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Editors

LOGIC, EPISTEMOLOGY, AND THE UNITY OF SCIENCE 20

Approaches to Legal Rationality

Springer

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LOGIC, EPISTEMOLOGY, AND THE UNITY OF SCIENCE

VOLUME 20

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Approaches to Legal Rationality

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Introduction

At the origin of the present volume there is a team of researchers coming from three different French institutions: the UMR-CNRS 8163 "Savoirs, Textes, Langage", and especially the group "Dialogical Pragmatism" at the Department of Philosophy of the University of Lille, the former Center Eric Weil at the University of Lille, and the Center René Demogue at the Law Faculty of the University of Lille.

An international workshop "Argumentation, Logic and Law", held in November 2005 at the Maison de la Recherche of the University of Lille, closed a first sequence of that interdisciplinary work. With the help of the Institut d'Histoire et de Philosophie des Sciences et des Techniques (IHPST) in Paris, and also with the logistic assistance of the Maison des Sciences de l'Homme du Nord et du Pas-de-Calais, researchers from different horizons, both geographical (England, France, Germany, Israel, Netherlands, Poland, Republic of Macedonia, United States) and intellectual, joined together to cross the lines of disciplines. During three days, logicians, legal theorists, moral philosophers, computer scientists and AI researchers, each of them usually working either in his own field in the ignorance of the other fields, or in the very same field but in one tradition in the ignorance of the others, tried to give new insights in the ways and means of legal reasoning.

Although the present volume flows from that conference and its methodological point of view, it should not be reduced to proceedings. The papers of this volume consist of a select subset of revised and newly refereed versions of the papers accepted for presentation at the workshop "Argumentation, Logic and Law". It also includes papers from leading researchers in logic, legal theory, moral philosophy and computer science, who did not attend the workshop but share our strong interdisciplinary perspective and have something new to propose about legal reasoning.

The result is a collection of papers that has a natural place in the series "Logic, Epistemology and the Unity of Science". From the beginning, the founders of that series were convinced of the necessity to provide it with a volume about legal reasoning.[1] The editors hope that the present volume meets the challenge.

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[1] Cf. Rahman S and Symons J (2004). Logic, Epistemology and the Unity of Science: an Encyclopedic Project in the Spirit of Neurath and Diderot. In Rahman S, Symons J, Gabbay D, and van Bendegem JP (eds) *Logic, Epistemology and the Unity of Science*. Volume 1, Springer, 2004, pp. 3–16.

The theme of the present volume is legal reasoning. All the papers are concerned with the question of making the structure of legal reasoning explicit. Despite of the fact that they operate in very different fields (legal theory, political sciences, sociology, philosophy of either "analytical" or "continental" traditions, logic, computer science, AI & Law), they all share a strong adherence to the intuitive structure of legal reasoning. More than other features, such an attention to legal reasoning as actually practiced by legal institutions makes our volume special in the normal production in this expanding area. The result is a set of new insights in major topics such as (to pick up just a few examples) the analysis and evaluation of legal arguments, the respective advantages and disadvantages of both logical and (dialectical) argumentative approaches to legal reasoning, rule-based reasoning *versus* reason-based reasoning, the relevance of logic to the law (and conversely).

The volume is divided into five parts.

The first part is concerned with the question of the "specificity" of legal reasoning. Tracking back to Aristotle and Cicero, four philosophers (Michel Crubellier, Fosca Mariani Zini, Pol Boucher and Jan Wolenski) give new insights and rediscover forgotten traditions in the received history of approaches to legal reasoning. The result is a critical discussion of some mainstream logical approaches to the law in the contemporary conceptual landscape.

The second part collects papers in which legal arguments are considered within the context of public reasoning. Indeed, the study of legal reasoning, of its structure and of its evaluation, often forgets, or fails, to take into account the fact that the notion of legal reason is directly linked to the notion of public reason in numerous and complex ways. Coming from different areas (legal theory, political sciences, sociology, and philosophy), four researchers (David M. Rasmussen, Patrice Canivez, Mathilde Cohen and Sandrine Chassagnard-Pinet) make some of those ways explicit.

The third part is devoted to the interface between logic and the law. Combining general and special investigations (the latter centered about the notions of condition, reasonable doubt and relevance in the law), three philosophers and logicians (Dov M. Gabbay, John Woods and Alexandre Thiercelin) propose new conceptual paths "to cross the lines of discipline".

The fourth part deals with formal approaches to legal reasoning. The relevance of logical models of defeasible legal argumentation is especially considered from a legal theory point of view (Ana Dimiskovska Trajanoska, Otto Pfersmann). New logical tools for modeling legal arguments are proposed in the framework of Labelled Deductive Systems (Dov M. Gabbay and John Woods).

Last but not least, the fifth part of the volume consists in a unique, ambitious paper by Maximilian Herberger, who strives to describe in a thorough way the different uses of the words "logic", "logical" and "logically" in a preeminent legal institution. Based upon a very rich set of textual data, his contribution opens a new direction for pragmatic investigations in the area.

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Part I
The Specificity of Legal Reasoning

Chapter 1
Aristotle on the Ways and Means of Rhetoric

Michel Crubellier

Plato hated rhetoric and the orators. In his main dialogue on that subject, the *Gorgias,*[1] Socrates – departing from his accustomed claim of ignorance, an unique occurrence in the whole corpus of the *Dialogues* – sets out a complete and refined classification of the various professions dealing with human goods, with the result that rhetoric is an irregular sort of practice, regardless of any notion of order or standards, and with no other specific skill than the ability to flatter men's immediate egoist emotions and their desire for pleasure. Although in later works[2] Plato did consider the possibility, and even the necessity, for rational politics to make use of some rhetoric in order to rule more easily irrational humans, he seems to have maintained to the end[3] this contemptuous and distrustful attitude towards rhetoric considered in itself. Rhetoric is not and will never be a science, not even a real "art" (*techne*), since it does not take its principles from the firm realm of being, but gets involved in the moving interplay of men's emotions and passions, and gives more importance to their opinions and impressions than to reality and truth. Still worse, the orator claims that his own skill does extend to the whole sphere of human affairs, and thus it seems to compete with the ideal science that in Plato's view is distinctive of the philosopher, i.e. dialectic.[4] At the ethical and political level, on the other

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I borrowed my citations of Aristotelian texts from the "Revised Oxford Translation", into which I made such changes as were required to match the interpretations that I want to defend. To avoid making my footnotes too cumbersome, I did not attempt to indicate and justify these changes. I hope that readers who would like to compare my citations with the ROT will easily understand what I have changed and why.

[1] Significantly enough, the *Gorgias* begins with the words "war" and "fight". That this opening is not fortuitous may be confirmed by a reference in the *Philebus* (58b), many years later.

[2] *Laws* IV, 722b ff.

[3] For instance in *Philebus* 58b–59d.

[4] *Philebus*, 57e–58d; *Sophistes*, 230b—231b (although the "Sophistes" in question remains unnamed, many details suggest that Plato had mainly Gorgias in mind).

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hand, it lets the irrational part of the soul prevail against the rational one, and lets justice or the common good give way to egoistic motives.

Yet through this hard confrontation with rhetoric, he came to formulate accurately some important questions raised by the relations between theory and practice in social contexts: how to reach a decision through weighing different motives, how to apply universal principles or norms to particular and casual states of affairs; and on top of all that, how to perform these activities by means of discussions with other people, in a context characterized by a certain amount of opacity – i.e., one cannot know with certainty what the others know and believe, to what extent they may pursue the same ends or different, even quite opposite ones, so that it is always possible to lie in different ways.

Aristotle inherited these concerns and concepts from his master, but he took a quite different stand. He thought there was a case for rhetoric, which he sets out in the first chapters of his *Art of Rhetoric*. Although he never mentions Plato, while many of his arguments are levelled at the earlier authors who wrote such *Arts*, claiming (in complete agreement with Plato) that there is nothing technical or rational in their writings, his main thesis is that rhetoric can be made into an art, and this is clearly anti-Platonic. Look at Socrates' assessment of rhetoric in the *Gorgias*:

> To tell you the truth, Polos, I think that [rhetoric] is in no wise an art.[5]
>
> I say that this no art, but a skill, because it does not know any reason why the things it brings about are such as they are, so that it could not tell the cause of any one of them.[6]
>
> Now you have heard what I say rhetoric is: the counterpart of cookery, which is to the soul what cookery is to the body.[7]

And now Aristotle:

> Rhetoric is the *counterpart* of dialectic. Both alike are concerned with such things as come, more or less, within the general ken of all men and belong to no definite science. Accordingly all men make use, more or less, of both; for to a certain extent all men attempt to discuss statements and to maintain them, to defend themselves and to attack others. Ordinary people do this either at random or through practice and from acquired habit. Both ways being possible, the subject can plainly be handled systematically, for it is possible to *consider the cause* why some speakers succeed trough practice and others spontaneously; and everyone will at once agree that such a consideration belongs to an art.[8]

If orators prove to have some efficiency, either by some habit or by mere chance, and even if they do not always succeed, then there must be a causal explanation of their successes; and whoever will take this cause or causes into consideration (*theôrei*), will have a *techne*, an "art", i.e. a rationally grounded way of doing. But

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[5] *Gorgias,* 462b.

[6] *Gorgias,* 465a.

[7] *Gorgias,* 465d–e.

[8] *Art of Rhetoric* I 1, 1354a 1–11; many characteristical phrases borrowed from the *Gorgias* passage occur in this chapter. The fact that rhetoric, which Plato paired with cookery, is matched here with dialectic, is particularly striking. But this is also due to the fact that Aristotle, for quite different reasons, downgraded dialectic from the most eminent position where Plato had put it.

the exact basis on which this claim of technicity may rest, remains to be seen; and at that point Aristotle wants to blame the former authors of books under the title *Art of Rhetoric*:

> Now, the framers of the current treatises on rhetoric have constructed but a small portion of that art. The *pisteis* are the only true constituents of the art: everything else is merely accessory. These writers, however, say nothing about enthymemes, which are the body of *pistis*, but deal only with the aspects [of rhetorical discourse] which are irrelevant. The arousing of prejudice, pity, anger and similar emotions has nothing to do with the subject matter, but is merely a personal appeal to the judge. Consequently if the rules for trials which are now laid down in some states – especially in well-governed states – were applied everywhere, such people would have nothing to say. All men, no doubt, think that the laws should prescribe such rules, but some, as in the court of Areopagus, give practical effect to their thoughts and forbid irrelevant talk. This is a sound law and custom. It is not right to pervert the judge by moving him to anger or envy or pity – one might as well warp a carpenter's rule before using it.[9]

So the distinct technicity of rhetoric consists in the art of producing the appropriate *pisteis* in an appropriate way. What is a *pistis* ? The word may mean a belief, or the fact of being persuaded by someone to believe this or that. Rhys Roberts translates it as "modes of persuasion"; but I think "modes" is a little too abstract, and "persuasion" is too subjective. As can be seen from the above-quoted passage, Aristotle seems to put outside the range of *pisteis* the arousing of emotions (at least of some of them), or the efforts to "move the judge" "to anger or envy or pity", though these efforts could be described as "a mode of persuasion". In the second chapter of Book I, he sketches a typology of the different kinds of *pisteis*. Some of them are "non-technical", i.e. they are not the result of the speaker's activity, but "are there at the outset", such as "witnesses, < evidence given under > torture, written contracts, and so on".[10] These seem to be characteristic of forensic rhetoric. Here the orator's job is only to find the best way to use them, or cope with them if they are definitely against his case.[11] In the second chapter of the *Rhetoric*, Aristotle divides technical *pisteis* – those which are produced by the orator himself according to certain rules – into three classes, on the basis of a schematic analysis of the act of communication[12] which to the modern reader will perhaps evoke a rudimentary version of Jakobson's table of linguistic functions[13]

• **speaker**	*personal character* of the speaker
• **speech** (and its **subject**)	*demonstrations* (real or apparent)
• **hearer**	*emotions* suscited in the judge

[9] *Art of Rhetoric* I 1, 1354a 11–26.

[10] *Art of Rhetoric* I 2, 1355b 35–37.

[11] See *Art of Rhetoric* I, Chapter 15.

[12] *Art of Rhetoric* I 2, 1356a 1–4; I 3, 1358 a 37–b1.

[13] Jakobson (1960), p. 352–357.

(Notice that in Aristotle's idiom the word *logos*, literally: "what is said", refers quite naturally to the contents as well as to the style and arrangement of the speech itself, with the result that he does not seem, at least in the first stage of his analysis, to isolate Jakobson's poetical function. In fact, he draws the distinction at the beginning of Book III,[14] which is entirely devoted to this aspect of oratory. But he does not consider it a specific element of the *pisteis*, and so it does not contribute to the technical character of rhetoric.)

Now, the examples of *pisteis* that emerge from this classification are likely to puzzle many a reader: what can there be in common between the report of a tough questioning session, a syllogism, or the moral virtues exhibited in somebody's speech ? The answer I would suggest is: all these are things that a good orator may "give" his audience in order to vouch for the fact that what he says is true, or just, or is the right thing to do now. Dictionaries do mention that the word was used in a concrete sense, to indicate a thing, or a sum of money, which was handed over to someone as a token of good faith or a security deposit.

(At this point, one might raise an objection, or at least mention a demarcation problem. In Chapter 1, as we have seen, Aristotle excluded from the *pisteis* the attempts to arouse anger or pity, as being more or less irregular moves directed towards the person of the judge, while here – i.e. in Chapter 2 – he counts the affects felt by the judge among the *pisteis*. Is this a mere inconsistency, or is it possible to fix at least a conceptual limit, even if we have to admit that there are some ambiguous or indecidable borderline cases ?– More on this topic at the end of my paper).

In any case, the *pisteis*, taken as a whole, are said to be "the only true constituents of the art". Aristotle justifies this claim in the following way:

> It is clear, then, that the technical study of rhetoric is concerned with the *pisteis*. Now *pistis* is a sort of demonstration (since we believe, most of all, when we consider that something has been demonstrated); the orator's demonstration is an enthymeme, and this is, in itself, the most effective of the *pisteis*; the enthymeme is a kind of deduction, and the consideration of deductions of all kinds, without distinction, is the business of dialectic (either of dialectic as a whole or of one of its branches); clearly, then, he who is best able to see how and from what elements a deduction is produced will also be best skilled in the enthymeme, when he has further learnt what its subject-matter is and in what respect it differs from dialectical deductions.[15]

Thus, Aristotle's claim that rhetoric can be turned into an art rests on analytics, i.e. a specific ability to find out the logical structure of an argument, and on syllogistic, which do provide a set of models for causal explanation of arguments in general. This might provide a plausible explanation for Aristotle's reversal of his master's judgment, since analytics is something that Plato did not know nor could foresee. Still, it may seem quite unrealistic to reduce rhetoric to a chapter of formal logic. In fact, having said that, Aristotle has very little to say about logic in the rest of his *Rhetoric* – at least in the strict sense of the word: for there are dialectical considerations in the last four chapters (20–23) of Book II, and hints about dialectic

[14] *Art of Rhetoric* III 1, 1403b 6–15.

[15] *Art of Rhetoric* I 1, 1355a 3–14.

scattered all along Books I-II; but he seems to develop openly and at length the very aspects that he has dismissed as irrelevant in his introductory chapters. Here again, shall we conclude that the *Rhetoric* is not consistent, maybe composed of stretches from different periods of Aristotle's career, or even that its very project was not consistent ? Barnes describes rhetoric as "a magpie, thieving a piece of one art and a piece of another, and then botching a nest of its own".[16] But it is not necessarily so. It may be the case that Aristotle did not include a systematic exposition of analytics in his *Art*, not even in the form of a summary, just because he supposed that his reader had to know that,[17] so that the *Rhetoric* should contain only new stuff, peculiar to the treatment of public debate. It would be a supplement to the logical treatises, which presupposes them and transforms the logical and topical equipment into a specialized set of abilities.

It seems to me also that he probably meant that this reference to analytics supplies rhetoric with a rational core (cf. the claim that enthymemes, which are the rhetorical counterpart of deductions, are "the body of the *pistis*"), and that this fact in turn confers some rationality even to the other parts of rhetorical activity. Such a progress of thought is not unfrequent in Aristotle: he allows inferences from the most perfect and complete type in a given class – which he considers to reveal the true essence of that class – to unfinished, or mixed and confused, cases.

Another important issue, for this discussion about the rationality of rhetoric, is the attitude that Aristotle recommends to adopt towards the judge (by the name "judge" we will indicate the person to whom arguments are proposed in view of some determined decision that this "judge" has to make, be it an individual or a collective person,[18] and independently of the relevant kind of decision : political, judiciary, or whatever).

The orator should not attempt to "pervert" the judge by arousing or increasing his most irrational passions.[19] Some minimal qualities of rationality and impartiality are expected from the judge, and – Aristotle insists – must be preserved or encouraged by the speaker, inasmuch as it depends on him. What does that mean ? One would perhaps ascribe this declaration to some motives that have nothing to do with the status of rhetoric. For instance, it could be just the expression of some naive faith in the goodness of human nature, or a rhetorical move made by Aristotle himself in order to defend rhetoric against "Platonist" accusators pointing at its immorality. Or it might be a merely conventional commonplace, something like the "I trust the laws and courts of my country" that every honourable defendant has to declare to

[16] Barnes (1995), p. 264.

[17] That analytics must have been considered by Aristotle himself as a (compulsory) first stage of philosophical training, as it was later on in the late Antiquity and Middle Ages, is attested by several mentions in the Corpus.

[18] In Athens, as well as in many other cities of ancient Greece, penal courts were relatively large assemblies (for instance the 500 Heliasts who sentenced Socrates to death); Aristotle seems to feel that it is in some way inappropriate to call "judge" a single person : cf *Art of Rhetoric* II 18, 1391b 10–12.

[19] *Art of Rhetoric* I 1, 1354a 24–26, quoted above.

his judges. It is certainly true that Aristotle was not so pessimistic a moralist as Plato seems to have been. He did not see all men (even cvilized men, citizens of a refined city like Athens) as constantly threatened by the tumult and disorder of savage desires and unrestricted selfishness; he would not have claimed that truth and science (the science of the Good) were the only forces able to preserve order and peace among men. For him, there existed something like a *Sittlichkeit*, a set of practical and unreflected principles of order embodied in the effective conditions of their common life. But there must be more than that in this contention. For here in the *Rhetoric*, he says that such an appeal to the judge's passions is "irrelevant" and that the very fact that former authors concentrated on things like that shows that they were incompetent.[20] This may be better explained by the following remark:

> Again, a litigant has clearly nothing to do but to show that the alleged fact is so or is not so, that it has or has not happened. As to whether a thing is important or unimportant, just or unjust (insofar as it has not been determined by the lawgiver), the judge must decide that for himself; he must surely refuse to take his instructions from the litigants.[21]

That does not mean that the orator must confine himself to factual points; in fact, Book I deals at some length with notions of good and harm, beautiful and shameful, just and unjust, and gives advice on how to assess the value of particular facts or ends or actions and how to compare them with one another.[22] Again, is this sheer inconsistency from Aristotle ? I think it is not. Of course, the final decision is the prerogative of the judge. But the act of deciding is not a process, but the instantaneous limit of the process of deliberation, and the orator is allowed to get along as close to that point as he likes (and is able to), so long as he leaves the last word to the judge. In a sense, Aristotle's insistence on the sovereignty of the judge[23] is the symbolic expression of a methodological principle. For even in the case of individual ethical deliberation, the same distinction between the stage of the statement and assessment of arguments and the stage of decision holds:

> We deliberate not about ends but about what contributes to ends. For a doctor does not deliberate whether he shall heal, nor an orator whether he shall convince, nor a statesman whether he shall produce law and order, nor does any one else deliberate about his end, but having set the end, they deliberate on how and by what means it is to be attained.[24]

We do not deliberate about ends, but we do not deliberate either on our actions considered in themselves. A sportsman training, a musician practising, may have

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[20] "The only question with which these writers here deal is how to put the judge into a given frame of mind, while about technical *pisteis* they have nothing to tell us". *Art of Rhetoric* I 1, 1354b 19–21.

[21] *Art of Rhetoric* I 1, 1354a 26–31.

[22] On the good and the ends of human life, see Chapters 5 and 6; on the relative values of goods, see Chapter 7; and also Chapters 13 and 14 for similar points about guilt and injustice.

[23] "This [= the ruling part of man] is what chooses. This is plain also from the ancient constitutions, which Homer represented : for the kings announced their choices to the people". *Nicomachean Ethics* III 3, 1113a 7–9.

[24] *Nicomachean Ethics* III 3, 1112b 11–16.

to reflect on how to perform some particular sequence of actions, but this is not deliberation[25]: we deliberate on our actions as means to some end. The distinctive kind of rationality which we call practical rationality can be attained only through this separation between means and ends. In fact, this is what Aristotle means in the celebrated passage of the *Politics* in which man is defined as a "political animal":

> Whereas mere voice is but an indication of pleasure and pain, and is therefore found in other animals (for their nature attains to the perception of pleasure and pain and the intimation of them to one another, and no further), the power of speech (*logos*) is intended to set forth the useful and the harmful, and therefore likewise the just and the unjust.[26]

The possession of an articulated language makes man able to go beyond the mere sollicitation of immediate desires, because he is able to conceive means-to-ends relations. His reflections lean on the conception of some given end, and deliberation may be described as an analytic process,[27] regressing from the goal to the conditions that are required to make it accessible:

> Since *this* is health, if the subject is to be healthy, *this* must first be present, e.g. a uniform state of body, and if this is to be present, there must be heat; and the physician goes on thinking thus until he brings the matter to final step, which he himself can take.[28]

With such considerations, it seems that Aristotle has found firm grounds for sustaining that rhetoric is a sound and rational occupation. It is all the more significant that he seems anxious not to push that claim of rationality too far, and to remind that rhetoric cannot be as exact and complete nor, in sum, as true, as many other arts:

> Now to enumerate and classify accurately the usual subjects of public business, and further to frame, as far as possible, true definitions of them, is a task which we must not attempt on the present occasion. For it does not belong to the art of rhetoric, but to a more instructive art and a more real branch of knowledge; and, as it is, rhetoric has been given a far wider subject matter than strictly belongs to it. The truth is, as indeed we have said already, that rhetoric is a combination of the sciences of analytics and of < the part of > politics which deals with moral behaviour; and it is partly like dialectic, partly like sophistical reasoning. But the more we try to make either rhetoric or dialectic not what they really are, practical faculties, but sciences, the more we shall inadvertently be destroying their true nature; for we shall be re-fashioning them and shall be passing into the region of sciences dealing with definite subjects rather than simply with language.[29]

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[25] Maybe someone would wish to call that deliberation too – but then it is of a different kind : not about winning this match or contest, but about becoming a better sportsman.

[26] *Politics* I 2, 1252b 10–15.

[27] Notice that this "hypothetical" analysis, which Aristotle sometimes compares with the hypothetical mode of resolution of a mathematical problem, is entirely distinct from the kind of analysis displayed in the *Analytics*.

[28] *Metaphysics* Z 7, 1032b 6–9; similar views in *Physics* II 9, 200a 15–24, and *Nicmoachean Ethics* III 3, 1112b 11–27.

[29] *Art of Rhetoric* I 4, 1359b 2–16 (context : an introduction to the section of Chapter I 4 in which Aristotle lists the main topics about which a political orator must know at least some basic facts, which he will be able to use as premises).

The idea that one cannot expect all the provinces of the realm of knowledge to conform to the same epistemological standards is a well-known Aristotelian tenet: for instance, Aristotle remarks that ethics, or physics, cannot attain to the exactness and rigour of mathematics.[30] But here, he places rhetoric even below ethics in that epistemological scale. Further, he is not merely stating the fact that rhetoric, as it is now, is imperfect (which could be due to a temporary state of affairs), nor making the poor truism that, were it to become more accurate and strict, it would then be a science and would not be any more the sort of thing it is by now. Clearly, he appears to consider that there is (and there will ever be) a place for a "practical faculty" of that kind beside a scientific knowledge of ethics and politics. Still more, its particular character makes it able to respond correctly to some situations in which an exact and universal science would prove to be inadequate.[31] Prudence (*phronesis*), the distinctive virtue of the statesman, is entirely distinct from science, though it is an intellectual virtue. In fact, Aristotle describes it as the ability to see at once what would be the outcome of an aptly conducted deliberation.[32]

The reason for that is that rhetoric is rooted in human condition: we all have to make important choices in situations of partial or inadequate knowledge, under constraints of time (most frequently the necessity to decide within a short time, but sometimes also the impossibility to act immediately, the necessity to wait for new information, etc.), and we have to come to a decision with, or against, other people. For lack of the relevant scientific knowledge, we must rest on our natural understanding of the meaning of words and our spontaneous capacity to handle the formal relations embodied in the structure of our language. That is why Aristotle says that rhetoric and dialectic deal not with the things themselves (*pragmata*, "definite subjects") but with language (*logoi*). *Logoi,* in the last sentence of the passage, is generally translated by "discourses", probably because that seems appropriate to the context of the *Rhetoric*, but it seems to me that this translation underestimates the fact that rhetoric is not concerned merely with the production of likely discourses (this would be its sophistical side), but, just like dialectic, may use language as a keen instrument for analyzing problems and situations. – By the way, the notion that the philosopher may withdraw to language for lack of the exact and complete knowledge he would have wished to possess is already present in Plato's *Phaedo*,[33] without any pejorative suggestion.

These considerations may also explain the strange sentence of lines 1359b 7–8, which seems to say that rhetoric is "broader than itself". One might also translate[34]: "rhetoric is allowed to assume much more than its own truths", i.e. while it has something like a definite field of its own (human actions and political affairs), it makes use of the general faculties of dialectic. This ambiguous status of rhetoric

[30] *Nicomachean Ethics* I 3, 1094b 11–27; *Metaphysics* ∝ 3.

[31] *Metaphysics* A 1, 981a 12–24.

[32] *Nicomachean Ethics* VI 9, 1142a 34 -b 9; cf. VI 5, 1140a 30 - b 10.

[33] *Phaedo* 99d – 100a.

[34] Giving the verb *dedosthai* its technical meaning of "to be granted" (said of a proposition).

was already present in the *Gorgias*, since the old orator claimed at the same time that rhetoric is concerned with discourses (in general),[35] while, on the other hand, the capacity of speaking before courts and assemblies about the just belongs exclusively to it.[36]

Clearly, Aristotle thinks that rhetoric is closely akin to dialectic. In what sense exactly ? He uses different phrases to express this proximity: rhetoric is "the counterpart" of dialectic[37] (or "corresponds" to it); it is "a branch of dialectic and similar to it".[38] Similarity is due to the fact that neither dialectic nor rhetoric has a special field of its own: as "faculties" concerned with discourse, their scope extends virtually to every problem or notion someone may meet, in unspecified circumstances.[39] Thus they have a sort of universality, although it must be pointed out that it is not a well-defined or grounded universality, but rather a sort of illimitation. The word *dunamis* ("faculty"), as opposed to "science" (*episteme*), was certainly meant to indicate this virtual character.[40] In the case of dialectic, such a faculty claims to deal with every possible object of discourse, be it real or fictitious, object of speculation or decision or production. Dialectic goes as far as man's natural curiosity[41]: it would be hard to conceive of a larger extension. Thus rhetoric, although it is unlimited in its kind too, may be called "a branch" (or "a part", *morion ti*) "of dialectic", i.e. its scope is necessarily restricted in comparison to dialectic. In what way ? One answer is that it deals only with the possible objects of deliberation. It may seem that it holds only for one of the genres of rhetoric, namely deliberative oratory, but this subclass is probably the most important one in Aristotle's opinion,[42] and the proper objects of the other two may be aptly described as variants of the object of the deliberative. Forensic rhetoric is confronted with past events, which as such are no more open to our present action, but the practice of justice rests on the notions that (1) the court has to make up a decision which is supposed to correct or compensate (were it only symbolically) the outcome of that past action, and (2) in order to assess the responsability of the author, the court will guide by a reconstruction of how he could or should have deliberated about it. The same kind of assessment is central to the last division of rhetoric, the epideictic, although in this case no sanction has to be taken. Thus deliberation is the "focal" centre of the field of rhetoric.[43]

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[35] *Gorgias* 449 d–e.

[36] *Gorgias* 454b.

[37] *Art of Rhetoric* 1354a 1.

[38] *Art of Rhetoric* I 2, 1356a 30–31.

[39] *Art of Rhetoric* I 1, 1355b 8–9.

[40] Before Aristotle, it had been used by Plato, to express that very same character of dialectic (for instance *Philebus* 57e), even if Plato did hope that dialectic woud lead to a real science.

[41] See the celebrated prologue of the *Metaphysics*, A 1, 980a 21–22.

[42] He does not say that in so many words, but he claims that it is "nobler" and "more political" and blames his forerunners for having taught quasi-exclusively forensic oratory (I 1, 1354b 22–1355a 1).

[43] On this notion of a "focal meaning", see *Metaphysics* Γ 2, 1003a 33–b 4, and its commentary in Owen (1960).

Objects of deliberation are characterized by the following specifications: (1) they are contingent facts (facts which could be otherwise), (2) they are open to our power of action (i.e. either they depend immediately of a choice that we can make now, or they are included in a process, an earlier stage of which lies within our power), and (3), as we have seen, they must be considered as means to attain to some end.[44] From the first two conditions, it results that the real scope of rhetorical practice is always related to a here and now. It is a thin, narrow and ever-changing net of possibilities that extends ahead of me; it is (in ordinary conditions) open-ended, but many of us will soon loose its ramifications from sight. Of course, the "art of rhetoric" does not deal directly with the particular configuration that I am facing just now, but with models that have some degree of empirical generality.[45] Other important features of rhetorical ability derive from conditions (2) and (3): the deictic reference to an "us" implies the consideration of some relevant facts about the present situation of a community, including its beliefs and values; and, as I have already mentioned before, we may have to cope with conflictual situation (which is regularly the case with forensic).

On the basis of these remarks, we are now in a position to draw a chart or map showing the situation of rhetoric among the neighbouring kinds of knowledge:

	analytics	
	dialectic	*wisdom* (= ontology)[46]
poetics	**RHETORIC**	
	political science	= ethics + politics

This unusual look at a region of the Aristotelian encyclopedy brings out a special class of learning that might be called "transverse" or perhaps "organic", since the *Organon* is an essential part of it (and it is worth remembering that while in the West the canonic order of Aristotle's works places the rhetorical treatises between the *Politics* and the *Poetics*, that is, on the borderline between "practical" and "productive" sciences, the Oriental considered it to be a part of the *Organon*). The existence of such "sciences" is due to the fact that while Aristotle rejected the Platonic project of an entirely unified science, he would not have been content with the mere addition of separate pieces of knowledge.[47] The role of these "transverse sciences" is to reflect upon the rules and conditions that are common to all sciences, as well as to some salient common features of their results. But they are not endowed with a metadiscursive or transcendental character; rather, Aristotle distinguishes them

[44] These conditions are specified in *Nicomachean Ethics* III 3, 1112a 18–1113a 2; a similar but shorter list in *Art of Rhetoric* I 2, 1357a 4–7.

[45] *Art of Rhetoric* I 2, 1356b 28–1357a 1.

[46] "Ontology" and "poetics" appear here only as reminders. They are not mentioned in the above-quoted text from Bk I Chapter 4, and the questions of the relationships between poetics and rhetoric, and of course of dialectic with first philosophy, exceed by far the scope of this paper.

[47] Cf Crubellier and Pellegrin (2002), pp. 111–113 and p. 149.

from those only by ascribing them less precision and necessity. Otherwise, he seems prone to put rhetoric on a same level as ethics and politics, inasmuch as the knowledge of some basic facts about the city and its constitution, or about emotions, virtues and vices, is an essential part of an orator's competence.

The relationship of rhetoric with dialectic and analytics is closer, but also more complicated. Rhetorical training is acquired through a regressive or backwards movement from conclusion to premises, just like analytics and dialectic[48]: "Rhetoric we look upon as the power of observing the *pisteis* on almost any given subject presented to us"[49]: phrases like "any given subject" recur in the definitions of the aims of both analytics[50] and dialectic.[51] The situation, or at least the language of the *Rhetoric*, is not exactly the same as what we read in the logical treatises. The *Analytics* (*Posterior* as well as *Prior*) present a general theory of inference based on the purely formal patterns of "syllogisms", while in the *Topics* dialectic makes use of more complex schemes, combining formal and semantical features, the so-called *topoi*.[52] Although the *Rhetoric* mentions both modes of constructing arguments, and seems to make a clear-cut distinction between them, Aristotle appears to be very lax in his use of the words, as we can see from some above-quoted passages:

> The consideration of deductions of all kinds, without distinction, is the business of *dialectic* (one would have expected "analytics") either of dialectic as a whole or of one of its branches (1355a 8–10), or:
>
> Rhetoric is a combination of the sciences of *analytics* and of the part of politics which deals with moral behaviour; and it is partly like *dialectic*, partly like sophistical reasoning (1359b 9–12).

So when he wrote the *Rhetoric* he seems to have considered that there was a theory of reasoning in general, including *topoi* as well as syllogisms, which he called (most of the time) dialectic, and into which he probably still distinguished analytics as a special part.[53] Thus analytics is relevant for rhetoric through dialectic, i.e. in his search for the best *pisteis*, the orator may use analytics and dialectic; rather, he must use dialectic, which in turn contains some analytical elements as an essential part.

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[48] On the regressive course of analytics, see Crubellier (2008).

[49] *Art of Rhetoric* I 2, 1355b 31–32.

[50] ". . .how we may ourselves always have a supply of deductions in reference to *the problem* proposed", Prior *Analytics* I 27, 43a 20–21.

[51] ". . .find a line of inquiry whereby we shall be able to reason from reputable opinions about *any subject presented* to us", *Topics* I 1, 100a 18–20.

[52] The Greek word means "place" and in dialectical contexts it is generally rendered in English by "commonplace". There is no real objection to this translation, except that in the course of this discussion I will have to mention a distinction between more and less common "commonplaces", so I chose to keep the Greek word.

[53] *Topoi* are never mentioned in the *Analytics*; in the *Topics* the word *sullogismos* appears with the general meaning of "deduction", and the characteristical form of the "syllogism" with its two premises and its middle term, never occur. That might suggest a later date for the *Rhetoric*; but it may also be the case that, for the purposes of a theory of public argument, he found it more convenient to treat the logical disciplines as one body of knowledge.

Then, in a way, since dialectic bears upon whatever can be said, it might seem that rhetoric is but a chapter of dialectic (some texts seem to go in that direction, as we shall see). But I think that one important nuance must be introduced here. A case is a matter for rhetoric when at least one of the persons who take part to the discussion is committed to taking a decision as an outcome; it is a matter for dialectic when it is investigated with no other motive than curiosity (for instance in the course of training a judge or a casuist). Thus rhetoric, although it may be very much like dialectic, cannot be reduced to it. Aristotle expresses that by saying that the specific aim of the art of rhetoric is "to invest speeches with a moral character" – literally, "to make discourses ethical", a phrase which is developed into: "there is a moral character in every speech in which the choice in conspicuous".[54] This is done:

(1) through the use of non-argumentative *pisteis*, i.e. those which rest more or less on some impressions felt by the judge, regarding either the trustworthiness of the speaker (the *ethos*) or the ethical character of the acts or facts in question (the *pathe*);
(2) through the possession of a body of specific knowledge, which provides premises for the inferential *pisteis*;
(3) but the very patterns of inferences which are characteristic of rhetoric differ significantly from their dialectical models: they are "counterparts" rather than instances of these.

Let us begin with this last point:

> Just as in dialectic there is induction on the one hand and deduction or apparent deduction on the other, so it is in rhetoric. The example is an induction, the enthymeme is a deduction, and the apparent enthymeme an apparent deduction: for I call a rhetorical deduction an enthymeme, and a rhetorical induction an example. Everyone who effects persuasion (*pisteis*) through proof does in fact use either enthymemes or examples: there is no other way. And since everyone who proves anything at all is bound to use either deductions or inductions (this is clear to us from the *Analytics*), it must follow that each of the latter is the same as one of the former[55].

From this text, it might seem that between analytics and rhetoric, as far as inferences are concerned, there is but a difference in terminology. Then an enthymeme would be any deduction, provided that it is used in a rhetorical context, and an example any induction occurring in a rhetorical context. But the situation is a bit more complicated. First, the rhetorical context imposes some characteristical qualifications on the arguments that are brought into play; second, even inside the *Prior Analytics*, Aristotle, as we will see, carefully distinguishes examples from induction, and enthymemes from deduction.

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[54] *Art of Rhetoric* II 21, 1395b 12–14; cf. also II 18, 1391b 20–21, b 25–26.
[55] *Art of Rhetoric* I 2, 1356a 36–b 11.

The constraints imposed by the situation will be easily understood. Every argument must be within the reach of the audience in the particular circumstances of the speaker's address. So it must be such as to be grasped even by people "who cannot take in at a glance a complicated argument, or follow a long chain of reasoning",[56] and thus:

- it must be short enough – a condition which amounts to beginning with premises which are not too far away from the conclusion, and so does not allow to reach always necessary premises; one will have to content with premises which will be only probable or likely[57];
- an argument must have a (comparatively) small number of premises, which leads sometimes to the suppression of some obvious premises[58];
- besides, the very nature of the objects of rhetoric implies that most of the premises will not be necessary;
- and that some of them at least must refer to concrete singular facts.

Other important characteristics of rhetorical arguments derive from the fact that they occur in socially determined situations, usually situations of confrontation. Hence, for instance, the fact that a dialectical premise must be shaped into a question, ad most often a closed question: "Do you think that P, or that not-P ?" More generally, the argumentative procedure may be described as the appropriate means for a bypassing strategy, in order to avoid a head-on collision with the opponent's convictions, which would block the discussion, as well as to bypass his prejudice or prevent him from discovering the orator's tactics (all these motives are already present in Socrates' use of questioning in Plato's dialogues).

The condition of reference to particular facts is probably the most important from a logical and epistemological point of view. For instance, in the *Prior Analytics*, it is used to mark off examples from induction:

> Clearly then an example is neither < an inference > from part to whole, nor from whole to part, but rather from part to part, which both are subordinated to the same term, and one of them is familiar. It differs from induction, because induction starting from all the particular cases proves that the extreme belongs to the middle, and does not bring its conclusion about the < particular > extreme, whereas argument by example does conclude about it and does not draw its proof from all the particular cases.[59]

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[56] *Art of Rhetoric* I 2, 1357a 3–4.

[57] *Art of Rhetoric* I 2? 1357a 22-b 1.

[58] Hence the later definition of enthymeme as an incomplete (or rather partly implicit) syllogism, with the remade etymology : "contained inside the mind". But in fact the verb *enthumeisthai* just means "to reflect", so that the name *enthumema* may apply to any moment provided by the speaker for the reflection of the judge or audience.

[59] *Prior Analytics* II 24, 69a 13–19.

Some clarification may be welcome. The paradigm case of Aristotelian induction is:

Man, horse, mule are bileless
Man, horse, mule are long-lived

Therefore bileless animals are long-lived

Aristotle says that it establishes that one of the extremes ("long-lived") belongs to the middle ("bileless")[60] by means of the other extreme (the list: "man, horse, mule"). It is an inference "from part to whole" because the subject of the conclusion has a wider extension than the subject of both premises (thus, to say that examples go neither from part to whole nor from whole to part, amounts to saying that they are neither inductive nor deductive inferences). An example is a four-term structure:

B belongs to C and to D as well
A belongs to C

Therefore A belongs to D

– in which C and D are particulars,[61] C is more familiar than D and D is very much like C. For instance: "Since when Callias was ill of this disease that did him good, that will (probably) do good to Socrates suffering from similar symptoms".[62]

One might be tempted to construe the example as the combination of an inductive move (concluding from particular cases that a person suffering of disease B will benefit from treatment A) plus a deductive move (concluding from that general rule that if D suffers of disease B, he will benefit from A), but that would miss the essential point, which is that the example is a shortcut, which is based only on singular facts and does not require awareness of one definite nosological entity (and hence belongs to empirical insight[63]), at the cost of a lesser certainty of the conclusion.

It is crucial for rhetoric to be able to draw conclusions about particular subjects, since the outcome of deliberation is the qualification of a particular action (as something to do or to avoid) or a particular person (as guilty or innocent or worthy of admiration). This can be done either by means of analogy with another particular term, as in the cases of examples, or – more effectively – through reference to a universal proposition, and then we have an enthymeme. An example of enthymeme (taken from the *Prior Analytics*) is:

A woman who has milk is with child
This woman has milk

Therefore this woman is with child[64]

[60] Here he calls "middle" the term that has an intermediate extension, and not (as he usually does) the one which bridges between the terms of the conclusion.

[61] While Aristotelian induction is always based on class attributions, such as "man is long-lived".

[62] Cf. *Metaphysics* A 1, 980a 8–9 ff.

[63] *Metaphysics* A 1, 980a 10–12, where empirical thought is opposed to art. Does that mean that Aristotle changed his mind between the *Metaphysics* and the *Art of Rhetoric* ? Not necessarily. The orator may possess an art, which enables him to devise proofs accessible even to laymen.

[64] *Prior Analytics* II 27, 70a 13–16

This looks very much like a syllogism of the first figure. But once again there is the same difference, namely that in an Aristotelian deduction (despite the famous school example "Socrates is a man – therefore Socrates is mortal", which is not Aristotle's) there is no place for particular terms such as "this woman". An enthymeme might be defined as "a syllogism in which there is one particular term" even though Aristotle does not use that criterium; but he says that an enthymeme is a deduction from signs,[65] which amounts to the same thing. For the sign, in the previous example, is the fact that this woman has milk. This is a particular information about a particular subject; but this is a sign insofar as it evokes immediately some universal proposition, with which it gives rise to an inference: in our case, the fact that this woman has milk evokes the general fact that women have milk when they are with child. The fact that this one has milk does not mean anything by itself. The trigger of the inference is the mental act by which a singular fact is recognized as a sign, i.e. referred to the universal proposition that gives it its meaning.

So examples and enthymemes are characterized by the fact that reasoning leans on some particular facts, which either are used as one would use general terms, as in the example, where the subject of the conclusion, D, is somehow subsumed under C, the familiar and undisputed comparison term, as if we had:

All Cs are A
D is a C ["of a kind"]

Therefore D is A

– or alternatively, as in enthymemes, they suggest or recall general rules that support the inference. The mental capacity to recognize forms, meanings and classes in our perceptive experience (as in the case of reading, one of Aristotle's favourite examples[66]) is crucial in Aristotle's epistemology, for it makes possible the conformity of our thoughts with external reality. He calls it *nous* or "actual comprehension", and he is always very careful to distinguish it from "logical" attribution of one general term to another.

(Another example of such an act of recognition or comprehension, and very akin to rhetoric, is the special perception that we have of a *prakton,* literally "a thing to do", which works as a trigger in the so called "practical syllogism", which is an analytic description of the formation of our intentional acts,[67] for instance:

I need drinking (or: I am thirsty)
This is a drink

He drinks at once[68]

[65] *Prior Analytics* II 27, 70a 10.

[66] See *Metaphysics* M 10, 1087a 8–21; *On the Soul* II 5, 417a 24–29.

[67] Including the activities of most animals, cf. *The Movement of Animals* and *On the Soul* III, 9–10.

[68] I put the "conclusion" in italics (and without a "Therefore. . .") to stress the fact that it is not a piece of knowledge, nor a proposition (even in the form of an order or a summon), but simply an action.

I may suffer an atrocious thirst, or be rationally convinced that I have to drink in order to keep healthy, that will not make me move an inch as long as I will not recognize something as "a drink" in the surroundings. As in the case of examples and enthymemes, the perception of a particular object actuates a general maxime, which otherwise would remain abstract or potential. The difference is that enthymemes or examples are used in the course of an argumentative process, which prefigures the action that should be done, but remains purely intellectual.)

In order to devise inferential *pisteis*, it is necessary to have premises that will be freely accepted by the judge and will allow easy and effective inferences. In this search for premises, it is essential to keep together considerations about the form of arguments and about the subject matter in itself. So the orator must possess a basic stock of truths, which he will try to link up in a convenient way to the conclusion he wants to prove.[69] These are the "proper" premises of rhetoric, which mark it off from dialectic, but are in fact common with ethics or politics. Most of them are facts about the geography, economy, sociology and history of the city[70]; others are general psychological facts about the emotions and characters of men.[71]

But there is another category of materials that can provide premises, namely truths about those "goods" or ends that all men (or at least the great majority of men in the great majority of circumstances) do share, because there is a human nature; and this is still the more true if we have to consider educated citizens of a Greek *polis*. Such ends are (1) happiness and its components,[72] (2) the good and the useful, i.e. what may lead to happiness or help us to attain to it,[73] (3) what is acknowledged by as commendable or admirable, thus strengthening the moral unity of the community: the beautiful, the just, and virtues,[74] and (4) the particular values implemented by the constitution of the state.[75] The orator must have a particularly developed, precise and methodical awareness of all these goods, which constitutes an important part of his own specialized expertise, although it is not really specific (since it develops the common beliefs of all the citizens) and it is no scientific knowledge. But this awareness becomes an art once it is worked up by dialectic and analytic capacities, which help the orator to see better what is implied in those common beliefs. For once such ends are assumed, rhetorical analysis is able to extract order and rules out of them. For instance: what do we mean by "happiness", "justice" or "virtues", and what events or properties are constitutive parts of them or conditions of their realization ?

Maybe Aristotle did not consider such truths to be as different from empirical evidence as they may appear to a modern reader of Kant, for instance: maybe he

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[69] *Art of Rhetoric* II 22, 1396a 4–7 ff.

[70] *Art of Rhetoric* I 4, 1359b 19 ff.; see also I 8, about constitutions.

[71] *Art of Rhetoric* II, 1–17.

[72] *Art of Rhetoric* I 5.

[73] *Art of Rhetoric* I 6.

[74] *Art of Rhetoric* I 9.

[75] *Art of Rhetoric* I 8.

saw them as just another kind of facts. But he must have felt some difference, since he acknowledged that while many ends are generally agreed on (*homologoumena*), many others are "disputed" (*amphisbetesima*).[76] There is a difficulty here, for since deliberation presupposes the assumption of some end, the practice of rhetoric (delivering a speech before a judge or an assembly in order to reach a decision) seems to require that the orator and the judge agree about the end. Does that mean that common deliberation is impossible whenever one of these disputed ends comes at stake, and the orator and the judge do not agree ?

In fact, it does not preclude deliberation in common, because there is still a possibility to produce and compare arguments for and against such ends by referring to some (agreed on) formal or generic features which are supposed to belong to any good as such, or to a great majority of them, so that they can be used as criteria without regard to the content. Is bad, for instance, "what our enemies desire, or at which they rejoice", "what is in excess"; is good "that of which the contrary is bad", and "that which most people seek after", "that which is praised", "what has been distinguished by the favour of a discerning or virtuous man or woman", and so on.[77] Another case of "disputable" ends is when different ends compete. Then it is possible to compare their relative values by means of different tests,[78] such as: "a thing productive of a greater good is itself a greater good"; "a thing which is desirable in itself is a greater good than a thing which is not desirable in itself"; "what is rare is a greater good than what is plentiful"; and so on.

With such patterns of argument as these, we are reaching the third element (beside inferential models and ethical premises) of rhetorical ability, the one which is properly dialectical: for they are *topoi*. What is a *topos* ? Jacques Brunschwig very aptly describes it as a "premise-making-machine",[79] i.e. a device which, from a given conclusion (or alternatively from the opponent's thesis that one has to refute), enables to generate another proposition which, once it is granted (either willingly, if our audience or the opponent feel that it is sound or true, or under constraint, if we are able to show that this is an undisputable fact or the necessary consequence of some assumptions they have made), entails the conclusion. More precisely, a *topos* gives the pattern (including some variables) of a premise that may be used to reach a conclusion modelled on a given pattern including the same variables. The method of *topoi*, as it is developed in the *Topics*, may be seen as resting on a kind of analysis of the meaning of terms. While syllogistic is definitely formal, the patterns of *topoi* are not really formal. Some of them may be extremely abstract or general, but they

[76] *Art of Rhetoric* I 6, 1362b 30. Although at 1362 b 29–30 Aristotle opposes "the things admittedly good" and "things whose goodness is disputed", and enumerates in great detail the "admittedly good", he gives no list of the disputed ones; from his examples, he appears to consider that controversies concern the application of the generally admitted notions of good to some particular object or action.

[77] *Art of Rhetoric* I 6, 1362b 30–1363a 4.

[78] Which are listed in Book I Chapter 7, with parallel passages in Chapter 9, 1367a 17–32 (for he epideictic genre) and in Chapter 14 (forensic).

[79] Brunschwig (1967), p. xxxix.

are never entirely free of reference to determined contents. The project of dialectic (already in Plato's dialogues) seems to have been the decomposition of meaning into elements which should be as simple as possible, more or less in the fashion of Leibniz's *Characteristica Universalis*; in fact, it seems (if one may try a guess on the basis of the scattered and often cryptic indications of the dialogues[80]) that Plato did hope to find absolutely simple components of meaning, from which every concept or notion could be reconstructed *a priori*, and thus made entirely clear (and become the principles of a universal science). Aristotle gave up this grand prospect, but his own contribution to dialectic was to make use of such semantic analyses in order to find premises and arguments.

The bulk of the *Topics* (from Book II to Book VII) is made up of lists of *topoi*, following a systematic division of premises and problems into four types according to the relation between the predicate and its subject – the so-called "predicables": definition, property, genus and accident.[81] Since this division of predicables is exhaustive, one might be tempted to think, here again, that the *Topics* contain a complete exposition of all the *topoi* there are, so that the *Rhetoric* would be only a collection of precepts for the application of dialectical rules to public deliberation. Once again, that would be an underestimate of the specificity of rhetoric. Some of the *topoi* I have just mentioned appear in the *Topics*: for instance, the notion that "things whose destruction is more objectionable are themselves more desirable", and "a thing whose loss or whose contrary is more objectionable is itself more desirable",[82] corresponds well enough to the rule: "is good that of which the contrary is bad".[83] But there is nothing like: "is bad what would greatly benefit our enemies": for it requires empirical knowledge, as well as a specific insight (which in fact is a form of prudence) to determine with certainty who are my enemies, and still more to foresee which actions of mine will benefit them. The same is true of the *topoi* that are used to assess the possibility or likeliness of some events – especially in the case of forensic oratory, in order to discuss about "things already done".[84] Christof Rapp suggests[85] (rightly, I think) that the word *topos* had a broader meaning than the models described in the *Topics*, which seem to have been selected by Aristotle, he says, according to some "specific formal and functional criteria". I wish to add that even within the range of these specifications, the *topoi* of rhetoric are marked by their pragmatic context, and that they implement some specific knowledge.

To conclude, I will return to non-argumentative *pisteis*, namely the ethical character of the speaker and the emotions that he is able to arouse, or at least (and more

[80] It would take a long journey through Plato's works to substantiate that conjecture (which could not be demonstrated with certainty anyway). The passage that lends the best support to it is *Phaedo* 99e – 100b ff.

[81] *Topics* I 6–8.

[82] *Topics* III 2, 117b 3–7.

[83] *Art of Rhetoric* I 6, 1362b 30–31.

[84] *Art of Rhetoric* II 19; cf. also I 3, 1358b 16–17.

[85] In an unpublished paper read at Villejuif in June, 2006.

plausibly) to inflect or regulate, in his audience. There are three questions about them that I want to tackle briefly here. (1) Is it really possible to describe them as *pisteis* in the sense I suggested above, i.e. something that the orator can "give" his audience as an aid to decision-making ? The second and third questions derive from this one, and are closely related to each other: (2) Are not they open to moral criticism, as being more or less dishonest tricks intended to manipulate an audience ? (3) Is Aristotle really consistent, if he allows himself a kind of behaviour for which he had sternly blamed the former authors ?

First, although the orator may, and probably must consciously intend to make such impressions on his audience, and to develop a battery of specific means to that effect, it seems less plausible that the hearers should become distinctly aware of these impressions and of the elements or aspects of the discourse that have created them. Indeed, it seems that it will work even better if the psychological processes remain unconscious. It is not completely implausible that the hearer would register with satisfaction the signs of competence and honesty that he discovers in his interlocutor's speech, but he will immediately become more suspicious if it comes to his mind that these signs may have been prepared on purpose. The case of emotions is perhaps a little more defensible: an orator may draw his hearers' attention on the particular emotion they are feeling just now, and suggest that they should take it as a guide to make the best choice. But even so, that will work only insofar as they can believe that their feelings are natural and not tampered by the orator's cunning. Moreover, Aristotle does not attempt to account for the psychological processes through which such *pisteis* produce their effects. So there may be some rationality in the use of them, but it seems to be objective rationality, so to say, which does not call on the rational faculties of the hearer. They do not contribute to the rational organization of a public space for discussion; rather, they presuppose opacity.

Thus we have to decide whether Aristotle proves to be inconsistent on an essential aspect of his project, or whether he is cynically cheating and speaking a double language. Another way out would be to conceive that he is ready to admit that, at its margins, the art of rhetoric shades off into its opposite, i.e. the kind of lawless practice that Plato censured. There must be something true in this supposition, since he happens to bring forward such justifications as:

> Again, it is absurd to hold that a man ought to be ashamed of being unable to defend himself with his limbs, but not of being unable to defend himself with rational speech, when the use of rational speech is more distinctive of a human being than the use of his limbs.[86]

The notion that one should not be ashamed of being unable to defend oneself before courts and assemblies is a hallmark of the Platonic Socrates,[87] while the description of rhetoric as a martial art, absolutely necessary in a world in which one is constantly assaulted, is a commonplace of his sophistic opponents

[86] *Art of Rhetoric* I 1, 1355a 38–b 2.

[87] *Theaetetus* 174a -175b; *Gorgias* 485c–486c.

in the *Gorgias*.[88] Even Aristotle's immediate reflection on this argument is strongly reminiscent of the Platonic Gorgias:

> And if it is objected that one which uses such power of speech unjustly might do great harm, that is a charge which may be made in common against all good things except virtue, and above all against the things that are most useful, as strength, health, wealth, generalship. A man can confer the greatest of benefits by a right use of these, and inflict the greatest of injuries by using them wrongly.[89]

This claim that rhetoric, as well as any other technique, is in itself ethically neutral, is Gorgias'.[90] But it must also be remembered that the idea that any good can be turned into its opposite as long as it is not regulated by the absolute Good, is often developed by Socrates himself, for instance in *Meno* 87e–89a, *Euthydemus* 288d–290d, *Phaedo* 68d–69c.

In order to appreciate more accurately Aristotle's position, another interesting indication may be taken from the following passage:

> Although the same systematic principles apply to political and to forensic oratory, and although the former is a nobler business, and fitter for a citizen, than that which concerns the relations of private individuals, these authors say nothing about public oratory, but try, one and all, to write treatises on the way to plead in court. The reason for this is that in political oratory there is less inducement to talk about non-essentials. Political oratory is less given to unscrupulous practices, because it treats of common affairs. In a political debate the man who is forming a judgment is making a decision about his own vital interests. There is no need, therefore, to prove anything except that he facts are what the supporter of a measure maintains they are. In forensic oratory this is not enough; to conciliate the listener is what pays here. It is other people's affairs that are to be decided, so that the judges, intent on their own satisfaction and listening with partiality, surrender themselves to the disputants instead of judging between them.[91]

Appealing to emotions in order to muddle and influence the judge is presented here as a characteristical feature (and a more or less pathological one) of forensic oratory, which is itself belittled in comparison to the political use of rhetoric. Aristotle does not seem to consider the possibility that the judge, who is a citizen, be interested in maintaining justice and order in the city; indeed he keeps that role for law: "well-drawn laws should themselves define all the points they possibly can and leave as few as may be to the decision of the judges"[92]: for these might be Philocleons.[93] While public deliberation about common affairs has its own norms, this is not the case with forensic oratory. On this point, Aristotle is not so far from his old master. For the main issue of the *Gorgias* is to know what is the end at which rhetoric aims and, above all, to establish the necessity for rhetoric to be ruled by

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[88] *Gorgias* 456c–457c, 486b–c, etc.

[89] *Art of Rhetoric* I 1, 1355b 2–7.

[90] *Gorgias* 456c ff.

[91] *Art of Rhetoric* I 1, 1354b 22–1355a 1.

[92] *Art of Rhetoric* I 1, 1354a 31–33.

[93] Aristophanes, *Wasps*, especially lines 545–630.

some external principle: after Gorgias has claimed that rhetoric is an independant and all-powerful activity, and Polos and Callicles have tried to defend the idea that it may be put in the exclusive service of our desires, Socrates establishes that rhetoric, like every other human activity, needs the guidance of a principle of order and harmony, which, in the field of human life and actions, is the same thing as justice.[94] Thus the difference between them is essentially that Plato seems inclined to condemn rhetoric as a whole, while Aristotle thought he could draw a line between an egoistic kind of rhetoric, caught in the interplay of conflicting passions, the type of which was forensic oratory, and another one that was capable of self-regulation, since people were dealing with "their own vital interests".

But this ethical and political disagreement had epistemological consequences as well. For Plato, rhetoric could only be redeemed by its integration into a more fundamental science, which would be a knowledge of the absolute good considered in itself, in such a way that every truth about human affairs could be demonstrated on the basis of this fundamental knowledge. Aristotle, on the contrary, considers that rhetoric is self-contained, and that it need not, but also cannot become just one part of such a universal wisdom.

To sum up: rhetoric is not a thievish magpie. It has a domain of its own, and a consistent set ot practices. Disparate as its elements may be, it becomes a real art (and not a scrappy collection of thumb rules or a kind of wrestling with no holds barred) once it is guided by one definite end. The case is very similar to medicine: the orator's abilities are in fact a set made out of different parts, just as the physician has to know not only health and the structure of human bodies, but also a lot of facts about medicinal plants, climates, and so on; that is one reason why they may be called arts, but not sciences in the proper sense of the word. The ultimate norm of rhetoric must remain external to it, as it were. Rhetoric is not expected to account for this norm; but neither is it fully determined by it. As we have seen before, the orator's specific aim is to prepare at his best a decision which will not be his.

In order to do so, he implements a specific set of abilities, which includes, as a distinctive and most important part, the knowledge of how inferences work, how they can be expressed through discourse and how one can best conceive them. In that sense rhetoric is "a branch of dialectic", but it is not true that they have "merely external" differences, as Hintikka (1993)[95] once claimed. For it requires also some specialized knowledge in the fields of politics and ethics. Which is more, it requires some moral and intellectual virtues: the ability to recognize relevant elements in the ever-changing complexity of particular facts; and a clear and steady consciousness of what is good, both for me and in itself. These capacities are the fact of "prudence", and without them all theoretical knowledge and dialectical virtuosity would amount to nothing.

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[94] *Gorgias* 500d–504e ff.

[95] Hintikka (1993), p. 22

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Chapter 2
Cicero on Conditional Right

Fosca Mariani Zini

Under what conditions is an argument credible, in that it can be subjected to a process of proof and, as such, be accepted by reasoned assent?

This question permeates Cicero's work and manifests itself, from a "sceptical", neo-academic viewpoint, as an enquiry into the conditions of possibility of our natural argumentation, of which juridical debate is the most fully-fledged expression. Within this framework, Cicero strives constantly to bring the psychological aspects (credibility, faith in the speaker, the stirring of public feeling) as well as the empirical elements (frequency of facts, material conditions of an event) of argumentation to the logical processes of proof. Therefore, I will first attempt to reconstruct his conditions of possibility, demonstrating that Cicero, while not refusing, in principle, the equivalence of all points of view, does not condemn himself to undecidability or to Pyrrhonian aphasia, but defines a space for forthright argumentation. This latter has as its objective that which it is *preferable* to pursue or to avoid in any circumstance and is founded on the constitutive possibilities of the *mens*, notably the possibility of anticipating in a rational manner the link between cause and effect, antecedents and consequences. Within this framework, the criterion for determining what is preferable is provided by the *probabile*, which does not correspond to simple probability, because the repetition of facts and their empirical verification are only a moment in the process of proof, and become significant only in a specific conditional apparatus, that is particularly well expressed by the dilemma.

I will then try to show that the right is not only, for Cicero, the proper domain for "plausible argumentation, but its most successful historical manifestation, the area where the conditions of possibility of our *mens* are effectively realised. It is for this reason that Cicero's *Topica*,"[1] which analyse in an efficient manner the processes of dialectical argumentation, present at the same time the ordinary apparatus of our

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[1] A late work, undoubtedly written in 44 AD. Cf. the excellent critical edition, with English translation, introduction, and commentary, by Reinhardt T (2003): *Topica*, Oxford.

D.M. Gabbay et al. (eds.), *Approaches to Legal Rationality*, Logic, Epistemology, and the Unity of Science 20, DOI 10.1007/978-90-481-9588-6_2,

minds in argument. The conditional structure proper to our inferences is emphasised here in a renewed reflection upon the notion of cause, considered as a condition.

It could thus, perhaps, be understood why Cicero's *Topica*, neglected in recent times,[2] was the founding text, from Boèce onwards,[3] for all medieval logic concerning the validity of specific conclusions and conditional argumentation.[4]

2.1 The Preferable and the Rupture with Indifference

Cicero has always been acknowledged as being an adherent of New Academy scepticism,[5] thereby renewing the Socratic practice of doubt: far from considering that all seeking for truth is doomed from the outset, he feels that this quest is legitimate and that it encourages a renewed examination of any question, starting from a new contradiction or from a different point of view. Thus scepticism is not so much a school as a way of thinking, which seems to be a point of commonality between the

[2]Cicero's speculative stratum has been neglected even by the recent resurgence of interest in Latin philosophy: cf. the two well-known volumes edited by Barnes J and Griffin M (1989). *Philosophia Togata I. Essays on Philosophy and Roman Society*, Oxford and *II. Plato and Aristotle at Rome*, Oxford: Görler W (1974). *Untersuchungen zu Ciceros Philosophie*, Heidelberg; Grimal P (1986). *Cicéron*, Paris; G. Gawlick and W. Gorler, «Cicero», dans *Grundriss der Geschichte der Philosophie*, vol. 4, Basel, p. 991–1168; Powell JGF (ed.) (1995). *Cicero the Philosopher*, Oxford; Leonhardt J (1999). *Ciceros Kritik der Philosophenschulen*, München; Auvray-Assayas C (2006). *Cicéron*, Paris.

[3]Cf. Boèce, *De Differentiis topicis*, critical edition by D.Z. Nikitas, Athens/Paris/Bruxelles, Academy of Athens/Vrin/Ousia, 1990 as well as the English translation with critical commentary by Stump E (1977). *Boethius's De Topicis differentiis*, Ithaca. On this subject, cf. Stump E (1989). *Dialectic and Its Place in the Development of Medieval Logic*, Ithaca; Marenbon J (2003). *Boethius*, Oxford, esp. 56–65.

[4]Cf. Green-Pedersen NJ (1984). *Topics in the Midle Ages*, München; Ebbesen S (1993), « The Theory of loci in Antiquity and the Middle Ages », in Jacobi K (ed.), *Argumentationstheorie*, Leiden; Moody EA (1953). *Truth and Consequence in Medieval Logic,* Amsterdam; Schupp F (1988). *Logical Problems of the Medieval Theory of Consequences,* Napoli. It should, however, be pointed out that studies of the topics have somewhat neglected Cicero's original conception, following Boèce: cf. Mariani Zini F (in press). "Les topiques oubliées de Cicéron". In Biard J and Mariani Zini F (eds.) *Le syllogisme topique, de l'Antiquité à la Renaissance*, Turnhout.

[5]In the third century AD the New Academy did not interpret Plato's dialogues as a systematic whole or an established ontology, but as an œuvre of which each part was permeated by doubt and the confrontation of contradictory positions without being able to take up a definitive position. Knowledge is thus always an infinite quest. It is in this connection that "scepticism" is spoken of, but the term is problematic. It was used in the early Christian era to indicate schools that questioned the possibility of establishing criteria for true and false. This must not be confused with a trivial conception of scepticism, because it implied a *logical and critical enquiry*. For the historical context of the relationship between the New Academy and Cicero cf. Lévy (1992). *Cicero Academicus. Recherches sur les* Académiques *et sur la philosophie cicéronienne*, Roma. For an examination of his logical and philosophical motives, cf. Inwood B and Mansfeld J (eds) (1997), *Assent and Argument. Studies in Cicero's Academic Books*, Leiden/New York.

New Academy and Pyrrhonism.[6] However, the main difference between these two trends is to be found in the outcome of undecidability to which Pyrrhonism leads. This latter maintains, in fact the equipollence (*isotheneia*) of all grounds, so much so that any argument can equally well be used either for or against one position or another. Consequently, it cannot be said that something is *more* this *than* that, but that it is *and* is not or that it *neither* is *nor* is not. Although Pyrrhonism maintains that the wise sceptic does not, in everyday life, deny that things appear to exist in a definitive fashion, according to which he/she can adapt his/her day to day conduct, this is only a matter of the warped world of opinion.[7] Above all Pyrrhonian scepticism leads, as its ultimate consequence, to aphasia, the supreme form of ataraxia[8]: once all dogmatic theses have been eliminated, as none is more valid than any other, the sceptic's point of view must, to be consistent, cease to exist of its own accord.[9] Cicero refused this outcome which would paralyse knowledge as much as action. While recognising that any "in utramque partem" debate is played out on the constitutional platform of the equality, in principle, of all points of view, no one being more valid than another, Cicero seeks to overcome their reciprocal neutralisation. To do this, he methodologically adopts an *enclosed* polemical space, with the aim of determining what is *preferable* at a given moment, established by the logical criteria of the *probable*, of which empirical verification is merely a moment which depends on a prioritised conditional argumentative structure. Let us see how. First and foremost, Cicero situates the opposition of points of view in the *finite* context of the history of philosophy. He is not motivated by a doxographic inspiration, but rather he is convinced that the major philosophical questions are worked out in a polemical philosophical space,[10] because models of thought are *limited* and are constituted by the clash of clearly opposing forces.[11] The history of doctrines thus becomes a precious methodological instrument for avoiding dogmatism and

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[6]From the third century the other sceptical tradition is inspired by Pyrrho, none of whose work has come down to us: his thought is known by way of his disciple, Thymon, cf. *Pirrone, Testimonianze*, Caizzi Decleva F (ed) Napoli, 1981. Pyrrhonism was revived by Sextus Empirucus, between the latter half of the second and the beginning of the third century. For the connections between the two scepticisms cf. Caizzi Decleva F (1985) « Pirroniani e Accademici nel III sec. a. C. ». In Flashar H and Gigon O (eds) *Aspects de la philosophie hellénistique*, Genève, Fondation Hardt, pp. 146–183. Cf. also, Ioppolo AM (1986). *Opinione e scienza: il dibattito fra Stoici e Accademici nel III e nel II secoli a*.C., Napoli; Bonazzi M (2004). *Accademici e Platonici: il dibattito antico sullo scetticismo di Platone*, Milano.

[7]Sextus Empiricus, M, XI, 148.

[8]Sextus Empiricus, M XI, 147; PH I, 206; II, 188.

[9]On these subjects cf. Burnyeat M (1983). « Can The Skeptic Live His Scepticism? ». In Burnyeat M (ed) *The Skeptical Tradition*, Berkeley, pp. 117–148; Voelke A-J (1993). *La Philosophie comme thérapie de l'âme. Etudes de philosophie hellénistique*, Paris/Fribourg, pp. 107–127.

[10]Such as the question of the nature of sovereign good, to which the philosophers' "maior dissensio" relates: Cicero, *Luc*., 42,129.

[11]Here there is no hint of eclecticism: as D. Sedley writes "Philosophical Allegiance in the Greco-Romain Word", in *Philosophia Togata* I, p. 97–119: "None of the ancient philosophers was eclectic", p. 118 note 48.

resuming philosophical interrogation in a *critical* manner.[12] Similarly, the opposition in a courtroom between the prosecution and the defence is circumscribed by an enclosed space: on one hand, it necessitates an explicit opposition which exactly determines the question[13]; on the other hand, the law offers multiple, but not infinite, possibilities of interpretation.[14]

The closing off of the space of confrontation between clearly opposing forces allows the possibility of an alternative to appear plainly. Within this framework, the examination can be orientated with a view to choosing that which it is preferable to pursue or to seek out, at a given moment and always with the benefit of the doubt. Thus the conviction that points of view are equipollent, that no one is more valid than another, does not give rise to their cancelling each other out, but to a comparative judgement which establishes, starting from the platform of indifferent equivalence, that which it is better to pursue or to refuse. However, the rupture with equipollence, deliberately assumed by comparative judgement, does not establish a superior point of view from which to gauge others. Consequently, since comparative judgement does not refer to any absolute criterion, creating as a third term the link between the two others,[15] the comparison is only a *commisuratio* between relative magnitudes, which are significant only in relation to each other, and within a context which is always specific. Thus, if it is true that points of view are, in themselves, equipollent, *each one being indifferent, that is to say not being any more valid than another*, it is possible, nevertheless, to judge which is more or less preferable, *by evaluating them in relation to each other*, each one only having value in their reciprocal opposition. This is why comparative judgement of the preferable gives rise, every time, to a detailed calculation of the variables in play:

> But, one ought when bestowing all these dutiful services, to look at what each person most greatly needs, and what each would or would not be able to secure without our help. Thus the degrees of ties of relationship will not be the same as those of circumstance. Some duties are owed to one group of people rather than to another. You should, for example, assist your neighbour sooner than your brother or companion in gathering his harvest; but you should in a suit in the law courts defend a relative or friend rather than your neighbour. In every case of duty, therefore, considerations such as these ought to be examined, and we should adopt this habit and should practise so that we can become *good calculators of our duties,*

[12] Cf. on this subject C. Auvray-Assayas, *Cicéron*, p. 35–46.

[13] Cf. the canonical example of *De Inu*., I, 13, 17: The prosecution claims: “He has killed”: the defence replies “No, he has not killed”, hence the question: “has he killed?”, which defines and orientates the debate. Cf. on this preliminary condition, Calboli Montefusco L (1986). *La Dottrina degli status nella retorica greca e romana*, Hildesheim et al., pp. 1–12.

[14] The possibilities of conflict between two laws, or between the letter and the spirit of the law, or the problems of legal ambiguity and antimonies are dealt with in the theory of the “status legales”, cf. in part., Cicero, *De Inu*., II, 40, 50, 116–151. On this, cf. Calboli Montefusco L, *La Dottrina degli status*, p. 153–196.

[15] Coming from the Platonic aporia of the third man.

and can see by adding and subtracting what is the sum that remains; from this you can understand how much is owed to each person.[16]

Thus, not only is the judgement of the preferable carried out in an enclosed space, constituted by relative variables, but it is orientated by the detailed calculation of duties, of *officia*, allowing a forthright evaluation of what must be done. Because Cicero profoundly transforms the Stoic notion of *kathekon* which he translates as *officium*.[17] For the Stoics, in fact, only the acquisition of the *summum bonum*[18] counted: all other goods, such as health, riches, power, renown, were considered "indifferent",[19] no one being of more value than another, none being of any value whatsoever in relation to the absolute measure of virtue. However, needing to justify the possibility of moral progress and the efficacy of concrete action, the Stoics distinguished among the indifferent certain *preferables*, which, like health or riches, can be acquired and managed in an upright manner, giving rise to virtuous actions, the *kathekonta*. These latter were certainly secondary and inferior in relation to sovereign virtue, but they contributed, by way of being favourable conditions, to rendering it effectively practicable.[20] Moreover, these indifferently preferable goods do not contradict the natural foundation of the Stoic ethic, the *oikeiosis*.[21] This latter does not only denote the tendency of any living being for self-preservation and finding the means necessary to this aim, but expresses, above all, a closeness to oneself – a form of affection for oneself as for something that one holds dear.[22] This preoccupation involves first the members of one's family and, little by little, extends to encompass the whole human race.[23] Within this framework, even the possession of preferable external goods could be experienced as something that closely concerns one.

Now, Cicero re-engages with the notion of the preferable, emancipating it to some extent from the measure of absolute virtue as *summum bonum*. Because,

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[16]Ibid., I, 59: « Sed in his omnibus officiis tribuendis uidendum erit quid cuique maxime necesse sit et quid quisque uel sine nobis aut possit consequi aut non possit. Ita non idem erunt necessitudinum gradus qui temporum: suntque officia quae aliis magis quam aliis debeantur, ut uicinum citius adiuueris in fructibus percipiendis quam aut fratrem aut familiarem, at, si lis in iudicio sit, propinquum potius et amicum quam uicinum defenderis. Haec igitur et talia circumspicienda sunt in omni officio –et consuetudo exercitatioque capienda- ut boni ratiocinatores officiorum esse possimus et addendo deducendoque uidere quae reliqui summa fiat, ex quo, quantum cuique debeatur, intellegas. » (Cicero, *On Duties*,. Griffin MT and Atkins EM (2001), Cambridge, first published, 1991).

[17]Cicero, *De Off.*, I, 7–8.

[18]Seneca, *De Vita beata*, IV, 2–3; VIII, 3. Cf. Inwood B (2006). *Reading Seneca*: *Stoic Philosophy at Rome*, Oxford.

[19]Cicero, *De Fin.*, III, 50–57; Seneca, *Ep.*, 66, 14; 82, 10 –16.

[20]Cicero, *De Fin*, III, 6.

[21]Cicero, *De Fin.*, III, 16–17. On this central notion cf. Sorabji R (1993). *Animal Minds and Human Moral*, Ithaca, Chapters 7, 10, 12, and 13.

[22]Cf. Sorabji R (2000). *Emotion and Peace of Mind. From Stoic Agitation to Christian Temptation*, Oxford, en part., p. 183ss.

[23]Cicero, *Fin.,* III, 19; *De Off.,* III, 6 and Seneca, *De uita beata*, 24, 3

although he acknowledges that the *officia media* are but similitudes of the sovereign good, he maintains that any absolute system of reference is decidedly an obstacle to the practical and cognitive orientation of conduct.[24] The order of preferables, on the other hand, common to the wise man and the foolish,[25] determines precisely that which must be done, the *officia*. These, in effect, are not classed in a series of specific types of conduct, but express natural orientations, which find their basis in the *oikeiosis*, which is rethought. For Cicero, the closeness to oneself of the *oikeiosis* is not limited to the tendency for self-preservation, but implies *a natural involvement in reason*, manifesting itself through a coherent and consistent direction over the course of a life. The rationality of the human *oikeiosis* is divided among four main dispositions, which define the fields of the *kathekonta* and of the *officia media*: the knowledge of truth,[26] justice,[27] magnanimity (*magnanimitas*),[28] suitability (*decorum*).[29] Each of these dispositions has a corresponding series of specific *officia*, which establish, in any situation, that which it is *preferable* to pursue or to avoid. In an impressive delineation, Cicero summarises them thus:

> Everything that is honourable arises from one of four parts: it is involved either with the perception of truth and with ingenuity; or with preserving fellowship among men, with assigning to each his own, and with faithfulness to agreements one has made; or with the greatness and strength of a lofty and unconquered spirit; or with order and limit n everything that is said and done (modesty and restraint are included here).[30]

The dispositions of the *officia* are, therefore, prenotions, conditions of possibility of our *mens*. It is not a question of ideal forms nor of concepts formed from perceptive experience, but of orientations of the mind which provide the foundations which lead it to seek truth, to achieve justice, as the determination of what is due, to desire the elevation of the spirit and to comport oneself in all things according to the measure. These tropisms, proper to the rational nature of the *oikeiosis*, are certainly of a very different nature and do not imply a rigidly hierarchical disposition, even if *decorum*, as sense of the measure and the order, permeates all parts of human experience. Their common trait resides rather in their constitutional use of the two

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[24] Cicero, *De Officiis*, I, 4–5.

[25] Cicero, *De Fin*., III, 59.

[26] Cicero, *De Off*., I, 6.

[27] Ibid., I, 7–18. This has a double face: on one hand the justice that presides over political, social, or contractual associations, whose principle duties are fairness and the *fides*, that is to say loyalty to the commitment made. As the Stoics point out, *fides* takes its name from the expression *fiat*, that which has been said shall be carried out. On the other hand, the *benignitas* or *liberalitas* guides social commerce, notably gifts or benefits according to precepts inspired by moderation and balance.

[28] Ibid., I, 18–25.

[29] Ibid., 26–42

[30] Ibid., I, 15: “Sed omne quod est honestum, id quattuor partium oritur ex aliqua: aut enim in perspicientia ueri sollertiaque uersatur aut in hominum societate tuenda tribuendoque suum cuique et rerum contractarum fide aut in animi excelsi atque inuicti magnitudine ac robore aut in omnium, quae fiunt quaeque dicuntur, ordine et modo, in quo inest modestia et temperantia”.

major rational processes of the *mens*: the connection between the antecedents and the consequences and the prediction of the link between causes and effects:

> The great difference between man and beast, however, is this: the latter adapts itself only in responding to the senses and only to something that is present and at hand, scarcely aware of the past or future, *man, however, is a sharer in reason: this enables him to perceive consequences, to comprehend the causes of things, their precursors and their antecedents, so to speak; to compare similarities and to link and combine future and present events*; and by seeing with ease the whole course of life to prepare whatever is necessary for living it.[31]

Thus the critique of the disastrous consequences of equipollence and of its dubious imperturbability[32] leads Cicero, while not denying, in principle, indifferent equality, to set up comparative judgement aiming for the preferable by way of the mind's own orientation towards truth, justice, greatness and measure in its ordinary activity, clarifying itself in the conclusion of consequences and the predicting of effects. However, these tropisms prior to the *mens* are not contents that are determined once and for all, but intentional dispositions *fulfilled* each time by a relative and comparative evaluation of the variables in play. It is this fulfilment that allows the orientations of the "mens" to not only guarantee the coherence of our minds, but to verify the accuracy and the correctness of our suppositions.

This sceptical concept, which is not doomed to undecidability, gives a logical expression to the preferable via the notion of *probabile*. The latter establishes the former, and it is juridical debate that provides for its most powerful expression.

2.2 The Probable and the Dilemma

If the determination of the orientations proper to the *mens* allows the establishment of the conditions of possibility for a judgement on the preferable, the *probabile* furnishes the criterion of validity, thus transforming the concept of the exchange of "in utramque partem" arguments. Cicero refuses to reduce this practice to the equitable examination of contradictory arguments, ending in their undecidable equipollence. However, although he seeks a criterion for choosing a point of view in this indifferent equality, he does not revisit the Aristotelian contradiction. If Aristotle recommends "in utramque partem" argumentation as a necessary exercise in the art of refutation,[33] it is nevertheless possible to decide the debate. For this,

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[31] Ibid., I, 11: 'Sed inter hominem et beluam hoc maxime interest, quod haec tantum, quantum sensu mouetur, ad id solum, quod adest quodque praesens est, se accommodat, paulum admodum sentiens praeteritum aut futurum. Homo autem, quod rationis est particeps, per quam consequentia cernit, causas rerum uidet earumque praegressus et quasi antecessiones non ignorat, similitudines comparat rebusque praesentibus adiungit atque adnectit futuras, facile totius uitae cursum uidet ad eamque degendam praeparat res necessarias"

[32] One can thus better understand the constant operation with Cicero, *De Fin.,* II, 34; IV, 18; *Tusc*., V, 84–85 to associate Stoicism and Pyrrhonism via their conception of indifference and imperturbability.

[33] Aristotle, *Top.*, 163b1–15.

it is necessary to construct an alternative between two contradictory elements, so that if it is shown that one is true the other is necessarily false.[34] This is why only the dialectic is critical, *peiratike*,[35] rhetoric, only concluding opposites, is not. Now, although the clarification of the autocontradiction of someone who claims knowledge, for example the prosecutor in a trial, remains for Cicero one of the essential aims of credible debate, the Aristotelian perspective does not offer a sufficient criterion of proof, because the Aristotelian alternative aims to test the contradiction from a formal point of view. Of the two possibilities: "the world is unique/ there are many worlds", one examines which does not fall into contradiction with the premises admitted by the two opposing parties, thus putting to the test the deductive character of the sequence.

However, in the ordinary exercise of argumentation, formal coherence does not orientate our cognitive activity any more than our decision making. On the contrary, these involve the taking into account of factual circumstantial elements and putting them into argument form via indicial and conditional processes. In this case it would be a question of testing the two branches of the alternative, examining them in hypothetical form and attempting to anticipate the possible connections of cause and effect, of antecedents and consequences while empirically verifying them. For example, one could pursue the hypothesis "there is only one world" and suppose in advance what could be the major effects of this, later trying to find signs of it in experience. It is not a question of a direct verification but of perceptive attestation *thanks to which* the expectations produced by the imagined hypothesis can be fulfilled.[36]

The *probabile*, Cicero's translation of the *pithanon*,[37] is then that which is most satisfying, in a comparative analysis, this rational condition of coherence between the anticipation of an expectation and its empirical fulfilment.[38] It is in this that it is credible in the sense that Cicero writes that an argument is the "probabile inuentum ad faciendam fidem",[39] something that, subjected to testing, can be believed. Since the *probabile* implies the step of putting something to the test, it is not confused with

[34] On the specificity of contradiction, cf. Aristotle, *Catg* 10, 13a37–b5; *Int.*. 7, 17b16–17; *Mf* D, 10, I4 and *Mf.* M, 1078b23-30.

[35] Aristotle, *Réf. Soph*., 11, 171b21–32.

[36] If there is only one world, it is reasonable to anticipate that other beings, in other possible worlds, would give no sign of life. No manifest signs of other beings have yet occurred. Therefore, it is more plausible that the world is unique.

[37] As C. Auvray-Assayas, *Cicéron*, pp. 38–39 points out, the Latin translation effects a transformation of the active sense of *pithanon* into the adjective *probabile* the usages of which are passive. Thus the *probabile* indicates not only that which is simply persuasive, but that which demands to be vouched for, to be subjected to a process of testing.

[38] Thus the probable does not imply any probability in the sense of the frequency with which the die falls on one face rather than another.

[39] Cicero, *Part. or*, 5

the *ueri simile*,[40] which is rather the result, that which is discovered,[41] nor with the premise[42] of a plausible argument, and for this reason it cannot be confused with the process that determines it.

Now, the credible nature of the plausible, achieved by the empirical fulfilment of a reasonable expectation, according to the presupposition of coherence between effects and causes or antecedents and consequences, evidenced by the indications – all these characters are demonstrated in their most essential manner in the speech of the trial, because it is constitutionally structured by "in utramque partem" argumentation, that is to say the confrontation of two positions, equivalent in principle, but contradictory. Cicero's practical examples are legion and demonstrate their close link with his theoretical reflection. We can at least read this one: Cicero is defending Cluentius against the accusation of having killed her mother's second husband by poisoning a loaf of bread. The fact itself is put into question in the following manner:

> Again, what an improbable story is this – how unusual, gentlemen, and how strange – this giving of poison in bread! Could it thus more easily permeate the veins and every part of the body, than if given in a cup, more thoroughly when stowed away somewhere in a piece of bread than if it had been completely dissolved in a draught, more speedily when taken with food than with drink? Would it have been harder to detect in bread, if attention had been drawn to it, than when so dissolved in the contents of a cup as to be quite indistinguishable?[43]

It is immediately noticeable that the improbability of poison in the bread does not arise from the infrequent nature of this act, as though remarking that the majority of murders by poison are carried out by way of a drink. The improbability relies rather on the insufficient credibility in the sense that the reasonable expectations of what would occur, raised by the hypothesis of poisoning by bread, remain unfulfilled: no factual element occurs to fulfil these anticipations.[44] Because, for poisoning by

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[40]This distinction between the *probabile* and the *ueri simile* is finely drawn by C. Auvray-Assayas, p. 56; p. 63; p. 143. For an analysis that links the Ciceronian *probabile* both to the Aristotelian *pithanon* of the *Rhetoric*, and to *l'eikós* of the *Timée*, notably in *Lucullus*, cf. the very interesting article by Peetz S (2005). « Ciceros Konzept des *probabile* », *Phil. Jahrbuch*, p. 97–133.

[41]Cf. Cicero, *Tusc*., IV, 47, passim.

[42]Unlike Aristotle's *Rhetoric*I, 1355a, where the premises are constituted by plausibility or signs. But the sign is most convincing, *An. Pr*., 70a.

[43]Cicero, *Pro A. Cluentio Oratio*, 173: « Iam uero illud quam non probabile, quam inusitatum, iudices, quam nouum, in pane datum uenenum! Faciliusne potuit quam in poculo, latius potuit abditum aliqua in parte panis quam si totum conliquefactum in potione esset, celerius potuit comestum quam epotum in uenas atque in omnis partis corporis permanare, facilius fallere in pane, si esset animadversum, quam in poculo, cum ita confusum esset ut secerni nullo modo posset? » (Cicero (1943). *The Speeches: Pro Lege Manilia; Pro Caecina; Pro Cluentio; Pro Rabirio Perduellionis*, trans. by Grose Hodge H, London, first published 1927.)

[44]On the conception of belief in Cicero's work, cf. F. Mariani Zini, " Crédibilité, croyance, confiance. Le legs de la tradition romaine", *Revue de métaphysique et de morale* (in press). Here I attempt to show that the production of reliable belief is founded upon three processes: defeasibility, elimination of apposite alternatives, inference at the best explanation.

bread to be plausible, a rational conduct would have to be anticipated that is not verified here. The expectation would have to be, in fact, that it would be easier to poison by way of a solid than by way of a liquid, or that the poison could dilute more quickly in the former than the latter. But these suppositions are refuted by the empirical attestation: "de facto", it is certainly more efficient to administer a liquid poison. However, the factual verification does not operate directly, as though one were limited to remarking that poison in liquid is more effective. On the contrary, it is included in a conditional apparatus and operates like that which is supposed to attest, by exhibiting an appreciable fact, one could say by a hypotyposis, the legitimacy of the passage from a hypothesis and anticipation, to that which, by presupposition, could result from it.[45] The structure of plausible judgement, therefore, does not refute the exercise of doubt: it simply presupposes that the links between causes and effects or antecedents and consequences may be anticipated as coherently as possible. Without an equitable supposition such as this no conduct would be intelligible, similarly methodological doubt according to which the other would lie consistently when speaking or would not know what he was saying, would rob the verbal exchange of any meaning.

Furthermore, this process of proof does not contradict the comparative apparatus of judgement. This is because, on one hand, the test concerns the verification of the hypothetical connections between a condition and what ensues from it, in such a way that the *probabile* does not determine isolated entities, but a relation between variables (a cause and an effect, an antecedent and a consequence) which only have meaning in relation to one another, rather than absolutely. On the other hand, it is the whole procedure of "in utramque partem" argumentation that is transformed. The alternative does not here concern two theses of which the deductive, non contradictory, character of the link between premises and conclusions is to be tested by refutation, but rather it examines two hypotheses of which the *incompatibility* of the link between antecedents and consequences, fulfilled or refuted by an empirical verification, is put to the test.[46]

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[45]This is clearly expressed by the analysis, in the *Topica*, 50–52, of the place, that is to say of the argumentative scheme "ab adjunctis". This implies an "adjunctum" which is an unnecessary sign, able to test the coherence of the cause/effect or antecedent/consequence connection: that is why it is not taken in isolation but within the framework, "when the question concerns present, past, or future fact, or what *can* happen al all" = cum quaeritur quid aut sit aut euenerit aut futurum sit aut quid omnimo fieri possit". (*Top*., 50, trans. T. Reinhardt, p. 141). Cicero made supreme use of what happened before, contemporaneously with, or after the event (*Top*., 51, p. 141) "ante rem, quid cum re, qui post euenerit", as he himself recalls, ib.: "This has nothing to do with the law-it's Cicero's business" our Gallus used to say if someone had brought before him such a matter as turned out to be a question of fact. = Nihil hoc ad ius, ad Ciceronem, inquiebat Gallus noster, si quis ad eum tale quid rettulerat, ut de facto quaereretur".

[46]It has sometimes been remarked that Cicero uses the dilemma in his examples, without ever having established a corresponding theory. This is not entirely true: the conditional, even disjunctive, structure as well as the empirical verification are attributed to the enthymeme, the rhetorical syllogism that Cicero considers as the third Stoic indemonstrable: cf. *Top*., 53–57, and T. Reinhardt's excellent commentary, p. 305–320.

It is by this intersecting of hypotheses that a point of view becomes more credible. Thus the hypothesis of the immortality of the soul is accepted as the most credible and the most plausible, because it implies the most coherent consequences and conducts.[47] Cicero also expresses a significant preference for this hypothesis in the defence of Sextus:

> Did I not know that the very wisest men have disagreed on just this point, some saying that that awareness and feelings are extinguished at death, others contending that it is precisely when they have passed from the body that wise and brave men's minds truly perceive and come alive – the former alternative, to be without sensation, not being a thing worth fleeing, the latter, to perceive more acutely being actually desirable?[48]

However, it is in the exercise of dilemma that the conditional structure of "in utramque partem" argumentation finds its most effective expression.[49] Cicero is the uncontested master of this art in his summations. He uses, for example, the dilemma in its simplest form in the defence of Caelius, who stands accused, by his ex-lover Clodia, of borrowing gold from her, to pay, without her knowledge, some mercenaries commissioned to commit a murder. Cicero puts forward the improbability of this accusation by way of the following dilemma:

> And in reply to such a charge I should first like to ask whether Caelius told Clodia his reason for taking the gold or whether he did not. If he did not, then why did she hand it over? If he did, then she too is implicated in the crime.[50]

In either case, one ends by finding Caelius innocent. As the accuser, Clodia's own words turn against her. If they were lovers, it would be reasonable to suppose that he would have told her the reason for this loan, but this is not proved, as Clodia maintains that he has not done so. Therefore, Caelius would not have had the money to pay the mercenaries. If, on the other hand they were not intimate, he would not have told her, and she would have had no reason to give him the gold; therefore, Caelius would not have had the money to pay the mercenaries. The conclusion to which the dilemma leads is thus the same. It can be expressed thus:

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[47] This is the basis of the arguments that Cicero uses, in the first book of *Tusc*., to prove that the hypothesis of the immortality of the soul is the "best": it takes into account, for example, the expectations of survival that each and every individual feels in order to give meaning to his/her life, I, 31, and which is expressed so eloquently by the poets, I, 34, as well as taking into account the non-perceptive nature of operations such as desiring, loving, foreseeing, I, 23.

[48] Cicero, *Pro Sextio*: XXI, 47: "Nesciebam inter sapientissimos homines hanc contentionem fuisse, ut alii dicerent animos hominum sensusque morte restingui, alii autem tum maxime mentes sapientium ac fortium uirorum, cum e corpore excessissent, sentire ac uigere? Quorum alterum fugiendum non esse, carere sensu, alterum etiam optandum, meliore esse sensu".

[49] Cf. Craig CP (1993). *Form as Argument in Cicero's Speeches: A Study of Dilemma*, Atlanta; Powell J and Paterson J (2004). Introduction. In Powell J and Paterson J (eds) *Cicero The Advocate,* Oxford, p. 1–57, sp. 47–49.

[50] Cicero, *Pro Caelio*, 21, 51: "Quo quidem in crimine primum illud requiro, dixeritne Clodiae quam ob rem aurum sumeret, an non dixerit. Si non dixit, cur dedit? Si dixit, eodem se conscientiae scelere devinxit". Cf. aussi ib., 21, 53.

Either P or Q

If P then X

If Q then X

Therefore, in either case, X

Cicero also constructs dilemmas with multiple branches. In the case of Roscius Amerinus, a placid and solitary man exclusively occupied with his lands in the Umbrian town of Ameria, Cicero has to defend him against an accusation of having killed his wealthy father in a Roman street. One of the most probative moments of his discourse is the construction of a cluster of incompossibles:

> How did he kill his father, then? Did he strike the blow himself or did he get others to do the job? If you are trying to maintain that he did it himself, let me remind you that he wasn't even in Rome. If you say that he got others to do it, then who were they? Were they slaves or free men? If they were free men, identify them? Did they come from Ameria, or were they some of our Roman assassins? If they came from Ameria, I ask again who they were – I want to be told why we are not allowed to learn their names. If they were from Rome, on the other hand, how had Roscius got to know them? For after all he himself had not been to Rome for many years, and had never on any occasion stayed there for more than three days at a time. So where did he meet them? How did he get into conversation with them? What methods did he use to persuade them? He gave them a bribe. Who did he give it to? Who was his intermediary? Where did he get the money from, and how much was it? Surely those are the sort of matters one always has to follow up in order to get back to the origins of a crime?[51]

2.3 Sceptical Right

Now, Cicero was not only a brilliant advocate, but he always upheld the close link between right and philosophy.[52] On one hand, he inserts into his summations general digressions aiming to legitimate the specific case,[53] on the other hand, he relates the speech of the trial to his philosophical presuppositions, defining the coherence of

[51] Cicero, *Pro Roscio Amerino* 27, 73–74: "Quo modo occidit? Ipse percussit an aliis occidendum dedit? Si ipsum argues, Romae non fuit; si per alios fecisse dicis, quaero quos? Servosne an liberos? Si liberos, quos homnes? indidemme Ameria an hosce ex urbe sicarios? Si Ameria, qui sunt ei? cur non nominantur? si Roma, unde eos nouerat Roscius qui Romam multis annis non uenit neque umquam plus triduo fuit? ubi eos convenit? qui conlocutus est? quo modo persuasit? "Pretium dedit; cui dedit? per quem dedit? und aut quantum dedit? Nonne his uestigiis ad caput malefici peruenire solet?"

[52] For a recent fresh perspective, May JJ (ed) *Brill's Companion to Cicero: Oratory and Rhetoric*, Leiden.

[53] For example Caelius" conduct as being suitable to his young age. Cicero *Pro Caelio*, 2, 3 passim. That said, Cicero effects a master stroke in passing off a 30-year-old man as a young innocent, a little impetuous and typically – as youth must be – rash!

juridical discourse by the Stoic term of *constantia*,[54] and bringing it back to the criterion of the *probabile*. This is why Cicero, defending himself against the accusation of opportunism, does not limit himself to evoking the deontology of the advocate, but makes explicit the sceptical academic foundation:

> You are confronting me with sealed documents, and putting in as evidence what I have sometimes said or written. Take that way with other people who are handicapped in argument by rules: I live from day to day; I say anything that strikes my mind as probable; and so I alone am free.[55]

This famous retort clearly expresses, in Cicero, the link between sceptical argumentation and the concept of right.[56] "We", here, does not only signify the body of *patrioni*,[57] but the *secta* and neo-academics. The practice of argumentation as well as life "in diem" is not so much an invitation to seize the fleeting occasion as the necessity to determine that which is *probabile*, not by reference to the stability of laws, but to the circumstantial and penetrating singularity of the *responsus*. This is why Cicero compares the specific precepts that he gives, in the context of spiritual therapy in the *Tusculanae*, to his summations.[58]

It could, in fact, be emphasised that Roman right presented, in Cicero's time, two striking traits that could be properly employed in his thought: the parsimonious use of the law as the source of right, and the precedence of the juridical tradition, controlled and exercised by experts, jurisconsults, who propagate their *responsus* in private business as well as in the form of political counsel.[59] Within this framework, the praetorial edict, as the principal source of right, complies with this tradition of scholarly and politically influential expertise, within which Cicero himself is recognised.[60] What is more, it is by the exercise of these counsels, in the courtroom

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[54]There are numerous examples, cf. for example, Cicero*, Pro Cluentio,* 51, 141.

[55]Cicero, *Tusc*., V, 33: « Tu quidem tabellis obsignatis agis mecum et testificaris quid dixerim aliquando aut scripserim. Cum aliis isto modo, qui legibus impositis disputant; nos in diem uiuimus; quodcumque nostros animos probabilitate percussit, id dicimus, itaque soli sumus liberi. » Cf. aussi Cicero, *De Or.,* II, 30 et *Pro Cluentio*, 50, 139; 51, 141. (Cicero (1927) *Tusculan Disputations*, trans. by King JE, London/New York).

[56]Cf. Smith P, « How not to Write Philosophy: Did Cicero Get it Right? », *Cicero the Philosopher*, pp. 301–323; Narducci E (1997) «Relativismo dell'avvocato, probabilismo del filosofo. Interpretazione di alcuni aspetti dell'opera di Cicerone a partire da "Pro Cluentio"». In *Pro Cluentio di M. Tullio Cicerone,* Atti del convegno nazionale*,* Larino, 4–5 XII 1992, Larino, p. 107ss.

[57]*Advocatus* is a more generic term. On the specificity of *patronus*, cf. Powell J and Paterson J. 'Introduction", *Cicero the Advocate*, sp. pp. 10–18.

[58]Cicero, *Tusc.,* III, XXXIII, 79.

[59]Cicero, *Top*., 28, p. 129; civil law is that which "legibus, senatus consultis, rebus iudicatis, iuris peritorum auctoritate, edictis magistratuum, more, aequitate consistat = that which consists in the laws, decrees of the senate, previous decisions, the authority of the jurisconsults, the edicts of the magistrates, custom and equity.

[60]Cf. Bretone M, *Storia del diritto romano,* pp. 179–94 and pp. 195–209; Lintott A. Legal procedure in Cicero's Time. In Powell J (ed) *Cicero the Advocate*, pp. 61–78. The parodic portrait of the jurisconsult in the *Pro Murena,* defence 19ss, is not a questioning of this role: cf. on this, Bretone

or in the political arena, that all questions concerning inheritance, marriage, good deeds, debts, ownership of goods, pledges, were dealt with. The law's domain thus covered duties, the *officia*, the theory of which Cicero had set out in *De Officiis*.[61] This is why Cato is reproached for the dogmatic rigidity of the Stoics who stuck obstinately to unshakeable convictions,[62] because of his precepts, which exceed the natural *officia*:[63]

> "You will forgive nothing." Rather something – not all. "You will do nothing because of influence." Rather resist influence when duty and honour shall demand. "Be not moved by pity." Yes, in tempering cruelty; but still kindness deserves some praise. "Abide by your own opinion" Yes, unless some other opinion shall prevail over your opinion.[64]

However, for Cicero, juridical speech is not only the most pertinent exemplification of our mental and argumentative faculties, but their most successful historical realisation. Within this framework, Roman right is not only a spectacular cultural phenomenon, but, strictly speaking, an *event* because it is here that the anticipative structures of the *mens*, founded on the rational orientation of the *oikeiosis*, are effectively realised. The cognitive tendency towards truth, the determining of justice, of fairness, and of the *fides*, as well as the aspiration to greatness and the pursuit of measure in all things – all these *officia* have found their appropriate expression in Roman law. The conviction according to which the constitutional possibilities of *oikeiosis* are historically realised in the law certainly seems problematic in a world of thought that is acknowledged as "academic". However, two remarks must be made. On one hand, what is realised is not an ideal form, but a natural tendency, proper to our conditions of possibility of knowing and of acting. On the other hand, the domain in which the mind is realised is a right characterised not by the law, but by counsels, edict, regulated debate, continued attention to the specific case: it is permeated through and through by individuality and historicity.[65]

Within this framework, the project of the *Topica*, where juridical argumentation is presented in a very simple manner, can, perhaps, be better understood. This late work, rather than borrowing argumentative structures from Aristotelian dialectic in

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M (1971). "Cicero e i giuristi del suo tempo", *Tecniche e ideologie dei giuristi romani*, Napoli, pp. 63–88.

[61] Which cannot, therefore, be simply reduced "to the manual of the Roman ruling class", Mazzarino S (1984). *L'Impero romano 1*, Roma/Bari, p. 38.

[62] "This is why their schools are empty": Cicero, *Pro Caelio*, 17,41: ". . .prope soli iam in scholiis sunt relicti". (Cicero, "Pro Caelio", in *Defence Speeches,* trans. by Berry DH, Oxford, 2008, first published, 2000.)

[63] Cicero, *Pro Murena*, XXXI, 65. (Cicero, *Cicero in Twenty Eight Volumes*, 10. *In Catilinam I-IV; Pro Murena; Pro Sulla; Pro Flacco*, trans. by C. MacDonald, Cambridge (Mass.)/London, 1976.)

[64] Cicero, *Pro Murena*, XXXI, 65: ""Nihil ignoueris". Immo aliquid, non omnia. "Nihil gratiae concesseris". Immo resistito gratiae cum officium et fides postulabit. "Misericordia commotus ne sis". Etiam, in dissoluenda seueritate; sed tamen est laus aliqua humanitatis. "In sententia permaneto". Vero, nisi sententiam sententia alia uicerit melior".

[65] This attempt to reflect on the constitutional and the historic together can be found in the concept of the *mos majorum*: cf. Cicero, *De Rep*., II, 1, 2–3.

order to adapt them to juridical debate, presents these structures as the realisation of our normal dialectic, that is to say of our natural apparatus of inference, which are characterised by the rational anticipation, and putting to the test, of consequences.

However, three important objections could be raised in relation to this. First, although Cicero seeks a coherent argumentative process,[66] he takes into account elements that seem alien to this aim, such as the manipulation of feeling and the suggestive description of people's characters.[67] Above all, his new classification of *topoi*, of loci,[68] seems to weaken the probative nature of argumentation. In effect, Aristotle, in the *Rhetoric*, divides loci into "technical" and "non-technical": the latter are, for example, testimonies, and do not require any specific discursive competence; the former concern the essentially probative dimension of argumentation and demand a method.[69] In this regard, Cicero accomplishes here a significant transformation, by replacing the couple: technical/non-technical by the couple: *internal loci and external loci*. Proof seems thereby to risk being compromised as though it were the exhibition of a simple given, following the testimonial model.[70]

It could, however, be argued that, on one hand, the stirring up of feeling also demands a cognitive counterpart, a judgement on what is good or bad as well as the conduct that must be assumed in relation to this;[71] on the other hand, in the *Topica*, the dimension of the *mouere* is eliminated.[72] As for the division of loci, Cicero emphasises that external proofs, such as testimonies, must always be inserted into an argumentative structure. As he clearly states:

> For my part, I intend to draw you away from witnesses. I will not allow the facts of the case, which are unalterable, to be made to rely on witnesses' personal inclinations, which can so easily be manipulated, and which can be twisted and distorted with no difficulty at all. Instead, I shall proceed by means of proofs, and shall refute the charges with indications

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[66] Cf.Stroh W (1975). *Taxis und Taktik. Die advokatische Dispositionskunst in Ciceros Gerichtsreden,* Stuttgart.

[67] Cf.. Classen CJ (1985). *Recht-Rhetorik-Politik*, Darmstadt; May JJ (1988). *Trials of Character. The Eloquence of Ciceronian Ethos*, Chapel Hill/London; Riggbsy AM (1997). « Did the Romans Believe in their Verdicts?», *Rhetorica* 15.3, pp. 235–252. «The Rhetoric of Character in the Roman Courts », in *Cicero The Advocate*, pp. 165–196 and ibid., Craig C, «Audience Expectations, Invective and Proof», pp. 187–213; *ibid*., M. Winterbottom, « Perorations», pp. 215–230.

[68] On the notion of "topos=place" and its evolution cf. Primavesi O, Kann Ch and Goldmann S (1998). Topik; Topos. In Ritter J and Gründer K (eds) *Historisches Wörterbuch der Philosophie,* Basel, vol. 10, pp. 1263–1288. Put succinctly a place is an outline that permits the establishing of a relation between two terms of two propositions, understanding them, for example, as one being the consequence of the other or as opposites or as cause and effect.

[69] Aristotle, *Rhet*., 1354a 8–13; 1355a 3–8.

[70] This is the reading, for example, of Calboli Montefusco L (1998). "La Force probatoire des pisteis ateknoi d'Aristote aux rhéteurs latins de la république et de l'empire. In Rosier-Catach I and Dahan G (eds) *La Rhétorique d'Aristote*, Paris, pp. 13–35.

[71] This is the fundamental concept of emotional therapy in the *Tusculanae*, III, IV which Cicero takes, in part, from the Stoics.

[72] Cicero*, Top*., 86 and the perplexities of T. Reinhardt in his commentary, p. 353. Cicero also seeks a form of *constantia* in the character portraits, cf. e.g., *Pro Caelio*, 19, 45 and *Pro Roscio Amerino*, 75.

> that are clearer that the light of day. Fact will be pitted against fact, reason against reason, argument against argument![73]

The external loci are susceptible, moreover, to being subjected to "in utramque partem" argumentation,[74] and come into play at a precise moment in the verification of probable expectations. They are one part of the probative procedure. Furthermore, in the *Topica*, the external loci occupy a considerably less prominent position.[75]

Now, the *Topica*, present juridical argumentation as the most successful realisation of our mental and discursive conditions of possibility, founded upon the mental orientation of the *oikeiosis*, that is to say reasonable, probable, anticipation of a link between antecedents and consequences. It is therefore a question, through the argumentation proper to the law, of deepening reflection on the anticipative and conditional structure of argumentation.

Cicero performs, in relation to this, two major operations: on one hand, he applies the "causal states", which are the positions from which opposing parties can do battle with each other over general questions,[76] in contrast to the rhetorical tradition which confined them to specific questions concerning people, places, times, actions, and determined facts.[77] Consequently, any specific question can be subjected to argumentation of a general nature and similarly any interrogation can entail the taking into account of specific circumstances:

> Therefore the problem is a part of the case. And every question is concerned with one of aspects cases are about, either with one or with several or sometimes even with all of them.[78]

Legal causes, therefore, constitutionally incorporate a pretention to generality. On the other hand, Cicero does not consider causal states as the expression of the position and of the strategy adopted by one party to the debate in view of the "res" in play, but as preliminary directions in any activity of judgement. When we want to attribute a predicate to a subject, we always do so according to three main orientations, by asking ourselves if a matter is, what it is, how it is.[79] As Cicero points out:

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[73]Cicero, *Pro Caelio*, 9, 22: "Equidem vos abducam a testibus neque huius iudici ueritatem quae mutari nullo modo potest in uoluntate testium conlocari sinam quae facillime fingi, nullo negotio flecti ac detorqueri potest Argumentis agemus, signis luce omni clarioribus crimina refellemus; res cum re, causa cum causa, ratio cum ratione pugnabit".

