Kisceral Argumentation in Law: Past and Present, Here and There

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Abstract: Gilbert's kisceral argumentation is, roughly speaking, about arguing based on intuitions. In the forefront of such a (rhetorical) model are arguers and audiences, who resolve disagreements using kisceral arguments. Intuitions as reasons were more important in pre-modern law, when the law was not as explicit, precise, and determinate as today. Law influenced by religion or religious law was a typical example. In our much more secular modern era, intuitions are more or less subordinated to the (legal) logical mode of arguing. However, in tough legal cases, when logic "runs out," it is values that decide them. Not surprisingly, neuroscience and cognitive psychology have shown a strong connection between values and intuition.

Résumé: L'argumentation kiscérale de Gilbert consiste, en gros, à argumenter sur la base d'intuitions. Au premier plan d'un tel modèle (rhétorique) se trouvent ceux qui argumentent et leurs auditoires, qui résolvent les désaccords à l'aide d'arguments kiscéraux. Les intuitions en tant que raisons étaient plus importantes dans le droit prémoderne, lorsque le droit n'était pas aussi explicite, précis et définitif qu'aujourd'hui. Le droit influencé par la religion ou la loi religieuse en était un exemple typique. Dans notre époque moderne beaucoup plus laïque, les intuitions sont plus ou moins subordonnées au mode logique (juridique) de l'argumentation. Cependant, dans les cas juridiques difficiles, lorsque la logique « s'épuise », ce sont les valeurs qui les règlent. Sans surprise, les neurosciences et la psychologie cognitive ont montré un lien étroit entre les valeurs et l'intuition.

Keywords: kisceral argumentation, intuition, pre-modern law, hardest cases, values

1. Introduction

According to Gilbert, "kisceral" (from the Japanese *ki* meaning energy) is one of the four modes of argumentation, and refers to various kinds of intuition (1997, 2011). In addition, an argument is

kisceral when it is drawn from that mode with respect to its reasons (Gilbert 1994, p. 166). Recognizing kisceral argumentation as a specific mode of argumentation entails a broadening of the concept of rationality, with an alternative to logical rationality in its narrow conception (Tindale, 2021).

In psychological terms, the question of what is kisceral or "intuitive rationality" follows, importantly, from Jung, who also termed it passive thinking or intellectual intuition,[1] where thinking is decisively influenced by intuition (1971). With respect to legal intuitive thinking, in the extroverted type it is directed to the object (i.e. legal sources and facts of the case), where a lawyer finds a quick diagnosis for the case based on a superfast syllogism in which the facts are subsumed under hundreds of possible major premises of legal norms, and their hunch stops at a particular one (or several of them), being those that they "recognized" using their "sense of the law" (German: *Rechtsgefüehl)* as the right ones. This might analytically be a wrong guess, so what is also needed is a full analysis to follow, something which Daniel Kahneman would designate as slow thinking (2011). It could also be called "instrumental intuition" (Novak 2016). There is, however, another version of intuition which is important in legal evaluation, namely "creative intuition" (Novak 2016). It is its introvertive variant, where a thinker is led by their (internal) ideas, archetypes and values (Jung 1971) especially where, in the case of a legal thinker, premises for their evaluation are vague, ambiguous, and gappy so that they read their values into abstract and general premises (Novak 2016). The reason why such an intuition can be termed creative is that it is on this basis that lawyers, most often judges, create or construe additional norms by reading their kisceral reasons into the pre-existing ones that are as a rule uncertain.[2]

A closer look at legal argumentation also even finds kisceral arguments in modern Western law that claim to be logical, as well

[1] See also Kahneman's »fast thinking« variant (2011).

[2] It is particularly in the area of constitutional review, where judges in especially hard and novel cases resort to their values when they discover new norms from an implied text, concretize constitutional principles, balance constitutional principles, and create value hierarchies between norms. See also Guastini, p. 407.

as some historical examples from Oriental law and the Middle Ages, and Sharia law both past and present. The easiest way for critics of kisceral argumentation to argue against it would be to assert that it is simply "irrational." The much more difficult way would be to admit that we all, even overtly "rational" Westerners, sometimes rely on these types of arguments.

1. The "Golden Age" of the kisceral in Western law

Kisceral legal argumentation as argumentation in which the evidence/reasons for a legal claim are intuitive, and such intuition, mainly as a "sense of justice," is even decisive for a final judgment, initially flourished in a model of law that Weber designated as 'formally irrational.'[3] This is the case "when one applies when in lawmaking or lawfinding means which cannot be controlled by the intellect, for instance when recourse is had to oracles or substitutes thereof" (Weber 1978, p 656). Following Weber, these kinds of reasons, or grounds with regard to evidence obtained from divine intervention, involved ordeals, drawing lots, combat, or oracular pronouncements. These kinds of revelation in law, otherwise determined by some supernatural entity, were as a rule interpreted by magicians, sages, prophets, or priests (pp. 760-761). Such argumentation—and it could be termed argumentative as it is possible to imagine potential differences in opinion or disagreements—was typical for Oriental law as well as for Western law in the Early Middle Ages, when mostly Germanic tribes settled in new territories and established their barbaric or pre-feudal states.

It is interesting that such kinds of argumentation had been suppressed to a considerable extent in ancient Greece and Rome, however, not to the same extent as it is today. What would be typical for Ancient Greece was the birth of logic (and rational thought), which to an important extent also applied in Rome. But the presence of a kisceral mode of arguing reemerged with Germanic tribal law, and was kept in existence up until the Renaissance. A decisive step in its suppression seemed to be the estab-

[3] According to Weber, formalism applies to "utterances of certain words, the execution of a signature, or the performance of a certain symbolic act with a fixed meaning" (p. 657).

lishment of the first universities, where scholars began to study Roman law in a rational-logical manner (through analysis, comparison, generalization, systematization, and interpretation). Moreover, the Church modernized its procedures by introducing inquisitorial procedures developed from the old Roman procedure of *cognitio*. Furthermore, in the 13th century, Aquinas rationalized metaphysics by linking it with the rational thought of Aristotle (Kelly 1993). Moreover, at the Lateran Council in 1215, the Holy See forbade its priests from participating in trials by ordeal. This move had a lasting impact on the development of procedural law in Continental Europe. Unlike ordeals and compurgation, inquisitorial procedure emphasized the importance of empirical evidence, such as documents, witnesses and confession. The previously mentioned metaphysical means of evidence were gradually superseded by witnesses (who were to testify from their own experience) and confessions with the aid of torture (Robinson, Fergus, Gordon 2000). Furthermore, ordeals were also forbidden in England in 1219, and in some Habsburg lands in 1277.

