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Preface

The present volume contains papers accepted to and presented at the 2^{nd} International Conference on Alternative Methods of Argumentation in Law (ARGUMENTATION 2012) which took place at the Faculty of Law of Masaryk University in Brno, Czech Republic on October 26, 2012. The first conference from this series was organized on October 7, 2011, also in Brno. The ARGUMENTATION conference is going to be held annually and the content of the present volume makes it plausible to assume that the forthcoming editions will be very interesting. The success of the two editions organized so far suggests that ARGUMENTATION conference will gradually become a part of the landscape of scientific events organized in Europe.

The main idea of the conference is to bring together researchers representing different scientific perspectives and to create a space in which they could exchange their views concerning the phenomenon of argumentation in the domain of law. Undoubtedly, argumentation is one of the most important topics in legal philosophy and theory. Quite independently of any academic season fashion, argumentation is also a permanent and irremovable part of legal practice, which makes it also a constant subject of interest of researchers. The amount of literature related to legal argumentation has become tremendous in the last four decades. Yet, many important problems pertaining to this subject remain open and some of them seem to share a typical feature of philosophical problems, which is the apparent lack of ultimate and unquestionable solutions. What our conference is trying to add to the broad picture of contemporary research on argumentation is interdisciplinary perspective, encompassed under the label of four 'streams' of the conference, namely, formal models of legal reasoning, law and literature, law and language and finally law and visualization. The main aim of the conference is to provide multifarious views on alternative methods in legal argumentation and to make it possible to exchange views between researchers representing different methodological stances.

This year we had twenty submissions by authors coming from seven countries. Out of these submissions, seven (that is 35%) were accepted as full papers for publication in this volume and presentation of the conference. Three further papers submitted to the conference are published as short papers in this volume. Also, we are happy to present the reader with a paper based on invited lecture by Professor Tomasz Gizbert-Studnicki.

In the paper titled 'Consensus and Objectivity of Legal Argumentation', related to his invited talk, Tomasz-Gizbert Studnicki elaborates on the concept of 'objectivity'. As he maintains that different accounts of objectivity may be recognized (ontologi-

cal, epistemic and moral objectivity) he establishes the notion of 'objectivity' with respect to legal argumentation. He asks the fundamental question if the consensus of the participants in the discourse can constitute the basis of objective validity of arguments and rules of argumentation. He suggests that while the observance of the rules and requirements designed by Perelman, Habermas and Alexy facilitates the reach of consensus there still is a danger that such consensus may not be genuine as it may be based on a misunderstanding, linguistic ambiguity, incomplete knowledge or fear.

The joint paper of Christian Dahlman, Farhan Sarwar, Rasmus Bååth, Lena Wahlberg and Sverker Sikström titled 'The Effect of Imprecise Expressions in Argumentation—Theory and Experimental Results' presents important findings related to the issue of acceptability of arguments. In particular, they explain how a choice of vaguer terms may influence how acceptable the argument is for an audience.

Giovanni Damele and Fabrizio Macagno touch a very similar issue in their paper titled 'The Dialogical Force of Implicit Premises. Presumptions in Legal Enthymemes'. They explore the issue of legal enthymeme with specific attention paid to the effect of its use on the audience. They establish a claim that the enthymemes can be considered as instruments of persuasion grounded on presumptions. Besides, they also suggest that enthymeme should be regarded as a strategic instrument for shifting and increasing the burden of proof.

The paper authored by Adam Dyrda and Wojciech Ciszewski which is titled 'In Search of the Rational Response: Assessing the Rawlsian Foreground for Resolving Political and Legal Disagreements' offers a sound critique of Rawlsian approach towards resolution of disagreements. The authors arrive at the conclusion that the strategy of limitation proposed by political liberals is not always sufficient to resolve a deep political disagreement.

Fabrizio Macagno, Douglas Walton and Giovanni Sartor contributed to the vast body of work related to the so-called argumentation schemes. In the paper titled 'Argumentation Schemes for Statutory Interpretation' they show how defeasible argumentation schemes can be used to represent the logical structure of arguments important for statutory interpretation. They also show how the process of statutory interpretation can be modeled using argumentation tools like the Carneades argumentation system.

Marcin Romanowicz in his paper titled 'The Effectiveness of Interpretative Arguments in the View of Cognitive Theory of Legal Interpretation' also touches the issue of an effectiveness of argument (as Dahlman et al. and Damele and Macagno do). His approach, however, is firmly grounded in the field of cognitive sciences. Thus, he offers a radically different view on this topic.

The issue of argumentum ad absurdum has been elaborated by Tomasz Stawecki in the paper titled 'Argument against Absurdity of Legal Reasoning—Fundamental, Subsidiary or Rhetoric?' The author traces the evolution of the argument and elaborates on its use in legal argumentation. At first the argument is introduced as a 'golden rule' of the interpretation. However, the author identifies an important switch from its recognition as a rule of interpretation to a mere aid that can be useful but is not binding in a sense of standards of interpretation.

Douglas Walton contributed with yet another paper centered around the notori-

ously famous case of Popov v. Hayashi. In his paper that is titled 'Argument from Fairness in Judicial Reasoning' Walton extends his previous analysis of the same case. Again he uses the Carneades software to model the argumentation schemes. However, this time he grounds his approach in Perelman's philosophical point of view on argument from fairness. He concludes that there are two variants of the scheme for argument from fairness—the simple version and a more complex one. The latter can be used for analytical purposes of reconstructing an instance of argumentation based on fairness in Popov v. Hayashi.

The proceedings also contain three short papers which represent a promising works of younger authors that has a great potential to offer many valuable insights. Lukáš Hlouch contributed with the paper titled 'Models of Legal Reasoning: An Attempt of a Practical View'. The paper titled 'How to Reach a Compromise on Compromise?' has been authored by Izabela Skoczeń. Martin Sobotka authored the paper titled 'Perspectives of Analogical Reasoning'.

To sum up, the content of the volume is rich and diverse. We hope that this volume will be read with interest not only by researchers who specialize themselves in argumentation, but also by lawyers and judges on the one hand and general philosophers on the other hand.

This volume could not be edited and the conference could not took place without support from many people and institutions. To name just a small fraction of them we would like to thank to Masaryk University for the provision of necessary funding, and to Naděžda Rozehnalová, the dean of the School of Law, Miloš Večeřa, the head of the Department of Legal Theory, and Radim Polčák, the head of the Institute of Law and Technology, for their support of the conference.

We are very grateful to the persons who kindly accepted our invitation to the Program Committee of the conference. Their kind cooperation and their hard work in the reviewing process made it possible for the conference to satisfy international standards of quality. Let us enumerate the members of the Program Committee in this place: Leila Amgoud, Hrafn Asgeirsson, Kevin D. Ashley, Trevor Bench-Capon, Floris Bex, Volker Böhme-Neßler, Daniele Bourcier, Colette R. Brunschwig, Noel Cox, Vytautas Čyras, Christian Dahlman, Vanessa C. Duss, Tom van Engers, Eveline Feteris, Enrico Francesconi, Anne Gardner, Tomasz Gizbert-Studnicki, Thomas F. Gordon, Jaap Hage, Pavol Holländer, Ales Horak, Zdenek Kühn, Pavel Materna, Filip Melzer, Ugo Pagallo, Monica Palmirani, Radim Polčák, Henry Prakken, Jiří Přibáň, Giovanni Sartor, Burkhard Schäfer, Erich Schweighofer, Alessandro Serpe, Tomáš Sobek, Adam Sulikowski, Delaine R. Swenson, Martin Škop, Torben Spaak, Daniela Tiscornia, Miloš Večeřa, Bart Verheij, Vern R. Walker, Douglas Walton, Radboud Winkels and Tomasz Żurek.

We are grateful for all papers submitted to the conference and in particular we would like to thank to those authors whose papers were submitted in final versions so that they could be published in this volume. Let us also thank those authors who decided to participate in the conference to develop their proposals, and thus participated in the research abstract session or in the special workshop.

To sum it up, ARGUMENTATION 2012 is—as was the first edition of the conference—a joint venture of large number of people. In absence of their help and support such an activity would be impossible to maintain. Let us hope that the

enthusiasm will persist and the International Conference on Alternative Methods of Argumentation in Law will become a traditional and established scientific event.

Michał Araszkiewicz,
chair of the Programme Committee

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Consensus and Objectivity of Legal Argumentation

Tomasz Gizbert-Studnicki[a]

Abstract. The requirement of objectivity of legal argumentation appears to be a commonplace. Participants of any legal dispute claim that their arguments "objectively" support the thesis for which they argue. Objectivity is perceived as a value, strongly tied with the concept of the rule of law (as opposed the rule of men), which is fundamental for contemporary democratic orders. The content of the requirement of objectivity remains, however, unclear. Different meanings of the predicate "objective" must be distinguished. Three basic meanings are: "objective" as "mind-independent" (ontological objectivity), "objective" as "valid for everybody" (epistemic objectivity) and "objective" as "impartial" (moral objectivity). For each of those basic meanings certain sub-meanings may be distinguished. The purpose of the presentation is to examine briefly in which sense legal argumentation may be considered as "objective". For this purpose a general structure of argumentation is designed and various senses of objectivity of premises and rules of argumentation are discussed. The stress is put on epistemic objectivity. Selected normative theories of practical and legal argumentation are examined from the perspective of epistemic objectivity.

Keywords. Law, argumentation, objectivity.

1 Why law and legal argumentation should be objective

Lawyers tend to ascribe a high importance to the requirement of objectivity. Ideology of the rule of law (as opposed to the "rule of men") assumes that the law imposes objective standards of conduct, at least in the sense that the content of the law (once enacted) should not depend purely on the subjective judgments and beliefs of any

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officers enforcing legal duties. Administration of justice requires applying pre-existing legal standards of behavior to the facts of a case, and not inventing new standards to be applied retroactively. Otherwise, the basic values underlying the ideology of the rule of law (such as predictability and certainty of judicial decision) could not be satisfied. Separation of powers (as one of the fundamental prerequisites of the rule of law) excludes any active role of judges in shaping legal standards of conduct. Ideally, the role of a judge is to apply a pre-existing standard in an impartial way; a judge's subjective judgments should play no role in his or her decision-making process. His or her decision should be fully determined by the pre-existing legal standards.

Such a picture of the administration of justice (as a mechanical application of pre-existing legal standards) is obviously naïve and simplified. Montesquieu's vision of the judiciary power as "pouvoir null" and of a judge's being only "la bouche de la loi" is outdated. To the best of my knowledge nobody supports such vision any longer. The reasons for rejection of Montesqieu's vision are quite obvious. First, legal standards are worded in a natural language. Any natural language is ambiguous and vague and, therefore, legal texts must be interpreted before they can be applied. Second, the lawgiver frequently uses open concepts, the extension of which cannot be predetermined. Third, legal standards must be applied to such cases which have not been anticipated by the lawgiver and with respect to which the lawgiver did not have any specific intentions or preferences. Fourth, application of legal standards on the basis of their literal wording quite frequently leads to absurd or obviously unjust consequences.

All that is commonplace for each lawyer. Nevertheless, lawyers do not abandon the requirement of objectivity of judicial decision. Being aware that the legal texts themselves are not able to fully determine each judicial decision, lawyers still insist that each decision should be objective, as subjectivity of the process of law constitutes a threat to the rule of law.

It is, however, unclear what the requirement of objectivity really means. Usually, the words "objective" and "subjective" are used in the practice of administration of justice in a purely intuitive and undefined sense. Various intuitions are linked to those words and various expectations as to the administration of justice are formulated. As it appears, the single common feature of the different usages of those words is that "objective" is commonly perceived as a positive feature, while anything that is "subjective" is condemned. Lawyers are frequently unaware that the problem of objectivity and objective knowledge is not specific to the law, but appears in every sphere of human knowledge, including science. Further, the word "objective" is frequently used by lawyers in certain specific senses, apart from the usage of this word in philosophy and methodology of science.

There arises a fundamental question of whether there are "domain-specific" conceptions of objectivity, or whether one conception of objectivity may be applicable to all areas, including that of law. (Leiter 2001, p. 5) If we assume that law and legal argumentation requires a special conception of objectivity that departs from the meaning of objectivity in other areas (such as sciences), the danger arises that the answer to the question of whether legal argumentation is (or may be) objective will no longer be relevant. A conclusion that the sense of the requirement of objectivity in the area of law is specific causes that we lose interest in such conclusion. We want

legal argumentation to be objective in the proper sense of the word, and not in any Pickwick sense. Therefore, any inquiry as to the objectivity of legal argumentation must be based on the general philosophical account of objectivity.

Therefore, a short recourse on philosophy and methodology of science appears to be helpful. The only purpose of such recourse is to help distinguish the different understandings of objectivity. The purpose of such an exercise is to investigate which of those understandings can be applied to the requirement of objectivity in the context of law and may help to clarify such a requirement.

2 Ontological objectivity

As it appears, the basic meaning in which the word "objective" is used in philosophical contexts is "mind-independent". (Comp. Kramer 2007, chapter. 1) This is an ontological issue, pertaining to the mode of existence. A thing objectively exists if its existence does not depend on what anyone might think, or in other words, on conscious awareness of it. In this sense the Earth's moon, the sun and the stars are objective, as their existence is independent of anyone's thought and perception. Even if there were no humankind, the moon, the sun and the stars would not cease to exist. Obviously, such a concept of objectivity is based on certain, fairly strong philosophical assumptions and would not be shared by all possible philosophical stances.

Let me borrow from M. Kramer the distinction between strong and weak mind-independence. (ibid.) Strong mind-independence is the mind-independence *tout-court*. It means that the existence of the thing in question does not depend on anyone's thoughts or beliefs. The moon is mind-independent in this strong sense. Weak mind-independence means that the existence of the thing in question does not depend on thought, beliefs or attitudes of any particular individual, but depends on collective attitudes or beliefs which individuals share in their interactions. Morality as a social phenomenon exists, because most of the members of a given community believe that certain actions are right or wrong. Morality does not cease to exist even if one or a few members of the community do not share such beliefs or are not inclined to perceive actions as morally right or wrong. Morality does not cease to exist simply because moral assessment of certain actions is controversial among the members of a community.

It can be argued that mind-independence in the weak sense does not deserve to be called "objectivity", but rather "collective subjectivity". I do not think, however, that such an argument is really relevant. What is important is that the law is not mind-independent (and, therefore, objective) in the strong sense. There can be no law if a given community does not perceive certain standards of conduct as legally binding and does not perceive certain persons as officers authorized to enforce such standards. Existence of a legal order is an institutional fact and, therefore, it is constituted by shared beliefs and attitudes of members of a definite social community. (Comp. MacCormick 2007)

The thesis that the law is objective in the weak mid-independence sense is itself weak. This thesis means only that the very existence of legal standards is mind-independent, but does not necessarily imply that all duties imposed by such standards

are mind-independent, as the content of legal standards may be unclear or vague. For example, prohibition of discrimination is an objective legal standard (in the sense of weak mind-independence). However, as "discrimination" is a vague and ambiguous word, the objectivity of this standard does not yet determine what exactly is prohibited or allowed. This is a matter of interpretation of this standard.[1]

Therefore, the conception of objectivity of law as mind-independent in the weak sense is not very helpful in the context of objectivity of legal argumentation. As it appears, the very concept of legal argumentation presupposes that the law is mind-independent at least in the weak sense. Otherwise, there would be no basis to dispute the right interpretation or application of the law in a given case. If the law were a matter of purely individual beliefs or attitudes (as opposed to shared beliefs), no rational dispute relating to legal matters would be possible, as any proposed solution based on such individual beliefs would be right. Without going into more details, let me assume that the law of a given community is mind-independent in the weak sense. Any honest participant of any legal dispute must assume that the existence and the content of the law does not depend on his or her individual beliefs and attitudes. If the (objective) existence of the law is denied, there is no room left for legal argumentation, as the object of argumentation disappears.

3 Epistemic objectivity

Presupposition that the law is mind-independent (in the weak sense) does not solve the problem of objectivity of legal argumentation. Law is objective (as its existence is not dependent on the thoughts of any definite person), but at the same time it is vague, ambiguous, unclear, worded in evaluative and open-textured terms. In order to answer the question of what the law requires with respect to the facts of a given case, we need to go through the process of interpretation. Here the problem of objectivity reappears as an epistemic problem. The fundamental difference between ontological and epistemic objectivity is that ontological objectivity is ascribed to things, whereas epistemic objectivity is ascribed to beliefs or sentences (in which human knowledge is expressed). This does not mean, of course, that there is no link between ontological and epistemic objectivity, but ontological objectivity of law does not yet entail that any sentences about the law are or can be epistemically objective. I will later return to the problem of the link between ontological and epistemic objectivity.

Sometimes a distinction is drawn between epistemic and semantic objectivity. (Leiter 2001, pp. 261–262) Epistemic objectivity refers to human knowledge, while semantic objectivity is ascribed to sentences or statements. The problem of epistemic objectivity is equivalent to the question of how to make our knowledge objective, and the problem of semantic objectivity is how to make our sentences true. I do not believe, however, that such a distinction is necessary. Our knowledge is expressed in

[1] Different view is presented by Leiter (Leiter 2001, p. 3), according to whom "the law is metaphysically objective insofar as there exist right answers as a matter of law". I consider, however, that "objectivity" in the sense of weak mind independence may be ascribed also to such legal standards which are vague or ambiguous, as their existence cannot be denied, although they do not give per se right answers to legal questions.

sentences that we accept. As long as any part of my knowledge is not expressed in a sentence, I have no basis for examination of whether such a part of my knowledge is objective. Second, as it will be explained below, objectivity may also be ascribed to sentences which do not have truth value. Therefore, as I believe, objectivity cannot be identified with truth.

Such an epistemic problem with respect to legal argumentation may be briefly formulated as follows: Is the outcome of interpretation of the law objective, or is it just a result of subjective beliefs, attitudes and convictions of the interpreting person? Let us assume for the sake of brevity that the outcome of interpretation is always an interpretative sentence. Such an interpretative sentence may have various linguistic forms: *"Text T has the meaning M"* or *"Fact F is (is not) denoted by the word W contained in the text T,"* or any similar form. An interpretative sentence always answers a legal question (or at least constitutes part of such an answer). Legal questions are questions relating to what one (legally) ought to do. Therefore, interpretative sentences have the nature of practical sentences. For the sake of brevity the concept of practical sentences shall not be discussed here. (Alexy 1978, chapter 1)

An interpretative sentence is usually an outcome of the process of argumentation. This means that acceptance of such a sentence is based on previous acceptance of certain other sentences (premises or arguments). Thus, the simple structure of argumentation may be described as follows:

$$\frac{\begin{array}{c} A_1 \\ A_2 \\ . \\ A_3 \end{array}}{C}$$

where $A_1 ... A_n$ are arguments and C is the conclusion.[2] I assume that both the arguments and the conclusion have the status of sentences (not necessarily having truth value). The arguments support the conclusion on the basis of the adopted rules of argumentation (which may, but do not have to, have the status of rules of logical interference). Intuitively, the status of the conclusion depends both on the status of the arguments and on the status of the rules of argumentation. Namely, one may say that the conclusion is "objective" only if the same attribute can be ascribed to the arguments and to the rules of argumentation.

4 Objectivity of interpretative sentences

Interpretative sentences, forming conclusions of argumentation involved in the process of interpretation of law, should be objective. But what is the meaning of the

[2]This is an oversimplified structure, as it does not take into account counterarguments and the defeasible nature of legal reasoning. Further, this structure does not reflect chronological order of argumentation; in most cases the conclusion comes first and only thereafter arguments supporting such conclusions are sought and defended.

requirement of objectivity in this context? Certainly it is not the objectivity in any ontological sense, including mind-independence. The question puzzling the lawyers is not whether the interpretative sentences, arguments supporting such sentences and rules of argumentation are mind-independent (they are certainly not), but the question of whether the interpretative sentence is right and should be accepted.[3] The answer to this question depends on the answer to the same question relating to the arguments and the rules of argumentation. We are apt to accept an interpretative sentence as right, if it is "objective" in an epistemic sense. This assumes that we are inclined to treat interpretative sentences as results of the process of cognition, as opposed to the process of decision making.

But still the question of the meaning of the requirement of objectivity in epistemic sense has not been answered. This is a fundamental problem of epistemology. It is not my intention to go into details of philosophical disputes referring to the matter of "objective knowledge". I will address only such issues which are relevant in the context of legal argumentation. In this context epistemic objectivity is quite frequently linked (positively) to determinacy, certainty, demonstrability, predictability and (negatively) to judicial discretion. (Comp. Kramer 2007 who, however, links those concepts with ontological) Various relations among those concepts are analyzed. In my view, the basic semantic intuition relating to objectivity in an epistemic sense is that "objective" means "universally valid" or "valid for everyone".[4] Obviously such a concept of epistemic objectivity does not entail that only such sentences (expressing human knowledge) which are de facto universally accepted are objective. Not the actual acceptance of everybody, but rather acceptability for everybody is meant here. Thus, epistemic objectivity is a concept with a certain normative content. A sentence is objective if it should be accepted by everyone, or, in other words, if nobody has a valid reason to reject such a sentence. This requires that acceptance of a sentence should be independent of any individual features of a definite person, which are not shared with other people (his or her individual values, habits, personal history etc.).[5] This means also that epistemic objectivity is a relative concept for at least two reasons. "Universally valid" means "valid for all members of the community in question". The borders of such community may be broader or narrower. In the extreme case such community may encompass the whole of humankind.[6] As it appears, sentences of natural sciences are to be valid for everybody in the sense that nobody may have a valid reason to reject such sentences. If such a valid reason is successfully claimed by anybody, the sentence in question is eliminated and no longer constitutes a part of the natural science. Obviously, a dispute may arise as to whether such reason is a valid one. Objectivity of sentences of politics, morality and art is relativized to much smaller communities and defined by shared values,

[3] I avoid the word "true" in order not to discuss the complex issue of truth value of interpretative sentences.

[4] Alternatively, objective knowledge or belief may be defined as knowledge or belief having the status of being fully supported or proven. In my view, such approach has the same effect as definition of objectivity as universal validity . A belief is "fully supported", if everyone is bound to accept it.

[5] There is another meaning of objectivity, linked to such a conception of epistemic objectivity. Namely "objective" is sometimes used in the meaning of "impartial" or "unbiased". This is an important legal issue, but "objectivity" as "impartiality" will not be discussed in this paper.

[6] This sort of "objectivity" as the extreme case can be named "absolute objectivity"

shared attitudes and common history. A sentence may be named "objective" if such shared values, etc., give a sufficient basis for its acceptance, or at least give no valid reason for its rejection. Second, epistemic objectivity must be relativized to a certain knowledge, as a change of knowledge may give a basis for a valid reason to no longer accept such a sentence. This leads to the conclusion that objectivity in an epistemic sense is never assumption free. A sentence is objective only to those who share such assumptions (which may be either explicit or tacit).

Let me note that epistemic objectivity does not necessarily presuppose ontological objectivity. One may argue that a sentence can be epistemically objective only if the fact (state of affairs) to which such a sentence refers is ontologically objective (at least in the weak sense). (Leiter 2007, p. 270) I think that such a conclusion would be false.[7] Let me take an example of the normative sentence *"No one should kill"*. As I think, such a normative sentence may be considered to be universally valid, irrespective of whether one believes in the existence of any moral facts (for example that there exists a moral fact that no one should kill). Facts are truth-makers for descriptive sentences, but not necessarily for practical sentences. Even those who do not believe in the existence of moral facts may agree that certain practical sentences are universally valid. The function of practical sentences is not to describe any facts, but to give us reasons for actions. Therefore, universal validity of practical sentences cannot be identified with truth conceived of as correspondence to facts. Universal validity of a sentence does not necessarily presuppose that there exists an ontologically objective fact making such a sentence true. If I say *"No one should kill"*, I do not state any fact, although my sentence is (or may be) epistemically objective as universally valid. Universal validity in this sense does not require that an objective sentence must have a truth value (at least in the sense of the correspondence theory of truth). A sentence is universally valid if it should be accepted by everyone—full stop. Obviously, as far as descriptive, non-analytical sentences are concerned, in most cases their universal validity is associated in some way with their correspondence to ontologically objective facts in the world. This, however, does not apply to practical sentences (normative and evaluative). Their epistemic objectivity does not assume that there are any evaluative or normative facts in the world.

Therefore, epistemic objectivity of a practical sentence does not have to assume metaethical cognitivism and does not entail that a practical sentence have truth values or that there exists any specific relationship between such sentences and the external world.

Let us come back to the problem of legal argumentation. The question arises what requirements must be satisfied in order to conclude that an interpretative sentence is "objective" in the epistemic sense. If an interpretative sentence claims objectivity, it must be the product of argumentation which satisfies certain criteria, and in particular is independent of any individual features of the arguing persons and of the situation in which argumentation takes place. In other words, an interpretative sentence must be objectively justified. This means that both the arguments and the rules of argumentation must be objective in the same epistemic sense. An interpretative sentence "inherits" objectivity of arguments and rules of argumentation. If

[7] I follow in this respect the view of (Postema 2001).

any of them is not objective, the interpretative sentence as the conclusion cannot be seen as objectively justified.

Due to this phenomenon of "inheritance", the basis for objectivity of an interpretative sentence cannot be sought solely in the rules of argumentation. Even if we assume that the only rules of argumentation are the rules of logical inference, so that the arguments logically entail the conclusion, we still do not have any guarantee of objectivity of the conclusion. The rules of logical inference are doubt objective in the epistemic sense (as they are valid for everyone). They transmit objectivity of the premises (arguments) to the conclusion. Such transmission, however, occurs only if the premises (arguments) are objective. Objectivity of the premises must be established separately.[8] This creates a problem which is frequently called "Muenchasen trillemma". (Albert 1968, p. 13) If C logically follows from the set of premises $(A_1...A_n)$, C is objectively justified only if each of $A_1...A_n$ is objectively justified as well. If for any A we seek sentences which logically entail such A, then either we have to do so with *regressum ad infinitum* (as we need to find objective justification for each of such sentences), or in *circulum vitiousum*, as we must make recourse to premises for which we seek justification). If we give up the search for objective justification of any A, then C (notwithstanding the logical entailment) is not objectively justified. Therefore, the rules of logical inference do not give any sufficient basis for an objective justification. With respect to legal argumentation, it should be additionally noted that the set of rules of argumentation is broader than the set of rules of logical inference. Legal argumentation also applies such rules of inference that do not have legitimacy founded by formal logic. Thus, the objectivity of the rules of argumentation applied in legal argumentation (other than the rules of logical inference) may be challenged, irrespective of any challenge to the objectivity of premises of such argumentation.

This is why the rules of argumentation (irrespective of their logical status) cannot be perceived as the sole and sufficient basis for objectivity of the conclusion.

5 Pragmatic conceptions of epistemic objectivity

The concept of epistemic objectivity (as "universal validity") suggests that the basis of objectivity of argumentation may be sought in the pragmatics. As explained above, such concept may be understood as relative in the sense that "universally valid" can mean "valid for all members of the community in question".

The starting point for the search of a pragmatic basis for objectivity of argumentation is the observation that argumentation either has a dialogical nature or is at least addressed to a certain auditorium. Argumentation is successful if the opponent or the auditorium accepts the thesis (in our case the interpretative sentence) for which it is argued. The problem which arises in any pragmatic conception of argumentation is how to "jump" from pragmatic efficacy of argumentation to its objective validity. The very fact that the auditorium is effectively convinced does not entail that the conclusion is epistemically objective. In other words, the question is how to make the outcome of argumentation independent of any contingent, particular and individual

[8] For the distinction of internal and external justification see (Wróblewski 1976, p16).

features of the opponent or members of the auditorium, as actual acceptance of the thesis (efficacy of arguments) may be caused by such contingent circumstances.

This problem is usually addressed by any pragmatic theories of argumentation by relativization of the epistemic objectivity of argumentation to certain theoretical constructs. My purpose is to investigate whether such strategy of building of a theory of argumentation may be successfully applied to legal argumentation. For this purpose I will briefly examine three theories, which, as I believe, apply such strategy; namely, these are the theories of Chaim Perelman, Juergen Habermas and Robert Alexy. All three theories are very complex and sophisticated. For the purpose of this paper, I will pick up only certain elements relevant for the question how to jump from the efficacy of argumentation to its objective validity. The common feature of all three theories is that they refer to practical argumentation, that is to argumentation aiming at justification of normative or evaluative sentences (stating that something ought to be the case or something is wrong or good). There are no doubts that legal argumentation is an instance of practical argumentation, as the final goal of legal argumentation is to justify practical sentences.

The basic concept of Perelman's theory is the notion of "auditory" as a collection of persons to which the argumentation is addressed. Perelman is fully aware that the fact that a certain argument is efficient vis-à-vis certain auditory does not entail that such an argument is objectively valid. Therefore, an empirical notion of auditory (as a collection of persons to whom de *facto* argumentation is addressed) is not sufficient, and Perelman introduces the notion of "universal auditory" as the fundamental concept of his theory. This concept may be interpreted either as an idealization (universal auditory as a collection of all people deprived of any individual features, beliefs or attitudes) or as a sort of normative concept. Perelman tends to adopt this second interpretation. *"L'accord d'un auditoire universel n'est donc pas une question de fait, mais de droit"*. (Perelman and Olbrechts-Tyteca 1958, p. 41) The participants of the universal auditory are *"tout etre de raison"* (any rational being). (ibid., p. 36) Any actual person participates in the universal auditory only to the extent to which she is guided by her reason, and not by her emotions, prejudices, resentments or habits. Argumentation is universally valid (and, therefore, objective) if the conclusion should be accepted by any rational person.

The crucial question for such a theory is the question of what criteria distinguish a "rational person". The concept of a rational person is a normative concept (and, therefore, the concept of universal auditory as collection of all rational persons inherits such normativity). A rational person is a person who is guided by certain normative requirements in the process of forming or adopting her convictions and beliefs. Those requirements must be met in order to say that a certain conclusion has been accepted on the basis of "reason" as opposed to emotions and subjective beliefs. Perelman's theory may be conceived of as an attempt to list and to justify such requirements. Requirements listed by Perelman (prohibition of advocating for a thesis, in which the participant does not believe herself; prohibition of contradiction; prohibition of exclusion of counter-arguments, etc.) may be conceived of as a partial definition of a rational person. A person who does not observe such requirement is certainly not rational. Thus, observance of those requirements is a necessary but not sufficient condition for being a "rational person". A conclusion which has been

adopted in breach of those requirements is not epistemically objective. But absence of such a breach does not yet entail objectivity, as those requirements only partially define a "rational person". An exhaustive and operational definition of a rational person does not seem to be possible. Therefore, in my view, even if we leave aside the difficulties with justification of the requirements defining the concept of a "rational person", Perelman's theory has the ability to exclude certain conclusions as not epistemically objective, but is not able to confirm epistemic objectivity of any conclusion.

Second, Perelman himself stresses that each argumentation has a certain point of departure. We never argue in a vacuum. Each argumentation must be based on certain assumptions (which may be descriptive, normative or evaluative). Therefore, as I stressed above, the concept of epistemic objectivity is relative. A conclusion may be considered as objective only in relation to such initial assumptions on which the argumentation is based. Any attempt to justify all such assumptions would lead to *regressum ad infinitum*.

In Habermas's theory, the criterion of rightness (Richtigkeit) of practical sentences is "a justified consensus" (der begruendete Konsensus). (Habermas 1973, p. 239) As it appears, "rightness" may be identified with epistemic objectivity, as a practical sentence is "right" if it should be accepted by everybody. "Justified consensus" is defined by Habermas not by reference to features of participants in the discourse, but by features of the situation in which the discourse takes place. An actual consensus is not a sufficient basis for qualifying a practical sentence as right, as an actual consensus may be based on a mistake, fraud or lack of sufficient knowledge. A consensus may constitute such a basis only in the ""ideal speech situation" (ideale Sprechsituation), in which the discourse is free from external interferences and from limitations resulting from the structure of linguistic communication. The basic requirements characterizing the ideal speech situation are as follows: equal chances and position of all participants, freedom to speak, no time limitations, observance of the requirement of sincerity, lack of external and internal coercion, etc. A consensus achieved in such a situation is perceived as constituting an "objective" basis for acceptance of a practical sentence.[9]

Habermas is of course aware of the fact that the requirements defining the ideal speech situation cannot be completely fulfilled. The ideal speech situation is neither an empirical phenomenon nor a pure construct, but rather an ideal, which constitutes a measure for a consensus achieved in the practice of discourse. An actual consensus may be qualified as more or less justified by comparing the situation in which it has been achieved to the ideal speech situation.

Leaving aside a critique of such an approach, let me note that the Habermas' theory does not constitute a satisfactory starting point for a theory of legal argumentation.[10] Legal discourse is conducted in a situation manifestly departing from the requirements of an ideal speech situation, as it is subject to numerous institutional limitations. For example, the judicial discourse is characterized by a privileged

[9]Habermas does not use explicitly the concept of "objectivity", but what he has in mind is "universal validity" for at least the participants in a given discourse.

[10]For a more detailed discussion of application of Habermas's theory to legal argumentation see (Feteris 2010).

position of the judge. Even if we assume that the paradigm of the legal discourse is the discourse of legal dogmatics, other limitations are visible, for example prohibition of questioning the content of valid legal norms. Therefore, the theory of Habermas cannot be applied to legal argumentation. Legal argumentation constitutes a specific instance of practical argumentation, and any theory of legal argumentation must give account of its specific features. (Comp. Grabowski 2001, p. 219)

This requirement is satisfied by the theory of Robert Alexy. This theory has a procedural nature. A practical sentence is right (in the sense of being "objectively right") if it is (or can be) the outcome of the procedure of rational discourse. The task of the theory of practical argumentation is to formulate the procedural rules, the observance of which will ensure the objectivity of the thesis which is argued for. Such rules are various in nature. They include rules of logic, rules of distribution of burden of argumentation, rules defining rights and obligations of participants in the discourse, rules of universalization, etc. Alexy stresses that those rules are weak in the sense that following them does not always determine the outcome of the discourse. There are three possibilities: a practical sentence which is the subject matter of the discourse may be "discursively necessary" (the rules compel its acceptance), "discursively possible" (the rules neither compel its acceptance nor its rejection) or "discursively impossible" (the rules compel its rejection). If two or more incompatible practical sentences are discussed it may happen that more than one of them is discursively possible. In such a situation the rules of argumentation do not determine the outcome of the dispute.

The theory of Alexy shares one important feature of Perelman's theory. The outcome of the discourse is relativized to the initial beliefs of the participants in the discourse; argumentations consist of processing such initial beliefs. The outcome of the discourse is objectively valid to the extent to which it depends on the procedural rules and only relatively valid to the extent to which it depends on the initial beliefs of the participants.

The basic problem of Alexy's theory is how to justify the procedural rules of argumentation. As stressed above, any conclusion of legal argumentation may be considered as objective, only if both the premises of argumentation and the rules of argumentation are objective. Alexy concedes that validity of the conclusion is only relative, as it depends on the initial beliefs of participants. On the other hand, rules of argumentation are, pursuant to Alexy, universally valid. Alexy designs four possible methods of justification of universal validity of such rules: teleological, empirical, definitional and transcendental-pragmatic. Those methods have been analyzed in detail by the critics of Alexy's theory, who concluded that none of those methods is sound. I will not repeat such criticism. (See Grabowski 2009)

6 Conclusions—consensus and epistemology

As it appears to me, Alexy's theory must fail due to a more fundamental reason, independent of soundness of the methods of justification of procedural rules of argumentation. The same reason applies to the theories of Perelman and Habermas. With respect to all three theories, the same question may be asked: Can the consensus of

the participant in the discourse constitute the basis of objective validity of arguments and rules of argumentation? This question seems to be fundamental not only with respect to any actual consensus, but also to theoretical constructs of a consensus in universal auditorium, consensus in ideal speech situation and consensus achieved by application of any procedural rules. The starting point of all three theories is that justification of practical sentences (practical argumentation) has the form of (actual or virtual) discourse (dialogue or dispute). Consensus as a criterion of objectivity of arguments and rules of argumentation is just the result of such an approach. A practical sentence is objectively justified if both the arguments supporting it and the rules of argumentation applied are valid for all (actual or virtual) participants of the discourse.

As it appears, two distinct issues should be distinguished. The first issue is the matter of the proper organization of the discourse, e.g. such an organization which facilitates achievement of the genuine (as opposed to forced or apparent) consensus of all participants. I strongly believe that observance of the rules and requirements designed by Perelman, Habermas and Alexy certainly performs such a function. If such requirements are met and such rules are actually followed, it increases the chances that the outcome of the discourse will be accepted by all participants and, more importantly, that such acceptance is genuine in the sense that it is not based on a misunderstanding, linguistic ambiguity, incomplete knowledge or fear.

The second issue is whether such a consensus proves that the outcome of the discourse (in our case, an interpretative sentence) is objectively valid in an epistemic sense. As it appears, there is no direct link (and certainly no analytical link) between the first and the second issue. Even such an organization of the discourse which to the highest degree possible facilitates achievement of a genuine consensus does not guarantee that the outcome of the discourse will be objectively valid in any strong sense. (Comp. Kaufmann 1986, p. 440 There may exist an empirical link: The risk that a consensus obtained as the outcome of a properly organized discourse is mistaken is probably lower than the same risk relating to any disordered discourse. But, on the other hand, as stressed above, each discourse by necessity has its starting point constituted by initial convictions and beliefs of its participants. Such initial beliefs are processed in the course of the discourse, so the outcome of the discourse is a function of both its starting point and of the applied rules of argumentation. Any objectivity of the conclusion must, therefore, be relativized to the initial beliefs of the participants which are processed in the course of argumentation. If the starting point of the discourse had been different, the outcome of the discourse (the conclusion accepted by its participants) could have been different as well. No rules of discourse can guarantee that false or wrong initial beliefs of its participants will be effectively eliminated.

I do not wish to argue that the consensus does not constitute a sufficient basis for acceptance of practical sentences (including interpretative sentences). All I wish to say is that the consensus as a criterion of acceptance of practical sentences does not find its justification in epistemology, but in a normative conception of democracy which is implicitly assumed. (Weinberger 1981) Such a conception of democracy appears to be sound from both the ethical and sociotechnical points of view. Such a conception is based on the ethical values of freedom, autonomy and dignity of human

beings. From a sociotechnical point of view it may be argued that a consensus as to a solution of a practical problem facilitates efficiency of any consecutive political or judicial decision relating to such a problem. This has, however, very little to do with epistemic objectivity.

