FORMAL JUSTICE AND THE FORM OF LEGAL ARGUMENTS

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Justice requires that essentially similar cases be treated in the same way, and that essentially different cases be treated differently. But since that is a purely formal principle, it requires supplementation with some conception of substantive justice to establish criteria of essential similarity and essential difference. Accordingly, it may appear that formal justice considered in itself is an entirely empty value. But that would be a misleading conclusion to reach, as may be seen by considering the bearing of formal justice on the practice of legal argument in its most characteristic function: the justification of claims, defences, counterclaims; above all of decisions, in the context of contested litigation.

Litigation in all its forms is inevitably concerned with particulars; with a particular set of past events upon which one party founds some claim or complaint against another. The parties and the factual issues which concern them are particular and unique. No case for trial can ever be exactly the same in every particular as any other. Disputed questions of fact are particular and resolution of disputes of fact depends upon the gathering and weighing of particular items of testimonial and other evidence with a view to constructing a credible and coherent (credible because coherent) version of past events. Having settled the questions of fact one can proceed to decide about claims or complaints founded on the averments of fact, and can, (if one is a judge) issue specific and binding orders to the parties in accordance with one's decision about the claim or complaint. Both in inception and in conclusion, litigation is essentially particular in focus.

Yet, as seems obvious, the justificaiton of the claim or complaint founded on the particular averred facts, or of the decision made about the claim or complaint, can hardly be in terms of the unique and particular. Justification is a matter

of universals, not of particulars; certainly, legal argument so far as it is concerned with the justification of claims or complaints or decisions or whatever involves the construction and testing of universal propositions of law (albeit universal only with reference to the jurisdictional areas of the court's competence). It happens not infrequently, of course, that the matters in dispute concern some relatively cut and dried area of law and therefore that the universal proposition advanced in justification of the particular decision is an established rule of positive law (whether derived from statute or from case law) which is uncontroversially capable of being applied once any disputes of fact have been resolved and authoritatively settled.

Of greater present interest, however, are the cases, by no means few in number, in which the law as well as the facts are in dispute. Even if *x*, *y* and *z* can be proved to have happened, as the pursuer avers, does it follow that he is entitled to the remedy *r* which he claims ? For some reason or other the legal answer to that question is in doubt. At any rate sufficiently in doubt to have enabled pursuer and defender to advance opposed contentions as to its correct answer. To settle what is the correct answer is the judge's job. My interest is in showing that and showing why the judge must frame and test generalised propositions (indeed, logically speaking, universal propositions) in framing a satisfactory justification of his answer to the question.

As a first step in that, let me give a concrete illustration, taking for my example a very famous legal decision, the decision of the House of Lords given in the Scottish case of *Donoghue v. Stevenson in* 1932 (1). The particular events out of which the litigation arose were as follows. The pursuer, a widow woman, went into a cafe in Paisley with a friend. The friend purchased two iced drinks made of ginger beer and ice cream. In making the pursuer's drink, the cafe proprietor took a sealed opaque bottle of Stevenson's ginger beer and poured some of it into the glass on top of a piece of ice cream.

(1) *Donoghue v. Stevenson* [1932] A.C. 562 1932 S.C. (H.L.) 31.

The like was done with a different bottle for the friend, who paid for both the drinks. Subsequently, when they were sitting at a table Mrs. Donoghue poured some more ginger beer from the bottle into her glass, whereupon the remains of a decomposing snail appeared from within the bottle. As a result of this nauseating sight and of the impurities resulting from the snail's presence in her beverage, she suffered shock and severe gastro enteritis. At any rate, Mrs. Donoghue (the pursuer) was prepared to aver that all those events had happened, and she proceeded to claim damages for the injuries she had suffered, alleging that it was the duty of the respondent to provide a safe system of working his business which would not allow snails to get into his ginger beer bottles, and that it was also his duty to provide an efficient system of inspection of the bottles before the ginger beer was put in them, both of which duties he had failed to carry out, his failure being the cause of her misfortune. Stevenson, the manufacturer of the ginger beer and the defender in the case, contended in opposition to Mrs. Donoghue's claims that her averments were irrelevant in law, since even if the facts alleged were true, they gave rise to no duty on his part to take care for her safety, and accordingly he couldn't be liable even if she had suffered injury as she averred. The Lord Ordinary, the judge of first instance, held for the pursuer on the question of relevancy, but his decision was reversed on appeal in the Inner House of the Court of Session. On final appeal to the House of Lords that House by a majority decided in the pursuer's favour. If she could prove that she had suffered the injuries averred in the manner averred, she was indeed entitled to damages as claimed, said the Lords.

