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Legal Argumentation Theory: Cross-Disciplinary Perspectives

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Introduction

Legal argumentation theory is a cross-disciplinary research field where theoretical tools for analyzing and evaluating legal argumentation are developed and applied. Due to its cross-disciplinary nature, legal argumentation theory has become a meeting point for scholars with a background in argumentation theory, logic, artificial intelligence, rhetoric, legal theory, cognitive psychology, communication studies and many other disciplines.

This volume brings together two theoretical approaches to legal argumentation theory: the first approach is based in general argumentation theory and contributes to the study of legal argumentation by developing general argumentation theory in application to law, the second approach is based in legal theory and contributes to the study of legal argumentation by developing legal theory with regard to argumentation. The chapters in this volume illustrate how research from one approach complements research from the other approach, and show how they can be fruitful for each other.

The papers that belong to the first approach take their point of departure in the analysis of a certain kind of argument, a specific argumentation fallacy, a rhetorical strategy or in certain rules for a rational discussion, and apply this theoretical analysis to legal argumentation. Each of the first four contributions concentrates on a specific form of argument: the argument from consequences, the argument *ad absurdum*, the argument from precedent and the argument *ad hominem*. The authors propose an integration of ideas from argumentation theory and legal theory to develop tools for analyzing and evaluating arguments of this kind in legal argumentation.

In her contribution, Flavia Carbonell investigates 'consequentialist arguments' in legal reasoning. She analyzes the diverse approaches to consequentialist arguments given by MacCormick's theory, Wróblewski's theory and Feteris's pragma-dialectical theory, with the purpose of, firstly, comparing, at a theoretical level, the strengths and weaknesses when arguing by consequences is at stake. For testing the scope of the proposals, the paper, secondly, uses the selected theories in a study of the consequentialist arguments used in a ruling of the Chilean Constitutional Court. The theoretical comparison, together with the outcomes to which the analysis of

judicial argumentation leads, sheds light on the capacity and efficacy of these tools in guiding the rational construction and evaluation of judicial reasoning.

In his contribution, Thomas Bustamante concentrates on a specific form of argumentation in which judges refer to the consequences of application of a legal rule, in this case the unacceptable or 'absurd' consequences of application of the rule in the specific case. He explains that the *ad absurdum* argument can be understood either as a strictly logical tool, which is equivalent to a proof by contradiction, or as a pragmatic argument about the desirability or undesirability of a given proposition. Yet, in legal reasoning lawyers tend to use it, at least in the vast majority of cases, only in the latter sense. The *argumentum ad absurdum*, he argues, can be classified as a special kind of pragmatic argument whose specific feature is its special argumentative strength in comparison with generic consequentialist argumentation. Once we are able to grant that premise, the chapter intends to explain the most important rules of interpretation that may be used to determine the conditions under which the *ad absurdum* argument can be correctly deployed in legal reasoning.

In his contribution, Fred Schauer investigates the argument from precedent. Schauer argues that it is a mistake to see the argument from precedent as a special case of the argument from analogy, and demonstrates that there are fundamental differences between the two argument types. An argument from precedent claims that the present case must be decided in the same way as a previous case, since there are no relevant differences between the cases. An argument from analogy claims that there is an important similarity between the present case and the previous case, but does not claim that the cases are identical in all relevant aspects. Furthermore, Schauer points out that a decision maker may disagree with the decision in the previous case and still make an argument from precedent, since an argument from precedent is made for the sake of consistency. This is not possible with an argument from analogy.

In their contribution, Christian Dahlman, David Reidhav and Lena Wahlberg develop a theoretical framework for evaluating an argument *ad hominem*. This is highly relevant for legal argumentation, as lawyers often use arguments *ad hominem* to cast doubt on the reliability of a witness. The authors propose a general definition of ad hominem arguments, and a general framework that identifies the different ways in which ad hominem arguments can go wrong. According to the authors, an argument ad hominem is an argument that makes a claim about the reliability of a person in the performance of a certain function, based on some attribute relating to the person in question. On the basis of this definition, the authors identify seven different ways that ad hominem arguments can go wrong, and classify them as seven different ad hominem fallacies: false attribution, irrelevant attribute, overrated effect, reliability irrelevance, irrelevant person, insufficient degree and irrelevant function.

