

# Thoughts About the Legal Argumentation in the Judicial Practice

Carlos Alberto Macedonio Hernández, Melba Angelina Méndez Fernández, Lucely Martina Carballo Solís  
Autonomous University of Yucatan, Mérida, Mexico

Legal argumentation is a discipline of philosophy, whose objective is to interpret the norm regarding the facts presented by the parties in a judicial process. As a consequence, various models of evaluating the facts in real life have appeared, and to be presented by means of argumentation before the judges. Consequently, there are several theories to solve each and every one of these types of problems. Therefore, it is necessary to train judges on legal argumentation, which will help them decide over the most difficult cases they are presented.

*Keywords:* judicial practice, legal argumentation, complex cases

## Introduction

This report provides an analysis of the current literature regarding the generalities of the concept of legal argumentation and its field of application in the judicial practice. The importance of training judges to recognize legal argumentation as a discipline of legal philosophy, as Manuel Atienza pointed out, to use it when evaluating the application of law to solve difficult cases.

## General Comments About the Concept of Legal Argumentation and Its Field of Application

According to Abelardo Hernández Franco (2010), the word argumentation comes from the term *arguere*, which means *to let see clearly* (p. 5).

However, other authors, such as María del Carmen Platas Pacheco point out that argumentation comes from the Latin word *argumentation is*, which also means “arguments”. From this word come: the adjective *argumentalis.-e* which means what is in an evidence; the verb *argument*, to argue, discuss, reasoning due to evidence, to provide proof, to prove; the noun *argumentum*, provide proof, reason in favor of something, the reason of something, object and theme, and the verb *arguitum*, to prove, demonstrate, state the fact, to show, contradict, to refute, to deny (Pacheco, 2006, p. 17).

In this way, María del Carmen Platas Pacheco (2006) considered that arguing “is a rational activity directly linked to language and interpretation” (p. 17).

No one doubts that argumentation is fundamental in the practice of law; therefore, following Manuel Atienza

---

Carlos Alberto Macedonio Hernández, Dr., professor Category “C”, Law School, Autonomous University of Yucatan, Mérida, Mexico.

Melba Angelina Méndez Fernández, Dr., professor Category “A”, Law School, Autonomous University of Yucatan, Mérida, Mexico.

Lucely Martina Carballo Solís, Master, professor Category “C”, Law School, Autonomous University of Yucatan, Mérida, Mexico.

(2005), we consider that what best defines a good jurist, perhaps, is the ability to formulate and handle arguments with skill.

But what is the argumentation? In the words of Victor Manuel Pérez Valera (2011), “is it to offer a set of reasons or evidence in support of a conclusion, but it is not a question of listing some opinions or hypotheses, but of supporting, demonstrating, consolidating the why of judgments” (p. 2); it is, in other words, about convincing, beyond persuading the soundness of the affirmations, to show the value, strength, and reasonableness (Valera, 2011).

Theodor Viehweg (1997) defined to argue as: “the foundation that satisfies certain communication duties. That act of substantiation implies interpretation, an intermediate element which ensures correction in the reciprocal conduct of the inhabitants” (p. 167).

But the concept or idea of argumentation differs from the concept of legal argumentation, because from the second half of the last century, the theories of legal argumentation have proliferated, trying to explain its basis and the form, or model of explanation, but beyond its conceptualization, the usefulness in the practice of law.

The most significant theories that have given birth to legal argumentation are: The theory of Theodor Viehweg, who proposes the return to the topics originally proposed by Aristotle as a means of finding arguments that help solve the practical problems presented in the practice of law (Amandi, 2011)<sup>1</sup>; the theory of Chaém Perelman, who underlines the renewal of rhetoric as an instrument for legal argumentation in contrast to the predominant use of formal syllogistic logic; and finally, the theory of Robert Alexy, who insists on the need to solidly substantiate values, which are the raw material of legal argumentation. The three authors, with diverse approaches, aim to explore the rationality of the legal decision in its various dimensions, as well as to clarify and find the justification of the decision-making process in the field of law (Amandi, 2011, p. 17).<sup>2</sup>

Carlos Santiago Nino considers that through argumentation, dogmatic jurists manage to interpret the rules in such a way that their meaning is consistent with other positive rules and with the intention of the lawmaker. Therefore, the class of scientifically valid arguments is “those that refer to the purposes of the legislature, and to the concordance with the requirements of other rules, with general principles that are inferred from them, or with the nature of the legal institutions” (Franco & Abelardo, 2010, p. 32).

