

THE ROLE OF BELIEF IN (LEGAL) ARGUMENTATION: A PROBLEM FOR THE BELIEF-BASED MODEL OF ARGUMENTATION

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Abstract. In the theory of argumentation, not only legal argumentation but argumentation in general, one can distinguish between two positions towards the role of beliefs of the participants of the dispute. According to the first position, beliefs of the agents do not and should not play a significant role in argumentation. Argumentation is understood as an activity the goal of which is to not to reach an agreement at the level of beliefs but at the level of commitments of the agents. Conversely, according to the second position, the agreement should be reached at the level of beliefs not at the level of commitments of the agents. Supporting this position is the assumption that agreement at the level of commitment is too weak of a condition to settle an argument.

In the first part of this paper it will be claimed that the latter position is more convincing than the former, i.e. in an argument agreement should be reached at the level of beliefs, not at the level of commitments. However, as it will be claimed in the second part of the paper, this position rests on a strong assumption about the rationality of belief formation and revision. The implausibility of this assumption will be pointed in the third part of the paper, in the context of different failures of rationality. In the last part of the paper, an explanation of this assumption will be proposed which will point to the solution of this problem. It will be argued that this assumption can be supported by a certain view about the psychology of the agents.

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Key words. Commitment- beliefs- argumentation - legal argumentation - belief-based model of argumentation - personal and subpersonal level - psychological explanation.

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1. Commitments and beliefs in argumentation

Commitment is a normative concept. Normativity of commitment boils down to the fact that it involves certain obligations of the agent who makes the commitment. In the context of argumentation these obligations can be identified with the rules governing the argumentative process. For instance, if an agent claims that *p* she is committed to what *p* entails, committed to rejecting what is inconsistent with *p*, or committed to rejecting *p* in the light of prevailing evidence against *p*. These commitments are incurred on the agent whenever she enters an argument.

Belief, on the other hand, is, first and foremost, a psychological notion. It is a propositional attitude which, on a standard account, consists of an attitude (believing) and the content of the attitude (what is believed). The psychological character of the attitude boils down to the fact that when a person believes that *p* she takes the proposition *p* to be true. The content of belief that *p* is the proposition *p*. Furthermore, the standard account assumes that there are properties in the real world which correspond beliefs. These properties can be understood as dispositions to behave in a certain way or dispositions to form other beliefs. Also, they can be understood as relations between the agent and her mental representations, or as mental states which perform a certain function in producing the behavior or other mental states of the agent. Beliefs of the agent, therefore, are understood to play a crucial role in the action of the agent.

There is an important difference between commitment and belief. For instance, despite the fact that the agent who claims that *p* is committed, for instance, to accepting what *p* entails it is certainly not the case that she always believes what she claims, or that she believes what is entailed by what she claims. For example, agent can claim that *p* while holding beliefs inconsistent with *p* for prudential reasons.

Interesting examples of situations when commitments and beliefs of the participants in a dispute come apart were proposed in a recent paper by David Godden. In these situations, despite verbal agreement, the beliefs of the agents remain inconsistent. Such situations include:

1. A situation when the acceptable information or legitimate moves available to an arguer is limited by the rules of the discussion itself.
2. A situation when disputant feels that she is not skilled enough to argue effectively against her opponent even though she thinks that his position is flawed, or

3. A situation when disputant feels that she is not knowledgeable enough to produce countervailing evidence even though she may believe that it exists.
4. A situation when disputant feels that the reasons disputed in the argument do not address her real reasons for holding her position¹.

Both commitments and beliefs seem to play a significant role in argumentation. The role of commitment is straightforward: commitments are incurred by the rules of argumentation, and without complying with these rules one cannot hope for a rational resolution of the dispute. If the agents decide to settle the difference of opinions by means of an argument, they will incur on themselves the commitments which are correlated with the rules of argumentation. However, beliefs also seem to play a significant role in argumentation. If the participants in an argument reach the agreement at the level of commitments without reaching the agreement at the level of beliefs, the achieved agreement can be described as merely provisional. The agreement will last only as long as the argument. In such situations, despite the conclusion of the argument, the beliefs of the agents remain unchanged.

Previous considerations make it interesting to investigate the consequences of neglecting belief in argumentation. For such investigation it is important to point out the characteristics of the models of argumentation which emphasize the role of commitment in argumentation at the expense of belief. Goddard plausibly claims that the models of argumentation which underline the role of commitment in argumentation rest on the following assumptions:

Assumption 1: The goal of persuasive argumentation is to settle a difference of opinion by rational means.

