

Kinds of Theory of Legal Argumentation

By Aleksander Peczenik

1. General Legal Doctrine

General legal doctrine describes and systematises legal sources and legal arguments. German *Juristische Methodenlehre* delivers the best examples of it. For example, Karl Larenz's book (1983) has the following structure. Its historical part includes, among other things, information on Savigny's views on legal method. Friedrich Karl von Savigny was the most influential German legal scholar in XIXth Century. It also gives information about the so-called jurisprudence of concepts; information about legal theory under influence of positivistic idea of science; and information about the so-called jurisprudence of interests. Finally, it includes information about a new legal method, proposed by Larenz, called jurisprudence of values. The systematic part includes, *inter alia*, the doctrine of subsumption, that is, the logical relation between general norms of legal statutes and particular legal decisions. It includes the doctrine of evidence, telling the lawyers how to evaluate different kinds of evidence presented for the courts. It includes also the doctrine of interpretation of legal statutes. Finally, it includes a discussion about legal concepts and legal system.

General legal doctrine also produces self-reflection about goals it serves and methods it uses, for example about standards of rationality in the law. It also includes philosophical tools and philosophical insights useful for jurists.

General legal doctrine is neither purely descriptive nor purely normative. It fits well Svein Eng's general theory of the descriptive and the normative element in legal language and argumentation (Eng 2003, 312 ff). According to Eng, statements about valid law can be understood both as description of existing law and as normative recommendation as to how to make the law better. There are no rules at the level of legal language or of legal methodology that may help us determine usual kinds of statements by lawyers as either descriptive or normative.

2. Relativism and Comparative Studies

The Polish scholar, Jerzy Wróblewski (cf., e.g., 1992) developed a rationalistic and relativistic meta-theory of interpretation and implementation of legal statutes. This means that he did not construct a theory about interpretation but a theory about theories of interpretation. He thus formulated theories about the ideologies of statutory interpretation. He also created a classification of various actually existing and logically possible methods of statutory interpretation and indicated their functions. The methods were reworked in the most rational manner. The main analytical tool consisted in a distinction between two kinds interpretative directives. Each method of statutory interpretation was thus characterised as a list of first-order directives, for interpretation of statutes, completed

with a list of second-order directives, for a choice between competing first-order ones. The author himself did not endorse any of the methods, but he understood the point of all of them. Relativism and intellectual liberalism of this kind were important characteristics of Wróblewski's all works. He was able to find a rational core of any legal theory, however strange it might appear to others.

In brief, Wróblewski developed a meta-theory, useful to classify and compare various theories of law and various theories of legal argumentation, both descriptive and normative. But he did not explicitly formulate his own theory of law, nor a theory of legal reasoning, neither descriptive (delivering new knowledge of facts or concepts), nor normative. No doubt, Wróblewski's meta-theory of law was founded on profound philosophy, but he published no confession of this kind.

Wróblewski's method resembles the method of comparative law. No wonder that he was the main intellectual figure of the project comparing interpretation of statutes and interpretation of precedents in about ten different countries (cf. MacCormick and Summers 1991 and 1997). The following argument types are used in statutory interpretation, at least in the surveyed countries:

- The argument from ordinary meaning
- The argument from technical meaning
- The argument from contextual-harmonization
- The argument from precedent
- The argument from analogy
- The argument from relevant principles of law
- The argument from history
- The argument from purpose
- The argument from substantive reasons
- The argument from intention. (MacCormick and Summers 1991, 512ff.)

3. Political Philosophy and Politics applied to Legal Argumentation

Another kind of research, containing both descriptive and normative components, exists mostly in the United States. It uses information about legal reasoning to construct theories which in part resemble philosophical analysis, in part political programmes. Ronald Dworkin's theory is a good example.

Let us read some fragments of Dworkin's writings:

The adjudicative principle of integrity instructs judges to identify legal rights and duties, so far as possible, on the assumption that they were all created by a single author - the community personified - expressing a coherent conception of justice and fairness. [...] According to law as integrity, propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community's legal practice. (Dworkin 1986, 225)

Moreover:

Law as integrity [...] holds that people have as legal rights whatever rights are sponsored by the *principles* that provide the best justification of legal practice as a whole. (ibid. 152)

Such a theory, appealing as it is, is not beyond doubt. As an example, one can quote the following leaflet:

This is an examination of Ronald Dworkin's claim that the true theory of legal practice is the theory that puts legal practice in its 'best light'. By 'best light' Dworkin means a measure of desirability or goodness: the true theory of legal practice, says Dworkin, portrays the practice at its most desirable. Now why would that be the case? What's between the desirability of a theory and its truth? (Raban 2003, 243)

It is not my intention to be entrapped in a dispute with Dworkin's theory. Let me merely state that his theory includes notoriously contestable statements about categorical priority of principles over policies, about equality as the sovereign value, about pre-existing rights, about the only right answer to all hard legal questions and so on. Such statements are partly a result of the author's philosophical background, partly a useful tool for political debate.

