Construction or reconstruction?
On the function of argumentation in the law

Jaap Hage

University of Maastricht

e-mail: jaap.hage@maastrichtuniversity.nl

ABSTRACT:
This paper discusses the viability of legal constructivism, the view that the legal consequences of a case are what the best legal argument says they are. Legal constructivism is opposed to reconstructivism, the view that legal arguments merely aim at establishing what the independently existing legal consequences are. It is first argued that legal constructivism is at best a view that can neither be verified nor falsified, and that legal arguments are what really matters. The argument continues with a discussion of ontological constructivism, the view that the legal consequences depend on the best *possible* legal argument. It is argued that ontological constructivism does not make sense in the law, because it presupposes a closed domain, while the law is an open domain. The paper closes with a discussion of procedural constructivism, the view that the legal consequences are determined by the best *actual* legal argument. This is the most attractive view, not in the least because its alternatives cannot well be defended. The most important objection against this view, that the best actual argument may lead to a wrong conclusion, is rejected because it presupposes that the legal consequences were already there.

1. Introduction

Derek is a thief. In an electronics shop, he took away a mobile phone without paying and with the intention to keep it. For this reason, Derek is punishable, because there is a rule that makes thieves punishable.

Derek's punishability apparently comes into being, even if nobody were to pay any attention to it. This is from the legal point of view an easy case, and the rule

that makes Derek punishable seems, so to speak, to 'apply itself'. The interpretation and application of the rule apparently were not only uncontroversial, but also 'automatic'. The legal outcome was seemingly already there, without any need for argumentation. If an argument is produced, its apparent function is merely to *reconstruct* the application, and possibly also the interpretation, of the rule that attaches its legal consequences to the case of Derek.

Not all cases are so easy. Take for instance the following case about hate speech. In 2010 the Dutch politician Geert Wilders was prosecuted for hate speech against Muslims. The issues at stake were both legal-technical and fundamental. The legal-technical issue was whether hate speech against the Islam counts as hate speech against Muslims. The fundamental issue was whether some members of society and in particular politicians should be allowed to express their opinion about other members of this society, or their religion, even if they do so in a manner that may be considered as insulting and may very well evoke hatred. Neither one of these issues has an easy answer and the case might very well be considered to be a hard one. Several arguments were adduced, pleading in different directions and the court of first instance discharged Geert Wilders (Rechtbank Amsterdam 13-1-2011).

What matters for the present purposes is that in this case it is less likely that the legal outcome was already there, only to be discovered by means of an argument that reconstructs the operation of legal rules. In such a hard case, it seems that the outcome may go anywhere, and depends strongly on the arguments that are actually being adduced in the legal debate. It appears that the legal consequences of the case are *constructed* by means of the arguments, and not merely reconstructed. The legal consequences of a case would then be what the best (possible[1]) legal argument says they are.

Apparently the distinction between easy cases and hard cases signifies a distinction between two kinds of law. In easy cases the law would consist of self-applying rules that 'automatically' generate legal consequences for cases. Legal arguments then have merely the function to reconstruct legal consequences which are already there. In hard cases, the law cannot operate in this independent fashion. It is necessary to produce arguments to determine the legal consequences of a case. This determination is not merely epistemic, aimed at obtaining knowledge of independently existing legal consequences. It is constructive: the legal consequences are created by means of the argumentation.

If the distinction between easy and hard cases is really so important, it has also implications for the role of legal argumentation. In easy cases, the role of argumentation would epistemic, aimed at discovering the legal facts. In hard cases, the role of argumentation would be constitutive. Argumentation determines the legal consequences of cases and standards for legal argumentation would therefore have a role that is on the same footing as substantive legal rules and principles.

---

[1] The relevancy of this insertion of 'possible' will become clear in section 4.

Going by the examples, the view that there are two different roles for legal argumentation seems attractive. When we encounter an 'easy' case, it seems obvious that the legal consequences are already there, only to be recognized by the observer. An argument is not really necessary, but may be useful to give an explicit justification of an obvious conclusion. When we encounter a 'hard' case, the proper legal consequences are – by definition – hard to see, and we need arguments to determine which legal consequences should be attached to the case. Notice the change in terminology: the consequences are not there yet, but have still to be attached to the case. Moreover, it seems that we, humans, are the ones attaching the legal consequences to the case, not the law which operates independently.

Attractive as this twofold division between easy and hard cases and the different roles for legal reasoning may seem at an intuitive level, it becomes problematic on second thought. Is there really a sharp difference between easy and hard cases, with different roles for legal reasoning, legal reasoners and the law? And if there is, how can 'the law' know that is must attach legal consequences to a case independently. Can 'the law' recognize easy cases? Do easy cases wear the label 'easy' on their sleeves? The use of this metaphor already illustrates that there is something seriously wrong with this way of looking at easy and hard cases. The adoption of legal constructivism for both easy and hard cases restores the desired uniformity in legal reasoning, but at a cost. How can we explain on a uniform constructivist model the difference in experience when we have to deal with easy and with hard cases? This leads us to the central question of this paper.

The central question with which this paper deals is *whether the constructivist view of legal argumentation is correct, and if so, whether it is only correct for hard cases or that it also holds for easy cases*. In the next section this question will be elaborated and to that purpose some useful distinctions will be introduced.

2. Legal constructivism

Amongst others through the influence of Dworkin, who proposed a theory of law according to which legal judgments are the result of constructive interpretation (Dworkin 1986b, chapters 2 and 7), constructivist theories of the law have become quite popular (e.g. for the Netherlands Smith 2009 and Soeteman 2010).