The following two contributions start from a specific argumentation-theoretical approach, the pragma-dialectical approach, and explain how legal argumentation can be analyzed and evaluated from this perspective as a constructive contribution to a rational legal discussion. Harm Kloosterhuis starts by giving a description of the pragma-dialectical approach to legal argumentation in which the justification of

a judicial decision is considered as part of a critical discussion. In this approach it is assumed that legal argumentation theory should integrate descriptive and normative perspectives on argumentation. Legal discourse should be studied as a sample of normal verbal communication and interaction and it should, at the same time, be measured against certain standards of reasonableness. This implies first a philosophical ideal of reasonableness, second a theoretical model for acceptable argumentation and third tools to analyze actual legal argumentation from the perspective of the model. Analyzing argumentation in judicial decisions from the ideal-perspective of a critical discussion is sometimes criticized. One of the main objections is that a judge does not have a standpoint in a critical discussion, but simply decides a case. As a result, the critical norms for evaluating argumentation are not applicable to a legal decision. In his contribution, the author tries to refute these two objections by showing how the ideals of a critical discussion relate to the ideals of the Rule of Law, and how these ideals function as starting points in analyzing and evaluating legal decisions, focusing on the reconstruction of standpoints in legal decisions.

Eveline Feteris gives a further explanation of the pragma-dialectical approach and presents an analysis of the discussion strategy of the Dutch Supreme Court in the famous case of the 'Unworthy Spouse'. The author explains how the theoretical starting points of the pragma-dialectical theory can be used in the analysis of the strategic maneuvering of the Dutch Supreme Court in a case in which there is a difference of opinion about the argumentative role of certain legal principles. In its discussion strategy, the Supreme Court aims at maintaining the decision of the court of appeal while at the same time making a correction so that the decision is in line with the way in which the Supreme Court wants to make an exception to a statutory rule about the division of the matrimonial community of property. The discussion strategy consists of a specific, systematic and coordinated choice of the dialectical possibilities in the different stages of a critical legal discussion, consisting of particular choices of common starting points and particular choices in the evaluation of the argumentation. These choices are aimed at steering the discussion in a particular direction so that a particular result is reached that would be desirable from the perspective of certainty, from the perspective of justice in the specific case, and the perspective of the development of law with respect to the role of general legal principles and reasonableness and fairness.

The chapters that are based in legal theory investigate legal argumentation in the context of various key issues in legal theory: the normativity of legal argumentation, the nature of legal justification, the nature of legal balancing, the formation and revision of normative systems and the relation between law and truth.

The contribution by Carlos Bernal discusses the different relations between legal argumentation and the concept of normativity. On the one hand, legal norms are elements of the arguments which go together to make up legal discourse. On the other hand, legal argumentation plays an important role in grounding the normativity of legal norms. Bernal considers four aspects of the relation: the normativity of the different kinds of legal norms, the rules of legal argumentation, the role played by

the rules of legal argumentation in grounding the normativity of legal norms and the role played by legal norms in legal argumentation.

The contribution by Bruce Anderson begins by arguing that the key elements in any analysis of weighing and balancing are questions, insights and judgments of value. This position is used to critique the role Marko Novak assigns to rationality in balancing and Robert Alexy's idealized weight formula. Finally, by examining the relation between deliberation and expression, he argues that a written legal decision represents the possibility of someone understanding and evaluating that decision. Expressions, in whatever form, do not justify legal decisions.

