

Volodymyr Kistianyuk¹

Specifics of Argumentation in Judicial Practice in Ukraine

1. Introduction

Judicial argumentation is an important element of the modern law enforcement process. Its rules are a vital element of the judicial process in Ukraine. In a global context, judicial argumentation has become a criterion for evaluating compliance with legal norms and the rule of law. Ukraine is no exception. There are numerous approaches of argumentation that can be used in litigation.

For Ukraine, compliance with these rules is important for raising the standards of justice. The Venice Commission also noted problems of justice, which in one of its latest reports regarding Ukrainian judiciary noted that:

These problems are – at least in part – the result of a poor legislative process: a plethora of bills dealing with specific aspects, often in a rushed manner, a fragmented approach / lack of a holistic approach, no proper impact assessments before further changes are proposed and a lack of clarity. As a logical consequence, some laws are subsequently found unconstitutional by the Constitutional Court and the whole process has to be started again. Another problem is the poor implementation of the laws once they are adopted, possibly

¹ Advocate, consulting@lawargument.com, <https://orcid.org/0000-0003-2169-7487>.

due to a continued problem of corruption and a lack of integrity in some parts of the judiciary. However, institutional reforms cannot be the answer to solve problems that have arisen on account of the personal conduct of some of the members of these institutions².

It must be noted that for judges in Ukraine, it is not sufficient just to apply the law. The law must be interpreted within the scope of argumentation rules. But these argumentation rules must be learned through the study of various contemporary doctrinal approaches of argumentation: inductive, deductive, coherent, hermeneutic and various other models developed by modern legal schools.

One of the reasons for this difficult situation in the application of law is non-compliance with the rules of argumentation. Although the rules of argumentation are not yet clearly regulated by legislation, they are derived from doctrinal approaches. In our opinion, it is worth considering several problematic issues in the judicial practice of Ukrainian courts.

The purpose of this study is to analyze specific judicial decisions in Ukrainian courts to evaluate their rules of argumentation, which are researched by scholars in academic institutions. Thus, the main methodology of this article is empirical, as judicial practice plays an important role in this area.

2. Adherence of logical rules in Ukrainian judicial practice

Rules of argumentation provide that decisions must be logical and comply with certain rules of logic. We cannot fully agree with the opinion expressed by Professor Douglas Lind, who notes,

Ever since Justice Holmes asserted that “the life of the law has not been logic: it has been experience,” lawyers and judges in the United States have minimized the importance of formal logic for understanding law and legal reasoning. Many legal scholars and practitioners

² Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe, 2020, Joint Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the draft amendments to the Law ‘on the Judiciary and the Status of Judges’ and certain Laws on the activities of the Supreme Court and Judicial Authorities (draft Law no. 3711). (October, 2020). Strasbourg. P. 3–4. //Accessed at: [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2020\)022-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2020)022-e).

have feared that to acknowledge that logic is central to law would risk a return to the rationalistic excesses of the formalistic jurisprudences that dominated nineteenth century legal thought. It was, after all, against that formalist tradition that Holmes wrote. And it was in spirited opposition to that tradition that members of the Legal Realist movement in America, as well as the Free Law movement in Europe, directed much of their energies early in the twentieth century³.

This statement does not necessarily apply to the judicial system in Ukraine because at this stage of its formation, the Ukrainian judiciary must appeal to logical rules. Ukraine has its own traditions of jurisprudence. Having a large scope of discretion can lead to mistakes in this process. Despite the criticism of logic, this approach can maintain some level of stability in Ukrainian judiciary.

As one Resolution of the Supreme Court of Ukraine put it,

The persuasiveness of the motivation must be based on its logic and consistency, so in the course of motivating its conclusions, the court must follow certain logical rules: do not apply judgments that contradict each other; do not use evidence that cannot be supported by other evidence; do not apply unfounded generalizations about a person, most of all, the accused; be sure to follow the logical connection between the circumstances that subject of evidence, the facts of the case and the conclusions that are formulated in the court's decision⁴.