In Dworkin's constructivist theory of law, two aspects of constructivism can be distinguished. First, Dworkin offers an account of how to arrive at legal judgments. This is through constructing a theory of law which must on the one hand fit with existing legal materials such as case law and legislation and which must on the other hand be substantively right (Dworkin 1986b, chapter 7). Second, Dworkin considers the judgments thus arrived at as law, *for the reason that they are part of such a constructed theory*. Legal reasoning is in the view of Dworkin not a way to arrive at legal judgments which were true for some other reason such as correspondence with some kind of legal reality. It is precisely the other way

round: legal judgments are true because they are the outcome of a correct construction. Dworkin (1986b, 225) states it as follows:

> 'According to law as integrity, propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community's legal practice.'

2.1 Types of procedure

If the legal consequences of cases are connected to legal arguments, it is important to distinguish between two different ways in which this connection may be viewed. Here, the Rawlsian distinction between perfect, imperfect and pure procedures is relevant (Rawls 1972, 86). In all three cases there is a procedure which leads to a particular outcome. The question is how the correctness of the outcome relates to the nature of the procedure. In the case of perfect and imperfect procedures, the correctness of the possible outcome is given independently.

A perfect procedure is such that it is guaranteed to lead to this correct outcome. An example of such a perfect procedure is to divide a cake in equal pieces by using a well-functioning balance on which pieces of an equal weight are measured out. Whether the pieces are equal does not depend on weighing them, but weighing with a perfect balance, if properly conducted, is guaranteed to lead to equal pieces.

This guarantee of a correct outcome is lacking in the case of imperfect procedures. A criminal trial, set up to determine whether a suspect is guilty, is an example of such an imperfect procedure. Whether the suspect is guilty is a fact that does not depend on the procedure. The criminal procedure is defined – we may hope – in such a way that the chance of a correct outcome is optimized, but there is no guarantee that the verdict of the judge or jury will be true to the facts.

In case of a pure procedure, the correctness of the result depends on the proper execution of the procedure. More in particular, the correctness is not defined independent of the procedure. A good example is a lottery. Which ticket wins the prize is determined by the drawing. There is no independent standard for the rightness of the outcome (e.g. the poorest ticket holder should win the prize). As long as the drawing of the winning ticket was performed in accordance with the rules of the lottery, any outcome is correct, and it is correct *because* it is the outcome of the correctly performed drawing.

The distinction between on the one hand perfect and imperfect procedures, and on the other hand pure procedures, has implications for whether a procedure has really to be executed or whether a 'simulation' is equally good. A nice example of such a simulation is provided by Rawls' contract theory. Rawls' two principles of justice would derive their status, not from their content, but from the fact that they *would be* chosen under the ideal circumstances represented by means of the origi-

nal position and the veil of ignorance. It is not necessary that the principles are actually chosen. If we look at Rawls' argument in *A Theory of Justice*, we see that it is based on a simulation of a decision making procedure. Rawls argues that people in the original position *would* choose the principles he proposes, and that would sufficiently justify those principles. That this simulation suffices, shows that Rawls considers his principles to reflect justice independently of their being chosen. The hypothetical contract merely aims to show that it would be rational to choose the two principles of justice. It is a case of a perfect procedure. Contrast this with a real contract, which is binding, not because its content is rational, but because the contract parties really agreed to it. Real contracts represent pure procedures, while hypothetical contracts provide perfect or imperfect procedures.

As we will see, it is important in connection with legal constructivism whether the role of legal argumentation is to arrive at conclusions that are independently correct (or incorrect), or that argumentation if properly performed, determines what the legal consequences of a case are.

2.2 Degrees of objectivity

For a proper understanding of the different versions of constructivism it is also useful to consider a related issue, namely the objectivity of law. In this connection, Leiter (2002) has distinguished between four versions of objectivity or the lack thereof, which are here slightly adapted to the purposes of this paper:

- *Subjectivism* assumes that whether a legal consequence obtains depends on the view of the cognizer (the person who holds a belief about the legal consequence).
- *Minimal objectivism* assumes that whether a legal consequence obtains depends on views held within the group of cognizers (e.g. the officials of a particular legal system).
- *Modest objectivism* assumes that whether a legal consequence obtains depends on the views which would under appropriate or ideal circumstances (e.g. full rationality and maximal knowledge of the facts) be held by the group of cognizers.
- *Strong objectivism* holds that whether a legal consequence obtains does not depend on anyone's views.

Strong objectivism is generally adopted with regard to hard 'physical' facts, such as the fact that the North Sea borders on the Belgian shore, or that Mount Everest is the highest mountain. If we reason to arrive at such facts, the reasoning is purely reconstructive, because the facts in no way depend on it.

Modest objectivism is an attractive view with regard to the outcome of mathematical puzzles, such as: What is the first derivative of the formula '$x^2 + 2x -3$'?[2] Most people (with the exception of so-called 'Platonists') do not believe that the derivative of this formula exists somewhere 'outside' just like physical objects. Neither do they believe that the proper outcome depends on the beliefs of a single persons or a group of persons. It does depend on what they would believe if they were purely rational, though.

Minimal objectivism seems an attractive view with regard to the existence of social phenomena, such as the leaders of informal groups, and the existence of customary law or other social rules in the sense of Hart (1994, 55-57).

Pure subjectivism, finally, seems the most appropriate view with regard to phenomena which are considered to be just a matter of taste, such as whether cauliflower is more tasteful than spinach, or whether 'Layla' by Derek & the Dominoes is a better piece of music than Bach's 'Erbarme Dich'.

