CHAPTER III

THE FACTS OF THE CASE: FACTS AND EVIDENCE

1. The Importance of the Case

THE theory and practice of law come down to the application of scientific methodology in the analysis of cases[1], because the law is, in fact, a science about singular and particular problems[2]. Although we may try to get a glimpse of the system as a function of cases, "in a rational sense, it is the problem and not the system that sets up the essence of the legal thought."[3] As such, books that employ a systematic approach may play an important introductory role in learning about and beginning to understand the law, but they (including this one) do not help in its practice: only working does.

For this reason, dissatisfaction with the teaching of budding legal professionals as how to solve legal problems[4] is rampant, even in the Anglo-Saxon world[5]. No matter whether a law student will eventually work as a

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[1] POPPER, KARL, *La lógica de la investigación científica*, Madrid, Tecnos, 1973; *El desarrollo del conocimiento científico. Conjeturas y refutaciones*, Buenos Aires, Paidós, 1967; *Unended Quest*, Open Court, 1976; MILLER, DAVID, *Popper Selections*, Princeton, Princeton University Press, 1985, p. 126.

[2] GARCÍA DE ENTERRÍA, EDUARDO, in his prologue to VIEHWEQ, THEODOR, *Tópica y jurisprudencia*, Madrid, Civitas, 1964, p. 12: "Legal science has always been, is and cannot help being, a science about singular problems."

[3] ESSER, JOSEF, *Principio y norma en la elaboración jurisprudencial del derecho privado*, Barcelona, 1961, p. 9; in the same sense MARTÍN-RETORTILLO / SAINZ DE ROBLES, *Casos prácticos de derecho Administrativo*, Valladolid, 1966, p. 18.

[4] "The courses at Law Schools and the University text books have never considered systematically the process by which the litigants collect, analyze and use the means of evidence to attribute the facts.": BINDER, DAVID A. / BERGMAN, PAUL, *Fact Investigation. From Hypothesis to Proof*, Minnesota, St. Paul, West Publishing Company, 1984, p. XVII.

[5] Compare ROWLES, JAMES P., Toward Balancing the Goals of Legal Education, *Journal of Legal Education*, 1981, vol. 31, pp. 375 and ss., 383, 384 and 389, who

counselor, negotiator, public official, or judge, his profession will always deal with *law on a daily basis, as it is applied to particular cases*.

2. The Importance of the Facts

It is imperative to comprehend all the facts in a given case and the relationship between them, and how to put pertinent information into the forefront, while downplaying the rest.

Once the facts are sorted, only then do we need to develop our arguments. Although CARDOZO[6] (justly) criticized him for exaggerating, SALEILLES was not wrong upon stating that in making decisions, judges first determine their answer based on the whole of the facts, and afterwards find the supporting legal principle. All legal minds need to function in this manner, *i.e.* by first taking into account the sum total of the facts affecting a particular case. The greatest shortcoming of people not knowledgeable with the law or with science in general, is that they constantly try to generate general rules from a single fact. That is just not feasible.

A former client of mine, a very intelligent man acutely versed in practical economics, figured out that his instinct in legal questions tended to be the same as mine. Because of this "skill," he decided to do without legal counsel until he encountered cases where other people found his intuition unconvincing. At that point, he would call me back, see how I felt about his take on certain questions, and regardless of my warnings (which he wrongly surmised to be the product of my monetary interests), reformulate his opinions.

While this former client of mine may have been right at times, he can no more be sure of himself than I of myself in my own predictions of law. I do know one thing, though - I trust my own perceptions in law as a lawyer, less than he trusts his as an economist. I still think that he is unduly saving money in legal fees in important decisions. A few clients of mine have lost fortunes because of such folly. Those who think it is only a matter of common sense make very dangerous thoughts, as I have seen once and again.

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is more optimistic with the technical aspect, not the social-political one (pp. 391 et seq.).

[6] See CARDOZO, BENJAMIN N., *The Nature of the Judicial Process*, Yale University Press, New Haven, reprinting 1952, p. 170. It deals with the scientific supposition, which we refer later to: it is not that it is already "decided", but that there is a provisional hypothesis, subject to modification.

