Legal Argumentation Theory: Cross-Disciplinary Perspectives

Law and Philosophy Library

VOLUME 102

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Editors

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Springer

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Introduction

Legal argumentation theory is a cross-disciplinary research field where theoretical tools for analyzing and evaluating legal argumentation are developed and applied. Due to its cross-disciplinary nature, legal argumentation theory has become a meeting point for scholars with a background in argumentation theory, logic, artificial intelligence, rhetoric, legal theory, cognitive psychology, communication studies and many other disciplines.

This volume brings together two theoretical approaches to legal argumentation theory: the first approach is based in general argumentation theory and contributes to the study of legal argumentation by developing general argumentation theory in application to law, the second approach is based in legal theory and contributes to the study of legal argumentation by developing legal theory with regard to argumentation. The chapters in this volume illustrate how research from one approach complements research from the other approach, and show how they can be fruitful for each other.

The papers that belong to the first approach take their point of departure in the analysis of a certain kind of argument, a specific argumentation fallacy, a rhetorical strategy or in certain rules for a rational discussion, and apply this theoretical analysis to legal argumentation. Each of the first four contributions concentrates on a specific form of argument: the argument from consequences, the argument *ad absurdum*, the argument from precedent and the argument *ad hominem*. The authors propose an integration of ideas from argumentation theory and legal theory to develop tools for analyzing and evaluating arguments of this kind in legal argumentation.

In her contribution, Flavia Carbonell investigates 'consequentialist arguments' in legal reasoning. She analyzes the diverse approaches to consequentialist arguments given by MacCormick's theory, Wróblewski's theory and Feteris's pragma-dialectical theory, with the purpose of, firstly, comparing, at a theoretical level, the strengths and weaknesses when arguing by consequences is at stake. For testing the scope of the proposals, the paper, secondly, uses the selected theories in a study of the consequentialist arguments used in a ruling of the Chilean Constitutional Court. The theoretical comparison, together with the outcomes to which the analysis of

judicial argumentation leads, sheds light on the capacity and efficacy of these tools in guiding the rational construction and evaluation of judicial reasoning.

In his contribution, Thomas Bustamante concentrates on a specific form of argumentation in which judges refer to the consequences of application of a legal rule, in this case the unacceptable or 'absurd' consequences of application of the rule in the specific case. He explains that the *ad absurdum* argument can be understood either as a strictly logical tool, which is equivalent to a proof by contradiction, or as a pragmatic argument about the desirability or undesirability of a given proposition. Yet, in legal reasoning lawyers tend to use it, at least in the vast majority of cases, only in the latter sense. The *argumentum ad absurdum*, he argues, can be classified as a special kind of pragmatic argument whose specific feature is its special argumentative strength in comparison with generic consequentialist argumentation. Once we are able to grant that premise, the chapter intends to explain the most important rules of interpretation that may be used to determine the conditions under which the *ad absurdum* argument can be correctly deployed in legal reasoning.

In his contribution, Fred Schauer investigates the argument from precedent. Schauer argues that it is a mistake to see the argument from precedent as a special case of the argument from analogy, and demonstrates that there are fundamental differences between the two argument types. An argument from precedent claims that the present case must be decided in the same way as a previous case, since there are no relevant differences between the cases. An argument from analogy claims that there is an important similarity between the present case and the previous case, but does not claim that the cases are identical in all relevant aspects. Furthermore, Schauer points out that a decision maker may disagree with the decision in the previous case and still make an argument from precedent, since an argument from precedent is made for the sake of consistency. This is not possible with an argument from analogy.

In their contribution, Christian Dahlman, David Reidhav and Lena Wahlberg develop a theoretical framework for evaluating an argument *ad hominem*. This is highly relevant for legal argumentation, as lawyers often use arguments *ad hominem* to cast doubt on the reliability of a witness. The authors propose a general definition of ad hominem arguments, and a general framework that identifies the different ways in which ad hominem arguments can go wrong. According to the authors, an argument ad hominem is an argument that makes a claim about the reliability of a person in the performance of a certain function, based on some attribute relating to the person in question. On the basis of this definition, the authors identify seven different ways that ad hominem arguments can go wrong, and classify them as seven different ad hominem fallacies: false attribution, irrelevant attribute, overrated effect, reliability irrelevance, irrelevant person, insufficient degree and irrelevant function.

The following two contributions start from a specific argumentation-theoretical approach, the pragma-dialectical approach, and explain how legal argumentation can be analyzed and evaluated from this perspective as a constructive contribution to a rational legal discussion. Harm Kloosterhuis starts by giving a description of the pragma-dialectical approach to legal argumentation in which the justification of

a judicial decision is considered as part of a critical discussion. In this approach it is assumed that legal argumentation theory should integrate descriptive and normative perspectives on argumentation. Legal discourse should be studied as a sample of normal verbal communication and interaction and it should, at the same time, be measured against certain standards of reasonableness. This implies first a philosophical ideal of reasonableness, second a theoretical model for acceptable argumentation and third tools to analyze actual legal argumentation from the perspective of the model. Analyzing argumentation in judicial decisions from the ideal-perspective of a critical discussion is sometimes criticized. One of the main objections is that a judge does not have a standpoint in a critical discussion, but simply decides a case. As a result, the critical norms for evaluating argumentation are not applicable to a legal decision. In his contribution, the author tries to refute these two objections by showing how the ideals of a critical discussion relate to the ideals of the Rule of Law, and how these ideals function as starting points in analyzing and evaluating legal decisions, focusing on the reconstruction of standpoints in legal decisions.