A prominent example of unlimited kisceral argumentation was trial by ordeal, in which it was held that God would not allow the innocent to suffer and would therefore reveal the truth through their reaction to the ordeal (Robinson, Fergus, Gordon 2000, p. 28). Perhaps the most famous example of such would be from Oriental law where, according to Art. 2 of the Code of Hammurabi, if a person accused another person of magic but could not prove this fact, the accused needed to immerse themselves in a river. If the river "took him," their accuser would be entitled to keep his house for himself. However, if the river showed that the accused was innocent by leaving him alive, the accuser would be executed, and the released person would get their house (Rot 1997, pp. 76-81). Trial by ordeal was also common in various Germanic tribes. For example, the Salian Franks, in their customary law (*Lex Salica*), instead of an ordeal presided over by river gods, practiced trial by boiling water (Robinson, Fergus, Gordon 2000). Furthermore, other types of ordeals were practiced, such as duels and the use of a red-hot iron which needed to be brought by a suspect from the entrance of a church to its altar in order to prove their (absence of) guilt.

Another example was compurgation, the practice by which a person's innocence or the truth of their claim was maintained, not on the basis of any objective (i.e., empirical) evidence, but by summoning sufficient oath-helpers who could swear to his or her good character, credibility and general fairness simply from their conscience and conviction. This kind of evidence was very much practiced in the framework of Germanic customary law (Robinson, Fergus, Gordon 2000, p. 28). It was important that such oath-helpers were sworn in before God, typically in religious premises and while touching a sacred object. It was a religious act in the then very religious community as a guarantee such person would not lie, otherwise they would face divine condemnation of their soul. Both judgments by ordeal and compurgation were used as evidence in cases in which there were no firm evidence about the defendant's guilt.

In the manner of kisceral argumentation of that time, in a religious aspect, the judge (typically a priest) would make a claim (judgment) based on his intuitive interpretation of a certain circumstance that occurred in such a trial, being evidence or "reasons" for that claim. They strongly believed that God was able to intervene in physical events and thus the fact that one combatant won a duel against another was a result of divine intervention. Likewise, oath-helpers would not take an oath to support the plaintiff if that person was not trustworthy, since otherwise they might run the risk of divine "revenge." This kind of knowledge was not based on (logical) cause-effect spatial and temporal relations but on a notion that there is a divine "knowledge" of things possessed by a supernatural being that controls the universe. For the same reason, the River God in a trial by ordeal carried out in Babylon would not allow an innocent person to drown but would only take the guilty.

What was typical of the predominant cultural psychological typology of these cultures, according to Carl Jung, was the subordination of their cognitive function of underdeveloped thinking, which was thus auxiliary to the dominant function of intuition. Such an intuition is driven by inner ideas or archetypes, in the case of these societies represented initially by pagan gods and later by the Christian God. This was a cultural typological pattern which

normally applied to law as well as being a socially predominant structure. The kisceral mode simply prevailed over some kind of "logical mode." Nowadays we would be struck by such ordeals and would surely call them irrational, to say the least. But our thinking is much more developed after hundreds of years of evolution, beginning in Ancient Greece with the birth of logic or analytic thinking, which in the case of law was even upgraded with Roman law. Today, at least with respect to law, we could say that the predominant cultural pattern is the predominance of the cognitive function of thinking. Intuition, as far as it exists, is subordinate to it as an auxiliary function. Yet, with the decay of the ancient world, the above-mentioned "irrationalism" in law reoccurred.

When judging kisceral societies with our modern eyes, we risk committing at least two fallacies: the first would be the "point of view" (Tindale 2020, pp. 4-5), when we develop our view of those societies from our own position whose predominant cultural psychological-typological pattern is very different. The second problem is how we define reasonable (Tindale 2020, pp. 4-5) which is very different from their conception of reasonableness. For those cultures, evidence or reasons to support judgments were simply different.

What was typical for such metaphysical societies was an uncritical following of means of revelation without serious rational evaluation, where rationality is associated with logic and critical thinking (i.e., the logical mode). However, with the advent of Ancient Greek civilization, with the turn from *mythos* to *logos*, this changed and developed further in Roman law. Rational thought and argumentation changed the status of kisceral argumentation in making it "interstitial." in the shadow of *logos,* logical thinking and reasoning. The logical mode came to prominence.

2. The kisceral in law in the Modern Age

2.1. The rise of the legal logical mode

By the late Middle Ages, important social changes had begun to occur in European societies which caused their gradual rationalization. The birth of universities provided a fertile arena for the study of Roman law in a systemic and analytical manner. The legal

institutions of Roman law were much more suitable than those of feudal law for newly emerging capitalistic economic relations. It seems that it was the reception of Roman law in particular that boosted the development of a modern logical mode of legal argumentation in the broader sense. That was even strengthened in subsequent centuries, culminating in the codification movement at the end of the 18th century, and throughout the 19th century, which brought tremendous civil codifications, such as Code Civil (1804), the Austrian ABGB (1811), and the German Civil Code (BGB) in 1900. Intellectually, the "spirit of the time" regarding law in the 19th century was one of legal formalism and legal positivism (Kelley 1993). The ideal and *forma mentis* as such was reflected in the German school of mechanical jurisprudence, according to which the role of the judge was to be merely a subsumption (automatic) machine that would perform their judicial work in a perfectly logical manner: subsuming facts under legal norms and coming to conclusions. It seems that the Industrial Revolution of that time also found its expression in law, by praising a very technical and mechanistic (logical) mode in law. At least formally, kisceral arguments were ousted from the official picture of law.

