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The Inextricable Entanglement of Argumentation and Interpretation in Law

Abstract At the basis of tireless efforts to explain the nature of law lies the question of how judges should decide cases. Therefrom arises a need for a theory that would clarify the role of the courts and, moreover, provide guidance to them on reaching judgments. The history of legal theory abounds with various attempts to offer a generally acceptable answer to the question raised. The fervor of debate and the perpetual dissatisfaction with offered solutions prompted the thought of untamable arbitrariness of judges. In the contemporary debate the significance of argumentation is particularly emphasized as a link of the court procedure which provides reasonableness and therewith justification and persuasiveness of the decision.

Before going into the matter, I will indicate in broad strokes which areas of legal theory do argumentation and interpretation belong to. The purpose of setting a conceptual framework is to prevent losing sight of the whole as well as to limit the scope of discourse to a certain section of legal issues. The second part deals with the concept of argumentation in general and some specific features of the argumentation in law. The third part examines the role of legal interpretation and draws a clear distinction between the interpretation as a process and the interpretation as a result. At the end of the discussion I shall put forward a thesis that the interpretation as a process is argumentation, while the interpretation as a result is an argument in the justification of judgment.

Keywords: Law, Argumentation, Interpretation, Interpretive argumentation, Interpretive conclusion

1. A Conceptual Framework of Law

A thoughtful explanation of the interpretation´s and argumentation´s role in law necessitates an adumbration of the fundamental problems in legal philosophy.[1] To set a conceptual framework, although an unavoidably imprecise one, is of exceptional importance because it contributes to a better understanding of the more concrete issues due to their interconnectedness. This is supported by the fact that every formulation of fundamental issues

1 "The reflection about law, its ways of functioning, about lawyers, their thinking methods and their scientific apparatus, leads to fundamental, essential questions. Every lawyer should have them recognized and plausibly answered, if he wants to work sensibly and responsibly in his professional field." (Rüthers et al. 2015: 16)

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raises a claim to completeness in the sense that an insight into every aspect of the law is gained by providing an answer to them.

The arising difficulty consists in the disagreement among legal philosophers as to which issues are considered fundamental. Comparing different views would certainly provide a more complete insight into the set of core legal topics. However, the slender similarities considering formulations of relevant issues, the ever more precise subdivisions of concrete problems and their mutual interdependence make every attempt to draw parallels between the various conceptual frameworks almost impossible in a work of limited extent. In the light of such a vast diversity a focus is needed on a particular representative approach. In this paper the reference point shall be an instance of a three-dimensional approach.[2]

In the course of centuries legal philosophy has produced three fundamental questions about law (Rüthers et al. 2015: 3). At the very beginning of endless discussions, the fascination for this seemingly unfathomable social phenomenon was given expression in question about the essence or the nature of law: What is law? The relentless controversy between legal positivists and legal non-positivists over the relationship between law and morality has led to the limitation of the first question to the criteria of the validity of law and the separation of the second question about the normativity of law: Why does law (not) obligate? The gap between the principle of legal certainty and the inherent indeterminacy of language, in which all law is expressed, led to the division into formalist and skeptical viewpoints and brought the methodological problem to the fore: How to apply law correctly?[3] While the first

2 In opposition to the three-dimensional framework, some authors make difference only between two fundamental questions: "What is law?" and "What is the law in a concrete case?" The first question concerns the essence or the nature of law, while the second question refers to the application of law. In such a two-dimensional framework the whole legal theory is divided in an abstract and a concrete level. The question about the nature of law further decomposes into the question about validity of law and the question about normativity of law. Therefrom arises an assumption that in the two-dimensional framework the question about legal normativity has a conceptual character, which means that all legal norms are either always obligatory or never obligatory. In contrast, in the three-dimensional framework a legal norm can, but must not possess normative strength. In other words, the question about normativity of law has to be solved in each case separately. See: Marmor, Sarch, internet.