Let me now give an example of people without such good insights. A couple of middle-age professionals (one lawyer, one economist) were part of a governing body of a State entity whose "nature" they wanted to determine. They wanted to know whether their entity was governmental in nature, or whether they could govern it themselves as a private entity. I quickly realized that their *real* question was whether or not they had to comply with regulations governing the public sector, or whether they could do whatever they wished. Two hours and much chagrin later, I could not get through to them that their question was wrong. I simply could not convince them that the second alternative does not exist in private law, that they always are bound to act with prudence and care, not recklessly, and that, publicly or privately, they will always be responsible for their actions. They simply could not believe it, because to them, private law meant doing whatever they pleased without accountability.

Similar concerns may be found elsewhere. Rules do not activate themselves. Whether a definite substantive rule is applicable or not depends on the facts of a case[7]. Indeed, as LORD DENNING said, "everything depends on the subject-matter."[8] Law must assure "that there is documented evidence that provides a rational and logical basis for the decision [and that it] is a product of reasoning as of the evidence indeed. This is to say, evidence in the case and in the context of the case [...]. A conclusion based on abstract evidence can be 'rational,' but it is not a rational decision within the case in question."[9] "Resolutions [...] based on non-existent evidence [...] turn the measure set forth in them arbitrary"[10], or "it is not admissible [...] without infringing upon the principles regarding the guaranty of due process of law, to omit evidence on the mere dogmatic statement that the testimonies are insufficient or inappropriate."[11] It is also important "[t]hat the judges taking part in it have the power to revoke or annul the adminis-

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[7] BINDER / BERGMAN, *Fact Investigation. From Hypothesis to Proof*, *op. cit.*, p. 2.

[8] LORD DENNING, *The Discipline of Law*, London, Butterworths, 1979, p. 93: "It is not possible to lay down rigid rules as to when the principles of natural justice are to apply: nor as to their scope and extent. Everything depends on the subject-matter".

[9] JAFFE, LOUIS, *Judicial Control of Administrative Action*, Boston-Toronto, Little, Brown and Company, 1965, p. 601.

[10] PTN, *Dictámenes* [*Opinions*] 81:228, 230 and our vol. 4, *Procedimiento administrativo*, *op. cit.*, chapter VII.

[11] CSJN, *Fallos* [*Judgments*], 248: 627, *Aldamiz*, 1960.

trative decision on the issue of facts, if it were unreasonable enough or it were supported only by the arbitrary will or the caprice of the officers."[12]

In order to discern what is really going on in a case's dossier, it is necessary to examine attentively and completely the set of documentation. As the old adage from the French *Conseil d'Etat* goes, one needs to "make the papers speak."[13]

3. The Difficulty of Determining the Facts

LEIBNIZ pointed out that while the aspects and details of reality are infinite, our own capacity to grasp those details is on the contrary quite limited. While the aspects of experience are inexhaustible, sensory or human perception of them is definitively limited. In other words, we do not have the possibility of discerning or grasping reality as a whole. That capability, if it exists, is simply not in the human nature.

Just as all scientists only admit a limited and contingent knowledge of their objects, the same goes for the jurist. In order to perceive as much reality as we humanly can, we must use all the means that science and technology can provide: photographs, graphs, plans, figures, statistics, actuarial projections, surveys, etc. Basically, we need to leverage all quantitative and qualitative analyses of reality, and also do not omit what our own eyes can observe.

Admittedly, this is not easy. Let me give you an example: Regulations determine that imported goods have to state which country they come from, as in the famous "*made in…*" case. In that case, the administration had sanctioned an importer for having goods in the market labeled "Made in the European Union, etc." Lawyers for the company appealed to the judiciary and argued extensively about the EU being enough identification. A judge said that a breach of the norm was clear and unjustifiable and the sanction was upheld. The court of appeals, on the other hand, after again reproducing the whole label, found that the interpretation of the statute had been too literal. The court went on to argue, quite well and convincingly, that only stating EU as place of origin had not broken the rule. It found for the claimant and against the administration. However, neither the administration, nor the lawyers, nor the judges read the label in full. In reality, the

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[12] CSJN, *Fallos* [*Judgments*], 244: 548, 554, *Reyes*, 1959.

