instance, regarding this methodology in the study of medicine—a little more comprehensive than the specific legal use of case method that I will explore further in this article. I think that is important to widen the focus to better understand the varieties and possibilities of this methodology. In this way a greater awareness of the sources and roots of the case method and its educational legacy and potential in the law becomes clear.

In this article I am adopting a working concept of case method in legal education that encompasses Langdellian and non-Langdellian approaches. Here the case method referred to is a pedagogical tool mainly consisting of the discussion in classrooms wherein judicial decisions are studied and students analyze written hypothetical or situational cases that are supplied by professors. It does not impair the case method to use it in a different way from the Langdellian approach of strict observance. This theme is later developed in III.C. In this approach the professor never explains the law, but exclusively gets it by extracting the principles from cases after painful and meticulous discussion carried on with the students. I propose that the case method could improve by adding previous, correlative, or posterior explanations by professors of the general principles governing a legal institution or a juridical problem or situation. This could then be supplemented with the use of codes, hornbooks, and manuals. This would enrich the case method, and for several reasons, improve the old Langdellian

system. This improved method could then be used in both Common Law and Civil Law courses.

We use this approach for two decades to teach Civil Law in Austral University Law School, with encouraging results, as I demonstrate *infra* in V.E. Therefore, I am including here both the Langdellian goal to find out the law from the case discussion and to reintroduce an entire science in an inductive way with a more modern approach to case method. The core of the operation of case method wherein the discussion or analysis of the professor with students and between the students. This would enable the use of interpretative devices and options to reach a solution and show the value of different paths that could be used by legal advisers or judges. They would thus better understand adjudications and the correct, just and suitable answers for the given situation. Consequently, this methodology endeavors for the students to develop and cultivate a critical legal mind that is oriented towards problem-solving. It is key that they understand the principles of law not as abstract conceptualizations, but as the answers to the complex juridical problems found in real life.²

These comments lead to the following questions: Where does this methodology come from and how has it spread so quickly? Is it really suitable for legal studies? A positive answer to the latter leads to another question: Is the methodology appropriate for the study of the Civil Law, as much as it is for the Common Law? These questions will be answered using a historical perspective, with a focus on the antecedents and the origins of the use of the case method, and on its relation with similar methodologies used in the past. Revealing its foundations will show how to address the difficulties generated by a revival of the case method in Civil

2. For my complete concept of “case method,” and the correlative concept of “case,” see my work ENSEÑAR Y APRENDER DERECHO CON EL MÉTODO DEL CASO: FUNDAMENTOS Y MODOS DE IMPLEMENTACIÓN (forthcoming March 2011), especially chapters III, §§ 16-17, VI, §§ 29-36, and XII, III, § 78. I am not excluding alternative forms to perform it pursuing specific educational goals in the broad field in which I draw the general scope of this methodology. For example, I am not excluding, neither the debate of mini-cases in the development of a theoretical lecture, nor discussion and analysis using role playing, or the discussion of problematic fragments of movies, nor the analysis of cases outside the classroom hours, individually or in groups, just orally or in written form. One of the main problems on the comprehension of this methodology is that different professors, of diverse traditions or sciences, frequently have a narrow view of the case method, in some way parochial, to see different and complementary approaches that are available within case law methodology.

Law education, and uncover some of the extraordinary possibilities for the methodology in this legal tradition.³

Legal education is a fascinating and challenging topic when explored in the context of the relationship between the Civil Law and Common Law traditions. There are at least two main reasons for that. The first one is that education is the beginning of several things, and to spread and develop the tradition in teaching, learning and training in law is a very important matter. This is especially true since there is undoubtedly a cross fertilization between education and practice. The second reason is that legal education is probably one of the main topics revealing the cross influences, the common roots and future permeability of the Common Law and Civil Law traditions. I am of opinion that such permeability does not contaminate or impair one tradition or the other, but helps to improve both of them.

Why speaking of a “revival” of the case method in Civil Law education? There are several reasons why exploring the foundations of the case method in civilian legal education: a) because it is necessary in order to understand, teach and further the knowledge and learning of the Civil Law; b) because it may be convenient, and even mandatory, in the forthcoming Bologna unification process of education in Europe; c) because the case method fits the Civil Law very well; d) because the Civil Law was in fact taught with the case method; e) because there are several common roots between the Common Law—where the case method flourished—and the Civil Law regarding this kind of pedagogical tool; f) because, based on the last points, the case method is not an exotic flower that has no place in the garden of Continental Law; and g) because there is, currently, a revival of case method in Civil Law education.

The topic of this work, besides the relevance that it has for those interested in this didactic method, has an added benefit. Many law professors in the Civil Law tradition look at the case method with skeptical eyes, in the belief that it is inexorably linked to the characteristics of what they mistakenly think is its origins or its nature. Such bias reveals a triple misunderstanding: firstly, that

3. Due to the scope of this paper, I will not deal with the different versions of the method in the 20th century in the two main areas where it is used, law and business. For the expansion and use of the method in law schools, *see* JULIO CUETO RÚA, *EL “COMMON LAW”: SU ESTRUCTURA NORMATIVA. SU ENSEÑANZA* 301-05, 311-23, 350-94 (1957). For the use of this methodology in business schools, *see* FRITZ ROETHLISBERGER, *THE ELUSIVE PHENOMENA: AN AUTOBIOGRAPHICAL ACCOUNT OF MY WORK IN THE FIELD OF ORGANIZATIONAL BEHAVIOR AT THE HARVARD BUSINESS SCHOOL* 141-142, 171-172, 233, 236-238, 275, 288-289 (George F. Lombard ed., 1977).

the case method is some kind of educational toy deprived of utility in serious science or scholarship; secondly, that the case method is useful to teach business administration, but unfit for a more organized and sophisticated discipline like the law; and thirdly, that the case method is characteristic of the Anglo-Saxon world, that is only useful for teaching the Common Law. Is it possible to answer these objections to the use of the case method in Civil Law education? May we make these professors realize what the origins and fundamentals of the case method are or can be? The aim of this article is to dispel these erroneous and preconceived notions and help to uncover the usefulness and possible applications of the case method thereby encouraging Civil Law scholars to further the revival of this powerful tool within Civil Law education.

In short, we are going to explore the roots of legal education with the case method and use this knowledge to understand present legal education and influence the future of legal education in Civil Law jurisdictions. This article endeavors to support the view that there are compelling reasons to *reintroduce* the case method in the Civil Law world. This article calls for a revival of this methodology.

II. FIRST MISCONCEPTION: THE CASE METHOD IS NOT FOR SERIOUS SCIENCE

The idea that law may be taught with the case method meets a formidable intellectual resistance among civilians, especially those who are solely academics. This may be due to several erroneous positions and assumptions.

Some law professors are afraid to be challenged by students and feel that the exercise of case method is more demanding than explaining a theoretical point. Others think that the method only fits a seminar size system of education, with classes of fifteen or twenty students and may not be workable with classes of forty-five, sixty, or more students. Others point to the shortage of casebooks in Civil Law countries, unlike America where more than 6,000 casebooks have been published since the time of Langdell.

Nevertheless, most professors have a skeptical or distant attitude towards the case method due to graver concerns. Namely, Civil Law professors commonly reject the use of the case method with the belief that it is not a serious pedagogical device to be used for a serious academic discipline. They espouse the idea that the dogmatic dimension of the law demands a dogmatic, lecture-based style of instruction. The professor lectures *ex cathedra*, students

take notes and, sometimes, ask questions to the teacher for clarification.

The study of the law is a science. Moreover, the law is a complex system that combines techniques from art, science, and philosophy. To fully understand the problems individuals and society have in relation to justice and to resolve them, it is necessary to synthesize all these disciplines within the context of law. Taking into account the scientific character of the study of the law, I believe that considering its use in other disciplines that that are widely accepted as “sciences” can dissipate Civil Law professors’ misunderstandings of case method. To this end, it is useful to see how it was used, from the very beginning, in medical education.

A careful observation of medical education reveals that the analysis of cases has been used for a considerable time.⁴ This methodology was first used by Galen (200-129 B. C.), who taught his pupils with concrete “cases,” who were sick people, and then asking his students about the right diagnosis and possible treatments.

The pedagogical ideas of Galen continue to be valid today. In medical schools, students examine actual patients, evaluate their symptoms, diagnose them, and consider and recommend therapeutic alternatives.⁵ Furthermore, the so-called “medical athenaeums” of old handed down by tradition, consisted of a professor or physician presenting a case wherein the pathology of a patient, were discussed with medical students.

It is therefore not surprising that the modern manifestation of this case method is carried out in the classroom in which is used for teaching students at the Harvard Medical School. It was borrowed from the Harvard schools of law and business.⁶ Clearly, the case method is undoubtedly compatible with “serious” scientific study.

4. See LEENDERS & ERSKINE, *supra* note 1, at 14.

5. On the relationship between case method and the practitioners’ formation in Medicine, see HARPER W. BOYD JR., DONALD M.T. GIBSON, CHARLES P. IFFLAND & LEE A. TAVIS, CASOS EN “MARKETING” 4 (Stanford Business School trans., 1967; original in English: MARKETING MANAGEMENT: CASES FROM THE EMERGING COUNTRIES, 1966).

6. For an interesting presentation of the change of teaching methodology carried out a few years ago in that famous American medical school, and of the program elaborated for that change, see: Daniel A. Goodenough, *Changing Ground: To Medical School Lecturer Turns to Discussion Teaching*, in EDUCATION FOR JUDGMENT: THE ARTISTRY OF DISCUSSION LEADERSHIP 83-98 (C. Roland Christensen, David A. Garvin & Ann Sweet eds., 1991). In Argentina, the Austral University Biomedical School uses case method for the same purposes.

III. SECOND MISCONCEPTION:

THE CASE METHOD IS NOT FOR LAW, BUT FOR BUSINESS SCHOOLS

A. From Errors to Denial

For many, including those connected to the business world, particularly Civil Law professors, the case method is viewed as having been created in the twentieth century in the American business schools, and more specifically, in the Harvard Business School. The model is then seen as having spread to other universities around the world, where it is now used extensively to teach business management.

From this understanding arose the first objection of most Continental Law professors to the use of case method in the learning and teaching of Civil Law: the case method is not for law, but only for business schools. We are going to demonstrate that this assumption is clearly inaccurate.

B. The Fruits of the Law: The Beginning of the Case Method in the Harvard Business School

In the nineteenth century the case method was used for teaching business and commerce in France and Germany,⁷ but the Harvard Business School has the honor of being the first to use the case method in a conscious and systematic way in the business world. However, as American lawyers know quite well, the case method was used to teach law previously to its introduction for the teaching of executives. Furthermore, searching the origins of the methodology, it is possible to see that the case method had been used previously not only in law, but in other sciences and arts as well. The story is as follows.

The first American business school, Wharton, was created in 1881. Wharton is now part of the University of Pennsylvania. The case method was not used there.

