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Evidence in Argumentation-Based Litigation (ALG): Comments on Xiong's and Du's Paper

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Comments on Minghui Xiong and Wenjing Du's "Between Evidence and Facts: An Argumentative Perspective of Legal Evidence"

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Section 1

The authors of this philosophically inspiring, succinct, and relatively wide-ranging paper discuss the problem of legal evidence in the framework of legal argumentation. By presenting legal evidence as the "objective basis for case-ruling," they begin their paper with an analytical introduction of certain key theories and concepts that are relevant for their work, such as the difference between the theory of evidence-*qua*-material and the theory of evidence-*qua*-fact, highlighting certain shortcomings in the Chinese theory of legal evidence. They continue by discussing the "subtle" difference between the legal and philosophical sense of evidence, concluding the first part by referring to Walton's theory of evidential reasoning and stressing the inferential relationship between evidence and facts (2002).

The main body of the paper addresses the topics of evidential reasoning and fact argumentation, which they base on an informal-logic perspective. With respect to evidential reasoning, they assert a logical/inferential relation between evidence and facts, where induction is no longer satisfactory given that certain informal logicians (Blair & Johnson, 2011) have already devised conduction to better deal with defeasible reasoning. With respect to conflicts of evidence, they are cognizant of the multiple strategies for pursuing evidential reasoning, and are keenly aware of the potential of strategic maneuvering, but they also try to find certain objective frameworks to resolve such problems. They believe that these may be found in Di Bello and Verheij's criteria of argumentation, probability, and scenario (2018) as methods utilized in both AI and law.

Their fact argumentation is dedicated to the justification of a legal fact-*qua*-claim, and they end the paper with a section on strategic maneuvering to wrap up their dialectial-rhetorical approach built upon their previously developed theory of Argumentation-Based Litigation Game [ALG] (Xiong, 2010).

The ALG appears to be an already established and coherent theory of legal argumentation based on a legal game interplayed by the suitor (S), the respondent (R), and the trier (T), which has now been extended to evidence reasoning and fact argumentation. In that, inspired by the Pragma-Dialectician van Eemeren (2018), they try to balance dialectic reasonableness with rhetorical effectiveness, since for the outcome of a legal controversy, of which evidential reasoning and fact argumentation is an inseparable part, it is not only important that the arguers follow the "10 Commandments" but also that their audience is persuaded.

Section 2

While the paper is both concise and well written, I have several suggestions as to how it may be improved upon in order to make it even more convincing. First, when dealing with evidential

reasoning in the legal/judicial domain, it seems that one cannot avoid a discussion of the degrees/standards of proof (such as, beyond reasonable doubt [in criminal procedures], the preponderance of the evidence and clear and convincing evidence [in civil procedures], and mere probability [for temporary injunctions]). They are measures which are necessary in order for a fact-finder to render a decision with regard to the evidence presented. Apart from the necessity of a logical connection between evidence and fact, they are the necessary epistemic value for an inferential connection which is required for a particular legal field in which the evidence is used.

The introduction of standards of proof to the discussion would be useful at several points in the paper, e.g., when the strength of evidence and the degree to which a set of evidence supports the facts are discussed (p. 5), and when referring Di Bello and Verheij's (2019) normative frameworks to deal with conflicts of evidence (especially as regards probability). I am confident this would add another dimension to the ALG when dealing with evidential reasoning and fact argumentation, securing a better analysis of both the dialectical and rhetorical dimensions of the three crucial players in the legal game.

Second, in terms of the rhetorical dimension of the ALG added at the end of the paper, the authors rely on van Eemeren's concept of strategic maneuvering. I believe this reductionist concept of rhetoric, embracing merely rhetorical *logos* and effectiveness as its goal,[1] could still work when the arguers S and R with their goal to "maximize their legal rights" are concerned. However, when T is discussed, the judge who is to "maintain judicial credibility through fairness and justice," the concept of strategic maneuvering falls short of properly explaining judges' normative concerns in moral situations. In unclear cases, especially novel ones, where the premises are enthymematic and thus the logic of the case runs out, or remains a formal shell to be filled with matters of more substance, judges most often rely on their personal values. Unless the ALG already has some firm reply to the abovementioned problem, I believe it would profit from including at least some kind of ethotic arguments and their heuristic potential when judges try to persuade their audience with some value-based aspects of the case, along with the dialectical reasonableness of their decisions.

Thirdly, Floris Bex's hybrid theory of stories and arguments (2010) does not seem to support the authors' attempt to strike a balance between dialectical reasonableness and rhetorical effectiveness in their ALG. Despite being an excellent AI scientist, Bex tries to balance two dialectical approaches when developing his hybrid theory, one argument-based and another grounded in story-telling. Whilst it might be possible for the second approach to introduce rhetoric, and I would like to think that the authors intend to, unfortunately Bex deals more with abductive reasoning in the case of stories. In conclusion, I see his interesting attempt as one which tries to balance a more formal and less formal logical (dialectical) approach. However, there is no mention of some kind of effectiveness, strategic maneuvering, and the like, which one can find in van Eemeren's concept of strategic maneuvering. This is therefore problematic since it is questionable whether one can use someone else's theory for a purpose other than the one for which it was originally designed. Rather than relying on Bex to strike a "subtle balance" between dialectical reasonableness and rhetorical effectiveness, I suggest the authors should stick with van Eemeren's strategic maneuvering, as long as they choose to accept his view of rhetoric, and perhaps supported their view by analyzing a specific case to illustrate the arguers following their rhetorical goals in a certain case. This was done to good effect in the utilization of the Shell case by van Eemeren (2010), and the legal cases used by Feteris (2012) and Plug (2019).

[1] Unlike some other approaches to rhetoric that include normative (heuristic) elements. If one wishes, these could be traced all the way back to Quintilian and his *Institutio oratoria*, which emphasizes the importance of ethical standards.

Last, but not least, it seems that this conceptually quite clear and well written paper would benefit if the authors included some cases or material facts (and certainly evidence) in order to illustrate how their theoretical positions might work in practical situations. Whilst they do refer to some cases, merely mentioning them does not seem to suffice for those who are unfamiliar with them.

To conclude, the authors provide an interesting account of how the dialectical and rhetorical goals of all the players in the legal game intersect in the framework of factual legal argumentation. As such, it contributes important insights to the overall scholarship in the field.

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