Escuelas de la teoría de la interpretación y argumentación jurídica

Schools of interpretation and legal argumentation theory

Francisco Javier Rivas Sandoval
Universidad Autónoma de Nayarit, México
rivas115@hotmail.com

José Antonio Serrano Morán
Universidad Autónoma de Nayarit, México
serranomoran@gmail.com

Resumen

El presente estudio tiene como objetivo ofrecer un análisis de las distintas escuelas e ideologías que han ejercido una gran influencia para determinar los alcances interpretativos de la norma jurídica y la solidez argumentativa que los operadores jurídicos habrán de practicar para la justificación de sus fallos.

El método comparativo fue utilizado para establecer una visión amplia de las distintas posturas que han ejercido una gran influencia en la argumentación e interpretación jurídica, así como los métodos histórico, dialéctico, exegético, documental y sistemático.

Los resultados arrojaron que, sin duda, un problema mayor que enfrenta el juzgador se presenta en la selección de la norma jurídica, su interpretación y argumentación, para decidir adecuadamente una problemática jurídica. Es decir, dichas herramientas juegan un papel trascendental en la correcta solución de un conflicto, pero a la par puede incidir directamente en su vertiente negativa, es decir, la toma de decisiones inexactas.

Palabras clave: administración de justicia, ley, justicia.

Abstract

The present study aims to provide an analysis of the various schools and ideologies that have exercised a great influence to determine the interpretive scope of the rule of law and the argumentative strength that legal operators should practice for the justification of their failures.

The comparative method was used to establish a broad view of the different positions that have exerted a great influence on legal interpretation and argumentation, as well as historical, dialectical, Exegetical, documentary and systematic methods.

Results showed that, undoubtedly one bigger problem facing the judge is presented in the selection of the rule of law, its interpretation and argumentation, to properly decide a legal issue. In other words, these tools play a transcendental role in the correct solution of a conflict, but at the same time it can impinge directly in its negative aspect, i.e. it decision making inaccurate.

Key words: administration of Justice, law, justice.

Fecha recepción: Enero 2015 **Fecha aceptación:** Junio 2015

Introduction

Legal interpretation and argumentation are some of the main tools guiding legal activity and especially the final legal operator, in other words, the judge. Hence arise various reflections on the subject, for example: What is what makes an interpretation and legal argument, right or wrong? Is it the strict compliance to the guidelines legally imposed or the free choice of the judge? The judge is free to interpret the law or should follow certain canons? If he/she is bound to meet some interpretive guidelines are affect their judicial autonomy? Can an argumentative technique produce one same result than another? What are the major interpretive errors?

Well, here we have a lot of questions to which you can add many more. However, intends to find a comprehensive response to the relational problem between the interpretation and legal argumentation and its intrinsic relationship with the miscarriage of Justice in the following lines.

First, the law as a social phenomenon has been, is and will be a subject of interpretation. Thus, law, to regulate the behaviour of men in society, enables multiple insights about its content and subject, to the degree that a same rule of law can be understood from different perspectives. The public body in charge of producing the rule of law (legislative) can get a clear impression regarding your product, which may or not be shared by the recipient of the norm (citizen), the body responsible for applying it (Executive) and, in particular, the different organ responsible for resolving on the legal application or even regarding its constitutionality.

As you can see, this multitude of perceptions comes in turn from one or several interpretive methods. Garcia Mayez says: "...the conception that its proponents are about what should be understood by sense of the texts, as well as the doctrines that they profess the law in general"' (Hallivis Pelayo, 2009). Such plurality was not always accepted as such; on the contrary, it was vehemently rejected during certain moments in history.

SCHOOLS OF THE THEORY OF THE JUDICIAL INTERPRETATION

Until the twentieth century, the interpretation was an activity that was for the body to create the standards, ie the legislature or parliament. This position was defended fiercely by such illustrious thinkers like Montesquieu and Rousseau, for whom the Parliament containing the interpretive monopoly of legislation, while the judiciary was erected on a mechanical operator right. Much more so if one takes into account legislative seats were occupied by perfectly certain sectors of nineteenth-century society, through legislation sought to perpetuate their own privileges.

