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# **THE SOUNDNESS OF JUDICIAL ARGUMENTATION**

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## **THE SOUNDNESS OF JUDICIAL ARGUMENTATION**<sup>2</sup>

One of the main aims for the argumentation theorists around the world is to define standards for the soundness of argumentation. Many authors, such as Chaim Perelman or Steven Toulmin, have emphasized the role that the field of argumentation plays in defining such standards. Judicial argumentation is strongly connected with legal procedure and substantive laws. But can we say that some rules of judicial argumentation are vested in legal rules? Can we derive standards of judicial argumentation from substantive and procedural laws? This paper answers these questions on the basis of Russian and US legislation. The present treatise is aimed at outlining the main aspects of the problem and elaborating directions for future research.

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## Introduction

Judicial decision-making is inevitably connected with argumentation, because the judge who makes a decision is expected to support it with arguments. In some countries, such as the Netherlands, Germany, Sweden,<sup>3</sup> and Russia, this obligation has the force of law. Even though many countries legalize the requirement of justification for court rulings, it is almost a miracle to see standards of argumentation stated explicitly, especially in legislation. This problem has two main causes. Firstly, the nature of argumentation is itself too complicated to define universal and precise rules of its formation. Secondly, in most countries, higher courts have discretion to determine whether decisions of lower courts are justified, again due to the nature of the argumentation. The problem of defining an appropriate standard of justification for court rulings can also be called a problem of the soundness of judicial argumentation. Soundness is the “ultimate” criterion for determining if an argumentation is good or bad. The establishment of standards for soundness that are appropriate to legal context is the main aim of the theory of legal argumentation. Despite the fact that judicial practice in Russia generally shows a low quality of argumentation, the field of legal argumentation remains uncharted waters.

In the present paper, we will focus on problems with defining standards for judicial argumentation. Russian and US civil procedure will be used as an empirical basis for our research. From the perspective of legal argumentation theory, a search for rules of argumentation specific for judicial argumentation must be carried out within the special context, which will be discussed in the first part of this paper. The field of judicial argumentation is inevitably connected with legislation, but it is unclear to what extent it depends on the law of procedure and substantive law. Designation of the degree of interdependency between rules of judicial argumentation and different kinds of legislation is one of the key insights of this paper, and will be considered in the second part of the treatise. Necessarily, our analysis will depart from Russian legislation, but, in order to demonstrate the complexity of the problem, we will apply attained hypotheses to the US legislation in the third part of the inquiry. Generally speaking, the present article will outline the main features of the subject at hand and spotlight some directions for future research.

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<sup>3</sup> Feteris E.T. *Fundamentals of legal argumentation: a survey of theories on the justification of judicial decisions* / E. T. Feteris . – Boston: Kluwer Academic Publishers, 1999. – p. 6

## **I. In search of rules for judicial argumentation**

From the perspective of legal argumentation theory, such authors as Aarnio, Alexy, MacCormick, Peczenik, and Wroblewski distinguish three aspects of justification for court decisions: formal, material, and procedural<sup>4</sup>. The formal aspect of argumentation refers to the internal justification of court rulings and to the logical validity and soundness of arguments that are used. This aspect, in terms developed by S. Toulmin<sup>5</sup>, is “field-invariant”, because the rules of argumentation that refer to this part may be applied to other fields of reasoning. Generally speaking, an analysis of internal justification focuses on arguments without regard to context. At the same time, the material aspect of justification is devoted to the admissibility of premises, which always depends on the context of argumentation, which means that it contains “field-dependent” rules of argumentation. From the author’s point of view, material rules of justification for court decisions can be found in three sources: in procedural laws, in substantive laws, and in court practice. The procedural aspect of justification is irrelevant to the subject of the present paper, so it will not be discussed here.

This work focuses on analyzing the rules that influence judicial argumentation in Russian civil procedure. From the author’s perspective, procedural rules are the foundation of a material standard for judicial reasoning. Procedural laws form the basic touchstone of judicial argumentation because they are applied to every court ruling. At the same time, substantive laws influence judicial argumentation in another scope. Argumentation will be affected by substantive rules only if these rules are applied in a given case. So the scope of influence of substantive law on argumentation will be narrower than that of procedural rules. As for court practice, the author’s hypothesis is that it contains rules of argumentation that are developed by judges with regard to specific types of cases. Court judgments contain rules of argumentation that specify the requirements imposed by substantive law. Consequently, research in the field of material standards for judicial argumentation must begin from an analysis of procedural rules.

