Book Review


Among the most encouraging developments is the work in the new field of computational dialectics (...). It is in such research projects (...), that the new dialectic will find its acceptance in mainstream logic as a framework for new methods of evaluating arguments. (Walton, 1998)

1. Introduction

It is by no means uncommon for a legal philosopher to doubt the existence of an independent and logical criterion of justice behind legal procedure. Nor is it surprising that a study of dialogue ends with the observation that many practical arguments are devoid of any logical structure. But Arno Lodder’s book ‘DiaLaw’ constitutes rather an exceptional case. For one thing, it presents a study of dialogical logic that advocates the use of psychological, or a-rational, arguments in legal dialogue.

Before commenting on Lodder’s book, I briefly overview its contents and describe its major hypothesis. The book is divided in four parts. First, Lodder sketches the area of AI & Law and the new issues that rise from the interaction between intelligent systems and law. Then Lodder argues how in particular the design and use of formal dialogical systems may help to achieve a better understanding of the notion of legal justification, and proposes DiaLaw as an example of such a system. The book ends with a consideration on the nature of an argument, and the observation that DiaLaw is the only model in which the building blocks of arguments (reasons) do not necessarily have underlying rules.

Lodder’s major hypothesis is that legal justification should be modeled dialogically. Lodder motivates this hypothesis with the argument that the justification of a legal decision is the product of a process, rather than the conclusion of a static constellation of logical arguments. (It is no coincidence that the German translation of ‘trial’ is ‘Prozess’.) Legal justification is defeasible, due to conflicting norms, exceptions to norms, cases without applicable norms, the open nature of law, and
tire vagueness of legal language. Thus, in many cases, so argues Lodder, there simply does not exist an independent and unambiguous criterion that produces a correct outcome. Lodder even goes as far as to consider legal process to be a pure procedure, i.e., a procedure for which no correct outcomes are not guaranteed, and for which actually no independent criterion of correctness exists at all (!). Later, I will treat this peculiar paradox in more depth. In connection, I will then also say more about Lodder’s conception of pure procedure.

Lodder’s answer to tire complexity of legal justification is a model that leaves room for the freedom that legal argument asks for. This model takes the form of a dialogical system. According to Lodder, a dialogical system is closer to legal practice than any other form of legal justification.

The specific model that Lodder proposes is DiaLaw. DiaLaw is a formal dialogical system with two participants, four elementary moves (claim, question, accept, withdraw), commitment stores, dialogue rules, levels, dialogue trees, and other elements that one can find in contemporary dialogical systems. Cf. (Gordon, 1994; Walton and Krabbe, 1995).

2. Other Work

There are a number of other works in the borderland of legal theory and dialogue, of which Gordon’s book *The Pleadings Game* is probably the most prominent one (Gordon, 1994; Gordon, 1995). The pleadings game identifies on which points parties in a civil lawsuit disagree, or, in legal terms, what issues – both legal and factual – exist between the parties. Gordon’s work is more ambitious and (therefore?) less accessible than Lodder’s book, however. Other important relevant work includes (Ashley, 1990; Vreeswijk, 1993; Prakken, 1997; Nitta et al., 1993; Hage et al., 1994; Prakken and Sartor, 1998; Loui, 1998; Prakken, 1999; Verheij, 1999) and (Leenes, 1999).

3. Lodder’s Notion of Justification

A central concept in Lodder’s book is that of justification, introduced on p. 14 and further explained on pp. 29–31. For Lodder, justification means: being able to establish in dispute. Thus, if a statement $p$ is said to be justified, Lodder means that $p$ can be put forward and defended successfully in any (fair) form of dispute. However, I have a problem with Lodder’s use of the term justification. In philosophical literature, the term ‘justification’ may mean different things. Globally, there are two different meanings: a logical one, referring to a rational underpinning of a claim with arguments, and a procedural one, referring to a successful defense in dispute. Lodder chooses the latter. However, I think that there are reasons for choosing the first option that is, I think that the term ‘justification’ should refer to a rational underpinning of a claim with arguments. The reason why I think so is that in spoken language, the term ‘justification’ normally refers to an explanation, that is, one or
more reasons that explain or clarify a possibly controversial statement. Thus, in practice, it is often possible to justify both a claim and its negation simultaneously, simply because ‘justification’ actually means something like ‘explanation’. This reading of the term ‘justification’, however, conflicts with Lodder’s use of the term ‘justification’.