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The Effect of Imprecise Expressions in Argumentation—Theory and Experimental Results[1]

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Abstract. We investigate argumentation where an expression is substituted with a less precise expression. We propose that the effect that this deprecization has on the audience be called deprecization effect. When the audience agrees more with the less precise version of the argument, there is a positive deprecization effect. We conducted an experiment where the participants were presented with a court room scenario. The results of the experiment confirm the following hypothesis: If the participants find it hard to agree with the precise version of the argument and accept the use of the imprecise term, they will agree more with the imprecise version of the argument. Furthermore, we show that a person who reacts in this way to deprecization commits the fallacy of equivocation.

Keywords. Deprecization, vagueness, ambiguity, fallacy of equivocation, experimental philosophy.

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1 Introduction

Consider the following court room scenario: Jason Williams is standing trial for murder. According to the prosecutor, Williams stabbed a man to death in front of a movie theatre in Atlanta, Georgia on July 10, 2011. At the trial, the prosecution calls Jessica Miller as a witness. She is twelve years old, and lives across the street from the movie theatre. She testifies that she saw the murder from her house, and identifies Williams as the killer. Williams' lawyer comments on the testimony in his closing statement with the following argument:

> (A) I would like to draw your attention to one important circumstance regarding Jessica Miller. A person who is under thirteen years of age is less reliable as a witness. Jessica Miller is therefore less reliable as a witness.

What would you say about this argument? Do you find it easy to agree with it? Or would you rather say that you find it hard to agree with?

Now, let us assume that Williams' lawyer expresses himself somewhat differently. The facts of the case are the same, but instead of the argument above (A), Williams makes the following argument (A*) in his closing statement:

> (A*) I would like to draw your attention to one important circumstance regarding Jessica Miller. A child is less reliable as a witness. Jessica Miller is therefore less reliable as a witness.

What is your reaction to this argument? Do you find it easier to agree with (A*) than (A)? If this is the case, you are not alone. We conducted an experiment where some of the participants were presented with the argument (A) and others with (A*). The participants who were presented with (A*) agreed more with the argument they were given.

This is very interesting, since the facts of the case are the same and the conclusion is the same. The only difference between (A) and (A*) is that (A) uses the precise expression 'under thirteen' where (A*) uses the imprecise expression 'child'. Why should this make a difference? In this article we investigate the effects of substituting an expression in an argument with an expression that is less precise. We will talk about the move from a precise expression to an imprecise expression as deprecization, and we will talk about the effect that this has on the audience as the deprecization effect. Section two of the article explains what it means that an expression is more or less precise, section three and four presents the results from our experiment, section five analyzes the deprecization effect as a fallacy of reasoning, and section six discusses deprecization as an argumentation strategy.

2 Defining 'Imprecise'

That a term is imprecise means that it is, to some extent, uncertain how the term should be interpreted. There are cases where it is uncertain if the term applies, since the term can be interpreted in different ways. As we shall see, this uncertainty can

be caused by two different things. It can be caused by vagueness or ambiguity.

That a term is *vague* means that the limit of its applicability is unclear.[2] The term has *borderline cases*, where it is possible to interpret the term in different ways.[3] It can be interpreted as applicable to the case, but it can also be interpreted as non-applicable. The term 'child' is an example of such a term. It is clearly applicable to a three-year-old and a five-year-old, but a twelve-year-old and a fourteen-year-old are borderline cases. That a term is vague means that its meaning is not completely determined. People have not (yet) decided exactly where the limit of its applicability goes. Vagueness can therefore be described as a semantic indecision (Fine 1975, p. 266; Lewis 1986, p. 212).

That a term is vaguer than another term means that the vaguer term has borderline cases that are not borderline cases in the application of the less vague term. 'Child' is vaguer than 'under thirteen' since there are cases that are borderline cases for 'child' but not for 'under thirteen' (e.g. the case of a twelve-year-old).[4] A speaker who substitutes a vague term with a term that is less vague makes a *precization*. An expression works as a precization of another expression if all reasonable interpretations of the former expression are reasonable interpretations of the latter, and there is at least one reasonable interpretation of the latter expression which is not a reasonable interpretation of the former (Naess 1966, p. 39). The effect of precization can be described as making the borderline area thinner. By means of precization, some cases that used to be borderline cases are now cases that fall clearly inside or clearly outside the scope of applicability. A speaker who makes the opposite move, substituting a term with a vaguer term, makes a *deprecization*. The effect of a deprecization is, of course, the opposite of precization. It thickens the borderline area.

Vagueness must be distinguished from ambiguity. That a term is *ambiguous* means that it has two (or more) separate meanings. A classic example is the term 'bank' that could mean a financial institution or the side of a river. Ambiguity is a lack of precision, just like vagueness. When we say that a term is ambiguous, we point out that the term can have different meanings, and that it has not been made

[2]It is typical for vagueness not only that an exact line has not been drawn, but also that we find it difficult to draw one. There does not seem to be any good reason why the line should be drawn in one particular place rather than the other (Wright 2001, p. 78). Nevertheless, we do draw such lines. There are plenty of rules that draw a line at a precise age. A person who celebrates his eighteenth birthday on Election Day has the right to vote, but a person who turns eighteen the day after the election does not have a vote. There is no reason to think that a person who has just turned eighteen is more intellectually qualified to participate in a political election than a person who will turn eighteen tomorrow, but there is a good reason to draw a line somewhere, and a line at eighteen years is, after all, more practical than a line at seventeen years and 364 days.

[3]Some borderline cases concern the real world, while others are only imagined. A distinction can therefore be drawn between extensional vagueness and intensional vagueness. A term is extensionally vague to the extent that there are real cases that lie on the borderline. A term is intensionally vague if there are possible borderline cases.

[4]That a term can be more or less vague is sometimes confused with the fact that a term can be more or less specific. Some very prominent scholars, including George Lakoff, have made this error (Lakoff 1970, p. 357). That the term 'child' applies equally well to a boy or a girl is not a matter of vagueness. It is a matter of being unspecific. As we have seen, vagueness is about borderline cases, but the fact that the term 'child' does not specify gender has nothing to do with the borderline of its applicability. It is in no way uncertain whether the term 'child' also applies to boys and not only to girls, or vice versa.

clear which meaning is intended. Does the sentence "John went to the bank" mean that John went to his banker or does it mean that he went down to the river? With an ambiguous term, precization is achieved by making clear which of the alternative meanings are intended. Alternative meanings are distinguished from each other with more precise terms that indicate the different meanings. In the case of 'bank', we could, for example, introduce a distinction between 'financial bank' and 'river bank'. Here lies the difference between ambiguity and vagueness. That a term is vague means that the concept that the term stands for has borderline cases. That a term is ambiguous means that the term can stand for more than one concept. Vagueness is removed by removing borderline cases. Ambiguity is removed by removing alternative meanings.[5]

That an expression is imprecise means that the expression is ambiguous or vague. It has several meanings (ambiguity) or borderline cases (vagueness). Some expressions are both ambiguous and vague. They have several meanings, and each of these meanings has borderline cases. This means that deprecization is a move from a precise expression to an imprecise expression, where 'imprecise' means ambiguous, vague or ambiguous-and-vague.

Some ambiguous terms have meanings that are completely separated from each other. A 'bank' in the sense of a financial institution and a 'bank' as the side of a river is an example of two completely separated meanings. Such ambiguities are quite easy to spot. It is more difficult to see the ambiguity in terms that have *alternate meanings with overlapping applicability*. In such cases, we often fail to realize that the term is ambiguous. As it happens, the term 'child' is an example of such a term. 'Child' is vague as well as ambiguous.

Suppose that someone would ask if a twelve-year-old counts as a 'child'. A careful person would be reluctant to give a yes or no answer to this question, and would rather respond by saying "it depends", sensing that there are some contexts where a twelve-year-old would count as a child and other contexts where 'child' has a different meaning that does not include twelve-year-olds. When we say, for example, that "a child should not drink alcohol", the term 'child' has a meaning that includes twelve-year-olds, but when we say that "a child is less reliable as an eyewitness in a court of law", the term 'child' has a different meaning that does not include twelve-year-olds. The meaning of the term 'child' depends on the *implicational context*. The term 'child' has one meaning in the implication that a child should not drink alcohol and a different meaning in the implication that a child is less reliable as a witness. In the same way that the different meanings of the term 'bank' can be distinguished by the more precise terms 'financial bank' and 'river bank', the different meanings of 'child', that we have now observed, can be distinguished by introducing the more precise terms 'alcohol-implication-child' and 'witness-implication-child'. This more precise vocabulary makes it possible to give a correct and precise answer to the

[5]It is often pointed out that the applicability of an imprecise term depends on the comparison class. That Jim is 'rich' in comparison to the people living in South Central Los Angeles does not mean that he counts as rich in comparison to the population in Beverly Hills. This is sometimes described as a feature of vagueness (Shapiro 2006, p. 12), but it is actually a case of ambiguity. The term 'rich' has different meanings that can be distinguished by introducing the more precise terms 'South Central rich' and 'Beverly Hills rich'.

initial question ("Is a twelve-year-old a child?"), by saying that a twelve-year-old is an 'alcohol-implication-child' but not a 'witness-implication-child'. This shows that 'child' is an ambiguous term, just like 'bank'. The difference between 'child' and 'bank' is that the different meanings of 'child' overlap in their applicability. The term 'alcohol-implication-child' and the term 'witness-implication-child' are, for example, both applicable to a four-year-old. When we realize this, we see that 'child' is both ambiguous and vague. The term 'child' is ambiguous, as it has different meanings in different implicational contexts, and when we look closer at one of these meanings we can see that it is vague in this meaning.

3 Deprecization Effect

Recall the court room scenario that we discussed in the introduction. Twelve year old Jessica Miller testifies as a witness for the prosecution, and the defense attorney questions her reliability with an argument *ad hominem*.[6] He claims that she is less reliable because of her age. We looked at two versions of the defense attorney's argument, a precise version (A) that talked about Jessica Miller as a 'person who is under thirteen years of age' and an imprecise version (A*) that talked about her as a 'child'. As we have seen, the move from (A) to (A*) is a deprecization. We propose that the effect on agreement caused by deprecization be called the *deprecization effect*. When the audience agrees more with (A*) than (A), there is a *positive deprecization effect*. If the audience agrees less with (A*) than (A), there is a *negative deprecization effect*.

To investigate the deprecization effect in this scenario we conducted an experiment where some participants were presented with (A) and others with (A*). We predicted a positive deprecization effect. Our intuition was that the participants would agree more with the imprecise version of the argument (A*) than the precise version (A), as they would accept the attribution of the term 'child' to a twelve-year-old, and find it easier to agree with the premise "a child is less reliable as a witness" than the premise "a person under thirteen is less reliable as a witness". Our prediction was based on the following general hypothesis.

> If the participants find it hard to agree with the precise version of the argument and accept the use of the imprecise term, they will agree more with the imprecise version of the argument. (*positive deprecization effect*)
>
> If participants find it easy to agree with the precise version of the argument or reject the use of the imprecise term, they will agree less with the imprecise version of the argument. (*negative deprecization effect*)

According to our hypothesis there are two necessary conditions for a positive deprecization effect. First, participants must find it hard to agree with the precise version

[6] An argument *ad hominem* is an argument that points out that a person has a certain attribute, and claims that this affects the person's reliability in a certain function (Brinton 1995; Walton 1998; Dahlman, Reidhav, and Wahlberg 2011).

of the argument. If participants find it easy to agree with the precise version, deprecization will have a negative effect. In our case, with the twelve-year-old witness, we predicted that participants would find it hard to agree with the precise version of the argument, but our prediction would have been different if the age of the witness had been different. In a case where the witness is four years old, and the precise argument says that a person under five is less reliable as a witness, we would not expect participants to find it hard to agree with this argument, and, following the general hypothesis, we would not predict a positive deprecization effect. On the contrary, we would predict a negative deprecization effect. Secondly, for deprecization to have a positive effect, participants must accept the use of the imprecise term. This means that there must be some implicational context where the attribution would be appropriate. We predicted that participants would accept the term 'child' for a twelve-year-old, but our prediction would have been different if the age of the witness had been different. In a case where the witness is nineteen years old, we would expect participants to reject the term 'child', and, in accordance with our hypothesis, we would not have predicted a positive deprecization effect. We would have predicted a negative effect.

To test this hypothesis we designed an experiment where we asked the participants if they agree with the argument that Jessica Miller is less reliable because of her age. We tested six different ages (four, nine, twelve, fourteen, seventeen and nineteen years), and for each age we tested if the participants agreed more with the precise or the imprecise version of the argument. We also made a separate test where we asked participants if they find it acceptable to say that a person of a certain age (four, nine, twelve, fourteen, seventeen and nineteen years) is a 'child'.

4 The Experiment

4.1 Participants

Data was collected online using *Amazon Mechanical Turk* (http://www.mturk.com/), an online service that recruits participants to carry out online tasks, such as surveys or experimental tasks.[7] The participants were given $0.45 to complete the test. All participants were US residents. In total, 1187 participants took the test, but 45 participants were removed from the data set because they completed the test either in a very short time (less than 100 seconds was used as the exclusion criteria) or left the test incomplete. Left for the analysis were 1142 participants (577 women) having a mean age of 32 years (SD = 11.8).

[7] *Amazon Mechanical Turk* has an increasing popularity among social scientists as a source of data (Paolacci, Chandler, and Ipeirotis 2010). One benefit of *Amazon Mechanical Turk* over traditional data collection methods is that it becomes feasible to run studies with large numbers of participants. Another benefit is that, compared to experiments where the participants consist of university students, participants on *Amazon Mechanical Turk* are more demographically diverse (Buhrmester, Kwang, and Gosling 2011).

4.2 Design

A 6 x 2 mixed design was used. The first factor was the age of Jessica Miller. Participants were given the information that she is 4, 9, 12, 14, 17 or 19 years old. The second factor was the phrasing of the argument made by Williams' defense lawyer. Participants were given a precise argument or an imprecise argument.

4.3 Material

The participants were given the court room scenario presented in the introduction of this article, with different information concerning the age of Jessica Miller. Participants who were given the information that Jessica Miller is four years old were presented with one of the following arguments by Williams' defense attorney.

> "I would like to draw your attention to one important circumstance with regard to Jessica Miller's testimony. A person who is under five years of age is less reliable as a witness. Jessica Miller is therefore less reliable as a witness." (precise)

> "I would like to draw your attention to one important circumstance with regard to Jessica Miller's testimony. A child is less reliable as a witness. Jessica Miller is therefore less reliable as a witness." (imprecise)

Participants who were given the information that Jessica Miller was nine years old were presented with the precise argument that a person under ten years is less reliable as witness, or the imprecise argument that a child is less reliable, and so on. The participants were then asked to assess to what extent they agreed with the argument that they were given, on a scale from one ('strongly disagree') to nine ('strongly agree').

4.4 Results

The result of the experiment is summarized in Figure 1, which shows the mean agreement with the given argument as a function of the age of the witness and the type of argument. Looking at Figure 1, there seems to be a region with a *positive deprecization effect*, but when the witness is too young or too old the effect disappears. Moreover, the relation between the agreement rating and the age of the witness seems to be well captured by a quadratic function (the lines in Figure 1) where the positive deprecization effect is manifested as a difference in curvature between the two curves. *Linear regression modeling* was used to test if there is a difference in curvature, and, subsequently, a region with a positive deprecization effect. A first model (M1) was fitted to the data with agreement rating as response variable. The explanatory variables were the age of the witness entered as a continuous variable and the argument style entered as a categorical variable. This model also included a term for the linear interaction between the age and the argument style and the complete model is summarized below:

$$\text{Agreement} = \text{Age} + \text{Argument Style} + \text{Age} * \text{Argument Style} \quad \text{(M1)}$$

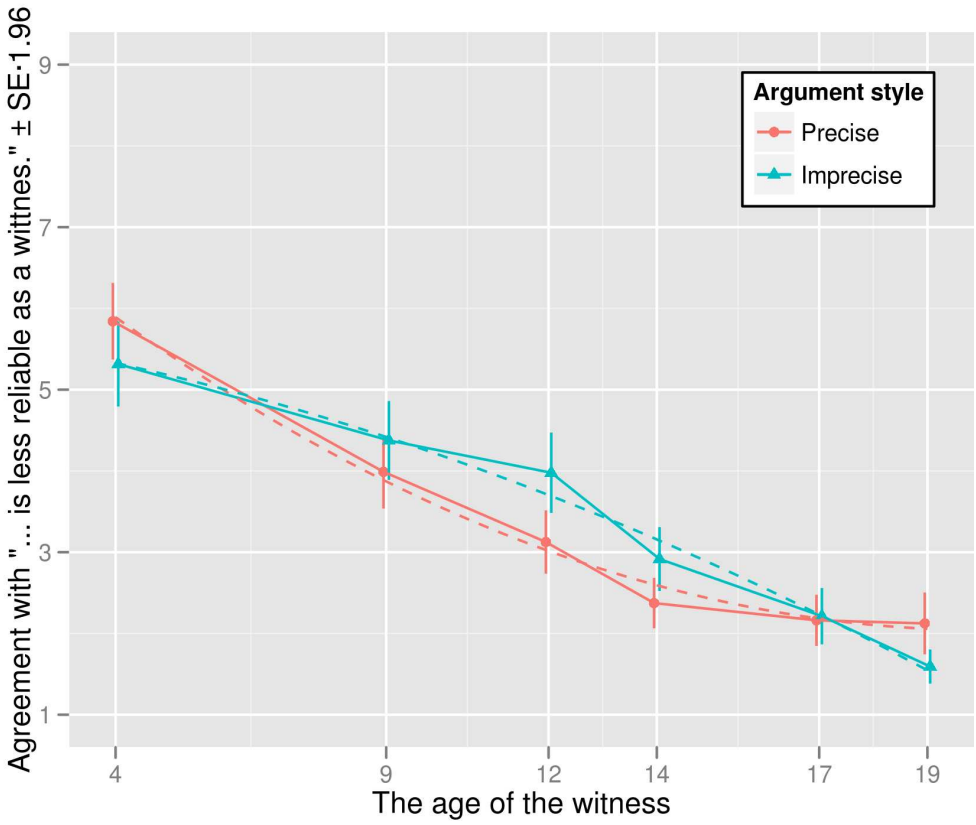

Figure 1: The mean agreement with the statement as a function of the age of the witness and argument style. The dashed lines show the best fitting quadratic curve.

Note that M1 cannot account for the difference in curvature visible in Figure 1. The purpose of M1 is to act as the baseline for a model that accounts for the curvature. Subsequently the coefficients for argument style and the interaction between age and argument style are not significantly different from zero. A second model (M2) was fitted that also included the squared age of the witness and the interaction between the squared age and argument style. The age of the witness variable was mean-centered before fitting the model to avoid multicolinearity due to the squared term.

$$\text{Agreement} = \text{Age} + \text{Argument Style} + \text{Age} * \text{Argument Style} + \text{Age}^2 + \text{Age}^2 * \text{Argument Style} \quad \text{(M2)}$$

This model can account for the curvature, and an F-test shows that M2 explains significantly more variance than M1 which motivates the inclusion of the quadratic term ($F(2,1136) = 10.98$, $p < 0.001$). Table 1 shows the coefficients of the two models. In M2 the interaction between the squared age and argument style is highly significant. This supports the notion that there is a region with a positive deprecization

effect stretching across the middle of the age spectrum, and a negative depreciation effect at each end of the spectrum.

		M1			M2	
	Estimate	SE	p	Estimate	SE	p
Terms:						
Intercept	3.21	0.082	< 0.001	2.84	0.12	< 0.001
Age	-0.25	0.016	< 0.001	-0.22	0.018	< 0.001
ArgumentStyle	0.11	0.12	0.33	0.66	0.17	< 0.001
Age*ArgumentStyle	-0.0012	0.023	0.96	-0.051	0.026	0.050
Age^2				0.014	0.0035	< 0.001
Age^2*ArgumentStyle				-0.022	0.0050	< 0.001
R^2 adjusted		0.287			0.299	

Table 1: Standard errors for the two models.

In order to deepen the understanding of the deprecization effect (positive and negative), planned t-tests were conducted between precise and imprecise argument for each age level (Table 2). The results show that there is a significant *positive deprecization effect* in the scenarios where the witness is twelve and fourteen years. The results also show a significant *negative deprecization effect* in the scenario where the witness is nineteen years. These results can also be visualized in Figure 1. No other difference reached to the level of significance.

Age of witness	Agreement with imprecise argument (mean and SD)	Agreement with precise argument (mean and SD)	t	Cohen's d
4 years	5.31(2.51)	5.84(2.34)	-1.47	-.22
9 years	4.38(2.21)	3.99(2.22)	1.14	.18
12 years	3.98(2.38)	3.13(1.95)	2.67**	.39
14 years	2.92(1.95)	2.37(1.57)	2.13*	.31
17 years	2.21(1.71)	2.16(1.60)	.22	.03
19 years	1.59(1.11)	2.12(1.99)	-2.41*	-0.25

Table 2: Means (and SDs), t-values, and corresponding Cohen's d for agreement with precise and imprecise arguments for different ages of the witness.
* $p < .05$
** $p < .01$

4.5 Too Old to be Called a 'Child'?

We also made a test to see when people find the term 'child' acceptable. In this test, the participants were presented with a statement saying that a person of a certain age is a child (e.g. "A person who is twelve years old is a child"). Six different

statements (four, nine, twelve, fourteen, seventeen and nineteen years) were tested, and the participants were asked to what extent the statement is acceptable, on a scale from 1 to 7 where 1 stands for "completely unacceptable" and 7 stands for "completely acceptable".

512 participants took part in the test on *Amazon Mechanical Turk*, and the results are shown in Figure 2. The participants accepted the term 'child' for a four-year-old, nine-year-old, twelve-year-old and fourteen-year-old, but not for a seventeen-year-old or nineteen-year old. The participants clearly rejected the statement "A person who is nineteen years old is a child".

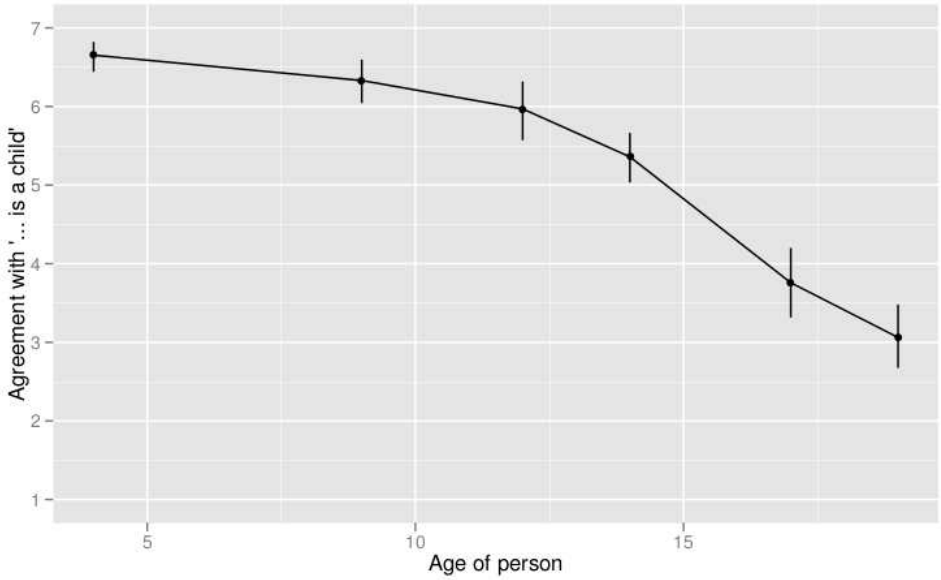

Figure 2: The mean agreement with the statement as a function of the age of the person.

4.6 Discussion

According to our general hypothesis, the participants will agree more with the imprecise version of the argument (*positive deprecization effect*) if the following two conditions are met:

1. the participants find it hard to agree with the precise version of the argument,
2. the participants accept the use of the imprecise term.

The first condition is met when the witness is nine, twelve, fourteen, seventeen or nineteen years. As we have seen, the participants found it hard to agree with the precise argument in all of these scenarios. The mean value for the precise argument

scored below 4.00 in all of them. The only test-scenario where the first condition is not met is the scenario where the witness is four years old. The mean value for the precise argument in this scenario was 5.84.

The second condition is met when the witness is four, nine, twelve and fourteen years. As we have seen, participants accept the term 'child' at these ages.

This means that the scenarios where both conditions are met are the scenarios where the witness is nine, twelve or fourteen years. According to our hypothesis there should be a positive deprecization effect in these three scenarios. This prediction was confirmed by the experiment. The mean value for the imprecise argument turned out higher than the precise argument in all of these scenarios, and the difference was statistically significant for the twelve year old witness as well as the fourteen year old witness.

According to our general hypothesis there would be a negative deprecization effect when participants find it easy to agree with the precise version of the argument. Here, the results of the experiment were inconclusive. In the scenario where participants found it easiest to agree with the precise version of the argument (age 4), the mean value for the precise argument came out higher than the mean value for the imprecise argument, but the difference was not significant. There seems to be a tendency towards a negative deprecization effect here, and it is possible that the difference had been significant if participants had found it easier to agree with the precise version of the argument. After all, the precise version only scored 5.84 (on a scale from 1 to 9).

Our hypothesis also predicts a negative deprecization effect when participants reject the use of the imprecise term. This prediction was confirmed by the experiments. The participants rejected the use of the term 'child' for a nineteen-year-old, and, accordingly, there was a negative deprecization effect in the scenario where the witness is nineteen. As we have seen (Table 2), this result was statistically significant.

5 Deprecization Effect as a Fallacy

As we have seen, there is a positive deprecization effect in several scenarios. One of them is the scenario we presented in the introduction, where Jessica Miller is twelve years old. People agree more with the conclusion that Jessica Miller is less reliable as a witness when the advocate talks about her as a 'child' (A*) then when he talks about her as a 'person under thirteen' (A). This is not rational. The facts of the case are the same, and the conclusion of the argument is the same. How could (A*) be a better argument than (A) just because it uses the expression 'child'? In this section, we will see that a person who does not agrees with (A) but agrees with (A*) commits a fallacy of reasoning known as the fallacy of equivocation.

The move from (A) to (A*) can be described to consist in the following four steps. (A) has the logical structure of *Modus Ponens* with an unstated minor premise ("Jessica Miller is under thirteen"). In other words, (A) is an *enthymeme* with regard to the following argument (A'), where the unstated premise has been made explicit:

(A′) I would like to draw your attention to one important circumstance regarding Jessica Miller. A person who is under thirteen years of age is less reliable as a witness. Jessica Miller is under thirteen. Jessica Miller is therefore less reliable as a witness.

To deprecize this argument, the advocate introduces the term 'child'. The term is introduced in the argument by expanding the major premise according to a reverse *Modus Barbara*. The premise "a person who is under thirteen years of age is less reliable as a witness" is substituted with the premise "a person who is under thirteen years of age is a child" and the premise "a child is less reliable as a witness". Expressed in sentential logic, T→U is substituted with T→T* and T*→U, where T stands for 'person under thirteen', T* stands for 'child' and U stands for 'less reliable as a witness'. The result of this maneuver is the following argument:

(A″) I would like to draw your attention to one important circumstance regarding Jessica Miller. A person who is under thirteen years of age is a child. A child is less reliable as a witness. Jessica Miller is under thirteen. Jessica Miller is therefore less reliable as a witness.

Then, the precise expression ('person under thirteen') is removed completely from the argument by substituting the premise "A person who is under thirteen years of age is a child" and the premise "Jessica Miller is under thirteen" with the premise "Jessica Miller is a child" according to *Modus Ponens*:

(A‴) I would like to draw your attention to one important circumstance regarding Jessica Miller. A child is less reliable as a witness. Jessica Miller is a child. Jessica Miller is therefore less reliable as a witness.

Finally, the premise "Jessica Miller is a child" is turned into an unstated premise. This turns (A‴) into (A*), since (A*) is an enthymeme of (A‴). We have now moved from (A) to (A*).

This representation shows that a person who disagrees with (A) should also disagree with (A*). If you refuse to accept the premise T→U ("a person who is under thirteen years of age is less reliable as a witness"), you commit a self-contradiction if you accept the premises T→T* ("a person who is under thirteen years of age is a child") and T*→U ("a child is less reliable as a witness"), since T→U follows by logical necessity from T→T* and T*→U.

This is quite obvious if you look at the representation of the arguments, but an audience in a real life situation often fails to see it. The imprecise term 'child' allows for a number of different interpretations, and among these interpretations there are some interpretations that make the premise "a person who is under thirteen years of age is a child" true and some interpretations that make the premise "a child is less reliable as a witness" true. If the term 'child' is interpreted to mean a person under the age of fifteen, the first premise ("a person who is under thirteen years of age is a child") becomes true. If the term 'child' is understood to mean a person under the age of seven, the second premise ("a child is less reliable as a witness") becomes true. This explains why someone would make the mistake of accepting (A*)

in spite of the fact that he does not accept (A). As we have seen, (A*) relies on two premises, the explicit premise "a child is less reliable as a witness" and the implicit premise "Jessica Miller is a child". A person who allows the term 'child' to have different meanings in these premises feels free to regard both of them as true. The problem is that you commit a logical fallacy if you take this liberty. A person who claims that an argument is sound, but assigns one meaning to a term in one premise and a different meaning to the same term in another premise commits the *fallacy of equivocation* (Mill 1974, p. 809; Quine 1950, p. 43). For an argument to be sound, a term must have the same meaning throughout the whole argument.

If a person who commits this fallacy of reasoning and declares that he agrees with (A*), realizes, at a later time, that he committed a fallacy, he will take back his declaration and say that he did not really agree with (A*). He is not taking back his declaration because he has changed his mind on some substantial issue. He is taking it back because he realizes that it was based on a logical error. As Naess puts it, the verbal agreement was not a real agreement. It was a *pseudo agreement* (Naess 1966, p. 95).

A psychological explanation for why people fall for the fallacy of equivocation has been offered by John Woods and Douglas Walton. According to Woods and Walton, people have an innocent desire to make an argument sound, and this desire overpowers the ability to notice the illegitimate shift in implicational context (Woods and Walton 2007, pp. 199–200). Some scholars doubt if this is really true (Deppermann 2000, p. 18). They question the assumption that the audience has a desire to make the argument sound.

We believe that it matters what implicational contexts are involved. It is easier to overlook that a premise is unacceptable in the relevant implicational context if there are many other implicational contexts where it would have been acceptable. As we observed earlier, there are other implicational contexts where Jessica Miller would count as a child. A twelve-year-old counts as a child in the implication "a child should not drink alcohol", and the list of implicational contexts where the term "child" includes twelve-year-olds can easily be made longer. Just think about implications like "a child should not be sent to prison", "a child should not smoke" or "a child should not have sex". There is a great number of implicational contexts where the premise "Jessica Miller is a child" would have been true. We think that this explains why some people are drawn to accept this premise in the argument, in spite of the fact that they do not accept it within the context of the argument. They sense that Jessica Miller is an 'alcohol-implication-child', a 'prison-implication-child', a 'smoke-implication-child', a 'sex-implication-child' etcetera, and this induces them to accept the premise "Jessica Miller is a child", though the only thing that should matter is whether Jessica Miller is a "witness-implication-child".

6 Deprecization as a Strategy

Several scholars from different scientific disciplines have observed that imprecise expressions can be used to overcome disagreement (Williams 1980; Eisenber 1984; Myers 1996; Bernheim and Whinston 1998; Jaegher 2003; Choi and Triantis 2010). Lee

Williams has investigated how a skilled advocate uses precise statements on issues where he knows that the audience agrees with him, and shifts to vague statements on issues where he fears that the audience will disagree (Williams 1980, pp. 31–32). Williams calls this a *stalling strategy*. The purpose of the stalling strategy is to avoid an early conflict with the audience, and postpone the conflict to a later time. The advocate waits for the best opportunity to present his controversial view. Eric Eisenberg has demonstrated that ambiguity is an effective strategy in organizational communication. People in an organization often have conflicting goals, and, according to Eisenberg, these differences can be mediated by ambiguous statements about core values. As Eisenberg puts it, such statements allow everyone to maintain his individual interpretation, while, at the same time, believing that he is in agreement with the others (Eisenber 1984, p. 231).

In this article, we have investigated an effect of imprecise expressions that can be used as a further strategy in situations of disagreement. Our results show that imprecise expression can be used to *conceal a controversial premise*, and induce the audience to commit the fallacy of equivocation. This strategy goes much further than the stalling strategy. The advocate does not merely try to postpone disagreement. He seeks to fabricate a pseudo agreement.

The practical implications of our findings can be summarized in the following rules of thumb for the strategic use of imprecise expressions.

- If the audience finds your argument easy to agree with, keep it as it is! Making the argument less precise will not make the audience agree more.
- If you have an argument that relies on a premise that the audience finds hard to agree with, try to conceal the controversial premise by deprecization!
- Remember to use an imprecise expression that the audience can accept.

From the audience point of view, the strategic use of deprecization is seen from the opposite perspective. Naturally, the audience does not want to be manipulated, and needs to defend itself. Here are some rules of thumb for the defense against strategic use of deprecization.

- If the advocate uses imprecise expressions, be alert!
- Identify all premises that rely on the imprecise expression. Be careful not to overlook unstated premises.
- Does the imprecise expression have the same meaning throughout the argument? If not, reject the argument! It commits the *fallacy of equivocation*.

7 Conclusions

We have investigated arguments where an expression is substituted with a less precise expression. This is called *deprecization*, and we propose that the effect that deprecization has on the audience be called *deprecization effect*. When the audience

agrees more with the less precise version of the argument, there is a *positive deprecization effect*. If the audience agrees more with precise version, there is a *negative deprecization effect*.

We conducted an experiment where the participants were presented with a court room scenario with a twelve-year-old witness. The participants agreed significantly more with the conclusion that the witness is less reliable because of her age when the advocate used the imprecise argument 'a child is less reliable' than the precise argument 'a person under 13 is less reliable' (*positive deprecization effect*).

We also tested scenarios where the witness is four, nine, fourteen, seventeen and nineteen years old. The results confirm the following general hypothesis:

> If the participants find it hard to agree with the precise version of the argument and accept the use of the imprecise term, they will agree more with the imprecise version of the argument (*positive deprecization effect*).
>
> If participants find it easy to agree with the precise version of the argument or reject the use of the imprecise term, they will agree less with the imprecise version of the argument (*negative deprecization effect*).

A person who disagrees with the precise version of the argument and agrees with the precise version commits a fallacy of reasoning. He assigns different meanings to the imprecise term in different parts of the argument, thereby committing the *fallacy of equivocation*.

An advocate who uses deprecization as an argumentation strategy tries to fabricate a *pseudo agreement*. He tries to induce the audience to commit a fallacy of reasoning, and agree with an argument that they otherwise would not agree with.

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The Dialogical Force of Implicit Premises. Presumptions in Legal Enthymemes

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Abstract. In the logical and rhetorical tradition, enthymemes have often been described according to two criteria: their structure and the epistemic status of their premises. These two characteristics are strictly connected to each other, since the major premise of an enthymeme can be taken for granted because it is commonly considered as likely. However, what is the relationship between likeliness and the possibility of taking a proposition for granted? Why does a speaker decide to leave a premise unexpressed? These two questions can be addressed by considering the pragmatic and the rhetorical perspectives. The purpose of this work is to investigate legal enthymemes, inquiring into their peculiar defeasible nature which makes them context-relevant and audience oriented. We maintain that the act of hiding a proposition needed to make the inference correct transforms the syllogistic type of reasoning into a powerful rhetorical strategy for both the speaker and the hearer. We claim that enthymemes can be considered as instruments of persuasion grounded on presumptions. The choice of an implicit premise becomes, in this perspective, a strategy of selecting what a specific interlocutor can hold as more likely based on his knowledge or values. For this reason the notion of kairos, the opportunity and contextual effectiveness of a premise, becomes crucial. An implicit premise should be regarded not only as an element that the speaker takes for granted, but as a strategic instrument for shifting and increasing the burden of proof.

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Keywords. Legal argumentation, rhetoric, enthymeme, presumptions, implicitness, legal strategies.

In the logical and rhetorical tradition, enthymemes have often been described according to two criteria: their structure and the epistemic status of their premises (Hamilton 1874, p. 389). For Aristotle, rhetorical syllogisms are syllogisms having fewer premises than the ordinary ones (Aristotle 1991, 1357a); they are characterized by an implicit dimension, by a premise that is left unexpressed (Gough 1985). From an epistemic perspective, enthymemes are not grounded on premises absolutely true (Burnyeat 1994), but on probabilities and signs (Aristotle 1991, 1357a), namely commonly accepted propositions (Walton and Reed 2005, p. 363; Walker 1994, p. 47) that do not need to be true, but only likely (Braet 1999).

The purpose of this work is to investigate enthymemes, and in particular legal enthymemes, inquiring into their peculiar defeasible nature which makes them context-relevant and audience oriented. We maintain that the act of hiding a proposition needed to make the inference correct, transforms the syllogistic type of reasoning into a powerful rhetorical strategy for both the speaker and the hearer. We claim that the dialectical and persuasive force of enthymemes is grounded on presumptions—on what is likely, namely what usually happens or *should* be the case.

1 The "Province of Opinion" of Enthymemes: Dialectical and Rhetorical *Topoi*

The definition of enthymeme as a truncated syllogism, or a syllogism with a missing premise has dominated the view on the rhetorical syllogism since the earliest commentators (Hamilton 1874, p. 154). However, according to Aristotle, the essential feature which makes a syllogism an enthymeme is not its accident of having a missing premise (McBurney 1994, p. 184), or having premises "fewer often than those which make up the normal syllogism" (Aristotle 1991, 1357a), but its matter, as it is drawn from "the province of opinion" (Quincey 1893, p. 149). The crucial question is what Aristotle intends with "opinion", as distinguished from dialectics.