## **II. Identifying Rules of judicial argumentation in Russian civil procure**

In Russian civil procedure, argumentation is a required element of a publicly justified decision, as defined by provisions of the Code of Civil Procedure of the Russian Federation<sup>6</sup>. Article 195 of the Code of Civil Procedure provides that a court judgment must be legal and

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<sup>4</sup> Id. p. 20

<sup>5</sup> Toulmin, Stephen E, *An Introduction to Reasoning* / Toulmin, Stephen E, Richard D. Rieke, Allan Janik. - NY: Prentice Hall, 1997. - p. 17

<sup>6</sup> Code of Civil Procedure of the Russian Federation: enacted on 14.11.2002 N 138-FL (as amended on 02.07.2013) // Legislation Bulletin of the Russian Federation. – 2002. - N 46. - art. 4532.

reasonable. Even though this rule is vague, it is the cornerstone of the material standard of judicial argumentation in Russian legislation.

By material standard of judicial argumentation, we mean statutory requirements for court rulings that, in some aspects, determine a court's mode of argumentation. The provisions of article 195 of the Code of Civil Procedure of the Russian Federation were elaborated in a Resolution of the Plenum of the Supreme Court of the Russian Federation "On court judgments"<sup>7</sup>. Officially, such resolutions are designated for judges of the general court system and their aim is to "clarify" ways of applying statutory law. Practically speaking, such acts are aimed at interpreting statutory law and, as a result, resolutions of the Supreme Court often include interpretations of normative value.

In the abovementioned resolution, the Supreme Court interpreted provisions of rule 195 of the Code of Civil Procedure. In this act, the court elaborated terms for the legality and reasonableness of judicial decisions by defining elements that constitute each notion. The legality of a ruling has three aspects. Firstly, a ruling must be made in strict observance of procedural rules. Secondly, it must be in full accordance with substantive laws. Thirdly, the procedural and substantive laws that were applied must be applicable to the given case. In its own turn, reasonableness consists of two parts. Firstly, the facts that are relevant to the case must be confirmed either by evidence that was examined by the court and which meets the legal requirements of relevance and admissibility, or by matters on which the party is relieved from presenting evidence. Secondly, the decision must contain comprehensive conclusions arising from established facts. Even though this interpretation sheds light on aspects of material standards for judicial argumentation in Russian civil procedure, it must be developed through an analysis of grounds for reversal of judgment. This is important, as appellate grounds for reversal naturally follow from the general provisions mentioned above because of the verifying function of the appellate courts.

Grounds for reversal of judgment play very sufficient role in appellate procedure, as they act as a filter for court rulings. From the author's point of view, they constitute the core of material standards for judicial argumentation. Grounds for reversal are used in appellate procedure to define if the sufficient elements of judgment are established. These grounds are formalized in Article 330 of the Code of Civil Procedure. The code provides four major grounds for reversal or alteration of judgment: 1) Wrongful determination of the facts to be proven in the

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<sup>7</sup> On court judgment: Resolution of the Plenum of the Supreme Court of Russian Federation, enacted on 19.12.2003 N 23 // Bulletin of the Supreme Court of the Russian Federation. – 2004. - № 2.

case; 2) lack of evidentiary support for the facts to be proven in the case, which have been established by a trial court; 3) Inconsistency of the findings of a trial court as stated in the court decision with the circumstances of the case; and, 4) Violation or incorrect application of the rules of substantive or procedural law.

It is obvious now that the grounds for reversal, listed in Article 330 of the Code of Civil Procedure, coincide with the standards declared in the resolution of the Supreme Court with one supplementation. Wrongful determination of the facts to be proven in the case is an extension of the material standard of judicial argumentation. This supplement is important because this rule is connected with a distinctive feature of Russian civil procedure – the role of the court. In Russian civil procedure, a court must determine which circumstances are important for the case and which of the parties should provide proof<sup>8</sup>. This is a special feature of Russian civil procedure. For example in US civil process, the scope of the facts to be proven in a case is determined by the parties to a dispute<sup>9</sup>.

Summarizing the material standard of judicial argumentation, we can develop four main rules that form the standard. Firstly, a judge must correctly determine the facts to be proven in a case and state them in the decision. Secondly, all facts that were established by the court must be supported either by evidence that was examined by the court and which meets the legal requirements of relevance and admissibility, or by matters on which the party is relieved from presenting evidence. Thirdly, the findings of the court must be coherent with facts that were established in the decision. Finally, the judge must apply substantive and procedural laws that are relevant to the case; he or she must not apply substantive and procedural rules that are irrelevant to the case and must correctly interpret the law.