Constructivism seems to be particularly relevant for those facts to which the modestly objectivist approach is applicable. The appropriate or ideal circumstances under which judgments about these facts can be given are then specified in terms of standards for good argumentation. These standards determine what are god arguments, and maybe[3] also what is the best possible argument and what one should believe if one were purely rational and omniscient.

2.3 What is at stake?

Given the distinctions made in the previous subsections, it is possible to formulate the central issues of this paper more precisely.

The first issue is whether legal argumentation is aimed at reconstructing legal consequences which are already 'there', or whether it aims at constructing the legal consequences. This is essentially the distinction between imperfect procedures ('perfect' procedures would be unrealistic) and pure procedures. In case the procedure were to be imperfect, the independently existing legal consequences would probably exist in a mixture of the minimally and modestly objective fashion.

The second issue arises if legal argumentation is constructive, aimed at creating legal consequences rather than merely reconstructing them. In that case it must be established exactly which argumentation creates the legal consequences. In this connection two questions arise:

1. Which arguments are sufficiently 'legal' to lead potentially to legal consequences?

2. If there are sufficiently legal arguments which lead to incompatible conclusion, which of them determines the legal consequences of a case?

---

[2] '2x +2' is the correct answer.

[3] But see section 4.2.

Both questions asks for standards to distinguish between arguments. The one asks for a standard to distinguish between legal arguments (which are relevant for legal consequences) and non-legal ones (which are not relevant). The second requires a standard to determine which of two or more conflicting legal arguments determines the legal consequences. What is the 'best' legal argument?

If there is to be any objectivity in this approach to legal reasoning, it must be of the modest kind, because it depends on the application of standards, and therefore on some idealized reasoning procedure, what the legal consequences of a case are.

3. Reconstruction

In the example about Derek the thief, it seems that the argument is merely a reconstruction of the legal consequences that came about independently, and of the rule application that brought these consequences about. This view of the relation between legal arguments and legal consequences sits together well with the so-called institutional theory of law.[4]

3.1 *The institutional theory of law*

The institutional theory of law assumes that the law is a part of social reality, that is characterized by that legal entities and facts are the result of the application of rules. We are all familiar with the physical world. It consists of a large number of 'things'. These things have characteristics and stand in relations to each other. That things have these characteristics and stand in these relations to each other, are *facts*. The facts in the physical world obtain to a large extent independent of human beings. This is the domain of Leiter's objectivism. The social world, or social reality, does not only depend on what is physically the case, but also - and to a large extent - on what people believe and accept about the social world. A legal example would be that some rules (those of customary law) exist as legal rules because sufficiently many people that participate in a legal system accept these rules as legal rules and believe that others do the same. This is the domain of Leiter's minimal objectivism.

In modern societies, however, most legal rules derive their existence and status as *legal* rules from being made in accordance with rules that specify how to make legal rules. They exemplify a second way in which facts in social reality can ob-

---

[4] There are many expositions of the institutional theory of law (e.g. MacCormick and Weinberger 1986, Lagerspetz 1995, La Torre 1999, Ruiter 1993 and 2001, and MacCormick 2007), and the following cannot be more than a very brief summary of the main ideas behind them.

tain, namely through the operation of rules which exist in social reality, including legal rules. The part of social reality that is the result of the application of rules may be called the *institutionalized part of social reality*. Typical phenomena within the institutionalized part of social reality are money, promises, the law and everything created through the law, such as officials, legally defined organizations, contracts, last wills, permits, and most legal rules.[5]

According to the institutional theory of law, large parts – if not all – of the law exist in the institutional mode, that is as the result of the application of rules. Although it is seldom formulated explicitly, the rules which create institutional reality are taken to apply 'automatically'. Given the rule which makes thieves punishable and the fact that Derek is a thief, Derek is punishable. This is a fact in the institutionalized part of social reality, because the rule attaches this status to Derek as he is a thief. This happens, even if nobody knows that Derek is a thief. In that case, Derek will be punishable without anybody knowing it.

Notice that the facts in institutional reality have an objectivity that is in part minimally and in part modestly objective in Leiter's sense. They are minimally objective to the extent that the rules which make the institutional facts possible must in the end be based on collective acceptance. They are modestly objective because the operation of these rules, if reflected in the human mind, is a matter of logical thinking. It would be misleading however, to think that according to the institutional theory of law legal consequences depend on logical thinking on the basis of rules. The rules are assumed to operate independently, and the arguments merely mimic the operation of the rules.[6]

'Correct' arguments lead to conclusions that are true independently, as the result of self-applying rules. If there are rules for legal reasoning, these rules might in theory be validated by checking whether their application - that is if the reasoning was correct - leads to true conclusions. In theory, because there is no way to check whether the conclusions of legal arguments are true other than by producing another legal argument. Notice, however, that on the institutional theory of law this impossibility of an independent check does not imply that the argument determines the legal consequences. The problem is 'merely' epistemic: there is no other test for the truth of propositions about legal consequences than a legal argument.[7] In theory, a legal argument may therefore lead to a false conclusion about the legal consequences. Legal reasoning is on this view an imperfect procedure.

---

[5] Extensive discussions about the mode of existence of social reality can be found in, amongst others, Searle 1995 and Tuomela 2002.

[6] Rules are taken here to include legal principles, rights and whatever other entities which may lead to legal consequences

[7] It should be realized that this not exceptional in epistemology. There is, in the end, no other test for the correctness of observational beliefs than the performance of a new observation, with as result another observational belief.

3.2 Intermezzo: Dworkin's 'one right answer'- thesis

In his early work, Dworkin (1978, chapter 13 and 331-335; 1986a, chapter 5) famously defended the thesis that (almost) every case has one right answer, even if legal experts do not agree about what it might be.

