JUSTICE AND THE NATURE OF LEGAL ARGUMENTATION

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The purpose of this essay is to show by means of an example the type of arguments which are used in the day to day practice of law. What arguments are considered relevant ? What is the form of legal reasoning ? Is legal reasoning to conform to the criteria of deductive logic pure and simple ? or are legal arguments to be judged against the concept of justice ? What sort of standard is "justice" ?

Let us look at the case of State v. Nkombani and anor. (1). A and B went by car to Klerksdorp where they picked up C and D, two friends. The four of them stopped some distance from a petrol station. A and B gave revolvers to C and D and sent them to hold up the filling station attendant. The attendant, whose name was Albert, offered resistance and a wrestling match started during which fight the thugs pulled out their revolvers. C aimed his at Albert's head but when it went off it shot D who fell where he stood, dead. In the trial court C and A were found guilty of murder and were sentenced to hang. They both appealed and it is with the appeal case that we are now dealing. We are particularly interested in A's appeal. A who had sat in the car some distance from the scene of the crime had been found guilty by the trial court as an accomplice. The law is clear. To be found guilty it has to be proved that there was the necessary intent to commit a criminal act. "The attitude of the doer is legally condemnable when its content is that he willed the act, or the results of the act, knowing that what he thus willed was illegal. This attitude is known as "dolus" or "intent" (2). (My translation from the Afrikaans). Chief Justice Steyn in a minority judgement said, "There must be such certainty that it can justifiably be said that a denial of the consciousness of the possible result would without doubt be unfounded" (Translation). He said attention must be paid to what A did forsee and not to what he ought to have forseen.

He found A not guilty on the grounds that there was insufficient proof that A had actually foreseen the possibility that C might shoot D. Judge Rumpff, having stated the identical law, said, "There is no direct evidence that A did have this consciousness, but in my opinion any normal person who organizes such a raid will have forseen the inherent possibilities mentioned above. The two robbers with the two loaded pistols were, in my opinion, as dangerous as if they had had a bomb with them". Judge Rumpff accordingly confirmed the trial court's finding and found A guilty. Judge Holmes again states the law quite clearly, then says, "in my opinion it is clear beyond doubt ... that he must have forseen the possibility of a shooting affray... in which anybody present could be hit by either of the robbers with their six shooting automatic pistols". Then he says, "This conclusion, arrived at by reference to reason and the facts, is also consistent with social necessity, that wicked minds which devise and plan such evil deeds may know the risks they run in the matter of forfeiting their own lives". In commenting on this case where Hung (A's name) was hung, De Wet says that the judgement of Chief Justice Steyn is more accurate than the majority judgement ([3]).

If from this example we can clear up three things we should gain several insights into the nature of legal arguments in general. The three problems are: By what process do the judges proceed from the statement of the law to the judgement, why do they reach different conclusions and how are we to judge their differing conclusions ?

If the case had not come up for an appeal and if one happened to read the judgment of the trial judge in the law reports then if one were asked about the process which the judge followed from the statement of law to the sentence it is quite possible that one would assume it to be of the form of a categorical syllogism:

Premise: All those who forsee the result of their illegal action have the necessary 'dolus' to be convicted of murder.

Premise: A forsaw the result of his illegal action.

Conclusion: A has the necessary 'dolus' to be convicted of murder.

This is a strictly deductive and valid reasoning of the traditional syllogism (Barbara): All S is P

M is S

therefore M is P

More generally it could be said to be of the simple mathematical model:

If A = B
and C = A
then C = B.

At first there seems to be no problem here. The judge's task seems merely to be one of finding out the facts of the case, fitting them to the pertinent law and then deducing the sentence, guilty or not guilty. It is often thought that a legal code reduces the practice of law to this simple process. However one might wonder whether this deductive pattern exhausts the problem of legal reasoning. The criteria for valid deductive reasoning are purely formal. (Whatever the subject matter, an argument that meets these formal requirements is valid, if not it is invalid.) However in appealing against the decision of the lower court Hung (A) was not implying that the judge had made a false deduction. He was appealing against something else, viz. the interpretation which the judge gave to the law. It is on a question of interpretation too that Chief Justice Steyn differed from the other judges; he was not picking flaws in their deductive abilities. This raises the issue of how these questions of interpretation are to be squared with the presumed deductive nature of legal argumentation.

