

LEGAL REASONING AND ARGUMENTATION THEORY

The current issue of IAS contains the written version of some of the talks given at the conference entitled „Legal Reasoning and Argumentation Theory” organized by the Philosophy and History of Science Department of the Budapest University of Technology and Economics. A conference on this subject was indeed topical. There is no single field in which argumentation figures so prominently as in law, so it is no wonder that legal science has devoted so much attention to the nature of argumentation. On the other side, scholars interested in the analysis of argument and debate have looked on legal reasoning as a model. Nevertheless, argumentation theory, which has emerged as a unified albeit heterogeneous field in the last few decades, has still not provided a penetrating analysis of legal reasoning. We believe that the recent and sophisticated analyses developed by legal scholars and the current theoretical models and analytic devices in argumentation theory may help each other to produce valuable insights. The conference was organized in order to explore these possibilities. We present these studies to the readers hoping that the effort was not wholly unsuccessful.

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ODDITY OF LEGAL ARGUMENTATION

Miklós SZABÓ

„Legal argumentation” is but one version of a general practical discourse, called argumentation. Its distinctive feature is the context of argumentative activity: legal practice. Legal argumentation shares both the properties of practical discourses in general (in this respect, as a model, it exemplifies their features), and, at the same time, shows specific distinctive features (in this respect it characteristically differs from them). This study mainly focuses on specialties of legal argumentation, and their possible causes. In doing so, we use as ground of reference two models of argumentative practical discourse, which are afar in time, while analytically close to each other. The first is legal rhetoric, the first reflected theory of legal pragmatics; the second is the interpretative framework of pragma-dialectics, one of most widespread theories of argumentation. In order to present the oddity of legal argumentation one of the long-lasting and central problems of argumentation theories seems to be the most sus-

ceptible: the problem of fallacies. Investigating fallacies offers ground for realignment of argumentation theories, as well – from the point of view of legal argumentation.

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DIALECTICAL/RHETORICAL ROLES AND STRATEGIC MANEUVERING IN JUDICIAL TRIALS

István DANKA

This paper argues that judges at trials face with a twofold rhetorical pressure, an analysis of which minimally requires (1) a two-level and (2) a four-pole model of argumentative practices. A two-level model distinguishes two debates running in parallel: a first, ground-level debate, being about the parties' persuading the judge about the truth of theirs; and a second, meta-level debate, being about their attempt to (re-)set the dialectical framework that determines the outcome at the ground level via making a distinction between allowable and non-allowable moves within the debate.

Accordingly, the judge plays a double role: on the one hand, she has to decide which party is right on the ground level, and on the other, she also has to keep the debate under control, i. e., she is to keep committed to (her interpretation of) the dialectical rules of a trial. This double role of her is the reason for introducing a four-pole model instead of a three-pole one: the trial is not between two parties aiming to persuade a neutral audience but they aim at persuading a double-role audience: a role of judging and another of facilitating the debate.

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A DIALOGUE-GAME MODEL FOR THE DISTINCTION BETWEEN STATEMENTS OF FACTS AND OPINIONS

Gábor FORRAI

The paper attempts to reconsider the conceptual foundations of the distinction between statements of facts and opinions, which plays a crucial role in defamation law. It starts from the idea that claims can only harm one's good reputation if they come to be believed. However, what actual people come to believe is not something the courts can consider and does not provide solid basis for legal regulation. We should, therefore, appeal to a theoretical construct, the standard reader. The way the standard reader comes to decide whether to believe a newspaper is modelled by a dialogue-game, a rule-governed dialogue between the journalist and the reader which serves to test the acceptability of the journalist's claims. In such a dialogue the journalist can exploit the reader's ignorance by making false claims the reader cannot challenge because of his ignorance. Since courts cannot condemn this ploy unless they are able to expose

the falsehood of the claims, the distinction can be explained in this way: statements of facts are those which the court is better equipped to challenge than the standard reader, whereas opinions are those which the court is not better equipped to challenge. The merits of this approach are the following. It does not rest on strong philosophical assumption. It gives a clear rationale for condemning false statements of fact. It implies the generally accepted provability test for opinions and it can also make sense of some other considerations courts appeal to.