These rules constitute the most formalized material standard of judicial argumentation that can be derived from the Russian legislation on civil procedure. It is a vague but important framework in which legal arguments are developed. This standard constitutes the material criteria of soundness, which can be applied to any judgment that was made by a trial court under the rules of civil procedure. The material standard of argumentation can be developed through an analysis of substantive law, but the scope of use for such standards will be confined.

Research of the material standards of judicial argumentation should be continued in three main aspects. Firstly, it is important to analyze criminal procedure and compare standards applied in civil and criminal procedure in Russian jurisprudence. Secondly, inquiry should be continued in the aspect of substantive law. It is important to define the scope of formalization of

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<sup>8</sup> Maleshin D. Russian Style of Civil Procedure // *Emory International Law Review* – 2007, Vol. 21, p. 548

<sup>9</sup> Reshetnikova I.V. Evidence law of England and USA / I.V. Reshetnikova. – Ekbn.: USLA publishers, 1997. - p. 98

the material standards of judicial argumentation. Thirdly, court practice must in turn be analyzed in two aspects: a search for judge-made standards of argumentation and a verification of the material standards that will be developed on the basis of procedural and substantive law.

### **III. Applying hypothesis to US Civil procedure**

As it was shown earlier, grounds for reversal maintain the core of the material standard for judicial argumentation in Russian civil procedure. From this perspective, we have attempted to analyze the analogous institute of US civil procedure. This part of the inquiry is necessary to demonstrate the complexity of the subject at hand and to elaborate the scope of the field of judicial argumentation. In US civil procedure, the institute of standards of review plays a similar role as the Russian institute of grounds for reversal. The main aim of standards of review is to determine what is necessary to overturn a decision<sup>10</sup>. This is also the aim of grounds for reversal in Russian civil procedure, but answers to this question in Russian and US civil procedure are different.

Even though a definition of proper standard of review is “a question of federal procedure and is therefore governed by federal law”<sup>11</sup>, standards of review may have sufficient differences in US federal courts of appeals. Whereas the objective of this work is to analyze standards of review in general, we will refer to legal precedents of the US Supreme Court and the Federal Court of Appeals for the 9<sup>th</sup> circuit. It will not reflect peculiarities of this legal institute in other federal courts of appeals, but it will show the main features of this institution in US civil procedure.

According to Kunsch, “The standard of review is the criterion by which the decision of a lower tribunal will be measured by a higher tribunal to determine its correctness or propriety”<sup>12</sup>. Moreover, “Appellate courts, by definition, are courts of review, not courts of original jurisdiction. Thus, they ‘do not sculpt on virgin marble’, instead, they review the trial court’s rulings, and in doing so, they accord varying degrees of deference to those rulings. That degree of deference is the standard of review”<sup>13</sup>. In the context of appellate review, the more deference accorded to the reviewed decision, the higher the standard of argumentation that the court of appeals must provide to reverse the decision. It becomes obvious that the notion of deference is central to standards of review. Yet, at the same time, Russian civil procedure does not recognize such a notion at all.

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<sup>10</sup> Kunsch K. Standard of Review (State and Federal): A Primer // Seattle University Law Review – vol. 18, 1994, p. 14

<sup>11</sup> Freund v. Nycomed Amersham, 347 F.3d 752, 762 (9th Cir. 2003).

<sup>12</sup> Kunsch K. supra note p. 15

<sup>13</sup> A Defense Lawyer's Guide to Appellate Practice. Chicago: DRI, 2004. - p. 99

Grounds for reversal might be understood as “types of mistakes” that a judge can make, because grounds of review have different nature, in that they may be connected with different types of questions resolved by the court, such as questions of fact or questions of law. All grounds have equal consequences of application, and a decision is reversed or amended on the discretion of the appellate court. In Russian civil procedure, the appellate court’s power to revise court rulings is constrained only by two factors: grounds for reversal and scope of review.

Scope of review refers to the scope of the arguments stated in an appeal and a response to an appeal. Even in this aspect, the appellate court may review its decision as a whole: “On behalf of justice”, without any regard to claims stated in an appeal or a response to an appeal<sup>14</sup>.