We agree with the Court's opinion here, as non-compliance with logical rules can result in violations of human rights and principles of judicial process. Abiding by logical rules avoids arbitrary interpretations of the law when courts formulate their decisions. In this context, we must not confuse logic with excessive formalism, which is sometimes inherent in the judiciary. Excessive formalism can indeed have negative consequences, for even if formally there is a norm which addresses a relevant

³ Lind Douglas (2014). *The Significance of Logic for Law* (1sted.). The National Judicial College. The University of Nevada, Reno. // Accessed at: <https://www.judges.org/news-and-info/the-significance-of-logic-for-law/>.

⁴ Postanova Verkhovnoho Sudu Ukrayiny vid 22 lyutogo 2018 roku u spravi № 461/6861/16-k [The ruling by the Supreme Court of Ukraine February 22, 2018 in case № 461/6861/16k]. Kyiv: Kasatsiyni kryminalnyi sud Verkhovnoho Sudu. [in Ukrainian] // Accessed at: <https://reyestr.court.gov.ua/Review/72460091>.

question it might be invalid if it is outdated or imperfect in its content. Adherence to logical rules of argumentation in the Ukrainian judiciary is a cornerstone of its stability. There is a great deal of academic literature describing various logical approaches. For a judge, it is essential to use rules of logic. He or she must then create a logical framework for each decision he or she issues. If a court's decision is grounded in logic, it will help justice to be served.

Courts should be supported in their efforts to think logically about how to resolve the matters before them. For example, one of the decisions of the Kyiv District Administrative Court states that:

A gap in the legal regulation of relations is traditionally considered one of the most common types of legal defects. A lack of necessary legal rule disunites the system of law and legislation, reduces its coherence and, consequently, the effectiveness of legal regulation. To overcome the gaps, tools such as the analogy of law and the statutory analogy of law are usually used. At the heart of the statutory analogy and analogy of law is a logical method of analogy: the ideas of law, already implemented in one place of the law, by applying the rule of equality are generalized and thus extend the scope of its application to other cases⁵.

Analogy is an effective mechanism of applying the law in the Ukrainian judicial system to fill legal gaps. The analogy may have a domestic dimension when it comes to the use of similar case law of Ukrainian courts and may have an international character when for example it comes to the application of case law from the European Court of Human Rights.

Therefore, to avoid legal gaps in their arguments, litigants of judicial process need to be up to date with the academic and doctrinal positions of scholars regarding judicial argumentation. A court's decision should be considered not only through the prism of the mechanical application of the law, but also through the prism of the application of logical rules, particularly: induction, deduction, analogy, coherence, and others.

⁵ Rishennya Okruzhnogo administratyvnogo sudu m. Kyeva vid 29 lypnya 2020 roku u spravi № 640/12605/20 [Judgment the District Administrative Court of, Kyiv, July 29, 2020 in case № 640/12605/20]. Kyiv: District Administrative Court. [in Ukrainian] // Accessed at: <https://reyestr.court.gov.ua/Review/90647960>.

3. Issues of argumentation arising from principles of law

Judicial argumentation is also based on the principles of law. The importance of these principles in this case is relevant because it is through them that a balance of public interests can be achieved to make socially significant decisions. The principles can eliminate so-called formalism regarding certain legal situations. Principles of law can be characterized by the appropriate level of understanding of law.

One such situation is the Decision of the Constitutional Court of Ukraine regarding the constitutional petition of 47 People's Deputies of Ukraine on the constitutionality of certain provisions of the Law of Ukraine "On Prevention of Corruption", the Criminal Code of Ukraine, which repealed some articles of the Criminal Code of Ukraine⁶.

One of the leading roles in the adherence of the rules of argumentation was played by a dissenting opinion of Judge V.V. Lemak, who stated that:

The decision is not properly substantiated. The rule of law begins with informed court decisions, through which they communicate with society. This is the first thing that individuals and society as a whole expect from the courts. This is especially true of the exercise of constitutional control by the body of constitutional justice, because at this level it is always a question of so-called "hard cases", when not just facts and norms of laws are investigated. It is a question of the analysis of features of legal norm and its measurement on scale of constitutional principles and norms. The question is not only and not so much what the final conclusions of the Constitutional Court of Ukraine in a particular case, but in what in this way they are substantiated with the use of constitutional arguments⁷.