Contrary to the explanatory reading of justification, Lodder sees justification as a successful defense in dispute. With such a reading of the term ‘justification’, it is almost by definition impossible to justify both a claim and its negation simultaneously, because it is impossible to defend a claim and its negation in a dispute simultaneously, even if that claim is established in one dispute, and its negation is established in another dispute. [What matters is that both disputes are of the same type (same disputing rules), are conducted on the basis of identical grounds and depart from identical facts.] Thus what I claim here is that Lodder’s notion of justification goes against the common sense notion of the concept of justification, namely, the act of justifying or explaining a possibly controversial proposition. What I propose is to reserve the term ‘justification’ for an underpinning of a conclusion with one or more arguments. Successful establishment in dispute can then be referred to as ‘defensible’. A more accurate but less common term would be ‘establishable’. In this way, the distinction between justification (i.e., explanation) and establishment (i.e., successful defense) would become more obvious.

4. The Notion of ‘Pure Procedure’

I now move on to another important concept in Lodder’s treatise namely, that of procedure.

Based on (Rawls, 1972), (Table I), Lodder distinguishes not three but four different types of procedure. According to Lodder, a legal procedure is not anyone of the three procedures named in Table I:

There is no independent criterion and applying the procedure is the only way to justify statements, but the procedure cannot guarantee that the statements are really just. (Lodder, 1999, p. 30, Italics from Lodder).
Lodder therefore proposes to introduce a fourth type of procedure, which he calls “the legal procedure” (Table II, not in Lodder, 1999).

Again, I have a problem with Lodder’s terminology, and actually with Rawls’ terminology, too. Before putting forward my view on the matter, I would like to mention another objection, which was made by a number of people that attended a recent lecture of Lodder in Groningen.¹ This objection is motivated by the thought that it is absurd to accept the outcome of a legal procedure one purely procedural grounds, without any reference to an underlying intuitive notion of justice. It would be horrendous, for instance, to convict someone unjustly just because the procedure says so. Conversely, it would be horrendous to liberate someone on license because of a judicial error of the prosecutor.² My answer to this objection would be that experts are well aware of the legal significance of errors made by, for example, the prosecuting attorney. Such errors are accepted to respect the rights of the accused. Conversely, experts are well aware of the potential danger to pronounce someone or something guilty unjustly. Basically, this danger is weighed against the danger that someone or something might impose on society. Therefore, I tend not to endorse the objection. It presupposes an underlying intuitive criterion of justice, and the existence of such a criterion is not evident. Rather it is one of the topics of Lodder’s book and other books on the philosophy of law.

Now I move forward to my own objection. My problem with Table II is not that the law can sometimes be unjust (to put it simply). Rather, my problem with Table II is his characterization of legal procedure. How can Lodder (or Rawls or anyone else) think that it is possible to talk about “the desired result of a procedure” without having an independent criterion (a yard-stick) against which that result can be measured? For in order to be able distinguish between correct and incorrect outcomes, we must have an independent criterion, a ‘semantics’ if you like, on the basis of which correct outcomes can be recognized. Conversely, if we ‘can’t tell right from wrong’, it is impossible to conceive a procedure that yields precisely all correct results, since without a criterion we are unable to classify the results as either correct or incorrect. Accordingly, I propose to convert Table I and its extension Table II to Table III. Lawsuit, then, either is a special type of an imperfect procedure, or else a special type of pure procedure. If one adopts the latter position, then there are no means to verify the outcome of a legal procedure. The

¹ At. Dec. 1, 1999, Lodder was invited to Groningen by Erik C. W. Krabbe.
² Lodder did not have the opportunity to respond to this objection at his lecture in Groningen.
only possibility that remains is to see whether the rules of the procedure themselves have been interpreted correctly and followed properly. But then we are moving to the area of procedural correctness.