In US law, standards of review on appeal “depend on the nature of the claimed error”<sup>15</sup>. Different standards are applied to cases with a distinct nature, and, what is more important, the application of different standards has different consequences. There are several types of standards of review. “Decisions by judges are traditionally divided into three categories, denominated as questions of law (reviewable de novo), questions of fact (reviewable for clear error), and matters of discretion (reviewable for abuse of discretion)”<sup>16</sup>. This statement describes three main standards of review and the nature of cases to which these standards are applied. In this paper, attention will be concentrated on de novo and clear error standards.

De novo standard is applied “when issues of law predominate in the district court’s decision.”<sup>17</sup> This standard is also used to revise cases with a mixed question of law and fact. The US Supreme Court defined mixed questions of law and fact as “questions in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard – to put it another way, whether the rule of law as applied to the established facts is violated.”<sup>18</sup> “De novo literally means ‘anew’; thus the appellate court reviews a decision on a question of law anew, without regard to the trial judge’s ruling.”<sup>19</sup> The de novo standard excludes any deference to the trial court’s judgment, because an appellate court can observe legal issues from the same position as the trial court, whereas the appellate court is unable to do that in respect to fact-finding. This standard is congruent with the appellate review in Russian civil procedure, because, as we have mentioned above, Russian civil procedure does not recognize the notion of deference.

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<sup>14</sup> Code of Civil Procedure of the Russian Federation, art. 327.1

<sup>15</sup> *Navellier v. Sletten*, 262 F.3d 923, 944 (9th Cir. 2001)

<sup>16</sup> *Harman v. Apfel*, 211 F.3d 1172, 1174 (9th Cir. 2000)

<sup>17</sup> *United States v. Mateo-Mendez*, 215 F.3d 1039, 1042 (9th Cir. 2000).

<sup>18</sup> *Pullman-Standard v. Swint*, 456 U.S. 273, 289

<sup>19</sup> *A Defense Lawyer’s Guide to Appellate Practice*. Chicago: DRI, 2004. - p. 100



Clear error or a clearly erroneous standard is used to review a district court's finding of facts. This standard is based on rule 52 of the Federal Rules of Civil Procedure<sup>20</sup>. The main aim of this standard is to recognize the trial court as a primary fact-finder and prevent needless review of fact-finding on appeal.<sup>21</sup> The extent of deference given to the reviewed is vested in the definition of the standard as given by the US Supreme Court: "finding is 'clearly erroneous' when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed."<sup>22</sup> The Supreme Court has also shown several practical applications of the clear error standard, which better show the degree of deference that is paid to the trial court's decision under this standard. For example:

- 1) The court of appeals may not reverse a decision even if it is convinced that, had it been sitting as the trier of fact, it would have weighed the evidence differently<sup>23</sup>;
- 2) When a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be a clear error<sup>24</sup>;
- 3) Where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous<sup>25</sup>;

Aspects of applying the clear error standard listed above show that this standard places real limitations on the appellate court and raises the standard of argumentation for the appellate court.

If we will compare the grounds for reversal with standards of review, it becomes clear that standards of review do not provide explicit rules for judicial argumentation. In US Civil Procedure, such rules are developed through applying standards of review. From our point of view, these standards are a framework or body of principles that are shaped into rules by judges. As opposed to the system of standards of review, grounds for review in Russian civil law amount to rules of judicial argumentation. Even though they are vague in some aspects, they can be applied straightforwardly. Consequently, it is impossible to deduce rules of judicial argumentation from standards of review. In the case of the US civil process, such rules might be framed through an analysis of precedents that interpret and specify standards of review.

Standards of review are the result of the historical development of US civil procedure. The appearance of different standards of review for facts was connected with equity cases.

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<sup>20</sup> FED. R. Civ. P. 52(a).

<sup>21</sup> *Zenith Radio Corp. v. Hazeltine Research Inc.*, 395 U.S. 100, 123 (1969).

<sup>22</sup> *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948).

<sup>23</sup> *Anderson v. City of Bessemer*, 470 U.S. 564, 573 (1985);

<sup>24</sup> *Id.*

<sup>25</sup> *United States v. Yellow Cab Co.*, 338 U. S. 338, 342 (1949)

“...Appellate courts developed a self-imposed body of principles establishing limited review of lower court findings of fact in equity cases. The degree of latitude permitted in evaluating such findings was governed by the nature of the evidence which formed the basis of the lower court determination”<sup>26</sup>. After the merger of law and equity in 1934, the multiple factual standards of review that were developed in equity cases were preserved. In particular, this has led to the enactment of Rule 52 of the Federal Rules of Civil Procedure, which established clearly erroneous standard in statutory legislation.