The contribution by Jaap Hage discusses the theories known as 'legal constructivism' and 'ontological constructivism'. According to legal constructivism, the legal consequences of a case are what the best legal arguments say that they are, and this means that legal judgments can be 'true' even in hard cases. Critics of legal constructivism say that there is no such thing as a 'best legal argument' in a hard case, and that judgments in such cases therefore cannot be 'true'. Hage concludes that legal constructivism is a view that can neither be verified nor falsified, and moves on to discuss ontological constructivism. According to ontological constructivism, the legal consequences of a case depend on the best possible legal argument. Hage points out that this view incorrectly presupposes that the law is a closed domain.

Marko Novak discusses the problem of the separation between the context of discovery and the context of justification of legal decisions, one of the basic themes in legal argumentation theory. Whereas the context of discovery focuses on the process of reaching a legal decision, which concludes a decision-making process, the context of justification is concerned with justification of the legal decision through the application of relevant legal arguments. The majority of legal theorists interested in legal argumentation theory support the position that the mentioned two contexts are rigidly separated, in the framework of which the process of discovery is mainly studied by psychologists while the process of justification is the only area that should be relevant for legal argumentation theory. The author opposes such a rigid separation between the two contexts and views it as a position that is too idealist. Instead, he supports a more realistic position of their moderate separation, whereby he recognizes the importance of the discovery context while still insisting on the major relevance of the justification context.

The contribution by Antonino Rotolo and Corrado Roversi proposes a framework for reconstructing legal arguments that support an extensive or restrictive interpretation of a legal provision. According to Rotolo and Roversi, these interpretative techniques correspond to revision operations in systems of constitutive rules. Extensive and restrictive interpretations of legal concepts require expansions and contractions in the constitutive rules that define them. The advantage of the proposed framework is that it makes these arguments more transparent and provides criteria for evaluating them.

Jan Sieckmann's contribution discusses legal justifications where normative arguments are balanced against each other. Sieckmann claims that a legal justification of this kind cannot be reconstructed as a deductive argument where a conclusion

is drawn from certain premises. Balancing is a different method for justification. According to Sieckmann, balancing is a rational method for justification in its own right, since the balancing of normative arguments includes an element of autonomous choice, subject to constraints of rationality.

In his contribution, Giovanni Tuzet discusses the role of facts in legal argumentation, and the function of trials with regard to the truth. Tuzet criticizes the view that trials do not aim at the truth, and cannot aim at the truth. According to Tuzet, truth is a necessary condition for justice.

Most chapters in this volume were presented at a workshop on legal argumentation theory at the Goethe Universität in Frankfurt am Main (Germany) on 18–19 August 2011. The workshop was organized by Christian Dahlman (Lund University) and Eveline Feteris (University of Amsterdam) as a special workshop at the IVR World Congress for Philosophy of Law and Social Philosophy. The participants to the workshop included scholars from Germany, Canada, Brazil, The Netherlands, Italy, USA, Sweden, Chile, Poland and many other countries.

Christian Dahlman
Eveline Feteris

Contents

Chapter 1
Reasoning by Consequences: Applying Different Argumentation Structures to the Analysis of Consequentialist Reasoning in Judicial Decisions

Flavia Carbonell

1.1 Introduction

Theories of legal argumentation, as many scholars point out, arise in legal theory as an echo of the argumentative turn in philosophy of language and as a middle way between the idea of a mechanistic judge and an arbitrary judge with absolute discretion. These theories propose a diverse range of criteria both for guaranteeing rationality and reasonableness of legal decisions – especially judicial ones – and for enabling intersubjective scrutiny or public control on the process of adjudication (García Amado 1986:152–154).

Among these criteria, one that has received special attention is the argument from consequences, also called pragmatic argument or consequentialist reasoning. This argument is generally used in the context of judicial hard cases – that is, when problems of interpretation, relevance, classification or proof arise, according to MacCormick's classification[1] – where judges have to justify their decisions using different types of argument and where the efforts are directed at reinforcing the chain of arguments. The theoretical proposals concerned with the argument from consequences consider diverse elements and variables that are necessary for assuring the correct, strong and sound construction of this argument and its proper use.

