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XLIII POLISH YEARBOOK OF INTERNATIONAL LAW

2023 DOI 10.24425/PYIL.2024.152312

PL ISSN 0554-498X
e-ISSN 2957-1510

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Aleksandra Mężykowska, Anna Młynarska-Sobaczewska, *Persuasion and Legal Reasoning in the ECtHR Rulings Balancing Impossible Demands,* Routledge, Oxon and New York: 2023, pp. 230

ISBN: 978-1-032-44622-6

Legal reasoning is a subject of interest in both the theory and practice of law. Juristocracy – understood as an evolution through which constitutional reform has transferred an unprecedented amount of power from representative institutions to judiciaries[1] – is accompanied by the constant adaptation of the argumentative tools used by the courts to justify their solutions. The strength of justice depends on how effectively judges convince us of the fairness of the solutions they adopt. This strength is not only based on the constitutional/legal recognition of their authority and competence, but also on the persuasive force of their arguments. However, the tools that judges use in constructing their reasoning are very diverse, and sometimes unconventional – in the sense that they move away from the classic methods of legal interpretation. This is natural, because the judge is not and cannot be imprisoned in an ivory tower, away from the tumult of life reflected in the continuous evolution of the law. But just as the legislator faces permanent challenges in identifying the most appropriate legal "garment" for complex realities, having to reconcile various moral, religious, and historical sensitivities, the same dilemma (perhaps to an even greater extent) faces the judge. The philosopher Plato emphasized the importance of motivating the legislative approach, showing that in all discussions and, in general, wherever the voice intervenes, there are introductions and somewhat preparatory exercises; "the purpose of the legislator in this preamble, which he tries to convince, is to prepare him to whom the law is addressed to willingly receive the prescription, meaning the law itself. Any legislation work must be preceded by the proper pre-

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[1] R. Hirschl, *Towards Juristocracy. The Origins and Consequences of the New Constitutionalism*, Harvard University Press, New Haven: 2004, p. 1.

lude (exposition of reasons)". Furthermore, the individual who interprets the law and its application must persuade those who approach them that they are the final recourse in the quest for justice.

From the perspective of the importance of legal reasoning, the book by professors Aleksandra Mężykowska and Anna Młynarska-Sobaczewska addresses a crucial theme in itself. What's particularly interesting is their unique perspective, which focuses on a jurisdictional framework and sensitive areas that highlight the challenges judges face in their mission, and the solutions they come up with to make their arguments more convincing. Thus, the authors chose an international court, the European Court of Human Rights (ECHR), i.e. the "flagship" of the guarantee of fundamental rights at the regional level and, insofar as its jurisprudence is concerned, deals in areas that pose fundamental existential questions: the right to medically assisted procreation, abortion, euthanasia. By its very position at the intersection of so many European legislations and existing country profiles in the Council of Europe, the ECHR is a court for which the "art of persuasion" is vital. This being the case, the choices made by the authors are inspired, providing a rich area of analysis. Insofar as concerns the chosen fields, indeed they are among those with the greatest number of "unresolvable" problems in the light of current social and scientific debates. In such cases, the "art of persuasion" meets perhaps its greatest challenges, demonstrating yet again that nothing falls beyond the purview of judicial review and anything and everything is justiciable.[2]

The authors do not intend to "judge" neither the solutions of the Court, nor the methods of argumentation used, but rather provide us with a landscape as complete as possible of the various ways of reasoning. The selected cases serve to formulate answers to the research questions focused on the relationship between the known and frequently described tools and methods of interpretation and ways of reasoning which play the role of convincing all persons involved of the rightness of the issued decisions, and the possible hierarchy between them and/or regularity in their co-application. To answer these questions, an analysis of judicial reasoning in the examined cases was carried in order to determine the arguments the Court used and what patterns and categories can be identified in the reasoning. Since the cases concern goods protected at the highest level by law and follow cultural or religious dictates, and are fundamentally excluded from permissible human interference, it can be observed, as the authors emphasize, that the establishment of boundaries, or even the indication that they will not be drawn, eludes logical inferences based solely on legal norms. Viewed in this light, since "there are no universally successful solutions that can convince everyone", the ECHR's choice of methods and tech-