The Harvard Business School was created in 1908, under the name of Graduate School of Business Administration. It was part of the Graduate Department, in the Faculty of Arts and Sciences at Harvard University.⁸ Up until that moment, American business

7. See MASONER, *supra* note 1, at 10-11.

8. See *The Harvard Guide: History, Lore, and More. Did You Know?* (2007), in <http://www.news.harvard.edu/guide/lore/lore9.html> (last visited July 10, 2010); and JOSÉ LUIS GÓMEZ LÓPEZ-EGEA, MÉTODOS ACTIVOS EN LAS ENSEÑANZAS DE DIRECCIÓN: ANÁLISIS Y CONCLUSIONES DE LA EXPERIENCIA DEL IAE 65 (Research paper; Universidad de Navarra, Pamplona, 2000; unpublished).

schools focused solely on undergraduate studies. Harvard, with the intention of making business a true profession, innovated by accepting graduate students.⁹

In the early twenties, under Dean Wallace B. Donham, the Harvard Business School made the first use of the case method as a pedagogic tool within a business context. The dean was a Harvard Law School graduate, and was first exposed to the case method while at law school. He borrowed this debate method and applied it to the business school. The transplant was made, naturally, with minor modifications born of the natural differences between law and business.¹⁰

In 1910, Donham's predecessor in the Deanship, Professor Edwin Francis Gay, advised Professor Melvin Thomas Copeland to complement his lectures with debates between students. The advice was implemented and executives who taught the classes introduced business problems in class and asked their students to solve them in writing, making recommendations. Donham's training in law introduced him to the case method and he soon recognized the importance of using this tool in the field of business. In 1920, he encouraged Copeland to publish in 1920 the first casebook on business—*Marketing Problems*¹¹—and within a few years the school faculty committed to using the case method.¹²

It is undisputable that the development of case method in management education has been due largely to the Harvard Business School.¹³ Furthermore, horseshoe or U shape classrooms were invented there in the 1950s to facilitate discussion amongst the students to enable them and the professor to effectively interact with one another.¹⁴ In Harvard MBA classes, the case method remains the chief pedagogical tool. Their students analyze an average of 600 cases over the course of two years.¹⁵ Thousands of

9. See *The Harvard Guide*, *id.*, referred in the previous footnote.

10. See ROETHLISBERGER, *supra* note 3, at 123.

11. It was later published several times under the name PROBLEMS IN MARKETING.

12. See LEENDERS & ERSKINE, *supra* note 1, at 14, 102.

13. See MASONER, *supra* note 1, at 11. Regarding the precise way of utilizing the case method in the Harvard Business School see these classical works: THE CASE METHOD OF TEACHING HUMAN RELATIONS AND ADMINISTRATION: AN INTERIM STATEMENT (Kenneth R. Andrews ed., 1953); THE CASE METHOD AT THE HARVARD BUSINESS SCHOOL: PAPERS BY PRESENT AND PAST MEMBERS OF THE FACULTY AND STAFF (Malcolm P. McNair & Anita Hersum eds., 1954); and TEACHING AND THE CASE METHOD: TEXT, CASES, AND READINGS (Louis B. Barnes et al. eds., 3d ed. 1994).

14. See Roland Christensen et al., *Acknowledgments*, in EDUCATION FOR JUDGMENT (C. Roland Christensen et al. eds.), *supra* note 6, at xxv.

15. Cf. ROBERT RONSTADT, THE ART OF CASE ANALYSIS 6 (3d ed. 1993).

cases were studied in Harvard and gradually became available to other schools and professors. Thus, this methodology has actively spread, first to other American business schools and then to business schools all over the world.

Having established this, let us leave business schools and go back to the law schools, where the professors of management found the case method.

C. The Restoration of Case Method in the Contemporary World: Langdell and the Harvard Law School

In the modern times, the case method experienced a renaissance in 1870 at Harvard Law School. Christopher Columbus Langdell became dean of the school for the academic year 1869-1870 and remained there until 1900. He introduced the case method as the main instrument to teach principles of judge-made law and to teach the students how to think in a legal way.

Prior to Langdell stretching back to and since the colonial age, retired judges delivered strictly theoretical classes to teach the law. Practical training was left to practicing lawyers, who dispensed it in an informal setting over a certain period of time, without much institutional organization.¹⁶ The theoretical framework for American lawyers was laid by reading the four volumes of Blackstone's *Commentaries on the Laws of England*.¹⁷ Following the creation of American universities, this teaching system remained mostly untouched within the academic world.

In a rudimentary stage before Langdell, cases were used to teach American law students. In 1810, Zephaniah Swift used a casebook to teach law at his law firm in Connecticut. Later in 1865, Professor John Norton Pomeroy used cases to teach law at New York University. Langdell's innovation, strictly speaking, was in making the teaching and learning with cases the main

16. See CHARLES EISENMANN, *THE UNIVERSITY TEACHING SOCIAL OF SCIENCES: LAW* 19, 67-68, 89-90, 92 (1954). It was a report on the teaching of law by this professor at the University of Paris for the International Committee of Comparative Law.

17. The COMMENTARIES were written between 1765 and 1769 based on Blackstone's classes in Oxford, being the first clear and complete exposition of the Common Law system. It is because of this that the treatise was considered the most important authoritative source on Common Law, thus enjoying a predominant position in England and the United States. See about this SIR WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 702-727 (reprint 1966) (1938); *DICTIONARY OF ENGLISH LAW* 252 (Earl Jowitt & Clifford Walsh eds., 1959).

instrument of legal education.¹⁸ His influential and visible position as professor of law and dean of the Harvard Law School contributed decisively to the success of his proposal. It is worth highlighting that Langdell introduced cases in the study of contracts, a key course in the study of law, and published his casebook with a prestigious publishing company, thus making it widely available for purchase to the public.

Langdell explained his method in his book, *A Selection of Cases on the Law of Contracts*, the first part of which was published in 1870—a year after his arrival to Harvard. It was used the first time during the first semester of the academic year 1870-1871. Its methodology rested on two main ideas: legal gnoseology within a positivist matrix and legal pedagogy.

Through his legal gnoseology, he denied the existence of general principles deriving from nature and instead believed that induction could be used to analyze all the Common Law precedents and reduce them to general principles. From there, rules could be obtained and applied to concrete cases. The applicable law for new cases could be obtained from principles obtained from previous cases. In this way case law could be clear and scientific, a key principle for the practice of law. According to Langdell, the science of law could be created following this method.

From a pedagogical standpoint, Langdell conceived the case method as a way to lead students to acquire by themselves, by means of their personal work and methodically oriented discussions, the juridical spirit. Rather than memorizing the law, they would start from a concrete case and use principles derived from them to reach general principles that could then be analogized and applied to other cases.¹⁹ He did not hand books and materials to students to be studied, but instead used course

18. See RAMÓN BADENES GASSET, *METODOLOGÍA DEL DERECHO* 433 (1959).

19. About the philosophical and pedagogical ideas of Langdell see C.C. LANGDELL, *A SELECTION OF CASES ON THE LAW OF CONTRACTS* v-vi (1871). The first part, published in 1870 with the same publisher, has 460 pages. The following year, his complete new edition had 1022 pages, with 336 cases, mainly full text without brackets or edition. For a complete and deep study on Langdell and his legal ideas see WILLIAM P. LAPIANA, *LOGIC AND EXPERIENCE: THE ORIGIN OF MODERN AMERICAN LEGAL EDUCATION* (1994). About his legal ideas see also William C. Chase, *Book Review*, *J. AM. HIST.* 1752-1753 (1995) and BADENES GASSET, *supra* note 18, at 434.

materials to be used as information for problem solving and to discover the legal rule through induction.²⁰

For a fruitful application of the method, Langdell created three principles and explained them in the foreword of his book on contracts as follows:

I entered upon the duties of my present position, a year and a half ago, with a settled conviction that law could only be taught or learned effectively by means of cases in some form...

I was expected to take a large class of pupils, meet them regularly from day to day, and give them systematic instruction in such branches of law as had been assigned to me. To accomplish this successfully, it was necessary, first, that the efforts of the pupils should go hand in hand with mine, that is, that they should study with direct reference to my instruction; secondly, that the study thus required of them should be of the kind from which they might reap the greatest and most lasting benefit; thirdly, that the instruction should be of such a character that the pupils might at least derive a greater advantage from attending it than from devoting the same time to private study.

How could this threefold object be accomplished? Only one mode occurred to me, which seemed to hold out any reasonable prospect of success; and that was, to make a series of cases, carefully selected from the books of reports, the subject alike of study.²¹

After several early difficulties and resistances, the case method gradually gained popularity, and eventually achieved a consolidated position towards the end of the nineteenth century and into the early twentieth century.²² After a rocky start, for more than a hundred years the case law methodology has remained the basic pedagogic methodology for teaching law in the United States.²³

20. See Julio Barboza, *Reflexiones acerca del Punto II del temario*, in INSTITUTO INTERAMERICANO DE ESTUDIOS JURÍDICOS INTERNACIONALES, *LA ENSEÑANZA Y LA INVESTIGACIÓN DEL DERECHO INTERNACIONAL* 175 (1969).

21. LANGDELL, *supra* note 19, at v.

22. See JOSEPH REDLICH, *THE COMMON LAW AND THE CASE METHOD IN AMERICAN UNIVERSITY LAW SCHOOLS* (REPORT TO THE CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING), 84 (1914). The same idea in BADENES GASSET, *supra* note 18, at 433.

23. See EISENMANN, *supra* note 16, at 111.

Two powerful reasons converged to create the success of case method. The first one is that United States is, fundamentally—and even more in Langdell’s time—*case law*. Juridical principles usually come from rulings and statutes are interpreted through these decisions under the rubric of *stare decisis*. The second reason is that the goal of law schools in the United States is to prepare law students to be practicing attorneys who can solve cases correctly and think clearly. Therefore, it is crucial that those studying law be able to interpret, reason from, and use cases to support their position.²⁴

It is worth mentioning that Langdell’s epistemological principles were strongly resisted by those who favored legal realism—particularly Holmes²⁵ and Llewellyn.²⁶ Legal realists disapproved of and criticized the case method’s attempt to teach law, which they viewed as a science, through the studying of cases. Nevertheless, it is possible to keep Langdell’s pedagogic method to educate lawyers using debates about cases without sharing his idea of the law as a science. The two ideas are very different and this fact has not been stressed enough.²⁷ Yet it is essential to grasp the fact that one may use the case method without endorsing a philosophical approach to the law that conforms to the “empirical” conception of the Common Law—a conception in the Anglo-Saxon tradition and that clearly contradicts some fundamental tenets of the Civil Law tradition.

In conclusion, the case method is not an educational resource born in business school, but one that originated in and was perfected as a specific legal educational device.

IV. THIRD MISCONCEPTION: THE CASE METHOD IS ONLY FOR THE COMMON LAW

A. Cases and Discussions: From Rome to the Renaissance Theology, and Back to Socrates

The second major objection to the case method in Civil Law education is that the case method only applies to the teaching of

24. See *id.* at 115-116; and CUETO RÚA, *supra* note 3, at 308-309.

25. See Oliver W. Holmes, *Book Notices-Review of CC Langdell, Summary of the Law of Contracts and WR Anson, Principles of the Law of Contract*, 14 AM. L. REV. 233-234 (1880).

26. See Karl N. Llewellyn, *A Realistic Jurisprudence-The Next Step*, 30 COLUM. L. REV. 431 (1930); and Karl N. Llewellyn, *On What Is Wrong with Legal So-Called Education*, 35 COLUM. L. REV. 665 (1935).

27. See William Epstein, *The Classical Tradition of Dialectics and Legal American Education*, 31 J. LEGAL EDUC. 399, 399-400, 422-423 (1981).

the Common Law because the tradition is created on a case-by-case basis. It is absolutely dependent on the case made law and *stare decisis*, and this is viewed as being inadequate in a Civil Law system, which is based on pre-existing legal *rules*.

Although Langdell was the modern “inventor” of case method for its use in a classroom, he can more properly be seen as a “restorer” in light of pertinent historical antecedents. The use of cases in legal education is indeed much older than Langdell and its use in the Harvard Law School. It is deeply connected to the Civil Law and Continental tradition, starting with Roman Law—the wellspring of Civil Law. The case method has remained a component of legal education in the European and Latin American law schools, and experienced great expansion with the teaching of moral and ethics. Moving further back in time, one discovers the genesis of this methodology in Greek philosophy, within the Socratic methodology and Aristotelian dialectics.