1.1 The Quasi-logical Relation of Rhetorical Syllogisms

Aristotle (Aristotle 1991, 1357a) points out that the propositions forming the basis of enthymemes are mostly or usually true, because they are probabilities and signs. In particular, he defines probabilities as follows (ibid., 1357a):

> A Probability is a thing that usually happens; not, however, as some definitions would suggest, anything whatever that usually happens, but only if it belongs to the class of the "contingent" or "variable."

On the other hand, Signs can be divided into two categories: the fallible and the infallible kind. The infallible signs cannot be rebutted, while the defeasible ones can lead only to plausible conclusions. Infallible signs can be represented as antecedents in logical consequences, while fallible signs can be conceived as abductive reasoning, or

reasoning to the best explanation (Harman 1965), in which the sign is the consequent of several possible antecedents. In the first case, the conclusion is the only possible explanation of the sign; in the second case, the conclusion is only the best of several options (Aristotle 1991, 1357b).

We can notice how in Aristotle's treatment of enthymemes particular emphasis is placed on the defeasible and tentative nature of this type of reasoning, which is grounded on "opinions", including both explanations and generalizations regarding the usual course of affairs. The province of opinion, however, is commonly considered as the area of inquiry of argumentation or human reasoning, different from the necessary logical inferences. This type of reasoning has been described using argument schemes, or prototypical patterns of inference (Walton and Reed 2005; Walton, Reed, and Macagno 2008). If we consider enthymemes as simply defeasible reasoning, we risk overlooking a crucial distinction pointed out by Aristotle between dialectical and rhetorical reasoning.

1.2 Enthymematic and Dialectical Topoi

Amossy (Amossy 2002, p. 476) noticed how dialectical reasoning is materially different from rhetorical inferences. On her view, while general *topoi*, or *topoi koinoi*, are in the domain of dialectics and are grounded on universal logic-semantic patterns (such as the relationship between genus and species), the specific, rhetorical topoi "embrace all kinds of stereotypical phenomena designated today by such terms as *commonplaces, received ideas, stereotypes, clichés*." If we start from this observation, we can see how the nature of the principle of inference is essentially different in dialectical and rhetorical arguments. Dialectical arguments, we maintain, are defeasible because a general and (mostly) necessary principle of inference (the *maxim*) is applied to premises that are only generally shared; in other words, necessary principles become defeasible when instantiated. For instance, the topic from definition, "What is predicated of the definition is also predicated of the definiendum and vice versa" (Stump 1988, p. 1059c), expresses the principle that "Definition is a predicate convertible with its subject signifying the essence" (Aristotle 1991, pp. I, 8). The topic from definition corresponds to the characteristics of the predicable, which is a logic-semantic relation. The necessary topical relation is, however, instantiated by definitions, which can be shared or controversial. For instance, the force of the argument "Bob killed his neighbour without malice aforethought; therefore he committed manslaughter" depends on the plausibility of the factual premise (Bob's homicide) and the definition of manslaughter, which can be shared or not accepted by the interlocutor. The abstract material rule of inference from definition is not controversial; what is weak is the actual definition from which the conclusion proceeds.

Rhetorical syllogisms reflect a structure of reasoning that presents two defeasible points, both the "factual" premise and the maxim. For Aristotle (ibid., 1357a 30-31), "there are few facts of the necessary type that can form the basis of rhetorical deductions." On his view, "the propositions forming the basis of enthymemes, though some of them may be necessary, will in the main hold for the most part. Now the materials of enthymemes are probabilities and signs." Therefore, rhetorical topoi include also commonplaces that are not based on semantics or logical relationships,

which are basically grounded on the very structure of language. Rhetorical topoi can be based on general principles reflecting what happens most of the time (Aristotle 1991, 1358a 26-27). Rhetorical arguments are, therefore, defeasible for two reasons: not only is the specific relation between properties defeasible, but also the abstract principle of inference. The structure of this type of reasoning can be analyzed by taking into consideration the legal notion corresponding to this type of defeasible reasoning grounded on the so-called "maxims of experience": presumptive reasoning.

2 Presumptive Reasoning

The concept of presumption is used to describe a particular type of inference based on general accepted principles that represent how things usually happen. They are defeasible generalizations and hold as true until the contrary is proven (Rescher 1977, p. 26). Presumptions are forms of inference used in conditions of lack of knowledge. For instance, if something has happened in a certain place the previous day, the place can be searched for evidence because it is presumed not have changed meanwhile. Such inferences are therefore strategies to fill the gap of incomplete knowledge shifting to the other party the burden of providing the missing contrary information or data (Walton 2008). Their conclusion is recognized as refutable even though it has not been refuted at that point of the discussion (Hart 1961, p. 10). Presumptions are grounded on principles of inference that need to be shared and based on the ordinary course of events; in particular, the presumed fact needs to be more likely than not to flow from the proved fact supporting it (for the specific notion of probability of presumptions in law, see *Leary v. United States*, 395 U.S. 6, at 36, 1969).

Presumptions work to move the dialogue further when knowledge is lacking. In law, they correspond to "maxims of experience" (Giulliani 1961) or presumptions of fact, propositions representing the ordinary course of events, or rather what is likely or what should be the case (ibid., p. 231). They shift the burden of producing evidence, so that the proposition can be rejected only by providing contrary arguments or positive facts leading to a contrary conclusion. If not rebutted, the speaker can consider it as tentatively proved, and move the dialogue further. For instance, who flees the crime scene when the police arrive is circumstantially presumed to be guilty of the crime. If the defendant does not provide contrary evidence or rebuts the presumption, this circumstantial evidence will be evaluated by the jury (together with all the other available evidence) in order to establish his guilt or innocence (Prakken and Sartor 2006). For this reason, ordinary presumptions (*praesumptio facti*) shift the burden of producing evidence (see Macagno and Walton 2012; Walton 2008). Rescher represented the structure of this type of inference as shown in table 1 (Rescher 2006, p. 33)

The *Rule* of presumption links the acceptability of a proposition P (for instance, the defendant is guilty) to a condition C (for instance, he fled the crime scene) until a specific default proviso D obtains (for instance, he proves that he was forced to leave the scene). If he is found to have fled the crime scene and no contrary evidence is provided, he can be provisionally and circumstantially considered to be guilty.

Presumptive reasoning can reflect the structure of defeasible inference of rhetor-

Premise 1:	**P (the proposition representing the presumption) obtains whenever the condition C obtains unless and until the standard default proviso D (to the effect that countervailing evidence is at hand) obtains.**
Premise 2:	**Condition C obtains (Fact).**
Premise 3:	**Proviso D does not obtain (Exception).**
Conclusion:	**P obtains.**

Table 1: Presumptive reasoning.

ical syllogisms. However, enthymemes are characterized by another fundamental feature, their implicit dimension. Their tacit premise plays a crucial strategic role in the process of persuasion.

3 The Implicit Dimension of Enthymemes: Missing Premises and Presumptive Reasoning

The fundamental characteristic of enthymemes is that they are grounded on the opinion. Their premises, more than absolutely true, need to be plausible, or rather likely. This characteristic was shown by Aristotle as essentially related to another fundamental feature, its implicit dimension. According to Aristotle (Aristotle 1991, 1357a 16–18), enthymematic premises belong to the realm of opinion because they are tacit, and vice versa, they can be taken for granted as they are shared by the interlocutors. However, how is it possible to leave a premise implicit, if it is impossible to know our interlocutor's mind?

3.1 Enthymemes as Presumptive Reasoning

A possible answer for the problem of knowing the other's mind can be found in the reasoning underlying the act of taking for granted a proposition. The speaker acts as if the hearers knew the proposition left unexpressed, treating it as if it were part of the interlocutors' dark-side commitment store (Walton and Krabbe 1995). According to the leading pragmatic theories, he "believes" or "thinks" that the proposition is a commonly known one, or at least it is shared by the hearer (Soames 1982, p. 486; Horn and Ward 2006, p. xii; Atlas 2008; Lewis 1979; Kempson 1975). This internal process of "believing" or "thinking" can be represented from a reasoning perspective by analyzing it as a form of presumptive reasoning (Macagno 2012), namely a form of guessing based on the speaker's incomplete knowledge of the other's mind. The speaker cannot know the other's mind; he can only advance a tentative and defeasible conclusion proceeding from what is usually the case (Strawson 1971, pp. 58–59; Kempson 1975, pp. 166–167). He acts on the grounds of general principles such as "Speakers belonging to a specific speech community usually know the meaning of the most important words" and draws specific conclusions on the interlocutor's knowledge. This type of reasoning can be regarded as presumptive (Rescher 1977, p.

1; Freeman 2005, p. 346).

For instance, we can analyze the presumptive reasoning of one of the most controversial legal and political cases, Obama's redefinition of "hostilities". In order to avoid requesting the Congress' authorization to continue the hostilities (*War Powers Resolution*, sec 5b, Public Law 93–148), the President advanced the following enthymeme in which the fundamental premise, the redefinition of "hostilities" was left unexpressed (*Obama Administration letter to Congress justifying Libya engagement*, June 15th, 2011, p. 25).

> Implicit redefinition: "Hostilities"
>
> The President is of the view that the current U.S. military operations in Libya are consistent with the War Powers Resolution and do not under that law require further congressional authorization, because U.S. military operations are distinct from the kind of "hostilities" contemplated by the Resolution's 60 day termination provision. [...] U.S. operations do not involve sustained fighting or active exchanges of fire with hostile forces, nor do they involve the presence of U.S. ground troops, U.S. casualties or a serious threat thereof, or any significant chance of escalation into a conflict characterized by those factors.

The presumptive effect of presuming the interlocutors' knowledge of the tacit premise (a redefinition, in this case) can be shown by reconstructing the reasoning as shown in table 2.

Accepted meaning	**Hostilities: "overt act of warfare"**
RULE	**The audience should know (be committed to) the shared meaning of "hostilities" (P) whenever such a word is used with its commonly accepted meaning (C) (unless the interlocutor does not master language belongs to a different culture or community, etc.). (D)**
FACT	**The commonly accepted definition of "hostilities" is "overt act of warfare". (C)**
EXCEPTION	**It is not the case that the audience does not know the language or belongs to different community of speakers (or culture). (non-D)**
CONCLUSION	**The audience should know that the definition of 'hostilities' is "presence of land troops and sustained fighting" (P).**

Table 2: Reconstructing presumptive reasoning—definition of "hostilities".

In this case, we can notice a conflict between the meaning that is and should be commonly accepted, and the one that cannot be shared, as newly stipulated. His logical unreasonableness, however, has an extremely powerful dialogical effect. The implicit move based on presumptive reasoning shifts the burden of proof, at least in

the sense that the other party has to make the implicit premise explicit, in order to request, eventually, supporting arguments to the other side. Indeed, in order to rebut the presumption, the interlocutors (in this case the Congress) have to prove that the definition is not the accepted one, which became extremely difficult, as there was no legal definition of "hostilities" in the act. The implicitness of the premise shifts onto the other party the burden of disproving a controversial premise. From this point of view, the implicit dimension of enthymemes constitutes the ground of its strategic uses. Also in this case, implicit premises are dialogically presumed to be shared, shifting the burden of proof onto the interlocutor, who needs to prove that the proposition left tacit is not shared or is false.

3.2 Enthymemes and Kairos: Tacit Premises and Their Context-dependency

The presumptions on which an enthymeme is based are not all at the same level (Giulliani 1961, p. 66–67). Their credibility (or rather acceptability) varies according to their nature, and, more importantly, according to the values of the interlocutors. Quintilian underscored the different levels of credibility as follows (Quintilian 1996, pp. V, 10-16):

> With regard to credibility there are three degrees. First, the highest, based on what usually happens, as for instance the assumption that children are loved by their parents. Secondly, there is the highly probable, as for instance the assumption that a man in the enjoyment of good health will probably live till tomorrow. The third degree is found where there is nothing absolutely against an assumption, such as that a theft committed in a house was the work of one of the household.

Some presumptions shall be, or are usually, preferred over others, and who denies them carries the burden of proof (Giulliani 1961, p. 67). The strongest presumptions correspond to ethical norms ("If she is his mother, she loves her son;" "If he is an avaricious man, he neglects his oath;" "There is no one who does not wish his children to be free from injury, and happy" (Cicero 1988, pp. I, 29-30), which carry not only a burden of proof, but also a burden of criticism (Kauffeld 1998, p. 264). For this reason, depending on the hierarchies of values of the audience (Perelman and Olbrechts-Tyteca 1951), some premises will be more effective because they are more shared, more acceptable, and more difficult to rebut. The relationship between presumptions, enthymemes, values, and audience brings to light the "situational" or rather contextual dimension of rhetoric (Bitzer 1968), which is essentially related to the notion of *kairos*, i.e. opportunity.

Kairos represents an essential dimension of enthymeme, and one of the material elements distinguishing between dialectical and rhetorical argument. The relationship between the opportunity and the structure of the enthymeme is pointed out by Aristotle when he analyzes the use and the choice of the maxims (Aristotle 1991, 1394a 25–26): "In regard to the use of maxims, it will most readily be evident on what subjects, and on what occasions, and by whom it is appropriate that maxims

should be employed in speeches." According to Aristotle, *kairos* is not simply limited to the pathetic or emotional aspect of rhetorical discourse, nor is it only a problem of timeliness. The crucial role that the audience plays in rhetoric is related to the very structure of the rhetorical syllogism and its persuasive power (*pithanòn*). According to Aristotle, the grounds of enthymemes are probabilities [*ex eikònta*] and signs; in particular, *eikòs* refers to what "is accustomed generally to take place, or which depends upon the opinion of men, or which contains some resemblance to these properties, whether it be false or true." (Cicero 1988, pp. I, 46). Enthymemes are grounded on what is presumed to usually occur, on what is likely, on what is supposed to be true by a *specific* audience, and not on statistical probability (Viano 1955, pp. 280–286).

4 Leaving Premises Unexpressed: Relative Likeliness and Presumptive Force

As mentioned above, the force and acceptability of presumptions depends on values and culture. Moreover, when the speaker leaves a premise unexpressed he can presume that it is shared by his audience. From this point of view, the persuasiveness of an argument depends on the acceptability of its premises. The speaker can take for granted an unaccepted premise; however, even if his argument were dialectically strong, it would be considered as not persuasive. The force of enthymemes lies in this fundamental relation between what is left unexpressed and what is shared by the audience. Instead of identifying the precise structure of the implicit premise by stating the other syllogistic premise and the conclusion, the speaker can omit the conclusion, or simply suggest it. In this fashion, he faces the interlocutors with a trigger, instead of a path of reasoning. The hearers can complete the reasoning with the premise that is more reasonable for them, and come to the conclusion that better reflects their structure of presumptions.

The relationship between the choice of the "opportune" premises and the force (or persuasive effect) of enthymemes emerges when the problem of the relative likeliness of an argument arises. Sometimes leaving a premise unexpressed is not simply a choice aimed at not repeating what is commonly shared, but a strategy for increasing the force of the conclusion. As the President Obama's example illustrates, a tacit premise may be exploited in order to leave implicit a controversial issue, shifting the burden of proof onto the other side. Moreover, the speaker can also combine two presumptive effects: the maxim of experience leading to a provisional conclusion, and the presumptive force of an implicit premise. To this purpose, the speaker can advance a much stronger conclusion than the one that could be borne out by the presumptive reasoning he is advancing. Or he can simply suggest the stronger conclusion to the interlocutors, so that he can avoid any commitment, leaving to the hearers the burden of reconstructing the viewpoint and more specifically the probative weight thereof. The effectiveness of this tactic depends on the boundary between presumption and prejudice, namely on the relationship between the hierarchies of presumptions that characterize a specific audience and their probative weight. The clearest case is the use of personal attacks in criminal trials. In these cases, an

allegation of prior bad conduct of a witness or the defendant can implicitly support conclusions on his credibility or guilt that are inadequate for the presumptive nature of the reasoning supporting them.

In U.S. criminal procedure, the presentation of evidence is governed by the *Federal Rules of Evidence*.[1] Rule 403 concerns the exclusion of evidence of the defendant's past actions. Such evidence needs to be relevant, but even when admissible, it may be excluded if its probative value "is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." The purpose of making an uncertain or unknown fact more probable needs to be considered together with the risk of prejudice (Park, Leonard, and Goldberg 1998, p. 720). Concerning witness' testimony, according to the *Federal Rules of Evidence* (rule 609) it is possible also to introduce evidence of the witness's past convictions in order to impeach his character for truthfulness. However, the implicit attack consisting in presenting his prior bad acts needs to be distinguished from the explicit ones, in which the sign (his past action) is presented as directly proving the person's bad character. (McCormick 1972, p. 104) underscored how "a slashing cross-examination may carry strong accusations of misconduct and bad character, which the witness's denial will not remove from the jury's mind." For this reason, the risk of leading the jury to a too strong conclusion needs to be evaluated when admitting questions during cross-examination.

The presumptive relationship between past actions, character, and guilt can be represented through a complex pattern of defeasible reasoning, based on the presumptions that the character and habit of a person is presumed to continue as proved to be at a time past (Lawson 1885, p. 180), and that the habit of an individual being proved he is presumed to act in a particular case in accordance with that habit (ibid., p. 184; Park, Leonard, and Goldberg 1998, p. 158). We can represent the complex structure of this reasoning as shown in table 3.

Reasoning from SIGN Value judgment	- Agent a committed the negative actions A, B, C. - A, B, C are a sign that a has an unchangeable negative characteristic P. - Agent a has (is) P.
Reasoning from CAUSE TO EFFECT Prediction	- P is a cause of a's choices for negative actions of the kind Q - Agent a is presumably inclined towards committing negative actions of the kind Q

Table 3: Reasoning from signs to predictions.

The syllogistic reconstruction of a character attack shows its inherent defeasibility, and the tentative nature of the conclusion that it can support. However, the effect of such reasoning can be greatly increased by leaving some of the premises unexpressed, and suggesting the conclusion instead of expressing it as tentative. The

[1]The latest version of these rules can be found on the web at www.uscourts.gov/rules/newrules4.html.

speaker can introduce evidence of past crimes, which can trigger an enthymematic reasoning grounded on presumptions that can become prejudices. We can analyze three cases, in which the speaker, instead of providing the jury with a complete reasoning, advances only the factual premise, leaving up to the interlocutors to draw the most appropriate conclusion.

In *State v. Carter* (189 Conn. 631, 1983) the defendant, accused of burglary and sexual assault, testified his innocence. In order to attack his credibility, during the cross-examination the prosecution introduced evidence of prior crimes, among which a previous sexual assault. The character attack, however, became an actual reason supporting his guilt, based on his tendency to commit sexual crimes (189 Conn. 631, at 644, 1983):

> We find, however, that we cannot justify the use of the very recent conviction of the defendant for the identical charge of sexual assault in the first degree of which he was also accused in this case. [...] It was, nevertheless, unreasonable for the trial court to attribute to the sexual assault conviction such great probative value on the issue of credibility as to outweight the extraordinary prejudice which must have arisen once the jury learned that this defendant had been convicted of a similar sexual assault offense the month before. "Where multiple convictions of various kinds can be shown, strong reasons arise for excluding those which are for the same crime because of the inevitable pressure on lay jurors to believe that 'if he did it before he probably did so this time.'" Gordon v. United States, 383 F.2d 936, 940 (D.C. Cir. 1967), cert. denied, 390 U.S. 1029, 88 S. Ct. 1421, 20 L. Ed. 2d 287 (1968). That pressure must have been extreme when the past conviction for a similar crime was so recent and for so infamous a crime as that involved here. *Gordon v. United States*, 383 F.2d 936, 940 (D.C. Cir. 1967), cert. denied, 390 U.S. 1029, 88 S. Ct. 1421, 20 L. Ed. 2d 287 (1968). That pressure must have been extreme when the past conviction for a similar crime was so recent and for so infamous a crime as that involved here.

In this case, the prosecutor simply introduced evidence of past crimes, which triggered a conclusion not based on the aforementioned presumptive reasoning, but on prejudices. By letting the interlocutors reconstruct the reasoning with the presumptive premise that is more acceptable and reasonable for them, it is possible to increase the effectiveness of an argument.

The strategic force of implicitness depends on the specific audience that needs to reconstruct what is left unexpressed. In order to show this dimension of enthymemes, it is useful to take into consideration the O. J. Simpson trial, and in particular in the arguments against the witness for the prosecution (Detective Fuhrman) in the defence attorney's closing statement (Bayor 2004, p. 928):

> We owe a debt of gratitude to this lady that ultimately and finally came forward. And she tells us that this man over the time of these interviews uses the "N" word 42 times is what she says. And so-called Fuhrman tapes. And you of course had an opportunity to listen to this man and

> espouse this evil, this personification of evil. [...] Talking about women. Doesn't like them any better than he likes African Americans. They don't go out and initiate contact with some six foot five inch Nigger who has been in prison pumping weights. This is how he sees this world. That is this man's cynical view of the world. This is this man who is out there protecting and serving. That is Mark Fuhrman.

This argument was used by the defence to show that the detective (Mr. Fuhrman) that found the fundamental pieces of evidence incriminating the defendant, Mr. Simpson, was actually lying and could have likely planted the evidence in order to harm an Afro-American. The argument could be reconstructed as follows:

- Fuhrman stated that he never used racial epithets.
- In the last 10 years, Fuhrman was found to have used privately racial epithets 42 times (in some interviews aimed at writing a novel and a screenplay).
- Therefore 1) he is not credible as a witness and 2) he is a racist and hates Afro-American people.

The argument can be refuted by stating its premises. Using racial epithets is only a sign of racism (also considering the context of screenplay interviews), and the "N" words were used over a period of 10 years. Similarly, Fuhrman's false testimony concerning the use of racial epithets can be considered only a weak sign of his lack of credibility concerning matters related to his work. However, the enthymeme could be reconstructed with the premises "Who uses racial epithets is a racist" and "Who lies about not being a racist (or using racial epithets) should not be credible" (or more simply, "Racist should not be trusted"), which were extremely acceptable, particularly by a jury composed primarily of black people (10 out of 12 jurors were Afro-American; see also Schiller and Willwerth 1997, p. 220). The choice of leaving such premises implicit had an extremely powerful effect on the specific jury (Thagard 2003), noticeably increasing the weight of the probability that the defendant was not guilty (citedung2010). The same evidence had a significantly different effect when presented in the civil trial before a mostly white jury.

5 Conclusion

Legal enthymemes can be strategic instruments for persuading the audience and shifting the burden of proof. Their crucial rhetorical and dialogical characteristic is their nature, which is presumptive for two reasons: 1. rhetorical syllogisms are grounded on generally accepted propositions, which are only presumptively true; 2. enthymemes are usually advanced by leaving a premise unexpressed, namely presumed to be generally known. Enthymemes proceed from what people usually accept to be likely, from presumptions, not from knowledge. The presumptive dimension of enthymemes can explain its implicitness. Rhetorical syllogisms are incomplete because one of its components is taken for granted: the speaker presumes that it is accepted by the interlocutor, and for this reason treats it as uncontroversial. This

implicit move shifts the burden of proof onto the hearer, who needs to reject the move and provide evidence that the presupposed proposition is in fact not acceptable or shared. The presumptive dimension of enthymemes is the cornerstone of kairos, which is the strategic aspect of rhetoric. The speaker can leave it up to the hearer to reconstruct the reasoning with the premise that is more acceptable to him. Enthymemes become triggers of specific conclusions that can have different forces depending on the community it is used in, and the shared hierarchy of presumptions and values.

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In Search of the Rational Response: Assessing the Rawlsian Foreground for Resolving Political and Legal Disagreements

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Abstract. The problem of political and legal disagreement is typically explained by four, not necessarily combined, major theses: 1) the miscommunication thesis, 2) the value pluralism thesis, 3) the essentiality claim, and 4) the cluster-concept or metaphor theory. These theses or theories somehow differently determine the importance and the scope of apparent disagreement in politics and law. On the other hand, one of the most interesting responses to political disagreement, being a rational and reasonable reconstruction of arguments acceptable in order to resolve genuine political and legal disputes, is the conception of 'political liberalism'. This paper reformulates the response to disagreement presented by J. Rawls and evaluates its claim to give a useful tool for constructing positive and reasonable arguments in debates arising around genuine disagreements.

Keywords. Disagreement, public reasoning, political liberalism, rational decision-making.

1 Introduction

Most of the traditionally conceived political theories emphasise the fact that society is built upon some kind of consensus or convention, assuming a basic, structural

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role of agreement as essential to political order of any kind. That view can be ascribed to the major philosophical figures, at least from Plato to T. Hobbes or D. Hume, who clearly included into their social theories the idea of substantial agreement, based either on some ideal scheme, instinct or rational deliberation. Those thinkers attributed rather a minor role to politics in the modern sense. The pursuit of consensus is also fundamental to many contemporary theories of liberal democracy, continuing the traditional strands. Nowadays however, politics can neither be identified with any kind of unified social order, which is actually determined by any kind of explicit agreement or tacit convention, nor can it be conceived by the use of a conditional 'as-if' hypothesis referring to such state-legitimising consensual facts. Any contemporary philosophical investigation of society that overlooks the very fact of pervasive political dissent, argument or disagreement cannot be called 'political' in the requisite sense. J. Ranciere brings matters to a head when he claims that disagreement is constitutive of politics and thus any attempt to manufacture consensus inevitably leads to depoliticisation (Little 2004, pp. 1–2; cf. Ranciere 1999). There are also more balanced views, contending that disagreement, although central to any healthy democracy, can fortunately be resolved by the use of political or legal institutions.

Irrespective whether this issue is essential or contingent, disagreement in politics is a very important fact to be acknowledged by any political theory developed in the spirit of the logic of the pragmatic turn. Since the middle of the twentieth century, the social research perspective has changed from an exclusive analysis of concepts of right, duty, freedom or justice, to a more complex analysis, which also takes into account the different social and political conditions of modernity, to a large extent determining the content of political ideas. Thus, the fact of disagreement, as well as other empirical facts, underpins any rational construction and justification of political (and, implicitly, legal) conceptions, being a peculiar kind of Ockham's razor for ideas, which avowedly belie important social facts.

As far as a genuine disagreement is dependent on the existence of differing views on some matters brought into the light by different parties in the shape of comprehensible arguments, the very task of elucidating the nature of political disagreement together with an attempt to create a relatively impartial, formal and universal basis for bringing any dispute to an end, closely unites theoretical investigations in the field of argumentation with public decision-making theory. That is why intelligent people, who are arguing about something, really disagree only if they are continuously communicating with each other, trying to resolve a single common problem by rational means. Of course, there are many dispute-resolution tools, including the use of force or threat, which are practical, but not always authoritative (normative for all parties). On the other hand, dispute resolution is always authoritative if built upon – and this constitutes the very important particle of genuine agreement in every genuine disagreement – principles of Reason. In disagreements between individuals, i.e. disagreements concerning their private matters, the way of getting to the right solution may be dimmed by 'private' principles of rationality, which are not always mutually understandable. But in the case of disagreements over public matters, which are characteristic of political life, the theoretical reconstruction of reaching a particular, non-compulsory solution may refer to the category of public reason-

ing. This category, precisely determined by different theorists, stands as a gauge for evaluating the reasonableness of arguments, presented in genuine political disputes, as well as disputes over the proper justification of institutional decisions. To that extent, the rational and acceptable resolution of genuine political disagreement may be treated as the basis for developing a general theory of argumentation, including within its scope particular theories, together with the theory of legal argumentation (understood at least as a theory of interpretation or argumentation based on legal principles and policies).

To diagnose that political disagreement exists is just the beginning of the whole story. The crucial thing is to present a theoretical response, combining two conflicting tendencies: (a) a deep differentiation of values and social evaluations referring to basic political matters, and (b) authoritative decisions of state agencies (institutional decisions) based on an allegedly unitary legal system. According to Hobbes, for example, such an antagonism can be resolved only by reference to the real power of the state operating to pacify the plurality or differentiation of values. Nonetheless, in this case the achieved guarantee for social stability is rather meretricious, because the unity born of force is fugacious and labile. The fixed point for every state theory is to reconcile these two tendencies, making the use of force unnecessary.

In the light of the above remarks, the main task of this paper is as follows. Starting from the conviction that broad dissent is a crucial phenomenon in social theory and political life, having a certain impact on legal policy and legal argumentation (esp. as concerns the justification of 'legal principles', evoked in legal decisions), we would like to briefly discuss some of the major hypotheses that account for certain types of disagreements: (1) the miscommunication thesis; (2) the value pluralism thesis; (3) the essential contestability claim; and finally (4) the linguistic model (Lakoff's metaphors, family resemblance conception, the idea of cluster-concept etc.). It must be stressed that however different, these explanations are not competitive ones: it is possible that a certain type of disagreement can be simultaneously explained by each theory; on the other hand, this list of explanations is not exhaustive: disagreements may appear that can be explained by neither theory. Nonetheless, in the whole scope of possible explanations of disagreement, each of these theories has its own place and may explain not only different types of disagreements, but also one type of it, but from different theoretical perspectives. However, in our opinion, these four explanations of disagreement in politics are the most influential ones. In section 3, we invite the particular, theoretical reconstruction of political disagreement resolution, based on the idea of public reasoning, as proposed by John Rawls. It is quite interesting to examine whether his theory—in our interpretation—can deal with all types of disagreements, especially these listed above. This analysis will also help to evaluate the formal quality of arguments proposed by Rawls as a response to political dissent.

2 Some Possible Explanations

The miscommunication thesis can be briefly presented as follows. People disagree on important issues just because they are using different concepts, while referring in their discussions to specific terms. Such disagreement is not genuine, as it disappears

when people start to understand the difference in the meaning of the words that they use. Thus, according to the miscommunication thesis, disagreement is a kind of sham, arising from a lack of knowledge in the possession of the parties (either only some or all of them). In that way, the miscommunication thesis is strictly connected with an imperfect conception of disagreement (Mason 1993, pp. 1–16). Although some—or even most—disagreements in political life are derived from human imperfection, different or wrong use of terms etc., which are easily resolvable by pointing out the right understanding. This means that this conception presumes some kind of factual, objective criterion, acceptable by all parties, but sometimes somehow hidden or forgotten by them. In this case, dispute resolution is not—strictly speaking—rational, but merely practical: a reference to proper understanding is sufficient to re-establish communication and stave off all, *prima facie* important but *de facto*, purely verbal, disputes. To the extent that we are focusing on genuine disagreements, the scope of such miscommunication disagreement in politics, where people just speak past one another, is out of our interest. The resolution is—theoretically—very easy. All it demands upon the proper explanation of introduced terms, and not a procedure of creating a rational argument. In fact, any interesting, genuine dispute presupposes basic agreement on the use of terms. The question that arises in genuine disputes is: how to propose a rational argument and to resolve a dispute by it (if it is at all possible, of course)? Two explanations of disagreement, which will be presented below, discard the imperfection conception and claim that the essence of genuine disagreement is not an apparent difference in the understanding of terms, but rather—a different recognition of value-structure (one specific value or a whole set or system of values), to which any concept or idea, shared by the parties involved, adheres.

Value pluralism theory is probably the most popular theory that explains the fact of political disagreement. On its basis, there is a variety of fundamental values that people hold, which are both objective and recognisable. What is important, this broad spectrum cannot be simply reduced or hierarchically ordered—values often are incommensurable and irreconcilable (Polanowska-Sygulska 2008, p. 26). Isaiah Berlin is usually considered to be the pioneer of this train of thought—he found a starting point for political philosophy in acknowledging the existence of different civilisations, cultures, aims and values. He strongly emphasised the fact that values can clash (Berlin 2000, p. 199). And, therefore, '(...) sane and honourable people can attach different importance to different values, so they will not agree on the resolution of many conflict cases' (Williams 1981, p. 80). The direct result of the fact that distinct values exist is the plurality of convictions and beliefs held by the citizens in the society. On the basis of particular values, different moral and political doctrines are formed. These are comprehensive and coherent values and belief systems, which enable people to form answers for the most important moral questions. In this sense, conservatism, liberalism and anarchism are views formed on different sets of values and, as a result, they generate incommensurable ways of thinking about practical rationality and moral issues. A discrepancy of beliefs is subsequently maintained by the pluralism of various intellectual traditions. Summing up: the value pluralism thesis related to the fact of political disagreement claims that political disputes are irresolvable, because the parties involve their ethical convictions (value judgments) in the disputes and these convictions are formulated on the ground of incommensurable

and irreconcilable values.

The value pluralism thesis and the essential contestability claim are theoretical relatives but cannot be treated equally. It seems that sometimes the essential contestability claim is a consequence of crediting value pluralism, but it is not the only consequence, certainly not the most obvious one.[1] In the case of value pluralism, the factual and objective existence of, sometimes incommensurable, but always irreducible values, is accentuated; in the case of the contestability claim, it is not important whether different values really exist and are irreducible or incommensurable (although it is possible), but rather that from an external observer's point of view, the real meaning of the terms referring to certain concepts is partly (and subjectively—from the participant's perspective) value-laden, but in a specific way, which is visible and comprehensible to all parties.[2] Therefore, the value pluralism thesis is actually an ontological thesis, whereas the essential contestability claim is only a descriptive thesis that refers to the actual use of certain concepts.

Strictly speaking, the contestability claim is the thesis that certain disagreements are due to the multiplicity of criteria of concepts' use, which are evaluative and in no settled relation in priority with one another. As W. Connolly has put it (citation following J. Gray):

> a concept is essentially contested when it is *appraisive* in that the state of affairs it describes is a valued achievement which is initially variously describable, when the state of affairs is *internally complex* in that its characterization involves references to several dimensions of meaning, and when its criteria of application—whether shared or disputed—are themselves relatively open, enabling parties to interpret even shared criteria differently, both across a range of familiar cases and as new and unforseen consequences arise (Gray 1978, p. 389).

Such concepts are subject to disagreement due to their internal complexity. According to W. B. Gallie, who developed this idea in a paper given to the Aristotelian Society in 1956, such disagreement cannot be resolved in a rational way.[3]

[1] Of course, there exist also many different types of value pluralism, e.g. normative value pluralism (cf. Mason 2011). We cannot discuss these theories and thus while referring to value pluralism we have in mind a descriptive, metaphysical and foundational version of that theory.

[2] I.e. it is observable that different parties accredit one type of achievement somehow differently and therefore they—subjectively—adopt different normative attitudes towards the concept, by which they embrace that achievement.

[3] Originally the idea of Essentially Contestable Concepts is built up of a few criteria. According to Gallie '[i]n order to count as essentially contested, in the sense just illustrated, a concept must possess the four following characteristics: (I) it must be appraisive in the sense that it signifies or accredits some kind of valued achievement. (II) This achievement must be of an internally complex character, for all that its worth is attributed to it as a whole. (III) Any explanation of its worth must therefore include reference to the respective contributions of its various parts or features; yet prior to experimentation there is nothing absurd or contradictory in any one of a number of possible rival descriptions of its total worth, one such description setting its component parts or features in one order of importance, a second setting them in a second order, and so on. In fine, the accredited achievement is initially variously describable. (IV) The accredited achievement must be of a kind that admits of considerable modification in the light of changing circumstances; and such modification cannot be prescribed or predicted in advance' (Gallie 1956, pp. 172–173

The conceptions of the linguistic model have much in common with the essential contestability claim, but the most interesting similarity is probably that all these conceptions share the view that the concepts used are internally complex and can be described as 'cluster-concepts'. According to this set of explanations, the impossibility of achieving an agreement is the result of the incompatibility of the languages used by the parties to the political dispute. The meaning of every political concept is rooted in a particular comprehensive view and that fact manifests itself in language, especially in notions—metaphors. This theory of explanation is hardly a new idea for philosophy; one can find its origins in Wittgenstein's theory of meaning. In the modern sense, supported by achievements of cognitive science, it is being developed in political context. The approach proposed by G. Lakoff (Lakoff 2002) claims that metaphors used in the communication process function in complex schemes of relations. They constitute kinds of *constellations* of terms, where understanding one concept is impossible without reference to the other elements. It is possible that two parties use different metaphors to stand for the same idea, and, on the other hand, the same metaphor may be used to stand for different ideas. As a result, there are no neutral concepts and no neutral language for expressing political positions; all we can is to recognise the language of conservatists, the language of liberals, the language of social democrats, etc. For example, it is impossible to analyse the concept of *freedom* without reference to a particular ideological framework; the meaning of the term is separate on every other background. Therefore, political disputes are irresolvable, because the parties use different languages, which comprise the sets of differently understood metaphors.

The interesting point is that these linguistic explanations have much in common with the neo-pragmatic and meta-theoretical view of W. V. Quine that disagreement between rival theories ('coverings' over the 'furniture of the World') is due to the fact that each theory generates its own ontology and thus imposes epistemological constraints on the understanding of certain facts. The starting point here is language, and not the fundamental and objective differentiation of values (the value pluralism thesis).

3 The Rawlsian Response

Many authors have noticed the necessity of constructing a rational response to genuine disagreement in politics. John Gray's response, which is finally constructed in the spirit of the Hobbesian tradition, the communitarianism of A. MacIntyre, the communication theory of J. Habermas or the different responses brought up by pragmatists—these are only a few possible ways of coping with political disagreement. Among these responses there is one, especially interesting, which we would like to focus on—a resolution based upon the idea of 'political liberalism', namely, the theory initiated by J. Rawls and that is still being vividly developed by his intellectual heirs. In the book entitled *Political Liberalism* (Rawls 1993), Rawls asks a central question (herein referred to as the 'stability question'): *How it is possible for there to exist over time a just and stable society of free and equal citizens, who remain profoundly divided by reasonable religious, philosophical and moral doctrines?* (ibid.;

cf. Rawls 2001). Before presenting the essence of his response there are at least two major presuppositions in this question demanding disclosure. Firstly, by asking this question, Rawls brings about a pragmatic perspective, focusing on the empirical fact of disagreement, which stands in line with the 'pragmatic turn' methodology described above. Secondly, the underlying basis of the whole dissent is important. The stability question is relatively clear in that regard: disagreement is about *religious*, *philosophical* and *moral doctrines*, which are vast and comprehensive doctrines, i.e. coherent sets or systems of general responses to crucial metaphysical and ethical questions. According to Rawls, the parties in political disputes are of the heavyweight class: e.g. liberalism, Christianity and Utilitarianism. The disagreement between such general outlooks or world-views is of main interest in his theory.