The most likely explanation of this view is that the legal rules, principles, and rights in a sense apply themselves to cases and generate legal consequences, and this makes these rules etc. into reasons why the cases have the legal consequences they have. Moreover, the self-application of the rules etc. can be reconstructed mentally and that leads to arguments about what the legal consequences may be. The best possible argument exactly reconstructs the operation of the rules etc. and therefore leads to the correct conclusion. If a case is hard, it is not simple to discover what the correct argument is and therefore also not what the right answer is. But since the rules etc. apply themselves, the argument is not necessary for their operation and therefore also not for the legal consequences. Obviously, this second interpretation sits well together with the institutional theory of law and with ontological constructivism.

3.3 Preliminary conclusion

Because there does not exist a test to determine whether a conclusion about legal consequences is true, other than another legal argument, there exists always uncertainty about the conclusions of legal arguments. In this sense, all cases are hard cases, because one can never be certain that one knows the truth about the legal consequences of the case. The 'best' that can be obtained is a theory about the legal consequences that is widely shared. But even that is no guarantee for the legal truth. In theory it is always possible that the best argument until now will be improved upon. Whether that is the case can, however, only be 'determined' on the basis of more argumentation. Even if it were the case that legal rules apply 'automatically', there is no way to establish this, and neither is there a way to discover the results. Therefore the idea that law is self-applying and that legal argumentation is merely reconstruction is at best an assumption that can neither be verified nor falsified.

4.   Ontological constructivism

As we could see in the previous section, the institutional theory of law leads to a number unattractive consequences such as legal consequences about which we can never be certain and legal rules which operate without anybody noticing it. These

consequences should make us reluctant to accept the institutional theory of law, even for easy cases. So it may be worthwhile to have a closer look at legal constructivism, and see if and under which circumstances that might work. We will do so in two steps. First we will consider the theory that the law is what the best possible legal argument says it is. This view will, for reasons to be discussed later, be called *ontological (legal) constructivism*. It will turn out that the plausibility of ontological constructivism presupposes that the law forms a closed domain. That the law forms a closed domain is not above dispute. Therefore we will consider in the next section *procedural (legal) constructivism*, the view that the law is what the best actual argument says it is.

If the law is what the best possible legal arguments says it is, we must be able to identify all possible legal arguments, and we must have a standard to compare these arguments in order to determine what is the best one. These demands are not easy to satisfy, but to give an impression of what is at stake we will have a brief look at a field in which both demands are satisfied. That field is the constructivist version of mathematics and logic.

4.1 Constructivism in mathematics and logic

Mathematical 'Platonists' assume that the mathematical facts somehow exist objectively, only to be discovered by human reason.[8] Constructivists, on the contrary, assume that mathematical objects, such as the smallest prime number above 10.000.000, only exist if they can be constructed. Moreover, mathematical facts only obtain to the extent that they can be proven from a set of axioms that does not exclude the law of the excluded middle. In this connection it is important that the proof is given by applying the inference rules of the logical system to the axioms of the system and to the theorems that were already derived from the axioms. In particular it is *not allowed* to prove a theorem by means of a *reductio ad absurdum*.[9]

According to logical constructivism, a sentence is a logical truth if and only if it can be, or has been, proven from the axioms of the system. The difference between these two possibilities will turn out to be crucially important. A proof in the

---

[8] See http://plato.stanford.edu/entries/platonism-mathematics/ (last consulted on October 28, 2011).

[9] Such a proof consists in showing that if a sentence were true, an inconsistency follows. Since an inconsistency cannot be true, the sentence cannot be true and *therefore its negation must be true*. An example of such a derivation is that the sentence 'A and not-A' is inconsistent and can therefore not be true. Therefore its negation, either not A or not-not-A (the same as A) must be true. In this way the logical truth of the disjunction A or not-A can be proven, without even knowing whether A or not-A is true.

form of derivation of a theorem from axioms is a kind of argument, and a theorem is only a theorem if, *and because*, it is the conclusion of such an argument. Under logical constructivism, logical truths derive their status as such from the fact that they are the conclusions of valid arguments with premises which are axioms. The function of arguments under logical constructivism is not merely to show that a sentence is a theorem of the logical system; they *make* sentences into theorems. Together the axioms and the inference rules determine what are the theorems (logical truths) of the system.[10] There is no independent standard, apart from the axioms and inference rules, which determines what are logical truths. Notice that this standard deals with two issues at the same time. In the first place it separates correct[11] mathematical and logical arguments from incorrect ones. And in the second place it selects the best arguments, because any correct answer leads to a true conclusion. So there cannot be competition between stronger and weaker arguments. All correct arguments are equally strong, and if their conclusions conflict, the logical system is inconsistent.

However, there is no guarantee that we can check whether a sentence is a logical truth if we do not have the argument yet. Maybe a correct argument with this sentence as conclusion *can* be constructed, but as long as this has not been done, we cannot be sure. The question therefore arises what we need for a logical truth under constructivism. Does it suffice that the axioms and the inference rules of the system make it possible to construct a sound argument, or should we require that the sound argument has actually been produced?

The literature on constructivist (intuitionist) logic is not very clear about this issue (Van Dalen 2001, 224-227), but there is no need for us to make a choice. We can distinguish between *ontological constructivism*, according to which a sentence is a logical truth if it is possible to construct a proof of it, and *procedural constructivism*, according to which there must be an actual proof for every logical truth.[12]

---

[10] That axioms and inference rules have similar roles can also be seen from the fact that one and the same logic can be characterised both by means of axioms and inference rules and by only inference rules (a larger number of them, then).