So much for the particular events, the particular claim, and the particular outcome of the litigation upon it. Let me now quote to you from the justifying reasons advanced by Lord Atkin, one of the majority judges, for the decision given:

> «In English law there must be, and is, some general conception of relations giving rise to a duty of care of which the particular cases found in the books are but instances... There will no doubt arise cases where it

will be difficult to determine whether the contemplated relationship is so close that the duty arises. But in the class of case now before the Court I cannot conceive any difficulty to arise. A manufacturer puts up an article of food in a container which he knows will be opened by the actual consumer. There can be no inspection by any purchaser and no reasonable preliminary inspection by the consumer. Negligently, in the course of preparation, he allows the contents to be mixed with poison. It is said that the law of England and Scotland is that the poisoned consumer has no remedy against the negligent manufacturer. If this was the result of the authorities I should consider the result a grave defect in the law, and so contrary to principle that I should hesitate long before following any decision to that effect which had not the authority of this House. I would point out that, in the assumed state of the authorities, not only would the consumer have no remedy against the manufacturer, he would have none against anyone else, for in the circumstances alleged there would be no evidence of negligence against anyone other than the manufacturer; and, except in the case of a consumer who was also a purchaser, [which as we have seen Mrs. Donoghue was not], no contract and no warranty of fitness, and in the case of a purchaser of a specific article under its patent or its trade name, which might well be the case in the purchase of some article of food or drink, no warranty protecting even the purchaser-consumer. There are other instances than that of articles of food and drink where goods are sold intended to be used immediately by the consumer, such as many forms of goods sold for cleansing purposes, where the same liability may exist. The doctrine supported by the decision below would not only deny a remedy to the consumer who was injured by consuming bottled beer or chocolates poisoned by the negligence of the manufacturer, but also to the user of what should be a harmless proprietary medicine, an ointment, a soap, a cleaning fluid or cleansing powder. I confine

> myself to articles of common household use where everyone, including the manufacturer, knows that the articles will be used by persons other than the ultimate purchaser — namely, by members of his family and his servants, and in some cases his guests. I do not think so ill of our jurisprudence as to suppose that its principles are so remote from the ordinary needs of civilised society and the ordinary claims it makes upon its members as to deny a legal remedy where there is so obviously a social wrong.» (2)

The conclusion which Lord Atkin reached at the end of his extensive speech was as follows.

> «My Lords if your Lordships accept the view that the appellant's pleading discloses a relevant cause of action, you will be affirming the proposition that by Scots and English law alike a manufacturer of products which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him, with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products is likely to result in injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care.» (3)

I hope I may be forgiven for having included so extensive a quotation from Lord Atkin's speech within this paper. But it seems to me essential for the purpose of indicating and illustrating the way in which in the justification of decisions on contentious questions of law the Courts find themselves faced with the inevitable task of framing and testing universal propositions as possible propositions of law. We have seen how Lord Atkin found it necessary in justifying his decision in favour of the particular pursuer in this case to consider what sort of situation would arise, not just if Mr. Stevenson were not liable to Mrs. Donoghue, but if manufacturers in general

(2) [1932] A.C. 562 at 580-83; 1932 S.C. (H.L.) 31 at 44-46.
(3) [1932] A.C. 562 at 599, 1932 S.C. (H.L.) 31 at 57.

were not liable to consumers in general in relation to latent defects in their products. Essential to the justification of the specific decision given is Lord Atkin's dismissal as wholly unacceptable of the proposition that a manufacturer, any manufacturer, should be held to owe no legal duty of care to consumers of his products. Either manufacturers owe such a duty or they do not. If they do not, many accidents may occur for which the innocent victims will be remedyless although it was known and intended by manufacturers that their products should be used by consumers. If they do, and if it should be possible to show that defects in products are attributable to a failure on the manufacturer's part to take reasonable care, then injured consumers will have a remedy. The former is unacceptable therefore the latter must be accepted. To decide the case in favour of the pursuer is to affirm the latter as a general proposition. Let me not trouble you by quoting again in extenso Lord Atkin's formulation of the proposition involved in deciding the case for the pursuer.

