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Defence of Rule-Deductivism

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Abstract

Many legal theorists subscribe to the claim that the legal syllogism has a role in justification of legal decisions. A challenge to this thesis is put forward in Luis Duarte d'Almeida's essay "On the Legal Syllogism". This article aims to examine Luis Duarte d'Almeida's arguments against rule-deductivism in order to refine the theoretical understanding of the role that the legal syllogism has in the justification of legal decisions. In this article, three main research methods have been used: the descriptive, the deductive, and the analytical method. The examination of Luis Duarte d'Almeida's arguments against rule-deductivism results in several conclusions. Firstly, the general argument against rule-deductivism fails because of some faulty assumptions about the scope of the major premise in respect to the scope of the statutory rule entailed by its ratio legis, i.e. that this adherence must be perfect when the judge is expanding the scope of the statutory rule by referring to the general purpose of the rule. Secondly, the critique of the first notion of rule-deductivism is effective, but only insofar as one also adheres to several contentious assumptions that are held by some rule-deductivists, but are not essential to rule-deductivism.

Keywords: legal syllogism, rule-deductivism, teleological correction.

Introduction

Deductivism or, as Luís Duarte d'Almeida calls it, rule-deductivism is a view that some parts of justification of a legal decision can be reconstructed by using legal syllogism (Duarte, 2019). Because of the prevalence of rule-deductivism (Alexy, 1989; MacCormick, 2005; Larenz & Canaris, 1995; Neimanis, 2004; Plotnieks, 2009) and in order not to get complacent, it is important to engage with critics who challenge the dominant view. This somewhat polemic is helpful and necessary to advance the understanding of the role (if any) that the legal syllogism has in justification of legal decisions.

This article aims to examine Luis Duarte d'Almeida's arguments against rule-deductivism in order to refine theoretical understanding of the role that legal syllogism has in justification of legal decisions.

In this article, three main research methods have been used: the descriptive, the deductive, and the analytical method. The descriptive and deductive methods are used to reconstruct Duarte's arguments against rule-deductivism, i.e., to elucidate and explicate the assumptions that are at the core of the critique. The analytical method is used to understand which theoretical assumptions are and are not essential to rule-deductivism.

1 Reconstruction of Luís Duarte d'Almeida's Arguments against Rule-Deductivism

In the first four chapters of the essay "*On the Legal Syllogism*", Luis Duarte d'Almeida tries to elucidate and argue against two notions of rule-deductivism. In the fifth chapter, he offers a positive contribution to the theory of legal justification – an alternative to rule-deductivism (Duarte, 2019). The first chapter of this study aims to briefly summarise the main points of Duarte's arguments against rule-deductivism.

1.1 First Notion of Rule-Deductivism

The first notion of rule-deductivism is the view that the legal syllogism is a model of the justification of law-applying judicial decisions. In this model, the premises of the legal syllogism entail that the judge **ought** to apply certain legal consequences. Although proponents of this notion of rule-deductivism claim that this is what the legal syllogism does, Duarte disagrees *inter alia* because of the examples offered by rule-deductivists (Duarte, 2019). The following is one such example.

> *"Rule:* Any person who calls another person a liar has a duty to pay $50 to that other person.
>
> *Fact:* Barnewall (a person) called Adolphus (another person) a liar.
>
> *Ruling:* Thus, Barnewall has a duty to pay $50 to Adolphus." (Gardner, 2007; *67*)

Duarte notes that this conclusion does not justify that a judge **ought** to perform an action, i.e., apply legal consequences. For conclusion to do what rule-deductivists claim it does, it should say that "*the judge ought to rule that Barnewall has a duty to pay $50 to Adolphus*" (Duarte, 2019, 350). Furthermore, it follows from Duarte's arguments (Duarte, 2019) that the major premise of the legal syllogism must be different for the correct conclusion to follow from the premises, e.g.:

> *Rule:* Court ought to rule that any person who calls another person a liar has a duty to pay $50 to that other person.

Duarte argues that the modified rule cannot be a reconstruction of the relevant statutory rule because rule-deductivists claim that the major premise is the section of the statute. In addition, the modified rule is not equivalent to, nor entailed by, the original formulation of the major premise; and the statute does not plausibly express the modified rule. (Duarte, 2019) Although Duarte does not mention this, such objections to the first notion of rule-deductivism are salient insofar as the legal system contains norms that are not already in the form of the modified major premise.