⁶ Rishennya Konstytucijnogo Sudu Ukrayiny u spravi za konstytucijnym podannjam 47 narodnyh deputativ Ukrayiny shhodo vidpovidnosti Konstytuciyi Ukrayiny (konstytucijnosti) okremykh polozhen Zakonu Ukrayiny "Pro zapobigannya korupciyi", Kryminalnogo kodeksu Ukrayiny vid 27 jovtnja 2020 roku [Judgment of the Constitutional Court of Ukraine regarding on the constitutional petition of 47 people's deputies of Ukraine on compliance with the Constitution of Ukraine (constitutionality) of certain provisions of the Law of Ukraine "On Prevention of Corruption", the Criminal Code of Ukraine of October 27, 2020] Kyiv: Constitutional Court of Ukraine. [in Ukrainian] // Accessed at: http://ccu.gov.ua/sites/default/files/docs/13_p_2020.pdf.

⁷ Okrema dumka suddi Konstytucijnogo Sudu Ukrayiny Lemaka V.V. stosovno Rish-

In light of this, it should be noted that Ukraine has a problem whereby, on the one hand, judges can find formal reasons to repeal a legal norm, while on the other hand, there is a lack of a philosophical, methodological approach to a court's decision-making that is based on principles. The absence of this methodological approach contributes to a lack of fairness in court proceedings. In this regard, the decision should not be understood as a set of references to the relevant rules, but a complex philosophical approach to solving the problem of an individual nature. This approach must correspond with the main principles of law.

As an example, this concept of “hard cases” is a common element in Western jurisprudence. In this regard, it would be important for the judges to make a conceptual analysis of the hard case in question, which was researched by the British-American legal theorist R. Dworkin. The theory of hard cases pertains to situations when a case can not be resolved by the mechanical application of law. At the same time, it requires the use of various types of legal argumentation.

4. Issues of rhetoric in local courts

The rhetorical approach in judicial argumentation makes it possible to understand the standpoint of trial participants in emotional and psychological terms. Moreover, this process is influenced by the opinion of the audience, which has its own attitude to the events taking place in court.

In contrast to the problematic issues that arise during the process of constitutional proceedings, the issue of rhetoric is an equally important aspect that demonstrates judicial argumentation in Ukraine. In Ukraine, courts tend to be overburdened with cases. As a result, communication between participants in trials is less effective.

ення у справі за конституційним поданням 47 народних депутатів України щодо відповідності Конституції України (конституційності) окремих положень Закону України “Про запобігання корупції”, Кримінального кодексу України від 27 жовтня 2020 року. [Separate opinion of Judge of the Constitutional Court of Ukraine Lemak V.V. regarding the decision in case on the constitutional petition of People’s Deputies of Ukraine on compliance with the Constitution of Ukraine (constitutionality) of certain provisions of the Law of Ukraine “On Prevention of Corruption”, the Criminal Code of Ukraine of October 27, 2020]. Kyiv: Constitutional Court of Ukraine. [in Ukrainian] //Accessed at: <https://zakon.rada.gov.ua/laws/show/nb13d710-20/conv#Text>.

According to information of the State Judicial Administration of Ukraine, there were 4,487,003 cases pending in local and appellate courts in 2019⁸. This scale of workload does not allow trial to fully speak and implement a rhetorical method of argumentation. Case law considers this issue in the context of adversarial proceedings. A lack of a rhetorical approach to argumentation makes the decision-making process formalistic and meaningless. It is not enough for a judge to understand case details only from the submitted documents. Instead, he must listen in person to the court proceeding's participants.

By the decision of the Supreme Court of Ukraine in case 222/1402/16-a, the Supreme Court noted that:

the Court also took into account that the circumstances relied on by the petitioner were substantial. He did not have the opportunity to express his opinion on the merits of the claim in the court of first instance, and in the case of deprivation of such a right in the court of appeal, the adversarial principle may be significantly violated⁹.