To summarise: the specific set of events, the specific relations between pursuer and defender, are considered as instances of generic relationships. The question becomes: 'What ought to be the legal position of anybody in the pursuer's situation standing in this type of relationship with somebody in the defender's situation?' The various possible answers to that generalised question propounded before the court by one party or another are then tested in terms of the desirability of their consequences. A preferred generalisation is achieved by elimination. The preferred general principle, and the reasons for its being preferred, are advanced as essential elements in the justification of the specific decision.

It may be thought that so far I have concentrated on talking about legal argument to the complete exclusion of the matter of justice, with which my paper is supposed primarily to deal. But I hope that the particular characteristic of legal argument in trouble cases which my chosen example has illustrated is a characteristic which will be seen to have much to do with the concept of justice. Too often, it seems to me, we assume that the idea of formal justice, of treating like cases alike,

has only a backward looking application. Certainly, formal justice supplies a reason which is always good if never indefeasible in favour of following relevant precedents when one is making decisions. For a court, faced with deciding a case, the existence of relevant precedent decisions of the same court constitutes a strong reason for deciding the instant case in the manner determined by the precedent, for to do otherwise is to decide today's case in a manner unlike the manner of one's decision of yesterday's like case. To that extent indeed, the principle of formal justice s a backward looking, indeed a conservative principle. Professor Perelman in his book *Justice* makes the point in the following way: (4)

> «What is the importance of the Rule of Justice when it is conceived as a purely formal rule ? It is limited to the requirement that people be faithful in their actions to a regular line of conduct. This requirement defines what Dupréel calls *static justice,* because it is characterized by conformity to established rules or to recognized precedents, whatever these might be. When an authorized decision has settled a case, it is just to treat an essentially similar case in the same way (*stare decisis*). We transform into a precedent — that is, into an example of the application of an implicit rule — any previous decision that has emanated from a recognized authority. In the domain of thought, as in that of action, the Rule of Justice accepts as normal the repetition of a given mode of action. It lends juridical certaintly and is embodied in the judicial syllogism that directs a judge to treat each member of a given category as every other member of that category is to be treated.»

But as I say, and think it important to acknowledge, the principle of formal justice has a forward looking as well as a backward looking and conservative application. After all, if cases decided this year ought to be justifiable by the same reasons as those applied to similar cases decided last year, that ought to have been a factor in the court's mind when it decided the

(4) Ch. Perelman *Justice* (New York, 1967) p. 24.

relevantly similar case last year. At any given point in time, a court ought to satisfy itself that its decision is based upon reasons which will be acceptable as reasons for giving the same decision at a later point in time if a similar case should subsequently arise for decision. To put the point more generally: at any point in time, a court which is called upon to give a decision on any matter in litigation ought only to decide the case conformably to such reasons as it considers will be acceptable for the disposition of any similar case which may come up for decision by it at any later time. A decision cannot be considered to be adequately justified unless it is justified by reference to reasons of general principle which the decision maker is prepared to commit himself to applying in future relevant situations. Thus, in the case of first impression where there is no guiding precedent, the court as a matter of justice must commit itself (not necessarily indefeasibly) to some general line, to some principle for dealing with any such case as the one now before it.

It is worth remarking that the whole idea of treating «like cases alike» can in fact be rendered intelligible only if we envisage decisions in individual cases as decisions of principle — indeed, as decisions the principles of which have to be articulated and expounded. What can count as a case relevantly similar to the case in dispute between Mrs. Donoghue and Mr. Stevenson is a matter which depends entirely on the way in which the relationship between the two of them is to be categorised. Once one has determined that the matter should be treated as being a matter between consumer of consumer goods and manufacturer thereof one has established a basis of comparison with other possible past and future situations. The idea of treating like cases alike presupposes a preparedness to treat cases in terms of general categories of some sort or another. The justification of decisions must be in terms of an assertion of the proposition that whenever a case in a given specified category occurs the decision of the case ought to be so and so and for that reason is now in the present case so and so.

Whatever may be the general merits of theories about the

universalisability of moral judgements, (5) the requirement of universalisability seems to apply unequivocally to the judgements of courts. Such a requirement applies necessarily, because courts are required to «do justice according to law», and because doing justice necessarily involves adhering to the principle of treating like cases alike. That principle gains force in its application because the courts can be conceived (indeed are conceived) as a single institutional structure acting in public and authorising the application of the public force of the state to enforce resolutions of issues in dispute between citizens, and citizen or citizen and state, and above all because courts are by convention if not by law required to state publicly the reasons for the decisions they give.