[74]Cicero, *Part. or*., 51.

[75]Cicero, *Top*., 24; 72–78.

[76]Cicero, *Top*., 79 and 81. They concern knowledge (for example, questioning of the natural or conventional origin of right) as much as action (for example, doubt over the legitimate participation of the wise man in public life: cf. *Top.*, 82)

[77]Cicero, *Top*., 79 and 80. Cf. on this subject, L. Calboli Montefusco, *La Dottrina degli status,* pp. 29–50 and pp. 197–206.

[78]Cicero, *Top*., 80, p. 159: "Itaque propositi pars est causa et omnis quaestio earum aliqua de re est, quibus causa continentur, aut una aut pluribus aut nonnumquam omnibus".

[79]Hermogenes establishes thirteen positions: conjecture, definition, antilepsis, compensation, counter-accusation, transfer of accusation, excuse, pragmatic state, metalepsis, the letter and the

> Questions of understanding are divided into three groups: the question is either whether something is the case or what it is or what kind it is. Of these the first is explained by conjecture, the second by definition, the third by the distinction between right and wrong.[80]

All in all, argumentation is orientated by interrogations of causal states, which divides up the field of responses in the predicted manner: conjecture determines if a matter is, definition what this matter is, and comparative judgement on the just and the unjust establishes its qualification. Within this framework, what is specific to Cicero's thought is the development of the anticipative argumentation structure to determine both schema and loci, which allows each causal state to fulfil this expectation. This is the close link between causal states and loci which constitutes the most important point of the *Topica*. It is in this way that the conditional nature of argumentation is brought to the fore, as can be seen in the concept of the cause, the schema of which allow the establishment of conjecture.[81] It is not, however, a question of adapting philosophical reflection to juridical argumentation, but of the necessity to ponder responsibility for acts committed, which leads to pondering the cause as a condition. Within this framework, the determination of the juridical *causa* becomes constitutionally a philosophical problem.

2.4 The Cause as a Condition

The *conjectura*, which concerns the very existence of the matter, is characterised, in Cicero's work, by an interrogation that does not seek to grasp the upsurging of a being-there, the manifestation of an intuitive presence, but considers the matter, that is to say the "res", as *the point arrived at via the cross referencing of a series of co-ordinates*. For example to know if eloquence is, one looks first to see whether it can be indicated somewhere as such (e.g., are there eloquent men?), next what may be its origin (e.g., does it arise from education or it is a natural gift?), its effective cause (e.g., which of its effects occur always or occur the most frequently?), what changes can it undergo (might one, with age, lose fluency?).[82] As can be seen, the presence of the matter is first and foremost the possibility of denoting something *that may verify the expectations awoken by the anticipation of a network of successive connections* (the origin), of coexistence (the connection of a cause to an effect according to different degrees of frequency), and of persistence, or of *constantia* (the changes

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spirit, antinomy, assimilation, amphibology. But this list could equally be reduced to three elements, because the quality is declined into three different positions according to three criteria: if the quality relates to the opportune, the just, the legal; if the time of the act is past or future; if the fact is an act or a text. Cf. Patillon M (1988). *La Théorie du discours chez Hermogène le Rhéteur*, Paris, pp. 47–51.

[80]Cicero, *Top*., 82, p. 159: « Cognitionis quaestiones tripertitae sunt; aut sitne aut quid sit aut quale sit quaeritur. Horum primum conjectura, secundum definitione, tertium iuris et iniuriae distinctione explicatur. »

[81]I limit myself here to the analysis of this relationship between conjecture and causal loci.

[82]Cicero, *Top*., 82.

that may be undergone without a radical alteration occurring). Thus the *conjectura* implies only anticipation reasonably regulated by experience: this is not, however, a property of any matter, but that which one can legitimately say about it according to the schema of connection, which belong to the judicative structure of the mind. This becomes obvious in the determining of the *conjectura* through the loci of cause and effect.

Cicero here proposes two classifications and two sub-classifications of the cause,[83] that can be formulated as follows:

1st classification:
A.: causa "ui sua"
A. 1.1: cause "nulla re adiuuante"
A. 1.2.: causes "quae adiuuari uelint"
B. Causa "naturam efficiendi non habet , sed sine quo effici non possit"
B.1.1. "quieta"
B.1.2. causes "precursionem quandam adhibent ad efficiendum, et quaedam adferunt per se adiuuanta , etsi non necessaria"

2nd classification:
C. Causa "sine ulla opinione, sine uoluntate, sine opinione"
(no sub-group)

D. Causa "cum uoluntate, perturbatione animi, habitu, natura, arte, casu"
D.1.1. constant causes
D.1.2. inconstant causes
D.1.2.1. Manifest causes
D. 1.2.2. Hidden causes.

The first classification distinguishes between the cause "ui sua id quod sub ea subiectum est certo efficit" (the cause which produces, by its own forces, its dependent effect, as fire produces flame), and the cause which "naturam efficiendi non habet, sed sine quo effici non possit" (it doesn't produce the effect, but the effect cannot be produced without it, like bronze for a statue).[84] The classification which produces the "ui sua" effect, in turn, includes two sub-groups: the causes which produce it "nulla re adiuuante" and as though by necessity (e.g., wisdom produces wise men), and the "quae adiuuari uelint" causes (e.g., the question: "does wisdom alone lead to happiness?"). The cause without which such or such an effect would not occur is distinct from causes that are resting, "quieta", and "precursionem quandam adhibent ad efficiendum, et quaedam adferunt per se adiuvantia, etsi non necessaria" causes (which are the antecedents of the effect without necessarily producing it).[85] These causes predispose a certain effect, as a date might be the cause of passionate

[83] Cicero, *Top*., 58–67; cf. le commentaire de T. Reinhardt, pp. 320–337.
[84] Cicero, *Top*., 58.
[85] Cicero, *Top*., 60.

love, and that might be the cause of a crime.[86] This is what the Stoics, as Cicero points out, mean by the "fatum".

The second classification distinguishes the cause which produces its effect "sine ulla opinione, sine uoluntate, sine opinione", from the cause which operates "uoluntate, aut perturbatione animi, aut habitu ut natura, aut arte, aut casu". A sub-group divides the second modality of causes. Causes which are dependent on nature and art are constant, for example a choleric disposition which worsens with age or a musical talent that does not weaken with age. All other causes are inconstant, and can in turn be divided into manifest causes (those which are dependent upon our will or desire) and hidden causes (those which are dependent upon chance).

Now, Tobias Reinhardt has rightly recalled that these classifications concern the attribution of degrees of responsibility for our acts, and that Cicero seeks, thereby, to establish the *legal* aspects of the problem on philosophical foundations, notably those of the Stoics.[87] Within this framework, Cicero seems here to return, on one hand, to the notion of effective and productive cause,[88] on the other hand, to the distinction, borrowed from Chrysippe, attested to by Cicero in the *De Fato*, 41, between "perfectae et principales" causes (which would here be "ui sua" causes) and "adiuvantes et proximae" causes (which would here be "sine quibus effectum non potest" causes), which are likely to explain the infinite causal chain of destiny. This seems to be confirmed by the interlinking of "adiuvantes et proximae" causes with causes that operate the "precursio" of the effect, which seems to refer to the "aition prokatharktikon".[89]

A slightly different reading of this can, however, be suggested, by emphasising the way in which Cicero's classifications diverge from the Stoic perspective.[90] In fact, Cicero considers perfect causes as borderline cases of co-existence, which, on most occasions, necessitate some outside assistance. As a result, *it is the notion of the cause as a condition of the effect, and not as its reason, which is brought to the fore*. The sequence cause-effect can be understood as a coherent link between a "before" and an "after" without implying a necessary relation between the two

[86] Cicero, *Top*., 59.

[87] Cf. his commentary, esp. pp. 322–323; pp. 325–328.

[88] Cf. T. Reinhardt, p. 323.

[89] The aspects that do not fit with the Stoic tradition are interpreted by T. Reinhardt as an attempt to achieve a score close to the Aristotelian tradition.

[90] The Stoics, in fact, developed a very subtle concept of the cause, in order to ponder moral responsibility. Causes are thus divided into sustentive or complete causes, which are conditions sufficient to their effects; proximate and auxiliary and proximate causes, which intensify effects that would occur anyway; co-operative causes, where there is no sustentive cause; antecedent causes, which seem to indicate all the causes in as much as they pre-exist their effects, including complete causes. Their sequence in time constitutes destiny. Within this framework, Cicero's thought transforms the notions of the auxiliary cause and the antecedent cause in particular, in order to refute the notion of Stoic destiny. Cf. Bobzien S (1998). *Determinism and Freedom in Stoic Philosophy*, Oxford;Frede D (2003). Stoic Determinism. In Inwood B (ed) *The Cambridge Companion to the Stoics*, Cambridge, pp. 179–205; Ioppolo AM (1988). Le cause antecedenti in Cic. De Fato 40. In Barnes J and Mignucci M (eds) *Matter and Metaphysics*, Napoli.

moments. It can be described as a connexion, rather than simply as a juxtaposition, thanks to the anticipation of a rational network of coexisting relations constituted by the loci themselves.

In effect, the Ciceronian distinction between "ui sua" causes and "sine quibus effici non posset" causes does not entirely correspond to the distinction between the "causes perfectae" and the "causes adiuuantes". The significant term "adiuuans" is attributed, by Cicero, not to "sine quibus effici non potest" causes (as one might expect), but to the sub-group of "ui sua" causes, those which "adiuuari uelint". Consequently, everything occurs as though the principal causes, implying an analytical relation between cause and effect, were a borderline case of connection, here marked by the bi-univocity (being wise and wisdom). Other principal causes "require supplementary assistance" to produce their effect, which they could perhaps execute directly in a truly orderly world, but this is not the case. Within this framework, the question "Does wisdom alone lead to happiness?", chosen by Cicero as an example of the cause that produces "ui sua" an effect, while still requiring some assistance, seems to me to clarify his concept of the cause, because this question concerns a preferable, expressing doubt over the absolute measure of sovereign good. Wisdom in itself could lead to happiness if something like sovereign good existed and could be acquired. But since we only have "similitudes", the outside assistance of a preferable (e.g., health or wealth) imposes itself: it operates as the condition in order that the principal cause, wisdom, may optimally produce the effect of happiness.

The conditional nature of the cause is, moreover, clearly assumed in the analysis of "sine quibus effici non potest" causes. In this respect, the apparently absurd presence here of material causes does not seem to me to express a desire to attune to Aristotle. Rather it reveals an intention to reflect upon the cause as a condition, in which even the bronze of a statue could be considered as a condition of the statue, without, thereby, being its reason. This perspective is all the more obvious as it concerns the concept of the "precursio" in destiny. Cicero seems, indeed, to consider in part of the notion of cause as that which anticipates and prepares the effect, without necessitating it. But, for Cicero, the cause is not, for example, beauty, which is perhaps a reason for love, but a simple meeting, which is a preliminary condition. It is simply that which, in a chain of events, comes immediately before the effect. It is this proximity that makes the cause seem determining, but only from the descriptive point of view. Because, if one wanted to describe how things occurred, one could say that in the series of events, the meeting had been the condition which had most closely preceded the amorous passion.

However, in order for this series not to be understood as a simple juxtaposition, it is necessary to consider the most immediate cause as the condition most explanatory of the event. It is a question of a condition, not a reason, so much so that even if the infinite series of causes could be developed, a necessary, rational order would not be found. The emphasis placed upon the most immediate cause, rightly signifies that the infinite series of causes cannot be traced back, and that this proximity is the explicative condition of the connection. Consequently, the immediate cause prepares and comes before the effect in the sense that it anticipates the effect. This

does not imply the presumed probable frequency of events: it is rather a question of anticipating the coherence of a network of connections, constituted by the loci themselves, as judicial schema of succession or of coexistence. One can therefore suggest that this first classification emphasises the conditional nature of the cause, even of perfect causes. Because, according to Cicero:

> We must therefore carefully separate the cause *without which* a thing does not happen from the cause by which a thing *certainly* happens.[91]

Here it is a question *of the anticipation of two forms of coexistence*, the first of which represents a borderline case of a proximity reduced to zero, but which does not imply an analytical relation. The second coexistence has even less reference to any necessity. In order that there are children, a father and mother are necessary, but it does not follow from this that a couple must procreate.[92]

This conditional structure of anticipation, shaped by the loci, permits an understanding of the second classification and of its apparently paradoxical moments. The second classification, in fact, offers, what seems at first, a remarkable distinction between causes that do not imply any movement of the spirit, and causes that depend on our internal agitations, but randomly, as though by fortunate navigation.[93] That volition and the greatest of chances should be found in the same classification is certainly problematic, but the confusion can be alleviated if the criteria of distinction, which are here at work, are grasped. It is a question of the *anticipation of the constancy of causal sequences*, understood as the supposition of the link between that which goes before and that which comes after. *In this way, the relation of cause and effect is also the expression of the anticipation of the link between the antecedent and the consequence*.

Causes independent of the spirit, which cannot not produce their effects, as "tout ce qui est né périra",[94] are once again a borderline case of what it is reasonable to anticipate. All the other causes are inconstant, except natural traits and artistic dispositions. Thus, unlike Seneca, for example, constancy is not the deliberately assumed attitude of the wise man, but the most fixed of character traits: someone is not constantly wise, but constantly angry. Cicero thus takes a stance opposing Stoic constancy, which he judges to be impossible from the psychological point of view. On the contrary, whether it concerns will or agitation of the spirit, inconstancy prevails: one can always change one's mind and one does not always act in the same manner in similar circumstances. This is why it is legitimate to bring together will and chance. Inconstancy is not then a psychological trait, but the character that may be attributed to the majority of actions and events: the anticipation of the link

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[91] Cicero, *Top*., 61, p. 147: "Hoc igitur sine quo non fit ab eo a quo certe fit diligenter est separandum".

[92] Cicero, *Top*., 61.

[93] Cicero, *Top*., 62.

[94] Cicero, *Top*., 62.

between an antecedent and a consequence must be verified by evidence drawn from experience.[95]

But since one must suppose that "nihil sine causa fiat", it is necessary to give a form of predictability to this inconstancy. This would appear to reside in the "perspicuum" character of causes that relate to our spirit, whereas fortuitous causes would be "hidden" from us. A clear intention would therefore allow anticipation of a coherent conduct. Our intentions are, most of the time, consistent with the efforts we make for realising them. However, Cicero specifies that very often acts of will occur without our knowledge.[96] An intention may not achieve its goal. In a network of multiple circumstances, it might link to another cause, which may condition and even deflect the production of the effect. In this case, the causal explanation must refer to the most immediate cause, that is to say the condition that precedes the effect, as in the case of accidental injury:

> For throwing a javelin is subject to will, hitting someone you did not want to hit is due to fortune. Hence that substitute ram of your action: " if the spear escaped from the hand rather was thrown"[97].

It could be argued that a spear that injured someone had not been thrown but had flown from someone's hand. From a descriptive point of view, this line of defence is possible by reconstructing the sequence of events, on condition, however, of segmenting it. One would thus obtain parts which followed each other, taking into account the possibility of a non-intentional act, but prepared by the sequence of one "before" and of another "after". If such a spear injured X, without my wishing it, it is not defensible just because the intention was not there, but also, and above all, because the act can be described as the result of a coherent series of moments, of which the last seems the most determining (e.g., I was annoyed, I had a spear in my hand, I was playing with it, I turned just at the moment that X was passing, and the missile flew out of my hand in that direction). The defence then rests upon a description of acts that it seeks to reconstruct in order, than a psychological or moral perspective of good or bad intentions.

The conditional and anticipative nature of the cause, in Cicero's work, seems to me, therefore, to be obvious. In conclusion, it is precisely juridical argumentation that effectively realises the conditions of possibility proper to the rational structure of our *oikeiosis*, in as much as it concerns the relation of cause to effect as an anticipative and conditional apparatus of the supposition of a constant link between an antecedent and a consequence. This is the philosophical foundation of the *officia* of the *fides*, of the promise that one will honour one's word, as well as the trust that structures any exchange, rendering the proffered word *credible*.

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[95] The same criteria of proof can be found at work here as in probable argumentation and the dilemma.

[96] Cicero, *Top*., 61.

[97] Cicero, *Top*., 64, p. 149: "Nam iacere telum voluntatis est, ferire quem nolueris fortunae. Ex quo aries subicitur ille in vestris actionibus "si telum manu fugit magis quam iecit" ".

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Chapter 3
Inductive Topics and Reorganization of a Classification

Pol Boucher

In an article entitled "Modes classiques d'interprétation du droit",[1] written on the occasion of a congress on the legal reasoning, Michel Villey summarized his research on jurisprudential technique, while endeavouring to find the methods of roman jurisconsults, glossators and bartolists who, according to him, "ressuscitèrent le droit Romain de la manière la plus fidèle" until the XVI°. For that, he distinguished three possible models in the representation of legal reasoning, namely: the scientist, rhetoric and dialectical models. The first consists in the use of a formal step copied on the method of mathematicians and logicians, and proceeds in a deductive way. It has the advantage of rigour but in same time, the disadvantage of altering the true nature of legal reasoning really used by Romans jurisconsults, because it hides the fact that this reasoning was accompanied by a casuistry and a dialectical art in the invention of solutions. The second model insists on the bond connecting the art of persuasion aiming at true and the treatment of legal controversies, but it does not hold account of the fact that the "style" of rhetors basically differed from that of Romans jurisconsults, because its purpose was the formulation of particular solutions while that of jurisconsults tended to the expression of general precepts taking the form of laws. The third models at last, that of dialectic, according to Mr. Villey has as an essential characteristic to be used in the works of scholastics and lawyers of Middle Ages, and to be quite unfamiliar with analysis of cases, because it lays in a search of singular solutions for particular cases, whereas the undertaking of roman jurisconsults aimed at the expression of general solutions. Thus, none of these models corresponds to roman jurisprudential art, because this art was a "quasi dialectical method", intermediate between the particularism of rhetoric and the abstract universality of logic. It relied on semantic analysis of legal statements to extract the definitions necessary to the construction of an argumentation by topics, and led thus to an art of controversy based on the distinction of *casus, causae* and *quaestiones*.

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[1] *Archives de Philosophie du Droit*, t.XVII (1979), *'L'interprétation'*, p. 72–88.

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These thesis of Michel Villey raise some interrogations, especially when we recognize in them a conception of original roman law, defined as an *art quasi dialectique*, of which we can wonder whether it does not express an irrational conception of legal argumentation. Indeed, even if old roman law finds indeed its origin in the *observation of the societies, customs and habits of ancestors*, nothing allows to transform this origin into a criterion of purity and to present the *quasi-dialectique* processes of this old right or of its version, hypothetically reconstituted by glossators, as the indisputable models of any *authentique* processes. More, if it is true that *it is from the true reality, completely considered, that juridical solutions are extracted,*[2] nothing allows to condemn a priori the rationalization attempted of the *décadente* scholastic[3] and of the legal humanism supporters, if they aim to perfect the logical instruments of dialectic to make them able to rationally express the complexity of social relationships. And this impossibility would increase if it was proved that one of the principal objectives of this *décadente* scholastic was precisely to constitute a logic for the evaluation of the degrees of probability of opinions, especially in the theory of the legal proof, for avoiding the risk of approximate judgements. One could not then support that *the dialectical reasoning are constituted on dubious opinions; they could only lead to dubious results, precarious, and problematic themselves*[4] because that would come down to transform a circumstantial incapacity into an essential impossibility and to limit the use of the *quasi-dialectical* method to the sole research of dubious solutions.

These interrogations increase when we discover the inaccuracy of the concept of topic in the article of Mr. Villey. Indeed, this word is successively used to indicate a fragile opinion,[5] a general standard,[6] an argument,[7] or a standpoint.[8] However,

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[2]Op. cit. p. 86.

[3]Op. cit. p. 88: "Ensuite, dans la scolastique décadente, la déduction syllogistique unilatérale l'emporte sur l'art polyphonique de la discussion; les Analytiques d'Aristote, sur sa Rhétorique et sur ses Topiques; la méthode encore dialectique des postglossateurs (mos italicus) se voit bientôt contestée par les humanistes... "

[4]Op cit. p. 82. Idem p. 83: "Les sentences des juristes consultés (sententiae et opiniones), étant le fruit d'un travail de dialecticien, sortes d'opinions seulement plausibles, ne sont elles-mêmes que des opinions."

[5]Op. cit. p. 83: "... le Digeste n'est qu'un catalogue de topoi, d'opinions fragiles... Il faut bien qu'il en soit ainsi si la méthode est dialectique..."

[6]Op. cit. p. 84: "On y voit les postglossateurs, ces successeurs authentiques des jurisconsultes, user selon les circonstances parfois du texte des statuts écrits des communes, des textes romains ou coutumiers, ou bien des lieux en sens divers que fournissent la philosophie et la littérature commune comme l'équité, le droit naturel ou l'utilité..."

[7]Op. cit. p. 84–85: "Il ne s'agissait pas d'une suite déductive de normes, mais d'un classement des genres de cas ou parfois des types de sources, ou des topoi, des arguments applicables à chaque problème."

[8]Op. cit. p. 87: "...ainsi nous autres sur le monde, les rapports justes dans le monde, n'avons jamais que des points de vue d'où naissent les topoi, les opinions particulières, point de départ de la dialectique." The standpoints would only be in fact the preliminary material of the *topoi* (themselves assimilated to particular opinions), if M. Villey did not add then quoting Viehweg (*Topik und jurisprudenz.* München. 1953) "les topoi sont des points de vue".

this mixture of different thesis is prejudicial in a theory of legal argumentation for two reasons: it confuses in the same relativism, this which belongs to the category of factual statements (flimsy opinions and standpoints) and this which concerns the judgement (the arguments). It finally reduces the logical properties of the calculation of probable to the relational objectives of an art focused on the discussion of irremediably dubious proposals.

In fact, this convergence of debatable thesis in the article of Mr. Villey has its explanation, both in an excessive valorization of the irrational components of legal rhetoric, and in a certain ignorance of the scholastic theory of topics.

Indeed, Michel Villey builds his argumentation by opposing on a side the quasi-dialectic reasoning of the jurisconsults previous to Justinian and of the partisans of the *mos italicus*, and on the other side, both the syllogistic deduction which he ascribes to the *scolastique décadente*, and its *représentation euclidienne* by the partisans of legal humanism. Then, he draws an inevitable conclusion from it: this quasi-dialectical reasoning has a true fruitfulness[9] because it fulfil a perpetual mixing of various opinions, released from the constraints of systematicity[10] and rules of rational coherence.[11] But then, in spite of his well-known hostility to kelsenian thesis, he is inevitably led to support a strictly positivist conception of law, since the absence of rational criterion of validity makes all the opinions also probable or also improbable, and justifies eventually that we leave to the argument of authority to favour a solution.[12] *A contrario*, the syllogistic deduction and the *Euclidean* reconstruction of the system of laws receive the defects of theoretical artificiality, without obtaining in compensation the recognition of the rational validity of their conclusions, since their logical nature basically prevents them from expressing the changing nature of legal reality. For Michel Villey, only an art of perpetual calling into question of opinions can therefore express the complexity of a legal reality where positions never be definitively acquired. Because if *le Droit se tire en dernière instance . . . de la nature de chaque rapport d'affaire (natura rei)*,

[9] Op. cit. p. 84: "Le droit du Moyen Âge non plus n'est pas un ni plusieurs systèmes mais une incessante dialectique entre sources hétérogènes; d'où sa grande fécondité..."

[10] Op. cit. p. 85: "Le droit à Rome ne possède pas de forme achevée; il n'a pas d'existence actuelle; il n'est qu'en puissance. Il est une recherche, un art; disposant..., d'un lot disparate d'instruments (de règles, de topoi)..."

[11] Op. cit. p. 83: "...Il apparaît que le jus civile Romain n'est pas fait de règles certaines et nécessairement consolantes . . . Nées de la dialectique elles demeurent dans la dialectique; elle sont encore soumises au feu de la discussion dialectique. Et rien n'empêche qu'elles ne discordent: on peut alléguer contre Labeon l'opinion de Sabinus..."

[12] Op. cit. p. 83: "Les sentences des jurisconsultes étant le fruit d'un travail de dialecticien, sortes d'opinions seulement plausibles, ne sont elles-mêmes que des opinions. On doit sans doute leur reconnaître une autorité supérieure, à cause du prestige de leurs auteurs et du long travail de recherche dont elles ont été le résultat., cette autorité cependant demeure relative." Idem p. 87: "Et, comme il est de l'essence de la dialectique de ne pouvoir jamais accéder à des solutions démontrées, il faut qu'au terme de sa recherche, ayant pesé le pour et le contre, le jurisconsulte prononce sa sentence autoritairement. . .La dialectique ne conclut que grâce à l'intervention d'un maître."

this observation cannot lead to an unquestionable knowledge of natural reports, since *la nature n'offre qu'un reflet, obscur, caché au fond des choses, qu'il est besoin d'interpréter*, and because there is not absolute criterion for the validity of interpretations.

But rather than to limit us to a very general criticism of the relativism of opinions raised to the legal criterion of authenticity, or the refusal of rational speech aptitude to understand legal reality by means of definitions, classifications and rules, it's better to concretely refute the main thesis of Michel Villey by showing that the method of some casuists of the *décadente* scholastic had nothing to do with the *déduction syllogistique unilatérale l'emportant sur l'art polyphonique de la discussion.*[13] For that, we must necessary leave the simplifying representation of the methods of *mos italicus*, and return to the basic works of the lawyers who leaned on the methods of the Bartolist school to constitute a casuistry founded at once on topics use, aristotelician analytic and systematic classification. In other words, we must prove that this *décadente* scholastic, criticized by Mr. Villey, did not leave the advantages of the *discussion* of cases to the benefits of logical processes constraints, and that she did not think that we had to find antinomy between such requirements, because she estimated that universality of reason and complementarity of deductive, inductive and analogical topics, prevented that there could be. We must also necessary underline that this methodological and doctrinal position was not the lonely expression of a small group of logician-lawyers, unfamiliar to legal art of the Doctors of *mos italicus* and that we could not reduce it to the research of the *prémisses sûres … fournies, dans l'école rationaliste (chez un Leibniz ou chez un Wolff) par des évidences rationnelles quasi cartésiennes,*[14] because the true function of the inductive and analogical topics is precisely to allow the adaptation of legal reasoning to the diversity of concrete cases and to obtain an unquestionable knowledge, although presupposing a normative innermost depth, from incomplete or different data. We must finally demonstrate the two following facts: there is no fundamental difference between the partisans of this so-called *scolastique décadente* applied to the research of topics, and the protagonists of the *mos italicus* since even a logician as Leibniz builds his legal work by systematically supporting on post-glossateurs and bartolists works in the whole. We don't neither need to lay into logical deduction to defend the originality of legal reasoning (if necessary, while supporting that it can free from the non-contradiction rules in accordance with its *quasi-dialectique* nature), because the theorists of topics never claimed to deal with legal cases by a priori deduction, but defend on the contrary an a posteriori conception of topics use.

These demonstrations suppose the preliminary resolution of the following difficulty: the thesis Michel Villey presents in his article in a simplified way, are the

[13] Op. cit. p. 88.
[14] Op. cit. p. 85.

same that Theodor Viehweg details in *Topik und jurisprudenz,*[15] justifying the interpretation according to which the topics would be simple *standpoints*, by the fact that theories of topics similar to thoses that Matteo Grimaldi Moffa <1506-1562> expose in his *De methodo ac ratione studendi libri tres*, are a matter for problematic and no apodictic, i.e. of demonstration, because they are based in different degrees, on aristotelician or ciceronian theories of dialectical argumentation. And he claims to confirm this thesis by quoting like similar examples[16] to the treaty of Moffa, the theories of topics worked out by lawyers of the same time, like Everhardus, Gammarus or Cantiuncula. However, the examination of these theories we will proceed further, shows that their authors precisely uphold the opposite since their thesis come within a rationalist context and aim to formulate the rules allowing to reach indubitable conclusions. Thus, there is here an amazing contradiction we must try to eliminate, not only because it comes within a general research about the nature of legal reasoning, but also because it results from a recurring criticism of the *deduction* applied to Law, that we always tries to justify by leaning on the presupposition of an intrinsically no-deductive nature of the theories of legal reasoning worked out by the lawyers-logicians of the late scholastic. Indeed, Bobbio and Bovero (2002) repeat the same ideas in a recent article,[17] explicitly referring to the works of Viehweg and Perelman,[18] whose Villey made usually the praise, and they basically draw from them two conclusions which we will find in him: (1) the development of jusnaturalism was accompanied by the progressive disappearance of the theories of topics, in same time as the demonstrative speech focused on certainty took the place of the

[15]Theodor Viehweg. *Topik und Jurisprudenz*. Mûnchen (1953), (the Italian translation which is used here, has been published under the title *Topica e Giurisprudenza*. Giuffrè editore, 1962. Milano). Indeed, we find in this book he same judgment on the "unilateral syllogistic deduction" principle (*"..sembra esistere un nesso, che non consente di esser ridotto, semplificato in un nesso logico, sicché noi veniamo ad occuparci soltanto, in definitiva, di costruzioni che sono ancora isolate ed indifferenti."* p. 40), the concomitant valorization of a pluralist and no-verifonctional approach of the diversity of practical cases (*"...le premesse vengono qualificate come 'rilevanti' o 'irrilevanti', 'accettabili' o 'inaccettabili', 'da condividere' o 'da non condividere', 'sostenibili' o 'non sostenibili' e così via e che anche delle posizioni intermedie, come 'appena sostenibile', 'ancora sostenibile'*, p. 43–44), and the assertion of the antinomy between deductive logic and the art of topic (*"la topica presuppone la mancanza di un sistema di tal genere... Se tuttavia si riesce a costruire un sistema deduttivo, verso il quale ogni scienza, considerata dal punto di vista della logica, deve tendere, la topica viene in larga misura abbandonata."* p. 45).

[16]Op. cit. p. 84: "Il suo lavoro, già pi volte citato, De methodo ac ratione studendi libri tres, non costituisce un fatto particolare, ma si pone accanto ad altri lavori consimili." (with the following note added for the term 'consimili': "Si tratta della cosiddetta letteratura topica. vero che essa si ha nell'età dell'Umanesimo (per es. Gammarus, 1507, Everhard, 1516; Cantiuncula, 1520; Apel, 1533; Oldendorf, 1545), ma contiene in larga misura spirito medioevale."

[17]Bobbio N and Bovero M (2002). *El caracter del Iusnaturalismo*, in *Sociedad y estado en la filosofia moderna* (article diffused on Internet by www.sociologia.de.

[18]Op. cit.: "Como el lector entendió, me refiero a la obra de Ch. Perelman tan vasta que no puede ser exhaustivamente presentada en una nota ... No debe olvidarse en la misma dirección el libro de Th. Viehweg, Topik und Jurisprudenz ... que si bien partiendo de supuestos diferentes llega a resultados similares."

argumentative speech devoted to the analysis of probability. (2) The authentic legal argumentation must proceed above all in a rhetoric and probabilist way, and not in a deductive way.[19]

The refutation of this position defended by such authorities obviously force to return to the texts of these logicians-lawyers who were Everhardus, Gammarus and Cantiuncula, to try to reach the following targets: (1) to understand the reasons why their respective theories of topics were interpreted in a relativistic way, while all the topics are stated there as rules imposing an indisputable conclusion. (2) to see whether the analysis of topics has only developed in the context of the *mos italicus* or if it is necessary to recognize in this processes, a method which exceeds the opposition *mos italicus/mos gallicus*. (3) to understand the function of the various topics in a general theory of argumentation, and their connexion with classification.

The position of Viehweg appears to find an indisputable justification in the two acknowledgment of the heterogeneous feature of the various collections of topics carried out by Everhardus, Gammarus et Cantiuncula, and in the frequency of use of the term *probabilis.*

The first point results from a convergence of several factors, because all these collections rest on a mixture of different theoretical contributions where we recognizes obviously the aristotelician doctrines, but where we also guess the ciceronian influence in the multiplication of topics, and sometimes the ramist and melanchtonian additions. In the same way, if there is a kind of agreement about the initial acceptance of common bibliographical sources,[20] notable divergences next appear in the detail of argumentation because Cantiuncula quotes first classical authors and the humanistic ones, while Everhardus and Gammarus remain faithful to the tradition of

[19]Op. cit.: "Con el avance de la 'escuela' van desapareciendo los tópicos y las dialécticas, todas las 'regulae docendi et discendi', que se refieren a la lógica de lo probable. El redescubrimiento de la retórica como técnica del discurso persuasivo, opuesta a la lógica como técnica del discurso demostrativo, y el reconocimiento de que las operaciones intelectuales efectuadas por los juristas en su función de intérpretes pertenecen a la primera, puede servir para explicar el carácter específico del iusnaturalismo, con una claridad de la que en general no hay huella en la historia de la escuela. Si bien con una cierta simplificación, es válido sostener que el iusnaturalismo fue la primera (y también la última) tentativa de romper el nexo entre el estudio del derecho y la retórica como teoría de la argumentación, y de abrirlo a las reglas de la demostración."

[20]See the preamble of the *Loci argumentorum legales* (p.8 of the edition of Francfort, 1591) where Everhardus declares: "The pieces of writing on 'loci legales' are not only useful for students in law, but mostly necessary (and it's on this subject that wrote Balde in his comment of C.1.3.15, the Speculator [Guillaume Durand] in his 'De disputationibus et adlegationibus', Alberic de Rosate in his 'Dictionarium juris tam Civilis quam Canonici' and Arnold of Rotterdam in his 'Tractatus de Dialecticis graecorum principalibus'. But Ciceron spoke of that more exactly in his Topics, and after him, Boece, Quintilien in his book 'Institutiones oratoriae', and Rodolphe Agricola in his book 'De inventione Dialectica libri tres'. See also the §. 'Divisio locorum' of the *Topica Legalia* where Cantiuncula says "Others have differently classified the loci and difficulty agree between them. Thus, Rodolphus Agricola, which follows the opinion of le Great Erasme, is in disagreement with Aristote, Ciceron and Boèce… But Ph. Melanchton differently deals with topics in his pieces of writings on rhetoric… and a long time before that, lawyers like Alberic of Rosate, the Speculator, Balde and some others, have put together a great number of arguments from the interpretation of laws."

mos italicus by highly using the contribution of bartolists and the postglossators.[21] All these authors also differ on the number of topics, because Everhardus counts 130 in his *Loci argumentorum legales,*[22] while Gammarus enumerates 81 in his *Dialectica legalis*[23] and Cantiuncula, 62 in his *Topica legalia.*[24] Moreover, quite an arbitrary seems to be the rule in the differentiation of topics, because Everhardus is satisfied with the introduction of only one (generic) topic *a simili*, while Gammarus distinguishes 34 and Cantiuncula 28. In the same way, Everhardus and Gammarus propose only one topic *a verisimili*, while Cantiuncula distinguishes 8 different forms. The same obvious arbitrary could be finally recognized in the various presentations that the same author proposes for his topics, in several times, because the 130 cases of the *Loci argumentorum* legales become 143 in the *Synopsis locorum legalium.*[25] whose function however is to summarize the *Loci argumentorum*, and are reduced to 100 in the *Centum modi argumentandi*[26] of the same Everhardus, like if the basically subjective nature of *standpoints*, prohibited to define an objective criterion allowing to draw up the exhaustive and definitive list of topics. Finally, all these presentations differ or seem to differ on the criterions for classification. Indeed, Gammarus points out the existence of several[27] principles for ordering topics, before distribute them in three categories, according to that they *come from that we debate, or are born from something else who is connected to that which we debate, or are completely extrinsic.*[28] Everhardus, who is however the most precise in his analysis of topics and in his recall of their basic rationality, uses as for him a more complex classification where intervene the syntactic and logical criterions, the diversity of people, institutional mechanics and rights, and the multitude of special

[21] The classification of authors quoted in the *Dialectica legalis* of Gammarus, according to their frequency of call, gives: Bartole, Balde, Aristote, Abbas Panormitanus, Dynus Mugellanus, Johannes Andreae, Boece, Jason of Mayno, Imola, Butrio, Paul of Castro, Gambilionibus, Geminianus, Pistoriensis and various postglossators incidentally used. Quite the same classification would be obtained from the *Loci argumentorum legales* of Everhardus, with the three following specificities: the number of references to postglossators works is considerable there; the quotations of Balde are more frequent than those of Bartole; and the references to the topics of Aristote are negligible, owing to the more 'casuisitic' character of the Everhardus processes. On the other hand, the classification of the authors quoted in the *Topica legalia* of Cantiuncula reveals his membership of legal humanism since we obtain: Cicero, Zasius, Alciat, Agricola and Boece, to which Bartole, who is practically the only one representative of the *mos italicus*, finally succeeds.

[22] *Loci argumentorum legales*, Francfort (edition of 1591).

[23] *Petri Andreae Gammari Bononiensis Dialecticae legalis sive topicorum libri III* (edition of 1522).

[24] The *Topica legalia* which was consulted, follows the *Methodica dialectice ratio ad jurisprudentiam adcommodata* in the edition of Bâle (edition of 1545).

[25] *Synopsis locorum legalium*, Darmstadt (edition of 1610).

[26] *Centum modi argumentandi*, Venise (edition of 1539).

[27] (1)According to the arguments can be obtained by deduction, induction or analogy; (2) according to they can be necessary and provable, only necessary, only provable; (3) according to they can be obtained by syllogism, induction, enthymem or by one example. (op. cit. p. 8).

[28] Gammarus, op. cit. p. 10.

cases. At last, Cantiuncula mainly based himself on aristotelician categories (*whole, genus, species, specific difference, definition, cause, form*), to which he adds the logical properties justifying the arguments (*conjunction, connection, correlation, contrariety, similarity*).

The second point, is due to the fact that the share of uncertainty, and thus of relativism in the expression of *standpoints*, grows partly with the frequency of use of the word *probabilis*. However, the case of Everhardus shows that this frequency is important, since a census of the terms which he uses and combines to summarize the properties of each 143 topic of his *Synopsis locorum legalium*, give the following results: 103 are named *useful*, 98 *frequent*, 84 *probable*, 26 *strong*, 14 *valid*, 8 *necessary* and 2 *effective*. On the other hand, the most employed combination of terms which we find in 65 cases, does not introduce any deductive necessity since it consists in the trio *useful, probable and frequent*. Thus, we can be tempted to see in these heterogeneous collection of topics, as much collections of pragmatic statements containing a share of uncertainty excluding the undeniable knowledge which we would obtain by the application of a deductive method. But that means in same time the end of the skeptic position of Mr. Villey, according to whom *dialectical reasoning are constituted on dubious opinions* and *can only lead to dubious and precarious results, themselves problematic*, since the label of topics by their respective degrees of probability (and in certain cases, of certainty), forbid to regard them as simple and indefinitely debatable *standpoint'*.[29] Thus, the true question is not to know if the proposals contained in the Topics of Everhardus, Gammarus and Cantiuncula are purely subjective, but to determine if their *objectivity* results from a simple institutional consensus, or on the contrary, of from the acknowledgement of their argumentative validity. In other words, it's to know if we can leave a purely rhetoric conception of topics and substitute a logic of certainty for a logic of conviction.

A precise return to the texts will make it possible to answer by showing that in spite of their respective particularisms, all these authors have as a characteristic to use a common corpus of presuppositions and methods which exceeds the opposition between *mos italicus* and *mos gallicus*, because it tackles the question of topics by combining the general principles of legal rationalism and the particularisms of casuistry.[30]

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[29]The comprehension of the relationships between logic and norms in the use of topics is no more ensured when Th. Viehweg uses the words 'cliché' and 'standpoint', to join together and confuse in the same category, contents as different as legal topics, 'literary topic' and 'musical topics' (p.38). Because the indisputable fact that the word *Topica* was used in a generic way to indicate as well "rules" of reasoning as criteria of empirical classification (cf. the *'medical Topics'*), or of taste, doesn't imply the argumentative identity of these various collections.

[30]Everhardus, *Loci argumentorum legales, 'Preambula'*, §.7: "We must know that it is easy to solve all legal difficulties if we pay attention to what contain the following terms: the cause, the place, the time, the person... Because law changes if they are added... See also what Odofredus and Balde say in their 'Proemium' of the Digeste, when they skilfully teach us that the force of any misleading argument can be invalidate in three ways: by the consideration of modalities, people and relations...".

Thus, the preamble of the *Loci argumentorum legales* that Everhardus composed to summarize the essentials of the lawyer's method, state a whole of nonrelativistic definitions of topics, whose contents are as follows: (1) in spite of the ambiguity of the word *probabilis*, which means at once: probable, provable and agreedable, topics are aids for argumentation, proceeding by deduction, induction or analogy, and whose function is to provide indubitable or convincing conclusions (*fidem facere*), from legal, rational or factual data.[31] (2) They make up for the generality and/or the inaccuracy of laws[32] while allowing to complete Law[33] by a tidy call to its sources and the respect of both the requirements of justice and reason.[34] (3) They provide this function when we proceed in accordance with the principles of rational exegesis, for interpret the terms according to the *ratio legis,*[35] and when we respect the common rules of syllogism, *enthymem*, induction and example, namely, when we fit the range of the conclusions obtained by these arguments, to the generic or special nature[36] of the legal cases we consider. The same conclusions could be obtained in Gammarus, from his *Dialectica legalis* or the *De veritate ac excellentia legalis scientiae libellus* who follows it in the edition of 1522, and where we find a summary of legal rationalism principles inspired by Cicero,[37] but that we would read also well in an aristotelician, ramist or melanchtonian context. And we could finally discover

[31] Everhardus, op. cit. §. 1: "We call places [locos], some positions [sedes] immediately available, by which we build necessary or probable arguments, about matter of points which it is necessary to confirm or invalidate"... "An argument consists of all this which give a conviction [fidem facere], in whatever way, about a doubtful thing we discuss." ... "It's arguing and disputing that we find the truth." We must finally underline that Everhardus quotes only one very 'dubious locus': "a tractatu sive perplexis aut implicitis", and that his argumentation aims to remove this uncertainty by analyzing the implicit one.

[32] Op. cit. §. 7: "We know by argument what we cannot notice in an obvious way."

[33] Op. cit. §.14: "What somebody tell be true according to law,, he must prove it by putting forward an express text or by leading to a text thanks to an argument using one of the legal loci... Whe argue in law, in three different ways, namely: by law, by reason, and by one example... We argue thanks to the reason, when an express law is missing, but however natural reason imposes something... And here Balde says in his comment of D.27.1 that we don't be astonished to see the reason receiving such a force, since reason is the soul of law and that it represents a kind of inner tacit law in the spirit of men, and his text says that reason, truth and God are equivalent... But we argue by an example when we proceed from a particular case to an other, owing to something similar we recognize in them. And there is not any way of argumentation which cannot be reduce to one of these three modes."

[34] Op. cit. §. 13: "The jurisconsult looks after what is just and unjust"; §. 16: "The reason is quite a tacit law which is inscribe in the spirit of men"; §. 17: "In discussions, it's necessary to finally refer to the most valid and most constraining argument."

[35] Op. cit. §. 16: "The reason is a kind of tacit law inscribed in the mind of men."

[36] Op. cit. §. 27: "Who studies law must be humble, and must not foresee to be able to judge according to the law if he did not examine the totality of laws, since the terms which follow sometimes clarify or sometimes depart from those which precede."

[37] Gammarus, *De veritate ac excellentia legalis scientiae libellus,* pp. 160–161: "In his book De republica, Ciceron elegantly spoke about it in this way: the true law is the right reason, congruent with nature, present in everybody, eternal and constant... And there will not be a law for Rome, an other for Athens, an other now, an other afterwards, but only one eternal law for all and in any

this same intimate connection between the theory of topics and legal rationalism, by resting also on the *Topica legalia* of Cantiuncula, i.e. be by taking for support of demonstration the text of this author not guilty of unmotivated sympathy for rational exegesis principles, since he was largely influenced by German and French humanists, and wrote a *De ratione studii legalis paraenesis*[38] where the rational exegesis method of the *mos italicus*, applied to the analysis of Roman Law, was rejected with the profit of the historical and philological step of the humanistics. However, the method he uses in his argumentation is opposes to the idea of standpoints relativism. Because if we examine an ordinary topic, like *a partibus,*[39] who however has this advantage on deductive topics like *a genere, a definitione, a conjugatis* or *a toto*, to be potentially interpretable in a relativistic way since it is inductive, we are confronted with a classification of cases, aiming to obtain rational certainty by the exhaustive enumeration of all the possible ones, the taking into account of exceptions, and the formulation of constraining reasoning. Indeed, Cantiuncula formulates the rules of use of this topic by proposing a classification of cases resting on the relation of the parts to the whole, considered according to essence, quality and quantity. Thus, he obtains the arborescence of valid arguments, affirmative or negative, we find in the two tables below, that allows to apply to the whole what is noted for some parts.

Validity or invalidity of the argument proceeding from the parts towards the whole, according to the parts are:

Heterogeneous								Homogeneous			
Secondaries				Main							
Relating to essence		Relating to quality		Relating to essence		Relating to quality		Relating to essence		Relating to quality	
Affirm. arg. +	Negat. arg. −	Affirm. arg. −	Negat. arg. −	Affirm. arg. −	Negat. arg. +	Affirm. arg. −	nEgat. arg. −	Affirm. arg. +	Negat. arg. +	Affirmg. arg. −	Negat. arg. −

Thus, in the case of an argument introducing heterogeneous and secondaries parts (like the furniture of a house, which belongs to the house but are not identical to it, nor essential to its existence), he can declare:

> While considering the parts which are secondary, we will introduce a distinction to know if we argue about the essence of the thing, or about its qualities. In the first case, the argument will be valid in an affirmative way, and not in a negative way. Indeed, the reasoning is correct in: it's the foot of a man, so it's a man . . . In the second case, consecution will be

time... The law is the highest reason inscribe in nature, which orders the acts having to be done and prohibits the others."

[38] *De ratione studii legalis paraenesis*, Bâle (1522).

[39] Cantiuncula, *Topica legalia*, pp. 28–30.

> necessary neither in an affirmative way, nor in a negative way. Thus, when we say: some furniture of the house are bequeathed to me, so the house is bequeathed to me, we conclude wrongfully. Idem, we doesn't conclude anything necessary in the opposite case when we say: the furniture are not bequeathed, by consequent the house is not so. indeed, it can happen that what we say about a part is true, even if what we say of the whole cannot be so. And that mainly occurs if we speak about these things which are in such a ratio with the whole, that they can be missing without any affects on its essence.[40]

The processes is the same one when we aim to a conclusion relating to the whole from the consideration of some main heterogeneous parts, (i.e. of an other nature that the whole, but essential for its existence), or from some homogeneous parts (of the same nature as the whole), since in this last case, and by supposing that the whole is considered from the viewpoint of the extension, we arrives at the following conclusion:

> We will never obtain anything valid while reasoning affirmatively or negatively concerning parts of a whole considered from a quantitative standpoint, either by regarding the whole as a universal proposal, or like a discontinuous quantity. Indeed in this case, we will have such an argument like: the action which is born from a contract is a personal action, by consequent any action is personal. Or in the opposite way: the complaint in justice is an action which is not personal, by consequent no action is personal.[41]

But to be exhaustive, this classification must be supplemented by a whole of exceptions who result either of dissensions about the concept of part, either of the introduction of additional norms. Indeed, in the first case the invalids affirmative and negative inferences consisting in concluding for the whole, starting from heterogeneous parts, secondaries and defined by their matter, yield the place to valid affirmative and negative inference, when we define these parts by their formal identity,[42] since this one makes the part and the whole conceptually equivalent. Likewise, the definition of the parts as a *total part*[43] or a *no total*, will have the same discriminating effect on the reasoning, since the validity of the affirmative and negative arguments is ensured when the *total part* becomes equivalent to the whole, and that it's necessary in the other hand to observe the rules of *quantification*[44] when the

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[40] Op. cit. p. 28.

[41] Op. cit. p. 30.

[42] Op. cit. p. 29: "The argument proceeding from the parts to the integral whole is valid in an affirmative way when we consider the shape of the thing as an integral part of this thing. Indeed, since this part exists and disappears at the same time as the whole (as we will teach it in the place "a forma"), we can reason in an affirmative and negative way from a part of this type."

[43] Op. cit. p. 29: "There is indeed parts... which take the name of the whole only when they are joined together. Thus, since the foundations, the walls and the roof constitute a house, they form a house when they are joined together. But alone, the foundations cannot be named by the name of house... It's not the same in the case of species whose all receive the whole name of the genus, like when man and horse receive the name of animal."

[44] Op. cit. p. 29: "In the enumeration of the parts which do not receive the name of the whole, unless being all joined together, we will follow the Boece's doctrines in the following rules. If we want to destroy an argument, it will be enough to find one missing element. If we want to confirm it, it will be necessary to find them all joined together."

parts are *no total* ones. Lastly, in the second case, the main principle of invalidity of the affirmative or negative inferences, by which we want to go from some quantitatively definite homogeneous parts, to the whole they make, will allow the three following exceptions: the negative inference turning on discontinuous quantity[45] is valid; the affirmative and negative inferences turning on parts indicated in a generic way[46] are valid; and the affirmative inference turning on parts exhaustively named[47] is also valid.

If we now examined the texts of Gammarus and Everhardus, we would find the same classifying processes, only changed by these secondary constraints which are the brevity of the talk in the first and the abundance of jurisprudential details in the second. But, even if the validity rules of the inference using the topic *a partibus* are reduced in the first to two fundamental statements,[48] and are unliked multiplied in the second due to his casuistic of particular rules and due to his different[49] classification of the topics components, the identity of their processes is obvious and allows to completely reject any relativistic interpretation of the topics. And this is all the more indisputable that where the relativism of opinions seemed to be able to be defended, every three agree on the principle[50] according to which common opinion can be used when a strictly rational solution proves to be impossible and doubt still exist, because this resort gives authority to the permanency of collective uses and not to brittleness of personal opinions.

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[45] Op. cit. p. 30: "But [this invalidity] is not accepted in three different cases. Firstly, if we speak about a discontinuous quantity, such as a promised or bequeathed species. As when we indicate this money which is in this coffer. Indeed, if this money is destroyed, we can infer that no discontinuous quantity is due, since the promisor is released by the destruction of the species, when there is neither fault nor fraud from him."

[46] Op. cit. p. 30: "Secondly, if the statement turn on a matter which give the same substance to the part and the whole, like when we say: an action in rem is in conformity with law, so any action is in conformity with law. And it's the same thing when we reason in a negative way, like when we say: the action 'ex empto' comes from a contract and is not an action in rem, so, no action coming from a contract is an action in rem."

[47] Op. cit. p. 30: "Thirdly, each time that we reasons starting from all the parts joined together at the same time, to go towards the whole, as we will underline it in the locus 'a specie'. We argue then affirmatively proceeding from a part so conceived, towards the whole, as follows: somebody has the intention of a good faith owner, thus he possesses in good faith. When we argue negatively, we do not create any right."

[48] These rules are stated in the topic *a specie ad genus* as: "De quocunque dicitur species, de eodem dicitur genus"; "Si in hac universali quaelibet singularis non est vera, tota oratio reditur falsa."

[49] Indeed, Everhardus distributes the properties of the topic *a partibus*, in two relatively minor topics: *ab enumeratione partium* and *a minori*, and in the basic topic: *a ratione legis larga ampla seu generali ad extensionem ipsius legis* (to which he devotes the pages 481 to 540 of his *Loci argumentorum legales*), distinguishing the argumentation rules according to whether they apply to cases rectifying a previous law (*casus est correctorium*), derogating from common law (*casus est exorbitantium a jure communi ac regulari*), coming under criminal law (*casus est poenalium, ubi locum habet extensio*), or simply expending this law (*casus est de extensione, in non correctoriis, nec exorbitantibus, nec poenalibus*).

[50] We find it especially in the §. 3 of the topic *ab opinione vulgi* of Everhardus's *Loci argumentorum legales*. (p. 113).

Thus, the true defects[51] we discovers in the treaties of these three authors, do not have to occult a basic fact which was not really understood by Th. Viehweg and M. Villey. Topics are not subjective *standpoints*, endlessly debatable, because they are inference rules, joined together in a *naturalist* type classification where the relationship between the genus and their respective species is the expression of a conditional necessity, because they allow a deduction *a posteriori*[52] when species is juridically included in the genus, and do not authorize it when there is an exemption to the rule.

The following data allow to establish this fact and the consequences which result from it:

1. A reading, even superficial, of the very teaching text of Gammarus, reveals immediately the importance of the rules since he systematically uses this means to summarize the essence of each one of his topics. Thus, he obtains 43 principal rules[53] to which he adds 40 other rules by the play of the negation, the reciprocal and the *converse*. This report would be identical if we considered the texts of Cantiuncula or Everhardus, because each of the two, with his respective style, proceeds in the same way and summarizes the argumentative function of topics by proposing a rule of inference affirmatively illustrated by the enumeration of the cases where it is applied, and negatively, by that of the exceptions.
2. The very title of the founder work of Everhardus, the *loci argumentorum legales*, clearly shows that the *loci legales*, i.e. the topics, are general categories allowing to classify the arguments used in laws. But the function of these arguments is to solve a case by determining how a norm can be applied to it. Formation of topics is consequently the result of an abstraction and classification process, where we start from positive laws to establish the reasoning which they contain, to gather them in very precise categories, and to synthesize each one of them in a general rule of inference.
3. As in the case of any empirical classification, topics are mainly obtained by induction since it is necessary to gather similar cases according to the arguments which they contain, and for each class obtained in this manner, to formulate the abstract rule (the topic), which summarizes its way of argumentation. But in same time, the function of topics is to provide inference rules allowing to obtain an indubitable conclusion. This difference, which we can change into an opposition when we estimate that the classification obtained by induction is the simple

[51] Cf. the disputable feature of the mixture of categorization criteria proposed by Cantiuncula in the case of the topic *a partibus* (according to the nature of the parts and the way of reasoning that we apply to them).

[52] For this reason, the Topics are both argumentation treaties and interpretation treaties whose target is to constitute a grammar of laws. This find expression in the presence of 'necessaries' topics like *a definitione, ab etymologia, ab allusione vocabuli*, etc, and the frequent compiling of works mixing logical, grammar and law (cf the opuscule *Particularis juris* of the Leibniz's uncle, J. Strauch).

[53] This number is obtained by counting for only one genus of topic the various species of the topic *a simili*.

registration of subjective convictions (cf. the intuitivism of Mr. Villey and his opposition to the *deductivism* of logicians), can be easily explained within the framework of a rationalist approach of legal argumentation, as soon as we precisely examine the list of topics named *necessary* and *probable*. Indeed, the word *necessaries*[54] which is used by Everhardus to define some of his topics, either express a purely normative relationship of absolute constraint (cf. the topic *ab autoritate*), either a logical relationship of identity, implication or inclusion. In this case, are named *necessary*, not only the topics in which there is an equivalence between the terms connected by the inference,[55] but also those in which there is a strict implication between the first term and the second.[56] In all other cases, the topics could be named both *probable* and *not-necessary*, because they exist and that existence supposes the preliminary acceptance of some norms. However, the use which is made of these terms in the treaties of Everhardus, Gammarus and Cantiuncula, only corresponds partly to that, because the inductive character of the mode of formulation and classification of topics lead to define each one of them by a hierarchical organisation of logical properties and institutional constraints, that is to confer a conditional validity to the rules of inference which characterize them. A very simple proof is still once given by the superficial reading of some *Topicae*, since we see that all necessary topics have their exceptions, and that there are intrinsically not-necessary topics (i.e. proceeding by analogy or induction), which are however named as necessary ones owing to their institutional valorization. Thus, in the case of the topic *a minori*,[57] where the inference goes from the whole to the part, Everhardus says in his *Synopsis locorum legalium*: *This locus a minori, that is a fortiori, provides in profusion a frequent, useful, very solid and necessary argument*, but he adds also:

> This locus does not apply … when the least is not contained in the most by the way of species or part (thus, that which refuses to give a goat can give a horse); in the cases derogating from ordinary law, as in the case of someone which would argue proceeding from the allowed cases to the weaker not-allowed cases; in the cases where the rule does not apply. (And which is four, as we will see it in the locus: a ratione legis larga), and in all the cases with restrictive function." Similarly, he says in the Loci argumentorum legales about

[54] We could perhaps reproach him to have confused necessity and obligation. However his interpretation is justify by the fact that all topics are naturally obligatory since the laws of which they summarize the way of reasoning (including those which derogate from the rule), have this character by definition.

[55] That is the *definiens* and the *definiendum* in *a definitione*, the *demonstrans* and the *demonstrandum* in *a descriptione*, the sum of the parts of a thing and the thing itself in *ab enumeratione partium*, the single species of a genus and this genus in *a specie ad genus*.

[56] Cf. the topic *a defectu formae* where the no-respect of legal procedures implies the nullity of the act, and those in which there is inclusion of the second in the first (like the species in the genus in *a genere ad speciem*).

[57] Op. cit. pp. 43–44.

> the locus "a simili"[58]: "However, I want that one does not remain without knowing that the similarity is sometimes probable and necessary, namely, when law defines the assimilation, see D.9.1.4,[59] and that it is sometimes only probable, when it is a judge or a lawyer who defines the assimilation of a person to an other, or of a thing to an other, or of a fact to an other. And it is precisely that, that Balde quotes in his comment of C.9.1.11, by declaring that when there are two similar, it is necessary to choose that which is most similar.

This remarkable conjunction of probable and necessary we find for the aforesaid reason in topics where the reasons of inference depend on the only institutions (*ab auctoritate,*[60] *a defectu formae*[61]), is also found in the topic *a specie ad genus*, that is in a topic which, apparently, should not be described as *necessary*, since nothing guarantees that the species to come will not be different from the preceding ones and will not invalidate a rule defined by induction. However, the thesis which is stated in the beginning of the text, is without ambiguity: *The argument of the locus a specie ad genus is not probable, but necessary, and will be formed in this way: when the species is stated, the genus which rules this species is affirmed, but not the opposite. Or thus: the statement of the genus results from the statement of the species, but not the opposite.* So, all the question is here to know how Everhardus can call necessary, an inference that we would qualify at best a probable one when the future exceptions to the rule are in low number, and an improbable one in the opposite. To tell it in another way, the question is to know by which means the logical no-necessity of the inductive inference proceeding from the species to the genus can be transformed into pure necessity, in order to reach the degree of certainty we obtain in the case of inferences based on the previous admission of criteria like authority or formal validity.

There too, the reply of Everhardus is strictly in accordance with the principles of legal rationalism as far as based on the logical properties of classification, that is, on a hierarchy of categories defined by extension or comprehension, and on the implicit use of quantification in the delimitation of the inclusion or exclusion relationships (case of the exemption), between species and genus. Indeed, he distinguishes two modalities in the relationship[62] between part and whole: according to

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[58] Op. cit pp. 120–131.

[59] The 'Assimilation', i.e. the analogical extension about which speaks D.9.1.4, is that by which the 'actio noxalis' defined by the 'Leges XII tabularum' and that we can exert against the owner of a quadruped which caused a damage, is extended to any animal. (*"And this action can be usefully brought if it's not a quadruped but an other animal which caused the damage"*).

[60] p.95 of the *Synopsis* and pp. 637–655 of the *Loci argumentorum legales*.

[61] p.10 of the *Synopsis* and pp. 86–92 of the *Loci argumentorum legales*.

[62] *Loci argumentorum legales* p. 50: "I don't want not more to let you be unaware of that species forms part of genus and that genus forms also part of species, but in a different way. This is why, so that you would not be misled by the ambiguity of the word 'to form part', I informed you that something can be said 'to form part of something else' in two different ways."

extension (relationship of inclusion[63]), and according to comprehension (relationship of *belonging*[64]), and he summarizes their respective properties in the following way: when the relation of the species to the genus is characterized by the extension of categories, two cases are possible: the very general case where species is included in genus (*semper specialia generalibus insunt*) and confirms the rule, and the exceptional case where it is not included in the genus (*generi per speciem derogatur*), because an exemption enables it not to respect the hierarchical order and the logical properties of no-symmetry and transitivity which result from it.[65] Conversely, when the relationship of the species to the genus is defined by the comprehension, the species is defined by the genus and the specific difference, and it implies then the genus,[66] like p.q ⊃ p.

This distinction allows him first to solve cases similar to those stated in D.32.47 §.1 and D.32.49 §.3, where the main question is to know if categories are defined by extension or comprehension. Indeed, when a husband decides to bequeath to his second wife goods put at the disposal of his first wife, and when those are composed with goods specifically bought for her and goods only reserved for her use, the legacy of the genus (i.e. *goods put at the disposal of the wife*), involve that of the species (*goods bought for the wife*) and not the opposite,[67] while if he names them

[63]It's indicated in Latin by the expression: *contentive sive comprehensive*, who does not mean *comprehensively*, but well *inclusively* (*continere* and *comprehendere* with the meaning of: to be materially included or intellectually understood in something).

[64]The latin sentence says: *illative, positive, consecutive seu per consequentiam*.

[65]Op. cit. p.51: "The first way is done in inclusion, and in this case, the species forms part of the genus, that is, the species is contained or included in the genus, and it's in this way that speak the end of the §. 'but if the fact of defrauding', when we say that the fraud is understood in the deceit, according to the first interpretation of the glose, see what say Bartole, Balde and the Doctors about this matter." . . . "And its in this way that speaks D.50.17.80" [*"In toto jure generi per speciem derogatur et illus potissimum habetur quod ad speciem derectum est"*], see Dino de Mugello, [on this rule] in the Sexte [rule 34: *"generi per speciem derogatur"*], and the rule "plus semper" [rule 35: "plus semper in se continet quod est minus"], with its note and the glose turning on the same title of the same book. But in this case, the exception forms part of the rule, in other words, is included or contained in the rule, as say it perfectly the glose turning on the rubric 'De regulis juris' of the Sexte, and Dino de Mugello, Albericus Roxiati and the Doctors, about D.50.17.1. And in a general way, the special categories or which are less common, form part of the most general or most common, in other words, are included or understood in them, see D.50.17.147 [*"Semper specialia generalibus insunt"*].

[66]Op. cit. p. 52: "In the second way, something is said to form part of something else, not in comprehension as I said, but by implication, or consecution, i.e. by the consequence; because the second term is implied or follows when the first term is stated; and thus, the genus, i.e. what is more common, is a part of the species, i.e. what is less common, because once the species is stated, the genus is stated; and once the least common is stated, the most common is stated, as with: it's a man, consequently it's an animal."

[67]Op. cit. p. 53: "The genus or the most common, implies its species or the least common, by inclusion; thus, when the husband bequeaths to the wife the things which are at the wife's disposal, then the things which were bought for she are supposed to be bequeathed to her."

in *comprehensive way*, it's the opposite which will occur[68] since the genus will be: *put at the disposal* and the species: *put at the disposal and bought*.

It also enables him to obtain a necessary inference from a topic which is potentially dubious for being possibly inductive, and to allow to obtain unquestionable solutions in this type of case, by applying the two following principles (whose equivalents are easily found in the texts of Gammarus[69] and Cantiuncula): (1) the topic *a specie ad genus* will be used each time that the categories implied in a legal case will be conceived in comprehension (that is, each time that the definition of the species will contain that of the genus), and conversely, the topic *a genus ad speciem*[70] will be used each time that the categories implied in a legal case will be conceived in extension (that is, each time that it will be possible to enumerate the species composing the genus). (2) This principle will be employed each time that it will be necessary to rectify a classification by correcting the errors[71] in the arrangement of genus and species, that is, in a rationalist and no-relativistic viewpoint.

At last, it gives him a means allowing to logically deal with the discriminating effect that the introduction of the *causa,* the *ratio,* or the *intentio* can have in a hierarchy of categories. Indeed, when he says *it follows that the things the paterfamilias wanted him to obtain by an other way, will not be included in the legacy of the only bought things,*[72] or: *we can be easily misled by an error proceeding from what is known secundum quid to what is simply known*, he introduces the consideration of what the scholastics lawyers called *the circumstances*, to modify the relationships of *belonging* or inclusion (that is the *ordering* relations), between the categories of genus and species. Thus, he based on this logic inspired by Aristotle, and revised by

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[68] Op. cit. p. 53: "But [from a comprehensive standpoint] the genus or the most common, does not imply the species, or the least common, because we have not the following consecution... it's at the woman's disposal, so, it is bought, because there can be another way of acquisition". See also the conclusion of D.32.47 §.1: "If the husband bequeathed to the second wife the goods [not bought] which had the first wife, these goods are at the second wife's disposal, even if the husband has bought nothing to her, and the legacies are obtained, even if they are not specifically allocated to her. But the goods which are bought for the first wife and which are at her disposal, are only due to the second wife if they are specifically allocated to her, because the husband did not think of the second when he bought them."

[69] See in Gammarus: "De loco a toto universali, seu a genere ad speciem" and "De loco a specie ad genus", op cit. pp. 23–28, and in Cantiuncula: op. cit. pp. 31–32.

[70] Op. cit. p. 47: "There exists in Law an other locus of frequent use, which we call a genere ad speciem, and which allows to obtain an argument which is not probable, but necessary."

[71] Op. cit. p. 54. "The glose ... rightly says that the fact of declaring that the whole is in the part secundum quid [i.e. comprehensively], because the whole is not simply in the part [i.e. extensively], must always be understood... by the consequence and not by the contents. And this must be kept in memory, because if not, we can be easily deceive because of an error proceeding from what is said secundum quid to what is said as simply; see what I said in the former locus [*a genere ad speciem*] and what I will say in the next [*a toto ad partem*]."

[72] Op. cit. p. 53.

scholastics, that the humanistic Cantiuncula presented in the following way in his *Methodica dialectice ratio ad jurisprudentiam adcommodata*[73]:

> The jurisconsult enumerates seven circumstances in the law 'aut facta' of D.48.19 [(law 16)], that is: the cause, the person, the place, the time, the quality, the quantity, the event. Others are summarized by the following expression: who, what, where, how, why, while, when. … "These circumstances have as a function to introduce differences into property, obligation and all that is stated in laws. [So] the cause [(that is the legal intent)] transform the property. The one who transfers his good to an other in accordance with a sale or a donation, makes of the one who receives, an owner. But the one who does it in accordance with a 'commodatus' or a deposit, doesn't make the same thing, because the causes of these two transfers are not the same ones and that the first wants a complete transfer while the second does not want it, argument of C.4.6.6.

But, it is obvious that donation, sale, *commodatus* and deposit can be considered on one hand as species numerically constitutive of the genus *transfer*, and in the other hand, as differences added to the indetermination of a common genus. In the first case, the inference from the genus to the species will be valid (as in the case exposed in the beginning of D.32.47.§.1), while in the second case, and according to what is related at the end of this law, only will be valid the inferences from each species to the common genus, or the inferences from each cluster of species having a common property, to this genus (since we can constitute subcategories like the *complete transfer* or the *costly transfer*, to gather together some of these methods). Thus, we are inevitably led to propose different possible classifications, according to the *circumstances* we favour for the attribution of rights, in other words, according to the norms these circumstances imply.

So, it's not in the true topics level that can lie the share of *uncertainty* claimed by the supporters of the relativistic interpretation, since we are ensured to obtain indisputable inferences when we proceed *a posteriori* like in *a simili* or *ab exceptione*, by the very fact that these topics summarize institutionaly established inferences, or *a priori* like in *a toto ad partem, a genere ad speciem, a specie ad generem*, etc., when the extensive or comprehensive relationships between genus and species are conceived in such a way that they can only succeed to an undoubted conclusion. In fact, it's on the level of the norms introduced by the account of circumstances that the possibility of a choice lies, since the true question in a classification finally based on the precariousness of norms, is to define the reasons of the privilege granted to one circumstance more than to another (like for the *quid* more than for the *quantum* in the above mentioned cases). And this question is so much important that we find it as a watermark in the true text of Everhardus, as in all those of scolastic lawyers who will try, like Gammarus and Cantiuncula, to join together in the same theory of

[73] Cantiuncula C.: *Methodica dialectice ratio ad jurisprudentiam adcommodata* (edition of Bâle, 1545), Chapter 7 (pp. 159–160). The *Proemium* of this book refers to the precursors of Cantiuncula, and especilally quotes Petrus Andreas Gammarus Bononiensis. Once more, it proves that the opposition *mos italicus*/*mos gallicus* is quite *secondary* when the thing to do is to elaborate a theory of legal reasoning.

legal reasoning the two traditional and contradictory rules: *semper specialia generalibus insunt* and *generi per speciem derogatur*, that is, to define the criteria of an indisputable hierarchy of general norms and their exemptions, from the evaluation of their circumstances.

This will clearly appears in the usual *processing* of *ordering safeties questions*, where the difficulty does not come like above, of the interference of the *quantity* and *quality* circumstances (*simpliciter* and *secundum quid*), in the delimitation of the part/whole or species/genus relationships, but of the interference of the circumstances *time* and *person* in the *order* of privileges. Indeed, the true fact that several creditors can compete claiming to override the others in accordance with different priority rules, justified, either by temporal circumstances (*the setting up time of mortgages*), either by personal circumstances (the holding of a lien), impose to define a *priority order* within these rules. However, that cannot be obtained by the consideration of topics, since their *formation way a posteriori* and the conditions of their relevant use, presuppose the true existence of this order, as we clearly see it in the Leibniz's *De Casibus Perplexis* where are examined all the perplexed cases of concurse between creditors, successively appeared in the roman, canonical and saxonic laws, and where the jurisconsults arguments and their vain attempts of resolution of these cases by the only use of topics, are discussed.

Indeed, let us examine the case n°19 where there is a concurse between a former creditor holder of an anterior mortgage, an intermediate creditor holder of an express mortgage, and a widow holder of a dowry lien. The first overrides the second in accordance with the rule: *prior tempore potior jure* already stated in the Sexte[74] (that is, in accordance with the time circumstance). The second overrides in turn the widow in accordance with the fact that the Constitution *Assiduis*[75] which gives her priority on all the holders of tacit mortgage, does not concern the holders of an express mortgage. However that means, as Johannes de Ripa[76] points it in his comment of this Constitution, that the lien of the woman applies only *secundum quid* and no *simpliciter*. Therefore, it gives her priority on the sole species of the creditors holders of tacit mortgages, and no on the whole genus of creditors holders of tacit and expresses mortgages. The third at last, that is the widow, overrides the first in

[74] Sexte, book 5, *De regulis juris*, rule 54.

[75] Constitution *Assiduis* stated in C.8.17.12: "We were disturbed by the constant taking away [made on the goods] of women, whose they deplore that they make lose their dowries and [*which are made*] by creditors former [to the marriage], on the goods possessed by the husbands. This is why we examined the ancient laws which provide in personal actions, an important prerogative with the action for a claim for dowry, so that women have a privilege against almost all personal actions and that they come before the other creditors, even if they were former."

[76] Johannes Franciscus de Ripa Papiensis, *Commentaria primae and secundae left digesti novi and infortiati and postremo in primam codicis*, fol.58 and 59, Lyon (edition of 1538): "It is said that the woman is preferred with all the creditors, by a special provision, for the things given by way of dowry. Consequently, she is not preferred with the other creditors for the rest of the husband's goods and so, she is not preferred with those which have an express mortgage by the only fact that she comes before those which have a tacit mortgage in accordance with the Constitution Assiduis. And this opinion opposite to that of Bartole is more veracious and more common."

accordance with the Constitution *Assiduis* and the rule *generi per speciem derogatur* that it illustrates, since the priority that this Constitution gives her departs from the general rule *prior tempore, potior jure*. In this case, the circularity of the relation of order is obvious, and the perplexity which results from it is all the more serious since it's due to the gathering of legal rules whose function is precisely to solve cases, and that it cannot be abolished when we try to restore a transitive relation of order between the three terms, by means of the only logical properties of a topic like *a primo ad ultimum*, or of its traditional expression *si vinco vincentem te, vinco te ipsum* [if I overcome the one who overcomes you, I overcome you too]. Indeed, in this perplexed case (and in all others cases of perplex concourse), each competitor is overcome by the precedent and overrides the following. Calling them by the letters A, B, C, we do obtain the following series: A>B. B>C. C>A, and some Doctors thought then that a competitor as A could claim to overcome on C despite everything, by the means of the victory that B (which he overcomes in other respects), obtained over C. The use of the rule *si vinco vincentem te, vinco te ipsum* would thus hypothetically allow, to restore a transitivity (and so a hierarchy of safeties), by a conclusion *a primo ad ultimum* and by neglecting the fact that the relation of order is opposite in the intermediate phase. But we immediately see the invalidity of their attempt, since each competitor could invoke this rule to his own benefit. Moreover, it's completely contestable, since it amounts to disguise a normative choice[77] behind a logical rigour appearance. Indeed, as Leibniz said ironically[78]:

> I admired the genius of the Doctors who venerate this axiom they state as follows: 'if I overcome the one who overcomes you, etc.', in each time it's in favour [of them], and who depreciate it in each time it's opposite [to them]; and they doesn't less overuse this rule when they demonstrate that [the privilege of] the dowry must be preferred to the others. Because they start where they want in their reasoning, that is obviously from what they think better, as if that did not make any difference, but that much imports in these circular relations.

In fact, the solution comes once more from a use of topics combining the respect of logical laws and the delimitation of the normative context of their use. Because the use of the topic *a primo ad ultimum* or of the rule *si vinco*, is only justified when we complete the logical writing of the connector by the account of the circumstances, that is in this case: the *ratio* and the *personae* determining the *secundum*

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[77] "Thus, every time that this is objected to them, from an other standpoint (i.e. when themselves argue as follows: the posterior dowry precedes the former tacit mortgage and this one [precedes the] middle express [mortgage], an so, the dowry [precedes] the latter; and that we object: start rather from the express mortgage in the following way: the middle express mortgage precedes the posterior dowry, the [posterior] *dowry* [precedes] the tacit former [mortgage], so, the first precedes the latter; or as follows: the former tacit mortgage precedes the middle express [mortgage], this one [precedes] the posterior dowry, so, the first precedes the latter), they immediately retort: this rule, 'if I overcome, etc', make a mistake in the two last relations. Thus, why doesn't it mistaking in the same way (in the first relation) when you are in favor of the dowry?"

[78] Leibniz, *De Casibus Perplexis*, Chapter 22. Akademie der Wissenschaften, VI.2. (1990).

quid. And this has been clearly stated by Everhardus[79] when he declared by quoting all those which had previously upholded the same idea:

> However, to decide clearly and lucidly on this common statement: if I overcome the one who overcomes you, etc., it's necessary to make a distinction following Petrus de Ancharano and Cynus de Pistorio in their comments of the Authentique 'Licet patri' of C.5.27, as Johannes Andreae in his comment of the Authentique 'Autoritate Martini' of the Sexte, Petrus de Ancharano about the same passage, and Lambertus de Ramponibus about the law 16, 'Claudius Felix', of D.20.4, as Ludovicus Romanus at the beginning of his advice n°436. Either we ask the question about different cases, or we ask it about the same case. In the first situation, the rule if I overcome the one which overcomes you, therefore I overcome you too, does not have any justification to be applied, and it's in this way that speaks the Authentique 'Licet patri' of C.5.27.8, and also the §.15 of D.38.17.2, the §.3 of D.38.17.5 et the §. 'his consequens' of the Authentique 'De aequalitate dotis' [Novel 97]; in the second situation where we speak about the same case, it's necessary to introduce the following distinction: either the reason which makes that I overcome you is the same one as that which makes that I overcome the one who overcomes you, and so the rule stated above is true, because I must overcome you still more easily, according to D.44.3.14 §.3, or the reason which makes that I overcome you is not the same one as that which makes that I overcome the one which overcomes you, and then this rule does not have grounds for being.

This syntactic and semantic distinction, does not affect the validity of the inferences we obtain; on the contrary, it creates their conditions of possibility by subordinating the use of topics to an increased precision in the formulation of circumstances. But by imposing that, it highlights still more the function of norms in the delimitation of the scope of topics since it's finally considerations of public utility,[80] introduced by the circumstances, which found the superprivilege of the dowry and restore an uncontested order of priorities between safeties.

Thus, topics are prototypes of inferences producing arguments, gathered by the synthesis of positive laws and which are always accompanied by exceptions (including in the case of topics logically necessary as those which proceed from the *definiens* to the *definiendum* or from the whole to the part, etc.), because the effectivity of inferences is here subordinated to normative choices concerning the scope of each topic and the importance of the exemptions (plea and fictions) that the consideration of circumstances introduces. We could therefore estimate that they all are inductive in a certain way, since they are all the result of an empirical classification of arguments. And we could also uphold that they are all deductive, because each one of them allows, within the precise limits of its scope, to reason from universal to particular (since any particular proposal is universal for the individuals to which it corresponds, in the same way that the rule of an exception applies to all the concrete cases corresponding to the criteria of this exception). In fact, the differences between these extreme topics or all those which are distributed on intermediate levels, are obtained by the conciliation of the two following constraints,

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[79] *Loci argumentorum legales*, p. 729.

[80] Cf. D.24.3.1: "The cause of dowries is everywhere and always in favour. Because it's the public interest to preserve the women's dowries because it's very necessary that women be provide with dowries to have children and to fill the city of them."

partly independent: (1) the basic precariousness of the norm which prohibits to apply the *déduction a priori* criticized by Mr. Villey, for both the reasons that there is no universal statement to which we cannot derogate by a plea, and that there is not two similar cases joined together by the topic *a simili*, which we cannot separate in two distinct classes by considering them *simpliciter* and *secundum quid*. (2) the two necessity of simplifying the laws system by formulating statements as general as possible, and consolidating their social effectivity by giving them a rationally constraining shape.

So, the specific difficulties of topics theories don't result from the dubious handling of a quasi dialectical art, because the advantage of the way in which they are formed is precisely to exclude uncertainty. They do result from the true consequences that this a posteriori way of formation can have on the questions of rational coherence and foreseeability of the system of laws. Indeed, as we have tell it above, a topic such that *a specie ad genus*, allows to obtain an unboubted inductive inference when we ensures the conformity of the species to the law of the genus by defining a recognition criterion of these last excluding on principle any exception. But we cannot limit the topics function to the repetition of usually received arguments, since they must be also used to facilitate the application of these arguments to new cases. However, we known that the introduction of a new norm can be in contradiction with the legal system of a pre-existent classification and lead to the formation of perplexed cases. Thus, the application of topics in the processing of new cases, can only be ensured if we admit the continuity of *causa* or *ratio* between the former laws and the laws to come, and so, the main question asked by their use in legal argumentation is to know how to transpose a whole of inferences made up a posteriori, and to confer them a creative function in the same time. More precisely, it's to know: (1) *why* the provisions of common law can be extended to the new particular cases in accordance with the logical rule *generi per speciem non derogatur*. (2) Under which conditions a relation of total or partial similarity allows the inclusion of a new term in a pre-existent category, with accordance to a principle of institutional coherence (cf. the case of the topics *a praesumptione eiusdem facti* and *a simili*). (3) By which normative constraints the reorganization of a classification and the introduction of a new category are authorized in accordance with the principle *generi per speciem derogatur*. However, the answers to these questions are systemic and suppose a work of classification, codification, abstraction and comparison that perhaps could not completely fulfil the Doctors of *mos italicus*, on account of the true semi-empirical character of their approach. They were satisfied on this point, to build a theory of the argumentation combining aristotelician logic and grammatical analysis. But some of these Doctors and those which applied their methods within the framework of romano-saxon Law, had however three basic merits we must recall in conclusion, since they are too often unknown: (1) they knew to connect casuistry to classification, that is to ensure the treatment of concrete legal cases within the framework of a general theory of reasoning. (2) They often achieved[81] to combine

[81] Cf. the works of Cantiuncula, but also and especially those, posterior, of Berlich, Carpzov and Leibniz.

the techniques of cases discussion of *mos italicus* with the contractualist analysis of norms hierarchy (and so, to exceed a traditional opposition), by giving greater place to the *classifying aspect* of problems. (3) They finally tried to rationalize the creative use of inductive or analogical topics, *while allowing* the distinction of the various *rationes, intentiones* and *causae* we can call upon thanks to a logical theory of predication.

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Chapter 4
Formal and Informal in Legal Logic

Jan Woleński

The tradition of legal logic go back to Roman *jurisprudentes*. It is very likely that great Roman jurists (e.g. Ulpian) working in the Stoic philosophical tradition elaborated some principles of legal reasoning. However, the history of legal logic in antiquity still awaits for its detailed examination. Medieval and later books about legal theory and practice used names like *logica iuridica*, *dialectica iuridica*, *dialectica iuris* or *dialectica legalis* (see Krawietz, 1980). We do not need to consider these labels as principally different, since *logica* and *dialectica* were used interchangeably in most cases. On the other hand, some peculiarities of legal tools were registered relatively early. Kant in his famous explanation of transcendental deduction refers to the medieval meaning of *deductio* as consisting in the process of justification of claims defended in courts. A person who performs such a justification, should do two things: (a) to present a factual basis for his/her claim, for example, that he or she lend money to someone; (b) to invoke a legal rule which makes obligatory returning the loan. The step (a) concerns facts and answers to the *question facti* (the factual basis of the claim), but the step (b) involves the *question iuris*, that is, how law contributes to the justification of the claim. In Kant's philosophy, (a) and (b) illuminated the main problem of transcendental deduction, which consists in explaining as something is possible by simultaneous appealing to facts and rules of reason. It is interesting that when Kant spoke about deduction in the present-day sense, he employed the term *Ableitung*, not *Deduktion*.

Kant's case suggests that some legal forms of reasoning were felt as specific with respect to general logic. It is difficult to say when and why this feeling arose. Certainly, an onward separation of jurisprudence and philosophy essentially contributed to perceiving legal logic as somehow different from general logic. This process became accelerated by locating professorships in legal philosophy at legal faculties in the 17th century (Thomasius, Pufendorf and others). The 19th was decisive in this respect. The rise and development of legal positivism and so-called

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formal juristic method (*formaldogmatische Methode*) grounded the view that elaboration of law and its content requires specific methods which are not reducible to formal logic used in other regions of mental activity and have own logic, methodology and philosophy. It happened very often that if logic was taught at legal faculties, it was done by jurists, not by logicians or philosophers. This situation can be taken as a sign of a very common view that formal logic is not sufficient for a correct reconstruction of characteristic patterns of legal arguments, like *argumentum a majori ad minus*, *argumentum a minori ad majus*, *argumentum a contrario*, *argumentum a fortiori*, *argumentum a simile*, *analogia legis*, *analogia iuris* or various kinds of presumptions (for example, that persons died in an aircraft catastrophe, died at the same moment). The point is not that legal arguments are at odds with principles of formal logic, but that the latter must be supplemented by peculiar modes of reasoning characteristic for law.

Although it is understandable that lawyers in the 19th century, especially of the positivist brand, wanted to be free of philosophical speculation and that they intended to create the positive science of law, they, roughly speaking, overlooked that the freedom of speculative philosophy does not mean the liberation of any philosophy. In particular, if we inspect analytical legal theories, we find the same methodological controversies, for example, concerning the scope of logical methods, as in the case of analytic schools in general philosophy. Thus, when someone investigates legal logic, he or she should take into account at least two factors, namely its relation to formal logic as well as an alleged specificity of legal reasoning. However, there is something more, because we also encounter serious controversies as far as the matter concerns the role of formal (logical or/and specific) arguments in law. In fact, legal theory is deeply divided in this respect. One part (various forms of legal positivism from the soft one to Kelsen's pure theory as the extreme legal formalism) stresses that legal thinking is entirely exhausted by formal techniques. On the other hand, the views belonging to sociological jusrisprudence (e. g., legal realism, the school of free jurisdiction) insist that, since law must closely fit social reality, legal arguments should be flexible and not bounded by formal limits; this view usually expresses a protest against so-called mechanistic jurisprudence. Thus, the situation how formal and informal elements are related in legal thinking, presents itself as fairly complex. I will defend three insights: (A) Formal logic is the only logic; (B) Logic in its proper sense, although labelled as "formal" has formal as well as informal aspects; (C) The view that legal logic is specific consists in confusing both mentioned aspects of logic.

The question what is logic encountered the following answers in the older history (see Risse, 1980; I keep some German words too):

(1) dialectic (analysis and synthesis of concepts; Plato);
(2) analytic (deduction; Aristoteles);
(3) *organon* (methods of reasoning; Aristoteles);
(4) canonic (norms of knowledge; Epicurus);
(5) *medicina mentis* (descriptive and normative account of mental capacities; Cicero);

(6) *Vernuftslehre* (rules of pure reason; the tradition of *philosophia rationalis*),
(7) *Kunstlehre* (the art of arguing; Husserl);
(8) *Wissenschaftslehre* (the theory of science; Petrus Hispanus: *ars artium scientia scientiarum ad omniam aliarum scientiarum methodorum principiam viam habent*);
(9) The theory of thinking (Arnauld, Nicole).

The particular points in this list provide various messages. Logic is theoretical or descriptive on some accounts (e. g., as dialectic or analytic), although practical or normative on others (e. g., as *organon* or *Kunstlehre*). Another important difference is captured by the medieval distinction of *logica docens* (logic as theory) and *logica utens* (applied logic). On Petrus Hispanus characterization, universality is the principal feature of logic. Since Leibniz, logic was typically connected with projects of *logica magna* or *characteristica universalis* as schemes providing methodological and linguistic framework for the whole of science. The variety of topics covered logic in its various understandings is nicely displayed by a popular tripartite division of logical subjects (logic in a broad sense) into semiotics (or the logical theory of language), formal logic (a collection of logical systems; logic *sensu sctricto*) and methodology of science (this organization of logic is often employed in teaching). If this perspective is taken, particular views of logic are not mutually exclusive, for example, (2) is formal logic, but the rest covers either logic *sensu largo* or its particular branches, mostly semiotic or methodology of science. All accounts expressed by (1)–(9) are applicable to legal logic as well. It can be understood as dialectic (the synthesis of legal concepts), analytic (deduction as applied to legal matters), organon (a general theory of legal reasoning), canonic (legal epistemology), *medicina mentis* (how jurist should solve their problems?), *Vernuftslehre* (the theory of juristic reason), *Kunslehre* (the art of legal argumentation), *Wissenschaftslehre* (like organon) or *Denklehre* (the art of legal thinking).

From the contemporary point view formal logic is at the centre of all logical topics. Its understanding can be shown by a couple of definitions taken from the standard textbooks and monographs of mathematical logic (I deliberately include passages from more and less sophisticated sources):

> Symbolic or formal logic [...] is the study of the various general types of deduction. (Russell, 1937, p. 10);
>
> [...] [formal] logic is concerned with the analysis of sentences or of propositions [...] and of proof [...] with attention to the *form* in abstraction from the *matter*. (Church, 1956, 1);
>
> The primary subject-matter of logic is the structure pattern of demonstrative inference. (Kneebone, 1963, 10).
>
> Logic is the study of correct reasoning. (Bonevac, 1987, 3).

Although this sample could be continued, so to speak *ad infinitum*, the above four explanations enough to display the fundamental preliminary intuitions. According to them, logic is concerned with deductive, correct or demonstrative inference and investigates it with reference to its form in abstraction from the content.

Logic in the above sense studies various logical systems as well as their syntax and semantics. It is very important to note that contemporary logic attributes to semantics a fairly distinguished place. Consequently, a semantic characterization of a logical system is mandatory in logical studies. However, the above way of thinking about logic as a codification of deductive modes of inference opens some doubts. Are the adjectives "deductive", "correct" and "demonstrative" synonymous or at least coextensive? Is inductive or analogical reasoning (the latter has important applications in law) logical or not? Since the discussion of these (and other similar questions) exceeds this paper, let me decide that formal logic studies the principles of logical consequence as the relation holding between sentences (or set of sentences) and other sentences. If $X \vdash A$, (this means: A is a logical consequence of the set X, B is formally, that, is deductively derivable from X), then A must be true, provided that every element of X is true. This relation holds in virtue of the form in abstraction of the content.

Yet some doubts arise in this context. In particular, it is obvious that people derive conclusions in ways, which do not fall under patterns of deduction. They use induction, analogy, statistics, persuasion, rhetoric, etc., which all are examples of fallible modes of argumentation. These strategies immediately lead to the problem whether such modes correct and in which circumstances. Although it is clear that fallible modes of reasoning are not always correct, the question is how to define their correctness, if it is possible at all. Even if we say that the fallible patterns of arguments exceed formal logic and should be investigated in semiotics, philosophy of science or methodology of science, the problem remains. This consideration shows that the distinction of the logic in the wide sense and the logic in the narrow sense is vital and difficult to be avoided. Now, if it is accepted, we can ask how informal logic or rhetoric is related to formal logic. One way consists in saying that informal logic and rhetoric belong to the logic in the wide understanding, but another option consists in maintaining that there is an intimate difference between formal logic and the study of argumentation, because the latter, at least partially, appeals to content. Any discussion concerning the application of logic to various subjects must be conscious of the above outlined distinctions. Although we can have different views about the relation between informal logic and rhetoric on the one side and formal logic on the second side, yet we should recognize that there are different concepts of logical validity, one being clear and attached to deduction and second – less clear (this is the most optimistic qualification, because one can regard is as inevitably obscure) which is applied to non-deductive modes of reasoning. Many misunderstandings concerning the place of logic in human mental activities stem from conflating of both kinds of validity with the adjective "logical" added to both.

The above diagnosis concerns logical problems appearing in legal matters perhaps more than any other. A very common wisdom suggests that legal activities and their results (legal texts, legal sentences) are logically regular to a high degree. We say that legal decisions are or at least should be rational and justified or that legal codes are or at least should be logically correct, that is, consistent, precise and well-systematized. In general, law was always a pattern of logicality and rationality. Lawyers developed special modes of reasoning, like *argumentum a maiori*

ad minus, etc. (see the list at the beginning of this paper), which are considered as constituting the legal logic. Now we encounter the problem concerning the nature of legal reasoning, that is, modes of arguments generated by legal logic. Are they inferences falling under schemata of formal logic? Or perhaps are they modes of rhetorical techniques (the school of Perelman)? And what is legal logic? An application of general logic to legal activities or *sui generis* legal *Kunstlehre*, *Denklehre* or even *Vernuftslehre*, directed to convincing courts, other authorities or audiences to some statements and decisions? Thus, legal logic is a very instructive example of a very general problem of the essence of logic and the nature of application of logic to special subjects. Take Kelsen's example. He, as a faithful Kantian scholar, influenced by Neo-Kantianism projected legal logic as the *Vernuftslehre*. He looked for transcendental elements in legal thinking, the very principles of the Legal Reason. Clearly, this project encountered enormous difficulties in explaining how validity of rules of legal transcendental logic should be understood (note that the term "validity" in this context means something entirely different than "legal validity" as denoting the state of affairs that law is in force). Personally, since I see no hopes for a satisfactory treatment of transcendental validity of the principles of the Legal Reason, I leave this question without comments.

Le me devote some remarks to legal logic as an application of formal logic (deductive patterns of inference) to legal matters. This is a controversial issue, surrounded by various basic philosophical controversies. One of them concerns the question whether logical relations can hold between norms or norms and sentences which are not norms. Intuitively, we are inclined to accept the following inference (*):

(a) Everybody who is committed a crime ought be punished;
(b) A person *P* committed a crime;
(c) *P* ought be punished.

This inference is an example of a pattern of so-called legal syllogism, where (a) is a general norm, (b) is a singular statement asserting what *P* did, and (c) is a singular norm. This means that (*) is a pattern of derivation a singular norm (c) from two premises: a general norm (a) and a descriptive statement (b). It can be considered as a special form of *dictum de omni* (the inference from the general to the particular).

Unfortunately, (*) rises the difficulty noticed by J. Jørgensen in his famous dilemma. (see Jørgensen, 1937–1938). The Jørgensen dilemma (this name was appeared in Ross (1941) for the first time) goes as follows:

(A) According to commonly accepted standards only declarative sentences, that is, sentences in the logical sense being true or false are premises and conclusions of valid logical inferences;
(B) Norms are not sentences in the logical sense;
(C) Norms cannot be premises or conclusions in genuine logical inferences;
(D) There are modes, for example (*), of intuitively valid logical inferences in which norms are premises and conclusions.

Of course, (D) contradicts (A)-(C). In order to solve the dilemma one must either modify premises or argue that (*) does not represent a logical inference in the proper sense.

The Jørgensen dilemma is very deeply rooted in philosophy. Jørgensen himself, as a faithful logical empiricist, accepted the emotive theory of norms and value sentences. According to this view, such utterances have no (cognitive) meaning. Hence, they are neither true nor false and thereby cannot stand in mutual logical relations as well in such relations with declarative sentences. Norms, similarly as value statements, express acts of will. They function similarly as exclamations, above all in order to influence human behaviour, but they have no descriptive content. The emotive theory of moral and legal utterances forces the treatment of (*) and similar examples as rhetorical performances, but not as genuine acts of inference. Hence, the defenders of this position deny that (*) is an instance of a deductive pattern of inference. Although this move solves the Jørgensen dilemma in a certain way, it is at odds with a firm feeling that passing from (A)–(C) to (D) has its justification in logic. Hence, much more is to say about the philosophical background of the considered dilemma.

The emotive theory also appeals to Hume's view that is-sentences do not imply ought-sentences. This thesis was repeated by Poincaré in his essay on morality and science (see Poincaré, 1910, Chapter 8). According to Poincaré, the imperative conclusion requires that at least one of its premises must be an imperative. Although original Poincaré's formulation does not exclude inferences with imperatives as premises or conclusions, it may be used as supporting arguments against considering (*) as a proper deduction, provided that logic is restricted to declarative sentences and ought sentences are understood as a kind of imperatives. In fact, the thesis about the is/ought gap is one the most influential philosophical views for legal theory. The Hume thesis was subsequently generalized by Kant and Neo-Kantians to the view that there are to entirely separate spheres or regions of being (in a very general sense), namely factuality (reality) and oughtness (the pure theory of law made this separation the starting point).

Another way out from the Jørgensen dilemma aims to demonstrate that norms are a species of declarative sentences, true or false and thereby suitable to logical operations. Taking this route requires a cognitive standpoint concerning the semiotic status of normative utterances. If they are considered as empirical statements, this view should meet the challenge of the naturalistic fallacy, because one may easily generalize Moore's view (see Moore 1903), originally directed to value sentences, as applicable to norms too. Another cognitive solution consists in accepting a kind of Platonism and see norms as referring to the ideal reality (Moore himself qualified this view as the supra-naturalistic fallacy). The third cognitive offer, following Moore, regards normative elements in normative utterances as referring to special qualities, namely oughtness or permissibility. A simple objection against this proposal points out that the ontic status of such qualities is unclear. One can combine emotivism and logic by building a special logic of norms. There are two ways of doing that. One (see Stenius, 1963; Weinberger, 1963, 1964) recommends a general logical calculus (viewed purely syntactically) subjected to two interpretations: normative and descriptive. The second proposal (see von Wright, 1969;

Kalinowski, 1972) goes toward a logic of norms, at least partly different from the logic of descriptive sentences. There is still additional motive for looking for a specific logic of norms, namely the presence of formulas, like "$OA \Rightarrow O(A \vee B)$" (the Ross paradox; see Ross, 1941), standardly valid but considered as unacceptable in the normative discourse.

It must be, however, remarked that logical studies of norms and normative discourse appeared earlier than the Jørgensen dilemma and the Ross paradox were formulated. Both puzzles were rather responses to some previous attempts in legal (or more generally: normative) logic. The first studies on norms were either semiotic (as in Husserl, 1901) or pointed out elementary relations between normative sentences (as in Höfler, 1917), similar to those displayed by the logical square for categorical sentences. It would be difficult to consider these studies as formal-logical. The first formal calculus of norms was proposed by Mally in 1926. Before 1939, various authors contributed to the logic of norms (imperatives), including Menger, Dubislaw, Grelling, Hofstadter, McKinsey, Ross and Rand; Kalinowski, Rescher, and von Kutschera (of course, among others) continued this line of investigations in the second half of 20th century (see Åqvist, 1987, 2002; Føllesdal and Hilipnen, 1971; Rescher, 1966;, Weinberger, 1958 for a more detailed historical information). Various ideas were taken as fundamental. For example, Menger offered the system based on three-valued optative logic, with the true, the false and the doubtful as values. Also Kalinowski, strongly influenced by Polish logical tradition, used many-valued logic with the positive, the negative and the neutral as values. Other attempts were based, for instance, on the concepts of commanding (Jørgensen), satisfaction (Hofstadter, McKinsey) or validity (Ross).

The turning point in the history of logical studies about the normative discourse happened in the early 1950s, when von Wright (1951) appeared. In the due course, deontic logic became one of the most developed branches of philosophical logic. It has own problems and applications going far beyond legal matters. Among discussed topics, we find, for example, the standard system of deontic logic, the discussion of paradoxes (the Ross Paradox, the Good Samaritan Paradox and other; see Woleński, 1998 for this issue), different kinds of permission, the conditional obligation, various semantic constructions, mostly related to Kripke's possible world-semantics and, recently, non-monotonic deontic logic. A particularly important part of deontic studies concerns the relation of deontic logic to the logic of action. Unfortunately, the terminology is not well established. Some authors use "deontic logic" and "the logic of norms" as referring to the same subjects. Other consider the logic of norms as expressed in the object prescriptive language (the language of norms) and deontic logic as formulated in the metalanguage and consisting of assertions about the first-level normative utterances. Still another usage distinguishes deontic logic *sensu largo* (the logic of norms and deontic logic) and deontic logic *sensu stricto* (deontic logic). I will not enter into these terminological matters, because the choice of a jargon is of a secondary importance. What is actually significant is that deontic logic concerns normative sentences (statements, propositions) considered as true or false. The semantics of possible worlds makes this clear.

Not entering into formal details, let as assume that we have the ordered triple (the Kripke frame) $\mathbf{S} =< \mathbf{K}, \mathbf{W}^*, \mathbf{R} >$, where $\mathbf{K}$ is a non-empty set of items called

possible worlds, $\mathbf{W}^*$ is a distinguished element of **K**, usually interpreted as the real world, and **R** is a binary relation defined on **K** (the accessibility relation). **S** is a deontic frame if and only if **R** is not reflexive, that is, it is not generally true that **WRW**. In particular, we assume that not $\mathbf{W}^*\mathbf{R}\mathbf{W}^*$. This assumption means that the formula (**) $A \Rightarrow OA$ is not a tautology of deontic logic. Now we define: OA is true in $\mathbf{W}^*$ if and only if A is true in every world **W** such that $\mathbf{WRW}^*$. Intuitively, the sentence "it is obligatory that A" is true in the real world $\mathbf{W}^*$ if and only if A in true in every world **W** being a deontic alternative to **W**,* that is, in the world which all obligations valid in the real world are satisfied. Accordingly, the sentence PA is true in $\mathbf{W}^*$ if and only if there is a world **W** such that $\mathbf{WRW}^*$ and A is true in **W**. This constraint justifies the definition: $PA = \neg O \neg P$. These brief explanations show how the concept of truth (as truth in a model) is crucial for deontic logic. This is important, because allows us to apply the standard semantic tools (more specifically: the standard semantic tools developed for modal logic) in deontic logic and its metalogic.

What is relation of deontic logic to the logic of norms considered as a logical theory of utterances which are neither true not false? For legal theory it is an important point, because the idea of the logic of norms as acting in the domain of norms as neither-true-nor false seems to be still popular. First of all, it is not true that these directions of logical studies of the normative discourse are completely different. For example, both see the structure of normative sentences as consisting of an operator (normative, deontic, imperative) and its sentential argument. Moreover, the formal relations between obligation, prohibition and permission are displayed in the same way in the logic of norms and deontic logic. There are also obvious reasons for the logic of norms. Perhaps the most important is as follows. Truth (or falsehood) of deontic sentences (except tautologies) is clearly dependent of some normative facts. What does it mean that OA is true in $\mathbf{W}^*$ if and only if A is true in all deontic alternatives to $\mathbf{W}^*$? An natural answer is that it is so, because some duties (obligations) are imposed on $\mathbf{W}^*$ in advance. Since, one can further argue, these duties are generated and communicated by norms as *sui generis* utterances, truth of deontic sentences seems to depend of properties of norms, for exaple, their legal validity. Clearly, norms, which are not valid, do not justify true deontic sentences. Hence, norms as linguistic utterances are prior to deontic sentences and thereby the logic of norms is needed and even is more fundamental than deontic logic. It is a very strong view about the relation of the logic of norms and deontic logic. Moreover, deontic logic without the logic of norms is circular, because the relation **R** has the hidden deontic parameter, namely truth of OA is defined with reference to truth of A in the world in which duties are satisfied. Call these worlds as permissible. However, the permissibility of a world cannot be accounted without any reference to already existing obligations. The view that the logic of norms is more fundamental than deontic logic can be qualified as strong. The weaker position view the relation between the logic of norms and deontic logic consists in pointing out that both logics are parallel and important.

Let me explain one historical point concerning Hume's views. As I already noticed, the Hume thesis about the is/ought relation is crucial for the problem of

the logic of norms. However, Hume's view is very often misinterpreted. Let me quote his own words (Hume, 1951, p. 469).

> I cannot forbear adding to those reasonings an observation, which may perhaps be found of some importance. In every system of morality, which I have hitherto met with, I have always remark'd that the author proceeds for some time in the ordinary way of reasoning, and establishes the being of a God, or makes observations concerning human affairs; when of a sudden I am surpris'd to find, that instead of usual copulations of propositions, *is*, and *not*, I meet with no proposition that is not connected with an *ought*, or *ought not*. This change is imperceptible; but is, however, of the last consequence. For as this *ought*, or *ought not*, expresses some new relation or affirmation, 'tis necessary that it shou'd be observ'd and explain'd; and at the same time that a resaon should be given, for what seems altogether inconceivable, how this new relation can be a deduction from others, which are entirely different from it.

This fragment says nothing about the relation between norms as specific linguistic utterances. In particular, Hume did not characterize ought-sentences as norms. He contrasted two kinds of copulations, relations or affirmations, one expressed by "is" and "is not" and the second expressed by "ought" and "ought not". Perhaps the word "affirmation" is particularly important in this context, because it seems to refer directly to sentences in the declarative mode. What Hume does consists in pointing out that ought-sentences are not deducible from is-sentences. To say that the non-deducibility in question is related to the fact that ought-sentences are norms, that is, linguistic sentences having specific semiotic status and are not logically entailed by is-sentences having a different semiotic status gives an explanation, but going far beyond Hume's text. On the other hand, deontic logic, which is, as I already noticed, the logic of deontic sentences interpreted as declarative, also explains why deontic sentences are not deducible from non-deontic ones. It is (see above) decided by the non-reflexivity of the alternativeness relation **R** (see comments about the formula (**)). This shows that Hume's thesis, although of "some importance", as he modestly said, is consistent with deontic logic too. I am inclined to maintain that the deontic metalogical elaboration of the thesis in question is much more convincing than other approaches, for instance, by appealing to other ways of justifications of ought-sentences than is-sentences (see Woleński, 2006 for a detailed analysis). Thus, the evidence for the logic of norms stemming from the Hume thesis is not defensible. As the matter of fact, Poincaré's formulation is closer to the view that the is/ought gap concerns declarative sentences and norms. Let me close these remarks by a linguistic observation. An elementary grammatical distinction distinguishes three modes of sentences: declarative, imperative and interrogative. Poincaré considered the relation of declaratives and imperatives, Hume the relation of is-sentences and ought-sentences. Both did not deny the possibility of logic connecting contrasted categories. Furthermore, Hume's distinction can be considered as defined over the class of declaratives. In fact, we have no grammatical evidence forcing us to interpret ought-sentences as the fourth mode. Thus, it remains either to see ought-sentences as a subclass of declaratives or to reduce them to imperatives. Deontic logic only explains, in a precise semantic way, why declarative ought-sentences are not reducible to declarative is-sentences (it is a typical situation in

the domain of various modalities). It has nothing to say directly about imperatives and their alleged logic.

Now I pass to other arguments advanced for the defence of the logic of norms. It is true that truth and falsehood of deontic sentence is dependent of normative facts or factors. However, it does not concerns tautologies, but only contingent deontic sentences. The standard axiom (***)$P(A \vee \neg A)$ is valid independently of the existence of any obligation. On the other hand, that an OA or an $O\neg A$ is true or false must be checked by reference to the state of affairs in the real world $\mathbf{W}^*$. However, the same situation is in the case of non-deontic sentences about empirical phenomena. In order to avoid possible misunderstandings, this does not mean that I equalize the deontic and non-deontic sentences in their cognitive status. My discussion is intentionally independent of the controversy between cognitivism and non-cognitivism as well as naturalism and anti-naturalism. Consequently, this issue does not force a definite conception of how deontic sentences are to be justified. I consider this independence as an advantage of the proposed way of looking at the matters. The next argument for the logic of norms points out that deontic logic as defined for declarative ought-sentences does not solve the problem of intutively correct inferences with imperatives. We also have reasons to think that two or more commands are, for example, mutually consistent or inconsistent. Hence, a logic of norms dealing with such questions is required. However, it is easily to see that the content of any imperative or a stock of imperatives is always expressible by a suitable set of deontic sentences. Thus, every logical problem concerning imperatives is easily embedded into deontic logic. This shows that the logic of norms has no advantage over deontic logic in this respect. My consideration does not imply that there is no the imperative use of language. We can view it as creating normative facts by what is called performatives or illocutions and thereby deciding about truth or falsehood of deontic sentences, but not the validity of theorems of deontic logic. This line of argument can be supplemented by objections directed against various project of the logic of norms (see Opałek and Woleński, 1987; Woleński, 1996–1997 for a more detailed account). There are well-known problems with semantics for imperatives. The proposed solutions raise several doubts. Validity, satisfaction (in the sense: OA is satisfied if A is true), or Menger's or Kalinowski's truth-values are unclear as explaining the normativity of considered utterances. The problem of negation of imperatives is the next weak point of the logic of norms. Are negations of norms normative utterances? I do not say tat these questions are impossible to be solved in a satisfactory way. However, the semantics of deontic logic is at the moment the only real semantic construction, which fulfils the conditions accepted in contemporary logic. In particular, the idea that the logic of norms is constructed as parallel to deontic logic, that is, deontic theorem are automatically translated into principles of the logic of norms seems to show that the latter is simply redundant.