Legal argumentation is defined by Rojas Amandi (2011), as “The special discipline of the philosophy of law which aims to analyze the reasoning used to justify, as legally correct, the claims raised by lawyers, or the decisions made by the authority” (p. 45); as can be seen, that is the main purpose of legal argumentation, the justification for the claims, and consequently, the decision of the judicial or administrative authority that administer justice.

For Manuel Atienza (2005), the theory or theories of legal argumentation, assert as object of reflection, “the arguments that take place in legal contexts” (p. 2). In principle, different areas of law, in which arguments are

<sup>1</sup> According to Victor Manuel Rojas Amandi, in the presentation of his work “*Legal Argumentation*”, he notes that theories of legal argument occupy a central place in the philosophy of law, after those of discussions between iusnaturalism, iuspositivism and legal realism, moving on to another discussion, on the problems of practice and the uses of language. The techniques and modes of legal reasoning are the central theme of legal argumentation.

<sup>2</sup> Some philosophers, such as Manuel Atienza have sought to explain the legal argument as a right. In Mexico, Jaime Cárdenas Gracia, researcher of the Institute of Legal Research of UNAM, and Serafn Ortiz Ortiz of the Autonomous University of Tlaxcala, have been the pioneers in Legal Argumentation. See the works of Jaime Cárdenas Gracia “La Argumentación como derecho” and “Fundamentos de la Teoría de la Argumentación Jurídica” by Serafn Ortiz Ortiz.

made, can be distinguished. The first of these, Atienza (2005) pointed out, “is the production or establishment of legal norms” (p. 2). Here, in turn, there is a difference between arguments that are presented at a pre-legislative stage, and those that occur in the proper legislative phase (Atienza, 2005). The former are carried out as a result of the emergence of a social problem whose solution, in whole or in part, is thought to be the adoption of a legal norm. A second field in which legal arguments are made “is the application of legal rules to the resolution of cases, whether this is an activity carried out by judges in the strict sense, administrative bodies in the broadest sense of the expression, or simple individuals” (p. 3). Here, in turn, there is a distinction between arguments concerning problems concerning facts or law (Atienza, 2005).

It can be said that the theory of the dominant legal argument focuses on the questions relating to the interpretation of law, which arise in the higher bodies of the administration of justice, in the Mexican context, we refer to the judges, local and federal courts. However, most of the problems on which both judges and justice officials, and non-judicial bodies of the administration have to know and decide are rather problems concerning the facts, so that the arguments that take place, when the occasion arises, do not belong to the field of study of the usual theories of legal argumentation. Every legal practice consists, in a very relevant way, of arguing, including theoretical practices (Atienza & Ferrajoli, 2016).

Finally, the third area in which legal arguments take place is that of legal dogmatics. Dogmatics is, of course, a complex activity in which these three functions can essentially be distinguished:

- To provide criteria for the making of legal rules, in the various instances in which this takes place.
- To provide criteria for the application of the legal rules.
- To order and systematize a sector of the legal system. The usual theories of legal argumentation also deal with the arguments developed by dogmatics in compliance with the second of these functions (Adrián, 2015, pp. 2-3).

These argumentation processes are not very different from those carried out by the justice administration bodies, since the objective is to facilitate a legal decision, by applying a rule to a specific case. The difference between the two argumentation processes could be summarized as follows: While the justice administration bodies have to solve specific cases, the dogmatic of the law deals with abstract cases. However, it seems clear that the distinction cannot always be made very closely. On the one hand, because the practice needs to resort to criteria supplied by dogmatics, at least when faced with difficult cases, while dogmatics are also based on specific cases. This is because sometimes courts have to settle abstract cases (Adrián, 2015).