Eveline Feteris gives a further explanation of the pragma-dialectical approach and presents an analysis of the discussion strategy of the Dutch Supreme Court in the famous case of the 'Unworthy Spouse'. The author explains how the theoretical starting points of the pragma-dialectical theory can be used in the analysis of the strategic maneuvering of the Dutch Supreme Court in a case in which there is a difference of opinion about the argumentative role of certain legal principles. In its discussion strategy, the Supreme Court aims at maintaining the decision of the court of appeal while at the same time making a correction so that the decision is in line with the way in which the Supreme Court wants to make an exception to a statutory rule about the division of the matrimonial community of property. The discussion strategy consists of a specific, systematic and coordinated choice of the dialectical possibilities in the different stages of a critical legal discussion, consisting of particular choices of common starting points and particular choices in the evaluation of the argumentation. These choices are aimed at steering the discussion in a particular direction so that a particular result is reached that would be desirable from the perspective of certainty, from the perspective of justice in the specific case, and the perspective of the development of law with respect to the role of general legal principles and reasonableness and fairness.

The chapters that are based in legal theory investigate legal argumentation in the context of various key issues in legal theory: the normativity of legal argumentation, the nature of legal justification, the nature of legal balancing, the formation and revision of normative systems and the relation between law and truth.

The contribution by Carlos Bernal discusses the different relations between legal argumentation and the concept of normativity. On the one hand, legal norms are elements of the arguments which go together to make up legal discourse. On the other hand, legal argumentation plays an important role in grounding the normativity of legal norms. Bernal considers four aspects of the relation: the normativity of the different kinds of legal norms, the rules of legal argumentation, the role played by

the rules of legal argumentation in grounding the normativity of legal norms and the role played by legal norms in legal argumentation.

The contribution by Bruce Anderson begins by arguing that the key elements in any analysis of weighing and balancing are questions, insights and judgments of value. This position is used to critique the role Marko Novak assigns to rationality in balancing and Robert Alexy's idealized weight formula. Finally, by examining the relation between deliberation and expression, he argues that a written legal decision represents the possibility of someone understanding and evaluating that decision. Expressions, in whatever form, do not justify legal decisions.

The contribution by Jaap Hage discusses the theories known as 'legal construc- tivism' and 'ontological constructivism'. According to legal constructivism, the legal consequences of a case are what the best legal arguments say that they are, and this means that legal judgments can be 'true' even in hard cases. Critics of legal constructivism say that there is no such thing as a 'best legal argument' in a hard case, and that judgments in such cases therefore cannot be 'true'. Hage concludes that legal constructivism is a view that can neither be verified nor falsified, and moves on to discuss ontological constructivism. According to ontological constructivism, the legal consequences of a case depend on the best possible legal argument. Hage points out that this view incorrectly presupposes that the law is a closed domain.

Marko Novak discusses the problem of the separation between the context of discovery and the context of justification of legal decisions, one of the basic themes in legal argumentation theory. Whereas the context of discovery focuses on the process of reaching a legal decision, which concludes a decision-making process, the context of justification is concerned with justification of the legal decision through the application of relevant legal arguments. The majority of legal theorists interested in legal argumentation theory support the position that the mentioned two contexts are rigidly separated, in the framework of which the process of discovery is mainly studied by psychologists while the process of justification is the only area that should be relevant for legal argumentation theory. The author opposes such a rigid separation between the two contexts and views it as a position that is too idealist. Instead, he supports a more realistic position of their moderate separation, whereby he recognizes the importance of the discovery context while still insisting on the major relevance of the justification context.

The contribution by Antonino Rotolo and Corrado Roversi proposes a framework for reconstructing legal arguments that support an extensive or restrictive interpre- tation of a legal provision. According to Rotolo and Roversi, these interpretative techniques correspond to revision operations in systems of constitutive rules. Extensive and restrictive interpretations of legal concepts require expansions and contractions in the constitutive rules that define them. The advantage of the proposed framework is that it makes these arguments more transparent and provides criteria for evaluating them.

Jan Sieckmann's contribution discusses legal justifications where normative ar- guments are balanced against each other. Sieckmann claims that a legal justification of this kind cannot be reconstructed as a deductive argument where a conclusion

is drawn from certain premises. Balancing is a different method for justification. According to Sieckmann, balancing is a rational method for justification in its own right, since the balancing of normative arguments includes an element of autonomous choice, subject to constraints of rationality.

In his contribution, Giovanni Tuzet discusses the role of facts in legal argumentation, and the function of trials with regard to the truth. Tuzet criticizes the view that trials do not aim at the truth, and cannot aim at the truth. According to Tuzet, truth is a necessary condition for justice.

Most chapters in this volume were presented at a workshop on legal argumentation theory at the Goethe Universität in Frankfurt am Main (Germany) on 18–19 August 2011. The workshop was organized by Christian Dahlman (Lund University) and Eveline Feteris (University of Amsterdam) as a special workshop at the IVR World Congress for Philosophy of Law and Social Philosophy. The participants to the workshop included scholars from Germany, Canada, Brazil, The Netherlands, Italy, USA, Sweden, Chile, Poland and many other countries.

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