One can summarise Duarte's objections to the first notion of rule-deductivism in the following way. The notion that the legal syllogism is a model of the justification of law-applying judicial decisions is unattainable if:

1) the major premise is a section of the statute;
2) there are instances when legal consequences of the statutory rule are formulated in such a way that they do not demand action from the judge (i.e., "judge ought to rule that");
3) the aforementioned statutory rules cannot be taken to demand such action.

1.2 Second Notion of Rule-Deductivism

Duarte initially describes the second notion of rule-deductivism as "*the view that the legal syllogism suitably models justification of particular legal claims – particular propositions of law – when these are put forward on the basis that a certain legal rule applies to the relevant particular case*" (Duarte, 2019, *350*). It would be a mistake to summarise this view by saying that the legal syllogism models a justification of an individual norm (Kelsen, 1949; Navarro & Rodriguez, 2014) (i.e., an instantiation of certain legal consequences). Duarte further highlights that the legal claim is based on an existing legal rule (Duarte, 2019). The reason for this clarification becomes apparent when considering Duarte's criticism of the second notion of rule-deductivism.

Duarte's critique of the second notion of rule-deductivism consists of two parts: an argument that the legal syllogism is inadequate and three rebuttals to potential counterarguments. Duarte argues that the legal syllogism is inadequate by showing that there exist cases where the court's argumentation cannot be reconstructed by using the legal syllogism. In one such case, the court used the general purpose (*ratio legis*) of an existing statutory rule to apply it to a case that did not fully fall under the antecedent (i.e., the operative facts) of the statutory rule (Duarte, 2019). It seems that Duarte emphasised that it was an existing statutory rule because the court *prima facie* did not argue that the statutory rule in question must be altered so that the scope of the rule would be more in line with its *ratio legis*.

The first counterargument to Duarte's criticism is concerned with the scope of rule-deductivism; one may say that such cases as described above are not in the class of cases that the legal syllogism is meant to model. Duarte disagrees because it is a case in which an existing law is applied to a particular case. Furthermore, the fact that courts

and lawyers frequently construct such arguments is strong pre-theoretical evidence for the legitimacy of such arguments (Duarte, 2019).

The second objection consists of an assertion that the court used a different major premise that is not identical to the rule expressed by the text of the provision. Duarte dismisses this argument because he thinks that "*the court did not justify its law-applying decision on the basis of any rule at all*" (Duarte, 2019, *356*). Furthermore, Duarte argues that rule-deductivists should not expect judges to articulate new universal rules (operative facts of the major premise) that explicate all the conditions which any case must meet for the provision to be applicable (Duarte, 2019).

The third objection consists of an assertion that the court implicitly used a different minor premise. Duarte dismisses this objection by reminding that the court did not try to show that the facts of the case were an instantiation of the operative facts of some rule (Duarte, 2019).

Duarte's objections to the second notion of rule-deductivism can be summarised in the following way. The second notion of rule-deductivism is unattainable because there exist legitimate cases where it seems (pre-theoretically) that:

1) an existing legal rule is applied only by reference to its general purpose;
2) no attempt is made to create a new legal rule that can be used as the major premise;
3) no attempt is made to subsume the facts of the cases under the antecedent of some rule.

2 Critique of Luís Duarte d'Almeida's Arguments against Rule-Deductivism

The first thing to note, Duarte's arguments are linked in the sense that the arguments against the second notion of rule-deductivism can be used to attack the first notion of rule-deductivism. This is because the argument against the former aims to show that there are cases that no form of legal syllogism can model. Therefore, if one wants to show that the first notion of rule-deductivism is tenable, one must refute both arguments. Because of this, it is prudent to start the examination of Duarte's argument by first addressing the more general critique, i.e., the arguments against the second notion of rule-deductivism.

2.1 Critique of Arguments against the Second Notion of Rule-Deductivism

Before addressing the main points of Duarte's argument, two assumptions must be dealt with. First, Duarte insists that, according to rule-deductivists, when the facts of the case cannot be subsumed under the operative facts of the statutory provision, a judge must construct a watertight description of the operative facts that any case must meet for the provision to be applicable (Duarte, 2019). Although it is a fair burden to place on

the legislator who is tasked with creating a provision, it may be that it is an unreasonable burden to place on a judge when he is confronted with a gap in the law. In spite of Duarte's insistence on the contrary, rule-deductivism does not commit one to such a position. Consider the following example.

> *The general purpose (ratio legis) of the provision*: to protect the fish population of lake Dzintars.
>
> *The antecedent of the statutory rule*: "If a person uses a fishing rod or a fishing net to catch fish in the lake Dzintars, then...".
>
> *Facts of the case*: A.A. used type F-1 cast iron hand grenades (SCH-00) to kill fish in lake Dzintars and then gathered them.