B. The Focus on Cases as the Core of Roman Law

Roman jurists understood quite well the relationship between cases and law. They did not conceive of the law as a mere rationalistic abstraction. Rather, they viewed it as a discipline that required the exercise of prudence in each individual case. Thus, the early Greeks gave importance to circumstances and exceptions, paying attention to different shades and factual adaptations. It was in this context that the jurist Alfen could say *in causa ius esse positum*: “the fair solution depends on the case,” or “the right is determined in the case.”²⁸

Casuistry is therefore one of the main elements of the spirit of Roman Law, which explains its current pedagogical utility. The Romans were the genius inspirers of this juridical method that flourished as a method to solve cases.²⁹ The essential flexibility of *ius* of Rome lies in the *prudentia iuris*, cause of the *ars iuris*; and this is what makes Roman Law so fertile and vital to this day.³⁰ It did not develop as a “science of law,” but as casuistry and practice wherein situational law, sought to achieve a fair solution for each

28. D. 9, 2, 52 [DIGEST].

29. See MANUEL JESÚS GARCÍA GARRIDO, RESPONSA: CASOS PRÁCTICOS DE DERECHO ROMANO PLANTEADOS Y RESUELTOS 17 (10th ed. 2003); and Alfredo Di Pietro, *Foreword*, in GABRIEL DE REINA TARTIÈRE, CASOS DE DERECHO ROMANO 10-11 (2004).

30. See Alfredo Di Pietro, note in GAIUS, INSTITUTAS 38 (Alfredo Di Pietro, trans. 4th ed., 1993).

case. Hence, the Romans understood the law, *ius*, to be that which is just, fair.³¹

This attention to cases in Roman Law derives from a unique feature: they had the legal rules of the *responsa* of Roman *iurisprudentes* or *iurisconsulti* as main source of their laws. These “answers” were authoritative elaborations based on concrete problems or “cases that were formulated as verdicts, legal opinions or answers to the praetor, to the *iudex*, or directly to the parties involved in the lawsuit, generating a doctrinal precedent.³² Besides their intrinsic value, the importance of the answers remained in the fact that, as Gaius says, “the sources of law for the Roman people are . . . [among others] the answers of the prudent,”³³ conceived as “the decisions and opinions of those to whom it has been granted to create law.”³⁴ In this way, although “private” jurists, who had the authority of their author, gave many answers, many other jurists had a special privilege given by the emperor, known as *ius publicæ respondendi*. These decisions-answers were vested with the strength of mandatory authority for judges.³⁵

In 529, Justinian’s jurists gleaned from those answers the famous *Digest*, a restatement of legal opinions about actual cases. It is interesting to note that the *Digestus* or *Pandectis*—as it was also known—formed one of the fundamental parts of the *Corpus Iuris Civilis*. The *Digest* was made as an official selection of Roman case law by the Emperor. Useful for practical application of the law by judges, these cases were primarily meant for the education of those aspiring to serve the office of justice. Justinian understood that the education of the new jurists was of greater importance and effectiveness than the coercive imposition of opinions to the court magistrates. Centuries later, his theory was validated when the summary of opinions on cases was used for the formation of jurists in the European *ius commune*.³⁶

31. See JULIO CÉSAR CASTIGLIONE, LAS LECCIONES DEL DERECHO ROMANO O EL NACIMIENTO DEL DERECHO 61, 64, 97-98 (1995).

32. See PONPONIUS, D. 1, 2, 2; F.C. DE SAVIGNY, I SISTEMA DE DERECHO ROMANO ACTUAL 154-155 (Jacinto Mesía & Manuel Poley trans. 2d ed., 1870); ALVARO D’ORS, DERECHO PRIVADO ROMANO 28 footnote 4 (1968); and Di Pietro, in GAIUS, *supra* note 30, at 58-59 n. 8.

33. GAIUS, *supra* note 30, at I, 2. I have consulted the versions of Di Pietro, aforementioned, and of JAVIER NÚÑEZ DE PRADO, INSTITUCIONES JURÍDICAS (1965). About the “answer of the prudent” as source of law, see also PAPIANUS, D. 1, 1, 7.

34. GAIUS, *supra* note 30, at I, 7.

35. See L.B. CURZON, ROMAN LAW 18-20 (2d ed. 1974) (1969).

36. About that idea of Justinian and the use of the *Digest* in the education of students in the *ius commune*, see A. D’ORS, F. HERNÁNDEZ-TEJEDOR, P.

Furthermore, Romans invented the *Institutes* or *Institutas*, or method of institutions. This is the best possible way of explicating the law in a scientific manner. The best exponents of this method are Gaius's *Institutes* and, some centuries later, Justinian's *Institutes*. They were introductory works, which were a compilation of a comprehensive theoretical material based on casuistry, culled from the infinite number of answers to actual and specific legal problems where the jurists attempted to find the fairest solution possible to the problems presented.

That is the last reason that explains why Roman Law was eminently practical, focused in its application. Roman jurists reasoned from particular cases to general principles. They took into consideration each problem and studied it in light of the general principles, and endeavored to arrive at practical, well-founded solutions.³⁷ Ihering, one of the greatest Roman Law experts and one of the finest Civil Law thinkers and writers, spoke about the spirit of this ancient system of law and said that its goal was to regulate the reality. He pointed out:

Law exists to be applied. Law's application is its life and truth. What doesn't really exist, what exists only in statutes and paper, it's only a legal ghost; . . . on the contrary, what is carried out as law, is law, even though it is not in the statutes, and even though neither the people nor the doctrine are aware of it.³⁸

Ihering also pointed out that, while the modern law is structured by concepts, Roman Law was structured without dividing or isolating concepts from concrete cases.³⁹

As shown above, the study of case law or casuistry is the best method for teaching Roman Law.⁴⁰ It is not a surprise, therefore, that those opinions, together with the *Institutes*, were studied in both the rival schools of the Sabinians and the Proculians, private institutions called *stationes ius publicæ docentium et*

FUENTESCA, M. GARCÍA-GARRIDO & J. BURILLO, I EL DIGESTO DE JUSTINIANO 7 (1968).

37. See PAUL (PABLO) KRÜGER, HISTORIA, FUENTES Y LITERATURA DEL DERECHO ROMANO 49-50 (ca. 1880).

38. RUDOLF VON IHERING, III L'ESPRIT DU DROIT ROMAIN DANS LES DIVERSES PHASES DE SON DÉVELOPPEMENT § 43 (O. de Menlaenere & A. Maresq trans., 3d ed. 1877).

39. *Id.* at § 58.

40. See D'ORS, *supra* note 32, at 7; *id.*, *El valor formativo del Derecho Romano*, in *id.*, PAPELES DEL OFICIO UNIVERSITARIO 159-169 (1961); and *id.*, *El dogma jurídico*, in PAPELES, 170-184.

respondentium.⁴¹ There, the law student was an *auditor*: he listened to the consultations made to the *iusprudentes*, whose opinions, while rather short, could have as companions detailed explanations in form of discussions with the students.⁴²

One cannot but agree with Rudolf Stammler, when he said that the texts of the Roman jurists are crucial for developing *critical thinking* in law students. For Stammler, it was inconceivable that this magnificent way of teaching future judges and lawyers was abandoned.⁴³

Thus, we can conclude that Roman Law, from where the Civil Law sprung, had the use of and the studying of cases at the very core of its practice and spirit. The reading of cases, the researching of them, the study with cases, is no abandonment of the Roman Law heritage, but honoring it in a higher degree.

C. Case Analysis in Legal Education in Renaissance Europe and the Colonial Americas

Centuries later, the Glossators and Post-Glossators did not use cases as the Roman *iusprudentes* did. Rather, they worked exclusively with Roman jurists' opinions and elaborations on the cases. But it was not necessary to wait for Langdell: between Ulpian and him, continuity was broken by the *ius commune* and, with it, by the *ius canonicum*.

In some prominent law schools both in Europe and the Americas—especially in the paradigmatic schools of Salamanca, Lima, and Mexico—the Civil Law was taught with cases and principles obtained from Justinian's *Digest* and *Code*, and Canon Law with the *Decree* of Gratian and the *Decretals* of Gregory IX.⁴⁴ The method consisted in reading a text, asking questions and receiving answers from the students. After that, they “put the case” to the learned principles, that is, real and hypothetical cases about the theory and norms were explained. With all these elements a discussion was held based on the laws extracted from the cases and authorities.⁴⁵ In the University of Mexico, for example, Pedro Farfán's *Constitutions* of 1580 prescribed that in the learning of canons, laws, or theology reading, disputes, and

41. See JOSÉ M. CARAMES FERRO, *HISTORIA DEL DERECHO ROMANO DESDE SUS ORÍGENES HASTA LA ÉPOCA CONTEMPORÁNEA* 214 (5th ed. 1993).

42. See KRÜGER, *supra* note 37, at 53.

43. See EL JUEZ, 44 et seq. (Emilio F. Camus trans., 1941), quoted by BADENES GASSET, *supra* note 18, at 429.

44. See VÍCTOR TAU ANZOÁTEGUI, *CASUISMO Y SISTEMA: INDAGACIÓN HISTÓRICA SOBRE EL ESPÍRITU DEL DERECHO INDIANO* 235 (1992).

45. *Id.* at 237.

solutions were practiced “so that students could develop their memory and cultivate their intelligence and understanding.”⁴⁶

It is interesting to point out that in the book *Arte Legal para Estudiar la Jurisprudencia* (Legal Art to Study Law), which was published in Salamanca in 1612 by Francisco Bermúdez de Pedraza as a repertoire of advice to students, it was stated that laws or canons should be read before attending class, and that it should be done “very slowly, one, two, or three times, until understanding it and putting a case to it.”⁴⁷ That is, students new to the study of law were advised to study slowly and to imagine cases of application to prepare themselves for the discussion that would take place in class. Similarly, the exam given at the conclusion of the students’ formal university training, which consisted of an hour exposition about the assigned point, followed the requirement that the student “put the case to the text” and “bring the reason to doubt and to decide.”⁴⁸

In this way, the introduction of case for discussion and the application of the studied texts, in sixteenth to eighteenth century law schools helped to stress the idea that the law should be applied to constantly changing facts, thus the art of deciding and solving cases with unique facts was paramount.⁴⁹

D. Not Only for Law: Casuistry in Moral Science

The science of ethics is very close to the study of law. Legal reasoning and ethical reasoning can be seen as brothers, or even twins. For this reason it is fruitful to explore the utilization of the case method in the study and research of ethics.

At the end of the sixteenth century, morality began to bifurcate from the other theological disciplines, and casuistry began to manifest in its teachings. This tendency became clear by the middle of the seventeenth century due to the influence of Canon Law.

It is important to remember here the deep influence of the Civil Law on Canon Law and, through it, of Roman Law. Martín de Azpilcueta, the so-called *Doctor Navarrus* (1493-1586), famous canonist and moralist from the University of Salamanca,

46. *Id.* at 240.

47. BERMÚDEZ OF PEDRAZA, *ARTE LEGAL PARA ESTUDIAR LA JURISPRUDENCIA* 103-104 (1612), quoted in TAU ANZOÁTEGUI, *supra* note 44, at 236-237.

48. *See* TAU ANZOÁTEGUI, *supra* note 44, at 240.