Assumption 2: Commitment and belief are logically and causally independent. A change in one does not always result in a corresponding change in the other.

Assumption 3: A difference of opinion is resolved when the commitments of the disputants have reached a state of agreement with respect to the claim at issue².

¹ D. GODDEN, *The Importance of Belief in Argumentation: Belief, Commitment and the Effective Resolution of a Difference of Opinion*, in: *Synthese*, 172, 3, 2010, p. 406.

² *Ivi*, p. 405

Godden argues³ that these assumptions can be found at least in the three following models of argumentation: the formal dialectics of Hamblin⁴, the contemporary dialectical theory of Walton and Krabbe⁵, and the Pragma-Dialectical theory of van Eemeren and Grootendost⁶. These plausible considerations will not be in the scope of the following analysis. What is more interesting are the unwelcome consequences of the fact that these models rest on the three above-mentioned assumptions.

According to Godden, the main objection against these models boils down to the fact that they:

"fail by their own standards to be effective normative models of argumentation. (...) I take it as a paradigm of failure when an arguer concedes a position in argumentation and yet proceeds to act as if no such concession had been made. That is, I take argumentation to have failed if the results of argumentation are not effective in shaping the future actions of arguers. In such a situation (...) the goal of argumentation has not been achieved⁷".

The goal of argumentation presupposed by these models, as it was already mentioned, is to settle the difference of opinion by rational means. According to Godden, one cannot hope to settle the difference of opinion by rational means at the level of commitment. Agreement at the level of commitments still allows for acting as if no such agreement had been made. To authentically settle the difference of opinion after the conclusion of the argument agents should act accordingly to what they agreed on. This can be achieved only when the conflict between the beliefs of the agents had been resolved.

On the other hand, theories of argumentation which underline the role of belief rest only on the first of the above-mentioned assumptions. According to the first assumption, it is still correct to describe these theories as understanding the goal of persuasive argumentation to be a

³ Ivi, p. 407.

⁴ CH. HAMBLIN, *Fallacies*, Newport News, Vale Press, VA, 1970.

⁵ D. WALTON, E. KRABBE, *Commitment in Dialogue: Basic Concepts of Interpersonal Reasoning*, State University of New York Press, Albany, 1995.

⁶ F.H. VAN EEMEREN and R. GROOTENDORST, *Speech Acts in Argumentative Discourse*, Foris, Dordrecht, 1984; F.H. VAN EEMEREN and R. GROOTENDORST, *A Systematic Theory of Argumentation: The Pragma-Dialectical Approach*, Cambridge University Press, Cambridge, 2004.

⁷ D. GODDEN, *The Importance*, cit., p. 405.

settling a difference of opinion by rational means. This assumption does not presuppose whether the agreement of the participants of the argument should be reached at the level of beliefs, or at the level of commitments. It only points to the fact that the agreement should be reached according to the rules of rationality. The second assumption in the context of belief-based model of argumentation will be discussed later. It will be argued that for the belief-based model of argumentation to hold, it should presuppose a certain relation between rational commitments of the agents and their beliefs. The third assumption, the assumption about the resolution of the conflict at the level of commitments, obviously does not apply to this approach. This approach underlines that the resolution of the conflict is reached when the *beliefs* of the agents are in a state of agreement to the claim at issue.

2. Commitments and beliefs in legal argumentation

The above-mentioned goal of argumentation, namely reaching an agreement at the level of beliefs, certainly seems adequate to many kinds of discourse. Especially in the ordinary, everyday discourse mere verbal agreement seems not enough to settle the difference of opinion. If, after the conclusion of the dispute and settling the difference of opinion, agents act as if no such dispute took place, it is difficult to claim that the argument was successful. The reason of this is that in many kinds of discourse there are no appropriate means of coercion to make agents to behave accordingly to the results of the discourse. In such discourse the only means of coercion available are, perhaps, some social sanctions. Non-legal sanctions tend to be, however, diffused and ineffective. Obviously, there is no catalogue of such sanctions and, furthermore, these sanctions have an unwelcome property of being to a great extent applied unequally across the members of the society.

The situation seems to be different in the area of legal argumentation. The rules of legal argumentation are supported with concentrated sanctions which can enforce acting in accordance to the result of the legal dispute. Despite the agents not reaching an agreement at the level of beliefs, reaching it at the level of commitments in legal argument can be claimed to be enough of a condition for the legal dispute to be effective. It would not be prudent for the agents in a legal argument to reach a verbal agreement (commitment-level agreement) and still act as if no such agreement had been made. Legal sanctions seem to ensure that the actions of the

agents after resolution of the legal argument will be in accordance to the agreement at the commitment-level.