A renowned embodiment of that *Zeitgeist* was surely the German sociologist and lawyer Max Weber, who wrote (yet never finished) his magnum opus, *Economy and Society*, in the 1920s. He designated ideal modern law as 'formally rational,' which was "found where the legally relevant characteristics of the facts are disclosed through the logical analysis of meaning and where, accordingly, definitely fixed legal concepts in the form of highly abstract rules are formulated and applied" (Weber 1978, p. 657). For example, Weber was very critical of the common-law institution of the jury, since it makes an independent verdict on the guilt of a defendant without producing reasoning in which reasons as the basis for their decision-making could be checked. Thus, at least theoretically, such a verdict could be purely intuitive, or kisceral. Weber thought that the institution of the jury was a remnant of pre-modern law, "qadi justice" (pp. 892-895).

What is typical of such logical rationality, is systematization, formalism, generality, abstractness, etc. and these were thus essential features of the great Continental civil codes mentioned earlier.

They were typical products of bourgeois law, which by their general and abstract legal rules brought important values of legal equality and certainty to the fore. These values were constitutive of the demands of bourgeois revolutions: equally applying rules of business in territorial terms, stable (precisely determined) legal relations, free workers and consumers.

In that model of law, there was no place whatsoever for the kisceral, as intuition was viewed as purely subjective, unscientific, and a remnant of the historical past. The most important legal source was the statute: an act of the legislature. Thus, statutory positivism was especially important as it particularly favored (abstract and general) legal rules,[4] leaving no room for legal principles to have a major role in legal decision-making. Furthermore, legal formalism and (statutory) positivism also echoed in the common-law world, particularly through Jeremy Bentham and the British positivist movement. Bentham was a great proponent of statute as a legal source, which in his view better ensured legal certainty than precedents without a stricter doctrine of *stare decisis* in force at that time. He accused common law judges of too freely considering past precedents when relying on them. He pointed out that reasoning from the spirit of a case of what was relevant and binding in a previous case was too intuitive and arbitrary, thus the doctrine of *rationes decidendi* was born (Zweigert and Kötz 1998).

A clear proponent of formality in the logical mode on the Continent was Hans Kelsen, who in his *Pure theory of law* wanted to cleanse law of all the external elements that he felt were foreign to the concept of law. For him, interpretation was no longer part of this pure theory of law, because: "the interpretation of a statute, need not necessarily lead to a single decision as the only correct one, but possibly to several, which are all of equal value, though only one of them in the action of the law-applying organ (especially the court) becomes positive law" (Kelsen 1989, p 351). Kelsen asserted that when legal practitioners interpret laws by means of their cognition (logical and rational), they could only establish what the frame of that law was and within it there were "several

[4] As abstract and general legal norms, they are able to accommodate judges' moral (i.e. kisceral) intuitions to a much greater extent than legal rules.

applications possible." He contrasted his view with traditional jurisprudence, which claimed that it had found legal methods of how to correctly fill in the ascertained frame (p. 351).

He continued that

> [t]raditional theory will have us believe that the statute, applied to the concrete case, can always supply only one correct decision and that the positive-legal "correctness" of this decision is based on the statute itself." (p. 231)

Further, it would seem

> "as if the law-applying organ had to use only his reason but not his will, and as if by a purely intellectual activity, among the various existing possibilities only one correct choice could be made in accordance with positive law." (p. 351)

…

> "All possible methods of interpretation developed so far lead only to a possible, not necessary, result, never to one which is alone correct." Thus, "it is futile to justify "legally" one at the exclusion of other." (p. 352)

As such,

> "it is not cognition of positive law, but of other norms that may flow here into the process of law-creation – such as norms of morals, of justice, constituting social values which are usually designated by catch words such as "the good of the people", "interest of the state", "progress," and the like." (p. 353-354)

Thus, there is no place for intuition and the kisceral in his definition of law.

This extreme logical and formalistic model of law resulted in the "eclipse of reason" (Horkheimer 1974), with the effect that law was justified as valid as long as it met the formal (logical) criteria of validity, regardless of its content. That resulted in, e.g., the Nazi Nuremberg laws of the 1930s which deprived Jewish people of their basic human rights. Those laws were adopted through legally

and logically correct procedures, as consistent, systematically, and hierarchically well-arranged but still led to such horrible results as to constitute extreme human rights violations. Therefore, after World War II, it became clear that a vision of law that does not respect basic human values, morality, and ethics, or denies them in extreme cases (such as with Nazi, fascist, and communist "laws") does not deserve to be called law (Radbruch 2003). After that, even legal positivists such as Herbert L. A. Hart included the minimum content of natural law (linked with morality) in their concept of law (Hart, 1961), and it was Ronald Dworkin who stressed the importance of moral principles in giving us solutions even in hard cases (1976).

Consequently, the door was again opened for moral intuitions, a version of kisceral arguments, to play a certain role in evidence or reasons to support certain legal decisions. The door, however, was not wide enough for the kisceral as it had been in the pre-modern law described at the beginning of this contribution. The role of kisceral arguments, while recognized, was limited to merely an "interstitial" relevance.

2.2. The postmodern return of the kisceral to legal decision-making and argumentation

The development of law after World War II witnessed a major increase in the importance of human rights and legal principles. National constitutional courts (as "moral legislatures") were established, international human rights conventions adopted and tribunals to protect them introduced. Particularly emphasizing the importance for law of human rights provisions and moral legal principles, which are typical repositories of human values, (moral) intuitions of judges, through which they have access to their inner values,[5] are no longer seen as arbitrariness necessarily detrimental to law and legal decision-making, but also as a virtue that help judges to make their logical decisions in certain situations more just.

[5] At least in civil legal systems, judges need to promise before a high state official that they will adjudicate according to the constitution, statutes, impartially, and according to their own "conscience" before they are sworn in.

However, the kisceral mode in law was no longer supreme as it had been in pre-modern times. Its role in law today is "interstitial:" predominantly in hard cases, when legal rules to precisely regulate factual situations run out, we can find it "alive" when judges ground their decisions on moral legal principles and constitutional rights thus relying on their own conscience and personal values in such abstract legal provisions (see also Cahill-O'Callaghan 2020).