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PRESS-RECTIFICATION AND STRATEGIC MANEUVERING: HOW PICKING THE RIGHT CLAIMANT AFFECTS JUDICIAL INTERPRETATIONS

János TANÁCS – Gábor ZEMPLÉN

The study focuses on the three aspects of strategic maneuvering (topical potential, presentational devices, audience demand) and discusses two landmark Hungarian cases that affected public trust of the judiciary and executive power as well as of investigative journalism (lawsuits following the publication of ‘Boys in the Mine: Orbán-family businesses’ in 1999 and ‘Tokaj wine-wars’ in 2005 in *Élet és Irodalom*). Reviewing some of the main documents guiding press-rectification procedures and focusing on issues where the judges took positions on semantic questions or utilized linguistic expert opinion to ground their decisions two strategies by judges are discussed that yield opposite judgments. One is prioritizing a hermeneutic approach to texts, closer to meaning-attribution in the public domain and favorable to journalist’s practices, the other prioritizing a procedural approach, favouring formal legal meaning-attribution. The paper also considers how in press-rectification cases choice of claimant (lesser known legal persons as opposed to well known public figures) influences topical potential and can have an effect on meaning-attribution in judicial decisions.

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DIFFERENT SCENES, DIFFERENT PROCEDURES OF DEMONSTRATIONS

*Decision of Hungarian Competition Authority
in the Case of Dove vs. Nivea Comparative Advertisement*

Hédi Virág CSORDÁS

Argumentation theory primarily analyzes the verbal content, but in recent years, visual argumentation and rhetorics have also become a new methodology. When we are analyzing advertisements, including the process of persuasion and argumentation verbal and visual elements are both considered important. In order to reach the maximum effect, creative professional's toolbars often include elements which are investigated and sometimes sanctioned by the Hungarian Competition Authority (HCA). Although acting in accordance with regulations pertaining to the Hungarian market, HCA tends to scrutinize the content of verbal communication only, in the process, it is inevitable to also analyze arguments conveyed by visual elements. We can pose the question how the truth content will change if we analyze it in the media sphere or in the judicial procedure. My aim is to establish the potential value of visual argumentation while analyzing a legally controversial case: Dove vs. Nivea comparative advertisement.

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COMPARING LEGAL REASONING AND DOCTRINAL FEATURES WITH NUMBERS

Comparative law, mathematics and jurisprudence

András JAKAB

Measuring legal reasoning or doctrinal features with numbers is unusual in legal scholarship. Not even the concept of „dominant scholarly opinion” (*herrschende Lehre, communis opinio doctorum*) or the permanent case law contains any element of measurement, even though it would be obvious to use some kind of weighted average in order to apply the former concepts. On the one hand this rejection of numerical methods is understandable, as lawyers take up an interpretive stance when working, which is difficult to accommodate with numbers. On the other hand, however, as legal scholars we can discover features by using certain statistical methods which would be partly hidden or partly debatable without these methods. In the first part of the paper, I am going to present the general difficulties of using such methods, in the second part I am going to show how they were used in a project by Groppi and Ponthereau, in the third (and largest part) I am going to present some of the results of the CONREASON project which measured constitutional reasoning in 18 legal systems, and finally I am going to

draw some tentative conclusions concerning the general theoretical consequences of such projects.

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REASONING WITH PREVIOUS CASES IN LAW

Zsolt ZÓDI

The paper deals with the topic of reasoning with previous cases. It tackles the problem splitting it to two parts. The first part covers the question: if we follow ‘similar’, or ‘like’ cases, what does ‘similarity’ mean in this context. Do the two cases have to be similar in the level of ‘brute facts’, or do they have to be somehow similar in the level of the narratives? What could be the basis of connection between the two cases? The second part of the essay is about the question: what do we follow, when we follow a previous case. The conclusion of the paper is that there is no such thing as reasoning from case to case, because when we reason with a case, we always reason with a rule, which was derived from the previous case. The difference between the legal systems based on the doctrine of precedent, and the continental ones is that in the former the formulation of the rule is mainly done when the new case is arising, while in the latter this formulation is done by the upper courts, right after the first decision.