This kind of "deification" of the legislator gave rise to the school of exegesis. As Santiago Nieto Ibáñez said: "This current stated that the law was the only source of law, therefore, the legal applicators should be limited to that space to do its job" (Nieto Ibañez, 2003).

It is understandable that for this dominant intellectual current for almost the entire nineteenth century, the judge should adhere to seek the will of the legislator in the regulatory text and limitation, because the law was complete and contained flaws. To achieve this, the school referred used two kinds of methods: the first was baptized with his own name, exegetical, and the other synthetic. In the first, the law analysis was performed on a first detected in the legislative body, while in the second the social reality detected by the legislature appreciated.

Diametrically opposed to exegesis School Free School position was so identified by Santiago Nieto Ibáñez. This ideological position headed by French lawyer Francois Geny, rejected the possibility that the legislature may provide by law all scenarios that could occur in the legal world and, therefore, the solution of a conflict always find support in the law , hence the judge should inquire freely to plug loopholes provided by the unpredictability of the legislator (Ibañez Nieto, 2003).

Later in the evolutionary progress of the German law jurist Hans Kelsen, who led the so-called "Vienna School", whose interpretation belongs to the method of legal knowledge which is, in turn, a problem of the general theory of law appears. In his view, rules are not only the proper object of legal science, but also of interpretation, which is a list of the possible meanings of standards. In the strict application of the "pure theory of law", there is an important difference between the interpretation related to the application that will make the applicator, ie, the interpretation of the legal authority, which is mandatory, the interpretation of the legal science, which is pure knowledge and has no legal effectiveness (Hallivis Pelayo, 2009).

In that sense, an authentic interpretation, which is the court of another inauthentic, which is what distinguishes the particular conduct. The first arises in view of the hierarchy of norms, the gradation of the legal order; derived from the application of the special rule of the judgment, that is, it derived from the general rule applied to a specific case.

According to Hans Kelsen: "... the law must be applied by a legal body, it has to establish the meaning of the rule will apply, must interpret those rules. The interpretation is a spiritual

process that accompanies the process of implementing the law, in its transition from a higher to a lower "(Hallivis Pelayo, 2009) degree.

On the other hand, it is the Scandinavian legal realism. This school was born in the early twentieth century in Sweden and Denmark, and was led by Axel Hägerström, AV Lundstedt, Karl Olivercrona and Alf Ross. For them, law is an empirical reality, product of non-legal factors including feelings, psychic phenomena, moral ideas or behaviors interested or disinterested. These authors seek real meaning of the regulatory text and also consider that not "discover" a meaning in the interpretation, but "assigned" (Hallivis Pelayo, 2009).

As for the interpretation, Karl Olivecrona estimated that when the legal language is judged by their appearance: "... shall be interpreted as a language that reflects a reality. But this is not really a part of the world of facts through the senses, memory or induction. It is a reality of a higher order. However, any attempt to learn this supersensible reality leads to failure. Therefore, a critical approach to legal language required. The primary purpose of legal language is not to reflect, but reflect reality "(Hallivis Pelayo, 2009).

Meanwhile, to understand the contributions of Danish jurist Alf Ross to legal interpretation, well worth a bit rebuild his influences and his appreciation of the legal environment. At first, as a student of Hans Kelsen and Hägerström, he adopted its legal theory based on the reconstruction of the theory of law in the area of the former Danish realism. His position was applied to the right empiricists such as standards of monitoring and verification principles. In his view, the key to which the rules are properly complied with by the persons to whom it is intended is to the social experience, namely the experience of them has the citizen (Hallivis Pelayo, 2009) is evaluated. On this basis, it considers that the main legal issue is the duality between reality and validity. Thus conceived law as a collective psychic phenomenon, consisting consider that there are different subjective rights of empirical reality, which is a phenomenon of the imagination that is not rationally justifiable.

On the issue that concerns us, considers the suitability of a system of standards to serve as an instrument of interpretation "... is based on the fact that the rules are observed, effectively, while felt as socially binding, and therefore obeyed "(Hallivis Pelayo, 2009). In that same directive states that the meaning of some legal concepts and other natural, well

resolved, they must also realize that words are used with a new meaning, different from usual. This is the function of legal science, which is nothing but the systematic reproduction legal rules and meanings; its activity is to interpret and systematize his name is legal dogmatism.