A general moral is to be derived from the above considerations. Independently of taking the idea of separate logic of norms as sound or not, legal theoreticians must realize that the term "logic" should be used accordingly to professional standards. A collection of formulas motivated by some syntactic insights or a sample of intuitive inferences taken from the natural language is not sufficient to form a logical

system in the proper sense. If we take first-order logic (the restricted functional or quantificational logic in the older terminology) the stock of its theorem might be defined as the set of consequences of the empty set). Since first-order logic is semantically complete, the above definition can be reworded in the following way: logical theorems are true in all models (or under all possible semantic interpretations). Still another version of the same idea consists in saying that logic is a subset of any set closed by the consequence operation (in fact, logic is the only non-empty intersection of all set closed by this operation). These ways of defining logic give the precise sense of its universality and of Petrus Hispanus' quoted sentence that logic is *ars artium scientia scientiarum ad omniam aliarum scientiarum methodorum principiam viam habent*. A modern version of the same idea expresses Quine's dictum (Quine, 1970, p. 102):

> Lexicon is what caters distinctively to special tastes and interests. Grammar and and logic are the central facility, serving all comers.

However, one must remember that it concerns no the theory of science (*Wissenschaftslehre*) but formal deductive logic.

If Quine's dictum is seriously taken, any system of normative logic (for imperatives or deontic declaratives) must be legitimized by rigorous syntax and formal semantics. Only such strict frameworks enable us to define the concept of logical deontic consequence, a crucial device for checking inferences performed by lawyers or other users of the normative discourse. Only deontic logic satisfies these demands at the moment. I stress this point because I think that legal theoreticians often employ the term "logic" in a very loose sense. It seems here is one of the causes of a quite widely widespread opinion that legal logic is specific and requires something different than formal logic *simpliciter*. Yet there is a problem with deontic consequence. It is, like many other modal consequences, not reducible to pure first-order logic. However, we have a very simple solution of this question. Let D is a deontic axiom (for example, (**) and D' – its logical consequence. Then, the implication (***)$D \Rightarrow D'$ is a theorem of pure logic. We can even consider deontic operators as predicates of actions, add special axioms for them (once more, (**) read as "tautological actions are permitted") and interpret deontic logic as an extension of first-order logic based on extralogical predicates and suitable axioms for them. This theory is a well-defined formal system capturing dependencies holding between deontic notions.

Let me now give a concrete example of a formal logical analysis of a mode of inference belonging to legal logic. Today, it is rather beyond any controversy that almost all arguments of legal logic in their traditional form are not deductive. It also concerns *argumentum a majori ad minus* and *argumentum a minori ad majus*, which have a realtively well-defined formal structure. We can easily show that both are mutual transpositions, that is falling under the scheme "$(A \Rightarrow B) \Leftrightarrow (\neg A \Rightarrow \neg B)$. In fact, the statement (I use capital letters for making the issue more explicit) "if it is permitted MORE, then it is permitted LESS" is equivalent to the statement "if it prohibited (not permitted) LESS, then it is prohibited (not permitted) MORE". However, the main point is what does it mean "MORE" and "LESS". Some cases

can be logically treated. For instance, one can say that "*A* and *B"* is more than *A* (or *B*). Deontic logic licenses the rule (***)$P(A \wedge B) \Rightarrow PA$. However, we must still decide on extralogical grounds that the conjunction of two or more actions expresses "MORE" than its members, taken separately. Generally, "MORE" and "LESS" are not logical concepts and always require a special interpretation guided by legal interests. Thus, the formulas

(****) $((PA \Rightarrow PB) \wedge (A \text{ is MORE than } B)) \Rightarrow PB$;
(*****) $((\neg PA \Rightarrow \neg PB) \wedge (A \text{ is LESS than } B)) \Leftrightarrow \neg PB$.

are perfectly deductive patterns. On the other hand, "MORE" and "LESS" must be additionally explained. For example, although, intuitively speaking, playing soccer on grass is something more than walking on it (in terms of creating the danger of destroying of the surface), it can happen that playing soccer is permitted, but walking is not, foe example, in the case of rules how soccer stadiums should be used. This example well shows as formal and informal aspects of legal reasoning are mutually related. In fact, there is nothing surprising. In any application of formal logic, one must decide whether a given mode is not only valid, but also materially correct. I claim that, except trivial cases and the *argumentum a contrario*, which is based on the rule of transposition for implication (or even equivalence), patterns of legal inference in their traditional forms are not reducible to pure logic. However, when some supplementary premises (for example, presumptions, exceptions and so on) are added, we are always able to transform specific legal arguments into perfectly constructed deductive patterns. An apparent reason that legal reasonings are both specific and require a special logic, stems from the fact that lawyers are more interested in material correctness than formal validity. Hence, they consider principles used in checking extralogical correctness as having the utmost importance in legal thinking. This observation also concerns openly counterfactual premises, for example, some presumptions, because they make respective patterns reasoning more effective. Various rhetorical moves employed in convincing parties participating in legal cases or authorities (judges, officials, etc.) making decisions have informal character; such techniques supplement (or even are more important than) justifications based on more or less formal rules. However. although the view considering rhetoric as more important in legal thinking is reasonable, should not be conflated with an unjust claim that tools of legal logic are illogical or even antilogical from the formal point of view. To remind: formal logic serves equally and does not distinguish any extralogical domain, but informal moves vary from one region to another.

Another example, which shows how logical analysis combine formal and informal features concerns some more complex concepts used in legal debates. The standard deontic logic is based on simple modalities: obligation, prohibition, permission and indifference. It is clear that jurisprudence employs several complex ideas, for example, claim (in the specific legal sense), competence, presumption, derogation or right. Their analysis must go beyond the basic elementary concepts. This opens room for strong or disjunctive permissions, conditional obligations, temporal obligations, hierarchical competences, etc.

A general picture is perhaps as follows. An argument **A** is an ordered sequence of sentences:

$$(\#)A_1, A_2, A_3, \ldots., A_n \blacktriangleright A,$$

where $A_1, A_2, A_3, \ldots, A_n$ are premises of **A** and A its conclusions. The symbol $\blacktriangleright$ refers to a connection between premises and the conclusion. An argumentation is a process starting with A_1 and ending with A through $A_2, A_3, \ldots, A_n$ as mediate stages. We can transform the above scheme into

$$(\#\#)A_1 \blacktriangleright^1 A_2 \blacktriangleright^2 A_3 \blacktriangleright^3 \ldots \blacktriangleright^{n-1} A_n \blacktriangleright^n A,$$

where $\blacktriangleright^k$ refers to the relation of passing from the stage k to the stage $k + 1$. We do not assume anything on this relation, except that, according to some standards, it displays reasons of achieving later stages from former ones. The relation in question can be formal or based on some informal subarguments. It clearly shows how formal and informal ingredients are related in legal reasoning. In particular, they are not mutually exclusive. It vindicates the view that the idea of a specific legal logic confuses various aspects of legal thinking. Lawyers consider arguments displayed by (##) as proofs. One should note that proofs in this sense are not proofs in the metalogical sense, that is, derivations by purely deductive tools. To prove something is a very respectable cognitive achievement and proofs support their conclusions to the highest degree, relatively to the available evidence. When one considers moves falling under (##) as proofs in the proper sense, he or she rhetorically uses positive associations related to the concept of proof. This is a good example of a rhetorical functions of metalogical concepts used in the legal discourse. Although proof plays a special role here, similar remarks can be made about consistency, completeness, etc.

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Part II
Legal Reasoning and Public Reason

Chapter 5
Public Reason and Constitutional Interpretation

David M. Rasmussen

One of the surprising things about John Rawls elaboration of the idea of public reason is the extraordinary role he attributes to judicial deliberation. Section six of the chapter on Public Reason in *Political Liberalism* is simply entitled, "The Supreme Court as the Exemplar of Public reason."[1] The chapter heading suggests that constitutional interpretation should be given special priority when it comes to the evaluation of the *reason* of a democratic public. Constitutional interpretation should provide the example *par excellence* of the way in which democratic society should deliberate about its problems. This peculiarly American way of defining public reason reflects the *juridification of politics* deemed normal by John Rawls.[2] One could, on the contrary, characterize the European tradition, at least until very recently, as anti-juridical.[3] The reasons for this stem from the considerable

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[1]Rawls J (1996). *Political Liberalism.* New York: Columbia University Press,, p. 231. It should be noted that when Rawls returned to the idea of public in the article, "The Idea of Public Reason Revisited" (Rawls J. *Collected Papers.* Cambridge: Harvard University Press, pp. 573–615.) he seems less enthusiastic about the idea of having the Supreme Court Justice be the exemplar *par excellence* of public reason. However, it should be noted that behind the selection of the exemplar is the theory that Supreme Court decisions function for democracy in the sense that they function for the protection of minorities from the tyranny of majorities.

[2]The phrase 'juridification of politics' may not have been acceptable to Rawls. I simply use it to characterize the significant role given to the courts in the American democratic system when compared with parliamentary democracies.

[3]One of the most interesting discussions of the differences between the United States and Europe on the issue of the differences between the United States and Europe is found in the essay, "Juridification of Politics in the US and Europe" by Lars Trägardh and Micheal X. Delli Carpini, appearing in, *After National Democracy: Rights, Law and Power in America and The New Europe.* (Ed. Lars Trägardh). Referring to the differences between the United States and Europe regarding jurifification they state: "The key reason for this startling difference is that while in Europe majority rule is taken for granted, there is at the heart of the American political system the belief that no one institution or process can or should represent the 'public will'. To the contrary, the system was from the outset designed to explicitly distribute power among individual citizens, various organized interests, the 50 states, and the different branches of national government. This design

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differences in European and American political and legal development. Whereas in a European specifically continental context the role of an independent judiciary has been held in suspicion, American politics has very often be conducted through the courts. The historical reasons for this difference on the European side lie in the strong role given to legislative bodies, the affirmation of the public will, coming from Rousseau through Hegel, Marx and the tradition of social democracy. This occurred while at the same time law was perceived through the very restrictive lens of legal positivism.[4] In contrast, the American political system has had deep suspicion of this conception of the moral role of the legislature. The idea of divided government stemming both from Hamilton and Madison's contributions to *The Federalist Papers*[5] put into question the idea of legislative supremacy as expressed through majority rule. After the acceptance of the American constitution Supreme Court Justice John Marshall succeeded in getting the right of judicial review.[6] The American civil war, various movements for the establishment of basic rights including the civil rights movement have resulted in a continuous juridification of politics. It should be noted that with globalization and the constitutional development of the

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was meant to check the abuses of any one individual, group or institution, while at the same time forcing these various sites of power to interact with each other in order to create and execute public policy." p. 53.

[4]"To understand the long-standing and widespread suspicion of the idea of an independent judiciary that has prevailed in continental Europe, one must begin by noting that the dominant tradition has been legal positivism. That is, unlike the English and American common law tradition, with its emphasis on adversarial proceedings, the crucial role played by the jury, and the law-making powers of judges, in Europe courts and judges have primarily served as officials of the state, applying positive, written, codified law. Law was not independent of state power, nor was there a higher law to appeal to, no independent source of authority, no basis for judicial review, whether a constitution or some species of natural law. Given this, it is not surprising that once opposition to authoritarian regimes began to emerge in earnest during the nineteenth century, critics often viewed the law as simply a matter of state power or anti-majoritarian class interest." *After National Democracy,* p. 46.

[5]"In this uniquely American schema, the judicial branch was accorded a significant role. In *Federalist* n. 78, for example, Alexander Hamilton specifically assigned the courts the task of keeping the legislature 'within the limits assigned to their authority'. In their role as 'an intermediate body between the people and the legislature', the courts were to be responsible not only for preventing 'infractions of the Constitution', but also for 'mitigating the severity and confining the operation of [unjust and partial] laws' which injure 'the private rights of particular classes of citizens' (Hamilton, Jay and Madison 1937/1787, 506 and 509). Far from deferring to the legislature, then, judges in the American system were, from the start, to maintain a critical eye in their review and application of legislation, remaining ever wary of implicit and explicit transgressions of individual rights upheld in the constitution." Hilbink L. Law and Politics in a Madisonian Republic. In *After National Democracy,* pp. 125–126.

[6]"In the legal community, and among American liberals in general, many interpret the framers' intentions as giving the Supreme Court ultimate authority over constitutional interpretation, or a trumping position in the political system. Indeed, this was the claim set forth in the famous US Supreme Court case of 1803, *Marbury v Madison,* which established the Court's judicial review power. Therein, Chief Justice John Marshall held that the very logic of a written constitution required judicial supremacy. Without it, he claimed, elected officials would be able to circumvent or ignore the legal restraints that the constitution placed on them, and the entire concept of limited government would thus lose meaning." Hilbank L in *After National Democracy,* p. 126.

European Union, if that processes regains momentum, the juridification of politics is becoming ever more significant in Europe as well as well.

I

While constitutional consensus[7] provides the framework for legal argumentation, legal argumentation provides the basis for the elaboration of constitutional consensus. Hence, in a society that affirms pluralism legal argumentation provides a justificatory role that both broadens and deepens the public discourse, which is framed by the constitution. Clearly, the possibility of political liberalism that must allow for the plurality of reasonable comprehensive doctrines depends on a consensus that will be shared by those holding opposing conceptions of everything from ideas of justice to conceptions of political participation. Under pre-constitutional conditions where only a *modus vivendi* between opposing parties is possible no reasonable agreement on matters of basic justice has been achieved with the exception of the agreement of opposing parties to live at peace with one another.[8] The development of a constitutional consensus is a major step in the creation of a framework through which basic differences can be mediated in a pluralistic society where agreement can be achieved only on certain political matters independent of major belief systems that incorporate in their respective ways particular conceptions of the good. It is essential for the *stability* of the political society that for purposes of the exercise of shared political power necessary coercive measures be undertaken with reference to certain agreed upon principles. These principles including the establishment of basic rights and the elaboration of fundamental procedures should be provided by the content of a constitution. Having established a constitutional consensus which provides the principles for shared political power the framework is created for the expression of significant differences, disagreements and controversies which exist and find expression in a democratic pluralistic society.

Once a constitutional consensus has been established legal argument through the activity of the Supreme Court can provide an elaboration of the breadth and

[7]John Rawls defines a constitutional consensus in the following way: "In a constitutional consensus, a constitution satisfying certain basic principles establishes electoral procedures for moderating political rivalry within society. This rivalry includes not only that between classes and interests but also between those favoring certain liberal principles over others, for whatever reasons. While there is agreement on certain basic political rights and liberties – on the right to vote and freedom of political speech and association, and whatever else is required for the electoral and legislative procedures of democracy – there is disagreement among those holding liberal principles as to the more exact content and boundaries of these rights and liberties, as well as on what further rights and liberties are to be counted as basic and so merit legal if not constitutional protection. The constitutional consensus is not deep and it is also not wide: it is narrow in scope, not including the basic structure but only the political procedures of democratic government." *Political Liberalism,* pp. 158–159.

[8]I gather the example would be something like the *Treaty of Westphalia,* October 24, 1648, which officially ended the 30 years and laid down the conditions for the various parties renouncing war and living at peace with one another.

depth of constitutional meaning. The form that legal argument takes is that of constitutional interpretation.[9] Constitutional interpretation is itself controversial in the sense that it arises from the often opposing opinions of Supreme Court Justices. However, because majority opinions rule in that context, Supreme Court decisions become the basis of constitutional interpretation worked out in some sense independent of any comprehensive idea of the good but compatible with comprehensive ideas of the good. In this broad sense legal argument as the basis for constitutional interpretation provides a political foundation for overlapping consensus between comprehensive doctrines even though the actual content of overlapping consensus must be worked out by the comprehensive doctrines themselves. In this sense constitutional interpretation contributes to political legitimacy by providing the basis for democratic self-understanding. It follows that constitutional interpretation is a leading force for democratic development providing an ever-changing basis for democratic self-understanding.

II

Constitutional consensus for which legal argumentation plays a justificatory role is fundamental for the idea of public reason. The idea of public reason, which can be traced to Kant's notion of publicity[10] is defined as the reason of the citizens of a democratic society.[11] Constitutional consensus provides the framework

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[9]Constitutional interpretation begins officially with John Marshall's insistence on the right of judicial review. Certainly, one would have to claim that much of the development of public reason would be found in the history of Supreme Court cases.

[10]Kant states: "If, in thinking about public right as jurists customarily do, I abstract from its *matter*(i.e., the different empirically given relations among men in a nation or among nations), the *form of publicity* [*From der Publizität*] whose possibility every claim of right intrinsically contains, still remains, and unless every such claim has this form there can be no justice [*Gerechtigkeit*] (that can be regarded as *publicly knowable),* thus no right either, since the right can be conferred only through justice. Every claim of right must have this capacity for publicity, and since one can easily judge whether or not it is present in a particular case, i.e., whether or not publicity is compatible with the agent's principles, it provides us with a readily applicable criterion that is found *a priori* in reason; for the purported claim's (*praetensio iuris*) falseness (contrariness to right) is immediately recognized by an experiment of pure reason." Kant I (1983). *Perpetual Peace and Other Essays.* (Trans. Ted Humphrey) Indianapolis: Hackett Publishing Company, p. 134. Kant goes on to work out the "*transcendental formula* of public right: "All actions that affect the rights of other men are wrong if their maxim is not consistent with publicity." p. 381

[11]Rawls states: "A political society, and indeed every reasonable and rational agent, whether it be an individual or a family or an association, or even a confederation of political societies, has a way of formulating its plans, of putting its ends in an order of priority and of making its decisions accordingly. The way a political society does this is its reason; its ability to do these things is also its reason, though in a different sense: it is an intellectual and moral power rooted in the capacities of its members." *Political Liberalism.* pp. 212–213. In a later statement he broadens the conception somewhat. "The idea of public reason, as I understand it, belongs to a conception of a well-ordered constitutional democratic society. The form and content of this reason – the way it is understood by citizens and how it interprets their political relationship – are part of democracy itself. This is because a basic feature of democracy is the fact of reasonable pluralism – the fact that a plurality of conflicting reasonable comprehensive doctrines, religious, philosophical and moral, is the normal result of its culture of free institutions." Rawls J. *Collected Papers.* p. 573.

for reasoning in a liberal democratic society. The argument for a constitutional consensus which provides a framework for public reasoning is to be found in the conception of a dualist democracy[12] which theoretically at least owes it's origin to John Locke's distinction between *constituent* and *ordinary* power, the former being associated with the people's ability to constitute a new regime while the latter is associated with the formal organization and exercise of ordinary politics. In Locke's democratic view of the relationship between constituent and ordinary power the constitutive "power of the people sets up a framework to regulate ordinary power, and it comes into play only when the existing regime has been dissolved".[13] On the one hand this understanding of the relationship of constituent power to ordinary power frames a democratic self-understanding of law while on the other hand this understanding of *higher law* is the expression of the constituent power of the people and has the authority of the *will of the people,* while ordinary power expresses itself through the acts of congress and the electorate. The entire argument or framework can be expressed in a simple formula: *Constituent power as higher law frames the interpretation of ordinary law.* In other words, constitutional interpretation with the authority of the will of the people guides and binds other law making procedures in a liberal democracy. If this is the case it will follow that constitutional interpretation will be fundamental to the democratic self-understanding of *We the People.* Hence, the justificatory role given to legal argumentation will be the basis for a democracy's changing perception of itself.[14] Further, as legal argumentation functions for constitutional interpretation it is constrained by public reason. In turn, public reason is enhanced by legal argumentation. Given the primacy of higher law over ordinary law the function of constitutional interpretation as it is represented by the supreme court

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[12]Rawls associates himself with the argument for a *dualist* democracy which of course, has Madisonian origins but find the most current expression in Bruce Ackerman's *We the People: Foundations.* Cambridge: Harvard University Press, 1991. The question that arises in the context of my argument is, does public reason apply only do the duelist democracy formulation or does it apply to parliamentary democracies as well? In the essay, The Idea of Public Reason Revisited" he seems to want to broaden the idea of public reason beyond reference to any particular democracy to include modern democracies in general. He states: Central to the idea of public reason is that it neither criticizes nor attacks any comprehensive doctrine, religious or nonreligious, except insofar as that doctrine is incompatible with the essentials of public reason and a democratic polity. The basic requirement is that a reasonable doctrine accepts a constitutional democratic regime and its companion idea of legitimate law. While democratic societies will differ in specific doctrines that are influential and active within them – as they differ in the western democracies of Europe, the United States, and Israel, and India – finding a suitable idea of public reason is a concern that faces them all." *Collected Papers*, p. 574.

[13]*Political Liberalism,* p. 231.

[14]Rawls states: "A democratic constitution is a principled expression in higher law of the political ideal of a people to govern itself in a certain way. The aim of public reason is to articulate this ideal. Some of the ends of political society may be stated in a preamble – to establish justice and to promote the general welfare – and certain constraints are found in the bill of rights or implied in a framework of government – due process of law and equal protection of the laws. Together they fall under political values of public reason." *Political Liberalism,* p. 232.

is that of protecting higher law. Hence the supreme court functions as a representative of democracy for democracy using public reason as its discursive framework. Its democratic purpose is to "prevent . . . law from being eroded by the legislation of transient majorities, or more likely, by organized and well-situated narrow interests, skilled at getting their way." (233)

Thus far my argument could be characterized as a democratic justification of constitutional interpretation and thus of legal argumentation. The framework for this democratic justification is provided by the constraint of public reason which confines argumentation to a public political context to be distinguished from a comprehensive moral position. If one would contextualize this argument by looking at constitutional history it would be possible to make some generalizations about the orientation of constitutional interpretation. No doubt those claims are controversial as one would expect them to be in a pluralistic society. Hence, Stephen Breyer, argues for a differentiation between courts based on his democratic notion of *active liberty.* Hence, the early nineteenth century court may be characterized as a

> period during which the Court through its interpretation of the Constitution, helped to establish the authority of the federal government, including the federal judiciary. One can characterize the late nineteenth and early twentieth centuries as a period during which the court overly emphasized the Constitution's protection of private property, as, for example, in *Lochner v. New York,* where (over the dissent of Justice Oliver Wendell Holmes) it was held that state maximum hour laws violated "freedom of contract". At the same time, the Court wrongly underemphasized the basic objectives of the Civil War amendments. It tended to ignore that those amendments sought to draw all citizens, irrespective of race, into the community, and that those amendments, in guaranteeing that the law would equally respect all "persons" hoped to make the Constitution's opening phrase, We the People, a political reality.[15]

Later courts, such as the court which legitimized Roosevelt's "new deal" social legislation and the Warren court which enacted civil rights legislation were, in this view, closer to the ideal of active liberty.

It seems reasonable to assume that as the self-understanding of a democratic society changes so in actual practice the understanding of the constitution changes. This is not necessarily to introduce the idea of an evolutionary view of the constitution since changes in the understanding of the constitution occur through actual political processes of amendments. Hence, even the most extreme *textualist*[16] will be forced to support the actual changes in the constitution. Clearly, legal argument itself does not make law. However it is also the case that different courts have interpreted the constitution differently. Equally, the constitution has been interpreted differently in

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[15] Breyer S (2005). *Active Liberty: Interpreting Our Democratic Constitution.* New York: Alfred A. Knopf, p. 10.

[16] Antonin Scalia puts his position on textualism in the following way: "To be a textualist in good standing, one need not be too dull to perceive the broader social purposes that a statute is designed, or could be designed, to serve; or too hidebound to realize that new times require new laws. One need only hold the belief that judges have no authority to pursue those broader purposes or write those new laws." *A Matter of Interpretation: Federal Courts and the Law.* Princeton: Princeton University Press, 1997, p. 23.

different periods of national history. Hence, there is a strong argument for different views of the constitution during the period of the *founding* when a kind of federal identity was first apparent, *reconstruction* which occurred after the civil war and the *post-depression era* when new forms of social legislation associated with the New Deal.[17] However, following Rawls, the idea of public reason is not necessarily committed to this specific interpretation of constitutional development. It is enough that constitutional interpretation be formulated in accord with the idea of public reason.

III

Thus far I have limited my discussion of public reason to constitutional interpretation. Constitutional interpretation is framed by public reason because it occurs in a pluralistic society in which there are competing comprehensive doctrines. This suggests that public reason implies a certain view of politics. Politics is not about struggle for the truth of one doctrine over another. Equally, politics in a democratic society is not merely about compromise although, to be sure, compromises will occur. Ultimately, politics is about a certain view of legitimacy that entails a willingness on the part of citizens to frame their political views in terms that can be appropriated by other citizens without recourse to their respective comprehensive doctrines. Ultimately democracy is about legitimate law. Public reason affirms the Kantian insight that the law's legitimacy can only be derived from the affirmation that the subject of the law is also its author. Hence, in order to have legitimate law it is necessary that every subject in a democracy be able to affirm the law as its author and it is necessary that public officials, i.e., judges, legislators, candidates and citizens frame their arguments in such a manner that they will meet precisely those canons of legitimacy which are both upheld by the constitution and required by public reason. It should be stated that public reason is not simply restricted to the province of judges. Legislators, candidates and indeed citizens as they discourse with one another must adopt the discourse of public reason. However, those who function in a judicial capacity should be the exemplars of public reason in order to guarantee the legitimacy of the law. Those of us who do not function in a judicial capacity can still think of the ideal of the Supreme Court Justice as an ideal type even though we are not under all the constraints of that position. In the end what is most central to the notion of public reason is the *duty of civility.* The duty of civility

[17] Rawls states: "Suppose we agree that the three most innovative periods of our constitutional history are the founding, Reconstruction, and the New Deal. Here it is important that all three seem to rely on, and only on, the political values of public reason. The constitution and its amendment process, the Reconstruction amendments that sought to remove the curse of slavery, and the modern activist so-called welfare state of the New Deal, all seem to fit that description, thought it would take some time to show this. Yet accepting this as correct, and seeing the Court as the highest judicial thought not the final interpreter of this body of higher law, the point is that the political values of public reason provide the Court's basis for interpretation. A political conception of justice covers the fundamental questions addressed by higher law and sets out the political values in terms of which they can be decided." *Political Liberalism,* p. 234.

obligates citizens to "explain to one another on those fundamental questions how the principles and policies they advocate and vote for can be supported on the political values of public reason."[18] And those values in the end are said not to be part of a political morality as such but only given as a "political conception suitable for a constitutional regime".[19]

[18] *Political Liberalism,* p. 217.
[19] *Political Liberalism,* p. 254.

Chapter 6
Democracy and Compromise

Patrice Canivez

A compromise is a settlement of differences in which each side makes concessions. Such a settlement is usually defined as a bargaining between conflicting interests under the pressure of a given balance of power. People have to compromise when they are not powerful enough to have their own way. In some cases, they just feel threatened by the other. In other cases, they need his or her cooperation to achieve their own goals. In order to pursue their own interests, they have to help or let the others do the same.

Meeting halfway is necessary for establishing peace and mutual tolerance. Still, it is not fully satisfying if one has to give up legitimate claims in order to achieve peaceful coexistence. In some cases, the very idea of compromising sounds absurd. If you are right, you are right; if your interlocutor is wrong, he is wrong. There is no point in admitting, for the sake of peace, that you might be half wrong and he might be half right. Mutual concessions may be sometimes morally inadmissible. Compromising on principles – human rights, moral imperatives – for the sake of reciprocal political support, economic relationships, and so on, is a symptom either of weakness or of cynicism. As a result, the very notion of compromise is ambiguous. On the one hand, to compromise means to be able to respect another's point of view. On the other hand, to compromise means: to compromise oneself.

Accordingly, contemporary political philosophy tends to consider compromise as the lowest form of agreement. According to Habermas, compromise belongs to strategic action; it is directed toward achieving certain goals, whereas communicative action aims at reaching inter-subjective understanding. A compromise is achieved by making mutual concessions with regard to the interests at stake, whereas the result of communicative action is an agreement on reasons for action.[1] In this

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[1] See Habermas J (1996). *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy.* Cambridge: Polity, pp. 140–141.

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view, compromise is a bargaining that must be redeemed by its submission to fair rules of procedure agreed upon on a consensual basis. Recent works, however, have reevaluated the concept of compromise, underlining its relevance for political theory. Such analyses provide suggestive insights for a further discussion of the notion.[2]

The purpose of this paper is: I. to distinguish between different types of compromise and especially between rational and reasonable compromises; II. to sustain the idea that the basic structure of constitutional democracies is a system of communicative interactions between different kinds of institutions: state institutions, social and cultural organizations. Such institutional interactions: (1) frame a political field in which action through speech is more or less effective according to the interlocutors' position in the field; (2) organize a collective decision-making where compromise plays a central role. In this view, we understand the relationships between argumentation and law, which is the topic of this volume, as the relations between the compromise-making process and the constitutional framework of modern democracies. Of course, democracies may prove unable to reach rational and reasonable compromises. Absurd and irresponsible decisions are made. Therefore, we will try to draw a normative pattern from the very concept of reasonable compromise. One criterion for the evaluation of democratic states is whether their institutions make it possible to reach sensible compromises.

6.1 Different Types of Compromise

Political scientists have made relevant distinctions between different types of compromise. For example, distinctions must be made between regulated and unregulated, brokered and not brokered, distributive and integrative compromises. Regulated compromises follow a procedure that guarantees the fairness of the compromise; unregulated compromises do not. Brokered compromises are mediated by a third party; un-brokered compromises are directly negotiated. Distributive compromises settle a dispute between contesting parties. Integrative compromises are achieved when each party endeavors to solve a common problem.[3]

Another distinction can be made between homogeneous and heterogeneous compromises. Homogeneous compromises deal with the partition of one and the same thing, aiming at some kind of equilibrium (which does not mean necessarily equal share). For instance, two countries have a claim on a given territory. In this case,

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[2] See Bellamy R (1999). *Liberalism and Pluralism. Towards a Politics of Compromise.* London and New York: Routledge and *Social Science Information*, June 2004, vol. 43, n°2, London, Thousand Oaks, CA and New Delhi: SAGE Publications, 2004, special issue dedicated to the concept of compromise, with contributions by Arnsperger C, Dupret B, Ferrié J-N, Kuty O, Leydet D, Nachi M, Papillaud C, Picavet E, Rol C, Salazar P-J (2009). See also *Eloge du compromis. Pour une nouvelle pratique démocratique*. In Nachi M and de Nanteuil M (eds) (2009). Louvain-la-Neuve: Academia-Bruylant.

[3] See Carens JH (1979). "Compromise in Politics". In Pennock JR and Chapman JW (eds) *Compromise in Ethics, Law and Politics.* New York: New York University Press.

partition is a compromise solution. Instead of dividing one and the same reality, heterogeneous compromises combine different realities, sometimes adding a hierarchy between them. An example of such a compromise is Kant's solution of the third antinomy. Necessity and liberty are combined in such a way that each principle has absolute value, but in two different realms, the empirical and the transcendental,[4] the former being subordinated to the latter.

The difference between rational and reasonable compromises can be introduced by means of an example. Suppose a couple plans to go on a 2 weeks vacation. Paul wants to go to the seaside; Mary wants to go to the mountains. First solution: one of them gives up; the other has his/her own way. Second solution: compromise. They both spend 1 week at the seaside, the other week in the mountains. This is the "meeting halfway" solution. Each partner makes concessions. Each of them has a concept of the ideal holidays. Both concepts are irreducible. Consequently, Paul and Mary agree on a reciprocal limitation of their demands. Another solution would be for each partner to switch from their first to their second preference, in case an agreement can be reached on this "second best" option. For example, instead of going either to the seaside or to the mountains, Paul and Mary go to Italy and visit Venice. They might be also incapable of reaching a decision on a concrete project. In this case, a decision could be achieved by means of an agreement upon a decision-making procedure. For instance, Paul and Mary might decide that each of them will alternatively make the decision. This year they follow Paul's choice, next year they are going wherever Mary wishes. Suppose Paul and Mary have children, they might as well agree to submit the choice of a vacation plan to the vote of the entire family. Eventually, Paul and Mary might discuss their plans with their friend Peter, follow his advice and opt for the Venice trip. In a word, the example illustrates a series of compromise-making methods: procedural or not procedural, brokered or not brokered, etc. Whatever the method, the compromise is based on mutual concessions.

There is another way of compromising. The mutual concessions are the same. For instance, Paul and Mary are going to spend 1 week at the seaside and another week in the mountains. In this case, however, the concessions lead to something more than a mere bargain. After considering the matter, the couple decides that splitting the 2 weeks is the best possible plan. In order to give sense to their mutual concessions, they convene that 2 weeks at the same place would be too long anyway. Consequently, they work out a new concept of ideal holidays. The new concept is based on the idea of variety. Changing places is more fun. Good health requires relaxation (at the seaside) and exercise (in the mountains), etc. In other words, a new concept of a good life makes the compromise meaningful for both partners.

What is the difference between the two kinds of compromise? In both cases, compromise implies mutual concessions. In the first case, the concessions are the result of a certain balance of power. None of the interlocutors is in a position to carry

[4]On this point see Perelman C and Olbrechts-Tyteca L (1988). *Traité de l'argumentation.* Bruxelles : Editions de l'Université de Bruxelles, p. 553.

the day; none of them is ready to give up. In a couple, of course, affection plays its role. Mutual concessions repose on reciprocal self-restraint for the sake of the other. There may be some sort of reverse calculation where the goal is to maximize the other's well being. However, that kind of compromise is not stable. On the one hand, when the partners' relationship is based on a mere bargaining a shift in the balance of power undermines the compromise. On the other hand, reciprocal self-restraint is not that stable when it is not embodied in a common way of life. What stabilizes the compromise is the fact that mutual concessions lead to a consensus on a common course of action. A compromise stands the best chance of being enforced when all partners – or, at least, a majority of them – agree that the resulting course of action makes sense.

Two additional remarks must be made. First: from Paul's point of view, the compromise is a rational means to achieve his own goal, although he will have to be content with a partial satisfaction of his desire. From Mary's point of view, the situation is the same. From Paul *and* Mary's point of view, the compromise is a rational means to fulfill the couple's goal, which is to enjoy their common holidays. In the first case, the compromise is rational as regards the achievement of each partner's goals. In the second case, the compromise is rational as regards the achievement of the couple's ends. Now, the same compromise is *reasonable* inasmuch as both partners consider the other's viewpoint and work out a shared understanding of such common ends.

Second: one could argue that, from an objective point of view, Paul and Mary have no better choice than the Venice trip. Whether they agree or not on this point, the trip would be *the* answer to their question. From Peter's point of view, for instance, going somewhere else is definitely the wrong decision. As far as Paul and Mary are concerned, compromising is the best possible way to make a common decision. It may lead to the best solution *under the circumstances*. It does not lead necessarily to the "absolutely best" solution.

Starting from these remarks, we introduce a distinction and a hierarchy between rational and reasonable compromises. By rational we understand either a relationship between definite goals and efficient means (instrumental rationality) or a relationship between definite values and appropriate goals (value rationality). By reasonable, we understand an interpretation of values, ethical or political, that is comprehensible and acceptable to all relevant interlocutors. Rationality is rather a matter of calculation, reasonability of "enlarged thinking" in Kant's sense.[5] In this view, a rational compromise is a way of maximizing one's achievement in the given circumstances, while the result of a reasonable compromise makes sense to all partners.

Without claiming to be exhaustive, we distinguish four sub-types of rational compromise:

[5] See Kant's *Critique of Judgment*, § 40.

(1) Gains and losses calculations. The parties compromise for fear of losing ground. A compromise provides more advantages than the so-called "fall-back position", that is: "the position which each party could guarantee itself in the absence of a compromise".[6] In another version of the same sub-type, the deal allows each party to avoid disadvantages that would be otherwise inevitable.
(2) Strategic expectations. The parties compromise for strategic reasons. In such a case, the dispute between the interlocutors is not settled by the compromise. The dispute is only temporarily stabilized. The interlocutors view the compromise as a first step in the right direction, that is: toward full achievement of their goals. Of course, such a strategy is always risky. In some cases, what was taken as a first step turns out to be a standoff. Temporary concessions become permanent renunciations while prospects of future improvements fade away.
(3) Rational self-restraint. In this case, rationality means: self-restriction of one's demands. The parties do not see the point of getting the upper hand. Consequently, they are satisfied with a semi-achievement of their goals. In some cases, this is still a way of maximizing the results that are obtainable under the circumstances. For example, in a context of class struggle a semi-victory secured by social peace is more profitable than a complete victory ensued by permanent social unrest.[7] In this case, the partners will consider social peace as a way of securing their profits. In other cases, self-restraint indicates a shift from one goal to another. For instance, the partners might consider social peace as more valuable to them than profit. In such a case, the partners' strategy is determined by a rearrangement of the hierarchy of values that sets a priority between their goals. Consequently, the compromise implies a reassessment of the goals. This is a matter of value-rationality rather than of instrumental rationality. We have an example of such a reassessment when the partners "agree to disagree" in order to maintain peaceful cooperation. In such a situation, conflicts among partners are neither solved nor forgotten, but merely set aside. They are subordinated to a consensus on the overarching value of social peace. Such a compromise supposes the existence of a stable society in which no collective action based on crucial choices is needed.
(4) Pragmatic compromises. In the three previous sub-types the goal is individual. The compromise is rational from each partner's viewpoint. For a group, however, a compromise between conflicting members is a rational means to achieve a common goal or to solve a common problem. While a mere combination of instrumental means is "technically rational", such a compromise is "pragmatically rational". It is a kind of integrative compromise. By bringing all members together, it enables a group or a community to reach common ends.

[6] Arnsperger and Picavet, "More than a modus *vivendi*, less than an overlapping consensus: towards a political theory of social compromise", in *Social Science Information*, *op. cit*., p. 168.

[7] On compromise based on self-restraint, see Arnsperger and Picavet, *op. cit*., pp. 167–204.

A pragmatic compromise enables a group to achieve a definite common goal. That is why the compromise is rational. Such a compromise is also "reasonable" when all interlocutors consider their partners' views and work out a shared reinterpretation of the values that justify the goal. Thus, a rational compromise between group and individual interests is overlapped by a consensus on shared values. The values give meaning to the compromise. Reciprocally, the necessity to reach a compromise – otherwise the common goal cannot be achieved – leads the interlocutors to a renewed interpretation of their shared values. The compromise is real: all partners give something up. Nevertheless, it makes sense to all of them.

Paradoxically, rational compromises are not stable. They rely on a given balance of forces. The moment there is a shift in the balance of forces the compromise is gone. This is the case with the "gains and losses" type of compromise. By definition, this is also the case with the "strategic type" of compromise. The "self-restraint" and "pragmatic" types of compromise are more stable as long as there is good will, but the compromise remains fragile when there is no common concept of what really matters.

As well as rational compromise, reasonable compromise is based on mutual concessions. In the ideal case, mutual concessions (at instrumental level) are overlapped by a consensus (at value level). Such an agreement is not a *modus vivendi* that transforms progressively into a consensus. It is a consensus that stabilizes the compromise by giving it a meaning. When compared with the parties' initial positions, the meaning of the compromise enlarges the previous viewpoints, each interlocutor evolving toward a standpoint that makes sense to the others. That is why the compromise is reasonable. It remains that the consensus is reached through reciprocal constraints and mutual concessions; it is not the result of common and disinterested reasoning. Reciprocally, a reasonable compromise is not a mere equilibrium of claims and forces. The partners work out a concept incorporating their initial positions.

The result of such a process is not a synthesis (or *Aufhebung*) because we have two distinct levels: a compromise of interests at instrumental level and a consensus on shared values at value level.[8] Of course, one could object to such a clear cut distinction between interests and values. Interests are always determined by ethical preferences. When formulated as legitimate claims, they refer to moral norms justifying the claim. Accordingly, we might be tempted to say that a compromise on shared values – more precisely: on the interpretation of such values – goes along with a compromise of interests. We would have one and the same compromise reconciling conflicting interests, on the one side, and competing interpretations of common values, on the other side. However, such a formula is wrong. As far as

[8]Richard Bellamy is right in saying: "A compromise is not a synthesis, that all regard as superior to their previous position. Compromisers must endorse a package many of the components of which they would reject if taken in isolation" (*op. cit*, p. 102). Nevertheless, such a settling of interests leaves the possibility of a consensus on the values (or interpretation of values) justifying the compromise.

meaning is concerned, there can be no compromise. Interlocutors may accept a compromise combining semi-satisfaction of their own interests and semi-satisfaction of their partners' interests. They cannot agree on an interpretation that would partially make sense and partially not make sense to them. The meaning of a text, of an action, of a value, is a matter of consensus or dissent. Sometimes consensus goes with dissent. In such cases, we have a partial agreement which is very different from compromise. For instance, someone says that a given action is legal and just. Someone else contends that the action is legal, but not just. There is a partial agreement on how the action must be interpreted. A compromise would be an agreement on a signification that is partially nonsense for each interlocutor. For instance, interlocutors contending that the action is just but not legal, or legal but not just, would compromise and conclude that the action is just and legal (or neither just nor legal). This is clearly a case of fake consensus (covering up a compromise of interests). A real agreement on the meaning of a text, an action, etc., implies consensus, even though the consensus may be restricted to certain parts of the proposed interpretation. Therefore, the compromise making through which conflicting interests are reconciled ends up, either with a persisting disagreement concerning the values justifying the claims, or with a consensus on the values justifying the compromise. In the first case, the compromise is merely rational. In the second case, the compromise is reasonable as well as rational.

Such reasonable compromise is not achieved through disinterested dialogue. Moreover, what would be seen as methodological defects in comparison with the rules of inter-subjective dialogue is precisely what characterizes the "logic" of compromise-making. In reasonable compromises, common understanding is not reached *in spite of* the existence of a given balance of forces. True, power relations are duly said to play a negative role when no agreement can be reached. A balance of forces may result in a mere deadlock. However, when the partners do manage to reach a consensus, it may be said, retrospectively, that power relations have played a positive role. Under the presupposition that all partners are determined to settle their differences by peaceful means, the resilience of each partner forces all the others to take his/her point of view into account. Although a reasonable compromise is not reducible to a mere settlement of conflicting interests, it does incorporate such a settlement as a way of progressing toward common understanding.

Consequently, there is no strict opposition between compromise and consensus. Of course, compromise does not necessarily lead to consensus, while consensus can be achieved through inter-subjective dialogue. However, compromise is not merely a medium term between sheer bargaining and reasonable consensus. In the optimal case, a compromise between conflicting interests is overlapped by a consensus on the meaning of the compromise. Rationality leads to reasonability; reasonability contributes to rational efficiency.

Two final remarks must be made. On the one hand, the overlap of a rational compromise by a reasonable consensus signifies that no agreement is fully rational unless it is also reasonable. In other words, no agreement is fully effective unless it makes sense to all partners. Of course, this is an ideal case. In most instances, especially when a plurality of actors is concerned, consensus is impossible and must be

substituted by a majority agreement. On the other hand, a reasonable compromise may be the best possible course of action under the circumstances, knowing that the circumstances are determined by the partners' wishes, priorities, refusals, etc. Consequently, the result of a reasonable compromise is not necessarily the best conceivable course of action. Even if the result is a sensible decision, it may not be the optimal solution.

6.2 Democracy and Compromise-Making

6.2.1 The Ideal-Type of Constitutional Democracies

Political issues are always a matter of compromise, be it a compromise between political partners, competitors, etc., or between promising theories and imperfect realities. Therefore, the concept of compromise is central to the logic of political discussion. To some extent, the institutional framework of constitutional democracies can be viewed as the institutionalization of compromise-making processes.

According to their ideal-type, contemporary democracies are constitutional states in which citizens participate in political decision-making. The constitution defines the citizens' basic rights and organizes the interactions between the executive, the legislative and the judiciary. Contrary to classic political theories, the role of the executive branch is not merely to enforce the laws passed by the legislative. On the contrary, most of the laws are legislative translations of the government's political initiatives. Far from being a mere executive, the government is meant to take positive action. Its task is to handle such problems as the enforcement of basic rights, the reconciliation of national security and individual liberties, of social justice and economic development, the preservation of the environment, etc. Such problems are matters of internal as well as external policy.

The difference between democracy and autocracy is that a democratic government cannot act alone.[9] On the one hand, it has to be authorized by the parliament. By refusing to pass laws, approve the budget or authorize the use of armed forces, the parliament has the power to stop or inhibit governmental action. On the other hand, supreme courts see to it that governmental action and legislative measures comply with constitutional rules and respect the citizens' fundamental rights. Public administration is also submitted to judicial control. Whenever they are denied their rights, the citizens are entitled to prosecute the administration. Governmental action is central but it is submitted both to parliamentary and judicial control.

As to the citizens, universal suffrage and eligibility to public office empower them to take part in the political process. Citizens may run for office at local or national level. They elect their representatives. They influence the composition of

[9] I am drawing on Eric Weil's theory of the constitutional state, see Weil E (1996). *Philosophie politique.* Paris: Vrin.

the government – directly when electing a president, indirectly through parliamentary elections. They give further support to the previous administration or dismiss it; they impose the formation of a new government, etc. In doing so, they make decisive political decisions. They make the choice of a given course of action.

The citizens' participation in the political process is mediated by political parties. The task of these parties is to set up and participate in viable governments. Of course, not every party lives up to this task. Some political parties are merely lobbying for particular interests, socio-economic or ethno-communitarian. All of them are meant to select politicians and foster their career. However, proper political parties are supposed to develop a political program in view of the general interest. The citizens make their choice between competing political projects.

Consequently, public and private liberties are equally important. The citizen is entitled to both of them: participation in political decision-making and private activity secured by judicially enforceable rights. Thus, the opposition between the "liberty of the ancients" and the "liberty of the moderns", as Benjamin Constant puts it,[10] is not relevant in contemporary democracies. Constitutional democracies entail a combination of both types of liberty.

Simple as it is, such an ideal-type poses a series of difficulties that necessitate additional institutions and political practices. Most of them are due to the paradoxical status of ordinary citizens. As a collective body, citizens are policy-makers. When electing a president, when choosing their representatives, they give support to a political party or a coalition of parties. In doing so, they approve a given course of action. As individuals, however, ordinary citizens have no influence on governmental action. The citizenry as a whole makes the decision but the decision is often uncertain and sometimes unpredictable. That is why constitutional rights and individual liberties are fundamental. Independence of the judiciary and the authority of constitutional courts, which secure those rights and liberties, are crucial issues.

Another problem derives from the idea of popular sovereignty. In principle, the citizenry constitutes a sovereign people unified by a general will. The vote gives voice to the "will of the people". However, the "sovereign people" is represented by the electorate and the general will is expressed through a majority vote. Such a vote splits the electorate in two conflicting parts. The result of the election signifies victory of the one part over the other. The solution to such a problem is political alternation within the framework of a widely accepted type of society. Political conflicts are more or less acceptable provided there is a broad consensus over the basic structure of the society. In addition to such a constitutional consensus, participatory politics (civic movements, participation of associations in local administration, citizens' consultation websites, etc.) give ordinary citizens the opportunity to have their say in public affairs, whether they belong to the majority or not. It remains

[10] See Constant B (1980). "De la liberté des Anciens comparée à celle des Modernes", in *De la liberté chez les Modernes.* Paris: Hachette, coll. Pluriel, p. 491–515. English version in Constant B (1988). *Political Writings*, translated and edited by Biancamaria Fontana. New York: Cambridge University Press.

that modern democracy, as we know it, is an aporetic concept. The historic development and realization of this concept is a process of permanent adjustment and self-correction.[11]

6.2.2 Political Discussion in Contemporary Democracies

According to such a paradoxical ideal-type, the structure of the political discussion in constitutional democracies may be envisaged in two different ways. On the one hand, it corresponds to the interaction between political parties. On the other hand, the discussion is framed by the relationships between state institutions: parliament, government, administration, constitutional courts, etc.

From both points of view, however, political discussion appears to be specifically different from inter-subjective dialogue. Political discussion is not an inter-individual dialogue. It is a discussion between groups, communities and their institutions. In practical terms, it is a discussion between individuals who have institutional positions, who represent more or less institutionalized groups or communities. Interlocutors taking part in a dialogue are individuals trying to reach a theoretical or practical truth through an exchange of arguments. Such interlocutors are not supposed to defend any kind of social or political interest. They express and submit their well-considered convictions to rational examination. In a political discussion, however, interlocutors are individuals, but they do not speak *as* individuals. Willingly or not, they represent various forms of institutions. Consequently, any political agreement entails a settling of different interests. On the one hand, institutions like political parties are rooted in civil society. They give voice to group interests, ideological trends and moral preferences. On the other hand, any institution has a symbolic and strategic interest in preserving its influence and furthering its own development. This is true of social and political organizations like political parties, workers unions, etc. This is also true of state institutions and agencies. Thus, any political discussion includes a compromise between conflicting interests as well as an interpretation (or reinterpretation) of common values.[12] A theory of political decision must take into account such a basic fact. It must also consider the heterogeneity of the various interests at stake: social interests of professional groups, cultural interests of communities, personal interests of party leaders, strategic interest of each institution as such.

Such a remark does not mean that only politicians, union leaders, representatives, and so on, are entitled to take part in political debates. All citizens have a right to participate in such debates. However, ordinary citizens take little part in the *public* discussion. As a whole, they follow the discussion and make their decision on voting day. Although all citizens have a say in the political debate, publicly

[11] See Rosanvallon P (2006, 2008). *La Contre-démocratie.* Paris: Seuil, and *La Légitimité démocratique.* Paris: Seuil.

[12] On this point see Weil E (1982). "Vertu du dialogue". In *Philosophie et Réalité.* Paris: Beauchesne.

expressed opinions of senators, union leaders, experts, judges, etc., have a different kind of impact (and impacts of different kinds). Individual voices have a more or less important "weight" according to the interlocutor's position in the political field. Such a weight is related to the individual's participation (or non participation) in the social and political institutions. Individuals with no institutional position have no political influence whatsoever. Ordinary citizens participate in private discussions (among friends and family members), in semi-private (among colleagues) or semi-public discussions (among members of civic associations, etc.). Stimulated by the increasing exchange of information, ideas and propaganda on the internet, semi-private and semi-public discussions may have considerable influence on the formation of public opinion. Nevertheless, such discussions are framed by the government's political agenda and the interaction between political parties. Eventually, the citizens' political influence crystallizes in the electorate's verdict on voting day.

To some extent, such a political discussion may be compared to a debate in a court of justice. In the same way as members of a jury make their decision after hearing the prosecution's and the defense's arguments, the citizens make their decision after hearing competing public discourses – which they reduplicate and discuss in more or less local public spheres, in more or less private spaces. Political parties confront their programs (when they compete for power) and results (when they have been in charge). The citizens are supposed to make their choice after weighing the pros and contras.[13]

In order to capture the main characteristics of political discussion, we have to consider the interplay between political parties as well as the interactions between state institutions. As regards the interplay between political parties, two features characterize the discussion: polarization and compromise. The discussion crystallizes around practical issues. Opposite options and ideological preferences appear on each issue and polarize the political spectrum. Between political competitors, polarization underlines the differences. Among political partners, it makes compromise necessary. In order to set up viable governments, partners within political parties or coalitions must define their common goals and values, identify the appropriate means and reconcile their different interests.

Such compromise making may be envisaged in two different ways. On the one hand, particular interests of different kinds must be reconciled: social and cultural interests of groups, classes or communities, strategic interests of social and political institutions. The reconciliation of such particular interests necessitates compromises of the "gains and losses" or "strategic" type. However, a mere distributive compromise between particular interests does not suffice to work up a real political project – that is: a project for the entire *polis*. In order to do so, the general interest must be assessed and determined. Particular interests must be reconciled with, and submitted to, the general interest.

[13] See Ana Dimiskovska's contribution to this volume: "The Logical Structure of Legal Argumentation: Dialogue or 'Trialogue'?".

Since particular interests must be subordinated to the general interest, the public expression of those interests is submitted to three constraints. First, there must be some sort of integrative compromise between the particular interests of groups, communities, social organizations, political parties. Such a compromise is strategic from the point of view of each partner. However, the compromise must be also rational with respect to the achievement of common goals. It implies self-restraint formula for partners who must accept a limited satisfaction of their claims or a rearrangement of their priorities in order to reach a common goal. In a word, such a compromise must be *pragmatically rational*.

Second, the general interest is determined by an objective assessment of the situation (economic, social, diplomatic, etc.) and a definition of the problems that are to be solved. In this view, the general interest requires the adoption of appropriate technical measures. In order to maintain the global welfare of society, for instance, interest and inflation rates must be contained within certain limits. Political choices have to be made on such issues. However, the choices are more or less conditioned by technical constraints. As a result of such constraints, any compromise between the interests at stake must meet the requirements of *technical rationality*.

Third, particular interests must be expressed in the form of legitimate claims. Formally speaking, legitimate claims are universalizable. Such claims must be granted to all social groups, nations, minorities, etc., which find themselves in the same situation or face the same problem. For instance, security is a legitimate claim, domination is not. However, legitimate claims are also vindicated by a discourse that is meant to justify the claim with reference to common goals and values. Therefore, any reconciliation of interests supposes a common understanding of the values that provide ethical grounds for such a justification. For example, a reform of the retirement system necessitates reconciliation between different interests (professional groups, trade-unions, state agencies interests, etc.) as well as an interpretation of such values as solidarity (among citizens), responsibility (toward the coming generations), etc. Such ethical values are combined in a representation of what is just – a "scheme of justice" – that justifies the final decision. In the previous example, such a scheme must accommodate social solidarity and individual responsibility – which can be done in different ways, including the subordination of one value to the other. Such a scheme of justice must sound *reasonable* to all partners, that is: it must be understandable and acceptable to all of them. Moreover, given the fact that the citizenry as a whole assess the value of the policy, the compromise must be understandable and acceptable to all citizens, not only to the social or political partners involved. The compromise must sound reasonable to all citizens, that is: the interpretation of common values it implies must make sense to all of them.

As a result of the triple constraint imposed on the formulation of the various interests at stake, particular and general, any political project must reconcile the imperative of justice with the requirements of pragmatic effectiveness and technical efficiency. Both are necessary if the project is to succeed. In other words, a reasonable scheme of justice must accommodate the requirements of pragmatic and technical rationality. This is what political compromises are about.

As regards political parties, such reconciliation between justice, pragmatic and technical constraints determines a credible political program. As regards governmental action, it is a matter of institutional interaction between parliament, state administration and government. On the one hand, the parliament represents a variety of social interests, political ideologies and ethical convictions. It represents the society in its diversity. Such a representation establishes a balance of forces between political parties or coalitions. It reflects conflicts and alliances of interests between social groups and ethno-cultural communities. It expresses the ethical convictions and ideological preferences prevailing in the country for the time being. On the other hand, modern state administration is an instrument for law enforcement and social regulation. It is also an organ for technical reflection. With respect to governmental policy-making, the role of modern administration is to elaborate several possible courses of action, to assess their preconditions and foreseeable results, to provide the government with a variety of scenarios on each issue of importance. Consequently, state administration is not a mere instrument for social regulation by means of coercive power; it is an agency for technical reflection. As to governmental action, it must combine technical expertise (provided by state administration and agencies) and pragmatic compromises (within and between political parties) while subordinating them to the ethical and social demands expressed by the citizens and their representatives.

From an institutional viewpoint, compromise making between pragmatic and technical rationality is a matter of mediation between the political agenda of the parliamentary majority and the demands of the state administration. The composition of parliament determines a political balance of forces, while the administration provides technical expertise. In principle, such mediation between the two types of imperatives depends from the government's policy and governance style. The subordination of technical rationality to a scheme of justice implies government control over the state administration. The reverse means autocratic bureaucracy. The subordination of pragmatic rationality to the realization of a political project implies government initiative and accountability. The reverse leads to political clientelism and policy immobilism. However, institutional relationships must not be understood in a univocal way. Within the limits of a given constitution, they serve different functions, they have different meanings. The configuration of the parliament determines a balance of political forces. It also represents the society in its social and cultural diversity. It expresses a variety of ideologies and ethical convictions that coalesce into a representation of what is just. Through parliamentary control the scheme of justice vindicating the government's policy is put to the test of its legitimacy and acceptability to the citizens. In the process, the technical rationality of the administration is submitted to a collective paradigm of justice.

As regards the citizens, they are supposed to answer two questions: "What should we do?" and "Is this policy in agreement with our basic rules and principles?" The first question is a matter of political decision. Citizens are faced with problems concerning poverty, public education, healthcare, criminality, war and peace, etc. Such problems arise in respect to the more or less far-ranging goals of the country (independence, economic progress, social justice, national unity, individual and collective

freedom, cultural autonomy, political influence in world affairs, etc.). In this view, the question is "What is the right thing to do?" Answering the question means to approve or disapprove a given policy. The policy is worked out (at party level) or is being pursued (by the government) through a political process that involves both polarization and compromise making. The citizens follow the political discussion. Laws and political decisions resulting from all sorts of compromises are submitted to their approval. Although individuals may be involved in political activities and state administration, citizens as a whole do not intervene in the compromise making process. In fact, public discussion is not about *making* compromises. It is about approving, rejecting, demanding compromises. Political compromises are worked out within political parties or coalitions, within and between state institutions and agencies, most of the time, through non-public discussions.

The second question is a matter of critical judgment. Judicial review sets a model for such a judgment. In this case, there is no room for compromise. A given policy complies or does not comply with the citizens' rights. It is admissible or unacceptable with respect to the fundamental human rights that are incorporated in most democratic constitutions. It is true that compromises are involved in the making of constitutions. A given constitution may be seen as a compromise between nation-state and federalist principles, another as a compromise between presidential and parliamentary democracy, etc. Combined with political alternation, the majority vote can be viewed as a compromise on a decision-making procedure. In any case, citizens do not participate in the making of constitutional compromises. They approve or reject compromises resulting from non-public discussions. Public discussion begins when it comes to the ratification of the constitution. In this view, constitutional compromises may appear rational or irrational, reasonable or not.[14] Once the constitution has been approved, however, the enforcement of constitutional principles is not a matter of compromise.

When assessing the merits of a given policy, citizens are supposed to envisage it from those two complementary points of view: political and judicial. On the one side, the policy must solve the problems faced by the country. On the other side, it must comply with the state constitution and respect the citizens' fundamental rights. To some extent, the polarity between universal suffrage and judicial review reflects the difference between both points of views. Universal suffrage enables the citizens to influence the formation of the government. Judicial review aims at rejecting

[14]For instance, the Constitution of the USA is a compromise between federal and state sovereignty. Although interpretations of the constitution and subsequent political practices have considerably evolved over time, the compromise remains fundamental. The Missouri compromise of 1820 was supposed to settle the dispute between free and slave states by drawing a geographic line between territories where slavery would be prohibited and territories where it would not (Maine and Missouri were admitted in the Union at the same time, Maine as a free state and Missouri as a slave state, but slavery was banned in the rest of the Louisiana Purchase north of latitude 36°30'). Such a compromise was a mixture of the "gains and losses" and "strategic" types of compromise and it soon proved fragile. Both examples may be seen as instances (the one positive, the other negative) of the fact that rational compromises are fully rational if, and only if, they are at the same time reasonable.

laws and procedures that contradict the constitution or the citizens' rights. However, the citizens must assess the problems from both standpoints, judicial and political. Accordingly, judicial review is not only the judge's task. Judicial review sets a model for examining any political program or governmental policy.[15] When considering any political project, citizens should consider themselves as judges assessing the conformity of the project to the basic principles of their democracy. They are also supposed to support a policy that is likely to help them out of the situation, problems, difficulties they are faced with. They must assess whether the policy is altogether just and efficient (technically and pragmatically).

In the preceding paragraphs, we introduced the expression "scheme of justice". This needs clarification. More precisely, we must distinguish between principles and schemes of justice. Principles of justice determine the individuals' fundamental rights and the basic structure of the society. Schemes of justice are involved in day to day policy-making. They accommodate various ethical values by giving each value its signification and proper place – its "just" place – in a concept that justifies a given policy, in a given context, in relation to a specific problem. A scheme of justice determines an interpretation of ethical values and a hierarchy between the values that justifies – in a reasonable or ideological way, depending on the case – a normative representation of the relationships between individual and society and/or between social groups, communities, nations, etc. We use the term "schemes" of justice in order to point out the fact that such schemes must comply with the fundamental principles that are enshrined in the constitution, in the declarations of human rights, etc. Moreover, schemes of justice determine a course of action that is supposed (in the ideal-type) to put principles of justice into effect. In the case of a healthcare system reform, for instance, a representation of what is just accommodates individual responsibility and social solidarity by subordinating the one to the other or establishing a balance between both values, a balance that has social and financial implications. As regards the relationships between social groups, schemes of justice are also at issue. For example, creating attractive work conditions for school teachers decides upon the position of science and culture in the society. Such policy determines to what extent modern economy requires high-level education. It also depends on the society's insistence on the ethical dispositions that must be developed through such education: personal autonomy, independence of judgment, etc. Schemes of justice are also involved in foreign policy. For instance, any concerted action between partner states implies a representation of a world order, of a hierarchy of alliances, etc., in which a given balance of powers is at stake as well as a certain understanding of independence, leadership, loyalty, and so on. At all events, schemes of justice describe the mutual relationships between social groups (within a given society) or nations (at world level) that would lead to, and result from, a better enforcement of principles of justice, whatever they are.

[15] See David Rasmussen's contribution to this volume: "Public Reason and Constitutional Interpretation".

Because principles of justice frame the basic structure of the society, they are more or less stable. All members of society are assumed to accept them, although minority groups may simply tolerate such principles.[16] In contradistinction, a scheme of justice is a representation that evolves continuously in relation to technical advancements, economic cycles, changes in the division of labor, etc. Schemes of justice need constant re-evaluation. Eventually, there are various competing schemes of justice in any society. Such schemes result from people's contrasted social positions and experiences. The role of political discussion is to express them in a conceptual discourse. It is to crystallize the opposition between different schemes of justice and work out a scheme that vindicates a common course of action.

As regards governmental action, the schemes may vary with respect to the particulars of each problem to be solved. Therefore, the agreement on values that overlaps the compromise may be circumscribed to a given issue. In any case, such an agreement is provisional. It may be called into question as new problems arise. Nevertheless, similar schemes of justice appear in the political handling of different problems. This is the case when there is political or ideological coherence in the government's action. Such coherence may be theorized in the form of a political doctrine (liberalism, socialism, etc.) that is comprehensive in the sense that it applies to a whole range of issues. However, political alternation implies that no coherent ideology is put into effect over a long period of time. Governments of different political convictions alternate. In the long run, the political doctrine that "governs" a people's policy is a compromise between different political orientations or ideologies – more precisely: between political orientations that are compatible with the fundamentals of constitutional democracies in general, with the political traditions and the constitution of each state in particular.

6.2.3 The Normative Structure of Rational and Reasonable Compromises

From the previous analyses we may derive normative criteria for political compromises. In this view, we may distinguish three main criteria: (a) the interests or claims that are to be reconciled must be legitimate; (b) the compromise must be fair; (c) it must be rational and reasonable. The legitimacy criterion determines what interests or claims may be taken into account. The fairness of the compromise is a matter of recognition among partner groups or communities. Rationality and reasonableness refer to the very structure of the compromise. Criteria (a) and (b) set up the conditions for acceptable compromises. Criterion (c) defines an optimum for political compromises.

[16]There may be a consensus among the majority of citizens who support the principles, while passive toleration of these principles by the diverse minorities is a mere compromise.

(a) The interlocutors' claims must be legitimate. As we have seen, the claims are legitimate insofar as they may be recognized to all the groups or communities concerned and/or facing the same problem, in similar circumstances.
(b) The compromise must be fair. The fairness of the compromise depends on several factors. On the one hand, it depends on the interlocutors' rights and positions in the compromise-making process. For instance, all interlocutors must be equally entitled to express their views. They must be free from coercion.[17] There must be a procedure of compromise-making and the procedure must be agreed upon by all interlocutors. Whenever the compromise is brokered, the mediating party must be accepted and trusted by all partners, etc. On the other hand, the fairness of the compromise may be also defined with respect to its rationality. Technical and pragmatic rationality determine the limits within which legitimate claims may be satisfied. It is fair to satisfy the claims as far as possible within such limits. Doing otherwise leaves room for arbitrary preferences.
(c) Optimal political compromises are rational *and* reasonable.

As regards *rationality*, political compromises must be technically as well as pragmatically rational. By definition, such compromises are heterogeneous. On the one hand, they must be compatible with the requirements of technical efficiency. On the other hand, they must accommodate competing interests and political forces in view of the realization of common goals. The reconciliation of both types of rationality, technical and pragmatic, is also a matter of compromise. For example, economic measures must be taken in order to solve a financial crisis. In order to implement the measures rational and reasonable compromises must be reached between different political partners (political parties, partner-states, etc.). Political choices enable policy-makers to select a course of action among the various scenarios that are technically possible. Reciprocally, technical necessities must be matched by political compromises. What is technically necessary must be rendered "politically" possible.

Two further remarks. First, optimal compromises must be *integrative* rather than merely distributive. In some cases, especially in matters of international policy, bringing the partners to peaceful coexistence through compromise making is a great and unhoped-for achievement. However, optimal compromises make the partners capable of further cooperation or common action. In contrast, mere distributive compromises of the "gains and losses", "strategic" or even "self-restraint" type lead to policies based on a "lowest common denominator". In matters of internal as well as external affairs (e.g. European affairs), such policies aim at satisfying the particular

[17] Prohibition of violence and equal participation in the discussion are necessary preconditions for the achievement of a fair compromise. However, such preconditions do not preclude any kind of constraint. In international politics, for example, the parties may be compelled to political negotiation by a third party that prevents the use of violence (international peace-keeping force, etc.). In any case, prohibition of violence does not mean absence of power relations. A given balance of forces between the parties – and between the parties and a third party when the compromise is "brokered" – plays a major role in the result.

interests at stake – interests of different segments of society, of political parties, of partner-states, etc. – without developing any global political project.

Second, a particular form of political compromise appears when the partners "agree to disagree". This is an example of reciprocal self-restraint. However, such a compromise may be understood in two different ways. On the one hand, the "agree to disagree" sort of compromise permits to maintain peaceful coexistence in a deeply divided society. The problem is: such a compromise does not suffice when common action is needed. Effective political action is about making choices between different courses of action. In this view, to agree to disagree means: to be in a situation where crucial decisions may be avoided or delayed. On the other hand, reciprocal self-restraint for the sake of peaceful coexistence is only a particular instance of the "agree to disagree" kind of compromise. In its most general form, such an agreement makes possible the achievement of a delimited consensus. The consensus may concern social peace as well as any other value that is considered as essential by the partners. That is the reason why the "agree to disagree" form of agreement is implied in many kinds of political compromises. Governmental coalitions, for example, suppose that the partners agree on a selected range of priorities, setting aside other issues they view as less important or less urgent. In this case, the partners "agree to disagree" because they know that an open conflict on such issues would endanger the unity of the coalition. Most of the time, the compromise serves strategic purposes. Partners in a governmental coalition are liable to insist on their common goals and priorities at the beginning of their mandate. When the time comes for new elections, they will insist on their divergences in order to mark their difference and maximize their electoral support.

As regards *reasonability*, pragmatic compromises (between political partners) as well as compromises between technical and pragmatic imperatives must be subordinated to an agreement on a scheme of justice. The scheme must be understandable and acceptable to all the partners involved in the compromise. It must be also understandable and acceptable to the citizenry and the public at large.

What is normative in the structure of a rational and reasonable compromise is the fact that the rational must be subordinated to the reasonable. Such subordination is the core principle of optimal political compromises. In the ideal case, an agreement on common values – a scheme of justice that accommodates such values as solidarity and responsibility, security and liberty, etc. – overlaps a compromise of interests. Such a normative structure reconciles justice and efficiency by subordinating technical and pragmatic calculations to a shared interpretation of ethical values. In this view, the compromise has instrumental as well as value rationality. It is instrumental as regards the partners' particular and collective interests. It is value-rational insofar as it permits the realization of certain principles or values under the circumstances, within the limits of a given community. Although rationality is subordinated to reasonability, both are closely interrelated. A reasonable agreement on common values is achieved inasmuch as there is need for a stable and durable compromise. Reciprocally, no compromise is fully rational unless it is also reasonable. Rational calculation compels to reasonable agreement; reasonable agreement gives full effectiveness to the compromise. In order to be durably enforced, compromises

must sound reasonable to all partners. Insofar as their implementation needs political support, they must make sense to the public at large.

Shifts in the hierarchy between rationality and reasonability determine distortions and failures in political interaction and co-action. Mere compromises of the "gains and losses" or "strategic" type lead governments to political clientelism. Such a policy aims at satisfying the particular interests of different groups or layers of society without developing any global political project. Distributive compromises of the "gains and losses" or even "self-restraint" type may end up with an agreement on a "lowest common denominator". When ethical principles are subordinated to political calculation, public discussion boils down to a mere phraseology (on justice, rights, etc.) covering up lobbying and partisan combinations. When technical expertise is not subordinated to ethical and political choices, technocracy replaces politics. When schemes of justice are nothing else but rationalizations of socio-economic interests, they turn to mere ideologies, etc.

What remains to be seen is whether the approval of a political compromise by the public at large is a sufficient condition for the compromise to be reasonable. In the optimal case, an agreement on shared values gives sense to political compromises. We call reasonable such an agreement inasmuch as it is based on reciprocal understanding among partners who recognize each other as legitimate interlocutors – which does not mean that they all have the same social and political "weight". In order to reach a reasonable agreement each interlocutor must be open to the others' standpoints; each of them must make his/her point of view understandable to the others. To some extent, this is how John Rawls understands reasonability, which is a central concept in his later work.[18] However, such openness results from the necessity to reach compromises. It is not only a virtue that permits the citizens to handle their internal pluralism or settle their conflicts. It is a virtue that actual conflicts force them to acquire, if – and only if – the conflicts cannot (or may not) be settled by force. True, we should conceive of reasonability as some kind of a priori that enables us to handle pluralism. However, reasonability is also the *result* of conflicts of interests when the use of violence is either prohibited (within the state), impossible or ineffective (in external affairs). Once again, this is the optimal case. Conflicts that cannot be solved by force may also end up in a standoff; they may be settled by mere bargain, etc.

At all events, the agreement on a scheme of justice that secures the compromise must be distinguished from the agreement on basic principles that makes possible the very process of compromise making. As we have seen, such principles concern the equality of all partners, the absence of coercion, etc., whereas the agreement resulting from the compromise concerns the interpretation of common ethical standards. The compromise is reasonable insofar as it gives way to a consensus on values that is achieved through reciprocal agreement. We may assume that such agreement on a certain interpretation of common values supposes that the underlying

[18] See Rasmussen D (2004). "Defending reasonability". *Philosophy & Social Criticism*, vol. 30, No. 5–6. London, Thousand Oaks, CA and New Delhi: SAGE Publications, pp. 525–540.

compromise of interests is fair. Nevertheless, the fairness of the compromise must be distinguished from the reasonability of the ethical agreement that is achieved through the compromise.

However, we must take into account the fact that such agreement concerns a limited group of partners, although it must be assessed and approved by the public at large – and by the electorate that represents the public. No such agreement is reasonable in absolute terms. A political compromise is always *more or less* reasonable. The compromise sounds reasonable to a people at a given time, under certain circumstances. It may sound absurd to another people, to the "international community" or even to the same people at another period of its history. Reasonability means universal comprehensibility and admissibility. It does not refer to a "faculty" (Reason) that would be substantially different from other faculties. It refers to an indefinite *process* of "enlarged thinking". Differentiation and universalization define such an ideal process. Each interlocutor must endeavor to overcome the peculiarities (prejudices, bias) of his view by comparing it with a variety of alternative standpoints. Thus, each interlocutor must be able to understand an indefinite variety of viewpoints that differ from his own. He must express his views in a way that makes them understandable and admissible to all the others. A community of such interlocutors would be a reasonable community, that is: the community would be able to achieve reasonable agreements. A reasonable agreement is an agreement that accommodates a plurality of universalizable viewpoints, as opposed to the summation of strictly particular (i.e. arbitrary) standpoints. In this view, a reasonable individual can be defined as an individual capable of doing by himself what a reasonable community does. Such an individual would be able to achieve by himself a conclusion that accommodates a plurality of viewpoints. He would retain each viewpoint in its universal content while overlooking its particular bias. A community of reasonable individuals would be made up of such individuals and their relationships would be based on the recognition of each other's reasonableness. Such individuals would not only express their views in a way that makes them comprehensible and admissible to the others. They would discuss the various ways in which every one of them strives to accommodate the plurality of their different but universalizable viewpoints.

Obviously, there is a gap between the citizenry as it really is and such an ideal community of reasonable individuals. As we have seen, in political matters individuals act as members of social groups, cultural minorities, nations, etc. Interests must be reconciled while agreements on common values must be reached. Any agreement on shared values – more precisely: on a certain interpretation of these values – occurs within the limits of a reconciliation of interests. In a democratic framework, however, compromises must be accepted and supported by the public at large. Therefore, the process of compromise making must include an anticipation of the public's response to the compromise. The public is supposed to assess: (a) whether the interests at stake are legitimate; (b) whether the way they are reconciled is fair; (c) whether the compromise is rational and reasonable.

However, the interlocutors involved in the compromise-making can anticipate either the response of the public as it is (de facto) or the response of an ideal political

community as we understand it (*de jure*), that is, as a community of reasonable individuals. If the compromise is to be reasonable, the second form of anticipation must serve as a regulative ideal. The compromise stands a better chance of being reasonable insofar as the compromise making anticipates the response of a community of reasonable individuals. Such regulative ideal does not provide an ideal response. It provides an ideal *methodology*. It determines an ideal method of response which is based on a process of "enlarged thinking" in a context of social and cultural heterogeneity. Such a methodological ideal serves also as a reference for citizens asking themselves whether they, as a people, can accept and support a given policy. The result is more or less reasonable, depending upon the degree of social and cultural differentiation of the society and the citizens' ability and willingness to generalize their views. At all events, the citizens' expectable response must be measured to the response of the political community at it is supposed to be. To the political community *as it is supposed to be*, because the very idea of democratic institutions presupposes that all citizens are capable of rational and reasonable thinking. When neither politicians nor the citizenry refer to such a norm of political judgment, the communicational interaction between the citizens and the government leads to demagogy and public manipulation. When the citizens contend themselves with expressing their particular interests or moral convictions, the resulting policy is often chaotic or mediocre. Under the most favorable circumstances, it may still be rational or even reasonable, but in spite of the democratic institutional framework it cannot be democratic. In this case, only an élite of policy makers is in the position of working out and assessing the compromises that are necessary to accommodate such a variety of particular views. Democratic discussion is about selecting the best possible way of defining and realizing the general interest. It supposes that all citizens express not only their particular interests or moral convictions, but also their own understanding of the general interest.

A range of issues concerning home politics in contemporary democracies might illustrate the previous analyses. However, similar remarks can be made when it comes to international affairs. In international matters, citizens are to judge policies resulting from compromises between political parties, between the administration and the military, between partner states, between states and international organizations, etc. Most of international politics is about solving problems through reasonable compromises between rival states (in order to avoid violence) or between partner states (in order to build alliances). Such compromises underline international treaties and concerted actions. The citizens assess the compromises when they are asked to approve a treaty or to support their government's international policy.[19] In such matters, as well as in domestic affairs, the role of parliament is to verify that a given policy is understandable and acceptable to a large majority of citizens. Nevertheless, the citizens have the final say. Therefore, the compromise making

[19] The referenda held in France and the Netherlands over the European Constitution (May 2005) are perfect examples. The Constitution was meant as a compromise between nation-state independency and federalist principles, between social solidarity and free market economy. Most of the debate focused on the question: is this a good or a bad compromise?

process must (should) anticipate the citizens' response and take it into account from the very start.[20] In international politics, this implies the expectable reaction of the world public opinion, of the international community.

In any case, reasonable compromises are never ideal solutions. By definition, a reasonable compromise is the best solution *under the circumstances*. Although there is a normative pattern in the concept of an integrative and pragmatic, rational and reasonable compromise, such a compromise is never the "absolutely best" solution. Reasonable compromise is the "relatively best" form of agreement, the form that is appropriate to the structure of constitutional democracies. Two concluding remarks will underline this point. First, there are situations that require uncompromising stances and courses of action (for instance, against totalitarianism or ethnic cleansing). We must recall that polarization as well as compromise is an essential feature of policy making. Wars of independence, resistance to genocide, etc., compel to radical action. Generally speaking, reasonable compromises are possible if, and only if, the partners agree that a negotiated solution is preferable to the use of violence or the exertion of sheer domination. Second, reasonable compromises are still what they are, that is: compromises. Although precedence is given to ethical tenets over technical and political calculations, technical and political constraints determine the extent to which ethical ideals may be realized for the time being, that is: in a given situation. Such compromises are central in political action but they never constitute perfect or definite solutions. They can be nothing more than milestones on a road that leads (or should lead) to a better enforcement of human rights and democratic principles.

[20] Analyzing the failure of the 1992 Charlottetown Accord on constitutional reforms in Canada, Dominique Leydet writes: "If the negotiators know in advance and work with the assumption that any negotiated agreement will be submitted to a national referendum, then this awareness will discipline their bargaining and direct them to an agreement more likely to stand the test of public debate". See Leydet D (2004). "Compromise and Public Debate in Processes of Constitutional Reform: the Canadian Case". In *Social Science Information*, vol. 43, p. 245.

Chapter 7
Reasons for Reasons

Mathilde Cohen

In most legal systems, courts and administrative agencies are required to give reasons to substantiate their decisions. Legislators and members of the executive increasingly tend to put forward reasons in support of their actions. How can one account for this practice? What value(s) is it pursuing?

This question must be distinguished from other ways of inquiring into the practice of giving reasons. A typical approach rests on the fact that public reasons giving is nowadays such a well-established phenomenon that it has become common to make two kinds of assumptions: a normative assumption that giving reasons is what should be the case in the realm of public action and a factual assumption that, in fact, most public decisions are being given proper reasons for. Because the practice of giving reasons is taken for granted, much of academic inquiry focuses on the rhetorical or logical structure of these reasons. In this line of scholarship, it has become very popular to study public institutions' practice of giving reasons under the label of "legal reasoning."

In short, the focus is usually not on the different values that are achieved by reason giving. This will be the topic of this paper: why do we give reasons? What are the reasons for giving reasons? Answering these questions is but a stage in a larger project regarding the notion of giving reasons. In particular, the question of why we give reasons must not be separated from two other inquiries. The first is conceptual and attempts to determine what giving reasons consists in. What kind(s) of reasons count as valid reasons for public decisions? Are reasons intrinsically different in the public and in the private sphere? The second is institutional and focuses on the way in which different public decision-makers are subject – or not – to giving reasons requirements. Why is it that some public institutions are obligated to give reasons while others have the discretion whether or not to give reasons and still others are prohibited from giving reasons? Why is it that institutions usually give reasons for some types of decisions but not others?

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This paper's goal is to shed light on the different values that are pursued by the giving of reasons. Is there something intrinsically valuable in the mere fact of giving reasons? Or rather, does reasons giving have a purely instrumental value, having to do with the effective pursuit of whatever other goals one is trying to use law to promote? It seems that there is no intrinsic value in giving reasons for the sake of giving reasons. If we were constantly giving reasons for everything we do, we decide and we say, most of our lives would consist in uninterrupted and extremely boring self-justifications. Similarly, if public decision-makers gave reasons for every single decision they make, they would spend most of their time drafting official documents that almost no one would have the time to read. Distinguishing innovative decisions from routine decisions would become difficult. We give reasons in certain circumstances only, when the action or the decision we are giving reasons for is of a certain importance or/and when it modifies the *status quo*. Do we abstain from giving reasons in recurrent circumstances because there is no value in the mere fact of giving reasons? Not necessarily, but to be sure, giving reasons is considered valuable in relation to a particular decision or action and to a particular relationship between the reason-giver and the reason-recipient. The action or the decision we are giving reasons for must be of some interest to someone here and now. When we do give reasons, it also seems that it is because something valuable can be thereby achieved, such as showing respect to those affected by the decision/action. In a word, we usually give reasons because by doing so we think that some other value will be realized. Reasons for giving reasons are often instrumental reasons.

Perhaps the most obvious non-instrumental value in giving reasons lies in the fact that giving reasons for a decision or an action might, taken alone, make that decision/action better.[1] In that sense, there is no necessary temporal distinction between, first, the making of a decision and, second, the reasons adduced in its support. The reasons that can be given in support of the decision are part of the decision-making process. There is an extensive literature on this issue of whether or not the mere fact of giving reasons for a decision increases the quality of the decision. However, in this paper, I want to focus on instrumental reasons for giving reasons, i.e. on reasons for giving reasons that are meant to achieve certain values distinct from the value of the decision itself. Focusing on instrumental reasons for giving reasons does not mean that giving reasons only achieves instrumental values. The giving of reasons might also achieve non-instrumental values, such as respect: each person has a fundamental interest in being treated as a person with equal moral standing among his fellow citizen.

There are many different instrumental reasons why we give reasons to support decisions. One of them is to *convince* the people being personally affected by it that it is a good, valid, decision. In the context of public institutions, reasons are often given because they help citizens to reach an *agreement* on certain important political

[1] By "non-instrumental value," I mean here a value that does not lie in the fact that the decision will be useful in achieving any other goal, but in the very fact that the decision will be better, regardless of other considerations.

decisions, but also because they might increase the chances of *compliance* on the part of citizens. Another reason for requiring from officials that they give reasons is *accountability*: instituting a giving reasons requirement, it is thought, lays the basis for future checking. Thus far I have introduced a variety of reasons which certainly do not constitute an exhaustive list. Rather than to provide such a list, in the course of this paper, I will examine some of the reasons that seem to be the most important and interesting ones. The way I will proceed is to present these reasons from the point of view of the value(s) that they are seeking to achieve. In what follows, the focus will be on four main values that are being pursued when decision-makers give reasons for their decisions: guidance, agreement, trust and respect. These values are not discrete ideals that are disconnected and separable from one another. They are structurally related in a certain framework. This is why it will sometimes seem artificial to examine them successively.

The most important value that is being fostered by reason giving is that of *guidance*: decision-makers want public decisions to effectively guide citizens, i.e. they want their decisions to be authoritative. Public authorities need citizens to act on the reasons that are being given. So as to achieve that end, they give reasons for their decisions that can be understood and accepted by citizens. This guidance function of the legal system can best be carried out where there is some degree of *agreement* with its prescriptions. Reasons are primarily designed to guide, but to do so, they must first be recognized as good, valid reasons.[2] Yet, this is not sufficient. There is little hope of attaining acceptance unless people both feel that they are being *respected* by decision-makers and *trust* public institutions. The reasons given are thus also reasons designed to display respect for the people and to develop trust.

In attempting to explicate these values, I will proceed in the following order: from respect to trust, to agreement and to guidance, eventually to arrive at the claim that ultimately, the essential reason for giving reasons is to reinforce a legal system's authority. At times I will pause to challenge the assumption that giving reasons really succeeds in achieving the underlying value under consideration. However, the main purpose of this article will be constructive, rather than critical; it will merely try to give a picture of the types of values being pursued by giving reasons.

[2]Reasons alone, provided they are sufficiently clear, can affect the behavior of people. Even though individuals disagree with the reasons that apply to them, they may still be guided by them as long as, for example, these reasons are backed by sanctions. This is a frequently observable situation in educational contexts. For instance, students will stop drawing graffiti on school furniture if teachers and supervisors clearly forbid it and support their prohibition with disciplinary action. Students may wholly disagree with the school's rationale (which may be based on the desire to preserve a clean and appealing environment), they may for instance think that their graffiti make the school furnishings more beautiful and attractive, but nevertheless be guided by the prohibition. Agreement with reasons is not a necessary condition for guidance, but guidance is likely to be much more effective where there is agreement.

7.1 Giving Reasons and Respecting

From the point of view of a person being affected by a decision, the first, immediate, value of reasons is to make him/her feel respected. In this regard, public decision-making does not differ from ordinary decision-making. Each time someone makes a determination that will affect others, he/she should provide reasons as a mark of respect toward these others. My friends and I decide to go out to see a movie. They generously allow me to choose the movie. If I merely announce: "I decided that we will see *Solaris*," without providing any additional explanation, they are likely to feel disrespected. They might think for instance that I am using them. I wanted to see this movie anyhow and I am dragging them with me with no concern for what would be an interesting movie to them. I just want company. I am ignoring the fact that they too have interests, preferences for this or that type of film. On the other hand, if I substantiate my choice with reasons that they can accept, discuss, or reject, they are likely to feel that they are being treated with respect. For example, I can say that the reason why I chose this movie is that the director was my friend, that I like one of the actors, that the show time and location of the movie theater are convenient and so on. Now my friends have a basis on which to decide whether they still want to join me or to discuss my choice and perhaps even convince me to change my mind. If they do decide to accompany me, it will not be because (or at least not only because) I chose to see that movie, but because they now think that the movie is worth seeing for *x*, *y* or *z* reasons. A similar arrangement is to be found when one switches from the private to the public sphere. Government agents should give reasons, it is thought, as a way of respecting citizens. In doing so, they acknowledge the fact that people are autonomous beings. What does this autonomy that must be respected consists of? In this context, it seems that people's autonomy requires decision-makers to be mindful of two things: that people cannot be simply ordered about and that they must be allowed to criticize decisions that apply to them.

7.1.1 Giving Reasons and Ordering

It is commonly assumed that people are rational, self-directing agents who ought to be treated as such. What does treating them as such entail? The fact that they are rational and self-directing makes it possible for others to guide their conduct. Presumably, only rational beings' actions can be guided; this is why it is often said that we cannot guide animals' conduct, but at most tame or train them to do some specific things. Human beings are the only beings who can be ordered about, but at the same time, precisely because they are rational and intentional creatures, it is considered illegitimate, or immoral, to simply order them about. *A fortiori*, government agents should not order people about. The legitimacy of public decisions is contingent on the fact that their subjects have reason to accept them as binding. Giving reasons is a mark of respect because by giving reasons, it is acknowledged that citizens are rational and independent beings who can make choices for themselves. If public institutions do not give reasons, their decisions are akin to orders or, at best, unintelligible preferences that they seek to impose on others. Giving reasons

involves respect because it establishes a relationship that is not merely that of a commander/commanded between the decision-maker and the decision-receiver. The decision-maker, by giving reasons, is trying to show to the decision receiver that he should comply with the outcome of the decision not merely because it was ordered, but because it is a valuable thing in itself. In this sense, giving reasons aims at being the opposite of commanding.[3] Of course, an order supported by reasons may still be an order. The fact that an order is an order depends not on whether it is accompanied by reasons, but on the circumstances of its utterance (such as: Who uttered it? When? In regard to whom? Is it backed by sanctions?) However, whether the order is respectful toward its recipients seems to depend on whether supportive reasons are advanced. The fact that a decision is respectful toward its receivers and is perceived as indicating a good or true outcome is something a decision or an order must earn, it is not part of what is said when we identify it as legally valid.

Imagine the following order: "Do 50 push-ups." In the context of an army boot camp, uttered by an army captain, it might be an order that soldiers obey because they are liable for sanctions if they do not comply. The same sentence has an entirely different flavor when uttered by a fitness instructor in a fancy New York gym, to exercisers who are voluntarily taking part in the class and are very much willing to do as many push-ups as it takes to look good. If the army captain gives reasons to support his order, (such as: "soldiers must suffer," "soldiers must be stronger," "push-ups make you look good,") even though it is still an order backed by the threat of sanction, it also becomes an order backed by reasons. Some soldiers might realize that some of these reasons apply to them regardless of the order. They might become convinced that they have independent reasons to comply with the order (independent from the fact that it is an order). But how is the army captain showing respect to his recruits by offering them reasons for doing push-ups? One possible answer is that by providing reasons, he is trying to relate his order to goals or larger aims that the young men may have independently of the army. People act intentionally when they do something because they see some point or attraction in doing it. We do what we do because we think that the action is something good. Our reasons for action are things which are valuable. Because giving reasons for an order, a decision, consists partly in showing why that order or that decision is worth being complied with, the army captain is trying to give the soldiers the opportunity to engage in a valuable practice as part of their goals.

7.1.2 Giving Reasons and Autonomy

Giving reasons is not only a passive way of respecting people, of merely refraining from interfering. In this sense, it is not only a principle of self-restraint. Giving

[3]Hobbes defines command: "Command is, where a man saith, *Do this* or, *Do not this*, without expecting other reason than the will of him that sayes it" (*Leviathan*, Part II, Chapter XXV. Cambridge: Cambridge University Press (1904), p. 182.)

reasons makes heteronomy less unpalatable, to be sure, but it even aims at fostering autonomy. Human beings are people who are autonomous because they are capable of intentional action, i.e., of having a view about their situation and the situation around them. Classically, autonomy is understood as self-legislation. On this conception, giving reasons can be said to strengthen autonomy because even though I may not have directly contributed to the enactment of the legal rule which applies to me, I can appropriate the reasons that justify the rule. Because I accept its reasons, the rule it is no longer extraneous to me. The rule becomes my rule, albeit *a posteriori*.

But there is another way to understand autonomy on which I want to focus. Autonomy thus understood is the capacity to make choices. Giving reasons can increase people's autonomy by helping them to view their situation more clearly. This is done in two ways. First, giving reasons, it is thought, helps people make better-informed choices, by having more information available, in particular on the rules that apply to them. Second, giving reasons also opens new courses of actions and introduces goals, which people may or may not pursue. It may lead people to discover valuable options that they were not aware of. There are various options open to them in every situation, that they can adopt or not. Giving reasons is a way to reinforce this openness. This is why giving reasons involves respecting people's ability to conduct their lives by helping them to do so.

For example, during an ethnographical survey of French administrative courts, I witnessed a deportation hearing during which a man who had been staying illegally in France for a couple of years was appealing from a deportation order that had been issued ten months earlier.[4] His lawyer argued that the order constituted a violation of his "right to respect for private and family life," in the sense of Article 8 of the European Convention on Human Rights, since he was living together with his (French) partner in Paris, actively taking care of her children, and was planning to get married to her. After the hearing, I interviewed the judge and asked him what he had decided in this case. He answered that it had been a hard case, because it was obvious to him that the order was indeed interfering with the petitioner's family life. He, nevertheless, decided to affirm because under French law, the legality of deportation orders must be assessed on the basis of petitioners' situation on the issuing date. At the time the order was entered, the petitioner had not yet moved in with his partner and was therefore precluded from claiming violation of his right to pursue a normal family life. However, the judge said that in this case, like in other cases of this type, he would write a detailed opinion explaining very precisely why he had sustained the order, so as to enable the petitioner to adapt his conduct.[5] In other words, the judge was claiming that thanks to the reasons given in support of his decision, the petitioner would be able to understand that his only options

[4]Mathilde Cohen, "Giving Reasons in Court Practice: Decision-Makers at the Crossroads", Columbia Journal of European Law, Vol. 14.2, 2008, pp.257–276

[5]This attitude, which appears to be relatively common among judges dealing with immigration law, is made possible by the fact that a vast majority of deportation orders are not enforced. Most petitioners simply receive a letter "inviting" them to leave the country before a fixed date and, in practice, most stay.

were not either to go back to his country or continue to live a clandestine life in France, but that there could be a third way. Deportation orders expire and must be re-issued every twelve months. Since any new deportation order issued after his family life had started would be illegal, he should wait for a new order to be filed against him and then appeal from it, this time with a much greater chance of reversal. The reason given: "the legality of the deportation order is assessed on the basis of the petitioner's situation on the day the order was issued" is the kind of explanatory reason that can help petitioners make choices for themselves. In this sense, giving reasons is essential to ensure that petitioners are respected, partly because they are not fully informed about the subtleties of the law. Not letting them know the options available to them might condemn them to live a diminished life.

In this example the judge is not trying to suggest new life plans or goals, but merely giving information likely to prove helpful for the effectuation of the life plans that the petitioner already has. The trouble, however, with this way of thinking about giving reasons as a way of enhancing people's autonomy is that it can appear paternalistic. On the one hand, the practice of reasons giving seems to promote autonomy by suggesting values that people can embrace as part of their life plans. On the other hand, in the course of this activity, government agents might not resist the temptation of acting like they know better what is good for others and of imposing certain values on people. However, this worry is not justified. Giving reasons does not run the risk of turning into paternalism because reasons enable active criticism. Even though offering reasons is indeed suggesting that some things are valuable, it also results in laying the grounds for discussion and contestation.

7.1.3 Giving Reasons and Criticism

Giving reasons for a decision greatly contributes to making the decision a possible object of discussion and of criticism. In the public context, this possibility of discussion is especially crucial because it allows citizens to criticize, and sometimes even modify, decisions affecting them. There may or may not be a formal review procedure available for people to contest a particular public decision. In any case, the fact that reasons are given helps the public to at least discuss the decision. For instance, formal review of administrative action is usually available. A citizen can appeal from a decision made by an administrative agency and argue (usually before a court) why he thinks that the decision is invalid and should be reformed. But such a procedure does not always exist in other contexts. For example, there is no review procedure available against supreme courts' decisions. The fact that their decisions are usually highly publicized and supported by abundant reasons nevertheless enables citizens to express its support or its discontent in the public forum. Even though individuals cannot formally appeal from a supreme court's decision, reasons give them at least the occasion to debate it.[6]

[6]One could even argue that, especially in parliamentary systems, formal appeal from supreme courts' decisions is available. People have the possibility, in a sense, overrule supreme courts' decisions that they disagree with. At the occasion of the next legislative elections, they can massively

Giving reasons is a mark of respect because it implies that public institutions assume that people are autonomous beings, who can choose whether to adopt the reasons as their own or to criticize them. Abstaining from giving reasons would constitute a lack of respect because people would then have to accept decisions as orders that they must obey *qua* orders. To be sure, many of the public decisions which are not substantiated by reasons can nevertheless be appealed from or criticized, but in that case, citizens bear the burden of conjecturing the grounds on which the decision was taken, which makes it much harder to effectively contest its validity. Respecting someone as a citizen when one is a public decision-maker may therefore consist in part in giving him grounds for reflection and eventually, criticism.

7.1.4 Individualized Reasons?

There seems to be something missing in the preceding analysis. What respect requires differs depending on whom or what you respect. It varies according to the grounds one has to respect *x* or *y*, not out of an a priori analysis of the concept of respect. Sociologist Charles Tilly observes that the acceptability of the reasons given greatly depends on their compatibility with the social relations that prevail between the giver and the receiver.[7] He cites as an example the fact that the phrase "Gotta go" can properly end a conversation with a talkative stranger who has stopped you to ask directions, but not a chance meeting with an old friend you have not seen for years. From this perspective, giving the same reasons, regardless of the person one is dealing with, is a mark of disrespect. Yet public institutions seem to be doing it all the time. Usually, officials give more or less standardized reasons that are not tailored to the particularities of their recipients. For instance, administrations, when they give reasons to support their decisions, do so regardless of whether the people affected are laypersons or professionals with expert knowledge of the matter. This is why it has become common to complain that many reasons are formal, artificial reasons that are not based on any personalized consideration of the individual involved. Another source of worry stems from the fact that certain public bodies subject to giving reasons requirements circulate among their members lists of ready made or model reasons that can routinely be used for certain kinds of cases. How is a citizen to feel respected if formal reasons are being cut and paste in decisions that apply to him?

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vote for representatives who also disagree with the contested decisions and who will overrule them during their legislature by enacting new statutes implementing opposite outcomes. From the point of view of American Constitutional Law, things are slightly more complex, but citizens could arguably achieve the same result either by electing a President who would in turn appoint to the supreme court – when the time comes – Justices that are likely to overrule the undesirable decision, or by voting in new representatives, – both at the state and the federal level – who are willing to engage in the long and perilous adventure of constitutional amendment.

[7] Tilly C (2006). *Why?* Princeton and Oxford: Princeton University Press, p. 26.

There are two possible answers to this objection. A first, realist answer might pinpoint the possibility that public reason giving departs from private reason giving in this regard because of practical necessity. It may be right that different persons should be given different types of reasons, (for example, people who lose a lawsuit and people who win it, people who are familiar with the law and laypersons,) but public institutions generally lack the time and the personnel to individualize reasons in such a way. Yet sometimes the legal system acknowledges that some differences between people should yield specific reason giving. For instance, such a differential treatment is established for administrative action in most civil law countries. Agencies are usually only required to give reasons when their decisions are both individual and unfavorable. If a decision concerns a category of persons, who are not individually named, reasons need not be put forward. Similarly, if the outcome of the decision is favorable to those concerned, then it need not be justified. The underlying assumption is that only those who have been singled out and whose petition has been rejected are due reasons, while others, especially citizens whose petition was granted, do not need such attention. Public institutions therefore seem to avoid distinguishing among different reasons-recipients for pragmatic considerations, unless doing so would be too disrespectful.

The second possible answer does not attempt to account for public institutions' relative blindness to people's particularities, but speculates that narrowly tailored reasons are not the kind of reasons citizens are in need of. Reason giving in the public context has a symbolic aspect that is much more important than in the private sphere. Reasons often constitute symbolic acts of respect in our society. *Qua* symbols, they are not designed to match their recipients' particularities, but rather to represent respect to all. A lot of public reason giving is symbolic in the sense that it aims more at displaying respect than at actually respecting personally each individual. Some reasons, for example, are incomprehensible for their receivers who are laypersons, but they still have a value as symbols.[8] The giving of reasons has acquired this symbolic quality, independent of the content of the reasons themselves, such that the absence of reasons is felt like a mark of disrespect. In that sense, formal reasons are better than no reasons at all. This argument from symbol reinforces the claim that there are different purposes for giving reasons: for some purposes, reasons should be individualized and for others, they need not be.

Respect is not the only value prompting the giving of reasons. To be sure, public institutions ought to respect citizens, but this is not enough to secure their authority. People must additionally trust officials. From this standpoint, giving reasons can play a crucial role inasmuch as it may foster trust.

[8]Laypersons are often represented by lawyers who can explain the reasons to them. This point is further developed below.

7.2 Giving Reasons and Trusting

Trust in public institutions and in official decision-makers is a major value democratic governments are supposed to achieve. Why does trust matter so much? Here again the primary need for trust in the context of public life does not differ in nature from the need for trust in everyday life. We need to trust people, because we rely on others for an incredible number of things. I need to trust the engineers who built my house to be able to sleep at night, I need to trust the farmers from whom I buy my groceries to be able to eat my food and so on. In short, we need to expect that people will behave in a certain way so that we can plan our actions accordingly.[9] Trust is necessary for action. People have plans, goals, aims, and so as to achieve them, they need to be able to plan their future. In the context of public action, trust is thought to be particularly important for two additional reasons. Only trust can enable public institutions to fulfill their function. People who trust institutions are likely to seek their services when they need to. In that sense, trust renders institutions *effective*. For instance, in case of dispute, citizens who trust the police will appeal to the justice system rather than attempting to resolve the problem informally within their community, but through the justice system. Trust also helps institutions to be more *efficient*. If people trust institutions, they will comply with public decisions more easily and perhaps even spontaneously.

7.2.1 The Paradox of Trust

How does giving reasons for public decisions foster trust? The problem stems from the fact that any form of government presumably involves institutions which can make relatively unconstrained choices. In our sublunary world, contingency is such that even if officials were constrained by extremely rigorous rules and guidelines, they would still enjoy a residual amount of discretion. From this metaphysical fact arises the need for building trust in governmental decision-makers. Giving reasons requirements may fulfill this need when implemented in order to establish or re-establish trust in public institutions. They may do so in two ways.

First, such requirements work as constraints on government agents' discretion. They diminish decision-makers' leeway because through the reasons that are given, any decision can ideally be traced back to specific rules and well-entrenched precedents. One role traditionally assigned to reason giving is to constrain the potentially misguided or arbitrary exercise of governmental power. The underlying idea is that requiring officials to give reasons will make for better decision-making by means of

[9] Arguably, this alone does not necessarily require trust in the usual sense. For instance, competitors in athletic contests, soldiers in wars may plan actions based on expectations of how opponents will act. Following Luhman, it could be suggested that as far as action planning is concerned, trust and distrust are functional equivalent. However, in "complex societies" such as ours, trust is to be preferred as a more efficient and economical way of predicting and organizing collective action. See Luhmann N (1979). *Trust and Power*. New York: John Wiley & Sons.

discipline, review by higher courts, informal criticism by colleagues, social acquaintances and even public opprobrium.[10] Here giving reasons renders decision-makers accountable, prevents abuse and therefore fosters trust. Giving reasons works as a safeguard against arbitrary or irrational decisions. In that sense, giving reasons encourages trust because helps people plan their lives. The reasons produce constraints which limit decision-makers' discretion and promote predictability.

Second, giving reasons requirements engender trust because they work as a device allowing for control by the citizens over public organs. By supplying reasons, decision-makers become accountable to the public and lend themselves more easily to checks, in part because they leave records of their action. In this view, controlling the government implies that whenever there is discretion, the people, individually or collectively, should be given the power to urge government agents to modify or at least explain their decisions. In short, it is thought that reasons make the decision-making process more transparent and the decision-makers more accountable. How does that relate to trust? It has become common to think that in order to make institutions more trustworthy, you need to make them more accountable. This may sound paradoxical: trust normally releases us from the need to check. Only in situations of doubt, conflict, danger, that is, of mistrust, do we start checking. Accountability might therefore appear as a self-defeating way to build up trust. Advocates of accountability propose that we trust something precisely because we believe that in case of doubt, checking it and measuring it against some established criteria could easily restore certainty. For example, I trust doctors when they announce their diagnoses even though I am completely ignorant when it comes to medicine and biochemistry. I trust them in part because I know that in case of doubt, I could have access to the evidence and the medical knowledge on which the diagnosis was based.

7.2.2 Giving Reasons and Accountability

Different patterns of institutionalized checking and trust have been developed to regulate activities where resources are exchanged or entrusted. Accountability mechanisms are typically needed to establish or re-establish trust when institutions enjoy a certain degree of autonomy from the people they are accountable to. Typically, institutions falling under agent-principal categories are thought of as being in pressing need of accountability. One could argue that to demand reasons there must first be a relation of accountability, a requirement for one party (the agent) to give account of his actions to another party (the principal). Trust, then, reveals an

[10]For example, Kennedy D (1986). Freedom and constraint in adjudication: a critical phenomenology. *Journal of Legal Education* 36, (arguing, p. 527, from the point of view of a hypothetical judge that he would feel constrained because "various people in my community will sanction me severely if I do not offer a good legal argument for my action. It is not just that I may be reversed and will have broken my promise. It is also that both friends and enemies will see me as having violated a role constraint that they approve of.")

agent-principal relationship between public institutions and citizens. The relevant principals, depending on the institution, may be the public at large, local residents, taxpayers, consumers of public services such as students, commuters, and perhaps even future generations.

The claim that companies – the paradigmatic case of agent-principal relations – are in need of greater accountability has become virtually ubiquitous. Accountability, in that context, is secured not by setting up a giving reasons requirement, but for example, by guidelines for proper managing and accounting. For companies which are financed by shareholders, a form of accounting which allows a check, or what is called "audit," has been developed to be made of the activities of the company. When companies are audited, their accounting practices are the primary materials that are being checked, partly because accounting practices say a lot about the way in which a company is managed, but most importantly because these are the kind of activities that are easily auditable (they are measurable for instance.)[11] Companies exemplify the situation when the economic resources of one party are entrusted to another. Human nature is assumed to be weak, untrustworthy and in need of some kind of check. Advocates of auditing argue that it would be naïve to fully trust individuals with economic resources. They must not only be made to account for their actions, but their account itself must be checked.

One could similarly argue that giving reasons requirements stem from the situation where some political or legal power is entrusted to public institutions. Assuming that decision-makers are weak and potentially untrustworthy, citizens need to monitor or at least to have the possibility to verify *ex post facto* that they exercised their tasks properly. To do so, the public needs to know, not only the outcome of decisions, but the reasons on which they were based. Forms of accountability such as auditing rely not on the giving of reasons, but on results. People are often made accountable without having had to give reasons. Results are the sorts of things that make individuals accountable, sometimes after being evaluated in terms of target schemes or performance indicators. If they reach the target or achieve a high performance score, they will be rewarded (by bonus, promotion, etc.) If they do not, they might be penalized in one way or another. This shows that reasons are not a necessary and sufficient condition for accountability. However, reasons can do some work: they may change the way accountability functions. Because of the ever-changing character of human existence, governmental decision-makers are often faced with new, unpredictable or very particular situations. If their work were assessed solely on the basis of results, our evaluations would not pay full attention to their achievements.