Perhaps one way to understand Lodder is to regard a desired result as a result that theoretically exists but often lies beyond our reach. To me this view ultimately forces one to adopt a position in which ‘Platonically speaking’, everyone is always guilty or not with respect to a well-formulated accusation (law of the excluded middle). But the tragedy of the law is that no one, or no group, is likely to be able to recall the complete fact situation at the time and place the crime was supposedly committed. Thus, another way out is to acknowledge that legal claims are always true or false but, due to human shortcomings, we are unable to determine the truth-value of most if not all of them. In this way we speak of an independent (but Platonic) criterion that exists but is beyond reach of legal procedure.

Another way out (which I prefer) is to adopt the assumption that there is a criterion of correctness – not in the form of a formal semantics or a declarative specification, but determined by (the admittedly vague criterion of) common sense. I think that it is our common sense that determines which rules of procedure make sense and which rules do not. On its turn, rules of procedure are justified by arguments that are put forward within the framework of the current procedure, and then the circle is closed.
5. Undercutting Defeater

Like many contemporary treatises on symbolic forms of argumentation, Lodder refers to the two concepts ‘rebutting defeat’ and ‘undercutting defeat’, terminology introduced in (Pollock, 1987).

There are basically two causes of defeasibility: exceptions to rules and conflicting rules. The argument representing the exception to a rule is usually referred to as an undercutting argument, the argument representing conflicting rules as a rebutting argument. (Lodder, 1999, p. 14).

Many authors are mistaken about the concept of ‘undercutting defeat’. Lodder’s description of the concept is rather vague and therefore I think that Lodder also does no justice to what Pollock actually meant. Let me take the opportunity to try to explain the difference between a rebutting and an undercutting argument. The difference is that the conclusion of a rebutting argument is the negation of the conclusion of the argument it attacks (\( t \) in Figure 1) and that the conclusion of an undercutting argument (\( \neg [p, q, r, s/t] \) in Figure 1) is the negation of the objectification of the last rule of inference applied in the argument attacked (dotted box). (Thus, dotted box = \( p/q, r, s/t \), written differently.) Contrary to what Lodder claims, undercutting defeat is not necessarily about exceptions. Although it is possible to incorporate the phenomenon of defeating exceptions (an exercise in its own right), the concept of undercutting defeat does not necessarily include it. The concept of undercutting defeat rather abstracts away from the phenomenon. (For example, suppose a precedent is cited to support a conclusion. This citation forms an argument that can be undercut by distinguishing the precedent.) A number of authors even claim that undercutting defeat is identical with indirect defeat, but this is plainly wrong. Indirect defeat is about defeating a sub-argument (Figure 2), while undercutting defeat is about defeating inference rules (Figure 1). For further information about rebutting and undercutting defeat, cf. (Pollock, 1987; Prakken and Vreeswijk, 2000).
6. Logical vs. Psychological Arguments

Lodder’s last chapter “what is an argument”, is an important one. It ties together loose ends that remained from the earlier chapters on DiaLaw. Lodder’s main concern in the last chapter is the distinction between logical and psychological arguments, and the distinction between structural and procedural arguments. I confine my review here to the distinction between logical and psychological arguments.

According to Lodder, the difference between logical and psychological arguments lies in the type of connection between the premises (or grounds) and the conclusion of an argument. With logical arguments, the acceptance of the premises warrants the acceptance of the conclusion. An obvious instance of warrant is deduction, but inductive or statistical reasoning may also provide sufficient warrant. With a psychological argument, on the other hand, the acceptance of the premises does not necessarily warrant the acceptance of the conclusion. Psychological arguments are termed “psychological” because the conclusion is related to the premises psychologically, rather than logically. Another way to look at a psychological argument (consistent with Lodder’s view) is to consider it as an argument in which a justification of some of the intermediary reasons remains ‘private’ to the proponent.

In Lodder’s thesis, Section 5 on the distinction between structural and procedural arguments is absent. Apparently it was added to the book in a later stage.

