

Introduction

The present volume comprises the proceeds of two Special Workshops held at the 28th World Congress of the International Association for Philosophy of Law and Social Philosophy in the University of Lisbon School of Law focusing, respectively, on the role of legal argumentation and human dignity in constitutional courts.

In recent years, interest in the legal argumentation of constitutional courts has grown significantly, both from a theoretical and practical perspective. The first section of the book addresses the role of legal argumentation carried out by constitutional courts in general, encompassing empirical and comparative perspectives on constitutional argumentative practices. It also comprises a comparative assessment of constitutional argumentation *vis-à-vis* argumentation deployed by other courts as well as decision-makers. The array of institutional factors and their role in constitutional reasoning as well as the different legal actors engaged in judicial argumentative practices are highlighted through the analysis of the various types of constitutional reasoning.

The first section starts with Giovanni Damele's article focusing on the persuasive force of the so called "naturalistic argument" in constitutional argumentation. Taking into consideration some examples taken from the Italian Constitutional Court case law, he refers to the appeal to the "nature of things" (often based on a supplementary appeal to the "common sense") and discusses its interpretation as an "auxiliary" argument which requires other arguments in order to convey the precise meaning of "nature".

Rachel Herdy addresses the subject of the use of arguments from epistemic authority (or appeals to expert opinion) in high courts. Her paper provides a functional, relational, and truth-oriented definition of epistemic authority. She further discusses the quality of the exclusionary reasons to follow an epistemic authority's say-so and examines the types of factual claims that constitutional courts frequently face (adjudicative and legislative), and for which they require the help of experts. Rachel Herdy schematizes a slightly modified version of Walton's structure of an argument from epistemic authority, which serves as a test of the strength of the inference and indicates instances of weak and fallacious uses of an argument from epistemic authority deployed by the Supreme Federal Court of Brazil. Her main analytical claim is that an argument from epistemic authority differs from political authority in respect to the conditions of its legitimate use.

Fernando Leal claims that saturating legal justification might be a problem for the rationality and the legitimacy of judicial decisions. Pursuant to distinguishing vertical and horizontal saturation, he further claims that the latter, as a maximizing strategy, does not fulfill the requirements of rationality in a constrained populated reality since it

might imply communicational, institutional and justificatory dysfunctionalities in legal justification.

Thomas Bustamante reconstructs the concept of *obiter dictum* with two central aims: first, to provide an understanding for all judicial pronouncements that are institutionally relevant while not strictly authoritative, instead of only those traditionally classified as *obiter dicta* by the classical theories of precedent; second, to understand the legitimacy requirements of *obiter dicta*, i. e. the circumstances in which they are expressed in a morally justified way. Particularly, he argues that by means of *obiter dicta* judges sometimes perform speech acts without the appropriate political legitimacy. Such speech acts can be abusive either because they interfere on political and legal processes in other institutions, or because they violate a role-obligation of judges in other ways.

Chiara Valentini addresses and unpacks the link between proportionality review and the right to justification. In drawing attention to aspects that have been only partially addressed to date, she claims, in the first part of the paper, that proportionality review – in its different versions – fulfills the right to justification. In the second part, she specifies the reasons why this is so, focusing on the structure of proportionality review and the ways in which it realizes the right to justification conceived as a complex standard through the combination of different requirements. Finally, she also points out that such realization is gradual insofar it depends upon the form taken by proportionality review and the extent up to which it fulfills those various requirements.

In the last part of the first section, Alberto Puppo wonders if judges are necessarily wrong in choosing some local applicable legal sources through the avoidance of making a better (or their best) contribution to some universal and moral ideal of substantive justice. On the one hand, he questions the value of local priority, as conceived by Dworkin, and whether it just means that judges are not virtuous enough to consider the whole legal order. On the other hand, he debates whether local priority is a kind of symptom of parochialism, whether accompanied by good or bad faith. Regarding the topic of local priority – or, more specifically, the “domestic constitutional priority” –, he reviews three cases: the *Kadi* judgment, ruled in 2008 by the European Court of Justice, the 238 (*Immunity*) judgment, ruled in 2014 by the Italian Constitutional Court, and the *Fontevecchia* judgment, ruled in 2017 by the Argentinian Supreme Court. He concludes his paper by stating that the principle underlying these rulings is not only justified from a domestic perspective rather it should be adopted by international actors if a decent international community – in which there is no place for the (unnecessary) sacrifice of individual fundamental rights – is to be constructed.