Courts or administrative bodies generally do not have to explain their decisions, but to justify them. The distinction between the context of discovery and the context of justification does not coincide with the distinction between descriptive and prescriptive discourse, but how much, in both contexts, a descriptive or prescriptive attitude can be adopted. In any case, the distinction between discovery context and justification context allows us, in turn, to distinguish two perspectives of analysis from the arguments. On the one hand, there is the perspective of certain social sciences, such as social psychology, which has designed various models to explain the decision-making process reached through arguments (Adrián, 2015).

According to Manuel Atienza, in the field of law, integrated information is one of those models for explaining decision-making, which was developed by Martin Kaplan. According to the Kaplan,

the decision-making process begins with the accumulation of evidence units or information; this is followed by the evaluation process in which each information item is assigned a value on a specific scale for the trial in process; the third step is to assign a weight to each information; then the information evaluated and weighed is integrated into a particular judgment, (Adrián, 2015, p. 5)

such as the probability of guilt; and finally, the initial impression, that is, the prejudices of the judge or jury, that may come from both situational conditions and conditions associated with their personality, is taken into account. The model not only aims to explain how the fact is actually decided, but also suggests what could be done to reduce the weight of prejudice, or under what conditions jury trials could be as reliable as trials with professional judges (Adrián, 2015).

### **The Exercise of the Power of Judicial Bodies**

In David Ortiz's opinion, rights are at risk due to the role of judges who directly apply the Constitution, and he also indicates that "Judges can change the letter of the law because of their power to interpret and apply the Constitution. Judges can verbalize sentences in such a way that jurisprudence can never be clear and objective" (Ortiz Gaspar, 2013). In short, for this author, we are facing judicial arbitrariness. On the other hand, he considers that the judges are not trained and, to top it all and points out there are dishonest judges and susceptible to corrupt actions.<sup>3</sup>

The truth is that the age of contemporary constitutionalism is the age of the judges. If we historically review the evolution of the organization of the state in the Western world in the last 300 years, we will see that there is a transition from the executive to the parliamentary power (from absolutism to the legal state), and from parliamentarism to the judicial (from the legal state to the constitutional state). The logic is simple to explain, but difficult to apply: When the Constitution, and the rights contained in it, is considered a norm, there must be a judge who enforces it when the obligation to respect the norm is breached. This was understood very clearly by the liberals with the law and the contract. If its precepts are violated, I can go to a judge and ask to enforce the disrespected rule. The same happens when rights are directly applicable, I can go before a judge to enforce them (Atienza, 2005).

It can happen, and we have witnessed it, if we look at the legislative production of any parliament, that lawmakers deviate from the Constitution. If this happens, a judge cannot be indifferent when there is an antinomy (Bobbio, 2005)<sup>4</sup>. The judge must apply the Constitution which prevails, by the principle of hierarchy. But, it turns out that conflicts occur against express laws and between rights with equal constitutional rank, and here the debate is extensive. When it comes to express laws; does a judge have the right to invalidate a law approved by those who have democratic representation? And when it comes to rights, does it make sense that a judge, through reasoning and argumentation, can destroy rights? These questions have been the subject of an interesting debate between two great philosophers: Jürgen Habermas and Robert Alexy. The constitutional trend, which has a strong historical burden (in Europe, the genocide produced in the fascist regime

<sup>3</sup> It is recommended to read the debates and arguments of the blog of David Anibal Ortiz Gaspar, with information on topics of Constitutional Theory and Philosophy of Law, available at <http://davi-dortizgaspar.blogspot.com/2013/09/en-defensa-del-neoconstitucionalismo.html>

<sup>4</sup> Norberto Bobbio defines antinomy as the legal situation in which two incompatible norms, which belong to the same legal system, have the same scope of validity, that is, one norm obliges and the other prohibits or when one obliges and the other allows, or when one prohibits and the other allows the same behavior.

and, in Latin America, the application of national security laws), is that judges have competence granted by the Constitution and therefore, have democratic delegation to control unconstitutional acts of public powers (Gracia, 2017).<sup>5</sup>

On the other hand, the collision of rights is inevitable and what the judges have to do, through reasoning and argumentation, is to avoid discretion as much as possible, maximize the protection of rights and minimize restrictions on rights, and this is what weighting is all about (Atienza, 2005).