3 In a two-dimensional framework at the concrete level some authors make difference between two questions. First, "What is the law in a concrete case?" that is "What does the law say in a concrete case?" Second, "How should a judge solve a case?" that is "What should the judgment say in a concrete case?" Kelsen, Hart and Raz consider those two questions as different, which means that their explanations of law and their explanations of adjudications are not one and the same. That means that non-legal reasons may play a role in reaching a judicial decision. Judges must have discretion in order to interpret unclear legal provisions, to correct legally valid, but particularly immoral norms or to fill

two issues are of a particularly theoretical nature, the third issue belongs to more practical spheres of jurisprudence.

Numerous authors seek to focus their research of law on a particular field and thus make the greatest possible contribution to legal philosophy due to the precision of methods, though at the cost of the generality of subject matter. In contrast to such a diversification, there is an understanding that in principle three fundamental issues cannot be solved separately. With extraordinary skillfulness Dworkin strives to interweave each of the three fundamental questions in the network of his comprehensive theory.[4] Starting from the thesis that judges do not enjoy discretion and thus can never overstep the bounds of law, it was necessary to extend the narrow conception of law beyond the enacted regulations and to bring the answer to question about the nature of law into accordance with the assumptions about its application. For this reason, Dworkin introduced legal principles in addition to legal rules and defined them as "requirement(s) of justice or fairness or some other dimension of morality" whose origin as "legal principles lies not in a particular decision of some legislature or court, but in a sense of appropriateness developed in the profession and the public over time" (Dworkin 1977: 22, 40). The presence of a moral element in the solution of the remaining two fundamental problems inevitably led to providing at least partial answer to the question of the normative power of law.

Dworkin's stance teaches us that the dividing lines in law should not be drawn too sharply. Answering any of the fundamental questions has inevitable consequences for the conception and solution of the remaining two issues. This is, among other things, shown by the fact that for a long time all the inquiry about law boiled down to just one all-encompassing question: What is law? However, the distinction between the fundamental issues emphasizes various aspects and provides an insight into the complexity of legal phenomenon. The peculiarities of a legal theory arise precisely from the fact which question is given priority and therefore answered first of all.

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gaps where the law is undesignated. On the contrary, Dworkin treats the two questions as equal. Accordingly, the problems of ambiguity, immorality or incompleteness of law do not emerge, so that the judges do not resort to non-legal reasons in making their decision. All the reasons for the judgment represent necessarily a part of law. See: Dickson, internet.

4 Although Dworkin accepts to a certain extent the differentiation between the question about the essence of law and the question about the obligatoriness of law, in the sense that the legal philosophy investigates the "grounds of law" (criteria of legal validity), while the political philosophy is interested in the "force of law" (obligatory character of law), he explicitly claims that an exclusive debate about one problem is only possible at the high level of abstraction and on the basis of a sufficient agreement about the other problem. Dworkin 1986: 108–113.

Since the three fundamental problems have struck strong roots in contemporary theory of law, it is advisable to abide by the set conceptual framework. Legal argumentation and interpretation belong to a more practical sphere of jurisprudence.[5] Therefore, the discourse on relationship between legal interpretation and argumentation falls into the third section of legal issues.

2. Law and Argumentation

Lawyers argue. Judges are moreover under the obligation to legally justify their decisions. Attorneys as representatives in criminal or civil matters try to convince the judge of the valid legal grounds for the raised claims respectively. The course of the court proceedings evidently shows that the function of lawyers has an argumentative character. At the same time, the arguments put forward before the court have specific features that make them legal arguments. In order to explain legal argumentation, it is necessary to become acquainted with the concept of argumentation in general, and then to establish the connection between law and argumentation.