The question arises: why is rhetoric so important when, a case could possibly be resolved only based simply on written documents and evidence? In this situation we can quote the wisdom of T.A. Maroni, *"The people who populate the legal system inevitably are affected by the full panoply of human emotion. Efforts to ignore or suppress this reality are doomed to failure; efforts to understand and shape it can meaningfully advance justice"*¹⁰. Every time we deal with the affairs of humans, we are inevitably dealing with emotions, and thus we cannot justly leave legal judgments entirely to the domain of sterile examination of presented evidence.

⁸ Vidpovid Derzhavnoyi sudovoyi administraciyi Ukrayiny vid 24.04.2020 [Letter of the State Judicial Administration of Ukraine April 24, 2020]. Kyiv: State Judicial Administration of Ukraine. [in Ukrainian].

⁹ Postanova Verkhovnogo Sudu Ukrayiny vid 20 bereznja 2020 roku u spravi № 222/1402/16-a [The ruling of the Supreme Court of Ukraine March 20, 2020 in case № 222/1402/16a]. Kyiv: Supreme Court of Ukraine. [in Ukrainian] // Accessed at: <https://reyestr.court.gov.ua/Review/80606979>.

¹⁰ Maroney Terry A. (2016). *Emotion in the Behavior and Decision Making of Jurors and Judges* (28th ed.). NGO "The International Society for Research on Emotion (ISRE)". // Accessed at: <https://emotionresearcher.com/emotion-in-the-behavior-and-decision-making-of-jurors-and-judges/>.

Thus, rhetoric must have a place during judicial argumentation in Ukrainian courts because it can help to evaluate the cases from various points of view. In addition to documents, there must be an opportunity for court participants to represent their positions with emotions and to express their opinions.

5. Confusion of inductive and deductive argumentation

Courts can be divided into those that work mostly with deductive argumentation, and those that mostly use inductive argumentation.

According to the Law of Ukraine “On the Judiciary and the Status of Judges”, courts specialize in civil, criminal, commercial and administrative cases, as well as cases of administrative offenses¹¹.

As such, these judicial institutions are characterized by a deductive approach, which operates by the rule of classical syllogism, whereby the first premise is the provision enshrined in law. In turn, the second premise is an individual situation that a natural or legal person handles to resolve their situation. The decision in the case is the conclusion. The final structural element of the deductive syllogism is the conclusion, which is made in the form of a court decision concerning the rights and duties of the parties.

The Constitutional Court of Ukraine, however, uses a mostly inductive approach. In accordance with Art. 1 of the Law of Ukraine “On the Constitutional Court of Ukraine”, the Constitutional Court of Ukraine is a body of constitutional jurisdiction that ensures the supremacy of the Constitution of Ukraine, make decisions on compliance with the Constitution of Ukraine and the official interpretation of the Constitution, as well as exercises other powers in accordance with the Constitution¹².

Thus, the inductive approach in this regard is that by collecting individual situations, a general rule is derived, which is contained in the

¹¹ Zakon Ukrainy “Pro sudoustriy i status suddiv” [Law of Ukraine “On the Judiciary and the Status of Judges”]. (2016). Kyiv: Holos Ukrainy. [in Ukrainian] // Accessed at: <https://zakon.rada.gov.ua/laws/show/1402-19/conv>.

¹² Zakon Ukrainy “Pro Konstytutsiynyi sud Ukrainy” [Law of Ukraine “On the Constitutional Court of Ukraine”]. (2017). Kyiv: Holos Ukrainy. [in Ukrainian] // Accessed at: <https://zakon.rada.gov.ua/laws/show/2136-19/conv#Text>.

court decision and which applies to a significant number of people in society.

However, the problem is that the duties of those courts are often usurped by other ones.

This issue is particularly relevant with the Supreme Court of Ukraine. The legal positions issued by this institution become the key examples of judicial practice upon which lawyers argue and courts render judgement upon cases. However, in this case, we can see a substitution of the deductive approach by the inductive approach, which is inherent primarily in the court of constitutional jurisdiction. However, it is not expedient for the Supreme Court to resort to inductive generalization, which does not match with its powers. One of the key reasons that cases before the Supreme Court have an individual dimension.