Another example is William Eskridge's dynamic theory of statutory interpretation (Eskridge 1991). He argues that statutory interpretation changes in response to new political alignments, new interpreters, and new ideologies. Apparently, it is a description. However, he also reveals sympathetic attitude towards dynamic interpretation of statutes. Moreover, he enters a discussion about legitimacy of this style of legal interpretation in the light of different "normative theories of jurisprudence" - liberal, legal process, and anti-liberal. Finally, he discusses the normative problem which theory of statutory interpretation best fits the requirements of modern democracy.

4. Dialectic Approach – Aulis Aarnio

The well-known Scandinavian scholar, Aulis Aarnio has devoted many writings to legal doctrine (legal dogmatic); cf., e.g., Aarnio 1997. The tasks of legal dogmatic are interpretation and systematization of legal norms. This task is normative, in contrast to the explanatory task of sociology. Two basic demands of legal interpretation are rationality and acceptability. Systematization aims at reformulation of legal norms in an abstract manner, in relation to certain basic concepts. Systematization is a bearer of legal tradition. According to Aarnio, legal interpretation is a hermeneutic activity justifiable in relation to an audience. Legal audience is characterized as essentially "relativistic", in the sense of admitting the possibility of disagreement about evaluations. Aarnio contrasts this relativism with Ronald Dworkin's theory of only right answer to all legal questions. Whereas Dworkin is bound to commit himself to value-objectivism, Aarnio's own position is relativist, but this relativity is also relative, namely relative to the audience. Aarnio's theory of audience is one of his original contributions to legal theory. He

has all his scholarly life aimed at understanding legal reasoning in the context of society. He sees legal interpretation, legal institutions and human actions, as parts of overarching totality. In brief, Aarnio has been inspired by the great philosopher, Ludwig Wittgenstein. Aarnio has summarised this inspiration, as follows (1997, 123-125):

At least the following ideas seem to be interwoven in the Wittgensteinian way of thinking.

(1) Practical legal discourse (praxis), in this very connection, the interpretation of legal texts, is "on the whole" hermeneutic by nature. [...]

(3) Legal dogmatical interpretation is an activity. [...] Meaning is not concealed in language and to be picked out from there. It is constructed, although not freely constructed, in the creative process of the interpreter. [...]

(5) [...] A legal *philosopher*, [...] is not to try and set norms as to how lawyers or scholars [...] should act. The practical life cannot be dictated from the chamber of a philosopher. [...] Yet, the task of a legal philosopher is a *reconstructivist* one. He tries to recover the implicit features of our language and behaviour making them explicit, i.e. "visible" so that the language-games become understandable. [...]

(6) [...] Lawyers try to clarify the content of the ideal normative world. Yet, legal thinking in this respect is *horizontal*, to use the expression of Hintikka [...]. This leads us to a problem that has been extensively considered in the legal theory of the recent years, the concept of *coherence*.

5. The Theory of the Present Author

My own theory has been influenced by Jerzy Wróblewski, Aulis Aarnio, Robert Alexy (cf., e.g., Aarnio, Alexy and Peczenik 1981), and later by Jaap Hage (Hage 1997 and Hage-Peczenik 2000 and 2001). I have always focused on coherent reconstruction of legal reasoning, using more profound philosophy only as a tool that helps understand how the lawyers think. Among writings delivering such philosophical tools, let me mention Berlin 1998 on value pluralism; Copp 1995 on socially centred morality; Haack 2003 on foundherentism in epistemology; Lehrer 1997 on coherentism in epistemology; Smith 1994 on platitudes in moral theory; and Swanton 1992 on wide reflective equilibrium. Recently, I have also been deeply impressed by the following words:

The conscientious philosopher has no alternative but to proceed systematically. [...] The fully adequate development of any philosophical position has to take into view the holistic issue of how its own deliberations fit into the larger scheme of things. (Rescher 2001, 43)

The reconstruction of legal reasoning includes philosophical reflections. The central point is that almost all legal thinking is defeasible, outweighable and justifiable by recourse to coherence. Legal doctrine is the most elaborated form of legal thinking. My latest book (Peczenik 2004) deals extensively with legal doctrine. Though jurists developing legal doctrine aim at generality, whatever they

say is open to counterexamples which originate from weighing of moral considerations.