As noted Hallivis Pelayo, who in turn refers to itself Alf Ross:

> The interpretation is based on the science of law must be recognized as an empirical social science. This means that we should not interpret propositions about the existing law as propositions that refer to a "binding" derived from a priori principles or postulates, but as propositions about social events ... Our interpretation ... in the actual content of the proposals the science of law refers to the actions of the courts under certain conditions (Hallivis Pelayo, 2009).

Hence for the professor at the University of Uppsala, interpretation "it has its starting point in the expression as a whole, in combination with the context and situation in which this occurs. It is wrong to believe in their natural linguistic meaning. This linguistic meaning has wide application, but as soon as a word in a context, the reference field is restricted "(Hallivis Pelayo, 2009).

The Danish professor distinguishes two systems of interpretation. On one side is the English, whose main source of law is the precedent. While in the second, it is the primary source of legislation. Regarding the second case, the core of the debate lies in the relationship between a language and a specific formulation given complex facts, for which state a method that begins to distinguish the semantic and pragmatic basis and their syntactic problems, logical, semantic and pragmatic. Thus, it begins by noting that any interpretation begins with a text or formula and that linguistic activity directed to expose the meaning is called interpretation, which can take two ways. In a first assumption, the meaning of an expression can be reformulated so that clarify its scope by different expressions that lessen its vagueness. Or in any case where a set of facts is comparable to the legal expression (Hallivis Pelayo, 2009).

Within the legal functionalism is the German theorist Niklas Luhmann, for whom the right is a structure of a particular social system, which is based homogeneous generalization of behavioral expectations. In his system theory it states that the latter are self-referential and

self-dependent in its construction. In his view, the law is a tight, self everything that has gaps, ambiguities, abuse of law and full separation between law and morality, as well as a kind of unpredictability of social and economic aspects.

With regard to interpretation, and unlike some of the studied schools that do establish a clear dichotomy between playing and argue, for it it is not so; by contrast, the interpretation is expressed through argument. To show is the passage of his work The right of society: "... to propose (or justify) a decision about what is in accord (or dissenting) right ... Any legal argument that explains the interpretation of the text has, Therefore, a decision regarding: a relationship with the decision on other issues. That is why the legal argument must face communication "(Luhmann, 2002). In his view: "The current law is proportionate reason to decide in the sense of entitlement. The literal meaning of the text is indispensable. The interpretation will then be understood as further streamlining the text, or compliance with the premise that the legislator himself has rationally decided "(Luhmann, 2002). In that sense, when doubts arise regarding the interpretation must seek the argument that convinces, that is, as stated Hallivis Pelayo to quote own Luhmann "... the reason is the decisive rule underlying the text to base it" (Hallivis Pelayo , 2009).

So far we have examined some of the most important schools that have been responsible for the legal interpretation, which are as eclectic as theorists who have headed. Hence, it is time to examine the main schools of the theory of argumentation.

SCHOOLS OF THE THEORY OF LEGAL ARGUMENT

Start worth making a relevant dimension that comes from what Manuel Atienza said in his famous work The right reasons: "What is usually meant today by theory of legal argument stems from a series of works from the years fifty sharing each other's rejection of formal logic as a tool to analyze the legal reasoning. The three concepts are most relevant topical ... Viehweg, the new rhetoric of Perelman and informal logic Toulmin" (Atienza, 2004).

Cited above, examine the main contributions of each of these concepts, starting with topical Viehweg. Professor at the University of Mainz topical characterizes three interrelated elements: a) technical troublesome thought; b) from the point of view of the instrument with

which it operates, what is central is the notion of topos or commonplace; c) it is a search and examination of premises (Atienza, 2004).

Topical is a search procedure premises or topics that really never end: the repertoire of topics is necessarily provisional, elastic. Hence, the topics are to be understood as opportunities for guidance and, in that sense, as wires of thought that only allow short reach conclusions.