[13] DE CORMENIN, M., *Droit administratif*, vol. I, Paris, ed. Pagnerre and Gustave Thobel, 1840, 5th ed., p. 11, note 3, highlights the conscientious and detailed work of the auditors who verify, instruct and report the dossiers.

label read: "Made in the European Union … Toledo, Spain." This case has been published without any criticism, because I imagine the editors did not read the label in full, either.

4. Analyzing the Evidence that Already Exists

In this section, we will provide a "how-to" for discerning the facts of a given case.

The first step[14] must comply with the existing evidence and that evidence's reality, without ignoring the case's administrative dossier. Meticulous analysis of all documents is needed, examining each one at a time, looking for connections between them. At the same time, it is worthwhile to prepare a list[15] of the facts we know and the evidence supporting them, noting where the gaps in information are and correlating what facts there are in order to verify whether there really are differences between them.

In the first stage, aside from evaluating the power of the existing evidence, the lawyer must examine the credibility of the witnesses, the reliability of the expert's reports, as well as the overall veracity of the documentation. All this without taking anything for granted[16], because documents will frequently be objected to as false.

Next, it will be important to interview the parties to find out their version of the facts. In addition, the lawyer should consult the business books of the parties, visit pertinent locations[17], and consult with experts[18] who know the non-legal aspects of the case to discuss the facts: not only to determine if one understood correctly, but also to assure that the experts present it properly. If a lawyer must argue or defend a medical malpractice suit, that lawyer must understand not only the basics of the medical prob-

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[14] See my book *El método en derecho*, *op. cit.*, chapter I.

[15] BINDER / BERGMAN, *op. cit.*, p. 40, they actually propose five lists of facts according to the character of the evidence that supports each of them: a total central list, two lists of concrete evidence corresponding to each one of the parties, and two lists of potential and additional evidence of each one of them.

[16] As regards the above mentioned we refer to BINDER / BERGMAN, *op. cit.*, chapters I to VIII.

[17] If it is about something existing physically in one place, know it, see it personally, picture it, measure it, etc., and get all the quantitative and qualitative information regarding that material.

[18] In this case (as well as in the previous item), ask for external technical reports, duly supported and certified in order to support their veracity.

lem that caused the lawsuit, but also the technical or factual elements involved in any administrative problem presented. Certainly, there are material time limitations: the period to appeal expires, as the period to reply, etc. However, the lawyer should know, at least, what the optimal conditions are for gathering information and evidence leading to the best possible result, and make them known in his case.

The lawyer must not be afraid of "overabundant" evidence gathering, because he will thereafter exercise his capacity to synthesize and focus[19]. On the contrary, if the evidence is not sufficient and the opposite party discovers and submits adverse and substantial evidence to the dossier, the case may be lost. If the professional knows of that evidence in time, he can warn his client *ab initio* that the law is not on his side and that he will lose the case. In this way, the lawyer avoids the disappointment and partial discredit of losing a lawsuit by imperfect knowledge of the facts of his own case, damaging his prestige, which is his sole capital. For this reason, the best moment to determine whether a case has sufficient factual support comes along with these first elements of trial.

4.1. Lawyers

Once that stage is over, the lawyer starts shaping a hypothesis as to the case, which will necessarily lead him to evaluate whether he has enough evidence to support this hypothesis. In other words, the lawyer needs to determine what the necessary evidence to support the argument is.

It is also at that point when lawyers must consider how their initial hypothesis may be challenged and imagine what evidence could uphold that challenge. As POPPER remarks, it is not only about looking for challenges, it is also about being critical of oneself - and of one's self-criticism - all the time[20]. Because this stage comes prior to initiating an action, we run the risk that a certain approach to the question gets discredited because of the subsequent production of opposing evidence. For this reason, a responsible decision must include this intermediate stage.

4.2. Officers and Magistrates

When an officer has to pass judgment on a case, the situation is the same, *mutatis mutandis*. This legal principle rules the administrative pro-

[19] Unless incurring expenses that seem to be excessive and irrelevant.

[20] MILLER, *Popper Selections*, *op. cit.*, p. 126.

ceeding, which means that the office acts on its own initiative, not only on the parties' initiatives. The burden of proof is on the administration, and if the evidence already submitted to the dossier does not satisfy the officer, he will produce reports, decisions, expert's opinions, etc., as long as he may deem necessary in order to reach the material truth[21].