It might perhaps be objected that such a view as this leaves out of account the possibility of decisions in accordance with equity rather than strict justice. It is sometimes said that equity is a matter of deciding each case on its own special merits without regard to general rules or principles (6). It seems to me that that view is pure nonsense. I cannot for the life of me understand how there can be such a thing as a good reason for deciding any single case which is not a good generic reason for deciding cases of the particular type in view, that is to say, the «merits» of any individual case are the merits of the type of case to which the individual case belongs.

What is true is that a system of enacted positive law may be enacted in terms which are of such considerable generality that the application of a given enacted rule to a particular dispute situation may appear to be unjust, unjust because the categories envisaged in the rule are insufficiently subtle (7). In

(5) Kant, *Critique of Practical Reason* (trans. T.K. Abbot, 6 ed. 1909) esp. at p. 105; Hare, Freedom & Reason (Oxford, 1962); Singer, Cf. Perelman *op. cit.* pp. 76f.

(6) See, e.g., sources cited in R. Wasserstrom *The Judicial Decision* (Stanford, 1961), ch. 5, esp. at pp. 87-88, and 93. I am in almost complete agreement with Wasserstrom's critique of those arguments.

(7) Which is the type of case envisaged by Aristotle in *Nicomachean Ethics* 1137b. Cf. Ch. Perelman *Justice* (New York, 1967) pp. 25-30.

such a circumstance it is obvious enough that there are good reasons for not applying the rule literally to the instant case, and that an exception ought to be made. For example, a statute providing for divorce on the ground of desertion over a three year period may specify that desertion continues for three years only if the initially deserted spouse remains willing throughout the triennium to adhere to the deserting spouse if he or she should return or offer to return to cohabitation. But can it conceivably be just to apply that rule if in some given case the deserting spouse's conduct after desertion has been so unconscionable that it would be quite unreasonable to expect the deserted spouse to resume cohabitation even if it were offered ? ([8]) It seems that the answer to that question might well be in the negative .But if that is so, would it be fair to hold someone seeking divorce in those circumstances to the strict terms of the law ? Evidently not. But notice: to say that there is a good reason in this case in which these circumstances have been realised for departing from the strict statutory provisions, is necessarily to say that in any case in which a deserting spouse has behaved unconscionably the same decision should hold good. To say, as can truly be said, that in some cases strict application of existing rules of positive law would be contrary to the merits of the case should not lead us to believe in some mysterious concept of equity under which individual cases are conceived as having their individual unique and particular merits. Equity cannot be understood, I would suggest, as something particular by contrast to the generality of justice. The contrast can rather, and rightly, be set as between law and equity, and only then in the sense that formal rules of positive law may work injustice in their application, which may justify the creation of exceptions to the law for classes of situations to which for good reason the previously declared or enacted law ought not to be applied.

([8]) The problem has been confronted in Scots law; see *Borland v. Borland* 1947, S.C. 432; but the judges declined to relax the requirement of 'willingness to adhere', and left it to Parliament to remedy the situation: Divorce (Scotland) Act 1964; even after that the judges have had problems. *Thomson v. Thomson* 1965 S.L.T. 52; *Donnelly v. Donnelly* 1969 S.L.T. 52.

But as that in itself says, equity is as much a matter of what is universalisable as is justice.

The thesis here to be argued is therefore a very general one. It is that the notion of formal justice requires that the justification of decisions in individual cases be always on the basis of universal propositions to which the judge is prepared to adhere as a basis for determining other like cases and deciding them in the like manner to the present one. But the question may well be asked how the judge can arrive at possible universal principles of decision and how having arrived at opposed rival principles he can in any rational sense test the one as against the other and choose which to apply.

The doubt about how judges can arrive at relevant principles to test arises from an obvious source. The «facts» of any case being unique and particular there is no end to the possible labels at possible levels of generality which can be stuck on them. What principles you assert as justifying, or entertain as possible justifications of, your decision, is then determined by how you choose to classify the facts and so there must be an enormously large if not indeed an infinite range of possible principles to be considered. How can you at all, and how can you with any semblance of justice to the parties, narrow down to a reasonable range of principles for consideration ?