49. *Id.* at 238-242.

played a key role in the development of casuistry with his *Manuale sive Enchiridion Confessariorum et Poenitentium*.⁵⁰

The decisive year for its development came in 1600 when the Spanish Jesuit Juan de Azor (1536-1603) published the first volume of his *Institutiones Morales*. It was a truly *summa*, following the new system of presenting and discussing series of hypothetical cases on concrete moral issues with solutions. The work was intended as a manual that would explain morals and teach them to confessors.⁵¹

Another important man in the application of the case method to the exposition of Morality was Cardinal Francisco Toledo, SI (†1596), who wrote *Instructio Sacerdotum s. Summa Cassum Conscientiae*.⁵²

In this way the use of casuistry was first seen in moral theology. As a result, works of true scientific merit and some monumental works, such as Antonio Diana's (1585-1663) *Resolutiones Morales*, known as *Summa Diana*, were produced.⁵³

Unfortunately, the system was flawed. It lacked the prudential method of Roman Law and ossified due to its adherence to rigid rules and strict use of rationalism. These authors of Catholic casuistic works were the true products of their authors who were primarily concerned with repelling the threat posed by Protestantism. Thus, they aimed primarily at giving to confessors, who may have no instruction in theology, solutions that were thought of in advance. In this way, these works focused on distinguishing mortal sins from venial sins and neglected an examination of the principles and nature of goodness. That is why, distancing themselves from the Roman Law methodology, they started to develop sophisticated ways of distinguishing the moral acts, trying to avoid the committal of mortal sins by introducing subtle shades and exceptions, frequently forced.⁵⁴

Gradually, the casuistic method fell into disfavor. When the Jesuits had their controversy with the Jansenists, it suffered a

50. About the surging of casuistry and the influence of Azpilcueta, see MARTIN GRABMANN, *HISTORIA DE LA TEOLOGÍA CATÓLICA* 231-233 (David Gutiérrez trans., 1940).

51. See JOSÉ LUIS ILLANES & JOSEP IGNASI SARANYANA, *HISTORIA DE LA TEOLOGÍA* 206-208 (1995); and GRABMANN, *supra* note 50, at 231-233. The works of Azor had three volumes and was published between 1600 and 1611, with the complete name of INSTITUTIONES MORALES, IN QUIBUS UNIVERSÆ QUESTIONES AD CONSCIENTIEM RECTE AUT PRAVE FACTORUM PERTINENTES BREVITER TRACTANTUR.

52. See GRABMANN, *supra* note 50, at 233.

53. *Id.* at 233-234, 236; ILLANES & SARANYANA, *supra* note 51, at 208-209.

54. See about this respect HENRY S. MAINE, *ANCIENT LAW* 337-341 (4th American ed. 1884, from the tenth London ed.).

serious blow from the hands of Blaise Pascal (1623-1662), who hardly censored it in his attack to Jesuits—who used it as their theological methodology. In 1656 and 1657, the French mathematician who was a Jansenist wrote eighteen letters—the famous *Lettres Provinciales*—in defense of a friend of his who was also a famous Jansenist. Pascal’s use of wit and irony introduced the previously unknown topic to the general public. Those *Provincial Letters*, besides their Jansenist origins, popularized the rejection of casuistry in ethics. As a result, to the extent that many influential moralists actively tried to avoid using the methodology.⁵⁵

In the twentieth century, the disfavor for the casuistic method for teaching morality was due to strictly theological—and not pedagogic—reasons. Indeed, the method became so modified as to begin to separate moral casuistry from integral theology and philosophical anthropology. Many books ended up as a simple compendium of ethical obligations with solutions and punishments.⁵⁶ As previously shown, this state of development was far from the spirit of Roman casuistry, from where the method began. Nevertheless, using practical cases in the teaching of ethics is a clear methodological contribution from the discipline. It still has—and should continue having—a preponderant role on both the discussion of theoretical problems and in the learning of the concrete usage of general principles.⁵⁷

E. Greek Dialectics and the Socratic Method as Fundamentals of Modern Case Method

Before examining the case method’s current manifestation, it is instructive to once more look to the ancient world in order to

55. On this intervention of Pascal, well known, see, among others, *id.* at 341.

56. See GRABMANN, *supra* note 50, at 231-232; and ILLANES & SARANYANA, *supra* note 51, at 209. However that is not of direct importance to the history of case method, we could say that today the moral theology is again in the good path, recovering the value of individual conscience, of biblical sources, of foundation of ethical solutions in the dogmatic theology, etc. On this see SERVAIS PINCKAERS, *LAS FUENTES DE LA MORAL CRISTINA: SU MÉTODO, SU CONTENIDO, SU HISTORIA* 309-336 (2d ed. 2000); and AURELIO FERNANDEZ, *I TEOLOGÍA MORAL* 352 (2d ed. 1995).

57. See ILLANES & SARANYANA, *supra* note 51, at 209. To have a complete view about the history, scope of the casuistry as a method of morals, this author recommends to consult H. Lio, *Casuistica*, in *I Dictionarium Morale et Canonicum* 573-578 (1962); R. Boluillard, *Casuistique*, in *II Catholicisme* 630-637 (1949); and E. Dublanchy, *Casuistique*, in *II Dictionnaire de Théologie Catholique* cols. 1859-1877 (1923).

uncover its basis. The Civil Law tradition was and still is greatly influenced by Greek philosophy. The dialectics and the Socratic method are central to this philosophy. Although they did not deal overly with “cases,” the dialectical and Socratic method have long been exercised in university teaching—particularly in English speaking countries.

It is generally recognized that the Greek dialectical method, where one evaluated and considered counterarguments to arrive to a decision, is a superior method to arrive at the truth when debating an opponent. It also forms the foundation and supports the modern American system of legal education by means of the training in reasoning through the case method. Thus, the classic pattern that is used to teach the law develops critical thinking skills, the ability to speak intelligently and persuasively, and how to point out the errors and inaccuracies of one’s opponent. Hence, facts, that are relative to important general or abstract aspects of the law are learned and the process of how the law works exposed.⁵⁸

Three great Greek thinkers are primarily credited with helping to create the dialectical method. Socrates (469-399 B. C.) was the first to contribute with his method of discovering error by means of questions.

In second place, Plato (427-347 B. C.) offered the supreme study of dialectics, as a method of questions and answers to educate those that would be the ruling philosophers. With this system, he tried to discover the last and deepest truths of the world of pure forms, with a rational process of analyzing arguments critically and eliminating false propositions.⁵⁹

Finally, Aristotle (384-322 B. C.) studied the dialectical method and used it as a critical process for the study and teaching of the human problems of aphoristic nature. For him it is characteristic of the practical and prudential truth—especially, in the ethics and in the politics—where the premises are generally accepted, but not evident themselves—as it happens in apodictic environment, typical of metaphysics. Aristotle conceived of the dialectical method as a useful pedagogical tool wherein truth was

58. See Epstein, *supra* note 27, at 400, 416-423. This article stresses the contribution to dialectics of the three big Greek thinkers, and its relevancy for the learning of the practice of the law, in the sense pointed in the text. Of this work of Epstein, at 401-408, I have also condensed the following paragraphs of the text, with Socrates’s, Plato’s and Aristotle’s contributions.

59. See *id.*, REPUBLIC 531e, 532a-b, 533b-c, 534e, 535a, 537c, 541b and 543b-c.

expected to emerge from the interaction of opposing arguments.⁶⁰ From some of his texts, where he asserts that the teacher should always say what he thinks and never teach something that is false. The interrogatory facet of the debate in case method should not carry the professor to strive only for ingenious obfuscation. Ultimately, he must fulfill his special obligation to further righteousness and truthfulness.⁶¹

The Socratic method, also called *maieutics*—pertaining to midwifery—,should be said to consist of teaching through the discussion of problems and the skillful interrogation of students. The teacher “gives birth” or induces the ideas in the students who discover them by themselves. This method was immortalized in Plato’s *Dialogues*. More precisely, *maieutics*, the second moment of the Socratic method, which started with the irony—from *eiro*, to interrogate, is an interrogation that is intended to make the speaker aware of his or her ignorance. Ignored wisdom is the beginning of the acquisition of knowledge. Socrates began the dialogue admitting his ignorance; then he asked for the student’s opinion. After the answer, he asked new questions that confused the speaker, until the student admitted that he ignored the topic. In that moment, *maieutics* began, founded in Socrates’ idea that the truth does not emanate from the outside, but rather it is inside everyone. Thus, the teacher’s task is to facilitate its emergence. Plato explained this phenomenon found by this method of learning as the process of remembering ideas that we have from our previous life, and that were forgotten. Taking into account different opinions, Socrates achieved a definition accepted by all the speakers, showing, against the Sophists, that the truth could be arrived at using this method.⁶²

The Socratic methodology of philosophical analysis, used by modern law professors has five clear characteristics. It is *doubtful* or *uncertain*. The professor begins with an actual or professed ignorance for the discussed topic. In this way, the search for

60. See especially the treaty of the TOPICS and, therein, the points I.1 100a 25-101a 18, I.2 101b 3-4, I.14 105b 19-22, VIII.5 159a 25-32, and VIII.10 160b 22-40. Aristotle also worked on dialectics in PERIHERMENEIAS—on the interpretation and the propositions—, the PRIOR ANALYTICS—syllogisms to know the truth—, the POSTERIOR ANALYTICS—truths that can be known by syllogisms—, the SOPHISTICAL REFUTATIONS—acknowledgment of false reasoning—and the RHETORIC—rules of argumentation in a debate.

61. This is the opinion of Epstein, *supra* note 27, at 405-407, pointing out Aristotle’s texts in TOPICS, VIII.5 159a 25-32, VIII.9 160b 10-13, and VIII.10 160b 22-40.

62. See JUAN CARLOS ZURETTI, BREVE HISTORIA DE LA EDUCACIÓN 54-55, 59-60 (1988); and ENRIQUE D. N. TELLO ROLDÁN, MANUAL DE HISTORIA DE LA EDUCACIÓN Y LA PEDAGOGÍA 104-105, 107 (1999).

knowledge is begun. It is also *dialectical* or *dialogic*, as didactic mechanism and technique for the actual discovery of truth, by means of the *maieutics* of questions and answers that start from an accepted conception, to arrive to a different and more appropriate one. Additionally, it is also *conceptualizing* or *definitional* in its endeavor to acquire philosophical concepts. It is *empiric* or *inductive* by criticizing the starting concept by referring to concrete issues and common experiences. And, finally, it is *deductive*. It proves that the definition elaborated by means of its implications and consequences is correct.⁶³

In Greece, the Socratic method coexisted with lessons that were given directly by the teachers.⁶⁴

Though not coinciding exactly with the case method, the Socratic method shares with it obvious similarities.⁶⁵ In this sense, it is generally accepted that Socrates' method constitutes the basis and foundation of the modern case method. Moreover, in the American legal system they are frequently seen as being synonymous.

Before moving to the next step, it is important to reiterate that the dialectics and the Socratic method, which are so strongly connected with the American approach to case method in legal education, were highly influential in the western tradition, where the Civil Law appeared and developed.

F. Discussion Method, Foundation of Medieval Teaching

Our next stop is in the first medieval universities, where we find a widely spread pedagogical tool: the methodology of discussion or debate. The medieval debate method is closely related with Greek dialectics and the Socratic method. The discussion is one of the main elements of the case method, to such an extent that it is sometimes named this way.

The discussion method generated in the debate clubs in Anglo-American universities. It also relates to the current *problem method*, appearing sometime around 1930 in the United States as a derivation of the law school case method and marking a return to the original Socratic method. It tried to enlarge the student's creativity and participation while addressing legal problems with a

63. See Ken Samples, *The Socratic Method*, in <http://www.str.org/site/news2?page=NewsArticle&id=5631> (1998) (last visited July 10, 2010). It can be seen, as paradigmatic example of the idea pointed out in the text, the platonic dialogue MENON, where Socrates interrogates if it is possible to transmit knowledge.