The main conflict that detects professor at the University of Alicante in Spain, Manuel Atienza, is its radical use: "... the essential problem that arises with its use is that the topics are not nested together, so that for resolution of the same issue might use different topics, which also lead to different results "(Atienza, 2004).

Moreover, the new rhetoric is headed by Chaim Perelman Polish theorist legal argument that begins with Aristotelian differentiate the formal analytical or logical reasoning of dialectical or rhetorical reasoning, and this belongs to his theory of legal reasoning. What matters to him it is for example (Atienza, 2004) structure, the logic of the argument, not the psychological aspects of it,.

So, Perelman offered the idea that the analysis of the arguments used by politicians, judges and lawyers should initiate a theory of argumentation. In this sense, formal logic moves in a deductive level, where the passage of the premises to the conclusion it is necessary to the extent that if the premise is necessary, so is the conclusion. For its part, the argument revolves around aspects of plausible nature. So the rhetorical arguments do not seek to foster evident realities, but to demonstrate the reasonableness of the proposal or opinion. Thus the audience is critical because it will depend on who try to persuade.

From the above, our author believes that there are three elements of argumentation, namely the speech, the speaker and audience. In order to classify the types of argument, when the distinguished Polish professor is directed to a universal audience, when it comes to a single listener or when deliberation is individually or with yourself. For Perelman, one of the main functions of the argument focuses on the fact persuade or convince. That is persuasive or convincing argument is valid.

Chaim Perelman made an extensive typology of the arguments, which begins with two groups as linking procedure or dissociation procedure. The first unite different elements and allow establishing among them a solidarity that aims to structure them, or value them positively or negatively. As for the latter, its purpose is to separate, desolidarizar elements as components of a whole or at least a global group within the same system of thought (Atienza, 2004).

In summary trial and Manuel Atienza: the importance of the work of Perelman, as often escrito- has essentially lies in its attempt to rehabilitate practical reason, that is, to introduce some type of rationality in the discussion of issues concerning morality, law, politics, etc., and that means something like a middle way between theoretical reason (the logical-experimental sciences) and outright irrationality. Furthermore, the proposal is characterized not only by the extent to which conceives argumentation, but also because it takes into account the practical arguments as presented in reality. Finally, the pragmatic importance of language is given axis (the purpose of argument is to persuade), the social and cultural context in which the argument is developed, the principle of universality (rule of law) or the notions of agreement and auditorium anticipating essential elements of other theories of argumentation now focus the debate concerning practical reason (Atienza, 2004).

Meanwhile, the British philosopher Stephen Toulmin Edelston with its analysis of the theory of argumentation, seeks to oppose a tradition that is rooted from Aristoteles and intends to make a formal logic of science, comparable to the geometry and other sciences accurate.

Contrary to this practice, and Toulmin words Manuel Atienza:

> It is proposed to move the focus of the logic theory to practical logic; not interested in an "idealized logic", but an operating or applied logic (working logic); and to make this operation as a model choose not to geometry, but to jurisprudence: Logic, we can say, is widespread jurisprudence. Arguments can be compared with legal disputes, and the claims that we do and for which argued in extra-legal contexts, are claims made in court, while the reasons presented to justify every kind of claim can be compared with each other. A key task of jurisprudence is to characterize the essence of the legal process: the procedures by which they propose, they question

> and the legal claims and categories in terms of which it is made are determined. Our research is parallel: try, similarly characterize what may be called the rational process, procedures and categories through the use of which can be argued in favor of something and settle claims in general (Atienza, 2004).

In other words, there is a correspondence between logic and jurisprudence for situating in the center of the critical role of reason, because a good argument, a sound argument is one that resists criticism and for which a case can be presented meeting the criteria required to warrant a favorable verdict.

Toulmin began to establish modes of behavior, which is the practice of reason, to provide reasons for what we do or say. According to this author, two main modes of language use exist: one that is used to instrument mode, and in which case the utterances directly achieve its aims without providing an additional reason; and argumentative use, which for linguistic expression that is host to succeed it is essential to provide reasons, arguments or evidence to support it.