Let me start by saying how it can be and is in fact done. The point to remember is that legal decision making does not proceed *in vacuo*, but always against a background of a relatively well established set of rules, principles, standards and values. That being so it follows that even in cases of first impression, cases not directly and unequivocally «covered» by some established rule, the court must nevertheless give its decision with an eye upon the surrounding framework of rules and principles within which the new decision is to be located. All the more so in that, for the reasons mentioned, the decision to be given must be justifiable as a decision of principle ,in a context in which the principle of the decision is to become, in effect, a new rule of the system.

It follows that not just any principle, but only a principle which is consistent with the existing system, can be accepted

as a valid justifying principle of a decision within the system. Of course this means as a minimum that no principle may be asserted which is contradictory to any established and accepted norm of the system, but in practice it means a good deal more as well, as I can best convey in terms of a notion of the overall «coherence» of the system. Not merely should the legal system, or any particular «branch» of it, contain no flat contradictions, but its norms ought to form a coherent whole in the broader and admittedly looser sense of embodying the rational pursuit of a consistent set of values. One of the ways in which this «coherence» is or tends to be secured is (as I have argued elsewhere) ([9]) evidenced by the way in which judges in their decision making do regularly make appeal to «general principles» of the law, or by the way in which arguments from analogy are regularly used to justify extensions of the law into new ground. So much is this so, indeed, that even the most significant acts of judicial law making in cases of first impression are normally represented as involving no more than extrapolations from, or rationalisations of, or removal of anomalies from, the existing law. The passage which I quoted from Lord Atkin's speech in *Donoghue v. Stevenson* gives rather a good illustration of just that practice.

Nor is this mere pretence; in terms of the crucial notion of the overall «coherence» of the legal system it does make sense to envisage the most adventurous of judicial decision making as involving no more than extrapolation, and to accept that there is a genuine if vague limit to the judicial power of law making implicit in the notion that innovation which goes beyond extrapolation is outwith the judicial function, being a matter reserved to the legislature ([10]).

Why should it matter that the legal system be coherent in the way which I have perhaps rather vaguely sketched here ? Again, I should suggest that there is an important point of formal justice involved. Treating like cases alike is possible

([9]) N. MacCormick 'Law As Institutional Fact' (1974) 90 L.Q.R. 102, esp pp. 121-129.

([10]) Cf. Ch. Perelman (ed.) *Le Problème des Lacunes en Droit* (Bruxelles, 1968) esp. pp. 537-552, at 539.

only given the enunciation of general norms as principles of decision which supply criteria of likenesses between different cases. But if the norms of the system are not in the sense here outlined «coherent», cases which are similar in principle may end up being decided quite differently simply because they fall under different rules. For example, there would not be any logical contradiction between a rule providing that there should be penalties for driving a car under the influence of alcohol voluntarily consumed by the driver, and another rule providing that no penalty attaches to driving a car while under the influence of other drugs taken voluntarily. But (in the absence of some explicable reason for the difference) the existence of two such rules would create injustice as between drunk drivers and drivers high on other drugs. The coherence of the system is in itself an aspect of justice .Also, in so far as the notion of extrapolation is a genuine one, it is relevant to the objection to judicial law making which suggests that it is necessarily unjust because retrospective.

Be that as it may, we are entitled to conclude that novel cases of first impression cannot just be decided according to any old principle of decision which commends itself to the judge out of an infinite range of possibilities, but must be decided in accordance with some principle which is not merely acceptable in itself and for its consequences but which is also coherent with and extrapolated from the existing norms of the system. «Rationality, as it presents itself in law, is always a form of continuity» ([11]) That implies a very considerable limitation on the range of possibilities available for serrious consideration. What is more, it is not only the case that judges deciding such questions do so against the context of the whole legal system, it is also the case that they do so in a particular context established by the system, one in which every one of the parties to an issue is entitled to advance before the court all the arguments which he can find in favour of his case. The judge is not left to his own unaided reflection

([11]) Perelman, *Justice*, p. 164.

in selecting possible principles of decision for consideration. He has pressed upon him from each side the best arguments of relevant principle which skilled counsel can find in favour of their client's case.