The second section of the book focuses on how constitutional courts reason with human dignity. This particular concept adopts many different shapes, very rarely in objective fashion. It is embedded in several western constitutions, although constitutional courts and scholars tend to disagree on its meaning and content. It is also *ratio decidendi* to many judicial “hard cases”, albeit an argument put forward to sustain contradictory theses of both parties to litigation. Lastly, it is subject to many philosophical debates and essays of moral and legal theorists in which it is not infrequent that debaters simply “talk past each other” on account of their own conceptions. On the one hand, its common

status of “paramount concept of human rights system” and the frequency with which it is used in legal argumentation makes it progressively harder to avoid trivialization and demands for a meaningful and more or less objective content. On the other hand, different accounts of human dignity are much easier to accept as a platform for pluralism and tolerance in modern constitutional states.

The second section comprises four papers which debate several philosophical and normative accounts of human dignity, particularly against the background of “hard cases”. Multiple questions are addressed: what does it mean that men have the right (or are supposed) to be *dignified*; what tools can be used to properly identify and extract from a constitutional text a *core* of human dignity; how are courts supposed to make use of this concept (or principle); should moral considerations be taken into account in such a moral resonating concept; is it worth debating philosophically the several accounts of human dignity or should the courts simply attend to the standard account of the concept in a given time and place?

It opens with a paper by Miguel Nogueira de Brito in which the view according to which there is no such thing as an absolute right to human dignity – and if there were, it would be bound to a particular constitutional system – is criticized. Based on the work of authors such as Alan Gewirth, Anne Phillips and Andrea Sangiovanni, he sustains a negative conception of an absolute right to dignity that differs from traditional conceptions on at least two grounds. Instead of searching for some morally-significant natural property shared by all human – and only human – beings, and then affirming the equal dignity of every human being on that basis, this conception focuses on the practice of treating others as moral equals. On the other hand, and as a consequence, it concentrates on negations of human dignity, by excluding concrete evils against humans.

Pedro Moniz Lopes intends to identify the many shapes in which human dignity shows itself. He identifies these ambivalences in the context of a particular case – *Fleming v. Ireland* – in which the also ambivalent liberty (or “right”) to die arises. In aiming at clarifying the conditions under which the concept of human dignity may be properly understood by pinning it against the background of several philosophical, political and theological theories, he draws much from the concept of deep interpretative disagreements as he moves to further identify other ambivalences of human dignity which are not interpretative *per se*, rather structurally normative. That said, his claim is three-fold. Firstly, he intends to show that there are no reasons to simply contrast the theological heteronomous account of human dignity with the Kantian autonomous concept (within the categorical imperative). Secondly, he sustains that, under “hard cases”, the ascription of meaning to human dignity is not a product of reason, neither a revealed truth, rather an ascertained concept subsequent to a factual inquiry. Finally, he concludes that the “culture of death” argument presented against the liberty to die in cases such as *Fleming v. Ireland* is flawed, not only because it ignores normative defeasibility and *exceptio probat regulam de rebus non exceptis* but also because it falls under the slippery slope.

Jorge Silva Sampaio addresses two main subjects with his paper: firstly, he acknowledges the essentially contested nature of the concept of human dignity; subsequently, he

analyzes the logical and behavioral structure of the norm of human dignity (“NHD”). To this end, after assessing the possibilities to surpass the contested nature of human dignity, he analyzes the NHD from a static perspective through deconstructing and unpacking the structural elements in order to clarify the substantive content. Subsequently, he moves to address the NDH from a dynamic perspective, through the examination of the possibility of entering into normative conflicts and conflict-solving balancing operations through the application of proportionality as a balancing norm. Finally, he reviews the “Aviation Security Act” case in light of the normative data obtained in order to demonstrate the soundness of its assumptions.

Finally, Mariana Melo Egídio addresses the subject of restrictions on fundamental rights as justified by the principle of human dignity. She focuses her analysis on a particular ruling of the Portuguese Constitutional Court according to which a norm that prohibits the use of another person as a pure instrument or means to the service of a third party does not breach the Constitution, even if that person’s will is free and well informed and the case includes a consenting adult. She discusses whether human dignity may be invoked as an argument against fundamental rights, a theme that is examined in the context of the ideas of “protection of the individual against himself” and “legal paternalism”. She concludes that turning incitement and procurement for prostitution into a crime when sexual freedom and self-determination are not diminished (and obviously only in these situations) is using the law to promote moral values and not a legal asset.

Miguel Nogueira de Brito

Rachel Herdy

Giovanni Damele

Pedro Moniz Lopes

Jorge Silva Sampaio