The stability question together with these two major presuppositions is the main determiners of the response given to the problem of existing political disagreement. This response, presented under the name of 'political liberalism', is aptly characterised by Ch. Larmore, who writes: '[I]n the face of disagreement, those who wish to continue the conversation should retreat to neutral ground, with the hope of either resolving the dispute or bypassing it' (Larmore 1987, p. 53). Thus, the strategy of response is to establish some kind of neutral ground for agreement and push away all delicate issues (being off negotiations). We may say, following J. Raz, that this strategy is *based on epistemic abstinence* (Raz 1990), or we may classify the whole idea of political liberalism as a *politics of omission* (Talisse 2009). Searching for relatively neutral ground, on which the possibility of reaching one rational resolution exists, *de facto* boils down to a limitation of the scope of controversy from the output. It seems that we can recognise three main limitations introduced by authors, being a point of rational response to disagreement on the grounds of political liberalism: (1) limitation of the scope of output disagreement; (2) epistemic restraint; and (3) restraint on permissible argumentation. These three limitations stand in certain relationship to one another, but it is fruitful, from the theoretical point of view, to discuss them one by one.

The first limitation concerns the ability to circumscribe the sphere of political values. 'Political liberalism' refers to the traditional liberal differentiation between the public and private spheres. The public sphere can subsequently be divided into the political sphere and associational sphere, where the main distinguishing criterion is its obligatory or non-obligatory character. The obligatory nature of the political sphere is a consequence of specific, political values, which constitute it and determine the main institutions, common constitution and public conception of justice. These values are not built upon one theory of the good, but are rather an intrinsic element of public political culture (Rawls 2001, p. 183). Political values are therefore autonomous in the strong sense,[4] so that the whole political sphere is *freestanding*. The basic aim of Rawls is to build the best political theory, being response to political disagreement, on possibly shallow foundations and the narrowest theory of the good, in order that it can be accepted by the widest number of citizens and become the subject of a so-called *overlapping consensus*.

[4]Cf. (Raz 1990, pp. 20–24), who distinguishes between political values in a strong, autonomous and inter-subjective sense, and weak, subjective and a sense related to particular conception of the good.

The second limitation—the principle of epistemic restraint—is also connected with the distinction between the public and private spheres. The principle of epistemic restraint claims that one *should not appeal to his knowledge that Y is true when debating or voting on the permissibility of X* (Quong 2007, p. 321), when the truthfulness of Y is dependent on the acceptance of certain moral, philosophical or religious assumptions. This second limitation is a result of the search for *the higher order of impartiality* (Nagel 1987, p. 216), which is essential for building a common sphere of agreement. 'Political liberalism' formulates the view that disagreement concerning subjective theories of the good is firm and unyielding, so the only way to reconcile with that fact is to omit all essential-to-comprehensive doctrines of philosophical, religious and moral beliefs (*politics of omission*). There is one other argument for epistemic restraint that refers to the equal moral status of all citizens, proposed by T. Nagel: '[The] exclusion of appeal to particular conceptions of the good at the most basic level of political argument is one of the ways in which it is required that social institutions should treat people equally' (ibid., p. 223). Just as public institutions cannot be guided by controversial issues, likewise ordinary citizens should not refer to vast doctrines in order to justify their political demands towards other citizens. Each postulate of creating a legal institution in the name of a particular theory of the good is nothing less than the use of state coercion under the aegis of that doctrine. The principle of epistemic restraint is an imperative prescribing a suspension of doctrinal judgment in public matters.

The third limitation is, as a matter of fact, a consequence of the first two limitations. Be that as it may, a qualification of it as a separate limitation is justified in relation to the critique of 'political liberalism' presented by M. Sandel (Sandel 2009, pp. 290–316) and J. Waldron (Waldron 1999, pp. 149–163). In their opinion, Rawls makes a serious mistake when he claims that the comprehensible doctrines, which stand in irresolvable conflict, can acquiesce in the political foreground by virtue of one theory of rightness.[5] To the contrary, they claim, on the level of rightness, disagreement can also appear. Therefore, 'political liberalism' needs a criterion allowing for the evaluation of the prevalence of one conception of rightness over another. If the requirement of epistemic constraint (the second limitation) is fulfilled, it would be possible to evaluate competing conceptions from a general standpoint.

All in all, the scope of argumentation permissible in the political discourse is, under the third limitation, restricted to reasons that are specified as public reasons. Pursuant to Rawls, *to give public reasons is to give reasons that we can reasonably expect that others can reasonably accept as democratic citizens* (Rawls 1999, p. 578). In the political sphere, citizens submit proposals of legal solutions and justify them by reference to public reasons. Only arguments formulated in such a way can be understood and recognised by advocates of different comprehensive doctrines. The set of public reasons consists at least of the following types of arguments: common political values, common knowledge, rules of thumb, rules of logical thinking, a narrow theory of rationality, as well as uncontroversial scientific evidence. Since the political sphere, according to the first limitation, is *freestanding*, all public reasons have their source in a common political culture and are comprehensible by subjects capable of

[5]Rawls probably points to that fact himself in (Rawls 1999).

rational and reasonable deliberation. Moreover, 'political liberalism' stipulates that all legal and political postulates justified by reference to public reasons are proposed in good faith, without pretense.

As we can see, on the grounds of 'political liberalism', the most important criterion of reasonableness of political resolutions is an ability to protect the stability of society of free and equal citizens. The highest possible level of agreement achievable by a democratic society is an overlapping consensus, i.e. stable agreement on political issues. What characterises the idea of overlapping consensus is that the reasons that citizens have to comply with the agreement are not identical and unified, but actually can be derived from the inside of comprehensive doctrines, which they hold. Principles, being the very essence of political agreement, are ultimately justified on the basis of the own world-views of citizens, and establishing such kinds of agreement does not mean forswearing one's own theory of the good.

These three limitations, stipulating altogether the Rawlsian ('political liberalism') response to disagreement, can be illustrated as follows:

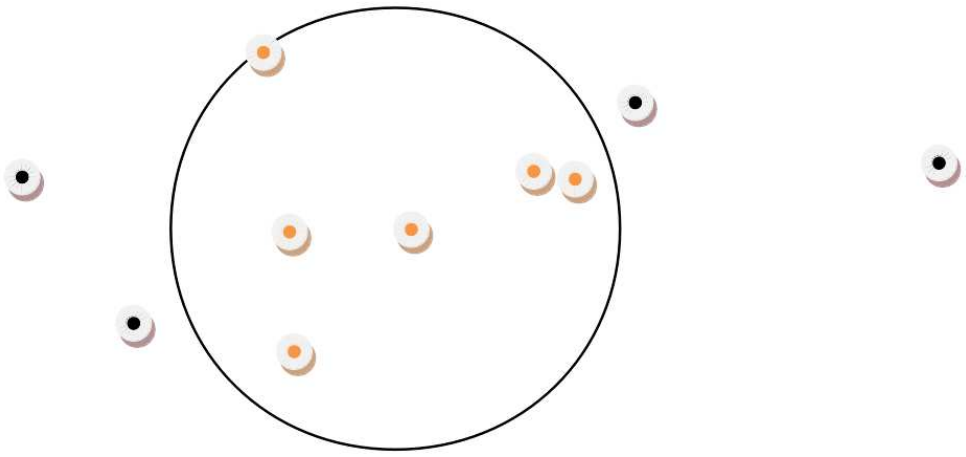

Figure 1:

The circle border marks the line of reasonableness in politics. All the points that are in the circle fulfil the conditions determined by the second limitation, which boils down to an acceptance of the principle of epistemic restraint, allowing all discussed matters into the sphere of political discourse. The points that are outside the circle symbolise the demands, which do not fulfill that limitation, because the argumentation is based on particular theories of the good. From the internal perspective (internal point of view of these who recognise public reasons as reasonable reasons accepted in the field of politics) those, external, particular reasons are beyond comprehension and may be treated as irrational. Thus, the circle borderline is the all-or-nothing criterion of distinguishing rational and acceptable arguments from irrational and unacceptable ones. But yet there is also a gradation of reasonableness (best fit) of arguments proposed in the political discourse within the circle: from acceptable but relatively reasonable by the border, to the most optimal and

absolutely reasonable in the middle (the ideal of overlapping consensus). The level of reasonableness of arguments is determined by the quantity and quality of public reasons evoked for their support (according to the third limitation). The arguments that will reach the middle of the circle are the best possible, rational arguments, resolving the widest scope of possibly resolvable political disagreement, and granting social stability. The best argument on disagreement is based upon the best public reasons.

It seems that a presented response to disagreement, developed by 'political liberalism', is quite tempting, as far as it brings together two conflicting tendencies mentioned in the beginning: (a) a deep differentiation of values and social evaluations referring to basic political matters, and (b) authoritative decisions of state agencies (institutional decisions) based on an allegedly unitary legal system. To get to the meat, this response is based, on the one hand, upon minimising the scope of necessary agreement (politics of avoidance), and on the other hand, upon improving and rationalising the agreement within this limited sphere. Thanks to some, basically ethical, restraints on political discourse, parties can achieve agreement (or, as Rawls calls it, overlapping consensus). However, what is the most surprising is the fact that guarantees that such an agreement is something more than a temporary cease-fire. Rawls is clear on that: the ultimate guarantees of stability in the field of consensus established by rational argument referring to public reasons are ... the same comprehensive and conflicted doctrines, which had *ab initio* generated pervasive disagreement. The point is that the overlapping consensus is an agreement on principles, which are an acceptable basis for creating reasonable arguments. The content of the agreement is likewise a feedback, which is incorporated as a moral element by comprehensive doctrines. The foundation for the agreement about the acceptability of public reasons is thus different sets of moral, philosophical and religious reasons. A pluralism of doctrines is ultimately the basis for agreement on the political level.

4 Discussion

First, it is worth noting that the response to disagreement presented in the precedent section, the essence of which is so-called *bypassing* or *politics of omission*, can certainly be ascribed to the late Rawls, but there are doubts whether this strategy of response can also be ascribed to his earlier, but more influential, *Theory of Justice* (cf. Rawls 1971). Some may interpret his earlier theory as proposing a universal, consensual resolution of pervasive disagreement by reaching consensus on the basis of conflicting comprehensive doctrines, and not—as it is in this case—beyond them. This interpretation of early Rawls is however problematic, which is why we have focused mainly on the theory developed in *Political Liberalism*.

Now, what is the real worth of the Rawlsian response to different types of disagreement? What is the relation between some of the major hypotheses explaining the very source of disagreement in politics with the way of coping with it proposed by 'political liberalism'? Is the strategy of constructing the rational argument, according to the proposed three limitations, the best means of justification of political

(and, in the long run, legal) decisions? In our opinion, the answer is as follows.

The response is built on specified types of reasons, which are called public reasons. In the structure of construing any kind of argument, in the context of practical reasoning, we can differentiate between many other types of reasons: moral reasons, private reasons, rules of thumb, conventional reasons, authoritative reasons, legal reasons and so on. There is also a differentiation between ordinary reasons (first order reasons to do something) and exclusionary (Raz 1999) or entrenched (Schauer 1993) reasons, which are reasons of a higher order or quality, which excludes from deliberation (and so forth—argumentation) reasons of lower order or quality.[6] Now, the reasons for both types can be balanced, but only within the set of reasons to which they belong. Moreover, reasons are intersubjective 'entities' to which we can refer in our rational deliberation and argumentation. Taking such structure of reasons (which is certainly not an uncontroversial one) as granted, what kinds of reasons are public reasons?

Although public reasons are reasons consensually accepted, they cannot be treated as conventional and conditional first order reasons, because, according to 'political liberalism', they have special moral property, granting their entrenched or exclusionary, and in this sense, authoritative (normative) character. Nonetheless, public reasons can still be balanced, and therefore weaker—in quality and/or quantity—reasons should be overweighted both in the practical process of rational deliberation, as well as in the procedure of constructing a rational argument. Accordingly, public reasons should be recognised as the universal basis for the justification of political and legal decisions.

Now we can turn to the question of whether the Rawlsian response to disagreement adequately applies to all types of disagreement mentioned above (section 2). The first type of disagreement, explained by the fact of some error in communication or perception, classified above as non-genuine disagreement, is out of consideration here. The response of 'political liberalism' is simply not applicable, moreover—it is beside the point.

The Rawlsian response can, however, be successfully adjusted to the second type of disagreement, which is explained by the reference to a plurality of values (the value pluralism thesis). This theory is realistic in the sense that it reduces all possible explanations of cultural phenomena to the issue of the real existence of values. It seems that the proposition, advanced by 'political liberalism', of suspending judgments and beliefs, grounded in controversial or incommensurable values characteristic of comprehensive doctrines, is a straightforward acceptance of such ontological (foundational) value pluralism. The point, stressed before, is that the Rawlsian response is directed to vast and comprehensive doctrines, which are built up on certain theories of the true and the good. The postulate of 'bypassing' reveals the fact that conflicting and sometimes incommensurable values exist objectively and have irreducibly foundational character for these doctrines (Christianity, liberalism, utilitarianism etc.).

This response is, at the same time, somehow problematic in the context of the disagreement explained by the essential contestability claim. In this case, the Rawl-

[6]Such classification of reasons, which are of higher quality than ordinary reasons has been developed at least by T. Hobbes or J. S. Mill who ascribed the function performed by such reasons to authoritative rules.

sian response cannot solve the disagreement, and, moreover, cannot protect political life against the emergence of such disagreements. Even if all three of the limitations described above had been reliably met, it would still be possible that some important, widely used political concepts continue to be essentially contested. Common political culture is not a monolith. The agreement on the matter of basic principles of rising up arguments and justifying them on the base of acceptable public reasons does not exclude the existence of other disagreements over the proper use of the concepts, which are irresolvable in a rational way. An excellent example of such a concept, which would probably be an essentially contested concept even in a situation of public agreement close to ideal of overlapping consensus, is the concept of 'the Rule of Law' (cf. Waldron 2002). The difference in diagnosis between the accuracy of the Rawlsian response to disagreement arising from value pluralism and to disagreement over the use of essentially contested concepts is that the latter is not limited to the conflict of vast and comprehensive doctrines founded on certain values. In the case of an essentially contested concept, there is the observable, empirical fact of the different attitudes adopted by the different parties, towards certain elements of the one, but very complex, concept (appraisiveness). These attitudes are observable from the external point of view, and may not—at least in some cases—refer to any objectively existing values. Some concepts may be essentially contested due to value pluralism, but certainly not all of them.[7] If this is so, the essential claim of contestability can be adequate in the context of disagreement between general concepts referring to the values founding comprehensive doctrines, but also—and it is the most important opportunity—in the context of more particular problems within these doctrines itself (Gallies' own example was 'Christian life'), not necessarily connected with one, foundational value. There is no reason to deny the possibility of using essentially contested concepts in the carefully delimited sphere of public reasoning, if there are good public reasons to do so. On the other hand, as the conditions of essential contestability, so widely discussed through years, may be considered as too rigid and hard to fulfill, genuine disagreements, which can be reliably explained by reference to that idea, may appear only quite rarely. In this case, such disagreements would be a quite important, but not a pivotal issue of any political theory.

The last-mentioned type of disagreement, which can be explained by general linguistic, as opposed to realistic (the value pluralism), theories—the metaphor theory, cluster-concept theory, or by reference to the idea of *Familienähnlichkeit*—is methodologically close to the explanation given by the essential contestability claim, but none of these ideas set up such rigid conditions to be fulfilled. These theories are, however, linguistic, in the sense that values are built into specific ontologies dependent upon the use of language; on the contrary, the essential contestability claim neither overtly contributes to realistic, nor anti-realistic (linguistic) explanations. As far as these linguistic theories can be perceived as more general theories of the source of disagreement over the use of the concepts, there is some hope that the Rawlsian response might succeed. However, its success is conditional and depends on whether it is possible for disagreeing subjects to abandon or transcend their basic outlooks,

[7] J. Gray, for instance, develops an argument that the value pluralism thesis and the essential contestability claim cannot be brought together. However, we do not intend to discuss this problem here, that's why we simply leave the option that it might not be possibly open.

which are strictly connected with metaphors or concepts that they use. The point is that in the case of any kind of disagreement, especially one explained by reference to these 'constellational' or 'metaphorical' models, carrying out the first limitation might delimit the sphere of disagreement only virtually, for it would not be possible to carry out the second limitation (the epistemic restraint). Since, in these models, basic language, being the first but tacit creator and Cerberus of human ontologies, could not allow parties to transcend them, so people may not be able to perceive the world without such a covering.[8] In that case, the suspension (bypassing) of judgement proposed by 'political liberalism' is hardly possible. Probably the possibility of rendering a basic consensus would be tied in with the concept of 'translation' (but this is the problem that we cannot discuss here). In different circumstances, if the second limitation could be met, the Rawlsian response would probably answer the disagreements explained in the manner already discussed. However, assuming the possibility of transcending basic outlooks on the basis of the metaphor theory and for the purposes of political discourse—raises immediately another important doubt. Transcended language and its ontology have to be superseded by another *constellation of metaphors* in order to make the political communication possible. The three limitations leave the space that must be fulfilled with something. Rawls seems to respond to the problem when he describes the factuality of political sphere. In his view, the public culture may perform the role of the primary and trustworthy source for such new language, which is appropriate for political purposes.

In reference to the above, we can see that the disagreement explained by the essential contestability claim is—to some extent—irresolvable by the Rawlsian response. Other types of disagreement, although under different conditions and additional restrictions, can be resolved according to this response. However, the difficulty with the essentiality claim is baffling only in the context of the late theory of Rawls ('political liberalism'). As we pointed out in the beginning of this section, there is at least one specific interpretation of 'early Rawls', referring to his fundamental *Theory of Justice*. Under this interpretation, achieving agreement is possible only in the case of contingently, but not—essentially—contested concepts. Moreover, it is claimed that all possible disagreements can be ultimately resolved, and thus this interpretation *a limine* rejects the claim that any type of essential contestation could ever appear. It means that from the beginning the explanation of political disagreement referring to the contestability claim is not plausible and may even be false. To the contrary, the interpretation of 'late Rawls', based upon *Political Liberalism*, leaves open the question whether this kind of explanation is reliable. If it is, 'political liberalism' can only reduce the sphere in which these disagreements can be recognised as public and political disagreements, but cannot resolve them. So, the Rawlsian response, the one which we discuss, respects the essential contestability claim, but does not answer it. As was stressed above, due to the fact that the partially possible agreement concerns only the basic principles and the acceptance of certain reasons as public ones, essentially irresolvable conceptual disputes (e.g. the dispute over the Rule of Law in Florida in the 2001 presidential election) may also appear in the public sphere.

[8]Indeed, this problem arises in case of every kind of explanation which is not realistic (like value pluralism) but typically linguistic (that language is 'the starting point' of the whole analysis).

5 Conclusion

Considering all above we can draw an important conclusion based on comparison of political liberalism with the idea of essentially contested concepts and the metaphor theory. Precisely: the strategy of limitation proposed by political liberals is not always sufficient to resolve a deep political disagreement. As we can see, important both for the theory and for bypassing the sensitive and controversial beliefs of citizens, is an indication of the positive common denominator that may be a trustworthy source of meanings and conclusions for all disputants. Rawls leaves us with the idea of public reasons which derive their content and normative value from public culture. However after studying above-mentioned cases of disagreement, we can reasonably question the effectiveness of public culture as a central reference point. The trouble with the theory of essentially contested concepts indicates that public culture is not so sufficiently precise and unambiguous; the metaphor theory, on the other hand, gives rise to the doubt whether it is substantial and content-rich enough to constitute origin for new political language. These are at least two features, the explicitness and content-richness, that should be fulfilled to make the Rawlsian idea of resolving disagreement fully defensible. Though it seems to be quite a hard task, because, at the first sight, we are willing to link public culture with deep controversies rather than essential explicitness.

Does Rawls have any response to this charge? He expresses his views about the content of public culture in paragraphs relating to so called, *fundamental ideas* of a democratic society. These are conceptual models formulated by Rawls on the basis of his intuitions and knowledge of facts from the content of the public sphere. T. Pogge, in order to capture the meaning of *fundamental idea*, used the well-known Rawlsian distinction on two stages of notion's specification: *concept* and *conception* (Pogge 2007, pp. 170–174). The former describes the idea only by showing its lexical definition. The latter stage specifies its reference to controversial values or purposes and also indicates rules related to correct use of the concept. This stage relies on substantive value judgments that go far beyond the pure lexical definition of the word. Hence it develops a *concept* of something into a conception of that thing. Pogge concludes that Rawlsian *fundamental ideas* could be labeled as *partially specified conceptions*. By this he understands ideas which are *specific enough to entail some value judgments, nevertheless remain vague*.

In our opinion this *partial vagueness* of fundamental ideas and public culture itself is irreducible; it will remain and will regularly pose a problem for resolving some sort of disagreements, especially those generated by essential contestability of concepts. It shatters hopes of political liberals to give fully rational response to every kind of disagreement. Therefore the success of the three limitations strategy can be only partial; the response is plausible solely with regard to a particular type of conflicts, maybe for most of the conflicts, but certainly not for all.

Does this conclusion refute the strategy of political liberalism? Certainly not, nevertheless it shows its limits and weak points. Political and legal disagreements which cannot be resolved by rational means are not doomed to be insoluble at all. Liberal democracies, in addition to 'purely rational' methods, dispose also of other means rooted deep in democratic tradition and culture, including decision-making

based on majority rule or on authority. These means seem to be a bit depreciated by modern deliberative theories (including political liberalism). However, it is beyond any doubt that they can establish a kind of a safety-valve for certain types of disagreements, sometimes indispensable in political practice.

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Argumentation Schemes for Statutory Interpretation

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Abstract. In this paper it is shown how defeasible argumentation schemes can be used to represent the logical structure of the thirteen types of arguments recognized as important for statutory interpretation by (Tarello 1980). It is shown that the process of statutory interpretation has a distinctive argumentative structure where the conclusion, namely, the meaning attributed to a legal source, is a claim that needs to be supported by pro and contra defeasible arguments. This transformation of the arguments of interpretation into the argumentation schemes framework is applied to the psychological and the *a contrario* arguments, as leading examples to follow. The defeasible nature of each scheme is shown by means of critical questions, which identify the default conditions for the accepting interpretative arguments and provide a method for evaluating a given argument as weak or strong.

Keywords. Argumentation, interpretation, argumentation schemes, a contrario, defeasible arguments, legal reasoning.

Legal reasoning is based on authoritative sources, such as legislative texts, regulations, judicial opinions. Interpretation "is a particular form of practical argumentation in law, in which one argues for a particular understanding of authoritative texts or materials as a special kind of (justifying) reason for legal decisions." (MacCormick 1995, p. 467). In order to use an authoritative source to support a specific conclusion, one needs to retrieve its meaning. We interpret a legal source, when the understanding of the source is controversial, but interpretation in order to be justified needs to be supported by arguments. Interpretive argumentation plays a crucial role in the law and can indeed be described as the "nerve of law" (Patterson 2004, p. 247). As we will show in this paper, the process of meaning retrieval and

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justification is based on a kind of reasoning that is subject to defeat, and which is evaluated by considering relevant counter-arguments.

The purpose of this study is to investigate certain types of defeasible arguments traditionally called topics (in the "weak" sense, Kreuzbauer 2008, p. 81) used in statutory interpretation. The theoretical framework is based on two different dimensions: legal theories on the arguments of interpretation, and tools provided by argumentation theory for formalizing and describing them. These tools were provided by the list of arguments set out by Tarello (Tarello 1980; see Feteris 1999) useful for statutory interpretation in civil law. There are comparable to the ones used in common law (MacCormick 1995; Summers 1991; Greenawalt 2002). The structure of such arguments will be reconstructed and modeled, by identifying the inferential relationship between premises and conclusion, and identifying the semantic principle that characterizes the inference (for the local connection between the terms (see Stump 1989, p. 6; Abaelardus 1970, p. 264). For this purpose the starting points are the argumentation schemes, abstract patterns of reasoning that specify a particular type of inference from a distinctive set of premises to a distinctive conclusion (Walton, Reed, and Macagno 2008).

1 Interpretation as Argumentation

The term "interpretation" is used in two ways in legal theory. In a broader sense it includes all activities consisting in determining the meaning of a legal source, as well as the result of such activity, namely, the rule which is attributed to the source as its proper meaning (see for instance Tarello 1980 and Guastini 2011). In a more restricted sense (which is assumed by the traditional brocardo *"in claris non fit interpretatio"*, in clear things no interpretation takes place), it only concerns cases where a (reasonable) doubt is raised concerning the meaning of a text (Patterson 2004).

Here we adopt the second view, assuming that the activity of interpretation *stricto sensu*, as mentioned in the introduction, presupposes a doubt, namely an implicit or explicit conflict of opinions, concerning the meaning of a word, a sentence or a text (ibid.), which induces the interpreter to question his/her prima-facie understanding. Embracing the account of Tarello and Guastini, we refer to the rule, namely the result an interpretative process, the "meaning" of a statement of law.[1] We can then distinguish the following objects we are dealing with:

- Source-statements: sentences contained in legal sources, meant to express legal rules;
- Prima facie understanding of a source-statement: the rule, if any, that in a certain socio-linguistic context is attributed by default to the source statement (and the activity of grasping such a rule);

[1] Interpretation reduces the vagueness of the statements of law, identifying the specific cases that are governed by such statements of law (Guastini 2011, p. 18). On this view, the "meaning" corresponds to both *Sinn* and *Bedeutung* (ibid., p. 6).

- Interpretative statements: statement affirming that a source-statement has a certain meaning (expresses a certain rule), made to overcome a doubt on its understanding (to select this one, among other possible meanings of the same source);
- Interpretation: the rule, which is attributed to a source-statement, which amounts to an answer to a doubt on its understanding (and the activity of making and supporting such statement);
- Interpretive argumentation: the arguments provided to support a particular interpretation of a source-statement.

Thus, from an argumentative perspective, interpretation can be distinguished from prima-facie understanding based on the processes of reasoning involved. In prima-facie understanding, the passage from a statement of law to the rule it expresses (Tarello 1980) is grounded on unchallenged presumptive meaning (Macagno 2011), the default explanation of the meaning of a word or sentence according to shared linguistic-cultural conventions/practices. For instance, we can consider the following source-statement, which we may find in a sign in front of Lincoln Park (Horn 1995, p. 1146):

All vehicles are prohibited from Lincoln Park.

The presumptive meaning, leading to the default explanation of meaning, is that "entities having wheels and used for the transportation of people are prohibited from Lincoln Park." However, sometimes the passage from the statement of law to the corresponding rule is more complex, as the statement may be vague or ambiguous (so that prima-facie understanding delivers alternative clues), or it needs to be applied to a specific case with regard to which there are grounds for nor applying the presumptive meaning. In such cases the default explanation is controversial, as it may be contested and challenged by contrasting ones. For example "vehicles" can be interpreted as unauthorized transportation means, or as the transportation means with an engine, etc.

As shown in figure 1, interpretations can be supported by certain types of argument to be described in the following section. In this case a more complex process of reasoning intervenes, aimed at establishing the best possible explanation. The distinct interpretations are supported by alternative explanations, which need to be supported by arguments in order to be proven to be better (more adequate, more suitable) than the others. The arguments that support the various explanations of meaning and/or reject the other possible interpretations are the so-called interpretative arguments. Even though there are many types of interpretative arguments, we will focus our analysis on the set of the most common ones, which have been acknowledged and discussed in legal studies.

2 The Arguments of Interpretation

The arguments used in the interpretative process have been analyzed by (Tarello 1980) in his work on legal interpretation. He identifies the structure and the uses of

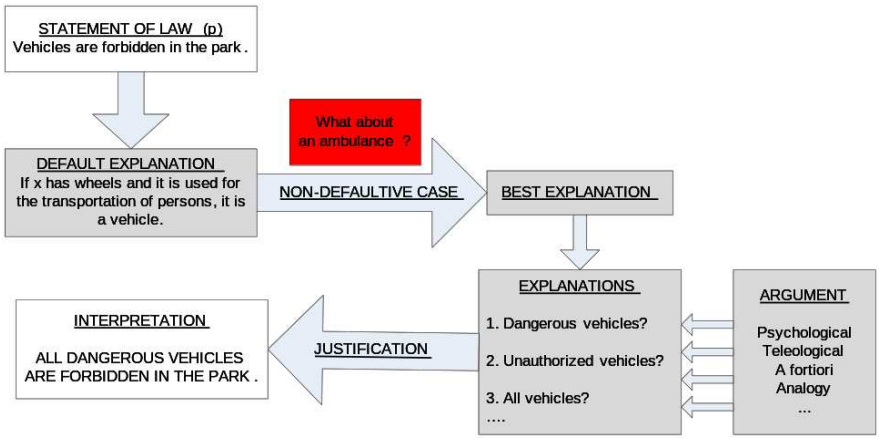

Figure 1: The argumentation process of interpretation.

thirteen types of argument, of which two (the argument from the coherence of the law and the argument from the completeness of the law) are ancillary, in that they exclude a possible explanation and support the need for a different interpretation of a statement of law. These arguments can be divided into five groups based on the semantic and logical relationship between premises and conclusion:

The first type of argument is the *"a contrario"*, which can be summarized by the Latin principle *Ubi lex voluit, dixit; ubi noluit, tacuit* (what the law wishes, it states, what the law does not want, it keeps silent upon). According to this maxim, if a rule attributes any normative qualification (such as a power, an obligation or a status) to an individual or a category of individuals, in lack of any other explicit rules it shall be excluded that any additional rule is in force (exists, is valid) attributing the same quality to any other individual or category of individuals. This type of argument, analyzed below, is grounded on a default type of reasoning called reasoning from lack of evidence.

The argument from similarity and the *a fortiori* argument both proceed from a comparison between two rules (Guastini 2011, pp. 282–283). In both cases, the interpreter aims at supporting an unexpressed rule and presupposes a *ratio iuris*, which is applied to the case not expressly regulated yet. In case of analogy, if a rule attributes any normative qualification (such as a power, an obligation or a status) to an individual or a category of individuals, it can be concluded that there is an additional rule that attributes the same quality to another individual or category of individuals connected with the former class by a similarity or an analogy relation. In the *a fortiori* argument, there is an asymmetry in favor of the case not expressly regulated: if a rule attributes any normative qualification (such as a power, an obligation or a status) to an individual or a category of individuals, it can be concluded that there is a different rule (or a different rule exists, is valid) that attributes the same quality to another individual or category of individuals in a situation in which such a normative qualification shall be even more needed or justified (Tarello 1980,

1. Argumentum a contrario	**Argument in lack of evidence**
2. Argumentum a simili	**Analogical arguments**
3. Argumentum a fortiori	
4. The psychological argument	**Arguments proceeding from the authority of the source**
5. The historical argument	
6. The naturalistic argument	
7. Argumentum ab exemplo	
8. The teleological argument	**Arguments proceeding from consequences**
9. The apagogical argument	
10. Argumentum a coherentia	
11. The economic argument	**Abductive arguments**
12. The systematic argument	
13. Argumentum a completitudine	

Figure 2: The arguments of interpretation.

p. 355).

Four arguments are based on authority: the psychological, the historical, the naturalistic and the *ab exemplo* arguments. In these arguments, the acceptability of the interpretation depends on the authority of the legislator, previous interpreters or popular opinion. According to the psychological argument, to a statement of law shall be attributed the meaning that corresponds to the intention of its drafter or author, that is, the historical legislator. In the historical argument the authority is not the actual legislator but the traditional interpretation of a previous statement of law that governed the same case in the same legal system. The argument *ab exemplo* (or authoritative) is based on the authority of a previous interpretation, or rather on the authority of the product of a previous interpretation. Finally, the naturalistic argument is grounded on the commonly accepted "nature" of the things, namely on the commonly shared values that characterize a specific culture.

The arguments from consequences proceed from the acceptability or unacceptability of a consequence of the application of a rule to the reasonableness or unacceptability of what leads to it, the interpretation leading to that rule. Through the apagogic argument it is possible to reject the possible interpretations of a statement of law leading to an unreasonable or "absurd" rule. According to the teleological argument a statement of law shall be given the interpretation that corresponds to the purpose which the legislator (or the law) aims to achieve through that statement.

Finally, abductive arguments lead from a fact to its best possible explanation. According to the economic argument, an interpretation of a statement of law that corresponds to the meaning of another, older or hierarchically superior, statement of law, shall be excluded, as the best explanation for the existence of two identical statements of law is that the legislator intended them as having different meanings.

The systematic argument is based on the authority of the legal system (the other provisions of law) and the explanatory principle that the legislator intended a unitary and coherent system of laws. Accordingly, the best explanation for the meaning of a statement of law is the meaning corresponding to the one imposed (and not excluded) by the legal system.

This analysis and categorization of the arguments of interpretation highlights a relationship between the legal interpretative reasoning and argumentation theory, and in particular the modern approach to the abstract patterns of arguments, called argumentation schemes.

3 Argumentation Schemes

Argumentation schemes represent the structure of defeasible arguments, namely arguments not proceeding from the meaning of quantifiers or connectors only, but from the semantic relations (*habitudo*) between the concepts involved. This account is rooted in Toulmin's notion of warrant, which he defines as "general, hypothetical statements, which can act as bridges, and authorize the sort of step to which our particular argument commits us" (Toulmin 1958, p. 91). These warrants can be different in nature: they can be grounded on laws, principles of classification, statistics, authority causal relations or ethical principles (ibid.). Such warrants became the principle of classification of arguments (Toulmin, Rieke, and Janik 1984, p. 199). Building on this approach, the idea of argumentation schemes was developed, representing the combination between a semantic principle (such as classification, cause, consequence, authority) and a type of reasoning, such as deductive, inductive or abductive reasoning. Their main purpose as regards legal argumentation is to provide abstract patterns representing types of arguments that carry probative weight for supporting or attacking a conclusion, but in the most typical instances are defeasible. Such arguments do not lead to necessarily true conclusions and are not based on necessarily true premises.

Most of the argumentation schemes listed in (Walton, Reed, and Macagno 2008) have a defeasible *modus ponens* structure, grounded on a conditional defeasible generalization. A standard example is the expanded scheme for argument from expert opinion (ibid., p. 19) shown in table 1.

Minor premise 1:	Source E is an expert in subject domain S containing proposition A.
Minor premise 2:	E asserts that proposition A (in domain S) is true (false).
Conditional premise:	If source E is an expert in a subject domain S containing proposition A, and E asserts that proposition A is true (false), then A may plausibly be taken to be true (false).
Conclusion:	A may plausibly be taken to be true (false).

Table 1: Argumentation scheme: *Argument from expert opinion.*

It is readily visible that version of the scheme for argument from expert opinion has a *modus ponens* structure as an inference. Since experts are generally not omniscient, and since in law it would be a great error to take what an expert says uncritically, this inference must be viewed as being defeasible.

Subsequent work on argumentation schemes has followed this general way of representing the logical structure of many defeasible argumentation schemes. Bench-Capon and Prakken (Bench-Capon and Prakken 2010) view the application of defeasible rules (such as legal or moral norms) as a particular instance of defeasible *modus ponens*. They represent through a semicolon connective (;) representing any inference warranted by a defeasible rule. The basic argument scheme for applying defeasible rules called the Rule Application Scheme (ibid., p. 159) is shown in table 2.

r: P_1, ...,P_n ; Q
P_1, ...,P_n
Q

Table 2: Rule Application Scheme.

The letter r indicates the name of the rule. The following two critical questions match this scheme (ibid., p. 159):

CQ_1: Is r valid?

CQ_2: Is r applicable to the current case?

Critical questions concerning an inference scheme indicate situations which can be presumptively assumed when reasoning with the scheme, but whose non-existence would put into question the application of the scheme. Negative answers to critical questions can be reformulated as counterarguments that undercut (make inapplicable) the concerned scheme or contradict (rebut) its premises (see "Justification of argumentation schemes").

Now we can see, in general, that our conditional rule for framing interpretive arguments in a general pattern for defeasible rules or argument schemes can also be cast into this format. In table 3 this rule has been expanded into a DMP form of inference.

If a sentence/term X has the property P, then X should (not) be given meaning M.
This sentence/term X has the property P.
Therefore X should (not) be given meaning M.

Table 3: DMP form of inference.

This abstract structure of inference represents the most generic pattern that the interpretative arguments have. On this perspective, the different argumentation schemes that want to capture the logical and semantic characteristics of an argument can be adapted to the specific field of interpretation by replacing the generic DMP form with the aforementioned one. This form of inference can be used to "translate"

the aforementioned arguments described by Tarello into argumentation schemes. In particular, we will analyze two arguments, the psychological and the *a contrario* arguments.

4 Psychological Argument (Intention of the Actual Legislator)

This argument is grounded on the intention of the actual, real drafter of the statement of law that needs to be interpreted. According to this line of reasoning, the meaning that corresponds to the intention of the drafter or author (the historical legislator) should be ascribed to a statement of law (Tarello 1980, p. 364). This type of argument is based on the idea that a statement of law is the expression of a command from a superior authority. Therefore, the interpretation of a statement of law corresponds to the reconstruction of the command of the authority. However, if the legislator is not a single authority, such as a king or an imperator, but a plurality of people (an assembly such as the Senate or the House of Representatives), this argument amounts to attributing a unique intention to a community of people, who may have voted the statement of law for different reasons and different intentions.

This type of argument can be illustrated using an example from the common law (*United States v. California*, 381 U.S. 139, at 150-151, 1965). This controversy concerning the possession of the submerged lands of California was based on the definition of "submerged water", which in its turn amounted to the definition of "inland water". The Court grounded its argument on the fact that the only way of recovering the definition was the legislative history, or rather the intention of the legislator. Since the Senate Committee excluded the definition set out in the proposed bill, their intention was not to define it, leaving its meaning to be determined by the Courts:

> The focal point of this case is the interpretation to be placed on "inland waters" as used in the Act. Since the Act does not define the term, we look to the legislative history. [...]
>
> Two changes relevant for our purposes were made in the bill which became the Submerged Lands Act between the time it was sent to the Senate Committee on Interior and Insular Affairs and the time of its passage.
>
> (1) As first written, the bill defined inland waters to include "all estuaries, ports, harbors, bays, channels, straits, historic bays, and sounds, and all other bodies of water which join the open sea." This definition was removed by the Senate Committee. [...]
>
> Removal of the definition for inland waters and the addition of the three-mile limitation in the Pacific, when taken together, unmistakably show that California cannot prevail in its contention that "as used in the Act, Congress intended inland waters to identify those areas which the states always thought were inland waters." By deleting the original definition of "inland waters" Congress made plain its intent to leave the meaning of

> the term to be elaborated by the courts, independently of the Submerged Lands Act.