The work of the lawyers in gathering facts helps officers in their own determination of the facts. However, not always can the officer enter a decision solely on the lawyer's facts presented as evidence: further evidence might be requested. There are various material reasons that may lead to that. For example, in ordinary proceedings, the facts could have changed with the passing of time[22]. In protection proceedings, due to their expedited nature, evidence that would have been necessary in an ordinary proceeding might have been omitted, but has to be produced nevertheless[23]. It is true that, more than once, tribunals have wondered whether "to let the mantle of the judge drop and assume the gown of lawyers."[24] It is also true that in each successive court hearing, the court becomes more and more reluctant to carry out new investigations or determinations.

This produces, however, a dilemma: Ruling without sufficient evidence, or carrying out at the court's own initiative the production of evidence. Although the first option may have apparent support in procedural law, it is not supported by the rules of constitutional due process.

4.3. "Irrelevant" Facts

It would be extremely naïve to think that only objective reasoning and salient facts are used by judges, and that no extraneous criteria ever enter into judicial decision-making except when it is biased by corruption. Frequently, decisions that are not tainted by corruption, nor illegal in a formal way, nor necessarily immoral, are yet influenced by what comes from outside of the docket and is not explained in the formal decision.

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[21] We explain such principles in our *Tratado de derecho administrativo*, vol. 2, *La defensa del usuario y del administrado*, Buenos Aires, FDA, 2000, 4th ed., chapter I.

[22] *See Cine Callao*, which we analyze in *Derechos Humanos*, Buenos Aires, FDA, 1999, 4th ed. (the tribunal not analyzing whether there was a change in the alleged factual situation between the moment that law was pronounced and the moment the Court declared it constitutional).

[23] Typical case, if there is a life at stake: *Fallos* [*Judgments*], 302: 1284, 1980, *Saguir y Dib.*

[24] LORD DENNING, *The Due Process of Law*, London, Butterworths, 1980, p. 61.

Many books have been written on these matters[25]. They all instruct us to be attentive and, as I suggest in Chapter V, to study all the facts before the tribunal and think about them for ourselves.

4.4. General Remarks

The lawyer[26] must then investigate and research based on the hypothesis constructed previously during interviews with technicians and other professionals, on new documentation that may have come up, or during advance preparation of witnesses, etc.[27]

Regardless of cost considerations that often force lawyers to put off such investigations until the trial, it is, in our opinion, better to produce the necessary additional or rebuttal[28] evidence[29] privately[30] and in advance. Holding a great deal of information in advance allows additional evidence to be submitted afterwards, if necessary. In addition, it is better to produce the evidence privately in advance, because, among other reasons, it is easier to collect evidence. It must be taken into account that the longer it takes to produce evidence, the harder it will be to be convincing about a position. On one hand, trial judges tend to give a certain value to the evidence pro-

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[25] One of the best courts in the world is also the best studied. See for instance COOPER, PHILLIP J., *Battles on the Bench. Conflict Inside the Supreme Court*, Kansas, University Press of Kansas, 1984. In the case of Argentina see SANTIAGO (h.), ALFONSO, / ALVAREZ, FERNANDO, *Función política de la Corte Suprema*, Buenos Aires, Ábaco, 2000. Even movies have been made on the subject. Only he who really wishes to ignore these facts manages to do so. Should he be a lawyer, it will be his own fault.

[26] As we explained, this applies to both the administrator or the magistrate, each in a lesser way.

[27] We refer again to BINDER / BERGMAN, *op. cit.*, chapters 11 to 17.

[28] We analyze in vol. 4, chapter VI, some of the problems that many means of evidence present: reports and documentary evidence (§§ 19 to 21, 23, 26), oral or written testimonies (§§ 22, 24), written interrogatories (§ 25), experts' reports (§ 26), etc.

[29] "We do not know: we can only guess […] But we tame carefully and austerely these suppositions or imaginative and audacious anticipations by means of systematical oppositions […] our method of investigation does not involve defending them to demonstrate that we were right; on the contrary, we try to overthrow them" (POPPER, *La lógica...*, *op. cit*., p. 259).

