

## Limits of didactic abstraction versus positivism in the hermeneutic method as a legal research system at the university level

BY

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### Abstract

The university student is a continuous reader of the law, but must know the resources that legal research has in order to get as close as possible to the correct interpretation. The objective of this research is to describe the characteristics of the hermeneutic method, highlighting the properties of abstraction as an epistemological system of interpretation of legal norms and principles. Within the methodological aspect, 10 third-level theses of university students from the University of Guayaquil and the Laica Vicente Rocafuerte University of Guayaquil are chosen. It uses the descriptive method, in order to establish the advantages and disadvantages of the interpretation.

**Keywords:** hermeneutic abstraction- legal interpretation- positivism-

## INTRODUCTION

### Development

For (Hernandez Manriquez, 2020)

The application of the legal norm implies a previous interpretative work of the same, not exclusively of the judge, but of any operator whose intention is to base a reasoning based on the legal system. In this sense, it is affirmed that the application of a legal proposition must precede the exact investigation of a legal proposition. (p.46)

Within the limits of didactic abstraction against positivism in the hermeneutic method as a legal research system at the university level, is the essay as a system of didactic interpretation. The essay makes an analysis of the problematic reality, developing a critique of it, trying to provide argumentative ideas that glimpse a solution to the raised reality. This reality is the phenomenon that we are going to propose. We use words to analyze the phenomenon that interests us. We report its characteristics.

The topic of the essay must attract the student with its problems. The lack of knowledge of the problem to criticize does not allow the development of the essay. Lorenz already said, quoted by (Candelero, 2016)

Curiosity, the desire for the new, as an intentional aspiration towards knowledge and learning of the outside world is, from an objective point of view, an attracted being... From the physiological point of view, this aspiration is not a drive, but ( ...) an orientation reaction, a positive taxia...( p.23)

This drive is born from the observation of the phenomenon that is combined with an exemplary cause or model that the student will have in relation to the norm. Then the student is formed personal arguments of the problem to be measured with their abstractions and then go to the bibliographical consultation to seek help from the experts that allow him to reach a state D which is that of critical writing. State A is the state of the observation of the problem, state B that of the formation of legal reasoning, state C that of the analysis of the existing norm or to create it. They can be topics of a legal essay:

The surrogacy or surrogate motherhood, legal difficulties in the postpartum period. Criticism of the Reforms and repeals by the COGEP (General Organic Code of Process) to the Labor Code.

The essay can consist of 4 to 6 pages in the third level and from 5 to 8 pages in the fourth level, and will consist of: 1) An

introduction to the critical theme in which a demonstration of knowledge of reality is recorded first problematic in a paragraph, going from a general international context to a regional and local context of the effects of the problem; to then anchor in the institutional reality or the affected groups as those that cause the problem. The problem in general is detailed and then two or three problems that are visible to the researcher or that he has perceived. The first phase of the scientific article is the Introduction. It contains the introduction at the background level of the topic addressed, the problem and contextualization briefly explained, objective(s), purpose or justification of the investigation.

The general problem becomes the objective to be changed or modified by the general objective; and the specific objectives, are related to the specific problems analyzed. It is justified why criticize the perceived reality. The scientific article does not have a hypothesis, although it may have an a posteriori guiding premise. 3 pages. These theories come out of the subject and its variables in 70%, of the research problems in 20%, and of the objectives, in 10%. It is the moment in which, didactically, the student prepares to start a journey to one of the most relevant issues within the philosophy of Law, and Law as a regulatory element of society. The third phase is the explanation of the type of hermeneutic analysis methodology that he carried out with his field experiences and the bibliography. He discusses the logical and ontological results found and in the fourth phase draws conclusions from this dialectical journey.