[2] A. Barak, Chief Justice of the Supreme Court of Israel (*Cf. ibidem*).

niques is fascinating. However, as it follows from the authors' conclusions, "the book also provides insight into something more than just reasoning in the Court's oeuvre", given the consequences of the judgments on the substance of rights and the direction of the development of the jurisprudence.

The book's structure follows the research intentions expressed in the introduction in a tight logic so that, although it is dense in terms of information, the book allows a facile approach. The book includes five chapters, preceded by an introduction and finalised with conclusions. The first chapter depicts the challenges of judicial reasoning and the second the ways of reasoning, thus orienting the reader to follow the analysis, properly structured into fields, in the three subsequent chapters dedicated to the art of argumentation in medically assisted procreation and surrogacy cases; abortion cases; and in end-of-life situations, including a comparative approach of the manner and intensity with which the European judges use the different types of arguments in the targeted areas.

Thus, insofar as regards *the challenges of judicial reasoning*, the authors mention both the nature of the court: "which operates in conditions of pluralism of values, has a composition that is ideologically and politically diverse, and is composed of judges representing various legal traditions and moral and social attitudes; the Court addresses its judgments to a wide range of people from all European States, which are, after all, even more profoundly diverse", as well as the subject of the cases: "the courts in general face a difficult task adjudicating cases that raise moral questions". In the general landscape of specific challenges, a distinct mention and analysis refers to *morality* and the difficulty of using this category by the courts. It is, of course, challenging to balance social, moral, or customary norms with the interests and rights of persons who wish and are (according to their judgment) entitled to decide about their own life or the life of another.

Insofar as the book is focused on the specific nature of certain arguments of an origin and character that transcend the legal order, we consider interesting the identification and characterization by the authors of some "key elements" from the perspective of the effectiveness of argumentation, meaning *recognition of who the reasoning is addressed to (audience)* and *commonplaces (starting points) of argumentation*.

From the perspective of the *audience*, and taking into account the specifics of the ECHR's position, the authors underline the importance of a "diligent and prudent examination of the limits of acceptability of the developments in the meaning of human rights under the Convention, [so] that the Court can avoid the risk that it turns into a purely academic church of human rights believers." With respect to the concept *of commonplaces of argumentation*, understood as "statements or formulations concerning values that are generally accepted and considered worthy of attention and protection", they are characterized as "the foundation which the

author of the reasoning must be aware of to have a chance of successful persuasion." The authors of the book thus distinguish several such commonplaces, but especially emphasise those deriving from the protection of the public interest, which in their opinion deserves particular attention and is problematic to attempt to define. Thus the authors draw attention to the concept of *vulnerable groups*, which is also analysed in the light of the consequences and the concept of *best interest*.

Regarding the *ways of reasonings*, the authors outline the concept of *argumentative tools*, distinguishing between several types of arguments. The first type refers to *authority*, meaning the external entity or environment in which the decision is made; the second category refers to *the interpretation of the text of the Convention*, seeking to demonstrate that the solution adopted derives from its content and the principles it recites; and the third group involves the *consequentialist arguments* (i.e. what consequences the decision will have not only for the parties involved, but also for the entire audience and community). Insofar as concerns the matter analysed, the authors distinguish "three main groups of arguments": referring to *authority* (external law sources; the margin of appreciation; relying on epistemic authority); *deontological* (based on incrementalism, proceduralisation and employing plasticity and the assimilation of concepts); and *teleological* (based on examination and assessment of secondary effects). Each of these types and subtypes of arguments are then characterised distinctly so that their use can then be traced in selected cases in each of the areas of analysis in an attempt to identify "argumentative patterns, devices, instruments or ways of argumentation" and the preference of the Court for one or another. The analysis of the ways of judicial reasoning is particularly relevant since the relationship between interpretative techniques and argumentative tools in ECHR judicial decisions, as well as the rhetoric and the rhetorical functions in its reasoning, are not significantly developed in the specialized literature.