The intention of the legislator can be used also for statutory interpretation, analyzing the context in which the act was enacted. For instance, in *Samantar v. Yousuf* (176 L. Ed. 2d 1047, at 1066, 2010), concerning the jurisdiction over a foreign official, the petitioner claimed that the United States have no jurisdiction over the case as it was governed by the Foreign Sovereign Immunities Act, which provided that "foreign state shall be immune from the jurisdiction" of federal and court state. In order to analyze the force and the characteristics of this type of argument, it is useful to distinguish between two kinds of authority. One is the classic form of argument from authority, corresponding to the authority of the expert represented in argumentation scheme shown in table 1. Obviously, the legislator cannot be considered an expert. However, this argument can be generalized by considering expertise only a specific form of authority. In another species of argument from authority, the force of the argument lies in the kind of authority based on the power deriving from a superior role or standing of some official who is entitled to make rulings that are binding within a legislative framework (Ciceronis *Topica*, 24). This second type of argument from authority, which can be called the *de jure* argument from authority, has the argumentation scheme as shown in table 4.

Minor premises:	L is an authority involved in (passing, drafting, amending) the source-statement A.
Major premise:	L (passed, drafted, amended) source-statement A intending M.
Conditional premise:	If L is an authority involved in (passing, drafting, amending) the source-statement A, and L intended the meaning (interpretation) M, then M may plausibly be taken to be right meaning (interpretation).
Conclusion:	M may plausibly be taken to be the right meaning (interpretation).

Table 4: Argumentation scheme: *De jure argument from authority.*

The structure of this argument highlights the critical dimensions of this scheme. Building on the critical questions of the argument from expert opinion, Tarello's analysis (ibid., pp. 366–367) and the aforementioned refutation of the psychological argument can be summarized in the following crucial defeasible dimensions:

1. *Role Question*: Whose opinion, in the case, effectively represents *L's* opinion (the majority, the most influential, the most representative)?

2. *Opinion Question*: Did L intend to express M by asserting A?

3. *Consistency Question*: Is M consistent with the intention of other *Ls* that passed the same law?

4. *Coherence Question*: Does M lead to any antinomy or incoherence in the legal system?

One of the crucial and most controversial problems is how to determine a collective intention, especially if the statement of law has been voted by different political groups for different purposes. As Scalia put it, "There is no escaping the point: Legislative history that does not represent the intent of the whole Congress is non-probative; and legislative history that does represent the intent of the whole Congress is fanciful" (516 U.S. 264, at 281, 1996). Another crucial problem is to understand the intention. The *travaux preparatoires*, or legislative history, are used for this purpose, in order to analyze the reasons given by the legislative bodies to support a statement of law. Obviously the reconstruction of the intention needs to be supported by further arguments, one of which is the appeal to further authorities.

5 *Argumentum a contrario*

The *a contrario* argument has been analyzed by Tarello (Tarello 1980, p. 346) as the passage from the attribution of a normative qualification D (an interpretation of a statement of law) to a specific category of individuals to the exclusion of the existence additional rules (or rather, other interpretations) attributing the same qualification D to other categories. This argument excludes an interpretation wider than the literal one, and it rebuts any analogical or extensive interpretation (Guastini 2011, p. 271). For instance, art. 17, 1 paragraph of the Italian constitution provides that:

> All citizens have the right to assemble peacefully and unarmed.

Is the legal predicate "to have the right of assembly" (A) also attributable to foreigners and stateless people? If we use the argument *a contrario*, we proceed from the principle that if the law wished to vest such a right D in foreigners and stateless people, it would have stated it (ibid., p. 272). Since there are no legal provisions relative to the foreigners' right to assemble, it shall be concluded that such a predicate is attributed only to citizens. As a consequence, foreigners and stateless people will be excluded from such a right.

The argument *a contrario* concerns what a law does not provide for. At common law, prior cases constitute only possible grounds on which a decision and rule is justified, and cannot have the pretense of completeness. For this reason, in case law this type of argument is not used. However, common law courts use such an argument to interpret civil codes within their own jurisdiction. For instance, the Supreme Court of Canada shall interpret the civil code of Quebec, while in the United States the federal court needs to interpret the civil codes of Louisiana and Puerto Rico (Friesen 1996, p. 4). For instance, we can consider the argument used by the Court of Appeal of Louisiana in *Southwestern Electric Power Co. v. Parker* (419 So. 2d 134, at 141, 1982). In a case in which the extent of the right of servitude on a land was disputed (petitioner wanted to conduct well drilling activities on portions of his land that a power company contended were within its right of way across the property) even though governed by a contract, the Court cited the Articles 705 and 749 of the Civil Code of Louisiana:

> Art. 705. The servitude of passage is the right for the benefit of the dominant estate whereby persons, animals, or vehicles are permitted to pass through the servient estate. Unless the title provides otherwise, the extent of the right and the mode of its exercise shall be suitable for the kind of traffic necessary for the reasonable use of the dominant estate.
>
> Art. 749. If the title is silent as to the extent and manner of use of the servitude, the intention of the parties is to be determined in the light of its purpose.

The court then reasoned a contrario: "when the title provides the exact dimensions of the area affected by the servitude, that contract must be given full effect."

In order to analyze the logic and the structure of this argument, it is useful to first investigate the defeasible principle on which it is based. The reasoning supporting the conclusion proceeds from the lack of contrary evidence in the so-called "closed-world assumption." The negation of a proposition (A is not true) is borne out by the lack of contrary evidence (A is not known to be true) (Walton, Reed, and Macagno 2008, p. 327). The argumentation scheme of argument from ignorance is shown in table 5.

Major premises:	If A were true, then A would be known to be true.
Minor premise:	It is not the case that A is known to be true.
Conclusion:	Therefore A is not true.

Table 5: Argumentation scheme: *Argument from ignorance.*

In the case of *a contrario argument*, the world taken into consideration is the paradigm of the provisions interpreted according to their literal meanings. If a rule (or meaning) cannot be found in the literal interpretations, it shall be excluded. This type of reasoning can be analyzed as a specific instance of the argument from ignorance (as shown in table 6).

Major premises:	If a sentence x has the meaning N, then rule D applies.
Closed world premise:	If a sentence x has a literal meaning M_x, x cannot have other meanings (other literal meanings $M_{y...n}$; other non-literal meanings $N_{1...n}$).
Minor premise:	Sentence a has the literal meaning M_1.
Conclusion:	Therefore, sentence x has not the meaning N (rule D does not apply).

Table 6: Argumentation scheme: *A contrario argument 1.*

The force of this type of reasoning is grounded on the acceptability of the closed world premise, which constitutes the basis of the incompatibility between the literal meaning and other interpretations. This premise excludes all non-literal interpretations, closing the world of meaning reconstruction to the ordinary (legal) meaning of the words.

The defeasibility of the argument can be evaluated using the structure of the argument from ignorance, which shows in detail the logical form of the reasoning. However, in order to reconstruct the premises and simplify the abstract pattern of argument, it is possible to incorporate the deep structure of the reasoning into a rule-based structure, where the closed-world assumption using negation as failure is factored in. This form of argument can be represented by using the following defeasible rule.

> If a sentence X has the property of having meaning M, but is not stated to have the property of having meaning N, where M has a different meaning from N, X should be not given meaning N.

Given this rule, we can now construct the full argumentation scheme for the *a contrario* argument. The defeasible rule plays the role of the major premise.

Major premises:	If a sentence X has the property of having meaning M, but is not stated to have the property of having meaning N, where M has a different meaning from N, X should be not given meaning N.
Positive minor premise:	Sentence X has the property of having meaning M.
Negative minor premise:	Sentence X is not stated to have the property of having meaning N, where M has a different meaning from N.
Conclusion:	X should be not given meaning N.

Table 7: Argumentation scheme: *A contrario argument 2.*

On this perspective, the structure of the *a contrario* argumentation scheme is a special instance of the defeasible *modus ponens* type of inference. The major premise has the form of a conditional statement where the antecedent of the conditional is a conjunction of two propositions. Each of the two minor premises is one of the propositions making up the conjunction. Using the connective $\Rightarrow$ for defeasible implication, the argument can be represented as having the following DMP form:

$$[(p \ \& \ q) \ \Rightarrow \ r, \ p \ q] \ \Rightarrow \ r.$$

Notice that the passage from the major premise and the negative minor premise to the conclusion is grounded on a type of reasoning that embeds the deep argument from ignorance into a DMP form of argument by contraposition of the major premise (as shown in table 8).

Major premises:	If A were not known to be true, then A would not be true.
Minor premise:	It is not the case that A is known to be true.
Conclusion:	Therefore A is not true.

Table 8: DMP form of argument by contraposition of the major premise.

This type of conversion is only a simplification (there are grounds for thinking that contraposition does hold (in general) for defeasible reasoning; see Caminada 2008) in order to outline a pattern of argument that is easier to apply to cases, leaving the analysis of the defeasibility conditions of the closed-world assumption of the reasoning from ignorance to the following critical questions.

CQ$_1$: Does the *a contrario* rule apply to this case?

CQ$_2$: If there are meanings other than M could be attributed to X, why is M better?

The application of this argumentation scheme to a case can be rendered through an argument map, where premises and possible rebuttals or backings are shown as boxes, and the plus sign indicates that it is a pro argument supporting the conclusion shown in the text box at the top left. The crucial problem is to decide whether the first critical question (the possibility of applying the argument to the case) should be treated as an assumption or an exception. If it is treated as an assumption, the *a contrario* argument is defeated by the mere asking the question. If it is an exception, it has to be backed up by further evidence to defeat the *a contrario* argument. In figure 3, the statement that the *a contrario* rule, which is the major premise of the argument, is shown as an exception, an additional premise of the argument such that if that premise fails to be backed up by evidence the argument fails.

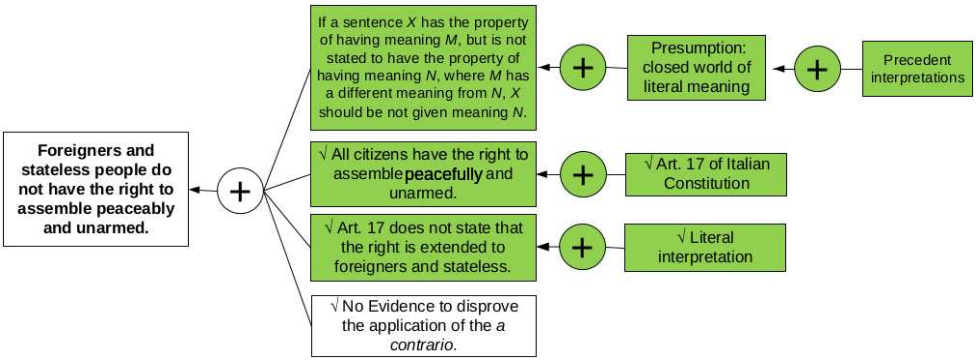

Figure 3: A Contrario scheme applied to the right to assemble example.

We can now see how this argument would be evaluated in the Carneades Argumentation System (Gordon 2010), a formal system that is capable of handling the distinction between assumptions and exceptions when mapping arguments based on defeasible argumentation schemes. Let's say that the second and third premises colored in green in the middle of figure 3 are accepted. Assuming that the *a contrario* argument is applicable, the conclusion that foreigners and stateless people do not have the right to assemble peaceafully and unarmed is acceptable.

6 Conclusion

It has been shown in this paper how the process of statutory interpretation can be formally modeled using argumentation tools available from artificial intelligence like the Carneades Argumentation System. According to this way of representing the structure of reasoning in this process the conclusion, the possible explanation of meaning, is a claim that needs to be supported by defeasible pro arguments, and that can also be undermined by defeasible contra arguments. Argumentation schemes when structured with variables and constants, and embedded in computational argumentation systems, can be used to represent the logical and semantic relation of the interpretative arguments analyzed by Tarello. This transformation of the arguments of interpretation into the argumentation schemes framework has been applied to the psychological and the *a contrario* arguments. These examples show how the procedure can be extended to the other kinds of interpretative arguments recognized by Tarello. The investigation on these arguments shows how they can be reconstructed according to a multi-logical criterion, which underscores the defeasible nature of the reasoning. The conclusion is drawn from the premises based on a defeasible *modus ponens* rule that makes computational structure of the argumentation scheme explicit, enabling the scheme is to be used to model the process of drawing conclusions based on statutory interpretation in law. The defeasible nature of the scheme is shown by means of critical questions, which identify the default conditions of the reasoning. It has been shown how schemes used for interpretation arguments in law of the structure that makes them compatible with the rule-based systems for legal reasoning characteristic of research in the field of artificial intelligence and law.

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The Effectiveness of Interpretative Arguments in the View of Cognitive Theory of Legal Interpretation

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Abstract. The interpretation of law is one of the key aspects around which legal discourse revolves. This statement, intuitively approved of by any practicing lawyer, inclines us to form a question concerning the patterns of argumentation used in during the legal discourse. A practical question, however, arises as to the effectiveness of each kind of interpretative arguments. For instance, in the case of a court dispute all participants of the discourse, i.e. the plenipotentiaries of the sides and the judge who is obliged to justify his or her legal decision, are interested in raising the most effective arguments in favour of their case. When undertaking the issue of subjective effectiveness of arguments used in the legal discourse I will take into account five theorems, presented in the Introduction. I will reduce, then, the subject of the analysis to the effectiveness of interpretative arguments, omitting the problem of, e.g. validity of legal rules or proving facts in law application. The proposed analysis is an attempt at an interdisciplinary view on the above-mentioned issue by invoking empirically (experimentally) settled knowledge on the interpretation of the law occurring in the course of becoming familiar with it. I prove that the cognitive theory of legal interpretation sheds light on the "context of discovery" of *prima facie* law interpretation, which allows "estimating" the effectiveness of each of the kinds of interpretative arguments while using the theory of cognitive dissonance.

Keywords. Legal interpretation, argumentation, legal discourse, effectiveness of interpretative arguments, cognitive theory of legal interpreta-

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tion, application of law, model of prima facie interpretation, eye-tracking, understanding of law, argument ad ignorantiam, holistic interpretation.

Motto: "Il mio supplizio è quando non mi credo in armonia".
("Such ordeal it is to me when I do not feel internal harmony inside my own self")
G. Ungaretti, *Fiumi*.

1 Introduction: Interpretative Arguments

1.1 I am about to undertake the issue of the effectiveness of interpretative arguments based on the following theories and explanations:

Law is discursive in character (theorem 1).

The key areas of the functioning of the phenomenon of the law, namely: (1) creating the law, (2) application of the law and (3) executing the law, assume such nature of procedures by which there occurs discursive exchange of arguments. Moreover, scientific conceptualization of the law is also rooted in the process of argument.[1] An attempt to theoretically describe these processes leads in the philosophy of law to the formulation of the notion of "legal discourse." This is (a) a process of interpersonal communication whereby (b) the goal of each of its participants is to persuade the interlocutor to accept (c) certain theses (d) concerning the law.[2] The theses in question can be descriptive, valuing or normative in nature. Legal discourse is a qualified form of general argumentative discourse because of its character. And such discourse can assume the nature of: (1) theoretical discourse, when its criterion is the truth, the aim is to learn the facts. Or, (2) it can become practical discourse, where its criterion is rightness or effectiveness. Then, the aim of such discourse is to demonstrate the specific evaluation of elements of reality or norms of conduct. Such a division is grounded in philosophical tradition that dates back to Aristotle, St. Thomas Aquinas and Immanuel Kant, or, more contemporarily, Jürgen Habermas, and comprises distinguishing two cognitive powers of the human being, namely: the theoretical and practical reason. The moment when argumentative discourse, whether practical or theoretical, starts to "revolve" around law, it transforms into theoretical (scientific) or practical legal discourse.

Legal discourse involves the exchange of legal arguments (theorem 2).

The notion "argument" comes from the Latin word *argumentum*, whose etymology dates back to the word *arguo*—"to make something shiny, to illuminate." In Greek the word *argyros* denoted "silver" and *agros* "white colour." An argument is, hence, something that "illuminates" a given thesis (opinion), makes it "shiny"" to such an extent that it becomes evident to those who become familiar with it and, by the same token, it becomes difficult or even impossible to refute. An argument does not require

[1] Arguing is an activity timing at installing certain convictions, opinions or/and aspirations.

[2] These issues I have discussed and analyzed widely in ("The argument from authority in contemporary legal reasoning").

to be verbal in nature, it needs only to be a message that makes a given thesis more powerful and convincing (it may, then, be based on non-verbal ways of expressions, such as, the tone of voice, facial expressions, gestures, body posture, i.e. the so-called "body language").[3] One can, therefore, distinguish between: (1) arguments *sensu largo*, which are coded through communicative verbal and non-verbal means, and also (2) arguments *sensu stricte*, which are only verbal in form (and by the same token, they are a subset of arguments *sensu largo*). (See Jabłońska-Bonca 2003, p. 116) Arguments used in legal discourse, which aim at convincing the interlocutor to accept the propagated thesis through persuasive actions, support the theses of the law (descriptive, valuing or normative ones). They become, therefore, legal arguments.

In the remaining part of the paper I would like to concentrate on legal arguments *sensu stricte* (reduction 1).

1.2. Legal discourse concerns the issue of law creation, its application and execution.

The application of law in the culture of statutory (civil) law, being one of the "areas" in scope of legal discourse, involves encompassing a given case, i.e. a certain state of facts, with a legal norm which has been interpreted from legal substantive rules (theorem 3).

From the subjective point of view, the application of the law is a process performed by state authorities (courts and administrative bodies), legal bodies and "private" bodies exercising their rights.[4] Each process of law application must end with a decision which involves encompassing the given state of facts with such and not other legal norms. This final decision is determined and justified by certain partial decisions. The following partial decisions are singled out: those of validity of legal rules, operative interpretation, evidence and choice consequences.[5] The practical legal discourse occurring between the judge (judicial body) and each party (their plenipotentiaries), and between the parties themselves in front of the judge, precedes each of these decisions. In the process of the afore-mentioned partial discourse, arguments to influence the interlocutors in a persuasive way and bring them to the thesis put forward by the arguing body are generated. In the case of discourse preceding an interpretative decision, interpretative arguments are presented.

In the following part of the discussion I would like to concentrate on interpretative arguments occurring in practical legal discourse (reduction 2).

1.3. Positivist concepts of legal interpretation (like the clarification theory of legal interpretation as described by J. Wróblewski in the Polish legal culture (Romanowicz 2011, pp. 55–57)) emphasize, among other things, the dominating role of the positive law, whereby the basic form is the text. It creates a normative act passed by the sovereign, who is the creator and editor of the legal text in question. The linguistic nature of the law "condemns" it to the need of interpretation. Forming legal rules in the vernacular language of the given society leads to "open texture" as described by H. A. L. Hart. (Hart 1998, pp. 171–179) Eliminating ambiguity and vagueness of the notions used by the legislator in the legal text requires employing interpretation tools which make it possible to solve the doubt to a certain extent, as far as the contents of the law is concerned (the linguistic shape of the legal norm) which is potentially

[3] See Pease 1988, passim

[4] See Wróblewski 1988, p. 7

[5] Wróblewski 1989, p. 242

to be used in the given case.

The tools aimed at eliminating the ambiguity of the law are the so-called directives of legal interpretation (theorem 4).

The aim of legal interpretation can be attained using "directives of interpretative procedure". (Wróblewski 1988, p. 120; Compare Wróblewski 1963, p. 410) Describing these directives, J. Wróblewski referred to contexts in which all legal regulations occur: "I define three such contexts: the language in which the regulation is formulated (this context involves the rules of semantics, syntax and pragmatics of the given vernacular language—annotation by MR); the system which embraces the regulations formulated in legal texts; the functional context of the origin or operation of the legal regulation including complex economic, political and cultural phenomena". (Wróblewski 1988, p. 120; See also Wróblewski 1990, p. 66–69; Wróblewski 1963, p. 410–414 and Wróblewski 1969, p. 9) Since each directive refers to one of the three contexts of the regulation under interpretation, one can assign it to one of three groups: (1) linguistic interpretation, (2) systemic interpretation, (3) functional interpretation. Each of the groups comprises directives which allow the elimination of vagueness of the legal regulation under interpretation to some extent, as they show how its meaning should be established. (Wróblewski 1990, p. 75)

Directives of legal interpretation pertaining to one of the three legal contexts (namely: the linguistic, systemic or functional one, where the last one also encompasses the teleological interpretation, which is based on searching *ratio legis* of the given legal rule), may be interpretative arguments raised in the legal discourse. The catalogue and the contents of the directives in question are relative to the given legal culture and legal order. Each interpretative argument formed *ad hoc* in the course of the discourse pertains to one (or more than one) of the above indicated contexts of the law, which, in my opinion, fulfils the whole spectrum of interpretative "contextuality" of the law.

Interpretative arguments may concern three contexts of legal interpretations: (a) the linguistic, (b) systemic and (c) functional one (theorem 5).

1.4. Based on the outlined theory of legal discourse let us face the following question: which kind of interpretative arguments, the linguistic, systemic or functional one, can be characterized with the most significant effectiveness from the cognitive point of view? The effectiveness of interpretative arguments I intend to tackle subjectively, i.e. I intend to treat it as derivative of persuasive force, which is experienced by the addressee of the given argument. I decided to omit the question of objective effectiveness as at the contemporary state of the legal science it seems to be "immeasurable" in the aspect which falls into the scope of my interests. Empirical study of the justification of legal decisions (e.g. at court) allows only pointing to the "effectiveness" of the arguments mentioned in the "context of justification" of a legal decision, while justifications (of, e.g. court verdicts) do not always reflect "the context of discovery."

Arguments that lead to making one and not the other interpretative decision are objectively perceivable and describable in a scientific manner only in the context of justifying such a decision. However, the context of discovery, i.e. the actual processes occurring in the mind of the decision-maker, remains undiscovered. By using cognitive theory of legal interpretation I will attempt to uncover the "cloak of ignorance," at least to a slight degree, concerning the "discovery" of the given

legal interpretation process, which, when using psychological knowledge concerning cognitive dissonance allows the persuasive power of each of the kinds of interpretative arguments.

The subjective effectiveness of interpretative arguments derives from their persuasive power, i.e. claim to approve of them (theorem 5).

In the suggested analysis, the given kind of arguments is subjectively effective in being characterized by a certain persuasive power which determines the "power" degree of a claim of such a kind of arguments to accept and approve of the theses they support. The problem of whether the given argument turned out to be objectively effective in the context of discovery, that is, if it actually led to accepting such and not the other thesis of the interpretation of the law remains out of the scope of this study. However, one should intuitively assume that the higher the subjective effectiveness of the given sort of interpretative arguments, the higher the probability that in legal discourse objective effectiveness is prevalent.

2 Cognitive Theory of Legal Interpretation: Model of *Prima Facie* Interpretation

2.1. Cognitive theory of legal interpretation[6] is an interdisciplinary attempt at analytical and empirical capturing the phenomenon of legal interpretation considering the actual cognitive processes occurring in the mind of the interpreting person while becoming familiar with the legal text. It is a project of empirical epistemology of the law. The theory comprises: (1) a descriptive part, containing an empirical model of the process of understanding the legal text in the course of reading, i.e. the model of *prima facie* interpretation of a legal text (hereafter referred to as MPFI), taking place in an automatic and unconscious way, (2) a normative part by which postulates are formed concerning the way of conscious searching for interpretative cues by a subject becoming familiar with the law, postulates take into consideration the cognitive characteristics of the mind of the person interpreting the law, as described in MPFI.

In the context of this analysis, the most interesting is the descriptive part of the cognitive theory of legal interpretation; hence the remarks to follow are limited to it. The model of *prima facie* interpretation of a legal text has been constructed on the basis of cognitive psychology and based on an experiment performed with the use of a device called eye-tracker.

2.2. Eye-tracker experiment:[7]

2.2.1. In this experiment, 15 lawyers aged 25 to 54 were tested (with the average age of 30), including 7 men and 8 women. The study material comprised two fragments of a newspaper article and excerpts from three Polish acts: Criminal Code, Civil

[6] Complex description of the theory to be presented in: Romanowicz 2013

[7] The description of the experiment is presented briefly, limited to essential information within the analysis of the effectiveness of interpretative arguments. At the same time, considering the readers of this paper, I will adjust the description to the style of papers on philosophy and theory of law and abstain from the form proper for texts concerning psychology and other empirical sciences (e.g. I decided to omit the description of the statistical analysis and methods of counting metric results).

Code and Act on Proceedings in Administrative Courts. These texts were presented on the screen of an eye-tracker. After each of them, a series of questions to check the degree of text comprehension followed. One press text and two legal acts were manipulated by "damaging" the linguistic material presented. The manipulations involved changes of the following character:

(1) physical—deformation of a letter in the composition of a word used in the text,

(2) spelling—introducing a spelling mistake in one of the words,

(3) lexical (semantics within one word)—replacing a word used in the text with another word constructed in concordance with the Polish grammar yet not having any meaning (a nonsensical word),

(4) internally syntactic—modification of an inflectional ending of a chosen word (e.g. changing the case so that it became non-consistent with the context of the sentence),

(5) externally syntactic—modification of a chosen word so that it becomes a member of a different category of a word (e.g. replacing a participle with an infinitive),

(6) semantic within a sentence—replacing one word with another word that can be found in the Polish dictionary (has a meaning), yet it does not match the context of the sentence,

(7) factual—introducing informational inconsistency between two consecutive sentences by modifying one word in one of them.

2.2.2. The theoretical basis for the experiment was the paradigm of eye-tracker cognitive research.[8] Its foundation is the so-called "eye-mind" hypothesis formulated by M .A. Just and P. Carpenter (Just and Carpenter 1980), according to which there are no significant delays between what is perceived (by the eye) and what is processed (by the mind). In other words: such observable data (registered by the eye-tracker) as eyeball movements (saccades, regressions) and eyesight fixation are indicators of the cognitive processes occurring simultaneously in the mind of the person reading the legal text. Based on this paradigm, research was done and its aim was to devise a descriptive model of the process of arriving at complete comprehension of the text in question. (ibid.)

The psycholinguistic experiment (based on a paradigm different than the eye-tracker one) conducted in the late 1980s by A. Polkowska and I. Kurcz led to the conclusion that the process of becoming familiar with a legal text is interactive and serial in nature. (Kurcz and Polkowska 1990, passim) This means that after registering the physical features of visual stimuli (letters), there follow interactive, simultaneously occurring, cognitive processes in the so-called linguistic module. The perceptive ingredient integrates the perceived visual stimuli into words, the lexical access ingredient assigns a particular meaning to them from the "mental lexicon", and afterwards, the ingredient of sentence integration "binds" the words into a complete

[8] Methodologies of the eye-tracker research can be found in (Holmqvist et al. 2011, passim).

sentence with a given meaning (sense). In the case of ambiguity (vagueness, unclear meaning) of one of the words the first clarification occurs which is aimed at attaining an internally consistent sentence and a meaningful informative entirety. These processes, although presented above in a certain sequence, are interactional and to perform them, the human mind uses the so-called "linguistic knowledge." Cognitive sequence occurs only at a later stage when the discourse competence determines the meaning of the sentence ("worked out" by the linguistic module) which is based on the completely processed text and the so-called "general knowledge" of the subject. This knowledge comprises, among other things, the knowledge of the text subject, and also episodic and autobiographical knowledge. In the case of inconsistency of the meaning of the sentence with the "world knowledge" or its ambiguity, discourse competence may modify it or clarify the elements of the sentence so that the whole meaning of the sentence is transformed. The result of the whole process is mental representation of the text, which is defined by cognitive psychology as a state of cognition (understanding) of the linguistic material. Figure 1 schematically describes the whole cognitive process. (ibid., p. 68)

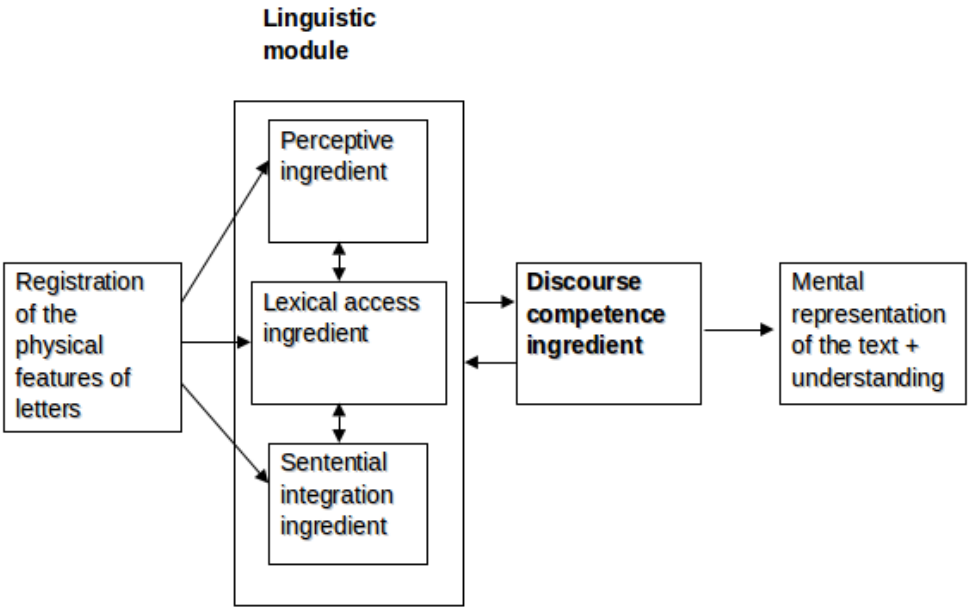

Figure 1: Descriptive model of the process of text cognition as described by (ibid.).

2.3. As a result of the eye-tracker experiment, the above-presented model of reaching the state of comprehension of the text was verified (compare Fig. 2). The results attained allowed the modification of psycholinguistic theory of cognitive process occurring at the moment of reading.
2.3.1. Conclusions from the experiment:

(1) the process of reaching the understanding of the text during reading, i.e. *prima*

facie interpretation (hereafter: PFI), are illustrated by two models: (a) the serial-interactional or (b) interactional one;

(2) the course of the process based on (a) or (b) is dependent on the lexical access ingredient, as the effect of this element of linguistic module being active (based on the "knowledge of the language") in a way that it assigns the meaning to the given expression in a task and conditions the transfer to simultaneously operating ingredients of sentential integration and discourse comprehension;

(3) the ingredient of sentential integration and discourse comprehension create the "module of sense" whose task is to assign the meaning to the sentence processed and this meaning is supposed to be instantly coherent with the "world knowledge" of the subject; the experiment showed that between putting the meaning of the sentence together from the partial elements in the form of the meanings of all the words, and negotiating it with a wider "*episteme*" and "*doxa*", context there is no sequence, i.e. the meaning of the whole sentence is constituted instantly using the information from the ingredient of linguistic access and interactional operations of the sentential integration and discourse comprehension ingredients;

(4) in the case where the process occurring within the ingredient of lexical access is not conclusive (e.g. there is an unknown word in the sentence), then *prima facie* interpretation becomes a fully interactional process, as the human mind commences a wider search to find interpretative clues using the context of the sentence (the activity of an ingredient of sentence integration), the whole text or the knowledge of a given field and even the so-called "life experience" (the activity of the ingredient of discourse comprehension); this situation is illustrated in Fig. 2.

(5) critical to the operations of the cognitive apparatus is the result of activity of the lexical access ingredient since until the mind verifies the contents of the "mental lexicon" it will not proceed to activate the sense module (at this time the process of becoming familiar with the text frequently passes through the attention filter and from an automated process it becomes a conscious cognitive problem); when observing the eyeball movements, this moment was registered by the eye-tracker in the form of prolonged fixation on a word which was manipulated in a lexical way (see: Fig. 3).

2.3.2. Transposing the above-presented conclusions from the scope of cognitive psychology to the language of the theory of legal interpretation one can state that:

(1) the experiment showed that in the PFI process the mind of the person interpreting the text uses:

   (a) "linguistic knowledge," i.e. the knowledge comprising, among other things, the linguistic context of the legal rule,
   -and-

   (b) "world knowledge," i.e. the knowledge comprising the systemic and functional context of the given legal rule,
   -then-

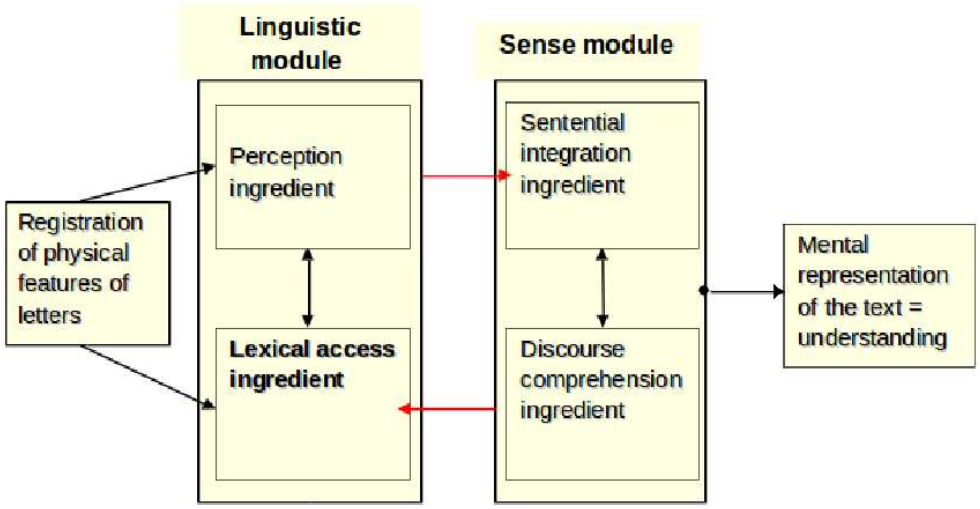

Figure 2: MPFI based on the eye-tracker experiment.

(2) persons interpreting the law automatically make use of all "classic" contexts of legal rules.

3 Conclusions: The Effectiveness of Interpretative Arguments

3.1. What new light is shed on the problem of the effectiveness of interpretative arguments MPFI in the view of the cognitive theory of legal interpretation? Addressing this question, one should first of all emphasize that MPFI is a model of an automated cognitive process, while arguing and participating in the legal discourse is a conscious decision (accompanied, obviously, by a series of subconscious mental activities). Therefore, there is no simple correlation between the descriptive part of the cognitive theory of legal interpretation and the issues concerning the theory of discourse. However, MPFI shows that in the "context of discovery" of the interpretation of the given legal regulation, the lexical issue influences fundamentally the flow of the cognitive process of a legal text comprehension. It is a strictly a semantic problem, i.e. assigning the meaning to the phrases constituting the legal regulation (the text of the normative act). The activity of the lexical access ingredient is critical as until the mind depletes the "store" of this ingredient (i.e. checks the contents of the "mental lexicon"), it will not initiate the process in the sense module. The cognitive constitution of the human mind in the subject in the process of reading comprehension shows, therefore, the primary role of semantics of linguistic expressions. It is a question which is "cognitively sensitive" as the human mind operates the language in such a way that during the reading process it makes a huge "effort," in other words, it incurs "cognitive cost" by solving the semantic issue within a single

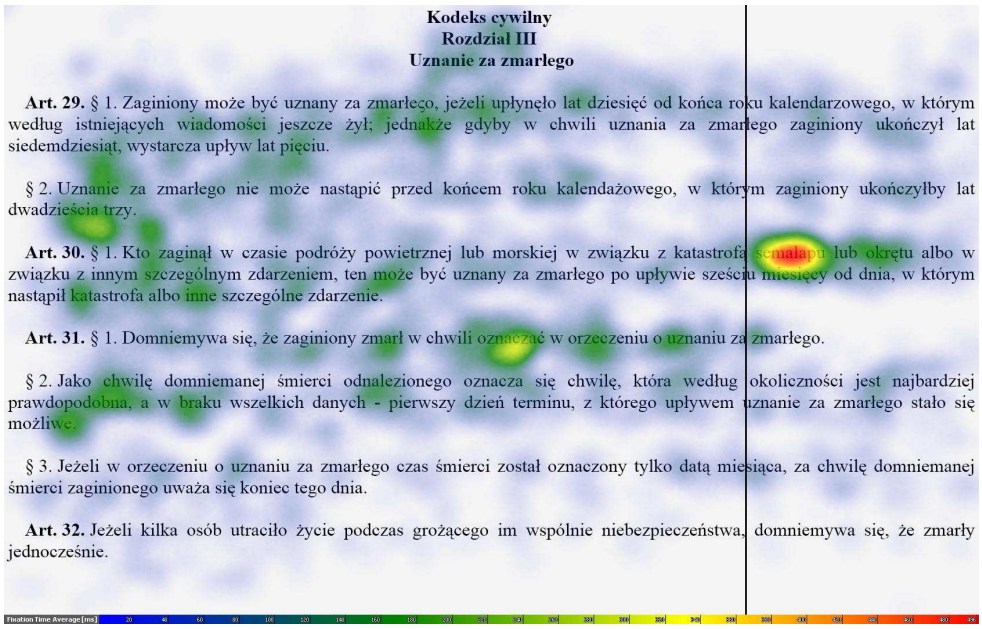

Figure 3: The so-called heat map of one of the experimental stimuli—a fragment of the Polish Civil Code. The red area behind the black horizontal line signifies the longest average time of fixation of the subjects studied (x = 358 ms). It is convergent with the word which was manipulated lexically.

sentence element.