When stating that it is the case, my theory is descriptive, not normative. But it is also normatively recommended by the author as legally correct. In other words, my theory not only describes legal doctrine but, being partly descriptive, partly normative, itself belongs to general legal doctrine.

In my opinion, binding norms are always social, in part inherent in the law and legal practice, in part developed in the society in informal manner. Behind this society-centred theory of normativity, there is a sceptical meta-theory. Being a sceptic, I doubt any metaphysics, any moral theory, any epistemology, and I also doubt any anti-metaphysical theory, any moral nihilism and any deconstruction of knowledge. But even a sceptic must live, and this implies believing in some things, though defeasibly. Nothing is certain, but inner normativity of the law appears to me as less uncertain than normativity grounded on moral theories which quarrel with each other.

My theory is in agreement with Susan Haack's general theory of knowledge. Susan Haack's theory tells us that knowledge is a coherent system linked to experiential evidence. Justification is like solving crossword puzzles. Experiential evidence is like clues to such puzzles. (Cf. Haack 2000 and 2003).

Some years ago, assuming that legal doctrine is in part descriptive and in part normative, I have written about legal data (Peczenik 1989, 143-144). The data are so to say "input" of knowledge. Both the letter of the law, the description of politically relevant facts and the judgments of justice are such data for legal researchers. Legal researchers should try to arrange them into a coherent system of beliefs and preferences.

Instead of coherence, moral philosophers talk often about reflective equilibrium. Reflective equilibrium in legal knowledge must be constrained by experiential evidence, but it is also constrained by other factors.

John Rawls has characterized reflective equilibrium in the particular context of his theory in the following manner:

By going back and forth, sometimes altering the conditions of the contractual circumstances, at others withdrawing our judgments [...] I assume that eventually we shall find a description of the initial situation that both expresses reasonable conditions and yields principles which match our considered judgments duly pruned and adjusted. (Rawls 1971, 20)

In my opinion, the idea of reflective equilibrium in legal justification requires some modifications. This equilibrium is not free. It is equilibrium of a peculiar kind, namely

wide,
constrained,
segmented and,
around commonly accepted platitudes.

Simple reflective equilibrium is too narrow for the legal doctrine. We need a wider equilibrium. Concerning wide reflective equilibrium in morality:

A wide reflective equilibrium is a coherent triple of sets of beliefs held by a particular person; namely, (a) a set of particular moral judgments; (b) a set of moral principles; and (c) a set of relevant background theories, which may include both moral and nonmoral theories. [...] The agent may work back and forth, revising his initial considered judgments, moral principles, and background theories, to arrive at an equilibrium point that consists of the triple (a), (b), and (c). (Daniels 1985, 121; cf. Swanton 1992, 11ff.)

Another deviation of legal doctrine from the simple idea of reflective equilibrium is this. A legal scholar is not entirely free to adjust principles and judgments to each other but he must do it within the framework imposed by the law. Finally, wide and constrained reflective equilibrium in legal doctrine is segmented. Each juristic theory should according to its own standards be coherent for itself, internally. However, the theories have different scopes. Some are relatively narrow, such as the theory of adequate causation in the law of torts. Others cover a whole branch of law, such as private law. At the same time, there exists a total unifying structure for the legal doctrine as a whole, and at the end the total system of acceptances, reasonings and preferences relevant for the law. Legal doctrine aims not only at internal equilibrium of legal system, but also at equilibrium with background knowledge of society and philosophy. The law is linked normatively to morality or politics.

Reflective equilibrium in legal doctrine is arranged around commonly accepted platitudes, not around precise ideas. The importance of platitudes for human thinking cannot be overestimated. It is obvious both in science and in morality. Especially, Michael Smith (1994, 39ff.) stated that the following platitudes are “surrounding our moral concepts.” Some indicate that moral judgement is especially practical. There are also platitudes that give support to our idea of the objectivity of moral judgement. Others tell us about the relation between the moral and the natural. Yet others deal with substance of morality, namely concern and respect for a person, etc. Some platitudes concern procedures, for instance reflective equilibrium.

All those constraints on reflective equilibrium in the law are ultimately justifiable by recourse to a total system of acceptances and preferences (cf. Hage 2004, 100). In its turn, this total system is constrained by experiential evidence, in a manner explained above on the basis of Susan Haack’s theory.

This theory is complex but it has a simple point. The theory recognises that the lawyers’ reasoning must stay within the limits outlined by the political system. On the other hand, it also recognises that the lawyers in general and the legal researchers in particular may and should re-work the law in the most rational manner. Only by following the requirements of rationality, legal reasoning can achieve both harmony and justice. Only in this way, it may promote social stability which is a necessary condition of progress and economic growth.

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