Accordingly, in unclear legal cases, what is important are also judges' inner (personal)[6] values perceived to an important extent through their intuition. In the absence of an explicit text, these values give judges a basis to further construe legal premises. As it transpires, this is not a mere speculation because we can find traces of that even in their written reasoning.[7] It seems that the less legal premises are determined, the more room there is for their values to step in. In interpreting unclear legal norms, judges are bound to follow objective legal values, i.e., the values of the legal system, such as legal certainty, equality, social security, and human rights, which are specifically provided for by being determined in the legal systems. However, it is their discretion to make such a selection or emphasize a particular point.[8]

For example, Kahneman introduced two systems of thinking. System 1 is "fast" thinking based primarily on intuition and emotion. System 2 is "slow thinking grounded in logical evaluation and analysis (Kahneman, 2011). In connection with the abovementioned two systems of thinking, the problem with unclear cases is the following. In clear cases, as their counter examples, the premises of legal syllogisms are very much developed, and in a modern legal system they are expected to be analytically, coher-

[6] Here I use the adjective "personal" (meaning subjective) because values in law can also be objective (or social): as part of legal provisions enacted such as, e.g., equality before the law (the value of universalism behind) and legal certainty (based on the value of security) that are in fact constitutional provisions (Cahill-O'Callaghan 2020).

[7] Cahill-O'Callaghan used a coding scheme to detect this in the judgments of the UK Supreme Court (pp. 33-34).

[8] When they resort to the so-called constructive arguments which surpass mere interpretation: e.g., balancing conflicting principles, creating value hierarchies between legal norms, resolving antinomies, and filling gaps in the law (Guastini 2011, p. 407).

ently, logically interrelated, and connected so that the principle of legal certainty is upheld. However, when there are gaps, ambiguities, and vagueness in the premises in the legal context of judicial proceedings, there is more room for System 1 to step in and direct the manner in which System 2 develops. This is an opportunity for values to step in for the initially unclear legal premises and do the job for them. A typical example of such is a constitutional review in which the clashes of values are commonplace because there are different judges with different worldviews.

Thus, if legal premises are vague and ambiguous, which is true as a rule in unclear cases, there is room for values or arguments of values to have their say. They are not part of the traditional legal logical mode and thus, when basing their decisions and reasons on values, judges in unclear cases would argue that what they apply is strictly law, and that their reasons and arguments necessarily only follow from the legal text. This should certainly be criticized as it makes decision-making and reasoning less transparent by leaving out something that is tremendously important. In such cases, judges should admit that what they do is also legal policing and moral legislating, since the values behind their "legalistic" activity can be of moral, social, and political importance for their community.

Moreover, Hugo Mercier and Daniel Sperber (2017, pp. 110-144) claim that most reasons are "after-the-fact rationalization." Their main role is to "explain and justify" our intuitions but are not involved in the process of intuitive inference itself. They are social constructs and are meant for social interaction, having "a central role in guiding cooperative or antagonistic interaction, in influencing reputations, and in stabilizing social norms." They continue that "the way we infer our reasons is biased in our favor. We want reasons to justify us in the eyes of others." And "they represent our inferences as rational in a different, socially relevant sense of the term where being rational means being based on personal reasons that can be articulated and assessed. To be socially shared they need to be verbally expressed" (Mercier and Sperber 2017, pp. 110-144).

Accordingly, although of crucial importance for law, legal decision-making and legal justification, the logical mode of arguing is unable to satisfactorily justify the resolution of various

problems that judges face when they (un)consciously rely on their personal values. Therefore, it needs to be supplemented in the most demanding cases by the kisceral mode, at least in the dimension indicated below.

3. The rhetorical model of legal argumentation and the kisceral

3.1. Strengths and shortcomings of the logical and dialectical models of argument

It is undisputable that the logical mode, in its formal logical and dialectical versions, is central for legal argumentation. First, the logical model of argumentation, which focuses on inferring from the upper premise of legal norm and the lower premise of facts to the conclusion, is a basic frame for legal reasoning. It is usually quite capable of explaining and justifying legal reasoning in clear or easy cases. The logical model of (legal) argumentation builds on argument as a 'product,' where the premises of an argument and their logical relations are emphasized in particular. The strength of such a connection between the premises is formal logical validity. However, in reality, since the formal validity of legal arguments is rare in the context of law, because legal norms are often unclear and facts frequently hard to be determined without the additional support of evidence, we should ask ourselves the following question: what is the role of legal syllogisms in law?

At least in theory, the logical model of legal argumentation is a normative (ideal) requirement if we want to call a decision legal. In the area of law as a special social discipline, facts are to be evaluated on the basis of legal norms in order to establish their legal status, or compliance with law. That is at least the demand of the rule-of-law principle as the meta-principle in the legal domain, in which one can find the sub-principles of legal certainty and trust in the law, encompassing some of the most important social values such as order, justice, stability. Furthermore, the logical model of legal argumentation is not only to serve as a departure point for a legal reasoning to be considered valid, but also as the final product's structure of a judgment's reasoning, to explain that certain

facts were subsumed under specific legal norms and a legal decision followed.

However, the logical model of legal argumentation alone "works" well only for the easiest or clearest legal cases.[9] For example, consider a case in which both the premises are more or less clear and from which a clear conclusion also follows. Many legal rules are defeasible, and facts might be unclear, but not in the following situation. Procedural rules in various jurisdictions provide for a deadline to file an appeal, e.g., fifteen days from the day when, e.g., a first-instance judgment is served on the party, which is confirmed by his or her signature.[10] How these fifteen days are to be counted is also regulated by procedural rules.[11] When legal motions are sent through regular mail, in order to have proof of their being submitted in a timely fashion, people send them via registered mail – there being a time stamp on the letter and the sending person receives confirmation of the date of dispatch.

Suppose in a certain case, A missed the deadline by sending his appeal in beyond the fifteen-day deadline. He was served the judgment on March 2nd and submitted the appeal to the post office on March 18th (with this time stamp on the letter). Suppose the above information is accurate and the case seems to be clear. Thus, the premises could be established as (practically) true: Major premise (Mp): Appeals must be submitted in fifteen days from the service, to be timely; Minor premise (mp): A was served the judgment on March 2nd and sent his appeal on March 18th. Therefore, the conclusion (c) would be that A missed the deadline (and his appeal was to be rejected as untimely).