Even if consequentialist reasoning is not a new technique in legal argumentation, its use in justifying legal decisions, particularly judicial decisions, is not exempt from criticisms, nor has it had a homogenous reception within legal theory and judicial practice. The criticisms refer to different problematic aspects of consequentialist

[1]The first two of these problems have to do with the major premise (law), and the others with the minor premise (facts). See MacCormick (1997:65–72, 87–97).

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arguments, such as insufficiently backing the prediction of future consequences, the extension of the consequences to be considered, proof of the causal relation between an act and its foreseen consequences, the parameters to evaluate or assess consequences against other values, interest or goods, and the question for what or for whom are the consequences favourable or unfavourable, among others. In the legal sphere we can add questioning about the legitimacy of judges incorporating extra-legal consequences as reasons for deciding in one way or another and problems of excessive judicial discretion and weak accountability mechanisms when these sorts of arguments are at stake.[2] This paper will not discuss all of these issues.[3] Thus, i.e., I will not develop at large the issue of whether judges do, can, must or should not use consequentialist extra-legal argumentation. Instead, the starting-point is that since judges use the argument from consequences to justify their rulings, it would be relevant to identify which are the theoretical tools that help them to make a better use of this argument. With this as the premise, I will focus specially on the different parameters proposed by legal theorists to evaluate the use of the argument from consequences, pointing out the problems derived from these proposals and offering a possible solution to them or at least a way of mitigating them.

The aim of this paper is to perform a preliminary comparison among the theoretical approaches to consequentialist reasoning developed by three scholars – MacCormick, Wróblewski and Feteris – bearing in mind the common purpose of legal argumentation theories in order to provide tools for constructing good or correct arguments, or indicators for improving, modelling or guiding the practice. The comparison will be done considering a ruling of the Chilean Constitutional Court. This case-study will be useful to identify strengths and weaknesses of the three theoretical proposals.

The structure of this contribution will be the following. I will first consider very briefly two aspects of consequentialist arguments (a concept and a distinction), and I will highlight the central points of each of the theoretical proposals. Secondly, I will apply these proposals to the evaluation of some consequentialist arguments of a recent decision of the Chilean Constitutional Court. The final section will offer some conclusive remarks.

1.2 Theories on Consequentialist Reasoning

In this section, I will explain the concept of the argument from consequences and I will outline a distinction that is relevant when applying this argument to legal reasoning. Second, I will briefly describe the way in which three scholars that

[2]Dworkin tackles this problem by saying that consequences-based reasoning denies past judicial and political decisions and displaces the conception of welfare of the community by the judge's own conception (1986:101; 152ff).

[3]For a panorama of the debates in legal scholarship on the argument from consequences see Bengoetxea (1993b); for an introduction to the philosophical consequentialism – non-consequentialism debate, see Scheffler (1988); Sinnot-Armstrong (2006); Slote (1992).

have delved into the analysis of the argument from consequences have tackled the problems and elements involved in the argument's use.

By "consequentialist argument" I refer to an argument that takes into account the positive or negative consequences that a particular legal decision may produce as a reason to support or reject that decision.[4] From this definition, it is relevant to emphasise that, on the one hand, consequences are brought forward as reasons to support decisions or, most of the time, to reject decisions with unacceptable, harmful or unfavourable effects, either for the legal system or for the society, i.e., consequences are a factor or a reason for making a decision[5]; however, on the other hand, those consequences that act as reasons for the decision are future and hypothetical ones, that is, they are only foreseen or foreseeable. In what follows, I will be using as interchangeable the expressions "consequentialist reasoning," "argument from consequences" and "argument referring to consequences." I will also circumscribe the analysis to judicial decisions as a paradigmatic case of legal decisions.