Using hand grenades to kill fish in lake Dzintars is clearly against the general purpose of the provision but the facts of the case only partially fall under the operative facts of the statutory rule. The question remains what options the judge has. In this case, there are three broad ways to approach the expansion of the antecedent of the statutory rule using teleological correction:

1) get rid of some operative facts that form a **conjunction** with other parts of the antecedent (similar to the statutory analogy (Kalniņš, 2003));
2) add operative facts that form a **disjunction** with other parts of the antecedent (similar to the teleological extension (Larenz & Canaris, 1995));
3) **replace** operative facts with ones that have a larger scope (Musts, 2022).

If a judge thinks that, given the *ratio legis* of the provision, there is no point in specifying a tool or method for catching fish, then the first option can be used to create the following antecedent:

(I) "If a person catches fish in lake Dzintars, then..."

An example of a modification using the third option, i.e., replacing one of the operative facts with a different one:

(II) "If a person uses a fishing rod or any other method to catch fish in lake Dzintars, then…"

Although both (I) and (II) encompass the facts of the case, these two solutions have the risk of over-inclusiveness.

If one wants to avoid this risk completely or take the view that there are cases in which the judge does not commit himself to what the relevant characteristics of a case are that can be universalised to other relevantly similar cases (Duarte, 2019; Duarte & Michelon, 2017), then the second option offers an appropriate solution because of its versatility. The versatility comes from the fact that the disjunct that the judge can add to the rest of the antecedent can be formulated in many different levels of abstraction in respect to the facts of the case.

The first level of abstraction: (III) "If a person uses a fishing rod, a fishing net **or a type F-1 cast iron hand grenades (SCH-00)** to catch fish in lake Dzintars, then…".

The first level of abstraction provides for the following:

1) creates a new universalizable rule that is more in line with the *ratio legis* of the provision;
2) if the judge gives sufficient reasons that, given the *ratio legis,* the provision is applicable to the case, then the first level of abstraction does not commit the judge to what the relevant characteristics of the case are;
3) reduces the chance of over-inclusiveness to the minimum.

In this example, one can create the first level of abstraction by omitting only the constants (i.e., the person who used the hand grenades) and the facts of the case that are already subsumed under the original parts of the antecedent of the statutory rule. This is the lowest level of abstraction possible. Furthermore, the first level of abstraction is unavoidable, if one wants to maintain that the decision is universalizable to relevantly similar cases.

In higher-level abstractions of the facts of the case, the judge can omit some or all irrelevant aspects of the case in respect to the general purpose of the provision, e.g., the type or material of the hand grenade. One can even abstract the term "hand grenades" to "explosive devices". This shows that the scope of the major premise implicitly or explicitly created by the judge can be in different levels of adherence to the general purpose of the statutory rule. Rule-deductivists are not committed to the view that this adherence must be perfect.

When explaining what the integral and orthodox elements of rule-deductivism are, Duarte points out two essential things that concern the major premise, i.e., that it is a general legal rule and that it is hypothetical in form (Duarte, 2019). The aforementioned perfect adherence to the general purpose of the statutory rule is not one of these integral and orthodox elements. Therefore, the first assumption of what rule-deductivism demands, i.e., that when the facts of the case cannot be subsumed under the operative facts of the statutory provision a judge must construct *a watertight description of the operative facts that any case must meet* for the provision to be applicable, is not true.

Secondly, Duarte insists that when the courts "***do*** *offer general statements of what they take the applicable law or "rule" to be, such statements are not properly construed as universal conditionals on which such courts rely as premises*" (Duarte, 2019, *357*). Duarte supports this view by pointing out that courts tend to say that such rules are "*made by* ***other*** *courts in previous decisions*" (Duarte, 2019, *357*). The problem with Duarte's second assumption is that such disclaimers are not material to whether the rule made by the judge is a proper universal conditional. Such disclaimers concern the origin of a rule, not its validity as a judge-made law (Sniedzīte, 2010).

In order to refute Duarte's main argument against the second notion of rule-deductivism, one must show that the examples he provided are not properly characterised as cases were:

1) an existing legal rule is applied only by reference to its general purpose;
2) no attempt is made to create a new legal rule that can be used as the major premise;
3) no attempt is made to subsume the facts of the cases under the antecedent of some rule.