Given that all the mentioned information is accurate, the above syllogistic argument is logically formally valid: if both the premises are true, so the conclusion is also true. Accordingly, the logical

[9] According to MacCormick, this is the so-called first-order of justification and, pursuant to Alexy, the internal context of justification (MacCormick 1978, Alexy 1989).

[10] When it comes to numericals, if they are part of a legal provision, they are usually the stricter legal rules possible concerning their meaning.

[11] Usually, the first day that counts is the next day from the day of the service, and it is still possible to submit an appeal (e.g. via regular mail) on the fifteenth day.

model is feasible enough to justify such legal cases, being the easiest ones in a legal system.

The dialectical method of legal argument, where we rely on additional interpretative arguments to explain the upper premise, and evidence to additionally explain the lower premise, is not needed in this situation because both premises are clear enough. Furthermore, the rhetorical model where legal arguments are subject to different audiences does not seem to work here either. Because of their clarity, legal arguments in such a situation have a strong inter-subjective value "speaking for themselves," and do not seem to be audience dependent. At this point, I do not agree that any legal argument is subject to an audience to the extent that, even if the premises are clear, it is never independent from the audience, as Perelman would claim (2008, p. 19).

However, such a case might become complicated and change its character, from being a clear case to an unclear one. In such situations, we need an additional criterion to justify the use of the logical model of legal argumentation. It is the dialectical model of legal argumentation which further justifies either an unclear major premise (legal norms) or minor premise (facts). In such a manner, unclear legal norms are first additionally justified by different canons of interpretation which have been established in legal theory. Second, if the facts are unclear or contested, they are further proved by evidence.

Why would that fall within the dialectical model of legal argumentation? The dialectical model deals with dialogue, a procedure in which arguers (proponents and opponents) present their views, while the dialogue itself is regulated by certain procedural rules. This type of model very much resembles quite detailed legal procedures (either criminal, civil, or administrative), in which every step that participants take is precisely regulated. The purpose of such procedures, in which arguers are allowed to express their views and reply to their opponents' positions more than one time, at different levels, is to ensure the issuance of a final judgment that is inferred from the premises. Moreover, dialectic also signifies informal (or "minor") logic, which is used in the determination of acceptable or probable premises, not "true" ones as in the case of formal logical reasoning.

When legal provisions are unclear, they are interpreted and then justified by external second-order criteria. These external criteria of justification are, e.g., linguistic arguments (literal or technical meaning), systemic arguments (*lex specialis, lex posterior*), historical arguments, arguments from intention/purpose, *a fortiori,* analogical arguments, balancing (argument of weight), principles, etc. Their role is to justify that the selection of the premises in the logical model was a reasonable one.

In a less clear case than the previous one (about the missed deadline), there was a procedural rule that judges are exempted from adjudicating a case if they are closely related to a party too involved in proceedings in that case.[12] However, it was not the judge in this instance but the judicial assistant helping the judge who was closely related to the party in that proceedings.[13] The problem was that, unlike in the case of judges, there was no explicit rule in the procedure imposing the duty on the judicial assistant to request their exemption in such cases. This meant that the case could not be resolved by applying the logical model of legal argumentation (Mp: A judge should request their exemption from the case when they are closely related to a party in such a case; mp: the judge was closely related to the party in the case). However, if we justify that logical argument by another criterion from the dialectical model of legal argumentation, by arguing that judicial assistants are analogous to judges in such cases on the basis of an (informal-logical) argument of analogy, since "like cases should be treated alike," the problem might be resolved.

Yet it is sometimes difficult to see why a certain canon of interpretation was used rather than another. In such cases several canons, rather than one specific one, could be reasonably applied, since none of them could claim its "necessity" of application. Accordingly, there is a question in such situations of which criteria of justification they should apply, or why legal arguers tend to select certain methods/canons of interpretation rather than others? Such very hard cases typically include several dissenting judgments from the judges adjudicating them, and fall within a group

[12] Case of the Supreme Court of Slovenia No. I Ips 280/97.

[13] They are often allowed by judges to carry out less important tasks independently.

of cases decided by the highest courts. In such situations, the dialectical criteria of justification seem to run out, since they are not able to successfully explain why certain external criteria of justification were used. Therefore, for such cases, we need an additional type of justification, to justify the selection of arguments from within the dialectical model of legal argumentation.

For example, there was a case in which the Constitutional Court of Slovenia did not prohibit a referendum on allowing gay persons to marry in the Marriage Relations Act, despite a constitutional provision determining that a referendum on decisions remedying human rights violations is unconstitutional.[14] Nevertheless, the majority upheld the referendum by interpreting those constitutional provisions in a systemic manner (a systemic interpretation). They argued that it meant that such a human rights violation first needs to be established by the Constitutional Court or the European Court of Human Rights, since Slovenia belongs to the tradition of the European model of centralized constitutional review. That entails that if the parliament remedies such a HR violation, it cannot be understood as "remedying a HR violation" to the effect that a referendum against such an Act cannot be prohibited. The dissenting judges, however, understood that constitutional provision very differently. They claimed that there was nothing in the explicit text of the Constitution, in particular not in the mentioned provision, which would prevent the parliament from remedying such a violation of the constitutional right to equality before the law. Since that should have also been considered as the remedying of a HR violation, the referendum should have been prohibited.

The above problem is that it is far from clear why the majority decision should be more reasonable than minority views. At least, this does not follow from both the logical and dialectical models of legal argument. Therefore, it seems that in such cases we need additional criteria to justify them, and another model of legal argumentation.

[14] Case No. U-II-1/15.

3.2. The need for a rhetorical model of legal argumentation

In the framework of the logical and dialectical models of legal argumentation which are based on (formal) logical and dialectical criteria, there is seemingly no important role for kisceral arguments. However, it is a rhetorical model of argumentation that seems to be more promising for explaining the role of the kisceral in legal argumentation, at least in certain types of cases. The rhetorical model of argumentation goes beyond mere logical (and dialectical *sensu stricto)* means of persuasion and justification which simply run out in the most demanding legal cases.