2.1. The Concept of Argumentation

Legal argumentation is a type of argumentation. The basic question expected to be answered when explaining the argumentative nature of the legal practice concerns the concept of argumentation. At first glance, it is surprising that in many works devoted to the problem of argumentation in law it is rare to find an explicit definition of argumentation in general. One of the exceptions is the simple definition given by MacCormick in his article *Argumentation and Interpretation in Law*: "Argumentation is the activity of presenting arguments for or against something." (MacCormick 1993: 16) A definition in that manner can be considered in the light of Agrippa's trilemma: 1) If the concept of argument were to be explained by reference to argumentation, a circular definition error would be committed; 2) The definition of argument as a reason for or against something would leave unresolved the pressing question about the essence of reason; 3) The assumption that the concept of argument is self-explanatory also leaves room for doubt. The offered definition can be justified by MacCormick's primary intention to distinguish between theoretical and practical argumentation, as well as to attribute practical character to the legal argumentation. Be that as it may, in his article MacCormick did not take on the task to construct a comprehensive definition of argumentation that would serve as a basis for the explanation of its role in law.

5 "Legal interpretation is a means for the realization of the practical task of jurisprudence. It ultimately consists in that to say what is legally required, prohibited and permitted in concrete cases." (Alexy 1995: 79)

Considering that legal theorists avoid an explicit and concise definition of both legal argumentation and argumentation in general, the question arises as to whether the argumentation can be defined and whether there is a need for a definition. One of the important lessons for jurisprudence was Hart's attitude towards the problem of definition in law (Hart 1994: 13–17). The classic form of definition *per genus proximum and differentiam specificam* is distinguished by its simplicity. In addition, it offers a set of words that can always replace the relevant term. The elegance of such a definition is flawed by the fact that it is often impossible to meet its conditions.[6] According to Hart the problems involved are sometimes too different from one another and too fundamental to be resolved by means of a definition. The absence of a definition clearly indicates that such an attitude prevails among legal theorists with respect to the concept of argumentation.

In contrast, a glimpse on the situation in the theory of argumentation provides an insight into a generally affirmative attitude towards the definition of basic concepts.[7] Under the strong influence of classical and post-classical rhetoric and dialectics, different approaches are established which offer a vast array of arguments (Van Eemeren 2001: 12–17). The main problem consists in the fact that each of those approaches starts from a different point. In order to properly understand any offered definition of a fundamental problem such as argumentation, it is necessary to gain insight into the basic assumptions of the relevant approach.

Bearing in mind the difficulties that arise in the analysis of the fundamental legal concepts and drawing on the contribution made by the theory of argumentation, I consider that a provisional definition of argumentation with a necessary explanation of some additional aspects would be instructive.[8] Argumentation can be defined as a process of convincing that a particular standpoint is correct by giving reasons.[9] A difference can be drawn

6 According to Hart there are three main obstacles to this type of definition: 1) the generic concept may be unclear; 2) all words have a penumbra of uncertainty; 3) the meaning of word depends on the context. See: Hart 1994: 13–17.

7 "A definition of argumentation suitable to be used in argumentation theory as an academic discipline should, in our view, connect with commonly recognized characteristics of argumentation as it is known from everyday practice." (Van Eemeren et al. 2014: 3)

8 Alexy appeals to the same kind of reason in order to justify his definition of philosophy. It should only serve as "a starting point for an answer to the question about the nature of legal philosophy. (W)e need, indeed, an understanding of the general nature of philosophy only as a first step and not as a final and complete basis on which our understanding of the nature of legal philosophy rests, like a house on its foundations." (Alexy 2004: 157)

9 For the sake of comparison a definition from the argumentation theory follows: „*Argumentation* is a verbal, social, and rational activity aimed at convincing a reasonable critic of the acceptability of a certain opinion by advancing one or more propositions designed to justify that standpoint." (Van Eemeren, Henkemans 2017: 1)

between the pro and contra arguments depending on whether the reasons affirm or deny the relevant standpoint. From the concept of argumentation follows its interactive, communicative and rational character. In order for a particular position to be considered correct, it must be reasoned (argued).

Argumentation has an interactive character. It is part of a dialogue, not a monologue. Arguments are presented when one is supposed to convince the other of the correctness of a particular point of view. Interactivity consists in the intended change of attitudes of the addressee. Opinions on an issue must be originally divided in order to start arguing at all. The argumentator adopts a certain standpoint in advance and seeks to show the other party that it is correct by giving reasons. The listener or reader either advocates the opposite view or has not yet taken a stance on the relevant issue.[10] Argumentation can be symmetrical or asymmetrical depending on whether both sides advance and advocate opposite views, or the audience has yet to gain insight into and take a stand on a problem (Rescher 2007: 26).