3.2. Discovering the above-mentioned cognitive properties of the human being in connection with the theory of cognitive dissonance[9] allows us to formulate a conclusion that interpretative arguments pertaining to the linguistic context of a legal regulation (e.g. directives of linguistic interpretation), mainly to semantic issues, will be characterized with the highest subjective effectiveness. If the cognitive apparatus of the given interpreter has incurred a high "cognitive cost" while solving a lexical problem, then interpretative arguments inhibiting the settling thereof will cause highest cognitive dissonance. Subjectively speaking, a person who has been addressed with such an argument will experience strong persuasion from such an argument. High level of cognitive dissonance will extort cognitive activity from this interpreter who, to reconcile his or her cognitive stability, will have to either (1) accept the argument and change his or her interpretation or (2) to preserve his or her interpretation of the given legal regulation the person will have to find an appropriately strong counterargument. Irrespective of additional factors that will stimulate the choice of one of these alternatives, the legal discourse will be more dynamic.

3.3. Translating the above-presented theoretical conclusion onto practical issues one should indicate that in a situation of interpretative discourse, e.g. in a court of law,

[9]Compare the classic work of (Festinger 1957, passim).

where the plenipotentiary of one of the sides strives to undermine the interpretation of the law as accepted by the court (in the Polish legal culture, the so-called "jurisprudence"), the most effective might be semantic arguments. They might be *ad rem* arguments in nature, or eristic devices. This means that they might refer directly to the contentious issue, which is the interpretation of the given regulation, but they might also serve to increase the cognitive dissonance of the judge adjudicating the case. For instance, in a way of ad *ignorantiam* (Compare Jabłońska-Bonca 2003, pp. 290–291) argument, one can pertain to each of the three interpretative contexts of legal regulations. Because, however, it is a case of *ad personam* argument which aims at enfeebling the interlocutor by demonstrating his or her ignorance or lack of interpreting skills within semantics building the legal rule. Increasing the cognitive dissonance will cause subjective discomfort within the decision-maker who will either "defend himself/herself" and find a counterargument (and, by the same token, "save" the interpretative stance of his or her judgment in the given practical discourse) or will have to modify his or her attitude to the given problem, which is the interpretation of the legal rule (and the lawyer will then achieve his or her goal and "break" the jurisprudence of the court).

3.4. The above observation concerning the effectiveness of semantic arguments is interesting in the context of contemporarily raised issues in the legal theory concerning the postulate of "holistic interpretation." (See e.g. Matczak 2007, especially chapter 6) Inasmuch as, for instance, in the Polish court practice until ca. 2002 the dominating view was one of the priority of linguistic interpretation and the subsidiary nature of systemic and functional interpretation,[10] which was a result of the strong position of legal positivism in the Polish legal culture (and also the positivist theory of legal interpretation in the form of clarification theory of J. Wróblewski). However, today we are witnessing the "emancipation" of the systemic and functional context of legal regulations.[11]

Directives of systemic and functional interpretation are more and more often treated as "equal" in relation to the directives of linguistic interpretation. Hence, invoking the first ones as interpretative arguments to break the literal meaning of the legal rule is not viewed as an error in the legal *ars interpretandi*, which disqualifies the view, supported by systemic and functional arguments and which stands in opposition to linguistic interpretation. The transformation of positivist-dominated legal cultures involving approving of methods of holistic interpretation might encourage more frequent use of interpretative arguments in the legal discourse, the arguments which pertain to systemic and functional contexts. We may even observe in the legal practice a certain "fashion" to call upon these arguments. Definitely, they become to dominate in the "context of justification" of court decision as judges, according to the "most modern" theories of legal science wish to "authorize" their adjudication with the holistic interpretation of the legal rules.

[10] Compare the analysis of jurisprudence of Polish supreme courts and tribunals in (Morawski 2010, pp. 51–96).

[11] Compare e.g. verdicts of Supreme Administrative Court of Poland: 19 XI 2009 r. , II FSK 976/08; 17 XII 2009 r., II FSK 1121/08; 10 III 2010 r., II FSK 1766/08; 17 III 2010 r., II FSK 1825/08; 27 V 2010 r., II FSK 198/09 or verdicts of Supreme Court of Poland: 26 IV 2007 r., I KZP 6/07.

Turning to cognitive psychology which allows looking into the "context of discovery" of legal interpretation at the level of automated cognitive processes reveals that contrary to the above-mentioned "fashion" within theory of argumentation in the practical legal discourse, semantic arguments enjoy the privileged position. It is them that are characterized with the highest subjective effectiveness, which may translate to the objective effectiveness of the given argumentation. Rational argumentative strategy should take into account the cognitive properties of the human mind revealed in MPFI and in order to strive to achieve the maximum effectiveness it should emphasize semantic arguments, treating systemic and functional ones as subsidiary.

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Argument against Absurdity of Legal Reasoning— Fundamental, Subsidiary or Rhetoric?

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Abstract. The principle "absurda sunt vitanda" (absurdities should be avoided) is well known from the times of Aristotle and Zeno. It was also used by famous Roman jurists. In the modern Europe it was used by English lawyers, as a principle (rule) governing interpretation of law. Thanks to its practicality it was named the "golden rule of interpretation". Together with two other rules: the literal rule and the mischief rule, it composed a canon of interpretative activity of lawyers. It has become also an important argument justifying the use or rejection of certain methods of legal reasoning. The paper attempts to analyse the evolution of argumentation against absurdity in traditional English legal thinking as well as in works of contemporary authors. It is clear that argumentation referring to absurdity is known and may be helpful in civil law countries, however the use of it in countries like Poland might be surprising.

Keywords. Legal reasoning, legal argumentation, legal interpretation, reductio ad absurdum, absurda sunt vitanda, literal rule, mischief rule, purposive approach, legal rhetoric

1.

Debates on legal reasoning cover broad spectrum of issues and controversies. Representatives of legal theory seek for the answers, in particular, to the question of how far can legal inference, which has the purpose of removing legal gaps, eliminating ambiguities in a legal text or logically developing standards, lead. And furthermore:

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to which criteria, standards or directives are a lawyer's interpretation activities subjected. Various answers to these questions are given in legal practice and various justifications are presented. One of the arguments used in order to provide reasons for a choice of certain interpretative decision is called the *"golden rule of interpretation"*. This has been formulated and discussed particularly frequently by English and American lawyers. However, lawyers in continental Europe have also been very familiar with it for a long time, because it directly refers to the *absurda sunt vitanda maxim—absurdities and repugnance should be avoided*. It is not an argument used very often, but certainly it is a strong one: it is not easy to prove rationality or reasonability of an interpretation which is contested for being absurd.

2.

Before developing *absurda sunt vitanda* maxim as core element of the *"golden rule of interpretation"*, we have to make one important reservation. The golden rule of interpretation of the law should not be confused with the *"golden rule" in ethics*. The latter involves the attempt to find a common denominator for various ethical systems, especially those justified by religion. It takes on a positive form, as in the Gospel of St. Matthew (7:12) "Therefore all things whatsoever ye would that men should do to you, do ye even so to them!", or the negative form: "do not do what you do not want to experience from others" (*"Quod tibi non vis fier, alteri ne feceris"*). The ethical golden rule is generally considered permanent and universal, which is why certain philosophers compared it to their own canons of moral choices and acts. Hobbes believed it to be a kind of abridged formula from which all laws of nature can be derived for the use of humans who are lacking in subtlety or time for their own deeper reflections. However, Montesquieu summed up this type of moral consideration as applying to the bases of the law, but a law which refers to some "virtue/value", and not only to the will of the ruler. In turn, Kant believed that the ethical golden rule was trivial compared with the formula of the categorical imperative, while, in turn, J. S. Mill saw the essence of utilitarian ethics in it.[1] (Kant 2002, p. 48; see also Wattles 1996, p. 86)

We should set aside, however, the broader considerations of the ethical golden rule for the purposes of the analysis of the criteria for interpreting the law.

3.

The principle of conducting an interpretation of texts so as not to bring about repugnant results has been observed and respected by philosophers and lawyers for centuries. *Reductio ad absurdum* reasoning was known very well to the Greek philosophers. Some authors claim that the *argumentum ad absurdum* was formulated even by Pre-Socratic philosophers, in particular by Xenophanes of Colophone and Parmenides of Elea. Others say, however, that the Pre-Aristotelian evidence for reflection on argument forms and valid inference are harder to come by. Both Zeno of Elea (born c. 490 BCE) and Socrates (470–399) were famous for the ways in which they

[1] *"In the golden rule of Jesus of Nazareth, we read the complete spirit of the ethics of utility."* (Mill 1863, chapter 2)

refuted an opponent's view.[2] Their methods display similarities with *reductio ad absurdum*, but neither of them seems to have theorized about their logical procedures. (citebobzien2008; see also Daigle 1991)

Less controversial is the opinion that this type of argumentation was developed by the "father of logic", Aristotle. The Philosopher referred rather to "reduction to the impossible", but his arguments are today translated sometimes as pointing out the absurdity of considered arguments. (see for example Aristotle 2006, pp. 19, 42, 66) It is significant—we can read in contemporary texts—that all specific demonstrations mentioned in Prior Analytics are geometrical and that most of them involve indirect reasoning or *reductio ad absurdum*. (Corcoran 2009, p. 14) In addition, Aristotle developed the concept of non-contradiction based on the *"elenctic refutation"*. The *"elenchus"* referred to the Socratic method of argument. When Socrates was using the *elenchus*, he got his opponent to contradict himself with his own words. The opponent was making a proposal that was shown to conflict with other claims to which he agreed. To be consistent, the opponent had to give up one of these claims, and he usually abandoned the original proposal. This was the method of *reductio ad absurdum* familiar to ancient Greek geometers and modern formal logicians and mathematicians. (Gottlieb 2011) Aristotle also classified *reductio* arguments as instances of immediate inference (as opposed to the mediate inferences formalized by syllogisms). Book 8 of Aristotle's *Topics* describes the use of *reductio* arguments as the means by which formal debates were conducted in Aristotle's Academy, suggesting that such an approach was seen as the preferred way to refute an opponent's philosophical position.[3]

In contemporary logic *reductio ad absurdum* is the technique of reducing an argument or hypothesis to absurdity, by pushing the argument's premises or conclusions to their logical limits and showing how ridiculous the consequences would be, thus disproving or discrediting the argument.[4]

The concept of *reductio ad absurdum* is often formulated in a narrow sense and distinguished from, for example, the *argument from adverse consequences*. The latter is a similar but more flawed technique. While *reductio ad absurdum* rejects an argument on the basis that its logical consequences are so unlikely that the argument cannot possibly be sound, the argument from adverse consequences rejects an argument because its consequences are undesirable, or because accepting it could mean accepting something we would prefer not to acknowledge; in most cases, this is regarded as a *logical fallacy*.

Reductio ad absurdum is sometimes understood also as a form of argument where one provisionally assumes one or more claims, derives a contradiction from them, and then concludes that at least one of those claims must be false. Such arguments are intimately related to the notion of paradox. In both cases, one is presented with a pair of claims that cannot both be true (a contradiction), but which cannot be easily rejected. A *reductio* argument, however, is specifically aimed at bringing someone to reject some belief. Paradoxes, on the other hand, can be raised without there being

[2]It is often repeated, the Zeno's well known "Achilles and the Tortoise paradox" was perhaps the earliest example of the *reductio ad absurdum* method of proof.

[3]*Reductio ad absurdum*, New World Encyclopedia. 2007. Retrieved August 22, 2012.

[4]http://rationalwiki.org/wiki/Reductio_ad_absurdum

any belief in particular that is being targeted.[5] In such case one of the assumptions of the *reductio* argument form is that claims which entail a contradiction entail an absurd or unacceptable result. This relies on the 'principle of non-contradiction,' which holds that for any claim 'p' it cannot be the case both that p is true and emphp is false. With this principle, one can infer from the fact that some set of claims entail a contradictory result (p and *not-p*) to the fact that that set of claims entails something false (namely, the claim that p and *not-p*). Though the principle of non-contradiction has seemed absolutely undeniable to most philosophers (the 18^{th} century German philosopher Christian Wolff attempted to base an entire philosophical system on it), some historical figures appear to have denied it (arguably, Heraclitus, Hegel). In more recent years, using the term "dialetheism", some philosophers have argued that some contradictions are true (motivated by paradoxes such as that posed by the statement, "this sentence is not true").[6]

The reference to absurdity of certain statement was used also in the discussions on the reasoning through deduction. Alfred Tarski for example claimed that the expressions 'indirect proof' and 'proof by *reductio ad absurdum*' indicate direct types of proof that use a certain logical law that he calls 'the so-called *Law of Reductio ad Absurdum*'. He alleged that proof of this kind may quite generally be characterized as follows: we assume the theorem to be false, and derive from that certain consequences which compel us to reject the original assumption. (Tarski 1994, p. 44)

4.

Due to the rich debate on the *reductio ad absurdum*, it is hardly surprising that the argumentation from the demonstration of the repugnance of specific assertions, their serious internal contradiction or the conflict between the assumptions made and their hypothetical consequences, has been fully accepted in legal thinking.

Roman jurists repeatedly questioned the views of others by reference to the *reductio (deductio) ad absurdum* argument; they very frequently formulated the assertion *"absurdum est ..."*; they distinguished between various levels of absurdity, etc. This way of thinking is encountered in the writings of such jurists as Gaius, Ulpian, Papinian, Labeo, Iavolenus Priscus, Celsus filius, and others, as well as Seneca and Cicero.

We have to be aware, however, that among lawyers and in legal doctrine (as well as in legal theory) *argumentum ad absurdum* is understood slightly differently than in treatises on logic. Logicians—as we saw above—refer to contradictions of different claims or impossibility of consequences of a claim. According to contemporary philosophers knowledgeable in legal practice, lawyers most often use the phrase *argumentum ad absurdum* in order to qualify consequences of certain rules or interpretations of rules as "notoriously unreasonable", simply stupid or impossible to be achieved. Certain forms of reasoning are regarded as doubtful or fallible, but not necessarily absurd in a logical sense and reasons for such weakness of reasoning can be derived from other aspects of social life, not from logical analysis. (Kotarbiński 1975, p. 167) Specific use of the well known argument constitutes good reason for deeper consideration.

[5] *Reductio ad absurdum*, supra note 3.
[6] *Reductio ad absurdum*, supra note 3.

For lawyers, the method of using the principle of *absurda sunt vitanda* was and probably still is first of all one of the key rules (canons) for interpreting the law. In English law, which developed interesting doctrine of argumentation from absurdity, the avoidance of repugnance is called the *golden rule*, because of the role that was assigned to it. In its original and traditional form the *golden rule* provides that if various meanings can be attributed to a legal text, the court should apply the literal rule, but should remember to avoid an absurd or repugnant result of the reasoning. In *Grey v. Pearson* as early as in 1857 (6 HL CAS 61), Lord Wensleydale said that one should "adhere to the ordinary meaning of the words used, and to the grammatical construction, unless that is at variance with the intention of the legislature to be collected from the statute itself, or leads to any manifest absurdity or repugnance, ... but no further". Lord Wensleydale called this principle of interpretation the *golden rule*.

It is worth noting that the *absurda sunt vitanda* rule may be applied in a *narrower* or *broader sense*. In the first case, if it turns out that the words used in the legal text have more than one meaning, the one which is not or is the least repugnant should be selected. Therefore, in these terms, the "golden rule of interpretation" is the preferential rule for "breaking down", *the rule of choosing* one of the possible meanings. A frequently cited example of such reasoning is the English ruling in 1872 in *R v. Allen* (LR 1 CCR 367). (Kiralfy 1956, p. 132) The defendant was married, but married again. This was obviously an illegal act, as well as being invalid, because a married person cannot "marry" again, unless that person's spouse previously dies or the spouses divorce. When the act was discovered, the accused claimed that he cannot be criminally charged with bigamy, because, from the point of view of family law, the second marriage was invalid and therefore, emphde jure, he did not have two wives. The court rejected such an interpretation of the term "marry" as being repugnant and accepted that this also means the situation where a given person goes through a marriage ceremony. This is because there is no doubt that this second solution is meaningful linguistically, even if it is in conflict with the legal structure of marriage. Therefore, the court found the accused to be guilty of bigamy.

However, in the broader sense, the *absurda sunt vitanda* rule is based on the fact that the court may modify the meaning of a legal text in order to avoid a situation of repugnance, some conflict or another unacceptable solution. In this case, the "golden rule" not only allows a choice to be made between different sensible literal meanings of a legal text but becomes an *independent directive* prejudging the content of the finally formulated provision of the law. Such a concept was accepted, *inter alia*, in the *Re Sigsworth* case of 1935. The English court had to decide on the plaintiff's right to inherit his mother's estate, whom—as was confirmed in criminal proceedings—he murdered. His mother did not leave a will and, therefore, the plaintiff claimed that he should inherit her estate as her closest relative, namely her "legal successor" ("issue"). However, the court applied the golden rule of interpretation and held that a person who murdered a parent cannot become that person's successor, because such an understanding of the contested concept gives rise to our most serious doubts, regardless of what meaning we attribute to the expression "issue" in the texts of

legal acts and court rulings.[7] This case well illustrates lawyers approach to the *absurda sunt vitanda* rule: they are ready to reject certain conclusion not because it is impossible, nor because other legal rule is breached by the fact of recognizing of the conclusion, but because we simply do not accept the consequence of the rule from moral, religious or customary point of view.

English doctrine, especially the traditional doctrine, indicates also that the "golden rule of interpretation" has certain advantages but is also not devoid of defects. It allows judges to avoid absurd or even harsh results, to which the restriction to literal reading might lead. The argument of absurdity can also serve further objectives. For instance, it can justify respecting civic rights. Up to as late as fifty years ago, American authors claimed, for instance, that racial segregation in trains is just as justified as the postulate for witnesses swearing an oath on the Bible before the courts having separate copies of the Bible: white and coloured. (Finkelman 2004, pp. 1001–1002)

On the other hand—there is a warning that the golden rule of interpretation allows judges to "re-edit" texts of statutory law, namely to depart from the meaning assigned to the text by the lawgiver because of the negative assessment of the consequence of accepting the literal meaning of the regulation. The application of the *absurda sunt vitanda* rule can even involve ignoring specific words appearing in the text (Cross 1995, pp. 18–19), namely the departure from the prohibition to conduct a *per non est* interpretation. Here, however, an argument appears of a political nature: after all, only Parliament is entitled to prejudge how addressees of the law should behave and what the consequences will be of their behaviour. This is because the English doctrine of Parliament's political sovereignty must not be forgotten.[8]

5.

For most British and American universities the "golden rule of interpretation" is the starting point for teaching about the interpreting the law, particularly statutory interpretation. It is considered an element of a traditional triad: the golden rule, the literal rule and the mischief rule.

It should primarily be remembered that the rule "absurdities should be avoided" is one of the most *important exceptions* to the principle of aiming to establish the literal sense.[9] This is because the main principle of interpreting English law is the literal rule. According to this rule, the words used in the text of the statute should be given a plain (ordinary, literal) meaning. The Court's objective is to establish the lawgiver's (Parliament's) intention expressed in the words the lawmaker used. If it happened that such an interpretation of the text leads to absurdity or repugnance, the aim should be rather to amend the statute and not to modify the text in the interpretation process.

The literal interpretation is not, however, limited to the use of the literal (semantic, grammatical) method of interpretation. The specific method of conducting

[7] This ruling is similar to the case *Riggs v. Palmer* made famous by Ronald Dworkin. (See Dworkin 1977)

[8] Certain authors claim that wide discretionary power of judges may put into question not only a practice of sovereignty, but also the rule of law principles. (See cite[p. 155]sullivan1997)

[9] Interdependence between golden rule and literal rule is presented in (Cownie, Bradney, and Burton 2005, p. 132).

an interpretation according to the literal rule is well demonstrated by the repeatedly cited ruling in the Sussex Peerage case of 1844 (11 Cl&Fin 85).(Cownie, Bradney, and Burton 2005, pp. 124–125; Cross 1995, pp. 5, 15, 50 and 57; McLeod 2007, pp. 256 and 266) Judge Tindal then stated that "the only rule for construction of Acts of Parliament is that they should be construed according to the *intent* of the Parliament which passed the Act" (emphasis—TS). If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in that natural and ordinary sense. The words themselves alone do, in such a case, best declare the intention of the lawgiver. The literal interpretation should therefore be strictly interrelated with the purposive interpretation and should be of a static nature. In many rulings, the courts accepted the literal wording of the legal text, after all, taking into account the lawgiver's objectives. In *Whiteley v Chappell* of 1868 (LR 4 QB 147), the accused tried to use the vote of a person who had recently died. In this way, he wanted to exercise a dead person's voting rights. The court held that such action is an offence, because a citizen's "right to vote" is that citizen's and nobody else's voting right, so it is inadmissible to "personate any person entitled to vote." As dead people cannot vote, the accused, who was trying to benefit from a third party's right committed an offence. This is because it was not Parliament's intention to grant the right to vote to anyone but living and adult citizens. A different interpretation of the electoral law would be absurd.

The English doctrine of the law refers to various strengths and weaknesses of the literal interpretation of a legal text. It considers the positive side of such an interpretation to be the encouragement of lawgivers to express their intentions clearly and precisely. This is because the literal interpretation assumes that the words which Parliament used will be respected. The obligation to make correct legislation is not therefore justified by the general idea of rationality of the lawgiver, but the routine rationality of judges, as the people responsible for applying the law. However, some authors doubt that, in fact, the risk of rejection of absurd interpretation of statutes by the courts effectively forces lawgivers to make precise laws. (Czarnezki and Ford 2006, p. 846)

Furthermore, according to the British doctrine, the literal rule applies the very doubtful assumption that the parliamentary editors of legal texts are infallible. It ignores the restrictions and weaknesses of the language, which we use. The literature states that the literal rule was irreversibly challenged by Herbert L.A. Hart's open texture theory. (See for example Donlan and Kennedy 2006, p. 97) However, proponents of legal formalism try to challenge the value of H. L. A Hart's concept. F. Schauer emphasizes that lawyers know that fidelity to the letter of the law sometimes brings bad results, but that "sometimes we have to live with that bad result as the price to be paid for refusing to empower judges or bureaucrats or police officers with the authority to modify the language of a rule in the service of what they think, perhaps mistakenly, is the best outcome." (Schauer 2008, p. 1129)

The support of an interpretation which is faithful to the language of legal texts is also a source of certain difficulties for proponents of this orientation. This is because differences are not always noticed between what is referred to as plain, ordinary language and legal, technical language. Such a difficulty—paradoxically—leads to an increase in the discretionary powers of a judge, because reference to the "technical

nature" of various words or phrases, without explicit grounds in the legal definitions, *de facto*, allows for the departure from the ordinary literal meaning of a legal text and the justification of this with the assertion that the interpretative decision arises precisely from the technical sense of the given provision.[10]

From the point of view of the Polish legal theoretician, this view of the literal rule should sometimes be considered naive, because it completely ignores the nature of the language used by lawyers, equally, lawgivers and judges, attorneys etc. Therefore, the specific nature of the legal language, the possible ambiguities and vagueness are usually ignored and simultaneously, there is a weak justification of the criterion which J. Wróblewski refers to as the presumption of everyday language, which other authors contest.(Wróblewski 1992, pp. 130–131)[11] On the other hand, the literal rule of interpretation is similar to the simplified view of the *primacy of literal interpretation* over non-literal types of interpretation and, simultaneously, the principle of subsidiarity of the latter. This simplification involves the direct and indirect combination of the primacy of the literal interpretation with the concept of the presumed easily achievable clarity of the law constituting the dominant experience. In these terms, it transpires that the literal rule of interpretation approximates thinking based on the principle of *clara non sunt interpretanda*. When this trend is noticed, it is easier to appreciate the value of the "golden rule of interpretation": it is a reminder that it is not the primacy of the literal interpretation which is of the universal nature of the "golden rule", but the exception to it.

6.

An important context setting the meaning and application of the "golden rule of interpretation" is finally the third component of the classic triad. The oldest principle of the interpretation of statutory law which is recognized in England is the "mischief rule". It was formulated as early as in 1584, in *Heydon's Case* (3) co Rep 7). In case of doubt, it allows the court to return to earlier legal rules (usually common law), which were in force before the enactment of the new law, and to conduct a critical analysis of the signs of their invalidity, if later statutory law turns out to be vague. This retrospective reference is needed to check what wrong (deceit, human injury, damage, mischief, meanness) the lawgiver actually wanted to avoid. In the cited case, the court accepted that "the true interpretation" of statutes requires the consideration of four circumstances: (1) what principle of common law (*case law*) was accepted before the enactment of the statute which gives rise to interpretational doubts; (2) what social wrong could not be remedied before the statute was enacted; (3) what legal measure was adopted by Parliament to remedy this social ailment; and (4) how the law should be interpreted to overcome or eliminate the social wrong, and simultaneously support the objectives and measures adopted by Parliament while ruling in the case.

In other words, the "mischief rule" was a principle of reconstruction of the *ratio legis* in opposition to the weaknesses of the earlier law and earlier social conflicts.

[10]Some authors are against the *"plain language"* concept (a.o. Malleson 2005, p. 66)

[11]Also American lawyers recognize variety of forms of legal language and the role (at least potential) of an ordinary language. (See Rose 2005, pp. 3 and 10)

Reference was made in this way to the lawgiver's objectives, but the voluntarism of statutory law was ameliorated. Leaving examples of rulings which are very distant in time, it is suggested that the "mischief rule" was applied, *inter alia*, in the ruling in *Smith v. Hughes* of 1960 (2) All ER 859). In this case, six women were accused of soliciting prostitution "on the street or in a public place." However, the facts of the case were more complex, because one of the accused women was on the balcony of a house, while the others were separated from the street by a window through which they could be seen. The court held that the accused are guilty of the act with which they are indicted, because the "social wrong" is soliciting prostitution and this was precisely the reason for enacting the Street Offences Act of 1959.

The assessment of the "mischief rule" is multifaceted. The application of this rule allows judges to reach out for legal measures which Parliament wanted to accept when enacting the statutory law in order to remedy social problems, which could not effectively be prevented by common law. After all, it is reiterated that the "mischief rule" was formulated in times when statutory law was a relatively rare source of law, while editing texts was not as precise as today. Therefore, there is a risk of making substantial changes to statutory law despite Parliament's exclusive powers. In addition, this principle requires reasoning based on uncertain analyses of former practices ("how was it when there was no law ...") and the doubtful construction of: "what would happen if (the statute were not enacted ...)."

Contemporary English lawyers and legal theoreticians combine the golden rule and the mischief rule into the so-called *purposive approach*. It combines elements of both of the interpretative rules, frequently replacing them. An example of the solution which illustrates the new approach is the ruling in *R v Registrar General ex parte Smith* of 1990 (2) All ER 170). The proceedings were held in connection with Article 51 of the British Adoption Act of 1976. This regulation provided that after attaining the age of 18 years anyone is entitled to obtain a birth certificate disclosing the identity of that person's real parents. Mr. Smith applied to the respective register for such a certificate, but the document was withheld because Mr. Smith was a dangerous murderer staying in a psychiatric hospital at that time. One of his former victims was his alleged adoption mother. The literal interpretation of this regulation referred to the obligation to issue the required document to the applicant, although the court adjudicating on the registry office's decision to reject the application adopted a purposive approach stating that "Parliament could not have intended to promote serious crime" and risk further natural persons after the disclosure of their identity.

It is interesting that English literature also contests the allegation that the purposive approach justifies accession into Parliament's powers by the courts applying an extensive interpretation (*interpretatio extensiva*). In such an unauthorized manner, the courts become—so to speak—"*positive lawgivers*" in this area, where case law has been excluded by statutory law. In fact, it is mentioned that, in contemporary times, the dependence between the courts and Parliament should not be treated in a simplifying manner by accepting that Parliament always has a position of supremacy, while the courts are simply subordinated to it. After all the purposive approach is supposed to promote efficacy of the legal rules adopted by the lawgiver, rather than tolerate them being undermined or limited through the use of a strict interpretation.

The *purposive approach* is fully legitimate, even if it means withdrawing from the literal interpretation.[12] (See McLeod 2007, p. 266)

The purposive approach also assumes that an interpretation is dynamic. This is because it should be remembered that the idea of the literal rule of interpretation has not rejected such a criterion as objectives or the lawgiver's intentions at all, but required that they are understood statically, as the actual intentions of the historic lawgiver. The change in this position is confirmed by the impact of the "golden rule of interpretation": after all, repugnance and absurdity are usually described by reference to a certain view of current reality. Among others, a well known Belgian philosopher and philosopher of law of Polish origin, Chaïm Perelman, also reminded us that within the domain of law the *argumentum ad absurdum* has a *quasi-logical character*. It assumes the reference to such premises as facts which are regarded to be rational or at least non-absurd. (Perelman 1982, p. 65)

7.

Several English and American authors do not limit themselves to reiterating interpretative directives accepted in the doctrine, or their simple assessment involving the indication of the advantages and disadvantages. A well-known British (Scottish) legal philosopher, N. MacCormick, emphasized that the purposive approach, also referred to as the "functional interpretation," has the nature of reasoning from the consequences; it simply involves the establishment of which values, objectives or consequences (and whose) will be promoted. (MacCormick 2005, p. 134) The Canadian author, R. Sullivan, emphasizes the same. The rule of avoiding repugnance, or, in other words, "consequential analysis" requires that the interpreter takes into account the effects and consequences of the interpretation. For this reason, it is presumed that an interpretation which leads to favourable consequences of the application of certain laws *takes precedence* over such an interpretation, which leads to irrational, unjust and unacceptable effects. This means that the "golden rule" can also correct *an interpretation based on every method*, including the "purposive approach." A legislation which promotes the interests of specific groups will also be absurd, because the conviction that legislation should serve the attainment of the public interest (the common good) dominates. (Sullivan 1997, p. 1001) The *golden rule* is therefore valuable, not only because of its usefulness in argumentation for the interpreter, but also because of its social value.

In the same spirit, N. MacCormick points out that the arguments in the interpretative process often appear in pairs, just as normally two parties (e.g. plaintiff and defendant) in the judicial process: the argument using the technical language is in conflict with the argument using the plain language, the argument from the earlier precedents is in conflict with the argument of a functional nature etc. The moment in which these opposites or even diverse arguments are summarized is the establishment of the *fundamental intentions of the lawgiver*. N. MacCormick emphasizes that certain authors treat the argumentation process as a simpler model: normally starting from the literal arguments, moving through the systemic arguments and reaching

[12] See the ruling: *R v Bradcasting Complaints Commission ex parte Owen*, dated 1985 (2 All ER 522).

out for the purposive or axiological arguments, when earlier arguments do not give a satisfactory result. The doctrine, which expresses this model of interpretation, is the result of the application of precisely what the English and Scottish lawyers call the "golden rule of interpretation." (MacCormick 2005, pp. 137–139) If such reasoning were to be treated as a simple set of interpretative directives arranged in chronological order, such a model would not be satisfactory.

On the contrary, British and American literature indicates that, for the purposes of the "golden rule of interpretation," the notion of absurdity refers to the conflict with the idea of reconstructed justice based on the principles accepted in case law or some internal contradiction in terms of inferred objectives of public policy implemented through legislation. Therefore, it is not so that the purposive and axiological argumentation can only appear if other arguments do not ensure irrefutable results. The argument itself which binds the primacy of the literal analysis may become a form of repugnance.

As a result, in fact the *"golden rule" is not a rule*. It is better treated—as N. MacCormick writes—as an imperative to apply the maxim of practical interpretative wisdom, indicating how various types of arguments can be reconciled in the case of conflicts between them. The rule of avoiding absurdity does not provide us with any simple criterion based on thinking "either—or" as to which interpretation is correct and which is not. This is because the golden rule indicates a certain method of approaching difficulties and disputes in argumentation which are encountered, instead of a rule of thumb for interpreting legal texts. Using the terminology of the European continental theory of the law, it can be said that the golden rule is a certain programme of legal policy.

In referring to the social context, to the states of things considered socially acceptable, the "golden rule of interpretation" approximates the imperative to avoid absurdities and the prohibition to commit a manifest injustice. (See Bellia 2006, p. 1518) In this sense, the famous Gustav Radbruch's formula can be consistent with the golden rule. In these terms the rationales for referring to rectitude and justice may be counter-arguments with respect to literal, systemic, purposive, functional and other rationales. The *"absurd sunt vitanda"* rule is moving away from its original narrow treatment as a correction of the literal rule based on the inspirations taken from the formal logic and is being transformed into a broad directive for reasoning in terms of practical understanding. (MacCormick 1993, p. 25)

8.

In conclusion, it could be argued that N. MacCormick, R. Sullivan and others have distanced themselves from the old English tradition. However, in the light of the above, can it actually be accepted that English judges are still bound by the "rules of interpretation", including the "golden rule"? Not really. The position that the directives for interpretation are not "rules" in the sense of standards which are binding on the interpreters is increasingly being encountered in English literature. In the justification of the ruling in *Maunsell v Olins*, 1975 (1 All ER 16), Lord Reid concluded that the directives for interpretation *"are our servants not our masters,"* they are an aid in the interpretation process, encompassing certain assumptions, presumptions or pointers. Their use requires weighing up competitive arguments and

thinking of interpretation more in terms of a wide range of "techniques", principles and "approaches." (See Feteris 2008, p. 23) This method of thinking was shared by F. Bennion, considered in England as the most outstanding theoretician on the interpretation of the law. Interpretation criteria are not, in fact, rules which are binding on judges and it is only out of respect for tradition that interpretation criteria are still called "rules." According to F. Bennion, the assertion that the interpretation directives can boil down to three simple rules: the literal rule, the golden rule and the mischief rule is worth as much as "an old parrot cry." (Bennion 2009, p. 2) There are no three rules of interpretation, there is also no single "golden rule" in the sense of a universal criterion from which it would be possible to infer, or to which it would be possible to bring all indications regarding the method of conducting an interpretation of the law. On the contrary, F. Bennion writes; there are *a thousand and one interpretative criteria*, they have different statuses: some are simply rules of formal logic, others have been expressed in statutes (e.g. in the *British Interpretation Act* of 2005), and yet others constitute the achievements of the theory of the law, the doctrine, or broadly understood legal culture. Fortunately, we do not apply all of these criteria at the same time, but the interpreter must face such richness. F. Bennion concludes "that is the nearest we can get to a golden rule, and it is not very near." (Bennion 2002, pp. 3–4)

It is similarly claimed that, in judicial hard cases, which, in view of the difficulties of interpretation, end up with the courts of appeal, it is impossible to treat rules of interpretation (directives) as simple "operating instructions" or "argumentative schemes". There is also no real sense in looking for the one correct legal rule specified *a priori* by the lawgiver or its fixed intention. Instead, the interpretation process should be seen as a process of the development of the law in accordance with such an understanding of the law that judges accept and their priorities. The rules of interpretation are supposed to reduce judicial subjectivity, but cannot completely eliminate it.

The evolution of the English theory of the law with respect to the interpretation and argumentation criteria is significant: it encompasses the transition from the "hard rules" of legal reasoning to the thorough and argumentative thinking about the law, encompassing various functions of the law and various modes of legal reasoning. If we take into account great heritage of philosophers developing logical reasoning, starting from Zeno of Elea and Aristotle and including contemporary logicians, philosophers of law and legal theorists, we can see very long way from elenctic refutation in which *reductio ad absurdum* played, at least *implicite*, key role, to the process of legal reasoning subject to few formal requirements in contemporary judicial practice.

9.

As the final endnote, let me make a comment on Polish judicial practice. In the case law of the Polish Supreme Court one quarter of the rulings, which use the *"reductio/deductio/ad absurdum"* argument, are rulings in which the court does not explain why it considers a specific position to be repugnant. The court only expresses its definitive assessment: "X's opinion/interpretation is absurd." However, when reading the ruling, such an argument is very frequently not obvious at all. This means

that the Supreme Court arbitrarily excludes certain options that are inconsistent with its interpretation of the law or with a selected method of settling the case. Likewise, the court neither makes an assessment of the various possible literal meanings of the legal text (semantic context), nor does it consider what the intentions of the lawgiver were or could have been, nor does it comment on the potential consequences of the given interpretation (functional context). There are sufficient rulings to be able to exclude pure chance. It may mean that there are situations where the court reaches for the argument of *ad absurdum* reasoning and uses it only as a *rhetoric argument* in a narrow sense. In effect a court (the Supreme Court) only moves the burden of proof that a particular interpretation is not absurd to another party. This method of reasoning *ad absurdum* pretends to be the use of the "golden rule of interpretation," except that, in this case, the "gold" is fake. Such argumentation deserves to be severely criticized by the commentators on court rulings.

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Argument from Fairness in Judicial Reasoning

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Abstract. This paper applies two argumentation schemes, argument from fairness and argument from lack of knowledge, to model the reasoning given by Judge McCarthy supporting his decision to divide the proceeds of a homerun baseball in the case of Popov v. Hayashi. The Carneades Argumentation System is used to model the reasoning. Both schemes are presented, and then applied to the account given by Judge McCarthy as the basis of the reasoning in the case. A special feature needed to apply the scheme for argument from fairness to the case is extracted from Perelman's theory of justice (Perelman 1980). The resulting analysis extends a previous analysis of the same case that also used Carneades (Gordon and Walton 2012).

Keywords. Argumentation schemes, Carneades Argumentation System, Popov v Hayashi, justice, argument from lack of evidence, standards of proof.

1 Introduction

Argumentation schemes are proving to be increasingly useful for modeling reasoning in legal cases (Bench-Capon and Prakken 2010), but it is also becoming apparent that the existing list of schemes in (Walton, Reed, and Macagno 2008, chapter 9) needs to be supplemented with some new schemes that are particularly important for this purpose. This paper applies such a new scheme, deriving from the work of Perelman (Perelman 1980) on justice, to the reasoning given by Judge McCarthy supporting his decision to divide the proceeds of a homerun baseball in a case where the factual evidence appeared to be deadlocked as a basis for arriving at a decision. The case of Popov v Hayashi (Popov v. Hayashi 2002 WL 31833731 (Cal. Superior, Dec. 18, 2002)) has become a benchmark for study in the field of artificial intelligence

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and law (Wyner, Bench-Capon, and Atkinson 2007). A special issue of the journal *Artificial Intelligence and Law* (volume 20, no, 1, 2012) has been exclusively devoted to it. The contributions of the papers in the special issue and the importance of the case are summarized and explained by Atkinson (Atkinson 2012).