For instance, when governments decide to regularize illegal immigrants by granting them residence or work permits, they usually issue guidelines designed to direct individual regularization decisions made by the relevant agencies. Some priorities may be set: for example, it might be decided that people who have been in the country for 10 years or more and/or families with children going to school should be regularized first. Such guidelines usually include specific targets to reach:

[11] Power M (1997). *The Audit Society. Rituals of Verification.* Oxford: Oxford University Press.

immigration officers are told to issue permits to at least 6000 families, or at most 100 000 people. Administrative agents' work is usually not merely assessed based on the fact that targets have or have not been reached, but usually with some consideration given to reasons as well. The reasons given to substantiate refusals to grant permits, for example, may modify the assessment that would result from the sole consideration of targets. Suppose the agency regularizes 6000 families because there are only 6000 families composed both of parents who have been in the country for at least 10 years and of children who go to school. Then, it seems the agency did a good job following the guidelines. If there are 100 000 families corresponding to the criteria and no valid reason why some were given permits and others were not, then administrators will look like they acted arbitrarily. Reasons can rebut this presumption. They can help understand that the 6000 families who were granted permits had other characteristics that made them eligible (e.g., the parents had a job offer, they had been paying their taxes for years and could demonstrate integration into the community, etc.) When decision-makers give reasons, accountability based on results becomes defeasible. Assessment of accountability may completely change after consideration of the reasons that explain or justify the results.

There is another way to explain why reasons are linked with accountability. Reasons tend to become proxies for accountability in the public sphere by virtue of pragmatic considerations. Just as accounting practices are the sort of things that are audited because they are auditable, one could argue that reasons are checked because they are the kind of things that can easily be reviewed. Reasons make checking easier in various ways. Firstly, giving reasons requirements call for meticulous record-keeping: the reasons are given in a written document, which makes checking easier because there is something tangible to check. Second, as was noted earlier, it is much harder to criticize a decision whose outcome is not supported by reasons, because one must imagine the possible rationales decision-makers had in mind. Third, reasons themselves can function as performance indicators which render government agents' work more assessable: an agent will be considered to have made a good decision if he was able to support it with sufficiently relevant, legally valid reasons that are difficult to challenge.

7.2.3 Giving Reasons and Personal Trust

It is not only through accountability mechanisms that giving reasons fosters trust. Philip Pettit showed that "impersonal trust" alone is insufficient to build trust toward government agents. Citizens need to trust officials both impersonally and personally.[12] In impersonal trust, reliance on an agent is associated with the belief that he is independently motivated, perhaps constrained to act in the pertinent manner. By contrast, in personal trust, reliance on an agent is associated with the belief that

[12]Pettit P (1998). Republican theory and political trust. InLevi M and Braithwaite V (eds) *Trust and Government*. New York: Russell Sage Foundation, pp. 295–34.

the agent, being of a cooperative disposition, will be motivated by *my* reliance on his being reliable. What we have described until now as trust based on accountability is the kind of trust that Pettit would label "impersonal trust." Accountability alone is insufficient to engender trust in institutions: according to Pettit, knowing that decision-makers' discretion is constrained by restraint principles such as giving reasons requirements is not good enough. There must also be some personal trust toward governmental agents. Does this rule out the giving of reasons as a way to foster trust? Not so. Reason giving may contribute to generate personal trust. Once again, it is a misconception to reduce giving reasons requirements to a restraint principle. The fact that officials give reasons does not only work as a discretion-reducing mechanism, but also develops personal trust. I believe that public officials are trustworthy, not only because they are subject to checks, but because they know that I trust them. They show me that they are responsive to my trust by giving me reasons for their action, i.e., by displaying the fact that they are motivated by proper reasons and acting in a trustworthy manner. In this sense, giving reasons encourages trust because it is a way of showing that one reached a decision in a conscientious fashion.

This interpretation can find support in the psychological literature on trust and government. In particular, Tom Tyler's psychological studies tend to provide an empirical basis for arguing that giving reasons helps create personal trust toward public officials. Based on an extensive survey of Chicago residents, Tyler argues that trust in the motives that prompted authorities to make decisions is one of the central factors underlying the willingness to obey legal rules.[13] If people feel that authorities making legal rules are "trying to be fair" to them, they are much more willing to accept those rules. Tyler distinguishes between two forms of trust, which roughly coincide with Pettit's impersonal/personal trust divide. One form is (impersonal) trust in government agents' *competence*, i.e., in the belief that authorities will solve problems well. Another is (personal) trust in *benevolence*, consisting in the feeling that officials are motivated by the desire to be fair and that they care about those with whom they are dealing. Tyler's study reveals that for a majority of subjects, benevolence is more important than competence. People evaluate the agent primarily in terms of their impression of his (or her) positive intentions and general good will towards them. This would then confirm the idea that giving reasons is an integral part of respecting them as well as creating a relationship based on personal trust.[14]

All these alleged virtues of reason giving in the quest for trust have, nonetheless, been severely challenged. One of the main arguments is that giving reasons,

[13]Tyler TR (1997–1998). Public Mistrust of the Law: a Political Perspective. *University of Cincinnati Law Revue* 66, 867.

[14]Of course, there may be a difference between the personal and small scale problems Tyler is studying and "big government" decisions such as decisions to go to war, supreme court decisions, etc. In the latter case, the public might be less concerned by decision-makers' motives and benevolence than in the former. Does it make a great deal of difference to me to know that when deciding to go to war the President cares about me? The answer would probably depend on people.

far from promoting trust, is a source of distrust.[15] The real enemy of trust is not the absence of reasons, it is said. On the contrary, we often trust in the absence of any reasons. The real enemy is deception. By increasingly requiring that government agents support their decisions with reasons, one creates more opportunities for deception and misrepresentation. Officials wanting to shelter themselves from accountability have an incentive to give artificial reasons that shield them from liability rather than candid reasons which might be challenged more easily. In such a situation, giving reasons requirements would fail in relation to both kinds of trust, impersonal and personal. The requirement fails to secure impersonal trust, because it does not work as a proper check on discretion: officials get around it by providing formal or artificial reasons and in reality make largely unconstrained choices. The requirement also fails to engender personal trust, because it provides officials with a deleterious incentive: they are not motivated to be conscientious because people trust them, but on the contrary, they are motivated to provide the reasons that look more trustworthy so as to safeguard themselves from potential liability. Reasons that look trustworthy can be deceiving if they do not reflect the real mental state of decision-makers. Reason giving does not achieve any value when it turns out to be a deceiving practice: trust is lost and respect together with it. Giving deliberately false reasons implies an intention to damage people's plans and their capacity to act autonomously. In that sense, deceiving officials are disrespecting their fellow citizens.

This challenge reminds us that there is always a risk that reason giving requirements yield the opposite of the results that were originally sought. Giving reasons requirements are therefore devices that can be misused and can lead to disrespect and mistrust. This explains why some writers call for constraints on the reasons that can be given by governmental officials. It has been suggested that only reasons that could be accepted from everybody's point of view be given. This would not only ensure that people are respected and have a basis for trust, but also that they can accept the decisions that have a bearing on them.

7.3 Giving Reasons and Reaching Agreement

A major reason for giving reasons is to secure agreement. In everyday life, when one seeks the agreement of others, the best method is to put forward reasons which show why the thing one wants is good or true. If one's interlocutor accepts the reasons as valid, there is a great chance (assuming that one's reasoning is sound and that the individual is rational) that he will also agree with the conclusion.

[15]This is Onora O'Neill's view, as expressed in (2002) *A Question of Trust. The BBC Reith Lectures*. Cambridge: Cambridge University Press, p. 19: "Perhaps the culture of accountability that we are relentlessly building for ourselves actually damages trust rather than supporting it."

7.3.1 Giving Reasons and Legitimacy

In the public context, agreement is even more important. This comes from the idea that no regime is legitimate unless it is acceptable from every individual's point of view. This can be said as soon as one insists that people should be able to enjoy liberty and freedom from domination, that is, on the principle that no one should be able to interfere arbitrarily in their lives. Giving reasons, if seen as the necessary condition for reaching agreement is a fundamental feature of a liberal political regime. In liberal democracies, the legitimacy of authority is thought to be conditional on the fact that its subjects have reason to accept it as binding and therefore to agree with it. Giving reasons is considered to be particularly crucial in pluralist societies, i.e. in societies where people have irreconcilable conceptions of the good and therefore have different practices and beliefs. Pluralist liberal democracies usually exhibit broad disagreement among citizens on issues of principle. Do such disagreements call for restraint in political action? If so, is giving reasons, or giving some specific forms of reasons, a promising restraint strategy?

Rawls's discussion of "public reason" suggests that giving reasons should indeed constitute a restraint principle designed to ensure that every citizen can agree on the most fundamental political issues.[16] Rawls's idea of public reason offers a solution to an ongoing problem affecting liberal democracy, i.e., the fact that people have different, sometimes even conflicting, views which have a bearing on collective life. If divergences of perspectives on fundamental topics dominate political life, society may become severely divided. Yet, as long as citizens are to enjoy equal respect, one cannot require from them that they agree on fundamental political matters on the basis of reasons that they cannot share. Coercing people by means of the conceptions of the good that are held by others might consist in forcing them to embrace reasons that they cannot reasonably be expected to accept. A solution to this problem is found in the reliance on public reasons, i.e., on reasons that citizens share as members of the same political community. According to Rawls, the fundamentals of political life should be agreed upon and set outside political disputes. Since people with different comprehensive views might have similar ideas about political justice, a consensus on the basic political structure of society is possible. For Rawls, appropriate principles of justice are ones that could be sustained by an overlapping consensus of comprehensive views. A well-ordered society will have wide agreement on principles of political justice, supported by such an overlapping consensus. To achieve and maintain this minimal form of collective agreement, the different branches of the government must exercise various levels of restraint in their action through the giving of public reasons. Courts are the most rigidly monitored: they are always subject to the constraints of public reason, which is the "sole reason" they

[16]Rawls J (1993). *Political Liberalism*. New York: Columbia University Press, Lecture VI. "The Idea of Public Reason," pp. 212–254 and (1997) "The Idea of Public Reason Revisited," *University of Chicago Law Review*, vol. 64, No. 3, pp. 765–807 (reprinted in Freeman S (ed) (1999). *Collected Papers*. Cambridge, Mass.: Harvard University Press, pp. 573–615).

should ever exercise.[17] Legislators and citizens enjoy more leeway: for them, "the limits imposed by public reason do not apply to all political questions but only to those involving what we may call 'constitutional essentials' and questions of basic justice."[18]

Public reasons therefore enable citizens holding different comprehensive views to reach a minimal agreement on principles of justice and on the structures of the state. From this perspective, giving some specific form of reasons is ultimately part of what makes public decisions legitimate. However, this idea that reasons are able to play such a role in building agreement and legitimacy has been attacked. Reasons are supposed to foster agreement, but some writers argue that in reality, the opposite may occur: the giving of reasons can reveal an underlying disagreement. This argument is more cogent as applied to reasons in general than to public reasons in Rawls's sense, because the status of public reasons is supposed to be, by definition, uncontroversial and independent of any comprehensive view. But even public reasons can create disagreement. Public reasons are based on political values everyone can reasonably be expected to endorse. However, one might refuse to agree with reasons that give only a partial picture of the whole truth, that deliberately put aside relevant aspects of an issue. One may disagree with the very idea of giving public reasons as a way of reaching collective agreement and thus of legitimizing public action. For many citizens, public reasons are insufficient to justify public decisions and are themselves the object of disagreement because truth, not acceptability, should be the proper basis for agreement and legitimacy. If even public reasons can engender disagreement, then *a fortiori* reasons in general, unconstrained by the Rawlsian concept of publicity, i.e., not based on political values that everyone can be reasonably expected to endorse, run the risk of yielding disagreement.

7.3.2 Giving Reasons and Disagreement

There is a tension between the fact that, on one hand, giving reasons is supposed to foster agreement, consensus and mutual respect, and the fact that, on the other hand, people usually agree on outcomes more than on the reasons justifying the outcomes. Inquiring into the reasons why people support an outcome, it is said, undermines, rather than contributes to consensus. It is easier to obtain the people's agreement on outcomes than on the reasons supporting the outcomes. The consequence is that giving reasons is a source of dissension in society. One explanation is that various people who agree on the same outcome often do so on different grounds: for example, I may think that the minimum wage should be higher on the grounds that people would consume more, thereby boosting the economy and making the stock market go up. You may think that minimum wages should be higher because that would be more fair: as it is, people are underpaid and they could have a better life

[17] Rawls J (1993), p. 235.
[18] Rawls J (1993), p. 214.

if they would get paid more. If the legislator decides to increase minimum wages, we will both agree with the provision included to that end in the statute. Yet, if our representatives decide to give reasons for why they enacted this new provision, (for example, by drafting a preamble stating that the statute is designed to reform labor law so as to defend workers against exploitation by big companies,) then you and I might start disagreeing about it. I will think that this goal is outrageous and that view might weaken my initial agreement with the outcome. I might now oppose the provision as a means for implementing a policy of which I strongly disapprove.

In short, giving reasons increases the number of issues about which it is possible to disagree. Moreover, not only citizens, but officials as well disagree on the reasons that are put forward in support of particular outcomes. When multiple decision-makers are involved, they often disagree among themselves about the reasons they should give to support a particular determination. The problem is especially acute in multimember bodies composed of agents holding divergent rationales.[19] For example, when panels of judges decide cases, it seems easier for them to reach a majority on the outcome than on the reasons. This is readily observable in legal systems allowing for the practice of concurring opinions where one or more judge(s) express(es) his agreement with the holding of the majority, but not with its reasoning.

On the face of such disagreement, one solution may be to limit the number or the nature of the reasons that support outcomes. Arguably, this is what Cass Sunstein suggests with his notion of "incompletely theorized agreement." Public institutions should not strive to give numerous and elaborate reasons for their decisions. In particular, they should perhaps not seek to give "public reasons," i.e. reasons based on political conceptions that could be potentially accepted by all, but which are often very general and abstract. Instead, they should imitate participants in legal controversies, who

> try to produce incompletely theorized agreements on particular outcomes. They agree on the result and on relatively narrow or low-level explanations for it. They need not agree on fundamental principles. They do not offer larger or more abstract explanations than are necessary to decide the case. When they disagree on an abstraction, they move to a level of greater particularity. The distinctive feature of this account is that it emphasizes agreement on (relative) particulars rather than on (relative) abstractions.[20]

The goal here is to obtain consensus on an individual outcome among people who do not want to inquire into questions of political philosophy or into general discussions so as to avoid disagreement over principles. According to this view, giving reasons is more likely to lead to disagreement than to agreement, and can

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[19] This type of situation may even give rise to the famous "doctrinal paradox," which has been discussed, for example, by Kornhauser L and Sager L (1986). Unpacking the court. *Yale Law Journal* 96, 82–117 and (1992) The One and the Many: Adjudication in Collegial Courts. *California Law Review* 81, 1–59. See also Pettit P (2001). Deliberative Democracy and the Discursive Dilemma. *Philosophical Issues* (Supp. *Nous*) 11, 268–299.

[20] Sunstein CR (1994–1995). Incompletely theorized agreements. *Harvard Law Review* 108, 1735–1736.

therefore hardly constitute a proper restraint principle of public action. By the same token, giving reasons cannot be the ultimate legitimizing device for public action.

One response could be that the giving of reasons never aimed at being a completely theorized practice in the first place. It was never the claim that *all* the reasons that are relevant for a particular decision must be given so that the agreement be complete and settle the controversy forever. On the contrary, it could be argued that inherent in the practice of giving reasons is the idea that one gives some, and only some of the relevant reasons. This is based both on epistemological and practical considerations. The epistemological point is that people may converge on a correct outcome even though they do not have a full account for their judgment. They can agree that *x* is true without entirely knowing why *x* is true. In fact, this is very much the case with most of the things we deem true, such as scientific truths: I believe that the earth is turning around the sun but I am unable to demonstrate it. In order for people to agree with a particular determination, it is ordinarily not necessary to give all the reasons that support it. The practical point is that giving *all* the relevant reasons would not only be fastidious and boring but would perhaps present a practical impossibility. Decision-makers would spend their life listing all the applicable reasons for decisions and citizens would spend theirs reading them. Giving reasons is always a partial, non-exhaustive enterprise. For instance, when an institution gives reasons for why *x* decision is the best, it does not give reasons for why a hundred other, different decisions would have been bad, although this might be relevant information. At most, it is usually noted that other decisions *x'* and *x''* would have been less commendable than decision *x* for *z* and *y* reason.

Most often, giving reasons seems a highly selective practice: the reasons given do not exhaust the list of all possible reasons. This is the case because people need to agree with fundamental political decisions; it is also desirable for people to be guided by public decisions, to act on them in everyday life. How can that goal be achieved by the giving of reasons?

7.4 Giving Reasons and Guidance

Usually the purpose of giving reasons is to guide conduct. The ability to secure compliance with decisions and rules, which can also be designated as the ability to be authoritative, is widely recognized to be a central characteristic of effective political and legal institutions. In other words, to be effective, legal rules and decisions must be obeyed. They must influence the actions of those toward whom they are directed. Compliance achieved through deterrence motives or threats of sanction is deemed a controversial method for the effective exercise of legal authority. Instead, authorities need the voluntary and spontaneous compliance of most citizens with most laws, most of the time. Ideally, internal values should lead citizens to want to act in ways that accord with or even benefit the government. In any case, gaining voluntary cooperation with the law involves giving reasons that can actually guide people.

7.4.1 Outcomes Are Insufficient to Guide When Unsupported by Reasons

Giving reasons is necessary to ensure that public decisions effectively guide people. Who are the people that reasons are meant to guide? Public reasons should be forward-looking, composed so as to guide the public at large, to be sure, but also lawyers and other counselors, who must advise clients. Even public decision-makers (such as judges, administrators, and other public officers) need to be guided by reasons. If the law is to be obeyed, it must be capable of guiding the behavior of its subjects. Does this mean that reasons can only function as guides if they are understood by the people to whom they are addressed? Obviously, yes: I cannot be guided by reasons that are wholly unintelligible to me. The trouble is that it is a well-known fact that a good deal of public decisions, especially in technical areas of law, are substantiated by reasons that are obscure not only to the immense majority of the people but even sometimes to the professionals. In light of this common phenomenon, it would be too strong a requirement to assume that only reasons that can directly be understood by their addressees are capable of guiding. In most legal systems, the solution is thought to lie in the creation of institutions entrusted with the task of explaining decisions and their reasons to those who do not understand them. *Mediation* is expected to bridge the gap between reasons and the public. Interested parties in a lawsuit, as well as individuals dealing with administrative agencies rely on intermediaries such as attorneys, advisers, trade unions, NGO representatives, to understand the reasons and explain them. The public at large relies on journalists to provide public accounts and explanations of lawsuits, court or jury decisions, new statutes, regulations, policies, etc. Persons who wish to go further can seek more exhaustive understanding in academic or doctrinal publications. In short, although it is true that people need to understand reasons to be effectively guided by them, they need not understand them directly, but can rely on others as mediators. Of course one must assume that it is necessary that at least counselors and other decision-makers have the ability to understand and act according to the reasons.

If one considers public decisions from a guidance perspective, it seems that what guides most effectively people is not the outcome of a decision, but the set of reasons given to support the decision. Once offered publicly, reasons may be applied to future cases that the governmental organ cannot possibly have before it while justifying a particular decision. This is why reason giving promotes planning. Giving reasons for decisions helps people understand why *x* decision was made and predict the outcome of future decisions in similar circumstances. From this perspective, some may argue that a bare statement of the law, unaccompanied by reasons, would provide little useful information. Decisions that are not supported by reasons do not indicate, for instance, what the public officials will consider in the future to be "like cases." Is the decision a narrow one, based on the particular facts of the case? Or, on the contrary, does it initiate a fundamental change in the area(s) of law under consideration? In particular, when judicial decisions are at stake, lawyers and judges need to know the scope of holdings and the purposes behind them so as to predict whether and how they may bear on similar cases. Does it follow, then, that the more

the reasons, the better? Too many reasons may fail to provide adequate guidance, particularly when decision-makers leave unclear which reasons are crucial to the outcome. How much reason is enough to guide then?

It seems excessive to claim that "bare statements of law," unaccompanied by reasons, have no guidance function whatsoever. It may be true in many instances, but not always. Unqualified statements of the law, especially if they are novel, may provide more guidance than many routine public decisions. In the United States, for example, most district courts do not give reasons at all for their decisions; they do not even write opinions. They do not provide us with a statement of the law, but only with an outcome (the plaintiff won or lost). In most legal systems, a great deal of administrative decisions follows the same pattern: agencies grant or deny petitions to individuals without saying which legal rule(s) control or whether some factual determination explains the result. These are situations of full particularity: cases seem to be decided on their (unspecified) facts, based on legal rules that are left unmentioned.[21] Yet, it would be an overstatement to claim that these decisions do not guide at all. They may not guide someone who is unfamiliar with the area of law in question and the institution making the decision, but they might guide more experienced individuals. These cases probably guide the institution's regulars: for example, lawyers or litigants who frequently appear before a court and petitioners who constantly deal with an agency may still be guided by particularistic decisions unsupported by reasons or by statements of the law. They are rewarded for their familiarity with these outcomes, in part because similar cases might come up routinely, or more generally because they become acquainted with the decision-makers' way of deciding cases.

By comparison with such particularistic and unsubstantiated decisions, when institutions indicate the legal rules according to which they are acting, they provide a substantial form of guidance. Even if they are only literally copying and pasting the applicable legal provision, such unsubstantiated statements of law still retain a guidance function. For example, in a desegregation of public facilities case, a court may limit itself to saying, without providing any further detail, that race cannot be taken into account in placing children at schools. But this decision will still guide the actions of school principals and parents, eventually affecting the whole community. While reasons would certainly prove helpful in the implementation of decisions and in filling potential legal gaps or ambiguities, they are not necessary for guidance.

[21] An intermediary situation would be that of an official decision-maker who only provides an outcome, but where the individuals affected by the decision had the opportunity to present reasons. It may be assumed that the outcome was based either on a dismissal or on an espousal of those reasons. This is typically the case in lower courts: the judge's determination, when unsupported by reasons, can – theoretically at least – be traced back to the arguments that have been forward by the parties during the proceedings. Presumably, this situation provides more guidance than a "bare statement of the law," but less than a decision substantiated by explicit reasons.

7.4.2 *Reasons, Not Outcomes, Enable Decisions to Guide Over Time*

Reasons might not be always necessary to guide *hic et nunc*, but they are indispensable for public decisions to guide people over time. We give reasons because reasons matter more than outcomes: reasons allow for change, adaptation. The understanding of legal rules, of rights, of certain legal concepts, may shift and deepen with time. If past decisions were standing alone, unaccompanied by reasons, it would be very difficult for the law to adapt itself, to evolve. According to Joseph Raz, rights are often used and referred to as reasons in practical arguments.[22] Rights may be analyzed as reasons which generate new duties as circumstances change: they have a dynamic aspect.[23] For example, the right to privacy changes with technological advancement, some things which were acceptable before become impermissible. The right to privacy is not some immutable principle, but a "direction" addressed to courts, to which they are subject as they decide what is necessary to protect privacy. There is no such thing as *the* right to privacy: the right is constituted by a cluster of reasons (for and against allowing x, y, z conduct,) which can be found in a series of supreme court decisions and which can be revalued over time. Lloyd Weinreb's study on analogical reasoning illustrates this adaptation of legal concepts by means of reasons given in judicial opinions.[24] The reasons given by previous judges, more than the outcomes, serve as guides to distinguish relevant from irrelevant analogies and in doing so adapt legal rules to new circumstances. Courts are guided by the reasons in the sense that a previous case's reasons are either adopted or rejected in new cases bearing on the same issue.[25] Reasons thus allow for change and adaptation of the law. But which reasons do that? Do all reasons have the same guidance function?

Not all reasons are guides for actions. Not every reason given by governmental agents is directed toward people's conduct. The term "reason" is indeed used indiscriminately to designate various types of arguments that may have a different status and a different function. The "reasons" given to substantiate public decisions usually encompass three different things: empowering norms, explanatory reasons and normative reasons. Only the last type of reason is strictly designed to guide action.

A substantial part of what is usually called "legal reasoning" consists in officials' showing that they had the power to make a decision, usually by referring to an empowering norm. This is the case when administrative agencies maintain that

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[22] Raz J (1986). *The Morality of Freedom.* Oxford: Clarendon Press, p. 181.

[23] Raz J (1986), p. 171.

[24] Weinreb LL (2005). *Legal Reason. The Use of Analogy in Legal Argument*. Cambridge: Cambridge University Press.

[25] This can be illustrated by the way in which the United States supreme court, in *Katz v. United States*, 389 U.S. 347 (1967), dismissed the reasons that the majority had given in *Olmstead v. United States*, 277 U.S. 438 (1928) and espoused – with modifications – the reasons justifying the dissent.

under *x* statute, they are entrusted with the power of granting or rejecting *y* types of permits, when courts claim that *x* case falls under their jurisdiction in virtue of *y* procedural rule, when congress points to *x* constitutional provision as a basis for legislating, and so on. When a decision-maker refers to such an empowering norm, he uses that norm to mark the decision as valid. The purpose of such reason giving is to show that a decision has been produced in conformity with the established rules and procedures governing the creation of new law in a given legal system. But this reason is not a reason for action.[26] The fact that the decision is produced according to a proper procedure is not a reason for anyone to engage in any specific action, it is merely a way of showing that the decision is legally valid.

From the above discussion it follows that not all reasons are guides for actions. The reasons that explain, for example, how passive smoking may result in lung cancer are not, taken alone, reasons for me to act in a special way. But the reasons that justify the enactment of a norm such as "it is forbidden to smoke in public spaces," namely because doing so would expose non-smokers to passive smoking, are reasons for me to refrain from or to perform certain actions. There is another sense in which reasons can be explanatory. Decision-makers often give reasons that explain their directives so as to enable people to obey them correctly. These reasons are meant to explain their directives to the extent that they provide, as it were, instructions for use. Just like a medicine's directions for use are essential to understand how to abide by a doctor's prescription but do not tell patients why they should take this precise medication; much of public reason giving aims at securing compliance by detailing the steps that individuals must take in order to properly observe the law. Explanatory reasons are found particularly useful to clarify complex and technical rules. For example, in most country, taxpayers receive, together with their income tax returns, accompanying manuals instructing them how to file their forms, with such details as which revenues are taxable on which account, etc. However, knowing how to file my tax returns does not, by itself, give me any reason to actually file them and pay the taxes I owe.

In order to explicate how giving reasons may have a bearing on action, one must distinguish, following Joseph Raz, between two sorts of reasons[27]: "normative reasons," that are considerations for action (e.g., when I say that the reason why I did *x* is that I promised to do *x*) and "explanatory reasons," which are facts or events that explain why things are (e.g., when I say that the reason why I did *x* is that I believed that *y* was the case.) Only the first, the normative reasons, seem to directly guide action. Explanatory reasons in and of themselves do not provide reasons for acting in the sense that they do not tell me why a certain course of action is intelligible and preferable to another.

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[26] That is, this is not a reason for action for anyone other than the official making the decision, except in the very limited sense that knowing that *x* institution is habilitated to make *y* kinds of decisions is a reason for people to bring their case to the competent institution.

[27] Raz J (1975). *Practical Reasons and Norms*. London: Hutchinson, pp. 18–19.

Even though the three sorts of reasons do not all directly guide conduct, they all achieve some form of value in that they reinforce the authority of the legal system. As a consequence, they all, at least indirectly, end up bearing on conduct. Reasons that express empowering norms tend to confirm that a particular decision is authoritative in that it has been issued by the organ which has authority in the matter. Even though the fact that decision *x* was arrived at by the proper official based on a specific empowering norm *y* does not directly provide me with any reason to act in any particular way, it might nevertheless do so indirectly. I may now have a reason to comply with the decision due to the authority of its decision-maker. This reason to act is independent of the content of the decision: I am not yet guided in any determinate way, but I have a presumptive reason to act in the way that is indicated by the decision. Explanatory reasons contribute to law's authority inasmuch as they facilitate the public's understanding why specific decisions are valid or good and therefore justify the authority of decision-makers. Explanatory reasons may also exert an indirect guidance function in a similar fashion to the extent that they demonstrate that decision-makers are experts in the matter, I will have a reason to follow their directives, whatever they are. Lastly, normative reasons, because they directly provide people with reasons to act (or to refrain from acting) in specific ways participate in making the legal system authoritative.

7.5 Conclusion

It appears that giving reasons does indeed guide action, but in a limited and specific way. Not all reasons are guides in the same way and the absence of reasons is not the end of guidance. This conclusion resembles suggestions we encountered before: not all reasons are respectful, not all reasons generate trust and not all reasons yield agreement. The giving of reasons does not fully achieve the four values that have been examined in what precedes (respect, trust, agreement, guidance). For each of the values fostered by the giving of reasons, there is a sort of open-endedness. Reasons are never the necessary and sufficient condition to achieve the four values. However, reasons certainly affect preexisting values. While the situations considered in this paper illustrate the ways in which institutions required to give reasons may fail to achieve these values, it should be noted that some of these same values can be attained by institutions which usually do not give reasons (e.g., parliaments) or which are even precluded from giving reasons (e.g., juries). Even though jurors are prohibited from giving reasons for their decisions, they are assumed to respect defendants and they are commonly trusted and supported by the public. Their decisions do guide legal professionals and the public at large (for example, in the U.S., following a series of medical malpractice suits in the 1980s, insurance companies raised their premiums for physicians based on juries' tendency to award very high damages).

These skeptical remarks should not lead to the conclusion that the practice of giving reasons is wholly overrated and generally fails to achieve any value. I take

it that giving reasons does contribute to the realization of important values, but that cannot be asserted indiscriminately and in an abstract fashion. For a more informed treatment of this issue, the set of values analyzed in this paper should be further examined and explicated by an institutional analysis of the different ways in which decision-makers are subject to or exempted from giving reasons requirements.

Chapter 8
Argumentation and Legitimation of Judicial Decisions

Sandrine Chassagnard-Pinet

The man is a reed, the weakest of the nature; but it is a thinking reed

(B. Pascal, Choix de pensées).

"The field of the argumentation is – according to Perelman and Olbrechts-Tyteca – the one of the likely, the plausible and the probable, in so far as this latter is out with the certainty of calculation".[1] The recourse to argumentation, as a basis of judicial imperative, therefore marks a break with the Cartesian conception of law, whose aspiration is to construct a formal system which can lay claim to the status of science.[2]

According to Descartes, promoter of this philosophical movement "all science is a certain and evident knowledge".[3] A rational construction can only be based on evidence, heard like the intuition of a clear and distinct idea and which is essential as such. Descartes, to this effect, stated "never accepting anything as true that I do not evidently know to be true: that is carefully avoid haste and prevention; and so not understand any more from my judgement that what is presented so clearly and so distinctly in my mind, which I have not had the opportunity to doubt".[4] He considers "everything which is only likely as false"[5] and rejects "all knowledge which is only probable".[6] This rule known as evidence formulates the Cartesian requirement for certainty.

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[1] Ch. Perelman and L. Olbrechts-Tyteca (1958, *Introduction,* p.1).
[2] M. Tutescu (1998, p.9).
[3] Descartes (1628, p. 5).
[4] Descartes (1637, p. 49).
[5] Descartes (1637, p. 38).
[6] Descartes (1628, p. 5).

D.M. Gabbay et al. (eds.), *Approaches to Legal Rationality*, Logic, Epistemology, and the Unity of Science 20, DOI 10.1007/978-90-481-9588-6_8,

Difference of opinion is thus considered as a sign of error.[7] "Each time that two men have opposing judgements on the same thing, it is sure – argued Descartes – that at least one of them is mistaken. None of the two even seems to have science, because if the arguments of one were certain and evident, one of them would be able to present them to the other in such a way that he would end up being convinced by his understanding".[8] When the prescription is dictated by evidence, it is not necessary to argue. The individual can only concede. The bearer of the truth, the wording is essential because it is evident without requiring the support of an argument.

"It is this idea of evidence, as defining reason that must be disputed if one wishes to make a place for the theory of argumentation, which permits the use of reason to determine our actions and to influence the actions of others".[9] It is with this statement that Perelman and Obrechts – Tyteca show their desire to move away from the idea of truth, to develop a judicial logic based on adhesion. The judicial decision is presented as an indisputable truth if it is the result of evidence; on the other hand, it must be argued if you admit that it is only taken from what is likely.

In order to attain support for a judicial prescription, one must then use strategies of persuasion and conditioning in the speech. Contrary to evidence, which imposes itself as such, adhesion involves the person who argues (the orator) and above the person to whom the argument is addressed (the audience).[10] The orator must employ, as Perelman put it, "discursive techniques which induce or increase the mind's adherence to the theses presented for its assent".[11] It is a matter, by means of the speech, of increasing the adhesion of the addressee to the judicial imperative and to convince them of the legitimacy of the law.

Necessary legitimacy which results from evidence, conflicts with a won-over legitimacy which has arisen from persuasion.

Legitimation constitutes a process of developing and justifying the action. "It returns to the question of public approval or rejection of a so-called legitimacy".[12] Applied to the judicial speech, a judgement of legitimacy can only be pronounced after assessing the validity of the formulated imperative. Two paths can be evoked to appreciate this relevance: the legitimacy can proceed in a formal regularity internal to the judicial system; it can also be the result of the material soundness of the speech, which is appreciated according to extrinsic factors.

In liberal societies, legitimacy of the law is assimilated to legality. The pertinence of the legal rule results from the respect of the required procedure. Legality is considered as consubstantial to legitimacy.

Max Weber holds that the type of legitimacy characteristic of modernity comes from a belief in legal dominance. This idea presupposes a judicial order centred

[7] M. Tutescu (1998, p. 9).

[8] Descartes (1628, p. 6–7).

[9] Ch. Perelman and L. Olbrechts-Tyteca (1958, p. 4–5).

[10] M. Tutescu (1998, p.10).

[11] Ch. Perelman and L. Olbrechts-Tyteca (1958, p. 5).

[12] V° Légitimité. *In* A-J Arnaud et al. (1993).

on formal rationality, that is to say, rejecting all imperatives outside the judicial sphere, whether they be ethical, utilitarian or political. Formally rational law contrary to materially rational law is characterised by its axiological neutrality. The triumph of rationalism, in modern Western society, has influenced the conception of the legitimacy that is retained. Weber established a typology of the models of legitimacy which have followed one another through the ages: the charismatic figure, who based legitimacy on the exemplary nature and personal value of a leader, as well as the traditionalist figure relying on the traditional authority of the sovereign, have given way to the rational figure which is founded on the lawful appointment of those of govern and on the legality of their decisions and actions. "The most consistent form of legality now, underlines Weber, is the belief in legality, that is the tendency to obey formally correct prescriptions established according to usual practices".[13] A legal rule is thus deemed legitimate as soon as it has been adopted according to the required prescription and it can be inserted into the system made up of all judicial rules, without undermining its coherence.

Hans Kelsen, in a similar way, separates the question of legitimacy from any axiological assessment. Developing a Pure theory of the law, he dismisses all material consideration and retains an exclusively procedural approach. The legitimacy of the legal rule comes from its validity, which is determined by the regularity of the procedure according to which it has been adopted.

This normative conception makes the legitimacy of the law an endogenous question to a legal order which is contained in its pyramidal hierarchy: the respect of procedural rules relating to the elaboration of the law guarantees its legitimacy. This formal legalist legitimacy conflicts with formal discursive legitimacy. The legitimation of the judicial decision resorts to factors extrinsic to the judicial system.

Lodging a challenge against Max Weber, Habermas objects to the idea of a law based on power and domination. Habermas substitutes the paradigm of power with the paradigm of communication, the legitimacy of domination with that of communicational legitimacy. Thus, Habermas' discourse ehtics leads to a formal validation of the rule. He states that, "it does not provide orientations relative to the content, but a manner of proceeding: practical discussion".[14]

Public approval of legal rules must be obtained by debate. The rules must be submitted to a practical evaluation according to a discursive rule. The orator and audience judge the law's claim to validity in light of the cultural standards in force. For Habermas, the judgement of legitimacy rests necessarily on a choice of values which must then be legitimized by rational arguments. The validation of the law necessitates an agreement brought about by common interest. Legitimacy comes from consensus.

The ideal conditions of the achievement of such an agreement being, in practice, difficult to satisfy, it is to be feared that the legitimacy secured by consensus is marked with artificiality. A more operational legitimacy has, since then, been

[13] M. Weber (1986, p. 234).

[14] J. Habermas (1983, p. 125).

evoked. It is no longer a question of seeking to attain a priori legitimacy founded on prior agreement to the normative project, but a posteriori legitimacy founded on the efficiency of the judicial decision. A teleological reasoning is used in order to show the capacity of the rule to produce the socio-economic effects desired. Legitimacy comes from effectiveness.

If one admits that the validity of the judicial decision is dependant on extra-judicial factors, the judgement of legitimacy must be pronounced with regard to material accuracy of the normative prescription. Two paths can then be used to convince the holders of a right of the relevance of a judicial decision: either to give rise to an agreement on the values which have guided the normative choice, the legitimacy is then sought in consensus (8.1), or demonstrate the aptitude of the rule to satisfy the end for which one has sought, then the legitimacy of the judicial decision results from its efficacy (8.2).

8.1 Legitimacy Sought in Consensus

If one holds that the legitimacy of a judicial decision proceeds from the validity of its normative content, adhesion to the rule necessitates the approval of the values which underpin it. The legitimation involves the pursuit of adhesion based on consensus (8.1.1). To incite this agreement, the author of the judicial decision carries out an increasing recourse to consensual premises (8.1.2).

8.1.1 Adhesion Based on Consensus

The French Code Civil must be developed "according to the principles of this natural equity whose human legislators must only be the respectful interpreters".[15] With these words, PORTALIS, one of the writers of the French Civil Code, attests to the jusnaturalist inspiration which, in line with the framework established the Enlightened philosophers, governed the codification. However, this codification, far from being based on the influence of natural law, has, on the contrary, led to the development of a legal positivism which has been embodied in the school of Exegesis. The authority conferred to the law allows then to push aside every criticism of its contents, inspired by extrinsic considerations. The law is legitimate because it is law.

To go further still, normative positivism shows the principles of assessment of the validity of the rule, which condition its legality. The pure theory of law encompasses legal rules detached from all social or historical context and all moral or ideological requirements. The legality of the rule is thus dependant of its validity and effectiveness. The double requirement leads the rule to be taken in its relationship with other rules. The validity of the rule is conditioned by the procedural regularity of its

[15] Portalis, *Discours préliminaire sur le projet de Code civil*, 1er pluviôse an IX.

enactment, independent of any assessment of its content. The rule is valid because it conforms to a superior rule contained within the pyramidal construction.[16]

Supporters of positivism seek legitimacy of the law in the coherence of the judicial system. However, as it has been observed by Professor OST "no formal system can provide evidence as to its own coherence, and thus assure, on the basis of its own resources its auto-foundation".[17] To show the legitimacy of a rule in any particular system, one must be able to extract it from the latter. The law cannot aspire to an auto-foundation. It cannot be satisfied with an internal legitimacy and must look the source of its validity out with the legal order.

The legitimacy of the judicial decision can only result from the relevancy of its content with regard to extra-judicial values. But it is necessary to convince the addressees of the law of the congruence of the axiological choice operated. Legitimacy is not attached ex nihilo to the judicial decision due to its conformity with enacted procedure but must be obtained through a process of justification. The adhesion of the audience is sought by the speech that encompasses the judicial decision.

So, Habermas accorded the determining role to "procedural rationality such as it is embodied in the practice of argumentation".[18] This he refers to the "communicative rationality", which is the "ability of the speech, orientated towards the listener to favour agreement".[19] The claim of validity brought about by an assertive act necessitates that this be submitted to rational debate with the aim of achieving consensus. Discursive competition aims to produce "reasons which are universally acceptable"[20] of such a nature which lead to the agreement of those involved. Adhesion is obtained by way of an agreement drawn on the premises which determine it. Because the addressees judge the latter to be valid, they give their agreement to the decision because of the underpinning premises.

However, when the speaker initiates the unilateral declaration of an action based on arbitrary intention or expression of simple requirements, he does not seek to achieve a consensus, because no agreement can be obtained. However, "there, too, claims of validity are at stake", holds Habermas, "proposed by one and open to be accepted or rejected by another".[21] But the speaker can only argue to obtaining an "understanding", not an agreement. The listener does not adopt as his own the reasons given in favour of the declared project but rather accepts them as "publicly intelligible"[22] reasons.

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[16] « *The validity of a rule can have no other foundation than the validity of another rule* », H. KELSEN, *Théorie pure du droit* (1962, p. 255).

[17] F. Ost (1985, p. 531).

[18] J. Habermas (1999, p. 43).

[19] J. Habermas (1999, p. 51).

[20] J. Habermas (1999, p. 58).

[21] J. Habermas (1999, p. 57).

[22] J. Habermas (1999, p. 58).

Beyond the speech, communicative rationality extends to social actions. Thus, Habermas speaks of communicative action "when the actors coordinate their plans of action by means of linguistic communication, by making the most of the illocutionary forces which are appropriate to the spoken language".[23] It is a question of leading the audience to "rationally motivated consent".[24] The actors "act according to the success they wish to attain".[25] They develop a "strategic activity" for which the language is "not used in a communicated way (...) but according to its consequences".[26] It is a matter speaker must to lead the audience to support his own goals.

Thus the danger is to use this art of communication to manipulate the audience, to resort to the force of persuasion in order to limit the choices. Consensus could be artificial if it is attained through orchestrated arguments. Legitimacy is not acquired achieving an agreement on common interests but by inciting the adaptation of individual aspirations to the prior choice made by the speaker.

The conditions of rational discussion such as Habermas envisaged are, moreover, ideal circumstances far from real situations. The risk is great, from that moment on, that "the themes of consensus, public opinion and rational discussion provide today a legitimacy for very little to the decision makers, more or less supported by these oracles of consensus which are the makers of opinion polls".[27] The discussion is then no longer the opportunity for discursive rationality but becomes instead a "ritual of power".[28]

An easily achieved and artificial adhesion is therefore sought after by growing recourse to consensual premises.

8.1.2 Recourse to Consensual Premises

According to PERELMAN, adhesion to a judicial decision is obtained by prior agreement, concerned, firstly with facts, then with presumptions and finally with the "values, the hierarchy of values and the common ground recognised within any given society".[29] "All judicial debate, Perelman believes, and all judicial logic is only concerned with the choice of premises which are the best founded and which will give rise to the least objection".[30] And so, the judge must, during litigation, decide between the opposing arguments and demonstrate the acceptability of the

[23] J. Habermas (1999, p. 62).
[24] J. Habermas (1999, p. 63).
[25] Ibid.
[26] J. Habermas (1999, p. 62).
[27] F. Ost (1985, p. 536).
[28] F. Ost (1985, p. 538).
[29] Perelman (1999, n° 95)
[30] Perelman (1999, n° 98).

chosen premises. In order to attain adhesion as to the result, the judge must accept the least controversial premises.

The legislator who looks for the support of the addressees of the law is also tried to set up as premise of the legal solution the consensual principles and the values. He presents the normative content of the law as the application of this "common ground".

In doing so, the modern legislator follows Plato's recommendation. Plato drew a distinction between dry law which only sets out a commandment and persuasive law which includes a prologue.[31] Evoking the image of a musician who captures his audience with his warm-up bars, Plato calls on the legislator to precede his text with an introduction. Legislation of persuasion, announced in this way by introductory remarks, incites an enlightened obedience, whereas a legislation of constraint demand blind obedience.

The legislative prologues required by Plato, first of all took the form, in our modern legislation, of preambles inscribed at the top of the law. The reasons for reform were then removed from the body of the law in order to find its place in a separate legislative preamble. This last technique only allows a restricted diffusion of the motives of the law. Only conscientious members of Parliament and lawyers become informed of it. The motives of the the law no longer reach those for whom the law was intended. The legislator was then tried to reintroduce into the law the motives of his intervention to ensure a better dissemination.[32] In doing so, consensual preambles multiply even within the body of the law.

One of many possible examples of this legislative technique of persuasion is the law of 11 February 2005[33] for "equal of rights and opportunities, the participation and citizenship of disabled people" of which even the title is a federative slogan, uses many incantatory expressions. Article 2 of the law states that "all disabled people have the right to the be part of the national community, which guarantees, as a result of this obligation, access to all fundamental rights conferred on all citizens, as well as full exercise of his citizenship".[34] "The aim of school is to see all pupils succeed" states the "Future of Education" law enacted 23 April 2005.[35]

The legislator does not employ these federative expressions, inserted into the body of the law, as restricting measures, but rather as a presentation of the normative measures of the law. The legislator highlights these consensual principles in order to achieve adhesion of a large proportion of the public, in hoping that the agreement incited is thus transferred to the normative content of the law.

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[31] Platon, *Lois,* IV, 719–733, IX 857b–859d

[32] A-M Leroyer (1998, p. 87); G. Rouhette (1999, p. 37).

[33] La loi n° 2005-102 du 11 février 2005 pour l'égalité des droits et des chances, la participation et la citoyenneté des personnes handicapées, *JO* 12 février 2005. (Law for equal rights and opportunities, the participation and citizenship of disabled people)

[34] Article 2 de la loi, inserted into l'article L 114-1 du code de l'action sociale et des familles. (Code of Family and Social Policy)

[35] L. n° 2005-380, 23 avril 2005, JO 24 avril 2005, p. 7166, C.cons, 21 avril 2005, n° 2005-512 DC, JO 24 avril 2005, p. 7173.

Besides the adhesion to the law, sought by the use of non-restricting federative expressions, it is the adhesion to government policy that may be sought. Thus, the law is used a communicative tool of its own to attest to the action of public powers in areas where society asks for state protection. As such, the law 18 March 2003 for national security states that, "the state has the duty of assuring the security and defence of institutions and national interests, maintenance of peace and public order and the protection of the people and property throughout the whole French territory".[36]

The legislator also disseminates in the law "programme measures"[37] which serve no other purpose than to deliver which serve no other purpose than to deliver messages of policy and action for the benefit of public opinion. If these measures provide an informative even interpretative interest, for the legislator they are, above all, of symbolic importance. The law is thus given a pedagogic[38] and communicative[39] function. Beyond the legitimacy of the law, it is a legitimacy of government policy of which the legislator is trying to convince us through increasing the number these above-mentioned federative references.

This quest for legitimacy whether of the normative measures or the state policy that inspired them, generates, in the body of the law, a proliferation of "legislative neutrons...of which the legal role is non-existent".[40] These legislative preludes are, in effect, unencumbered by any restricting effect. The French Conseil Constitutionel has, in recent judgements condemned this legislative practice stating that, "the aim of the law is to set out the rule of law consequently clothed with normative significance".[41] Of the requirement of judicial security, the Conseil Constitutionel deducted, indeed, the principle of a quality control of the law.[42] The requirement of

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[36] Loi du 18 mars 2003, n° 2003-239 pour la sécurité intérieure (Law relating to National Security) *JO* 19 mars 2003, p. 4761.

[37] C. Atias (1982, p. 219).

[38] « *Nothing is more like a private tutor attached to a child than a government devoted its people* », J. Carbonner (1979, p. 214). Voir aussi, J. Carbonnier (2001, p. 155).

[39] W. Maclauchlan (1996, p. 363); A. Viandier (1986, p. 75).

[40] J. Foyer, *JO* Débats AN 21 juin 1982, p. 3667, with regard to the law on the orientation of research.

[41] Cons. const. 29 juillet 2004, n° 2004-500, *Organic aw relating to the financial autonomy of local authorities*, RTD civ. 2005, p. 93, obs. P. DEUMIER ; LPA 13 août 2004, n° 162, p. 12, note J-E SCHOETTL : 'By the terms of article 6 of the 1789 Declaration of human and civic rights 'The Law is the expression of the general will'. The result of this article and of all rules of a Constitutional value relative to the object of the law, subject to certain measures laid down by the Constitution, the aim of the law is to set out the rule of law clothed with normative significance'. Using the same preamble, Cons. const. 21 avril 2005, n° 205-512, *Loi d'orientation et de programme pour l'avenir de l'école (*The Law relation to the orientation and programme for the future of education*), JO* 24 avril 2005, p. 7173 ; B. Mathieu (2005, p. 250); J-P Camby (2005, p. 849).

[42] The Constitutional Council extended the application of the principle of clarity to non criminal law measures. Cons. Const, 10 juin 1998, n° 98-401 DC, Rec. P. 258) and added to that that objective of constitutional value of acessibilité and intelligibility of the law (Cons. const. 16 décembre 1999, n° 99-421 DC, Rec. P. 136) The Council linked these two principles in the oft-quoted expression, '*It is for the legislator to exercise fully the competence vested in him by article 34 of the*

clarity, intelligibility and accessibility can only be satisfied if the law is precise and therefore normative. Thus, the legislative text must be free from all non-normative arguments.

Measures of which the restricting capacity is unclear are "threatening for judicial security"[43] because these incantatory measures harbour a normative potential upon which judges and administrative authorities may seize.[44] It is for the legislator to "adopt sufficiently precise measures and non ambiguous expressions" in order to warn holders of rights "against the risk of litigation and, as the Conseil Constitutionel adds, to prevent the legislator from transferring "to administrative and judicial authorities the job of fixing the rules, whose resolution has only been confided or entrusted by the Constitution to the law".[45] While the administrative and judicial authorities can interpret the law when necessary, the legislator must not delegate to them the power of making the law by disseminating ambiguous measures in the legislative texts. The risk is seeing these arguments, designed as persuasive expressions becoming normative supports appropriate for establishing legal precedent.

However, the risk of judicial insecurity raised by the Conseil Constitutionel for the removal of non-normative measures from the law, is without doubt very weak in the eyes of other negative effects caused by this practice. The search for consensus can open the way for a double hoax. The legislator assigns to these declarations a mission of persuasion which presents the risk of a double level of manipulation of the audience. The first hoax can be found in the content of the rule: the varnished measures create hopes which may then turn into frustration. The disparity between the principles set out and the normative content of the law can only be deceptive to those whom have given their adhesion to the law under the influence of these prologues. The second hoax is the policy that the law is supposed to embody. The intentions displayed in the law are there to convince the audience of the fact the public authorities are carrying out their requests and responding to their aspirations. The development of the communicative function of the law leads to a transformation of the substance of the legislative text: this then becomes in part descriptive, its imperativity dissolves and its efficiency is limited. Once one has gotten passed the attraction of legislative preludes, the artificiality of the legal notices increases public scepticism regarding the effectiveness of the law and public policy.

The search for legitimacy through adhesion presents two stumbling blocks concerning both the quality of the law (judicial insecurity, the weakening of the

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Constitution. To this effect, the principle of legal clarity that ensues from article 4, 5, 6 and 16 of the 1789 Declaration of Man and the Citizen, imposes on him the duty to adopt measures which are sufficiently precise and non ambiguous wording'

[43] J-E Schoettl, note sous Cons. const., 29 juillet 2004, above.

[44] The most significant example of the normative potential of a non-restrictive measures devised by the legislator is without doubt article 1384 para.1 of the French Code Civil. The judge seized on this introductory article, originally void of any normative significance, to establish a new foundation of civil responsibility.

[45] C. cons. 29 juillet 2004; C. cons., 21 avril 2005

imperativity of the law) as well as its reception by society (its disappointing effect, the artificiality of the principle set out, public scepticism). Persuasive arguments, intended to convince as to the legitimacy of the law should be placed out with the law itself so as not to lead to the false belief that they are of any normative consequence.

"When one acts with the intention of providing a reason for a law, that reason must be worthy of it" stated Montesquieu.[46] And yet, the arguments advanced in support of the law, are less about demonstrating the ratio legis and getting the contest of the holders of rights, but rather clothing the normative content with the attractive finery it was missing.

Faced with the acknowledgement of the artificiality of legitimacy based on consensus, a more operational path of legitimation may be followed. This is based on the effectiveness of the judicial decision.

8.2 Legitimacy Based on Effectiveness

The proliferation of the numbers of laws, their lack of coherence and their vague wording incites judges to move away from judicial syllogism and instead favour an instrumental and teleological reasoning.[47] The decision is made, not by way of formal deduction but with regard to the socio-economic effects of the possible choices. The judge is sometimes led to prior resolution of the appropriate decision, according to its effects before piecing together a rational reasoning to justify it. At the same time the legislator is tempted to adapt his normative choice so that the law may produce the intended results. The evolution of our juridical system favours this instrumentalisation of the juridical decision (8.2.1). It encourages in an assessment of its effectiveness (8.2.2).

8.2.1 The Instrumentalisation of the Judicial Decision

Judicial syllogism traditionally governs the application of the rule of law.[48] The reasoning is meant to be deductive. Starting with a normative proposition; it leads to the decision according to a mechanical reasoning, ruling out any subjective margin of appreciation of the judge. The reactional mode of judicial decisions symbolises an application of the law which is based entirely on deductive logic. This is particularly true of Cour de Cassation (The French Court of Cassation) decisions which retranscribe the syllogistic reasoning which underpin them. Firstly, the decision relates the minor premiss (the facts), the major premiss (the rule of law) from which a conclusion is derived (the pronouncement). Thus, the written judgement reveals the

[46] Montesquieu, *L'esprit des lois*, XXIX, 16.

[47] In this sense, F. Ost (1985, p. 191).

[48] VG Timsit (1988, p. 44)

different stages of mechanical reasoning, which, are supposedly led to the decision of the judge. The judgement is the transcription of judicial syllogism, which must govern the application of the law.

The rigour with which this reasoning is applied is not always apparent as the judge does retain some degree of discretion as to premises of the decision.

The first stage of syllogism consists of the judge establishing and qualifying the facts of the case. This task requires "applying the act in consideration into a pre-existing judicial category",[49] after having identified elements in the act which lead to this qualification.[50] This necessitates an "evaluation of the facts"[51] and supposes the intellectual task of comparison which tries to identify the real situation from a legal concept.

The qualification achieved by assigning the act into a legal category, then the designation of the appropriate legal rule.[52] This will then determine the applicable legal status of the facts in question.[53] This task is carried out beforehand, without consideration of the resulting legal effects. All individual cases must be qualified, according to Lambert "into categories which have been set by an inexorably logical legal precept which is applied to all cases following into its category, without being swayed by taking account of personal iniquity and social wrongdoings".[54]

However, the process may be reversed. The judge having already made his choice as to the appropriate legal status can infer from that the appropriate qualification of the facts. "In turn, there may be a game of mirrors between legal nature and legal status".[55] The judge may be tempted to lessen the charges in order to satisfy some "social need"[56] and through ingenious device modify the applicable rule or even introduce a dispensatory rule.[57]

This judicial practice leads to the phenomenon of disqualification, "a process of judicial politics, by which, in planning to bring about specific effects of an act, the judges substitute the legal category of the act in consideration for a distinct category which has been deemed preferable.[58] The pursuit of any given legal effect necessitates the application of a different qualification that that which would normally be applicable. So, the qualification is the result of a prior chosen legal status.

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[49] G. Cornu et al. (2005, V° Qualification). Voir R. Dekkers (1961, p. 7).

[50] O. Cayla (1993, p. 3).

[51] S. Goyard-Fabre (1972, p. 69).

[52] R. MARTIN (1990, p. 163).

[53] J-L Bergel (1984, p. 255). 'On the opportunity of the lawyer « to move from the concrete to the abstract to give (. . .) the most correct solution' : M. WALINE (1963, p. 359).

[54] E. Lambert (1921, p. 205–206).

[55] F. Terre (2006, n° 325).

[56] Ph. Jestaz (1993, p. 50).

[57] Ibid.

[58] D. Grillet-Ponton (1982, n° 261).

Disqualification has been defined as "anormal qualification"[59] that is to say developed regardless of, indeed going against, rules concerning legal nomination'.[60] It favours the appropriateness of the decision for society rather than the material truth.[61]

The syllogistic process of applying the law, if it shows the perfection required by deductive logic does not acknowledge the prior evaluation inherent in every qualification. The procedure of qualification is not the execution of a purely formal logic, based on an exclusively factual judgement. The changing of a fact into law requires a value judgement governed by "a fundamental and prior evaluation of what is politically desirable or socially acceptable given the particularities of the act".[62] In counterpoint to the deductive criteria in the designation of a legal rule, axiological considerations are mobilised.

The relativity of judicial syllogism is also evident when determining the major premiss, that is to say, determination of the applicable rule of law.

The discursive method allows the judge, according to Dworkin, to discover "the correct answer".[63] In effect, he holds that even where the law is silent, the judge exercises no discretionary power. The judge must make his ruling conforming to the underlying principles of the legislation after having carried out an immanent systemization of the law. The judge must look to the spirit of the law in order to find, "the correct answer", that is to say the necessary answer, free from any judicial subjectivity.

However, this task of rebuilding the framework of the law is largely unrealistic, in an age where there are an increasing number of laws, where legislation has an essentially instrumental nature and where its stability is also declining.[64] What is equally fanciful is the belief in the absolute neutrality of the judge. Even if the latter aspires to a free normative creation, he can modify the content of the legal rule. His contribution as a creator, apparent where he implements notions of adaptable content, is also noticeable when applying a supposedly inflexible rule. Far from being a mechanical legal speech based on purely judicial logic, the judge has at his disposal a power to intervene on the normative content of the major premise. This task of interpretation is guided by seeking the most appropriate decision. Consequently, what are witnessing is an inversion of judicial syllogism. One writer, at the completion of a sociological study, was even led to conclude that "no where does judicial reasoning consist of a syllogism of which the law is the major premise".[65]

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[59] S. Asencio (1999, p. 6).

[60] Ibid.

[61] P. Louis-Lucas (1965, p. 583).

[62] O. Cayla (1993, p. 9).

[63] Voir F. Michaut (1989, p. 69).

[64] Voir S. Rials (1989, p. 3)

[65] Saluden (1983, p. 82).

The justification stated in the judicial decision can also appear as an artificial construction, which masks or clothes the motives behind the solution. The arguments stated conceal the conclusive reasoning. The judge abandons the myth of the "correct answer" in search of a congruent answer. It is a matter of the judge making his contingent decision and, following that, coming up with a rational reasoning that corresponds to his decision.

Thus, it is the role of the judge that must be reconsidered. Beyond his jurisdictional role, the judge is led to exercise a regulatory role.[66] He is vested with a role of arbitrate which leads him to integrate extra-judicial factors into his field of decision. Social regulator, it falls on him to carry out his judgements in a way which is economical, social and political.[67]

Often concealed, the intervention of extra-judicial factors in judicial deliberation can in some case be more visible. The rulings of the Mixed chamber of the French Court of Cassation 23 November 2004 provide one such example.[68] The haut magistrates were asked to determine on the legal status of the contract called of investment or of savings-insurance. According to the terms of the contract, the subscriber verses his savings to the insurer so that sum be capitalized. The insurer is committed to returning this sum of money by a pre-fixed date, increasing the rate of return of the paid capital, depending on the outcome of the investments that were made. The contract guarantees no risk but capitalizes the subscriber's payment to be returned, either to the subscriber himself, if he is still living, or to the designated beneficiary, in the case of the death of the subscriber on the due date. These instruments of pure capitalization, benefiting from government benevolence brought about by concerns about financing the retired, up till now, fell under the status of insurance. This qualification allowed them to enjoy the tax benefits associated with the status and allowing the sum received by the beneficiary to escape inheritance tax.

The Court of Cassation was asked to reconsider the qualification of these contracts. The aleatory status was contested, because contrary to a life insurance contract, the sum of which the insurer benefits does not depend, in this type of agreement, on the life span of the subscriber. And yet, though legal analysis would have "led inevitably to the opposite decision",[69] the court maintained that these contracts fall under the category of aleatory contracts. Taking into consideration the economic disruption that a reclassification of the disputed agreements would cause, the Court preferred to modify the concept of aleatory to allow this type of contract to continue to benefit from the advantageous life insurance status. As the concluding

[66] Voir S. Rials (1989, p. 3)

[67] F. Ost (1985, p. 527).

[68] C. cass., ch. mixte, 23 novembre 2004, D. 2005, p. 1905, note B. BEIGNIER ; RDCO 2005, n° 2, p. 297, obs. A. BÉNABENT ; J. GHESTIN, 'The Court of Cassation held against the requalification of life insurance contracts into capitilization contracts', JCP 2005, I, 111.

[69] A. Bénabent, *RDCO* 2005, n° 2, p. 297.

remarks of the Advocate-general show,[70] the Court avoided requalifying these contracts because of the economic repercussions that such a decision would inevitably cause.

This judgement is thus very telling of the task vested in the court: a regulatory role which necessitates the inclusion of the socio-economic effects of the legal solution into the ratio decidendi. This consequentialism French style is apparent not only by the presence of economic considerations in the Advocate Generals concluding remarks but equally in the fact the amicus curiae were called upon during the investigation of four different cases.[71] Mirroring American practice, the Court of Cassation took into consideration the opinions of people concerned by the judgement.[72] The amicus curiae can thus draw the judge's attention to the possible socio-economic repercussions of the judgement. These extrinsic considerations upset judicial syllogism. Legal justification is depended on of a politic and economic logic. In doing so, the declining importance of the law in the judicial decision leads to the removal of the judge who was the legitimate interpreter. The place of the decision moving outside the law, the judge is no longer the decision-maker, he leaves the decision to the expert, the holder of the knowledge who presides over the decision and who can bring "additional legitimacy"[73] to the judgment.

This evolution, placing the effects of the legal solution at the heart of the decision, is part of a larger movement which evaluates legitimacy of the rule by its performance. The judicial decision becomes a means to an end, of which the efficacy must be assessed.

8.2.2 The Assessment of Effectiveness of the Judicial Decision

From the moment we see the law, no longer simply as a means of regulating social transactions but as an essential organ of the state interventionism, the extent

[70]The 1st Advocate General of Grouttes states in his concluding remarks a note from the Minisrer of Economy and Finance, that make it known that the requalification of the these contracts, 'would profoundly affect future plans, savings and inheritance for which these mixed life insurance contracts represent a simply and efficient tool for millions of French people. Taking into consideration the sums at stake and the reassuring image of life insurance, such a disruption would not only pose a systematic risk for Paris' status, but would not fail to cause profound and long-term lack of confidence of investors towards the whole legal and taxation system set up by the state around savings schemes'.

[71]On 'consequentialism' see: C. Jauffret Spinosi (1989, pp. 61 et s.)

[72]This new procedure is defined by the Court of Cassation as a '*little revolution in French judicial practice'*, Les Échos, 29 avril 2004 (p. 2). On this practice, see G. Canivet (2005, p. 99) ; R. Encinas De Munagorri (2005, pp. 88 et s.) which relates the three other cases in which Court of cassation has referred to the opinions of *amici curiae*. V. Aussi, Y. Laurin (1992); Y. Laurin (1997); H. Ascensio (2001). In the USA, the judges can also be made aware of the effects of a judicial decision by the 'Brandies brief' in which the lawyers can set out, besides relevant precedents,, the positive effects of the solution they advocate and the negative effect of the opposite solution. V.C. Jauffret Spinosi (1989, pp. 61–62).

[73]R. Encinas De Munagorri (2005, p. 92).

of the socio-economic impact of the judicial decision becomes determinant of its legitimacy. "The primacy of means in a system which favours the stability of the formal structure of organisations leaves place to the primacy of goals in a system which favours change, innovation and mobility".[74] The judicial decision constitutes a means which serves pre-fixed objectives. Legitimacy comes from its ability to achieve the goals which it is set.

To insure the effectiveness of the law, starting with its legitimacy, the legist establishes new methods of developing the legal rule in such a way as to ensure the tangible effect of the legal prescription. He develops instrumental procedures of legitimation of the rule, and doing so, takes a managerial dimension. The evaluation of the law thus takes the form of an impact study. A circular of 26 January 1998 established a procedure which as been experimented since 1996. It aims to accompany bills and decrees subjected to Council of State with an impact study.[75] "It is a matter, according to the wording of the circular, of achieving the best suitability of the measure proposed to the objective pursued in order to ensure greater effectiveness of state policies". The proposed text is assessed not only with regard to its legal and administrative consequences, but also in considering its social, economic and budgetary consequences. This assessment of the probable effectiveness of the rule in question leads to the elimination of ineffective texts and, as such limits "legislative inflation" fuelled by the increasing number of ineffective laws. Impact studies are viewed as, according to a 1995 circular, as a tool to "curb the proliferation of regulatory and legislative texts which today make the law obscure, unstable and, in the end, unjust".[76]

The demonstration of effectiveness of the law can equally be in the form of experimentation. The law must then carry out a practical demonstration of its adaptation to a socio-economic context and its ability to achieve the desired effects. The constitutional law of 28 March 2003 relating to the decentralised organisation of French Republic gave constitutional status to this process, distinguishing between national and local experimentation.[77] The Constitution now states that "laws and regulations can now include, for a specific purpose and for a limited time, measures which are experimental in character".[78] At local level, "local authorities or their groupings can, when the law or the regulation provides, derogate, on an experimental basis, and for a limited time, from legislative and regulatory measures that are concerned with the exercise of their competences".[79]

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[74] J. Chevallier et al. (1982, p. 58).

[75] *JO* 6 février 1998, p. 1912.

[76] Circulaire du 21 novembre 1995, *JO* 1er décembre 1995, p. 17566.

[77] La loi constitutionnelle n° 2003-276 du 28 mars 2003 relative à l'organisation décentralisée de la République.(Constitutional Law relating to the decentralised organisation of the French Republic)

[78] Article 37-1 of the Constitution.

[79] Article 72 of the Constitution.

The purpose of the experimentation is to lead the normative power to adapt their law in function with the "knowledge acquired through the practice of observation".[80] However, as the reporter of Constitutional bills at the National Assembly asserted, its use is more often motivated by concerns about "overcoming doubt and to make it easier to accept change".[81] Experimentation is used not as an instrument of scientific legitimation of the rule but as a tool of persuasion.

Further, contrary, to what the terminology would lead one to believe, experimentation cannot claim to be scientific. It does not consist "methodologically in a true test of scientifically objective verification".[82] This is where the method shows its limitations: deflected from its original goal, that of testing the efficacy of a new legal prescription, it could be used for other ends. Experimentation simply for show, feigned experimentation or experimentation-passage in strength, so much drift as incurs this legislative process

Disguised as scientific procedures which put a legal rule to the test, the legislator could then try to use these tools in order to prove his own legitimacy. It is necessary to be careful that "the illusions of science do not help those of the power".[83]

By seeking the coherence or the discursive method or the efficiency, the legislator tries a posteriori to connect his normative choice to a rational procedure although, fundamentally, the judicial decision is contingent. Legitimacy is to be found on other places than in syllogistic or instrumental procedures. "Fundamentally, what is lost in sight, states Prof. OST, is that the power, and the law that it produces, is powered by belief. Every judgement of legitimation contains an investment of trust, an act of support or of faith, not irrational but certainly incompatible with formal or causal logic. All power and all governmental policy only find solid support in the form of complicity which is, at the same time, the acknowledgment or delegation of authority and ignorance of the obscure motives than bring about this transfer".[84]

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[80] C. Mamontoff (1998, p. 354).

[81] Rapport Clément, p. 60.

[82] J. Boulouis (1970, p. 34).

[83] J. Boulouis (1970, p. 85).

[84] F. Ost (1985, p. 536).

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Part III
Logic and Law

Chapter 9
Logic and the Law: Crossing the Lines of Discipline

Dov M. Gabbay and John Woods

Part I: The Possibility of Rapprochment

The present chapter is a small part of an effort to expose the logical structure of English criminal law. Our purpose here is to lay to rest some objections that might be raised against the project. A further aim is to show that, in particular cases, legal concepts actually respond well to logical analysis. We demonstrate this as regards the legal concept of proof beyond a reasonable doubt.

9.1 A Lapsed Alliance

It is said that the first logicians were Greek lawyers. Certainly there were inchoate logicians well before Aristotle's formal systematizations; and it is hardly credible that none was a practitioner at the bars of Attica. Aristotle (384–322 BC) conceived of his theory of the syllogism as the theoretical core of a wholly general account of argument.[1] By these lights, legal argumentation possesses a logical core. It was its preoccupation with argument that bound the logic of the syllogism to the law. It produced an intimate kinship, an alliance enriched by the sharing of further leading ideas, among which we find: *evidence, probability, relevance, reasonableness, precedent, presumption, plausibility, explanation, proof.*

For most of their respective histories, lawyers and logicians have found it natural to share this conceptual terrain. Indeed some of history's most visible logicians were also lawyers. Leibniz (1646–1716) was a lawyer, as was Lukasiewicz (1878–1956); and J.S. Mill (1806–1873) might as well have been. But if one looks at the recent history of these things, the example of Lukasiewicz is anomolous. In the last century,

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[1] *Topics* and *On Sophistical Refutations.* See also Woods (2001) and Woods and Irvine (2004).

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mainstream logic and the law not only went their own respective ways, they showed scant interest in each other's doings.

No one proposing a reconciliation of these two ancient disciplines should be indifferent to the estrangements that came into full force in the century just past. So we shall tarry with them awhile.

9.2 The Integrity of Disciplines

Enquiry attains the status of a discipline when two factors are in play.

One is *subject-matter*. The other is *specialization*. It is a peculiar partnership, in as much as specialization tends to *shrink* subject-matter. So the identity-conferring roles of subject-matter and specialization stand to one another in an interesting kind of "dynamic tension". Still, once these factors are catered for, important byproducts are let loose. By and large, these further features fall into one or other of two categories. One is *methodological*. The other is *professional* or *administrative.*[2] Together they conduce to give the disciplines they serve not only their operational and organizational identities, but also their exclusiveness. They endow a discipline with its kitty-bar-the door standoffishness.[3]

Anyone with a nodding familiarity with modern universities will be aware that we have entered an era of interdisciplinarity. Vice-chancellors, deans and granting agencies thrill to the very idea of it, and programmes designed to implement it are approved and funded at the drop of a hat. It has been a remarkable development in light of the inherent resistance that the disciplines display towards foreign trespass. For what *is* interdisciplinarity if not a kind of extraterritorial intrusion? It is therefore hardly surprising that most interdisciplinary initiatives fail outright or are dubiously graced by outcomes that are scorned, or merely ignored, by the home disciplines.[4] The present chapter is an exercise in interdisciplinary enquiry. It seeks, however modestly, to bring together the ancient disciplines of law and logic in ways that overcome their entirely natural territorial antagonisms. Given the modern record, this is an undertaking suffused with risk. Statistically speaking, chances of success are scant. Why would we bother?

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[2]A discipline's identity is shaed by those methods of operation that are characteristic of it. Professional or administrative traits influence conditions of entry, issuance of qualifications and general management of the discipline's infrastructure, including ways and means of the dissemination of results.

[3]The idea of disciplinary integrity is an ancient one. Aristotle refused admittance to "inappropriate" premisses, even if true. A statement is inappropriate in an argument when it belongs to a discipline different from the one represented by the argument's conclusion. See *On Sophistical Refutations* 172^a8 and *Physics* 223^a 21^7–15, 263^a4 -264^a6.

[4]To mention just one example, informal logic has produced a vigorous research-programme in the past thirty-five years or so, but one could count on the fingers of one hand (with room left over) leading representatives of the mathematical mainstream who have paid it the slightest heed.

For all the sheer rubbish that interdisciplinary initiatives sometimes give rise to, there have been of late some highly instructive successes. Biochemistry is now a mature science, having achieved its independence from the parent disciplines. Cognitive science is a newer hybrid, brought about by the merger of computer science and psychology. Cognitive science is not yet as mature a science as biochemistry, but its boosters are legion and its prospects glowing.[5] Biochemistry is an attractive example of the *offspring model* of interdisciplinary enquiry. Neither chemistry nor biology, it numbers among its principal results insights that chemistry alone and biology alone are powerless to sustain, or even formulate, and yet its existence as a *bona fide* discipline has not damaged the integrity of either parent. Cognitive science also seems headed toward the status of a fully independent offspring discipline, but with some interesting differences. One is that one of the partners, computer science, is itself an interdisciplinary enterprise, and psychology, the other partner, has recently opened itself to instruction from neurobiology (which in turn is a union of medicine and biology).

Not all interdisciplinary successes fall into the offspring camp. A notable example is the *take-over* model, typified by Descartes' greatest achievement, the algebraicization of geometry. What Descartes (1596–1650) showed was that algebra is a *minimum vocabulary* for geometry. His founding of analytic geometry is a paradigm of reductive interdisciplinarity, in which one of the partner disciplines, if not driven into outright retirement, is nevertheless revealed to be expressively redundant. Take-over interdisciplinarities bear some likeness to zero-sum games. They are mergers that often produce winners and losers, in which losers are, in some way or other, junior partners of the others. In extreme cases, the losing partner *does* go into permanent retirement.[6] Offspring interdisciplinarities, on the other hand, produce multiple winners. The parent disciplines are left intact, and neither they nor the new discipline need be considered junior to the others.

The establishment of a discipline's expressive redundancy is rarely an end in itself. Someone in John Le Carrϑ's novel, *A Perfect Spy*, remarks that anyone coining unnecessary and confusing terms is little more than a piss artist. There is useful instruction in this pungent observation. If the take-over by discipline D' of discipline D establishes the expressive redundancy of D, that might be of interest to those interested in expressibility as such. More commonly, there is s deeper interest. For example, if D were met with (apparent) ontological or epistemological difficulties of which D' is free, then D's expressibility in D' would suggest that it is in fact free of those difficulties. This is a useful reminder that take-overs needn't wholly disfavour the over-taken. What an over-taken discipline may lose in foundational independence might free it from conceptual or epistemological complexity. Still, the character in Le Carrϑ's book makes an important point. There is little to

[5] A notable dissident is Jerry Fodor, for whom the name of cognitive science is an oxymoron. ([Fodor, 2000])

[6] As witness the displacement of astrology by astronomy and of alchemy by chemistry.

recommend the tarting up of one discipline in the notation of another if nothing else follows from it.

Both the take-over and offspring models admit of *partial* instantiation. Not every take-over is as comprehensive as that of geometry by algebra. As logicians will know, Heyting's intuitionistic calculus is a part of logic representable in the modal system S4, a different part of logic. Similarly, biochemistry is not the offspring of all of chemistry[7] and all of biology, but rather of respective parts most congenial to one another. It is a congeniality born, for the most part, of a cross-over of interests and an intersection of subject matter. Here, too, the equivocal role of subject matter is on view. If its primary function is to protect disciplinary integrity, its further function is to weaken disciplinary monopolies. Not only is the territorial protection afforded by subject matter degraded by the integral constraints of specialization, but considerations of subject matter open a discipline to foreign incursion (provided it is not *too* "foreign").

The *partial offspring* model seems clearly best for the interactions of logic and law. No one we know sees in such a rapprochement even the slightest prospect of take-over; nor is there particular reason to anticipate the emergence of a wholly realized offspring discipline. The more realistic expectation is that

Proposition 1 (Elucidation of common concepts) *In those respects in which logic and the law share basic concepts, interdisciplinary success requires that the one discipline achieve conceptual elucidations that the other doesn't (or can't) provide.*

Corollary 1a *Since the present authors are logicians, it is appropriate that they attempt to satisfy Proposition (1) by providing elucidations of legal concepts that flow from logic's treatment of them. Needless to say, it may also be hoped that legal scholars would produce elucidations that flow conversely.*

9.3 Interdisciplinary Skepticism

How reasonable is it to expect that we might achieve some degree of success in the manner of Proposition (1)? The natural state of a discipline is to resist foreign incursion. A discipline's default position is that extraterritorialities are unhelpful. We might say, then, that

Proposition 2 (Inertia) *Disciplines are inertial with regard to extra-disciplinary incursions.*

That is one strike against our project. Another is occasioned by the modern structure of logic itself. The American logician W.V. Quine (1908–2000) famously quipped that logic is an old discipline, but since 1879 it has been a great one. The reference to 1879 is to the year of publication of Gottlob Frege's *Begriffsschrift* (Frege, 1879), which marks (somewhat honorifically) the subordination of logic to mathematics, itself a kind of take-over. The mathematicization of logic had been underway

[7] Notwithstanding the widely held belief that all of biology is reducible to chemistry.

in fits and starts since the seventeenth century (Leibniz, 1966) and had achieved considerable momentum by the middle of the nineteenth century, especially in England (Boole, 1847, 1958; De Morgan, 1966, 1847).

In Frege's hands, the mathematicization of logic is decidely ironic. It instantiates the take-over model of interdisciplinarity. Its driving idea was *logicism,* the doctrine that all of arithmetic reduces without relevant loss to pure quantification theory and set theory (themselves united by a common purpose). Frege (1848–1925) saw logicism as a corrective to Kant's doctrine of the synthetic apriority of arithmetic. Frege's purpose was to show against Kant (1724–1804), that arithmetic was an analytic discipline.[8] This he would do by finding an uncontestedly analytic discipline to which arithmetic would reduce. No one at the time seriously doubted that logic was indeed analytic. The problem was that by the time of the logicist program, arithmetic had gone transfinite, a momentous turn to which the logic of the day could not begin to offer satisfactory accommodation.[9] Thus was occasioned a remarkable transformation within logic itself, in which the old syllogistic logic was jettisoned in favour of innovations purpose-built to achieve the take-over of arithmetic. Let there be no mistake, modern logic was a take-over of the old logic, but it was motivated largely by the transfinite character of the new arithmetic, together with the desire to have a logic that would take arithmetic over. Frege, along with Charles Peirce (1839–1914) independently, would succeed in the one respect only to fail in the other.[10] The new logic would flourish, but the attempt to reduce arithmetic to it would fail.[11] This, too, is ironic. Much of the impulse to mathematicize logic was to facilitate logic's appropriation of mathematics. With the failure of logicism, there was ample motivation to re-think the desirability of mathematicizing logic. But, as things turned out, it was a transformation that stuck, and it set the stage for a century and more of rich attainment in that logic's four main precincts: *set theory, proof theory*, *model theory* and *recursion theory*.[12]

Therewith a problem. We may call it the *apples-and-oranges problem.* Having taken the mathematical turn, logic detached itself from its historic mission of producing the theoretical core of a wholly general theory of argument and reasoning. In so doing, it substantially fractured the enduring kinship between the ancient disciplines of law and logic. It was a transformation that engineered a radical alienation between the two former friends. For while legal argument and legal

[8] An analytic discipline was thought to be one all of whose truths are so solely in virtue of the meanings of their contained terms. On the other hand, a synthetic *(priori* discipline was taken to be one whose truths while not analytic (hence synthetic) are nevertheless knowable independently of sensory experience. Kant's logic is examined in Tiles (2004).

[9] Transfinite arithmetic studies actual, rather than potential, infinities, conceived of as quite definite cardinal or ordinal numbers

[10] Frege (1964, 1978) and Peirce (1931–1958, 3. 328–358, 3. 456–552 and 4.12–20).

[11] The principle reason that one of the host disciplines – set theory – was shown to be inconsistent, and subsequent attempts to produce a consistent rehabilitation of sets were not credibly analytic.

[12] A more detailed treatment of the mathematicization of logic may be found in Gabbay and Woods (2004a).

reasoning remain to this day *context-sensitive, agent-oriented, concretely realized, non-demonstrative, highly nuanced* and strikingly *tacit*, the new logic was *symbolic*, *formal, abstract, deductive, context-free, agent-insensitive, explicit* and, most of all, *mathematical*. Apples and oranges. Worse, phosphorous and water.

Further discouragements lie in wait. One flows from a particular aspect of the apples-and-oranges differences between law and logic. The law – especially the common law – is deeply responsive to an *epistemology of tacitness*. With respect to some of its leading concepts – proof beyond a reasonable doubt and determination by the balance of probabilities are two – there is an attitude of Don't Ask – Don't Tell. It is typified by a well-known observation of *McCormick on Evidence*:

> Reasonable doubt is a term in common use as familiar to jurors as to lawyers. As one judge has said it needs a skillful definer to make it plainer by the multiplication of words. (Strong, 1999, p. 517)

Here is an attitude embodied in an epistemological maxim which we might call the Tacitness Principle:

Proposition 3 (Tacitness) *Articulation risks conceptual distortion.*[13]

One need hardly say that the common law discloses many exceptions to the Tacitness Principle. What matters for present purposes is that, where the law does endorse it, a logician would be strongly minded to demur from it. Accordingly, since logic greatly prizes explicitization and precision, there are fundamental issues on which, to a degree at least, logic and the law have opposing epistemological inclinations.

If the law and mainstream logic disagree on the extent to which precision and articulation are attainable virtues (if virtues at all), they also disagree, or appear to disagree, on a further equally fundamental epistemological issue. The law embodies a *fallibilist epistemology*. But logic has long since championed the high road of certainty. Fallibilism is a philosophical thesis about the relationship of error to knowledge.[14] Its central idea is that

Proposition 4 (Fallibilism) It *can be reasonable to execute knowledge-acquiring procedures that one knows will, on occasion, produce error.*

Proposition (4) is itself contextualized by three related claims: (a) Given their constitutions and the circumstances in which they operate, error is in principle unavoidable by beings like us. (b) Errors, when committed, are in principle recognizable as such. (c) Errors, once revealed, are in principle open to correction.

These are considerations that mitigate the "crap-shoot" aspect of unadulterated fallibilism, and much welcome on that account. Even so, Proposition (4) states

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[13] Hart and Honorϑ's *Causation in the Law* also imported into legal studies, via the concepts of "family resemblance" and "open texture", a rejection of essential definitions, occasioned by developments in ordinary language philosophy (Hart and Honorϑ, 1959). See also the entry on "indeterminacy" in Bix (2004, pp. 97–98).

[14] Its present-day form derives from Peirce (1955).

the dominant fact, since each of these mitigations is open, in turn, to erroneous application. So, the correction of an error might produce a further error.

Fallibilism, then, is not merely the view that it can be rational to employ methods which one knows to be imperfect, but also that, for certain ranges of cases,[15] the best procedures possible will harbour these imperfections. If this is right, an interesting implication presents itself.

Proposition 5 (Error-persistence) *For beings like us, fallibility persists even under the maximization of error-avoidance.*

Corollary 5(a) *If fallibilism is true, maximal error-avoidance does not guarantee error-elimination.*

Epistemic procedures aim at knowledge. Imperfect epistemic procedures aim at knowledge imperfectly. If fallibilism is correct, imperfect epistemic procedures are the best that we humans can command. Where, then, does this leave the project of knowledge? A traditional skeptic might answer that this must leave the project of knowledge in tatters. The fallibilist is not so-minded. His further view is that

Proposition 6 (Taking for knowledge) *Although such knowledge as can be got is got by imperfect procedures, knowledge is nevertheless a realizable attainment for beings like us.*

Proposition 7 (Defeasibility) *Under the requisite procedures,* taking something as known *advances the project of knowledge defeasibly, and nothing advances it non-defeasibly.*[16]

Although fallibilism has had some good innings in the past decades, it is greatly at odds with a longer-lived and more deeply dug-in epistemological rival. It is a rival admitting of variations – some with celebrated names, and not always pairwise compatible. At the appropriate level of generality we can call it simply *infallibilism*, and characterize it as the view that

Proposition 8 (Infallibilism) *Fulfillment of the project of knowledge turns on epistemic procedures that* eliminate *(rather than minimize) error.*

How do these reflections bear on the matter presently under review? They bear as follows. The law incorporates a fallibilist orientation. Mainstream mathematics has an infallibilist signature.

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[15] All, in some versions.

[16] Defeasibility is a notion introduced to the philosophy of law by Hart HLA (1907–1992) in his lectures on Moral and Legal Reasoning in New College, Oxford in the academic year 1951–2.

9.4 Answering the Skeptics

We have four challenges that require a response.

a. A partnership between logic and the law is made improbable by their respective inertial resistances.
b. The differences between logic and the law are so great as to create an apples-and-oranges problem for any prospect of interdisciplinary rapprochment.
c. On some central issues logic and the law are riven by a fundamental disagreement over the Tacitness Principle.
d. The law and logic split along fallibilist and infallibilist lines.

We shall briefly consider these objections, beginning with apples-and-oranges.

9.4.1 Apples-and-Oranges

It would be wrong to leave the impression that the mathematicization of logic has generated an uncontested monolith. Even as Frege's and Russell's logicistic projects were unfolding,[17] alternative approaches were being developed. Intuitionism, many-valued and modal systems emerged as early alternatives of classical logic.[18] Some of the beneficiaries of this advance were epistemological concepts, such as *knowledge* and *belief* (Hintikka, 1962), and moral/legal concepts, such as *obligation* and *permission*, all of which were conceived of as modal operators by analogy with the alethic modalities, *necessity* and *possibility*. Of particular relevance to legal studies is the modal logic of obligation and permission, *deontic logic* so-called (Mally, 1926; von Wright, 1951); see also (Bix, 2004, p. 50)

Most of these non-classical developments reflect an interest in how reasoning is actually done. In the case of modal logic, there is a recognition that reasoning often pivots on what is taken as *necessary* or is assumed to be *possible*. Epistemic logic takes notice of the role that reasoning plays in the attainment of *knowledge*. Deontic logic examines the logical relations that connect the concepts of *obligation* and *permission*. Much of the motivation of many-valued logic arises from the *vagueness* of human languages. Even intuitionist logic was designed better to capture the structure of mathematical reasoning on the ground. None of these developments required, or aspired to, the abandonment of an abstractly mathematical methodology. This suggests that this kind of formal treatment is not intrinsically hostile to an interest in reasoning as it actually occurs. Even so, it could not be denied that a significant gap

[17] Bertrand Russell (1872–1970) was also a notable proponent of logicism. As it happens, however, Russell had a different understanding of this doctrine from Frege's. While interesting, and important for the philosophy of mathematics, this is a point that need not occupy us here.

[18] Brouwer LEJ pioneered intuitionist logic in the teens of the last century. A standard formulation is Heyting (1966). Many-valued logic appeared in Lukasiewicz (1920). C.I. Lewis' work on modal logic dates from 1912, and is accessibly reported in Lewis (1918).

remained between the methodology and the subject matter, a gap which theorists attempted to bridge with the device of *ideal models* (for reservations, see Gabbay and Woods, 2003c).

The gap considerably narrowed with the emergence of "user-friendly" logics in the second half of the past century. These developments arose from three principal sources, and largely independently of one another. From logic itself there flowed a rich pluralism of reinvigorated modal logics (Gabbay, 1976; Kripke, 1963), logics of relevance (Anderson and Belnap, 1975), time and action logics (Gabbay et al., 1994) and other forms of dynamic logics (Gochet, 2002; van Benthem, 1996), situational logics (Barwise and Perry, 1983), game-theoretic logics (Hintikka and Sandu, 1997)[19], and systems of belief dynamics (Alchouron et al., 1985). Significant advances were also made by computer scientists and AI theorists. Some of the best-known of these developments include default logics (Reiter, 1980), theories of defeasible reasoning (Rescher, 1976),[20] non-momotonic reasoning (Schlecta, 2004), logic programming (Kowalski, 1979; Pereira, 2002) and various extensions and adaptations of them to the imperatives of time-sensitive, resource-based cognitive agency (Ginsberg, 1987).

A third source has been the informal logic movement, comprising three overlapping orientations. One is argumentation theory (Freeman, 1991; Govier, 1986; Johnson, 2000; Johnson and Blair, 1994, 2002; van Eemeren and Grootendorst, 1984; Woods, 2003), and fallacy theory (Hamblin, 1970; Walton, 1995; Woods, 2004; Woods and Walton, 1989). Completing the trio is dialogue-logic (Barth and Krabbe, 1992; Gabbay and Woods, 2001a, 2001b; Hamblin, 1970; Hintikka, 1981; Mackenzie, 1990; Walton and Krabbe, 1995).

We see in these various developments considerable encouragement of the idea that modernized systems might well be restored to logic's original purpose of investigating the structure(s) of real-life argumentative practice and reasoning as it actually occurs. It is an interesting rehabilitation, incorporating an unmistakable drift to the practical aspects of argument and inference.

This drift towards the practical is given further impetus by developments in cognitive psychology, especially those that take a mental models approach (Johnson-Laird and Bryne, 1991) or favour a bounded-rationality orientation (Gigerenzer and Selten, 2001) towards cognition.[21] Another stimulus is the practical logic of cognitive systems advanced in (Gabbay and Woods, 2003b, 2004b, 2005a).

These are important innovations both collectively and in their own right, and fully deserving of a name. We propose "the new logic" as a fitting baptism (Gabbay and Woods, 2001a). The net resultant of these transformations is that the alienation of a strictly mathematical and symbolic orientation from the give-and-take of legal thinking is substantially mitigated. The proof of the pudding is in the eating, needless to say. But the closure of the gap between mainstream logic and the law is

[19] See also Bix (2004, pp. 77–78).

[20] See also Bix (2004, p. 50).

[21] See also Bix (2004, 26–27).

sufficiently encouraging to take much of the sting out of the apples-and-oranges objection.

Proposition 9 (Law and the new logic) *The apples-and-oranges objection is largely answered by the various adaptations of the* new logic *to the peculiarities of real-life reasoning.*

9.4.2 Inertia

If we are justified in accepting Proposition (9), an answer to the reciprocal inertia objection easily falls out. It is true that disciplines have a natural tendency to resist one another's advances, but as the example of analytic geometry, mathematical logic, biochemistry and cognitive science shows, when the conditions are right, such resistance can be overcome. Here, too, the very existence of the new logic justifies a certain optimism for a fruitful partnership between logic and the law. Still, as we say, the proof of the pudding is in the eating. We may take it that

Proposition 10 (Inertia) *Proposition (9) gives us reason to attempt the reconciliation, albeit, at this early state, without the re-assurance of guarantees.*

9.4.3 Tacitness

Logicians who investigate the structure of science have long recognized the tactiness in which the proclamations of science are systematically rooted. It is wholly typical of scientific laws that they hold *ceteris paribus*. The invocation of *ceteris paribus* clauses is a kind of hand-waving. It points to the importance of background knowledge which cannot, then and there,[22] be made fully explicit. The practical turn in logic engenders a wider recognition of tacit knowledge as factor in cognition as such. A dominant example is the phenomenon of common knowledge (so-called) in which propositions are advanced without their accompanying justifications.[23] A further instance is a class of practices made successful by the sufficiency of their comportment with the requisite rules, but in the absence of anything like a general articulate command of them. Memory, too, is highly selective in what it stores at high levels of articulability.

Gabbay and Woods (2004b) sets out the general structure of a resource-bound logic. A logic is conceived of as a model of the behaviour of real-life cognitive agents. In this approach, an agent is performing reasonably only in relation to at least three factors.

[22] In some accounts, ever.

[23] In some accounts, without the possibility of recovering their justifications.

1. The cognitive target that he is aiming at.
2. The standard required (or sufficient) to hit that target.
3. The resources available for the task at hand.

It is clear that agents, whether individuals or institutions, routinely operate under conditions of cognitive-resource scantness. In the real world, agents must transact their cognitive agendas in the face of incomplete information, limited time and constraints on computability. Comparatively speaking, institutional agents (NASA, for example) do much better than the man in the street on all three scores. But relative to the loftiness of its cognitive targets and the strictness of the standards for meeting them, NASA, too, often knows the challenge of squeezed resources.[24] But, next to NASA, beings like us tend to aim lower and call upon less strict standards in following through. (We say more about this in the subsection to follow.)

Given the pervasiveness of resource constraints, agents of all types have a large stake in proceeding economically, that is, in ways that conserve scant resources. Accordingly, agents operate in *cognitive economies*. At their respective levels, both individual and institutional agents owe their rationality to how effectively they manage to transact their cognitive agendas "on the cheap." This bears directly on the factor of tacitness.

Proposition 11 (Economizing with the tacit) *Tacit knowledge and tacit understanding are attended by significant savings in the cognitive economy.*

One should not make more of Proposition (11) than is in it. We are a long way from suggesting that articulation is never possible or desirable. One of the central tasks of a *theory* of a given body of practice is to articulate the canons against which success is measured, notwithstanding that practitioners on the ground are not in the general case able to give full expression to them. Language is a case in point. Speaking is comparatively easy. Linguistics is terribly difficult. Given that the law admits of a distinction between legal practice and legal theory, there is occasion to still the present objection. A logic of the law is a theory. It seeks to articulate the structure of the practice of legal reasoning. It is no impediment to the theory's success that the fruits of its articulations are not always of direct edification to the legal reasoner in the buzz and boom of actual practice. Even so, given that a resource-bound logic is a theoretical model of the actual behaviour of cognitive systems, it must take pains to reflect the tacitness and inarticulacy of reasoning in the raw.

One of the attractions of classical variations of mathematical logic is the extent to which they are able to narrow the gap between articulate theories and tacit practice. In some instances, the theory's target properties are effectively recognizable by the reasoner on the ground. But this does not change the fact that even when recognition procedures are ready to hand, typically they are not invoked by real-life reasoners. What is more, the more a logic converges on the task of representating reasoning in the raw, the less it is able to make its target properties mechanically ascertainable.

[24] Something of an understatement, in the wake of the Columbia disaster.

9.4.4 Fallibilism

A procedure that makes a target property (e.g. validity) effectively recognizable is called a *decision procedure*. A decision procedure is one that executes mechanically, finitely and infallibly. This helps us see that mainstream mathematical logic has an infallibilist orientation which, in some cases, is directly accessible by the agent in the field. It is important to observe that mainstream mathematical logic investigates cognitive processes for which infallibility is an attainable goal, at least in principle. Mainstream logic investigates the target of truth-preservation and, as a standard necessary for attaining it, validity. It discloses proof-rules and other devices for meeting this standard. The validity standard and infallibility fall into a wholly natural alliance. We could say that they were made for one another.

Still, the technically austere (and highly conservative ideal of truth-preservation is at once too expensive and cognitively inappropriate given the actual interests of cognitive agents. It is no exaggeration to say that if we attempted to hold it to the validity standard, the criminal justice system would in short order be a paralyzed disgrace. Given our interests and our position in the world, most of what we seek to know is not deductively available to us. Reasoning, as such, is dominantly *ampliative*.[25] Legal reasoning is a paradigm of this.

Here, too, we must say that the extent to which a logic seeks to model the real-life behaviour of cognitive agents, it must (to say the least) displace the validity standard from the centre of its preoccupation. Given its purpose-built structure, mainline mathematical logic must fail in this regard. But the new logic is another thing entirely.

Accordingly,

Proposition 12 (Fallibilism and the new logic) *Since the new logic strives to model the reasoning of actual agents, it has a stake in recognizing the fallibilist character of such reasoning.*

These are our answers to objections that a theoretical rapprochement of logic and law is an imperiled thing *in principle*. If our answers are adequate, we have reason to say that the logic and law project is not impossible. Welcome as it is, it is a rather weak result. In Part II we attempt a footfall on higher ground.

Part II Commonality of Concepts

9.5 Logically Salient Concepts of Law

Some of the general notions embedded in legal practice and theoretical jurisprudence are of little direct interest to the logician. For all their juridical importance, the concepts of copyright and easement, to take just two examples, have little in their

[25] Reasoning is ampliative when its conclusions contain information not present in the premisses.

makeup by which they could reasonably be called concepts of *logic*. However, perhaps it is not surprising that a large number of the notions that underwrite litigation have the dual significance of being at once concepts of law and concepts of logic. These are some of the major building blocks of the logical structure of the law. As we have said, the concepts that constitute the laws logical structure are these: *evidence, probability, relevance, reasonableness, precedent, presumption, plausibility, explanation,* and *proof.*[26] We now give some brief indication of how each of these might be approached logically.

Evidence. The legal concept of evidence subdivides into three categories: *Physical, eyewitness,* and *expert*. Of the three, the latter two are of greatest logical interest. Eyewitness evidence is known to be unreliable when a witness's memory is stimulated by leading questions from a person in authority, or when the witnessed event was highly shocking or terrifying (Loftus, 1980). Expert evidence relies upon a judge's prior determination of qualifications and salience. Given that the judge is himself not an expert in the fields subject to these determinations, the judge is acting in those matters as an ordinary person reasoning in the way of ordinary persons. The instability of eyewitness testimony also calls into question the role of eyewitness *corroboration* (Walton, 1997; but see Woods, 2004; see also Cohen, 1980, 1982, 1991; Schlesinger, 1988). The logician's role is to reconcile the probativity of such corroboration in face of the known instabilities of eyewitness recall. A major task concerning the admissibility of expert testimony is determining the extent to which the judge (who sometimes takes expert advice on what to count as expert advice) is subject to the traditional *ad verecundiam* fallacy, which, in its modern form is the fallacy of defective or unjustified reliance on the sayso of another (Woods et al., 2004; but see Woods, 2004). A central task of a legal logic is to ascertain how determinations of the admissibility of expert testimony evades the charge of fallaciousness.

Evidence at trial is led by testimony. Testimony comes from witnesses by what lawyers call *examination*. Similarly, evidence is rebutted in two ways. One is by the direct testimony of contradicting witnesses. The other is by *cross-examination*. Examination and cross-examination are further aspects of trials that are subject to procedural constraints. These constraints, in turn, are grist for the mill of the standard of proof. Examination and cross-examination alike exemplify *interrogative models* of dialogue. What makes legal examination by question and answer distinctive is the distance of their regulatory canon from interrogations made at common sense levels and in scientific enquiry. The interrogative logics of examination and cross-examination are (in different ways) peculiar to legal practice, and

[26]Perhaps as further attestation to the law's fondness for the tacit, only one of these nine shared concepts (viz., "precedent"; see also the entry on "analogy") has an entry in Brian Bix's *A Dictionary of Legal Theory* (Bix, 2004). True, one of the aims of that little book is to help adjust its readers to theoretical concepts imported from disciplines other than the law. Even so, these are striking omissions in any work carrying such a title. We might observe in passing that whereas Bix (2004) contains an entry on "rationality" (to which "reasonableness" is merely cross-referenced), it has nothing to do with the legal notions of the reasonable man and of reasonable doubt.

this is something that the legal logician must give an account of. It is also clear that cross-examination has the structure of what Aristotle called *ad hominem* arguments (Aristotle, 1984), also so-called by John Locke (Locke, 1975). In Locke's characterization, one makes an *argumentum ad hominem* against an adversary when one "presses him with consequences of his own principles and concessions". In modern logic, *ad hominem* arguments are usually regarded as fallacious (Woods et al., 2004). This is a puzzle for the logician. Either cross-examination is inherently fallacious (which seems absurd on its face) or somehow the modern logic of fallacies has yet to produce and adequate account of *ad hominem* reasoning (Woods, 1993).

A further feature of adversarial proceedings is the extent to which parties seek to discommode one another. Cross-examination, for example, pivots vitally on factors of non-cooperation. True, the requirement that witnesses give truthful and complete answers considerably constrains the extremes of non-cooperation (viz., refusal to answer and perjury), but in actual practice considerable room is left for evasion and spin, depending on the skill of the parties. Non-cooperative dialogue logics study these factors in a systematic way, and accordingly are an indispensable tool for the legal logician (Gabbay and Woods, 2001a, 2001b).

Probability. Probability is a fundamental concept of reasoning in every system of jurisprudence since the *Talmud*. From antiquity to the Renaissance, probability has been the object of theoretical elaborations of considerable subtlety (Franklin, 2001). Probability is no less a part of common sense reasoning and scientific enquiry. As science entered its modern period in the 17th century, probability was caught up in the general drift toward the mathematical. By the end of that century, Fermat (1601–1665), Pascal (1623–1662) and Huygens (1629–1695) had succeeded in mathematizing a conception of probability applicable to games of chance – or *aleatory* probability (Cohen, 1989).[27] This, the probability calculus, has been considerably refined in the ensuing centuries, and in its present form is without question the most successful and complete formal articulation of probability yet attained. One of the attractions of the probability calculus is the promise it offers of describing the logic of ampliative (i.e., other than strictly deductive) reasoning. "Bayesianism" is a term that names the most dominant of these contemporary theories of probabilistic reasoning (Pearl, 1988). In recent years a dispute has arisen between those who hold that Bayesianism[28] is the canonical theory of all conceptions of probability, including probability in the law (Cohen, 1980), and those who see its range as limited to the peculiarities of games of chance. Anti-Bayesians tend to look with a certain wistfulness at the four thousand year history of learned commentary on probability. They tend to regard the probability calculus as a "Johnny-come-lately", too self-enamoured for its own good (Cohen, 1980; Franklin, 2001). Right or wrong, there is ample necessity to test the mettle of Bayesianism in jurisprudential contexts. Such is a task for a *probability logic* (Williamson, 2002).

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[27] "Aleatory" derives from the Greek word for game.

[28] Bayesianism is named after Thomas Bayes (1702–1761), discoverer of the famous probability theorem that bears his name. There exists some scholarly disagreement as to how much of a Bayesian Bayes himself actually was. This is a question that need not detain us here.

Relevance. On the standard legal definition, information is relevant to a proposition when it affects, positively or negatively, the probability that that proposition is true (Cross and Wilkins, 1964). In actual legal practice, it is clear that it is *ir*relevance, rather than relevance, that wears the trousers. The epistemic artifices that justice requires will often cause the exclusion of relevant evidence, but a judge will also make every effort always to exclude information that is irrelevant. Aside from its formal definition, considerations of relevance also crop up in evidence-exclusion decisions that are not determined by whether the evidence in question would, if admitted, alter the probability of some or other salient claim. Here the exclusions are based on the finding that, if admitted, it would compromise the accused's right to a fair trial. Very often these decisions involve evidence of the accused's character (Cross and Wilkins, 1964; Murphy, 2000). A common reason for exclusion is the judge's belief not that the evidence is probabilistically irrelevant but rather, even if probabilistically relevant, a jury would be enflamed by hearing it. It is here perhaps that we find the law at its epistemically most artificial. There are ranges of cases in which a judge will exclude testimony about an accused's character which, in common sense terms, well might increase the probability of some proposition of importance to the prosecution, but which he excludes on grounds of irrelevance.

This apparent contradiction is explained by observing that, in its actual employment in legal reasoning, the concept of relevance is ambiguous. In one sense, evidence is irrelevant because it doesn't affect the probability of some pertinent proposition. In the other sense, the same evidence is declared irrelevant precisely because it *does* enhance the probability of the proposition in question. It is therefore excluded not on grounds of probabilistic irrelevance but rather on grounds of what might be called "standard of proof" irrelevance, where, among other things, the standard requires that verdicts be reached dispassionately. We see from this that considerations of relevance in this second sense tie in with the proof standard in quite intimate ways. In plain words, the standard of proof is made strict not by the strictness of the target it aims at, but rather by constraints on what prosecutors are allowed to lead as evidence, even evidence that satisfies the probabilistic definition of relevance. It falls, then, to the legal logician to deploy the resources of an appropriate *logic of relevance* (see, e.g., Gabbay and Woods, 2003) for the purpose of bringing these interconnections into tighter focus. In particular, the logician has the task of unpacking this notion of standard of proof-irrelevance. Part of that story will be one that takes due note of the factor of *bias*. Bias lies at the heart of these exclusions. It is entirely possible that evidence exists which, if led, would wholly comply with the law's own definition of relevance. If a judge excludes it on the grounds of irrelevance, he excludes it for its *bias*. Again, he excludes it not because it doesn't increase the probability of the accused's guilt, but rather because it does increase the probability of his guilt and does so in ways that may induce the jury to give it excessive *weight*. The evidence is excluded because the judge thinks that the jury will make too much of it, with consequent risk to the requirements of a fair trial.

Precedent. Precedents are a "core aspect of common law reasoning . . . [but in] most civil law systems, courts are not bound by prior decisions" (Bix, 2004, p. 163).

Reasoning from precedents is the law's closest link to *analogical argument* (Bix, 2004, pp. 5–6; Gabbay and Woods, 2005). In the logical literature, there are two entirely disjoint concepts of analogy, which answer to an ancient distinction. One is the notion of analogical *predication*[29] (Woods and Hudak, 1992). The other is the notion of analogical *argument* (Woods and Hudak, 1990).[30] The former concept pivots fundamentally on embedded ambiguities. The latter notion is a generalization of arguments from *logical form*. Precedential reasoning in legal contexts instantiates the second sense of analogy, and presents the logician with the task of exposing the structure of the logical forms on which they generalize.

Precedents are also extremely interesting for the further questions they raise about *ad verecundiam* thinking in the law. Precedents are created by judges both brilliant and stupid, scrupulous and foolish. They are binding irrespective of the qualities of the judges who created them. They derive their force not from a judge's virtues, and notwithstanding his vices; indeed they derive their authority from the judge's *office*. This raises the question of why a dubious decision by a stupid or careless judge should have any precedential standing.[31] On the face of it, this is a state of affairs tailor-made for the charge of *ad verecundiam* fallaciousness especially in the sense of the *Port Royal* logicians of the 17th century (Woods, 1999).[32] It falls to the logician to examine the credentials of this accusation in the context of a suitably general logic of the fallacies. The anomaly noted above recurs. Either the doctrine of precedent is replete with fallacy, or the modern logic of fallacy has not taken adequate notice of the logical structure of criminal law.

Presumption and plausibility. In its employment of the notion of presumption, and of the allied concept of presumptive reasoning, legal reasoning most nearly takes on the character of *default logics* (Reiter, 1980) and related forms of non-monotonic and defeasible reasoning (Schlecta, 2004). This generates a question of central importance for a legal logic. Presumptive inferences, whether mandatory or discretionary, are considerably influenced by considerations of plausibility. Plausible inferences are inferences made and accepted on sufferance. In the standard logics of such matters, presumptive reasoning and plausible inference fall well short of achieving standards that would justify the name of *proof* (Rescher, 1976). But it is precisely proof to which criminal procedure is fundamentally directed. The question, then, is whether procedures that are so imbued with aspects of the presumptive and the plausible can make any kind of logically justified claim on the notion of proof. In this there is a clear affinity to the doctrine of "the ordinary man"

[29] As with the statement that Philip Mountbatten is the First Lady of Great Britain.