Argumentation has a communicative character. As a rule, the arguments are formulated in words. Nonetheless, the reasons may be expressed by using a variety of symbols. [11] Anything that can be a bearer of meaning can be a bearer of argument. Still, having in mind that the other symbols can always be reformulated into the signs of language, and given that language is a regular means of communication, it is plausible to say that argumentation has a verbal character.[12] After all, the use of language is often implicit in the reconstruction of the argumentative procedure.

Argumentation has a rational character. Giving arguments means referring to rationality. The argumentator always starts from the implicit assumption that the listener or reader will act as a rational critic when judging whether the reasons offered are valid or invalid.[13] The necessary premise of

10 If the convincement about the correctness of a certain standpoint could be graduated, then arguments could be used not only to create a new or qualitatively change the present opinion of another party, but also to quantitatively weaken or strengthen the convincement about the correctness of an already accepted standpoint. In that case the argumentation could also take place between the subjects who share the standpoint about certain question. Nonetheless, the regular assumption underlying argumentation is a discrepancy between the standpoints or an absence of standpoint on the side of the audience.

11 "Although these communicative moves are usually verbal, they can also be wholly or partly nonverbal, e.g., visual." (Van Eemeren et al. 2014: 5)

12 "Argumentation is a verbal activity that can be performed orally and in writing." Van Eemeren, Henkemans, 2017: 1.

13 "(Argumentation) is aimed at convincing the addressee of the acceptability of the standpoint by making them see that mutually shared critical standards of reasonableness have been met. Trying to convince the addressee by means of argumentation relies on the idea that the other party will approach the argumentation constructively, judging its soundness reasonably." (Van Eemeren et al. 2014: 6)

argumentative activity states that the subjects of argumentation, that is, human beings as such, are, in principle, capable of distinguishing good from bad reasons for accepting substantial statements (Alexy 1995: 120). The task of the argumentation theory is to determine which criteria should be met for the argumentation to be labeled reasonable. Different argumentative areas contain different criteria of rationality (Alexy 2000: 7).

2.2. Legal argumentation

One of the main causes for the growing interest in legal argumentation is a change in the understanding of the roles allotted to legislator and judge (Feteris 1999: 5). In the 19th century the prevailing opinion on the role of lawyers rested on Montesquieu's doctrine of the separation of powers. The legislative function consisted in the formulation of clear and precise laws, while courts were meant to apply rules literally in concrete cases. In the 20th century, as the opinion prevailed that it is impossible to conceive all future cases or reliably foresee changes in social relations and moral attitudes, the theory of the strict separation of legislative and judicial powers was abandoned. The legislator´s task was narrowed to the formulation of a general norm, the meaning of which in difficult cases judges have to choose and justify their choice.

Legal argumentation can be analyzed from a normative and a descriptive perspective (Feteris 1999: 14). A normative theory seeks to determine the criteria of rationality, that is, the criteria of correctness of legal argumentation. The task of a descriptive theory consists in an analysis of argumentative techniques that are effective in persuading a particular legal audience.

Over the last 40 years three more or less consistent normative approaches to legal argumentation have evolved (Feteris, Kloosterhuis 2009: 312–318). The longest tradition in the study of legal argumentation has the logical approach. From the logical perspective the formal validity is emphasized as a criterion of the rationality of legal argumentation. The logical consistence of argumentation is a necessary, though not a sufficient condition, since it is required that the arguments put forward comply with the legal norms. On the contrary, by denying almost any importance to the form of argumentation, the rhetorical approach brings the content of the arguments to the fore. From a substantial perspective, the rationality of argumentation depends on the effectiveness, i.e. persuasiveness of arguments. In the rhetorical approach a paramount importance is attributed to the context, as it determines the success of an argument. In response to the one-sidedness of previous approaches, a discursive approach was founded on the basis of logical, rhetorical and communicative aspects of argumentation. Argumentation has a rational character when it is conducted in accordance with certain procedural criteria. Discursive approach prevails in contemporary theory of law (Alexy 1995: 95).