The issue of the case concerned which fan should have ownership rights to a homerun baseball hit into the stands by Barry Bonds. There were many arguments put forward by both sides on the issue of which of two claimants should be awarded the right to possession of a ball that bounced from the mitt of one who was attacked by a crowd into the possession of the other. After examining all these arguments in much detail, Judge McCarthy decided that any award to one party would be unfair to the other. He concluded that since each party had an equal and undivided interest in the ball, its monetary value should be divided equally between them. The Carneades Argumentation System (Gordon 2010) has already been comprehensively applied to the argumentation in Popov v. Hayashi (Gordon and Walton 2012). In the present paper its application to the use of argument from fairness by Judge McCarthy in the case is modeled in greater depth using two versions of a scheme representing this type of argument. Using these schemes, along with some other schemes necessary to carry out the job, it is shown in finer detail how argument from fairness provides the basis of the reasoning that led to the decision to divide the proceeds between the two parties equally instead of awarding it to the one or the other based exclusively on the factual evidence in the case. A key factor is that the factual evidence was judged to be insufficient for argument of the one side or the other. The paper takes a different approach to modeling the scheme for argument from lack of evidence to reveal a link between this type of argument and argument from fairness.

Section 2 offers an introductory explanation of the argumentation schemes needed for the work of the paper. Section 3 briefly explains the essentials of the Carneades Argumentation System necessary for the analysis of the case. Section 4 presents and explains the argument from fairness along with another argumentation scheme needed for the work of paper called argument from lack of evidence. Section 5 presents a description of the line of argumentation in the case summarized from the statement of decision of the judge, Kevin M. McCarthy (McCarthy 2002). Section 6 contains a reconstruction and analysis of the main argument in the case using the Carneades Argumentation System. Section 7 states the conclusions of the paper.

2 Argumentation Schemes

Argumentation schemes represent, at an abstract level, forms of reasoning used in everyday conversational argumentation, and in other contexts, like legal and scientific argumentation (Bench-Capon and Prakken 2010). Many of the most common schemes, still recognized as centrally important in the literature, were identified in (Hastings 1963), (Perelman and Olbrechts-Tyteca 1969), and (Kienpointner 1992). The schemes described and explained in chapter 9 of (Walton, Reed, and Macagno 2008) include the ones for argument from expert opinion, argument from sign, argument from commitment, argument from lack of knowledge, practical reasoning (argument from goal to action), argument from cause to effect, the sunk costs argu-

ment, argument from analogy, three kinds of *ad hominem* argument, and four kinds of slippery slope argument. Historically, schemes are the historical descendants of the topics, representing common types of arguments, originally catalogued by Aristotle.

Two schemes that we will have to use in this paper are the one for argument from expert opinion and the one for argument from lack of knowledge, widely known in the literature on fallacies as the argument from ignorance. To explain how schemes works, it is best to begin with a description of these two schemes.

Major Premise: E is an expert.

Minor Premise: E asserts that A is true (false).

Conclusion: A is true (false).

The reader might be interested comparing this form with a slightly more complex version of it given in (ibid., p. 310).

This form of argument is defeasible, meaning that it only holds tentatively in a given case, subject to the possibility of new evidence might come in that can defeat it. It is important to recognize that argument from expert opinion is subject to critical questioning, and that therefore it needs to be treated as an open-ended type of argument rather than as a conclusive one of the kind that might be represented by deductive logic or any other monotonic system where the addition of new premises will not make the argument default. This set of critical questions matches this scheme for argument from expert opinion (ibid., p. 310).

CQ_1: *Expertise Question.* How credible is E as an expert source?

CQ_2: *Field Question.* Is E an expert in the field that A is in?

CQ_3: *Opinion Question.* What did E assert that implies A?

CQ_4: *Trustworthiness Question.* Is E personally reliable as a source?

CQ_5: *Consistency Question.* Is A consistent with what other experts assert?

CQ_6: *Backup Evidence Question.* Is E's assertion based on evidence?

CQ_1 questions the expert's level of mastery of the field F. CQ_4 questions the expert's trustworthiness. For example, if the expert has something to lose or gain by saying A is true or false, this evidence would suggest that the expert may not be personally reliable. The asking of the critical question defeats the argument temporarily until the critical question has been answered successfully.

Argument from ignorance, also called inference from lack of knowledge, argument from lack of evidence, argument from negative evidence, or the *ex silentio* argument, is a subtle argument that is used very commonly but is not easy to identify because of its subtlety. It is associated with what is called the closed world assumption in computing (Reiter 1980). Traditionally in logic, this form of argumentation is called the *argumentum ad ignorantiam*, argument from ignorance. The standard form of the argumentation scheme representing this type of argument is the following one, taken from (Walton, Reed, and Macagno 2008, p. 327).

> Major Premise: If A were true, then A would be known to be true
>
> Minor Premise: It is not the case that A is known to be true.
>
> Conclusion: Therefore A is not true.

The argument from ignorance was traditionally for many years portrayed as a fallacious form of argument in leading logic textbooks, although it is some of them it is recognized that it can be reasonable in some instances. Recent research in argumentation studies however, has turned this around by finding many cases showing that it is a reasonable but defeasible form of argument in many instances.

In some of the examples of argument from fairness we will examine below, we will see that evaluating arguments from ignorance is closely related to burden of proof, and depends on standards of proof that are set in place in an argument (Gordon and Walton 2009). For these reasons, below we provide a reformulated version for the scheme. Instead of calling it argument from ignorance (the negative term 'ignorance' suggesting a fallacy), we will call it the standard scheme for argument from lack of evidence.

> If there is insufficient evidence to prove that A is acceptable [according to the standard of proof required] then A is not acceptable.
>
> There is insufficient evidence to prove that A is acceptable [according to the standard of proof required]. Therefore A is not acceptable.

This scheme represents a better form of argument from lack of evidence, or argument from negative evidence as it might also be called.

3 The Carneades Argumentation System

Schemes are now being used in computational argument mapping systems, for example Araucaria[1] and Carneades[2]. A user can also select argumentation schemes from a menu and use them to analyze and evaluate arguments, as well as to search through the database for new arguments to prove a claim. The Carneades Argumentation System is a mathematical model of argumentation (Gordon and Walton 2006) that has an Open Source argument mapping graphical user interface available at no cost to users. The version that presently exists can be used to analyze, construct and evaluate arguments using defeasible forms of argument like argument from testimony, argument from analogy, argument from precedent, practical reasoning, and many other kinds of arguments (Gordon 2010).

Carneades models critical questions by drawing a distinction between two kinds of premises in an argumentation scheme, assumptions and exceptions. The premises of the scheme that are explicitly stated are modeled as assumptions, meaning that they are taken to hold unless they are challenged, but if they are challenged the arguer as to back up the premise with some evidence, or else the argument is treated as no longer acceptable. The kind of premise that represents an exception is taken

[1] Araucaria can be downloaded from http://araucaria.computing.dundee.ac.uk/doku.php.
[2] Carneades can be downloaded from http://carneades.github.com/

to remain acceptable even when the question is posed. The premise is only shown to be not acceptable when evidence is given to back up the allegation made in the critical question. Consider the field question matching the scheme for argument from expert opinion. Let's say the questioner asks whether E is an expert in the field that A is in. When this question is posed by a challenger, the arguer who put forward the argument from expert opinion has to provide some evidence that the expert is an expert in the appropriate field. Otherwise the argument from expert opinion defaults. The burden of proof is the other way around with the consistency question, however. When a challenger asks whether is A consistent with what other experts assert, merely asking that question does not defeat the argument. To defeat the argument the questioner asked to present some evidence that is not consistent with what other experts assert. For example he could claim that another expert says the opposite.

Let's consider the example shown in figure 1. The original arguer puts forward an argument to prove this claim that Ed is insane, based on an argument from expert opinion. The two premises are his statements that Dr. Bob says that Ed is insane, and that Dr. Bob is a psychiatrist. Since it can be taken as an additional implicit assumption that psychiatry is the appropriate domain of knowledge into which claims about insanity fall, the argument is persuasive. In the Carneades argumentation system, the text boxes in which these two premises are contained are colored in green, indicating that both premises have been accepted. Assuming that the argument from expert opinion is applicable, the conclusion that Ed is insane is also automatically shown in a green box by Carneades. But now suppose that the critical question is asked whether what Dr. Bob says is consistent with what other experts assert. In the Carneades System, the proposition that what Dr. Bob says is not consistent with what other experts assert is shown as an exception. In the system, this premise is shown as posing a contra argument (indicated by the minus sign in the argument node), an argument that goes against the original argument from expert opinion. The mere stating of this exception does not defeat the original argument from expert opinion. However, if supported by appropriate evidence it can defeat the original argument.

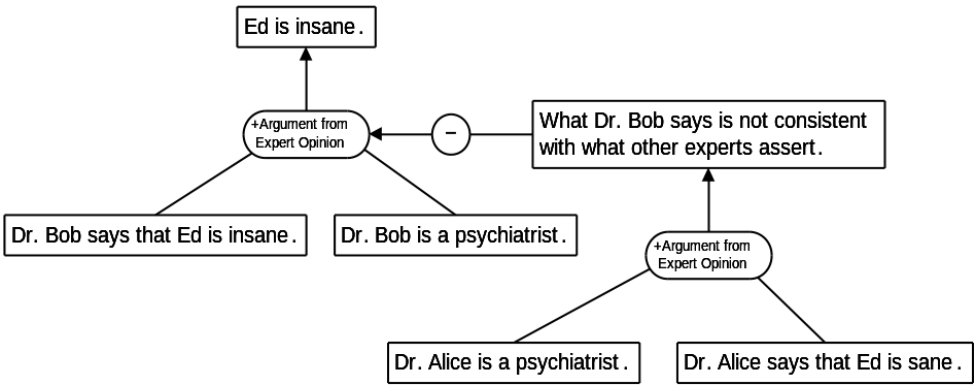

Figure 1: Example of argument from Expert Opinion.

If we look at the right side of figure 1, we see that the conclusion 'What Dr. Bob says is not consistent with what other experts assert' is supported by two premises: Dr. Alice is a psychiatrist, and Dr. Alice says that Ed is sane. Once these two premises are accepted, assuming that the argument from expert opinion scheme is applicable, the conclusion that what Dr. Bob says is not consistent with what other experts assert has been supported by evidence. Therefore the second argument defeats the original argument from expert opinion. The structure represents the common situation often called the battle of the experts in the courts.

Now we have some grasp of how argumentation schemes work as devices for analyzing, evaluating and inventing arguments when incorporating into argument mapping technology, we can go ahead and examine the schemes for argument from fairness.

4 Schemes for Argument from Fairness

In a study that identified different kinds of arguments used by the party leaders in a Canadian provincial election (Walton and Hansen 2012), several instances of a particular kind of argument called argument from fairness were found. Four argumentation schemes representing versions of this type of argument were proposed. Several versions of the scheme for argument from fairness were considered and evaluated. Of these, only two need to be considered in this paper, a simpler version and a more complex version. We begin with the scheme that will be called here the simple version of argument from fairness. In this scheme, φ represents an action, or in some instances is taken to represent a policy for action. α and β (or others) are agents or groups of agents. ϕ is an alternative action (or policy) being considered.

Major Premise: If φ is fair (just) to α and β, φ should be carried out.

Minor Premise: φ is fair (just) to α and β.

Conclusion: φ should be carried out.

There are five critical questions matching this scheme.

CQ_1: Are agents α and β of the same kind?

CQ_2: In what respects are α and β equal?

CQ_3: In what respects are α and β different?

CQ_4: Are there special circumstances such that α and β should be treated differently?

CQ_5: Are there reasons supporting ϕ?

Argument from fairness fits into the classification system of (Walton, Reed, and Macagno 2008) as a species of argument from values. In the model of value-based argumentation of (Bench-Capon 2003), the strength of an argument depends on the comparative strength of the values advanced by the parties.

When argument from fairness is used in everyday conversational reasoning, it is often used in a negative form. Children are very familiar with using this form of argument in the simple saying that they often used repeatedly, "That's not fair". Since this form of argument appears to be so common, it is useful to have a negative version of the simple scheme for argument from fairness.

> Major Premise: If φ is unfair (unjust) to α and β, φ should not be carried out.
>
> Minor Premise: φ is unfair (just) to α and β.
>
> Conclusion: φ should not be carried out.

The problem with using the term 'equally' in these two simple versions of the scheme is that equality is such a highly contested concept in politics and law that there is a need to avoid building any particular political philosophy into the argumentation scheme from fairness. (Perelman 1980, p. 11) provided a solution to this problem by formulating an underlying principle of "formal" or "abstract" justice. It is "a principle of action in accordance with which beings of one and the same essential category must be treated the same way". But how does the notion of an essential category work in this principle of justice? According to (ibid., p. 11), everyone is agreed despite their political disagreements, that to be just is to give the same treatment to those who possess a particular characteristic that groups people together into a class or category defined by the fact that its members possess this characteristic. So for example, some contend that fairness requires that equal treatment be given to all persons who have the same needs. For the adherents of this political view, the essential characteristic will be that of having the same needs. Others might contend that equal treatment should be given to all persons who have the same merit. For the adherents of this political view, the essential characteristic will be that of having the same merit. Different groups or persons advocate different political views to these questions, so that no system secures universal agreement. Underlying this diversity, however, all are agreed that to be just is to give the same treatment to those who are equal with regard to one particular characteristic defined as an essential category (ibid., p. 10). Perelman's insight on how the abstract notion of fairness (justice) can be extended to accommodate particular cases by building it into a more complex version of argument from fairness will now be shown.

Perelman's views on the principle of justice suggest building a more refined version of the scheme based on the simple scheme for argument from justice presented above. The variant of the argumentation scheme for argument from fairness presented below is called the complex version of the argument from fairness.

> Premise 1: Agents α and β are of the same kind.
>
> Premise 2: φ treats α and β equally.
>
> Premise 3: If φ treats α and β equally, then φ is fair.
>
> Interim Conclusion: φ is fair.
>
> Premise 4: If φ is fair, then φ should be carried out.
>
> Ultimate Conclusion: φ should be carried out.

The complex version of the argument from fairness treats the argumentation scheme as a chaining together of two inferences. The first inference leads to the conclusion that the action or policy φ is fair. The second inference uses this interim conclusion as a premise that is combined with and additional conditional premise, leading to the conclusion that φ should be carried out.

The complex version eliminates the need for the first critical question, leaving only the other four critical questions matching the complex scheme. There also is a negative version of the complex scheme for argument from unfairness. Next we need to see how these two schemes can be applied to a relatively simple example of argument from fairness.

One of the examples from the election project (*Toronto Star* 14/09/2011, 'Hudak Still Intends to make Sex Offender Registry Public') can be used to apply the argument mapping tool of the Carneades Argumentation System to it. In the example, Tim Hudak, the Progressive Conservative leader, told reporters that he believes that correctional officers are in favor of a work program which would require criminals to perform manual labor for up to forty hours a week in exchange for some compensation. His opponents derided the plan, calling it "a chain gang initiative". Hudak presented the following counter-argument: we are just asking the criminals to do what every other hard-working Ontarian does, an honest day's work instead of spending the day working out to become better criminals. As shown in (Walton and Hansen 2012), what Hudak says essentially contains three arguments. The first is that correctional officers are in favor of the work program. The second is that criminals should be treated in the same way as other citizens with respect to having to put in an honest day's work. The third is that it is better for criminals to spend the day working than for them to spend the day "working out to become better criminals". In addition to these three arguments, there is also a fourth argument put forward those who called the original argument "a chain gang initiative". This fourth argument is a contra argument against the work program proposal put forward by Hudak.

Figure 2 shows how argumentation schemes can be applied to the argumentation in the example, including a scheme for argument from fairness and a scheme for argument from expert opinion.

The third scheme is that of argument from classification. According to this argumentation scheme, if something fits a certain classification, and all things fitting that classification have a certain property, then this thing will have that property. For example, if something fits the classification of being a whale, and all things fitting the classification of being a whale have the property of being a mammal, then this particular thing is the property of being a mammal. In this instance Hudak's plan is classified as what is called "a chain gang initiative", which is taken to be something negative. In general, if a plan or policy can be described as something negative, it should not be carried out. So in this instance the plan should not be carried out. Because of the negative nature of the argument in this instance, in the argument map in figure 2, it is represented as a contra argument. It offers a reason for not carrying out the work program. The ultimate conclusion is the statement that the work program should be carried out, shown in the text box at the top. On the left at the top, the statement that correctional officers are in favor of the work program

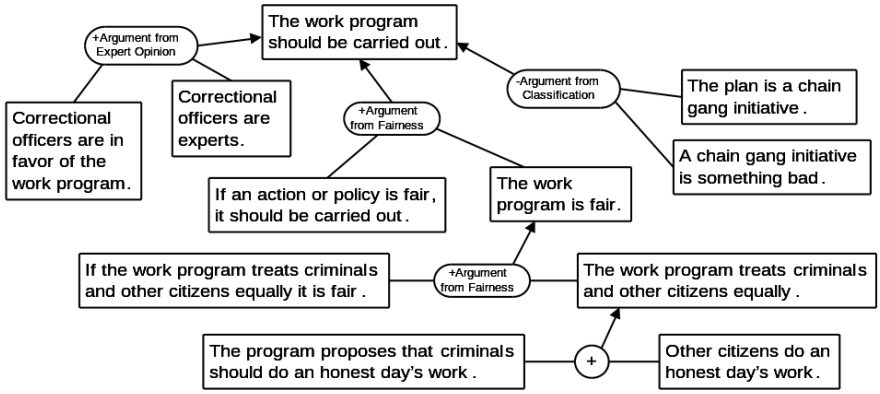

Figure 2: Argument Diagram of the Work Program Example

is taken as one premise in an argument from expert opinion supporting the ultimate conclusion.

Notice in figure 2 how argument from fairness is represented in two different argument nodes, reflecting its representation in the format of the complex scheme for argument from fairness. At the top stage of the argument, the simple scheme for argument from fairness is applied. The argument tells us that if an action or policy is fair, it should be carried out. That is one premise. The other premise is that the work program is fair. According to the requirements for the application of the simple argumentation scheme for argument from fairness, the scheme can now be applied and provides a transition by a defeasible inference to the conclusion that the work program should be carried out. This application of the simple scheme is only part of the application of the complex scheme, which requires that another argument be chained to the simple argument from fairness. According to this way of structuring the argument as shown in figure 2, considerations of equal treatment are brought to bear to support the conclusion that the work program is fair. This conclusion is then reused as a premise in the simple argument. By combining the two arguments, a complex argument from fairness is produced.

Figure 2 also illustrates the support of one of the premises of the secondary argument from fairness by evidence. The one premise of the argument from fairness stating that the work program treats criminals and other citizens equally is supported by the argument containing the two premises shown at the bottom of figure 2. The argument is that the program proposes that criminals should do an honest day's work, and that other citizens do an honest day's work, so the work program treats criminals and other citizens equally.

5 The Case of Popov v. Hayashi

Barry Bonds, playing for the San Francisco Giants, hit his 73rd home run in 2001 at PacBell Park in San Francisco, breaking his previous record. The ball, worth millions

of dollars (Mark McGwire's 70th homerun ball hit in 1998 sold for $ 3 million), went into the stands in the arcade section. It landed briefly in the upper portion of a glove worn by a fan, Alex Popov, who was at that moment thrown to the ground by a mob of fans trying to obtain it. At some point, the ball left Popov's glove and ended up on the ground. Another fan standing nearby, Patrick Hayashi, who was not part of the mob that had knocked Popov down, picked up the loose ball and put it in his pocket. Somebody in the crowd videotaped the incident. When the man making the videotape pointed the camera at Hayashi, he held the ball in the air for the others to see.

Popov later sued Hayashi contesting ownership of the ball, and arguments were presented on both sides. The case was tried in the Superior Court of California and the arguments on both sides along with the basis of the decision have summarized by the presiding judge, the Honorable Kevin M. McCarthy (McCarthy 2002). Hayashi argued that possession does not occur unless the fan has complete control of the ball. This claim was supported by an expert, Professor Brian Gray, who said that a ball is caught (possessed) only if the fan has complete control of it. However, a number of other legal experts also participated in a forum during the trial to discuss the legal definition of possession and the group could not reach agreement on how 'possession' should be legally defined. If Popov had obtained control of the ball, he would have been entitled to possession of it, but the partial catch did not give certainty of obtaining control of the ball, since Popov had to reach for it and may have lost his balance while doing this. Thus the evidence was insufficient to show that Popov caught the ball, possessed it, and therefore had a legal right to the ownership of it.

Popov argued that Hayashi had illegally interfered with his possession of the ball, on the basis that Popov had taken steps to achieve possession but was interrupted by the unlawful action of others. According to Judge McCarthy's legal analysis (ibid.), Popov pled four causes of action, but we will only mention two of them here, called conversion and trespass to chattel. Conversion is defined as a wrongful exercise of dominion over the personal property of another party. Essentially it is wrongful withholding of the property of another party, and requires interference of the accused party, which could be constituted by an unjustified refusal to give the property back to the other party. But there was no evidence of conversion of the part of Hayashi. Trespass to chattel takes place where personal property has been damaged or with one party has interfered with the other party's use of the property. But there was no evidence sufficient to support trespass to chattel on the part of Hayashi.

There were other interesting arguments in this case as well, including comparisons to some precedent cases involving the catching of wild animals. But what is of particular interest to us here is the ultimate ruling of Judge McCarthy and the way he supported it. Although there were strong arguments on both sides, Judge McCarthy ruled that neither argument was strong enough to meet its burden of proof. This being a civil case, the standard of proof is that of preponderance of the evidence. Judge McCarthy concluded, as quoted below (ibid., p. 10), that since ownership of the ball requires full possession and that since neither party could claim full possession of the ball, based on the evidence, it would be unfair to award the ball to either side.

An award of the ball to Mr. Popov would be unfair to Mr. Hayashi. It would be premised on the assumption that Mr. Popov would have caught the ball. That assumption is not supported by the facts. An award of the ball to Mr. Hayashi would unfairly penalize Mr. Popov. It would be based on the assumption that Mr. Popov would have dropped the ball. That conclusion is also unsupported by the facts.

Judge McCarthy (ibid.) described the case as posing a dilemma, but then he added that that there is a middle ground. Since it would be unfair to award the ball to either one side or the other, he concluded that the best solution would be to sell the ball and divide the proceeds equally between the two parties. He had shown, in his remarks above, the previous conclusion that the evidence was insufficient to show that Popov had caught the ball, and therefore that it could not be proved, by the standard of proof required, that Popov had ownership. Similarly Judge McCarthy had shown in his remarks above that there was insufficient evidence to prove Hayashi's claim to ownership of the ball could be proved by the evidence Hayashi presented. This posed a dilemma, because the contention of neither side could be proved on the basis of the evidence presented in the trial. To resolve the dilemma, Judge McCarthy proposed that the ball should be sold and the proceeds divided equally between the two parties.

6 An Analysis of the Main Argument from Justice

The Carneades Argumentation System has already been applied to the case of Popov v. Hayashi in the full analysis of the argumentation in the case provided by Gordon and Walton (Gordon and Walton 2012). This paper shows in detail that since Popov, the plaintiff, failed to prove either of his claims of conversion or trespass, and since Popov had the burden of proof, Judge McCarthy should have decided the case in favor of Hayashi. Hayashi did not need to prove that he had the right to possession of the ball. He only needed to produce arguments sufficient to prevent Popov from proving his case (ibid., p. 13). Nevertheless, Judge McCarthy went on to propose a third solution based on argument from fairness.

Gordon and Walton presented an argument map (figure 8, p. 13) of Judge McCarthy's reasoning. On his representation of the case, there are three possibilities represented for arriving at an equitable solution. One is to give the ball to Popov. Another is to give the ball to Hayashi. The third solution is to sell the ball and divide the proceeds equally between the two parties. Using the argument diagramming tool of the Carneades Argumentation System, it is possible to construct an argument map that is comparable to the one presented by Gordon Walton, but uses argument from fairness, as well as argument from ignorance, to build an alternative reconstruction of the argument that exploits the explicit use of argumentation schemes. The analysis of Walton and Gordon presented their modeling of this part of Judge McCarthy's reasoning as a deliberation problem. In the analysis below, which represents argumentation schemes on the argument map as key components of the structure of the reasoning in the case, the approach of presenting the case as a deliberation problem is preserved.

Judge McCarthy's ultimate conclusion that the ball should be sold and the pro-

ceeds divided equally is shown in the top text box in figure 3. It represents an action, or a recommendation for action, that should be carried out based on the reasoning shown supporting it in figure 3.

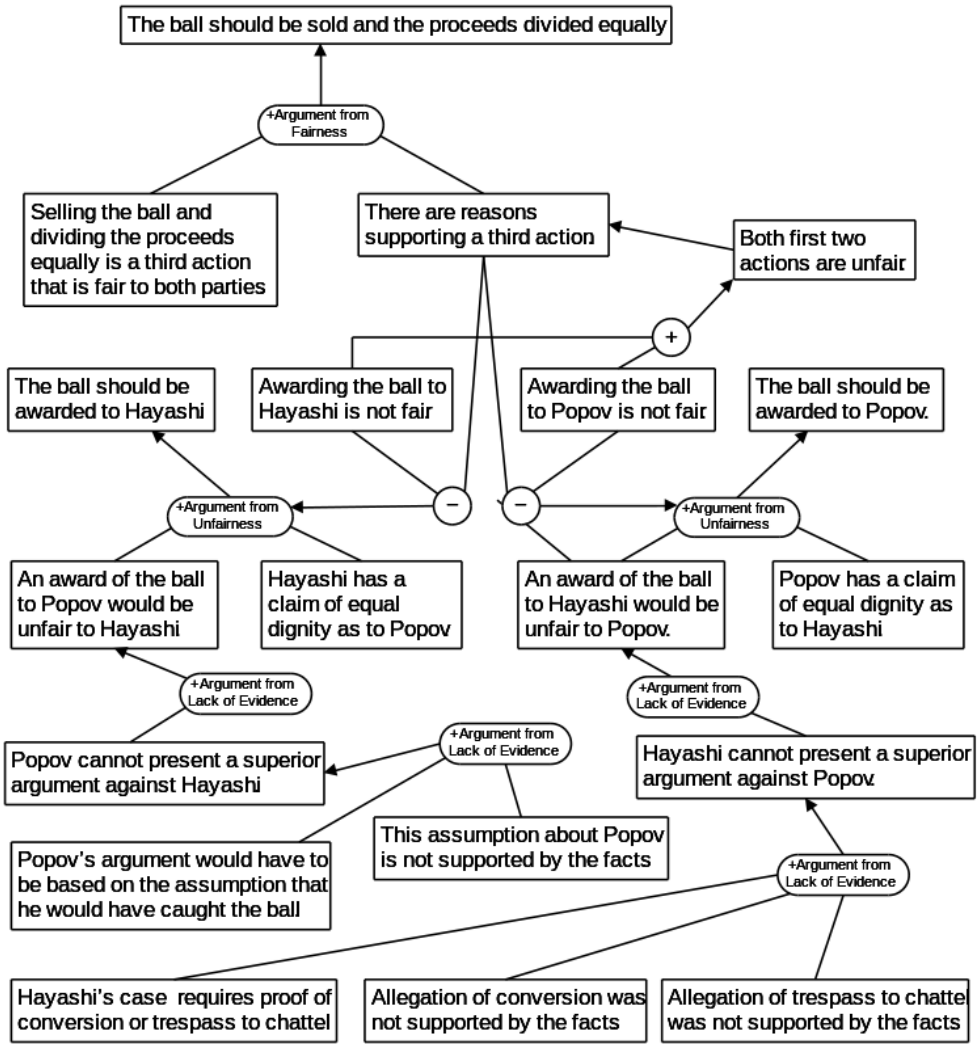

Figure 3: Argument Map of McCarthy's Argument for his Decision in Popov v. Hayashi.

What is shown by this version of the argumentation in the case is that Judge McCarthy's main argument combines three instances of use of argument from fairness with four instances of argument from lack of evidence. The best way to appreciate how this argument map is supposed to represent the reasoning of Judge McCarthy in the case is to start with the bottom and work upwards. The two arguments from

lack of evidence at the bottom of the diagram show that Popov cannot present a superior argument against Hayashi, and also that Hayashi cannot present a superior argument against Popov. The conclusions of these two arguments show, again using argument from lack of evidence as the scheme, both that an award of the ball to Popov would be unfair to Hayashi and that an award of the ball to Hayashi would be unfair to Popov. These two conclusions can now be used as premises in a pair of arguments that fit the scheme for argument from unfairness. Both these instances of argument from unfairness fit the complex form of the scheme, since each has a premise that makes a claim of the quality in a certain respect, specifically, a claim of equal dignity. But once we get to these two arguments, we appreciate the dilemma pointed out by Judge McCarthy. We have a pair of equally persuasive arguments. The conclusion of one is that the ball should be awarded to Hayashi. The conclusion of the other is that the ball should be awarded to Popov. The reason given that an award of the ball to Popov of would be unfair to Hayashi is that there is insufficient evidence to prove Popov's argument against Hayashi. Hence this argument, as shown in figure 3, is labeled as an instance of argument from lack of evidence.

Also, if we look at the next level, the two text boxes shown at the next level from the bottom of figure 2, there is another argument from lack of evidence supporting the conclusion that Popov cannot present a superior argument against Hayashi. One of the premises is the proposition that Popov's argument would have to be based on the assumption that he would have caught the ball. The other is the proposition that this assumption about Popov is not supported by the facts. In other words, since the evidence that would be required to support a superior argument by Popov against Hayashi is lacking, the conclusion drawn is that Popov cannot present a superior argument against Hayashi. This argument too is an instance of argument from lack of evidence.

Similarly, if we look down the right side of the chain of argumentation shown in figure 3, we see that there are two comparable instances of argument from lack of evidence supporting the premise of the argument from fairness above that an award of the ball to Hayashi would be unfair to Popov.

To appreciate the next step in the argument we have to look at the statement in the text box in the middle of the second level saying that there are reasons for supporting a third action. It needs to be recalled that this is critical question CQ_5 matching the scheme for argument from fairness. Using the approach of the Carneades Argumentation System in this instance, we represent this statement as an exception. It functions as an undercutter attacking the two arguments from unfairness just below it. If supported by evidence, it will defeat both of these arguments. And as shown on figure 3 at the right, it is supported by a statement saying that both of the first two actions being considered are unfair. This statement is in turn supported by the two other statements that awarding the ball to Popov is not fair and awarding the ball to Hayashi is not fair. Hence both arguments from unfairness are defeated. At the top of the diagram we see the argument from fairness supporting the ultimate conclusion of Judge McCarthy in the case that the ball should be sold and the proceeds divided equally. It proposes this third alternative as an action that is fair to both parties and that is supported by the body of evidence indicated below the premise that there are reasons supporting a third action.

The application of the argumentation schemes for argument from negative evidence and argument from fairness in the Carneades Argumentation System have therefore proved helpful to bring out the deeper logical structure of the evidential reasoning in Judge McCarthy's summary of how he arrived at the conclusion that the ball should be sold and the proceeds divided equally. The comprehensive treatment of Judge McCarthy's reasoning in the case of Popov v. Hayashi (Gordon and Walton 2012) included thirty-three arguments and used other argumentation schemes including argument from witness testimony argument from circumstantial evidence, arguments from legal rules, argument from precedent, practical reasoning, and argument from tradition. In the Gordon and Walton analysis, the type of argument that we have called argument from fairness, based on the principle of equitable division, was modeled as argument from legal principle.

7 Conclusions

By using a special argumentation scheme for argument from fairness, and by representing other schemes to apply to the arguments of Judge McCarthy in the case chosen for study, this paper goes deeper in certain respects than the analysis of the case by Gordon and Walton (ibid.). The new analysis has adopted Perelman's philosophical point of view on argument from fairness, as a way of seeing this type of argument has a complex structure based on a premise asserting that an abstract principle of equality is a necessary part of the complex version of the scheme. The conclusion of the paper is that there should be two variants of the scheme for argument from fairness, the simple version that can be quickly applied to initially identify an instance of the use of this type of argument in a given discourse, and a more complex version that can be used for analytical purposes of reconstructing an instance of argumentation based on fairness in a given case. The main finding of the paper is the presentation and justification of these two schemes, and the application of them to a legal case that is of special importance in its own right in artificial intelligence and law.

Another important lesson demonstrated by the paper is the revealing of the link between argument from lack of evidence and argument from fairness. A different approach to argument from lack of evidence has been taken in this paper, based on the analysis of burdens and standards of proof provided by the Carneades Argumentation System. In traditional logic, the argument from ignorance has been taken to be a fallacy, whereas in this paper, in sharp contrast, it has been shown to be a fundamentally important species of legal argumentation on which argument from fairness is based. It would seem that in certain cases, including the case of Popov v. Hayashi, argument from fairness always has to be based on the applicability of argument from lack of evidence a s a necessary component.

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Models of Legal Reasoning: An Attempt of a Practical View

Lukáš Hlouch[a]

Abstract. This contribution deals with the problem of two different models of legal reasoning: linear and dialectic reasoning. It shows the nature of these two models and presents examples of their usage in legal practice. An analysis of positives and negatives of these models is also included. As a conclusion, mutual relationship between the two models of reasoning is explained from the point of view of the author.

Keywords. Linear reasoning, dialectic reasoning, adjudication, models of legal reasoning, hard cases.

1 Introduction

Legal reasoning represents primarily the everyday practice of lawyers and that is why still more and more attention is paid to its theoretical conceptions (let us here remind the concept of supremacy of legal practice often mentioned by Ota Weinberger). (Weinberger 1995, p. 161) This contribution shall be endowed to an analysis of models of legal reasoning, which are usually used in adjudication and administrative proceedings. The scope of this text is to offer a brief insight into most frequent models of legal reasoning and then critically evaluate their effects as an important element of the scheme of legal communication between a decision making body and its addresees (parties to the proceedings) as well as between individual authorities in the process of judicial (constitutional) review.

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2 Models of Legal Reasoning in Adjudication

Legal theory as well as legal rhetorics offer various models of legal reasoning, that can be used in adjudication in order to justify a legal decision (decree, judgment, order etc.). These models differ from the points of view by virtue of which the functions of legal argumentation can be recognized. At this point, I accept Robert Alexy's opinion that legal reasoning (as well as legal interpretation) has its internal and external aspects. While internal aspects are connected with the logic of reasoning, string of premises graduating to a conclusion, external aspects of legal argumentation are connected with the language forms and structures of reasoning, stylistics of legal texts etc.[1] (Alexy 1995, pp.17–18) Mutual ties between internal and external aspects of legal reasoning are considerably interesting, because the lack (or absence) of one of them does not inevitably mean that a concrete argument is wrong. We can imagine a rather convincing legal argument, which can be logically (deductively, inductively) incorrect (this is sometimes a problem with inductive legal reasoning) (Sobek 2011, pp. 143–175), on the other hand, some logically correct arguments are not very convincing due to the fact that they are not sufficiently justified by "strong" legal reasons (values, principles, equity, fairness etc.). Both these combinations can be seen in adjudication practice and case law.

Using internal and external points of view, models of legal reasoning can be sorted into two groups: a) inductive and deductive reasoning, b) linear and dialectic reasoning. For the purposes of this text, we may leave aside two most important ways of logical reasoning (induction and deduction) and concentrate on the problem of external image of legal argumentation—linear and dialectic approaches. (Haft 1999, pp. 98–108) These approaches to legal reasoning are also characterized as styles of legal reasoning.[2] These two models differ both by their complexity, and by their structure. (MacCormick and Summers 1997, pp. 21, 107, 147, 193, 225 and 319)

2.1 Linear Approach

In this model, arguments or premises follow a rather simple string one after another. This model is characterized by a visible effort of the arguing authority to create a non-controversial, clear and consistent string of arguments. The aim of this effort is to show a unique legal solution of a case which is correct. Therefore, this model is considered to support one of the most important legal values, which is legal certainty. Theories which describe law as a type of social discourse claim that this effort is for legal communication typical.[3] Legal arguments are intended to be correct, if they are not, they could produce legal desinterpretation and misunderstanding. This model can provide correctness through unambigous interpretation

[1] This opinion has been shared also by other authors (See Wróblewski 1990, p. 108).

[2] MacCormick, Summers, R. and others distinguish in their comparative study different styles of legal argumentation, i. e. deductive, syllogistic, magisterial, argumentative, discursive and legalistic according to individual jurisdictions and systems of adjudication (See MacCormick and Summers 1997, pp. 21, 107, 147, 193, 225 and 319).

[3] These are the theories of legal discourse represented mainly by German authors J. Habermas, R. Alexy, K. Günther etc. They have been influenced by legal hermeneutics (H. G. Gadamer), Ronald Dworkin's theory (law as integrity) and others.

of—sometimes ambigous—legal concepts. This approach can easily be understood with application of language game theory and speech-acts theory (L. Wittgenstein, J. L. Austin).[4] If legal reasoning meets the criteria of a language game (so called justification game), the players (parties to the proceedings, court, administrative authority) are subject to follow certain rules of arguing as participants of a language game.[5] Thus correctness plays the role of a standard requirement by which both the individual arguments and the conclusion itself are measured. While creating a linear string of arguments, the participants of such a language game prefer clear and intelligible reasoning usually built up on the deductive method. Then the conclusion seems to be the only correct legal answer to the legal case which is to be solved. Arguments in this model of reasoning are only the most relevant factual statements or legal sentences.

As to the effect of this model of reasoning, two important remarks shall be made. Firstly, the linear argumentation could be more easily understood even by the participants who are not legally educated. Secondly, linear model may show even very complex legal problems in an easy "start—finish" image, where there are no doubts about the correctness of the conclusion at all. In the Czech republic, until 90-ties of the 20^{th} century only the linear model of argumentation was most common in adjudication. As Z. Kühn clearly explains, this was the result of an era of socialist normativism, which was characterized by simplification of legal positivism and strong formalist approach to the text of legal provisions. (Kühn 2004, pp. 103–106) The effect of this stable approach was that even hard (complex) cases were decided and justified by this model legal reasoning. The illusion of the only correct answer (solution) of a legal case, which can be potentially achieved by logically correct linear string of factual and legal (particularly statutory) arguments has become a pervasive aspect of legal thought of judges and clerks. On the other hand, having been faced with a soft (easy) case, the judge or clerk does not need to use more sophisticated models of reasoning, for the case is simply clear.