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ARGUMENTATION IN FUNDAMENTAL RIGHTS-BASED LEGAL DISPUTES

Zoltán POZSÁR-SZENTMIKLÓSY

In a legal dispute in which fundamental rights are involved, the task of reasoning is quite specific. The wordings of fundamental rights are characteristically abstract in constitutions or other legal documents, therefore it is inevitable the interpretation of the *fundamental rights norm*, the careful analysis of its meaning, function and substantive elements in order to understand the real question behind the legal dispute. The characteristic question of these legal disputes is the permissibility of the restrictions on the fundamental right in question due to its conflict with another fundamental right or a rival constitutional value. Therefore, as a starting point, this requires the interpretation of the constitutional norm too, which enables this kind of restriction (the *limitation clause* of the constitution). These two procedures mentioned above, are to be carried out with the well-known methods of constitutional interpretation, the task therefore, is not much of the difference from any other kind of interpretation, where constitutional debates occur.

Special focus should be, however, on the actual analysis of the limitations on the fundamental rights in legal disputes. When analysing such limitations, most of the courts apply structured tests, consisting of several steps of examination. The most widespread method is based on the *principle of proportionality*, known as the “*necessity and proportionality test*” in the Hungarian legal literature. The proportionality test should be regarded as a framework of argumentation, in which every step of examination has an autonomous function but may be applied only together with close regard to each other. The judicial practice based on this test is fairly inconsistent, so it is high time to try to clarify the methodological requirements related to its application.

The paper analyses the characteristics of the argumentation as expressed in the different steps of examination of the proportionality test. The author’s special focus is on the argumentation techniques which promote the professional use of the proportionality test and as a consequence the justified and legitimate decisions of courts.

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THE CHARACTERISTICS OF THE HUNGARIAN JUDICIAL REASONING: STATUTORY INTERPRETATION AND LEGAL ARGUMENTATION IN THE PRACTICE OF THE HIGH COURTS OF HUNGARY

J. Zoltán Tóth

The present paper deals with the methods of statutory interpretation, focusing, primarily, in the Hungarian practice thereof. It uses the term ‘interpretation’ in the sense of Jerzy Wróblewski’s well-known category as an activity that one does if the meaning of a given text is vague or dubious and he/she wishes to reveal the appropriate meaning of the text in question. Firstly, the paper reviews the techniques by use of which judges (or anybody else) can decide what a given word, phrase, sentence or text means, or what it does not, establishing a classification that attempts to cover the pool of the possible methods of statutory interpretation. Secondly, the article analyses and introduces, in a legal sociological way, what kind of methods and in what proportion are applied by high courts in Hungary, and, mainly, by the Supreme Court of Hungary in the judicial practice.

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JUDGMENT OVER THE TEXT

*Legal Arguments of the Defendant in the Press Correction Procedures
and the Moral Rights Lawsuits*

László BODOLAI

The press correction procedures and the moral rights lawsuits pertaining to the media have a special role in the Hungarian legal system. This is reflected not only in the fact that the press correction procedure is regulated in a separate chapter in the civil procedure system, but also in the result that the judiciary deliberation here is much broader than in other kind of civil procedure. The judge not only states the facts and measures the evidences, but usually interprets extra legal (non-legal in strictu sensu) texts within the frames of the law. There, certainly, exists judiciary interpretation in other kind of procedures as well, but there the texts are generally legal texts, especially contracts. In the press corrections cases, however, these writings or texts – to be analysed from a legal aspect – are just vary from the legal language, the legal discourse used in other cases. This paper demonstrates the argumentations of the press used in these sort of lawsuits, - i.e. from the point of view of the defendant. The objective of the reasoning in this position is to justify the lawfulness of the relevant writing (communication). The defence may invoke legal-based and content-based arguments. The legal-based arguments refer to the procedural and material legal norms, the guidelines of upper (supreme) courts, uniformity decisions, decisions of the Constitutional Court and the case-law of the Human Rights Court in Strasbourg.