64. See ZURETTI, *supra* note 62, at 83.

65. See GÓMEZ LÓPEZ-EGEA, *supra* note 8, at 25, 89.

scientific approach, as a counterpart to the single discussion of solutions already given by the courts.⁶⁶

The use of debate between two contenders, as a didactical method, finds its origin near the year 1100, in the school that the University of Paris originated from. It grew from the hands of William of Champeaux (1070-1121), and, especially, of his apprentice and then leader of a rival school, Peter Abelard (1079-1142).⁶⁷ The method was very successful and, though it originated in the School of Theology, it also spread and dominated in the schools of arts—philosophy—, law and medicine during the thirteenth and fourteenth centuries.⁶⁸ The method gained the denomination of *quæstiones disputatæ*—disputed questions—and became typical of the medieval teaching, sharing equal footing with the *lectio*—lesson or lecture.

Between Socrates' method and the debate method there was a narrow relationship: the first raised different *quæstiones*, some of them to get a quick solution for the teacher, while others, more meaningfully, gave material for the *dispute*, of which consisted the second method.⁶⁹

In the disputes, which were common practice in medieval universities, two students engaged in a dialectical competition on a previously determined issue, under the supervision of one or several teachers. After one or several sessions discussing an issue,

66. On the problem method like an intermediary among the theoretical teaching and the case method, see MASONER, *supra* note 1, at 12; and EISENMANN, *supra* note 16, at 111. One of the first to propose the problem method, as superior of mere case method, for the reason pointed in the text, was Jacob Henry Landman in his book THE METHOD OF STUDYING LAW (1930). Anyway, Landman's critique of the case method has diverse inconsistencies, generalizations without enough elements and many confusing aspects of that methodology. Among these last ones there is critic to the original method of Langdell that had already evolved for the time when the book was written, without need of giving for good the judge's reasons, like it happened in its original version. Cf. in this respect H. Claude Horak, *Scanning Old Procedures*, 2 J. HIGHER ED. 52-53 (1-1931), where reviews the book of Landman. On the origins of the problem method in the United States, see María T. del Rosario Moya, *La utilización de los fallos y opiniones consultivas de la Corte Internacional de Justicia y las decisiones de otros tribunales internacionales en la enseñanza del Derecho Internacional Público*, in INSTITUTO INTERAMERICANO DE ESTUDIOS JURÍDICOS INTERNACIONALES, *supra* note 20, at 195.

67. See MAURICE BAYEN, HISTORIA DE LAS UNIVERSIDADES 21-22, 27 (A. Giralt Pont trans., 1978).

68. See Laura E. Corso de Estrada, *Rasgos de una Quæstio Disputata del siglo XIII*, in TOMÁS DE AQUINO, CUESTIÓN DISPUTADA SOBRE LAS VIRTUDES EN GENERAL 22 (1998).

69. *Id.* at 20-21, and corresponding footnotes.

the teacher summarized the opposing arguments, typically based on reasoning and the citation of numerous profane and religious authors, expressing the cultural heritage of the time. He analyzed and confronted them, and finally gave his solution. Disputes have, accordingly, an *aporia-lysis* structure originating with Socrates, Plato and Aristotle: an issue to discuss, some alternatives, and a solution to the problem.⁷⁰

On the other hand, much like in Antiquity, many teaching methods became literary forms for investigation. A number of *Quæstiones Disputatæ* published by philosophers and theologians of that period give testimony of that oral methodology.⁷¹ Among them, those written by Thomas Aquinas (1224-1274) should be mentioned as giving an extraordinary example of an author following the method to elucidate different matters.

Those written disputes not only originated in the private disputes among one teacher's students, but also in those carried out openly, on a weekly or biweekly basis, where, choosing topics that constituted a comprehensive theme, teachers debated among themselves for entire mornings, in the presence of the whole school, with bachelors and students also intervening. Then, in a second part that took place the following day, a teacher unified logically the adduced reasons, expressed the authorities that endorsed what he would sustain, exposed his own doctrine—*determinatio magistralis*—and, finally, answered each of the contrary reasons. In the end, the teacher's thought on an issue was the subject of discussion and scrutiny by the university community. Some people took notes, which were reviewed and improved by the teacher: these are the works that came to us.⁷²

Twice a year, extraordinary disputes opposed the most qualified professors “with open agenda,” since they were *ad voluntatem cuiuslibet*. Books followed under the title of *Quæstiones Quodlibetales*, like those written by Thomas Aquinas, or by William of Ockham (ca. 1280-1349).⁷³

70. *Id.* at 18, 24-25.

71. *Id.* at 17-20, and corresponding footnotes.

72. *Id.* at 22-26, with corresponding quotations. Each disputed question would correspond to what has come to us as *questio*, corresponding the different articles that an issue is composed to the extension of a private dispute, *in scholis*. The number of existent *quæstiones* can give us an idea, on the other hand, of the great frequency with which the disputes were carried out. *See id.* at 26-27 and footnote 39.

73. On the lessons and medieval disputes, *cf.* also ETIENNE GILSON, LA FILOSOFÍA EN LA EDAD MEDIA 135-136 (M.M. and J.C. trans., 1940). With regard to the *quodlibetales* questions, *see also* Corso de Estrada, *supra* note 68, at 27-28.

An application of the disputed question method, though not in the oral form, may be found in the book *Sic et Non* of Abelard. The book gathers Bible and Church Fathers doctrines on many issues that are apparently contradictory, with the purpose of formulating the problems and encouraging a desire to solve them. Nearly a hundred years later, Abelard's method, that immediately deserved a large adhesion, was entirely adopted by Alexander of Hales (1185-1245) and also by Thomas Aquinas in many of his works, especially in his *Summa Theologiæ*.⁷⁴

Aquinas offers a paradigmatic example of the system. When following this method, his works are divided in different treatises, first outlining a general *quæstio* that contained different problems or articles. Each of these articles opens with quotations from different authorities that express opinion contrary to the author's—more than twenty in *Quæstiones Disputatæ*, five or six in *Summa Theologiæ*. Then, these authorities are contradicted with quotations from other thinkers (*sed contra*), helping Aquinas shape the status of the question (*status quæstionis*). Aquinas then expresses the solution that he maintains, with his reasons and proofs (*corpus articuli, solutio* or *respondeo*). Finally, he answers with detail to each of the objections outlined in the first place (*ad primum, ad secundum*, etc).

Not only did medieval thinkers create universities, but they also developed a more efficient teaching and research methods, contributing to a renaissance rather than a dark age. Their pattern of analyzing the problem, alternatives, solution, and answers to the incorrect alternatives comes very close to the IRAC (Issue, Rule, Analysis, Conclusion) system of analysis of cases in American law schools.⁷⁵ The medieval writing methodology is a very suitable methodology for scholarly work. The only criticism one may suggest is to finish the answers to the alternatives before exploring one's own solution.

In relation with these medieval analytic and teaching methods, another aspect of the purest classic tradition in education should be explored. The *trivium* was an introduction to university studies, leading to the “bachelor” degree. It developed from the

74. On Abelard and their system of “yes and not,” see GILSON, *supra* note 73, at 75, 139.

75. The IRAC system organizes the case analysis following the next or similar questions: ISSUE—What factual elements could be taken into account and what issues arise from that specific circumstances? RULE—Which is the law or rule that could govern and solve the issue? ANALYSIS, APPLICATION OR ALTERNATIVES—Am I bound to apply this rule to this facts? How does one apply this rule to these specific facts? Are there other alternatives of solution? CONCLUSION—Which is the most satisfactory solution and why?

Carolingian Renaissance to the first centuries of university teaching. By means of three subjects, the students were introduced to wisdom and to the heights of thought. These three subjects were: rhetoric—oratory and literary style—, dialectics—logics, argumentation, and art of discussing—and grammar—including literature and analysis of written texts. This knowledge was the core of medieval teaching. Together with the *quadrivium*—arithmetic, geometry, astronomy and music—, they formed the famous *seven liberal arts*, called this way for their liberating effect on the mind. They developed in human beings an ability to think with discipline and ease, and were characteristic of free men.⁷⁶ The Socratic method was central to the training in the three arts of the *trivium*, the conjunction of which being a clear antecedent to the case method.⁷⁷

Therefore, we can conclude that the medieval discussion method of analyzing issues in oral or written form is an important antecedent to the modern case method, especially in law and business, taking from them several elements of its dynamics and functioning.

G. Case Method in Classroom and Medieval “Apprentice’s” System out of the Schools

Before explaining when and why the Civil Law lost the case method, its relationship with professional training or apprenticeship must be explored; this element is deeply rooted in western tradition.

The educational system for apprentices of occupations and professions consists of learning an art through direct experience under the guidance of a master, with whom the apprentice can learn, “case by case,” the secrets of the specific job. This reveals how much the case method can be a “vicarious experience,”

76. On these seven liberal arts and their influence during that period, see GILSON, *supra* note 73, at 17-18, 39, 84; and ZURETTI, *supra* note 62, at 117, 119, 129. This classification was introduced in schools by Alcuin of York (735 - 804), Charlemagne’s educational and more important collaborator, who wrote a treaty on each one of the arts of the *trivium*: DE GRAMMATICA, DE RHETORICA and DE DIALECTICA. Added to philosophy, theology, law and medicine, they somehow summarized the “arts”—humanities—and the “sciences.” With relationship to Alcuin and his educational influence *see also* Salvador Claramunt, *Alcuino de York*, in I GRAN ENCICLOPEDIA RIALP 502-503 (2d ed. 1981).

77. Also relates the way of teaching the *trivium* with case method, MASONER, *supra* note 1, at 10.

because it bases the learning and training on the reproduction of real experience of a job, with its advantages and limitations.⁷⁸

This system of *apprenticeship* or learning by training has been regulated since the Code of Hammurabi and had an outstanding importance in the Middle Age, where it structured most of the teaching system. Its significance must be highlighted: it is still perpetuated nowadays as an unavoidable element in the formation of young professionals starting in a function or a company.⁷⁹

Apprenticeship is a worldwide constraint for the young lawyer. It is sometimes optional—although often generalized—in those systems promoting educative internships during legal studies or after graduation, like in Argentina. It is often compulsory. In many European countries, such as France or Italy, there is no special emphasis on the case method in law school but professional practice with attorneys at law or in the judiciary varying between one year and five years, before being licensed to practice is required.⁸⁰

In conclusion, the case method is an extraordinary tool that vicariously teaches the real functioning of law across legal studies, and apprenticeship is the natural continuation of the case method in the last years of study and after graduation.

78. With regard to that characteristic of case method, *see* W. Waller Carson, Jr., *Development of a Student Under the Method*, in *THE CASE METHOD AT THE HARVARD BUSINESS SCHOOL* (McNair & Hersum eds.), *supra* note 13, at 86; RONSTADT, *supra* note 15, at 2-3, 8; and GÓMEZ LÓPEZ-EJEA, *supra* note 8, at 3, 78-81, 85-86, 160-161.

79. On the relationship among the apprentices' system and case method, *cf.* Juan Antonio Pérez López, *El método del caso: instrumento pedagógico para el profesional de la acción 2*, Nota técnica 0-394-023 ASNN-3, IESE-Universidad de Navarra (1993); and MASONER, *supra* note 1, at 9.