Although rhetoric is popularly (and primarily) associated with effectiveness, with reasonableness only being its outer framework of legitimacy (consider van Eemeren's concept of "strategic maneuvering" (2010)), here it is considered to be more than that. To separate effectiveness from reasonableness implies that these are two separate things. It presupposes that an arguer is aware in advance of more than one reasonable (and "just" in the case of law) way of resolving a dispute and decides for one as long as it benefits them in winning the argument. In such a view, there seems to be something eristic about effectiveness. However, when an arguer purports to pursue a "just" solution that seems the only reasonable one to them, a goal in itself, no matter how effective it is at that point, it seems that it ceases to be appropriate to distinguish effectiveness from reasonableness. In such unclear cases when arguers try to "justify their claims under conditions of uncertainty as an attempt to convince a relevant audience of a claim about what we collectively should do or how we should act" (Zarefsky 2014, p. 3), it appears that there is something heuristic in their undertaking. In *Phaedrus*, Plato highlighted that all discourse is rhetorical, even when the speaker is simply trying to communicate the truth—indeed, true rhetoric is the art of communicating the truth (notice the broad sweep of the discussion of discourse at 277e5–278b4). Rhetoric is present wherever and whenever people speak (261d10–e4 and context). Even when one is not sure what the truth is, and even when one is thinking through something by oneself—carrying on an inner dialogue, as it were—discourse and persuasion are present (Griswold 2021).

In such unclear situations, both arguers and audiences do not know exact ("just") answers in advance. They do not have previously established clear upper premises at their disposal to subsume lower premises to them, and decide on past cases, like in the case with forensic rhetoric according to Aristotle (2004). Although they are deemed to decide on past cases, they in fact need to construe the upper premise further so they act, at least partially, like legislators in the manner of deliberative rhetoric deciding on future cases. This seems to relate to the most difficult cases in law, where dialectical legal arguments run out because the premises are enthymematic (i.e., unclear, gappy, ambiguous or vague), such that those who are to resolve such a case necessarily navigate their thoughts in the dim light of such unclear premises. Such cases could even be termed "very hard" ones, and would include the hardest topics in constitutional law such as cloning, euthanasia, abortion, gay marriage, etc. In these kinds of cases we actually have upper premises, such as constitutional norms (principles and human rights norms), but they are particularly abstract and general. Furthermore, we usually do not have previous similar decisions to follow as precedents.

Supreme or constitutional court judges, being the last judicial resort in a country, also have an audience that surpasses the immediate parties to a case before them, as does the European Court of Human Rights in human rights case. Their general audience are people populating the jurisdiction on the top of which these judges sit. When appointed by representatives of parliament, these judges are entrusted with specific powers, not only as lawyers with an excellent knowledge of law but also as "moral legislators" (Dworkin 1986) that embody certain values that they share with those who appointed them. Thus, they are entrusted with the power to be "reserved" legislators especially in controversial cases. Certainly, even in such cases, they need to rely on legal norms but the legal norms in such situations are often very abstract provisions. In such cases, the judges find the meaning of these partially enthymematic premises through reading in their personal values. This brings an ethotic rhetorical element to legal argumentation. The audience generally follows them, but in case they do not want to, they propose a constitutional amendment to overcome their decision.

These kinds of judgments are particularly judgments of value. The impact of judges' personal values on their decision-making can be found in their opinions where they rely on different values to justify their decisions. The rhetoric of values, and thus kisceral arguments, because we generally have access to our inner values through the cognitive function of intuition, come into play where there are no firm dialectical proofs to rely on. Given such partially enthymematic premises, judges' opinions are therefore very much divided. Thus, it seems that a dialectical model is unable to justify the normative reason/choice for selecting one of the dialectical arguments. Thus, they need to be justified further by the value choices of judges.

In her empirical analysis, Rachel Cahill-O'Callaghan demonstrated the role of the personal values of UK Supreme Court judges in their decisions. Especially when complicated cases are controversial and include several dissents, the judges use a discretion that is influenced by their personal traits, most importantly personal values, "which act at a subconscious level in decision making". They do not even deny this fact (Cahill-O'Callaghan 2020a, pp. 596-598; Cahill-O'Callaghan 2020b; Posner 2010). Her research studied an actual case in which she proved the judges relied on certain values to back their decisions. The case was R v. JFS Governing Body (2009) UKSC 15, in which a boy was denied admission to the Jewish Free School because his mother was not Jewish by birth or Orthodox by conversion but had converted to a non-Orthodox branch of Judaism. The Court of Appeal held that the admission policy violated the Race Relations Act 1976 and discriminated on the grounds of ethnicity. Conversely, they could have decided that the policy was based on a religious criterion, which would be exempted from the Equality Act, and thus not unlawful. The majority of the Supreme Court (five judges) upheld the Court of Appeal decision, while a minority of four judges were against.

By analyzing the text of the majority and minority opinions in that case, Cahill-O'Callaghan showed how judges' values influenced their decisions. In their majority opinion, the judges relied on the value of universalism backing the principle of equality, the violation of which they found in that case. On the other spectrum of values, the minority judges referred to the value of tradition to

support the importance of the conservation of religious tradition (Cahill-O'Callaghan, pp. 608-610).

A similar analysis could be made with respect to the judgments of highest courts in the legal family of civil law, either constitutional or supreme courts.[15] For example, in the previously mentioned case of whether a referendum to be held on gay marriage is constitutional, the majority allowed that it relied on the values of conservation, such as tradition and conformity, while the minority who wanted to ban the referendum (since it is not allowed if against human rights), resorted to the values of openness to change, including self-direction and stimulation, as well as universalism and as much equality as possible (Schwartz et al. 2012).

In such cases, it is not difficult to point to their legal-political character. As already established, in such situations they not only follow forensic oratory when they are to adjudicate on past actions. In such a manner, very hard cases invite judges to set precedents in novel cases and engage in semi-political, i.e., deliberative, oratory to set new standards in landmark decisions, and act like legislators in carrying out distributive and not only commutative justice.