Although reaching an agreement at the level of beliefs seems to be a somewhat less significant condition for the success of legal argumentation, one can point out the fact that in many cases beliefs still play an important role in this kind of discourse. For instance, the judgments of a court usually bind only the parties involved in the case at hand. Even if the parties do not agree with the judgment (the resolution of a legal argument) at the belief level, legal sanctions can be applied if they do not act in accordance to the judgment. It is desirable for such an argumentation, however, to bind also other judges in similar cases, especially if the case at hand has been settled in a higher court. Nevertheless, in legal systems where there is no doctrine of precedent such judgments will not formally bind other judges in similar cases. They can act (judge) as if no such judgment has been made, despite the fact that, arguably, they are also participants of a legal argumentation. The situation would be different if there was an agreement at the level of belief between the agents participating in a legal dispute. In such situation, the actions of the agents should correspond to each other, at least *ceteris paribus*, just as their beliefs correspond. Another example, indicated by Godden, includes legislative argumentation which results in the passing of a statute⁸. Despite the fact that the statute is binding across the society, it can be invalidated by the Supreme Court. It can happen, for instance, when the beliefs of the members of the Supreme Court are inconsistent with the beliefs of the participants of a legislative argumentation.

3. A problem for the belief-based model of argumentation

The above-mentioned claims underlining the role of belief in argumentation are plausible because of the role of belief in action. On a standard, belief-desire model of action, agents act in accordance with possessed beliefs and desires⁹. Desires and beliefs of the agents are understood to be the causes of behavior. Agents possessing conflicting beliefs will, therefore, act differently. Commitments of the agents are not, on the other hand, causes of behavior. Of course, one can have a reason to act accordingly to the incurred commitment, e.g. when he

⁸ *Ivi*, p. 411.

⁹ D. DAVIDSON, *Actions, Reasons, and Causes*, in: D. DAVIDSON, *Essays on Actions and Events*, Oxford University Press, Oxford, 2001, pp. 3-20.

possesses a corresponding belief. However, on their own, commitments cannot assure the outcome of the action.

If, after the conclusion of the argument, the actions of the agents are still not consistent, one can plausibly argue that the goal of the argument had not been achieved. After all, settling the different opinions of the agents is not only verbal matter, but also a psychological one. In the case of such discrepancies between actions, even when participants in an argument agree at the level of commitment, one can plausibly state that the difference of opinion had not been really settled.

Despite its plausibility in underlining the role of belief in argumentation, this approach, as it was mentioned, still rests on the assumption that the goal of the persuasive argument is to reach an agreement by rational means. However, if the agreement is understood to be at the level of beliefs, it follows that agents are taken to be capable to revise their beliefs according to the rules of rationality. This is certainly a strong assumption about the rationality of the agents participating in an argument. If we take the agents to be capable to revise their beliefs according to the commitments incurred by the rules of the argumentation which are taken to be rational, we take the agents not only as being able to notice such rules but also as being able to be motivated by such rules when they notice them. On this account the agents are capable not only to be responsive to rules of rationality but, furthermore, revise their beliefs according to such rules. There are, however, many examples of the agents failing to track such rules and failing to revise their beliefs in the above-mentioned manner. An example of the former is hyperbolic discounting, which is a time inconsistent mode of discounting. This phenomenon consists in agents preferring the sooner albeit smaller reward to a greater reward which will be received later¹⁰. An example of the latter is self-deception. It is a phenomenon when the agent holds certain beliefs despite the fact of strong evidence contrary to this belief. These examples justify the statement that agents are only partially rational in their action and belief revision¹¹. It would seem, therefore, that the assumption that the agents can track the rational rules of argumentation and revise their beliefs accordingly is an example of moralistic fallacy, when it is assumed that what agents ought to do corresponds to what agents really do.

¹⁰ G. AINSLIE, *Breakdown of Will*, Cambridge University Press, Cambridge, 2004, pp. 28-33.

¹¹ An interesting account of partial rationality of the agents can be found in W. ZAŁUSKI, *Evolutionary Theory and Legal Philosophy*, Edward Elgar, London, 2009.

Godden seems to acknowledge this difficulty. In a footnote to his paper he makes a following provision to the claim that the argumentation fails when it is not effective in shaping the future actions of the agent:

"I wish to exclude cases of cognitive failures (e.g., the arguer simply forgets what was conceded in the argument), cases of 'moral' failures (e.g., akrasia), and cases where the arguer re-thinks the issue (even only a few moments later) and comes to a different view or simply changes her mind. All of these can occur without the type of failure I imagine here. The type of failure I imagine here comes from ignoring or flaunting the responsibilities incurred in the process of argumentation. For argumentation to be effective in shaping the future action of the arguers, they must take proper account of its results in their practical and theoretical reasoning insofar as they are able"¹².