Concerning the argument from consequences in the legal sphere, it is interesting to distinguish – following the suggestions of several scholars[6] – between two types of consequences: legal and extra-legal ones.[7] *Legal consequences* are the effects of a decision inside the legal system or the possible legal implications of a decision internally (Bengoetxea 1993a:256). In this sense, the use of the argument from legal consequences looks for consistency and coherence of a ruling with the Constitution and the rest of the norms of the legal system and, at the same time, tries to avoid legal gaps and deregulation. Thus, consequentialist argumentation appears frequently together with arguments based on coherence, and it is used mainly to dismiss solutions that produce effects that are incoherent with the legal system as a

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[4]The argument from consequences has been generally conceptualized as "the argument for accepting the truth (or falsity) of a proposition citing the consequences of accepting that proposition (or of not accepting it)" (Walton 1999:252). This same argument, under the name of "pragmatic argument", is defined by Perelman as the one that enables to evaluate an act or event in accordance with its favourable or unfavourable consequences (Perelman and Olbrechts-Tyteca 1969:266ff).

[5]MacCormick differentiates between the result of a decision – understood as the legal effects that must be applied to a case when the factual and normative requirements prescribed by the rule are met – and its consequences as a factor for deciding (MacCormick 1983:246).

[6]Bengoetxea, following MacCormick, distinguishes, in my view, between these two types of consequentialist arguments, even when not with this terminology: (a) those consequences that refer to the possible internal juridical implications of a legal decision, that is, within Law as a legal system; and (b) those consequences that might follow a judicial decision in Law that refer to the results or repercussions (in behavioural terms), for example, consequences in the economy or in Law as a social system or in other systems (Bengoetxea 1993a:256ff). See also the distinction between juridical and behavioural consequences in MacCormick (1983:251). An analogy could also be made with the categories "normative" and "factual" consequences within the trilogy proposed by Wróblewski (1984:151ff).

[7]Scholars have also elaborated other classifications that, although interesting, will not be developed here: causal and remote, favourable and unfavourable, foreseeable and certain, particular and systemic. See, for example, Perelman Olbrechts-Tyteca (1969:266ff), Gottlieb (1968:76), and MacCormick (1997:150).

whole or with the specific principles of a branch of law (Bengoetxea 1993b:48). Some examples of the use of the argument of legal consequences are: to avoid legal uncertainty, to avoid normative gaps, to avoid empting the content of a legal competence, to avoid injuries to the rights of third parties in good faith, and to reject generic appeals to future damages.[8]

On the other hand, *extra-legal consequences* are all those repercussions that a judicial decision may have in the extra-legal social reality or outside the legal system. Like the argument from legal consequences, an argument referring to extra-legal consequences is commonly a negative one. That is, the argument is incorporated in judicial reasoning to justify the rejection of a competing decision because of that decision's unfavourable or undesirable consequences. Some examples of extra-legal consequences are: the economic consequences, for the local government, of reviewing or annulling a town-planning administrative permission; the impact in the public funds derived from the duty of the state to return taxes paid on behalf of a statute declared void; the variations produced by a decision on the economic and financial state policy; the negative political effect of the failure to comply with an international duty; the changes in the logic of the democratic system; the social consequences produced by changes introduced in the labour policy.[9]

The relevance of distinguishing among these types of consequences is twofold. Firstly, the argument referring to legal consequences is less controversial than the argument referring to extra-legal consequences. This is so since legal consequences are usually articulated, in the law-adjudication justificatory discourse, by other elements coming from the corresponding legal system that are easily identifiable or the belonging of which to the system and its importance are not controversial. It would be difficult for someone to deny that legal certainty is an aim protected by legal systems, leaving aside the issue that the expression "legal certainty" is a vague one which may have multiple meanings. In contrast, it is generally contentious whether the positive or negative effects of an unwritten social, economic or political principle or value can be used as a reason for adopting or rejecting a certain decision. Thus, e.g., it is not clear if "economic stability" can be brought forward in a decision as a reason for deciding one way or the other – and it is even less clear if judges are the ones entitled to do this balancing of values, principles and interests of a given society – despite the fact that it seems, at first glance, a positive and desirable status for a society to reach. Moreover, the analysis would be incomplete if one argues that economic stability is desirable, without mapping out whether there is some legal principle or legally-protected interest that is being defeated, unapplied or overruled

[8]These type arguments come from an analysis of a set of rulings of the Spanish Constitutional Court that I did a couple of years ago. Following the order of the text, these rulings are: STC 45/1989, de 20th February; STC 195/1998, 1st October; STC 75/1984, 27th June; STC 37/1981, 16th November; STC 178/2004, 21st October; STC 184/2004, 2nd November.