[30] See in our *Tratado*..., vol. 4, *El procedimiento administrativo*, Buenos Aires, FDA, 2002, 5th ed., chapter VI, §§ 19, 22.8, 26.2 and chapter VII, §§ 10, 10.1, etc.

duced previously from a private or administrative seat, sometimes even invoking public instruments[31] characteristic of administrative dossiers. On the other hand, in appellate courts, there is an increasingly popular attitude to accept the version of the facts that lower court judges accepted. In this way, every postponement of the proof-finding activity is harmful[32].

According to the modern principles of evidence, valuing it depends upon the reliability and credibility of every element submitted. However, it is important to learn how to weigh the evidence from the opposing party's perspective and from that of the judge if the question reaches trial. As for the latter, as there are successive instances, and as time can produce changes in the administration or magistracy, it is difficult to present arguments that do not contradict the current or potential idiosyncrasies of those decision-makers.

The dynamics of every problem must be recognized for how they affect the setting and possible solutions[33]. In other words, we must avoid the idea of conceiving law as a system in which "there are no temporary processes, there is no cause or effect, there is no past or future."[34] Therefore, it is important to be alert to the changes in facts produced over the course of time[35], the changes in the perception and proof of them, the additional information that is produced, and to evaluate how all these affect the case[36]. Keep in mind, however, that many "future factors" can arise that may alter the case: the allegation of the initial fact; "the applicable rules"[37]; "the desirable result"[38]; the deciding authority; the political and legal environment; the prevailing ideas in the society or in the government. In this way, time engenders a constant re-analysis of all the factors of the case.

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[31] As explained in vol. 3 of our *Tratado*..., chapter VII.

[32] BINDER / BERGMAN, *op. cit.*, p. 134; LEVI, *op. cit.*, p. 5 and his references. Comp. LORD DENNING, *The Due Process of Law*, *op. cit.*, p. 62.

[33] We analyzed this subject in our *Tratado de derecho administrativo*, vol. 2, *La defensa del usuario y del administrado*, *op. cit.*, section IV, "La protección de los derechos", chapters VIII to XIII.

[34] COHEN, FÉLIX S., *El método funcional en el derecho*, Buenos Aires, Abeledo-Perrot, 1962, p. 122, obviously uses general criteria.

[35] ROMBAUER, MARJORIE D., *Legal Problem Solving. Analysis, Research and Writing*, Minnesota, West Publishing Company, 1984, p. 328.

[36] ROMBAUER, *op. cit.*, p. 329.

[37] CARRIÓ, *Cómo estudiar...*, *op. cit.*, pp. 32-33, § G. In another sense LEVI says, *op. cit.*, p. 12, that "The rules change while they are applied."

[38] CARRIÓ, *op. loc. cit.*

It is also necessary to identify the facts that gave rise to the motive, as distinguished from those that constitute the factual causation[39]. Yet we must be careful not to pay so much attention to this so that we lose our overall perception of the situation. This is absolutely essential to understand and apply law. For example, to read *Cine Callao* without noticing that the court does not take account of the facts, is to lose our way in its reading. To read *Chocobar* believing that the grounds exposed are the real ones (and not the ones collected by the newspapers), is also to make a mistake. The same goes for *Marbury v. Madison.* This is, if we do not really know and understand the facts of a case, we cannot understand much about the law stated within the decision.

There is a great and persistent error committed by society, which is to believe blindly in people in power, whether they be in the public or private sector, economic or political in nature, or honest or corrupted. This is true not only in politics, but also in the law. There is the common error of believing that all legal authority is correct. In this way, people confuse the presumption of legitimacy[40] with plain and simple truth, which is not only logically unsustainable but also a substantial political error within the law.

The student must also train himself to find the legal rules and principles applicable to a particular case, whether they be: supranational[41], which, in the words of LORD DENNING, are more and more like the "rising tide. It penetrates into the estuary and goes up the rivers. It can not be stopped"[42]; constitutional; legal; and, finally, regulatory - applicable to each aspect of the case, bearing in mind that one of the errors of information that can be committed is precisely the ignorance of the administrative rules, which are numerous and constantly changing.