In the chapter dedicated to the *ways of reasoning in medically assisted procreation and surrogacy cases*, the authors have selected cases that reveal, insofar as concerns the arguments referring to *authority*, "the intense search for an applicable standard". Moving on to the *deontological arguments*, it is specified *ab initio* that contrary to the deontological tools identified in the areas of abortion cases and end-of-life situations, in the field of medically assisted procreation the Court does not argue with the tool of plasticity and assimilation of notions. A large space in this regard is dedicated to the analysis of the *incrementalism*, used in this area to define and *de facto* extend the limits of the right to respect for private and family life under Art. 8 of the ECHR (the right to become parents and definition of embryo). Also, according to the authors' analysis, *proceduralisation* takes on various forms in decisions concerning medically assisted procreation, illustrating to some extent "how to avoid substantive review." Finally, insofar as concerns *teleological argumentation*, those based on an

examination and assessment of secondary effects are addressed, regarding the need to protect groups that deserve special attention. The conclusion after the analysis of the selected cases is that the ECHR's justification of interference on grounds other than morality leads to a situation in which the Court has the opportunity to avoid presenting its moral view of the issue under examination straightforwardly.

In the chapter dedicated to *ways of reasoning in abortion cases*, the analysis of the selected cases highlights both the extensive evolution of the arguments used and the use of specific tools of argumentation. Such specificity concerns, inter alia, the arguments referring to *authority.* According to the authors, in this field, the ECHR's argumentation makes extensive use of external assertions, and the instrument of margin of appreciation occupies a special place among them. Although auxiliary references to international law are also included, "this argument is not conclusive and is only used in a supplementary and indirect way." Thus, in arguments based on the authority of the codified law, a "pick and choose strategy" is identified, and arguments based on the margin of appreciation reflect an evolution of deference. Likewise, it is highlighted that the *deontological perspective* is particularly extensive, especially regarding *incrementalism* (rights of fetuses, pregnant women, and potential fathers), *proceduralisation,* and the *plasticity* of notions. Insofar as far as *teleological arguments* are concerned, the conclusion is that they "are completely absent."

The chapter dedicated to *ways of reasoning in end-of-life situations* starts from the idea according to which "dying has been institutionalized and professionalized more than ever before," requiring decisions on the part of both legislators and courts. Regarding the arguments used in the decisions, it is shown that references to external *authorities* play a considerable role. In its reasoning, the Court has often referred to the content of international documents addressing the legal and ethical issues in connection with end-of-life situations (external law sources), building a connection with other argumentative tools, particularly with the margin of appreciation. In the same area, arguments based on epistemic authority, like the patient's best interest, are also included, which involves the strategy of appealing to the expertise of physicians and medical personnel. It is also found that *deontological argumentation* is used by the Court, aiming to demonstrate what is right and proper in light of the rules reproduced in interpreting the norms of the Convention. In the categories of the arguments based on *proceduralisation,* the duties of states to ensure the right to die are mentioned. With respect to *incrementalism*, the jurisprudence that evolves towards the gradual identification of new elements within the framework of the rights protected by the Convention is analysed, concluding, however, that there is still no positive obligation for the State to assist people in anticipating their own death, nor is there a clearly established right for individuals to die. Regarding the *teleological arguments*, the authors argue that the ECHR's decisions in several of

its end-of-life rulings are particularly worthy of attention because of the deliberations they contain regarding the public interest, "which in turn may lead to the crystallization of a certain moral minimum established in these cases in regard to the principle of the protection of life." However, based on the analysis of the selected cases the authors conclude that although there have been many rulings on these issues, it would be difficult to consider them as decisive for the shape of domestic regulations or actions.