The difference in terminology continues. Where Lodder uses the term ‘warrant’, I would use the term ‘support’. Lodder would say, for example, that argument x warrants the acceptance of conclusion y. Moreover, he would say that a (correctly executed) argument or dispute, d between parties a and b justifies the acceptance of conclusion z. In contrast, I would say that a chain of reasoning, or argument, x supports y, but not necessarily warrants it. In particular, I would reserve the term warrant for a (possibly fictitious) criterion of correctness, so that it makes sense to say that d is warranted on the basis of the current facts. In my terminology, a conclusion is warranted if and only if it can be established in a dispute that is conducted according to a fair and effective procedure. I think that my use of the terms ‘support’, ‘warrant’ and ‘establishment’ is in line with the terminology that is used in defeasible reasoning and computational dialectics. Cf. (Pollock, 1987; Pollock, 1995; Loui, 1998).
of that reason. In this way, the justification of a psychological argument is left implicit to all other parties. For example,

“If the radio disturbs it is better
to turn it off”.

“The radio disturbs”.

“It is better to turn the radio off”.

would be a logical (or rational) argument, while

“Right now, no one in this room
listens to the radio”.

“The radio disturbs”.

“It is better to turn the radio off”.

would be a typical example of a psychological (or a-rational) argument, since the conclusion does not immediately follow from the facts. According to Lodder, psychological arguments persevere legal reasoning: “not only the argumentation of academics or rhetorically well-equipped attorneys, but also the argumentation of courts is regularly a-rational” (p. 152).

I find Lodder’s distinction between logical and psychological arguments only partially convincing. Let me first say what I like about it. What I like about it is that the distinction emphasizes the fact that indeed, participants in a discussion often do not justify the elementary steps of reasoning they made, unless asked for. Thus, when psychological arguments are permitted, then a dialogue of the following type is possible:

1  PRO:  A holds.
2  CON:  Why does A hold?
3  PRO:  Because $F_1$ holds.
4  CON:  Why does $F_1$ hold?
5  PRO:  Because $F_2$ holds.
6  CON:  Why does $F_2$ hold?
7  PRO:  Because $F_3$ holds.

where $F_1$, $F_2$ and $F_3$ might be fake reasons, i.e., if PRO would ask CON to explain why $F_2$ would follow from $F_3$, then CON would be unable to justify a connection between $F_3$ and $F_2$. Whether PRO actually gets away with ‘fake reasons’ is another matter, which I will discuss in a moment. What is important to note here at this point, is that the justification for a reason that is put forward in a discussion usually remains implicit to all parties, except for the proponent of that reason (hopefully).
Viewed thus, a reason is psychological as long as its proponent did not attempt to explain its rationale to other parties.

As opposed to Lodder, however, I would not choose for a distinction between logical and psychological arguments (or rational and a-rational arguments, for that matter). Instead, I would cancel the distinction and say, or actually require, that all arguments are logical (or rational). It is true that in practical discussions, the arguments that support the reasons themselves are often left implicit, because speakers (rightly) assume of many reasons that their rationale is known to all parties. In case someone does not understand the rationale of a reason, or does not agree with it, then any reasonable dialectic system permits him (or her) to question that reason, thus transforming a ‘psychological’ argument into a ‘logical’ one.

Consider, for example, the argument above where someone, say PRO, suggests to turn off the radio in view of the fact that no one listens, etc. Clearly, it is not immediately obvious how the conclusion of this argument should follow from the premises. However, if someone else, say CON, asks PRO to clarify the connection between the premises and the conclusion (or the antecedent and the consequent, in case of an elementary rule application) then I think any reasonable dialectic system puts the burden of proof back on PRO, so that PRO has the task to explain the connection between the current facts and the conclusion. I would say that reasons that cannot be explained, justified, or defended (Lodder: psychological reasons) can be used in an argument, at the risk of the party using that argument:

1 PRO: A holds.
2 CON: Why?
3 PRO: Because $F_1$.
4 CON: Why does $F_1$ imply $A$?
5 PRO: I don’t know.

At line 3, PRO has taken the risk to use a fake rule to justify one of his earlier claims. This time, however, CON does not take PRO’s reason for granted, but uses his right to question not only simple claims, but also the reasons themselves (line 4). At line 5 it turns out that PRO is unable to establish a logical connection between $F_1$ and $A$, indeed.