The conclusion is "the one that is reached after considering a series of data or circumstances" (Royal Spanish Academy of Language, 2010). In fact, concluding is defined as "inferring, deducing a truth from others that are admitted, demonstrated or presuppose" (Royal Spanish Academy of Language, 2010). Therefore, the conclusion is directly related to something that was previously admitted, proposed, or evidenced in the introduction and development of the text. Thus, in the conclusion the criticism that was defended in the text or the idea that was addressed in the work is reiterated; Answers are given to the initial questions or compliance with the objectives presented is reviewed in light of what has been elaborated in the development.

For (Escobar Córdova, 2020)He quotes (Giraldo et al, 1999: 53) stating that The object of legal research goes towards the formal sources of law, that is, the set of normative regulations that serve the lawyer to solve specific legal problems. [...] The object of study is therefore, in legal research, the set of rules that regulate the social activity of a country at a given historical moment. (p.248)

Here are some examples of an introduction to some legal science articles:

Example 1:

1. The COGEP was approved in the National Assembly on May 12, 2015, and will be in force twelve months from its publication, as prescribed by the second final provision of the same legal body. This new regulatory body has repealed provisions of various procedural laws such as the Mediation and Arbitration Law, Civil Procedure Code, Cassation Law, Organic Code for

Children, Intellectual Property Law, Environmental Management Law, Civil Code, Cassation Law, Law for the Judgment of Collusion, among others and among its objectives is to expedite the trials that remain crowded and that keep in suspense the presence of justice so necessary in contemporary society.

Ontology is part of philosophy, it is a requirement of reason so that what is being affirmed is witnessed with reality, hence legal ontology is a demonstration within legal argumentation but with evidence. Although "Every judicial process is a set of activities in pursuit of justice, which seek to lessen the inescapable impact of human fallibility when it becomes apparent in the search for truth." (Oliveros, 2010: 165) The knot between procedural reality and ontological reality that is not the same becomes evident to the judge because in procedural reality the facts are narrated as true, but who knows what it really happened and for this, there is the test that brings the judge closer to the evidence and with it to the truth of the facts, which is the ontological reality.

Although legal argumentation has traditionally been dialectical, an ontological legal dialectic would mark a new era of legal argumentation in which the advancement of information and communication technologies will favor a technological legal ontology in which evidence is associated with two principles of ontology, clarity, and evidence, two alleles of positivism so that the General Organic Code of Process does reach objective speed in the absence of procedural discharge.

How to formulate objectives? In the first place, choose a topic within the field in which the Law is applied: Demonstrate the importance of social ontology in the changes that have occurred in the COGEP reforms, analyzing the importance of speedy trials through the use of Information and Communication technologies to use them in the application of cases in labor matters.

It can also be: addressing the realization of the right to health based on a neo-positivist legal paradigm from the practice of management in the food culture continues within the University of Guayaquil

Among the specific objectives are: Motivate the creation of a recreation area and maintenance of physical conditioning with the participation of teachers from 30 to 60 years of age and a regime guided by Physical Education students from the last two semesters of study, protected by the Constitution of the Republic of Ecuador: Art. 24.- People have the right to recreation and leisure, to practice sports and free time.

Also, simulate the structuring of a food health department guided by the faculties of Chemical Engineering and Medicine in order to design 20 different diets that allow reducing the risks of genetic or acquired degenerative diseases.

A first example on the justification is: The parameters of the extraordinary protection action are met, which in its articles clearly states that it will act against rulings, resolutions, sentences, and that violate their constitutional rights and human rights. Whose appeal was presented before the constitutional court so that its members who make it up, which are nine whose knowledge is of high

studies, enshrine in their motivations and sentence rulings that fully repair those violated rights.

A second example of justification is the following: The legal modifications are urgent and necessary for them to continuously manage physical and mental health programs that benefit the group of workers, in this case, of the University of Guayaquil, taking into account that in the field study of the surroundings of the university premises, the majority of about 30 food outlets do not have qualified personnel or the diets within the food that they sell so that they are adequate for the consumption of the teachers who are inside the premises and who must eat food in the pandemic and post-pandemic times of covid 19.