[30] As with the claim made by some opponents of same-sex marriage that if the argument for same-sex marriage is sound, so too is an analogue of that argument on behalf of polygamy.

[31] In actual practice, courts are allowed "a great deal of freedom to 'distinguish' prior decisions as not being truly on point for an issue currently before the court." (Bix, 2004, p. 163).

[32] In the *Port Royal* approach, the fallacy in question is one of deferring not to the merits of the case but rather to the rank or social status of one of the parties. The principal authors of the Port Royal *Logique* were Antoine Arnauld (1612–1694) and Pierre Nicole (1625–1695), although some scholars conjecture that Pascal contributed the sections on probability.

(or "reasonable person"), in particular, with the assumption that epistemically justified convictions can be entrusted to the untutored and the unlearned, when reasoning in the way of the ordinary man.

Explanation. In a criminal proceedings, it is the duty of the prosecution to present to the jury (or where applicable to the judge) a *theory of the evidence*. A theory of the evidence is a hypothesis that best explains it. In the prosecution's hands, this hypothesis is always that the accused is guilty as charged. Although the accused need not enter a defence, it is usual in practice for counsel for the accused to do one or other (or both) of two things. One is to try to discredit the prosecution's claim that the accused's guilt best explains the evidence. The other is to launch an alternative theory of the evidence in which a hypothesis other than the accused's guilt is proposed as better explaining the evidence. What lawyers call a theory of the evidence (or theory of the case), logicians call *abduction* or, more particularly, "inference to the best explanation" (Harman, 1986; Lipton, 1991).[33]

Legal reasoning is thoroughly abductive (Gabbay and Woods, 2005). Some philosophers of science are of the view that a hypothesis' explanatory force is rarely, just as it stands, of probative value, i.e., that the satisfactoriness of an explanation of something is not a particularly reliable marker of its truth e.g. (van Fraassen, 1980). We ourselves share this view. This is problematic if true. If explanations don't confer truth, then, if the hypothesis that best explains the evidence is that the accused is guilty as charged, how can it be that this does anything at all to advance a juror in his basic duty, which is to determine whether the charge against the accused has been *proved*? It is a challenging issue for the legal logician, for whose solution he must develop the appropriate logic of abduction (see Part IV below).

Proof. The law's interest in proof centers around a distinction between the *burden* of proof and the *standard* of proof. The law is expressly clear about the former and not so clear about the latter. In either case, there is work for a logician to do. In the matter of burden, the criminal law is clear that proving the case rests solely with the prosecution and that an accused is subject neither to a duty to present a defence nor to a disadvantageous inference should he not do so. In actual practice, it is rare for this contrast to present itself so cleanly. This suggests that from the point of view of effective case-making, it is frequently if not typically the case that a defence is actually presented. On the face of it, the injunction not to draw inferences disadvantageous to an accused who chooses to stand mute is not heeded (or able to be heeded) by jurors. This needs to be accounted for in what dialogical logicians call the *logic of response to challenge* or – in one of its present-day meanings – *dialectic* (Barth and Krabbe, 1982; Gabbay and Woods, 2001b, 2001c; MacKenzie, 1990; Walton and Krabbe, 1995).

The standard of proof is a pricklier issue. Among lay people it is widely believed that in criminal cases the standard is, as it should be, artificially strict. It is quite true that in the criminal law justice sometimes trumps truth, and that the law will

[33] As we show in Gabbay and Woods (2005) inference to the best explanation is just one form of Abductive reasoning, albeit it a common one. Even so, it seems the right form of it for reasoning to a verdict in criminal trials.

tolerate epistemically wrongful *acquittals* as a cost of avoiding epistemically wrongful *convictions*. Accordingly, from the point of view of common sense there are epistemically compromising restrictions that courts will impose upon what a jury is allowed to hear. We see here the law's determination to acknowledge situations in which social goods trump epistemic goods. This is indeed an artificial intervention, and it often has the cumulative effect of making counsel's evidential targets harder to hit than would be the case in non-legal settings. In that sense, too, there is an element of strictness. But it is not the *juror's* job to judge the admissibility of evidence. His task is to assess the evidence as presented and to make of it, if he can, an assessment of the prosecution's theory of the case. These are his fundamental duties, and in performing them the juror is not required (or allowed) to engage in thinking that is either artificial or particularly strict. For he must determine the accused's guilt or innocence on the evidence he is allowed to hear as an ordinary person, reasoning in the way that ordinary reasoners reason.

This provides the logician with a central task. It is to specify the conditions under which reasoning is that of the ordinary person (hence the importance in our approach of the notion of practical agency). The logician must identify its characteristics, and he must offer an account of what it is about such reasoning that answers to the Crown's (and the public's) aversion to wrongful conviction. In a word, if the reasoning that leads to a conviction is distinguished by neither special expertise nor learnedness, how can it be believed that reasoning of this kind rarely leads to a bad result? No one would dream for a moment of leaving the results of neurobiology or topology to the ruminations of the untutored and the unlearned. Why should criminal procedure be an exception to this?

This brings us to the close of Part II. Our case so far has been that there is nothing in principle that rules out the logic and law project, and, by way of shared concepts, there is reason to think that the project might succeed. We said at the beginning that, while topical overlap may be encouraging, what really counts is whether the one discipline can make elucidations of the other's concepts that the other has not made, and perhaps could not make. A case in point is the proof standard in criminal trials. Our further purpose is to show how it attains a considerable degree of conceptual clarification in a branch of logic that deals with abduction. In the Part to follow, we lay out a schema for a logic of abduction. In the Part after it, we use the logic to probe the concept of reasonable doubt.

Part III: A Sketch of a Logic of Abduction

9.6 Ignorance Problems

We begin with the idea of an *ignorance problem (IP).*

Definition 1 (Ignorance problems) *An* IP *exists for a cognitive agent* X *if and only if* X *has a cognitive target* T *that cannot be attained from what he currently knows (or equivalently from* K*, his current knowledge-base).*

*IP*s present cognitive agents with two options. One is to acquire new information that will enable *X* to attain *T*. Accordingly, for an agent *X,*

IP-option # 1 (X overcomes his ignorance) *X* extends *K* to some successor knowledge-base K^* such that K^* attains *T*.

Example: Not remembering how to spell "accommodate", *X* checks his online dictionary. Now he knows.

Another response to an *IP* is to acknowledge that the pair <*K, T*> constitute for *X* an insolubilium. Accordingly,

IP-option # 2 (X's ignorance overcomes him) Unable to succeed with option # 1, *X* capitulates.

Example: Not remembering how to spell "accommodate" and lacking access to a dictionary, *X* decides to settle for a near synonym.

It is well to note the dynamic character of this pair of options. For example, *X* might try and fail to exercise option #1 at time t_1, and at time t_2 he might acquiesce to option #2. Yet at time t_3 he might recur to option #1 with good results.

Many people are of the view that, when an agent is confronted with an ignorance-problem, alternatives # 1 and # 2 exhaust his option space. In fact, there is a third option. *It is the founding datum of abduction.*

IP-option # 3 (Presumptive attainment) *X* finds an *H* which, if he did know it, would together with *K* solve his IP, and from that fact he conjectures that *H*.

Example: Not knowing how to unify the laws of black body radiation, Max Planck postulated quanta and thereby presumptively achieved the unification (and revolutionized physics.)[34]

Option # 3 incorporates the element of conjecture in an essential way. This is obvious in the case of *H* itself, but what is often overlooked is that this does not solve the original problem. *X*'s problem is that his *T* is attainable only on the basis of what he now knows *(K)* or can readily get to know(K^*). His situation *now* is that *T* cannot be attained either way. If he selects an *H* such that the truth of *K* revised by *H would* hit *T,* then *conjecturing H* does not produce K^*. In particular, *K* together with *H* (hereafter *K(H)*) is not a knowledge-base for *X*. So it does not solve *X*'s ignorance problem.

This highlights the second irreducible element of conjecture that option # 3 embeds. *K(H)* doesn't hit *T*, but we may say that it hits it *presumptively.* Accordingly, option # 3 offers *X* not a solution of his ignorance-problem, but rather attainment *faute de mieux* of a lesser target. Instead of a target that admits of only *epistemic* attainment, it proposes a conjectural variant of it that provides *presumptive* attainment. This is deeply consequential.

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[34]Of course, over the decades quantum mechanics has acquired truly impressive levels of empirical confirmation. But at the time of its original conjecture there was nothing whatever in the physics of the day that lent it the slightest degree of confirmation. Here again we see the diachronic character of enquiry. What begins as an abduction may end up as a confirmed fact.

Proposition 13 (Ignorance-preservation) *Whereas deduction is truth-preserving and induction is probability-enhancing, abduction is* ignorance-preserving.

Proposition (13) sets forth what we will call the *ignorance condition*. For any account of abduction, it is a condition of adequacy that

AC1 A theory of abduction must honour the ignorance-condition

Option # 3, as we see, is not a solution of an IP; it is a *transformation* of an *IP* into a problem that conjecture can solve. It is a response to an *IP* that requires *X* to lower his sights with regard to *T*. It turns on *X*'s disposition to *satisfice* rather than *maximize.*

Here, too, it is prudent to emphasize the dynamic character of *IP*s and the responses that they induce. A cognitive agent might try and fail with option # 1, and then move to option # 3. If it also failed him, option # 2 might now recommend itself. If option # 3 succeeded, *X* might persist with it until, so to speak, he came to know better, in which case he might move to option # 1; and so on. Accordingly, we say that

Proposition 14 (IP-relativities) IPs *arise in relation to targets in play at a time and resources then available. Responses to* IPs *retain those targets and proceed in ways, permitted or otherwise, by subsequent resources.*

Peirce and others have emphasized that it is a condition on the scientific admissibility of an abductive conjecture *H* that it be *testable*, as indeed the quantum hypothesis turned out to be. By these lights, a solution to an abduction problem is also a step in a process that solves the originating ignorance problem. So, for the class of cases that Peirce has in mind,

Proposition 15 (Ignorance-mitigation) *Although a solution to an abduction problem preserves the ignorance that gave rise to it, it may also contribute to the solution of the originating problem by identifying* candidates *for the status of new knowledge.*

It is necessary to observe, however, that in certain cases, abductive conjectures are *not* scientifically testable. For example, various forms of philosophical skepticism attract inference-to-the-best-explanation abductions. It may be that the best explanation of our external world experiences is that there is an external world that produces them. But to require that the external world hypothesis be testable is to beg the question against the skeptic, which in turn, ruins the anti-skeptic's rejoinder. Accordingly,

Proposition 16 (Testability) *Testability is not intrinsic to the making of successful abductive hypotheses.*

Corollary 16 (a) *Proposition (16) is of clear relevance to abductions in which the winning* hypothesis *is "guilty as charged."*

9.7 Abduction Problems

We now have the means to define abduction problems *(AP)*. With *K* and *T* set as before,

Definition 2 (Abduction problems) *X* has an *AP* with respect to *{K, T}* if and only if he has an *IP* with respect to *{K, T}* in response to which he is disposed to exercise option # 3.

Generalizing IPs

An *AP* is an *IP* to which *X* responds in a particular way. It substitutes conjecture for knowledge. It is the received view that all abduction problems are ignorance problems. This is a mistake. It is easy to see that the structure of abduction problems is wholly preserved if we substitute for *K* any cognitive state with regard to which presumption is epistemically junior to it (belief is the obvious example). Accordingly, given that an ignorance problem represents an *epistemic* shortfall,[35] a variant of it would represent a *doxastic* shortfall,[36] or in some cases a *plausibility* shortfall. In each case, the conjecture deployed by the abducer's solution would have to meet two strong conditions.

Proposition 17 (Epistemic juniority) *If* H *is a solution of an* AP, H *has a lesser epistemic status than the cognitive standard against which the original problem arose.*

Proposition 18 (Effective juniority) *If* H *is a solution of an* AP, *then although there is an epistemic disparity between it and the epistemic standard against which the* AP *arose,* H's *epistemic juniority must comport with the requirement that it produce a presumptive solution of* AP.

Proposition (17) generalizes on the ignorance-preserving character of abductive solutions to *IP*s. It provides that in its fully general form, abductive solutions are *cognitive deficit*-preserving. Proposition (18) offers the helpful admonition, that for all their cognitive limitations comparatively speaking, successful *H*s must have the wherewithal to produce rationally adequate, though cognitively subpar, solutions of their *AP*s. Proposition (17) gives us occasion to broaden adequacy condition *AC1*, which calls for theories of abduction to honour the ignorance-condition. As now we see, in its more general form, *AC1* would demand that abductive theories honour the *cognitive-deficit* condition. Henceforth we shall read the ignorance-condition in this more general way, in the absence of indications to the contrary.

9.8 Avoiding a Confusion

When a reasoning agent conjectures an *H* that bears the presumptive attainment relation to his cognitive target *T*, he is operating at an *epistemic* disadvantage. If he

[35] "Epistemic" derives from a Greek word for *knowledge*.

[36] "Doxastic" derives from a Greek word for *belief.*

cannot attain *T* on the basis *K* of what he now *knows*, he may conjecture a proposition *H* that he doesn't know but which, if it were true, would, in apposition to what he does know, attain *T*. Or, in a variation, if *T* cannot be attained on the basis of what a reasoner *strongly believes* or what he *takes to be highly probable*, his hypothesized *H* must be a proposition that he neither (that) strongly believes nor takes to be (that) highly probable. As we see, the epistemic juniority of *H* is relative to the epistemic standing of the *K* in relation to which the ignorance-problem arose initially. So it bears repeating that the agent's recourse to *H* is from a position of *relative* epistemic juniority, and that this aspect of juniority is expressly recognized in the fact that in selecting it, the agent is proceeding conjecturally.

Note, however, that the content of the agent's conjecture of *H* is that *H* is *true*. This is as it should be, given that th conjecture of *H* turns on the fact (or what the abducer takes to be a fact) that if *H were* true, then *H* in apposition to *K* would attain the cognitive target *T*. Philosophers often characterize truth as an *alethic* property of propositions (or theories). Given that "alethic" derives from the Greek word for "true", the appellation has a certain redundancy about it, but not one that occasions any real harm. In fact, it is a baptism that affords us an essentially important distinction for the logic of abduction. Accordingly,

Proposition 19 (Epistemic v alethic factors) *While it is essential that a successfully abduced* H *possess the requisite* epistemic *juniority, it is neither necessary nor desirable that it be* alethically *subpar.*[37]

Corollary 19 (a) *If we put it that abducing a* H *is always a kind of guessing, it is easy to see that what the abducer hopes for is that his guess will* turn out to be true. *Abducers deliberately set their task as one of guessing, but they do* not *aspire to guess what is false.*

The same lesson applies to *K*-parameters of strong belief or propositions held as highly probable. In conjecturing *H*, one's epistemic hold on it must be of a lesser grade than that of strong belief or propositions held as highly probable. But nothing precludes the abduced hypothesis hitting the alethic standard of truth. On the contrary.

9.9 Abductive Schematics

Although ignorance abduction is but a case of epistemic-deficit abduction, we will here confine ourselves to the former as an expository convenience.

Let *T!* express that *T* is a (contextually indicated) agent's target. *K* is the agent's knowledge-base, K^* a closely accessible successor of *K*, *R* the attainment relation

[37] In classical approaches to truth, any proposition that is alethically subpar is false. In many-valued approaches, an alethically subpar proposition has a less truth-like value than the proposition to which it is subpar. In truth-approximation approaches, one proposition is alethically subpar to a second when the former is less approximately true than the latter.

for T, R^{pres} the presumptive attainment relation, H in hypothesis, $K(H)$ the revision of K by H, $C(H)$ the conclusion that H is a justified conjecture and H^c the discharge of H. Then the schema for abduction can be sketched as follows.

1. $T!$ [declaration of T]
2. $\neg(R(K, T)$ [fact]
3. $\neg(R(K^*, T)$ [fact]
4. H meets conditions $S_1 \ldots, S_n$. [fact]
5. R^{pres} $(K(H), T)$ [fact]
6. Therefore, $C(H)$. [conclusion]
7. Therefore H^c [conclusion].

Where H is the hypothesis or conjecture that solves the AP for $\{K, T\}$, $C(H)$ expresses that it is justified to conjecture that H. In the final line of the schema, H^c reflects two things. One is its release for premissory duty in further inferences in the IP's subject domain. The other (denoted by 'c' in superscript position) reminds us of H's conjectural origins.

9.9.1 The Reach of Abduction

A contentious question is whether a sublogic for H exists, and, if so, how it would go. The H-factor presents the abduction theorist with at least two questions.

1. What are the conditions under which hypotheses are *thought up*?
2. What are the conditions under which hypotheses are *deployed*?

It is easy to see that part of the answer to (2) is that deployed Hs should honour the abductive schema. In some approaches (e.g. Aliseda-Llera, 1997; Kuipers, 1999), H is required to be minimal, and neither to bear R to T nor to be inconsistent with K. In the present model, the conditions on H are less specific. The reason for this is that we are unsure about the proposed constraints. Let us take these in order. (This helps us specify certain of the conditions $S_1, \ldots S_n$ mentioned in clause (4) of our abductive schema.)

a. *$K(H)$'s minimality:* An ambiguity lurks. Does the condition require that H be the least modification of K that delivers the intended goods? Or, does it require that H modify the least class of K that delivers the goods? Or does it mean both? What we have here, in all three cases, is a contingency elevated to the status of a logically necessary condition. It is true that abduction problems don't require for their solution everything whatever the agent may know at the time. It is also true that winning hypotheses aren't wantonly redundant. In actual practice, abductive reasoning is from subsets of K augmented by not overly redundant hypotheses.

This is a fact for our schematic models to take note of. But minimization achieves this end over-aggressively

b. *H's independence*: The requirement in question is that it not be the case that *H* alone bear R^{pres} to *T*. Of course, one wants to avoid mischevious instantiations of *H*. If *T* is our target, we don't want *H* to be *T*. Other cases should give us pause. Causal inference is sometimes structured in such a way that *T* calls for a causal account of some phenomenon *P* and *K* fails to provide it. It may well be the case that although *K* itself doesn't yield the cause of *P* it does *indicate* that *H* might be a hypothesis worth considering. For this to be so, it is not at all required that *H* itself, if true, not be causally sufficient to *P*. So *H* could cause *P* even though the abducer rests his selection of *P* on the facts that *K(H)* also causes *P*, and *K* (by itself) *suggests* that *H* be entertained.

c. *H*'s *consistentcy with K*: There are cases in which the abducer is required to reason from databases that contain unresolved inconsistencies. Juries, for example, must determine the guilt or innocence of accused persons from evidence-bases that are routinely inconsistent. As we saw a theory of the evidence is an abduction that generates a verdict on the strength of what best explains the evidence, inconsistency and all.[38] Here, too, we find the constraint excessive.

9.9.2 The Cut-Down Problem

Perhaps the greatest problem posed by the thinking up of hypotheses is that, on any given occasion, a candidate for selection occupies an up to arbitrarily large *space of possibilities* or (*candidate space).* Whatever the details, it appears that abductive agents manage to solve what might be called a *cut down problem.* In the general case, it would appear that the hypotheses that an abducer actually entertains are relevant and plausible subsets of large candidate spaces. (We note in passing that the idea that the minimality condition seeks to honour is handled here non-quantitatively by relevance and plausibility *filters).* It is doubtful that the full story of the dynamics of cut down can be told in any logic, no matter how capacious; but part of it, certainly, requires the logician's touch. Accordingly,

Proposition 20 (Relevance and plausibility) *In giving an account of* H *an abductive logician should deploy the resources of the appropriate logics of* relevance *and* plausibility.[39]

It would seem that plausibility also bears in a central way on the question of hypothesis *selection.* It is implicated in a further step of the cut down process. It

[38]This may appear to generate a very bad problem for criminal jurisprudence. If the standard in criminal trials is *proof* beyond a reasonable doubt, how can it be envisaged that an abductive *conjecture,* however confidently made, could rise to it? See Part IV below.

[39]For relevance, see Gabbay and Woods (2003b); for plausibility, see Rescher (1976) and Gabbay and Woods (2005).

cuts down the set of *entertained* hypotheses to subsets (ideally a unit set) of the most plausible.

Abductive reasoning is shot through with considerations of plausibility and presumption. In our abductive it is explicit that presumption plays a role. It plays it in two connected ways. If we have a successful *H,* then *K(H)* will hit the abducer's target presumptively. Correspondingly, it may plausibly be inferred that the conjecture of *H* is justified; that is to say, that the presumption of *H* is reasonable. Most of the work to date on the logic of presumption has been done by default logicians in the computer science and AI communities. As we have them now, such logics haven't adapted well to the particular requirements of abduction. There is work still to be done.

Proposition 21 (Presumption) *The logic of the conclusional operator "therefore" should subsume an appropriate logic of presumption.*

9.10 Grounds of Action

In a standard situation an ignorance-problem presents an agent with two choices. One is to acquire the knowledge that solves the problem and then to *act* on it in ways that may conduce to the agent's further interests. The other is (perhaps temporarily) to admit defeat and to postpone any action that would be suitably occasioned by a solution to the problem if it existed.

As we have seen, there is also a third option. Perhaps its principal attraction is that it is an alternative to the passivity of giving up on one's *IP*. It is, of course, a qualified alternative, since it does not solve the *IP* but rather solves it presumptively. Notwithstanding this essential qualification, an abductive solution bears on the question of *action* in two important ways. In the one case, the abducer's embrace of H^c constitutes the *cognitive act* of releasing *H* for generally unfettered inferential work in the domain of enquiry within which the abducer's *IP* arose in the first place. In the other case, it is open to the agent to take whatever *further actions* as may comport with his other interests, on the basis of conclusions in the descendent class of inferences dependent upon *H*. This is far from saying that *H*'s conjectural origins are overlooked in such cases. It means only that the actions are taken so with requisite regard to the higher risk than that that would attach to actions occasioned by what the agent does really know. Accordingly, it is a deep fact about abduction that

Proposition 22 (Abduction as a spring of action) *Abduced hypotheses* H *give agents a basis for consideration of subsequent actions involving degrees of risk concomitant with the strength of* H*'s conjecture.*

Briefly sketched though they are, we now have the resources to explore the role of abduction in criminal proceedings.

Part IV: The Criminal Proof Standard

9.11 Reasonable Doubt

The meaning of the reasonable doubt provision is not well-explained either in case law or in legal textbooks. As we saw, *McCormick on Evidence* takes a dim view of subjecting the idea to analysis:

> Reasonable doubt is a term in common use as familiar to jurors as to lawyers. As one judge has said it needs a skillful definer to make it plainer by multiplication of words . . . (Strong: 1999, p. 517).

It is sometimes supposed that it is the legal counterpart of the high standard of proof that one finds in science and mathematics, where, in all three cases, the standard is at the top of the epistemic scale. Whatever may be the case with science and mathematics, it cannot be so with convictions won on circumstantial evidence. The meaning of "beyond reasonable doubt" must preserve this fact. Cases in which a verdict of guilty is secured by circumstantial evidence are often those in which the link between evidence and verdict is understood probabilistically.

There have been efforts of late to capture the structure of such reasoning in more or less stock models of Bayesian inference (Tillers and Green, 1988). We ourselves are doubtful of the overall adequacy of this approach, even in civil cases in which the standard is "proven on a balance of probabilities". Inspection of the actual empirical record of such cases reveals the more dominant presence of abductive considerations. On the face of it, however, this cannot be right. For if it were right, we would have it that when a conviction is won on circumstantial evidence, the verdict is mired in nothing stronger than a conjecture. But surely not even the most confident conjecture of guilt meets the standard of proof beyond a reasonable doubt.

Accordingly

Proposition 23 (The circumstantial conviction dilemma) *At first appearance, either circumstantial conviction cannot meet the required standard of proof, or it is not abductively grounded.*

We ourselves are minded to challenge the first horn of the dilemma, notwithstanding that great weight would appear to be placed against it by the doctrine of the reasonable person. In its most general sense, the doctrine requires that jurors perform as ordinary persons in the course of their reflections on the matters before them. They are then required to use this ordinary thinking to reach a verdict. Verdicts are not only open to be produced by ordinary thinking, but are *required* to be so produced, except when juridically constrained in some or other particular way. If this is right, then in the context of realistically constructed cases based on circumstantial evidence, ordinary thinking is frequently, if not typically, abductive. Since abductive thinking is inherently conjectural, not only is it left open that a verdict of guilty might be conjecturally based, but it is inevitable that this frequently, if not typically, be so. What remains is to show *whether conjecturally structured theories of a case can manage to attain the required proof standard.*

The core idea embedded in the standard makes a twofold claim on reasonability. First, the theory of the case for conviction must be such as to draw the favour of a randomly selected reasonable person (where untutored reasonableness trumps expertise). Secondly, that self-same reasonable person must also be disposed to the view that the facts of the case do not answer to a rival theory of them that could reasonably be accepted. Interpreted abductively, this requires that an abductively secured conjecture of guilt must be strongly secured, and that there is no rival conjecture that is strongly enough secured. However, as the Indiana Court of Appeals has made clear in a case from 1978,

> Convictions should not be overturned simply because this court determined that the circumstances do not exclude every reasonable hypothesis of evidence (Klotter, 1992, p. 69).

Accordingly,

Proposition 24 (Guilt and reasonable alternatives) *If a verdict of guilt is arrived at circumstantially it is not necessary that rival abductively reasonable theories of the evidence* not exist.

For the present suggestion to pass muster, the idea of abductive strength requires clarification. To do so, it is important to emphasize that typically a conviction based on circumstantial evidence is a conviction *faute de mieux*, epistemically speaking. The qualification "typically" is made necessary by the fact that the law allows that, on occasion circumstantial evidence may be as strong or stronger than direct evidence. Also significant is an American case from 1969,

> **the trial court properly instructed the jury that 'the law makes no distinction between direct and circumstantial evidence but simply requires that the reasonable doubt, from all of the evidence in the case,' including 'such reasonable inferences as seem justified, in the light of your own experiences' (Klotter, 1992, p. 68).

The betterness that circumstantially based verdicts fail to achieve is the grade of epistemic attainment, whatever that is in fine, that attends conviction by direct evidence.

Thus we assume as a matter of epistemology, rather than of juridical pronouncement, that unrebutted direct evidence possesses an epistemic strength not usually possessed by circumstantial evidence in the face of competing and not unreasonable rival theories. In structural terms, let K be what the court knows of the matter before it by direct evidence. Since, by hypothesis, a conviction cannot be got from K, alone, it must be aimed for by some supplementation of K short of additional direct evidence. *This constitutes an abduction problem for the prosecution*. The prosecution must attempt to supplement K in ways that the contents of K itself make reasonable and without further direct evidence. The task of the juror is to determine whether the prosecutor's case is a strong enough abduction without strong enough rivals. To achieve this standard, he must overcome the epistemic disadvantage implicit in the fact that sufficiently strong abductions won't attain the *epistemic* standard hit by K.

Accordingly we shall say

Proposition 25 (Discounting epistemic disadvantage) *A successful abduction for conviction is one that is strong enough to off-set the epistemic disadvantage that inheres in abductive solutions. Correspondingly, a rival abduction is insufficiently strong when it does not off-set the inherent epistemic advantage to a sufficient degree.*

Corollary 25(a) *Implicit in the doctrine of the reasonable person is the principle that sometimes it would be unreasonable not to accept an abduction, or to accept it weakly, just because it failed to hit the epistemic standards reached by* K.

What we are here proposing is an epistemic commonplace. It is the idea that epistemic satisfaction is not only not typically achieved by epistemic optimization, but that, for large classes of cases, postponing epistemic satisfaction until greater strides toward optimization are achieved would be markedly unreasonable. In the absence of contrary indications, you know that you are your parents' child if you arrived during the child-bearing years of their union. In the absence of contrary indications or some contextually required standard of proof, resort to DNA testing would be quite mad. The criminal law requires that those of its obligations that fall to jurors be discharged by persons who operate as ordinary thinkers. The criminal law requires that the epistemic endeavours of jurors rise to the standards of the epistemically ordinary person. The requirement of determining whether, in its turn, the prosecution's theory of the case achieves the law's standard of proof is thus a requirement that a reasonable person can be expected to attain when operating as an ordinary thinker. What the criminal law clearly settles for is not optimization, but satisfization set against the requisite standards.

9.12 Hypothesis-Discharge

We must now deal with the question of whether hypothesis-discharge is possible within abductive contexts and, if so, what its structure would be. As we have it so far, hypothesis-discharge is achieved by an inference to a H^c. H^c reflects a readiness to release H on sufferance for premissory work in future inferences. How does this hook up with what juries do?

The answer lies in what we have already discovered about the operation of the provisions of the beyond-reasonable-doubt standard for circumstantial criminal conviction. We summarize the main points of that finding.

(a) A verdict in a criminal trial is not usually thought of as a conjecture. It is a *finding*; hence something that is forwarded assertively.
(b) Even so, especially in cases built upon circumstantial evidence, verdicts are reached abductively. They are solutions of abduction problems.
(c) This necessitates a distinction between how the verdict was *reached* and the manner in which it is *treated*.

(d) The standard of proof beyond a reasonable doubt in effect requires a jury to discharge its theory of the case, that is, to forward it non-conjecturally. This resembles what abducers in general achieve by forwarding H^c assertively.
(e) Since, in such cases, there is no independent means of demonstrating directly the truth of a jury's finding, the jury's discharge of the hypothesis cannot be seen as post-abductive.
(f) H^c denotes this twofold role. H was reached conjecturally but it is discharged assertively.
(g) Accordingly, in reaching its finding in such cases, hypothesis-discharge is part of the jury's solution of its abduction problem.

This allows us to say that

Proposition 26 (Discharge) *Conditions on abductive hypothesis-discharge approximate to those governing circumstantial conviction in a criminal trial.*

Accordingly, it may be said that when a jury reaches its verdict, they have done something like draw an inference to *C(H)* and rendering a decision in the form H^c. "*C(H)*" expresses the jury's conviction that, although the evidence is only circumstantial, it may be taken with requisite confidence that the accused's guilt best explains it. In turn, H^c releases the verdict, "Jones is guilty", for work as a premiss in future inferences or decisions. For one thing "Jones is guilty" is a primary datum for subsequent decisions about sentencing. And thereafter, it states a legal fact. But here, too, it is a fact on sufferance, i.e. in the absence of an appeal that would eradicate it.

9.13 Proof Standards

As we begin to see, the criminal proof standard is subject to a considerable misconception. This is the idea that the standard is artificially high. In fact, it is not artificial, and it is not especially high — certainly it is no kin of mathematical proof or experimental confirmation of the sort required in drug trials. It is perfectly true that, in the name of justice, the law artificially constrains what evidence a jury may hear and, at times, the weight that a jury can give it; but this same artificiality is not intruded into the standard of proof itself. What shows this to be so is the commonplaceness of the constraints under which the standard is honoured in actual judicial practice. Key to a proper understanding of them is the idea of *satisfaction* (see here Woods, 2005b). What the law requires is that jurors attain a certain level of doxastic satisfaction. They must be satisfied that the picture that the evidence suggests to them is undisturbed by the fact that it is not an epistemically optimal theory of the case. The other is that the failure of a rival theory of the case to satisfy them is not something that counts against it in an epistemically optimal way. But this is the condition in which the epistemic satisficer finds himself quite routinely. It is the hallmark of the reasoning of an ordinary reasoner when reasoning in the way of ordinary reasoners about just about anything. What counts, both in the general case and in the case of proof

beyond a reasonable doubt, is that these occasions of possible error do not disturb the reasoner's doxastic repose. (The language of the law is replete with the idioms satisfaction and repose. Judges tell juries that, to convict, they must be *satisfied* that such-and-such and so-and-so. When counsel have presented their case, they *rest*.) In this model of juridical determination, it is difficult to over-estimate the pivotal importance of satisfaction. Satisfaction is the dual of cognitive irritation, which is what occasions the need for abductive reasoning in the first place. Accordingly,

Proposition 27 (Doubt and satisfaction) *A jury's verdict meets the standard of proof beyond a reasonable doubt when its members are in a state of doxastic satisfaction achieved by the procedures of ordinary reasoning in abductive response to the evidence led at trial.*

Proposition 28 (Competence) *The present model of cognitive satisfaction presupposes the competence of individual jurors; in particular that the satisfaction required by the standard would not be achieved by a competent reasoner unless he were untroubled by the fact that his theory of the case did not attain standards of epistemic optimality and by the fact that his exclusion of rival theories did not attain it either.*

The key to hypothesis-discharge lies in the structure of the abducer's doxastic satisfaction. When a proposition is held conjecturally, what the reasoning agent is satisfied about is that it is a proposition that merits conjecture. When a proposition is abductively discharged, what the reasoning agent is satisfied with is *it*. He is satisfied with its propositional content. A reasoner moves from $C(H)$ to H^c when he moves from the first kind of satisfaction to the second.

We have seen that jurisprudential contexts occasion significant distortions of most concepts of relevance and all standard conceptions of presumptiveness. This is a reflection of the epistemic compromise that justice negotiates with truth. It arises from the law's fundamental operating principle that epistemically wrongful convictions should be minimized even at the cost of epistemically wrongful acquittals. These, we say, are epistemologically significant distortions, but they are significantly redressed by the circumstance that in achieving even the high standard of proof required for a criminal conviction, the juror′s reasoning, step by step, need not – and should not – aim at or attain a standard higher than the standard achieved by a reasonable person when reasoning as an ordinary being; i.e., including the drawing of "such inferences as seem justified, in the light of [his] own experience" (Klotter, 1992, p. 68). This places the phenomena of circumstantial conviction in the spotlight, and gives us a point worth repeating. It gives us occasion to provide an interpretation of proof beyond a reasonable doubt according to which the juror is an abductive satisficer concerning the verdict he proposes, whose confidence in it is not shaken by his recognition that his own solution does not optimize to the level of K or higher, and for whom there is no rival abduction that could appeal to his obligations as a satisficer. We have it, then, that

Proposition 29 (Beyond reasonable doubt) *The judicial question of proof beyond a reasonable doubt has a solution in the logic of abduction*.

9.14 The Probativity Question

Pages ago we drew attention to a still unresolved contention among philosophers of science about the probativity of explanation. We pointed out that there is a considerable body of opinion – an opinion shared by the present authors – that the explanatory force of a proposition is not in the general case a satisfactory marker for its truth. At first sight, this is disastrous for the abductive theory of criminal conviction. For if the fact that the hypothesis of guilty as charged is indeed the best explanation of the evidence led at trial is a fact that is compatible with the *falsity* of that hypothesis, surely we are deluding ourselves in thinking that the common law offers to accused persons the safety of a fair trial, at least for the most part.

How shall we answer this objection? Perhaps this is the best place to drive home the point that the common law's criminal justice system does *not* offer accused persons epistemic guarantees. Another – and somewhat jolting – way of saying this is that the criminal justice system squarely faces accused persons with the prospect of outcomes that are not *known* to be true.[40] (If this doesn't drive a stake, once for all, through the heart of the common belief that guilty verdicts attain an unusually high standard of proof, nothing will.) Accordingly,

Proposition 30 (The fundamental epistemic fact) *The fundamental epistemic fact about criminal convictions is that they constitute verdicts that need not be known to be true (and in general are not known to be true) in order to qualify as both just and cognitively scrupulous*.

Proposition (30) bears on the structure of abduction itself. Suppose, contrary to what the present authors believe, that best explanations are probative. That is, suppose that best explanations are truth-conferring. Then it is easy to see that an inference to the best explanation cannot be a case of abduction. Abductive inference is ignorance-preserving; but (on the present assumption) best-explanation inferences are truth-conferring. So best-explanation abductions don't preserve the ignorance condition on abduction. Accordingly,

Proposition 31 (Non-probativity). *If theories of the evidence are best-explanation abductions, explanations are not truth-conferring.*

Corollary 31(a) *By the fundamental epistemic fact (Proposition (30)), best-explanation inferences are not truth-conferring in judicial settings.*

Part V: Concluding Remarks

As mathematical logicians will be aware, there is a celebrated paper in which W.H. Stone followed up on some work of Tarski's and sought to unify logic and

[40]This proceeds not only from the abductive character of verdicts but also from the admissibility of testimony.

topology. More strictly, he sought to unify Boolean algebra and topology (Stone, 1936). Like Tarski, Stone gives an account in which conjunction, disjunction and negation correspond to set-theoretic multiplication, addition and complementation. The closed-open sets under these operations form a Boolean algebra. Stone also examines a class of topological spaces, known as Boolean spaces, that display some mathematically interesting features. They are totally disconnected, compact Hausdorff spaces. A particular case of these is the Cantor space which is got by according the pair (0, 1) the discrete topology and then assigning to the Cartesian product of countably many cases of it the product topology. The highlight of (Stone, 1936) is the Representation Theorem. It establishes a duality between any Boolean algebra and some or other Boolean space. The Stone Representation Theorem teaches us a useful lesson about interdisciplinarity at its most fruitful. The theorem is underivable in neither Boolean algebra nor topology. It carries the marks of the parent disciplines, but it does not owe its identity to them. The unification achieved by Stone is a good example of the offspring model of interdisciplinary amity. It produces results that are very much worth having and which neither parent is able to deliver.

What we have tried to establish in this chapter is that the logic and the law admit of this same kind of creative advance. If we run the legal notion of proof beyond a reasonable doubt through a suitable logic of abduction, it is possible to learn something about the standard which is very much worth knowing and which would not have surfaced in either of the parent theories if simply left to their own devices. If we are not mistaken, we now have a better understanding of the epistemic structure of that standard, namely, that it is not an epistemic standard. It is a case in which logic has been able to elucidate the law. But we should also note that this has not been a one-way street. In response to the probes visited upon it by abduction logic, the law has kicked back in ways that help achieve an important clarification the structure of abduction itself. In the minds of some logicians an abduction problem is solved at line (6) of the schema; that is to say, when the abducer concludes that H is a proposition that warrants conjecture ($C(H)$). However in the theory advocated in the *The Reach of Abduction: Insight and Trial* (Gabbay and Woods, 2005), it is argued instead that an abduction problem is not fully dealt with until the conjectured proposition H is also *discharged.* In the simplest possible terms, what this means is that although conjecturally occasioned, H is (on sufferance) allowed to operate non-conjecturally. No one should think that in discharging H the abducer has put himself in a psychological state of denial. He is not trying to *forget* H's conjectural origins. Rather, he is not giving them a *structural role* in the further inferences that H is now free to drive forward. For its role in those inferences, H's conjectural origins are not forgotten, but they are inferentially suppressed. Another way of saying this is that at line (7) of the schema, the "c" in H^c reminds us that H arose conjecturally; and beyond that it imposes no constraints on how H operates inferentially.

Why should we believe this account of hypothesis-discharge? The short answer is that we should believe it because the law requires us to believe it. We should believe it because finding a verdict of guilt is an abduction that eventuates in a *verdict*. In a criminal trial the proposition H that asserts the accused's guilt plays a twofold

role. It *arises* as an conjecture, and thus as something in the form of the *C(H)* in our schema's line (9); and it is *treated* as a fact. No one thinks that real facts are ever made by mere guess-work. The decision to treat *H* as a fact does not require it to be one. Thus a jury's verdict has the structure of a H^c. It is well-knows that in matters of criminal conviction the law takes great pains that the legal fact of guilt coincide with the real fact of guilt, that is, that there be an equivalence between H^c and *H*. Alas, sometimes the equivalence fails. It is a dramatic way of telling us that the fact of guilt is a legal fact; it is a proposition that arises from conjecture, which is treated as if it didn't. We have it, then, that the structure of the law's guilt beyond a reasonable doubt gives us reason to hold that abductions terminate not with judgements in the form *C(H)*, but rather with determinations in the form H^c. It is a welcome outcome. It discloses issues on which logic and law can be of assistance to *each other.*[41]

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Chapter 10
Epistemic and Practical Aspects of Conditionals in Leibniz's Legal Theory of Conditions

Alexandre Thiercelin

10.1 Introduction: Targets to be Met by a Legal Theory of Conditions

Let αβχ be an action performed by an individual agent α in favor of an individual agent β, with a legal content χ. Such a legal content means that, once αβχ has been performed by α, new legal claims are accessible to β.

For instance, according to one clause contained in α's last will, 1000 Euros shall be given to β. Such a gift is an action in favor of β that will be performed by α after he dies. As long as α is still alive, the gift is not performed. Indeed, until he dies any testator has the possibility to change his mind and to revise his last will. In the case that α erases his clause in favor of β, no new legal claim is accessible to β after α's death.

Now an action αβχ can be made depend on a condition δ[αβχ] be such a conditioned action.

For instance, instead of expressing his will that 1000 Euros shall be given to β, α could express his will that 1000 Euros shall be given to β *if* β teaches philosophy to α's daughter. Such a conditional gift is a conditioned action that will be performed as such after α dies only if it is then proved that α has not changed his mind in the meanwhile.

Actions such as αβχ and δ[αβχ] can also be performed in contracts. In that latter case, the action is still performed by α in favor of β, but its content χ and its form (conditional or not) is collectively designed by α and β. Actions and conditioned actions designed by α and β are performed once α and β agree on the terms of their contract.

A legal theory of conditions is then a theory for actions such as δ[αβχ]. It aims at answering two main questions[1]:

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[1] See for instance Terré, Simler, Lequette (2002, pp. 1131–1148).

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1. *Nature*: What are the conditions of validity to be fulfilled so that an action such as δ[αβχ] can be performed? What are the conditions to be fulfilled by α, β, χ, and δ so that αβχ can be made depend on δ? A legal theory of conditions has to make those conditions explicit and to systematize them as much as possible. In order not to confuse conditions of validity with conditions such as δ, the legal theory speaks of the former as "modality-conditions".[2] A legal theory of conditions is a theory for modality-conditions, i.e. for conditions that individual agents use in order to conditionalize some of their actions provided with legal contents.
2. *Effect*: What is the meaning of an action such as δ[αβχ]? Does it only mean that the new legal claims provided by αβχ will be accessible to β in the future if the condition δ is fulfilled? Or does it also mean that, once δ[αβχ] has been performed, new legal claims are accessible to β which are different from the ones that will be accessible to β in the future if the condition δ is fulfilled? (According to the first view, an action such as δ[αβχ] is only the "suspension" of the action αβχ, i.e. of the new legal claims provided by αβχ, by the "suspensive" condition δ: as long as δ is not fulfilled but still can be fulfilled, no new legal claims are accessible to β[3]. According to the second view, as long as δ is not fulfilled but still can be fulfilled, the suspension of the action αβχ already provides β with new legal claims: a conditioned action δ[αβχ] is more than the plain hope that αβχ in the future if δ.)

Regarding the effect of an action such as δ[αβχ], a legal theory of conditions has to answer the following connected question: What follows from the fulfillment of δ? The answer seems to be very easy. The legal claims provided by αβχ are now accessible to β. But *since when* should we say that they are accessible to β?

Let tδ be the moment when δ is fulfilled and let tδ[αβχ] be the moment when the action δ[αβχ] is performed by α. In the case that δ[αβχ] is designed in α's last will, tδ[αβχ] precedes the moment of α's death. In the case that δ[αβχ] is designed by both α and β, i.e. in a contract, tδ[αβχ] is preceded by the moment of the signature of the contract by both α and β.

Let us consider the simple case where tδ is posterior to tδ[αβχ]. In the case that δ is fulfilled, it is a fact that in some cases the new legal claims provided by αβχ are said to be accessible to β since tδ, whereas in some other cases they are retrospectively said to be accessible since δ[αβχ]. How to explain such differences?

Last but not least, in the case that the new legal claims provided by αβχ are retrospectively said to be accessible since tδ[αβχ], a legal theory of conditions has also to make the structure of that retrospective view explicit. Should we do as if δ

[2] Ibid., p. 1132.

[3] The legal theory, but also the law and the jurisprudence, is used to make a distinction between two kinds of modality-conditions: an individual action provided with a legal content can be made depend either on a "suspensive" condition or on a "resolutory" condition. Both their respective nature and effect are different. I will focus here on the suspensive conditions because they are the main targets of Leibniz's legal theory of conditions.

had been fulfilled at tδ[αβχ]? Is the law committed to that fiction or are there other theories that could explain the fact that, after δ's fulfillment, β's new legal claims are accessible to him since tδ[αβχ], and not since tδ?

10.2 From Conditions to Conditionals: Leibniz's Legal Theory of Conditions

Among Leibniz's legal works, we find a complete legal theory of conditions based upon a quite original approach.[4]

Indeed, Leibniz's legal theory of conditions consists in modeling an action such as δ[αβχ] as a conditional whose if-part is δ and then-part is αβχ. Leibniz calls such a conditional a "moral conditional proposition".[5] Leibniz's theory of actions such as δ[αβχ] is the theory of conditional propositions such as $\delta \rightarrow \alpha\beta\chi$.

Such a propositional approach is quite unusual from a legal point of view.[6] Indeed, the legal theory of conditions is usually focused on the conditions as "modalities": a condition is something that can be *added* in someone's last will, or in a contract, in order to modify the legal meaning of a clause[7]. For instance, instead of giving you 1000 Euros after my death and that's all, I choose to add the following condition: if you stay by my children until they graduate in philosophy.

Leibniz's conceptual model lays the emphasis on the fact that the notion of condition is a *partial* notion, insofar as a condition is nothing but a part of a conditional proposition, namely its antecedent. It results from it that a rigorous legal's theory of conditions should start from the very notion of conditional proposition.[8] Better, it appears that a legal theory of conditions, insofar as it presents itself as a theory of moral conditionals, should be based on the logical theory of conditionals. Leibniz's legal theory of conditions aims at making explicit how moral conditionals are specific conditionals in comparison with "logical" conditionals.[9]

From Leibniz's point of view, the two preceding questions can thus be reformulated as follows:

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[4]Gottfried Wilhelm Leibniz (1646–1716) presented his legal theory of conditions in two texts. He presented it first in 1665 in two academic dissertations, the *Disputatio Juridica de Conditionibus* and the *Disputatio Juridica Posterior de Conditionibus*. A strongly modified presentation is given in the *Specimen Certitudinis seu Demonstrationum in Jure, Exhibitum in Doctrina Conditionum*, which is part of the *Specimina Juris* of the period 1667–1669. Both texts can be found in the first volume of the sixth series of the academic edition. I will quote in the usual abbreviation system: "A VI i 147" is to be read as "first volume of the sixth series of the academic edition, p. 147".

[5]A VI i 371.

[6]As H. Schepers stresses it in Schepers (1975, p. 1).

[7]See again Terré, Simler, Lequette (2002, p. 1132).

[8]A VI i 371.

[9]Ibid.

1. *Nature*: What kind of propositions must be δ and αβχ so that δ → αβχ?
2. *Effect*: Given a set of premises with a conditional such as δ → αβχ, which arguments are valid?

To answer the nature-question and the effect-question amounts to provide an analysis for what Leibniz calls the "form" and the "matter" of conditionals such as δ → αβχ. Conditionals such as δ → αβχ are specific conditionals because of both their specific nature and their specific effect.

The nature-question deals with what Leibniz calls the "fact": "When" is a conditional a moral conditional?[10] Leibniz's answer to that question consists in making two kinds of rules explicit: validity rules of course, but also interpretive rules.

Validity rules stipulate the form and the matter of both propositions δ and αβχ so that δ → αβχ. Starting from the answers given by the Roman jurisconsults, Leibniz uses logical tools in order to make general validity rules explicit and to systematize them.

Interpretive rules stipulate with which signs α's will (in the case of α's last will) or α's and β's collective will (in the case of a contract between them), it can be presumed that δ → αβχ. Indeed, such a presumed will is the "rule" that the legal interpreter has to follow in order to answer the question whether δ → αβχ or not. Based upon such a presumed will, the legal interpreter can thus infer that δ → αβχ whereas δ has not been expressed. In other words, δ can be implied. It is worth noting that those signs are not only "terms" (*verba*). Facts, circumstances, can be relevant signs too.[11]

As Leibniz puts it, his legal theory of conditions aims at providing very numerous answers given by the Roman jurisconsults with "very certain and almost mathematical demonstrations".[12] But the explicit combination of validity rules and interpretive rules makes it clear that Leibniz's demonstrative project is not a purely deductive one. Even if conclusions based upon validity rules can be shown to be "necessary", those based upon interpretative rules cannot be more than "probable". Insofar as legal arguments relevant to answer the question whether two propositions δ and αβχ are in such a way that δ → αβχ or not, mix both kinds of conclusions, they cannot be reduced to deductive arguments.[13]

As far as the effect-question is concerned, to say which arguments are valid given a set of premises with δ → αβχ, amounts first to make the meaning of the moral implication explicit. Such an analysis is based upon the answers given by the Roman jurisconsults. With the help of formal tools provided by the logical theory of conditionals, Leibniz achieves to abstract inference schemata from them and thus to explain them formally, providing them with "very certain and almost mathematical demonstrations".[14]

[10] A VI 1 375.
[11] Ibid.
[12] A VI i 370.
[13] A VI i 375.
[14] A VI i 370.

Leibniz's formal analysis of the moral implication results in the following axioms and inference rule:

a1 : $(A \rightarrow B) \rightarrow (\sim B \rightarrow \sim A)$ *Contraposition.*
a2 : $(A \rightarrow B) \rightarrow ((B \rightarrow C) \rightarrow (A \rightarrow C))$ *Transitivity.*
a3 : $(A \rightarrow B) \rightarrow (\sim A \rightarrow \sim B)$ *Suspension.*
R : From $A \rightarrow B$ and A to infer B *Modus ponens*.

Both axioms a1 and a2 and rule R are common to all conditionals, whether they are logical or moral. But axiom a3 is specific to moral conditionals.[15]

It results from a1 and a3 that $\delta \rightarrow \alpha\beta\chi$ means a relation of biconditionality: $\alpha\beta\chi$ if and only if δ. Leibniz explicitly says that moral conditionals are "convertible" conditionals.[16] His argument for a3 is the following[17]:

1. A proposition such as $\alpha\beta\chi$ means that α deprives himself of some legal claims that were accessible to him until then, and now makes them accessible to β.
2. As such, those legal claims cannot be accessible to β if α does not want it.
3. But α wants that those legal claims are accessible to β if the condition δ is fulfilled.
4. Therefore those legal claims cannot be accessible to β if the condition δ is not fulfilled.

In other words, no need for α to express his will that not-$\alpha\beta\chi$ if not-δ. It results from the very legal meaning of $\alpha\beta\chi$ that to make depend $\alpha\beta\chi$ on δ is to make depend it on a both sufficient and necessary condition.

It is worth noting that, whereas Leibniz's formal analysis of the moral implication leads him to assert the "convertibility" of moral conditionals, Leibniz does not lose the "difference" between the if-part and the then-part of moral conditionals. Indeed, if formally the if-part and the then-part of a moral conditional are convertible, from a legal point of view δ is analog to a "cause" and $\alpha\beta\chi$ is analog to an "effect": even if δ and $\alpha\beta\chi$ "are accomplished together", δ "starts to exist first".[18]

Leibniz's argument for a3 is very strong. But one may dislike infering from it that moral conditionals are biconditionals. One may want to save on the very logical level the difference between the if-part and the then-part of moral conditionals.

As I see it, it is possible to give an alternative analysis for the moral implication, without invalidating the argument that leads Leibniz to assert a3. According to

[15] A VI i 372–375.
[16] A VI i 375.
[17] Ibid.
[18] A VI i 112.

that alternative analysis, the moral implication should be interpreted as a connexive implication.[19] Let $\Rightarrow$ represent such an implication:

a1': $(A \Rightarrow B) \Rightarrow (\sim B \Rightarrow \sim A)$ *Contraposition.*
a2': $(A \Rightarrow B) \Rightarrow ((B \Rightarrow C) \Rightarrow (A \Rightarrow C))$ *Transitivity.*
a3': $(A \Rightarrow B) \Rightarrow \sim (\sim A \Rightarrow B)$ *Second Aristotle's connexive thesis.*
a4': $(A \Rightarrow B) \Rightarrow \sim (A \Rightarrow \sim B)$ *Second Boethius' connexive thesis.*
R': From $A \Rightarrow B$ and A to infer B *Modus ponens.*

Thanks to the replacement of a3 by both a3' and a4', we still have a strong connection between the if-part and the then-part of moral conditionals, we still capture the validity of Leibniz's argument for a3, without asserting a3 itself, namely without making of $(A \rightarrow B) \rightarrow (B \rightarrow A)$ (*Convertibility*) a valid axiom for moral conditionals.

The formal analysis of the moral implication enables one to say, given a set of premises including $\delta \Rightarrow \alpha\beta\chi$, which arguments are formally valid, which others are not. Such a logical analysis explains what follows in the case that δ is fulfilled, and also what follows in the case that δ is infringed, i.e. what follows in the case that not-δ is fulfilled.

But, as already stressed in the preceding section, to answer the effect-question is also to consider a third case: What follows in the case that δ is not fulfilled yet but still can be fulfilled?

Indeed, the fact that δ is called "suspensive" condition for the legal claims provided by $\alpha\beta\chi$ does not mean only that those claims are accessible to β if the condition δ is fulfilled, and that they are not accessible to β if not-δ is fulfilled. It also means that the accessibility of those claims is *uncertain* as long as δ is not fulfilled yet but still can be fulfilled. That δ is a suspensive condition for $\alpha\beta\chi$ is not a purely propositional notion. It is obviously an epistemic notion, too: suspension as *suspense*.

If Leibniz's legal theory of conditions is based upon the logical theory of conditionals, such a theory is strongly complicated with an epistemic approach to conditionals.

10.3 The Epistemic Nature of Moral Conditionals

Leibniz lays the emphasis on the bivalence principle: every proposition is either true or false.[20] But the truth value of any proposition is to be distinguished from the knowledge of it. Indeed, it may be certain that δ is true, or that δ is false. But it also may be uncertain whether δ is true or not. Such an uncertainty is not a third

[19] See Rahman and Rückert (2001) and Wansing (2005). I name the connexive axioms according to Rahman and Rückert (2001).
[20] A VI i 399.

truth value. It describes an epistemic relation between a given agent and a given proposition at a given moment in time.[21] From such a point of view, to say that δ has been fulfilled means that the truth value of δ is no longer uncertain, i.e. it is now certain that δ is true.

Leibniz's *legal* theory of conditions is based upon *epistemic* modalities in the following ways:

> δ is necessary $=_{df}$ it is certain that δ (= it is known that δ).
> δ is impossible $=_{df}$ it is certain that not-δ (= it is known that not-δ).
> δ is possible $=_{df}$ it is not certain that δ (= it is not known that δ).
> δ is contingent $=_{df}$ it is not certain that not-δ (= it is not known that not-δ).[22]

Legal modalities are nothing but specifications of those epistemic modalities.[23] As Leibniz explains it, "δ is prohibited by the law" is to be interpreted as equivalent to "it is certain that not-δ".[24]

Among the validity rules for moral conditionals, the main one is what I will call the "epistemic condition":

> ***Epistemic condition for moral conditionals (first round).*** *$\delta \Rightarrow \alpha\beta\chi$ only if it is not certain that δ.*[25]

In other words, it is only in a given epistemic context that $\delta \Rightarrow \alpha\beta\chi$ can be the case. To make that epistemic condition more explicit:

> ***Epistemic condition for moral conditionals (second round).*** *$\delta \Rightarrow \alpha\beta\chi$ in a given epistemic context only if, in that context, it is not certain that δ.*

It follows from it that a proposition whose truth value is certain in every epistemic context can never be the if-part of a moral conditional. For instance, that Titius touches the sky with his finger, or that Titius does not touch the sky with his finger, can never be the if-part of a moral conditional for it is known in every context that the former is false and that the latter is true.[26]

But, as Leibniz stresses it, moral conditionals are not only conditionals whose if-part "is not certain". They are also conditionals whose if-part "can nevertheless

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[21] Ibid.

[22] A VI i 398. To speak the truth, necessary propositions are true and « determined » propositions. Nevertheless, it is clear from the context that what Leibniz calls a « determined » proposition is just a proposition whose truth value is certain.

[23] Ibid.

[24] A VI i 400.

[25] A VI i 111.

[26] See for instance A VI 1 423.

be certified *moraliter,* that is proved".[27] Therefore, propositions whose truth value is uncertain in every epistemic context because it exceeds our cognitive capacities and resources, can never be if-parts of moral conditionals.[28]

> ***Epistemic condition for moral conditionals (third and last round).*** $\delta \Rightarrow \alpha\beta\chi$ *in a given epistemic context only if, in that context, it is not certain that* δ*, but the truth value of* δ *can be known in the future.*

A theory of moral conditionals thus requires considering both propositions *and* epistemic contexts. From an abstract point of view that pays no attention to epistemic contexts, the fact that $\delta \Rightarrow \alpha\beta\chi$ does not make any sense. Indeed, it is the case that $\delta \Rightarrow \alpha\beta\chi$ as long as the truth value of δ is not known. As soon as it is known that δ, or that not-δ, it is no more the case that $\delta \Rightarrow \alpha\beta\chi$: the accessibility of the new legal claims provided by $\alpha\beta\chi$ is no more suspended.

In order to make that epistemic feature explicit, it is worth adding an epistemic operator to the axiomatized connexive interpretation of moral conditionals ("K" is to be read as "it is known that" or "it is certain that"):

a1'' : $K(A \Rightarrow B) \Rightarrow (\sim KB \Rightarrow KA)$ v $(K \sim B \Rightarrow K \sim A)$.
a2'' : $K(A \Rightarrow B) \Rightarrow K(B \Rightarrow C) \Rightarrow K(A \Rightarrow C)$.
a3'' : $K(A \Rightarrow B) \Rightarrow \sim (\sim KA \Rightarrow B)$ v $\sim (K \sim A \Rightarrow KB)$.
a4'' : $K(A \Rightarrow B) \Rightarrow \sim (KA \Rightarrow \sim KB)$ v $\sim (KA \Rightarrow K \sim B)$.
R'' : From $K(A \Rightarrow B)$ and KA to infer KB.

Such a distinction between propositions and epistemic states enables Leibniz to explain the fact that, once the condition δ has been fulfilled, the new legal claims provided by $\alpha\beta\chi$ are accessible to β since $t\delta[\alpha\beta\chi]$ (see section 1), and not since $t\delta$. To explain it, it is no need to do as if δ had been fulfilled at $t\delta[\alpha\beta\chi]$. Because $\delta \Rightarrow \alpha\beta\chi$ makes $\alpha\beta\chi$ depend on δ, i.e. it makes the truth value of $\alpha\beta\chi$ depend on the truth value of δ, and not on the fulfillment of δ (what Leibniz calls its "event"), once that truth value had been known, namely at $t\delta$, it is justified to consider $t\delta[\alpha\beta\chi]$ as the starting point, and not $t\delta$. Leibniz's legal theory of conditions, based upon a propositional approach complicated with epistemic considerations, is superior to other theories insofar as it does not need any fiction to explain the fact that the fulfillment of δ has a retrospective effect.[29]

Now what follows from $\delta \Rightarrow \alpha\beta\chi$ as long as the truth value of δ is not known yet but can still be known? The accessibility to β of the new legal claims provided by $\alpha\beta\chi$ is uncertain. What does it mean for the law? Leibniz's answer is that new legal

[27] A VI i 111.

[28] For instance, that angels have a subtle body, or that there is void in nature, or that the world will collapse at the end of the sixth millenium, can never be the if-part of a moral conditional. As Leibniz puts it explicit, only a proposition whose content is empirical can be the if-part of a moral proposition. See A VI i 398–399.

[29] See A VI i 421 ; 426.

claims, different from the ones provided by $\alpha\beta\chi$, that is different from the ones that will be accessible to β in the future if δ is proved to be true, are already accessible to β.[30] In other words, $\delta \Rightarrow \alpha\beta\chi$ means more than the plain hope that the new legal claims provided by $\alpha\beta\chi$ will be accessible to β in the future if it is known that δ. We meet here *real* intermediate states of the law.

10.4 An Agenda Relevance Condition on Moral Conditionals

Leibniz's legal theory of conditions has obvious legal results. Based upon the logical theory of conditionals, it provides many answers given by the Roman jurisconsults with "very certain and almost mathematical demonstrations" insofar as it provides them with general and systematic reasons. To put it more directly, Leibniz's logical approach to the law enables him to make it notably more explicit.

But, as I have just shown, Leibniz's legal theory of conditions achieves logical results, too. Based upon a propositional approach, it achieves an epistemic complication of the logical notion of conditional. Moral conditionals are conditionals whose meaning is related to specific epistemic contexts.

It thus appears that, if logic enables Leibniz to make the law notably more explicit, the latter enables him to develop the former, for instance by establishing the relevance of new distinctions.

For instance, whereas logicians usually make a distinction between "affirmative" and "negative" propositions, the epistemic nature of moral conditionals leads Leibniz to add a distinction between "negative" and "purely negative" propositions[31]:

> ***Purely negative propositions.*** *δ is a purely negative proposition $=_{df}$ δ is the if-part of a conditional whose then-part is $\alpha\beta\chi$, and whereas it can be known at every moment that not-δ (i.e., β can infringe the condition δ at every moment), it can be known that δ only at one moment, namely after β's death (β can fulfill the condition δ only after he dies, when it is proved that he has never infringed δ).*

For instance, given α's last will where α expresses his will to give 1000 Euros to β, in the case that α adds the condition "if β does not go to Paris" such a condition can be fulfilled by β only after β dies because, until β dies, β can infringe the condition by going to Paris.[32] It is worth noting that such conditionals are not absurd

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[30] "A conditional right puts something into the being" (A VI I 424). Leibniz's theory is here strongly based upon the answers given by the Roman jurisconsults. Is it directly connected with Leibniz's modeling of an action such as $\delta[\alpha\beta\chi]$ as a conditional $\delta \Rightarrow \alpha\beta\chi$? It is difficult to say.

[31] A VI i 398.

[32] A VI 1 381–382; A VI i 422–423.

and can be moral conditionals. Indeed, even if β cannot receive his gift, his own heirs can.

But Leibniz's legal theory of conditions is not concerned with propositions and epistemic states only. The explanation of the very nature of moral conditionals also requires a practical analysis. Better: Leibniz's epistemic approach is commanded by a more general practical approach.

Indeed, a conditional such that $\delta \Rightarrow \alpha\beta\chi$ can be analyzed in terms of advantages and disadvantages for both individual agents connected by $\alpha\beta\chi$, namely for α and β. Leibniz achieves here the following general result[33]:

> ***Utility of moral conditionals.*** *From α's point of view, δ is advantageous and αβχ is disadvantageous. On the contrary, from β's point of view, δ is disadvantageous and αβχ is advantageous.*

For instance, in the case that α expresses his will to give 1000 Euros to β if the war in Afghanistan stops, it is "obvious" that the then-part is advantageous to β whereas the if-part is disadvantageous to him (it would be better for β if no condition had been added). It is also "obvious" that the if-part is advantageous to α: it gives him time, it also open the possibility that α never owes 1000 to β.[34]

But such a result is not obvious anymore in the case that α is a testator. In that case it is not so obvious that, from α's point of view, $\delta \Rightarrow \alpha\beta\chi$ could be analyzed in terms of advantages and disadvantages. Indeed, when the new legal claims provided by $\alpha\beta\chi$ are accessible to β, α is already dead.

That's why Leibniz's practical analysis goes further in the case that $\delta \Rightarrow \alpha\beta\chi$ occurs in α's last will. In that case, assuming too that δ is a « potestative » condition (i.e. δ can be fulfilled by β only), Leibniz makes explicit that[35]:

> ***Utility of moral conditionals in last will, with potestative conditions (first round)****. From α's point of view, δ is a goal and αβχ is a means to reach it. From β's point of view, αβχ is a goal and δ is a means to reach it.*

To put it in another way:

> ***Utility of moral conditionals in last will, with potestative conditions (second and last round)****. From α's point of view, δ is an agenda and αβχ is a way to advance and to close it. From β's point of view, αβχ is an agenda and δ is a way to advance and to close it.*

For instance, in the case that α expresses his will to give 1000 Euros to β if β teaches philosophy to his daughter, it is obvious that such a conditional is a way for

[33] A VI i 409.
[34] Ibid.
[35] Ibid.

α to be sure that β will teach philosophy to his daughter. α's plan is that β will teach philosophy to his daughter in order to obtain the 1000. From that point of view, the condition is not a simple "addition" made by α. It is his very goal, his very agenda, and his gift in favor of β is only a means to reach it.[36]

Now it is a fact that Leibniz's legal theory of conditions lays the emphasis upon testamentary moral conditionals whose if-part is a potestative condition. In that case, it is α alone who decides to make αβχ depend on δ in such a way that $\delta \Rightarrow \alpha\beta\chi$, and α who chooses αβχ as the best way to advance his agenda δ (α could have chosen another way to make it sure that δ will be fulfilled, for instance $\delta \Rightarrow \alpha\beta\varepsilon$; α could also have chosen to advance another agenda with the help of αβχ, for instance $\phi \Rightarrow \alpha\beta\chi$). β has nothing to say here. Once aβχ and δ have been connected by α so that $\delta \Rightarrow \alpha\beta\chi$, β is faced with an alternative: either β is ready to fulfill δ in order to advance and to close his agenda αβχ, or he is not.

The fact that αβχ is or can become one of β's agendas, and that β will be ready to fulfill δ in order to advance and to close it, can only be presumed by α. It may happen that β is not interested in αβχ, or that β is interested in αβχ without being ready to fulfill δ because the price to pay for that fulfillment is too expensive in comparison with the value of αβχ. In both cases β will not fulfill δ and therefore α will neither close nor advance his agenda.

As a result, it is up to α to find the best connection. Given the if-part, it is up to α to find the most relevant then-part. Then it appears that $\delta \Rightarrow \alpha\beta\chi$ is a good answer given by α to the question: How to get δ fulfilled? Indeed, Leibniz makes the following *validity* rule explicit for testamentary moral conditionals whose if-part is a potestative condition[37]:

> ***Agenda relevant condition for moral conditionals in last will, with potestative conditions*** $\delta \Rightarrow \alpha\beta\chi$ *only if* $\alpha\beta\chi$ *increases the probability that δ will be fulfilled.*

In other words, a testamentary conditional whose if-part is a potestative condition δ, and whose then-part is αβχ, can be such that $\delta \Rightarrow \alpha\beta\chi$ only if αβχ is actually a way for α to advance and to close δ, i.e. only if αβχ is actually an agenda for β and β is actually ready to fulfill δ in order to advance and to close it.

Leading scholars on Leibniz's legal theory of conditions do not seem to pay much attention to those explicit practical considerations.[38] It is all the more surprising that such considerations play a cardinal role in Leibniz's treatment of "ridiculous" conditions.

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[36] I do not consider here the differences that can be made between the notions of agenda, goal, plan. For such differences see Gabbay and Woods (2003, pp. 195–197).

[37] A VI i 409. « The testator (that is α) must make it that for the *conditionarius* (that is β) the advantages of the *conditionatum* (that is αβχ) are superior to the disadvantages of the fulfillment of the condition (that is δ) ».

[38] See for instance Armgardt (2001), pp. 322–323.

Indeed, Leibniz lays the emphasis on the following condition given by the Roman jurisconsults: $\delta \Rightarrow \alpha\beta\chi$ only if δ is not ridiculous.[39] For instance, in the case that α expresses his last will to give 1000 Euros to β if β gives 100 Euros to ϵ, such a conditional cannot be a moral conditional for the condition added by α is "ridiculous". As Leibniz makes it explicit, a testamentary conditional whose potestative condition is ridiculous is a conditional whose the very connection between the if-part and the then-part is ridiculous. To put it more formally:

> ***Ridiculous implication***. *The implication of $\alpha\beta\chi$ by δ is ridiculous $=_{df}$ β is not moved to fulfill δ in order to get $\alpha\beta\chi$ because δ is more or equally disadvantageous to β than $\alpha\beta\chi$ is advantageous to him. (As such $\alpha\beta\chi$ may be an agenda for β, but the price to pay in order to advance and to close it, i.e. the fulfillment of the condition δ, is too expensive in comparison with the value of $\alpha\beta\chi$.)*

Some conditions are called "ridiculous" by the Roman jurisconsults, and as such they cannot be the if-part of a moral conditional. Other conditions are called "vain" by them, and cannot either be the if-part of a moral conditional.[40] For instance, in the case that α expresses his last will to give 1000 Euros to β if β goes outside his house with his right foot first, the Roman jurisconsults answer that such a conditional cannot be a moral conditional because the condition added by α is vain. As Leibniz puts it, such a condition is called "vain" because its fulfillment seems to be of no interest for anyone. What's the matter if β goes outside his house with his right foot rather than with the left one? How the fulfillment of such a condition could be an agenda for anyone, especially for α.

But as Leibniz stresses it, here the matter for α is not that β goes outside his house with his right foot. It is that β goes outside his house with his right foot *in order to fulfill the condition and thus to obtain the gift in his favor*. α is interested in a sign of obedience from β. From such a point of view, a testamentary conditional whose potestative condition is called "vain" can nevertheless be a moral conditional. Indeed, such conditionals can meet the agenda relevance condition.

Leibniz's treatment of vain conditions is thus interesting for two reasons. First, it shows that Leibniz's legal theory of conditions is not only an explanative theory. It can also revise some answers given by the Roman jurisconsults. Second, it makes it clear that the agenda relevance of moral conditionals is not always obvious.

10.5 Conclusion

Based upon the logical notion of conditional, Leibniz's legal theory of conditions achieves both legal and logical results. If logic reminds the law that the notion of condition is a partial notion (a condition is first of all the if-part of a conditional), the

[39] A VI i 409 ; 422.
[40] A VI i 405.

law reminds logic that agents play with conditions in order to advance and to close agendas. Besides propositional aspects, conditionals have epistemic and practical aspects that are relevant both to logic and to the law.

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Chapter 11
Abduction and Proof: A Criminal Paradox

John Woods

11.1 Verdicts as Abductive

In the common law tradition,[1] a conviction at the criminal bar is constituted by a verdict of guilt beyond a reasonable doubt. Verdicts reflect an interpretation of the evidence heard at trial and an assessment of the competing parties' theories of it. A theory of the evidence is also called an "argument", presented as an address to the jury after all evidence has been heard. An argument in this legal sense is grounded in an inference to the best explanation, which is the most common form of abductive reasoning. A guilty verdict is the conclusion of a suitably strong abduction, and a verdict to acquit is a judgement to the effect that the evidence permits no abduction of requisite strength to convict. A jury's task is to adjudicate between the rival abductions proffered by opposing counsel in their closing statements. It is also possible that a juror might reject the arguments advanced by counsel and make his own interpretation of the evidence. Either way, the jury's task is complicated by the fact that nearly always the sum total of the evidence heard at trial is internally inconsistent. This gives all three parties – prosecution, defence and jury – occasion to trim the evidence with a view to reining in its inconsistency. This is done in one or other of two ways, singly or in combination. Juries will either base their determinations on a consistent proper subset of the total evidence, or they will form a subset of it that retains some of the inconsistency but will assign to its competing elements different weightings. It is therefore entirely commonplace that the abductions advanced by opposing counsel proceed from different subsets of the total evidence. Nor is it uncommon that the evidence tied to the jury's own abduction is yet a different subset of the evidence, although usually the three overlap fairly significantly.

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[1] Although there is some overlap between them, not everything that holds in the common law tradition holds in the tradition of Germano-Roman law.

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Accordingly, a lawyer's address to the jury will typically have two components. One is a presentation (sometimes implied rather than expressed) of reasons for selecting his particular subset of the evidence. The other is the advancement of what he takes to be the best explanation of it. By the time a case goes to the jury, it is typically the case that its members are faced with two rival abductions explaining two rival bodies of evidence. It falls to the trier of fact to assess not only the strength of these rival abductions, but the soundness of the evidence-selection choices to which they are tied.

On the face of it, these features place criminal verdicts at risk of incommensurability. Let the prosecution's and defence's respective theories of the case be schematized as follows, with "*G"* representing "guilty as charged" and "*E"* and "*E*′" representing different and usually mutually incompatible subsets of the evidence heard.

Prosecution: G best explains *E.*
Defence: not-G best explains *E.*′

It is an interesting sort of incommensurability. For how could the one claim prevail over – indeed contradict – the other, given that they might both be true?

I won't be concerned here with the incommensurability problem. I lack the space to examine the dynamics of evidence-selection, interesting and important as this question assuredly is.[2] Instead, what I want to do in this chapter is to expose what I take to be the basic structure of abductive reasoning, with special attention on how this bears on the criminal proof standard of guilt beyond a reasonable doubt.

11.2 Ignorance-Problems

Abductions are responses to *ignorance-problems.* An agent has an ignorance-problem in relation to an epistemic target that cannot be reached by the cognitive resources presently at his command, or within his easy and timely reach. Intuitively, if I want to know whether *P*, and I lack the information to answer this question, or to draw it out by implication or projection from what I currently know, then I have an ignorance-problem with respect to *P*. The two most common responses to ignorance-problems are:

(1) the acquisition of new information
(2) acquiescence.[3]

[2]This is undertaken in (Woods, 2007b).

[3]Consider a commonplace sort of case. I've forgotten how to spell "accommodate". Does it have one "m" or two? If I walk from my desk to the dictionary on the other side of the study and look up its spelling, then I have availed myself of response (1). On the other hand, if I decide to replace "accommodate" with a synonym that I can spell – say "provide for" – I have made a response of type (2).

In the first case, one's ignorance is removed by new knowledge, and a new position is arrived at which may serve as a positive basis for action. In the second case, one's ignorance is fully preserved, and is so in a way that cannot serve as a positive basis for new action.

There is a third response that is sometimes available. It is a response that splits the difference between the prior two. The third response is abduction. Like response (2), it is ignorance-preserving, and like response (1), it offers the agent a positive basis for action. In response (1), the agent overcomes his ignorance. In response (2), his ignorance overcomes him. In response (3), one's ignorance remains, but one is not overcome by it.

Response (3) offers the agent a reasoned basis for action in the presence of his ignorance. No one should think, however, that the goal of abduction is to *keep* oneself in ignorance. The goal is to make the best of the ignorance that one chances to be in.[4]

11.3 A Schema for Abduction

Consider an actual case. In 1900, Max Planck was troubled by the fact that there were no unified laws for black body radiation. He took it for granted that the actual state of the world was such that black body radiation was in fact governed by unified laws. But in 1900, the physics of the day presented no such unification. So Planck took it as given that the physics of the day misdescribed the world in that regard. It presented the world as it wasn't. The laws which were disunified in our theories were unified in nature. Planck wanted to know what it was about the universe that subjected black body radiation to unified laws. He didn't know. No one knew. This constituted an ignorance-problem for physics. Planck realized that if light possessed a quantal structure, then the laws of black body radiation could indeed be unified. Nothing that was known of the physical world in 1900 lent the slightest credence to this idea of the quantum. Even so, Planck persisted with it. Let *H* be the proposition that "Light has a quantal structure" and let *T* be the epistemic target of wanting to know what the world has to be like in order that black body radiation would be governed by unified laws. Planck didn't come upon the answer to *T,* but he did know that if *H* were true, *T would* be answered. He knew that *H subjunctively* answers *T.* The rest is history. On the basis of *H*'s constituting a subjunctive attainment of his epistemic target *K,* Planck did two things. First, he *conjectured* that *H* is true. Secondly, on that basis, he *activated H* and put it to further premissory work in physics.[5] Since it was grounded in conjecture, Planck's activation of *H* was, of course, presumptive and defeasible. Even so, this did not prevent him saying to his son, "Today I have

[4]Ignorance-problems are discussed in greater detail in Gabbay and Woods (2005) and Gabbay and Woods (2006).

[5]The thesis that activation is essential to abduction is discussed in greater detail in Gabbay and Woods, (2005).

made a discovery as important as that of Newton." It is useful to note in passing that Planck's was not an inference to the best explanation. For one thing, Planck was convinced that the quantum hypothesis lacked physical meaning. His employment of it, therefore, was for its instrumental value, not its explanatory force.[6]

With Planck's example in mind, we can give a general schema for abduction, as follows. Let T be an agent's epistemic target at a time, and K his knowledge-base at that time. Let K^* be an immediate successor of K that lies within the agent's timely means to produce. Let R be an attainment-relation on T and R^{subj} a subjunctive-attainment relation on it. $K(H)$ is the revision of K upon the addition of H. $C(H)$ denotes the conjecture of H and H^c its activation. Accordingly, the general structure of abduction is as follows.

1. T!	[setting of T as target]
2. $\sim (R(K, T))$; i.e., T cannot be reached on the basis of K.	[fact]
3. $\sim (\mathrm{R}(K^*, T))$; i.e., T cannot be reached on the basis of K.*	[fact]
4. However, $\mathrm{R}^{\mathrm{subj}}(K(H), T)$; K updated by H would attain T if H were true.	[fact]
5. H meets further conditions S1, $\cdots$ S_n.	[fact][7]
6. So $C(H)$; i.e., H is conjectured.	[sub-conclusion, 1–5]
7. So H^c; i.e., H is activated and released for defeasible premissory action in subsequent inferences and calculations.	[conclusion, 1–6]

Here, too, and notwithstanding what might be suggested by the Planck example, it is advisable to guard against a misconception. When we say that an abduction involves the activation of a hypothesis in a state of ignorance, it is not at all necessary, or frequent, that the abducer be wholly in the dark, that his ignorance be total. It need not be the case, and typically isn't, that the abducer's choice of a hypothesis is a blind guess, or that nothing positive can be said of it beyond the role it plays in the subjunctive attainment of the abducer's original target. Abduction is not mysticism. In particular, it is not foreclosed that there might be evidence that lends the hypothesis a positive degree of likelihood. But when the evidence is insufficient for activation, sometimes explanatory force is the requisite "top-up". Loosely speaking, abduction often is a deal-closer for what the available evidence cannot, then and there, attain on its own.[8]

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[6] Non-explanatory modes of abduction appear prominently in "reverse mathematics" pioneered by Harvey Friedman and his colleagues, e.g., Friedman and Simpson (2000). The idea of reverse mathematics originates with Russell's notion of the regressive method in mathematical logic (Russell, 1907), and is also present in some remarks of Gödel (1944, 1990).

[7] Informally, what this means is that H has a no more plausible and relevant rival constituting a greater degree of subjunctive attainment of T. Elucidating condition (5) is one of the more difficult tasks facing a logic of abduction, but it won't be our focus here. See Gabbay and Woods (2006).

[8] One should add: "if ever".

11.4 Its Bearing on Theories of the Evidence

Of course, some criminal prosecutions are open and shut. They leave no one in any doubt about who did what to whom. Sometimes those cases are defended for merely strategic reasons, perhaps in the hope that a losing defence may nevertheless influence a judge's decision on sentencing.[9] But in the usual run of cases, a defendant will go to trial with a plea of not guilty if he thinks that the Crown's case can be effectively rebutted or if he thinks that, rebuttable or not, it doesn't rise to a proof beyond a reasonable doubt. In the majority of such cases, the total evidence will embody significant inconsistencies. Not only will the evidence led by opposing counsel be in conflict, but witnesses for either side may in various respects contradict one another. This presents a juror with two ignorance-problems. Although he must decide who is telling the truth, by and large he will have to perform this duty on some basis other than knowledge. And, having selected which segments of the evidence he is prepared to accept, a verdict of guilty is also by and large rendered on some basis other than knowledge. While it cannot be foreclosed that a jury will sometimes lodge a conviction in the manifest certainty of the accused's guilt, in the general case a conviction will be underdetermined by what a jury *knows*.

A theory of the evidence is meant to narrow the gap between what the juror knows and what he desires to know. In the cases we are discussing, a prosecution's closing argument is an argument to the effect that the hypothesis that best explains the evidence is that the accused is guilty as charged. If a juror accepts that evidence and accepts that it provides the best explanation, his remaining duty is to determine whether the explanation is strong enough to justify a conviction. A juror may select a different subset of the evidence and may have a different view of what best explains it. When this happens he must determine whether the hypothesis of guilt is a better explanation and strongly enough so to justify a conviction. Even so, on a strict reading of the burden of proof, a jury cannot *convict* on that basis. On that reading, its duty is to determine whether the *Crown*'s theory of the case supports conviction, not that its own theory of the case does.[10] On the other hand, under this same reading,

[9] Still, such cases are rare. It is much more common for defendants, in jurisdictions where it is permitted, to "plead out" in return for an antecedently agreed-upon lighter sentence.

[10] Actually, this touches on a vexing problem for legal theory and legal practice alike. In the common law tradition, the prosecution's burden is to prove every element of the case required for conviction. A jury's duty is to determine whether the prosecution has met this burden. So from this perspective, the juror's duty is to assess the prosecution's theory of the case, which involves determining whether the prosecution's abduction has the requisite strength and whether the subset of the evidence it purports best to explain is an adequate evidential basis for an abduction of guilt. On the other hand, the jury also has a duty to determine whether, having heard *all* the evidence, it is proved beyond a reasonable doubt that the accused is guilty as charged. This is a broader mandate than the duty to determine whether the prosecution's case has met the burden of proof. Let us say this as simply as possible. The burden of proof and the standard of proof place on jurors different and not always compatible tasks. It is easy to see that, in fulfilling its duty to ascertain whether the Crown has met its burden, a jury might well reject the Crown's *case* and thereby find that the prosecution has failed to meet the burden of proof. But the jury might also, and with consistency to

a jury may *acquit* an accused on this basis. If a jury fashions its own theory of the case in which the winning hypothesis is incompatible with the hypothesis of guilt, it has a duty to bring in a verdict of not guilty.

The abductive character of theories of the trial is perhaps most evident when the evidence heard is circumstantial. For the purpose of this chapter, I am content to restrict the scope of my abductive thesis to the enormous number of cases that cluster around this paradigm. There is a myth that seems to have become rather entrenched among the laity, to the effect that circumstantially argued cases can't meet the criminal proof standard or, anyhow, can do so only in some diminished sense, *faute de mieux*. The myth is contradicted both by legal practice and juridical pronouncement. Thus we read in (Klotter, 1992, p. 69) that

> [h]istory is replete with examples of convictions based exclusively on circumstantial evidence.[11]

What is more, in an American case from 1969,

> The trial judge properly instructed the jury that 'the law makes no distinction between direct and circumstantial evidence but simply requires that the reasonable doubt [if it exists] should be drawn from all the evidence in the case', including 'such reasonable inferences as seem justified in the light of your own experiences.' (Klotter, 1992, p. 68)[12]

This would also be a good place to try to bring some clarity to the constraint that the winning theory of the case be the *best* explanation of the evidence. In 1978, the Indiana Court of Appeals ruled that

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its total obligations, determine that the evidence heard contains an acceptable subset that supports a verdict of guilty in fulfillment of the standard of guilt beyond a reasonable doubt. Perhaps this doesn't happen often. But it is perfectly possible for a stupid or lazy prosecutor to fail to find a winning case in his own filtering of the evidence. Upon reflection, it is right and proper that standard of proof supercede the burden of proof. And, of course, it would be neater if the burden of proof were revised to reflect the necessity that every element of the case for conviction be proved to the requisite degree by the subset of the evidence that the jury accepts as operational, never mind whether the Crown actually succeeds in making that case.

[11] Klotter (1992) defines circumstantial evidence as follows: "Direct evidence proves a fact without inference . . . Circumstantial evidence is evidence from which a fact is reasonably inferred but not directly proven." (pp. 67–68).

[12] But here, too, there are contradictory rulings. Notwithstanding that the U.S. Supreme Court eliminated it from federal trials, the following instruction regarding circumstantial evidence is still in force in the state courts of California.

> However, a finding of guilt as to any crime may not be based on circumstantial evidence unless the proved circumstances are not only (1) consistent with the theory that the defendant is guilty of the crime, but (2) cannot be reconciled with *any* other rational conclusion . . . Also, if the circumstantial evidence permits two reasonable interpretations, one of which points to the defendant's guilt and the other to innocence, you *must* adopt that interpretation that points to the defendant's innocence, and reject that interpretation that points to guilt. (CALJIC 2.01. Emphases added).

See *Holland v. U.S.* (1954) for the opinion that "the instruction on circumstantial evidence is confusing and incorrect."

> [c]onvictions should not be overturned simply because this court determined that the circumstances do not exclude every reasonable hypothesis of [the] evidence. (Klotter, 1992, p. 69).

While the Indiana ruling does not say so explicitly, it would appear to allow for the possibility of a theory's superior explanatory force being undermined by the jurors' doubts about the credibility of the particular subset of the evidence which counsel offers it as explaining. In other words, a losing theory of the case might have the greater explanatory power in relation to evidence the jury has trouble with than that possessed by the other party's explanation of the evidence that jury is more disposed to accept. The ruling also allows for a conviction in which prosecution and jury have selected the same evidential subset, notwithstanding that there are other reasonable explanations of it incompatible with the hypothesis of guilt. This offers some clarification of the "best" requirement, but not much. But it does tell us that the best explanation is not in general to be identified with the *only* reasonable explanation.

Still, we should not overlook that on rare occasions the evidence that a jury is prepared to accept does admit of only one possible explanation. In such cases, it is perfectly proper for the jury to make a "transcendental" inference in the form: "These are the facts. These facts could not have obtained except that the accused committed the crime with which he is charged. Consequently, we must convict." Transcendental arguments are regressive or backwards chaining arguments, but they are not abductive, since, when they come off, they are not ignorance-preserving. But I say again that occasions for a jury availing itself of a transcendental inference are comparatively rare in actual practice.

Acceptance of the prosecution's case has two components. The jury must find that the hypothesis abduced by the prosecution is strongly explanative and that no rival hypothesis permitted by the evidence is more explanative. The jury must also determine that the best explanation is strong enough to meet the criminal proof standard. In so saying, a nasty difficulty presents itself. On the face of it, this second condition cannot be met. The reason is that abductions are ignorance-preserving, leaving the jury not knowing whether the accused is guilty as charged. This flows from the logical structure of abduction. It provides that the hypothesis of guilt is a conjecture, an educated guess. How can an educated guess qualify as *any* kind of proof, still less a proof beyond any reasonable doubt? This is trouble bad enough to deserve a name. My choice is the *Abductive Paradox.*

11.5 The Hypothesis-Activation Problem

Leaving legal niceties to one side for the next several lines, it is clear that the activation factor presents the abducer with an interesting and quite general epistemological challenge. Given that a successful abduction preserves the ignorance that originally triggered it, then in fulfillment of what criterion of justification does a rational decision to activate consist? We may take it as given that not every

conjecture an abducer makes is one that he actually activates. Presumably there is a factor present in the activating cases that is absent in the non-activating cases. On the face of it, it is satisfaction of a criterion *K* that justifies acting in the face of one's ignorance, a criterion that makes acting in such conditions *reasonable.* No doubt, part of what constitutes the reasonability of abductive hypothesis-activation is the agent's due regard for the costs that would arise should the hypothesis in which the action is rooted turns out to be false. But it also bears on the economics of the situation what the costs would be if no action were taken and yet the abducer's hypothesis happened to be true. There is a considerable body of work that probes the general question of inference under conditions of uncertainty. To date, the consensus appears to be that an uncertain hypothesis might be accepted if its conditional probability on the available evidence is high, and that it might be acted on when it passes the requisite cost-benefit test. However, returning now to the legal context, there is little reassurance in this consensus for the juror-abducer. For one thing, high probability does not meet the standard of criminal proof (see just below). For another, the cost of a false conviction is very high. Taken together, one can only wonder whether *any* ignorance-preserving conviction could meet the standard of proof. Let us call this the hypothesis-activation problem (HAP). It is, as I say, a quite general problem for abduction, but it has a particular bite for the rendering of criminal verdicts.

11.6 Reasonable Doubt

Concerning HAP in legal settings, we know that activation of the hypothesis of guilt requires that it meet the standard of proved beyond a reasonable doubt. We read in a prominent American text book that

> [r]easonable doubt is a term in common use as familiar to jurors as to lawyers. As one judge has said, it needs a skillful definer to make plainer by multiplication of words . . . (Strong, 1999, p. 517).

A like sentiment is to be found in instructions from the U.S. Seventh Circuit Court of Appeals.

> "Reasonable doubt" must speak for itself. Jurors know what is "reasonable" and are quite familiar with the meaning of "doubt". (*U.S. v. Glass,* 846 F.d. 386 (1988).

These are remarks wholly typical of the epistemological orientation of the common law. Its fundamental concepts – proof, inference, relevance, probability, among others – are presumed to be adequately understood intuitively, that is, in the absence of analytical tutelage. What is more, the common law embodies a certain scepticism about definitions and formal explications, according to which an analysis of terms is either redundant or conceptually distorting. Both these sentiments can be found in the lines I have just now quoted.

Even so, judges will on occasion venture forth with definitions. A recent example is formulated by the Supreme Court of Canada in *R. v. Lifchus* as a model instruction

to jurors.[13] It provides, on the one hand, that jurors need not have absolute certainty of the accused's guilt but, on the other, that his probable guilt is not enough. Even believing that he is guilty is not enough. In a subsequent case, it was averred that it would

> [b]e of great assistance for a jury if the trial judge situates the reasonable doubt standard appropriately between the two standards [of certainty and probability]. (*R. v. Starr*, [2000] 2 S.C.S. 144 at para. 242.)

I will not take the time to dwell on the haplessness of these high court explications, beyond saying that they are multiplications of words that make things less plain, not more. Even so, the model charge of *Lifchus* also contains a further sentence that may be of some use to us.

> In short, if based upon the evidence . . . you are sure that the accused committed the offence you should convict since this [i.e., the conviction] demonstrates that you are satisfied of his guilt beyond a reasonable doubt. (13–14).

I don't for a moment want to suggest that these words are the acme of clarity, but they do embed (perhaps inadvertently so) an interesting suggestion which I now want to try to tease out.[14] I shall do so by examining the doctrine of the reasonable man.[15]

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[13](1999), 9 C.R. (5th) 1 (S.C.C.)

[14]Ennis (1996) reports the experience of its American author as a juror in a murder trial. Robert Ennis is a leading analyst of critical thinking (and, in many common law jurisdictions, would have been excluded from jury-duty on that account – perhaps the courts in Illinois don't regard critical thinking as an expert discipline). Ennis tells us that the presiding judge refused the jury's request for a definition of reasonable doubt, replying that "There is no definition of *proven beyond a reasonable doubt*. Do the best that you can" (p. 320). Ennis then proposed the following definition to his colleagues, which they accepted (and acted on):

> To say that something is *proven beyond a reasonable doubt* is to say that it would not make sense to deny that thing (p. 320).

After the trial, Ennis thought better of this definition and replaced it with:

> To say that a conclusion is *proven beyond a reasonable doubt* is to say that the evidence supports it so strongly that it would not make good sense to deny it (p. 326).

In the end, the jury acquitted the defendant of murder but found her guilty of voluntary manslaughter. Ennis writes "[t]he definition I gave, despite its defects, enabled us to discuss the matter [of the justification of the defendant's use of force]. In this situation, I believe that the defects in the definition did not affect the argument" (p. 321). Why would this be so? Because, says Ennis, in "giving that definition in that situation, I was not telling people anything they did not already know" (p. 320).

[15]It is not too much to say that in common law jurisdictions the question of the teachability of the criminal standard of proof is in substantial disarray. In a significant ruling, the Supreme Court of the United States (*In re Winship*) found that there was a constitutional obligation that criminal juries were, without exception, to be instructed that guilt beyond a reasonable doubt is necessary for conviction. Given that judges must now tell juries that they are subject to this standard, a question naturally enough arises as to whether judges should also go on to tell juries what the standard means. It bears on this that recently England has abandoned a practice of two centuries

11.7 The Reasonable Man

The concept of the reasonable man or, as we must now say, reasonable person, lies at the heart of the law of torts, where it helps distinguish strict liability from the liability of fault. In this usage, it is the subject of a great deal of finely wrought analytical instruction by judges and legal theorists and, so, is an important exception to the law's epistemology of tacitness with regard to its foundational concepts. But the idea of the reasonable person also leaves its tracks in other quarters of the law, notably in its conception of how juries are to be constituted and what they can be considered capable of doing. Juries – both criminal and civil – are made up of ordinary persons who have had no expert or formal tutelage in the matters they will hear in evidence. In most common law jurisdictions, a professional training in any such matter disqualifies a person from jury duty. In this same spirit, it is assumed that the reasoning and reflection that the jury will be required to bring to bear on the evidence will be of a kind and of a quality open to the ordinary person reasoning in the ordinary way of things. Here, too, if a judge actually did think that a formal training in, say, logic endowed its owner with expertise in the matter, he would disqualify him from serving. (But see again the reference to the critical thinking scholar Robert Ennis in note 14.)

This teaches us an important lesson about reasonable doubt. In its commitment to the reasonable person model of the trier of fact, the law presumes that the standard of proof beyond a reasonable doubt is routinely meetable by ordinary persons reasoning in the way of ordinary persons. What is this "reasoning in the way of ordinary persons"? It is intuitive and unreflective reasoning. It is reasoning that omits the overt calibration of performance to criteria. This means, in particular, that when a juror finds an accused guilty beyond a reasonable doubt, he (the juror) has no duty to make the case that his verdict meets the conditions required to meet the standard and in general would be wholly incapable of making it. We have here a distinction of some importance. Everyone agrees on the *name* of the proof standard. What matters are the conditions necessary and sufficient for meeting it, that is the conditions that constitute the legal fact of criminal guilt. The distinction, then, is that between

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of having judges instruct jurors about the meaning of the standard. What brought this about was pressure from legal theorists to the effect that "reasonable doubt could be neither defined, nor uniformly understood, nor consistently applied." (Laudan, 2006, p. 76) Much the same view prevails in a number of U.S. state jurisdictions. In Oklahoma and Wyoming, to take just two examples, a judge's instruction on the meaning of the standard is automatic grounds for reversal (*Pennell v. Oklahoma*,640 P.2d 568 at 570 (1982), and *Cosco v. Wyoming*, 521 P. 2d 1345 (1974) at 1346). On the other hand, 15 states require that the standard be defined, while most appellate courts discourage the practice. Again, the Seventh Circuit Court of Appeal "admonished district courts not to define 'reasonable doubt'." (*U.S. v. Martin-Tregora* 684 F. 2d 485, at 493 (7th Cir. 1982). In 1994, the Fourth Circuit Court ruled that when a jury asks for a definition of the standard, a judge is at liberty to refuse. (*U.S. v. Reives*, 114 S. Ct. at 2679 (1994). The U.S. Supreme Court has never managed to decide whether reasonable doubt should be defined, finding that the American constitution is non-committal about whether a definitional obligation exists (*Victor v. Nebraska,* 114 S. Ct. at 1243 (1980).

the proof standard and the conditions or criteria for its fulfillment. Thus we are re-met with HAP, the hypothesis-activation problem of the preceding section. We are re-met with it rather strikingly. For what the doctrine of the reasonable person reasoning in the way of reasonable persons seems to say is that the ordinary untutored juror is incapable of articulating a solution to his own HAP as it applies to a decision to convict. Of course, he can state the condition. But it would appear to be that he lacks the wherewithal for establishing that his verdict to convict satisfies the conditions necessary and sufficient for meting the standard. It is not just that the juror can't name the conditions that constitute proof, but even if he could, he would not have the means of determining whether the decision he is minded to take comports with those criteria. So, as an expository convenience, we will say that the juror's situation is that he appears not to be able to *negotiate* these conditions, whether or not he is aware of them.

This is epistemic implicity of high order. The decision (as in some jurisdictions) to send a man to his death rests on satisfying a criterion of justified hypothesis-activation which the ordinary person cannot and should not be required to negotiate. This contrasts markedly with what may be taken as the dominant decision model in the relevant research literature. For lack of a settled term, I shall call it the *Rational Deliberation Model* (*RDM*)[16]. According to *RDM*, a decision to perform an action *A* is reasonable only if (1) there is a criterion *K* for the reasonableness of action, which the decision-maker is able in principle to cite. And (2) it is possible in principle for the decision-maker to determine – usually by calculation – whether *A* satisfies *K*. The doctrine of the reasonable person – the ordinary, untutored person – rejects *RDM*. It asserts the existence of reasonable decisions in which conditions (1) and (2) of *RDM* are failed. On this view, if there is a criterion of reasonableness for the decision-maker, it is not one that he negotiates by *RDM*-procedure of citation and calculation. We could characterize *RDM*-decisions as *hit-the-mark* decisions. Accordingly, non-*RDM* decisions are those that do not hit the mark, they are, as we might say, non-hit-the-mark decisions, or decisions according to the non-hit-the-mark model (*NHMM*).[17]

There is an epistemological counterpart of the *RDM*. It is by far the historically dominant model of knowledge in the western philosophical tradition. Although it admits of a number of variations that are not always pairwise compatible, at its central core is the idea that our knowing that α depends on our having the competence to

[16] A classic source of the *RDM* is Savage (1954). Early reservations about it are found in Simon (1957) and Suppes (1956). See also Suppes (2002, chapter 5) and Gigerenzer (2000).

[17] Consider an example from Gigerenzer (2005). An outfielder is making to catch a well-hit fly fall. There are two models for this, only one of which comports with the empirical record. In the one model – not unlike the *RDM* – he seeks to predict where the ball will land, and moves himself accordingly. This involves calculations of trajectories and the like that no one can make in the time it takes to catch the ball. So instead – this approximates to the *NHMM* – the fielder moves himself in such a way as to keep the moving ball in the centre of his field of vision. In so doing, he moves to where he needs to be when the ball falls. No doubt what he does conforms to all the mathematical requirements for charting the point of impact, but in actually catching the ball, none of these requirements was actually implemented.

make the case that α. Let us call this the case-making model of knowledge (*CMM*).[18] Like the *RDM* of reasonable decision-making, the *CMM* of knowledge conceives of the human knower as a rational intellect capable of identifying the criteria of knowledge and of determining articulately – and, in some cases, determining by calculation – whether, in his present state, he fulfils them. In recent years, however, the *CMM* has been challenged by the rise of causal-reliabilist theories of knowledge. Here the basic idea is not that knowledge is a state of belief negotiated by the knower against a set of cited criteria, it is not a state of belief that one elects to be in when these criteria are fulfilled. Rather, knowledge, like belief itself, is the output of *causal* processes. One knows that α when α is true and when the cognitive processes that caused one's belief that α are working reliably, or as they should.[19] Let us call this the causal-reliabilist model of knowledge (*CRM*). In its pure form, the *CRM* provides that when the knower of α *is* in a position to make a case for it, this is supplementary to the fact that he knows it. So while it is sometimes true that we are able to make the case for what we know, that we do so is not a general condition on our knowing what we know. However, this is *not* to overlook that it also sometimes happens that one doesn't know that α short of making the case for it, and that one's case-making processes *cause* the belief that fulfills the *CRM*-requirements. There is all the difference here between electing to believe and being made to believe.

It is easy to see that NHMM decisions bear an affinity to the *CRM* of knowledge. In both models, the end state – whether a decision or a belief – is the causal output of processes and stimuli which the agent is duly placed to receive, as opposed to being the results of voluntary selection on the basis of case-making. It would not be going too far to say that what the *CRM* and the *NHMM*-model emphasize is that competent beliefs and decisions are those that arise somewhat passively[20] from exposure to the right stimuli, as processed by the causally right devices. Perhaps there is something to learn from this in the case of the activation of the hypothesis of guilt. But let me say for now that consistency requires that if one scorns the NHMM of decision-making, one must also scorn the *CRM* of knowledge. In the last 30 years or so, the *CRM* has secured a well dug-in place in mainstream epistemology. So simply rejecting it out of hand is not a reasonable option. Like care should be taken with breezy denunciations of the NHMM.

Consider a concrete example of *RDM*- and *CMM*-thinking. Anyone who has had even a nodding familiarity with first-year logic, will have some command of the proof methods for classical propositional logic. Not only is it possible to hit the logic's proof standards, it is possible to demonstrate when they've been hit. In fact, it is possible to give precise instructions as to how to find out whether they've been hit. For expository ease, when these possibilities obtain let us say that the embedded standards are "fully negotiable". Contrast this with determining whether an infant's

[18] See here Woods (2005).

[19] I have adapted this formulation from Millikan (1984). We might note in passing that in its present construal, unlike early formulations in Goldman (1967, 1973), justification plays no role.

[20] The qualifier "somewhat" is explained below in Section 9.

formula is the right temperature for drinking. There is a criterion *K* for this. How does the feeder fulfill it? The feeder sprinkles a drop or two of the heated milk on his or her forearm. If it feels right, the baby is fed. If not, not. When the arm feels right, the feeder supposes the milk to satisfy *K*. But unlike the logic student, who can prove that he has hit the proof standard and who can give instructions as to how to prove that he's hit it, the bottle-warmer can do neither of these things, even when he has judged correctly. He cannot negotiate the conditions necessary and sufficient for the fulfillment of *K*. This is *NHMM/CRM*-thinking *par excellence*

There is a further moral to draw. It is widely believed that the criminal proof standard is a particularly high one, and artificially so. That is to say, that it is a standard higher than one that would suffice for determinations of guilt in non-juridical settings – think, for example, of a university's misconduct committee – and artificial by virtue of the fact that it is imposed by the courts as a hedge against wrongful conviction. This is twice-over a mistake. If compared to the standards of mathematical demonstration and scientific confirmation, the criminal standard is pretty small beer. And since it is a comparatively low standard, its remarkable loftiness cannot be a matter of courtly imposition. It is quite true that courts do impose artificialities that serve as hedges against wrongful conviction,[21] but the criminal standard of proof is not one of them.

Since juries don't proceed by aiming at standards and don't succeed by aligning their thinking to their criterial requirements, in other words, since jurors are not hit-the-mark thinkers, it remains to speculate on how the proof standard is actually met.

Here the last-quoted observation from *Lifchus* is suggestive. A juror must convict if, upon attending to the evidence, he is *satisfied* that the accused is guilty as charged. And since, in reaching that state of mind, he is not a hit-the-mark thinker, satisfaction here is an *operational* concept, not a criterial one. A juror's satisfaction is not to be confused with his belief that the accused is guilty or his judgement that the accused is probably guilty, or his feeling that the accused could not possibly be innocent, but rather is *constituted* by the decision to convict. The satisfaction is implicit in the conviction.

I think that we may now say that we have ready to hand one part of an answer to the Abduction Paradox in legal settings:

1. *The criminal proof standard* is not *particularly high, and is attainable without tutelage by any reasonable layman.*

Proposition (1) is supported semantically. People who worry that the intuitive and untutored character of jury decisions is of too low a standard to qualify as proof overlook the core meaning of that notion. Whether in mathematics or science or the kitchen, a proof is the result of a trial that defeats a presumption. The toughness of both the presumption and the trial vary with the nature of the contexts in which

[21] Notably in judicial determinations of the admissibility of evidence, the Crown's burden of proof and the presumption of innocence.

proof is sought. Things are tougher in mathematics than they are in the kitchen, but, for all their difference, a proof of a theorem and a proof of the pudding preserve this core meaning. This gives a second thing to say against the paradox:

2. *The comparative lowness of the criminal standard doesn't particularly strain the core meaning of the concept of proof.*

We come now to a third point. If we again reflect on the core meaning, we are reminded that proofs arise from *trials.* In mathematics, a trial is a sound demonstration of a proposition otherwise presumed to be mathematically inadmissible. In science, a trial is the application of the scientific method to a proposition otherwise presumed to be scientifically inadmissible. In the kitchen, a trial is the eating of a dish otherwise presumed to be unfit for the King. In law, a trial is an attempt to defeat the presumption of innocence. In this we see a deviation from the abductive paradigm schematized in section 3. In the general case, the trial of an abduced hypothesis *follows* its activation. But in the law, activation is reserved until the hypothesis has been tried. So a third thing to say against the paradox is:

3. *A prosecution is an attempt to defeat the presumption of innocence. A defence is an attempt to defeat that attempt. A verdict of guilty survives all available effort to defeat it.*

Perhaps we might think that we have made some progress in attaining a better understanding of the criminal proof standard. In what we have suggested so far, we have placed good deal of weight upon the notion of satisfaction.[22] But satisfaction is no less ambiguous a concept than the law's other foundational concepts. If we leave it in this undisambiguated state, we compromise the criminal standard interpretation that rests upon it. It is not that we have done nothing to clarify our intended use of "satisfy". We have said that being satisfied that *H* is, in this legal sense, different from believing that *H,* judging *H* to be probable and thinking *H's* falsity impossible. But what, we might ask, is its further positive mark, and in what way does it bear essentially on the structure of abduction?

11.8 The Abductive Character of Verdicts

What is it to convict a person for murder knowing that you do not know whether he is guilty of it? The general form of this question is answered in the logic of abduction. There is a presumption that risky actions should be avoided in the absence of certainty. This is the fundamental principle of risk aversion in conditions of uncertainty. The costlier the consequences should one's action turn out to be mistaken, the greater the need to mitigate uncertainty before the action is taken. This is a wisely

[22] If space permitted, a good deal more could (and should) be said about what might be called the psycho-epistemic character of satisfaction. Interested readers could consult Woods (2005), Gabbay and Woods (2007) and Woods (2007a).

conservative principle, but like most good things we can have too much of it. In its most extreme form risk-averse conservatism is equivalent to our second – or do-nothing – response to an ignorance-problem. No one thinks that this is the right form of the principle *in general.* Abduction, or the third response, risks action in the absence of knowledge, even where such actions are neither trivial nor reversible. Even so, the weightier the consequences of being wrong, the stronger the abduction must be. This cues a further operational remark about satisfaction.