From the author’s perspective, it is important to depart from the main theme of this paper for a moment to look into perspectives of improving Russian civil procedure. Two of grounds for reversal in Russian civil procedure can be applied to the same cases as can the clear error standard. It is doubtless that the scope of application of these grounds for reversal and the field of application of the clear error standard are not totally congruent, but the conjunction is sufficient enough to analyze the possibility of implementing some aspects of the clear error standard in Russian civil law.

The appellate procedure in both Russia and the US is aimed at reviewing cases, not retrying them. In Russian civil procedure, the appellate court can accept new evidence only if the party that proposes fresh evidence has substantiated the impossibility of submitting it to the trial court for reasons beyond its control and the court finds these reasons to be sound. Similarly, the clear error standard is aimed at removal of questions of fact from the appellate courts. This helps to discourage parties from an ill-suited contestation of facts established by the trial court and to simultaneously reverse factually erroneous court rulings. Generally speaking, this standard is coherent with the policy on which Russian appellate procedure is based.

Even though it is possible to implement some rules regarding the review of fact-finding by the trial court, why should these rules be applied?

The main rational argument we have to keep in mind is that trial courts are primary fact-finders and they are always in a better position to make findings on an issue. As the US Supreme Court pointed out, “When findings are based on determinations regarding the credibility of witnesses, Rule 52(a) demands even greater deference to the trial court’s findings; for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener’s understanding of and belief in what is said.”<sup>27</sup> In spite of the fact that rationality is important, from the author’s point of view the main goals of such implementation lie in practical reason. It is important to observe how adopting even some elements of this standard can influence the judicial system. Firstly, congestion of appellate courts, which is one of the major

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<sup>26</sup> Susan R. Petito *Federal Rule of Civil Procedure 52(a) and the Scope of Appellate Fact Review: Has Application of the Clearly Erroneous Rule Been Clearly Erroneous?* // *St. John's Law Review* - Vol. 52, Iss. 1, Article 3.

<sup>27</sup> *Anderson v. City of Bessemer*, 470 U.S. 564, 573 (1985);

problems of the Russian court system, will be reduced because fewer cases will be appealed. Secondly, the finality of determination for factual matters in trial courts will be more certain, which will improve the legal certainty in Russian civil procedure. Thirdly, trial courts will be less dependent on superior courts, which might be considered a problem of Russian civil courts.

In the opinion of the author, the benefits will outweigh the costs in a given case. One of the most evident objections to this idea is that implementing a legal institution from common law is hardly possible or might even be harmful to Russian civil law. If the clear error standard will be examined in detail, it will become obvious that this standard includes several principles and norms that can be implemented directly into Chapter 39 of the Code of Civil Procedure of the Russian Federation.

## **Conclusion**

The main aim of this paper was to set up the problem of standards of justification for the court decisions in broad terms. As it was discovered on the basis of civil procedures, procedural law can provide a vague and constrained, yet nevertheless very important framework for judicial argumentation. This thesis is one of the main suppositions that was elaborated in the present paper and must be verified in prospective research.

Another important conjecture of this treatise is that, firstly, the material rules of judicial argumentation may be deduced from substantive laws and court practice. Secondly, the clearer the rules of judicial argumentation are, the narrower the scope of their application. These theses will also be revised in future works. Thirdly, grounds for reversal in Russian civil procedure constitute the core of the material standard of judicial argumentation in Russia, but in US civil procedure the standards of review do not provide such a framework. As we have noticed, specific features of the standards of review emerged during historical development of US civil procedure. These features are derivative from the notion of deference, which constitutes the nature of standards for appellate review. From the author's point of view, the abovementioned differences may be connected with the influence of equity cases in general, which can be found in common law countries, or it may rest on the specific features of the historical development of US civil procedure. This inference shows that the scope of the field of judicial argumentation might be limited to the procedural law of procedure of a specific country or may be homogeneous within civil law and common law. These hypotheses must also be tested in future research.

At the same time, some important similarities were discovered between several grounds for reversal under Russian civil procedure and several standards of review that were developed in US civil procedure. These findings allowed the author to suggest that the grounds for reversal as an institution of civil procedure may be improved with regard to revision of the facts established by a trial court through implementation of some principles and rules that formed within US civil procedure.

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