Let us now return to the case in hand. If we look at the three judgements we may be able to get a line on what is involved in the interpretation of the law. The point in dispute with reference to A is whether he had the necessary intent or not. Judge Steyn said that the test was that there was not the necessary intent unless a denial of the consciousness of the possible results was without doubt unfounded. In other words A may have had the necessary "dolus" but to say that he did not was not obviously nonsense. The Judge was evidently

trying to stick to the rule that the accused must in fact have forseen what would have happened. (Whether he had the necessary intent turns on the sense assigned to "foresight"). In the other two judgements we get references to "any normal" person. Here the accent is placed on what any normal person ought to have forseen, which together with the assumption that A was a normal person proves that he must have thought of the possibility that D would have been shot. The point which must be seen here is that the situation is construed differently by different people in accordance with what interpretation they place on the law. What does "foresight" mean in the major premise, and how can we determine whether the alleged foresight measures up to it ? If we narrow the argument down some more we see that Judge Steyn is relying on different evidence of what A in fact foresaw, while the other two judges feel that the only way of determining what A foresaw is to apply the standard of the normal person. The latter changes the issue from a factual question to a normative question: What A ought to have foreseen, not what he did actually foresee. So we see that the argument swings on how the different judges go about determining what the state of A's mind was while he sat in the car. This question of interpretation is of considerable legal significance. Why does Prof. De Wet approve of Judge Steyn's judgement and not of the other judgements ? He is no doubt motivated by the consequences of the majority opinion, which has now set a precedent. The law is now changed; "What he in fact foresaw" becomes "What a normal person would have foreseen" (It must be admitted that the "normal person" standard is not likely to be applied in the case of a blatantly abnormal person). This new factor of the normal person stretches the scope of the law substantially. It makes, as it were, the task of reading the inside of the accused's mind easier. So we see that even though, in the final instance the question of "dolus" appears as the necessary conclusion of a syllogistic chain of reasoning this can only be of a valid deductive form because it presupposes, as it were, a prior chain of reasoning. It has to be established whether the "foresight" in the major premise is identical with the "fore-

sight" in the second premise; it depends on this interpretation whether the argument is of a valid deductive form or not.

Let us ask of this prior chain of reasoning whether it is not just a prior syllogism. If one reads the case through carefully again it will be found that it is possible to pick out the form of a deductive syllogism. This time:

Premise: Any normal person in situation x would have thought of z.
Premise: A was a normal person in situation x.
Conclusion: A thought of z.

Again this is a deductively valid form of argumentation, and even of the same mood of the syllogism as the previous one (Barbara). But there, as before, the problem rests with the interpretation of certain words, in this case, "normal person". Here again the logical form is flawless but itself depends on substantive questions of interpretation. What have we learnt by the light of these two examples of the apparent deductive form in legal arguments ?

We have seen that the process followed by the judge to reach his conclusion is not one of simple deduction. If this were so, (if it were such a process) clearing up legal tangles would merely be a matter of picking out the faulty link in the chaim of reasoning. It is more complex than that. This is the burden of the recurrent problem of interpreting the law.

On reading a law report one finds that the judge uses various types of arguments not all of which are obviously in accordance with the simple deductive model. In the present case for instance there is an analogy (comparing the two armed thieves to a bomb) and a reference to the purpose of the law (serving "public policy") which are examples of two types of arguments used. That different types of arguments are used in practice is obvious but the problem is to find out what the status is of these arguments. In other words how to tell a good argument from a bad one. The criteria of valid deductive reasoning is not all that is needed. What gives the judge's statements the status of acceptable legal reasoning ? How can we judge their

judgements ? What are the criteria for justification and validation in legal reasoning ?

