teoría & derecho

REVISTA DE PENSAMIENTO JURÍDICO

¿Para qué sirve la teoría de la argumentación jurídica?

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Sumario

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WHY THEORY OF LEGAL ARGUMENTATION?

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ABSTRACT

The article addresses the question about the aim of theory of legal argumentation, through the description and proposal of a particular theory of argumentation combining the most valuable contributions from those authors considered to be precursors of the theory of legal argumentation (Vlehweg, Perelman, Toulmin, Recasens), as well as those who assert the so-called standard theory (Alexy, MacCormick). Here it is introduced a theory which overcomes the shortages of the former, providing theoretical and conceptual tools to grant a rational legal praxis within a framework of a concrete theory

KEY WORDS

Theory of legal argumentation, postpositivism, formal argumentation, material argumentation, pragmatic argumentation

WHY THEORY OF LEGAL ARGUMENTATION?

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ABSTRACT

The theory of legal argumentation is a historical concept, which belongs to the realm of legal philosophy and aims at providing us with a description, a systematization, a guide and a legitimacy of adjudication in Constitutional States on the ground of a strong but limited conception of practical reason. This article defends its viability against some criticism and its suitability to become the very core of legal philosophy as a whole.

KEY WORDS

Theory of legal argumentation, philosophy of law.

WHY THEORY OF LEGAL ARGUMENTATION?

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ABSTRACT

Theories of legal argumentation appear in the mid of the XX Century when some authors (Perelman, Viehweg) disappointed by the yield of logics for the law, and their dissatisfaction with the three predominant legal doctrines: realism, normativism, and iusmoralism. Along the theories of legal argumentation there is a shift in the legal thought paradigm, and law starts to be understood as an argumentative praxis. Within this trend, there are three sorts of theories of argumentation: descriptive, weakly normative and strongly normative. Each of these fits —or can be useful for— each of those conceptions of law.

KEY WORDS

Theory of legal argumentation, realism, normativism, iusmoralism.

INTERPRETATIVE ARGUMENTATION AND EQUITABLE ARGUMENTATION. AGAINST THE JUDICIAL CREATIONISM

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ABSTRACT

The article deals with the theory of argumentation as an epistemological dimension of law, considering judicial reasoning as a mainly cognitive activity which combines probative, interpretative, and equitable argumentation. From this point, it assesses the conceptions of law which assume that judiciary can create law and also vindicate the overcoming of the rule of law. The paper focuses on those argumentation dimensions which have an increasing relevance in the legal interpretation providing an appropriate support to submission of judges to the rule of law.

KEY WORDS

Epistemology, judicial function, rule of law, judicial creationism, positivism

NULLUM CRIMEN SINE LEGE: COMMISSION BY OMISSION AND CRIMINAL LAW DOCTRINE

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ABSTRACT

The thesis of this study flows in diverse levels: a) In a first level it shows the confusion, mistake and inconsistency of the theory of the so-called «legality´s defect» in crimes of commission by omission, which was the majoritarian one in German and Spanish penal doctrine; b) In a second level it explains that the dogmatic of Criminal law tends to search general concepts which do not take into account sufficiently the specific circumstances of the singular case. Consequently, very often this dogmatic ignores the constitutional principles and rights; c) Thirdly, the variety of dogmatic systems in Criminal law shows by itself that the dogmatic discourse is not a scientific one in the strict sense. Additionally this discourse is not neutral and may not be like this, due to the fact this discourse uses to be so often against the constitutionals rights to liberty. However, now more than ever, this discourse should defend those rights.

KEY WORDS

Legality principle, defect of legality, commission by omission, penal dogmatic, fundamental rights, constitutional right to liberty.

INTERPRETATION OF THE CONSTITUTION: A GOVERNMENT OF JUDGES?

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ABSTRACT

The interpretations of the Constitution as made by both, the Constitutional Court and the ordinary courts sometimes exceed the limits of constitutional review to get into the field of political questions. This paper examines some of the main interpretative criteria and arguments through which such actions take place (precisely, the principle of interpretation in conformity with the constitution and the proportionality test or balancing). It also warns about the risks for democracy and the rule of law arising from such judicial interpretations.

KEY WORDS

Constitutional interpretation, constitutional review, interpretation in accordance with the constitution, judicial balancing.

DEFEATED SCHOLARS. JURISTS EXILED IN THE UNAM

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ABSTRACT

Throughout history, there has come a diversity of exiled communities to the American continent. Unlike other countries in Latin America, mainly Mexico, republicans in exile from Spanish Civil War were received with great generosity. First, thanks to the work of President Lazaro Cardenas and then by the help of various civil, state and academic institutions, many were able to achieve, over time and despite many difficulties, relevant positions in this country. In this paper we will see the example of the assistance provided by the Universidad Nacional Autónoma de México (UNAM) group of law professors, that apart from their chairs in Spain, will end up linking to their classrooms. They helped to complement and make law science advancements in the country that welcomed them.

KEY WORDS

Civil War, exile, professors of Law, jurists, Spanish University, UNAM, academic records.

PAROEMIA AND THE PHRASE "ECHAR BANDO" IN THE QUIXOTE. LEGAL PRAGMATICS AND SEMIOTICS

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ABSTRACT

The text offers a reversal of the traditional process of reading the cervantine work among lawyers. Glossing Borges, the author proposes: if I were granted the possibility of reading a page of Don Quixote as it was read in 1615, I would know how was literature (and in its case law) was in 1615. The iusliterary methodology about how we used to from a legal point of view means finding out the legal reading approach, considering such reading the way of understanding how the text worked. We can maintain then that the phrase *echar bando* present in Don Quixote implies pragmatic legal dimensions in a legal mandate or legislative decree regarding certain aspects of the norm procedure with have to do with certain solemnities —formal proclamation— of its statement, its publicizing as well as its effectiveness ambition. Also, from the perspective of legal semiotics, analysis of the interpretation of The gesture of Don Quixote to *echar bando* reveals legal-performative action. The text concludes with an addendum of reading legal, valid for all times, and especially in the current.

KEYWORDS

Law and literature, Law's literary culture, The Ingenious Gentleman Don Quixote of La Mancha, Miguel de Cervantes Saavedra (1547-1616), legal pragmatic, legal semiotics.

THE DECISIONALIZATION OF INDIVIDUALIZATION

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ABSTRACT

Throughout forensic science and adjacent branches, academic researchers and practitioners continue to diverge in their perception and understanding of the notion of 'individualization', that is the claim to reduce a pool of potential donors of a forensic trace to a single source. In particular, recent shifts to refer to the practice of individualization as a *decision* have been revealed as being a mere change of label (Cole, 2014), leaving fundamental changes in thought and understanding still pending. What is more, professional associations and practitioners shy away from embracing the notion of decision in terms of the formal theory of decision in which individualization may be framed, mainly because of difficulties to deal with the measurement of desirability or undesirability of the consequences of decisions (e.g., using utility functions). Building on existing research in the area, this paper presents and discusses fundamental concepts of utilities and losses with particular reference to their application to forensic individualization. The paper emphasizes that a proper appreciation of decision tools not only reduces the number of individual assignments that the application of decision theory requires, but also shows how such assignments can be meaningfully related to constituting features of the real-world decision problem to which the theory is applied. It is argued that the *decisonalization of individualization* requires such fundamental insight to initiate changes in the fields' underlying understandings, not merely in their label.

KEYWORDS

Individualization, decision theory, likelihood ratio.