In order to establish more clearly their ideas, Toulmin sets out a number of basic concepts. For example, it defines argument as "total activity to raise claims, put in question support them producing reasons, criticizing those reasons, refuting that criticism, etc.". On the other hand, the reasoning term used to refer to "the core activity of the reasons for submitting a claim, and to show how those reasons are successful in giving strength to the claim". Regarding the argument notion, a distinction made in two ways. In a first point, an argument is a stretch of reasoning, that is, the sequence of claims and chained reasons, including establishing the content and strength of the proposal in favor of a particular speaker's arguments. In a second sense are human interactions through which formulated, debated and turns to such flights of reasoning. Finally, who is involved in an argument expresses its rationality or lack thereof, as the argument shows open (open to argument) or try to replicate or manifest deaf to the argument (deaf to argument), in other words, ignore contrary reasons, or replies to them with dogmatic assertions (Atienza, 2004).

On these bases, the British philosopher establishes what the key elements of an argument that satisfied involve correction and are are: the claim, the reasons, warranty and support.

With respect to the claim, this is the starting point and the destination point of our argument. Imagine an assertion either, for example: "Laura has problems at work."

If the listener question this statement, the proponent will have to provide each and every one of the important reasons for the case. For example, the proponent can set, "she told me that the new owner of your area is very demanding and more with it; It has even threatened to fire her. "

Should he be questioned on the above, you should make a general statement to serve as a guarantee of its claim. For example, our speaker could argue: "the fact that they become unemployed due to threats from his boss is a problematic situation itself, as there are few spaces for a librarian perform satisfactorily; addition to age very few employers would risk hiring her. "

For some of the above may be solid enough for the party accepts that "Laura has problems at work"; however, this might do another question, in which case the proponent should provide support, that is, prove that your warranty is sufficiently strong. He can say: "Indeed, if Laura is fired can not find a new job where he can develop his skills as a librarian because there are few places to perform, particularly if we consider that according to the latest census statistics produced by INEGI, the Mexico libraries are few and also the census to which I refer also indicates that most people over 60 are unemployed or unemployed ".

Tracking the previous sequels allows us to obtain a valid or correct argument, however, this may not necessarily be strong enough to convince, depending on what Toulmin called rebuttal conditions (rebuttals). To the extent that there are, even right that this argument is not convincing and can only be adjudicársele the adjective presumably, probable or plausible.

In conclusion, Professor of Oxford University discusses the fallacies, which are the ways in which it is argued incorrectly. In this regard, Toulmin distinguishes five categories, which fallacies arise: 1. a lack of reasons; 2. reasons irrelevant; 3. faulty reasons; 4. unsecured assumptions; and 5. ambiguities. The best example of the first is to begging, which is to make a claim and argue in favor advancing reasons whose meaning is simply equivalent to the original claim. With regard to the second, this happens when the evidence for the claim

are not relevant to it; for example, the person is appealed, the people, or feelings to justify the claim. The third arises when the reasons offered for the claim are correct but inadequate to establish the specific claim in question. The fourth is generated when the budget that you can spend reason the claim on the basis of a shared security for the majority of community members is taken, when in fact the warranty is not accepted by all. Finally, the fifth type of fallacy occurs when a word or phrase is used erroneously because of a grammatical error, misplaced emphasis or similar assumptions.

CONCLUSIÓNS

One of the main problems facing the judge at the time of settling disputes under its authority has to do with the interpretative scope to be given to the regulatory text to apply or, where appropriate, the argumentative strength to justify the decision of the ruling , both of which on many occasions generate inaccurate decisions.

Thus, such situations occur daily in the judicial work of judges, magistrates and ministers, who almost mechanically apply some regulatory text and argue with appropriate fluency and mathematical logic, but also incur interpretive and argumentative conflicts, such as when a text clearly enough interpreted in isolation and should be read in conjunction with the law where it is locked or when the purpose of establishing the reasons for the failure incurred a logical fallacy of begging the question.

Bibliography

Atienza, M. (2004). Las razones del derecho. México: UNAM.

Hallivis Pelayo, M. (2009). Teoría General de la Interpretación. México: Porrúa.

Luhmann, N. (2002). El derecho de la sociedad. México.

Nieto Ibañez, S. (2003). Interpretación y Argumentación Jurídica en Materia Electoral. México: IIJ-UNAM.