One approach would be to ask what is the purpose of a judge ? The most likely answer which one would get would be of the kind, "A judge is there to implement justice". In answer to the further question, "What is 'justice' ?", one is likely to get various conflicting answers such as, "Justice is ... to each according to his needs", or "Justice is ... to each according to his merits", or "Justice is ... to each according to his rank" (4). One thing about all these definitions is that they have the phrase "to each" in common. This points to the one thing about the concept of justice which is never disputed and that is that like cases be treated alike. This is a formal requirement which applies to all those setting up a theory of justice. It is akin to the requirement of consistency which applies to all reasoning. But in spite of this purely formal criterion the parties can still have vastly different ideas of justice. If we look at the definitions of justice above it can be seen that each definition entails a substantive normative argument. "To each according to his merits" implies a capitalistic norm, while, "To each according to his needs", implies a more socialistic norm.

How is this relevant to our example, which is taken from the criminal law ? The point being made is that in any concept of justice there is besides the purely formal element also a substantive normative content. In Judge Holmes's judgement he makes explicit a certain attitude to the world where he says: "This conclusion arrived at by reference to reason and the facts, is also consistent with social necessity...". Although Judge Holmes says that he reached his decision "by reference to reason and the facts", it is certain that had he had another view of "social necessity" he would have reached a different conclusion also by reference to "reason and the facts". The question now arises as to what happens when it is discovered that two opposing norms are at the basis of the conflicting judgements. Must we say like Prof. Perelman, "If we regard a rule as unjust because it accords pre-eminence to a different value, we can only note the difference", and further argument

is ruled out. This would be an acceptable argument if all concepts of concrete justice could be reduced to a single value judgment. But, I maintain that rational argument is still possible because the premises underlying a judge's judgment or the premises underlying a concept of justice cannot be reduced to a single value. There are multiple premises underlying every legal argument. In the case with which we are dealing there are many common premises which all the judges would accept. There are also common values which they would accept, for instance... that evil ought to be punished is a social necessity ... and ... that where there is doubt as to a person's guilt he should receive the benefit of the doubt. Where the judges differed was in according different weights to the different values. These values rest on other values again: The value accorded to the individual and the value accorded to the society. Where a deadlock is reached along one path one will usually find that along another path one will come across a point of agreement. It is impossible to have any discussion without there being any points which the parties to the dispute agree upon. Perelman and Olbrechts-Tyteca deal with the varied and various types of premises found in argumentation in their book, "The New Rhetoric". In chapter one they deal with various types of premises, inter alia:

1. Facts. These they define as uncontested data in the eyes of the universal audience. In our eyes the evidence given by the police would probably count as such facts.
2. Presumptions, e.g. Honesty. These are group bound. In our case this type of presumption would be that the judges are presumed not to have any financial interest in the outcome of the case.
3. Values. In this case the right of the accused to the benefit of any doubt as to his intentions, and the good of society.
4. Hierarchies. These are group bound and are accepted methods of dealing with cases where a conflict of values arise. In our case it is the hierarchy itself which is disputed.

5. Loci. That a greater number of good things is better than a small number.

The very possibility of argumentation implies certain spheres of agreement between the parties involved. These premises are manifold and are not reducible to a single premise which is a value.

Two questions must now be answered. Who is the "other" with whom the judge is involved in argument, that is with whom must he reach points of agreement ? How is this social context of legal argumentation relevant to our original problem, viz. How are the constituent premises combined to form an argument ?

The judge's audience is what one might vaguely term the "legal world" which includes in South African law, the Roman jurists, the Dutch jurists, the South African jurists, South African judges past and present, the members of the legal profession, the hypothetical jurists of the future and also the vague and indefineable maker of "public policy". The judge's task is then to try and reach an acceptable and justifiable judgement in terms of this wide audience. After a decision has been made, that decision, as it were, joins the audience; in future decisions a point of agreement will have to be reached with it.