As an important and authoritative example of psychological argumentation, Lodder comments on a decision of the Dutch Supreme Court in a case on the Dutch Road Traffic Act. A discussion of Lodder’s comment would carry too far here. Still, what I want to say about this example is that the Dutch Supreme Court’s use of ‘psychological’ arguments can be explained by the fact that the court is in a position to use such arguments, i.e., arguments in which not every step of reasoning is explained. This can be better understood if one takes into account that the Dutch Supreme Court is the highest legal institution in The Netherlands and may frame decisions and new rules on the basis of authority.

5 From here on I will use the generic masculine form, intending no bias.
Lodder’s reply to my insistence on rules and rationales would probably be that with psychological arguments, rules and rationales do not always exist: “instead of creating an artificial rule, it is better to model the argumentation dialogically, where the conclusion is accepted after only the statements are adduced” (pp. 153–154). However, I would say that eventually, it is everyone’s duty to put forward the train of reasoning (ratio decendi) that lies behind a particular case, when asked.

7. Evaluation

Lodder’s frame of reference is the school of AI & Law. An advantage of this background is that Lodder, like other researchers in this area, has a strong tendency to use law cases as the main criterion for choices in the theory formation of dialogical models of argumentation. Thus many conclusions reached in the book are supported by existing (Dutch) law cases. In accordance with the AI & Law tradition, Lodder’s principal insights are often motivated by such cases, which thus firmly support many conclusions drawn in the book.6

A disadvantage of a legal view on dialogue (which is not reserved exclusively for Lodder’s book, by the way), is that other aspects of dialogue receive less attention. Examples of such aspects are the problem to compute the propagation of conclusive force through rules of inference, the problem to model the phenomenon of private or unilateral argument (‘thinking’), and the problem to discover how people dispute in daily practice when they are not guided by explicit rules of order. These problems reside on the terrains of philosophy (theory of knowledge), computer science (knowledge based systems and computer supported collaborative argumentation) and psychology (cognitive psychology, mental models), and I think that AI & Law, in particular Lodder’s book, does not (try to) answer such questions.

Another disadvantage of Lodder’s legal approach is that the complexity of the law and the major interests involved in legal issues almost always prevent him from drawing general conclusions concerning dialogue, whether that is legal dialogue or riot. If a specific choice can be made, there is always a legal case contradicting that choice. Remarkably, legal scholars such as (Hage et al., 1994; Prakken, 1999) and (Verheij et al., 1998) claim precisely the opposite: they claim that more general (read: non-legal) theories of dialogue abstract from all aspects that make dialogues interesting. I think this claim is put in perspective by general and useful work in dialogue such as (Vreeswijk, 1995) and (Walton and Krabbe, 1995).

8. Conclusion

Compared to other works in the borderland of legal theory and dialogue, there are relatively few novelties to be found in DiaLaw. Perhaps the notion of ‘psychological argument’ is a novel concept, together with its use in dialogue. I think

6 Such as the ‘bussluis’ case (taxi driver trying to steer through a bus-only gate), the Tyrell case, the Chabot ease, and an application of the Dutch Road Traffic Act by the Dutch Supreme Court.
the merit of Lodder’s book rather lies on the terrain of clarity of exposition and completeness. DiaLaw is a system that smoothly integrates contemporary work on artificial legal dialogue. Lodder shows to have carefully compared DiaLaw with related systems, learnt from their faults, and provided solutions for it in DiaLaw, without paying the price of an increasing complexity. On the contrary: DiaLaw remains relatively simple and transparent. Therefore I consider Lodder’s book as an excellent introduction in the area of dialogical models of legal argumentation. It would serve well as an introduction to scholars in legal theory, artificial intelligence (AI), and argumentation. By its sober language and transparent but otherwise complete exposition I recommend the use of Lodder’s book in graduate courses on AI & Law and legal argumentation.

References

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