80. This system is actually used in Germany (one year and half of practice), Belgium (three to five years), Denmark (three years at least, plus exam), France (three years), Ireland (one or two years), Italy (two years and an exam), the Netherlands (three years for the attorneys at law and four for the judges), Greece (one year and half, plus exams), and England (after an exam, one period of practice of two years). On this *see* II CONVOCATORIA DE AYUDAS DE LA ANECA PARA EL DISEÑO DE PLANES DE ESTUDIOS Y TÍTULOS DE GRADO: LICENCIADO EN DERECHO ("LIBRO BLANCO" DE LA LICENCIATURA EN DERECHO), 19-21 (june 2005). This study was presented to the ANECA by fifty five law schools from Spain; it was published in <http://derecho.usal.es/libroblanco/05PartePrimera.pdf> and <http://derecho.usal.es/libroblanco/06PartePrimera.pdf> (last visited July 10, 2010). That specific part of this work was done by professors Alarcón Caracuel, Campins, Arenas, and Camas.

H. When and Why the Civil Law System Lost the Cases

All the previous epigraphs show a legal pedagogy inclined towards casuistry and discussion. The use of the case method in the Civil Law tradition, with variations in times and places, started in Rome and went across the Middle Ages and the Modern Age. Things changed when, under rationalistic ideas, Roman Law was largely put aside to be replaced with the study of National Law with the codification movement starting in the late eighteenth century.⁸¹

The change was not negative in itself. What is negative is the positivist and legalist deviation that accompanied this change in the nineteenth and twentieth century. This influence led to the abandonment of prudentialism in juridical analysis and, thus, of cases, leading to the loss of the case method.⁸²

This abandonment generated an alarming situation:

- the classroom was filled only with the lecture method, and the classes became boring and the students were not involved.
- the law is perceived solely as a system of abstract concepts logically related, without relation to real life and real problems.
- the textbook—a good idea and a valuable product of the Civil Law tradition—, largely replaces cases.
- the students remain passive and generally do not learn in a critical way.
- the key of education is to be able to repeat memorized rules, principles, and concepts in the examinations. The ability to use them and transfer them to real situations being all too often neglected.
- there can be an abyss between law school and the life of lawyers. Students often have no idea how to deal with a real problem.

This phenomenon gained influence in Europe and the Americas, yet with some exceptions.⁸³

V. THE REVIVAL OF THE CASE METHOD IN CIVIL LAW EDUCATION:
FROM IHERING TO THE THIRD MILLENNIUM

As pointed out already, in modern times the United States is, without any doubt, the leading country in teaching law with the

81. See TAU ANZOÁTEGUI, *supra* note 44, at 242-251.

82. *Id.* at 250.

83. *Id.*

case method. It has not been completely alone in this endeavor. Emerging from the deep roots explored in the past sections, several attempts (some very successful) to use the case method in Civil Law classrooms have been made.

A. Legal Education in Germany

In first place, we should consider Germany, with experiences preceding national codification. Rudolf von Ihering (1818-1892) allegedly used an experimental and Socratic method in class, starting in 1847. Also, in the Fourth German Congress of Jurists in Mainz in 1863, the judicial advisor Volkmar, of Berlin, put forward a reform project of legal studies, where he insisted in the practical and pedagogical formation of the professorship and in the creation of a legal clinic to support the needs of practice.⁸⁴

That is why in Germany in the late nineteenth and early twentieth century, many professors taught with hypothetical cases that the students should resolve, inside or outside the classroom, written or orally, in order to be discussed later. Some volumes were published with cases in order to teach. This method was praised for forming critical legal minds and stimulating a scientific study of the law in the quest for answers to practical problems. It highly favored by the Pandectists, simultaneously favorable to meeting students with social needs that was going to solve the law.⁸⁵

The German experience revived by Ihering can be traced back to the medieval *ius commune*. Based on the old Bologna model and developed with a rich contribution by German scholars trained in Roman Law, it was taken to its most sophisticated refinement by the great Pandectists until the day a civil code—BGB—was substituted to the *usus modernus pandectarum*. To this day, a significant part of class work in German law schools is dedicated to the study and discussion of cases, and exams frequently consist of analysis of concrete legal situations.⁸⁶

84. On Ihering and Volkmar, see BADENES GASSET, *supra* note 18, at 440.

85. See OLIVER, LA ENSEÑANZA SUPERIOR EN ALEMANIA 89 (1918), quoted by BADENES GASSET, *supra* note 18, at 440.

86. I appreciate the several explanations that were kindly made to me on the German legal education by professors Peter Sester (Universität Freiburg and Universität Karlsruhe), Ulrich Magnus (Universität Hamburg), and Álvaro Pérez Ragone (Universität Köln and P.U.C.V.).

B. Some Endeavors for a Practical Legal Education in France, Italy, and Spain

Several practical attempts took place within the European legal education. Let us see at a glance the situation in the last century in three law-leading countries.

In France, the Code Napoleon and the abstract approach of the School of Exegesis largely influenced the legal education. At the beginning of the twentieth century some law professors also chose to introduce, along with theoretical classes, some practical applications of the principles by means of exercises with cases.⁸⁷ Furthermore, legal studies were amended in 1954, in view of getting the student more in touch with practice.⁸⁸ Nowadays in France, in addition to the traditional lecture (*cours magistral*), from first year to fourth French Law students attend seminars (*travaux dirigés*), complementing core subjects, where they are invited to discuss and comment court decisions and hypothetical cases. However, this vital part of the teaching is assigned to the least experienced teachers. Students are invited to write or present orally a commentary on a case, which must satisfy stringent formalistic canons, with the risk of prioritizing form over substance.⁸⁹

Something similar happened in Italy, where in 1920 practical exercises in legal teaching became compulsory.⁹⁰ Their case method is used partially for discussions in universities and in some seminars organized by non-university institutions.⁹¹

In Spain, after a long history of theoretical approach to legal education, legal studies were reformed in 1990, with a timid attempt to include practical teaching. This includes the

87. See Alfredo Orgaz, *La enseñanza práctica en la Facultad de Derecho de París*, 6 REV. DE DERECHO Y CIENCIAS SOCIALES 782 (1927) (Arg.), quoted by BADENES GASSET, *supra* note 18, at 440-441.

88. BADENES GASSET, *supra* note 18, at 441.

89. Cf. Olivier Moréteau, *Bilan de santé de l'enseignement du droit*, in ETUDIER ET ENSEIGNER LE DROIT: HIER, AUJOURD'HUI ET DEMAIN. ETUDES OFFERTES À JACQUES VANDERLINDEN 273, 285-301 (2006).

90. See BADENES GASSET, *supra* note 18, at 441.

91. See René-Jean Dupuy, in THE UNIVERSITY TEACHING SOCIAL OF SCIENCES: INTERNATIONAL LAW 19 (René-Jean Dupuy ed., 1967) (It was a report on the teaching of International Law carried out in the International Association of Legal Sciences, under the direction of this professor from Nice, answering a request by Unesco); and G. Arangio-Ruiz, *Italy*, in *id.*, 62 (that is one of the national reports content in the general report).

introduction of a *Practicum* at the end of legal studies and practical credits in different subjects.⁹²

Nonetheless, despite these initiatives in the direction of more practical teaching, one cannot say that the use of the case method is widespread in France,⁹³ Italy,⁹⁴ or Spain.⁹⁵

C. The Civil Law Education in Europe and the “Declaration of Bologna”

The current situation in France, Italy, Spain, and many other countries may change in the wake of the “Declaration of Bologna,” carried out on June 19, 1999, by the Secretaries of Education of a number of European states, most of them members or future members of the European Union. The “Bologna Process” that started with the Declaration is not a European Union initiative, but rather an intergovernmental project. More than 45 countries (n.b. countries outside Europe are admitted) have now signed the Declaration, which creates a European Space of Higher Education, an idea to be found in the earlier Declaration of La Sorbonne (1998). With a set deadline in the current year 2010, the signatories must make efforts towards the convergence of their national systems of higher education, making them consistent and compatible, facilitating the recognition of degrees among different countries. Access to a unified work market must be facilitated within the European Union and must remove obstacles for the mobility of students, professors, and researchers.

92. See Royal Decree 1424/1990, of October 26, which establishes the official law degree and the general guidelines of studies to obtaining it, *in* B.O.E of November 20, 1990, number 278; and CONSEJO DE UNIVERSIDADES, REFORMA DE LAS ENSEÑANZAS UNIVERSITARIAS – TÍTULO: LICENCIADO EN DERECHO. PROPUESTAS ALTERNATIVAS, OBSERVACIONES Y SUGERENCIAS FORMULADAS AL INFORME TÉCNICO DURANTE EL PERÍODO DE INFORMACIÓN Y DEBATE PÚBLICOS 40-41 (1988) (Informe técnico del grupo de trabajo N° 10–Título de Licenciado en Derecho). See also the references, very few, to the need of more critical and practical teaching, done by some professors or universities that sent their suggestions to the project, *id.* at 152-153, 630-631, 745-746. In the book there are also oppositions and resistances to the introduction of practical activities in universities, for different reasons, like it happens at 161-167 and 200-201.

93. See Moréteau, *supra* note 89, at 285-290; and Dupuy, *supra* note 91, at 19-20, 35-36.

94. In Italy, legal education traditionally has been theoretical and, although it has been tried to emphasize practice, most of the teaching consists of *formal lectures*. See also Arangio-Ruiz, *supra* note 91, at 61.

95. I spent five years teaching law in Spain, and it is widely known that the lecture is almost the unique pedagogical tool used there.

The principal elements of the European university convergence may be summarized as follows. Degrees are structured in two mandatory cycles: graduate—bachelor—and postgraduate—master—, or undergraduate and graduate studies, to use the American lexicon. The first cycle is comprised of three years (180 credits) and the second cycle of two years (120 credits), with the possibility to extend the first one to four years (240 credits) and to shorten the second to only one (60 credits). A third cycle leads to the doctorate, typically of three years of duration.

Subjects or courses are measured in “European credits,” or ECTS—*European Credit Transfer System*—, calculated on the assumption that a full time student works for 60 credits a year or 30 in a semester. Each institution is free to allocate the number of credits to each course or learning experience. Computation of credits is not exclusively based on the number of course hours like in English speaking countries, but on the average of expected working hours dedicated to the subject by students. For a given course or activity, this may include lectures, supervised work in small groups, personal study time, and various ways of evaluation. Motivation of professors and students is required, with the intent to establish an education based on learning and not exclusively on teaching. The student is expected to have an active role in his studies and the professor is his or her tutor in that process.⁹⁶

The Bologna Process has pushed the Old Continent to change, with an effort to adapt the different national university systems to the Declaration. Almost every European country has made adjustments towards a mandatory two-cycle system regarding legal education: first cycle—Bachelor, *Licenciatura*, *Licence*, *Baccalauréat*, or other variants—, plus second cycle—Master—, plus the elective third cycle—Doctoral studies. The “bachelor” degree should enable people to access law-related jobs in companies, public administration, or as legal representatives. However it will not be enough to qualify as a judge or attorney. A master is required, often supplemented by compulsory professional training and additional exams, the system varying from country to country.⁹⁷

96. Other elements of the system of Bologna are: it requires a system of information that reveals the contents and level of received education; it has tried to avoid an excessive duration of the higher studies with respect to their nominal duration, instead trying that the studies are carried out in the years in which they are structured.

97. On the European system of studying law under the Declaration of Bologna, see the comparative study included in II CONVOCATORIA DE AYUDAS, *supra* note 80, at 5-18. Professors M.R. Alarcón Caracuel, Mar Campins, Rafael

Italy was the first country of the European Union to adopt the Bologna system, applying it in 1999 and 2000 to all fields, including law.⁹⁸ France and Germany had their reforms in 2002.⁹⁹ Other countries already had a Bologna compatible system—Greece, Finland, England, and Scotland—, while others like Spain or Portugal, have delayed the process.¹⁰⁰ Many countries adopted the “three plus two” years formula, while others followed a “four plus one,” or “four plus two.”