One of the greatest difficulties in the application of the administrative legal order deals with the supranational and constitutional rules and principles that are submerged in legislative norms that, in turn, hold less value. The non-jurist tends to perceive otherwise the normative hierarchy and gives more importance to the most minimal regulation, even if it opposes

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[39] See our *Tratado...*, vol. 3, *El acto administrativo*, *op. cit.*, chapter X, § 6.

[40] See in our *Tratado*… the vol. 3, *op. cit.*, chapter V, second part, §§ 2 to 6.

[41] For debate of this subject we refer to Chapter VI; our art. La supranacionalidad operativa de los derechos humanos en el derecho interno, *LL*, 1992-B, p. 1295, reproduced in chapter III of our book *Derechos Humanos*, *op. cit.*

[42] LORD DENNING, *The Discipline of Law*, *op. cit.*, p. 18, who adds that "undoubtedly" the national courts "must follow the same principles" as the international courts in the application of treaties that contain rules of internal law.

the general principles of law, such as constitutional and supraconstitutional principles, justice, reasonableness, etc. It is necessary to understand how to deal with cases in a way that does not infringe upon the true higher hierarchy that values have in the legal system, and yet not unprofessionally just ignore a lesser norm. At the same time, this perspective needs to be viable in relation to the interests at stake and obtaining justice.

Also, we must be reminded that thinking that cases have only one necessary, true and valid solution is a chimera: There are no similar cases, they only seem to be analogous. In this way, hypothesizing a "solution" that could have been "better" at a certain time may not, in the end, be the best for innumerable reasons. Amongst these reasons may be not being fully acquainted with the facts, failing to connect the main evidence to those facts, and/or mutating the actual factual situation, interests at stake, applicable social values (including the legal or supranational norms), the case law, etc. Consequently, in law and in other sciences, the alleged "solution" to a case will always be a hypothesis that the facts and time will either validate or not. Previous cases will not do it.

"Science is never in pursuit of the illusory aim that its answers are definite, or even probable; on the contrary, [it] is in pursuit of discovering unceasingly new, deeper and more general problems, and then to subject our answers (always provisional) to contrasting facts, which are continually renewed"[43] and more severely challenging. This objective makes it inevitable that every scientific statement be forever temporary. Of course, these statements may be corroborated, but every corroboration depends upon other statements, which are, in turn, temporary themselves.

CARDOZO reminds us of MUNROSE SMITH's words, that rules and principles are not final solutions, but rather hypotheses of work. That is, every new case is an experiment, and if the rule that seems applicable leads to an unfair result, the result must be thought again[44]. However, a lawyer who must answer to his client will have to take into account that clients usually want the lawyer's "opinions and not his doubts."[45] What is more, the client will want the complete analysis and grounds for his lawyer's opinions, which will then have to withstand the client's criticisms. Likewise, judges can express doubts they may have regarding a particular decision. How-

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[43] POPPER, *La lógica de la investigación científica*, *op. cit.*, p. 9.

[44] CARDOZO, *op. cit.*, p. 23; MUNROE SMITH, *Jurisprudence*, Columbia University Press, 1909, p. 21. In the same sense CARDOZO remembers ROSCOE POUND and POLLOCK: it is a common and traditional appreciation in the American law.

[45] LORD DENNING, *The Discipline of Law*, *op. cit.*, p. 7.

ever, they will have to express themselves assertively in this regard before they have to present the arguments that support their decision factually and normatively.

The inevitable need in all cases is to decide or advise concretely and definitely, supporting arguments properly with facts and law. This does not, however, change the fact that a case is just one more hypothesis and not an eternal truth. Subsequent debates sometimes pay special attention to the kind of arguments presented previously or the legal grounds used, but we must not forget that the decisive element will always be how the analysis of the facts was carried out. It is not surprising, then, that it has been said that "what a judge does is more important than what he says he does."[46]

In light of this statement, it is important to bear in mind the old saying that "the only rule is that there is no rule."[47] Or, as POPPER stated, "[o]ne can never be sure of anything."[48] As we have already explained, there are no previous rules from which we can "infer" solutions, and no empirical rules from which to "induce" them, either.