An example of linear approach in practice—procedural case:[6]

LS1:	The decision of an appellate authority may not be appealed any more; such an appeal is inadmissible.
LS2:	The court shall reject an application, which is inadmissible under the law.
FS1:	After the decision of an appelate authority was delivered, the appellant submitted another appeal against the appelate decision.
C:	His appeal is inadmissible.
Result:	The court decided upon rejecting another appellant's appeal against the same decision.

[4]For a brief overview of Austin's and the late Wittgenstein's main ideas compare (Morris 2007, pp. 231–242 and 292–308).

[5]For a special type of a language game used in adjudication, Aulis Aarnio uses the term "justification language game" which might have three possible alternatives: syllogistic (inferential), analogical and inductive. (See Aarnio 1977, p. 99)

[6]LSx means "legal sentence", FSy means "factual statement", C means "conclusion".

Similar string of legal and factual arguments represents the merits of this procedural case and the majority of such decisions is based on this model of reasoning. Of course, this model of reasoning is used in substantive argumentation, too. Reasoning to the merits of the case is always characterized with considerable emphasis upon factual reasoning, in which the court has to show that the case has been decided upon well ascertained facts obtained in a trial. The factual premises are then the outcomes (conclusions) of process understanding of the state of affairs by the judge. The case—however complicated in practice it may really be—in this model of legal reasoning seems to be easy. Linear argumentation suffices with traditional legal syllogisms tied up in a practical string of arguments and that is the reason why it is sometimes referred to as "deductive" or "syllogistic". (See Taruffo and Torre 1997, p. 147)

2.2 Dialectic Approach

This model of reasoning is based on the mechanism of controversy among individual reasons forming the string of arguments. Under the concept of "dialectics" we may conceive a study of dialogues and dialectical systems of communication. (Sartor 2005, pp. 304–307) Unlike the linear approach, this model favours explicitely individual justice. Applying this model, the participants of reasoning usually discover other controversies that arise in the string of arguments. From the point of view of authority, there are two possible schemes of dialectic reasoning as to the participants: either there are participants who are equal in their positions and have no power to give any orders to each other (e. g. contractual reasoning, doctrinal reasoning etc.), or there is one of the participants who has the power to decide and determine the correct conclusion of the justification game (court, administrative body, arbitration body etc.). This is also the case of adjudication reasoning used in judicial and administrative proceedings. The authority (court, adminstrative body) posses the neutral position among the parties. In some proceedings, the authority represents some kind of public interest (e. g. criminal proceedings, misdemeanour proceedings, construction proceedings etc.).

To the positives of a dialectic approach belongs certainly the complexity of reasoning presented to justify a legal case. In judicial or administrative adjudication, this model is applied usually in hard cases, where the decision-making body is not quite certain of the correct solution of the heard case. Thus it truly argues for individual alternatives of the right answers to the legal case and then strives to decide upon one of them to determine the solution of the case. The reasoning, then, is complex, but also very extensive and sometimes complicated. Then it is also referred to as "argumentative" or "discursive" style of legal reasoning. (See Morawski and Zirk-Sadowski 1997, p. 147) In fact, there is usually not only one string of reasoning, but more strings (threads) of arguing. The criterion of relevancy of each argument in the string is not fully satisfied in this model, since the main effort is made to present all possible arguments for all possible cases. Sometimes not only "legal" arguments[7] are

[7] "Legal" argument means a legal sentence stemming from a legal source respected under a certain legal system regulating a certain legal community (i. e. legal provisions, legal principles, case law, doctrine etc.).

applied in this model—the authority may raise other sources (sociological, economic, political aspects of the case). This is typical for the procedures of review (judicial review, constitutional review) which is usually practised by higher (supreme) and constitutional courts. However, this kind of reasoning is not very often when these courts justify procedural aspects. To these purposes, even these courts use linear model of reasoning.

Example of a dialectic approach:

> Constitutional Court of the Czech republic applied the extreme form of this approach in its judgment on the case of providing information on the former membership of Czech judges in the Czechoslovak Communist Party until 1989.[8] In this case, the court created a new legal rule, according to which the person (authority) obliged to provide information on certain matters has the duty to detect the information even if it does not maintain this concrete data and provide it to the entitled person (applicant). From the constitutional point of view, this case was based upon a collision of the right to free access to information and protection of privacy of judges.
>
> To fill in the "gap" in the valid law, the Court applied sociological and even masmedial arguments (quotations of some sentences published in newspaper articles) in a very complex and complicated strings of reasoning that went very far from the legal merits of the case. Finally, the Court decided in favour of an applicant and his right to free access to information on the membership of a concrete judge in the Czechoslovak Communist Party and quashed the judgment of the Supreme Administrative Court, which did not grant this right to the applicant.

This case may serve as a perfect example of an extremely dialectic argumentation and as a confrontation of the two approaches at the same time. In its effort to provide individual justice for the applicant, the Constitutional Court employed not only legal argumentation, but mainly politological and ideological.

On the other hand, the Supreme Administrative Court in its previous judgment decided upon the case applying simple legal syllogism and linear reasoning.[9] This case shows how these two models may lead to a completely different conclusions, or more precisely, how they can be applied to justify different legal conclusions in the same case. To make the distinction more evident, let us show a brief model of the concurrent legal reasoning of the Supreme Administrative Court in the cited judgment:

LS1: Inviolance of a person and its privacy is guaranteed and may be restricted under the law only (Art. 7 sec. 1 of the Charter of Basic Rights and Liberties, hereinafter "Charter")

[8] See judgment of the Constitutional Court of the Czech republic from 15^th November 2010, No. I. ÚS 517/10 (http:\\nalus\usoud.cz). It has become famous under the title "Case of Red Member Cards", for the members of the Czechoslovak Communist Party used to have red member cards.

[9] See the judgment of Supreme Administrative Court of the Czech republic from 6^th January 2010, No. 3 As 10/2009-77, http:\\www.nssoud.cz.

LS2: Everybody has the right to privacy protection against unlawful obtaining, publishing or other misusing his personal data (Art. 17 sec. 4 of the Charter)
LS3: The law distinguishes so called common personal data and protected personal data (§ 4 of the Privacy Protection Code)[10]
LS4: The data on *political views* belong to protected data under the valid law (§ 4 of the Privacy Protection Code).
LS5: The protected data may be processed only on the grounds of a previous consent of their holder (§ 9 of the Privacy Protection Code).
LS6: The data on *political membership* are not a precondition for being a judge under the valid law.
FS1: The applicant requested the data of concrete judges as to their former *membership* in Czechoslovak Communist Party until 1989.
C: The applicant has no right to free access to information on former membership of a concrete judge in the Czechoslovak Communist Party.

As can be clearly seen from this reasoning which justified the solution of the case by the Supreme Administrative Court, the main logical problem seems to be the inference between the legal concepts of "political views" and "political membership". The Supreme Administrative Court applied a sort of analogical view and—using an isomorphism—tacitly supposed the similar sense of these two concepts. However, this was not the crucial point which the Constitutional Court aimed at having quashed this judgment. Instead, the Constitutional Court used quite different premises referring to different sources of teleological argumentation (politics, media, literature, reports of international organizations etc.) to justify its opinion of unconstitutionality of this judgment.

3 Practical Aspects of both Models of Reasoning

In my opinion, the question of usage of these models explained above is in most cases not a matter of controversy or dilemma, since the characteristics of each case is the decisive aspect upon which the participants of the reasoning (particularly the authority with the power to decide upon the case) in the selection of an appropriate model of reasoning. Still, in some cases it is either a matter of personal preference of the participants, which model is more suitable for a concrete case. One of the most important factors is always legal culture and style of reasoning usual in a certain legal community.

As for Czech legal community, it seems that both models of legal reasoning are used in adjudication. But for most cases (either civil, criminal or administrative) the courts and administrative bodies prefer to use linear model of legal reasoning (sometimes reduced to a mere legal syllogism in its elementary form (higher premise = legal sentence, lower premise = statement of facts). On the other hand, higher courts (particularly Supreme Administrative Court and Constitutional Court) have started to apply dialectic model of reasoning still more often in cases, which are complex. To this conclusion one more remark shall be made: higher courts and the

Constitutional Court are in different material position from lower courts as to the numbers of clerks (legal assistants) who help judges to lead the proceedings and to prepare the drafts of the decisions. The dialectic model of reasoning is much more time consuming to elaborate. This factor causes that the model of reasoning is very hard to use when the lower courts are over-loaded with cases to decide and shall avoid useless delay in hearing and deciding cases.

4 Conclusion

As was explained above, in the context of adjudication linear and dialectic models of legal reasoning are rather complementary than in a controversy. Dialectic (or sometimes discursive or argumentative) reasoning is undoubtedly more complex, but it could be regarded as redundant in soft (easy) cases, where there is one right undoubted answer (in Aarnio's terminology, these are decisions issued by an institutionalised conduct). (Aarnio 1977, p. 180) In hard (complex) cases it is regarded as a guarantee of a maximum effort of a public authority to provide individual justice for the participants to the proceedings. Facing these cases public authorities issue interpretative decisions which are based on a decision of choice. Linear legal reasoning is governed by the relevancy of arguments and hardly ever comprises other types of arguments except for legal ones. Still it is regarded more predictable by legal community and represents a kind of legal certainty (from the textualist point of view). However, usage of linear reasoning in hard cases may lead into misunderstanding or even unconstitutional legal conclusion. To provide its functions effectively, adjudication needs both models of legal reasoning to react comprehensively to the needs of everyday social life in legal community.

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How to Reach a Compromise on Compromise?

Izabela Skoczeń[a]

Abstract. Legislative deliberations among various democratic bodies result most of the time in some sort of compromise. Consequently, this compromise is often a major source of law in democratic countries. But what exactly does it mean "to reach a compromise" and, more importantly, how does this phenomenon affect the quality of the regulations issued by a democratic body? Do the regulations issued as a result of compromise differ importantly from those resulting of a unanimous decision? And if so, is the difference perceivable only at a purely linguistic level or does it entail further consequences? Shall we then avoid compromise or rather resort to it as often as possible? Finally, is compromise a source of interpretation? This paper is an attempt to provide at least a partial answer to most of the questions posed above. The answer seems not only a riddle at the theoretical level, but also has numerous practical consequences. It can affect the quality of the regulations issued as well as the level of legal certainty (or predictability) in a particular society, especially in those governed by continental (positivist) legal systems. Let us start this analysis with an attempt to define this complex and mysterious notion of legislative compromise. There exists numerous definitions of what compromise could be, but there is one that seems particularly interesting: let us take a closer and critical look on Andrei Marmor's definition.

Keywords. Law, language, open texture, interpretation, compromise.

1 Introduction

Legislative deliberations among various democratic bodies result most of the time in some sort of compromise. Consequently, this compromise is often a major source

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of law in democratic countries. But what exactly does it mean "to reach a compromise" and, more importantly, how does this phenomenon affect the quality of the regulations issued by a democratic body? Do the regulations issued as a result of compromise differ importantly from those resulting of a unanimous decision? And if so, is the difference perceivable only at a purely linguistic level or does it entail further consequences? Shall we then avoid compromise or rather resort to it as often as possible? Finally, is compromise a source of interpretation? This paper is an attempt to provide at least a partial answer to most of the questions posed above. The answer seems not only a riddle at the theoretical level, but also has numerous practical consequences. It can affect the quality of the regulations issued as well as the level of legal certainty (or predictability) in a particular society, especially in those governed by continental (positivist) legal systems. Let us start this analysis with an attempt to define this complex and mysterious notion of legislative compromise. There exists numerous definitions of what compromise could be, but there is one that seems particularly interesting: let us take a closer and critical look on Andrei Marmor's definition.

2 A. Marmor's Definition of Legislative Compromise

In "Philosophy of Law" A. Marmor, in his query aimed at finding the sources of interpretation in law, defines compromise reached during the legislative process as "tacitly acknowledged incomplete decisions, that is decisions that deliberately leave certain issues undecided". (Marmor 2011, pp. 154–155) Three assumptions define a compromise so perceived:

(I) "X would want to say "P" intending to implicate Q.

(II) Y would want to say that "P" intending to implicate non-Q.

(III) X and Y act collectively intending their collective speech in saying P to remain undecided about the implication of Q." (ibid., p. 155)

Marmor argues that this underlying intentions are not so clear and only sometimes they are conflicting or incompatible. Let us concentrate on such "conflict" cases. Both X and Y have a goal to reach in enacting a law, that is either to implicate Q or not Q. X will hope that the courts will interpret P in a way that implicates Q, and Y will hope that the courts will interpret P in a way that implicates not-Q. Interpretation of the regulation is the key factor here. This descriptive thesis can be presented in the figure 1.

From a descriptive perspective everything is coherent. Let us imagine we are the legislative body and have a particular domain C that needs to be regulated by the law we are about to create. We divide context C into 3 subsections. In C_1 and C_2 it is clear what the law implicates as it is either Q or $\neg$Q. However, in subsection C_3 we as a collective body have reached a compromise and it is not clear whether the issued regulation implicates Q or $\neg$Q. Everything now will depend on the way the

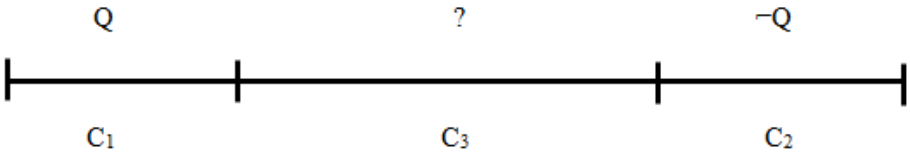

Figure 1: Andrei Marmor's definition of compromise.

courts will interpret the given regulation in context C_3. We are solely "pushing" the decision to the court as another institutional body that will consider the issue.

First, such a solution does not comply with Montesqieu's vision of the division of powers, as it is the court that plays the role of the legislator here. A decision that should be taken at the legislative level is taken by a judicial body (due to a deliberate action of the legislative body). The legislative body gives a fraction of its powers to the judicial authorities. The power-divide principle is especially vital for continental law systems, as in common law the precedent doctrine creates a more flexible situation.

Second, such a theory of compromise is purely descriptive. It may not be understood as a sound normative theory (a recommendation what the legislative body should do), since as such it would be in conflict with another fundamental element of the rule of law principle: the idea of protected expectations toward the judicial process. Interpretation of law is supposed to cure rather accidental and unwanted uncertainties, and not deliberate ones. A compromise in Marmor's sense should be rather perceived as a defect of the legislative process. Let us note that, in his "Philosophy of Law", he maintains that law is made to be determinate. It is while comparing art to law that he makes the following statement:

> Works of art are created with an intention to be subject to different possible, potentially conflicting interpretations. (...) A work of art is not intended to convey a determinate communicative content that can simply be understood (or misunderstood); it is created with an intention to be somewhat indeterminate in content, or ambiguous in various ways, open to various interpretations. None of this, however, applies to law. In fact, art and law could not be less similar in this respect. Legal instructions are meant to generate concrete results, providing people with particular reasons for action, thus aiming to affect our conduct in some specified ways. (...) Art is there to be interpreted; law is there to be acted upon. (ibid., pp. 142–143).

In common law systems where the doctrine of the binding precedent is broadly recognized the process of moving decisions from the legislative level to the courts is widespread. However, it is worth noting that precedents, at least at a normative level, are mostly meant to solve cases where there is lack of regulations. So a strong thesis that we can allow indeterminate regulations, when they are the result of legislative

compromise, seems dubious.

The two theses posed by A. Marmor (indeterminate regulations can be the result of legislative compromise and law is supposed to be determinate) are in conflict. Maybe by suggesting a different concept we could leave the law determinacy's postulate intact and at the same time benefit from legislative compromises.

3 A Revised Model

The need to stay in compliance with the requirement of the enacted regulations being determinate leads us to the presentation of a domain regulated by the legislator as depicted in figure 2.

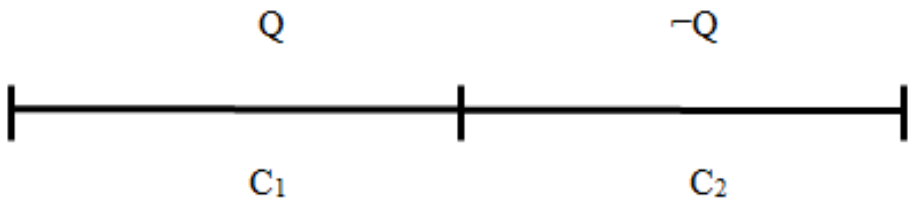

Figure 2: A domain regulated by the legislator.

In the abovementioned situation a compromise has also been reached. Among the regulated domain C, with the use of some criterion, two subdomains C_1 and C_2 have been distinguished. In the subdomain C_1 it has been settled that the regulation would imply Q, and in the subdomain C_2 it would imply ¬Q. So instead of leaving a fraction of the regulated domain C completely undecided at the mercy of the courts, the legislator has determined when and what should be implied by the regulation.

Nevertheless, reality is unpredictable and it is common that a new context, that had not been foreseen by the legislator, suddenly arises. As a result, we have a new unregulated fraction of the domain as depicted in figure 3.

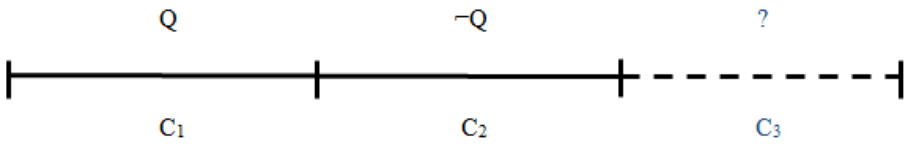

Figure 3: An altered model.

C_3 does not have to appear at all, but unfortunately it appears very often. For instance the roman saying "mater semper certa est"[1] was recently overthrown by the occurrence of surrogate motherhood.

[1]The mother of a child is always certain.

It is precisely in the abovementioned context C_3 when the court has no choice and can only resort to interpretation as the law is indeterminate. However, this indeterminacy is completely unintended. The legislator had every reason to think, while issuing the regulation concerning the domain C, that the law he has created is perfectly determinate. This way the principles of division of powers or the postulate of the determinacy of law remain intact.

After the occurrence of C_3, the judicial body is now faced with a truly hard case. The court has a fraction of the domain that is not regulated and must resort to interpretation to solve it. A representative of the hard-positivist view in legal theory would probably state that C_3 is now a separate and distinct legal norm. But it seems much more rational to treat C_3 as the phenomenon of open texture. However, is just the possibility of indeterminacy also a source of interpretation? Do we interpret as well, while there is no regulation at all? Let us take a closer look on those issues in the next sub-section.

3.1 The open texture phenomenon

F. Waismann in his article "Verifiability" was the first to notice the open texture phenomenon through Ludwig Wittgenstein's example: a chair that disappears and then reappears again. Is this a chair? Or just an illusion? We could pose the question in a slightly altered manner: can the meaning of the word "chair" be applied in this concrete instance? Waismann distinguished vagueness of words (understood as the occurrence of borderline cases) from open texture, which he understood as the possibility of vagueness. This concept was later developed by Herbert Hart. (Endicott 2003, p. 37) In fact, what Waissmann depicted, was the impossibility of verifying any empirical sentence, because of the open texture phenomenon. (Bix 1991, p. 56) Its definition, included in these considerations will be that of Waissman's—the possibility of vagueness (of the occurrence of borderline cases) due to empirical and linguistic grounds.

4 Intention

A. Marmor, in his definition of compromise, is emphasizing mainly the intention of the legislator to implicate either Q or ¬Q. He distinguishes 3 possible situations:

1. It is possible that the legislator has not given the question any thought at all; it simply did not occur to his mind.

2. The legislator may have thought about the question, but either failed to make up his mind or intended to delegate the decision to the courts, which practically amounts to the same thing.

3. Finally, there is the possibility that the legislator had a determinate intention that the rule should—or should not—apply to bicycles as well" (Marmor 2005, p. 129)

The second possibility is particularly interesting, while it makes direct reference to Marmor's concept of compromise described above, whereas the definition suggested

in this paper makes reference rather to the first point (with a slight alteration—the question did not occur in the legislator's mind because it could not have due to purely empirical grounds—C_3 has not yet occured). Enacting a law without taking a decision and conveying a definite intention is equivalent to delegating the decision to the courts. Not only does this pose a serious problem to the divide of powers in a democratic state, but also it directly makes compromise the source of interpretation. If we understand interpretation as a choice between different possible options, such choice can be guided by different rules (linguistic, systemic, teleological etc.), then the situation when a court has to make a decision (between Q and ¬Q) and regulate what has not yet been regulated does fall within the scope of a borderline case. Marmor's notion of compromise is a deliberate creation of borderline cases at the legislative level. It leads to the situation, where not only the language, but also the legislator becomes a source of borderline cases. It allows the situation when a legislative body deliberately creates a vague statute. Vagueness occurs when there is already a law and it is not clear whether to apply it or not (we are faced with the necessity of making a choice between Q and ¬Q) or it can occur as a result of open texture. According to Marmor legislative compromise is a direct source of indeterminacy in law. The alternate definition of compromise formulated in this paper only "allows" a law to be source of open texture, and so reduces the indeterminacy and interpretation-necessity problem to a minimum. It is only the language and the empirical, practical character of the "sein" world, that can produce borderline cases and render the enacted statute indeterminate. Open texture can also create an immediate necessity of enacting a new law and interpretation is therefore often insufficient. That is why a conclusion has to be drawn: open texture usually requires a brand new regulation, as the former Q or ¬Q choice may cease to be relevant. Nevertheless, even if the definition of compromise suggested in this paper is an incentive to create new regulations by the legislative body when the open texture phenomenon occurs, it still remains consistent with the power-divide principle, the prescriptive statement of law's determinacy as well as the need of protected or justified expectations toward the judicial system. First, the C_3 context does not have to occur at all, so the legislator is not leaving any field unregulated. Secondly, an agent has justified and protected expectation to the maximum possible extent—that is to the extent of the available knowledge. Of course, a new context C_3 can hypothetically occur, but this cannot be ever avoided because of empirical and/or linguistic grounds. Finally, the legislator is enacting laws that are initially determinate.

It often occurs, that the legislator leaves a certain scope of discretion to the courts. One could easily get the misleading impression that discretion is identical to Andrei Marmor's notion of compromise. It has to be noted though, that both these notions differ slightly in function. Discretion is conveying a fraction of legislative power (that is the possibility to choose between Q and ¬Q), in order to make law more flexible, to adjust it to concrete cases. Discretion is a revelation made by the legislator, who admits, that he cannot foresee particular circumstances that might occur and render a statute too stiff and inappropriate to apply it to a particular case. Compromise in Marmor's terms seems to be different, as it is a deliberate surrender of the legislator created by internal discords, that result in the impossibility of taking a decision where it could be and should be taken. Its function is not to render law more flexible and

adjustable to the empirical diversity of the cases at hand. Compromise is just an unwanted byproduct of disagreements within the legislative body, that result in lack of choice between Q and ¬Q. X hopes that, in context C_3, the courts will say "P", while intending to always implicate only Q. Y hopes that, in context C_3, the courts will say "P", while always intending to implicate only ¬Q. X and Y do not have the intention to render law more flexible and enable it to adjust to particular situations, which amounts to making "P" implicate Q or ¬Q depending on some empirical details of the analyzed case. Despite technical resemblance, compromissory legislation is of lower quality and effectiveness than the legislation openly leaving disrection to the courts.

5 Discussion

This issues can also be seen in the light of a broader problem: the delimitation between interpretation and innovation (when put in Dworkinian terms). When the legislator delegates deliberately a decision to the judicial level so as to avoid taking a particular resolution, is it still interpretation that is required from the court? Or maybe it is yet innovation and the divide of powers is undermined? Moreover, it seems vital to clarify the definitions of intention and interpretation. B. Bix underlines the fact that intention is sometimes understood broader than just the mental state of the legislator. He does this due to the fact, that the British legal system has long functioned on the basis of a maxim stating that the courts can never resort to the intention of the legislator, they should always read a statute and interpret it in accordance to the meaning of the words used. (Bix 1955, p. 143) Interpretation in this paper is understood as a choice between possible "options" resulting from the use of some directives of interpretation (linguistic, systemic, functional etc.). Saying that we interpret everything we say or read, or in other words putting an equality sign between understanding of the words and interpretation is not being taken under consideration, as it does not have as serious legal consequences, as the "choice-definition" that makes direct reference to the borderline-cases problem. What seems particularly interesting, is the controversial case of Pepper vs. Hart (mentioned by B. Bix), a decision taken by the House of Lords who, contrary to a 250 years precedent tradition, decided that "(...)judges may refer to the record of legislative debates, in at least some of the circumstances, to help elucidate the meaning of legislation. (...)" (ibid., p. 146). This could be viewed as a recognition of the importance of legislative intentions even in the British common law system, which at least at first sight, seems hostile to this notion.

6 Conclusion

Compromise defined as a deliberate action of leaving certain issues undecided due to discords within a legislative body seems to be inconsistent with three major principles of most democratic states: the divide of powers principle, the requirement for law to be as determinate as possible and the high standard of judicial predictability. This has to be distinguished from the discretion phenomenon, that aims at enhancing law's

flexibility and adjusting it to unpredictable empirical occurrences, that may render a statute too stiff and therefore unjust. Discretion has a function and is not the result of an internal disagreement. A deliberate creation of borderline cases directly boosts law's indeterminacy, as it is no more only language, but also the legislative process that becomes its source. The model proposed in this paper permits a statute's enactment process to stay within the legislative power. It also enables a maximum determinacy of law, that is limited only to the extent of current human knowledge. Law' s predictability can be undermined only with empirical or linguistic grounds that give rise to open texture, but this seems unavoidable.

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Perspectives of Analogical Reasoning

Martin Sobotka[a]

Abstract. The author of the article is engaged in legal understanding of analogy comparing the classical legal meaning of this institute with not so generally accepted, but more progressive understanding the analogy as universal ground of reasoning in law. The first section describes the classical role of analogy (the historical use as the means to fill the gaps in law) and its methodological and argumentative role from the constructivist position. The second one points out the main generalized features of the analogy within the process of reasoning. The third section deals with the meaning of the analogy in the Czech law commenting the judiciary decisions of the higher courts, and particularly referring to the new civil code.

Keywords. Analogy in legal science, analogical reasoning, constructivism, positivism, concretisation, abduction, new civil code.

1 Understanding the Analogy

At the first sight the analogy is not problematic and often used in practice, because it is brought together with the jurisdictional or legal gaps.[1] But it should not be the only one meaning in theory of law. We can consider the analogy:

a. From the narrow (classical) standpoint as one of the legal institute (among others)— as a potential and exceptional technique in order to fill the gaps in the legal system.[2]

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[1]There are the gaps in the law when a legal problem has not complete solution. For details see pregnant analysis of legal gaps: A Tale from Two Traditions: Civil Law, Common Law, and Legal Gaps, in P. Comanducci, R. Guastini (eds.), Analisi e diritto 2006. *Ricerche di giurisprudenza analitica*, Torino, Giappichelli, 2007, pp. 49-71; available on web: giuri.unige.it.

[2]See for example the textbooks of the legal theory, e.g. (Knapp 1995, p. 172).

b. From the broader (argumentative) standpoint as a particular proposition—as one of the legal argument among others (as well as *argumentum a maiori ad minus*, etc.) belonging to the argumentative discourse in order to justify the certain legal interpretation or decision.

c. From the broad (interpretative) standpoint as a special model of legal interpretation. (See Broekman 1991)

Contemporary theory of law does not dedicate any significant effort to the analogy from the mentioned broad(er) perspectives. (See ibid.) The analogy still has no fixed meaning.

1.1 The Traditional and the Situative Approach

From the classical point of view the law is defined, understood and explained as a complete unified system of rules,[3] and the character of the logical-systematic autonomy and identity of law is underlined. It is beyond doubt the analogy must have a specific meaning, conceptualised within the legal culture as an institute among others. All the institutes[4] then shall be incorporated into existing system of positive law. From the position maintaining the inner unity of the legal system the analogy needs a pre-understanding of the new case. The pre-understanding is the ability for the interpreter to look at the norm with certain expectations and to reach the interpretation, based on deep and expressed structures of reasoning, which are repeatedly corrected and updated, until the final sense. (See Grondin 1997) It is the interpreter who has to find the correspondence. It is the interpreter who has to judge whether the normal case and the new case (we mean two real situations—two facts) may be legally valuated as the same. The validity of the analogical reasoning coincides in syllogistic reasoning. And the new case must be naturally solved through the analysis of the text and its logical structure. Nehrod criticizes the standpoint that analogical inference must have a logical foundation (Nerhot 1991): *analogia legis* represents a situation in which the norm applied to a normal case is transferred to the new case not regulated by the law but judged by interpreter to be similar to a normal case. To generalize it, we can find three types of relations: relations between the normal case and the norm, of similarity between normal case and the new case, and finally between the new case and created norm. One example from the Czech criminal trial procedure:[5]

1) if there is a similarity between the normal case and the norm—according to provision of § 250 the Act No. 141/1961 Coll., code on criminal procedure, an accused

[3]There are many various tendencies towards completeness and system, and many forms of such prepositions, generally (and schematically) comprehended in the conception of legal positivism (especially in German and Czech legal culture, in the period the second half of the 19^{th} century and the period of the 20^{th} century until the beginning of the Second World War). We can involve in the list the famous thoughts of Kelsen or Weyr.

[4]According to Savigny (publ. System des heutigen Römischen Rechts) the aim of "Rechtsinstitute" is to maintain the unity and the systematic character of the law, quoted in (Holländer 2012, p. 292).

[5]See the finding of the Constitutional Court of Czech Republic I. ÚS 291/96 dated 23^{rd} September 1997.

person (let's imagine a real person) can waive the right to appeal against the judgement (the first premise), and

2) if there is a similarity between normal case and the new case—the judgement is similar to criminal order, and the waiver of the right to appeal against the judgement is similar to the waiver of the right to appeal against the criminal order (the second premise), then

3) there is the similarity between the new case and the new created norm—our client can waiver the right to appeal against the criminal order.

Such process constructed by classical analogical reasoning is still deductive conclusion from the premises, still finding of the existing law (not creating).[6] The analogy only can expand the existing legal institutions within the solution of a new legal problem (new case). It has principally the status of means to help to solve the problem of the legal gaps, and consequently form of explanation of the legal system, maintaining the idea of totality. Although the complete and systematic character of law has becoming obsolete and later conceptions accept the possibility of gaps within the legal system, the analogy remains an exception.

On the other hand, we can refer to the modern one, more topical, like Dworkinian in nature, emphasizing the constructivist position, in which classical definitions through genus and a difference[7] do not play the essential role. While we cannot confirm the autonomous character of the analogy, like of any other element, it is only possible to take the institute as the result of reconstruction. The analogy thus cannot be separated from the interpretation, because the point is to reconstruct the relations to the elements surrounded. We can agree with the conclusion of Ladeur, that *"... the assumption of the logical-syntactical order of the legal system and the comprehension of legal practice as deductive rule-application and, ultimately, the presupposition of a system of legal rules which is not itself transformed by its own application are given up."* (Ladeur 1991, p. 25)

Such situative rationality excludes the interpretation through the logical rule structure. It is refused the possibility to gain the legal decision from deduction. The concept of subsumption is replaced by the conceptions of argumentative practices performed in a given context. (See in comparison Villa 1991, p. 168) The theory of concretisation can be mentioned in this connection. (Ladeur 1991, p. 25 and compare the conception of Esser in Holländer 2012, p. 314 et seq.) We can see in concretisation the change from closed logical-syntactical language of law to the open texture, to a certain extent in legal methodology and practice. The situative character of this model changes the subject of interpretation which leads to the argumentative rationality of discourse (plural argumentation and concretisation).

In comparison with the classical model, the starting point does not rest upon the deduction now. The starting point is the previous known case (drown out from the

[6] *"Finding of the law (Rechtsfindung) is the progressive construction of the relationship of correspondence between the normative datum, formulated in the legal facts of case, and the concrete datum, through a procedure establishing their resemblance, equating them"* (See Zaccaria 1991, p. 46

[7] It is because the law as a whole cannot constitute a genus. (See generally Broekman 1991)

knowledge database) and analogical reasoning insists in a topical approach to particular events being relevant to the reconstructed new case. Therefore the constructivist approach accepts and develops the creative character of analogy.

Figure 1[8] summarizes the basic differences between classical and situative understanding of interpretation with respect to the analogy. To gain a better definition of the analogy, we have put the approaches against themselves in some degree.

	Classical interpretation	**Situative interpretation**
Paradigm	Positivism. Finding of law.	Constructivism. Creating of law.
Interpretation basis	Conceptual understanding of legal norms refers to the logical-syntactical deductive interpretation based on model of "rule application".	Situative understanding of legal norms refers to reconstruction from general principles by extensive interpretation and argumentative reasoning.
Application of the legal norms	Subsumption under the abstract norm. Conceptual model of rationality which is mediated by the logical rule structure.	Parametric constructive model of rationality comprising the cognitive and the normative component of legal system.
Principal logic method of the analogy	Deduction. Construction of the particular decision from the general norm.	Abduction. Construction of the particular normative hypothesis from other particular hypothesis.
The orientation of the interpretative activity	Passive – discovering (finding) of something existing. Analogy is method used in rare case of evolution the law within existing legal institute (self-explanation of the legal text within a hierarchically structured legal order).	Active – interpretative and evaluative process. Analogy is unsystematic mode of evaluation for cases which from pre-understanding and pre-evaluating deserve equal evaluation; based on understanding of the concrete situation.
Meaning of the analogy within the law	Unity, complex and systematic character of law treats the analogy as an exception restricted to borderline cases. Classical analogical reasoning is still deductive conclusion from the premises.	Principally constructivist and inconsistent character of law treats the analogy as base of legal reasoning - explicit innovative creative procedure of raising hypothesis and distributing legal discourse.

Figure 1: The analogy in the two models.

[8]The quotations in the table are subject to reference in the notes.

1.2 The Principle of Analogy

No matter how the law is conceptualised we try to put law finding and law creation (For comparison see Holländer 2012, p. 297) together coming out from the common features of the analogy:

- dependence on the social content of the concrete situation (situative character),
- connection with the (non)existence of legal rules, respectively explicit texture of the rule (intertextual character), and
- character of fundamental operation which establishes the legal discourse.

To describe the process of analogical reasoning we can differentiate four steps of the application of law procedure:

1) At the very beginning it is necessary to conclude the new (interpreted) case cannot be easily solved with the explicit (wording of) provisions nor positive regulation, and the analogy is to be applied.[9] Such qualified conclusion results from "the failure" in the process of the subsumption of the new case under the norm. The aim of this step within analogical reasoning is to have the sensitivity for understanding the new case, or better said, to have a pre-understanding for the incorrectness of the formal subsumption. Interpreter performs the hermeneutical operation of pre-selection of the relevant signs of the new case based on differences and resemblances (logical-semantic operations).

2) The second inductive[10] step consists in comparing of the normal (previous) cases or existing interpretations with the new case regarded as special one. Kaufmann refers the law is originally based on analogy: continuous comparing and sorting of legal cases. (Kaufmann 1982) This step of analogical reasoning has the character of the analysis of facts about the new (interpreted) case.

3) The search mentioned above is followed with the third step—abduction,[11] not explicating a pre-existing general relationship between elements (contrary to induction and deduction), but innovative (not specially organised or systematic) reasoning based on facts. Abduction has no idea about the theory. It is momentum of invention – construction of a particular normative hypothesis based on presumption the new case should be solved similarly to the existing.

4) The fourth step finalizes the analogical reasoning in the deductive construction of the particular decision from other cases. And it is only in the moment that the new case is subsumed under the new norm and the produced normative result is deductively reviewed as following from the application of a (new) norm.

Reflecting the previous steps, the analogy reasoning is restricted to borderline cases hence very important for the process of legal interpretation as whole. The

[9] Some authors talk about "broadening hypothesis" or "widening the perspective".
[10] Induction is the construction of a general norm from particular case.
[11] Abduction is syntactical statement (the conclusion is not made of premises).

solution of such borderline (hard) cases by way of analogical reasoning can help to integrate the interpretations, and consequently support the innovative tendency in the law.

2 The Analogy and the New Civil Code

Now we can ask what role plays the analogy in Czech legal system. The practice of higher Czech courts can illustrate the increasing tendency towards the analogical application.

Since 1989 The Constitutional Court of Czech Republic has applied the analogical reasoning at least in 13 cases (incl. 5 in plenum). In one case the analogy has achieved to be the right method of finding of material justice over the simple a formalistic subsumption (I. ÚS 2366/07). Conclusions about increasing tendency remain valid also if we take into account an uncertainty of the difference between the analogy reasoning and extensive interpretation, and sure discrepancy in amount of decisions before and after 1989. The judicial practice underline that the analogy can be used as an explanatory model.

The new Civil code (Act No. 89/2012 Coll.), like the other European private codes, contains the explicit regulation of the analogy.[12] The provision of § 10 (1) says: *Should any legal case can't be decided under the explicit provisions of this act, or other legal regulation, then the one shall be judged in accordance with the provision which is related to the immediate legal case regarding the content and the purpose. In the absence of such provision, or doubtfulness in question how the legal case decide, the legal case shall be judged after the complete discretion of all the circumstances in accordance with the principles of this act, and conventions of private life.* The second section brings the possibility for the interpreter (judge in the role of the legislative body) to create a new norm *ad hoc*, under the condition of the application of legal theory and judicial practice. In accordance with the mentioned provision, the interpreter shall pay the attention as follows: to the will of the legislator,[13] to the principle of justice, to the principles of the new civil code, and finally to the *analogia legis*.

It is commented that the purpose of the provision is to fill the gaps in law within the normative structure, because the law cannot be silent even in the unsolvable situation. But it is not the "official" confirmation of understanding the analogy form the basic narrow standpoint. Right the opposite. The possibility for the application practice to create the new norm is meaningful shift in the comparison with the old code reflecting the theoretical position of situative understanding as mentioned above. Providing that the analogical reasoning consist in finding differences of special case and the construction of norms from general principles the constructivist model in the new civil code prevails.

[12] Contrary to the actual Act.
[13] Cf. Ladeur 1991, pp. 12–13

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