The argumentation process takes place in different legal contexts. These include discussions of legal theorists, legal counseling, peaceful resolution of a dispute, proceedings before the court, debates in the parliament, assessment of issued judgments in the media. The types of legal argumentation differ in terms of whether they are institutionalized, whether they are limited to a certain period of time, whether a binding decision is made at the end (Alexy 1991: 262). The least confined type represents a legal theoretical discussion, while the most restrictions are present in the court proceedings. What is common to all different types of legal argumentation and what distinguishes them from moral argumentation is their attachment to valid law (Alexy 1991: 262). Therefore, legal argumentation can be defined as a process of convincing that a legal standpoint is correct by giving (legal) reasons.[14]

The court proceeding undoubtedly constitutes a paradigm when explaining the relationship between law and argumentation.[15] The subject of court proceeding is a dispute. The reason for bringing forward arguments before the court is the need to eliminate the dispute by a third unbiased and disinterested party decision. Thus, a conflict of interest is the reason to reach for arguments in a legal context.

Arguments, however, are not the only means available to help resolve a dispute. There are different ways to make the other party give up its interest. Fraud, as well as any form of coercion, such as threat or force, are the very opposite of argumentation. Fraud consists in giving deliberately false arguments, that is to say, in adducing nonexistent reasons in order to convince the other party to believe the correctness of a standpoint. Coercion, on the other side, is not at all concerned with the correctness of a standpoint. The appeal to force represents a logical error in the wider sense, "because no logical justification of expressed opinion is offered, although it can be a rhetorically effective means of persuading the audience" (Van Eemeren 2001: 146–147). Fraud involves untrue, and coercion unsound arguments, which is why they fall into the category of prohibited argumentative moves.[16]

Furthermore, conflicts of interest do not have to be solved by legal arguments. One side in the dispute can try to convince the other one of the correctness

14 „Everybody who advances a legal standpoint and wishes this standpoint to be accepted by others, will have to present justifying arguments." (Feteris 1999: 1)

15 „When other participants – say, legal scholars, attorneys, or interested citizens – adduce arguments for or against certain contents of the legal system, they refer in the end to how a judge would have to decide if he wanted to decide correctly." (Alexy 2002: 25)

16 Although coercion is normally considered to be an irrational means to solve a conflict, the way law functions gives cause to ask about exceptions. If the affected party does not accept the judgment, the state threatens with the application of force and ultimately implements the decision by force. A doubt in the rationality of the state power calls into question the justifiability of the monopoly on violence.

of a standpoint by giving moral reasons, and vice versa. If any of the parties is successful in that endeavor, the dispute between them ceases to exist. However, as soon as any of the parties invokes the law, the argumentation takes on a legal character. The legal claims raised suggest the proximity of the state´s coercive apparatus, which is going to enforce the court decision independently of the will of the affected parties. Argumentation that takes place before invoking the law can be designated as non-legal, while afterwards it becomes a legal argumentation.

A dispute is solved when one party completely abandons its interest or when both parties partially climb down. In the first case, one party is triumphant over the other, while in the other case, both sides reach a compromise. When a dispute is to be solved by argumentation, each party tries to persuade the opposite party to believe the correctness of a standpoint, wherefore it gives reasons for its own, and against the opposite standpoint.

Court proceedings represent the main setting in which legal argumentation takes place. However, this is not the only possible way to eliminate the conflict of interest by legal means. Parties may put forward legal arguments and try to resolve their dispute among themselves with or without the help of attorneys. If no party succeeds in convincing the other one of the correctness of its standpoint, then there is nothing left but to initiate a court proceeding. The first type of argumentation could be designated as extrajudicial and the second one as judicial. Out of court each party seeks to persuade the other one, whose interest is also at stake in the dispute, while before the court both parties seek to convince the judge, who plays the role of a disinterested decision maker.