The modulation of sentences, which goes hand in hand with the principle of *iura novit curia* by which the judge has the possibility to establish the scope of rights, is nothing other than the ability of the judges to be able to foresee the unwanted effects in a sentence. It may happen that the norms are formally and materially constitutional, but that certain factors and the context in which they are applied may have rights-infringing effects. For example, a period is established to be able to exercise a right, but it turns out that a *force majeure* situation arises and the period becomes an obstacle to the exercise of rights. In this case the judge could declare the constitutionality of the norm, but modulate its application. The Constitutional Court of Colombia, for example, has modulated the sentence in the case of massive displacement of people for reasons related to the internal armed conflict; in those cases, policies are applied experimentally and the sentence is executed in a trial-error-correction fashion (Atienza, 2005).

### **The Importance of Training Judges**

The lack of training of judges is a serious problem, as well as corrupt judges. But, in the face of this reality, is it preferable to maintain the *status quo* and do nothing about it? It does not seem sensible to remove the guarantees because they do not work. Would not it be better to make them work? As for the dishonest judges, as some authors have pointed out, the fact that they exist and declare inappropriate sentences does not invalidate the necessity and usefulness of the principles. Just as there are corrupt judges, there are also honest judges who have applied principles and done justice. The approach has to be clear. The problem is not the Constitution, but those who apply it (Atienza, 2005).

This must be enough reason for the courts to acknowledge legal argumentation as a discipline of the philosophy of law for the application of the legal system, especially regarding weighting in difficult cases. Hence, training the judges is important.

For example, the perspective of other disciplines, studying under what conditions an argument can be considered justified, should be known and applied where appropriate. Here, in turn, one could speak of a formal justification of the arguments and a material justification. This would distinguish between formal or deductive logic, on the one hand, and what is sometimes called material or informal logic, on the other hand, this in order to justify the decisions (Atienza, 2005).

Some are the reasons behind the decision, and others that justify it, their reference is that the verb motivate can be used in two ways: First, when the judges have an obligation to motivate their decisions, it means that they

---

<sup>5</sup> For Jaime Cárdenas Gracia, the notion of the Constitutional State is a very strong conception of human rights as the foundation and end of the State and the legal order, since the Constitution must not only recognize the rights of the people but also guarantee them, because each time, the acceptance of international human rights treaties grows, in such a way, when there are conflicts between rights, principles, values, legal solution methods are used that are applied case by case.

must justify their decisions. Various social sciences would have to address the context of discovery. The theory of law would be placed exclusively in the context of justification (Atienza, 2013b).

The above is called the standard theory of legal argumentation, which comes from a clear distinction; on the one hand, the judicial decision and the discourse referred to or connected to the decision; and on the other hand, at the level of the discourse, between the justification of the judges, that is, the reasons they provide as a basis, in other words, the motivation of their decisions, which means, the context of the justification of the decisions and not of the description and explanation of the decision-making processes; in other words, the context of the discovery, which would require taking into account economic, psychological, ideological factors, etc. (Atienza, 2003).

The standard theory of legal arguments is placed in the context of justification of arguments and, in general, tends to have both descriptive and prescriptive claims. They start from the fact that legal decisions must be and can be justified and, in this sense, opposed to methodological determinism. The first of these two positions seems unsustainable, especially in the context of modern law, in which the obligation to motivate, that is to say justify decisions, not only contributes to making them acceptable, but the law shall fulfill its role as a guide to human conduct (Atienza, 2003).

On the other hand, justifying a decision in a difficult case means more than a deductive operation consisting of drawing a conclusion from normative and factual premises. And as well as the second opinion, that judges do not justify their decisions but make them irrationally and after that they subject them to a process of rationalization (Atienza, 2013b).