[11] The informal term 'correct' is here meant to express the same as 'sound' in more precise logical work.

[12] The reason why the first version is called *ontological* constructivism is that it relies on the range of *possible* arguments. The reason why the second version is called *procedural* constructivism is that it relies on the arguments that were actually produced

4.2 The law as a closed domain

In the introductory section legal constructivism was introduced as the view that the legal consequences of a case are what the best (possible) legal argument says they are. We are now in a position to recognize that 'the best legal argument' would refer to the procedural version of legal constructivism, while 'the best possible legal argument' would refer to the ontological version. Following up on the discussion of constructivism in mathematics and logic, we will now first consider the possibility that the law is what the best possible legal argument says it is. If the law on a particular issue is what the best possible argument about this issue says it is, there must be a best possible argument.

The phrase 'best possible argument' has two presuppositions. One presupposition is that arguments can be compared in order to determine what the best one is; it will be discussed in section 5.2. The other presupposition is that it is possible to identify the 'possible arguments'. Is this a reasonable presupposition if we are not dealing with logic, but with the law?.

If the law is a closed system in the sense that the number of rules, rights and principles etc. that can be used in legal arguments is finite[13], and if the number of facts that characterize a case is finite too[14], the number of possible legal arguments is finite. Although both the assumptions that the law is closed system and that the number of case facts is finite are dubitable, it is instructive to see why the combination of these two assumptions leads to the possibility to identify the set of possible arguments.

To show that there is a finite and identifiable set of possible arguments, a few additional assumptions will be made. These assumptions are there for expository purposes only and dropping them would not lead to a different conclusion, but merely to a more complicated demonstration.[15] The additional assumptions in

---

[13] It is assumed here that legal arguments are arguments in which legal rules, principles, rights etc. are employed. Some support for this assumption can be found in, for instance, Alexy 1978, 283/4. What is needed for the finiteness of the number of legal arguments is that this test is exclusive, and that there are no other legal arguments. That is not what Alexy had in mind.

[14] This assumption also covers 'rules' by means of which case facts can be derived from other case facts, such as the 'rule' that if X takes away something that belongs to Y, and if X and Y are not the same person, then X takes away something that does not belong to him or her. In other words: so-called 'world knowledge' is taken to be included in the set of case facts, and is therefore also temporarily assumed to be finite.

[15] The demonstration would for instance have to take defeasible argumentation into account. That would be more complicated, but also in that case a finite set of premises leads to a finite and identifiable set of arguments. See Hage 2005, chapter 8.

question are that the law consists of rules only and that all arguments are of the 'detachment' or 'modus ponens'- type, that is of the form 'if A then B; A, therefore B'.

If these two assumptions are made, any argument that answers a legal question can be seen as having a tree-structure. This will be illustrated by means of a very simple example. The issue at stake is whether Derek was punishable after he took away the mobile phone from the electronics shop. Any argument concerning this issue would have as its conclusion either that Derek was punishable or that he was not.[16] Such an argument would have two premises: (the validity of) a legal rule with this conclusion and a conjunction of (descriptions of) case facts. Both these premises must either be included in the finite set of rules, respectively the finite set of case facts, or must be derivable from them. Any argument by means of which the premises can be derived must have the same structure, and therefore have premises that are either in the finite set of premises or are derivable from this set. In the end, any argument with the conclusion that Derek is punishable, or that he is not, will have a tree structure with as a root this conclusion and with branches ending in premises that can be found in the finite set of premises. On the assumption that all arguments have the form of a detachment, the set of arguments that meet these two conditions is finite, and this finite set contains all the possible arguments. This means that if there is a standard for comparing these arguments, it is possible to identify the best *possible* argument. And then legal constructivism in its ontological version would be a viable option.

However, the assumption that the law is a closed domain is rather controversial. It seems that it can only be defended on some variant of legal positivism according to which the law must exist as a matter of social fact. And even then the additional assumption must be made that there is only one correct interpretation of social reality, because if more interpretations are possible, the arguments concerning these interpretation can draw from an in principle unlimited set of premises, therewith opening the domain of arguments that seemed to be closed by the assumption that the law exists as a matter of social fact. In fact, there are many reasons why the law would not be a closed domain, including that:

- there may be exceptions to rules which cannot be listed on beforehand;
- sometimes legal rules conflict without there being a clear standard for prioritizing the one above the other;

---

[16] In theory a third possibility might exist, namely that the law does not answer the question at issue. However, in case of punishability it is plausible to assume that it does not exist if it cannot be shown that it exists.

- the law sometimes contains 'gaps', where a gap is to be understood as a kind of case to which the law seems not to connect any legal consequences although it should have a legal consequence;[17]
- the terms used in legal rules have a fuzzy scope of application (actually a special case of a gap, because the law does not answer the question when a term is applicable);
- legal rules are sometimes 'open-ended' in the sense that they implicitly refer to evaluative standards (also a special case of a gap);
- the law contains standards (e.g. legal principles) which cannot be identified by means of their pedigree (Dworkin 1978, chapter 2).