3.3. *Kisceral argumentation in Islamic law*

As already indicated, the role of kisceral arguments in contemporary Western law is predominantly "interstitial," which points to their limited significance – mostly in very hard cases. There seems to be, however, greater promise for them in Sharia law,[16] even though that type of law has also gone through a modern transformation in the last two centuries (Hallaq 2009). Even so, the Sharia system of adjudication is less formalized than adjudication in Western legal systems. There is a greater insistence on religious and community moral values and social customs in addition to legal texts. What is embedded in the heart of Sharia is that "the content of rational thinking must be predetermined, transcendental

[15] Since the majority decisions of these courts are more official in style, and not so much analytic and discursive as those from their common-law counterparts, dissents are a better terrain to find judges' expressions of their personal values justifying their decisions.

[16] Islamic religious law has the validity of positive law in certain areas of legal regulation in Muslim countries.

and above and beyond what we can infer through our mental faculties of reason. … It marries reason and revelation, where rational thought is insufficient" (Hallaq 2009, pp. 12-15). It traditionally recognized the supremacy of the unwritten codes of morality and morally grounded social relations (p. 62), where communal values of honor, shame, integrity, and socio-religious virtue entered and intermeshed with legal practice and the prescriptive provisions of the law (p. 164).

> The basic judicial institution in Sharia is the qadi, the magistrate or judge of a Sharia court, who also exercises extrajudicial functions, such as mediation, guardianship over orphans and minors, and the supervision and auditing of public works. Not infrequently, the qadi's ambition is not only to apply black-letter law to a dispute but also to reinstate social harmony in a community in which the dispute arose, concerning which perhaps mediation could be a better option than adjudication. Thus, they are understood to advocate a moral logic of distributive justice rather than the logic of winner-takes-all. (Hallaq, pp. 175-176).

In the past, no body of Islamic positive law had come into existence, and the first qadis therefore decided cases on the basis of the only guidelines available to them: Arab customary law, the laws of the conquered territories, the general precepts of the Quran, and their own sense of equity, where they relied on their personal values being in consistency with religious and moral values of Islam. In the case of a qadi, legal norms and social morality were inseparable, one feeding on and simultaneously sustaining the other, where the Muslim court was the product of the very community which it served. Once this law had formed, however, the role of the qadi underwent a profound change. No longer free to follow the guidelines mentioned above, a qadi was now expected to adhere solely to the new Islamic law, and this adherence has characterized the office ever since (p. 64).

Traditionally, the power of the qadi to interpose his own judgment was legitimized by the belief that adjudication in conformity with divine law is one of those duties which some individual must perform on behalf of all in the society for it to remain a proper community of believers in the eyes of Allah (Juynboll 1961,

Schacht 1964, p. 206). Although the traditional role of the qadi has been greatly altered by the introduction of Western codes and the development of bureaucratic structures, the quest in many Muslim countries for an authentically Islamic way of life has given renewed emphasis to the classic precepts of Islamic jurisprudence (Rosen 1980/81, p. 218).

Less formalized adjudication in Sharia law also stems from how the appeal against qadi justice is organized. The mazalim is a court (presided over by the supreme ruler or his governor) that hears complaints addressed to it by virtually any offended party. [17] Since Islamic law did not provide for any appellate jurisdiction but regarded the decision of the qadi as final and irrevocable, the mazalim court functions as a kind of court of appeals in cases where parties complained of unfair decisions from qadis. The mazalim judge is not bound to the rules of Islamic law (*fiqh*), nor for that matter is he bound to any body of positive law, but is free to make decisions entirely on the basis of considerations of equity. The mazalim court thus provided a remedy for the inability of qadis to freely take equity into account. It also made up for certain shortcomings of Islamic law, for example, the lack of a highly developed law of torts, which was largely due to the preoccupation of the law with breaches of contracts. In addition, it hears complaints against state officials (Ahmed 2018).

Weber juxtaposed the rational interpretation of law on the basis of strictly formal concepts to a kind of adjudication that is primarily bound to hallowed traditions. According to this notion, individual cases cannot be unambiguously decided by tradition on the basis of concrete revelation (oracle, prophetic dicta, or ordeal—in Oriental law) or informal judgments rendered in terms of concrete ethical or other practical valuations. He continued that "Qadi justice" knows no rational rules of decision. But he was in a similar manner even critical of the common law jury, calling it empirical justice. The problem with juries was, in his opinion, the fact that after rendering a verdict, the members of a jury do not give reasons for their decision (Weber 1978, p. 976). Weber was critical of a system in which judges have recourse to a general set of

[17] See for example divan al-mazalim (or Grievance Board) from Saudi Arabia.

ethical precepts unevenly employed on a case-by-case basis rather than to a series of rules abstractly formulated and uniformly applied (Turner 1974, pp. 107-121). However, even Weber's *Kadijustiz* principle does not say that a qadi would administer justice according to "his own arbitrary whim or momentary fancy", but their discretion is to be carried out in accordance with popular conviction (the sound feeling of the people) following the religious or ethical value system prevailing at that time and place (Rheinstein, xlvii).

In order to follow a relatively large extent of discretionary deciding and justifying decisions that (still) allow qadis and their appellate bodies to make kisceral arguments embedded in Muslim religion and local customs, let us examine a few legal cases. From 1967 to 1978, Rosen made several field trips to Morocco, to the city of Sefrou, where he observed the work of a qadi court.

In Hussaini v. Alahami (1965), the plaintiff requested the return of his wife, the defendant, who left him several months ago. Represented by her father, the defendant claimed that the plaintiff had indeed divorced her, producing a document claiming that 50 people had testified to the fact before a notary. The plaintiff denied this, arguing that those 50 people brought by the defendant should not be trusted as they were her close relatives. The qadi found for the plaintiff and ordered the defendant to return to her husband because she failed to produce a special document about divorce that needs to be attested by a notary (the so-called *stisfar)*. The defendant then appealed, relying on a special provision of the Code of Personal Status, which provides that if there are witnesses to a divorce that is said to have occurred in the absence of notaries then this testimony must itself be notarized. The defendant thus produced a document in which 12 witnesses stated that they knew the couple had been married for a little over one year, after which the husband repudiated his wife. The plaintiff presented the notarized testimony of 12 witnesses who stated that the couple had been married for four years, and that all of them were present at the wedding, and that the plaintiff had never divorced his wife (Rosen 1980/81, pp. 224-225).