It is instructive to draw a distinction between a passive and an active model of judicial argumentation. According to the active model, after hearing the arguments parties put forward referring to the legal grounds of their claims, it is up to the court to assess whose argumentation is more convincing. The judge´s task exhausts itself in the choice between the alternative justifications offered. By contrast, according to the active model, the court is supposed to form its own opinion on the legal ground of the conflicting claims. Although parties to a dispute may suggest which arguments are relevant in their particular case, the judge is not bound by their proffered opinions. Which model of judicial argumentation shall be accepted is a matter of legal policy. The active model seems to be better suited for the protection of public interest, while the passive model would be more appropriate in private law cases. Indeed, court proceedings can be molded by combining both models depending on the type of issue at stake.

The purpose of legal argumentation is to justify a legal judgment as an individual case of normative proposition (Alexy 1991: 273). The court pronounces

its judgment and informs parties of the reasons for its judgment in order for them to accept the correctness of the court's decision. The judgment rationale enables higher-instance judges to verify whether the judgment rendered is correct and lower-instance judges to ensure the uniformity of law. In addition, a justification is subject to public appraisal: the judgment rationale forms the basis for evaluation of the judgment in legal discussions and law journals.

The structure of argumentation in law is, unlike its purpose, a subject of numerous disputes. According to a widely accepted understanding a difference exists between an internal and an external justification of judgment. A court's decision is internally justified if it logically follows from a legally valid norm and a statement of facts (Alexy 1991: 18). Premises of legal syllogism represent direct arguments in support of the judgment. The internal justification is contextually sufficient, because it is limited to material that was originally accepted as legal (Aarnio 1990: 75). The external justification consists in the justification of the premises. Arguments in favor of or against the premises used in legal syllogism are indirect arguments in relation to the judgment. In view of the normative and the descriptive premise in legal syllogism, external justification involves two types of argumentation: interpretive argumentation and evidentiary argumentation.

2.3. Legal Argumentation and Interpretation

The basic characteristic of legal argumentation is its attachment to valid law. This means that the reasons which can be given in favor of or against a judgment are not unlimited. Therefore MacCormick draws a distinction between substantive arguments as reasons carrying practical weight independently of authority and authoritative arguments as reasons referring to the authority of lawmaker (MacCormick 1993: 17–18). Despite a somewhat different terminology, Alexy introduces an identical distinction between institutional arguments which are possible solely within the institutional framework of a legal system and general practical arguments which draw their power exclusively from their own substantial correctness (Alexy 1995: 87–89).

Opinions of legal theorists as to the exclusiveness of authoritative (institutional) arguments are divided (MacCormick 1993: 18). The strong thesis claims that authoritative arguments constitute the only acceptable arguments in law. The court cannot invoke norms of morality in the judgment rationale. On the contrary, the weak thesis requires the use of authoritative, while allowing the complementary use of substantive arguments. This means that authoritative arguments do not have an essential, but only a necessary character in the field of law. The answer to the question about the correctness of the depicted theses depends on whether it proceeds from a positivist or a non-positivist concept of law. Thus, both strong and weak thesis must

be addressed in the light of the dilemma of legal non-positivism. [17] Alexy and MacCormick expressly accept the weak thesis as the correct one (Alexy 1995: 88; MacCormick 1993: 18).

Irrespective of the question as to their exclusiveness, authoritative arguments are inevitable in law. A reference to the authority of lawmaker implies a reference to a particular legal text. This is explained by the fact that all laws are expressed in language. This does not mean that every legal norm is necessarily enacted, but that each can be formulated as a particular legal proposition. There is no law beyond language.[18] According to Hart, the legislation and the precedent represent two basic means to communicate general standards of conduct. The first of them makes use of words as much as possible, while the other requires minimal use of language.