The didactic explanation of the theme can be written as follows: This context aggravates the situation of food intake, presenting stress and poor nutrition with dishes full of fats or sugars such as bolón de verde, sausage broth, guatita, coffee, empanadas to the arrive without having breakfast at the university classrooms, or at lunchtime lentil Moor with meat or egg, fried potatoes with eggs or sausages, chicken with fried potatoes, rice with chicken, and little sea bass, vegetable soup, fish soups, legume salads, green juices or fruits with little fructose.

In the exposition of the papers, an example of the application of the expository method in research in Law, he expresses: What this paper intends is to recover the sense of science within the real world. Protected by the Constitution of the Republic, which (National Constituent Assembly, 2008) establishes in its art. 32.- Health is a right guaranteed by the State, whose realization is linked to the exercise of other rights, including the right to water, food, education, physical culture, work, social security, healthy environments, and others that support good living. (p.19)

The expository comparison is expressed in That there is an education for health, from the management of human talent. The departments of human talent, it is not only the distribution of the workload but the distribution of health managers, the fight for kiosks, restaurants, and cafeterias within the universities with qualified personnel and nutritional preventive measures, taking into account that A good diet generates a better material performance of the worker, as established by the Constitution of the Republic (National Constituent Assembly, 2008) Art. 66.- The following is recognized and guaranteed to people: (...) 2.- The right to a dignified life, which ensures health, food, and nutrition, drinking water, housing, environmental sanitation, education, work, employment, rest and leisure, physical culture, clothing, social security, and other necessary social services. (p.32)

What is the use of legal interpretation within the didactics of narrative in Law classes? It serves for the theoretical foundation. They are the theories that show the importance of the variables presented in the writing of the article, its foundations. The body or development is the main and most extensive part of the scientific article. It is the advance and foundation of the main idea. The purpose is the meticulous and progressive exposition of the investigation, specifying the aspects studied, analyzed, and interpreted, it must also contain thematic unity with data and

information collected, with logical legal argumentation of the search for information that will be the basis of the conclusions.

(Lage Cotelo, 2020) Investigating the external manifestation of the legal is not to theorize about the external manifestation of what the norm is, whatever its nature, it is to refute the optimization of the norm in terms of the concurrence of rights holders who are included in that norm: the external aspect of a norm consists of the regularity of its compliance and/or the sanction of its non-compliance (p.572)

A first example of development of the theoretical foundation would be: The COGEP is a regulatory instrument for all matters except constitutional, electoral, and criminal, with strict observance of due process and other principles enshrined in the Supreme Regulation, Organic Code of the Judiciary, among other. The spirit of this brand-new code is to technically decentralize the procedural burden borne by the judges and courts of the Judicial Branch, that is, to relieve them of congestion and expedite the judicial procedure for processing them.

Its objective is to be a procedural code that, by reforming the processes in non-criminal matters, achieves that the trials are fast and agile with the application of due process, orality, and legal argumentation. It is in this procedural part that legal ontology acts because as an integral part of the philosophy of Law, it allows supporting legal argumentation with evidence. Francisco Puy Muñoz, as emeritus professor at the University of Santiago de Compostela, gives orality advantages such as: "That orality guarantees better than other procedures respect for the dignity of the prisoner, the immediacy of the judge, the publicity of the trial, the search for truth and the avoidance of delay" (Puy, 2009: 118)

The COGEP, as a procedural norm, has cut the procedural phases of civil, appeal, child, intellectual property, tax litigation, and all non-criminal matters, since it favors speed in the procedural substantiation, as there will undoubtedly be errors and shortcomings that will be corrected along the way and will help to improve this regulatory body.

The future of the actions that COGEP involves has to do with the future of Justice in Ecuador. Will the COGEP serve as in Colombia to improve and administer justice, shore up procedural law in favor of citizens and that they have access to justice?