Arenas and Ferran Camas, from the Universities of Sevilla, Barcelona, Autònoma of Barcelona and Girona, carried out this part of the study.

98. Italy made changes in 1999 (Decree n. 509 of November 3, 1999) and 2000 (Ministerial Decree of August 4, 2000), and other countries follow its approach. In legal studies this country adopted a three level system (graduate, postgraduate, and doctoral levels) that last three, two, and three years, the first two compulsory. The first cycle (180 ECTS), which is started by the students at 19 years old, offers the degree *Laurea Triennale in Giurisprudenza* and has as an objective to provide the students adequate dominium of the general scientific methods and contents, and of specific professional skills. The second cycle (120 ECTS) gives the *Laurea Specialistica* degree, with five concentrations or orientations, which is intended to prepare highly qualified professional activities in specific areas. In the first two years of the *Laurea Specialistica* there is the *Master di primo livello* (60 ECTS), and in the second year the elaboration and presentation of an original work of end of studies is required. For an analysis of the new Italian system see Manuel J. Peláez, *La Historia del Derecho y la Historia de las Instituciones en las nuevas Licenciaturas italianas adaptadas a Europa (El Decreto m. de 4 de agosto de 2000 del Ministerio de Universidades y de la Investigación Científica y Tecnológica)*, 25 REV. DE ESTUDIOS HISTÓRICO-JURÍDICOS 507-512 (2003) (Chile).

99. Germany, as is pointed out by Peláez in the work mentioned in the previous footnote, reformed the law studies in 2002, not including structural or substantial reforms regarding the subjects of the law degree that were in operation before that year.

100. Let us take the Spain case. This country became part of the European space of higher education since the 2008-2009 academic year. In the Organic Act 6/2001, of December 21, the topic was discussed, with a generic regulation in articles 87-89 (B.O.E., December 24, 2001). The Real Law Decree 9/2005, of June 6 (B.O.E., June 7, 2005), has modified the Act on some points. Spain will have a four years graduate degree, with a master of one year or two, both necessary to become an attorney at law. To begin doctoral studies it is necessary to have a previous Master degree. Cf. II CONVOCATORIA DE AYUDAS, *supra* note 80, at 21. The X Conferencia de Decanos y Decanas de las Facultades de Derecho de las Universidades Españolas, that took place in Vigo on June 28, 2008, confirmed that basic legal formation requires in Spain a minimum content of 240 credits ECTS, which means four years of full time studies.

D. Perils and Menaces against the Revival of the Case Method in European Civil Law Education

It can be expected that all the effort put on the European Space of Higher Education will come to fruition and will not be mere wishful thinking. Signs already exist that the generalization in that continent of master studies of professional character which embrace the adoption of case method in legal education, is increasing its use in European countries.

Despite the positive signs and promising openings, triggered by the Declaration of Bologna, a lot remains to be done to promote the case method in Civil Law education. Whilst promoting more active student participation, the Declaration of Bologna does not put a special emphasis on the practical formation of university students. In addition, one should not neglect the idiosyncrasy and manifold traditions of different societies and academic communities.

Unfortunately, reality shows that many law schools of continental Europe keep a predominantly lecture-based legal education, making little room for case discussion, which keeps students in a passive role as spectators of the professor's teachings.¹⁰¹ The situation in Latin America is the same.¹⁰² Therefore, except for some law schools, some professionally oriented programs (usually at Master level), or some individual professors, in Continental Law or Civil Law countries facts demonstrate that the practical teaching in legal education is limited or remains nonexistent, despite expressed desires, official plans or statements to the contrary. Many professors from continental Europe give more value to a dogmatic formation, which they give by means of classes with formal lessons, rather than investing time in the discussion of cases. Many have never used this methodology in class.¹⁰³ When recognizing that things should change, they put the blame on the large number of students and lack of resources: the lecture system appears to be more compatible with mass education. But they ignore the fact that in United States it is common to see classes of more than a hundred students learning with the case method, especially in the first year

101. This, which is well known, is outlined, among many others, by Moréteau, *supra* note 89, at 285-290; Dupuy, *supra* note 91, at 19-20, 35-36; Arangio-Ruiz, *in id.*, at 61.

102. Cf. E. Jiménez of Aréchaga, *Latin America*, in *THE UNIVERSITY TEACHING SOCIAL OF SCIENCES: INTERNATIONAL LAW 19* (René-Jean Dupuy ed., 1967), at 72, 76-77.

103. See Dupuy, *supra* note 91, at 19; Moréteau, *supra* note 89, at 285-290.

of legal studies. The number of students is not the problem, the real purpose of the professor is.

The same lecture-based legal education is the rule in law schools in countries with quite different legal traditions, like Japan, Eastern Europe, the Nordic countries,¹⁰⁴ and also in some Common Law countries.¹⁰⁵ It is necessary to exclude England of this panorama, because it has made spectacular strides in promoting case discussion in class, with a multiplication of casebooks in the last twenty or thirty years.¹⁰⁶

In consequence, there is no systematic and generalized teaching with a legal, critical, and practical mentality. With some exceptions, the use of the case method in class as a privileged tool for developing that mentality is almost inexistent in many countries. The theoretical class, current version of the medieval *lectio*, remains largely predominant.

The *lectio*, originated in cathedral and monkish schools where it coexisted with *disputes*, consisted in the reading of a text—something necessary in a time previous to Guttenberg—, from which the professor carried out a comment and developed his own ideas.¹⁰⁷ The development of printing did not change this pattern. The debate system of education, close to the Roman prudentialism forgotten, the influence of rationalism leads the university education to be based on the accumulation of knowledge by the professor and its oral transmission to students, all too often in a

104. See S. Tsuruoka, *Japan*, in THE UNIVERSITY TEACHING SOCIAL OF SCIENCES: INTERNATIONAL LAW 19 (René-Jean Dupuy ed., 1967), at 67-68; and I. Hambro, *The Scandinavian States*, *id.* at 89; G. Haraszti, *Hungary*, *id.* at 45-46; and S. Janković, *Yugoslavia*, *id.* at 146-147.

105. See P. K. Iranian, *India*, in THE UNIVERSITY TEACHING SOCIAL OF SCIENCES: INTERNATIONAL LAW 19 (René-Jean Dupuy ed., 1967), at 53-54; and E. I. Nwogugu, *Nigeria*, *id.* at 80-81.

106. This way, England completes the extended previous use of cases in its jurisdiction, with great quantity of books that followed the methodology of the restatements, where the state of case made law is summarized in a certain field, sometimes beginning with 14th century decisions and many of those books being perpetuated because of generation-to-generation updates. Before the current circumstances, when the case method spread more and more in British law schools, they used to expose the English legal system, mainly based on cases, in a theoretical or abstract way and not using case discussion or debates, and they did not have significant casebooks. On the previous situation in English law schools, see EISENMANN, *supra* note 16, at 116; and K. R. Simmonds, *United Kingdom*, in THE UNIVERSITY TEACHING SOCIAL OF SCIENCES: INTERNATIONAL LAW 19 (René-Jean Dupuy ed., 1967), at 115-117, 121.

107. See JAIME PUJOL BALCELLS & JOSÉ LUIS FONS MARTÍN, LOS MÉTODOS EN LA ENSEÑANZA UNIVERSITARIA 19 (2d ed.1981).

way similar to dictation.¹⁰⁸ This way, lecture method is a system “based mainly on a continuing exposition of a lecturer” and where students can “ask or participate in a small discussion, but generally they just listen and take notes.”¹⁰⁹

Therefore, in most Civil Law countries law schools have not realized at all, or some of them not fully realized, that the case method can be effective to carry out very diverse exercises and legal training, with great utility and benefits. A Civil Law professor wrote in Buenos Aires, cases can be used to let the student employ rules and principles to different facts, analyze cases interpreting pertinent rules and looking for different alternatives of construction and application, identify and qualify facts and evidences, commit in the search and analysis of alternatives in a situation, etc.¹¹⁰

E. The Blend between Civil Law Substance and American Approach to Legal Education in the Revival of the Case Method in Some Latin American Law Schools

Several law schools in Latin America, especially in Argentina and Brazil, apply the case method intensively in legal education. They successfully blend the Civil Law tradition of explaining the codes, the rules, and the legal system, with the Common Law approach of the last century of teaching and learning with cases and recovering the roots of the old Civil Law tradition to teach law with cases.

Among the law schools that are applying the case method in legal education, the Austral University Law School (Facultad de Derecho de la Universidad Austral), from Buenos Aires, is a leader. It has been a pioneer in promoting a participatory approach to legal education since 1988, when it started as an institute of research and postgraduate studies. This institution delved deeply into the case method when starting a masters’ degree in the beginning of the 1990s and a J.D. program in the middle of the same decade. Austral Law School has compiled collections of cases, trained hundreds of law professors in the case method, and is spreading the methodology in law schools in Brazil, Chile, Colombia, Guatemala, Mexico, and Peru.

108. *Id.* at 20-21, 23-24.

109. See UNIVERSITY GRANTS COMMITTEE, REPORT OF THE COMMITTEE ON UNIVERSITY TEACHING METHODS (THE PULLS REPORT) 170 (1964), quoted in PUJOL BALCELLS & FONS MARTIN, *supra* note 107, at 21.

110. On this, see ABEL M. FLEITAS ORTIZ DE ROSAS, DERECHO DE FAMILIA—MÉTODO DE ENSEÑANZA. CASOS Y OTRAS VARIANTES 25-79 (1996) (1994), where the author gives many ideas on the point.

It could be convenient to provide at this point of our survey a short explanation of the case method used for twenty years in the Civil Law tradition at Austral Law School. The employment of this methodology largely resembles the use in American law schools; Austral tried to follow and adapt to Civil Law needs. The use of case method in this Argentinean law school is therefore much closer to the current American legal education approach than to the way this methodology was used in the Civil Law in ancient, medieval, and colonial times. Nevertheless, the utilization of case method in Austral adds to the United States common experience a strong combination with the teaching of general framework of legal concepts that is required for a logic and structured legal system like the Civil Law. The results of using this methodology to expand the benefits of an ordered system like the Civil Law for the training of a critical legal mind are extraordinary. However, naturally, the use of case method in the environment of Civil Law demands a special and continuous effort, and Austral Law School needs to focus again and again its commitment with this methodology. The reasons probably are the constraints to know the complete logic system, characteristic of Civil Law, and the formation and customs of the professors of this legal tradition, conspires against the use of this pedagogical tool.

The case method in Austral is used both in the basic law degree and at the LL.M. level. In the J.D. courses the professors devote one third of their time in classroom to discuss cases with the students, and in the LL.M. programs the proportion is two thirds of the classroom hours. The remaining time is for the explanations and explorations of principles and theory, aimed to structure the knowledge, trying to achieve that not in a one way style, but in a participatory and Socratic approach. In the LL.M. one-third to a half of the time devoted to case debate is carried out in groups of discussion of five to eight students, using special small seminar rooms dedicated only to this purpose. The professors visit the teams, spending five to ten minutes with each group of discussion. In the J.D. program, the group discussions are not mandatory, but some professors do that for specific case debate in the classroom, or sometimes, out of classroom time giving assignments to a group to deal with a specially complex case analysis in written form.