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ENVIRONMENTAL VALUES AND THE INTERPRETATION
OF THE NON-REGRESSION PRINCIPLE

Gyula BÁNDI

To define the content of environmental values, as a part of the public good, is far from being an easy task, therefore one does not find proper definitions. Usually vague provisions are used, such as 'high level of protection' or similar terms. Anyhow, there is a general consensus to take the current state of environment as the bottom line, which should not allow regression. The message of the environmental human right concept – generally understood as a right to a healthy or clean environment – covers mostly a similar vision. Non-derogation, non-regression is a concept, widely used in international law and constitutional law – and in diverse fields –, typically interpreted by the judiciary and scholars. In Hungary, this principle could serve as an emblem of the related decisions in connection with the right to a healthy environment of the Constitutional Court before and after the adoption of the Fundamental Law. The types

and major outcome of these decisions are presented and interpreted in details. There are different opportunities of qualifying a norm or a decision as infringing the non-regression principle, taking it as the minimum guarantee of environmental rights. The most important characteristic of this principle is its abstract substance, due to the fact that usually the erosion of environmental values may only be visible only after a longer period. Still, with the lack of direct environmental thresholds, the principle of non-regression remains the easiest means of solution.

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THE DIOCESAN BISHOP'S FUNCTION IN THE RENEWED CANONICAL MATRIMONIAL PROCESS

Szabolcs Anzelm SZUROMI

Pope Francis (2013-) edited the M.P. *Mitis Iudex Dominus Iesus* and the M.P. *Mitis et Misericors Iesus* on August 15th 2015 which have become in force on December 18th 2015, modifying the matrimonial process law at several places within the Code of Canon Law and also in the Code of Canons of the Eastern Churches. In the introductory part of *Mitis Iudex* point III is the one which particularly dedicated to the judicial authority of the diocesan bishop, which question expressively appears in Can. 1673, moreover in Art. 5 about the so called “abbreviated (or brief) matrimonial process” before the bishop (Cann. 1683-1687). Here we give our considerations not only about the stable canon law and theological historical background of the diocesan bishop’s judicial authority, but even on this mentioned new prescription, analyzing its meaning, goals, conditions and effects on the current canonical matrimonial process, with attention to those several process law experts of international canon law science who have already dealt with this question.

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DIE GESCHICHTE DES VERFAHRENS DER GELTENDMACHUNG DER FORDERUNGEN MIT GERINGEM WERT IN UNGARN

E. Írisz HORVÁTH

In der Geschichte des ungarischen Zivilverfahrensrechts diente der Bereich des Verfahrens der Geltendmachung der Forderungen mit geringem Wert einiger Maßen als Experimentbereich, also einige prozessuale Rechtsinstitutionen wurden erst in

diesem Prozessbereich eingeführt, und als sie „erprobt“ wurden, erst dann wurden sie in weiteren Kreisen eingeführt oder auch bei anderen Prozessarten durchgesetzt.

Der Aufsatz ist der rechtshistorischen Präsentation des Verfahrens der Geltendmachung der Forderungen mit geringem Wert gewidmet: ab dem Beginn der Reformzeit, also von der Trennung des ungarischen Zivilverfahrens vom Strafrechtsverfahren an ist die eingeleiteten Verfahren für die Geltendmachung der Forderungen mit geringem Wert untersucht und analysiert. Dementsprechend stellt der Aufsatz die vor der aktuell geltenden Regelung existierende sechs Lösungen vor und beschreibt auch den Entwicklungsbogen.

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THE SIX „ARROWS“ OF ATATURKISM

Katalin SÍSKA

*„What I expect from the entire people without exceptions, is complete submission to the orders of the government. [...] The entire nation accepted the principles I published and it was clear that those who opposed the principles or even my person have no chance of being elected deputies by the nation.”*¹ The principles in the above mentioned quote from Mustafa Kemal Atatürk (1881–1938), the founder of the modern Turkey were the next directives: republicanism, laicism, nationalism, populism, revolutionism and statism that not only defined the etalon ideology of Turkey, but are continuously and officially present in the Turkish constitutional law from Atatürk's age to the present. The content of six principles, together the „six arrows“ (*ALTI Ok*) is often summarized as *Kemalism*, (Turkish: *Kemalizm, Atatürkçülük, Atatürkçü Düşünce*) or *Ataturkism*. Since the legitimacy of the constitution derives from Atatürk, actually all the legal provisions and principles based on Atatürk's principles. From the perspective of the Turkish legal system this means that in spite of any legal reforms the law can be interpreted by such methods and principles that are in accord with the principles of Atatürk.

In this study I do not analyze each policies I concentrate on their interactions to each other and pointing to the Turkish specialities of the six ideas.