For the citizen, without a doubt, the effect is positive, since it shortens the deadlines and terms in non-criminal judicial processes when before they slept the sleep of the just, who spent months and years without being dispatched by the judges. Now there are advantages in speed, however, in the qualitative research carried out, it is established that speed is very low; With a clear idea of the legal ontology and the use of technology, for the collection of evidence, which is given to the victim, the speed will be more objective.

Being a good procedural rule and having shortcomings, such as the procedure in litigious tax and contentious administrative trials, the procedure will have to be compared to the regulations that were included in the original repealed laws. The law of administrative litigation jurisdiction, for example, is an old law but procedurally

very good, unfortunately, the judges did not respect it, and the terms that, as a result of the excessive load of files, were not put into practice one hundred percent.

It is worth doing the analysis since the COGEP does not pass this law, the corresponding reforms will have to be made to continue advancing along this path. And without a doubt that the shortcomings that are evident along the way must be corrected at the step to advance correctly and not get bogged down or rain on wet, but rather the necessary corrective measures will have to be made in a timely manner. We must all collaborate, especially justice operators, to recommend ontological techniques that allow judges to give a timely sentence and respecting the evidence in the shortest possible time.

An example 2 of theoretical foundation would be: According to (Avila Santamaría, 2022) "All human actions have cosmic significance and are part of the universal order. This way of seeing the world does not make sense for Western thought, which is deeply individualistic" (p. 23); And it is precisely this individualism that has caused a debacle in adulthood in terms of health. Medical care is left to the IESS, but medical care does not make it possible to change a culture, whose other levels of health, such as self-esteem, family context, and food, are in the real world separated from the pharmacological sphere.

Therefore, the present proposal is presented based on the Constitution of the Republic, which in the fifth chapter on Participation Rights, art. 61.- Ecuadorians enjoy the following rights:(...) 3. "Present projects of popular normative initiative." (p.30)

Today it seems that given the large amount of misinformation about the correct way to eat, self-eating talent must be educated, and closely related to food intelligence, a way of being aware of the environment in which one lives to choose according to age, the environmental context, the production of their area, the best foods for their physical and mental well-being, and constitutionally supported the procedures adopted by the organizations that assume it.

### Investigation methodology

It is an argumentative descriptive research, which uses a narrative of how the research processes should be done, how to frame within the type and design expressed, characterizing the process given in the research. Analyze the reality between making a Code and using the media to achieve its correct interpretation. A quantitative qualification process is applied to know the opinion of the researchers in order to rule out wrong criteria. 5 university professors are interviewed about the research methods that are functional for university students.

### Analysis of the results

**Each of the respondents referred to at least 7 different types of criteria regarding legal research:**

- 1) 80% of the teaching lawyers, thesis tutors, state that for students to sometimes have the skill of legal argumentation they need two epistemological currents, that of empiricism and positivism, in such a way that the

proof with arguments, it must be proved correctly. "The defender who tries to protect the interests of his client uses speech, tries to get the judge's attention through the verb, to present a favorable version of what he defends." (Oliveros, 2010: 165)

- 2) Some have said that the selection of the topic actually precedes a situation. I think that it is true and that from the outset it conditions the selection. For example, one case is that of someone who carries out work of this type because they have to obtain an academic degree, another possible case is that of someone who wants to know the historical background of a certain movement, another could be that of someone who is forced by a government or by an organization to prepare the story that interests us, about (López, 2017) The French Civil Code or Napoleon Code as it is also known is a legal monument we have no doubts. What we want to highlight now is how, without having been repealed, it has been able to serve the progress of France through an adequate doctrinal interpretation, jurisprudence, and innovative legislation. (Page 9);
- 3) They consider that within the legal investigation and demonstration, and the procedural load is technically decentralized, third-level students should be taught a correct presentation of the evidence with the help of legal ontology, which in this case is the help of ICTs for the most part, this will allow once the lawyers the agility of the process, otherwise the trials will continue to be stagnant.
- 4) The guidelines for learning legal argumentation with the advancement of technology is one of the ways in which students can learn to complement the tests, improving legal argumentation.
- 5) The problem of the subjectivity of the subject himself who is confronted with the norm is the basic problem of law for which appeal is made to an exclusive and individualized sphere in which there is a place, already within the norm itself, for the dialectical concessions of his conviction about this norm, and that is that, since the law began to be codified, one of the problems that jurists faced was to make it compatible, or at least to draw attention to problems of inconsistency or contradiction between the rules or between the existing comments regarding the rules.
- 6) The students have problems selecting the research topic, around which different planes will have to be considered. A person who is starting out must be advised to reduce the limits of this research as much as possible, since most of them dilate and digress what topic to choose, but after the practices of the last year of studies or pre-employment practices, the subject of the The investigation must be born from a doubt that keeps those who want to be a lawyer concerned and whose subject matter he or she already envisions some legal reform. We must be aware of our possibilities from the outset: of some specific possibilities, taking into account a few

