

Hon.-Prof. Dr. Wolf Okresek

Litigation SS 2012-03-13

Introductory notes

Time : Wednesday, 6:00 pm to 7:30 pm; no break.

Homework : see http://www.heinz-mayer.com/lehre_institut.htm; deadline: Wednesday, 10:00 am.

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Introduction

What does the word „litigation“mean?

Webster's New Encyclopedic Dictionary explains the word “litigate” as follows:

1: to carry on a legal contest by judicial process

2: to contest in law [Latin *litigare*, from *lis*, *lit-is* “lawsuit” + *agere* “to drive, act, do”].

Usually the term “litigation” is associated with civil litigation but it also makes sense in other areas of law. In our Praktikum we have to deal with litigation before the European Court of Human Rights (ECHR) and the Court of the European Union (ECJ).

Effective litigation demands knowledge of the relevant procedural and organizational provisions.

A “**litigation strategy**” should be considered already at the domestic level, for example as regards the exhaustion of **domestic remedies** before lodging an application to the ECHR or suggesting a referral to the ECJ asking for a **preliminary ruling**.

See for example Joint Cases C-465/00, C-38/01 and C-139/01 where persons were concerned by a domestic legal regime (with the rank of a constitutional law) which violated their private sphere. They succeeded in getting a preliminary ruling by the ECJ which was succeeded by a ruling of the Constitutional Court that the regime in question was not applicable because it was in contradiction with Community- (now Union-) law.

Rhetoric, Legal Advocacy and Legal Reasoning

Recommended books:

Posner, Overcoming Law (1995)

Posner, The Problems of Jurisprudence (1990)

According to *Richard Posner* “the *chef d'oeuvre* in this field remains **Aristotle's Rhetoric**, “beyond which more than two millennia's worth of subsequent literature has made few advantages”.

Posner stresses the fact, that **Rhetoric does not produce knowledge**. As can be typified by the English barrister the **rhetorician works with the material he is given** (*Overcoming Law* p 528).

In written submissions as well as in oral pleadings there is always the question **how to present the available arguments in the most efficient manner**. The goal of rhetoric must not be “to make the weaker appear the stronger argument” but to find out and **to show what makes a cause appear convincing**. The short formula is: **To convince and not to persuade**.

One should also have in mind that besides the legal aspect there is usually also a **factual** aspect which must be argued as well (cf questions of the evaluation of evidence).

Empirical data (eg statistics) can play an important role in reinforcing legal argumentation.

Posner identifies certain **forms or manners** of argumentation used by lawyers giving the following examples for specific techniques for rhetoric, legal advocacy and legal reasoning:

Analogy

Arguing by analogy (in a broad sense) generally means to maintain that legal norms or maxims or legal theories developed for other cases are also applicable in the case at issue.

Casuistry (case-based reasoning)

Wikipedia: Casuistry means case-based arguing; it is a **method** of case reasoning. Usually it is argued that a decision in a specific case also proves right for another case.

Metaphor

According to Wikipedia a “**metaphor** is an analogy between two objects or ideas, conveyed by the use of a word instead of another.” Metaphors sometimes can illustrate very well a specific problem.

Posner: “Even if the truth value of metaphors is irrelevant “[M]etaphor **plays a useful cognitive role** in jolting a person out of its existing frame of reference by getting him to look at something in a fresh, and perhaps a more illuminating way” (*Posner*, *Overcoming Law* 523).

Informative Articles:

Levels of Metaphor in Persuasive Legal Writing, by Michael R. Smith*
<http://www2.law.mercer.edu/lawreview/files/58309.pdf>

The Art of Advocacy, Lemon of a metaphor, by Paul Mark Sandler:
http://www.attorneyadvocacy.com/2009/08/lemon_of_a_metaphor_1.html

Making sense of metaphors, by Professor Bernard Hibbits, University of Pittsburgh School of Law
http://www.attorneyadvocacy.com/2009/08/lemon_of_a_metaphor_1.html

Authority

Usually it is the authority of supreme courts' decisions to which reference is made to. Legal decisions are authoritative not when they command a consensus among lawyers, corresponding to a consensus among scientists, but when they emanate from the top of the judicial **hierarchy** (*Posner*, *Problems*, 79).

In a broader sense taking resort to authority may also mean to refer to (supreme) court decisions even in other legal systems for instance of the US Supreme Court or to the teachings of qualified publicists.

European Court of Justice and European Court of First Instance

See the background documents and the Rules of Procedure on the website of the ECJ:
<http://www.curia.europa.eu/en/instit/presentationfr/cje.htm>

Recommended Book; *Craig/de Burca*, *EU Law – Text, Cases and Materials*, 4th edition, 2007

European Court of Human Rights

See the background documents and the Rules of Procedure of the Court on the **website** of the Court:
www.echr.coe.int

Recommended books

Harris, O'Boyle & Warbick (eds) *Law of the European Convention on Human Rights*, second edition, 2009

Leach, *Taking a Case to the European Court of Human Rights*, Second edition, 2005

Reid, *A Practitioner's Guide to the European Convention on Human Rights*, third edition 2007

Jacobs, White, and Ovey, *The European Convention on Human Rights*, fifth edition, 2010

Van Dijk, van Hoof, van Rijn, Zwaak, *Theory and Practice of the European Convention on Human Rights*, fourth edition, 2006

Case of Kremzow:

ECHR, 21.9.1993, No 12350/86

ECJ, 29.5.1997, C-299/95