Let us repeat that we do not have to look for the "idol of certainty [...] the worship of this idol represses the audacity of our questions and endangers the severity and the integrity of our verifications. The wrong opinion of the science is detailed in its claim of being right: because what makes a man of science is not his *possession* of knowledge, of the irrefutable truth, but his steady and temerariously critic enquiry of the truth [reality]."[49]

We must not pretend to find "certainty" of the "true" unquestionable solution of a case of law: "those who are unwilling to confront their ideas to the adventure of refutation do not have a role in the game of science."[50] We must learn to live together with creative uncertainty, with the anguish of looking for a fairer or better solution that will be, at the same time, only

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[46] REED DICKERSON, Some Jurisprudential Implications of Electronic Data Processing, in the magazine *Law and Contemporary Problems*, *op. cit.*, pp. 53 et seq., p. 68.

[47] Or as CARDOZO says, *op. cit.*, p. 161, "After all, there are few rules: there are principally standards and grades", that is to say, great principles; LORD DENNING, *The Discipline of Law*, *op. loc. cit.*, referring to the supranational law.

[48] Except for the demonstrated error.

[49] POPPER, *La lógica...*, *op. cit.*, p. 261.

[50] POPPER, *La lógica...*, *op. loc. cit.*

temporary[51]. Admitting one's infallibility as a myth makes it easier and more satisfying to refuse to ascribe to the infallibility of others[52].

CARDOZO says that during his first professional years:

"I was looking for certainty. I was oppressed and discouraged when I realized that the search of it was futile", but as time went by "I reconciled with uncertainty, because I grew up to see it as inevitable. I grew up to see that the process in its highest levels is not a discovery, but creation; and that doubts and uncertainties, aspirations and fears are part of the mind's work."[53]

Not even a "similar" prior case "solves" the one following it. This is not only because "corroboration is not a 'truth' value,"[54] but because there will be at least a different time, a different person, a diverse space, etc.[55] Let us not commit the scientific error of pretending to find general rules from previous particular cases to apply to future cases. In order not to do this, we must differentiate between cases to avoid making previous mistakes that are no other than variations of the same methodological mistake. In addition, it is important to keep in mind that there are no "typical" cases. It is the method that must be learned through experimentation, not the alleged solutions. In each case, we must look for new, creative, imaginative hypotheses, but adapted to the reality of the case and the facts in a particular action. A mere adjustment of previous "solutions" does not suffice, because they will turn out to be always different in the new factual and legal situation. Instead, it is necessary to reason factually and legally to explain the case's hypothesis. It must be refined, modified, changed and altered, until it reaches a moment in which the actual decision is made and put in writing. Once this happens, the work is finished, although the problem is not forever or completely solved - science demands a constant debate of it.

We have already mentioned that the facts and circumstances of a case can be modified through the course of time, as well as through the interests

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[51] The quest for scientific objectiveness renders all scientific statements eternally provisional. It is worthwhile to verify, but all verification is relative to other statements, which are, in turn, provisional. POPPER, *La lógica...*, *op. cit.*, p. 260.

[52] CARDOZO, *op. cit*., p. 30.

[53] CARDOZO, *op. cit.*, p. 166.

[54] POPPER, *La lógica...*, *op. cit.*, p. 257.

[55] To say it again in CARDOZO'S words, each case is a new experiment: *op. cit.*, p. 23.

and the values at stake. Therefore, it is necessary to consider cases not only in terms of when and what things are thought that will happen, but also to determine *how* and *who* will decide *when* the impulse for things to happen will take place[56].

Although legal theory sometimes discusses the application of principles via the court's own initiative, the practice actually stems from the input of the interested parties. At the same time, there exists an imbalance that should not be judicially accepted. Each party is not allowed to argue its case before a court officer without the presence of the opposite party, for it eliminates the possibility of either party to correct or contradict what is asserted[57]. Likewise, time can show that, despite the emphasis placed initially on certain arguments, those arguments cannot result later to be less relevant. Alternatively, current arguments are forced to be permanently[58] critical and sufficiently adaptable to statements of different problems. This can be done privately or by administrative proceedings, negotiations or even a lawsuit and the potential transactions.

We need to discover how the facts were analyzed according to the moment when the case arose; how its reasoning adapted to the times and its social values; how a convincing and reasonable solution was proposed; and how the advantages and disadvantages of the many alternatives presented in each case were argued. A methodological aid to help us in this task is to understand that, in every case of law, there is a series of legal questions that must be explained by the person who is to solve it. An experienced lawyer does not even need to state those questions, because he understands them automatically and instantly. The lawyer who is not acquainted with the subject, or the student of law, can instead find it useful to analyze them[59].