Duarte offers two cases that allegedly are of the same sort and cannot be modelled by the legal syllogism, i.e., *Smith v Hughes* (1960) and *R v Luffe* (1807) (Duarte, 2019). The problem with the first example is that even *prima facie* it does not fulfil any of the three aforementioned requirements. This is because the court asserts: "*that on the true construction of section 1(1), taking into consideration the mischief at which the Act of 1959 was aimed, it mattered not where a prostitute stood (whether on a balcony, or in a room behind a closed, or half-open window), if her solicitation was projected to and addressed to somebody walking in the street, she was guilty of an offence against section 1 (1)*" (*Smith v Hughes,* 1960).

It is clear that the court gave a new construction ("*the true construction*") of the statutory rule and applied it. Therefore, the court did not apply an existing legal rule only by reference to its general purpose; there **was** an attempt to create a new legal rule that was used as the major premise; the court **did** subsume the facts of the case under the new antecedent. If anything, this is a good example of a case in which the court explicitly creates a new rule and uses it as the major premise in a legal syllogism.

Duarte's main example comes from the oldest of the two cases – *R v Luffe.* The role of the legal syllogism in *R v Luffe* is less obvious for two reasons. Firstly, the Justices of the Peace of the parish already issued an order of filiation to H. Luffe (i.e., applied the legal consequences of the statutory rule in question) and then H. Luffe appealed the order in *R v Luffe.* Secondly, the judges in *R v Luffe* primarily focused on addressing the three objections that were made to the order of filiation by the defendant (*R v Luffe,* 1807). It only seems that the justification in *R v Luffe* cannot be modelled by using the legal syllogism because the judge's arguments were aimed at defending an existing legal syllogism that was used to issue an order of filiation to H. Luffe.

Duarte reconstructs the statutory rule and the facts of *R v Luffe* in the following way:

> *"(1) For every x and every y: if x is a single woman delivered of a bastard child chargeable to a parish, and y is a man charged on oath with being the father of the child, then the Justices of the Peace of the parish have jurisdiction to make an order of filiation judging y to be the father of the child.* [..]
>
> (2) *Mary Taylor is a married woman delivered of a bastard child chargeable to a parish, and the defendant is a man charged on oath with being the father of the child*" (Duarte, 2019, *352*).

The second objection of the defendant was about the fact that Mary Taylor was not a **single** woman. The judge dismissed this objection by referring to the general purpose of the statutory rule (Duarte, 2019). By doing so the judge expanded the scope of the statutory rule. This new rule can be used as the major premise of the legal syllogism. It seems that the statutory rule was modified by omitting the operative fact "single" from the antecedent, or the facts of the case not covered by other parts of the antecedent were added as a disjunct, i.e., the judge modified the rule by adding a first level of abstraction of the facts of the case. Although the judge did not restate the new rule,

nor explicitly subsumed the facts of the case under the operative facts, it is clear that it was not necessary to explicitly do so. It is possible that for brevity's sake the judge did not repeat the whole statutory rule with the one amendment demanded by its general purpose. Furthermore, none of the two aforementioned ways of expanding the scope of the statutory rule necessitates further considerations concerning subsumption of the facts of the case under the new antecedent. In the first case, there are no new operative facts that the judge must consider. In the second case, the new operative facts are identical to the corresponding facts of the case.

Such a reconstruction of the court's arguments cannot be simply dismissed because Duarte acknowledges that rule-deductivists do not think that the court must strictly follow the form of the legal syllogism, i.e., it is sufficient that the court's justification can be represented as an instance of the legal syllogism (Duarte, 2019; Leiter, 2010).

To summarise, in *R v Luffe* a new legal rule was made by reference to the general purpose of the statutory rule. The new legal rule can be made in a way that abides by Duarte's interpretation of the case, i.e., that the judge did not commit himself to what were the relevant characteristics of the case which can be universalized to other relevantly similar cases. There was no need to explicitly argue that the new legal rule was applicable to the facts of the case because of two reasons. Firstly, it is unnecessary when the new legal rule is created by omitting an operative fact, or trivial when the new operative facts are identical to the corresponding facts of the case. Secondly, the defendant did not manage to successfully argue that other operative facts of the original statutory rule were not obtained (*R v Luffe*, 1807). Therefore, the legal syllogism can be used to model some parts of the justification in *R v Luffe*.