That that should be so is a requirement of what British lawyers are accustomed to call «the principles of natural justice» ([12]) Perhaps the present context of discussion indicates a strong reason for accepting this terminology of «natural justice». The basic idea of formal justice has been shown to require that legal decisions be genuinely decisions of principle, that is decisions based on principles whose acceptability and coherence with the system has been tested as rigorously as is possible in the nature of the case. The only practicable way to secure such rigour is to give every interested party an equal opportunity of bringing to the attention of the court all relevant considerations of principle in favour of his case, and all relevant objections to rival cases. One kind of equality which seems absolutely essential to any sort of justice is equality of opportunity to advance one's own side of the argument in relation to decisions affecting one's interest. Of course, as is usual, there may be much argument about what equality here involves — for example, must everybody have equal access to equally skilled, and expensive, lawyers ?

Such matters of «natural justice», so called, involving questions of right to a hearing and to due process of law, right to representation before administrative tribunals, rights to adjudication by an evidently unbiased judge, and so forth, are noteworthy as being among the few legal topics in relation to which lawyers and judges in litigation characteristically involve themselves in direct and explicit discussion of justice as such. Apart from the relatively technical and formal or procedural questions raised within this area of controversy, it would be difficult (if possible at all) to find within the Law Reports any explicit or sustained discussion of other aspects of justice,

([12]) See, e.g., H.W.R. Wade *Administrative Law* (2nd ed., Oxford, 1967) Ch. 5.

or of the requirements of substantive justice in relation to this or that issue.

To some extent this is a matter merely of decorum, for it is far from being the case that courts are not concerned with questions of substantive justice. The decision in a case like *Donoghue v. Stevenson* for example is obviously a decision based on a view of the just distribution of risks as between the consumers of manufactured goods and the manufacturers. Indeed, Lord MacMillan, in expressing similar reasoning to that of Lord Atkin quoted above, remarked that he was happy to think that the principles of Scots and English law were (I quote) «sufficiently consonant with justice and common sense to admit of the claim which the appellant seeks to establish» ([13]) It would be absurd to suppose that judges are not motivated in reaching their decisions by considerations of what they take to be the substantive justice of the matter in hand, and indeed it would be undesirable that they should be. Nor is a remark like that quoted from Lord MacMillan by any means a rarity in the law reports so it is not the case that judges or lawyers are unconcerned with, or that they express no opinions upon, questions of justice. What is the case is that they do not to any great extent indulge in explicit argumentation as to the theoretical basis of the justice which they assert. To that extent, the testing of rival principles of decision in disputed cases involves implicit rather than explicit reference to criteria of substantive justice, by contrast with the explicit and detailed consideration given to the exposition of relevant rules, doctrines and principles of the various branches of the established law which may be involved in or related to the cases in hand. Questions of what I have in this essay called «coherence» are pursued at greater length and more explicitly than questions of sustantive justice.

That, of course, points the way to a realisation that the relative infrequency of explicit discussion of substantive justice in judicial opinions is due to more than mere decorum. The matter of coherence in the legal system is to be understood

([13]) [1932] A.C. 562 at 621; 1932 S.C. (H.L.) 31 at 72.

in terms of the pursuit through the law of a set of values which hangs rationally together. In pursuing the coherence of the system, the judiciary is in fact pursuing and in effect sustaining the consistency of the value system to which the law gives expression. In any system in which the judiciary is expected to play the role of servants rather than masters of the law, it is right that the values of the system should play a larger part in the testing of principles of decision than the judge's own personal values. What is more, especially in a democratic political system, there is good reason to assert that the judiciary ought to play the role of servants rather than masters of the law.

Disputes over the substantive values which ought to be embodied in the legal system, disputes, that is, over questions of substantive justice are in effect clashes of ideology. As such, they could be resolved only if we could find some Archimedean point of argumentation beyond any one of them. Rawls indeed and others before him have claimed to have established such an Archimedean point, but the claim is in its nature perennially open to challenge.

If for no other reason, it seems to me to be of value to pursue the question whether formal and procedural justice has a value independent of particular substantive values embodied in the legal system at any point in time. I think that the answer is «Yes», and I think that the study of legal argument is relevant to that conclusion in spite of, or perhaps because of, the fact that it is a relatively poor source for explicit discussions of substantive justice ([14]).

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([14]) I am grateful to Professor W. A. J. Watson, Mr. Z. K. Bankowski, and Mr. Morice G. P. for criticisms of drafts of this essay, and to Professor Ch. Perelman for encouraging me to proceed with publication of it.