4. *Knowing the risks, one's satisfaction with H is constituted by one's activation of it, the higher the risks, the greater the satisfaction.*

Jurors, like the rest of us, are seized of the great wrong of a false conviction and have a duty to minimize the likelihood of its commission. But jurors are not permitted, still less do they have a duty, to avert the wrong of wrongful conviction by declining to convict no matter what. They have a duty to convict when they are satisfied. The *mark* of that satisfaction is activation of the hypothesis of guilt, knowing the risks.[23]

According to the general schema for abduction, a conjecture is activated when the abducer releases it for premissory work in the disciplinary contexts in which the originating ignorance-problem arose in the first place. This is one way – the abductive way – of sending a conjecture to trial. One puts it to work, and one sees what happens. It is quite true that sometimes a conjecture is sent to trial without the intervening step of activation. In such cases, the conjecturer does not act on the hypothesis he has arrived at until its *bona fides* have been subsequently established. As common as this practice may be, it is not abduction according to the general schema. Some may see it otherwise. They may think that the example at hand shows the general schema in a bad light. Lacking an interest in unedifying semantic wrangles, I am prepared to split the difference. Such cases are not abductions in full; they are *partial* abductions.

This has a direct bearing on the abductive character of theories of the case. When a prosecutor conjectures the guilt of the accused and the defence conjectures his innocence, it lies in the nature of criminal proceedings that neither party can put his respective conjecture to work in ways that qualify as *activation.* Activation falls to the jury. So we may say that a distinctive feature of counsels' theories of the evidence is that they are partial rather than full abductions. But it is different with juries. When a jury convicts on the basis of his own abduction from a subset of the evidence that it itself selects, the abduction is full.

11.9 Rational Adequacy

My limited purpose has been to explain away the Abduction Paradox in legal settings by demonstrating that the criminal proof standard, both in its height and the

[23] Nor should we lose sight that in common law jurisdictions, most criminal convictions are not appealed, and most appeals are lost. So much for the reversibility of wrongful convictions.

manner of its attainment, is low enough and ordinary enough to permit satisfaction by the shared structure of the Crown's case, with the Crown making the conjecture of guilt and the jury activating the conjecture or, with the jury itself making its own case which it then activates. It has not been my further purpose to suggest that in general the results of such abductive manoeuvres are epistemically satisfying.

Even so, the question of the epistemic reliability of these practices is a crucially important one. It is a harder question to answer than we might like it to be. Such empirical work as presently exists is disturbing. In an investigation of several hundred Michigan jurors, fully twenty-five percent asserted that "you have a reasonable doubt if you can see *any* possibility, no matter how slight, that the defendant is innocent" (Kramer and Koening, 1990, p. 414; quoted from Laudan, 2006, p. 49). In another study, one in four Florida-based jurors found that when the evidence is evenly balanced between guilt and innocence, the defendant must be found guilty (Strawn and Buchanan, 1976, pp. 480–481; quoted from Laudan, 2006, pp. 49–50). Discouraging as these findings are, there may be some reason not to take them at face-value. For if, as has been suggested here, a jury's finding is intuitive, unreflective and non-criterial – in other words, of the *NHMM*-kind – the very questions that prompted these answers are of a type that require criterial determination in terms that may not have entered the jury's actual thinking. Accordingly, there may be some room for the hope that they inadequately reflect what was actually in those juries' minds as they reached their decisions. Where would such room be sought? An obvious candidate is the *NHMM* for decision-making. In this model there is no presumption that the reasonable decision-maker is required, or able, to cite the conditions whose satisfaction makes his decision reasonable. It is possible, therefore, that when such decision-makers are pressed, they yield to *RDM*-presumptions and, accordingly, talk a lot of nonsense.

Not everyone will like the *NHMM* of decisions any more than they like the *CRM* of knowledge. Concerning the former, it might seem to harbour a twofold difficulty, especially in legal settings. One might think that the legal understanding of proof beyond a reasonable doubt places too much emphasis on what a juror *feels* about the evidence, that the injunction that requires a juror to be *satisfied* that the standard is met is unsupportably subjective. A related weakness might also be described this way: Suppose

> that the criminal law had a genuine standard of proof, one that did not depend on the juror's subjective evaluation of guilt but on the establishment by the prosecutor of a powerful inferential link between the evidence presented and the guilt of the accused. In such circumstances, guilt would not depend on jurors' introspection of their confidence in guilt but on a determination by them of whether that standard has been satisfied (Laudan, 2006, p. 81).

On this view, jurors must weigh the probative value that the evidence objectively possesses. They must also determine when that value is high enough to satisfy the standard of proof objectively (Laudan, 2006, pp. 83–88).

There is confusion in these remarks. Not only do we see clear evidence of a presumption that favours the *RDM*, there is also the suggestion that a decider's subjective state is insufficient to meet the proof standard. This last is true. But its

negation is nowhere present in the criminal law. On both models, the *RDM* and the *NHMM*, there is the requirement that a decider be in a subjective state, but in both models something else is required. The *RDM* requires the decider to be able to articulate criteria of reasonableness and calculate the degree to which his subjective state conforms to it. The *NHMM* provides that the decider's subjective state qualifies as a reasonable decision if it meets conditions which the decider may not know how to articulate or negotiate. But there is nothing in the *NHMM* that rules it out that a juror *attempt* to perform the requirements of the *RDM*. The difference between the two is rather striking. On the *RDM,* a decision is not reasonable unless the decider succeeds in performing the requirements of the model. On the *NHMM*, a decision may be reasonable if, as a result of trying to perform the requirements of the *RDM* (and almost certainly failing), the *causal* conditions on reasonable decision-making are satisfied, whether or not the decider is able to articulate them or to calibrate the degree of conformity to them of his subjective state.

This is a point worth emphasizing. What is at issue here is how we get our cognitive devices working as they should. One possibility is that by and large they are already performing as they should just as they are, and that there isn't anything for *us* to do to get them in good shape. However, there are ranges of cases in which this is contradicted empirically. These are the cases in which doing well requires that we *try hard*. Since this is precisely the situation in which juries find themselves, it behooves us to ask what trying hard consists in. We already have to hand part of the answer to this question. Trying hard means paying attention, not rushing to judgement, keeping in mind the utter undesirability of false convictions, and so on. But it is also part of trying hard that jurors *somehow* place the evidence they accept within the ambit of the standard for conviction. How is this done? No one wants seriously to propose that all that a juror need do is simply sit back, let the trial's evidence, arguments and instructions waft over him, and then wait to see what decision he actually comes up with. This is too passive by far. Jury-duty is not aroma therapy. On the other hand, I have been trying to show that the success that follows his trying hard is not a matter of his implementing the mechanics of the *RDM*, since, as an untutored layman this is not something that he knows how to do. This might suggest that the *RDM* has no place in a juror's deliberations. If I have left this impression, I disavow it now. Indeed, one plausible way of elucidating the notion of working hard is by postulating what we might call

> *The Sleight of Hand Effect*: In working hard to effect a decision on the accused's guilt, jurors try (and fail) to implement the *RDM*. In making this effort, the juror suffers a *RDM*-defeat but, in so doing, he positions his cognitive devices in such ways that, in these particular circumstances, they function as they should. In other words, trying and failing with a *RDM*-decision facilitates a defeasibly successful *NHMM*-decision.

Why is this sleight of hand? If, in operating in this way, the juror is satisfied that the accused is guilty, then his satisfaction results from an attempt to implement the *RDM*. Since his effort results in a decision, this could lead the juror to think that he did in fact implement the *RDM*. But he did not. Thinking that he did is a sleight

of hand. It is an illusion. Trying to implement the *RDM* causes the activation of the cognitive processes required for successful implementation of the *NHMM*.[24]

Even so, the opportunism of causal receptiveness found in both the *NHMM* and the *CRM* should not be lost sight of. According to the latter, one knows that α when one's holding the true belief that α is a causal outcome of *how he is placed* to receive the requisite inputs. Equally, making a reasonable decision δ on the *NHMM* is also a matter of being requisitely placed with regard to the incoming stimuli that effectuate the mechanisms causally sufficient for δ. In the common law tradition, three things of fundamental importance to the epistemics of the law are posited.

1. The arbitrarily selected ordinary person is a reasonable person and, as such, can be presumed to be a person whose cognitive and conative devices function reliably (or, as Millikan says, "Normally").
2. Judges require jurors to position themselves in such a way that, in effect, the stimuli arising from testimony, counsels' arguments and judges' instructions activate cognitive and conative devices as required for reasonable decisions. Although judges never say so, part of that positioning might involve the juror's *trying* to reach his decision on the *RDM*. It is further presumed that jurors are capable, without tutelage, of positioning themselves as required.
3. When a juror finds that he has decided to convict, then *thanks to (1) and (2)* his decision is one that it would not be reasonable to suppress.

It is no accident that in its modern form abduction was invented by a logician with clear ties to the *CRM* of knowledge, hence a predisposition towards the *NHMM*. It is from Peirce that we learn that with regard to the acquisition of practical knowledge and the reaching of practical decisions ("vital affairs"), it is necessary, but not sufficient, to undertake to perform the requirements of *CMM* and *RDM*. What is also required is that these efforts produce in us the subjective states that meet the causal conditions for knowledge and reasonable decision. It is fitting that these Peircean requirements imbue the law's conception of how the criminal proof standard is met. After all, a verdict is achieved by abduction – which is Peirce's invention. And it is an abduction whose activation satisfies a broadly Peircean conception of reasonable decision on a practical level.

If I am not mistaken, then, this Peircian flavour is rather well caught by the celebrated nineteenth-century legal theorist who wrote:

> What circumstances will amount to proof can never be [a] matter of general definition; the legal test is the sufficiency of the evidence to satisfy the understanding and the conscience of the jury (Starkie, 1842/1837).

Laudan despairs of this (Laudan, 2006, p. 80). To my mind, it is just about spot on. Its message is: Put yourself in the right causal environment (this often involves trying hard) and by and large the right decision will ensue if your cognitive devices

[24] For a discussion of The Sleight of Hand Effect (though not under that name) as a general epistemological regularity, see Woods (2005) and Gabbay and Woods (2007).

are in good order. No one thinks that this is a fool-proof process. It is a defeasible process. Let us not forget that verdicts are reached in the absence of knowledge. But, in the circumstances, given the untutoredness of jurors and the comparative brevity of trials, it is the best that can be hoped for, and it might be good enough to satisfy *NHMM* expectations of reasonableness.

11.10 A Hopeful Equivalence

I don't want to make light of Laudan's scruples. I am sure that he would allow that for large ranges of cases the *NHMM* of decision-making is epistemically adequate by and large, that it produces decisions which in the aggregate don't significantly offend against the Enough Already Principle. But what Laudan is pointing out is that the criminal law is different. It *wants* to impose a stricter than usual standard on criminal convictions. Although he doesn't say so in just these words, it is clear that something that at least approximates to the *RDM* is required for jurors properly to close the gap between evidence and conviction, whenever that standard is honestly in play. After all, Laudan says that juries must determine whether " a powerful evidential link [objectively exists] between the evidence presented and the guilt of the accused" (p. 181) and they must "determine" whether the standard required for conviction is met without regard to their "confidence in [the accused's] guilt" (p. 81). Perhaps, contrary to what I have been saying, Laudan is right about this. Perhaps it is the case that in the absence of a principled process for matching evidence to the strict proof standard, *NHMM*-convictions are epistemically disreputable and, worse, *unjust.* But the question is whether in practice this is the standard that *is* in play. It is an empirical question.

Laudan himself comes close to answering his own objection. He gives a good deal of disapproving attention to the artificialities that the law imposes on the legal process. The intended effect of these impositions – most notably the evidential exclusions imposed by judges – is to make convictions harder to achieve than they would otherwise be. Laudan is especially troubled by the hefty exclusions of evidence that is plainly (epistemically) relevant to the question at hand, exclusions that are grounded in the unevidenced presumption that, if admitted, jurors would make too much of them, whether through emotive excess or lack of judgemental balance, or both.

This is very odd – apart from being psychologically naïve and blatantly patronizing. It generates a bizarre contrast of operational models, as follows.

> *Model 1.* Suppose that jurors heard all the (epistemically) relevant evidence against the accused. Then, given the lowness of the proof standard, both as explained by judges and in actual practice, convictions would be comparatively easy to obtain, thus undesirably raising the frequency of false convictions. So instead of raising the proof standard, which is practically unrealistic, we must suppress some of the evidence, making it harder to convict. In so doing, we suppress the frequency of false convictions.

What Laudan appears to favour is

> *Model 2.* Suppose now that, contrary to fact, the proof standard could be raised and juries somehow could be equipped with the wherewithal to implement something like the *RDM*-approach to their decisions. Then all (epistemically) relevant evidence against the accused could be heard, since, even so, it would be harder to convict. This would keep the frequency of false conviction in reasonable check.

At the level of actual outcome, the law seems presupposes a rough practical equivalence between the two operational models. They may be sharply inequivalent with regard to epistemic reputability, but they are (it is supposed) at one with regard to the requirement of justice and the net *accuracy* of the record of convictions. On the face of it, this is a presupposition that is fundamental to the tenability of criminal convictions in common law. What, then, should we make of it? Whatever the fully detailed answer turns out to be, it is plain that problems lie in wait. Here are three of them.

Let C be the set of false convictions that over a representative period of time model (1) prevents from occurring. Let C^* be the set of false convictions that over a representative period of time model (2) prevents form occurring. Then

i. Have we any reason to think that $C = C^*$? If C and C^* aren't identical, then the two models are not equivalent.
ii. Is there any reason to suppose that if $C \neq C^*$, they are at least equinumerous? If they are not equinumerous, then the inequivalence of the two models deepens.
iii. In those cases in which $C \neq C^*$ and C and C^* are equinumerous, is there any reason to believe that the members of C and C^* are equally serious, i.e., that the frequency of convictions carrying light sentences and the frequency of convictions carrying heavy sentences are practically the same? If not, the inequivalence between the two models deepens further.

We see in the comparison between model (1) and model (2) two efforts to discourage false convictions. In model (1) we compensate for the lightness of the standard for conviction by denying jurors evidence that it is epistemically relevant for them. In model (2), we allow jurors to hear all relevant evidence, but in toughening the standard for conviction, we make it harder for that evidence to bring an accused down. Legal practice clearly presupposes that model (1) is the only model of the two that falls within the actual competence of jurors, given the circumstances that currently prevail in criminal procedure, most especially the prominence of the reasonable person doctrine. Against the charge that this is an epistemically disreputable arrangement, the law is pressed to make a virtue out of necessity by pleading the net equivalence of the two models, the one a performable model and the other

not. It is a plea demanding the closest examination by all concerned. It is an open question for legal theory.[25]

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[25] In Ennis (1996), Prof. Ennis reports as follows. Having proferred a definition of proof beyond a reasonable doubt (see note 12), it became apparent that the "other jurors had a degree of special respect for me because they knew me to be a professor and teacher of critical thinking . . .. So they took my word." (pp. 320–321). It would appear that, in effect, the jurors found that, although they themselves were mired in model (1), Prof. Ennis operated in the loftier climes of model (2) and, moreover, that the jurors were ready to subordinate their efforts to understand the proof standard to Ennis' superior command of it. If I am not mistaken, Ennis himself didn't think this confidence to be misplaced. Of course, with respect to the proof standard itself, Ennis was not operating in the manner of model (2), since, in his own words, he "was not telling people anything they did not already know." (p. 320) We have no record of any other suggestions that Ennis might have made in the course of their deliberations; so it is not possible to determine whether he presented his fellow jurors with any methods about how to negotiate the requirements of the standard – for example, did he teach them the probability calculus? But it is unlikely that he did. This reflects not so much on the difficulty of bringing *NHMM*-reasoners up to *RDM*-speed as on the likelihood that even the author of *Critical Thinking* was not up to *RDM*-speed either. None of this is said with the least whiff of criticism. *Critical Thinking* makes a valuable contribution to sharpening up *NHMM*-thinking, but it does nothing to set out the routines for negotiating the proof standard. This contrasts, as we saw, with even the elementary example of proof in a simple axiomatic presentation of propositional logic, which is *RDM*-thinking at full bore. But there is nothing like it in jury rooms.

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Chapter 12
Relevance in the Law

Dov M. Gabbay and John Woods

12.1 Two Solitudes

Like proof, probability and inference (and a good many others), relevance is a concept of central importance to both logic and the law. Even so, these two disciplines have not had much to do with one another in well over a century. Although it is an alienation more inadvertent than principled, there do exist some methodological differences which might shed light on it. One is that the law embodies an epistemology of tacitness. While it is true that in their pleadings and findings lawyers and judges are fully at home with sharply detailed, carefully formulated and tightly reasoned judgements, it is also true that the law's foundational concepts are put into play on the assumption than an ordinary person is capable of applying them correctly largely on the basis of an implicit, common sense understanding of them. We might call this the *Tacit Access Thesis*.

Proposition 1 (The Tacit Access Thesis) *The ordinarily competent human reasoner possesses an implicit, common-sense knowledge of how to apply concepts such as proof, probability, inference and relevance.*

The *Tacit Access Thesis* is itself usually tacitly present in a judge's charge to a jury. Notwithstanding that such instructions can be lengthy, detailed and highly complex, but it is comparatively rare that they contain any instruction about these foundational concepts. When a word or two of explanation *is* offered about, say, criminal proof or probability, one finds in them no semblance of a theoretically robust analysis. If jurors already know what "proof" and "probable" mean, albeit tacitly, then telling them what it means can only be redundant. But there is also a body of opinion among judges, lawyers and legal theorists to the effect that telling a jury what these concepts mean is often worse than redundant. It is also misleading. A case in point is an American opinion cited in *MacCormick on Evidence* (Strong, 1999, p. 517):

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> Reasonable doubt is a term in common use as familiar to jurors as to lawyers. As one judge has said, it needs a skilful definer to make it plainer by multiplication of words . . .
> The same sentiment may be found in (Thayer, 1898, 1927, p. 5108):

There is, in truth, generally, no rule of law to apply in answering such questions as whether evidence, although probative, is too slight, too conjectural, or remote: or whether it will take too much time in the presenting of it, in view of other practicable ways of handling the case: or whether it will complicate and confuse the case too much.

Here we see the influence of a further assumption, which we may call the *Analytical Distortion Thesis.*

Proposition 2 (The Analytical Distortion Thesis) *For familiar concepts, analysis is distortion.*

It would be wrong to leave the impression that the *Analytical Distortion Thesis* is accepted by all practitioners, especially in this rather stark formulation. But there is no doubt that there are cases galore in which attempts at juridical definition or clarificatory analysis produce near-incoherence. An instance of this is a mock charge to the jury crafted by the Supreme Court of Canada in *R. v. Lifchus*.[1] On the one hand, it provides that jurors need not have absolute certainty of the accused's guilt, but, on the other, that probable guilt is not enough. Even believing that the accused is guilty is not enough. Accordingly, the reasonable doubt standard hovers midway between these extremes.[2] Had the justices in *R. v. Lifchus* attended to the idea that the criminal proof standard is "as familiar" to ordinary persons as to persons trained in the law, they would have simply advised their mock-jurors "to use their common sense". Instead, they produced a charge that requires untutored jurors to manage a threefold distinction between certainty, probability and belief, in such a way that some fourth alternative becomes discernible. Jurors are, in effect, invited to complete the following sentence: "Although on the evidence presented it is probable that the accused is guilty, and I believe that he is guilty, I must not convict unless I am absolutely certain that he is guilty or, not being so, unless I . . .". Small wonder that practitioners scorn the mere "multiplication words."

If the law embodies a culture of implicity, logic's orientation displays an enthusiasm for the explicit. Logicians put a premium on precision and exactitude, and they reserve a special place for definitions, both biconditional and implicit.[3] It has a considerable bearing on the two-solitudes phenomenon that, for over a century, mainstream logic has been part of mathematics. As the name suggests, mathematical

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[1] (1997), 9 C. R. (5th) 1 (S. C. C.).

[2] *R. v. Starr*, [2000] 2 (S. C. C.) 144 at para. 242: ". . . it will be of great assistance for a jury if the trial judge situates the reasonable doubt standard approximately between [the] two standards."

[3] To forestall confusion, what logicians recognize as "implicit" definitions, legal scholars would recognize as explicit definitions. A case in point is the implicit definition of the definite article afforded by Russell's theory of descriptions ([Russell, 1905]). The theory defines 'the' by mapping sentences containing 'the' to equivalent sentences not containing 'the'. Definitions implicit in this sense, Russell also calls "contextual".

logic serves the interests of mathematics,[4] and its methods are themselves imbued with richly mathematical content.[5] Certainly it would take only the most monomaniacal of mathematical logicians to propose that the logic of legal reasoning is a Boolean lattice or that the secrets of legal relevance are best revealed in a possible worlds semantics for relevant logic.[6] But logic has come a long way in the past 40 years, spurred by developments in computer science, AI, logic programming, dynamic and deontic logics and logics of practical reasoning in which there have been repeated attempts to reconnect with human reasoning in real-life situations. Any number of successes (or partial successes) have already been claimed by theorists working in what collectively has been called the New Logic (Gabbay and Woods, 2001c). It is here that the two-solitudes phenomenon makes least sense, and it is here that prospects of rapprochement are at their best. In companion articles, we have recently explored the logical structure of probability in legal reasoning (Gabbay and Woods, 2006a, 2006c), as well as the abductive character of the criminal proof standard (Gabbay and Woods, 2005, Chapter 8; Gabbay and Woods, 2006b). In each case, we have attempted to bring to bear upon these legal issues resources from the New Logic. In the present essay we try our hand at relevance.

12.2 Relevance

On the standard legal definition, information is relevant to a proposition when it affects, positively or negatively, the probability that the proposition is true (Cross and Wilkins, 1964, p. 148).[7] A typical expression of this view may be found in (Paciocco and Stuesser, 2002, p. 24).

Evidence is relevant where it has some tendency as a matter of logic and human experience to make the proposition for which it is advanced more likely than it would appear to be in the absence of the evidence. To identify logically irrelevant evidence, ask "Does the evidence assist in proving the fact that my opponent is trying to prove?"[8]

The same idea is enshrined in the *Federal Rules of Evidence*.

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[4] Whether it be Frege's logicism (Frege, 1879]), which was an attempt to reduce mathematics to pure logic, or Brouwer's intuitionism ([Brouwer, 1975]), which was an attempt to refine logic's capacity to elucidate the character of constructivist reasoning in mathematics.

[5] For example, the use of mathematical induction in the proofs of many of the most important metatheorems.

[6] For example, in a variation of the system known as *First-Degree Entailment* ([Routley and Routley, 1973, 1985], [Priest, 1987]).

[7] Prefiguring the probalistic concept is the view that relevance is a causal relation ([Stephen, 1876]). While rejected by legal theorists (Ilbert, 1960, p. 13), a causal conception of relevance flourishes in the present-day theory of *Agenda Relevance* (Gabbay and Woods, 2003).

[8] On this reading, probabilistic relevance has an unmistakable Wigmorean flavour. According to Wigmore, an "identiary fact" is relevant if it can be used to prove or counter a case's *factum probandum* (Wigmore, 1983, 1104–1195).

[Evidence is relevant when it has] any tendency to make the existence of any fact that is a consequence of the determinations of the action more probable or less probable than it would be without the evidence. (*FRE* Rule 401)

In some contexts, lawyers characterize evidence as relevant when it "renders some fact probable". However, in this usage, evidence that renders probable a fact alleged in a charge against an accused is evidence that constitutes a *prima facie* case for it, clearly a very strong notion of "probable.". Whatever the meaning of probable in the definition of probabilistic relevance, it is clear that it cannot be probability in the present sense. The probability enshrined in this definition of relevance stops well short of that which establishes a *prima facie* case for the prosecution or, for that matter, a no-case-to-answer determination for the defence.

Aside from its probalistic definition, considerations of relevance also crop up in evidence-exclusion decisions that are not determined by whether the evidence in question would, if admitted, alter the likelihood of some material claim. Here the exclusions are based on the finding that, if admitted, the evidence would compromise the accused's right to a fair trial. Very often these decisions involve evidence of the accused's character (Cross and Wilkins, 1964, pp. 148–149, 153–156; Murphy, 2000, pp. 8–9, 132–149, 162–167, 178–179, 216–219, 360–365). A common reason for exclusion on grounds of irrelevance is the judge's belief not that the evidence is probabilistically irrelevant but rather, even if probabilistically relevant, that a jury would be enflamed by hearing it. Clearly a different sense of "relevant" is at work here. In this further sense, courts take the view that evidence is relevant when it is "worth hearing", when, that is to say,

> it will not take an undue amount of time to call, will not confuse the issues in the case, and will not cause prejudice or unfair surprise to a party. (Paciocco and Stuesser, 2002, p. 30).[9]

This gives us two notions of relevance. One is probabilistic (or what legal theorists call logical) relevance. The other is called legal (i.e. worth-hearing or practical) relevance. It is a useful distinction. It helps explain why judges will often admit evidence whose probabilistic or logical relevance is a matter of serious doubt. As LaForest J. said in *R. v. Corbett,*

> . . . at the stage of the threshold inquiry into relevancy, basic principles of the law of evidence embody an inclusionary policy . . . In the absence of cogent evidence establishing that evidence . . . is irrelevant . . . the fact that reasonable people may disagree about its relevance merely attests to the fact that unanimity in matters of common sense and experience is unattainable. (*R. v. Corbett* (1988), 64 C. R. (3d) 1 (S. C. C.)).

[9]See here (James, 1941): "Why exclude any data which if admitted would change the apparent probabilities and hence serve, even to a slight degree, to aid the search for truth? Justice Holmes suggested one answer, it is 'a concession to the shortness of life' – and perhaps to the shortness of purse of harassed litigants. If any and all evidence may be admissible which . . . would operate to any extent to alter the apparent probability of some material proposition, the field of judicial inquiry in most cases would be unlimited. Trials would come to an end only by the exhaustion of lawyers' ingenuity or client's money, and the trial judge or jury might be overwhelmed and bewildered by the multiplicity of collateral issues".

Writing to the same effect is (Thayer, 1898, 1927 p. 5108):

> The law of evidence undoubtedly requires that evidence to a jury shall be clearly relevant, and not merely slightly so: it must barely afford a basis for conjecture, but for real belief: it must not be remotely relevant, but proximately so. . . . [But] it must not unnecessarily complicate the case, or too much tend to confuse, mislead, or tire the minds of that untrained tribunal, the jury, or to withdraw their attention too much from the real issues of the case . . . To discuss such questions . . . even if we introduce *the poor notion of legal relevancy, as contrasted with logical relevancy* – tends to obscure the nature of the inquiry.[10] (Emphasis added).

By these lights,

Proposition 3 (The admissibility of irrelevancy) *Judges should admit evidence unless its logical irrelevance is simply not open to reasonable doubt. Given that standard, finders of fact may be permitted to hear evidence which some reasonable persons would think irrelevant.*

Where the common perception of judges as a vigorously exclusionary gatekeepers is more accurate is in the matter of the exclusion of *legally* irrelevant testimony. The concept of legal relevance in turn subdivides into a further pair of notions. Whereas the heart and soul of logical relevance is its probative value, legal relevance is understood to be a more practical matter. It reflects the common sense view that probative evidence is not worth hearing if jurors can't understand it or it takes too long for them to process it or if it stimulates emotional over-reaction. Legal relevance also captures the deeply important point that, whereas it is part of a juror's job to try his best to arrive at the truth of the matter before him, another part of his job is to discharge this first task in conformity with the fundamental imperative of criminal justice, which is to minimize aggressively the likelihood of wrongful conviction.

Quite often bias lies at the heart of these exclusions. It is entirely possible that evidence exists which, if led, would wholly comply with the law's definition of logical relevance. If a judge excludes it on the grounds of irrelevance, he excludes it for its bias. Again, he excludes it not because it doesn't increase the probability of the accused's guilt, but rather because it does increase the probability of his guilt and does so in ways that may induce the jury to give it excessive weight. The evidence is excluded because the judge thinks that the jury will make too much of it, with consequent risk to the requirements of a fair trial.

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[10] See also the *Australian Law Reform Commission Report* 26, *Volume 1, Evidence* (1985), section 11, *Relevance* (ALRC, 1985): "It may be concluded that two people, or groups, may have different, but equally rational, views of the relevance of a piece of evidence, depending on their prior experience and conceptions. In a jury case, the experience of jurors may be quite different from that of the trial judge, and consequently their assessment of 'relevance' and probative force may vary from his. Therefore, so long as a juror's assessment of the probabilities in the case might be rationally affected by the proferred evidence, then it is relevant. The trial judge may be doubtful about the probative force of the evidence and yet should admit it because the jury may rationally assess probative force differently from the way he does. That does not mean the jury is acting irrationally or emotionally, but only that they are utilizing their own experience to supply and evaluate appropriate hypotheses of proof."

The theory mentioned in note 7 is a comprehensive account of agenda relevance. In contrast with the probabilistic account, agenda relevance incorporates as its leading principle the idea that information is relevant when it is *helpful*, and that the helpfulness of information is a matter of what it is *wanted for* and what it is *good for*. Since evidence led at a criminal trial is wanted for different, albeit nested, ends – the attainment of truth and the attainment of justice – it is perfectly possible that a given piece of evidence might attract differential relevance-verdicts, that it could be helpful in regard to what is true and not helpful in regard to what is just. It would appear, then, that the law's twin conceptions of relevance have a welcome home in the theory of agenda relevance (Gabbay and Woods, 2003). We shall return to this suggestion below.

12.3 Materiality

The law draws a distinction between relevance and materiality. Information is immaterial when it bears on an issue that need not be decided in the proceedings at hand. So,

> [evidence] is material if it is directed at a matter in issue in the case. (*R. v.* B. (L) (1997), 9 C. R. (5th) 38 at 48 (Ont. C. A.)).

There is a connection between materiality and relevance. In law, relevance is reserved for evidence from which finders of fact are invited to draw inferences regarding some material fact. In logic, the tendency would be to associate materiality with *topical* relevance (Anderson and Belnap, 1975; Demolombe and Jones, 1999; Walton, 1982).[11] Something is topically relevant to something else when they share a subject matter. However, the logician's notion of topical relevance is broader than the law's conception of materiality. Something is material to a case when it is an *element* of the case. The prosecution's burden of proof is to prove every element of the case at hand. So as a general rule we may say that something is material to a case when the Crown's failure to prove it would cause the prosecution to fail.[12,13]

Finally, there is another possible connection with relevance in law. It depends on how "has a bearing" is interpreted. In one meaning, evidence is material when it bears *relevantly* on some matter. In another, evidence is material when it is *directed*

[11] In the legal literature, the having-a-bearing notion of relevance is developed in, e.g., Wills (1938).

[12] It is interesting that notwithstanding his earlier work on topical relevance, Walton's discussion of relevance in the law in Walton, (2002) overlooks the factor of materiality. (It is mentioned in passing on p. 20 as one of Wigmore's conditions on relevance.)

[13] The tightness of the tie of relevant to materiality is resisted by some writers. According to (Eggleston, 1970, p. 59), "[t]o attempt to confine the evidence to transactions or facts in issue and the surrounding details of those transactions and facts is to exclude some evidence of strong probative value. Unless the definition of 'surrounding details' is widened in such a way as to include any facts having logical probative value, then the expression becomes meaningless."

at (i.e., forwarded *as* bearing relevantly on) some matter. Given that materiality is a condition of a successful prosecution, it is clear that the former meaning should prevail.

12.4 Targets for a Logic of Relevance in the Law

What we are attempting to ascertain is whether the concepts of probabilistic and worth-hearing relevance, as they have evolved in legal usage, admit of theoretical elucidations using the resources of logic. In some ways, our course has already been charted – albeit contentiously – in volume one of John Henry Wigmore's massive work on evidence, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* (Wigmore, 1940).[14] Volume 1a of that work contains a chapter entitled "General Theory of Relevancy", in which at pages 1109–1195 Wigmore reviews a number of attempts "to use logical tools to model the legal notion of relevance" (Walton, 2002, p. 19–20).

What, then, should the targets be for our own logical elucidation of relevance in the law? Clearly, logical relevance (in the lawyer's sense) pivots on the concept of probability. But closely allied is the concept of probativity. Evidence is relevant not when it makes some material fact more probable, but when it does so in such a way as to bring the material fact either closer to or further removed from meeting the requisite *proof-standard*. It is clear that materiality plays some role here. And it is hardly a stretch also to say that the probabilities that relevance provide must be such as to increase or decrease the likelihood of proving the case. So, in the matter of logical relevance, our targets are

(a) *probability*
(b) *materiality*
(c) *probity*.

Legal relevance (again, in the lawyer's sense) is a more sprawling notion. But here, too, the central preoccupation is the proof standard. In criminal trials, the proof standard is motivated by a strong principle of justice according to which

Proposition 4 (When justice trumps truth) *Epistemically wrongful acquittals are a just price to pay for minimization of epistemically wrongful convictions.*

In civil trials, the leading public policy consideration is not the minimization of epistemically wrongful decisions for the plaintiff, but rather the principle that justice requires timely and definitive settlement even under conditions of substantial uncertainty. In both kinds of action, judges will exclude evidence simply on the grounds

[14] A new edition, under the title *Evidence in Trials at Common Law* is edited by Peter Tiller, whose substantial footnotes are a valuable commentary on the work (Wigmore, 1983). Critics of Wigmore include (Twining, 1985). See also Tillers' commentary in Wigmore, (1983).

that admitting it may compromise the public policy considerations that constrain the embedded notions of proof, never mind its epistemic import. And since different public policy considerations are at work in criminal and civil settings, judgements of legal relevance will show a concomitant variability. Of particular note, especially in criminal cases, are the factors of *emotional excess* and *cognitive load*. Evidence is excluded if it will over-excite the jury. Evidence will be excluded if it is beyond the information-processing capacity of ordinary reasoner's. Accordingly, the following issues are added to our list of target concepts:

(d) *emotive distortion of impartiality*
(e) *cognitive capacity.*

No doubt other logicians might have considered other candidates for inclusion, and some of our choices may not have made their lists. We shall have nothing further to say here about alternative targets; we will be better served by getting on with the job at hand. But, first, a small diversion into dialectics.

12.5 Dialectical Relevance

At the beginning of this note, we remarked upon the vigorous and multivarious transformations that have occurred in the last generation or so in what has been called the New Logic. One of the more prominent of these developments has been a modern revival of dialectic. In its present-day form, dialectical argument is an interpersonal argumentative exchange about a matter in dispute. Dialectic is the study of such arguments. Some of the places where the dialectical approach is emphasized are:

(1) theories of fallacious argument in the tradition of (Hamblin, 1970)
(2) pragma-dialectical treatments of critical discussions in the manner of (van Eemeren and Grootendorst, 1984, 2005)
(3) analyses of fallacious argument and other forms of argumentational structure in the manner of Walton (1995) and Walton (1996)
(4) interrogative logics in the manner of Hintikka et al. (2002)
(5) dialogue logics in the manner of Barth and Krabbe (1982), MacKenzie (1990), Walton and Krabbe (1995), and Gabbay and Woods (2001a, 2001b).

There is no serious question about the importance of these developments. To the extent that logic has succeeded in re-attaching itself to its historic mission as a theory of real-life argument, logic must leave room for dialectic. Apart from its mathematical roles in set theory, model theory, proof theory and recursion theory, if nothing else were logic's mission, then dialectic would be all there is to logic beyond mathematics. In the by-now sprawling literature on dialectic there are unmistakable indications of the presence in some quarters of this very view. If correct, it would

mean that, with the possible exception of those that have a purely mathematical role, the concepts of logic are *dialectical* concepts.

This raises two questions of importance.

(1) Is it in fact the case that, apart from its purely mathematical orientation, dialectic is all there is to logic?
(2) What does it mean to say that a concept is a dialectical concept?

Question (1) has itself spawned large literature, for a review of which there will be no time in this note. Suffice it to bring to the surface the principal reason for answering this question in the negative. It is that, like the old, the New Logic is not just about argument; it also is about reasoning, especially inference. It used to be supposed in antiquity that reasoning is simply arguing with oneself, and so is inherently dialectical. But given the present state of the logic of belief dynamics and cognitive psychology, there now is ready to hand credible discouragement of such a view (Harman, 1986; Gigerenzer and Selten, 2001; Stanovich, 1999). As it happens, this is also our own view of the matter:

Proposition 5 (Non-dialectical logic) *Even apart from its contributions to pure mathematics, there is a good deal about logic that has a non-dialectical character.*

Question (2) has attracted much less attention than (1). In a way, this is unfortunate, since it is a question that embeds a significant ambiguity. In one sense, a concept is dialectical if it plays a load-bearing role in a dialectical theory. In another and stronger sense a concept is dialectical if and only if (or to the extent that) *its sense is fixed* by its role in dialectic. Understood the first way, the sense of a dialectical concept could be independent of the dialectical theories in which it functions. Understood the second way, a dialectical concept would have no meaning (certainly, no seriously theoretical meaning) apart from what is imparted to it by the dialectical theories in which it operates. It is easy to see, for example, that the concept of *scientific law* has a sense that is fixed independently of its role in a dialectical dispute about, say, whether the Rayleigh-Jeans Radiation Law for low frequencies of black body radiation is a genuine law of physics. On the other hand, it is equally obvious that the concept of *cross-examination* owes its sense to how such exchanges are structured in actual dialectical practice. Similarly, whereas it is clear that the concept of begging the question is inherently dialectical, the concept of circularity is not.[15] For expository convenience, we may say that concepts that are dialectical in the first sense are *contingently* dialectical, and that concepts that are dialectical in the second sense are *essentially* dialectical.

A good deal of the present-day dialectical literature bubbles with disputes about which concepts of logic are essentially dialectical. Perhaps leading the list is the concept of *fallacy*, whose essentially dialectical character is as vigorously avowed

[15]The notorious claim of Sextus Empiricus that all valid arguments are question-begging arises from confusing question-begging with circularity.

(Hintikka, 1987; van Eemeren and Grootendorst, 1992a; Walton, 1995) as it is denied (Johnson, 2000; Woods, 2004; Woods and Hansen, 1997, 2001). The concept of relevance is also this list, with loyalties divided in quite similar ways, with Walton (2003) and van Eemeren and Grootendorst (1992b, 2005) pro, and Anderson and Belnap (1975), Gabbay and Woods (2003), and Sperber and Wilson (1995) contra.

In some writings, the purported essentiality of dialectical relevance also extends to legal theory (Feteris, 1999; Walton, 2002). There seems little doubt that what attracts theorists to this view is the dialectical character of legal proceedings in actual practice. But what this overlooks is that in both the civil and common law traditions, substantial parts of criminal proceedings are not at all argumentative. Even in its *overtly* argumentative phases, legal argumentation is peculiar to the point of eccentricity. When counsel presents his closing argument, he is making a speech, in which, though he may register disagreement with opposing counsel, and call into question items of testimony, there is strictly speaking no one whom he is arguing *with*. Then, too, when opposing counsel argue a point of law before the judge, there exists a disagreement between the parties. But the parties' arguments are not directed to one another, but rather to the judge. The last thing that judges are required (or allowed) to do is to resolve these disputes dialectically. Judges *rule*.

Finally, opposing counsel set the tone of the trial in their respective opening statements, in which they may state their respective theories of the case. Such statements must not, however, be argumentative. There is nothing dialectical about such episodes. Although the opening statements are usually strongly incompatible, there is nothing confrontational about them.[16]

A case in point is a common law judge's exclusion of testimony on grounds that it does not raise or lower the probability of anything material to the trial. On such occasions, the judge is invoking the probabilistic concept of probability, whose sense is fixed wholly independently of judicial wrangles about whether an item of testimony does or does not instantiate it. Similarly, when a judge excludes testimony on grounds of legal relevance – say, that in hearing it the jury would likely be inflamed against the accused – what is at issue is not whether jurors would be rendered dialectical misfits – argumentative maladepts – but rather whether their duty to determine the facts of the case dispassionately and efficiently would be compromised. For these and other reasons, we think that we must allow that

Proposition 6 (Legal relevance as non-dialectical) *As it operates in actual cases at the criminal bar the concept of relevance is not essentially dialectical.*[17]

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[16] If we tell *you* that we greatly disagree with *him*, we are not confronting you, since we are not expressing this agreement with you, and we are not confronting him because we are not even addressing him.

[17] A recent example of how the excessive dialecticization of concepts can lead us astray is Douglas Walton's demonstration of the difference between probability and plausibility. It is part of the dialectical character of probability that "if you claim that a proposition is probably true, then there is a burden of proof attached . . ." (Walton, 2002, p. 110). On the other hand, "if you only [sic] claim that a proposition is plausibly true, there is no burden of proof attached." (p. 110). Since

The dialectical research programme is one of the success stories of the New Logic. To underestimate its importance would be a great folly. Like all theoretical successes, there is a natural tendency to accord to argumentation theory an applicability that exceeds its range. Much the same enthusiasm has also been visited upon the probability calculus, which is a considerable mathematical achievement. But it too is a theory whose limitations its loyalists sometimes have difficulty respecting (Cohen, 1977; Gabbay and Woods, 2006a; Walton, 2002). It is perfectly all right to insist that argumentation theory is about arguments and nothing else. But it is a mistake to suppose that logic is exhausted by the study of arguments and nothing else. This is a second objection to raise against over-eager dialecticians. The first was that even within argumentation theory there are load-bearing concepts that are not essentially dialectical. The further objection is that there is more to non-mathematical (or real-life) logic than argumentation theory. Accordingly,

Proposition 7 (Non-dialectical logic) *There are logical issues that cannot be satisfactorily analyzed in a theory of argument, and logical problems that cannot be solved dialectically.*

A notable example is the logical analysis of the concept of relevance in the law. It is our submission that

Proposition 8 (Relevance as non-dialectical) *A satisfactory logical analysis of relevance in the law is virtually untouched by dialectical considerations.*

12.6 Relevance and Probability

In a widely used textbook on the law of evidence, we find the following remark.

> One fact (conveniently called an evidentiary fact) is relevant to another when it renders the existence of the other fact probable or improbable. Relevancy therefore is a matter of common sense and experience rather than law (Cross and Wilkins, 1964, p. 148).

This, of course, is what lawyers call logical relevance. The notion of legal (or worth-hearing) relevance is different. The quotation from Cross and Wilkins adumbrates this distinction. In asserting that logical relevancy is not a matter of law, they

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"the dialectical requirements for the reasonable acceptance of the two kinds of speech acts are quite difference" (110), then the two concepts are not the same. We think that we are not alone in seeing two difficulties with this account. First, whether or not one create a burden of proof for oneself in uttering "*P*' depends on whether in so doing one asserts something *challengable.* ("I feel depressed" and "My name is Johan van den Boten" make assertions, but typically they are not challengeable.) Walton thinks that it is intrinsic to utterances of "Probably *P*" that a challengeable assertion is made, and that intrinsic to utterances of "Plausibly *P*" that no such assertion is made. Nowhere in the empirical record of actual speech is any such suggestion upheld. But, secondly, even if Walton were right about this, it would have done nothing to demonstrate that when "possibly" occurs in these contexts, it is, as Walton also avers, *statistical* probability that is at work. (See below).

correctly leave the inference that legal relevance is a matter of law. It is, as we have seen, an expression of the law's conception of a just trial. Our purpose in this section is to try to identify the concept of probability that is in play in logical relevance, and to do so mindful of the assertion that it is "a matter of common sense and experience". In the section above we noted the somewhat imperious provenance of the probability calculus. Certainly *logicians* are dominantly of the view that anything that could seriously be called probability is the very concept that the probability calculus describes.[18] Some legal writers make the point that historically the gap between a logician's and a lawyer's appreciation is not all that wide, as witness (Dejnoska, 2004):

> my conclusion is that it is both possible and likely that [the logician] Keynes was inspired by English law. English law required evidence to be "relevant" as early as 1783, and articulated relevance as "logical relevance" as early as 1897. it is likely because Keynes himself cites cases from English law and approves of the judges' subtle understanding of degrees of probability which cannot be quantified by cardinal numbers: specifically. *Sapwell v. Bess,* 2 K.B. 486 (1910), and *Chaplin v. Hicks*, 2 K.B. 786 (1911)

In fact, however, it is easy to show that there is a considerable difficulty in associating legal probability with the concept analyzed by the probability calculus. Ironically, it was Keynes himself who was the first to come upon this difficulty (Keynes, 1971). It was subsequently revived by George Bowles (Bowles, 1990) and independently by Woods in (Woods, 1994).

If we probabilify the notion of logical relevance by the lights of the probability calculus, then we have it that for all propositions p and q, the probability of p given q is either higher or lower than half. In other words,

$$p \text{ is relevant to } q \text{ if and only if } \Pr(p \mid q) \neq 0.5 \tag{12.1}$$

Probability theorists will be aware that equation (1) resembles the principle of probabilistic independence, and that it lies open to criticisms pressed against it by Keynes, as follows.

First criticism (Keynes, 1971, pp. 45–46).[19] Consider the three mutually exclusive statements "This book is red" (symbolized by Q), "This book is black" (R) and "This book is blue" (S). To these a fourth statement, (P) "This book weighs a pound" is strictly irrelevant. If so, then the consitional probability of Q or R or S on P is 0.5, i.e.,

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[18] The same is also true of a slender minority of lawyers. Alluding to FRE 401's characterization of probabilistic relevance, (Dejnoska, 2004) has it that "FRE 401 . . . leaves probability undefined. And if FRE 401 is uninterpreted, it is useless ... The whole question is what probability is in the first place. The fundamental task of probability is to answer that question. Aristotle, Venn, Keynes, Ramsey, Mises, and Reichenbach all agree that probability is the obscure and basic notion needing explanation. But FRE 401 goes in the opposite direction and defines relevance in terms of probability".

[19] Keynes' approach to probability is discernible in Lempert (1977) discussion of logical relevance.

$$\Pr(Q \text{ or } R \text{ or } S \mid P) = 0.5 \tag{12.2}$$

By the probability calculus, (12.2) is equal to

$$\Pr(Q \mid P) + \Pr(R \mid P) + \Pr(S \mid P) \tag{12.3}$$

which is equal to

$$0.5 + 0.5 + 0.5 = 1.5 \tag{12.4}$$

But (12.4) cannot be accepted. No probability is greater than 1.

Second criticism (Keynes, 1971, p. 47). A book's weight is irrelevant to its colour. So a book's weighing a pound is irrelevant to its being a red book. Accordingly, from (1) above we obtain

$$\Pr(x \text{ is red and } x \text{ is a book} \mid x \text{ weighs a pound}) = 0.5 \tag{12.5}$$

Given that

$$\Pr(x \text{ is red} \mid x \text{ weighs a pound}) = 0.5 \tag{12.6}$$

it is probable in the probability calculus that if $\Pr(p \mid q) = \Pr(p \text{ and } r \mid q)$, then p logically implies $r \mid q$. In other words,

"x is red" logically implies "x is a book given that x weighs a pound" (12.7)

But this is absurd.

The probability calculus was a 17th century invention, designed to elucidate the betting structure of games of chance. The probabilities involved in these calculations are sometimes called "aleatory" probabilities, after the Greek word for *game*. What the present difficulties show is that for large classes of cases, the probability associated with the law's notion of logical relevance cannot be aleatory probability. Some aleatorists have attempted to disarm the Keynesian counterexamples by changing the definition of conditional probability. (Bowles, 1990, p. 69). Some critics have found the altered definition to be dubiously *ad hoc* (Woods, 1994). Whether or not this is a tenable objection, it is a direct consequence of this strategy that the probability which probabilistic relevance embeds is not aleatory probability. For, in changing the definition of conditional probability, one rejects the Kolmogorov axioms.

It is open to those who favour the aleatory view to argue that, provided the change to conditional probability is slight, the probabilities remain aleatory-*like*. Since nothing in the nature of the difficulties discovered by Keynes' counts against such a possibility, we are left with the question of whether the probability embedded in logical relevance might indeed not be aleatory-like.

12.7 Theory-Drag

Since the Keynsian examples do not answer this question, it might be prudent to change our focus. We remarked just above that it is a well-planted habit among logicians to interpret any kind of probabilistic behaviour aleatorily. One explanation of this habit is that to date aleatory probability is the only probability concept for which we have a deep and accurate theory. We find in this a good example of what might be called *theory-drag.* It is a feature (and a virtue) of well-established theories to attract otherwise unclaimed data, to sweep them, so to speak, into the theory's explanatory embrace. Such attractions lose their virtue and become theory-drag when their treatment of the unclaimed data constitutes a distortion of them. A case in point are the probabilities of legal procedure. If they are correctly analyzed by the probability calculus, well and good. If not, the probability calculus acts on theory-drag on the data of probabilistic usage in the law.

Bearing on this is a simple fact of ordinary speech. In ordinary speech it is often the case that three idioms are used interchangeably. These are the idioms of *possibility, probability* and *plausibility* (the *P*-idioms). Mathematicians and logicians have furnished their own interpretations of these notions which flatly contradict their intuitive interchangeability. Left to their devisings of such theorists, probability is captured by the probability calculus, possibility is captured by systems of modal logic such as S4 and S5, and plausibility is (rather more inchoately than the others) described by a smattering of elementary plausibility logics, of which the best to date is Rescher (1976). In their respective theoretical manifestations these are strictly disjoint concepts. It is useful at this point to call to mind the qualification of Cross and Wilkins, that in order to command the meaning of probability in the law it suffices for the ordinary person to rely on his "common sense and experience". In other words, he is expected to draw upon his linguistic intuitions, which are reflections of his understanding of how expressions function in ordinary speech. It is fundamentally important that the law's position is that an understanding of probability is adequately available to ordinary persons without tutelage of any kind. When one adds to this the interchangeability of the *P*-idioms in ordinary speech, two things of consequence fall out.

(1) The law's requirement to estimate probabilities might well be properly discharged in actual practice by estimating *plausibilities.*
(2) To assess a person's probabilistic success or failure by the theorems of the probability calculus requires, on pain of theory-drag, that it be *independently established* that the person in question had the aleatory concept of probability actually in play.

There isn't a shred of evidence to suggest that in taking on the legal requirement to be mindful of the probabilities associated with a piece of would-be evidence, a judge has pledged himself (however tacitly) to fidelity to the aleatory axioms. Neither is it ruled out that in actual practice he will perform his duty to take note

of the probabilities associated with this evidence by estimating its plausibilistic consequences.

Lest we think that this matter turns on a trivial terminological confusion, to the extent to which the *P*-idioms are indeed distinguishable, probability and plausibility stand starkly apart. No statement and its negation can have the same probability, whereas often they can be equally plausible. The conjunction of probabilities never exceeds 1 (recall Keynes' first criticism), whereas conjunctions of plausibilities often exceed 1. Conjoining probabilities is always multiplicative, whereas conjoining plausibilities is often additive. Furthermore, updating the probability of a given state of affairs in the light of new information very quickly becomes computationally explosive, and well exceeds the computational capacity of the human reasoner (Harman, 1986). For all these reasons, and more (Gabbay and Woods, 2006a, 2006b), it may be proposed that

Proposition 9 (The non-aleatory character of probabilistic relevance) *There is reason to doubt that legal probability is aleatory. If this is right, then the law's notion of probabilistic relevance is also non-aleatory.*

This, of course, is a negative result, and a qualified one at that. It leaves the actual nature of probabilistic relevance as an open research programme in the logic of the law. This is not the place to try to bring that programme to a definitive conclusion. Even if we knew how to do so, there is not the space for it here. But we will conclude this section by declaring a working hypothesis.

Proposition 10 (Probabilities as plausibilities) *The lexical indication that the P-concept embedded in the logical definition of relevance is probability is mistaken. It betokens not probability but plausibility.*[20]

A good example of theory-drag in the analysis of legal relevance can be found in Walton (2002, pp. 335–338). Legal relevance is forwarded as an essentially dialectical concept in a theory of persuasion dialogues. It is its "central thesis ... that legal relevance is based on dialectical relevance ..." (p. 337). Moreover, "dialectical relevance in persuasion dialogue is the underlying logical framework on which the science of legal reasoning should be based." (p. 338). However, if the observations of the present section are sound, what we have here is theory-drag to a bad end. Even in their argumentative phases, trials aren't persuasion dialogues, never mind that they aim at persuasion and have elements (e.g. examination-in-chief and cross) that are dialogical. Relevance is a contingently dialectical concept, but it is not essentially dialectical. Accordingly, even if legal relevance does indeed depend on logical relevance, it is not a dependency that dialectifies it.

[20]By these lights, it is a considerable virtue of (Walton, 2002) to emphasize the dominance of plausibilities over aleatory probabilities in legal proceedings. See Chapters 4 and 6.

12.8 Materiality and Probativity

We are now in a position to see that the law misstates its own definition of logical relevance. Contrary to what the textbooks say, it is not the case that one proposition *p* is logically relevant to another proposition *q* if and only if *p* raises or lowers the probability of *q*. There is also the requirement to take *some* account of the factor of materiality. The state of affairs reported by *q* must be, or be part of, an element of the case. The case in question is the prosecution's case. In pressing for a conviction, there are various elements that a prosecutor must prove. In first-degree murder, such elements include that the accused caused the death of a person, and that the accused had a guilty mind with respect to that action. It remains true that the tie to materiality – relevance via a transaction as Will (1938) has it – is resisted by some legal theorists. But usually these reservations are directed against over-narrow interpretations of "details surrounding an element of the case", rather than standing as an outright rejection of the materiality standard.

In an earlier section it was suggested that the theory of agenda relevance might offer to relevance in the law a congenial theoretical home. On this view, evidence would be relevant if it were helpful, and it would be helpful if it facilitated the attaininment of the objectives at hand. In *Agenda Relevance,* the intuitive idea is formulated as follows:

Proposition 11 (Agenda relevance, first pass) *Relevance is an ordered triple ⟨I, X, A⟩, such that I is information, X is an agent, A is an agenda of the agent, and I advances or closes (or retards) X's agenda (Gabbay and Woods, 2003).*

It is easy to see that the condition of materiality helps us flesh out this schema. In law, information is relevant when it assists a trier of fact in determining how an element of the case fares with regard to the obligation to prove it. In such contexts, we may think of agendas as determinations of the proof-status of elements of the case.

Of course, this is still a bit rough. In *Agenda Relevance,* the basic definition is refined as follows.

Proposition 12 (Agenda relevance) *I is relevant for X with respect to A iff in processing I, X would be affected in such a way as to close or advance (or retard) A.*

What this definition seeks to bring out is that the primitive idea that information is helpful requires not only that it be helpful in some regard but that it be helpful to some *agent*. There could be masses of evidence that would be helpful to a person if only he knew of it. If he isn't aware of it, it is not helpful to him in fact. In Proposition 11, we capture the idea that when information is helpful it is helpful for someone, by requiring that it be information that the person at least *processes*, and that in having done so, it brings the person closer to or further removed from the closure or advancement of his agenda.

This would be a good point at which to recur to the Paciocco and Stuesser characterization of logical relevance. Evidence is relevant when it "assist[s] in proving the fact that [counsel] is trying to prove." (2002, p. 4). Seen this way, it is the evidence's

probative value that carries the day. The prosecutor's agenda is to prove various facts, i.e., the elements of the case. Evidence is relevant when it helps or hinders such proofs, that is, when it advances or retards the prosecutor's agenda in regard to that element of the case. It is important to take note of what the agenda-relevance characterization of relevance in the law leaves out. It omits all mention of probability. It is unspecific as to the ways and means of assisting with the proof of an element of the case. It is certainly not ruled out that relevant information is sometimes information that raises the probability of a fact that needs to be proved, but, as is now clear, probability-enhancement is not *intrinsic* to such helpfulness. What makes this so is that the criminal standard is usually met by what is called the best theory of the case.

12.9 Best Explanations

A theory of the case is a hypothesis that explains the evidence. A theory of the case meets the proof standard when it explains the evidence better than alternative theories and does so with an appropriate degree of explanatory force (Gabbay and Woods, 2005). Doubtless there will be occasions on which the following pair of facts coincide:

The hypothesis of guilt is the best explanation of the evidence and has a high degree of explanatory force.

The conditional probability of guilt on the evidence heard is high.

But there is no reason to think that any such concurrence is inevitable across the board. Not only is high probability not a sufficient condition of strong explanatory success, it is also disputable whether it is a necessary condition of it. For, as we were at pains to suggest in an earlier section, it can hardly be ruled out that when the legal texts call for probabilities, legal practice furnishes plausibilities.

To be sure, we have not entirely settled the present question. We have not demonstrated that the concept of probability is wholly absent from the law's concept of logical relevance. But of one thing we can now be confident. Probability does not *define* logical relevance.

We will bring this section to a close with a brief remark about Mr. Justice La Forest's observation that "basic principles of the law of evidence embody an inclusionary policy . . . In the absence of cogent evidence establishing that evidence . . . is irrelevant . . .the fact reasonable people may disagree about its relevance merely attests to the fact that unanimity in matters of common sense and experience is unattainable." (*R. v. Corbett* (1988), 64 C. R. (3 d) 1 (S. C. C.)). On this telling, the law's default position is that logically *irr*elevant evidence be admitted. The exception is that evidence exists that *establishes* its irrelevancy. What are we to take from this? It would appear that there are two inferences that we would be right to draw.

(i) In the general case, the irrelevancy of irrelevant information is not apparent at the time of the decision to admit it or not.

(ii) In the general case, the irrelevancy of irrelevant information only becomes evident after the decision to admit it as evidence, which is to say, after some assessment of its *efficacy* becomes possible.

Here are the authors of the *Australian Law Review Commission Report* to the same effect.

Circumstantial evidence is usually introduced item by item, and it is the cumulative effect of all the evidence from which a finding of fact is made. But relevance cannot depend upon its rendering a material proposition probable or improbable – individual items of circumstantial evidence, on their own, rarely render a material proposition probable (*ALRC*, 1985)[21]

If the irrelevance of some information *I* to some element of the case *A* were just the lowness of the probability of *A* on *I*, it would be difficult to see whether either (i) or (ii) would hold as salient conditions. If the probability we are speaking of here really is *probability* (rather than plausibility), it is problematic, to say the least, that the probability of *A* on *I* would resist early determination and would admit of determination only after admittance. Certainly that is not the way probability works at least, as conceived of by most logicians.

On the other hand, if the law's logical relevance is a case of agenda-relevance, then conditions (i) and (ii) acquire a strong motivation. It is a sheer commonplace that the helpfulness of some putatively helpful thing is not apparent before it is tried and becomes apparent only on the basis of how, when tried, it performed. So we may say again that

Proposition 13 (De-probabilifying relevance) *Logical relevance is agenda relevance, and that its identification with probability-enhancement is at best an over-statement and at worst an outright mistake – a troubling instance of theory-drag.*

12.10 Legal Relevance

With legal relevance, it is irrelevance that wears the trousers. Irrelevance, in turn, is something of a motley. Evidence is legally irrelevant when

(a) It would take too long to hear
(b) It would confuse the issues at hand
(c) It would catch a party by surprise
(d) It would cause prejudice.

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[21] See also Learned Hand: "[Evidence's] relevancy really did not, and indeed could not, demand that it be conclusive; most convictions result from the accumulation of bits of proof which taken singly would not be enough in the mind of a fair-minded person. All that is necessary, and all that is possible, is that each bit may have enough rational connection with the issue to be considered a factor contributing to an answer." (*US v Pugliese* 153 F 2d 497, 500 (1945))

Criteria (a) and (b) both bear on the question of a human being's cognitive capacity (a) is clearly about the capacity of memory and the limits of attention. (b) speaks to our capacity for understanding. Condition (c) calls attention to the fact that surprises are often cognitively disorienting; they are also sometimes emotionally destabalizing. Condition (d) forwards the commonplace that judgement is sometimes unsettled by anger and fear.

Let us begin with (b). It is clearly over-stated. It is not at all uncommon for the issues at trial to be highly confusing. Construction trials, trials involving fraud or securities violations are often required to call evidence of considerable complexity and technical sophistication. It is known that such trials cause jurors difficulties which they might be incapable of overcoming. In so far as judges are not experts in such matters, they, too, are met with much the same problems. If (b) were applied as written here, such trials could not be held. So when it does hold, it holds in a qualified form.

The obvious question is, when would a judge exclude testimony for its difficulties of comprehension? Certainly he will not (should not) exclude it if it is necessary, or otherwise highly important, for the Crown's prosecution or the accused's defence. This tells us something interesting:

Proposition 14 (Logical over legal relevance) *Probativity necessity trumps exclusions for incomprehensibility. In other words, evidence whose logical relevance is very high takes priority over evidence whose legal irrelevance is also high.*

By the lights of Proposition 14, incomprehensibility exclusions are qualified. A judge will exclude information that is confusing and hard to understand to the extent to the degree to which it is not probatively essential. Accordingly, we must amend the observation of Mr. Justice La Forest. Judges will admit irrelevant information unless its irrelevance is then and there demonstrable *or* its irrelevance is not then and there demonstrable *but* its propensity to confuse is high. This is rather bemusing. The two standards conflict logically. If the testimony's irrelevance is not immediately demonstrable, then by the first condition, a judge should admit it. By the second test, however, he should both admit it and not admit it. He should admit it because its irrelevance is not immediately demonstrable (La Forest) and he should exclude it because it is hard to understand (condition (b)).

Much the same can be said for criterion (a), on which evidence that would take too long to hear should be excluded. Here, too, there is an ambiguity that we must take note of. If "too long" means "longer than necessary", then the condition is sound but trivial. If "too long" means "too long for a person's memory or attention span", then the condition is not trivial, but (as it stands) is certainly unacceptable. For again, some trials are immensely long, and present huge challenges to memory and attentiveness alike. For such trials to be held at all, evidence must be admitted which, in this very sense, takes too long to hear. Since such trials do in fact occur, the prohibition has only a qualified application. As before, the qualification would appear to be that the evidence is required or is of high importance to the case of one of the parties. But if it is required, its probative value is high. If its probative value is high, it has a high degree of logical relevance.

So again not only does logical relevance trump legal irrelevance, but the same confusion arising from the immediate indemonstrability of logical irrelevance also obtains.

Condition (c) also embeds an ambiguity. If "surprising" means "surprising to the parties", it is a correct condition and a trivial one. The law's procedures embed the epistemological presumption that answers to surprises are not in general well-made on the spot. On the other hand, if "surprising" means "surprising to jurors", then the condition is not trivial but false. It is far from uncommon for jurors to hear testimony that shocks them in ways for which they could not have been prepared. True, counsel may seek to mitigate the surprisingness of testimony to come in their respective opening statements. But when they do, they present the information and deliver the surprises *then.*

By now a certain recurring pattern is evident. It is the pattern in which logical relevance trumps legal irrelevance, and the conflicted consequences of the immediate indemonstrability of logical irrelevance also hold. The pattern also extends to condition (d), that information causative of prejudice be excluded as a matter of law. Here too, perhaps it is not surprising to come upon a further ambiguity. If "prejudice" means "that which destabilizes impartiality", the condition is sound but trivial. If "prejudice" means "causative of anger or fear", criterion (d) is not trivial but is false. It is another commonplace that trials brim with probatively necessary evidence that is disgusting, horrific, and productive of hard feelings. Jurors have a duty to make their decisions independently of the contempt in which they hold the accused or witnesses called to testify. The very fact that such trials occur attests to the law's confidence in the ability of jurors to treat with fairness people whom they may despise or fear. That being so, what is the basis for the exclusion of evidence that may induce hatred or fear? It is, again, that the evidence is not probative, not that it is hateful.

Still, judges do exclude probatively relevant evidence on grounds that jurors might make too much of it. In making too much of it, a juror would distort its probative value. This marks a striking ambivalence in legal procedure. On the one hand, when it comes to applying the fundamental concept of proof, the law's position is that jurors have a satisfactory command of it just on the basis of their common sense and experience. Yet when a judge excludes evidence because jurors may make too much of it, the law's position is that jurors lack a satisfactory command of how to apply the concept of proof.

Some will see in these presumption-swings the alternating presence of negligence, as in the first case, and paternalism, as in the second. Perhaps this is a trifle harsh. Certainly the ambivalence in question has a paradoxical cast to it. It allows for cases in which evidence that is *necessary* to prove an accused's guilt is excluded on grounds that a juror may think it *sufficient* to prove it. By these lights, evidence that may prove the *factum probandum* of guilt is inadmissible because the judge thinks that the juror is likely to think that it *does* prove it. What would justify this exclusion? It is the principle that it is better forgoing a conviction than securing it on evidence in relation to which jurors are likely to lose control of the distinction between necessity and sufficiency.

12.11 Character

The prohibition of prejudice harbours a further ambiguity. Judges will often cite the factor of bias in excluding testimony about an accused's character. "Character" here means "bad character". On some readings, character evidence is suppressed precisely because it is hateful. As we now see, this is far from sufficient to ban it. Might there be some other reason? Consider a case in which the accused is charged with a serious criminal offence, murder say. Character evidence takes the form of information which, if true, counts towards the truth of the assertion that this murder is the sort of thing that this accused would do. In other words, it would not be out of character for the accused to have committed this offence. It bears on this that in the ordinary affairs of life, that it would be characteristic of *X* to have done *D* renders it to some degree plausible that he did in fact do *D*. In other words, that it is the sort of thing *X* would do is logically relevant to the question of whether he did do it. It doesn't matter.

Proposition 15 (When legal relevance dominates) *It is part of the law's determination to constrain evidence in fulfillment of its policy to minimize wrongful convictions, that what is logically relevant information in ordinary circumstances is legally irrelevant information at trial. It is the one of the few situations in which we see the dominance of logical relevance over legal irrelevance reversed.*

Dialecticians relish the topic of character evidence. They see it as natural occasion to expatiate on the fallacy of *argumentum ad hominem* (abusive variety). But, if the above remarks stand up to scrutiny, it is hard to see that legal relevance has any particular tie to this sophism. In its modern conception, the abusive *ad hominem* involves the introduction of facts about one's opponent that are logically irrelevant to the matter in dispute. Evidence of this kind is excluded for its irrelevance, not for its *ad hominem* aspect. It is true that evidence of bad character is also excluded on grounds of *legal* irrelevance. This is interesting precisely when the evidence is logically relevant. As we have just seen, in those cases the law is constraining the admissibility of relevant evidence out of a concern to make the criminal proof standard hard to attain. It has nothing to do with the abusive *ad hominem*. It is but a further expression of the law's subscription to justice as an epistemically artificial constraint on truth.[22]

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Part IV
New Formal Approaches to Legal Reasoning

Chapter 13
The Logical Structure of Legal Justification: Dialogue or "Trialogue"?

Ana Dimiškovska Trajanoska

13.1 Introduction

In 1966, the Polish-born Belgian logician and legal philosopher Chaïm Perelman published a text in the title of which he asked the apparently simple but very important question: what can a philosopher learn from the study of law? The need to ask such a question was inspired by his observation that the (rationalistic) philosophical tradition, fascinated by the power of mathematical, especially geometrical methods, has almost completely ignored the legal model as a possible methodological paradigm for philosophy.[1] In Perelman's view, however, the analyses of the specificity of law and the fundamental mechanisms of its functioning can largely contribute to the better understanding of the very nature of philosophical rationality (Perelman, 1983, p. 207).

Obviously, this kind of rationality is essentially concerned with the making of rational choice between the competing alternatives in thinking and acting, and with the effort to give strong and convincing arguments in favor of one's position. Having in mind that the philosophical as well as the legal argumentation is often non-conclusive, allowing the possibility of counter-arguments, it is clear that in both areas the disagreement between two (or more) perfectly rational beings concerning a particular issue would rather be a rule than an exception. That's why the controversial nature of legal disputes can serve as a very useful model for every kind of rational, including philosophical argumentation.[2]

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[1] However, as Jan Woleński observed in the discussion during the colloquium *Argumentation and Law* (Lille, France, November 14–16, 2005), in the history of philosophical thought counter-examples for this Perelman's claim could be found. Some of them were analyzed in the introductory part of Woleński's communication "Formal and informal in legal logic".

[2] Compare the well-known Toulmin's view of logic as "generalized jurisprudence" (Toulmin, 1958, p. 7).

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Namely, the general structure of legal disputes finds its most adequate expression in the dialogical form of legal controversy, in which two parties are pleading for a different and in principle opposite solution of the issue at hand. The legal principle *audiatur et altera pars*, as well as the metaphor of the balance taken as a symbol of justice since Roman times, are but a small piece of evidence in favor of the thesis that the dialogical model is intuitively appealing as a pattern of legal, especially judicial reasoning. Nevertheless, by appropriate abstraction, this dialogical structure can easily be seen as an instance of a universal formal model for articulating and, hopefully, resolving the controversies in virtually all subject areas. In that way, in the contemporary philosophical investigations, the dialogical pattern of reasoning and argumentation is gaining, or better, is regaining the high appreciation especially in the eyes of logicians, making them a particularly diligent class of perelmanian philosophers – learners from the field of law.

This is, of course, not to say that the importance of the dialogue as a logically and philosophically indispensable tool of reasoning was not perceived before this contemporary approaching between the philosophy, law and logic. Quite on the contrary, ancient as well as medieval logic and philosophy had greatly contributed to the elaboration of the dialogical pattern of reflection and debate.[3] Contemporary logic starting from the sixth decade of the twentieth century, had also, on its own, developed several important systems of dialogical logic.[4] However, the field of law, thanks to its practical and procedural dimensions, offers a particularly instructive insight into the functioning of the dialogue as an instrument of attempted dispute resolution. Those insights concern not only the practical details, but also the theoretical dimension of the dialogical phenomena, in both logical and philosophical sense. Therefore the main goal of this paper is to explore certain aspects of the use of dialogical models in the analysis and representation of legal argumentation, with the aim of evaluating its theoretical perspective rather than suggesting some practical applications or proposing a new, alternative model.

13.2 Legal Justification and Its Dialogical Modeling

However, I will restrict my attention only to one particular area of legal reasoning and argumentation – namely, the area of legal justification. In the most general sense, legal justification is concerned with the effort to bring forward justifying arguments for any kind of legal standpoint advanced in an appropriate context (cf. Feteris, 1999, p. 1). The justification of legal statements is closely linked to the rationality of legal discourse (Wróblewski, 1979, p. 277), as well as to the fact that the need for argumentative justification is dictated by the specific nature of legal decisions, which are "neither evident nor arbitrary" (ibid.).

[3]This line of elaboration of the dialogical pattern can be traced back to Socrates and the sophists, and followed through the work of Plato and Aristotle, to that of the medieval logicians, especially in the framework of their theories of *obligationes.*

[4]Cf. infra.

Given the importance of the justificatory procedures in the framework of legal reasoning, it is possible to argue – as, for example, Robert Blanché does – that the legal justification is, in fact, the very essence of the legal argumentation. Namely, according to this view, behind the "syllogistic facade", i.e. the appearance of an impartial deduction of the legal conclusions from normative and/or factual premises, there is always an effort to justify a particular axiologically determined legal standpoint (cf. Blanché, 1973, p. 238). Having in mind that, as (Feteris, 1999, p. 1) points out, "the acceptability of a legal thesis is dependent on the quality of the justification", it is clear that the weight of the justificatory arguments for a particular legal judgment can dip the balance in its favor in a decisive manner.

Although the area of legal justification is wide and complex enough to comprise the whole range of justificatory procedures for different kinds of legal standpoints, in this text, by "legal justification" I mean primarily the justification of judicial decisions, which, in some contemporary legal systems is imposed as a statutory obligation on the judge. Thus, the need for justification of judicial decision is at least doubly motivated. On the one hand, it is imposed by the mechanism of the division of powers, incorporated in the structure of modern democratic societies, which determine in a precise manner the institutional role of the judge in the system of multi-layered justice. On the other hand, it is inspired by the specificity of legal reasoning, which encompasses far more complicated mechanisms, then the subsumption of facts under the normative major premise of what is called "legal syllogism". This specificity, due, amongst other, to the nature of legal rules, which allow for exceptions and mutual conflicts, and are often formulated in vague and imprecise legal language, create the need to develop some more sophisticated techniques of justifying, i.e. showing the permissibility of deriving a particular legal conclusion from the combination of normative and empirical statements in the case at hand.

This focusing of the interest on the justification of judicial decisions further imply that I am, at least for the sake of the argument, adopting the perelmanian conception of the judicial reasoning as the "privileged" kind of legal reasoning. Namely, it is obvious that the umbrella term *legal reasoning* can cover different types of rational activities in the field of law. From a logical point of view, the activity of legislation, the activity of adversarial exchange of pro and contra arguments of the prosecution and the defense, the activity of resolving doctrinal issues of legal science, etc., represent very important and complex types of legal reasoning. However, according to Perelman, legal reasoning *par excellence* is only the reasoning of the judge (Perelman, 1983, p. 95). Namely, the judge (or the judges, in the cases of collective adjudication) is the only person who is entitled to reach the decision of a legal dispute and to state it in a form of a motivated judgment. This, in turn, means that he/she is obliged to handle the totality of the controversy, taking into consideration all of its elements and bringing it to an end. The important presence of the phenomenon of judicial reasoning in the attempt to determine the content of the concept "legal reasoning" is also obvious in some more contemporary approaches to this problem. Thus, for example, Julie Dickson, in her text "Interpretation and Coherence in Legal Reasoning" points out to three main senses that legal theoreticians usually ascribe to this concept:

> (a) reasoning to establish the existing content of the law on a given issue, (b) reasoning from the existing content of the law to the decision which a court should reach in a case involving that issue which comes before it, and (c) reasoning about the decision which a court should reach in a case, all things considered (Dickson, 2005, p. 2).

According to Dickson, a particular instance of (c)

> might be the kind of situation which could arise for a judge in a 'wicked' legal system where the law on some issue is so morally odious that, all things considered, the judge should not decide the case according to the law at all, but rather should refuse to apply the law (ibid.).

So, if we subscribe to Blanché's view (Blanché, 1973, p. 238) of the essentially regressive nature of judicial reasoning, in the sense that its aim is not to progress from normative and factual premises to the legal conclusion, but rather to expose the reasons for the decision which is considered to be in greatest conformity to the ideal of justice, we have to admit that judicial argumentation manifests itself mainly in the form of justification of the juridical decisions.

Starting from the above-mentioned position, I would like to discuss the following question: to which extent can the contemporary dialogical models be treated as an adequate tool for a logical analysis, representation and evaluation of the legal justification? The context in which this question is to be treated has a double, historical as well as theoretical dimension.

Namely, as it was already mentioned, in the second half of the twentieth century, especially in the last few decades, thanks to the efforts to bridge the gap that has separated formal logic from argumentation theory, a number of dialogical approaches to the reasoning phenomena have been developed (cf. Rescher, 1977; Barth and Krabbe, 1982; Lorenzen, 1982; Lorenz, 1982; Walton and Krabbe, 1995; Rahman, 2000, etc.). The structure of the formal models designed in the framework of those approaches is based, in principle, on two main elements, usually named proponent (P) and opponent (O), which represent the roles of two participants in a dialogical interaction. In the most general sense, the goal of this interaction is to defend a thesis from the actual or possible attack(s) on it. Two main features of the construction and the application of those dialogical models are particularly worth being considered.

The first feature concerns the formal structuring of their logico-deductive components, in the framework of which an attempt is made to represent the ordinary deductive operations in a purely dialogical form (Barth and Krabbe, 1982, p. 29). This tendency is, according to Barth and Krabbe (ibid.), deeply rooted in the logico-philosophical tradition, because since scholastic time the dialogical disputation is widely recognized as closely connected with deduction. However, in the area of the contemporary logical investigations, the most far-reaching result of this approach is, as it seems, the method that, since 1958, has been developed in the pioneering work of Paul Lorenzen, and in the subsequent work of the researchers from the field of formal dialectics. Two particularly important results of this method are, on the one hand, the giving of the dialogical definitions of the fundamental logical constants, and on the other, the complete dialogical characterization of the concept of logical validity (cf. Hage, 2005, p. 198). The thorough formal elaboration of this approach issued in what is called "dialectical presentation of logic",

which, in a historical perspective, is succeeding its former axiomatic, inferential and model-theoretic presentations (Barth and Krabbe, 1982, p. 8; see also Krabbe, 1982, pp. 126–127).

The second feature of the construction of the contemporary dialogical models consists in the fact that, besides the definition of their logical, deductive core, it demands also a detailed elaboration of a complex of "procedural rules". Those rules determine in a precise manner the role and the possible, legal moves of each of the participants in the dialogue, in the function of its global goal. Moreover, the tendency of elaborating the procedural dimension of the dialogical interaction also underlines the deep connection between the dialectically oriented logical investigations and the general theory of games. Thanks to the merging of these two approaches, it became possible to treat the dialogue between the proponent and the opponent as a kind of (logical) game – a regulated discursive interaction, based on the following of a corpus of rules, which can be used in a creative way in order to achieve the strategic goal, winning the game. In the dialogue game, the victory of the proponent means that he/she has defended successfully his/her thesis, and the victory of the opponent means that he/she has prevented the proponent from achieving his/her goal (cf. Rahman, 2000, p. 11).

In a historical sense, even though the opening of this dialogical perspective in contemporary logic had important theoretical consequences on its own, the legal field was immediately perceived as an extraordinarily fruitful area for the application of its findings. Namely, the legal reasoning as reasoning basically concerned with resolving of the disputes and controversies in a strictly determined institutional framework is essentially dependent on using the dialogical techniques as one of its basic instruments. The big potential of the dialogical models for the analysis and representation of reasoning phenomena in the field of law was revealed especially when the researchers in artificial intelligence become widely interested in the task of modeling of legal argumentation. As a result of the individual and/or joint efforts of the contemporary AI and Law scholars, as, for example, Gordon, Prakken, Sartor, Vreeswijk, Verheij, Hage, Lodder, Nitta and others, several systems and computer programs for "intelligent legal support" are developed, which are based precisely on the implementation of different variations of abstract logico-dialogical models.

However, the use of dialogical models in the analysis, representation and evaluation of legal justification, which is, as it was mentioned above, the main object of interest of this text, is most extensively treated in the work of Arno Lodder, especially in his book *DiaLaw – On Legal Justification and Dialogical Models of Argumentation.*[5] That is why in the rest of the paper a crucial place will be given to a critical discussion and elaboration of some of his fundamental ideas, which have in a large measure inspired the interest for the problem of dialogical modeling of legal justification as a particularly important kind of legal argumentation.

[5]This book is a revised version of Lodder's dissertation "DiaLaw – on legal justification and dialog games", defended on June 5th 1988 at the Universiteit Maastricht.

The main thesis of his book reads, in Lodder's words, as follows: "legal justification should be modeled as a procedural, dialogical model in which not only products of argumentation are allowed, but, even in formal models, rhetorical, psychological aspects of argument are dealt with" (Lodder, 1999, p. xi). In this book, a two-person dialog game called "DiaLaw" is defined, which is intended to serve as a model of legal justification. According to Lodder, the key idea on which his model is based is that "justification of a statement can solely be based on agreement among the participants in a dialog" (Lodder, 1999, p. 33) and that "there is no criterion outside the dialog that can determine what is justified" (ibid.).

Although stated in such a clear and precise manner, this position can nevertheless raise certain doubts, which consist mainly of the following. On the one hand, having in mind that the disagreement between the parties represents a basis for the litigation in general, it seems very appealing to represent the legal controversy in a two-person dialogical model, in which the proponent and the opponent are adducing reasons pro et contra a particular legally relevant claim. On the other hand, however, if the acceptance by the other party is defined as an ultimate criterion of justification, we are in too great a risk not only to leave the dialogue unfinished, but also to distort the normal picture of the legal reality. Namely, in a legal context, it is precisely the disagreement of the parties that imposes the need of adjudication. The paradigmatic legal dialogue is rather conflicting than cooperative, which means that the parties are not very eager to accept easily and impartially each other's arguments. Moreover, the very idea of the court or judge implies the existence of a third party that intervenes when the usual methods of reaching agreement between the two parties fail. So, if we are sticking to the binary proponent/opponent structure of legal controversy and justification, presupposed by the suggested dialogical model, we are naturally led to the systematic exclusion of the concept of the judge or arbiter from it. But in that case, leaving no room for the role of the judge, can we still insist on the claim that we are building a model of a specifically *legal* justification?

To do justice to Lodder's position, it is necessary to underline that he is completely aware of the "unpleasant consequences" of not modeling the role of an arbiter in DiaLaw. Although he admits himself that in law, the judges and arbiters perform the role of an independent third party that decides the issue in case of the disagreement of the parties, he deliberately chooses to leave it completely aside. His reasons for such a decision are stated in the following way:

> [...] it (i.e. the modeling of the role of an arbiter in DiaLaw) would imply that there indeed exists an independent criterion to settle conflicts, namely the criterion the judge uses to decide. This would be in contradiction with my claim that such a criterion does not exist (Lodder, 1999, p. 35).

But, we can ask the question, does the inclusion of the role of the arbiter in a dialogical model, really imply by itself the existence of *an* independent criterion to settle conflicts? In my opinion, it is important to make the distinction between the role of the arbiter as an element of the model, charged with the task of terminating the disputation in the case when the reaching of an agreement is impossible, and the criterion, or better the criteria he/she uses to decide the issue. Namely, the judicial weighing of reasons adduced by the parties is performed by different and multiple

criteria drawn by legal sources, whose combination is almost unique in every single case. So, the including of the third element – the arbiter, the judge, the jury – in the structure of the legal justification does not introduce an intolerable degree of "externality" in the dialogue. On the contrary, thanks to the role of the judge, the legal controversy is guaranteed to reach the stage towards which it inherently tends – namely, the stage of termination on the basis of totality of its elements. In that sense, the possibility of assessment of the extent to which a "good case" has been made is an essential feature of the rationality of a controversy (Rescher, 1977, p. 43).

13.3 The Absent Arbiter?

However, despite the apparent absence of this third, judicial element in the basic dialogical structure, a closer look at some contemporary dialogical models, whether or not designed for legal application, shows some very visible traces of its presence. First of all, in the work of Lodder himself, in the first version of his DiaLaw developed with Aimée Herczog (1995), the possibility of calling an arbiter is explicitly allowed. In this version, the decision of the arbiter is performed in one or two consecutive moves, which "have as a result that neither the sentence the arbiter is called upon, nor its negation is any longer disputed" (Lodder and Herczog, 1995, p. 7). Another instructive example is Thomas Gordon's Trial Game. The Trial Game is embedded in the context of his Pleadings Game, which represents a formal, two-person game, inspired, among others, from Lorenzen's Dialogue Logic. Nevertheless, in the Trial Game, the only player is the court. In this model, the court's role is, as Gordon puts it, relatively passive, given that in the course of pleading, the parties had completely determined the legal and factual issues. Consequently, the court cannot "make arguments on its own initiative", but its role is restricted to choosing which of the claims have to be accepted, and which rejected (Gordon, 1995, p. 152). Another, particularly detailed account of the role of the judge, especially in the phase of "rational reconstruction" of the dispute in order to reach the decision, as well as a formalization of this role in the framework of the formal dialogue game, is given by Henry Prakken, in his text "Modelling Reasoning about Evidence in Legal Procedures". According to Prakken, in the decision phase the judge has to perform several mutually connected tasks: identifying the argumentative speech acts made by the parties during the pleading phase, checking their procedural correctness, determining their mutual logical and dialectical relations, completing the adversaries' arguments (when necessary), deciding on the internal strengths of the advanced arguments, and finally, adjudicating between conflicting arguments (Prakken, 2001, p. 120).[6]

[6]A more developed version of the dialogue game for adjudication dialogues was presented by Henry Prakken in his communication during the colloquium *Argumentation and Law*; for the theoretical foundations of the proposed model, its formal structure and its functioning on practical examples see Prakken (2008. pp. 305–328).

However, apart from the above-mentioned examples, one of the most explicit considerations of the importance of the third, judicial element in representing legal argumentation can be found in the work of Jaap Hage. In fact, it is from the draft of his book *Studies in Legal Logic*[7] that I borrowed the expression "trialogue" which I find a very successful merge of the ideas of dialogue, the presence of the third element in it, and some legal flavor suggested by the idea of trial. In Hage's words, "The role of this judge in legal procedures can be modeled as a third party in what now becomes a trialogue. The trialogue can in turn be modeled as three interrelating dialogues between the three parties involved in the procedure" (Hage, 2005, p. 221). According to this concept, the content of the dialogue of the two ordinary parties are the facts of the case, but in the same time each of the parties is involved in "a dialogue with the judge about the legal consequences of the case." Consequently, "the outcome of the trialogue consists of the commitments of the judge at the end of the procedure" (ibid.).

My appreciation of this "trialogical" proposal comes mainly from two sources. First of all, it captures very well the underlying structure of formal disputation in general, defined by Rescher as "a method for conducting controversial discussions, with one contender defending a thesis in the face of objects and counterarguments made by an adversary" (Rescher, 1977, p. 1). According to this view, a disputation in this sense, even not necessarily legal, involves by default three parties: the two adversaries and the *determiner* who presides over the conduct of the dispute and judges its outcome (Rescher, 1977, p. 4). Second, and perhaps more important, the "trialogical" perspective gives us a deeper insight into the nature of legal justification, determined by the specific position of the judge in the contemporary democratic systems of division of powers. Namely, the addressees of a motivated judicial decision are not only the parties involved in the legal controversy, but also the other judges, as well as the social body which has charged the judge with the mission of adjudication. In that way, there are at least two "trialogues" opened by the justification of a legal decision. On the one hand, in a motivated judgment, the judge is stating the rational grounds for deciding the issue, in order to convince each of the parties of the legality of the decision as well as of its conformity to the ideal of justice. But on the other hand, he/she is exposing his/her justification to the critical evaluation of the higher judicial instances and of the wider social community, thus constituting a new triangular path of the flux of arguments. In this "trialogical" structure, it is important to note the idea of hierarchization of its elements, because the position of a judge is superior to the position of the parties in the litigation, but is itself inferior in the cases when his/her judgment become an object of evaluation by higher instances and, in a looser sense, by the social community in general.

[7]My source was the draft version of the book, which, at least by the October 29, 2005, was available on the WWW http://www.rechten.unimaas.nl/metajuridica/hage/publications/PDF_files/Chapter%209.pdf

13.4 Justification, Dialogue and Procedure

In the light of this recognition of the importance of the third, judicial element for building a realistic logical model of legal argumentation, and especially legal justification, we can rethink Lodder's rationale for not including such an element in the developed version of his model DiaLaw. As it was already mentioned, the key idea behind his considering the agreement of the participants in a dialogue as the only criterion of justification is the idea that the justification should be modeled in a purely *procedural* way. This, in turn, means that instead of considering an independent standard of acceptability of legal statements, the stress is laid on defining the procedure in which statements are justified.

As Lodder himself points out, his "procedural view of law", is using and partially modifying Rawls' distinction of three types of procedures: perfect, imperfect and pure procedures (Lodder, 1999, p. 28). This distinction is based on the combination of two principles of classification of the types of procedures: (1) the existence (or the non-existence) of an independent standard of evaluation of the outcome of a procedure, in the sense of criterion of "right" and "wrong", and (2) the possibility (or the impossibility) to define a procedure that leads to the desired result. The perfect procedure is the one in which both conditions are positively satisfied, i.e. there is an independent criterion of a fair outcome, as well as a guarantee that the procedure will give the desired result. In his *A Theory of Justice*, in order to illustrate his idea of perfect procedural justice, Rawls gives the example of a fair slicing of a cake. The procedure is the following: one man is slicing the cake and is letting the others to pick a slice before he does. In this situation the criterion of the fair outcome is the equality of the divided pieces, and the procedure that guarantees the desired outcome is the rule that the slicer picks last. Namely, in order to be sure that he will not get a smaller slice, he has to slice the cake on equal parts. In the second type of procedures, there is an independent criterion of the correctness (fairness) of the outcome, but there is no possibility to design the rules of procedure which will guarantee the reaching of that outcome. Rawls' example for the "imperfect procedural justice" is a criminal trial. If the defendant in trial is declared guilty "if and only if he has committed the offense with which he is charged", than the procedure led to the desired result. However, to formulate legal rules the application of which will always guarantee this desired outcome is an impossible task, although the overall design of rules and procedures of criminal law strives to maximize the number of cases in which the right result is achieved. Finally, the third type, pure procedures are those in which "there is no independent criterion for the right result". Instead, there is a "correct or fair procedure"; provided that it has been followed properly, the outcome is correct or fair, "whatever it is". The example of the pure procedural justice is the situation of gambling, in which the distribution of the cash after the last bet (in a series of previous fair bets) is considered fair, "whatever this distribution is" (cf. Rawls, 1987, pp. 116–118).

However, in Lodder's view, none of the above-mentioned three types of procedure is adequate enough to characterize the procedure of justification of legal statements. That is why Lodder modifies the initial classification of perfect,

imperfect and pure procedures, by adding the fourth category, called "the legal procedure". This type of procedure is characterized not only by the absence of the independent criterion of the correctness of the result, but also by the impossibility to have a procedural guarantee that the justified statements are really just (Lodder, 1999, p. 30). Consequently, legal statements are considered to be justified if they are defended successfully in a dialog, in the framework of which the agreement between the participants is the only criterion of justification (Lodder, 1999, p. 31).

In that way, it becomes obvious that this focusing on the procedure almost automatically promotes the central place of the dialogue as a rule-governed activity in a logico-philosophical account on justification. Of course, one has to be aware of the different meanings that the concept of dialogue acquires in the different contexts of its use – the general philosophical context, the context of the legal theory, or the context of formal logic. Sometimes, in practical argumentative contexts the role of the dialogue parties can also be played by more or less loosely connected groups of people instead of single persons/players. However, it seems that it is possible to isolate a common core of defining characteristics and general rules of dialogical justification, which, with an appropriate modification can be applied in a transcontextual way, or be easily adapted to any specific context. In that sense, one of the most exciting features of Lodder's approach is, in my opinion, the attempt to give a precise formal expression and practical operationalization of such a core of characteristic and rules, extracted from the general logical, legal and philosophical theories that represent the conceptual basis on which his logical model is built. Thus, for example, the deep connection between the concept of the dialogue as a fundamental form of (human) communication and the concept of procedure as a specific communicative protocol, is extensively elaborated in the work of influential continental legal theorists, such as Aarnio (1987), Alexy (1989), and Peczenik (1989), as the prominent representatives of what Feteris calls "the dialogical approach" to the problem of rational justification of legal decisions.

Namely, according to Feteris, in contemporary research in legal argumentation, three approaches can be distinguished, on the basis of the conception of the norms, criteria and standards of rational justification of legal decisions. These approaches are the logical, the rhetorical and the above-mentioned dialogical approach.

In the logical approach, in order to qualify a legal justification as acceptable, it is necessary "that the argument underlying the justification is reconstructable as a logically valid argument" and that "the reasons brought forward are acceptable according to legal standards" in force (Feteris, 1999, p. 15).

In the rhetorical approach, which can be conceived of as a reaction to the overemphasizing of the formal aspects of legal argumentation by the logical approach, the focus is moved to the "content of arguments, as well as to the context-dependent aspects of acceptability" (Feteris, 1999, p. 16). In this approach, justification is audience-relative, because the measure of the acceptability of the justification is its effectiveness for the audience.

Finally, in the dialogical approach, "legal argument is considered as part of a dialogue about the acceptability of a legal standpoint" (Feteris, 1999, p. 19). So, from this point of view, legal justification has not only a formal and a material, but also a strongly emphasized procedural dimension. In fact, here the very criteria of rationality of legal discussions are defined in a procedural manner (cf. Feteris, 1999, p. 20). Thus, in the seminal work of Robert Alexy *A Theory of Legal Argumentation – The Theory of Rational Discourse as Theory of Legal Justification*, the procedural approach to the rationality of legal discussions is suggested as a means of overcoming the infinite regress in the attempted justification of normative statements. In Alexy's proposal, the demand for ever further justification of every statement by another statement ("the Münchhausen-Trilemma"), is to be dropped in favor of a "set of requirements governing the procedure of justification", which can be formulated as "rules for rational discussion" (Alexy, 1989, p. 179). There are five groups of such rules elaborated in Alexy's theory: basic rules, rationality rules, rules for allocating the burden of argument, justification rules and transition rules (cf. Alexy, 1989, pp. 188–206).

The importance of those rules and their formulation can be stressed at least at three levels.

First, they can be seen as a more formal expression of the basic principles of practical rationality – the principles of "consistency, efficiency, testability, coherence, generalizability and sincerity" (Feteris, 1999, p. 20; cf. also Aarnio, 1987, pp. 195–204). The formulation of the rules and forms of rational practical argumentation, attempted at in Alexy's work, represents, in fact, a step toward building a "codex of the practical reason", the respect of which could hopefully improve the overall quality of rational discussion. The logical formalization of such rules, where possible, should result in a set of general rules regulating the dialogical interaction in basic and most abstract lines. For example, in Lodder's DiaLaw the first five rules are formulated as general rules for communication, and the rest of them as special rules for legal justification.

Second, those rules of general practical discourse represent, in Alexy's words, a "*negative hypothetical criterion* for the correctness of normative statements" (Alexy, 1989, pp. 193–194). Namely, according to this position, justificatory arguments, which would not be accepted when the above-mentioned rules of discourse were satisfied, are to be regarded as invalid. The importance of this sort of negative criterion for the legal justification is obvious, given that, especially in the higher instances of adjudication, the role of the court in many situations consists of checking and guarantying the correct application of legal rules by the lower instances. Consequently, if the application of the rules is correct and the decision made according to those rules is still contested, its contestation can be rejected on the above-mentioned basis.

Third, Alexy's rules of general practical discourse incorporate some fundamental logical constraints in the general rules for rational dialogue – for example, the rule that forbids self-contradiction. From a logical perspective, this point is particularly important, because it can be seen as a prolongation and specific application

of a very productive path already opened by the dialogue logic. This path concerns the possibility to integrate the elementary logical rules in the context of a wider corpus of rules for dialogue (cf. Lorenz, 1982; Rahman, 2000, pp. 6–7, for the distinction of "local" and "global" rules). This possibility is systematically applied in Lodder's DiaLaw, as well in other dialogical models of argumentation. Thus, in Lodder's model the "logical core" of the sixteen rules that define its formal framework is centered on the concept of "commitment" of the two players, especially the "forced commitment". The forced commitment is, in Lodder's words, "comparable to derivation in logic, and occurs when a player is forced to accept a sentence, due to the sentences he is already committed to" (Lodder, 1999, p. 39).

So, this idea of logically forcing the opponent to accept or reject some point of view, or, in the dialogue logic, building a winning strategy for every possible attack by him/her, can throw some light to the fundamental question that has inspired our reflection. That was the question of the need to consider the enlargement of the basic dialogical model with a third element, which would guarantee the termination of the dispute on the basis of some rationally justifiable criteria. Namely, the concept of forced commitment, as well as the formal definitions of the winning strategies, shows that the procedural dialogue rules, with an appropriately incorporated logical core, lead *by themselves* to the termination stage of the dialogue. In general, the dialogue ends when the opponent, following the dialogue rules, runs out of possible, legal moves. In Lodder's model, the dialogue stops when there are no open, disputed sentences left for acceptance or withdrawal. Moreover, as to the need to introduce the dimension of the assessment of conflicting arguments, in the formal models of legal reasoning, as Prakken and Sartor suggest, even the principles of a meta-level – for example, the principles of priority of arguments, as lex specialis, lex posterior, etc., can be expressed in the logical language and became an object of argumentation (cf. Prakken and Sartor, 1997, p. 176). In the light of all this, it can be suggested that the two-parties framework, thanks to its multi-layered nature in which, to use Prakken's terminology, logic, dialectic, procedure and strategy (Prakken, 1997, pp. 270–274) are combined, is powerful enough to model legal controversies without the need to include a third element in it.

In my mind, however, this (hypothetical) line of thought does not lead to conclusive arguments against the need to include the element of arbiter or judge in the logical modeling of legal justification, especially if we want to build a theoretical model of legal argument which would not be too unrealistic. Namely, there is another potentially problematic point in this dialogical perspective, especially in the procedural one, which has to be considered. That is the fact that the real argumentative practice in legal context uses the medium of natural language, which, as it was pointed out to in the framework of the rhetorical approach, allows for abundant use of rhetorical devices in order to obtain the audience's acceptance of the theses brought forward by the speaker.

As already mentioned, Lodder himself insists on the fact that the importance of the rhetorical component of legal argumentation needs not to be underestimated. Thus, in his model not only is the logically compelling, forced commitment allowed,

but there is also room for the free acceptance of the opponent's statements by the participants in the dialogue. This, in turn, means that Lodder's model allows for a kind of what he calls "(di)a-rational" argumentation, in which the conclusion is accepted without the premises being sufficient to accept it. So, in Lodder's words

> Argumentation is (di)a-rational if adduced premises cause acceptation of the conclusion without these premises being *sufficient* to accept the conclusion. In case of (di)a-rational argumentation it is not exactly clear why the conclusion was accepted. The actual acceptation is essential, because the premises are not sufficient to accept the conclusion (Lodder, 1999, p. 151).

Consequently, there is a possibility that a participant in a dialogue accepts even a logically unsound argument, provided that it seems convincing to him/her. Given that the acceptance of the suggested conclusion by the other party in a dialogue in Lodder's model is the only criterion of justification, it follows that in the framework of it the conclusions that do not logically follow from their premises can nevertheless be justified.

But if we admit this possibility of accepting the conclusion without the premises being sufficient for it, together with the already mentioned conflicting nature of a paradigmatic legal dialogue, then the door is open for the phenomenon of a possible sophistic and eristic subversion of the rules and the goal of the dialogue by the parties. Namely, each of the parties could try to turn the course of the dialogue in its own benefit and to obtain the acceptation by every available, including manipulative discursive techniques, and not only by the logically, procedurally and legally impeccable means. In fact, this door seems to be being constantly open in the real argumentative practice. So, it is obvious that in the legal context, it is of utmost importance to have a way to control the *dialogical behavior* of the parties, in order to assure the correct application, not only of the material rules of law, but also of the procedural ones. This is, in fact, one of the most important functions of the role of the judge.

Therefore, in my opinion, the "trialogical" path is indeed a promising way to follow. Namely, it is pointing out precisely to that function of the third, judicial party in the dialogue. As Hage puts it,

> if the parties do not use the rules to which they are committed, commitment to the law has few or no effects. It is crucial that somehow the application of valid rules of law is secured, and for this purpose an independent "guardian of the law" is necessary. The role of the judge in actual legal procedures springs to mind as an example of such an independent "guardian of the law" (Hage, 2005, p. 221).

Moreover, one of main points of the justification of judicial decisions is to convince the audience (the parties, the other judges, the community) that the judge has duly performed his/her task of "an independent guardian of the law", i.e. that he/she has safeguarded that the applicable legal rules or principles have indeed been applied in the case at hand. So, if, in a dialogical approach to legal argumentation, especially to legal justification, the main stress is applied to the formulation of the rules of the rational discussion, it seems very natural to think also of the way to

guarantee the correct use of those rules, because a large class of procedural flaws can be generated precisely by their inappropriate use.

So, it can be suggested that the necessity of inclusion of the third party in a realistic model of legal dialogue, performing the function of the judge or arbiter, is deeply motivated by the specificity of legal argumentation and legal dialogues, especially in the paradigmatic form of legal trial. Namely, in contrast to other form of argumentative activity, such as philosophical or commonsense argumentation, legal argumentation is not developed in a free and unstructured, but in a strictly defined institutional context. This context, on the one side, puts severe restriction on the choice of possible premises and on possible ways of justification of legal conclusions, and on the other, it provides a multi-leveled institutional control on their legal tenability, as well as on their social acceptability. Moreover, legal disputes and controversies in principle demand to be brought to an end in definite way and in reasonable time; so, their leaving unfinished is an almost unacceptable solution, given the importance of the things and values that are at stake in them, as well as the importance of the consequences of legal judgments. Consequently, it seems that what makes a model of justificatory argumentation to be model of specifically legal rather than a model of general philosophical or practical argumentation, is not only the inclusion of special legal elements in its language and rules, but also the incorporation in his structure of an element the function of which will be to assure the bringing of the controversy to an end according to legal standards, as well as the to guarantee the correctness of the procedural behavior of the parties.

13.5 Conclusion

Thanks to the efforts of many contemporary researches in the field of logic, argumentation theory, law and artificial intelligence, the dialogical models of legal argumentation are developed as one of the most powerful tools that the modern logic has at its disposal for the analysis, representation and evaluation of legal argument. The contemporary studies have shown that those models are particularly successful in dealing with the features of legal reasoning that are incapable of being adequately treated by the resources of the classical logic. Such feature is, for example, the defeasibility of legal reasoning, mainly due to the existence of conflicting rules and exceptions from the rules in the legal field, as well as the dynamic aspect of legal controversies. However, some kinds of legal argumentation, such as the legal justification, seem to inspire the need to enlarge the basic proponent/opponent structure with a third element – that of the arbiter or judge – as a guarantee of the termination of the dispute and of the proper use of the dialogue rules by the parties.

Of course, one of the serious shortcomings of that position is the fact that it is, for the moment, unable to propose a thorough and widely accepted formalization of the role of this element, although, as mentioned above, some very important steps toward this end have already been made. Nevertheless, this fact, in my opinion, should not represent a conclusive argument for its general untenability. In fact, as it

is shown in the history of logic so many times, even the most sophisticated formal logical devices sometimes emerge from some basic and simple conceptual insights. And in the general contemporary division of intellectual labor, the search for that kind of insights is still, in my view, one of the most important tasks of philosophers, together with the task to keep open their minds for the possibility to learn from the others.

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Chapter 14
Explanation and Production: Two Ways of Using and Constructing Legal Argumentation

Otto Pfersmann

Legal argumentation is in contention.[1] I shall assume that the dominant position in contemporary writing in the field purports that a theory of such argumentation is mainly concerned with how actors of the judicial process effectively make a case for their thesis, that such argumentation includes elements of morals, that it is defeasable,[2] i.e. that it may be or even has to be revised against new arguments or circumstances. I shall try to make a brief case for the opposite position. My thesis is first that valid legal argument is either an interpretative explanation or a justification of a decision within the limits of admitted discretion, second that many things which dominant legal theory presents as legal argument is not valid and aims at producing law by purporting to describe it. In what follows, I shall try to show the following theses: (1) Legal explanation is specifically easy and unspecifically difficult. (2) Legal justification is practically, not theoretically difficult. (3) The main anti-positivist strategy consists in making practical problems appear as theoretical problems. (4) This position leads to more difficulties than alternative positivist

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[1] It largely exceeds the scope of this paper if only to outline some of the main trends in present research. To quote just but a few cf. Aarnio A (1977). *On Legal Reasoning*. Turku: Turun Yliopisto; Aarnio A (1987). *The rational as reasonable: A treatise on legal justification*. Dordrecht, Reidel; Aarnio A, Alexy R, Peczenik A (1981). The foundation of legal reasoning. *Rechtstheorie* 21, 133–158, 257–279, 423–448; Alexy R (1989). *Eine Theorie der juristischen Argumentation*, Suhrkamp Frankfurt am Main 1978 (Engl.: *A theory of legal argumentation*: The theory of rational discourse as theory of legal justification, Oxford Clarendon Press; van Eemeren F, Grootendorst R (1992). *Argumentation, communication, and Fallacies*. A pragma-dialectical perspective. Hillsdale NJ: Erlbaum; La Torre M (2002). Theories of legal argumentation and concepts of law. An approximation. *Ratio Juris* 15, 377–402; Hage J (1997). *Reasoning with Rules*: an Essay on Legal Reasoning and its Underlying Logic, Kluwer Academic Publishers, Dordrecht,; Peczenik A (1989). *On law and Reason*. Dordrecht Kluwer Academic Publishers; Prakken H (2004). Analysing reasoning about evidence with formal models of argumentation. *Law, Probability and Risk* 3, 33–50.

[2] Prakken H and Sartor G (2004). The three faces of defeasibility in the law. *Ratio Juris* 17, 118–139.

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conceptions. In order to make my case, I shall first introduce the practice of arguments aiming at modifying law through the appearance of explanation by a famous example (I), I shall then outline a classification of legal arguments (II), and finally introduce the class of s-arguments (III).

14.1 A General Law Is Not a "General Law"

The German Federal Constitutional Court had to settle the question whether civil law can set limits to the liberty of expression as determined by art. 5 of the German Grundgesetz, which reads: "Article 5 (Freedom of expression).

(1) Everyone has the right freely to express and to disseminate his opinion by speech, writing and pictures and freely to inform himself from generally accessible sources. Freedom of the press and freedom of reporting by radio and motion pictures are guaranteed. There shall be no censorship.
(2) These rights are limited by the provisions of the general laws, the provisions of law for the protection of youth and by the right to inviolability of personal honour."[3]

A high official of the City of Hamburg, Erich Lüth, published an address in which he urged the public to boycott the film "Unsterbliche Geliebte" by Veit Harlan, a film director formerly implicated in anti-Semitic propaganda under the Third Reich.[4] The Landgericht of Hamburg sets an order forbearing Lüth from similar action (22 November 1951). Lüth files in a constitutional request and succeeds in getting the order of the Hamburg tribunal quashed.[5] The arguments of the highest German jurisdiction may be summarised as follows:

(1) The freedom of expression is ...guaranteed only in the limits of the "general laws".
(2) The freedom of expression is constitutive of a democratic state order.
(3) Hence there is an interaction: the laws set limits, but they are themselves to be seen in the light of the value-setting meaning of this fundamental right.