[9]These examples are taken from the study of a set of rulings of the Spanish Constitutional Court mentioned in the previous footnote. Following the order of the text, these rulings are: STC 54/2002, 27th February; STC 13/1992, 6th February; STC 155/2005, 9th June; ATC 135/2004, 20th April.; STC 22/1981, 2nd July.

by the desirable extra-legal effect that the decision may carry. In short, the problem of extra-legal consequences in judicial argumentation is that the justification of the desirability or positive character of them is not a straightforward issue. Further, in many cases this argument is dressed as one of common sense or authority which, at the end, hides both the existence of a fundamental disagreement on the matter and the reasons that really justify the decision (Bell 1983:36).

Secondly, the distinction is also useful to identify criteria for assessing the argument from consequences that are problematic, especially when applied to extra-legal consequences, and to consider the need of having both common and differentiated criteria for each type of consequences.[10] However, in some cases there is no clear dividing line between legal and extra-legal consequences, or the latter are redirected to legal principles or norms.

Keeping in mind the concept of the argument referring to consequences and the two types of consequences that play a role in legal argumentation, the following sections will expose the main points of consequence-based reasoning in the three authors under study: MacCormick, Wróblewski and Feteris.[11]

1.2.1 MacCormick's Theory

In MacCormick's theory, the argument from consequences acts as a second-order justification, which consists of the material justification of the normative and factual premises. This second-order justification follows the deductive syllogism (first-order justification) when the latter is insufficient for solving a hard case or when there is a problem of interpretation, relevance, proof or classification. At this second level, three elements have an important role to play, which are consistency, coherence, and consequences of the alternative decisions. The first two are requirements of the decision making sense within the given system, while the latter looks for the decision to make sense with the perceptible world (MacCormick 1997:132).

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[10]In my view, this is the proposal of Bengoetxea. Some of the common criteria for assessing consequences that he points out are the *unity* among the parts of the argument, the *consistency* or absence of contradictions among the elements of the argument, the *coherence* of the argument with the legal system, and the *completeness*, that is, that the argument gives account of all its premises. Concerning the different criteria, the parameters of evaluation of legal consequences are: substantive equality, the goals and purposes of the norm or branch of law, institutional values, constitutional principles or general principles of law. Extra-legal consequences, in turn, are assessed through axiological criteria such as economic stability, good international relations, and protection of the social welfare of the society or of a certain group. The problem is, precisely, that with the consequences being hypothetical, there is no possibility of an empirical evaluation when they are used as an argument; instead, their assessment is always made *a priori* and abstractly, which prevents the rational control of those hypotheses (Bengoetxea 1993b:46ff).

[11]I borrow this expression from Péter Cserne (2012).

MacCormick is especially interested in the justification of the second level because if the premises are well-justified, a formally correct deduction from the premises will lead to a justified or rational conclusion, interpretation, or decision. Consequences are brought into the theory as a reminder that legal decisions, and particularly judicial decisions, do not impact only on the shape of the legal system, but also – and maybe mainly – directly on people and other dimensions or subsystems within society.

Following a suggestion of Rudden (1979), the Scottish scholar distinguishes between juridical and behavioural consequences. Juridical consequences, or consequences with logical implications relevant for legal justification, are those that have effects within the legal system. Behavioural consequences, on the other hand, are those effects that the decision produces in the world, in the behaviour of individuals and of economy and society (MacCormick 1983:251).

There are other important aspects in MacCormick's writings about consequences. According to his view, some types and ranges of consequences are *necessary* and *relevant* in the justification of decisions, and, thus, should be included. This is the result of placing his proposal as a middle-way between two extreme views: justification only based on consequences – with the main criterion here being the cost-benefit ratio – and justification that guarantees the nature and quality of the decision (1997:101–102).