The assumption of the belief-based model of argumentation is, therefore, that agents are able to take proper account of the results of the argument in their practical and theoretical reasoning. Obviously there are situations when the agents fail to do so, which include not only situations mentioned by Goddard but also many others, including hyperbolic discounting and self-deception. However, these situation should be rare enough for the belief-based models of argumentation to hold. If the agents do not possess the ability to track the results of argumentation and revise their beliefs accordingly, one could have little hope to settle the differences of opinion at the level of beliefs. The agents must possess such a capacity for the belief-based model of argumentation to be plausible. However, there is prevailing evidence coming from many fields of science that rational capacities of humans are too limited to expect them to track and to follow the rules of rationality in many situations¹³. This presents a problem for the belief-

¹² D. GODDEN, *The importance*, cit., p. 405.

¹³ Apart from hyperbolic discounting and self-deception one could point to one of the most popular experimental paradigm in experimental psychology, the Wason selection task. In these experiments agents systematically fail to utilize a simple rule of inference, namely *modus tollens* (J. TOOBY, L. COSMIDES *Cognitive Adaptations for Social Exchange* in: J. BARKOW *et al. The Adapted Mind*, Oxford University Press, New York, 1992, pp. 163-228). Other examples of failures of rationality include errors in reasoning under uncertainty, a topic which was extensively researched on by Daniel Kahnemann and Amos Tversky (D.

based model of argumentation due to the fact that agents do not seem to possess the capacities required for the argumentation to be effective, i.e. to revise their beliefs accordingly to the conclusion of the argument and to act in accordance with the revised beliefs. Or even if they do, this capacity is limited at least to some extent.

4. Personal and subpersonal level of psychological explanation

The plausibility of the belief-based model of argumentation requires, therefore, a much stronger link between rational commitments incurred on the participants in an argumentation and their beliefs than the link (or even a complete lack of it) between commitments and beliefs in commitment-based models. Many examples of the failures of rationality make any proposal of such a strong link problematic. There is, however, a way to evade this objection which is connected to a certain understanding of the psychology of the agents.

Despite the fact that the belief-based model of argumentation rests on the assumption about agents possessing certain rational capacities which is, at least to some extent, undermined by empirical science, the defense of this model of argumentation can appeal to a rational interpretation by the agent of other agents, in terms of them having beliefs, desires, intentions, etc. The basic assumption about the agents on this view is quite simple: to understand other person is to rationalize her, i.e. to assign her a set of propositional attitudes (such as beliefs, desires, or intentions) which will make her as rational as possible. It is argued that whenever we attribute propositional attitudes to other agents when trying to explain their behavior, we do not have any other possibility of doing so except to understand them as agents which do have the capacity to track and to follow rules of rationality. This kind of explanation can be described as personal explanation¹⁴. On the other hand, explanation of behavior which does not utilize the assumption about the rational attribution of propositional attitudes can be described as subpersonal explanation¹⁵.

KAHNEMANN, A. TVERSKY *Judgment under Uncertainty: Heuristics and Biases*, in: *Science*, 185, 4157, pp. 1124-1131). More familiar examples of failures in rationality involve leaping to conclusions and wishful thinking.

¹⁴ Perhaps a more familiar name for this kind of explanation would be to commonsense explanation, or folk psychological explanation.

¹⁵ The distinction between personal and sub-personal levels in understanding the mind was introduced by Daniel Dennett (D. DENNETT, *Content and Consciousness*, Routledge, London, 1969, p. 93).

At the subpersonal level of explanation it is appropriate to explain the behavior of the agents as a result of the operation of mental, or biological mechanisms. Mechanism is the view that the behavior of the agents and mental phenomena connected with it can be explained in terms of the functioning and the organization of the parts of the agents mind, and/or brains¹⁶. This kind of explanation is characteristic to neuroscience, and, arguably, to cognitive science¹⁷. Obviously, this kind of explanation does not need to invoke rationalization of agents in order to explain their behavior.