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[3] "(1) Jeder hat das Recht, seine Meinung in Wort, Schrift und Bild frei zu äußern und zu verbreiten und sich aus allgemein zugänglichen Quellen ungehindert zu unterrichten. Die Pressefreiheit und die Freiheit der Berichterstattung durch Rundfunk und Film werden gewährleistet. Eine Zensur findet nicht statt.
(2) Diese Rechte finden ihre Schranken in den Vorschriften der allgemeinen Gesetze, den gesetzlichen Bestimmungen zum Schutze der Jugend und in dem Recht der persönlichen Ehre."

[4] He is namely the director of "Jud Süß" (1940) an anti-Semitic reinterpretation of the story of Joseph Süß Oppenheimer (1692–1738) and "Kolberg" (1944), a film aiming at justifying war until the very last breath. With "Unsterbliche Geliebte" (1951), he tried to re-establish himself as film-director in post-war Germany.

[5] BVerfGE 7, 198

(4) The Constitution sets a non-neutral order of values.
(5) A balancing has to be achieved considering all aspects of the case.
(6) The civil judge may hence have violated the fundamental freedom in applying the general laws.
(7) The civil judge has not correctly recognised the importance of the freedom of expression even though it conflicts with private interests of other persons.
(8) The Landgericht has violated the fundamental right to freedom of expression.

Since then, the "fundamental rights" (i.e. the rights which bear this title in the German Constitution), are considered to have at least indirect horizontal effects, that is they organise as such legal rights and duties among private persons not only between persons and public authorities. The only thing, which still may seem in discussion, is the extent to which this is concretely the case. The Lüth case is thus seen as the founding act of a new conception of fundamental rights, characterising the constitutional order of German post-war democratic constitutionalism.[6]

The context of this famous decision is often forgotten, but one can easily appreciate the practical importance of the case in post-war Germany: is it admissible that a former Nazi propaganda-person shall prevail by the force of law over someone who simply asks cinema-owners not to show and the public not to watch the film – without questioning by any means that the former Nazi has of course all legal possibilities to making films and showing them. In other words, Lüth is just asking people to freely refrain from giving Harlan any moral support. He says it forcefully, but he does not ask for any legal action to be taken against Harlan. Can one imagine the moral damage for the young Federal Republic if the newly created Federal German Constitutional Court would have upheld the order of the Hamburg Landgericht?

This decision is perhaps one of the best known, most quoted, most commented cases in German law ever. It has set standards, which no judge and no doctrinal author undertakes to challenge. Indeed, the case is legally complex as all interesting cases are, as soon as we are trying to delve into the concrete arguments put forward in order to justify the decision. Indeed, once we have admitted there has to be a balancing, we have to review all relevant elements and to show why one should be given more weight than the other. And this can be a nearly endless task where each several point may be seen from quite different perspectives.

But why should we admit this premise? Aren't there other strands of argument, which could have led to a quite different result or to the same with another reasoning? One sees immediately that it is impossible to strictly analyse such problems without indulging in the concrete legal problems.

To take only one point, the Court comes to the conclusion that the Hamburg Landgericht has violated a fundamental right, quashes its decision and orders it

[6] The Lüth case has enticed an immense amount of commentaries and the usual analysis of its significance for the case law of the Court can be found in any textbook of German constitutional law. For a historical contextualisation, cf. Thomas Henne, Arne Riedlinger (eds.): *Das Lüth-Urteil in (rechts-) historischer Sicht*. Die Grundlegung der Grundrechtsjudikatur in den 1950er Jahren. Berliner Wissenschafts-Verlag, Frankfurt am Main 2004;

to judge the case again in the light of the Courts reasoning. That means that the Constitutional Court leaves the applicable statutes in validity,[7] that is the statute remains in force, whereas he has the exclusive power and the duty to quash primary legislation and other general norms violating the Constitution.[8] The Court does not even ask himself whether the statute is constitutional or not. Nor does the Court ask whether this or another relevant provision has gone too far in limiting a fundamental right, as article 19 (2) requires.[9] What the Court requires is that the Landgericht *does not apply* the *applicable* statute.

This is of course a technique quite common in constitutional review in so called American systems, where the courts cannot properly eliminate primary legislation but only disapply it in a particular instance. But the German is not an American system, nor is this fact by any means in contention and no one claims that it would have to be seen in the light of the American tradition. And the reason simply is that if that were the case, there wouldn't be any need for a constitutional court, which has precisely the exclusive competence to strike down primary legislation. So the point is: if there is neither an unconstitutional statute because the relevant provision does not in and off itself contradict art. 5, nor any norm limiting the application of a statute, which concretises the freedom of expression, because there is no case for a violation of the requirement of art. 19, par. 2, what is the legal justification for quashing the order of the Landgericht?

There is none. At least, according to the relevant provisions of the Basic German Law. The reason is something which allegedly *is not written* in the Constitution, but which the Constitution is nevertheless taken to express. But if so, and if this is really such an important matter, why did the German Constitutional Counsel drafting the German Constitution just 2 years before everything began and, taking pains to make a radically new start after the Nazi-regime by enshrining fundamental rights and their protection by a special court against all public powers (including the parliamentary legislator) not state things exactly that way, providing on the contrary that the legislator is authorised to *explicitly* frame restrictions in the exercise of fundamental rights, though within the limits of its "essential content"? Why did he not say that in fact these rights were *not* left to the concretisation by the legislator and why did he not simply say that instead of the "essential content" all public powers would have to protect fundamental rights notwithstanding valid primary legislation

[7] Notably § 826 BGB which serves as the legal basis for the order of the Hamburg Landgericht. This provision reads: "Wer in einer gegen die guten Sitten verstoßenden Weise einem anderen vorsätzlich Schaden zufügt, ist dem anderen zum Ersatz des Schadens verpflichtet." (Who is offending someone else intentionally in a way contrary to good manners is liable to pay for the damage).

[8] This is the main difference between the American and the European System of constitutional review: whereas in the American system all courts disapply unconstitutional provisions without annulling them, in the European system, first introduced in the Austrian Constitution in 1920, special constitutional courts are exclusively entitled to quash legislative provisions infringing the formal constitution.

[9] "19 (2) In no case may a basic right be infringed upon in its essential content."

by disapplying it? Well the reason might have been that in such a case, legislation would have been a much weaker instrument under the Grundgesetz and that instead of attributing to the Constitutional Court the difficult task to set the precise limit where a set of legislative provisions would indeed contradict the Constitution and would therefore have to be struck down, or, lets admit, where a conflict of fundamental rights (which is not invoked in this case) may lead to give one of them more weight than others, this jurisdiction would have to intervene in any case in order to set the concrete balance of rights which the Constitution requires. The German legal system would have had a completely different structure.

But basically, this is exactly what the Court purports to establish. It states that, being an objective order of values, the Constitution directly overrides any other relevant set of norms, leaving it to the Constitutional Court to set the ultimate balance in any possible case of conflict. Instead of explaining the Constitution, it *aims at replacing it* by another constitution. Legal argument is used not to analyse and to justify, but as a mode of production of new standards if not of a new legal order.

Now of course my problem, here, is not the Lüth case itself, nor German constitutional case law. The example just shows that so called great cases, and one could quote an awful lot of them, often present not just arguments about how to understand certain provisions and how to apply them to the case at hands, but arguments aiming at rebuilding and reshaping the applicable provisions themselves in the light of an eventually desired result. At least one can argue that this is not absent from those decisions, which are deemed important in the legal literature, and that arguments aiming at modifying the legal system itself instead of explaining it are those, which usually get most attention.

Empirical findings are largely backing this hypothesis. New Courts of highest level do set up their own standards and then do progressively build upon it a system of justification narrowing down possible choices to a set of options, which allows them to continue their construction without too important discrepancies.[10] But empirical findings are just, as it were, findings about factual developments, they don't tell us very much about the legal significance and validity of an argument. And it is the legal validity of the argument, which is our problem.

More significant than even strong empirical evidence is the development of Legal theory in its characterisation of situations like those encountered by the Federal Constitutional Court. While positivists argue that indeterminate provisions leave applicants with discretional power,[11] anti-positivists state that judges have to look for decisions, which answer the practical needs of the case at hands. Not only do,

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[10] See e.g. Sweet AS and McCown M. Discretion and Precedent in European Law. In Wiklund O (ed) *Judicial Discretion in European Perspective*. Stockholm: Kluwer Law International, pp. 84–115. With Brunell T. The European Courts and the National Courts: A Statistical Analysis of Preliminary References, 1961–95. *Journal of European Public Policy* 5, 66–97. For a systematic presentation of such an evolution: same author, *The Judicial Construction of Europe*. Oxford: Oxford University Press, 2004.

[11] This is notably the view held by Hart H (1961). The *Concept of Law.* Oxford Clarendon Press (1994, 2nd ed), pp. 126 or Kelsen H (1961). *Reine Rechtslehre*, Vienna (2nd ed), p. 346.

according to this view, judges lack any significant discretion, they are required to apply normative standards which are not necessarily traceable to any explicit act of a public authority and in many instances the applicable standards are precisely those which cannot be identified through a recourse to such explicit imperatives.[12] Most contemporary legal-argumentation-theorists or legal-reasoning-theorists are anti-positivists who concentrate on nothing else but the way in which the actors of a litigation succeed in making a case, *however the legal system may have framed the issue.*[13]

Taking up one or the other position entirely changes the nature and scope of legal argument. Indeed there cannot be any significant common progress on the problems of legal argumentation as long as the question of positivism versus non-positivism is not settled, for both positions reject radically the other's starting point. And in the present landscape, positivists seem to reflect rather on general problems of normativity, whereas the problem of legal argument has become a domain of those adopting an anti-positivist stance concentrating on concrete adjudication.

It seems thus preferable to show how a positivist theory of argumentation may recast the problem of the referential framework.

14.2 A Simple Classification of Legal Arguments in a Positivist Framework

A positivist legal conception consists in the following claims:

(a) Norms are artificial constructions requiring deontic semantics, without any logical link to propositions with exclusively factual content.
(b) *Legal* normative systems differ modally from other (i.e. non-legal) normative systems in comprehending norms which are relatively well respected (at least above a certain threshold) and, in addition to norms setting direct standards for

[12] This very traditional argument against positivism is famously couched in a new terminology by Dworkin R (1977). *Taking Rights Seriously.*, London: Duckworth, p. 22.

[13] This is notably the position of Henry Prakken who considers his highly interesting contributions as ways of making law more rational or as showing us litigation as a game using defeasable arguments (cf. his contribution to the present volume or Prakken H (2004). Analysing reasoning about evidence with formal models of argumentation. *Law, Probability and Risk* 3, 33–50; Prakken H and Sartor G (1997). A dialectical model of assessing conflicting arguments in legal reasoning. In Prakken H and Sartor G (eds) *Logical Models of Legal Argumentation*. Dordrecht: Kluwer Academic Publishers, pp. 175–212). See also Gordon TF (1995). *The Pleadings Game – An Artificial Intelligence Model of Procedural Justice*. Dordrecht: Kluwer Academic Publishers; This view, as I have tried to show elsewhere (see e.g. Pfersmann O (2001). « Ontologie des normes juridiques et argumentation », in : Otto Pfersmann, Gérard Timsit (eds.), *Raisonenment juridique et interprétation,* Publications de la Sorbonne, pp. 11–34), rests on a confusion of the way in which argumentation may *factually* work in a given case or set of cases – outside any reference to a given legal framework – and the way in which argument is framed and constrained by already established legal norms

human behaviour, norms of norm-production, i.e. empowering norms, as well as norms authorising and/or requiring factual coercion in case of non-execution of norms regulating directly certain human behaviour.[14]

A set of normative standards, which does not present these constitutive properties, may be extremely rich and interesting, but it is not a *legal* system so considered. However you call such systems, "legal" or otherwise, these are the ones that interest us here.

c) Legal systems are recursively closed, that is, a legal norm is considered to exist – to be valid – if and only if there already exists another norm to this effect in the system under scrutiny. If we arrive at a norm, which cannot again be so identified, then either we have to consider it as the ultimate norm, valid by stipulation only or we are not in presence of a legal system.

Such systems are *technically dynamic* in so far as they organise their own ontology. Nothing can be a norm of such a system, which would be taken to be produced outside this structure or to exist within the system without having been produced according to norms of the system.

Again, there may be several alternative conceptions. What they define is not, however it may be named or conceived of, a legal system in the sense here introduced.

What such a conception thus excludes is *spontaneous creation*, in other words the emergence, let alone the existence of norms, which would not have been explicitly produced according to some – however defined –, previously set norms to this effect. As King Lear would have it, "Nothing will come of nothing".[15] Even if there were customary law, which is precisely thought to slowly evolve from mere factual action to effective obligation – or permission –, such evolution would have to be defined as a form of norm-production by which certain actions and events presenting certain properties would be considered as reasons for other actions to be obligatory, permitted or prohibited according to the law. Other consequences stem from this positivist point of departure, like the separation of law and morals, or the link between law and the eventual use of force. They don't need to concern us here. Suffice it to say that a norm, which would not have been produced according to an already given procedure (or its stipulated highest element), does not pertain to law or at least not to this particular legal system. It may be something else.[16]

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[14] These questions are set forth with more detail and discussion of controversial claims in Pfersmann O (1995). Pour une typologie modale de classes de validité normative. In Petit J-L (ed) *La querelle des normes — Hommage à Georg Henrik von Wright,* Cahiers de philosophie politique et juridique de l'Université de Caen, no. 27, p. 69–113.

[15] William Shakespeare, King Lear, I,1.

[16] I present my theory concerning these points in detail in: „Pour une typologie modale de classes de validité normative", (note 14).

This ontology defines a *hierarchy* by which those entitled to produce new norms concretise already existing norms within a certain delimited framework. What is outside the framework is not a norm of the system, even though it may externally present some common features with norms of the system: it may be published in an official gazette or appear on the letter-paper of a tribunal with all requirements judicial acts have usually to meet. More frequent are normative acts which are valid, i.e. they respect the conditions of norm-production attached to that particular norm-class, but present a specific default in the sense that they violate some other requirements set by superior norms and are therefore amenable to be struck down or amended at the issue of specific procedures.

Concerning a legal system so conceived of, legal argument could be of the following classes (By *legal*, I mean only such arguments aiming at showing what ought be done within the frame of a certain given legal system, given certain circumstances. Arguments dealing with establishing the circumstances at hand are only indirectly legal insofar as they are not dealing with the specific normative problem itself):

(a) *Explanatory*: any consecution of propositions aiming at showing what the content of the normative system consists of; again such argument can be made either by an observer or by an actor taking part in the production of a new norm without having properly the competence to produce it, like a lawyer or a prosecutor, or by an organ who is constrained by law to justify the enactment of a new norm among other things by explaining the state of the law, that is to show what are the relevant provisions before applying them.

The position of the persons involved does not change anything concerning the validity or absence of validity of the argument. It makes simply evident that an uninvolved observer may be more neutral than an actor who has a subjective interest in showing the law in a certain light or even an organ aiming at giving a certain solution to a conflict or to use the competencies conferred upon him in a certain way. Although the argument has to be strictly descriptive, it may be biased to different degrees.

Explanatory arguments concern often questions of interpretation of legal provisions, where "interpretations" means the analysis of the meaning of linguistic expressions, which serve as formulations of norms. This can prove to be an extremely difficult exercise, but the fact that explanation is mainly concerned with interpretation so conceived of, is not a very contentious matter.

(b) *Decisional*: an organ is requested to justify how she will use the attributed competencies in producing a particular new norm or taking a particular action. If there is one and only one possible such outcome, a decisional argument is at the same time an explanatory argument. In all other cases, that is if there is at least a choice among 2 or more possible outcomes, such arguments have no explanatory character. The relevant norm requires the organ to act in two or more possible ways without telling him which one to choose. If, however the choice is limited by any normative standards, it is not a choice so understood. It

may eventually be a difficult question whether the relevant provision leaves the organ with a choice or rather with criteria to act in only one possible way, but this is another problem.

Balancing may be a requirement to narrow down the range of possible outcomes or even the imperative to act in one and only one way, all things considered or it may be the attribution of the competence to exercise wisdom and in each hypothesis there is a different amount of possible outcomes available. It will of course not be sufficient to say that the organ has to exercise considered judgement in order to reach one and only one possible solution without further constraining the way in which judgement has to be exercised in such a way that only one outcome will result. All things equal, that is without further elements, the provision telling the organ to make one choice and one only is in fact the empowerment to exercise a choice within a range of at least several possible outcomes. But whether the provision does mean this or something else because of its wording is again a question of interpretation, and that is a different problem. That is, it is an explanatory question whether there are one or several possible outcomes, it is a decisional problem which one to choose among the several possible and admissible choices and the reasoning aiming at showing how this ought to be done is a decisional arguments.

The problem with decisional argument is hence the following: the law orders to take action and requires to justify the action taken by argument, without there being a norm asking to make this rather than that admissible choice. There is, in other words, a legal obligation to choose and a legal obligation to justify this choice, whereas there is by hypothesis no legal obligation by which the choice would be constrained if not by the set of legally possible outcomes. These arguments are *strict decisional arguments*.

(c) At this point I shall propose the following claims. My first simple claim is that this is a very common situation, which should not be very difficult to understand. My second, equally simple claim is that such situations are not only empirically common, but also structurally unavoidable. No legal system is able to set all organic duties and competencies individually for every possible situation. Discretion, as it is sometimes called, is a structurally necessary feature of every possible legal system. Hence the presentation of decisional arguments will be a legal obligation wherever the exercise of discretion is bound to argumentative justification. My third simple claim is that strict decisional arguments are not explanatory arguments.

My forth and last claim is that there are no other legal arguments. At least not within the framework of a once given legal system whichever it might be. Concerning a system of norms, an argument may concern a scientific description of its content or the justification of an action required under some of its norms. In some cases it may be both, that is, when the norm requires that one has to take *one and only one action* and to explain by reasoning precisely this fact of the matter. When one is required to act, to justify her action, and there is more than just one

choice, than explanation stops at the point of telling this fact of the matter and decisional argument starts, when it comes to showing which choice has been made, for what reasons, and in what manner. And that's all there is.[17]

14.3 Changing Legal Frames by s-Arguments

It follows from the precedent section that legal scholarship as a scientific and hence an academic discipline is nothing but the set of true explanatory arguments. No legal research, however sophisticated, can tell us whatsoever about *how* to use discretion – except of course if it is *not* discretion strictly so defined – that is, it can say absolutely nothing about what choice should be made, why and how. If *legal* research tries to answer these questions, it is simply not legal research, but wrong moral philosophy. It is moral because it concerns the question how someone ought to act irrespective of any legal framework, it is wrong, because it tries to present as a matter of *legal* scholarship a range of arguments for which there is *no legal* explanation. It can be moral argument proper, if it is showing as such the moral reasons because of which a certain action has to be realised.

But what pertains to the core of legal explanation, lawyers have at bottom no specific disciplinary knowledge to provide. The most common and often the most difficult questions a lawyer can face are questions of interpretation and questions of interpretation are not specific to law.

Lets admit the academic lawyer has succeeded, applying the methods of the sciences of language, in determining the meaning of the provisions at hand. It may be and it is often necessary to draw conclusions concerning the fact of the matter, the relevant case. Drawing conclusions from premises is a matter of logics; hence the relevant discipline to achieve this goal is not specific to legal explanation.

There is another important exercise for explanation, i.e. the classification and systematisation of domains and applications. But again, developing concepts and applying a theory of classification is not something in and off itself specific to law.

I don't deny that these tasks are sometimes extremely difficult. My simple claim is only that they are not specific. They are shared with other disciplines. If they appear particularly difficult to several lawyers, the reason may be that they make their unspecified task the more difficult, the more they refrain from indulging in the

[17] Again, I don't mean this of course to deny the interest of highly developed and sophisticated research, quoted above, especially in Law and Artificial Intelligence, which opposes my approach. The point is that these contributions try to formalise argument as it appears in practical litigation and legal practice, from the perspective of participants. They don't aim at analysing the law as such, but discourse *about* law and arguments used in order to win a case. If it is relevant, it is not relevant, *all things equal,* as a neutral and scientific analysis of law. The fact that such a discourse exists in legal practice is undeniable; it makes no case for the impossibility of a neutral analysis of the law itself. These points are elaborated in more detail in Pfersmann O (2005). Le sophisme onomastique. A propos de l'interprétation de la constitution. In Soucramamien FM (ed) *L'interprétation constitutionnelle* (Collection Thèmes et commentaires). Paris: Dalloz, pp 33–60.

specific disciplines necessary to come to grips with their mission, i.e. semantics and logics, and persevere in applying external methodologies like "hermeneutics", "new rhetoric's", "law as integrity", *moral* reasoning etc.

The task of a decisional argument is entirely different. First it appears only when one is under the legal obligation and empowerment of setting a new norm in application of an already existing one or to take a specific action under a certain legal provision. It is a practical, not a theoretical exercise. Explanations leave things as they are, a decisional argument has to justify how you will change the state of the world. It thus bears the specific difficulty of all practical decisions.

Let us admit that the organ has found a solution, which appears satisfactory to his, or her eyes, irrespective of its eventual fit with the legal framework. Nothing guarantees that the range of legally possible choices may encompass this solution. In order to avoid conflicts between the appreciation of the judge and exigencies of the relevant provisions, there are in certain legal systems provisions authorising the organ to take another action than the one that is required in the first place. This is what is the content of the so-called "rules of interpretation" the object of which is evidently not *interpretation* but alternative decision-making. Or it may that the competent organ is allowed to introduce a referral to another organ empowered to review the applicable norm against some other, higher standard. These are of course very interesting legal structures, which can eventually accommodate the gap between the legal requirements and extra-legal practical preferences of empowered organs: extra-legal preferences are transformed into intra-legal decision-procedures. But even if all these intra-legal means of changing *prima facie* applicable norms are exhausted, there is still no guarantee that the then available choices match the extra-legal preferences of the organ. Again, this is a very current and banal situation; it trivially defines the structural difficulty of organic positions. It is a practical difficulty as the organ has to choose whether to surrender to the legal requirements against his or her own moral preferences or whether she thinks that the conflict is so strong that she will not apply the legal norm to the case at hand.

This is not a theoretical difficulty. At the level of legal theory, one can only provide the best possible explanation of what the legal norms require, that is state with the most available precision the set of legally admissible outcomes. One can eventually state that no such outcome meets the different requirements of other normative systems, be they legal or non-legal. But that is all one can do.

The organ instead has to act and however she or he will act, it will have consequences in the legal world as in the practical world generally. How can one make subjective irreconcilable preferences make prevail on legal requirements without violating the law? Trivially, there is, by hypothesis, no intra-legal solution. There are of course solutions like conscientious objection or other forms of protest by which one assumes the consequences of disobedience under and within the existing law.

All other solutions, whatever they may consist in, are *extra-legal* even though they may have and usually do have intra-legal consequences. My simple claim is that the solution with test lowest transaction costs consists in *swindling*: the organ simply presents his or her extra-legal solution as if it where an intra-legal

solution. Empirically considered, swindling is probably one of the most common techniques of accommodating conflicting values. It seems difficult to admit, though, that legal concretisation could be backed by swindling. But if my view is correct, then argumentative swindle must be one of the most common phenomena in legal argumentation. Once this possibility is recognised, it can be utilised for any given conflict of preferences, nothing restricts it to cases with dramatic moral consequences. My point is neither psychological nor moral, swindling may have been achieved without any intent to do so, it may have been the best moral solution whereas a strict application of the legal standard my be a paradigmatic instance of cowardice and cause terrible moral harm. The issue is not whether what the organ did was morally good or bad, the issue is that swindling is possible within certain limits and that it often happens. It probably happens more often than lawyers would be ready to admit. If you don't like the term, because it seems to bear moral disqualification, chose another one, more neutral in connotation: for instance "s-arguments". Again, the issue is structural, not moral.

The point is that swindling has important effects on the evolution of the legal system, depending on the hierarchical position of the norm at stake. If it is a decision amenable to review or appeal, higher instances may correct what they will identify as a wrong decision backed by a wrong legal reasoning. But it may just go unnoticed, or may not be challenged by review. And then, what happens at the level of first or second instance can happen at all legally possible instances. It can happen at the level of supreme courts or constitutional courts or international courts, the dignity of the institution and the collective character of the organ may have been intended to prevent it, but the only structural means to prevent it consists in introducing organs of review and if the organs of review use their authority to swindle, there is by definition no legal remedy.

To state it briefly the legal consequences of organic swindle consist in modifications of the systems outside the means for modification provided by the system. If it happens at the highest levels of norm-production, it means that the system has been modified in its foundation, that it is henceforth a different system.

In a sense, one can understand the commentaries of important swindling decisions saying that they were audacious advances or foundational or whatever deferential grandiloquent compliment one can find in this sort of literature. It simply states in positive structurally swindling terms that the competent organ changed the norm it was requested to apply.

The problem for the legal literature is that it should provide explanatory arguments and that for whatever reasons, lawyers are not ready to face and qualify swindle for what it is.

This converges with anti-positivist conceptions. As anti-positivists consider adjudication in and off itself as the only single legitimate focus of legal theory, hence of a theory of legal argument, judicial argument is taken as the point of departure of argument theory, not as an instance of argument to be checked against already given legal provisions. It follows that for an anti-positivistic adjudication-theorist the main move will consist in making the practical problem of accommodation of

conflicting preferences appear as if they were theoretical question, whereby decisional arguments would have to be considered as explanatory arguments. By this move, which characterises much of what has been called the "dworkinian revolution" in Anglo-American legal theory, problems of legally unguided choice appear as issues of "developing" standards in a complex social practice.

This move conceals the most important structural changes in law. It weakens the level of awareness for s-arguments and their consequences, whereas positivist conceptions highlight structural intra-legal problems and enhance awareness of s-arguments. Plus, they insist on using logics in explanation, not as an s-instrument for legal change. All things considered, that may be pragmatically uncomfortable, but scientifically difficult to avoid.

Chapter 15
The Law of Evidence and Labelled Deduction: A Position Paper

Dov M. Gabbay and John Woods

15.1 Background: Logic and Law

In the past 30 years major changes in logic have taken place. Whereas in the first half of the last century logic was mainly applied to mathematics and philosophy, the rise of computer science, artificial intelligence, computational and logical linguistics, logic in engineering, and quantum computation have given logic a big push and accelerated its evolution. All of this is well known and has been discussed in various places (Gabbay and Woods, 2002–2012, 1999; Woods et al. 2002). What has not been sufficiently discussed is the influence and interaction of these developments on the area of logic and law.

Consider, for example, the way logic has evolved in response to the needs of computer science, AI and theories of language. They have to do with daily human behaviour, reasoning and action. These areas deal with devices and artifacts that help and or replace the human in his daily activities.

Logic is needed partly as the underlying formal language and partly to model and analyse the human in these daily activities, with a view to producing better devices to serve, regulate or understand him.

The authors have already embarked on a multi-volume research effort entitled *A Practical Logic of Cognitive Systems*. The first volume, *Agenda Relevance: A Study in Formal Pragmatics* (Gabbay and Woods, 2003) has already been published. The second volume (Gabbay and Woods, 2005), on *The Reach of Abduction: Insight and Trial* has soon followed. These books aim to model the human in his daily reasoning and action activities.

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Once logic has evolved in this direction and has developed new logical tools for this purpose, these same kind of new logics and new tools can usefully be adapted to the consideration of similar issues in the law.

Here lies the connection between logic and law. We can say without serious exaggeration that the interface of logic and law is going to be central to the further advancement of logic in the next twenty years. If only we can bring the respective communities together and make them aware of their potential! This is the purpose of this position paper.

We envisage the following main benefits to the law community, in addition to the benefits from existing logical tools and aids available from Artificial Intelligence.

- The proper LDS logic tailored for law of evidence and other judicial arguments can help articulate and clarify (hidden) intuitive common sense principles behind existing practices.
- The LDS methdoology includes a system of labelling and stylised hierarchical movements which have logical content. This kind of hierarchy can be added to legal specification formats thus giving a better specification language for law without sacrificing the use of ambiguities and variety of interpretations.

It is astonishing to realize that very few people are aware of the true potential of the interaction of the new logics and law. There are many reasons for that, most of them social. The new developments in logic are slow to spread around even among logicians, and certainly among researchers in legal reasoning and legal theory, many of whom still think of "logic" as "Aristotlian syllogism".[1]

Some bridging work between law and logic has been done by C.H. Perelman (Perelman, 1980), who kept in touch with both logicians and judges and lawyers, arguing that logic should play a different — more restricted — role. But when Perelman wrote, the new logical tools were not as available as they are now; and such as were available, Perelman made no use of.

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[1] It is instructive to read the following passage on legal reasoning from the July 2003 edition of a basic textbook on legal philosophy, widely taught in the UK (Harris, *Legal Philosophies*, 2003 p. 213):

"It is far from easy to get a comprehensive view of the subject [of legal reasoning]. Most writers who have discussed legal reasoning have either concentrated on the form as distinct from the substance of justificatory arguments, or else dealt with only part of the subject. Two forms of argument, the deductive and the inductive, have generally been considered inapposite characterizations of legal argument. Some take the view that deductive argument – from major and minor premises to a logically necessary conclusion – is inappropriate even in clear cases. This may be asserted on the general ground that deductive arguments only hold true of factual propositions not of norms; or on the more specific ground that even the clearest rule may be held not to apply to a case where that would frustrate the purpose of the law or produce absurd consequences, and the decision whether this so or not cannot be dictated by logic. On the other hand, reasoning in clear cases seems very close to deductive reasoning – here is a speed-limit rule applying to all car drivers, I am a car driver, so it applies to me. Even in unclear cases, it can be contended that the form of the argument is deductive, since what is at issue is which of competing rulings should be adopted, granted that the winner will be applied deductively in all cases of the present type – although here our major concern will be with the substantive arguments which dictate choice among the rulings.

The rise of Horn clause logic programming in the 1980s has helped turn some logicians in the direction of the law, but early attempts to apply logic to law, such as the formalisation of the British Nationality Act (Sergot et al., 1986), has drawn a strong critical reaction from the law community on the ground that Horn clause logic is not rich enough to allow for the wealth of nuances and interpretations/explanation/revision so common in legal reasoning. See also (Aldisert, 1989) by Judge Ruggero J. Aldisert.

This criticism may have been valid in 1980, it is no longer valid now, especially in view of many advances made in logics of practical reasoning and argumentation.

Logic programmers and deontic logicians have had a somewhat earlier interest in law, have their own conferences and journals (Deon Conferences). But we doubt if they are aware as a community of all relevant developments in logic. They appear not to realize (or believe) that law is an area of potentially evolutionary significance to logic.

We recommend to the reader survey works by two key researchers in the area, Trevor Bench-Capon's (Bench-Capon) survey article for the *Encyclopaedia of Computer Science and Technology* and Henry Prakken's book (Prakken, 1997), *Logical Tools for Modelling Legal Argument*. Prakken's book, especially, takes note of many of the new developments in logic, and argues very strongly in favour of the theoretical connectedness of logic and law. He especially highlights the new developments in defeasible and non-monotonic logics and reasoning from inconsistent data. However, he is unaware of the methodology of labelled deductive systems which subsumes the logic of legal reasoning, among many others, as a special case. More importantly, Prakken believes that 'logic should be regarded as a tool rather than as a model of reasoning', [(Prakken, 2003), Section 1.4]. Furthermore, the entire approach to date of the community to logic and law is further restricted by the view that [Prakken, 1997 p. 6]:

> To understand the scope of the present investigations it is important to be aware of the fact that the information with which a knowldge-based system reasons, as well as the description of the problem, is the result of many activities which escape a formal treatment, but which are essential elements of what is called 'legal reasoning'. In sum, the only aspects of legal reasoning which can be formalised are those aspects which concern the following problem: *given* a particular interpretation of a body of information, and *given* a particular description of some legal problem, what are then the general rational patterns of reasoning with which a solution to the problem can be obtained? With respect to this question one remark should be made: I do not require that these general patterns are deductive; the only requirement is that they shold be formally definable.

Thus modelling the legal theory of evidence (which decides what 'body of information' we are 'given') is beyond the horizon of current research in logic and law. In what follows, on the contrary, we shall develop a case study that will show just how important this area is.

A recent key collection of papers by Marylin MacCrimmon and Peter Tillers (MacCrimmon and Tillers, 2002) indicates very lively activity in law and logic. However, most of the papers take a fuzzy logic, uncertainty and probabilistic approach (in the sense of (Guan and Bell, 1991; Shafer, 1976). See also (Prakken et al., 2003) and the references there.

We must here add that the Bayesian reasoning community is actively involved in (Bayesian) logic and law. This is because of several high visibility court cases and evidence where probabilities are used. Part of the problem is that the probabilistic reasoning community is not so interactive with the ordinary logic communities (and so we also need to bring logic and probability together as part of our own ongoing work). The theory of Labelled Deductive Systems is fully compatible with probabilistic reasoning and networks.

We shall have a full discussion of (MacCrimmon and Tillers, 2002) in the full version of this paper.

In the sections to come we examine some case studies to show how the new logics can play a role in the area of evidence and legal reasoning.

15.2 Legal Theory of Evidence and the New Logics

Our purpose here is to show how the new labelled logics, arising from research in computer science, can be applied to the legal theory of evidence. For a sample of Labelled Deductive Systems, see (Gabbay, 2002). For the original monograph, see (Gabbay, 1996).

15.2.1 Some Labelled Logic

We start with logic. One of the most well known resource logics is linear logic (Girard et al., 1989). In this logic, the databases are multisets of formulas and each item of data must be used *exactly once*. So, for example, we have

$$A, A \to B \vdash B$$

But

$$A, A \to (A \to B) \nvdash B$$

This is because two copies of A are needed here, and we have only one. The proof would run as follows:

1. $A \to (A \to B)$, assumption
2. A, assumption
3. $A \to B$, from 1 and 2 using the rule of modus ponens.
4. B, from 1 and 3, using the rule of modus ponens.

In this proof, 2. is used twice.
To make this example more concrete, let

- $A =$ having a drunken driving conviction
- $B =$ driving licence suspended.

Then $A \to (A \to B)$ means that two convictions entail suspension (and of course you cannot count the same conviction twice!).

Linear logic allows for the connective $!A$, which means that A can be used as many times as needed.

Thus

$$!A, A \to (A \to B) \vdash B.$$

Let us modify the logic a bit[2] and add the connective $\blacktriangledown A$:$\blacktriangledown A$ means that we can use A if we ask and get permission from some meta-level authority. So we can write

$$\blacktriangledown A, A \to (A \to B), \text{permission given} \vdash \text{B}.$$

There is a mixing here of object level and meta-level features. Such logics are best expressed as labeled deductive systems (LDS) (Gabbay, 1996, 2002). A labelled system is comprised of formulas and labels. The labels contain additional information relating to the formulas. For example an item of data (called a *declarative unit*) may have the form

$$\Delta : \text{ John has cancer.}$$

Δ can be a medical file with data confirming the fact that John has cancer. This fact can be used in certain situations of legal argument; e.g. to attempt to release John from prison. The reasoning governing Δ is medical, while the reasoning governing the release from prison is legal. Labelled logic is the methodology of how to use such mixed reasoning.

We have in LDS the following form of modus ponens:

$$\frac{t : X, s : X \to Y, \varphi(s,t)}{f(s,t) : Y}$$

Here t, s are labels (their nature and mode of handling are defined in the system), which can be themselves entire databases; φ is meta-predicate indicating that there is the permission to apply modus ponens (φ is called the compatibility predicate); and f is a function giving the new label of the result Y.

Going back to our example, we write

1. $s : (A \to (A \to B))$, where s represents here a body of legal background data on how the substantive law of
   "two drunken driving convictions → licence suspended" has been established.
2. t: A, where t is a file indicating the data establishing the facts of the drunken driving incident.

[2] See footnote 17 for an anagram example.

3. $\varphi(s,t)$ is a meta-level argument looking into s and t and arguing that, although we have here only *one* incident of drunken driving, the intention of law (see file s) and the severe circumstances of the incident (see file t) call for suspension (that is, permission to count as two incidents is granted).
4. $f(s,t) : A \to B$, by modus ponens from (1), (2), (3). $f(s,t)$ is a file containing the arguments present in granting permission, i.e. $f(s,t) = t + s + \varphi$
5. $f(s,t) : B$, by modus ponens from (4) and (5). So formally, we have $f(f(s,t),t) = f(s,t)$.

We now show a further connection with the law of evidence.
One important feature of LDS is that it regulates the admissibility of data into the database together with the label it is permitted to have. In fact, using φ we can diplomatically admit a datum D into the database with a label "don't touch", with the effect that φ will never give permission to use it.
These kinds of logics were developed to accommodate the needs of artificial intelligence and the logic ofin language. It is surprising how well these logics fit the needs of theories of evidence.
Imagine a database (Barclays Bank) containing data about a customer. One kind of data includes home telephone number, mobile telephone number, etc. Assume hat a security protocol will allow only certain individuals at the Bank to enter such data and it is up to them to decide whether to 'admit' an additional number. Suppose I call Barclays bank, identify myself and ask the represenative to add my mobile number to the database. The representative will ask me some questions (usually mother's maiden name). If correct answers are given, he will add (admit) the additional telephone number. If he is still uncomfortable with my identity (for whatever reasons) he can refuse to do so. We doubt, however, that he has the authority to decide to accept the phone number even if we fail to answer the questions correctly. In other words, security protocols allow the representative to refuse admissible data but do not allow him to overrule and accept non-admissible data!

15.2.2 What Some Books on Evidence Say

Let us go to the website and to the book of Professor Steve Uglow. He teaches evidence at the University of Kent (www.kent.ac.uk/law/spu/), established the law school there, and is actively involved with the community and its problems.

In his web course notes, right at the beginning, he says:

"Evidence is about regulating the information produced at a trial.

- What are the general principles regarding this?
- What are exclusionary rules?
- What logical processes are involved?"

In our labelled logic we can phrase these points as

- With what label do we insert the new data (evidence) in our database?

The challenge of this area to the research community is made clear at the very first paragraph of Uglow's 725-page book on evidence (Uglow, 1997) (*Textbook on Evidence*, 1997)

> "The law relating to evidence is a strange and unruly beast. It is unruly because, first, it refuses to fit into any easy structure for analysis and exposition and, second, it often adopts the characteristics of an uncharged minefield, by which is meant that any set of facts has the potential of throwing up evidential problems, not just of one but of several types, often unforeseen. It is strange because it fulfils different functions than the familiar areas of substantive law. It is in such areas that we see legal rules at their most visible, dealing with the *consequences* of facts – if a contract is broken, damages are paid; if a theft is committed, punishment is imposed. Damages, imprisonment and other civil and criminal remedies are the sanctions accompanying rules which require or prohibit certain types of conduct or which lay down conditions under which that conduct can take place. These rules are often referred to as the substantive law. Within most contested trials, such rules form the background to the case but play little part since there is no conflict over the substance of the rule. We know what the rule says and what the consequences of a breach will be: if there has been a road accident and a driver has been negligent, damages for personal injuries will be paid to any plaintiff; if a sane defendant intentionally kills another person, he or she will be prosecuted and generally receive a life sentence.
>
> But the real conflict in a court, before any substantive rule is brought to bear, is about establishing the facts: was the driver negligent? Did the defendant cause the victim's death? What happened? The law of evidence is not about determining the consequences of facts but about establishing those facts. In a contested trial, under the common law system of justice, the opposing parties will present differing, sometimes diametrically opposed, views of the same event. Having listened to these accounts, the trier of fact must decide what the facts are. It is this problem as to how 'facts' are established with which the law of evidence is concerned: what information can be presented to the court' through what means; how does a court decide whether that information proves whether an event happened in a particular way or not? Such rules, alongside the rules of civil and criminal procedure, can be described, not as *substantive*, but as *adjectival* law.[3] This means that these rules attach themselves to and qualify the operation of a substantive rule but never, by themselves, directly decide the

[3]This is our footnote.

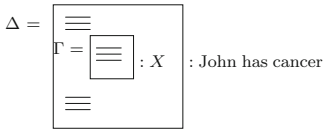
Note that a substantive law in labelled logic looks like $s : A \to (A \to B)$. Facts look like $t : A$. We can also have other testimony allowing for $t' : \neg A$. The rule that decides in *LDS*, whether to deduce A or $\neg A$ given say, $t_1 : A, t_2 : A, t_3 : \neg A$ is called a *flattening rule*. More precisely, a flattening rule tells us, given $t_i : A$ and $s_j : \neg A$, what is the resultant labels $t : A$ and $s : \neg A$. So, for example, if t_i, s_j are reliability measures of various sources supporting A and $\neg A$ respectively, t and s might be some averages.

What Professor Uglow calls here *Adjectival Law*, means in LDS the logic for reasoning *inside* the label t. For example, t may contain medical evidence and a lawyer may attack that!

If we take our example

Δ: John has cancer,

Δ may be a medical file about John. Δ may contain among other things an expert opinion of a certain Dr. Smith, giving a statement Γ: X, there X is the Doctor's statement and Γ is another file showing Dr. Smith is a world expert on this kind of cancer. A lawyer wishing to attack Δ might choose to attack Γ (i.e. Dr. Smith's credentials are false), thus weakening the value of X and overall weakening Δ. So we have a structure like



> rights and wrongs of any issue. The law of evidence qualifies the operation of a substantive rule because it controls the flow and nature of the information which can be presented to the court. Indirectly, of course, the law of evidence can be decisive since the outcome of a case can depend on whether a particular item of evidence is allowed to be presented to the court or not. For example, a guilty verdict or an acquittal can hang on whether the prosecution can meet the preconditions for the admissibility of a confession in a criminal trial; in a civil case where the weight of the evidence is evenly balanced, the decision may hinge on the question as to where the burden of proof rests.
>
> Many of these evidential issues seem very technical to a layperson and, especially in criminal trials, to exclude relevant and important information from the proceedings. Examples might be given of the rule against the admission of hearsay evidence – a witness would be usually prevented from testifying that the victim, now dead, had identified the accused as the assailant; similarly the jury would rarely be allowed to hear about any previous convictions of the defendant. But these are not technicalities for their own sake and reflect the nature and characteristics of the common law trial."

Put in the language our own LDS, what Uglow is saying right at the beginning of his textbook is that:

Given the situation

$$t : A, s : A \to B$$

he calls $A \to B$ "substantive law", (in logic it is called a "rule" or a "ticket"), and calls A the facts (called minor premises in logic), then the main part of the theory of evidence is whether to admit A into the database (i.e. establish A as a fact) and with what label t? t may be a label supporting A and what the book calls "adjectival law" is the theory (logic) of evidence.

There is no doubt that the new labelled logics have a role to play in taming this "strange and unruly beast".

Here now is another basic textbook on evidence (Dennis, 1992), I. H. Dennis (Dennis, 1992), *Law of Evidence*, 1999.[4] He says (pp. 4–6)

B. Concepts and Terminology

The law of evidence uses a number of concepts which are fundamental to an understanding of the subject. This section attempts to introduce these concepts by stating a number of general propositions about them and about their relationships. The propositions are stated in summary form, with more detailed explanation given later.

1. Evidence must be *relevant* in order for a court to receive it. This means that it must relate to some fact which is a proper object of proof in the proceedings.[5]

[4]Professor Dennis teaches at University College London. He also says in his introduction "Evidence is a notoriously difficult subject to organize in any logical basis".

[5]The facts which are proper objects of proof are sometimes called material facts, but materiality is a slippery term which can be used with more than one meaning. See the discussion in the text below.

The evidence must relate to the fact to be proved in the sense that it tends to make the existence (or non-existence) of the fact more probable, or less probable, than it would be without the evidence. A simple example is a case where a fact to be proved is the identity of the accused as the person who stole certain goods. Evidence that the goods were found in the accused's house is relevant because it makes the existence of the fact that he is the thief more probable.

2. Evidence must also be *admissible*, meaning that it can properly be received by a court as a matter of law. The most important rule of admissibiltiy is that the evidence must be relevant; irrelevant evidence is always inadmissible. Generally speaking evidence that is relevant is also admissible, but certain rules of law prohibit the reception of certain types of evidence, even though the evidence is relevant. An example is the rule against hearsay evidence, which, broadly speaking, forbids the reception of evidence of a statement made by a person on another occasion when the purpose of adducing[6] the evidence is to ask the court to accept that the statement was true. These rules are often called the *exclusionary rules*, to indicate their function of excluding certain evidence from the court's consideration. The rules are complex because they are often accompanied by exceptions, some of which may be narrow and precisely defined, others may be in broad and flexible terms.
3. In criminal cases, in addition to exclusionary rules, there is also *exclusionary discretion*. A trial judge may exclude prosecution evidence that is relevant and admissible (in the sense that it is not excluded by an exclusionary rule) in the exercise of a discretion conferred on him by the common law or by section 78 of the Police and Criminal Evidence Act 1984 (PACE). The statutory discretion is to prevent the admission of the evidence from adversely affecting the fairness of the proceedings. The main application of the common law discretion is to exclude evidence the prejudicial effect of which outweighs its probative value. Probative value refers to the potential weight of the evidence (see next paragraph), whereas prejudicial effect refers to the tendency of evidence to prejudice the court against the accused, so as to lead the court to make findings of fact against him for reasons not related to the true probative value of the evidence.
4. At the end of a contested trial the court will have to evaluate the relevant and admissible evidence that it received. The *weight* of the evidence is the strength of the tendency of the evidence to prove the fact or facts that it was adduced to prove. This is a matter for the tribunal of fact to decide. In civil cases the judge who tries the case is generally the judge of issues of both law and fact. In criminal cases the tribunal of fact is different according to whether the case is tried on indictment or summarily. The jury is the tribunal of fact for cases tried on indictment. In summary trial the magistrates (justices) deal with issues of both law and fact; lay magistrates have the guidance of their clerk on questions of law. This book uses the term "factfinder" to refer generally to a tribunal of fact, unless

[6] "Adducing" evidence is a term often used to denote the process of presenting evidence to a court in one of the approved forms, most commonly in the form of the testimony of a witness.

> the context requires a specific reference to a judge, jury or magistrate. When a factfinder has to determine the weight of evidence it will examine carefully, amongst other things, the *credibility* and *reliability* of the evidence. These terms are not always used with a consistent meaning. Credibility is most commonly used in connection with the testimony of a witness and refers to the extent to which the witness can be accepted as giving truthful evidence in the sense of honest or sincere testimony. Reliability refers most commonly to the truthfulness of testimony in the sense of its accuracy. Honest witnesses may sometimes give evidence that is inaccurate; mistaken evidence of identification by eyewitnesses is a classic example.

Note here the central role played by the notion of *relevance*. This is also an AI and natural language concept. It is no accident that the first book of our series of books on cognitive systems is a book on relevance (Gabbay and Woods, 2003).

15.3 Case Study: Hearsay Case, *Myers v DPP*

We begin by quoting from [Allen, 2000 p. 133].

A good statement of the hearsay rule was given originally in *Cross on Evidence*, (Cross, 1999).

> "An assertion other than one made by a person while giving oral evidence in the proceedings is inadmissible as evidence of any fact asserted".

Allen continued on page 135:

> "Hearsay law has been described as 'exceptionally complex and difficult to interpret' (Report on the Royal Commission of Criminal Justice). What we need is a method of approach to the subject which will enable us to understand why some cases were decided as they were and why others are open to criticism. Above all, we need a technique [our comment: i.e. logic] for thinking about hearsay, . . .".

We now examine a key case, which seems to be quoted in every textbook on Evidence (and hearsay). This is a case of *written statements*, which may fall under hearsay law.

We quote two descriptions of this case, one from (Keane, 2000) and one from (Uglow, 1997), and then we model the arguments as quoted in (Uglow, 1997).

We begin with [Keane, 2000 pp. 250–252]

> *(b) Written statements*
> The leading case on written hearsay is *Myers v DPP* ([1965] AC 1001). The appellant was convicted of offences relating to the theft of motor cars. He would buy a wrecked car, steal a car resembling it, disguise the stolen car so that it corresponded with the particulars of the wrecked car as noted in its log book, and then sell the stolen car with the log book of the wrecked one. The prosecution case involved proving that the disguised cars were stolen by reference to the cylinder-block numbers indelibly stamped on their engines. In the case of some cars, therefore, they sought to adduce evidence derived from records kept by a motor manufacturer. An officer in charge of these records was called to produce microfilms

which were prepared from cards filled in by workmen on the assembly line and which contained the cylinder-block numbers of the cars manufactured. The Court of Criminal Appeal held that the trial judge had properly allowed the evidence to be admitted because of the circumstances in which the record was maintained and the inherent probability that it was correct rather than incorrect. The House of Lords held that the records constituted inadmissible hearsay evidence. The entries on the cards and contained in the microfilms were out-of-court assertions by unidentifiable workmen that certain cars bore certain cylinder-block numbers. The officer called could not prove that the records were correct and that the numbers they contained were in fact the numbers on the cars in question. Their Lordships, however, were divided as to whether the evidence should be admitted by the creation of a new exception to the hearsay rule.[7] Lords Pearce and Donovan were in favour of such a course, but the majority, comprising Lords Reid, Morris and Hodson, declined to do so, being of the opinion that it was for the legislature and not the judiciary to add to the classes of admissible hearsay.[8] It was argued before the House that the trial judge has a discretion to admit a record in a particular case if satisfied that it is trustworthy and that justice requires its admission. Lord Reid, while acknowledging that the hearsay rule was 'absurdly technical', held that 'no matter how cogent particular evidence may seem to be, unless it comes within a class which is admissible, it is excluded . . .'

The actual decision in *Myers v DPP* was reversed by the Criminal Evidence Act 1965, which provided for the admissibility of certain hearsay statements contained in trade or business records. Although the 1965 Act was repealed by the Police and Criminal Evidence Act 1984, ss 23 and 24 of the Criminal Justice Act 1988 are wider in scope than the provisions of the 1965 Act and provide for the admissibility of first-hand hearsay statements in documents generally as well as hearsay statements contained in documents created or received by a person in the course of, inter alia, a trade or business. The principles enunciated in *Myers v DPP*, however, remain of importance in relation to hearsay statements falling outside the statutory exceptions. Over 25 years later, another majority of the House of Lords, in *R v Kearley*,[9] although of the opinion that there may be a case for a general relaxation of the hearsay rule, affirmed the majority view in *Myers v DPP* that the only satisfactory solution is legislation following on a wide survey of the whole field.

Patel v Comptroller of Customs[10] also illustrates the application of the hearsay rule to written statements. The appellant was convicted of making a false declaration in an import entry form concerning certain bags of seed. Evidence was admitted that the bags of seed bore the words 'Produce of Morocco'. The Privy Council held that the evidence was inadmissible hearsay and advised that the conviction be quashed. The decision may be usefully compared with that in *R v Lydon*.[11] The appellant, Sean Lydon, was convicted of robbery. His defence was one of alibi. About one mile from the scene of the robbery, on the verge of the road which the getaway car had followed, were found a gun and, nearby, two pieces of rolled paper on which someone had written 'Sean rules' and 'Sean rules 85'. Ink of similar appearance and composition to that on the paper was found on the gun barrel. The Court

[7] The Lords were unanimous in dismissing the appeal on the grounds that the other evidence of guilt being overwhelming, there had been no substantial miscarriage of justice.

[8] The minority view, that it was within the provenance of the judiciary to restate the exceptions to the hearsay rule, was adopted by the Supreme Court of Canada in *Ares v Venner* [1970] SCR 608. See also per Lord Griffiths in *R v Kearley* [1992] 2 All ER 345, HL at 348.

[9] [1992] 2 All ER 345, HL, per Lords Bridge, Ackner and Oliver at 360–361, 366 and 382–383 respectively.

[10] [1966] AC 356, PC. See also *R v Sealby* [1965] 1 All ER 701 and *R v Brown* [1991] Crim LR835, CA (evidence of a name on an appliance inadmissible to establish its ownership); and cf *R v Rice* [1963] 1 QB 857, below.

[11] [1987] Crim LR 407, CA.

> of Appeal held that evidence relating to the pieces of paper had been properly admitted as circumstantial evidence: if the jury were satisfied that the gun was used in the robbery and that the pieces of paper were linked to the gun, the references to Sean could be a fact which would fit in with the appellant having commited the offence. The references were not hearsay because they involved no assertion as to the truth of the contents of the pieces of paper: they were not tendered to show that Sean ruled anything.[12]

If we go 480 pages into Steven Uglow's book (Uglow, 1997), we find his account of the same case.

> "*written statements*: the classic case here is *Myers v DPP* ([1964] 2 All E.R. 877) where the defendant bought wrecked cars for their registration certificates. He would then steal a similar car and alter it to fit the details in the document. He would sell the disguised stolen car along with the genuine log book of the wrecked car. The prosecution sought to show that the cars and registration documents did not match up by reference to the engine block numbers and introduced microfilm evidence kept by the manufacturer, showing that this block number did not belong in a car of this registration date. The microfilm was prepared from cards which were themselves prepared by workers on the assembly line. Lord Reid in the House of Lords held that the microfilm was inadmissible since it contained the out-of-court assertions by unidentified workers."

The labelled structure of the above is as follows.
Let

- $t : C$ The numbers assigned to the cars by the manufacturers are $x_1, x_2, \ldots$
- $t' : C'$ The numbers in the cars' logbook are $y_1, y_2, \ldots$.

If $x_i \neq y_i$, then we get:

- $t + t' : C'' =$ the numbers on the cars and numbers on the registration documents do not match

where

- $t =$ description of how the microfilm supporting C was obtained and compiled.
- $t' =$ the cars' logbooks.

The candidate item of data for admissibility is

- $t : C$.

[12] See also *R v McIntosh* [1992] Crim LR 651, CA (calculations as to the purchase and sale prices of 12 oz of an unnamed commodity, not in M's handwriting but found concealed in the chimney of a house where he had been living, admissible as circumstantial evidence tending to connect him with drug-related offences); and cf *R v Horne* [1992] Crim LR 304, CA (documents of unknown authorship, referring to H, containing calculations possibly relating to the cost of importing drugs, and found in the flat of a co-accused to which H was supposed to deliver the drugs, inadmissible against H). *R v McIntosh* was applied in *Roberts v DP* [1994] Crim LR 926, DC: documents found at R's offices and home, including repair and gas bills and other accounts relating to certain premises, were admissible as circumstantial evidence linking R with those premises, on charges of assisting in the management of a brothel and running a massage parlour without a licence.

The following passage is Lord Reid's argument that $t : C$ should be inadmissible, i.e. Lord Reid wants to argue that t should also contain the phrase "do not use me".

This is done in the logic of the labels. In other words, Lord Reid's argument has to do with the data inside t.

Here is Lord Reid's argument (technically it is part of t). It also quotes the arguments given in favour of admitting $t : C$.

***Myers v DPP* [1964] 2 All E.R. 877 at 886b–887 h, *per* Lord Reid**

It is not disputed before your Lordships that to admit these records is to admit hearsay. They only tend to prove that a particular car bore a particular number when it was assembled if the jury were entitled to infer that the entries were accurate, at least in the main; and the entries on the cards were assertions by the unidentifiable men who made them that they had entered numbers which they had seen on the cars. Counsel for the respondents were unable to adduce any reported case or any textbook as direct authority for their submission. Only four reasons for their submission were put forward. It was said that evidence of this kind is in practice admitted at least at the Central Criminal Court. Then it was argued that a judge has a discretion to admit such evidence. Then the reasons given in the Court of Criminal Appeal were relied on. And lastly it was said with truth that common sense rebels against the rejection of this evidence.

At the trial counsel for the prosecution sought to support the existing practice of admitting such records, if produced by the persons in charge of them, by arguing that they were not adduced to prove the truth of the recorded particulars but only to prove that they were records kept in the normal course of business. Counsel for the accused then asked the very pertinent question — if they were not intended to prove the truth of the entries, what were they intended to prove? I ask what the jury would infer from them: obviously that they were probably true records. If they were not capable of supporting an inference that they were probably true records, then I do not see what probative value they could have, and their admission was bound to mislead the jury.

The first reason given by the Court of Criminal Appeal for sustaining the admission of the records was that, although the records might not be evidence standing by themselves, they could be used to corroborate the evidence of other witnesses.[13] I regret to say that I have great difficulty in understanding that . . . Unless the jury were entitled to regard them, I can see no reason why they should only become admissible evidence after some witnesses have identified the cars for different reasons . . .[14]

At the end of their judgement, the Court of Criminal Appeal gave a different reason. 'In our view the admission of such evidence does not infringe the hearsay rule because its probative value does not depend upon the credit of an unidentified person but rather on the circumstances in which the record is maintaned and the inherent probability that it will be correct rather than incorrect.' That, if I may say so, is undeniable as a matter of common sense. But can it be reconciled with the existing law? I need not discuss the question on general lines because I think that this ground is quite inconsistent with the established rule regarding public records. Public records are prima facie evidence of the fact which they contain but it is quite clear that a record is not a public record within the scope of that rule unless it is open to inspection by at least a section of the public. Unless we are to alter that rule how can we possibly say that a private record not open to public inspection can be prima facie evidence of the truth of its contents? I would agree that it is quite unreasonable to refuse to accept as prima facie evidence a record obviously well kept by public officers and

[13] This is our footnote. "corroborate evidence of other witnesses" means in our LDS language "help with the flattening process".

[14] Our footnote: i.e. $u_1 : X$ is admissible only if some other $u_2 : X$ is already admissible. See objection $s_{3,2}$ below. LDS allows formally for putting item $u_1 : X$ in the database in such a way that it can be used only in the flattening process to support other items but not in deduction.

proved never to have been discovered to contain a wrong entry though frequently consulted by officials, merely because it is not open to inspection. But that is settled law. This seems to me to be a good example of the wide repercussions which would follow if we accepted the judgement of the Court of Criminal Appeal. I must therefore regretfully decline to accept this reason as correct in law.

In argument, the Solicitor-General maintained that, although the general rule may be against the admission of private records to prove the truth of entries in them, the trial judge has a discretion to admit a record in a particular case if satisfied that it is trustworthy and that justice requires its admission. That appears to me to be contrary to the whole framework of the existing law. It is true that a judge has a discretion to exclude legally admissible evidence if justice so requires, but it is a very different thing to say that he has a discretion to admit legally inadmissible evidence. The whole development of the exceptions to the hearsay rule is based on the determination of certain classes of evidence as admissible or inadmissible and not on the apparent credibility of particular evidence tendered. No matter how cogent particular evidence may seem to be, unless it comes within a class which is admissible, it is excluded. Half a dozen witnesses may offer to prove that they heard two men of high character who cannot now be found discuss in detail the fact now in issue and agree on a credible account of it, but that evidence would not be admitted although it might be by far the best evidence available.

It was admitted in argument before your Lordships that not every private record would be admissible. If challenged it would be necessary to prove in some way that it had proved to be reliable, before the judge would allow it to be put before the jury. And I think that some such limitation must be implicit in the last reason given by the Court of Criminal Appeal. I see no objection to a judge having a discretion of this kind though it might be awkward in a civil case; but it appears to me to be an innovation on the existing law which decides inadmissibility by categories and not by apparent trustworthiness . . .

15.3.1 Structure of Lord Reid's argument

$\Delta_1 : N =$ number on car A is a, (when assembled), and Δ_1 is the support of this claim.

$\Delta_1 =$ description of procedures of entering numbers during assembly.

We also have a common sense metalevel persistence principle: numbers on cars persist (don't fade away or change).

$$N \rightarrow \textbf{Always}\, N.$$

Thus, according to Lord Reid, t is equal to:

$$t = \{\Delta_1 : N, N \rightarrow \textbf{Always}\, N\}.$$

He wants to block the use of t by attacking the admissibility of Δ_1.

Four reasons were quoted for the admissibility of Δ_1 and three reasons for non-admissibility:

r_1: Evidence of this kind is admitted in Central Criminal Court.

r_2: Judge has discretion to admit such evidence.

r_3: This is a list of reasons given in Court of Criminal Appeal, namely:

- $r_{3,1}$: The records were produced to show that the records were kept in the normal course of business (but not to prove the truth of the recorded particulars).
- $r_{3,2}$: Although the record may not be evidence by themselves, they may be used to corroborate other evidence.
- $r_{3,3}$: We do not have dependency on the credit of an unidentified person but rather on a probably reliable process of record maintenance, and can therefore admit them.

r_4: Common sense rebels against rejection of such evidence.
s_0: No reported case or any textbook as direct authority for admission.

It seems at this point that $r_1 - r_4$ are stronger than s_0.[15] So Lord Reid is trying to weaken the force of r_3 and r_2 by attacking them logically with s_3 and s_2:

s_2: Judges do not have the discretion to admit legally inadmissible evidence.
s_3: Counter argument to r_3 comprising of:

- $s_{3,1}$; If the records are not intended to prove the truth of their entries, what are they intended to prove? (I.e. they are irrelevant!)
- $s_{3,2}$: Either the records are admissible or not. There is no sense in which they can become admissible only after some other evidence to the same conclusion becomes admissible (see Footnote 14).
- $s_{3,3}$: Such records are not public records which are admissible for reasons that they are open to the public for inspection and correction. The current law therefore does not support their admissibility.

Figure 15.1 shows the form of t, where $E =$ admit evidence or 'use me'.

To strengthen his case (i.e. strengthen the overall labels for $\neg E$, Lord Reid is attacking the label r_3 by putting forward $s_{3,1}, s_{3,2}$ and $s_{3,3}$. Note that the reasoning in the different boxes can be of different kinds!

Note that one of the points Lord Reid is making is s_2, namely that trial judges do not have discretion to 'admit legally inadmissible evidence'.

Compare this with the Barclays Bank example. So the force of the argument is to influence the flattening process: we have r_1–r_4: E and $s_0, s_2, s_3 : \neg E$, which one wins?

In this case the evidence was not admitted.[16]

Uglow continues:

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[15] In other words, it seems that a reasonable flattening process, weighing $\{r_1, r_2, r_3, r_4\}$ against $\{s_0\}$ will decide in favour of the former and thus admit the records. Note that no rules are given at this stage of how the decision is made. In some logics, where labels are confidence numbers, we can give a rule; e.g. admit iff $r_1 + r_2 + r_3 + r_4 > s_0$, but not here.

[16] This decision was made by vote as described in the quote from Keane (2000) on our page 12.

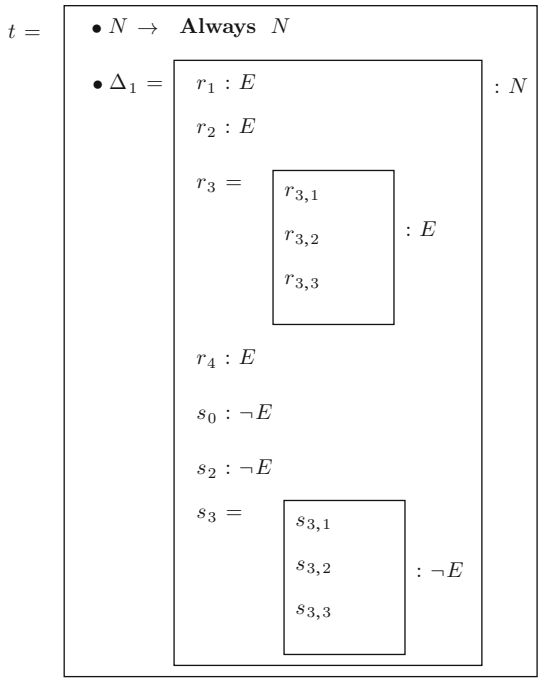

Fig. 15.1 Structure of Lord Reid's Argument

The House of Lords recognized the absurdity of their position but felt strongly that it was for the legislature to reform the law and create new exceptions. Parliament dealt with the problem of documentary hearsay with the Criminal Evidence Act 1965 which created an exception for trade and business records This was later extended by section 68 of the Police and Criminal Evidence Act 1984 and now by sections 23 and 24 of the Criminal Justice Act 1988. Such records have all been admissible in civil proceedings since the Civil Evidence Act 1968.

Myers has been regularly followed in such cases as *Patel v Comptroller of Customs* ([1965] 3 All E.R. 593) where the appellant was convicted of making a false declaration to customs, having stated that the bags of seed were originally from India. The prosecution sought to prove that the seed originated in Morocco and adduced evidence that the bags were stamped with 'Produce of Morocco'. The Privy Council, following *Myers* held that these words were hearsay and inadmissible. Unlike *Myers*, there was no evidence that the writing was at all reliable, there being no testimony as to how or by whom the bags were marked."

The reader should note that the main thrust of the argument and logic of the Lord Reid example is in weakening and strengthening labels. Put schematically we have a master argument, say E which can prove a conclusion on D. E is a labelled argument containing various labels within labels. Among this maze of labels there is a label t containing another argument, say Δ. To attack E we can attack Δ. Our argument attacking Δ can itself be attacked by attacking some label s in it and so on. This is reminiscent of systems of abstract argumentation theory. Bench-Capon (2003) has a paper on graphs of arguments and counterargunents, but his model is schematic.

We can give actual proof rules and labelling disciplines so that questions like export from one label to another can also be considered. For example:

> "If you weaken t then D will not follow from E, and that would be a bad precedent."

One cannot argue in this way unless a specific labelled model is available. We shall examine the Bench-Capon paper in the next section. For the time being, we think that we have seen enough to be convinced that labelling logics can play a central role here, though we would understand if the cautious reader would prefer to reserve judgement until more case studies are presented.

15.4 Value-Based Argument Framework

The purpose of this section is to compare our approach with that outlined in Bench-Capon (2000) and to show how labels can be used more effectively. We also give a Bayesian approach and a neural nets approach. In the full paper we hope to offer an LDS mix of all approaches. We believe any realistic model needs to do that!

We can indicate at this stage how the abstract argumentation model can relate to LDS. Consider the Lord Reid argument as presented in Fig. 15.1. It has arguments $r_1, \ldots, r_4$ in favour of E and counter arguments $s_0, \ldots, s_3$ in favour of $\neg E$, esssentially attacking $r_1, \ldots, r_4$. LDS requires in this case a flattening function (or a process) to tell us which arguments win and at what strength we can use E or $\neg E$.

This flattening process can make use of abstract argumentation theory, either in its Bench-Capon form, or modified with probability or implemented in neural nets. A taste of these options is given in this section.

15.4.1 The Framework

We begin by discussing and highlighting our method of modelling. The first principle is to work bottom up from the application area into the formal model, trying to reflect in the formal model more and more key properties of the application area. In the case of evidence this means we need to see and study many examples/case studies/debates about evidence and then try to construct a suitable logic for it. Chances are that existing logics, constructed for some other purpose, may not be the most suitable. Our starting formal system for this purpose is LDS. The theory of LDS was developed from the bottom up point of view, especially to model aspects of human behaviour, reasoning and action, and is very comprehensive, adaptable and incremental. It contains a large variety of existing logical systems as special cases. What is more important is that LDS is not a single system but a methodology for building *families* of systems, ready to be adapted to the needs of various application areas, in our case to the theory of evidence.

One very important side effect of this approach is that the logic can be worked up directly from the day-to-day activity of the practitioner of the laws of evidence, without necessarily forcing him to study logic. The 'logic' will be hidden in the

stylised movements he will be asked to make, and the interplay between the labels and comments and arguments he will be using.[17]

In contrast to our approach, in a good deal of applicational work in logic, a logic is applied to various areas and tend to force the application area into a form suitable for its existing formalism. This tends to produce results intelligible mainly to the logician, ignoring that the ordinary human/lawyer/judge already knows intuitively how to handle his daily life, and that all he needs is some bottom up additional organisation of his activities which will enable him to understand it better and possibly solve some of his outstanding puzzles.[18]

The difference in this point of view is apparent when we look again at Prakken's book. The book does realise the potential in the interaction of logic and law. It also recognises some of the kinds of logics needed to model some aspects of the law. But having made and argued all of these points, the main part of the book gives an exposition of the relevant parts of the logic in a way that only a logician can understand. This is also true at the moment of this version of our paper, but we hope in the full version to be able to do logic directly in the legal evidence application area. See Footnote 17.

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[17]Consider the widespread use of anagrams. Take as an example the pair of words 'read on'. We can rearrange the letters (including the space between the words) into 'no dear'. Let us write this as

$$\text{read on} \vdash \text{no dear}$$

We can also write equivalently

$$\text{space, a, d, e, n, o, r} \vdash \text{read on}$$
$$\text{space, a, d, e, n, o, r} \vdash \text{no dear}$$

where on the left we just listed the basic blocks we can use, including the space. Now suppose we allow you some 'wildcard' of the form

$$\text{space} \mapsto \text{any other already listed letter}$$

Then we get

$$\text{space, a, d, e, n, o, r, (space} \mapsto \text{any other already listed letter)} \vdash \text{adorned}$$

We chose here space $\mapsto$ d.

What we have been doing here was linear logic!

So anagrams with wildcards is linear logic.

The idea that logic can be 'translated' into stylised proof movements was put forward in the Gabbay 1984 logic lectures at Imperial College, London. See the first chapter of (Gabbay, 1996) and see (Gabbay, 2001). Peter Tillers says similar things in his paper in [(MacCrimmon and Triller, 2002) pp. 2–11]. We assume the word 'dynamics' in the title of (MacCrimmon and Triller, 2002) is significant.

[18]The modelling practices of the social sciences generally are adaptations of the modelling paradigms of physics (rather than, say, biology), and are a reflection of the primacy of logical positivism as the social sciences were in process of articularing its philosophical presumptions. But it is almost never satisfactory to abstract from the data of human interactions in the same way that one abstracts from the interactions of physical particles.

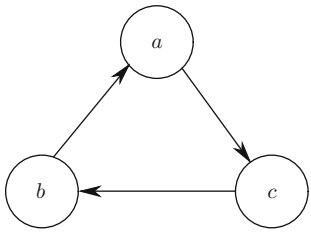

Fig. 15.2 Three node argument system

Having said all that, we can now look at some specific model, namely that of abstract argumentation systems. These were put forward as a response to the realisation that no argument or proof is conclusive in real life, and that arguments have counterarguments. The argument framework has the form $AF = (AR, Attacks)$ where AR is a set of objects called arguments and $Attacks$ is a binary relation (usually irreflexive), saying which arguments x attacks which argument y. The following Fig. 15.2 is an example

$$a \text{ attacks } c,\ c \text{ attacks } b \text{ and } b \text{ attacks } a.$$

There are no winning arguments here. This framework is too abstract to be of specific use. It equally applies to circuits and impending circuits, credits and debits, neural nets and couterweights or any system involving x and anti-x, whatever x is.

To apply such a system successfully we need to go into the structure of the arguments and analyse the mechanics of one argument attacking another.

Bench-Capon tried to improve upon such systems by introducing a clever idea; the value-based argumentation framework. In this framework we are given a set of colours (values) and a colouring of the arguments. The values are partially ordered and an argument of strictly lesser value cannot now attack an argument of stronger value.

So following Bench-Capon in the previous figure, if we make b red and a and c blue then

1. If blue is stronger than red, then b cannot attack and defeat a, a can attack c and the winning arguments are $\{a, b\}$, because c is out.
2. If red is stronger than blue then the winning arguments are $\{b, c\}$.

Certainly this colouring with values is an intuitively welcome improvement. However, this model is still too abstract. Real life has arguments within arguments in different levels and interconnections between the levels. We can extend the Bench-Capon model by using our technique of self-fibring of networks (d'Avila Garcez and Gabbay, 2004, 2005; Bench-Capon, 2003a, 2003b; Christie, 2000; Bench-Capon; Coleman, 1992; Cross, 1999; Dennis, 1992; Dean Conference; Gabbay, 1996, 1998). This method allows for the recursive substitution of networks inside nodes of other networks. We will work out the details in a later section. Still, we think using LDS is a much better option.

In LDS, this situation will arise if we have a labelled database which includes items such as $t : a, s : b$ and $r : c$ and some additional data, say $u_i : X_i$, such that the following can be proved, among others:[19]

- $\gamma(t) : \neg c$
- $\beta(r) : \neg b$
- $\alpha(s) : \neg a$.

α, β, γ are the labels of $\neg a, \neg b$ and $\neg c$ respectively and t, r, s are mentioned in the respective labels to indicate that e.g. $t : a$ is used in the proof of $\gamma(t) : \neg c$ (a with label t attacks c, by proving $\neg c$ with label $\gamma(t)$). The label $\gamma(t)$ shows exactly what role a plays in this attack.

The flattening process acts here as value judgement of what can win, $r : c$ or $\gamma(t) : \neg c$, by comparing r and $\gamma(t)$.

Obviously the value based argumentation machinery can be utilised as part of our flattening mechanism.

The following LDS model will reflect the Bench-Capon coloured diagram:

red: b
blue: a
blue: c
red to blue: $b \rightarrow \neg a$
blue to blue: $a \rightarrow \neg c$
blue to red: $c \rightarrow \neg b$

Using modus ponens in the form

$$\frac{\alpha : X, \beta : X \rightarrow Y, \varphi(\beta, \alpha)}{\alpha \cup \beta : Y}$$

We can prove:

red: $\neg a$ if red to blue is allowed
blue: $\neg c$ if blue to red is allowed
blue: $\neg b$ if blue to blue is allowed.

The flattening function has to flatten:

{red: b, blue: $\neg b$}
{blue: a, red: $\neg a$}
{blue: c, (blue: $\neg c$ is not allowed!)}

[19] Note that we are assuming here that to defeat x we must put forward an argument for $\neg x$. This is only a simplifying assumption. In LDS, x comes with a label t and so to weaken $t : x$ we can attack t.

Case 1.

red stronger than blue i.e. *blue to red* not allowed.
We get b and $\neg a$ and c.

Case 2.

Blue stronger than red (*red to blue* not allowed) We get
{blue: a, (red: $\neg a$ not allowed)}
{blue: c, blue: $\neg c$}
{red: b, blue: $\neg b$ if c is available}

We cannot decide between c and $\neg c$ since both are blue. If we leave them both out or take $\neg c$ then $\neg b$ will not be obtainable and hence we will have $\{a, b\}$.

We see that in the labelled formulation we have more options

1. We can have $X, \neg X$ or neither as choices
2. The label colour (value) can itself be a whole database and so arguments about the values and their strengths can also be part of the system.

The Bench-Capon system is only one level.

The following Fig. 15.3 shows the abstract argumentation structure of Lord Reid's arguments.

Accordingly, Δ_1 in Fig. 15.1 can be better rewritten as Fig. 15.4 below

Assuming that the attack of Lord Reid is successful, then Fig. 15.4 reduces to $\{r_1 : E, r_4 : E$ and $s_0 : \neg E\}$. The Lords indeed decided that s_0 was stronger, but they were uncomfortable about it and decided to recommend new legislation.

Note Lord Reid's argument $s_{3,2}$. This is a metalevel value argument like "you cannot colour something red".

Also note that s_0 and s_2 can be further counter-argued if possible by other Lords. The formal labelling of these additional arguments may require self-fibring. See Section 4.5.

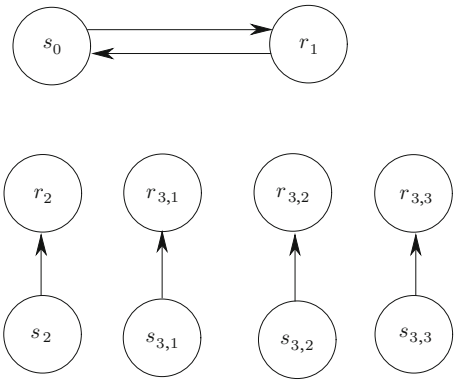

Fig. 15.3 abstract argumentation structure of Lord Reid's arguments

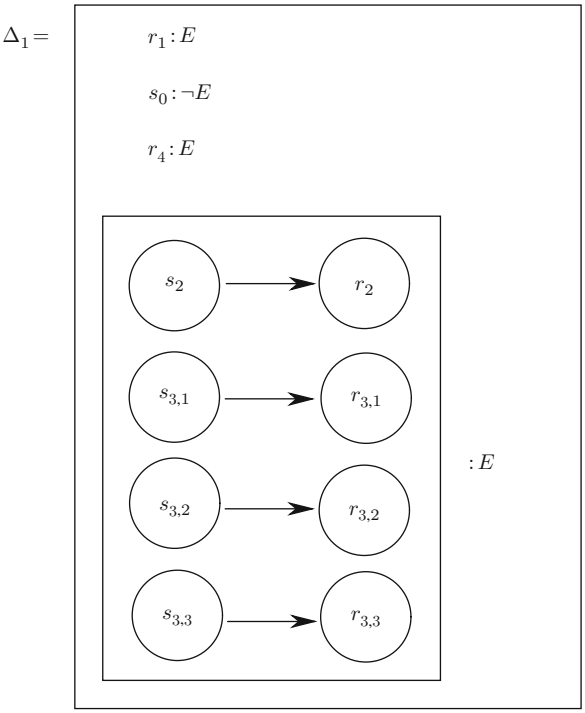

Fig. 15.4 Rewriting of Fig 15.1

15.4.2 Moral Debate Example

This section also follows Bench-Capon [Bench-Capon, 2003 p. 442]. We consider an example cited by Bench-Capon, attributed to Coleman (1992) and Christie (2000).

> "Hal, a diabetic, loses his insulin in an accident through no fault of his own. Before collapsing into a coma, he rushes to the house of Carla, another diabetic. She is not at home but Hal enters her house and uses some of her insulin. Was Hal justified, and does Carla have a right to compensation?"

The following are the arguments involved as presented in the Bench-Capon paper:

A = Hal is justified, since a person has a privelege to use the property of others to save their life - the case of necessity.
B = It is wrong to infringe the property rights of another.
C = Hal compensates Carla.

Bench-Capon (2003) quotes that Christie (2000) adds:

- D_1 = If Hal is too poor to compensate Carla, he should nonetheless be allowed to take the insulin, as no one should die because they are poor.
- D_2 = Moreover, since Hal would not pay compensation if too poor, neither should he be obliged to do so even if he can.[20]

Bench-Capon further suggests:

E = Poverty is no defence for theft.
F = Hal is endangering Carla's life.
G = Fact: Carla has abundant insulin.
H = Fact: Carla does not have ample insulin.

Figure 15.5 now represents the situation. Note that H = ¬G.
Bench-Capon gives the following value properties to the arguments:

Life:	A, D, F
Property:	B, C, E
Fact:	G, H

He says one might argue whether life is stronger than property or not but facts are always the strongest.

Since H = ¬G, and since we cannot have both facts, he regards that part of Fig. 15.5 as a case of uncertainty.

We cite this example because we want to analyse what is needed for a better representation of it.

We begin by listing the points:

1. The model needed for a proper analysis of this kind of problem in general (though maybe not necessarily the Hal problem) is a time/action model. There is a difference of values depending at what stage of the action sequence we are at. Has Hal entered Carla's house? Has he checked for insulin? Is it all over and

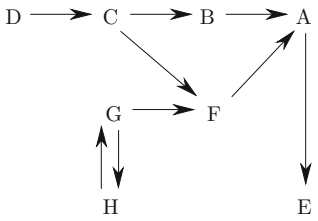

Fig. 15.5 Representation of the *Moral Debate Example*

[20]Christie puts $D_1 + D_2 = D$ together as D. The division into D_1 and D_2 is ours, for later discussion.

Carla is dead? Each of these cases may have a different argument diagram, possibly with values depending on the previous one! We might add at this point that the need for time/action models has already been strongly emphasised in Gabbay (2001) in connection with puzzles involved in the logical analysis of conditionals. This is factors of connected to contrary-to-duty models[21] and also needed to incorporate uncertainty. We can get a quite complicated (but highly intuitive) model.[22]

2. We require a better metalevel hierarchy of values and rules, as are available in Labelled Deduction. Possibly such options can also be made adequately available to the abstract argumentation model via self-fibring.
3. The links $(X \rightarrow Y)$ should be given strength labels to help us model more realistic cases where an argument X is attacked by arguments $Y_1, \ldots, Y_k$ with strength measuring $m_1, \ldots, m_k$.

This is an essential generalisation. One of the quotes we cited from the car case study was (see footnote 7) had the Lords rejecting the written evidence because there was other ample evidence to the same effect (and they didn't want to create a precedent by admitting it).[23]

4. We can read the link $X \rightarrow Y$ as preventative action of X to stop Y and thus by giving probability of success turn any acyclic network into a Bayesian one. This will introduce uncertainty into the framework. Actually the probability of success is inversely proportional to the conditional probability of Y on X.

[21] See the authoritative survey of A. Jones and J. Carmo (2002) in the *Handbook of Philosophical Logic*, 2nd edition.

[22] We take this opportunity to reinforce our methodological remark of footnote 18. In modelling human practical reasoning, actions and general behaviour it is often a disadvantage and a deficiency to try and use a stylised model and abstract too much from the actual reality (in contrast possibly with modelling physical nature). Often the details of the reality to be modelled suggests the solution to what otherwise is a puzzle. Let us look at the story and focus on the part which assumes Hal is too poor to replace Carla's insulin. We can ask how is he getting his insulin? Is he getting it on National Health Service? If yes, can't he call the NHS and try to get a replacement? So surely the question of replacement is not 'whether' but 'when', i.e. can he get a replacement in time before Carla runs out of insulin? If life is more important than property this is a good question. If property is more important, then we know he can replace it! Another question, if Hal steals the insulin from Carla and then calls for a replacement, would it not be more difficult to get a replacement (as opposed to calling the NHS first)? We need more details. We are *not* transforming the problem to one more suited to our framework. There are many other examples in other areas which need more details.

[23] This is a mixture of metalevel/strength/proof argument that only LDS can model. We shall address this kind of argument later.

15.4.3 Bayesian aspects of the moral debate example

We begin this section with a closer look at Fig. 15.5. We require a time/action model and contrary-to-duty considerations. We shall explain these features as we model the example.

We imagine an agent, such as Hal, who has available a stock of optional actions. These actions have the form $\mathbf{a} = (A, (B^+, B^-))$ where A is the precondition of the action and B^+, B^- are the post-conditions. A must hold in order for Hal to be allowed to perform the action, in which case the resulting state is guaranteed to satisfy B^+. However, the agent may take the action anyway, without permission (i.e. A does not hold), in which case the post-condition is B^-. Note that in most cases $B^- = B^+$.

We imagine we are at a state (or time) T_0, described by a logical theory Δ. The actions available to us to perform are $\mathbf{a}_1, \mathbf{a}_2, \ldots \mathbf{a}_i = (A_i, (B_i^+, B_i^-)), \ldots$. If $\Delta \vdash A_i$, then action $\mathbf{a}_i$ is allowalbe at time (state) T_0, otherwise not. If we perform the action $\mathbf{a}$, with post-condition B (B is either B^+ or B^-) then we move to time T_1, with state $\Delta_{\mathbf{a}} = \Delta \circ B$ where $\Delta \circ B$ is the revision of Δ by B. We have $\Delta \circ B \vdash B$.

So to have time action model we need

1. A language for the theories Δ to describe states
2. A language for pre-condition and a language for post-conditions for actions
3. A logic or algorithm for determining when $\Delta \vdash A$ holds, where A is a pre-condition.
4. A revision algorithm giving for each Δ and post-condition B a new theory $\Delta' = \Delta \circ B$. This algorithm can satisfy some reasonable axioms.

Note that the languages for Δ, the pre-conditions and the post-conditions need not be the same!

The flow of time is future branching and is generated by the actions. So if for example our agent can perform actions $\mathbf{a}_1, \ldots, \mathbf{a}_k$ as options then after two steps in which he performs say $\mathbf{a}_1$ first and then say $\mathbf{a}_3$, we may get a situation as in Fig. 15.6.

The real history at time T_2 is $(\Delta, \Delta_{\mathbf{a}_1}, \Delta_{\mathbf{a}_1,\mathbf{a}_3})$. The states $\Delta_{\mathbf{a}_1,\mathbf{a}_2}$ and $(\Delta_{\mathbf{a}_2}, \Delta_{\mathbf{a}_2,\mathbf{a}_1})$ are hypotheticals.

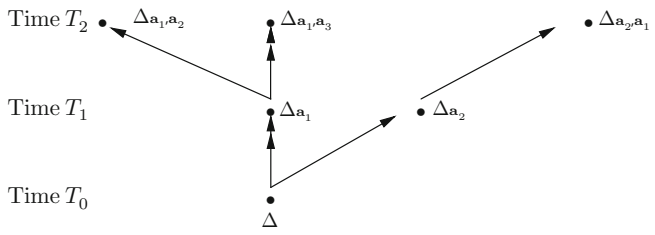

Fig. 15.6 Future branching time-action model

At time T_0, our agent chose to take action $\mathbf{a}_1$ moving onto state $\Delta_{\mathbf{a}_1}$, but he could have chosen to take action $\mathbf{a}_2$ and done action $\mathbf{a}_1$ afterwards, ending up at state $\Delta_{\mathbf{a}_2,\mathbf{a}_1}$ at time T_2. In reality, however, he chose to perform $\mathbf{a}_1$ and then $\mathbf{a}_3$.

The pre-conditions of actions can talk about states and hypotheticals. They need not be in the same language as Δ or the same language as the post-conditions. What is important are the algorithms for '$\vdash$' and '$\circ$'.

We are now ready to analyse the moral debate example. First we tell the story in a more realistic way (see footnote 22!). Then we propose some probabilities as an example and we conclude by translating the Bench-Capon satements A–H (page 24) into our time/action set up.

Our story goes as follows. Hal needs insulin. So does Carla. Both are poor and get their insulin from the Health Service. They get it in batches, though not at the same time. So the question whether Carla has spare insulin (G) depends on the time, and is a matter of probability.

Hall loses all his insulin and would need to break into Carla's property to get hers. He has the option of calling the NHS and asking for replacement, which he can use either for himself if it arrives immediately or to replace Carla's if necessary. He might get some money from friends. One thing is clear to him. If he steals Carla's insulin, it will complicate matters; it might be more difficult to find a replacement. So the question of compensation C is also a matter of probability. The following are the possible scenarios.

If property is valued more than life, then if Hal steals Carla's insulin, the probability of getting a replacement is lower in the case where Carla's life is not threatened.

If life is valued more than property, his chances of obtaining replacement is higher in case Carla's life is threatened.

We must clarify what 'getting a replacement' means. Hal will probably start a process for getting insulin for himself immediately at start time T_0. Since it might not arrive in time, he will break into Carla's home and use hers, and hope to use the insulin he 'ordered' to replace Carla's. If Carla has ample insulin, there is a higher chance or that the replacement will arrive in time before Carla's life is threatened. If Carla does not have ample insulin, Hal can use this as a further reason to rush the process of replacement. This further reason might be counterproductive if property is valued above life.

So the statement

$$\mathrm{C} = \text{Hal gets a replacement}$$

should be taken as (see Footnote 22):

Hal gets a replacement before Carla is in need of it.

We may then have the following scenarios (P stands for Probability $P(x)$ and it should be indexed by case and time, i.e. $P_{1,a}, P_{1,b}, P_{2,a}$ and $P_{2,b}$:

Case 1. Property stronger than life

(a) Time = Before Hal breaks into Carla's house.

$P(G) = \frac{2}{3}$
$P(\neg G) = \frac{1}{3}$
$P(C/G) = 0.9$
$P(\neg C/G) = 0.1$
(Since Carla does have ample insulin, Hal has more time to replace what he might take.)

$P(C/\neg G) = 0.5$
$P(\neg C/\neg G) = 0.5$
(Admittedly, Carla's life is in danger but there may not be enough time to get a replacement. On the other hand, this very fact might help get the insulin more quickly. Note that the event C means 'getting replacement in time'.)

(b) Time = After Hal breaks into Carla's house.
At this stage the value of G is known: either $G = 1$ or $G = 0$. We get

$P(C/G = 1) = 0.7$
$P(\neg C/G = 1) = 0.3$
(less than before breaking into the house, because Hal committed a serious crime. He may not be favourable with the authority.)
$P(C/G = 0) = 0,4$
$P(\neg C/\ G = 0) = 0.6$
Again, less than before.

Case 2. Property not stronger than life[24]

(a) Time = Before Hal breaks into Carla's house

$P(G) = \frac{2}{3}$
$P(\neg G) = \frac{1}{3}$
$P(C/G) = 0.9$
$P(\neg C/G) = 0.1$
$P(C/\neg G) = 0.9$
$P(\neg C/\neg G) = 0.1$

(b) Time = After Hal breaks into Carla's house

$P(G) = \frac{2}{3}$
$P(\neg G) = \frac{1}{3}$

[24] Jon Willimanson reminded us that it is reasonable to assume that the legal process does not make general value judgements like this, nor can a legal argument appeal to such judgements. Instead much more specific 'mitigating circumstances' can be used to reduce the length of a sentence on conviction ('I did it to save my life, guv').

$$P(C/G = 1) = 0.9$$
$$P(\neg C/G = 1) = 0.1$$
$$P(C/G = 0) = 0.7$$
$$P(\neg C/G = 0) = 0.3.$$

Let us now translate the arguments involved in the original moral debate example of Section 4.2.

When is Hal justified in breaking into Carla's home? The answer is yes only in the case that life is stronger than property and he can reasonably say he is not risking her life. That depends on finding a replacement. We therefore have to calculate the probability of C given all the data we have.

Thus our time/action axis has the form of Fig. 15.7:

The actions available to Hal are

1. **b** = breaking into Carla's house. The post-condition is breaking in and taking the insulin. The pre-condition of **b** is high probability of replacing Carla's insulin (in time before she needs it) in case *life is stronger than property* and $\perp$ (falsity i.e. no permission to do the action) in case *life is not stronger than property*.
2. **r** = actions having to do with getting a replacement of insulin. We assume he can perform these actions at any time but the post-conditions are not clear.[25]

We need also agree the value of the threshold probability, e.g. only if there is at least 0.9 chance of replacement can Hal break into Carla's home to take the insulin. Consider now:

B = It is wrong to infringe the property of others.
B is an argument reflected in the pre-condition of the action **b**, it can be done when B satisfied otherwise not. I would write it as

$$\mathbf{b} = (\text{Justification, Break in and taking insulin}).$$

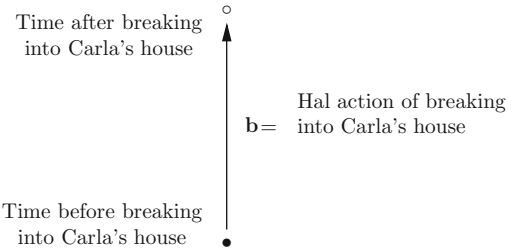

Fig. 15.7 Time action axis for the Carla example

[25] We may need a temporal language for the post-conditions so that we can say something like 'insulin will be delivered in two days'.

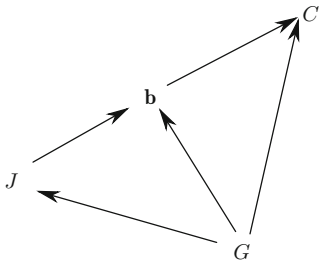

Fig. 15.8 Bayesian reading of the Carla example

Let us now model the chain of events as a Bayesian network. The story is clear. Depending on the probability $P(G)$, Hal decides whether he wants to break into Carla's house **b** (no use breaking into her house if she does not have enough insulin). He is justified J in breaking **b** into Carla's house if there is high probability of compensation C. Thus C depends both on **b** and G, and **b** also depends on G. We have the following network, Fig. 15.8.

There are two problems with this representation.

1. The dependency of **b** on G is not on $G = 1$ or $G = 0$ but on $P(G)$. Say if $P(G) < 0.1$ then maybe $\mathbf{b} = 0$.
   This is OK because the probabilites can be made to take account of that. This is allowed in the theory of Bayesian nets.
2. The probabilities in Fig. 15.8 depend on whether property is stronger than life or not. The best way to represent this is to have a Bayesian net with one variable only, *Case*.

Case =1 means property stronger than life and *case* =*0* means property is not stronger than life.

For each case we get a different copy of Fig. 15.8 with different probabilities.

So we get a substitution of the network of Fig. 15.8 into a one point network:

- *Case*. This operation is in accordance with the ideas in Williamson and Gabbay (2004).

We can also allow for several justification variables to make it more realistic.

It is not difficult to work out the details of the rest of C–H, but the reader can already see that in the simple minded model there is lack of sensitivity to a variety of metalevels.

15.4.4 Neural Representation of Argumentation Frameworks

This subsection, based on (d'Avila et al., 2005) will outline how to represent (in neural nets) any value-based argumentation framework involving x and anti-x

(i.e. arguments and counter-arguments). For instance, it can be implemented in neural networks with the use of Neural-Symbolic Learning Systems (d'Avila et al., 2002). A neural network consists of interconnected neurons (or processing units) that compute a simple function according to the weights (real numbers) associated to the connections. Learning in this setting is the incremental adaptation of the weights (Haykin, 1999). The interesting characteristics of neural networks do not arise from the functionality of each neuron, but from their collective behaviour, thus being able to efficiently represent (and learn) multi-part, cumulative argumentation, as exemplified below.

Cumulative behaviour can be encoded in Neural-Symbolic Learning Systems with the use of a hidden layer of neurons in addition to an input and an output layer in a feedforward network. Rules of the form $A \wedge B \rightarrow C$ can be represented by connecting input neurons that represent concepts A and B to a hidden neuron, say h_1, and then connecting h_1 to an output neuron that represents C in such a way that output neuron C is activated (true) if input neurons A and B are both activated (true). If, in addition, a rule $B \rightarrow C$ is also to be represented, another hidden neuron h_2 can be added to the network to connect input neuron B to output neuron C in such a way that C is now activated also if B alone is activated.[26] This is illustrated in Fig. 15.9. The network can be used to perform the computation of the rules in parallel such that C is true whenever B is true (d'Avila et al., 2002).

In a neural network, positive weights can represent the support for an argument, while negative weights can be seen as an attack on an argument. Hence, a negative weight from a neuron A to a neuron B can be used to implement the fact that A attacks B. Similarly, a positive weight from B to itself can be used to indicate that B supports itself. Since we concentrate on feedforward networks, neuron B will appear

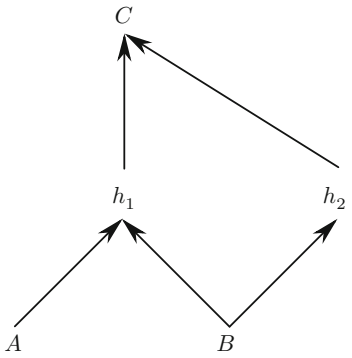

Fig. 15.9 A simple example of the use of hidden neurons

[26] In the general case, hidden neurons are necessary to implement the following conditions: (**C1**) The input potential of a hidden neuron (N_l) can only exceed N_l's threshold (θ_l), activating N_l, when all the positive antecedents of r_l are assigned the truth-value *true* while all the negative antecedents of r_l are assigned *false*; and (**C2**) The input potential of an output neuron (A) can only exceed A's threshold (θ_A), activating A, when at least one hidden neuron N_l that is connected to A is activated.

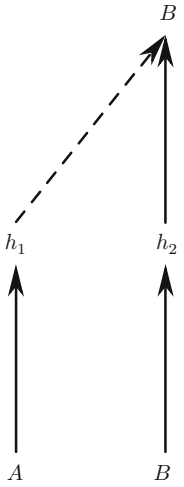

Fig. 15.10 A simple example of the use of negative weights for coutner-argumentation

on both the input and the output layers of this network as shown in Fig. 15.10, in which dotted lines are used to indicate negative weights.

In Fig. 15.10, A attacks B via h_1, while B supports itself via h_2. Suppose now that, in addition, B attacks C. We need to connect input neuron B to output neuron C via a new hidden neuron h_3. Since B appears on both the network's input and output, we also need to add a feedback connection from output neuron B to input neuron B such that the activation of B can be computed by the network according to the chain 'A attacks B', 'B attacks C', etc. As a result, in Fig. 15.11 (in which we do not represent B's feedback connection for the sake of clarity), if the attack from A on B is stronger (according to the network's weights) than B's support to itself, then A will block the activation of (output) B, and (input) B will not be able to block the activation of C. In this case, the network's final computation will include C and not B in a stable state. If, on the other hand, A is not strong enough to block B, then B will be activated and block C.

Let us take the example in which an argument A attacks an argument B, and B attacks an argument C, which in turn attacks A in a cycle. In order to implement this in a neural network, we need positive weights to explicitly represent the fact that A supports itself, B supports itself and so does C. In addition, we need negative weights from A to B, from B to C and from C to A (Fig. 15.12) to implement attacks. If all the weights are the same in absolute terms, no argument wins, as one would expect, and the network stabilises with none of $\{A, B, C\}$ activated. If, however, the value of A (i.e. the weight from h_1 to A) is stronger than the value of C (the weight from h_3 to C, which is expected to be the same in absolute terms as the weight from h_3 to A), C cannot attack and defeat A. As a result, A is activated. Since A and B have the same value (as e.g. in the previous case of an unspecified priority), B is not activated, since the weights from h_1 and h_2 to B will both have the same absolute value. Finally, if B is not activated then C will be activated, and a stable state $\{A, C\}$ will be reached in the network. In Bench-Capon's model (Bench-Capon,

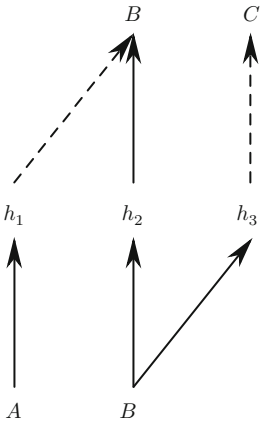

Fig. 15.11 The computation of arguments and counter-arguments

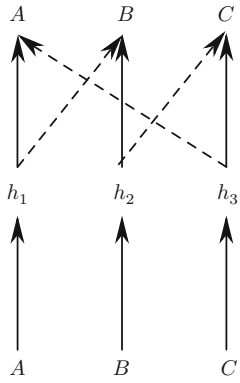

Fig. 15.12 The moral-debate example as a neural network

2003), this is exactly the case in which colour blue is assigned to A and B, and colour red is assigned to C with blue being stronger than red. Note that the order in which we reason does not affect the final result (the stable state reached). For example, if we started from B successfully attacking C, C would not be able to attack A, but then A would successfully attack B, which would this time round not be able to successfully attack C, which in turn would be activated in the final stable state $\{A, C\}$. This indicates that a neural (parallel) implementation of this reasoning process could be advantageous also from a purely computational point of view.

Note that (as in the general case of argumentation networks) in the case of neural networks, we can extend Bench-Capon's model with the use of self-fibring neural networks, which allow for the recursive substitution of neural networks inside nodes of other networks (d'Avila and Gabbay, 2004).

The implementation of the network's behaviour (weights and biases) must be such that, when we start form a number of positive arguments (input vector $\{1, 1, \ldots 1\}$), weights with the same absolute values cancel each other producing zero as the output neuron's input potential. A neuron with zero or less input potential

is then deactivated, while a neuron with positive input potential is activated. This allows for the implementation of the argumentation framework in neural-symbolic learning systems, in the style of the translation algorithms developed at (d'Avila et al., 2002).

15.4.5 Self-Fibring of Argumentation Networks

We will conclude this section by indicating how to do self-fibring of argument networks. The mechanics of it is simple. We begin with one network, say the one in Fig. 15.2. We pick a node in it, say node *a*, and substitute another network for that node, say we substitute the network of Fig. 15.5. We thus get the 'network' of Fig. 15.13.

The need of self-fibring may arise if additional arguments are available supporting the contents of the node.

The self-fibring problem has three aspects:

Aspect 1: Intuitive Meaning What is the intended interpretation/meaning of this substitution? This can be decided by the needs of the application area. Here are some options:

(1.1) *a* is supposed to be an argument, so Fig. 15.5 can be viewed as delivering some winning argument (*A* of Fig. 15.5) which can combine/support *a*.

(1.2) Figure 15.5 is a network so *b* of Fig. 15.2 can plug into it. We can connect *b* to all (or some) members of Fig. 15.2 and similarly connect all (or some) members of Fig. 15.5 into *c* of Fig. 15.2.

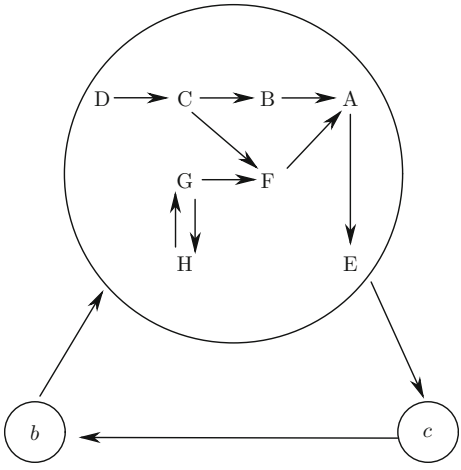

Fig. 15.13 Example of fibring Figure 15.5 into 15.2

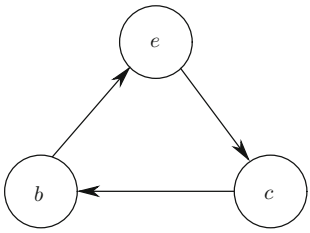

Fig. 15.14 possible result of Fibring, 15.13

For various options see d'Avila and Gabbay (2004), Gabbay (1998), and Williamson and Gabbay (2004).

Aspect 2: Formal aspect

(2.1) *Syntactical substitution* Formally the node a is supposed to be an argument. So we need a fibring function **F** (node, network) $= e$ yielding a node e and so we end up with Fig. 15.14

F might do, for example, the following: **F** can use the colour of node a to modify the colours of the nodes in Fig. 15.5 (the substituted network), and maybe also modify some connections in Fig. 15.5, and then somehow emerge with some winning argument e and a colour to be substituted/combined with a and its colour.

(2.2) *Semantic substitution* If the original network has an interpretation, then the node a can get several possible semantic values. We can make the definition of the substitution context sensitive to those values. We may even go to the extent of substituting different networks for different options of values.

Aspect 3: Coherence To enable successful repeated recursive substitution of networks within networks, we have to modify our definition of the original network. For example:

(3.1) Possibly extend the notion of network and allow arrows to either support or defeat arguments.

(3.2) Restrict the substitution of networks for nodes by compatibility/consistency conditions.

Example: Self-fibred argumentation network

We have a set of nodes and links of the form (a, b) meaning a attacks b. We also have valuation colours. A weaker colour cannot attack a stronger colour. So far this is the Bench-Capon definition.

Let a be a node. Define the notion of x is a supportive (resp. attacking) node for a as follows:

- a is supportive of a
- if x is supportive (resp. attacking) node of a and y attacks x then y is an attacking (resp. supportive) node of a.

Now let a be a node in a network A and suppose we have another network N which we want to substitute for a. We must assume a appears in N with the same colour value as it is in A. We substitute N for a and make new connection as follows:

- Any node x of A which attacks a in A is now connected to any node y in N which supports a in N.
- Any node y in N which supports a in N is now made connected to any node x of A which a of A is attacking.

This definition is reasonable. a is an argument in network A. N is another network which is supposed to support a (a in N). Thus anything which attacks a in A will attack of all a supporters in N and these in turn will attack whatever nodes a attacks in A. Note that he may be attacking facts in N by this wholesale connection of arrows. However, Bench-Capon has already remarked that facts should get the strongest colour and so the colours will take care of that!

See reference Gabbay (2009).

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Part V
Logic in the Law

Chapter 16
How Logic Is Spoken of at the European Court of Justice: A Preliminary Exploration

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16.1 Introductory Remarks on Method

16.1.1 Limiting the Analysis to Explicit References to Logic

If we wish to ascertain how a court of law makes use of logic the only material generally available for such investigations is found in the texts containing the reasoning of judgment and, where provided for by procedure, minority votes. In these texts we find logic sometimes in the form of an authority which is named and invoked *explicitly* and sometimes in that of a benchmark which is referred to *implicitly*. If we want to work our way up to the more complex aspects it makes sense to start out at a simpler level by analysing explicit references to logic. This essay limits itself to just that, by studying certain decisions of the European Court of Human Rights and in those decisions looking at the contexts of the terms "logic", "logical" and "logically". For the overview of logical relations to be complete we would also need to study implicit logical references, but that is an extremely complex and extensive research programme which would require complete logical analysis of all the decisions.[1]

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[1] With regard to the methodology of analysing such implicit method references I first attempted such comments in "Rechtswissenschaftsgeschichte – eine neue Disziplin?", Rechtshistorisches Journal, Vol. 3 (1984), pp. 150–168.

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16.1.2 No Synthesis

16.1.2.1 The Problem

The administration of justice in a court represents a development in time where various ruling authorities are involved. This brings up the question as to whether quotations on logic made at different points in time and by different ruling authorities may be considered as part of a homogeneous whole. It is not easy to answer that question methodically. On the one hand courts surrender to the normative law of homogeneity in their rulings for the simple reason that the formal principle of equal rights would otherwise not be guaranteed.[2] On the other hand, however, it cannot be denied that empirically speaking there can be varying degrees of discord and even downright contradictions.

16.1.2.2 Normative Reading

In view of the difficulties referred to above a consistently *normative reading* should be undertaken in such a way that the manner of ascribing meaning undertaken "removes" contradictions that could be perceived through other manners of ascribing meaning. One could even say *in extremis* that in a corpus which is meant to be read as free of contradictions such contradictions do not exist and are therefore only apparent contradictions.

16.1.2.3 Empirical Reading

A consistently *empirical reading* would, in contrast with the normative approach, operate by ascribing the most likely meaning in each case. Such a reading must naturally expect to encounter gaps and contradictions in the argumentation (which from a normative point of view should not occur).