However, incorporation of consequences in judicial reasoning cannot ignore a crucial rule applicable to legal argumentation in general: that the legal answer "always has to be capable of being framed in terms of the law, through interpretation of statues or of precedents, or of legal principles developed through reflection on law as practically coherent normative order". In this vein, a primary requirement of legal reasoning is to show that the ruling "does not contradict validly established rules of law". A second requirement is to show that the decision is supported by established legal principles. When both requirements are not sufficient or conclusive in favour of a single ruling, then consistency and coherence need to be complemented by the argument about consequences (MacCormick 2005:101, 104).

Together with the requirements just mentioned, the justification process should lead to the universalisation of the reasons involved in the decision, which is a way of realizing formal justice or the egalitarian character of the rule of law (MacCormick 2005:230–231).[12] The universalisation requisite applies also to consequentialist reasoning, which means that one criterion in the evaluation of the reasoning should be its capacity of being universalised, i.e. of becoming a general norm of the

[12]By universalisation or universalisability in adjudication legal theorists refer to the fact that the judge that adopts a decision in a particular case has to be ready to give the same solution to all future cases with analogous relevant features. Uniformity in judicial decisions is a requirement also of consistency and coherence of the legal system, at the same time as being an expression of the rule of justice that "requires that those who are essentially similar should be treated alike". Perelman calls it the rule of *formal justice*, "because it does not tell us *when* beings are essentially similar nor *how* they must be treated" (Perelman 1977:81–82; 1974:28).

system.[13] In the same sense, one should understand MacCormick's claim as saying that relevant consequences are those that are based on a general rule and not only on the specific effects produced by the decision over the parties (1997:150).

Finally, MacCormick identifies the determination of the criteria for assessing consequences as a "trap" of consequentialism. Without distinguishing among juridical and behavioural consequences, he says that this exam should be done in the light of criteria such as "justice", "common sense", "public policy", and "convenience" (1997:150; 1983:255). Evaluation, then, considers a plurality of values that law aims to uphold, and not only utility or a cost-benefit relation. This is why consequentialist argument cannot be strictly assimilated into utilitarian reasoning. Assessing consequences is not only done according to a plurality of values, but, in the words of this scholar, it is at least in part subjective, because different judges can attribute different weights or importance to the diverse evaluation criteria. He even raises the following question: can these criteria be redirected to a single metric or should one accept that they are incommensurable? This question, however, is left relatively unanswered. There are values, he argues, that are "imperfectly commensurable even situationally"; on the other hand, there are irresolvable contentious cases where the disagreement is a reasonable one (2005:117). The suggestion seems to be that in these last cases, judges can justify their rulings in several directions, and logical form, universability and completeness act as basic argumentative requirements that only guarantee a *minimum* of "correctness".

1.2.2 Wróblewski's Theory

Firstly, it is advisable to note that Wróblewski uses the term "consequences" to describe two different operations: the "choice of consequences" and the "justification through consequences". The first use of the term refers to the competence that certain norms confer on judges for particularizing the consequences of their decisions, with this determination being inside their discretionary powers by explicit recognition of the legal order (Wróblewski 1992:189ff). The typical example is criminal rules that enable judges to decide the years of imprisonment within an established range. However, the exercise of this competence does not necessarily involve consequence-based reasoning but rather is just the use of a judicial power.

Wróblewski's second use of the term "consequences" is the one of interest here. Justification through consequences, as Wróblewski explains, is justification that includes consequences among the reasons for justifying a decision or, in other words, reasoning that justifies a decision or an action "by the evaluation of its consequences" (1984:141). The author differentiates this type of justification from

[13]Some authors have pointed out that universability is a feature of rationality of argumentation according to the great majority of theories of practical reasoning. Wróblewski says that even if the former idea could be debated, universability can be nevertheless understood as a requirement of its legality (1984:160–161).