

Legal argumentation:

Rationality and dynamism in law practice

The crisis of the formalistic legal conceptions of the late twentieth century led to a reconsideration of the issues related to the correlation among law, morality and politics. One of such issues was the re-evaluation, in practical-argumentative terms, of the concept of rationality embedded in the Constitution. Before providing a critical overview of the core aspects and the key theories of the literature conducted in this direction, this dissertation will focus on the concept of ‘argumentation’ in general terms and, subsequently, will address its applicability in legal terms.

In the rhetorical field, where speakers adjust and tailor their speeches in relation to the target audience, the argumentation represents a crucial, if not the most important, aspect of communication. Indeed, it can be argued that the argumentation is a form of ‘localised’ reasoning. It consists in inferring, from introductory statements, an enunciation that seems to lead, deductively, to a conclusion. However, unlike formal logic, the premises of the argument are not always or totally true. They are assumed as such by those who develop the reasoning or by those who listen to and evaluate it. However, the truth value that is given to what is said depends on the level of belief of all actors of the communicative event, i.e. the producer and the receiver. Consequently, arguing means reasoning in a probable and not certain context, starting from assumptions which may be, to certain degrees, widely accepted but not necessarily true. It also implies addressing interlocutors, people with their beliefs, principles, assumptions, which that may diverge from the background knowledge or implicit assumptions of the other interlocutors. Therefore, an analysis of the argumentation in rhetorical terms needs to consider that argumentation is target-specific, i.e. it occurs having a specific audience in mind, and has persuasive effects which are inevitably determined by the beliefs and knowledge of all the subjects involved in the act of communication, the speakers and their audience.

After a theoretical overview of the concept of the argumentation and the different perspectives about it in the literature to date, this dissertation will move on to the analysis of the concept of argumentation according to the legal/procedural dimension, i.e. by considering it according to its use by legal practitioners. If considered according to the legal context, it is evident that the argumentation becomes the basis of justification and, inevitably, legitimacy

of judicial decisions. This specific characteristic of legal argumentation can allow an investigation of the concept of truth and an analysis of the traditional dichotomy between real and processual truth.

Given that the work of the jurist cannot only be based on mere logical-formal operations, unable to compensate the incompleteness-indeterminacy of positive law, it is necessary to tackle the evaluation or the 'politics' of the legal decision in the event of a legitimacy issue within the legislative power. Indeed, it is the judiciary power that has a main role in the legal system. Today, judges are aware that in order to reach to the decision upon a concrete case, legal norms may not suffice. Judges may need to resort to the "sovereign prerogative of choice" among solutions which are no longer determined exclusively by legal norms, i.e. the purely technical-formal instruments of the legal system. It is precisely in relation to such concrete cases that it is possible to assist to the transformation of judges' decisions in circumstances which prepares the ground for complex ethical choices. In other words, the implicit trend in the Constitutional State to concentrate the "political aspect" in the judicial dimension is radicalised, especially if the pervasive role of the constitutional principles is considered. Constitutional principles are characterized by an intrinsically polemogenic and conflicting nature and can be directly applied to concrete cases because of the mediating intervention of the courts.

Therefore, far from offering a definitive and conclusive solution to the long-standing philosophical-juridical debate about the correlation among legal reasoning, argumentative pragmatics and the politics of law, it can be argued that the argumentative theories of law, although inspired by an immanent rationality of the constitutional orders, do not exclude subjective / "political" reasons that inexorably escape any form of universalism and transcendentalism. Consequently, the argumentative theories of law do not contribute to the construction of the moral dilemma nor, in other words, lead to a neutralisation of the moral conflict, by using strategies of legal proceduralism.

The "construction" of the fundamental rights and the universal moral discourse, inevitably, has to deal with the political matrix of the language as well as with the practical application of the Constitution in contexts characterised by heated legal debate and whose boundaries are often redrawn case by case. Finally, the "the reduction to one" of the law by a fully procedural reason, if on the one hand seems to reflect that desired feature of predictability and legal certainty of the legal norms, on the other hand it seems to neglect the excluding

features of fundamental rights, their pluralistic, and therefore inevitably conflicting nature, which calls into question the relativity and the partiality of the legal synthesis.

What are possibilities then for the legal interpreter/executor in such dynamism of legal practice? Uncertainty leaves space to possibility when the jurist, immersed in the procedural formation of law with a view to preserving the ethical aspect of the norm and, in turn, to rationally checking the jurisprudential activity, carries out a verification of the hermeneutical-practical rationality. This verification is conducted before and after, in preparation and as form of subsequent control, in order to neutralize any arbitrary or "political-judicial decision-making", and, thus, ensuring the legal argumentation the role of guarantor of rationality and dynamism in legal practice.