In order to apply the law to a particular case, the established facts must be subsumed under an appropriate legal norm. The main problem of legal syllogism is the gap that regularly yawns between the words of the legal norm and the words of the statement of facts.[19] Starting only from the dissonantly formulated normative and descriptive premise it is impossible to draw a logically correct conclusion about the applicability of the relevant norm to the given case, and thus to internally justify the judgment. Language gap can be overcome by reformulating the legal norm so that it corresponds to the description of the factual situation. The reformulation of the norm must remain true to its original meaning. In fact, it represents the determination of the norm´s meaning with respect to the facts of the case.

The role of interpretation in law is an inevitable consequence of the significance attributed to authoritative reasons in rendering judgments (MacCormick 1993: 19). Justification of a judgment necessitates authoritative arguments. Authoritative arguments involve a reference to certain legal texts. Therefore, in order to justify a judgment, it is necessary to determine the meaning of a legal norm expressed in language. It follows that interpretation, as a process in which the meaning of a statute´s text or a judicial precedent is being determined, is an inevitable part in the process of justifying a judgment.

The consideration of authoritative arguments throws light on the inextricable link between interpretation and law. Interpretation is a necessary element of argumentation when justifying a judgment. The question as to the role of argumentation in determining the meaning of legal regulations

17 About the dilemma of the legal non-positivism see: Alexy 2000: 15–16.

18 "Even those who conceive a law as preceding the language – in the sense of "legal perception" or "legal awareness" – have to reach for the language in order to express the conceived or experienced contents and enable their effectiveness." (Rüthers et al. 2015: 101)

19 The problem of how to state facts and formulate the descriptive premise is here left aside.

remains, however, unanswered. Does the legal interpreter have to engage in argumentation just as the legal argumentator has to resort to interpretation?

3. Legal Interpretation

Legal interpretation is a type of interpretation. Since the term "interpretation" is ambiguous, it is advisable to learn about its possible meanings so as to establish order in the analysis of the role interpretation plays in law.

With regard to the subject, a distinction can be drawn between a general and a language interpretation (Alexy 1995: 71–73). The general interpretation is interpretation of any symbol, a sign made with intention to convey a meaning. The language interpretation is interpretation of linguistic symbols. With regard to the doubt, a difference can be made between interpretation in a broad and a narrow sense (MacCormick 2005: 121). Interpretation in the broad sense encompasses every case of understanding a symbol. Interpretation in the narrow sense includes the presence of a doubt about the correctness of understanding a symbol and its resolution through a choice based on reasons. Interpretation in the narrow sense corresponds to what is usually called construction (Alexy 1995: 73). At the heart of numerous legal discussions lies the problem of language interpretation in the narrow sense.

However, the term "interpretation" contains yet another ambiguity. The third ambiguity matches the linguistically plain difference between judging and the judgment. Judging is an activity, while the judgment represents the outcome of that activity. Analogously, the term "interpretation" could refer either to the interpretive process or the result of that process. In order to resolve such equivocation, it is prudent to draw a distinction between interpretive argumentation as a process and interpretive conclusion as its outcome.

Interpretive conclusion as an outcome of interpreting represents an interpretive assertion (opinion, standpoint). As an assertion it necessarily raises a claim to correctness (Alexy 1995: 77). In order to demonstrate the correctness of an interpretive conclusion, it is necessary to offer reasons for and refute reasons against it. It follows that interpretation as a process actually represents argumentation.[20]

The introduced distinction sheds light on the fact that not only the interpretation as a result is important for argumentation (in rendering a judgment), but also argumentation is important for the interpretation as a process (in

20 In a similar way a line can be drawn between judging and a judgment. Judging is an activity, while a judgment represents the outcome of that activity. A judgment is an assertion which necessarily raises a claim to correctness. In order to demonstrate the correctness of the judgment, the judge has to bring forward arguments for and refute arguments against it. Therefore, judging is an argumentative activity.

choosing a meaning) (Compare: MacCormick, 1993: 20). It is important to note that interpretation and argumentation in law are linked by the authority. Starting from the weak thesis, the significance of interpretive conclusion as an argument in favor of the judgment can be expressed in the following way:

1) In order to legally justify its judgment, the court must use at least authoritative arguments.
2) In order to use authoritative arguments, the court must interpret regulations.
3) In order to legally justify its judgment, the court must interpret regulations.