16.1.2.4 The Method Followed in This Study: Empirical Reconstruction and Critical Analysis

In the present considerations the second path is taken, that of an empirical search for knowledge. The objective is to reconstruct and critically discuss the way logic is spoken of in the Court. The very open style of justification used there allows the assumption that the lines of thought have been picked up from the corresponding discussions. With such an approach it is then also possible to include *dissenting opinions,* something that would not be permissible if the normative method were used to attempt to reconstruct the overall corpus. Since it is highly likely that the authors of *dissenting opinions* also presented their arguments in the discussions,

[2]Anything the Court may (normatively) postulate in the way of logical soundness for the Convention on Human Rights (cf. Relation to the system) it must also admit as a requirement for its own corpus of jurisprudence.

this implies that they were discussed and rejected. Considering all of these points together one could feel justified in hoping to be able to find out about the attitude towards logic in the Court through a preliminary exploration.

16.2 "Logic", "Logical" and "Logically": The Surface

The European Court of Human Rights frequently speaks explicitly and extensively of "logic".[3] Even on first consideration various aspects stand out directly.

16.2.1 Logic: A Word with Positive Connotations

When the European Court of Human Rights speaks of logic then it does so in strong terms in many cases, but always in a positive sense. It speaks of

– *"logic and truthfulness",*
– *"logic and fairness",*
– *"common sense and logic",*
– *"implacable jurisprudential logic",*
– *"inescapable logic",*
– *"natural and logical",*
– *"logical and convincing",*
– *"logical and juridically correct",*
– *"logical necessity",*
– *"logical and reasonable manner",*
– *"consistent and logical",*
– *"clear or logical",*
– *"logical or rational",*
– *"logically necessary",*
– *"logically and legally",*
– *"logically and jurisprudentially",*
– *"logically inescapable"*

and so on.[4]

Consideration of the relevant contexts shows that a reference to logic is not always meant in the sense of formal logic. To put it differently: it is largely affirmative rhetoric that is involved. Nonetheless even this allows a solid conclusion on the status of logic in these speeches that give reasoning of judgment, and that is that within the Court logic is unquestionably a recognised authority. Furthermore, arguments based on logic are not only accepted as arguments but also count as particularly weighty arguments.

[3] Cf. the tables in the annexe.

[4] Cf. the tables in the annexe.

16.2.2 Logic as An Instrument of Critique in "Separate Opinions"

It is conspicuous that logic is referred to with considerable frequency in the "separate opinions" sections. The figures for the terms "logic", "logical" and "logically" are given below:[5]

	logic	logical	logically
Altogether	80	110	47
In reasoning of judgment	66	65	31
In "separate opinions"	14	45	16

It can be seen from these figures that logic occupies a considerable position as an explicitly invoked critical authority in the Court.

16.3 Characteristic Aspects of Logic

16.3.1 Relation to the System

In the argumentation of the Court logic relates to the system and serves to ensure systematic agreement. The Convention on Human Rights must be read in its entirety according to this "logic"; individual statements must be "in harmony with the logic of the Convention", "consistency" must be observed throughout and particularly in "conclusions".

The quotation that most especially expresses this requirement is to be found in the case LEANDER v. SWEDEN:

"78. The Court has held that Article 8 did not in the circumstances require the communication to Mr. Leander of the information on him released by the National Police Board. The Convention is to be read as a whole and therefore, as the Commission recalled in its report, any interpretation of Article 13 must be in harmony with ***the logic of the Convention***. Consequently, the Court, consistently with its conclusion concerning Article 8, holds that the lack of communication of this information does not, of itself and in the circumstances of the case, entail a breach of Article 13 (see, mutatis

[5] As at 8.11.2004. The HUDOC database (http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en) contained a total of 4 735 rulings of the Court at the time. (The links to the HUDOC-database are the ones under which the decisions were retrieved originally. Due to a change in the retrieval system they do not function any more. In order to retrieve the cases cited the application number or the reference number can be used on http://cmiskp.echr.coe.int/tkp197/search.asp?sessionid=58046093&skin=hudoc-en in the search field 'Application Number'.)

mutandis, the above-mentioned Klass and Others judgment, Series A no. 28, pp. 30-31, para. 68)."[6]

All in all this is terminology that refers to postulations of logic understood in the field *(logic, consequently, consistently with its conclusion, entail)* and incorporates them in judicial argumentation as normative means of reference. Thus conditions are postulated that are generally to hold sway in interpreting the Convention on Human Rights. In this way the "logic of the Convention" also takes on the significance of a higher regulatory principle in the sense of formal logic.

16.3.2 The "Judicial Syllogism"

In the course of a long-standing litigation case concerning the custody of a child the court proceedings had taken up so much time that the Court unanimously agreed that Article 6 para. 1 of the Convention had been violated through the excessively long procedural duration.[7]

Then the Court decided, by four votes to three, that Article 8 of the Convention[8] had not been violated. In their minority vote the three outvoted judges considered this decision a *"logical absurdity"* and *"circular absurdity"* for the reasons given below:

"Judicial decisions are rendered through ***a logical syllogism*** (or, in the common-law tradition, through *stare decisis* analogy) in which the judge selects a major premise (the norm or the applicable case) depending on how he or she initially perceives the facts. Thereafter, in a process which the French fittingly call *la qualification du cas,* the facts made relevant by the selected norm come into focus. The selected legally relevant facts may modify the previous choice of the applicable major premise, or they may confirm it. Once this dialectic between the norm and the facts is settled, the subsumption of facts under the norm yields a judicial

[6]CASE OF LEANDER v. SWEDEN, Application No. 9248/81, Date of Judgment 26/03/1987, http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31233&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49

[7]CASE OF NUUTINEN v. FINLAND, Application No. 32842/96, Date of Judgment 27/06/2000, http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=32450&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49

[8]"1 Everyone has the right to respect for his private and family life, his home and his correspondence. 2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

conclusion made explicit in the reasoning of the judgment. If this reasoning is persuasive on appeal, the judgment becomes final. This finality - *res judicata pro veritate habetur!* - implies immutability but above all straight enforceability of the judgment.

It is clear, therefore, that the facts, once selected as relevant - what we usually call "the truth"- are the independent variable of judicial decision-making. This is why Maat, the goddess of justice, was always portrayed with feathers, the Egyptian symbol of truth. The assumption in all this is, of course, that the facts of the case are a constant, that they are permanently given.

Indeed, in most cases legally relevant facts are irretrievably lost in the past and are therefore not liable to change. The choice of the applicable legal norm thus depends on unchangeable past events. It follows logically, that legal judgment is *predetermined* by the established veracity of the matter. Such predetermination based on past events, since it excludes arbitrariness, is another cornerstone of the rule of law.

In child custody litigation, however, where the recalcitrant parent delays implementation of the theoretically final judicial decision, the crucial *fact* of time - during which the child is critically and definitely alienated from her own father - changes the whole equation. After a decisive passage of time it is then suddenly no longer in the best interest of the so-alienated child to even recognise her own father...! Under the same norm, that is, under the same major premise, the fact changed through the critical passage of time has forced a converse judicial conclusion."[9]

In many ways these are particularly interesting comments on the *"logical syllogism"*. The explanation of the *"dialectic between the norm and the facts"* recalls strongly the procedure which in Germany is often described using the metaphor of looking from one side to the other. The method is described in the Anglo-Saxon legal field as *"stare decisis analogy"* and in the French legal field as *"la qualification du cas*" – i.e. as a procedure which is basically understood in the same way. This is, incidentally, a momentous assumption, deserving separate investigation, about a consistency of method across various systems. Irrespective of this, the question that

[9]CASE OF NUUTINEN v. FINLAND, Application No. 32842/96, Date of Judgment 27/06/2000, DISSENTING OPINION OF JUDGE ZUPANČIČ JOINED BY JUDGES PANŢÎRU AND TÜRMEN, http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=32450&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49

arises in this context is how, from the viewpoint of this minority vote, the *"logical"* problem comes about. The crucial link can be summarised as follows:

> *Owing to the extreme length of the proceedings the facts have altered to such an extent that what would earlier have been presumed to be in the child's best interest can no longer be taken as the basis for argument.*

This link does not, however, allow conclusions about *"logical absurdity"* and *"circular absurdity"*. It is rather the case that questions of an entirely different kind present themselves, such as: can, in custody litigation, the party that through persistent manoeuvering has contributed to a delay in the court's decision legitimately plead circumstances that stand in their favour at the time of judgment (such as the fact that the child has become alienated from the other parent in the meantime)? In other words it is basically a question of abuse of rights[10] rather than a question of logic.

In the minority vote under consideration here[11] clarity is lacking in another point of logical terminology as shown in the following quotation:

"It may be true that the father in the present case is not an ideal person, but since when is personal perfection a precondition to becoming a father or, consequently, to exercising parental rights? To say that he was aggressive and that the mother was afraid of him, in so far as his aggressiveness was ***a logical consequence*** of the fact that he has been brutally denied access to his only daughter, is part of the same circular absurdity. Likewise, the Finnish courts' progressively more limited access decisions were a concession to the mother's recalcitrance, made in the hope that perhaps she would be mollified. To claim that this very concession then justifies the ultimately total denial of access is simply not ***logical***."[12]

To say that increasing aggressiveness on the father's part is the *"logical consequence"* of the denial of his rights of access over several years is possible in a colloquial sense of the word *"logical"* (roughly equivalent to "understandable" or "comprehensible"), but it does not accord with the technical meaning of *"logical"* otherwise intended in the vote.

In the end, therefore, despite a methodically remarkable passage on judicial syllogism, the logic-oriented criticism of the majority vote proves unfounded.

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[10] A maxim that springs to mind here is "nemo auditur turpitudinem suam allegans".

[11] See footnote 9.

[12] See footnote 9.

16.3.3 Consistent Argumentation

In CONDRON v. THE UNITED KINGDOM a quotation by Lord Bingham introduces a thought that connects logic and fairness in a way worth analysing. The passage runs as follows:

"39. In *R. v. Birchall* ([1999] Criminal Law Reports) Lord Bingham CJ stated, with reference to section 35 of the 1994 Act: '***Inescapable logic*** demands that a jury should not start to consider whether they should draw inferences from a defendant's failure to give oral evidence at his trial until they have concluded that the Crown's case against him is sufficiently compelling to call for an answer by him. ... There is a clear risk of injustice if the ***requirements of logic*** and fairness are not observed ...'"[13]

In other words, it should be valid that:

If it is not imperative to give an answer, it is forbidden to draw incriminating conclusions from the refusal to answer.

It is clear that it would be unfair to act any other way. But is it also *"illogical"*?

To answer that it is essential to see that the protection intended by the permission to remain silent would be removed if one wished to draw incriminating conclusions from the silence maintained. In the case of such behaviour one would say two things to the accused:

(P1) I grant you protection and therefore leave the decision to you to remain silent.
(P2) But if you do remain silent I will construe that to your charge (and so will not protect you).

Through (P2) one goes against the commitment to protection given in (P1). Such self-contradicting behaviour can always be construed as non-consistent by means of logic. At the same time, experience shows that such behaviour is always considered unfair. So it is indeed the case that both logic and fairness are involved here. To put it more accurately, logic is able to precisely analyse a particular expression of the principle of fairness – the rejection of self-contradicting behaviour[14].

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[13]CASE OF CONDRON v. THE UNITED KINGDOM, Application No. 35718/97, Date of Judgment 02/05/2000, http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=32512&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49 Also in: CASE OF BECKLES v. THE UNITED KINGDOM, Application No. 44652/98, Date of Judgment 08/10/2002, No. 45, http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=34386&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49

[14]It is part of the same context that "venire contra factum proprium" (= self-contradicting behaviour) is considered as a case of violating the principle of loyalty and faith.

16.3.4 Drawing Consequences from Definitions

The logic intended by the Court can also be the logic that draws conclusions from an undisputedly assumed premise that contains a definition (along with other undisputed suppositions). An appropriate example can be found in KLASS AND OTHERS v. GERMANY:

"55. Review of surveillance may intervene at three stages: when the surveillance is first ordered, while it is being carried out, or after it has been terminated. As regards the first two stages, ***the very nature and logic*** of secret surveillance dictate that not only the surveillance itself but also the accompanying review should be effected without the individual's knowledge. Consequently, since the individual will necessarily be prevented from seeking an effective remedy of his own accord or from taking a direct part in any review proceedings, it is essential that the procedures established should themselves provide adequate and equivalent guarantees safeguarding the individual's rights."[15]

The essential argument of KLASS AND OTHERS v. GERMANY is thus that a meaningful understanding of *"secret surveillance"* necessarily entails certain (logical) consequences.

In the framework of this argumentation the Court distinguishes three phases of secret surveillance:

– *first,* when the secret surveillance is ordered,
– *second,* while the secret surveillance is being carried out,
– *third,* after the secret surveillance has been terminated.

On this basis it is assumed that in phase 1 (when the **secret** surveillance is *ordered*) and phase 2 (while the **secret** surveillance is *being carried out*) Nature and logic *"dictate"* that both the adoption of the measure and the subsequent monitoring are to be carried out without the knowledge of the person under surveillance. Indeed, under the normal understanding of the term *"secret"* this is a necessary consequence. For if this were not the case (i.e. if the person involved were informed that the measure had been ordered and were being carried out) then it would no longer be possible to speak meaningfully, on the basis of an accepted general use of language, of *"secret"* surveillance.

Nevertheless, all this does not prove that this understanding of *"secret"* is also to be assumed *in concreto*. For the question here is whether a particular form of *"secret surveillance"* may be considered permissible according to the Convention

[15]CASE OF KLASS AND OTHERS v. GERMANY, Application No. 5029/71, Date of Judgment 06/09/1978 (http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31224&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49)

on Human Rights. Only when the premise is added (and there seems reason enough to do so) that the Convention follows the general use of language in this respect can one talk of the validity of the argument involved. For the sake of consistency we should give the corresponding line of the Court's thoughts the character of an enthymeme in this respect. It would insult the intelligence of the reader, in the Greek sense, if we had to explicitly add such additional explanations of the term *"secret"*.

16.4 Logic and the Analysis of Non-sequitur in "GOLDER v. THE UNITED KINGDOM"

16.4.1 The Initial Question: Does Article 6 Para. 1 of the Convention Contain a"Right to Access"?

In GOLDER v. THE UNITED KINGDOM[16] there was a controversial debate on the question as to whether Article 6 para. 1 of the Convention,[17] which guarantees the right to a fair trial, also accords a right to access to the courts in proceedings that are not yet in being. In other words, does Article 6 para. 1 of the Convention (also) accord the right to go before a court[18]?

16.4.2 The Arguments of Majority Opinion for a "Right to Access"

16.4.2.1 The Argument from the French Version of the Convention

The majority opinion assumes that Article 6 para. 1 of the Convention does not contain such a right to access *"in express terms"*[19], but that it is possible to achieve the guaranteeing of such a right to access by Article 6 para. 1 of the Convention through interpretation. This interpretation is primarily based on the French text[20]:

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"The clearest indications are to be found in the French text,
first sentence. In the field of "contestations civiles" (civil
claims) everyone has a right to proceedings instituted by or
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[16] CASE OF Golder v. THE UNITED KINGDOM, Application No. 4451/70, Date of Judgment 21/02/1975, http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31210&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49

[17] "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

[18] See footnote. 16/No. 40.

[19] See footnote 16/No. 28.

[20] *« Toute personne a droit à ce que sa cause soit entendue équitablement, publiquement et dans un délai raisonnable, par un tribunal indépendant et impartial, établi par la loi, qui décidera, soit des contestations sur ses droits et obligations de caractère civil, soit du bien-fondé de toute accusation en matière pénale dirigée contre elle. »*

against him being conducted in a certain way - "eq́uitablement" (fairly), "publiquement" (publicly), "dans un deĺai raisonnable" (within a reasonable time), etc. - but also and primarily "à ce que sa cause soit entendue" (that his case be heard) not by any authority whatever but "par un tribunal" (by a court or tribunal) within the meaning of Article 6 para. 1."[21]

Speaking of a right *"à ce que sa cause soit entendue ... par un tribunal"* does indeed suggest the assumption that a right to access in the sense of a right to being heard should be granted.

16.4.2.2 The Argument of Non-exclusion

The majority then supports the interpretation through a further argument:

"While the right to a fair, public and expeditious judicial procedure can assuredly apply only to proceedings in being, it does not, however, necessarily follow that a right to the very institution of such proceedings is thereby excluded."[22]

This argument assumes that a right that is not expressly granted is not necessarily to be regarded as excluded. At this point one has the impression that there is a *mutatio controversiae*. The question at issue here is whether the Article of the Convention under discussion *grants a right*, not whether it *excludes the granting of such a right*. From the statement that granting this right is not excluded no logical argument could be built to conclude the existence of that right: Something that is not forbidden will not, without further assumptions, become something that is imperative. Under certain basic deontic assumptions it is, however, possible for something that is not forbidden to become something that is permitted[23]. Then this argument of the Court would apply insofar that the desired conclusion (right of access to the courts from the Convention) would lie in the realm of that which is non-excluded (= of that which is permitted). It would, however, be subsequently necessary to justify the transition from being permitted to being imperative.

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[21] See footnote 16/No. 32.

[22] See footnote 16/No. 32. The dissenting opinion's second accusation of "fallacy" refers to this.

[23] Cf. Herberger/Simon, Wissenschaftstheorie für Juristen, Frankfurt am Main 1980, p. 184: *"P(p) ↔ ¬ F(p) Precisely when it is permitted to carry out the action p it is not forbidden to carry out the action p.(The permission is equivalent to the lack of prohibition)"*

16.4.2.3 The *"Inconceivable"* Argument

The third argument for the possibility of deriving a *"right to access"* from the Convention is presented thus:

"It would be inconceivable, in the opinion of the Court, that Article 6 para. 1 should describe in detail the procedural guarantees afforded to parties in a pending lawsuit and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court. The fair, public and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings."[24]

At first this argument sounds as if reference were being made to a necessary condition that could be derived. The corresponding question would be:

> *Does the guarantee of a fair judicial proceeding also entail the guarantee of the right to even institute such a proceeding?*

Putting the question thus is tantamount to negating it, because it is also reasonable to imagine a guarantee such as the following:

> *Insofar as national law permits judicial proceedings to be instituted the Convention on Human Rights prescribes that certain standards be adhered to.*

But since this is the case, the Court reasons that such a thing is inconceivable – or in individual cases equivalent to a *petitio principii*.

16.4.3 The Minority Opinion of Sir Gerald Fitzmaurice Against a "Right to Access"

16.4.3.1 The Starting Point

The majority opinion presented above with some of its central arguments must have been debated in a highly controversial manner in the Court. This is shown by the minority votes of Verdross, Zekia and Sir Gerald Fitzmaurice. While the minority votes of Verdross and Zekia follow the classic patterns of juridical interpretation, Sir Gerald Fitzmaurice's minority vote stands out because it brings to the fore explicit logical argumentation. The aim is to subject the majority's *"logic of the argument"* to critical analysis. The relevant passage runs as follows:

"(b) The argument embodies ***a well known logical fallacy***, in so far as it proceeds on the basis that without a right of access the safeguards for a trial provided for by Article 6.1 (art. 6-1) would be rendered nugatory and objectless, -

[24] See footnote 16/No. 35.

so that the one must necessarily entail the other. This is merely to perpetuate the type of fallacy arising out of what is known to philosophers as the "King of France" paradox, - the paradox of a sentence which, linguistically, makes sense, but actually is absurd, namely the assertion 'the King of France is bald'. The paradox vanishes however when it is seen that the assertion in no way logically implies that there is a King of France, but merely that, rightly or wrongly, if there is one, he is bald. But that there is one must be independently established; and, as is well known, there is in fact no King of France. Similarly, one could provide all the safeguards in the world for the well being of the King of France, did he exist, yet the fact that these would all be rendered nugatory and objectless did he not do so, would in no way establish, or be compelling ground for saying that he did, or must be assumed to. In the same way, the safeguards for a fair trial provided by Article 6.1 (art. 6-1) will operate if there is a trial, and if not, not. They in no way entail that there must be one, or that a right of access must be postulated in order to bring one about. The Judgment also abounds in ***the type of logical fallacy*** that derives B from A because A does not in terms exclude B. But non-exclusion is not ipso facto inclusion. The latter still remains to be demonstrated."

This logic-oriented critical analysis takes up two topics:

– the "King of France paradox"

and

– the "non-exclusion/inclusion fallacy".

Logically speaking the two topics are disparate; they are therefore analysed separately below.

[25]CASE OF GOLDER v. THE UNITED KINGDOM, Application No. 4451/70, Date of Judgment 21/02/1975, SEPARATE OPINION OF JUDGE SIR GERALD FITZMAURICE, http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31210&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49

16.4.3.2 The "King of France Paradox"

The "King of France paradox" in the version quoted probably originates from Bertrand Russell, who uses the example several times in his essay "On denoting".[26] The starting point of the considerations is the phrase

> "The present King of France is bald".

The proposition expressed by this sentence is problematic because there is no-one who fits the description "the present King of France". It therefore seems unreasonable, in a preliminary study, to ascribe properties to an object that does not exist (as in the example of being bald). One could then be tempted to consider such a proposition as plain nonsense. Russell, however, prefers not to draw this conclusion, prefering to classify the proposition as simply false.[27] But this assumption then leads to a different kind of difficulty:

> By the law of the excluded middle, either 'A is B' or 'A is not B' must be true. Hence either 'the present King of France is bald' or 'the present King of France is not bald' must be true. Yet if we enumerated the things that are bald, and then the things that are not bald, we should not find the present King of France in either list.[28]

So what does Russell suggest as a solution in relation to the example given here? He insists on reformulating the sentence as follows:

> Thus 'the present King of France is not bald' is false if it means
> 'There is an entity which is now King of France and is not bald',
> but is true if it means
> 'It is false that there is an entity which is now King of France and is bald'.
> That is, 'the King of France is not bald' is false if the occurrence of 'the King of France' is *primary,* and true if it is *secondary.* Thus all propositions in which 'the King of France' has a primary occurrence are false: the denials of such propositions are true, but in them 'the King of France' has a secondary occurrence.[29]

As we can see it is part of the solution strategy to reconstruct the proposition in question in such a way that it contains a claim of existence with regard to the King of France that is then linked conjunctively with a proposition ascribing the property of being bald.

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[26] Bertrand Russell, On denoting (Mind 1905), http://cscs.umich.edu/~crshalizi/Russell/denoting/. The example has been popular in logic manuals ever since, and in view of the lack of further information this makes it more or less impossible to find out where Sir Gerald Fitzmaurice could have found the example. As an explanation of Russell's ideas on statements of existence cf. the succinct comments in Ernst Tugendhat/Ursula Wolf, Logisch-semantische Propädeutik, Stuttgart 1993, pp. 189–193.

[27] "Hence one would suppose that 'the King of France is bald' ought to be nonsense; but it is not nonsense, since it is plainly false" (see footnote 26).

[28] See footnote 26. Being a friend of caustic humour, Russell cannot resist a dig at the Hegelians at this juncture: "Hegelians, who love a synthesis, will probably conclude that he wears a wig."

[29] See footnote 26. In this way the Hegelian conclusion – that it must be expected that the King wears a wig – is also avoided, to Russell's satisfaction: "Thus we escape the conclusion that the King of France has a wig."

At this point we can recognise the transition to the argumentation of Sir Gerald Fitzmaurice quoted above. It said:

> The paradox vanishes however when it is seen that the assertion *in no way logically implies* that there is a King of France, but merely that, rightly or wrongly, if there is one, he is bald. But that there is one must be independently established.[30]

According to this line of thinking, therefore, it must be independently shown that a King of France exists before any further properties can be ascribed and conjunctively linked with him.

Is it possible to relate this line of thought with the juridical subject under discussion in "GOLDER v. THE UNITED KINGDOM"? By referring to the example of the bald King of France Sir Gerald Fitzmaurice obviously intends to give parallel consideration to the following two assertions:

(1) The present King of France is bald.
(2) The judicial proceeding to be judged in accordance with Article 6 must be fair.

From this obviously intended parallelisation one naturally arrives at the following considerations:

Just as it is necessary in the example of the bald French king to show that this king exists if we wish to reasonably ascribe him any further properties, so it is necessary in the context of Article 6 of the Convention on Human Rights to first show that a corresponding proceeding exists before any further properties may be ascribed to it. Just as the proposition "The present King of France is bald" does not imply the existence of the King of France, so the proposition "The judicial proceeding to be judged in accordance with Article 6 must be fair" does not imply the (necessary) existence of a proceeding that is to be judged according to Article 6. Sir Gerald Fitzmaurice is right there. But was that actually the initial question? It was not. It was: Does the obligation laid upon the State to make a judicial proceeding fair necessarily entail the obligation to admit the institution of such a proceeding? A certain structural similarity to the topic that occupied Russell cannot be denied. Nonetheless it can be seen that the question at hand cannot be reduced to the problem dealt with by Russell. The example of logic taken by Sir Gerald Fitzmaurice would need further processing to be able to deal with the underlying topic of the case. Of course it is edifying to see reference being made to a logic debate of such high quality, but the conflicting impression remains that the logical heritage thus mobilised has not been transferred to the problem at hand with the extreme precision necessary. This deficiency is most likely due to the fact that the two sentences that were placed on an intellectual parallel

(1) The present King of France *is* bald.
(2) The judicial proceeding to be judged in accordance with Article 6 *must* be fair.

[30] Cf. footnote 25.

are actually completely different in one aspect.
The proposition on the King of France is an empirical one: it deals with the existence of a person and of properties ascribed to that person.
The proposition on Article 6 of the Convention, however, is a normative one: it deals with a deontic *requirement* for a proceeding with regard to which there is a dispute as to whether there is a *right* to institute this proceeding.

In the face of such clear differences it becomes clear that it is not possible to have a smooth parallelisation of the deontic debate demanded on Article 6 with the logical debate on existential propositions on the subject of the "King of France". If we really want to keep a comparative view we would need to transpose the arguments on the "King of France" to the context of deontic logic. The minority vote does not do this. Nevertheless we are surely not entirely mistaken in assuming that Sir Gerald Fitzmaurice was at this point intuitively on the trail of a topic of logic that merits further elaboration.

16.4.3.3 The "Non-exclusion/Inclusion Fallacy"

With regard to this alleged fallacy the minority vote contents itself with a brief remark (unlike the detailed comments on the King of France paradox):

"The Judgment also abounds in ***the type of logical fallacy*** that derives B from A because A does not in terms exclude B. But non-exclusion is not ipso facto inclusion. The latter still remains to be demonstrated."[31]

It seems difficult to pinpoint the precise argument at stake in this case. Moreover the logical point claimed here seems difficult to formulate. The argument of Sir Fitzmaurice is based either on a propositional analysis or a first-order analysis. In the first case, it is not clear what connective Sir Fitzmaurice has in mind. If, however, he is talking about first-order logic then it is quite hard to see how this follows from the text under scrutiny. The logic-based criticism that a common fallacy is at play here does not, therefore, do justice to the argumentation of the majority in the Court.

16.5 The "reductio ad absurdum" Argument in "PRETTY v. THE UNITED KINGDOM"

In the tragic PRETTY v. THE UNITED KINGDOM case, that presented an extreme challenge to jurisprudence on the border of death, there is a passage in the reasoning of judgment that explicitly invokes logic:

"5. The Secretary of State has advanced a number of unanswerable objections to this argument which were rightly

[31] Cf. above at footnote 25.

upheld by the Divisional Court. The starting point must be the language of the Article. The thrust of this is to reflect the sanctity which, particularly in western eyes, attaches to life. The Article protects the right to life and prevents the deliberate taking of life save in very narrowly defined circumstances. An Article with that effect cannot be interpreted as conferring a right to die or to enlist the aid of another in bringing about one's own death. In his argument for Mrs Pretty, Mr Havers QC was at pains to limit his argument to assisted suicide, accepting that the right claimed could not extend to cover an intentional consensual killing (usually described in this context as 'voluntary euthanasia', but regarded in English law as murder). The right claimed would be sufficient to cover Mrs Pretty's case and counsel's unwillingness to go further is understandable. But there is ***in logic no justification*** for drawing a line at this point. If Article 2 does confer a right to self-determination in relation to life and death, and if a person were so gravely disabled as to be unable to perform any act whatever to cause his or her own death, ***it would necessarily follow in logic*** that such a person would have a right to be killed at the hands of a third party without giving any help to the third party and the State would be in breach of the Convention if it were to interfere with the exercise of that right. No such right can possibly be derived from an Article having the object already defined."[32]

In this argumentation there are two constellations involved: *"assisted suicide"* and *"intentional consensual killing"*. Mrs. Pretty's lawyer had tried to limit his argumentation to the case of assisted suicide. The Court objects that this is not possible for reasons of logical soundness and that it is rather the case that under the condition of a right of self-determination in relation to life and death it is also possible to derive a right to have oneself killed by a third party without giving any help. But if it is agreed that *"intentional consensual killing"* does not lie in the realm protected by the Convention then from a logical consideration the following situation results. From the point of view of the Court the following initial premise forms the basis of the argumentation that is to be refuted:

(P1) The Convention accords a right of self-determination in relation to life and death.

[32]CASE OF PRETTY v. THE UNITED KINGDOM, Application No. 2346/02, Date of Judgment 29/04/2002,http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=34162&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49

Anyone who on the basis of this right claims a right of *"assisted suicide"* is also, in the opinion of the Court, obliged to postulate a right of *"intentional consensual killing"*. This conclusion is justified, because when a right of self-determination in relation to life and death is accorded globally – as the Court argued was the initial premise of the argumentation under discussion – the permissibility cannot depend on the modalities of the act (*"assisted suicide"*, *"intentional consensual killing"*). In this case (P1) should be understood as follows:

(P1') The Convention accords a right of self-determination in relation to life and death irrespective of the modalities chosen for the act.

This leads to the conclusion that:

(P2) The Convention (also) accords a right of "intentional consensual killing"(since this is a possible modality).

At the same time, the Court considers the following premise valid:

(P3) According to the Convention "intentional consensual killing" is not permitted (= is prohibited).

From these premises it can be concluded that the Convention may not be interpreted in the sense of (P1') because otherwise it would be possible to derive the permissibility of something which is prohibited, a deontic contradiction that is unacceptable. The pattern of argumentation is a *reductio ad absurdum*.

It is clear that this *reductio ad absurdum* stands and falls with the assumption of (P1'). If (P1') is taken as the basis of argumentation the Court's conclusion must be recognised as logically sound. But the question arises as to whether it is not logically possible after all to escape this verdict, as Mrs. Pretty's lawyer obviously tried to do. He wanted to have the initial premise understood as:

(P1'') The Convention accords a right of self-determination in relation to life and death in the modality of assisted suicide.

If this initial premise is taken the *reductio ad absurdum* postulated by the Court is not possible.

Two facts are thus established: The Court presents a clearly elaborated *reductio ad absurdum* that suffices the demands on this type of argumentation. The crucial point for the result, however, is the dispute about the initial premise chosen. It is not possible by means of logic alone to demonstrate that premise (P1') merits preference over premise (P1''). In this respect it depends on further points of interpretation correspondingly brought in by the Court (*"language of the article"* as the *"starting point"*).

16.6 Complainant's Duty to Draw Logical Conclusions

In the case of GEA CATALÁN v. SPAIN[33] fraudulent actions of the complainant in his capacity as a bank employee (writing out cheques under a false identity and cashing them[34]) had resulted in prosecution. Two provisions of the Spanish Criminal Code played a "logically" decisive role for the complainant's and the court's argumentations and are therefore quoted by the Court:

"17. Two provisions of the Criminal Code are relevant to the present case:

Article 528

'Anyone who, with a view to pecuniary advantage, engages in dishonest practices in order to deceive another person into transferring property to the latter's detriment or to the detriment of a third party shall be guilty of the offence of obtaining property by deception.

A person convicted of this offence shall be liable to a term of imprisonment (arresto mayor) [from one month and one day to six months] if the sum involved exceeds 30,000 pesetas. If there are found to be two or more of the aggravating circumstances provided for in Article 529 below or one especially aggravating circumstance, the person convicted shall be sentenced to a term of imprisonment (prisión menor) [from six months and one day to six years] ...

Where only one of the aggravating circumstances referred to in Article 529 is found to be established, the term of imprisonment shall be in the range of the maximum sentence available (grado máximo) [from four months and one day to six months]."

[33]CASE OF GEA CATALÁN v. SPAIN, Application No. 19160/91, Date of Judgment 10/02/1995, http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31633&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49

[34]"8. In the first months of 1985, taking advantage of his position as an employee of the Bank of Fomento, he caused the bank to discount in his favour a number of bills of exchange that he had himself drawn using false names."

> Article 529
> "The following circumstances shall be deemed to be aggravating circumstances for the purposes of the preceding Article:
>
> 1. Where the deception is practised by altering the nature, quality or quantity of staple goods, dwellings
>
> or any other goods of recognised social utility.
>
> ...
>
> 7. Where the deception is particularly serious in terms of the sum involved.' "

It is clear that the qualification in ***No. 1*** does not apply to the case at hand – only that in ***No. 7***.

The proceeding then continued:

> "14. On 7 November 1990 the Supreme Court (Tribunal Supremo) dismissed his appeal. The discrepancy complained of by Mr Gea Catalań had resulted from a mere clerical error that had been easy to understand and to correct simply as a matter of common sense and logic, given the absurdity of applying paragraph 1 of Article 529 to the facts in issue."

In other words, a typing error in the judgment had led to the confusion of ***Article 529 Paragraph 1*** with ***Article 529 Paragraph 7***. The complainant then established his argumentation as follows:

Since the ruling had related to Article 529 Paragraph 1, not Article 529 Paragraph 7 (as should have been the case), he had been refused the due process of law relating to Article 529 Paragraph 7.

One thing cannot be refuted in the complainant's argumentation and that is logical stringency – on the linguistic surface. It appears that precisely this clearly artificially constructed logical connection provoked the Court into responding thus:

> "29. Having regard to the clarity of the legal classification given to the findings of fact set out in the investigating judge's committal order of 1 July 1986 (see paragraph 9 above), the Court fails to see how Mr Gea Catalań could complain that he had not been informed of all the components of the charge, since the prosecution submissions were based on the same facts (see paragraph 10 above). Furthermore in the instant case it would, as the Supreme Court rightly noted (see paragraph 14 above), have been absurd to have applied paragraph 1 of Article 529 of the Criminal Code, whereas the inference that it was paragraph 7 that applied,

`although not an automatic conclusion, could at any event have been arrived at` ***`through minimal recourse to logic`***`."`

One is tempted to say: "Indeed".

16.7 A Logic-Oriented Critique of the Judgment in "PRODAN v. MOLDOVA"

The minority vote in the case of PRODAN v. MOLDOVA[35] is remarkable for its particularly frequent[36] referral to aspects of formal logic. It therefore merits more precise analysis as an example in this study.

The case at issue involved compensation claims for unjustified removal of property. The dispute did not relate to the compensation claim itself, but to the principle according to which it was determined.

16.7.1 Logical Argument No. 1: Differentiating "Fact" and "Supposition"

The first point of criticism in the minority vote starts from the following premise:

Damage to property must be established as a *"legal fact"* and may not be left as a *"supposition"* to this effect.

This gives crucial significance in the argumentation to the differentiation between *"fact"* and *"supposition"*. In this context formal logic is brought into play as follows:

`"In my humble view there is a clear distinction,` ***`from the angle of formal logic`***`, between the notion of a proven 'fact' and that of a 'supposition'."`[37]

In fact, this argument does not, primarily, have a lot to do with *"formal logic"*. The question is much rather the meaning assigned to the terms *"(proven) fact"* and *"supposition"*. This also becomes clear in the minority vote through the fact that immediately after mentioning *"formal logic"* the New Oxford Dictionary of English is quoted. Once the meanings have thus been established formal logic actually plays a subordinate role: on the basis of the definitions given by the New Oxford

[35] CASE OF PRODAN v. MOLDOVA, Application No. 49806/99, 18 May 2004, (http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=35470&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49), PARTLY DISSENTING OPINION OF JUDGE PAVLOVSCHI. Judge Stanislav Pavlovschi is the judge who Moldova had sent to the Court. Cf. http://www.yam.ro/forum/read.php?f=3&i=36560&t=6989

[36] Explicit reference is made to logic ten times.

[37] See footnote 35 at A. GENERAL COMMENTS.

Dictionary of English it necessarily follows that *"(proven) fact"* and *"supposition"* are to be differentiated (in case there was previously any doubt about this).

16.7.2 Logical Argument No. 2: Lack of Intention to Deposit Money

To continue from Logical argument No. 1 (Differentiating *"fact"* and *"supposition"*) we now consider a conclusion that aims to prove an "inner fact" occurring in the past:

"As to the alleged pecuniary damage in the form of the lost opportunity of depositing money with a bank and receiving dividends, I would like to mention the following circumstances. The applicant received compensation for five apartments in the sum of MDL 488,274 on 20 November 2002. So, after that, if we apply here again ***the laws of formal logic***, had the applicant had the intention to deposit the money with a bank, she should have deposited MDL 488,274. That would have given her an opportunity to get interest for a period of one year and five months and would have proved also the "fact" that she did indeed previously intend to do this. Unfortunately, the applicant failed to produce any evidence to this effect. In all these circumstances it is impossible, ***from the point of view of logic***, to accept as proven beyond a reasonable doubt the "fact" of her intention to deposit money in the past when she has not done so despite all the necessary conditions being satisfied in the present."

If we take into account, for the question of damage to property, the fact that a past desire to deposit money must be proven as a *fact*, then an insightful argument is constructed in that respect that runs as follows:

> *Anyone who has not deposited money received as compensation would probably not have done so with a compensation payment received earlier either.*

One notices again that the only connection with the *"laws of formal logic"* consists of the fact that the external form of the argument can be logically reconstructed. Other than that, the argument stands and falls with the plausibility of the premise: *"Anyone who has not later deposited money for the purposes of profit would not have done so earlier either."* So it would not be the "laws of formal logic" that would be appropriate for settling the dispute – and for that reason they cannot be invoked to contest the majority decision.

In this context of an exaggerated emphasis on logic there is at this point, incidentally, a comment that at first sight appears out of place:

"I do understand that applying ***the laws of formal logic*** is not the best way of approaching judicial cases, but in this

particular situation of the lack of any strong evidence to the contrary, their application could have helped the Chamber to take a correct decision."

One is tempted to ask why logic is so often referred to if applying the laws of formal logic is not the best way to approach cases that are to be judged in a court of law. The most likely reason is probably that logic is called upon in desperation as a kind of last resort because the majority – it is assumed – has committed particularly grave errors of argumentation.

16.7.3 Logical Argument No. 3: Error in Precedence-Related Transformation

The minority vote reproaches the majority decision – still in the framework of a "logical" critique – with violating logic through a new formulation of a previously accepted decisive rule:

"I agree entirely with the Court's findings in the Former King of Greece case and namely that the respondent State has:

'a legal obligation to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach'.

At the same time I find it ***incorrect and contrary to the laws of logic*** to transform the above rule in the present judgment into:

'The reparation should aim at putting the applicant in the position in which she would have found herself, had the violation not occurred.'

Literally speaking, the rule contained in the Former King of Greece case is composed in its turn of the following three linked elements:

i. a legal obligation to put an end to the breach;
ii. reparation for its consequences;
iii. this reparation to be made in such a way as to restore as far as possible the situation existing before the breech.

And these three ***very clear and logical elements*** are now transformed into an ambiguous formula - 'the reparation should aim at putting the applicant in the position in which she would have found herself, had the violation not occurred'".

Had it been the case that the Court had maintained that the rule from the "King of Greece case" were *logically transformable* into the rule that was applied now, then the criticism would be justified for reasons of logic. For from the point of view of logic such a transformation is possible but not necessarily so. But there is no reason to suppose that the Court intended the rule applied *in casu* to be understood as being a *logically necessary reformulation* of a principle that had been formulated at an earlier stage. It is true that for reasons of logic the question arises (and here the minority vote is onto an interesting idea) as to whether the rule from the "King of Greece case" is logically compatible with the rule formulated here and whether – for any deviation that may be assumed – sufficient reasons could be explicitly given. But this question could only be studied if the rule *in casu* under debate were not simultaneously declared "ambiguous".

So far the results can be summarised as follows:

> With regard to the principle under debate that is to be applied to determine the damage suffered, either it is criticised as being incompatible with a decision taken at an earlier stage (in which case it must be deemed that the principle can be understood precisely) or it is criticised for being too vague (in which case it cannot be simply claimed that the principle is incompatible with earlier decisions).

The strongest criticism towards the majority opinion indicates that (as a preliminary formulation) the main point of attack is a potential lack of clarity in the rule it is presently based on. This accusation is formulated as follows:

"It is worth mentioning that the above-indicated ***amphibology (if not outright illogicality)***, i.e. "the reparation should aim at putting the applicant in the position in which she would have found herself, had the violation not occurred" presents an English-language modification of the formula used by the 2nd Section in the Popescu Nasta v. Romania case."

With the relativising formulation "if not" this passage basically pushes the claim of logical criticism into the realm of "possibly". What is unreservedly formulated, however, is the accusation of "amphibology". This implies a formulation which for whatever reason is open to several interpretations and which (in any nuances of comprehension connected with "amphibology") removes the clear point of connection from logical conclusions because conclusions can be drawn according to the respective understanding of the starting premise (or other means of understanding).

Apart from this criticism the minority vote also refers to a different topic that merits more detailed examination and may even be linked with a topic of logic that has not been explicitly invoked:

"I would agree that in this particular case, owing to delays in the enforcement of judicial decisions, the applicant missed some opportunities and must be fairly compensated for their loss. But in no wise, from the legal point of view, can compensation for damage, be it damage of a pecuniary or non-pecuniary nature, be treated as "putting the applicant in

> the position in which she would have found herself, had the violation not occurred". Just as it is not possible to enter the same river twice, it is not possible to return to a past situation and even less possible to place the applicant there."

Besides the impossibility of being able to enter the same river twice, the formulation that persons who have suffered damages should be put in the position in which they would have found themselves had the violation not occurred presents the question of logically necessary structures of reasoning with regard to this type of hypothetical construction. This difficult topic of logic is important in this day and age, and judicial thinking cannot avoid it if it wishes to use such principles to reach conclusions. Despite one or two logical formulations deserving criticism, the minority vote discussed here does have the merit of having aired this vital question.

16.8 Concluding Thoughts

Until recently the jurisprudence of the European Court of Human Rights was, to the German courts, a world perceived from a distance. There was even an explicit refusal to take this jurisprudence into consideration. Since the German Federal Constitutional Court's ruling of 14 October 2004, however, such thoughts – both of being distant and of keeping a distance – have become obsolete. The ruling states that

> Adhering to the rule of law (Constitutional Code, Article 20 para. 3) includes consideration of the guarantees accorded in the Convention on the Protection of Human Rights and Basic Rights ***and of the decisions of the European Court of Human Rights within the framework of the methodically feasible interpretation of laws.*** Omitting to consider a decision of the Court or executing an order in contravention of superior legislation can violate basic rights as well as the principle of the rule of law.[38]

As a consequence of this ruling the German courts will necessarily also encounter the considerations of the European Court of Human Rights that deal with logic and the soundness of judicial reasoning. If they wish to take these thoughts into consideration as proposed in the guideline of the Constitutional Court then they will have no choice but to open themselves, too, to the idea of drawing logic-based conclusions in the argumentations used in their reasoning, insofar as this is not already standard

[38]For the German wording see BVerfG, 2 BvR 1481/04 of 14.10.2004, Leitsatz 1, http://www.bverfg.de/entscheidungen/rs20041014_2bvr148104.html

procedure. Since the Constitutional Court does not postulate an automatic obligation to comply, merely conceding instead the possibility of methodically founded deviation, the minority votes at the European Court of Human Rights assume particular importance in that they are possible examples of rationally (and possibly logically) founded deviation from the majority opinion.

In the end the German courts will find themselves facing what the European Court of Human Rights has declared to be the dominant postulation with regard to logic:

"One must constantly keep in mind the original intent of all judicial conflict-resolution, which is to resolve by logic what would otherwise be resolved by arbitrariness, force, etc. **The essence of the rule of law is that the logic of private force be replaced by the public force of logic.**"[39]

In place of arbitrariness, therefore: logic.

In place of the logic of private force: the public force of logic.

Is this an objective to be fervently hoped for?

At least it is an objective that can no longer be questioned as a normative point of reference for German courts too, if ever they have to deal with the jurisprudence of the European Court of Human Rights. For what is described here as the *ultima ratio* of the "rule of law" is part of "adhering to the rule of law", according to the Constitutional Court ruling cited above, and probably not one of the principles that could be deviated from "within the framework of the methodically feasible interpretation of laws".

It will be interesting to see the further results of the interjurisdictional discourse to come that is so necessary.

Annexe

Tables of quotations containing the key words *logic*, *logical* and *"logically" (drawn up by Marie Herberger)*

[39] CASE OF NUUTINEN v. FINLAND, Application No. 32842/96, Date of Judgment 27/06/2000, http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=32450&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49 (The links to the HUDOC-database are the ones under which the decisions were retrieved originally. Due to a change in the retrieval system they do not function any more. In order to retrieve the cases cited the application number or the reference number can be used on http://cmiskp.echr.coe.int/tkp197/search.asp?sessionid=58046093&skin=hudoc-en in the search field 'Application Number'.)

Table 16.1 Quotations containing the key word *logic*

KWIC quotation	Case	File reference	Date	Link
...24 (art. 24) or 25 (art. 25) and in all *logic* such an Application could only relate to matters prior to ...	CASE OF STÖGMÜLLER v. AUSTRIA	1602/62	10/11/1969	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31296&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...inadmissibility of the petition is, from the standpoint of pure *logic*, one and indivisible. The Commission either has jurisdiction or it ...	CASES OF DE WILDE, OOMS AND VERSYP ("VAGRANCY") v. BELGIUM (MERITS)	2832/66;2835/66;2899/66	18/06/1971	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31320&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...in re sua judex esse potest. Of course, both in *logic* and in law, this could not operate per se to ...for comment under three heads, - those of probability, the *logic* of the argument, and the nature of the operation they ...	CASE OF GOLDER v. THE UNITED KINGDOM	4451/70	21/02/1975	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31210&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...As regards the first two stages, the very nature and *logic* of secret surveillance dictate that not only the surveillance itself ...Article 13 (art. 13) must be in harmony with the *logic* of the Convention. The Court cannot interpret or apply Article ...	CASE OF KLASS AND OTHERS v. GERMANY	5029/71	06/09/1978	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31224&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...Convention, vol. 6, pp. 520–590, at p. 588). However, the *logic* of the system of safeguard established by the Convention sets ...	CASE OF WINTERWERP v. THE NETHERLANDS	6301/73	24/10/1979	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31311&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr

Table 16.1 (continued)

KWIC quotation	Case	File reference	Date	Link
...than 10,000 [Belgian] francs". From this premise, they described the *logic* of the reasoning followed in the report as "curious", submitting ...	CASE OF DEWEER v. BELGIUM	6903/75	27/02/1980	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31183&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...the individual may sometimes be needed, it is neither in *logic* nor by necessary implication part of the positive freedom of ...	CASE OF YOUNG, JAMES AND WEBSTER v. THE UNITED KINGDOM	7601/76;7806/77	13/08/1981	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31322&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...the fulfilment of these conditions in a given case, the *logic* of the system of safeguard established by the Convention places ...	CASE OF X v. THE UNITED KINGDOM	7215/75	05/11/1981	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31316&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...22 above). It must therefore be asked whether the very *logic* of the Belgian system does not require subsequent judicial review, ...	CASE OF VAN DROOGENBROECK v. BELGIUM	7906/77	24/06/1982	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31185&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...decision occasioning it complied with the relevant domestic legislation, the *logic* of the system of safeguard established by the Convention sets ...	CASE OF BARTHOLD v. GERMANY	8734/79	25/03/1985	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31146&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr

Table 16.1 (continued)

KWIC quotation	Case	File reference	Date	Link
...Rent Acts; whilst it might be argued on grounds of *logic* and consistency that no limit should be set, that would ...	CASE OF JAMES AND OTHERS v. THE UNITED KINGDOM	8793/79	21/02/1986	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31221&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...does not entirely convince the Court either, despite its undeniable *logic*. It may happen that a Contracting State's agents conduct themselves ...this connection, however, is subject to limits inherent in the *logic* of the European system of protection, since it is in ...	CASE OF BOZANO v. FRANCE	9990/82	18/12/1986	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31162&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...a decision which is so outrageous in its defiance of *logic* or of accepted moral standards that no sensible person who ...a decision that is so outrageous in its defiance of *logic* or of accepted moral standards that no sensible person who ...	CASE OF WEEKS v. THE UNITED KINGDOM	9787/82	02/03/1987	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31308&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...Article 13 (art. 13) must be in harmony with the *logic* of the Convention. Consequently, the Court, consistently with its conclusion ...	CASE OF LEANDER v. SWEDEN	9248/81	26/03/1987	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31233&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...or more specific and precise provisions of national law, both *logic* and truthfulness demand that the first step in assessing whether ...	CASE OF BROGAN AND OTHERS v. THE UNITED KINGDOM	11209/84;11234/84;11266/84;11386/85	29/11/1988	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31164&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr

Table 16.1 (continued)

KWIC quotation	Case	File reference	Date	Link
...a decision which is so outrageous in its defiance of *logic* or of accepted moral standards that no sensible person who ...	CASE OF VILVARAJAH AND OTHERS v. THE UNITED KINGDOM	13163/87;13164/87;13165/87;13447/87;13448/87	30/10/1991	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31427&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...In such a case I persist in thinking that both *logic* and truthfulness demand that the first step must be to ...compatible with the Convention4. It is not only required by *logic* and truthfulness but also out of fairness to Belgium. The ...	CASE OF BORGERS v. BELGIUM	12005/86	30/10/1991	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31434&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...granting the injunction, the Supreme Court was merely sustaining the *logic* of Article 40.3.3° of the Constitution. The determination by the ...and indeed, as the Government put it, to sustain the *logic* of that provision. Fourthly, there is also a certain proportionality ...	CASE OF OPEN DOOR AND DUBLIN WELL WOMAN v. IRELAND	14234/88;14235/88	29/10/1992	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31503&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...with the Convention. This approach is not only required by *logic* and truthfulness (see my dissenting opinion in the Brogan and ...	CASE OF FEY v. AUSTRIA	14396/88	24/02/1993	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31522&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...in the present case must be in harmony with the *logic* of the Convention (see, mutatis mutandis, the Klass and Others ...	CASE OF OTTO-PREMINGER-INSTITUT v. AUSTRIA	13470/87	20/09/1994	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31611&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr

Table 16.1 (continued)

KWIC quotation	Case	File reference	Date	Link
...a decision which is so outrageous in its defiance of *logic* or of accepted moral standards that no sensible person who ...	CASE OF FAYED v. THE UNITED KINGDOM	17101/90	21/09/1994	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31604&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...and should exercise a certain power of review. However, the *logic* of the system of safeguard established by the Convention sets ...	CASE OF KEMMACHE v. FRANCE (No. 3)	17621/91	24/11/1994	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31608&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...mark "Creacions Orient" is, as a matter of law and *logic*, different from the question whether the later mark "Orient H.W. ...	CASE OF HIRO BALANI v. SPAIN	18064/91	09/12/1994	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31624&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...to correct simply as a matter of common sense and *logic*, given the absurdity of applying paragraph 1 of Article 529 ...any event have been arrived at through minimal recourse to *logic*. 30. In sum, the Court holds the applicant's complaint to ...	CASE OF GEA CATALÁN v. SPAIN	19160/91	10/02/1995	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31633&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...(art. 8). We find it inconsistent and contrary to the *logic* of the Convention system that the constraints of a legal ...	CASE OF McMICHAEL v. THE UNITED KINGDOM	16424/90	24/02/1995	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31637&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr

Table 16.1 (continued)

KWIC quotation	Case	File reference	Date	Link
...a decision which is so outrageous in its defiance of *logic* or of accepted moral standards that no sensible person who ...	CASE OF AIR CANADA v. THE UNITED KINGDOM	18465/91	05/05/1995	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31653&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...which political and moral values "creep into" academic language and *logic*, the possibilities for extra-curricular communication between teacher and pupils, the ...	CASE OF VOGT v. GERMANY	17851/91	26/09/1995	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31663&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...homicide in respect of the soldiers themselves. That is the *logic* of the situation. You may reach a situation in which ...	CASE OF McCANN AND OTHERS v. THE UNITED KINGDOM	18984/91	27.09.95	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31657&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...drawn into criminal acts in a way that defies all *logic*. Ronald Ribitsch's version of events, according to which, 'between 3 ...drawn into criminal acts in a way that defies all *logic* " (see paragraph 22 above). (6) The Constitutional Court did not ...	CASE OF RIBITSCH v. AUSTRIA	18896/91	04/12/1995	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31678&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...events unambiguous and clear. I initially thought that, following that *logic*, we should also find a breach of the principle of ...	CASE OF BULUT v. AUSTRIA	17358/90	22/02/1996	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31685&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr

Table 16.1 (continued)

KWIC quotation	Case	File reference	Date	Link
...coldly to ignore their caresses'. Although we quite appreciate the *logic* of this point of view, we have reservations about the ...	CASE OF WINGROVE v. THE UNITED KINGDOM	17419/90	25/11/1996	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31794&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...the privilege against self-incrimination may, as a matter of inherent *logic*, entail that (since no use may be made of the ...	CASE OF SAUNDERS v. THE UNITED KINGDOM	19187/91	17/12/1996	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31723&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...this connection, however, is subject to limits inherent in the *logic* of the European system of protection, since it is in ...	CASE OF LUKANOV v. BULGARIA	21915/93	20/03/1997	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31736&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...without leaving any address. It is contrary to all legal *logic* to interpret that negative behaviour on the part of the ...	CASE OF AYDIN v. TURKEY	23178/94	25/09/1997	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=32085&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr

Table 16.1 (continued)

KWIC quotation	Case	File reference	Date	Link
...account in future fiscal years in accordance with the same *logic*. The voluntary arrangements made no provision for interest to be ...	CASE OF THE NATIONAL & PROVINCIAL BUILDING SOCIETY, THE LEEDS PERMANENT BUILDING SOCIETY AND THE YORKSHIRE BUILDING SOCIETY v. THE UNITED KINGDOM	21319/93;21449/93;21675/93	23/10/1997	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31823&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...murderers"). 6. I also agree, in general terms, with the *logic* of the American "flag burning" cases where, inter alia, the ...	CASE OF GRIGORIADES v. GREECE	24348/94	25/11/1997	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31830&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
ved that the *logic* of the structure of the Convention and of the Court's ...	CASE OF TANRIKULU v. TURKEY	23763/94	08/07/1999	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=32003&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...that it was only if the purported justification "outrageously defies *logic* or accepted moral standards" that the court could strike down ...punished the victims of prejudice. The applicants considered that the *logic* of the Government's argument applied equally to the contexts of ...	CASE OF LUSTIG-PREAN AND BECKETT v. THE UNITED KINGDOM	31417/96;32377/96	27/09/1999	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=32121&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr

Table 16.1 (continued)

KWIC quotation	Case	File reference	Date	Link
...that it was only if the purported justification "outrageously defies *logic* or accepted moral standards" that the court could strike down ...punished the victims of prejudice. The applicants considered that the *logic* of the Government's argument applied equally to the contexts of ...	CASE OF SMITH AND GRADY v. THE UNITED KINGDOM	33985/96;33986/96	27/09/1999	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=32122&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...of the Court's competence according to the Convention. 6. The *logic* of accepting the Government's concession of a violation while refraining ...	CASE OF CABALLERO v. THE UNITED KINGDOM	32819/96	08/02/2000	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=32172&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...law", unless it complied with the relevant domestic legislation, the *logic* of the system for safeguarding rights established by the Convention ...	CASE OF L. v. FINLAND	25651/94	27/04/2000	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=32497&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...with reference to section 35 of the 1994 Act: "Inescapable *logic* demands that a jury should not start to consider whether ...is a clear risk of injustice if the requirements of *logic* and fairness are not observed ..." 40. In R. v. ...	CASE OF CONDRON v. THE UNITED KINGDOM	35718/97	02/05/2000	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=32512&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...public domain alchemise that public information into private data? The *logic* behind this sequence of propositions simply passes me by. 13. ...	CASE OF ROTARU v. ROMANIA	28341/95	04/05/2000	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=32300&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr

Table 16.1 (continued)

KWIC quotation	Case	File reference	Date	Link
...intent of all judicial conflict-resolution, which is to resolve by *logic* what would otherwise be resolved by arbitrariness, force, etc. The essence of the rule of law is that the *logic* of private force be replaced by the public force of *logic*. To render justice is to enforce the satisfaction of the ...	CASE OF NUUTINEN v. FINLAND	32842/96	27/06/2000	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=32450&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...pp 32–33, § 33). This constant case-law and the whole *logic* of the system established by the Convention impose reasonable limits ...	CASE OF ELSHOLZ v. GERMANY	25735/94	13/07/2000	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=32477&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...than they would otherwise have been. It also accepts the *logic* of dealing with the appeals before dealing with the reference, ...	CASE OF HOWARTH v. THE UNITED KINGDOM	38081/97	21/09/2000	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=32518&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...this connection, however, is subject to limits inherent in the *logic* of the European system of protection, since it is in ...	CASE OF WLOCH v. POLAND	27785/95	19/10/2000	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=32607&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...p. 2957, § 41). The Court has applied a similar *logic* in cases where the applicant's grievance has been directed at ...	CASE OF KUDLA v. POLAND	30210/96	26/10/2000	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=32634&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr

Table 16.1 (continued)

KWIC quotation	Case	File reference	Date	Link
...events complained of as involving human rights issues. If their *logic* was followed, every leader of a religious community who had ...	CASE OF HASAN AND CHAUSH v. BULGARIA	30985/96	26/10/2000	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=32635&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...They considered that, as a matter of legal principle and *logic*, the manner of acquisition of a property had no bearing ...	CASE OF THE FORMER KING OF GREECE AND OTHERS v. GREECE	25701/94	23/11/2000	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=32765&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...the unjustified attack, which itself must be unprovoked, etc. The *logic* here is similar to the *logic* of extreme emotional distress situations in which the actor is ...the police effecting the arrest, etc.) are satisfied. When this *logic* is applied to executing a lawful arrest, it means that ...	CASE OF REHBOCK v. SLOVENIA	29462/95	28/11/2000	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=32766&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...crimes. The majority has not found it offensive to legal *logic* to accept that there existed reasonable fears of 're-offending' when ...	CASE OF N.C. v. ITALY	24952/94	11/01/2001	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=32840&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr

Table 16.1 (continued)

KWIC quotation	Case	File reference	Date	Link
...Giunta, cited above. 7. In order to comply with this *logic*, the Court ought to split its procedure into two phases. ...to the Committee of Ministers to abide by the above *logic*. Consequently, it would be very helpful if our judgments contained ...	CASE OF LUCA v. ITALY	33354/96	27/02/2001	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=32936&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...the United Kingdom government to decide to what extent the *logic* of the Court's decision calls either for automatic review or ...	CASE OF KEENAN v. THE UNITED KINGDOM	27229/95	03/04/2001	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=33079&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...investigation had killed the individual in question, which defies all *logic*. There is no causal link between the "cause" and the ...	CASE OF TANLI v. TURKEY	26129/95	10/04/2001	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=33086&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...not? In the Court's view, there is force and hard *logic* in those submissions. There are also a number of other ...	CASE OF ATLAN v. THE UNITED KINGDOM	36533/97	19/06/2001	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=33234&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...not unreasonable for the German courts to assume that the *logic* of the system excluded any German review of confiscation measures ...§ 52). It might even be feasible, following the same *logic*, to deny the "genuine and serious" nature of the dispute, ...	CASE OF PRINCE HANS-ADAM II OF LIECHTENSTEIN v. GERMANY	42527/98	12/07/2001	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=33305&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr

Table 16.1 (continued)

KWIC quotation	Case	File reference	Date	Link
...unwillingness to go further is understandable. But there is in *logic* no justification for drawing a line at this point. If ...his or her own death, it would necessarily follow in *logic* that such a person would have a right to be ...	CASE OF PRETTY v. THE UNITED KINGDOM	2346/02	29/04/2002	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=34162&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...2. 4. Thus, in a case of this kind, simple *logic* dictates that the essential task is to establish the "procedural ...right to life under Article 2. Contrary to this legal *logic*, what the Court has done is to list, randomly, a ...	CASE OF SEMSI ONEN v. TURKEY	22876/93	14/05/2002	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=34165&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...of Article 2. Reasoning of that kind defies all elementary *logic*, in my opinion, and is therefore unacceptable to me. 6. ...being clear and convincing and is in contradiction with legal *logic*. Some people, and the applicant is one, are awarded sums ...	CASE OF ORHAN v. TURKEY	25656/94	18/06/2002	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=34223&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...seems to me right as a matter of principle and *logic* to give predominance to psycho *logic* al factors just as it seem ...	CASE OF I. v. THE UNITED KINGDOM	25680/94	11/07/2002	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=34309&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr

Table 16.1 (continued)

KWIC quotation	Case	File reference	Date	Link
...seems to me right as a matter of principle and *logic* to give predominance to psycho *logic* al factors just as it seem ...	CASE OF CHRISTINE GOODWIN v. THE UNITED KINGDOM	28957/95	11/07/2002	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=34310&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...however, the second finding is the result of implacable jurisprudential *logic*. In Reinhardt and Slimane-Kai¨d v. France (judgment of 31 March ...or in respect of new arguments formulated in terms of *logic* or justice and presented orally to the court with its ...	CASE OF MEFTAH AND OTHERS v. FRANCE	32911/96;35237/97;34595/97	26/07/2002	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=34352&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...with reference to section 35 of the 1994 Act: "Inescapable *logic* demands that a jury should not start to consider whether ...is a clear risk of injustice if the requirements of *logic* and fairness are not observed (...)" 46. In R. v. ...	CASE OF BECKLES v. THE UNITED KINGDOM	44652/98	08/10/2002	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=34386&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...said to him previously, because, and you will understand the *logic* of that, the information is all coming from one source, ...	CASE OF ALLAN v. THE UNITED KINGDOM	48539/99	05/11/2002	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=34427&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...their case had been decided on the basis of the *logic* applied before the amendment to the Code of Civil Procedure ...	CASE OF ZVOLSKY AND ZVOLSKA v. CZECH REPUBLIC	46129/99	12/11/2002	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=34463&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr

Table 16.1 (continued)

KWIC quotation	Case	File reference	Date	Link
...provided no justification, as a matter of legal principle and *logic*, for reducing the amount of compensation. Moreover, this argument was ...applicants stressed that, as a matter of legal principle and *logic*, any privileges or tax exemptions that were available to members ...	CASE OF THE FORMER KING OF GREECE AND OTHERS v. GREECE	25701/94	28/11/2002	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=34511&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...Ress in his separate opinion. However, I would take the *logic* of the arguments – as I did in Cable and ...	CASE OF SIGURDSSON v. ICELAND	39731/98	10/04/2003	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=34734&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...The Court understands the spirit of this rule and the *logic* on which it is based: the duties of Government Commissioner ...	CASE OF YVON v. FRANCE	44962/98	24/04/2003	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=34767&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...which was free of mistakes in law and errors of *logic*. No link can be established, and moreover no link was ...	CASE OF PERNA v. ITALY	48898/99	06/05/2003	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=34789&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...of things because all the conditions are right. The usual *logic* of hitting one person in order to teach a hundred ...	CASE OF CRAXI (No. 2) v. ITALY	25337/94	17/07/2003	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=34943&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr

Table 16.1 (continued)

KWIC quotation	Case	File reference	Date	Link
...Once the case had begun with one judge, efficiency and *logic* dictated that it remain with him and, in any event, ...	CASE OF DORAN v. IRELAND	50389/99	31/07/2003	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=34991&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...grounds of personal hardship was in accordance with the underlying *logic* of the treaty, which the Court has found to strike ...	CASE OF SLIVENKO v. LATVIA	48321/99	09/10/2003	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=35048&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...without reservation on that finding; but I believe that the *logic* and cogency of the judgement would have benefited had the ...	CASE OF NACHOVA AND OTHERS v. BULGARIA	43577/98;43579/98	26/02/2004	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=35362&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...disenfranchising prisoners and the objectives is not empirically demonstrable, reason, *logic* and common sense, as well as extensive expert evidence, support ...	CASE OF HIRST v. THE UNITED KINGDOM (No. 2)	74025/01	30/03/2004	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=35394&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...that they are either contradicted by other evidence or defy *logic*. The Court therefore considers that the evidence given by Celal ...	CASE OF AHMET OZKAN AND OTHERS v. TURKEY	21689/93	06/04/2004	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=35410&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr

Table 16.1 (continued)

KWIC quotation	Case	File reference	Date	Link
...there is a clear distinction, from the angle of formal *logic*, between the notion of a proven "fact" and that of ...that, if we apply here again the laws of formal *logic*, had the applicant had the intention to deposit the money ...circumstances it is impossible, from the point of view of *logic*, to accept as proven beyond a reasonable doubt the "fact" ...present. I do understand that applying the laws of formal *logic* is not the best way of approaching judicial cases, but ...say that I am unable to accept this line of *logic*, which is far from the general standards of the theory ...I find it incorrect and contrary to the laws of *logic* to transform the above rule in the present judgment into: ...is the case, and if we accept the laws of *logic*, in the present situation, we are bound to follow previous ...	CASE OF PRODAN v. MOLDOVA	49806/99	18/05/2004	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=35470&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...trustee was in conformity with his legal duties and the *logic* of the situation. According to domestic law (section 50, sub-section ...	CASE OF NARINEN v. FINLAND	45027/98	01/06/2004	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=35511&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr

Table 16.1 (continued)

KWIC quotation	Case	File reference	Date	Link
...and Former King of Greece and Others, § 87). This *logic* applies to such fundamental changes of a country's system as ...satisfaction has rather absurd results. This follows the crucial legal *logic* according to which the right and the remedy must be ...Convention itself, any additional legal rationalisation to legitimise its principled *logic*, and especially if it is to seek that legal basis ...deriving from the same cause." The true reason for the *logic* started in Scozzari and Giunta and continued in Assanidze v. ...	CASE OF BRONIOWSKI v. POLAND	31443/96	22/06/2004	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=35541&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...whether the Russian Federation has jurisdiction it preferred the opposite *logic* in holding that there is "jurisdiction" because there is "responsibility". ...	CASE OF ILASCU AND OTHERS v. MOLDOVA AND RUSSIA	48787/99	08/07/2004	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=35599&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr

Table 16.2 Quotations containing the key word *logical*

KWIC quotation	Case	File reference	Date	Link
...off the list as he found this solution to be *logical* and reasonable if one took into account that, in these ...date was not contrary to the Convention, the Commission, in *logical* consequence of these premises, declared that it would not wish ...	CASE OF DE BECKER v. BELGIUM	214/56	27/03/1962	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31147&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...justified by the principle of economy of proceedings, by the *logical* sequence in which the various questions arise and by the ...	CASE "RELATING TO CERTAIN ASPECTS OF THE LAWS ON THE USE OF LANGUAGES IN EDUCATION IN BELGIUM" v. BELGIUM	1474/62;1677/62;1691/62;1769/63;1994/63;2126/64	09/02/1967	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31238&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...proceedings leading to the final judgment. It seems natural and *logical* that this protection is secured to him by the application ...	CASE OF WEMHOFF v. GERMANY	2122/64	27/06/1968	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31309&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr

Table 16.2 (continued)

KWIC quotation	Case	File reference	Date	Link
...(art. 14+P1-2) of the Convention. This opinion follows from a *logical* application of the principles formulated by the Court, in particular, ...does not imply any positive obligation of the State. A *logical* interpretation of Article 2 (P1-2) leads to the same result. ...grounded. The negative interpretation adopted by the Commission is both *logical* and consistent with the wording of Article 2 (P1-2). Article ...	CASE "RELATING TO CERTAIN ASPECTS OF THE LAWS ON THE USE OF LANGUAGES IN EDUCATION IN BELGIUM" v. BELGIUM (MERITS)	1474/62;1677/62;1691/62;1769/63;1994/63;2126/64	23/07/1968	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31239&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...the one hand such a waiver appeared to be a *logical* consequence of the whole arrangement and, on the other hand, ...	CASE OF NEUMEISTER v. AUSTRIA (ARTICLE 50)	1936/63	07/05/1974	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31257&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr

Table 16.2 (continued)

KWIC quotation	Case	File reference	Date	Link
...feeling, attitude, or even policy, rather than correct legal or *logical* argument, there is scarcely a solution along those lines either. ...that is, access to a court". As a matter of *logical* reasoning however, this is a complete non-sequitur. It might perhaps ...best highly exaggerated. (b) The argument embodies a well known *logical* fallacy, in so far as it proceeds on the basis ...one about. The Judgment also abounds in the type of *logical* fallacy that derives B from A because A does not ...	CASE OF GOLDER v. THE UNITED KINGDOM	4451/70	21/02/1975	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31210&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...of Article 5 (art. 5) in the Convention and its *logical* link with Article 6 (art. 6), are an indication that ...	CASE OF ENGEL AND OTHERS v. THE NETHERLANDS	5100/71;5101/71;5102/71;5354/72;5370/72	08/06/1976	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31193&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...satisfied. I regard these safeguards as necessary and indeed the *logical* sequence of the principles laid down in the Lawless case. ...	CASE OF IRELAND v. THE UNITED KINGDOM	5310/71	18/01/1978	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31220&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr

Table 16.2 (continued)

KWIC quotation	Case	File reference	Date	Link
...negative vote on questions 1 and 2, it was only *logical* that I should also give a negative vote on questions ...	CASE OF KÖNIG v. GERMANY	6232/73	28/06/1978	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31226&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...assert in the last place that it would not be *logical* to exempt a convicted person from payment of the interpretation ...	CASE OF LUEDICKE, BELKACEM AND KOÇv. GERMANY	6210/73;6877/75;7132/75	28/11/1978	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31244&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...a necessary truth. Rights of inheritance and disposal are not *logical* concomitants of the right to have and to hold. They ...	CASE OF MARCKX v. BELGIUM	6833/74	13/06/1979	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31248&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...designed to ensure that the course of the proceedings is *logical* and orderly. The function of sifting which Articles 26 and ...	CASE OF ARTICO v. ITALY	6694/74	11/05/1979	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31138&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...it, two aspects of the same freedom. There is no *logical* link between the two. The positive freedom of association safeguards ...	CASE OF YOUNG, JAMES AND WEBSTER v. THE UNITED KINGDOM	7601/76;7806/77	13/08/1981	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31322&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr

Table 16.2 (continued)

KWIC quotation	Case	File reference	Date	Link
...being for Mr. P. Van de Walle's attention, it is *logical* to suppose that he knew that that judicial officer had ...	CASE OF PIERSACK v. BELGIUM	8692/79	01/10/1982	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31271&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...(art. 5–4) of the Convention, I do not consider it *logical* that the applicant should, in the same judgment, be granted ...	CASE OF SANCHEZ-REISSE v. SWITZERLAND	9862/82	21/10/1986	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31285&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...of Article 6 (art. 6), I do not consider it *logical* - as I said in my dissenting opinion annexed to ...	CASE OF H. v. BELGIUM	8950/80	30/11/1987	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31215&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...on the exact content of these requirements'." 4. In purely *logical* terms I find it very difficult to regard the fines ...	CASE OF MÜLLER AND OTHERS v. SWITZERLAND	10737/84	24/05/1988	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31201&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...that case send me your report', which would have been *logical* if the assignment had been to obtain information, but says ...	CASE OF SCHENK v. SWITZERLAND	10862/84	12/07/1988	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31286&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr

Table 16.2 (continued)

KWIC quotation	Case	File reference	Date	Link
...There is also a second series of difficulties, which are *logical* rather than legal in nature. Can it normally be expected ...	CASE OF CIULLA v. ITALY	11152/84	22/02/1989	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31174&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...from telephone tapping, notably searches and seizure of property. Although *logical* in itself, such "extrapolation" does not provide sufficient legal certainty ...	CASE OF HUVIG v. FRANCE	11105/84	24/04/1990	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31341&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...in the analyses. It considered the latter's opinion to be *logical* and convincing, in particular because it was consistent with Mr ...examined the findings of the proceedings in detail, in a *logical* and coherent manner in relation to the evidence, and had ...	CASE OF BRANDSTETTER v. AUSTRIA	11170/84;12876/87;13468/87	28.08.91	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31397&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...Convention in the present case, I do not consider it *logical* to join in the conclusion of the majority that the ...	CASE OF B. v. FRANCE	13343/87	25/03/1992	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31484&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr

Table 16.2 (continued)

KWIC quotation	Case	File reference	Date	Link
...69. As regards the application of the "proportionality" test, the *logical* consequence of the Government's argument is that measures taken by ...a declaration to that effect, the injunction followed as a *logical* consequence. The source of the injunction was to be found ...	CASE OF OPEN DOOR AND DUBLIN WELL WOMAN v. IRELAND	14234/88;14235/88	29/10/1992	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31503&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...the Constitution over any contrary statute. He pointed to the *logical* and legal difficulty of drawing any even remotely clear dividing-line ...	CASE OF KOKKINAKIS v. GREECE	14307/88	25/05/1993	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31541&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...of the Judicial Code (see paragraph 32 above) establishes a *logical* sequence for the formalities to be completed in order to ...to the profession of advocate. The applicant had disregarded that *logical* sequence and had thus acted erratically. This had made it ...	CASE OF DE MOOR v. BELGIUM	16997/90	23/06/1994	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31591&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...come into consideration. 3. In my opinion this is the *logical* and juridically correct approach for a reading of Article 14 ...	CASE OF KARLHEINZ SCHMIDT v. GERMANY	13580/88	18/07/1994	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31594&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr

Table 16.2 (continued)

KWIC quotation	Case	File reference	Date	Link
...of the mandatory life licence was thus, in reality, the *logical* corollary of the discretionary sentence. In the alternative, he maintained ...	CASE OF WYNNE v. THE UNITED KINGDOM	15484/89	18/07/1994	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31600&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...the obligation of the arrested person to carry out a *logical* exercise so that he will thereby know of the charge ...	CASE OF MURRAY v. THE UNITED KINGDOM	14310/88	28/10/1994	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31609&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...Spanish State, provides for "guarantees to appear for trial". A *logical*, purposive interpretation of that Article (art. 5) in the context ...	CASE OF VAN DER TANG v. SPAIN	19382/92	13/07/1995	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31660&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...with Article 10 (art. 10). The injunction was only a *logical* consequence of this finding and was framed precisely to prevent ...	CASE OF TOLSTOY MILOSLAVSKY v. THE UNITED KINGDOM	18139/91	13/07/1995	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31661&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...para. 35), has interpreted this Article (art. 11) in its *logical* sense that this negative right of association - the right ...In my opinion, however, the majority has not reached the *logical* consequence of this premise, namely that the facts adduced by ...	CASE OF GUSTAFSSON v. SWEDEN	15573/89	25/04/1996	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31707&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr

Table 16.2 (continued)

KWIC quotation	Case	File reference	Date	Link
...Court has already had occasion to note, it is a *logical* consequence of the principle that laws must be of general ...	CASE OF CANTONI v. FRANCE	17862/91	15/11/1996	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31782&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...we took on the preliminary objection, we should as a *logical* consequence have found that there had been a violation of ...	CASE OF AKSOY v. TURKEY	21987/93	18/12/1996	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31717&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...which is based on other provisions. 1. It is *logical* that if the person concerned is detained only for the ...	CASE OF SCOTT v. SPAIN	21335/93	18/12/1996	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31724&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...and no charges may be brought against them ...'. A *logical* and systematic interpretation of the aforesaid provision suggests that [what ...	CASE OF LUKANOV v. BULGARIA	21915/93	20/03/1997	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31736&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...the present judgment is neither within these lines nor a *logical* continuation thereof, while on the other hand the facts of ...	CASE OF VAN MECHELEN AND OTHERS v. THE NETHERLANDS	21363/93;21364/93;21427/93;22056/93	23/04/1997	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31744&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr

Table 16.2 (continued)

KWIC quotation	Case	File reference	Date	Link
...were incurred by the applicants (that would appear to be *logical*) and that it is they, the applicants, who must be ...	CASE OF MENTES AND OTHERS v. TURKEY	23186/94	28/11/1997	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31834&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...of the interpretation of Article 6 in both historical and *logical* terms. 4. The second idea was developed in connection with ...	CASE OF HUBER v. FRANCE	26637/95	19/02/1998	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31845&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...found the evidence of the witnesses to be exhaustive and *logical* and their statements consistent. 10. The applicant filed an appeal ...	CASE OF BELZIUK v. POLAND	23103/93	25/03/1998	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31859&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...independence and impartiality cannot be regarded as objectively justified. The *logical* consequence of asserting the contrary would be to cease to ...	CASE OF INCAL v. TURKEY	22678/93	09/06/1998	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31911&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...Unfortunately, the majority of the Court have not drawn the *logical* consequences from those findings and observations. 6. In my opinion, ...	CASE OF SHEFFIELD AND HORSHAM v. THE UNITED KINGDOM	22985/93;23390/94	30/07/1998	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31926&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr

Table 16.2 (continued)

KWIC quotation	Case	File reference	Date	Link
...appeal on the ground that the investigating judge had given *logical* and sufficient reasons for his decision. The court noted that ...	CASE OF CONTRADA v. ITALY	27143/95	24/08/1998	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31931&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...the decision to retire him on grounds of invalidity, a *logical* consequence of the rules. In its judgment of 31 May ...	CASE OF COUEZ v. FRANCE	24271/94	24/08/1998	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31934&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...parties. The unacceptability of delay in private litigation is a *logical* consequence of the fact that the first act of the ...to bellum omnium contra omnes, i.e., anarchy. It is, therefore, *logical* that the calculation of delay in such cases should depend ...been very small. Apart from that, it would not be *logical* to require them to object to expropriation as such. As ...wholly in conflict with the actual reality. This is only *logical*, since the intent of irrebuttable presumptions is in effect to ...particular situation, would seem to me to be the only *logical* answer to the fact that litigation over this aspect of ...	CASE OF PAPACHELAS v. GREECE	31423/96	25/03/1999	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=32005&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr

Table 16.2 (continued)

KWIC quotation	Case	File reference	Date	Link
...the identity of those who had written them. No persuasive *logical* explanation of this was given to the Court.	CASE OF SELMOUNI v. FRANCE	25803/94	28/07/1999	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=32001&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...the interests of national security. This, I think, is the *logical* connotation of the principle that in assessing the pressing social ...	CASE OF LUSTIG-PREAN AND BECKETT v. THE UNITED KINGDOM	31417/96;32377/96	27/09/1999	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=32121&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...the interests of national security. This, I think, is the *logical* connotation of the principle that, in assessing the pressing social ...	CASE OF SMITH AND GRADY v. THE UNITED KINGDOM	33985/96;33986/96	27/09/1999	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=32122&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...22 April 1992 the Court of Cassation had drawn the *logical* conclusion from the finding that the index which served as ...	CASE OF ZIELINSKI AND PRADAL & GONZALEZ AND OTHERS v. FRANCE	24846/94;34165/96;34173/96	28/10/1999	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=32306&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...law expressed in the Preamble to the Convention to its *logical* conclusion. It is obviously prudent to avoid an actio popularis. ...	CASE OF ATHANASSOGLOU AND OTHERS v. SWITZERLAND	27644/95	06/04/2000	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=32274&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr

Table 16.2 (continued)

KWIC quotation	Case	File reference	Date	Link
...The witness said that he was unable to give a *logical* explanation as to the fact that six people had maintained ...	CASE OF ERTAK v. TURKEY	20764/92	09/05/2000	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=32913&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...ledgers. While this would indeed appear to have been a *logical* step in an investigation of this nature, it is nevertheless ...	CASE OF TIMURTAS v. TURKEY	23531/94	13/06/2000	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=32615&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...for a system of preliminary questions, it was reasonable and *logical* for the court dealing with an application for a reference ...	CASE OF COEME AND OTHERS v. BELGIUM	32492/96;32547/96;32548/96;33209/96;33210/96	22/06/2000	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=32908&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...June 1992, Series A no. 238, p. 18, § 34). *logical* conclusions flow from that definition. (a) Firstly, only "victims" within ...	CASE OF ILHAN v. TURKEY	22277/93	27/06/2000	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=32448&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr

Table 16.2 (continued)

KWIC quotation	Case	File reference	Date	Link
...by the final judicial decision, the problem metamorphoses into a *logical* absurdity. How does this absurdity arise? Judicial decisions are rendered through a *logical* syllogism (or, in the common-law tradition, through stare decisis analogy) ...of him, in so far as his aggressiveness was a *logical* consequence of the fact that he has been brutally denied ...justifies the ultimately total denial of access is simply not *logical*. The distinguishing characteristic of the case we have decided today ...	CASE OF NUUTINEN v. FINLAND	32842/96	27/06/2000	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=32450&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...of proceedings before the Commission and the former Court was *logical* and orderly; the function of sifting which former Articles 26 ...	CASE OF DIKME v. TURKEY	20869/92	11/07/2000	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=32465&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...family be implemented in an effective and coherent manner. No *logical* purpose would be served in deciding that visits may take ...	CASE OF SCOZZARI AND GIUNTA v. ITALY	39221/98;41963/98	13/07/2000	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=32466&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr

Table 16.2 (continued)

KWIC quotation	Case	File reference	Date	Link
...witnesses. As to the date of the rape, it was *logical* to deduce that it was immediately prior to R.'s refusal ...	CASE OF MATTOCCIA v. ITALY	23969/94	25/07/2000	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=32478&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...solely in respect of information concerning civil-party applications. From a *logical* standpoint, moreover, I find it odd that the majority should ...	CASE OF DU ROY AND MALAURIE v. FRANCE	34000/96	03/10/2000	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=32543&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...court dismissed this request, holding, inter alia: "... It is *logical* that [the applicant] should be released after bail is paid. ...	CASE OF KUDLA v. POLAND	30210/96	26/10/2000	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=32634&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...in company X. Given that he had resigned, it was *logical* to release him. The Judge for the Preliminary Investigations, however, ...	CASE OF N.C. v. ITALY	24952/94	11/01/2001	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=32840&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...running for the purposes of appeal? That is not very *logical*. In the present case, admittedly, there is room for genuine ...	CASE OF VAUDELLE v. FRANCE	35683/97	30/01/2001	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=32881&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr

Table 16.2 (continued)

KWIC quotation	Case	File reference	Date	Link
...Court of Cassation by persons convicted in absentia was a *logical* consequence of the nature of the judgment, which by its ...	CASE OF KROMBACH v. FRANCE	29731/96	13/02/2001	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=32925&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...trial continues to sit in prison. Pecuniary just satisfaction is *logical* only if we set out from the premise that gravely ...in Section I of [the] Convention". It would not be *logical* to assume that this obligation simply ceases to exist, perhaps ...	CASE OF LUCA v. ITALY	33354/96	27/02/2001	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=32936&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...of legality has to do with objective, rigorous semantic and *logical* legal restrictions (lex certa) on the State's power to punish. ...	CASE OF STRELETZ, KESSLER AND KRENZ v. GERMANY	34044/96;35532/97;44801/98	22/03/2001	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=33067&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...seemingly paradoxical, but – to my mind – simple and *logical*, way of arriving at the conclusions of the judgment would ...2 but not of Article 3. There is thus no *logical* hierarchy between them. Admittedly, the practice is to follow the ...	CASE OF KEENAN v. THE UNITED KINGDOM	27229/95	03/04/2001	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=33079&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr

Table 16.2 (continued)

KWIC quotation	Case	File reference	Date	Link
...a whole. There is, as the majority judgment recognises, a *logical* relationship between the public nature of the proceedings and the ...	CASES OF B. v. THE UNITED KINGDOM AND P. v. THE UNITED KINGDOM	36337/97;35974/97	24/04/2001	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=33136&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...South Africa" (Pleadings, vol. II, p. 503). These statements, by *logical* necessity, must be taken to extend to decisions taken by ...	CASE OF CYPRUS v. TURKEY	25781/94	10/05/2001	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=33168&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...judge to the jury in the summing up, provides a *logical* and complete answer to the complaint based on Steiner's alleged ...	CASE OF ATLAN v. THE UNITED KINGDOM	36533/97	19/06/2001	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=33234&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...criteria for determining what is "civil" are applied in a *logical* and reasonable manner – and that may make it necessary ...	CASE OF FERRAZZINI v. ITALY	44759/98	12/07/2001	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=33303&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...by the applicant and had reached the conclusion, supported by *logical* argument, that there had not been any infringement of her ...	CASE OF PELLEGRINI v. ITALY	30882/96	20/07/2001	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=33318&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr

Table 16.2 (continued)

KWIC quotation	Case	File reference	Date	Link
...finding that there had not been a violation, because the *logical* consequence of the conclusion reached by the majority would be ...within the meaning of Article 6 § 1 would, by *logical* implication, amount to finding that all military courts contravene Article ...	CASE OF SAHINER v. TURKEY	29279/95	25/09/2001	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=33380&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...finding that there had not been a violation, because the *logical* consequence of the conclusion reached by the majority would be ...within the meaning of Article 6 § 1 would, by *logical* implication, amount to finding that all military courts contravened Article ...	CASE OF ARI v. TURKEY	29281/95	25/09/2001	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=33381&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...finding that there had not been a violation, because the *logical* consequence of the conclusion reached by the majority would be ...within the meaning of Article 6 § 1 would, by *logical* implication, amount to finding that all military courts contravened Article ...	CASE OF MEHMET ALI YILMAZ v. TURKEY	29286/95	25/09/2001	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=33382&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr

Table 16.2 (continued)

KWIC quotation	Case	File reference	Date	Link
...finding that there had not been a violation, because the *logical* consequence of the conclusion reached by the majority would be ...within the meaning of Article 6 § 1 would, by *logical* implication, amount to finding that all military courts contravened Article ...	CASE OF FIKRET DOGAN v. TURKEY	33363/96	25/09/2001	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=33383&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...finding that there had not been a violation, because the *logical* consequence of the conclusion reached by the majority would be ...within the meaning of Article 6 § 1 would, by *logical* implication, amount to finding that all military courts contravened Article ...	CASE OF TAMKOC v. TURKEY	31881/96	25/09/2001	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=33385&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...finding that there had not been a violation, because the *logical* consequence of the conclusion reached by the majority would be ...within the meaning of Article 6 § 1 would, by *logical* implication, amount to finding that all military courts contravened Article ...	CASE OF GUNES v. TURKEY	31893/96	25/09/2001	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=33387&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr

Table 16.2 (continued)

KWIC quotation	Case	File reference	Date	Link
...finding that there had not been a violation, because the *logical* consequence of the conclusion reached by the majority would be ...within the meaning of Article 6 § 1 would, by *logical* implication, amount to finding that all military courts contravened Article ...	CASE OF ARAP YALGIN AND OTHERS v. TURKEY	33370/96	25/09/2001	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=33388&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...finding that there had not been a violation, because the *logical* consequence of the conclusion reached by the majority would be ...within the meaning of Article 6 § 1 would, by *logical* implication, amount to finding that all military courts contravened Article ...	CASE OF SELCUK YILDIRIM v. TURKEY	30451/96	25/09/2001	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=33389&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...finding that there had not been a violation, because the *logical* consequence of the conclusion reached by the majority would be ...within the meaning of Article 6 § 1 would, by *logical* implication, amount to finding that all military courts contravened Article ...	CASE OF YAKIS v. TURKEY	33368/96	25/09/2001	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=33390&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr

Table 16.2 (continued)

KWIC quotation	Case	File reference	Date	Link
...witnesses' questioning. It held that the statements were consistent and *logical* and were corroborated by each other and by other evidence ...	CASE OF SOLAKOV v. THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA	47023/99	03/12/1998	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=33583&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...a suitable home to an adopted child which was the *logical* corollary of the reference to such an interest reflected a ...of the Convention. This interpretation of Article 14 is the *logical* consequence of what it actually states: "The enjoyment of the ...	CASE OF FRETTE v. FRANCE	36515/97	26/02/2002	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=33882&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...the terms of detention on remand are not clear or *logical* [because] calculating the terms depends on various circumstances, including access ...	CASE OF STASAITIS v. LITHUANIA	47679/99	21/03/2002	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=34051&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...Paris, 1986, pp. 87–88: "The Court of Cassation drew the *logical* conclusions from the fact that the two legal systems are ...	CASE OF S.A. DANGEVILLE v. FRANCE	36677/97	16/04/2002	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=34146&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...the risk of serious non-violent offending. It would not be *logical* or rational if he was unable to refuse to order ...	CASE OF STAFFORD v. THE UNITED KINGDOM	46295/99	28/05/2002	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=34200&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr

Table 16.2 (continued)

KWIC quotation	Case	File reference	Date	Link
reached a number of *logical* conclusions (extracts from pages 148–227): "Having thus far referred strictly to the contents of the case file without drawing any *logical* 'inferences', the court considers that it must now set forth two *logical* and legal considerations whose importance is far from secondary. [p. ...	CASE OF PISANO v. ITALY	36732/97	24/10/2002	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=34420&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...entry into force of that law. ... it follows from *logical* and systematic interpretation of Section 5 (1) of the Extra-Judicial ...	CASE OF KOPECKY v. SLOVAKIA	44912/98	07/01/2003	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=34571&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...on the applicant's application, the Conseil d'Etat dismissed it on *logical* grounds, thereby indicating that the dispute had not been resolved ...	CASE OF CHEVROL v. FRANCE	49636/99	13/02/2003	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=34655&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...view, Article 2 still permits death penalty in wartime. The *logical* conclusion would then be that the death penalty constitutes a ...	CASE OF OCALAN v. TURKEY	46221/99	12/03/2003	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=34693&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr

Table 16.2 (continued)

KWIC quotation	Case	File reference	Date	Link
...national proceedings would seem to be the appropriate, if not *logical*, outcome of such a judgment. The Committee of Ministers has ...together with the compensation for damage (damnum emergens), provides a *logical* remedy in cases where there can be no restitution of ...	CASE OF SIGURDSSON v. ICELAND	39731/98	10/04/2003	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=34734&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...to the applicant's representative's question: "How can you explain this *logical* contradiction: Mr Yusev had no micro-bacterial growth but after a ...	CASE OF KHOKHLICH v. UKRAINE	41707/98	29/04/2003	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=35301&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...left it open to the viewers to decide, between various *logical* explanations, as to who was responsible for the failures in ...left it open to the viewers to decide, between various *logical* explanations, as to who was responsible for the failures in ...left it open to the viewers to decide, between various *logical* explanations, as to who was responsible for the failures in ...	CASE OF PEDERSEN AND BAADSGAARD v. DENMARK	49017/99	19/06/2003	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=34882&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr

Table 16.2 (continued)

KWIC quotation	Case	File reference	Date	Link
...appreciation" (see § 123 of the judgment). 10. It is *logical* that there be an inverse relationship between the importance of ...interferes with the rights of others. However, it is not *logical* to infer from this that the proportionality doctrine of inverse ...	CASE OF HATTON AND OTHERS v. THE UNITED KINGDOM	36022/97	08/07/2003	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=34902&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...The judgment in Stafford v. the United Kingdom was a *logical* step in a rather lengthy development whereby certain guarantees of, ...	CASE OF EZEH AND CONNORS v. THE UNITED KINGDOM	39665/98;40086/98	09/10/2003	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=35047&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...majority the award of compensation to the applicants was the *logical* consequence of finding a violation, nevertheless, in the light of ...	CASE OF SLIVENKO v. LATVIA	48321/99	09/10/2003	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=35048&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...entail and to regulate their conduct. However, it is a *logical* consequence of the principle that laws must be of general ...	CASE OF GORZELIK AND OTHERS v. POLAND	44158/98	17/02/2004	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=35351&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...by the majority in the present case: "It is a *logical* consequence of the principle that laws must be of general ...	CASE OF MAESTRI v. ITALY	39748/98	17/02/2004	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=35352&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr

Table 16.2 (continued)

KWIC quotation	Case	File reference	Date	Link
...respect for the rule of law, there is no clear, *logical* link between the loss of vote and the imposition of ...seen as part of a prisoner's punishment, there is no *logical* justification for it to continue in the case of the ...	CASE OF HIRST v. THE UNITED KINGDOM (No. 2)	74025/01	30/03/2004	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=35394&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...has taken what to my mind represents a welcome and *logical* step forward from the aforementioned restitution of property cases, as, ...	CASE OF ASSANIDZE v. GEORGIA	71503/01	08/04/2004	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=35588&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr

Table 16.3 Quotations containing the key word *logically*

KWIC quotation	Case	File reference	Date	Link
...whether the Belgian State has fulfilled its obligations, it is *logically* necessary for the Court to give a decision on the ...	CASE "RELATING TO CERTAIN ASPECTS OF THE LAWS ON THE USE OF LANGUAGES IN EDUCATION IN BELGIUM" v. BELGIUM	1474/62;1677/62;1691/62;1769/63;1994/63;2126/64	09/02/1967	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31238&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...Article 24 or Article 25 (art. 24, art. 25) and, *logically*, such an application could deal only with events prior to ...that their arguments, based on Article 26 (art. 26), led *logically* to the conclusion that the period of detention to be	CASE OF MATZNETTER v. AUSTRIA	2178/64	10/11/1969	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31251&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...no room for the application of that Article (art. 6–1). *logically* therefore, this part of the case must, for me, and ...Opinion, a term could, so far as I am concerned, *logically* be put to the question of the effect of Article ...when it is seen that the assertion in no way *logically* implies that there is a King of France, but merely ...was comprised by Article 6.1 (art. 6-1). This argument is *logically* correct, but is not completely watertight since Articles 5.4 and ...	CASE OF GOLDER v. THE UNITED KINGDOM	4451/70	21/02/1975	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31210&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr

Table 16.3 (continued)

KWIC quotation	Case	File reference	Date	Link
...(art. 6) for a criminal court. The converse seems both *logically* and legally difficult. If a penalty occasioning deprivation of liberty ...for the reasons given in 1 (a) above, I should *logically* conclude that there was a violation of Article 5 para. ...	CASE OF ENGEL AND OTHERS v. THE NETHERLANDS	5100/71;5101/71;5102/71;5354/72;5370/72	08/06/1976	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31193&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...of the Court's judgment. 12. But the reverse is not *logically* true: indeed, precisely because the one can exist irrespective of ...	CASE OF MARCKX v. BELGIUM	6833/74	13/06/1979	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31248&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...purposes of Article 6 (art. 6). This being so, it *logically* follows, as is in fact accepted in the judgment, that ...	CASE OF CAMPBELL AND FELL v. THE UNITED KINGDOM	7819/77;7878/77	28/06/1984	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31170&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr

Table 16.3 (continued)

KWIC quotation	Case	File reference	Date	Link
...worked unjustly for the reasons suggested by the Government, then *logically* it must work unjustly in respect of all tenants, regardless ...irrational. In particular, although the argument of "moral entitlement" was *logically* capable of being applied across the board, Parliament cannot be ...paragraph 49 above). On the view that Parliament took, it *logically* follows that "in equity" the tenant should only be required ...	CASE OF JAMES AND OTHERS v. THE UNITED KINGDOM	8793/79	21/02/1986	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31221&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...in a form which allowed different conclusions. It was therefore *logically* impossible for the defendant to establish that the only possible ...of assessing Mr. Kreisky's behaviour and that it could not *logically* be proved that one interpretation was right to the exclusion ...	CASE OF LINGENS v. AUSTRIA	9815/82	08/07/1986	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31237&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...were plausible and credible; their account of the incident was *logically* coherent. The applicant's previous convictions showed that conduct like that ...	CASE OF UNTERPERTINGER v. AUSTRIA	9120/80	24/11/1986	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31302&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr

Table 16.3 (continued)

KWIC quotation	Case	File reference	Date	Link
...chooses. This "inner circle" concept presupposes an "outside world" which, *logically*, is not encompassed within the concept of private life. Upon ...	CASE OF BELDJOUDI v. FRANCE	12083/86	26/03/1992	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31481&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...unjustified and, secondly, that the response was necessary and measured. *logically*, on account both of the presumption of innocence and of ...Article 8 (art. 8) in respect of the first applicant, *logically* I had to consider that there had also been one ...	CASE OF KLAAS v. GERMANY	15473/89	22/09/1993	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31540&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...from their own desire to see obscene publications, it would *logically* be necessary to punish private showings of such films too. ...	CASE OF SCHERER v. SWITZERLAND	17116/90	25/03/1994	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31586&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...had been identical to those established by the investigating judge. *logically* only paragraph 7 could apply to those facts. 28. Like ...	CASE OF GEA CATALÁN v. SPAIN	19160/91	10/02/1995	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31633&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...of the Regulation of 7 July 1987. They argued that, *logically*, the association should not have had to pay any fine ...	CASE OF PROCOLA v. LUXEMBOURG	14570/89	28/09/1995	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31658&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr

Table 16.3 (continued)

KWIC quotation	Case	File reference	Date	Link
...the true position in law. But adopt it I do. *logically*, I regard it as the only defensible stance, certainly now ...	CASE OF C.R. v. THE UNITED KINGDOM	20190/92	22/11/1995	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31669&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...the true position in law. But adopt it I do. *logically*, I regard it as the only defensible stance, certainly now ...	CASE OF S.W. v. THE UNITED KINGDOM	20166/92	22/11/1995	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31679&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...appeal court conclusively that there was a situation which could *logically* explain why the police interviews degenerated into criminal behaviour. Moreover, ...	CASE OF RIBITSCH v. AUSTRIA	18896/91	04/12/1995	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31678&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...applicant did not make use of either of these remedies. *logically*, the applicant's subsequent inaction by no means proves that if ...	CASE OF HAMER v. FRANCE	19953/92	07/08/1996	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31712&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...than answers which themselves will support a conviction. It must *logically* embrace all answers which would furnish a link in the ...	CASE OF SAUNDERS v. THE UNITED KINGDOM	19187/91	17/12/1996	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31723&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr

Table 16.3 (continued)

KWIC quotation	Case	File reference	Date	Link
...the interview had taken place and summoned journalists as witnesses. *logically*, therefore, the Court should have taken the view that the ...	CASE OF ZANA v. TURKEY	18954/91	25/11/1997	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31829&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...to depend on the first one. Surely it follows – *logically* and juridically – that the breach of the reasonable time ...	CASE OF PAFITIS AND OTHERS v. GREECE	20323/92	26/02/1998	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31855&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...stood accused of, and whether he was dangerous. Two experts *logically* had to start from working hypothesis that he had committed ...he was. The two specialists appointed by the investigating judge *logically* had to start from the working hypothesis that the applicant ...	CASE OF BERNARD v. FRANCE	22885/93	23/04/1998	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31875&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...of expression may be justified in extreme circumstances only, since *logically* such a measure would seem to be counterproductive. 6. Even ...	CASE OF AHMED AND OTHERS v. THE UNITED KINGDOM	CASE OF AHMED AND OTHERS v. THE UNITED KINGDOM	02/09/1998	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31936&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr

Table 16.3 (continued)

KWIC quotation	Case	File reference	Date	Link
...State ought to provide for a retrial. It cannot be *logically* maintained that a conviction and sentence in a criminal case ...	CASE OF CABLE AND OTHERS v. THE UNITED KINGDOM	24436/94;24582/94;24583/94;24584/94;24895/94;25937/94;25939/94;25940/94;25941/94;26271/95;26525/95;27341/95;27342/95;27346/95;27357/95;27389/95;27409/95;27760/95;27762/95;27772/95;28009/95;28790/95;30236/96;30239/96;30276/96;30277/96;30460/96;30461/96;30462/	18/02/1999	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=31925&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr

Table 16.3 (continued)

KWIC quotation	Case	File reference	Date	Link
		96;31399/96;31400/96;31434/96;31899/96;32024/96;32944/96		
...State ought to provide for a retrial. It cannot be *logically* maintained that a conviction and sentence in a criminal case ...	CASE OF HOOD v. THE UNITED KINGDOM	27267/95	18/02/1999	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=32627&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...of their families, who consented to undergo deprogramming tests which *logically* required them to be physically isolated initially. That isolation lasted ...	CASE OF RIERA BLUME AND OTHERS v. SPAIN	37680/97	14/10/1999	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=32035&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...with the Convention and, secondly, applies that answer rigorously but *logically* to the present case. 1. On the general question the ...	CASE OF ZIELINSKI AND PRADAL & GONZALEZ AND OTHERS v. FRANCE	24846/94;34165/96;34173/96	28/10/1999	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=32306&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...procedural safeguards afforded on that account to civil servants must *logically* be the same as those applicable to other types of ...	CASE OF PELLEGRIN v. FRANCE	28541/95	08/12/1999	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=32116&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr

Table 16.3 (continued)

KWIC quotation	Case	File reference	Date	Link
...becomes a matter of public knowledge and the right can *logically* and legally be asserted, since it would be absurd and ...	CASE OF MIRAGALL ESCOLANO AND OTHERS v. SPAIN	38366/97;38688/97;40777/98;40843/98;41015/98;41400/98;41446/98;41484/98;41487/98;41509/98	25/01/2000	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=32165&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...excluded under the Convention system, with all the consequences that *logically* follow. It is for that reason that the Court has ...	CASE OF MAHMUT KAYA v. TURKEY	22535/93	28/03/2000	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=32237&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...excluded under the Convention system, with all the consequences that *logically* follow. It is for that reason that the Court has ...	CASE OF KILIC v. TURKEY	22492/93	28/03/2000	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=32238&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...legal norm thus depends on unchangeable past events. It follows *logically*, that legal judgment is predetermined by the established veracity of ...	CASE OF NUUTINEN v. FINLAND	32842/96	27/06/2000	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=32450&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr

Table 16.3 (continued)

KWIC quotation	Case	File reference	Date	Link
...reads as follows: "General condition good. ... Able to communicate *logically*. He stated that this had not been his first attempt ...	CASE OF KUDLA v. POLAND	30210/96	26/10/2000	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=32634&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...perform the essential fact-finding function for the Court. It follows *logically* that the Court will have to adapt to this new ...	CASE OF REHBOCK v. SLOVENIA	29462/95	28/11/2000	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=32766&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...memory, the powers of concentration or the ability to reason *logically*". 23. On 27 August 1996 the guardianship judge heard the ...	CASE OF VAUDELLE v. FRANCE	35683/97	30/01/2001	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=32881&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...Before the Court awards pecuniary just satisfaction, this critical phrase *logically* (argumento a contrario) presupposes that the High Contracting Party's legal ...any] ... reparation to be made". This, however, does not *logically* imply that the internal legal system cannot react and correct ...the court of appeal is empowered to grant the retrial. *logically* then, the "reparation to be made" need not be "partial" ...	CASE OF LUCA v. ITALY	33354/96	27/02/2001	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=32936&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr

Table 16.3 (continued)

KWIC quotation	Case	File reference	Date	Link
...of a judge rapporteur who with his specialised knowledge was *logically* called upon to hear evidence. Moreover, his activities could be ...	CASE OF D.N. v. SWITZERLAND	27154/95	29/03/2001	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=33078&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...does not imply any personal right to retribution. It follows, *logically*, that the issue in this case is not whether the ...	CASE OF CALVELLI AND CIGLIO v. ITALY	32967/96	17/01/2002	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=34043&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...of the Convention. In their submission, the minister's reasoning should *logically* have led the court to find, in the light of ...	CASE OF STES COLAS EST AND OTHERS v. FRANCE	37971/97	16/04/2002	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=34145&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...that were pending at that stage. Lastly, the authorities had *logically* enough, in view of the high degree of uncertainty over ...	CASE OF S.A. DANGEVILLE v. FRANCE	36677/97	16/04/2002	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=34146&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...most publicity, fall into the latter category. (5) It is *logically* and jurisprudentially wrong to require judges to sentence all categories ...particular circumstances of the case before them. (6) It is *logically* and constitutionally wrong to require the distinction between the various ...	CASE OF STAFFORD v. THE UNITED KINGDOM	46295/99	28/05/2002	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=34200&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr

Table 16.3 (continued)

KWIC quotation	Case	File reference	Date	Link
...much in its decision in the instant case. It followed *logically* that the refusal by the Netherlands courts to allow the ...	CASE OF YOUSEF v. THE NETHERLANDS	33711/96	05/11/2002	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=34437&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...served two thirds of his sentence. 12. It is thus *logically* compelling that the denial of early release cannot be interpreted ...	CASE OF EZEH AND CONNORS v. THE UNITED KINGDOM	39665/98;40086/98	09/10/2003	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=35047&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...more absolute terms than the principle in the preceding sentence *logically* allows. For, if it is accepted that there are many ...	CASE OF MAESTRI v. ITALY	39748/98	17/02/2004	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=35352&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...processing his application before the Court. In addition, he claimed, *logically* in my view, that he incurred certain office expenses (such ...	CASE OF AMIHALACHIOAIE v. MOLDOVA	60115/00	20/04/2004	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=35430&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr
...The consubstantiality of the language of Articles 41 and 46 *logically* implies that the internal law of the HighContracting Party must ...other words, in Scozzari and Giunta we came to the *logically* inescapable conclusion that a restitutio in integrum should be required ...	CASE OF BRONIOWSKI v. POLAND	31443/96	22/06/2004	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=35541&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr

Table 16.3 (continued)

KWIC quotation	Case	File reference	Date	Link
...been laid by Fourteenth Army personnel, but merely contended that *logically* work of such a technical level could only have been ...	CASE OF ILASCU AND OTHERS v. MOLDOVA AND RUSSIA	48787/99	08/07/2004	http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=35599&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49&skin=hudoc-fr

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2. Index nominorum

2.1 Classical authors

2.2. Contemporaneous authors