It seems therefore useful to see what the implications are for the viability of legal constructivism if the assumption is dropped that the law is a closed domain. If we assume that the law is 'open', it is unclear how there could be a best possible legal argument. Even if one disregards the question whether there is a standard by means of which arguments can be compared, there is the impossibility to determine which legal arguments are possible. Possibility can only exist in the presence of constraints which draw the borderline between what is possible and what is impossible. If the law is an open domain, in theory any argument might be presented as a legal argument. Therefore one cannot identify which arguments are possible, let alone which of the possible arguments is the best one. As a consequence, *ontological legal constructivism as the view that the law on an issue is what the best possible legal argument says it is, is not a viable view.*

5. Procedural constructivism

It seems that it is either one of two. Either the law is closed in the sense that there exists a finite number of valid legal rules, principles etc. Then it is possible to identify the possible legal arguments. Or the law is an open domain in the sense that the set of valid legal rules, principles etc. is not finite. Then it is not possible to identify the possible legal arguments. However, there is an intermediate position between these two assumptions and their conclusions. This intermediate position can be found by abandoning a static, a-temporal perspective on the law, which assumes that the possible legal arguments can be generated 'automatically'. Then it is possible to allow that the law is open in the sense that there is no finite, given set of true legal premises, and still to work with a finite set of arguments. The crucial step in this connection is not to work with all possible legal argu-

---

[17] This is only a reason why the law would be 'open' on the assumption that there is law where there is a gap, but that this law cannot be identified easily on the basis of, for instance, pedigree.

ments, but with all *actual* legal arguments. This means that we take the step from ontological constructivism to procedural constructivism.

5.1 The Erlanger approach

The inspiration for taking this step can be found in the ideas of the so-called Erlanger Schule, and in particular the work of Schwemmer and Lorenzen (1973). In this work, justificatory arguments – and this would apply to legal arguments as well as to other justificatory arguments - are not interpreted in a timeless way as structured sets of propositions, but as actual contributions to a discussion. Any such argument must have premises. Instead of assuming that these premises must be traced back to a given set of premises which are above criticism, Schwemmer and Lorenzen proposed the idea that these premises would just be assumed to be true or justified, unless they were disputed. Notice that this assumption only holds for the premises of arguments that were somehow really produced; not to all possible arguments, however possibility might be defined in this connection. Moreover, the disputation of premises must be real argument steps too, and not merely possible disputations.

Such an approach to arguments presupposes that there are rules that specify which arguments can be adduced, and how and under which circumstances arguments may be disputed. For instance, it may be forbidden to dispute the truth of premises which were also used in earlier arguments by the person disputing them.[18] These rules only specify which argument 'moves' are *possible*, however. The defining characteristic of the 'Erlanger approach' is that the real argument moves have to be made in *actual* argumentation. That the argumentation must be 'actual' does not necessarily mean that the arguments must be formulated explicitly and communicated to another person or auditory than the person who made the argument. It is possible that arguments are merely mental, merely were thought of by a person who is wondering which conclusion to draw. The crucial point, however, is that the number and nature of the arguments is determined by events that actually took place, and not by a pre-given set of premises and rules that specify which arguments can be formulated on the basis of these premises. It will not do that an argument can be generated by, for instance, a computer program; it must somehow actually be produced.

The demand that arguments are somehow actually produced makes that for any legal question there will be a finite set of actual arguments that plead for or against a particular answer to that question. As a consequence, the 'Erlanger approach' resembles the assumption that the law forms a closed domain as far as the issue is concerned whether it is possible to identify all the arguments. It resembles the as-

---

[18] Such rules, which govern legal 'dialogues', are discussed in Lodder 1999. See also

sumption that the law is open, however, by allowing the introduction in the argumentative process of any premise. On beforehand, there is no fixed and finite set of possible legal premises, but at any moment in time there is a fixed, limited set of valid arguments that were actually adduced. This set may be empty.

The 'Erlanger approach' does not solve the problem posed by the assumption that the law is an open system, the problem that there is no set of possible legal arguments and that it is therefore impossible to identify the best *possible* legal argument. The reason is that the 'Erlanger approach' does not lead to a set of possible legal arguments but merely to a finite set of *actual* legal arguments. Does this mean that the 'Erlanger approach' cannot defend legal constructivism against the criticism that the open nature of law allows an infinite set of possible legal arguments and in that way makes legal constructivism an impossible enterprise? Yes and no. The criticism that the open nature of law allows an infinite set of possible legal arguments still stands and if one assumes that the law is an open domain, legal constructivism in its ontological form cannot be maintained. However, the 'Erlanger approach' suggests how legal constructivism can be amended in such a way that it is compatible with the open nature of law. On this amended version legal constructivism would be the position that the law on an issue is what the best actual legal argument on this issue says it is. This is a variant of procedural legal constructivism.

5.2 Comparing arguments

The amended, procedural, version of legal constructivism has an additional advantage, namely that it allows the comparison of arguments, even where the premises seem to be incommensurable. As was noted above, legal constructivism in its ontological form makes two assumptions. One is that there is a finite set of possible legal arguments; the other that there is a criterion at the hand of which it can be established which of those arguments is the best one. By amending legal constructivism as proposed, the first assumption has been turned into the more like one that there is a finite set of *actual* legal arguments. This leaves the second assumption open for discussion: how is it possible to select the best argument, given a finite set of arguments?

Rather than discussing this in abstract, I will give an example that illustrates how the comparison of arguments can be handled.[19] The example is the hate speech case about Geert Wilders, mentioned in the introduction. The issue is whether Geert Wilders should be punishable for his insulting utterances about the Islam. To simplify the issues at stake, I will assume that there are two reasons.

---

[19] An abstract discussion can be found in in my paper *Dialectical Models in Artificial Intelligence and Law* (Hage 2005, chapter 8) and in the literature mentioned there.