The most suitable provision on this issue was implemented by a legislator because the Ukrainian legislation stipulates that the plenum of the Supreme Court practice provides clarification of the advisory nature of the application of legislation in resolving court cases. Therefore, the explanations of the Supreme Court are strictly advisory and cannot be binding. Today, cases are frequently decided based upon the key examples of judicial practice set in other cases decided by the Supreme Court. However, this approach is somewhat erroneous, as cases before the Supreme Court do not concern inductive problems, which are the domain of the Constitutional Court, but have unique content and cannot be applied to other circumstances that require legal regulation.

There is another trend, in which the inductive approach should prevail. This methodology should be applied to only the most important socio-economic and socio-political issues. However, to date, the Constitutional Court is considering a significant number of individual and collective appeals.

In this situation, the Constitutional Court of Ukraine, as a user of inductive argumentation, should consider exceptional cases of constitutional significance, and not be overburdened with a massive caseload, lest the quality of court decisions suffer. The Constitutional Court must work within the scope of constitutional control.

Inductive and deductive argumentation should be considered as part of the judicial process in Ukraine. At the same time, the judicial process

must be clear for all participants. Each type of court must work within the area delegated to it, be that inductive or deductive argumentation.

6. Conclusion

In analyzing Ukrainian judicial practice, it should be noted that the technique of judicial argumentation is being improved as a part of the system's reform process. However, there are still problems in the structure of legal argumentation in general that need to be methodologically rethought and understood. There are several theoretical issues which show problems with judicial argumentation in Ukraine. The first is a lack of a proper logical approach. Often, parties to lawsuits violate logical rules. Therefore, there is a need for further clarification of judicial decisions. Another reason for the low level of judicial argumentation is a non-compliance with the principles of judicial process. These principles can have different origins, relate to different areas, and may follow from legal acts, case law and other sources. The third problem is the limited usage of rhetoric in courts of general jurisdiction as a result both of the low level of legal culture and the high caseload of the courts. The fourth characteristic is the confusion of inductive and deductive approaches in law enforcement. This happens when courts take over functions outside their assigned jurisdiction. Courts of general jurisdiction often inappropriately apply an inductive approach, when from individual situations they form a policy of justice. In turn, for constitutional proceedings, instead of an inductive approach that must be used we can often observe consideration of individual cases that concern to deductive approach.

Studies of the peculiarities of argumentation in the judicial practice of Ukraine will continue, as this area of research is still evolving. Its improvement is possible through the joint efforts of scholars, judges, lawyers, notaries, and other legal practitioners. However, there is an even bigger role for legislators to play as Ukraine improves its norms of jurisprudence.

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- podannym 47 narodnyh deputativ Ukrayiny shhodo vidpovidnosti Konstytuciyi Ukrayiny (konstytucijnosti) okremykh polozhen Zakonu Ukrayiny “Pro zapobigannya korupcii”, Kryminalnogo kodeksu Ukrayiny vid 27 jovtnja 2020 roku [Judgment of the Constitutional Court of Ukraine regarding on the constitutional petition of 47 people’s deputies of Ukraine on compliance with the Constitution of Ukraine (constitutionality) of certain provisions of the Law of Ukraine “On Prevention of Corruption”, the Criminal Code of Ukraine of October 27, 2020] Kyiv: Constitutional Court of Ukraine. [in Ukrainian] // Accessed at: http://ccu.gov.ua/sites/default/files/docs/13_p_2020.pdf.
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Summary

In the context of reforming the legal system of Ukraine, the issue of judicial argumentation, which is developing in modern law schools, is necessary in current conditions of law enforcement process. In this regard, there is a need to outline the problematic aspects of the use of argumentation in the Ukrainian judicial system.

This article is devoted to some features of the argumentation contained in decisions of Ukrainian courts. The article describes typical problems that occur during judicial argumentation, which hinder quality of justice. The author analyzes the logical approach to judicial argumentation, argumentation based on principles, the rhetorical approach and inductive as well as deductive argumentation during proceedings in Ukrainian courts. These are some of the most widely used approaches in judicial argumentation.

The article provides some recommendations that can improve argumentation in Ukrainian judicial practice. These problems can be solved by improving the level of legal culture, increasing the education of litigants and by using other methods.

Keywords: court, argumentation, reasoning, judiciary, rhetoric, logic, induction, deduction