The J.D. and LL.M. students at Austral are required to use theoretical materials and casebooks—hornbooks, manuals and articles, on the one hand, and published casebooks when available or more commonly a set of cases tailor made by the professors, on the other hand. Because of the Civil Law tradition and needs, the

systematic knowledge and theoretical approach is strongly further underlined there than it is in American law schools. Therefore, the relation between cases and materials are opposite to American legal education: the quantity of cases never surpasses the theoretical materials and rarely is 50% of the total elements to study. It is more common that 60 to 80% of the pages to study and analyze are of theoretical and scientific nature, and 20 to 40% of the total amount consist solely of cases—judgments or hypothetical.

The cases are mainly judicial decisions—mostly of the Supreme Court and upper courts, but also from lower courts. Like in American law schools, depending on the professor the discussion could be about a unique case for an entire class hour—more common—, or about a line of decisions—e.g. two to five judgments. Currently most of the large cases—20 to 100 or more pages—are given to the students edited with brackets, focusing on the important excerpts, but is not uncommon to discuss a very long decision. In the last decade the use of hypothetical or “situational” cases increased in classroom discussion and examinations, for the benefits of students: learning law facing a problem without the rigid structure of a closed case, with the main problems mostly answered by majorities and dissents in upper court decisions. This way, with the situational cases, Austral follows the *approach from the front* to cases suggested by Llewellyn.¹¹¹ The midterm and final examinations consists of analysis of cases—judgments and hypothetical—, combined with theoretical questions and problems in the J.D. program, and exclusively at the LL.M. level.

Other remarkable institutions promoting the case method in law are the Escolas de Direito da Fundação Getulio Vargas, located in São Paulo and Rio de Janeiro. The São Paulo branch is developing an extraordinary “*Casoteca Latino-Americana de Direito e Política Pública*” that may be consulted on the Internet,¹¹² resembling the Harvard Business School cases clearing house. This *Escola* also published two interesting books about the case method and other participatory methodologies in the teaching of the law.¹¹³

However, a number of issues have to be dealt with. In Argentina, for example, there was much discussion about the

111. Cf. Karl N. Llewellyn, *The Current Crisis in Legal Education*, 1 J. LEGAL EDUC. 211, 212-213 (1948-1949).

112. See <http://www.gvdireito.com.br/casoteca> (last visited July 10, 2010).

113. See MÉTODOS DE ENSINO EM DIREITO: CONCEITOS PARA UM DEBATE (José Garcez Ghirardi org., 2009); and ENSINO JURÍDICO PARTICIPATIVO: CONSTRUÇÃO DE PROGRAMAS, EXPERIÊNCIAS DIDÁTICAS (José Garcez Ghirardi & Rafael Domingos Faiardo Vanzella orgs., 2008).

practical approach to legal education and the refusal of the lecture method. Nevertheless, with some exceptions, the case method did not spread in all the classrooms. Most professors who try to apply the case method think that it consists mostly in narrating cases to students, not sharp discussions about them.

The situation will hopefully improve. Between 2002 and 2006, an Argentinean National Commission of Private Law Schools prepared a project of guidelines for the national accreditation of law schools. In this guidelines project, the case method is required for all legal education. In the near future, this requirement may be made mandatory by administrative decision.

However, despite the multiple shadows that the case method situation has in Europe and in Latin America, I firmly believe that in 30 years the main question will be not about which law school is using the case method, but which law school has the best performance in using the case method, because all of them will need it, similar to how the current discussion is not who uses the lecture method, but which law school has the best lecturers.

VI. BENEFITS OF MERGING THE LEGAL EDUCATION APPROACH OF CIVIL LAW AND COMMON LAW TRADITIONS

A. A Possible Combination of Legal Education Styles and the Utility of the Case Method in a Comprehensive Civil Law Education

In the Cambridge Symposium on the Teaching of Law, in 1952, the celebrated professor Henry Batiffol summarized the meeting advocating for a combination of lecture method—commonly used in Civil Law schools—and case method—mostly used in Common Law schools. He invited law schools in Common Law countries to explain more the law in class and Civil Law professors to introduce the case method in their teaching.¹¹⁴

Evidently, influences and permeability between legal systems should be strongly encouraged. Legal education is an area where cross-influences between Common Law and Civil Law are not only possible, but may also be extraordinarily beneficial.

The utility of the case method in a comprehensive Civil Law legal education is extraordinary, because it can be really good to carry out very diverse exercises and legal training, all of great utility. For this goal could be important looking for the roots of this methodology in its origins, experience and progress of Civil

114. See the transcripts of the *Conclusions*, in EISENMANN, *supra* note 16, at 123.

Law tradition, and borrowing its current uses and developments in Common Law schools. That way, cases can be used in Civil Law schools to let the students:

- employ rules and principles to different facts,
- analyze cases interpreting pertinent rules and looking for different alternatives,
- identify and qualify facts and evidences,
- commit to the search and analysis of alternatives in a situation,
- to select facts and principles,
- to analyze principles and rules and their application,
- to prevent consequences,
- to imagine solutions,
- to decide,
- to argue,
- to look for alternatives,
- to ask, listen to others,
- to change one's or others' mind when necessary,
- and, in conclusion, to integrate a deep knowledge and understanding of the law, including its practical aspects.

The case method can achieve these aims, giving life, sense of reality and fortitude to the legal system. For the reasons given above and some others that I may not develop in the context of this paper, the combination of legal logic and prudential approach to cases of a comprehensive legal education in Civil Law may favor something in some ways better than Common Law education. The reason is its unique contribution to the formation of a critical legal mind, because this legal tradition can unify logic and a systematic comprehension with a problem-solving oriented capability.

B. A Being that Tells Stories, and the Education as an Activity of Central Human Interest

That way—without forgetting the readings of treatises and handbooks, the study of codes, and good lectures—with the case method it is possible to bring reality to the classroom, and to take full advantage of the advise of Aristotle who wrote: “the things we have to learn before we can do them, we learn by doing them, e.g. men become builders by building and lyre players by playing the lyre.”¹¹⁵ That is the nature of man and the nature of law. We are beings that tell stories, beings that hear stories . . . We become

115. ARISTOTLE, NICOMACHEAN ETHICS, II, chap. 1, 1103a 32-33.

involved in the stories. And our best achievements arise when a sharp mind joins a heart full of illusions and magic.

Proceeding in that mode, it is possible to feel the rewards of a transforming education.¹¹⁶ Without a doubt, this method involves more technicalities in legal education: it involves the direct and ineffable experience of teaching and learning that transforms people and helps persons to grow. It is a tool that truly empowers people.¹¹⁷ It is something like a magical process, interlacing a common achievement, a common space.¹¹⁸ Considered and experienced in that way, education reveals itself as an activity of central human interest.¹¹⁹

Most case method professors know that this methodology produces a stimulating atmosphere that involves and educates the students, and that stimulates and educates the professor too.¹²⁰ As Professor Christensen of the Harvard Business School said, this method and atmosphere produces classes that are moments full of enjoyment, a true “celebration of education.”

C. Achieve a Mixture of Legal Traditions as an Invaluable Service to the Cause of the Law

In that line, to finish this work and before the conclusions, let us read what Professor Cueto Rúa wrote more than 50 years ago, in the last part of his section on the case method, in his excellent book on the Common Law:

The education system of Civil or Roman tradition . . . may contribute to the law universe with important pedagogical elements to the solving of limitations and inconveniences that the “case method” may present, especially regarding the transmission of knowledge, the teaching of statute law, and the building of a General Theory that integrate the

116. See Richard F. Elmore, *Foreword*, in EDUCATION FOR JUDGMENT (C. Roland Christensen, David A. Garvin & Ann Sweet eds.), *supra* note 6, at ix-xix, ix, xi-xii, xvi.

117. See Colleen Burke, *Tulips, Tinfoil, and Teaching: Journal of a Freshman Teacher*, in EDUCATION FOR JUDGMENT (C. Roland Christensen et al. eds.), *supra* note 6, at 37-67, 43, 58, 64-66; and Christensen, *Premises and Practices of Discussion Teaching*, in *id.* at 15-31.

118. See FLEITAS ORTIZ DE ROSAS, *supra* note 110, at 1; and Michael A. Berger, *In Defense of the Case Method: A Reply to Argyris*, 8 ACAD. MANAGEMENT REV. 329, 332 (1983-2).

119. See David A. Garvin, *Preface*, in EDUCATION FOR JUDGMENT (C. Roland Christensen et al. eds.), *supra* note 6, at xxii.

120. On the importance of a community of learning that supports a rigorous intellectual analysis, see Christensen, *Premises*, in *id.* at 19-20.

dispersion of cases. On the other hand, the [Anglo-Saxon] case method may contribute in a valuable way to prevent the lecture classes of the aridity that characterizes them, giving to students a more convenient and accurate notion of the legal reality, of the necessary skills to solve individual problems, and of the instrumental, vital and human aspect of the law.¹²¹

After that, this great master of the law concluded:

A good synthesis could produce highly rewarding results. Such synthesis is worth a try, when considering the crisis in legal education, which is acknowledged in the U.S., and latent, even when not less real, in Argentina. He or she who achieves such synthesis will have delivered a valuable service to the cause of the law.¹²²

The best of Europe and the best of America can be recombined: the legal system, on the one hand, and a critical and dynamic legal education, on the other hand. My hope with this article is to contribute a new step in this direction.

VII. EIGHT CONCLUSIONS ON THE FOUNDATIONS OF THE CASE METHOD AND ITS RELATIONSHIP WITH THE CIVIL LAW TRADITION

This long journey can lead to eight conclusive elements, which support the announcement and encouragement of a revival of the case method in Civil Law education.

In the first place, this study shows that the case method is suitable for serious scientific or scholarly work. The method of case analysis is adapted to a multitude of arts and sciences, having proved its merits in medicine, law, ethics, and business, and being able to provide important services in many other academic disciplines.

Secondly, we could see that case method is not a teaching technique without lineage, just created in the laboratory of pedagogues of the *avant garde*, a need to pass the sieve of the time to demonstrate its relevancy and utility, but is rather connected and nourished in an ancient educational tradition.

Thirdly, it can be pointed out that the case method has not arisen *ex nihilo* from modern business schools.

121. See CUETO RÚA *supra*, note 3, at 329.

122. *Id.*

Fourthly, the case method did not develop from the teaching of the Common Law, but has its roots in legal and ethical sciences going back to the Antique Age and the Middle Ages.

Fifthly, I can affirm that the case method was somehow applied in Roman Law, in the *ius commune* and in the *ius canonicum*, and was applied too in the colonial law schools of Hispanic America.

As a sixth conclusion, I can point out that the case method is used, as a matter of fact, and with full success, in some law schools in Europe and Latin America, and there is hope that the Declaration of Bologna and a developing competition among the best law schools is going to strongly encourage, in the near future, this methodology across European legal education.

As a seventh conclusion, the case method is strongly related to the dialectics, to the participatory methods rooted in the Socratic style, to the diverse applications of casuistry and to the dispute of texts or issues, all of them so characteristic of the first medieval universities, and, outside universities, with apprenticeship as a professional training system. For that reason, it can be affirmed that the case method is related with some of the western culture most characteristic pedagogic elements—culture that is the adjunction of the Judeo-Christian vision, the Greek philosophy, and the Roman Law—all of which it is deeply impregnated.

Lastly, it is possible to conclude in the eighth place that the case method did not arise in the world of the Common Law, featuring case law as an essential element, but was applied in some ways in Roman Law, in the medieval teaching of the *ius commune* and *ius canonicum*, in the colonial law schools, and is applied with energy today in some houses of legal education of Europe and Latin America. This indicates that it is not accurate to claim that this methodology is inherent and definitively bound to systems having judicial decisions as a primary legal source, namely the Common Law tradition. On the contrary, it can be a fertile method in other legal system such as the Civil Law tradition, helping to reconnect with its genesis and its essence, reencountering the original taste and flavor of the law.