One reason, pleading for punishability, is that the utterances insult Muslims through their religion and that they evoked hatred between groups within the Dutch population. The other reason, pleading against punishability is that Geert Wilders expressed his opinion, and that the freedom of expression is a fundamental right which deserves even extra protection in the case of politicians. So we have two arguments, one pleading for, and the other pleading against punishability. How can we decide which is the stronger?[20]

It has been argued that in such cases there is no common scale on which the two values (on the one hand no conflicts between population groups and on the other hand freedom of expression) can be balanced (Chang 1997, 1). In a dialogical setting, in which parties can adduce arguments against each other's positions, there may be a way out however. It is for instance possible that the party arguing against punishability adduces the argument that freedom of expression is, in this particular case, more important than the avoidance of hate speech. If this argument is not attacked by the other side, it stands and a balance has been struck between the two values. If the other side does not immediately accept this additional premise, a dialogue about this premise may be started and it is not excluded on beforehand that this dialogue will end with a conclusion about the relative weight of the two values in this particular case. If that happens, the dialogue about the punishability of Wilders comes to an argued end. If that does not happen, the case remains undecided, and there is no 'best' argument.

The point of having the dialogue is that even where a common scale is originally lacking, the parties in the dialogue *may* come to an agreement about a criterion to determine which value prevails under the given circumstances. In other words, even where a common scale seemed to be lacking, it may come to be recognized. That is the advantage of real dialogues over the automatic generation of arguments on the basis of a fixed set of premises. In the course of a dialogue, the standard for determining what the best actual argument is can be introduced on the fly. If such a standard is already available, or can be introduced, for all the arguments that deal with the issue at stake, it is at least in theory possible to determine what the best actual argument is. If such a standard cannot be found, there is no best argument and there are – on a constructivist approach – no legal consequences.

Notice, by the way, that in this example the comparison of arguments has been reduced to a (potential) discussion about one of the premises of the argument, namely about the premise that the one reason outweighs the other reason. This means that the 'Erlanger approach' is not only suitable to solve problems about the premises of arguments, but also to deal with the comparison of arguments. The 'trick' is to move the comparison of arguments from the meta-level (a relation between arguments) to the object level (a proposition about the relative weight of reasons). This is not the place to go into details[21], but it seems in general possible

---

[20] For the sake of easy exposition, I assume that these two arguments are the only relevant ones.

[21] More details can be found in Hage 1997, and in chapter 3 of Hage 2005.

to treat the information that is necessary for the comparison of arguments as premises for arguments. As a consequence the problem of comparing arguments is 'reduced' to the problem of reaching agreement about the premises for justificatory arguments.

5.3 *Reification of the law*

A procedural approach to justification and to the determination of legal consequences has a major advantage. It is that the limitation to actually adduced arguments avoids the problem of potentially infinitely many arguments that is the consequence of the open nature of the law. There is a corresponding drawback however, and that has to do with the fact that there is no guarantee that all plausible arguments for or against a position will actually be adduced. Let us return to the easy case about Derek the thief, who stole a cellular phone from an electronics shop. It seems obvious that he is punishable. Suppose, however, that Derek is only an eight year old boy who was pushed by his father to steal the thing. If this fact were adduced in a legal procedure it would probably change the conclusion from the punishability of Derek to his non-punishability. But what if it is not adduced? Would that mean that Derek is still punishable, or merely that his punishability is wrongly assumed to have been proven? Another, rather theoretical, possibility is that nobody thinks of it that Derek is punishable, not even Derek himself. Would that mean that Derek is not punishable, or merely that his punishability has not been shown and is unknown?

Somehow the reconstructivist view that legal consequences are automatically attached to cases and that legal argument is merely a reconstruction of these independently existing legal consequences remains attractive. In hard cases, like the hate speech one, it has lost its attraction however. There are two ways to deal with this seeming inconsistency. The one is to assume that the law works differently in easy cases and in hard cases: it attaches legal consequences automatically to easy cases, and in hard cases it waits for the arguments that are actually adduced. The other one is to explain why the law seems to deal differently with easy and with hard cases, although this is not really the case. The first way to deal with the inconsistency is not attractive, if only because it requires that we can distinguish between easy cases and hard cases. Moreover, this distinction should be made on another ground than that the law operates differently in easy cases than in hard cases, because otherwise the argument would be circular. A convincing way to distinguish between easy cases and hard ones has not been offered yet[22], and therefore the second way to deal with the inconsistency is the more attractive one.

---

[22] In an earlier paper (Hage e.a. 1994) I have tried to define the distinction in procedural terms, and as will be clear from this paper, I still believe this to be the right approach. The details of that earlier paper appear unsatisfactory me now.

How can we explain that the legal consequences of a case depend on the actual arguments adduced about them, while it seems that the law attaches the legal consequences automatically in easy cases? Tentatively I want to mention the inclination in modern legal thinking to reify the law. In Roman law, legal reasoning was less aimed at establishing legal positions such as owing an object, or being punishable, but more at the possibility to get things legally done. The question was less whether particular behavior was punishable than whether an action aimed at punishment would succeed. This action-oriented style of thinking is still more prominent in the common law tradition than in the civil law tradition, but also in the common law tradition there is a tendency towards reification of the law and of legal consequences.

A consequence of this style of thinking is that the question 'Should Derek be punished?', which is future-oriented, is easily transformed into 'Is Derek punishable?' which is past-oriented. Moreover, where the former question is easily interpreted in terms of decision making, which must be done by individual persons or bodies of persons, the latter question is more naturally interpreted as dealing with a matter of fact which must be the same for everybody. And if it is to be a matter of fact whether Derek is punishable, this fact must have been brought about and then the rule which made Derek punishable must have applied 'automatically'.