Nevertheless, it must be taken into consideration that such a guide must be adapted progressively by the student. If the student is acquiring skills to solve the initial steps, he will have to concentrate later on those that are the most important for solving the hypotheses presented for a given case. In this second stage, after having duly analyzed the validity of the act in

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[56] See vol. 4 of our *Tratado...*, *op. cit.*, chapter VIII, § 1.

[57] See LORD DENNING, *The Discipline of Law*, *op. cit.*, p. 85.

[58] As regards the critic role of the teacher in the systematization of the living law, we refer to our *Teoría general del derecho administrativo*, Madrid, Instituto de Estudios de Administración Local, 1984, pp. XIV and XV of the prologue; *Derechos humanos*, *op. cit.*, chapter I, § 3.3.

[59] For a better development, our book *El método en derecho*, *op. cit.*

question, the most important step in the legal analysis is to determine the possible options and then to choose one.

In other words, what reasons there are for and against each of the following: omission[60]; negotiation[61]; management, *lobby*, material behavior, etc.[62]; remedy, complaint or administrative denunciation[63]; and legal action.

Once the preferable behavior is solved and when it is not a case of a fact or omission, it is, of course, necessary to develop through *writing* the legal writ (remedy, complaint, denunciation, legal action, etc.) selecting[64] and grading[65] the arguments to be used, without excluding adverse[66] facts and arguments. The proper and sufficient supporting of fact is of course as necessary as the supporting in law.

If it is suggested to take the omission, management, negotiation[67] or behavior proceedings which do not imply the filing of legal remedies, the

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[60] Passive acceptance, for there are situations in which the solution is to do nothing.

[61] See *e.g.* EDWARDS / WHITE, *Problems, Readings and Materials on the Lawyer as a Negotiator*, St. Paul, West Publishing Company, 1977; WILLIAMS, *Legal Negotiations and Settlement*, same publisher, 1983.

[62] The lawyer receiving the case in consultation must not leave these alternatives apart and must continue evaluating them through the course of time. Sometimes, the administration itself will suggest the administrated a material way of behavior that, by means of modifying the factual situation, may allow to face the resolution of the matter.

[63] For its differences see in the vol. 4 chapter III, § 2º.

[64] Main questions must be argued. Read more in ROMBAUER, *op. cit.*, p. 329 and the subsequent note; the same for the writing of administrative decisions or judicial judgments in which the adjudicator often does not explain all the grounds of the decision.

[65] According to the wise MORELLO's piece of advice, we must try to "avoid" all the possible *legal* arguments on the matter, in order to make the decisive task difficult for the administrative or legal authority; that is, the task of finding *new* grounds, which do not repeat the claimant's arguments but do not fly in the fact of reason.

[66] ROMBAUER, *op. cit.*, p. 329. As regards the administrative subject, the lawyers often fail to put themselves in the place of the public officer. For this reason, they cannot foresee, prove or argue according to the reasoning that the public officer will later apply.

[67] See *e.g.* EDWARDS / WHITE, *Problems, Readings and Materials on the Lawyer as a Negotiator*, *op. cit.*; WILLIAMS, *Legal Negotiations and Settlements*, *op. cit.*

explanation of the material behavior, negotiation or omission recommended must be given.

In the case of an administrative or legal authority that has to solve a matter, the steps are essentially the same. It should also evaluate the facts, ponder reasonability, weigh the alternative proceedings, choose one, write it down, set the sufficient, proper and convincing basis for it, in order not to commit an arbitrary act for lack of sufficient motivation or factual support. Time can sometimes handle it and, in fact, it does[68].

Regarding choosing a creative solution to a case and writing its brief, we refer to what is explained in *El método en derecho*[69]. The first rule is clear: to *start* writing, at the very least the account of the case and the description of its facts or the transcription of its rules. Little by little, we construct and polish the final argument.

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[68] We refer to *Problemas del control de la administración pública en América Latina*, Madrid, Civitas, 1981, pp. 55-58.

[69] *Op. cit.*, chapters VII to XII, pp. 99-197.