The significance of arguments in choosing a meaning of legal regulations can be expressed as follows:

4) In order to interpret regulations, the court must justify the choice of a particular meaning.
5) In order to justify the choice of a particular meaning, the court must use arguments.
6) In order to interpret regulations, the court must use arguments.

From the explanation of the structure of legal argumentation, it follows that the judgment is the outcome of direct argumentation, while the interpretive conclusion is the outcome of indirect argumentation. An interpretive conclusion is, in fact, the major premise of legal syllogism, which must be justified by indirect arguments in support of the judgment.

Methods of interpretation are arguments. Interpretive arguments can be classified in different ways. The first known systematic debate on legal interpretation in England dates back to 1567 (Frankfurter 1963: 60). Canons of interpretations were and remain the subject of numerous discussions in German theory of law from Savigny's work in 1840 (Rüthers et al. 2015: 423–427). Countless elaborated theories require us to focus our attention on contemporary authors. MacCormick distinguishes linguistic, systemic and teleological arguments.[21] Alexy introduces a distinction between institutional arguments, which include linguistic, genetic, and systemic, and general practical arguments, which include deontological and teleological arguments.[22]

21 At the outset MacCormick included both teleological and deontological arguments in the interpretive arguments. However, later he retained only the teleological argumentation in law as an expression of the consequentialism. MacCormick 1993: 25; MacCormick 2005: 132.

22 Alexy initially discriminated between semantic, genetic, historical, comparative, systemic and teleological interpretive arguments in law. Subsequently he will subsume the historical and comparative argument under the systemic one, and moreover introduce the distinction between institutional and general practical arguments. Alexy 1991: 289; Alexy 1995: 85–89.

4. Conclusion

Legal interpretation as a process represents an argumentation in which reasons are given in favor of or against a certain understanding of the relevant legal norm. In relation to the judgment interpretive arguments are indirect, because they justify the choice of the major premise in legal syllogism. It follows that interpretation as a process is argumentation.

Since law is expressed in language and a legal judgment requires authoritative arguments, the legal interpretation as a result is used in the justification of judgment. An interpretive conclusion represents a direct argument in favor of the judgment. In fact, it constitutes the major premise of legal syllogism. It follows that interpretation as a result is an argument.

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Miloš Marković

Nerazmrsivi splet argumentacije i interpretacije u pravu

Apstrakt

U temelju neumornih poduhvata da se objasni priroda prava počiva pitanje kako sudije treba da rešavaju slučajeve. Otuda proističe potreba za teorijom koja bi rasvetlila ulogu sudova i štaviše pružila im smernice prilikom donošenja presuda. Istorija pravne teorije obiluje raznovrsnim pokušajima da se na postavljeno pitanje ponudi opšteprihvatljiv odgovor. Vatrenost rasprave i stalnu nezadovoljnost ponuđenim rešenjima podsticala je misao o neukrotivoj proizvoljnosti sudija. U savremenoj debati se naročito ističe značaj argumentacije kao karike sudskog postupka koja obezbeđuje razumnost i time opravdanost i ubedljivost donete odluke.

Pre ulaska u meritum stvari naznačiću u opštim crtama kojoj oblasti teorije prava pripadaju argumentacija i interpretacija. Smisao postavljanja misaonog okvira jeste da se predupredi gubljenje iz vida celine, a da se istovremeno ograniče dometi izlaganja na određeni deo pravne problematike. Drugi deo rada je posvećen pojmu argumentacije uopšte i specifičnostima argumentacije u pravu. U trećem delu se razmatra uloga pravne interpretacije i povlači jasna razlika između interpretacije kao procesa i interpretacije kao rezultata. U zaključku rasprave izneću tezu da je interpretacija kao proces argumentacija, dok je interpretacija kao rezultat argument prilikom obrazlaganja presude.

Ključne reči: Pravo, argumentacija, interpretacija, interpretativna argumentacija, interpretativni zaključak