This reifying style of thinking may be useful to create a body of law which is intersubjective and can function as a social order that creates the same expectancies about future behavior in most of its participants. It is less useful, and possibly even confusing, when it comes to thinking about the nature of law and the operation of legal rules. It creates the appearance that rules operate 'automatically' and that legal arguments merely reconstruct legal consequences which were already there. This appearance is deceptive. Even in easy cases, legal rules are used by human reasoners to attach legal consequences to cases.[23] It is in actual legal arguments that the law is created, and it is only because of a reifying way to look at the law that the impression is created that the legal consequences were already there.

6.   Conclusion

The central question of this paper is whether and to what extent legal constructivism, the view that the legal consequences of case are created, constructed in legal argumentation is correct. Its alternative is legal reconstructivism, the view that legal argumentation merely reconstructs the operation of legal rules etc. and aims at

---

[23] This also explains the defeasibility of legal reasoning, a phenomenon that cannot well be accounted for on a reifying view of the law. See Hage 1997, 113f, where the application of a rule is treated as a kind of action to give a good account of defeasible reasoning in the law, and Hage 2005, 69f where the reifying perspective is adopted and the defeasibility of legal reasoning is down-played.

discovering facts which were already there. An important representative of this reconstructive view is the institutional theory of law.

The problem with reconstructivism is that it seems only attractive in easy cases, where everybody with the appropriate knowledge of the law can easily 'see' the legal consequences which the legal rules allegedly attached to the case. In hard cases, reconstructivism seems far-fetched, even to the extent that a judge of superhuman powers, Hercules, is needed to discover the law (Dworkin 1978, chapter 4). On the assumption that the operation of legal rules is not fundamentally different in hard cases than in easy cases, a unified account of the operation of legal rules is asked for. This account should either adopt constructivism and explain why legal rules *appear* to operate automatically in easy cases, or adopt reconstructivism and explain why it only *seems* that they cannot operate automatically in hard cases. The former alternative is the more attractive one, because the latter can neither be verified nor falsified. Moreover, I have argued that the seemingly automatic operation of legal rules in easy cases may be explained from the tendency to reify the law and in particular the generation of legal consequences.

In the case of constructivism, we can distinguish between ontological constructivism, which identifies the legal consequences of a case with what the best possible legal argument says they are, and procedural constructivism, which identifies the legal consequences of a case with what the best actual legal argument says they are. Ontological constructivism makes only sense if it is possible to identify the possible legal arguments. Such an identification is only possible if the domain of law is closed. There are, however, many reasons to assume that the domain of law is not closed, and the conclusion is therefore that ontological legal constructivism does not make sense.

By elimination of its two alternatives we therefore arrive at procedural legal constructivism, the view according to which the law is what the best actual argument says it is. At first sight, this view may seem implausible, because there is no guarantee that the best legal argument until now leads to a correct conclusion. This appearance is deceptive, however, because it is the consequence of the (implicit) assumption that the legal consequences are already there. But, as we have seen, we have no evidence at all for that view, and its attractiveness is better explained from the inclination to reify the law than from the existence of legal consequences which cannot be perceived nor proven or disproven. Legal consequences are not independent entities, but are essentially conclusions of law-applying arguments. It is in these arguments that the consequences are created, and the final result is what the best argument, the best actually produced argument, says it is.

References

Alexy, R. 1978. *Theorie der juristischen Argumentation*. Frankfurt a/M: Suhrkamp.
Chang, R. (ed.) 1997. *Incommensurability, Incomparability, and Practical Reason*. Cambridge: Harvard University Press.
Dworkin, R. 1978. *Taking rights seriously*. London: Duckworth.

Dworkin, R. 1986a. *A matter of principle*. Oxford: Clarendon Press.

Dworkin, R. 1986b. *Law's Empire*. London: Fontana.

Hage, J.C., R.E. Leenes and A.R. Lodder (1994). Hard cases; a procedural approach. In *Artificial Intelligence and Law* 2, 113-167.

Hage, J.C. 1997. *Reasoning with Rules*. Dordrecht: Kluwer.

Hage, J.C. 2005. *Studies in Legal Logic*. Dordrecht: Springer.

Hart, H.L.A. 1994. *The Concept of Law*, 2nd ed. Oxford: Oxford University Press.

Lagerspetz, E. 1995. *The Opposite Mirrors*. Dordrecht: Kluwer.

La Torre, M. 1999. *Norme, Instituzioni, Valore: per una teoria instituzionalistica del diritto*. Rome: Laterza.

Leiter, B. 2002. Law and objectivity. In Jules Coleman and Scott Shapiro (eds.), *The Oxford Handbook of Jurisprudence and the Philosophy of Law*. Oxford: Oxford University Press, 969-989.

Lodder, A.R. 1999. *Dialaw. On Legal Justification and Dialogical Models of Argumentation*. Dordrecht: Kluwer.

MacCormick, N. and O. Weinberger O. 1986. *An Institutional Theory of Law*. Dordrecht: Reidel.

MacCormick, N. 2007. *Institutions of Law*. Oxford: Oxford University Press.

Rawls, J. 1972. *A Theory of Justice*. Oxford: Oxford University Press.

Rawls, J. 1980. Kantian Constructivism in Moral Theory. In Samuel Freeman (ed.), *John Rawls: Collected Papers*. Cambridge: Harvard University Press, 303-358.

Ruiter, D.W.P. 1993. *Institutional Legal Facts*. Dordrecht: Kluwer.

Ruiter, D.W.P. 2001. *Legal Institutions*. Dordrecht: Kluwer.

Schwemmer, O. and P. Lorenzen. 1973. *Konstruktive Logik, Ethik und Wissenschaftstheorie*. Manheim: Bibliographisches Institut.