This way, it must be understood, according to María Platas, that there are elements comprised in the legal argumentation, the activities of the parties in conflict and the argument of the judge, resulting in a judicial argumentation; which is a kind of practical argumentation that implies that there is a link between the facts being narrated, and the rules governing them. These indicate that this argument is binding on the parties and of a prescriptive type, constituting a constitutional duty to establish and motivate its resolutions (Pacheco, 2006).

### **Legal Argumentation as Practical Application**

According to Manuel Atienza, argumentation is an important ingredient of legal experience, virtually in all its facets: Whether its application is considered as interpretation or production of the law; and whether it is seen from the perspective of the judge, the lawyer, the theorist of law, or the lawmaker. What may be less obvious is to make clear its importance and its meaning, and, above all, to show how the argumentative perspective makes it possible to fully understand many aspects of law and legal theory; and ultimately provides extremely useful instruments to work meaningfully within the law, particularly in the legal systems of constitutional states (Atienza, & Ferrajoli, 2016).

Therefore, Manuel Atienza now conducts an analytical study on legal argumentation and points out where we intend to go with all of the above, as is to affirm that just as the constitutional state, as a historical phenomenon, is undeniably linked to the growing development of argumentative practice in contemporary legal systems; constitutionalism, as a theory, is at the heart of a new conception of law which, in our view, no longer fits in the framework of legal positivism, and an idea that leads to a particular emphasis on the law as an argumentative practice (although, of course, the law is not just argumentation).

Those who do not accept this new idea (they are not constitutional authors) fail not to recognize the importance of argumentation in the constitutional state. Unlike in the legislative state, in the constitutional state, the power of the legislature and any state body is a limited power and must be justified more demandingly. Reference to the authority (to the competent body) and certain procedures is not sufficient, but also—always—content control is required. The constitutional state thus represents an increase in the justification of public bodies and, therefore, a greater demand for legal argumentation (than that required by the rule of law).

Truly, the ideal of the constitutional state (the culmination of the rule of law) implies the complete submission of power to the law, to reason: the force of reason against the reason for force. It seems, therefore, quite logical that the progress of the constitutional state has been accompanied by a quantitative and qualitative increase in the requirement of justification of public bodies (Atienza & Ferrajoli, 2016).

In order to verify the validity of the latter statement, it is sufficient to examine what has been the evolution of the obligation (and practice) of judicial reasoning of decisions. In continental legal systems (the *common law* has had a somewhat different trajectory), two stages can be distinguished: the first begins in the second half of the 18th century and it is characterized by, in its various models, what Michele Taruffo has called the “endoprocessual” conception of motivation: motivation allows the parties to understand the meaning of the decision, they may possibly present its objection and the court may properly assess the grounds for the objection. On the contrary, in the second stage (since the end of the Second World War), to the “endoprocessual” functions, another of an “extraprocessual” or political nature is added: The obligation to motivate is a manifestation of the need to democratically control the power of the judge.

Neo-constitutionalism is the product of profound transitions from the rule of law; it arises as a reaction to the legicentrism of the legal rule of law, taking postpositivism as a conciliatory philosophical theory of the pure forms of iusnaturalism and positivism. The new constitutional law implements a moral or ethical reading of the law in which principles, immersed in fundamental rights, guarantee and protect human dignity in an integral way.

This constitutional rule of law, which embraces the new theories of the Constitution, is closely related to the consolidation of a democratic state, but not of any democracy, but of which in addition to the formal element of it, finds the substantial element in which human rights rise as limits to the actions of the state power. Luigi Ferrajoli defines his constitutional democracy in this way, marking an international milestone for its development. Democracy today can no longer be conceived without the protection and guarantee of fundamental rights.

In this context, the constitutional human rights reform of 10 June 2011 is in line with constitutionalist theory by applying, mainly through its paradigmatic first article, the constitutionalizing of international human rights law, the diffuse control of constitutionality and convention, especially of members of the judiciary, as well as the implementation of the principles of conforming interpretation, *pro personae* and those that characterize the nature of human rights.