2.2 Critique of Arguments against the First Notion of Rule-Deductivism

The problem with Duarte's criticism of the first notion of rule-deductivism is that it is contingent upon several uncommon assumptions, i.e., the notion that the legal syllogism is a model of the justification of law-applying judicial decisions is unattainable if:

1) the major premise is a section of the statute;
2) there are instances when legal consequences of the statutory rule are formulated in such a way that they do not demand action from the judge (i.e., "judge ought to rule that");
3) and the aforementioned statutory rules cannot be taken to demand such action.

It seems that Duarte's argument against the first notion of rule-deductivism is effective at showing that, given the three assumptions that are not essential to the first notion of rule-deductivism, it is unattainable. The strength of such an argument is contingent upon the acceptability of the assumptions among rule-deductivists.

If Duarte maintains that these three assumptions are essential to rule-deductivism, then there are fewer legal theorists who would subscribe to rule-deductivism than Duarte leads us to believe. For instance, Duarte claims that Neil MacCormick and Robert Alexy

are prominent authors who have defended rule-deductivism (Duarte, 2019). It seems that Alexy would not endorse the third assumption, because he stressed that there can be several different formalisations of a statutory rule, e.g., "*one might perhaps understand it as a reaction-guiding norm addressed to the court and stipulate that it is the court as addressee of the norm*" (Alexy, 1989, *224*). This means that Alexy allows for the possibility that a statutory rule can be taken to demand that the judge **ought** to rule in a certain way. Furthermore, it is reasonable to assert that Alexy's view of the major premise is different from the one expressed in the first assumption because for him the first premise "*is a norm, either expressed in a statute or arrived at by the judiciary*" (Alexy, 2003, *434*). "Expressed in a statute" is meaningfully different from "is a section of the statute". The former is compatible with the view that there are different ways of reconstructing the major premise, the latter is not.

Furthermore, it can be argued that MacCormick does not endorse the first notion of rule-deductivism and, because of that, it does not matter if he subscribes to any of the three assumptions. Duarte recognises that, when MacCormick is more careful, he explains that in order to complete the justification of the law-applying decision the legal syllogism must have an additional implicit premise, i.e., that the judge should apply the law when it is relevant and applicable (Duarte, 2019; MacCormick, 1978). Therefore, MacCormick's view of the legal syllogism (without the additional premise) is more in line with the second notion of rule-deductivism.

One can argue that it is important that the added premise is implicit, because of the purpose of justification. As such it would be an argument against the first notion of rule-deductivism and any other model of justification that aims to explicitly justify that the judge ought to apply a statutory rule (provision). When justifying a decision, a judge must adhere to two important functions of justification, i.e.:

1) to **inform** how and why the judge arrived at a specific solution and;
2) to **convince** the parties to the case and the general public of the correctness of the solution (Bārdiņš, 2016; Baader, 1989).

If justification is meant to inform and convince the parties to the case, the aim of the second notion of rule-deductivism is more in line with these functions because the conclusion is directed at said parties. In contrast, the conclusion of the first notion of rule-deductivism is directed at the judge, i.e., that the judge has an obligation to apply the instantiated legal consequences.

To summarise, Duarte's argument against the first notion of rule-deductivism is effective given some more or less exotic assumptions that are not essential to rule-deductivism. R. Alexy's description of the relevant parts of the internal justification shows that one can maintain that the legal syllogism is a model of the justification of law-applying judicial decisions and reject most of the assumptions that are essential for Duarte's critique to work. Although Duarte's arguments fail to show that the first notion of rule-deductivism is unattainable in all circumstances, the conclusion may be reached by considering that justification is mainly addressed to the parties to the case, not the judge.

Conclusion

A thorough reconstruction and examination of Duarte's arguments against rule-deductivism lead to several conclusions.

Firstly, Duarte's general critique of the legal syllogism as inadequate in properly representing even some parts of a justification of a law-applying decision where the judge expands the scope of a statutory rule, depends on a faulty assumption, i.e., that the scope of the major premise must always be in perfect adherence to the general purpose of the statutory rule. Absent to this assumption (that is not essential to rule-deductivism), legal syllogism is compatible with Duarte's assertion that there are cases where the judge expands the scope of the statutory rule but does not commit himself to what the relevant characteristics of the case are that can be universalized to other relevantly similar cases.

Secondly, Duarte's criticism of the first notion of rule-deductivism is effective, but only insofar as one also adheres to several contentious assumptions that are held by some rule-deductivists but are not essential to rule-deductivism. A more apt critique of the first notion of rule-deductivism may be levied by appealing to the purposes of justification.

Finally, an awareness that there exist such sets of assumptions that are not compatible with rule-deductivism is useful for further refinement of theoretical understanding of the legal syllogism.

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