Furthermore, the view which assumes the irreducibility of the rational component in the explanation of behavior proposes a radical discontinuity between personal and subpersonal levels of explanation. Despite the fact that empirical sciences reveal, for instance, regularities of behavior and reasoning which do not correspond to the assumption about the rationality of the agents, from the viewpoint of personal explanation, to understand other agents is still to take them as rational beings. This kind of explanation omits the descriptive aspect of how people really behave or reason, and focuses on the normative aspect of how they should behave, or reason. The normative aspect plays a crucial role in the explanation at the personal level.

The assumption about the rationality of agents, which is a necessary condition of understanding agents at the personal level of explanation, is, obviously, only an idealization. The proponents of this view realize it, but despite this rationality is understood on this view as inherent in this kind of explanation. One of the proponents of this account, Daniel Dennett, claims:

However rational we are, it is the myth of our rational agenthood that structures and organizes our attributions of beliefs and desires to others and that regulates our own deliberations and investigations. We aspire to rationality, and without the myth of rationality the concepts of belief and desire would be uprooted. Folk psychology, then, is *idealized* in that it produces its predictions and explanations by calculating in a normative system; it predicts what we will believe,

¹⁶ C. CRAVER, *Explaining the Brain: Mechanisms and the Mosaic Unity of Science*, Oxford University Press, New York, 2007, pp. 2-8.

¹⁷ An example of a mechanism utilized by cognitive science is a mental module. The assumption about the mind here is that, at least partially, mind is constituted of different mental modules. Behaviour is explained by the functioning and the organization of these modules.

desire, and do, by determining what we ought to believe, desire, and do¹⁸.

Elsewhere he claims that:

*"When considering what we ought to do, our reflections lead us eventually to a consideration of what we in fact do"*¹⁹.

This viewpoint, therefore, acknowledges that personal explanation is a rationalizing explanation, and rationalizing explanation implicates normative considerations. On this kind of explanation, to understand others the interpreter tries to make sense of their behavior by implementing in the explanation the normative rules of rationality. These rules do not describe the actual behavior or reasoning of the interpreted agents, but enable the interpreter to make sense of these phenomena.

The view described above proposes a very close connection between rational commitments of the agents and their propositional attitudes, such as belief. Understanding that others possess beliefs implicates understanding commitments which follow from possessing them such as believing what is entailed by explicated beliefs. On this account one can propose a solution to the above-mentioned problem for the belief-based model of argumentation. This problem consisted in the fact that there is a discontinuity between rational commitments incurred on the participants in the dispute and their beliefs. It was argued that often agents do not follow these commitments in forming and revising their beliefs. Because of that, one cannot hope to effectively resolve the dispute at the level of conflicting beliefs by rational means. However, the described account of the psychology of the disputants allows to

¹⁸ D. DENNETT, *The Intentional Stance*, MIT Press, Cambridge MA, 1987, p. 52. Similar accounts of the personal level of understanding other agents were proposed by other philosophers, including Donald Davidson (D. Davidson, *Essays on Actions and Events*, Clarendon Press, Oxford, 1980), John McDowell (J. MCDOWELL, *Functionalism and Anomalous Monism*, in: E. LEPORE and B. MCLAUGHLIN *Actions and Events*, Blackwell, Oxford, 1985), or Jennifer Hornsby (J. HORNSBY, *Simplemindedness: in Defense of Naïve Naturalism in the Philosophy of Mind*, Harvard University Press, Cambridge MA, 1997), or Alan Millar, (A. MILLAR, *Understanding People. Normativity and Rationalizing Explanation*, Clarendon Press, Oxford, 2004).

¹⁹ D. DENNETT, *The Intentional Stance*, MIT Press, Cambridge MA, p. 98.

accommodate this discrepancy. On this understanding, when we ascribe beliefs to others it is inevitable that we utilize normative considerations of what others should believe in. It is not a mistake, therefore, to think of beliefs as being shaped by rational commitments. Despite the fact that agents often do not meet this ideal, there is no other way of understanding them as having beliefs.

5. Conclusion

In the first part of the paper it was claimed that there are two positions towards the role of belief in argumentation. According to the commitment-based model of argumentation, it is not relevant what disputants believe in. It is only the commitments which are incurred on them by the argumentative process which are significant. According to the belief-based model of argumentation, it is at the level of beliefs that the disputants should reach an agreement to effectively resolve the dispute. It was argued, after Godden, that belief-based model of argumentation is a more plausible account of argumentation, including legal argumentation. However, in the second part of the paper a problem for this account of argumentation was described. The problem boils down to the fact that often it is questionable to expect the agents to form and to revise their beliefs in accordance to the results of the dispute. In the last part of the paper it was argued that one can propose a solution to this problem assuming that psychological explanation, at the personal level, is irreducibly rationalistic.