Undoubtedly, Mexico has a major challenge in implementing the 2011 constitutional reform, and it will have to take several actions to consolidate it, including supporting all state and federal authorities, especially academic authorities in the training of the 21st century lawyers, as well as avoiding personal and institutional judicial activism. And as a fundamental challenge, to strike a balance between both state and federal powers; the consolidation of the modern constitutional system will, undoubtedly, make the state as the permanent guardian

of the protection of the human rights of the inhabitants of the Mexican state, and this will help to comply with the modern democratic institute of this century.

### Conclusions

Nowadays, legal argumentation is understood as a discipline that allows to interpret, reason, and decide those difficult cases presented to the judge, who after hearing the arguments of the parties, must make a correct decision, in order to provide justice to the citizen. In countries with a Constitutional Rule of Law, judges must have in-depth training on legal argumentation, because far from seeming only a theoretical, philosophical construct with a high linguistic content, it actually has a practical application, because the only way to make decisions effectively is by taking into account the facts, the legal rule and the values immersed in them, this is of capital importance, because, in the end, the judges will justify their resolutions and by doing it they will fulfill society's deepest desire, which is justice.

### References

- Adrián, J. (2015). *Razonamiento constitucional: Críticas al neoconstitucionalismo desde la argumentación judicial*. Perú: Academia de la Magistratura. Retrieved from [https://img.lpderecho.pe/wp-content/uploads/2017/05/Razonamiento-constitucional-criticas-al-neoconstitucionalismo-Legis.pe\\_.pdf](https://img.lpderecho.pe/wp-content/uploads/2017/05/Razonamiento-constitucional-criticas-al-neoconstitucionalismo-Legis.pe_.pdf)
- Amandi, V. M. R. (2011). *Argumentación Jurídica* (1° reimpresión). México: Editorial Oxford.
- Atienza, M. (2001). *El sentido del derecho*, Editorial Ariel, Barcelona. Retrieved from <https://www.lexml.gov.br/urn/urn:lex:br:redede.virtual.bibliotecas:livro:2004;000746795>
- Atienza, M. (2003). *El derecho como argumentación*. México: Editorial Fontamara.
- Atienza, M. (2005). *Las razones del derecho: Teorías de la argumentación jurídica*. México: UNAM.
- Atienza, M. (2009). *Introducción al derecho, Biblioteca de Ética, Filosofía del Derecho y Política*. México: Distribuciones Fontamara.
- Atienza, M. (2013a). *En los casos difíciles, no basta con el silogismo*. Mérida: Poder Judicial del Estado de Yucatán.
- Atienza, M. (2013b). *Curso de argumentación jurídica*. Madrid: Editorial Trotta.
- Atienza, M., & Ferrajoli, L. (2016). *Jurisdicción y argumentación en el Estado constitucional de derecho*. Ciudad de México: UNAM.
- Bobbio, N. (2005). *Teoría General del derecho* (2° ed.). Bogotá: Temis.
- Hernández Franco, J. (2010). *Argumentación jurídica, Colección de textos jurídicos universitarios*. México: Editorial Oxford.
- Gorra, D. G. (2012). *Teoría de la argumentación jurídica de Robert Alexy: Sistema de ponderación de principios*. Retrieved 14 de junio de 2019 from <https://jifa.fi-les.wordpress.com/2012/01/gorra-daniel.pdf>
- Gracia, J. C. (2017). *Del estado abosoluto al estado neoliberal*. México: Instituto de Investigaciones Jurídicas (UNAM).
- Martínez, R., & Manuel, J. (2017). *Estudios sobre la argumentación jurídica principalista: Bases para la toma de decisiones judiciales*. Ciudad de México: UNAM.
- Gaspar, O., & Aníbal, D. (2013). *En defensa del neoconstitucionalismo transformador. Los debates y los argumentos*. Retrieved 14 de junio de 2019 from <http://davidortizgaspar.blogspot.com/2013/09/en-defensa-del-neoconstitucionalismo.html>
- Pacheco, M. C. P. (2006). *Filosofía del Derecho, Argumentación jurisdiccional* (3° ed.). México: Porrúa.
- Valera, V. M. P. (2011). *Argumentación jurídica*. México: Editorial Oxford.
- Viehweg, T. (1997). *Tópica y Filosofía del derecho*. Barcelona: Edit. Gedisa.