When the judge gives his judgement he is not just giving a learned talk to the accused, or to the advocates present. As we have seen he is relating the formal procedure from law to conclusion. This judgement of his consists of arguments which he uses to support his decision. This means that he is not free to reach any conclusion which he wants to. He is bound by certain rules. These rules are those which are laid upon him by the laws of the land, (e.g. specifying the scope of his jurisdiction, the extent of his powers and certain things which he is bound to regard as facts) the rules laid upon him by official policy, the rules which are laid upon him by the legal tradition, and the rules which are laid upon him by the current norms in society. These rules serve as guidelines for him but still have to be interpreted, the judge still has to make a decision. There is no necessary process of reasoning which will

make this decision automatic. It is here that we can see why people have traditionally tried to force legal reasoning into the mould of deductive reasoning. In the syllogism it seems as if one is relieved of the task of taking any decision. The conclusion seems completely necessary. I say "seems" intentionally because even if the logical form is deductively valid, in actual practice a decision has to be taken; the decision being to accept the premises and the specific relation between them, on which, as we have seen the issues of interpreting the law hedges. Once one has accepted these premises and their relation on this interpretation it is merely a matter of maintaining internal consistency. If someone rejects the rule of non-contradiction we say that he cannot do maths, if he does not accept the rules of chess we say that he cannot play chess. Now, although, if we look at one judgement in isolation it appears from its apparent syllogistic form as if it is also a question of merely obeying the internal rules, this is not so. In the case of maths and chess it is a matter of moving signs in accordance with certain rules but as soon as these moves are applied outside of the narrowly circumscribed field there occurs what Prof. Toulmin calls a "type-jump" ([5]). That is that as soon as it is no longer a question of internal validity then we are dealing with what he calls "substantial" arguments. In the case of substantial arguments there are strong arguments and there are weak arguments, but there are no longer arguments which are either right or wrong (necessarily) according to the purely formal criteria only. The rules which we mentioned earlier in this paragraph Toulmin calls "warrants" for type-jumps. A warrant is an accepted rule, or argument. It is always possible to question the backing of a warrant. Thus the search for a point of agreement continues. Let us return to our case. What is the judge's judgement ? It seems to be an attempt to make explicit what is accepted as data, what are to be accepted as truths, what hierarchies are being used and what loci are being used.

The combinations of these constituent parts are varied. The accepted rules or warrants vary according to the situation (where when and who is the audience). Thus the rules binding

a judge are time bound. Values change and hierarchies change. Stone says of the connection between law and its setting. "The content of justice as normative, of justice felt as binding, is not given, or found once and for all. It is rather argued, fought and lived out, and it cannot thus "be studied independently of these dynamic processes involved" ([6]).

To summarize:

We have tried to show with the aid of an example that:

1. The judges use a different type of reasoning to that of straight-forward deductive reasoning or that which is used in pure mathematics.

2. Their decisions are still guided by reasoning, which reasoning depends on the use of accepted rules or warrants.

3. These rules or warrants are not eternal but are dependent on the situation and the audience.

NOTES

([1]) S. v. Nkombani and anor. 1963 (4). S.A. 882.
([2]) De Wet and Swanepoel, Strafreg.
([3]) De Wet, Class Notes for LLB. III students, 1970, Stellenbosch University.
([4]) PERELMAN, *The Idea of Justice and the Problem of Argument*, p. 7.
([5]) TOULMIN, *The Uses of Argument*, p. 210.
([6]) STONE, *Social Dimensions of Law and Justice*, p. 546.

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[2] PERELMAN, *The Idea of Justice and the Problem of Argument*. Routledge and Kegan Paul London, 1963. Translated by John PETRIE.
[3] PERELMAN and OLBRECHTS-TYTECA, L., *The New Rhetoric, A Treatise on Argumentation*. University of Notre Dame Press, London, 1969. Translated by WILKINSON J. and WEAVER P.
[4] TOULMIN, S., *The Uses of Argument*, Cambridge University Press, Cambridge, 1964.
[5] STONE, J., *Social Dimensions of Law and Justice*, Stevens and Sons, London, 1966.
[6] *South African Law Reports*.