The conclusions of the book highlight the importance of argumentation, as well as the fact that in the cases analysed the Court makes the most frequent use of ways of reasoning based on *proceduralisation, incrementalism, and margin of appreciation*, and appeals to the need to look after the interests of vulnerable persons. The Court uses the arguments identified with varying frequency, often interrelating and overlapping. Answering the essential question of *why does the ECtHR opt for certain ways of reasoning*, the authors share the view concerning a *'pick and choose'* approach on the part of the Court, in the sense of selecting the arguments considered helpful in reasoning its judgments. However, the authors argue that "this apparent lack of coherence should be viewed in the context of achieving the primary goal of the reasoning, which is convincing the audience of the correctness of the decision." In correlation with one of the research aims, the authors draw our attention to the conclusions of "the almost complete lack of appeal to moral considerations." However, it is argued that the Court avoids presenting its clear position in relation to the ethical aspects of the decided cases, which would be possible if the legitimacy of introducing limitations to the rights and freedoms of individuals in the analysed areas was examined against the premise of morality. Its position in this respect can be divined indirectly from the arguments used.

In conclusion, it should be said that the book significantly enriches the legal landscape on a topic of wide interest, i.e. that of judicial argumentation, approached from an original perspective and surrounded by areas that raise existential questions and are difficult to frame legally. The authors' conceptualization is inspiring, innovative, and based on a rigorous analysis of a wide selection of causes. Even if, as the authors state, their analysis should not be regarded as a comprehensive presentation of the ECHR's jurisprudence in the area under examination, the selected jurisprudence, including cases considered to be relevant for the reasoning used by the Court to justify its decisions, give us a clear picture of both the challenges that the judge may encounter and the way in which he or she can respond, choosing different ways of argumentation. The authors manage to demonstrate the special character of argumentation in the selected cases, where the instruments as not only targeted to the interpretation of legal norms themselves, but also comprises tools of explanation and justification of the Court's decisions, deviating from pure

deduction and legal syllogisms in order to convince by referring to commonplaces and pragmatic arguments, appealing to basic and neutral criteria: the duty of care; protection of common sense; and recognizing shared community standards. Even if "the book does not focus on what the Court has ruled, but instead addresses the ways in which it seeks to convince audiences of its decisions in cases that are exceptionally complex", the way in which the Court carries out its argumentation must be seen inevitably in the light of the solutions it adopts and the way it influences the normative framework of the member states of the Council of Europe.

The twin perspectives of the acceptance and acceptability of such diverse persuasive tools, including both legal and extra-legal reasoning and sometimes lacking in predictability, gives us some important food for thought. That's why the subtitle, "Balancing impossible demands", can also serve as a conclusion of the research approach embodied in this book, which remains a reference for the perspectives of knowledge and understanding of the argumentative tools it opens up for us. How flexible, open, and unconventional can a judge be to convince his audience while avoiding arbitrariness? Where is the fair balance when sensitive moral issues intervene in the balance of justice? Of course, the analysis, applied in the context of ECHR decisions can also be adapted to other courts, such as constitutional courts for example, which are equally concerned with "capturing" the audience, making it sympathetic to statements of values and to principles which, while often relating to specific undisputed facts, give rise to general and overarching principles such as fairness, equity, good faith or freedom. Through the analysis and explanations of the authors, rulings with a certain bombastic and repetitive profile or unexpected references to legal sources and concepts identified in the reasoning of court decisions appear to us in a different light, gaining a definitive purpose and determining even a kind of empathy with the judge faced with the difficulty of identifying "anchors" for his or her argumentation. This "fresh perspective on the rhetorical tools used in judicial argumentation", as authors characterize it, is in and of itself an invitation to debate.