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¹ Ghazi Mustapha KEMAL: *A Speech Delivered By Ghazi Mustapha Kemal, President Of The Turkish Republic, October 1927*. Istanbul, Chandra Chakravarti Press, 2007. 24.

PLACING THE III. OF 1921. ON THE EFFECTIVE PROTECTIONS OF STATE AND SOCIAL ORDER IN THE HUNGARIAN CRIMINAL SYSTEM IN THE 20. CENTURY

Izabella DRÓCSA

At the end of the I. World War a great economical and social crisis were developed in Hungary, that is why the political control was not able to stop the seditions against the Hungarian Army. As a result, the Communist Regime in 1919 executed a political coup, and this short period – between the 21. of March and the 31. of July - caused serious damages in the country. For compensation, after the end of the communism, the legislation power created a new act against the anarchical movements for the safety of the society. This was *the III. of 1921. on the Effective Protection of the State and Social Order*. Next to the political and historical reasons, the creation of this criminal act was also necessary in a legal point of view. The effective Criminal Code was codificated in 1878 which regulated the political crimes quite softly: for example the items of confinements were not strict enough to possess a deterrent force on society, but it is important to emphasise too, that preparation activities stayed unpunishment, independently of the fact that they were probably dangerous for the society. That is why this new regulation in the Criminal law was right: it contained stricter facts of the crime and penalties, which could complete the existing system. In my article I analyzed the sections of the act, and the connected judicial practice to prove this affirmation.

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DILEMMAS IN RELATION TO THE ELECTION AND OPERATION OF BUDAPEST'S GENERAL ASSEMBLY

Gábor KURUNCZI – Ádám VARGA

2014 was a year of elections in Hungary. Since the change of the regime it did not occurred that in the same calendar year three different national election happened in our country. One of the first significant step in the newly established National Assembly amended the rules for the election of the metropolitan assembly, although a number of professional and political criticism were raised against it.

The transformation of the system of justification, that the new system which put control of a capital cheaper, more efficient, simpler and more democratic. It was further argued that the electoral lists are compiled by the nominating organizations. Because of this there can be candidates who personally (directly) did not challenged themselves before the electorate in any form.

The Basic Law states that in the capital districts can be created, and the law on local council states that „the capital’s municipal government and local authorities”. Because of this the capital is an independent municipalities, with the Basic Law and the Law on Local council also offers a number of tasks and powers. The effective decision-making is not only the capital interest, but also in many cases national interest as well (eg, the fact is that the a sixth of Hungary’s population lives in the capital). Before the modification, the pure proportional system was often indecisive or stalled by endless debates on issues, where efficiend decision was essential. As an indecisive giant capital government is unable to perform its duties effectively.

Thus, the hypothesis can be stated that the change of the city government was required, but a number of issues are raised concerning the electoral law and the right of the council. The study examines the issues that were raised in search of answers / solutions.

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WERBŐCZY’S THEORY OF SOURCE OF LAW, THE HUNGARIAN PERCEPTION OF FEUDAL LAW, THE SPECIALITIES OF THE DEVELOPMENT OF THE HUNGARIAN FEUDAL LAW, IN WIEW TO THE JAGIELLONIAN-AERA

Zoltán Attila LIKTOR

Though the roman law was present from the beginning in the Kingdom of Hungary, but it was unable to break down the dominance of the hungarian customary law, although there were many feeble attemps on it, mainly under the Habsburg rule. Although in Hungary the Jagiellonian-age (1490-1526) – unfortunately – lives in the historical memory as subsidence and the decades of decadence, and the Jagiellonian kings as weak-hand rulers and helpless puppets. We examine the age in the perspective of the public law, and the balance is more positive and prosperous then the general one. The law of Hungary was built on customary law mostly, and it had stiffend the hungarian law for centuries. Through the centuries the customary law sat a triumph over the legal-system. By the conception of Werbőczy the customary law replace the law, explane the law, and break the law, and this condition ’sat the customary law to the throne of the hierarchy of the source of the law’. The king could not make unlawful decree, the noble county has to refuse the enforcement. Under the reign of Matthias Corvinus, Vladislaus and Louis Jagiellon many of warrantly rules were taken which had ensured the integrity of the rights of the nation against the Habsburg-absolutism.