The appellate court affirmed the qadi's decision. Confronted with two sets of witnesses, it chose to assume that those living in

the same settlement as the couple were more likely than those living at some distance to know the actual state of their relationship. Additionally, they argued that the husband was eager to live with his wife or he would exercise his legally recognized right to divorce her unilaterally. Because no charges of mistreatment from his side were made, it could be suspected that the wife's family had played an important role in creating the dispute. Thus, this is an example of cultural assumptions and legal presumptions that shape the qadi's discretionary powers (Rosen 1980/81, p. 226). Thus, an example of kisceral reasons in his argument was his "gut feeling" that the locals would know better about their marriage than those distant people.

In case there is no evidence on either side to support the parties' assertions, the court has the power to require litigants to support their claims with a holy oath, which is commonly taken in the presence of two notaries at a mosque, a saintly shrine, or in the lodge of a religious brotherhood. Such an oath apportions the burden of swearing and the legal presumptions that accompany its use (Rosen 1980/81, p. 226). It usually takes the following form: for example, the court demands that the defendant take an oath swearing that he did not take any of his wife's belongings with him upon their divorce. If the defendant takes the oath, he will be presumed innocent. If, however, the defendant refuses to swear, the plaintiff must take the oath, and if the latter does so, the case will be awarded to him or her. But the sequence of oath taking could be reversed depending on the situation. What is important is the power that such oaths are believed to contain, since there is a real fear that a false oath will result in harsh supernatural punishments. It is also not very common that, when asked to take an oath, a person refuses to do so and thus surrenders the case. Accordingly, the presumptions and the order of oathtaking may be deciding factors in a case (Rosen 1980/81, p. 227). Again, this is (merely) kisceral evidence that a defendant was innocent because they would not lie in front of God.

A qadi's equitable discretion even allows them to decide differently when the law on a matter is quite clear, and when they nevertheless feel that justice may be violated by the strict application of the law. A case in point is al-Haji v. Hedraz (1961), where the

plaintiff stated that her husband, the defendant, has been sent to jail for two years. But for three years and two months prior to that he did not support her and their young daughter. She wanted the qadi to divorce her because she could not wait for the husband to come back from prison. In fact, she had sued him several times before and the court always ordered him to support her, but he refused every single time to do so. Although technically following the "letter of the law," in that situation the qadi could only grant her a revocable divorce meaning that the husband would be able to take the wife back after a certain period of time, he decided that the situation was so outrageous that it would be unfair to do so, and he decided for an irrevocable divorce. In his opinion, the qadi not only pointed to the husband's bad record but also to the fact that the plaintiff had constantly displayed the characteristics of a respectable woman since her neighbors regarded her as circumspect, well-behaved, and long suffering. From that it seems that by using his powers of consultation and utilitarian reasoning, even the present-day qadi may be able, from a formal point of view, to make a lawless *(contra legem)* decision. However, this is substantively justified in terms of the countervailing equities (Rosen 1980/81, pp. 235-240).

Another example of discretion in Islamic law is tazir, which refers to punishment for offenses at the discretion of the judge (qadi) or ruler of the state. It is one of three major types of punishments under Sharia law: hadd, qisas, and tazir (Cammack 2012, pp. 1-7). The punishment for the hadd is determined by the Quran or Hadith, qisas allow equal retaliation in events of intentional bodily harm, whereas tazir refers to punishments for less serious offenses which are not specified in the Islamic sacred texts (El-Awa 1993), such as thefts among relatives, attempted but unsuccessful robbery, fornication that does not include penetration, and homosexual contact such as kissing that does not result in fornication (Bassiouni 1982). The punishments include prison terms, flogging, fines, banishment, and seizure of property (Baldwin 2012, pp. 117-152). In this respect, the judge enjoys considerable leeway to use an appropriate form of punishment; the punishment needs not be consistent with respect to other defendants or over time, and the

qadi has also the discretion to forgive tazir offenses (El-Awa 1993).

From the above we can see that the level of judges' discretion is (still) much higher in Sharia law than in modern Western law. This is a definite cultural difference, still it is far from claiming that Western judges are akin to "logomachs." Why would this feature of adjudication be connected with rhetorical argumentation rather than with dialectical (or logical) argumentation? A crucial point is that in uncertain legal situations their discretion is quite extensive, much more so in Islamic law than in Western. It is the Islamic audience that trusts their qadis to a great extent, and they adhere to their audience to find a suitable solution in clear but also problematic cases. The audience trusts their (moral) authority to the extent that they find the best legal solution relying on their (expert) intuition, which is not absolute and unlimited but embedded in Islam. This is then justified by means of kisceral arguments.

Both in the form of either value judgments from Western law or discretion in the framework of Sharia law, it seems that kisceral arguments based on arguers' intuitions are still present in contemporary law in a more or less restricted manner. In this way, judges' own sense of justice supplements positive law due to various reasons (indeterminacy, obsolescence, injustice, etc.). When judges are sworn in, they generally promise not only to uphold the constitution and statutes, and adjudicate impartially, but also to follow their conscience (i.e., morality), regardless of which version of morality they will be bound to follow.

Conclusion

Kisceral (i.e., intuitive) arguments, as those in which their reasons are found in one's intuition, are (unlike their historical predecessors) very limited in their recognition and application in modern legal systems. One of the chief reasons for that is the modern conception of the rule of law, according to which laws are democratically (collectively) enacted in parliaments whose legal texts also need to be followed by courts. In addition, serving the same principle of the rule of law, courts are bound by their previous decisions. To rely on kisceral arguments to the contrary of the

above-mentioned procedures may imply arbitrary decision-making and justifications.

Still, from present reports and experiences too many to cite, it follows that in at least quite unclear cases laws cannot prevent legal decision-makers (most typically, judges) from relying on their kisceral arguments when they need to act in a discretionary manner. After all, the genius of creativity very much depends on intuition, with the same being true for judicial creativity as well. However, then again, such creativity can be once welcome and another time self-willed and arbitrary. By all means, it needs to provide reasons that the audience accepts every time, or not.

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