factors that different elements intervene in the development of the investigation: resources, time, narrative capacity and legal experiences.

- 7) Another criterion to take into account will be the national and international bibliographic needs. Give a high priority to research on a period or a topic whose general context is well known to the person concerned, as well as having a predilection for it.

## Conclusions

Based on what has been achieved through these works, it is possible to delimit both the topic of the investigation and its phases and circumstances. To do a research project, the first thing is to determine the issue or problem that is diagnosed in your workplace. Do not look for strange or very complex things. If it is a school work, look at its context, what is interesting enough to ask yourself a scientific solution to it, and once this is achieved, see what is done about a reality, use the research model, it is important to know how to "observe"

If it is a programming in the strict sense, which can very well suppose the elaboration of a hypothesis or field of hypotheses as a starting point, to later, when going beyond the various stages of the investigation, verify them, verify if they were valid, and be able to Go correcting them as many times as required, or replacing them with others when the increase in our knowledge so advises. Even in programming, the appropriate time for each phase of the task can be calculated, otherwise, the lack of rhythm can easily sink a job.

The objectives in bibliographic research are measurable and observable in a simple way, but that of the research projects must be fulfilled once the research is finished. They are formulated in the infinitive and must be observable for the researcher and measurable for any critic and the same researcher, for this reason, it is important to formulate realistic objectives. Although there are verbs that are already predetermined for investigations, some go beyond verbs such as identify, determine, and for proposals: design, elaborate, and others.

The research projects of the 20th and 21st century are projects that start from a problem, from a phenomenon; They are not just bibliographic projects. Although the bibliography is part of the project, what a researcher must first know is a problem that, as a result of his studies in Law, Medicine, Philosophy, Education, Engineering, or another branch of knowledge, he has been able to perceive as a solvable problem, through a proposal. The other projects that many teachers send to investigate and that do not start from a humanistic or scientific disciplinary problem are not research projects, but bibliographic projects and are generally for college students or those in their first years of university. Research projects by their nature are field,

## Recommendations

In the development of the methodology, it must be possible to do it through the identification of the type of research, knowing what the sample will be, the procedure that will be carried out, the research techniques, and the analysis of the results. The type of research asks if the research is qualitative, quantitative, or mixed, also if the

scope is descriptive, exploratory, correlational, and explanatory, and finally the design if the research is experimental or quasi-experimental and the population and sample, to pose the problem with the general objective, and the minimum sample of 10% of the population.

The theoretical framework to which they refer must have a title: In addition, you must specify what you study, and why you want those subjects, according to that background, I will be able to search and send that theoretical framework in which you must respect the copyright of whoever has made the book or electronic magazine by means of a textual quote if you are going to copy it verbatim or refer to that person if you are going to comment on it.

All research must be planned from the beginning. The first task to be carried out would be to know the state of the matter at a national and international level, so as not to fall into total or partial repetitions and to know what help is available in the bibliographic field. Along with this study, and almost simultaneously, it is convenient to proceed with a survey of the documentary funds that exist or that can be located in order to establish the possibilities of material with which to carry out the investigation.

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