



Law and Philosophy Library

Marisa Iglesias Vila

Facing Judicial Discretion

Legal Knowledge and Right Answers Revisited

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Facing Judicial Discretion Legal Knowledge And Right Answers Revisited

Aharon Barak



Facing Judicial Discretion Legal Knowledge And Right Answers Revisited:

Facing Judicial Discretion M. Iglesias Vila, 2013-03-09 In response to ETA's 1997 kidnappings and murders thousands of Spaniards attended mass demonstrations to express their contempt for violence as a means of political pressure The demand that public authorities prosecute and condemn those who directly or indirectly support ETA and its terrorist attacks was one of the most prevalent slogans in the marches Indeed the social response was aimed not only against the terrorist group but also against Herri Batasuna HB the political party that openly endorse ETA's armed actions in the Basque Country From the legal point of view it is interesting to examine what it is citizens are requesting from the government in the above mentioned case How do these collective claims translate into legal language One may think it fit to answer that Spanish citizens want violence to be met with the institutional punishment prescribed by the legal order Nonetheless it could also be argued that citizens in fact demand that certain kinds of behaviour be regulated by the law in their country While from the latter viewpoint citizens wish for the creation of new legal norms from the former they are just calling for the application of the law What reasons may render us inclined to sympathise with one of these two views rather than the other Which one of these two options is most appropriate At first sight this may appear to be a simple question

Facing Judicial Discretion Marisa Iglesias Vila, 2014-10-09 In response to ETA's 1997 kidnappings and murders thousands of Spaniards attended mass demonstrations to express their contempt for violence as a means of political pressure The demand that public authorities prosecute and condemn those who directly or indirectly support ETA and its terrorist attacks was one of the most prevalent slogans in the marches Indeed the social response was aimed not only against the terrorist group but also against Herri Batasuna HB the political party that openly endorse ETA's armed actions in the Basque Country From the legal point of view it is interesting to examine what it is citizens are requesting from the government in the above mentioned case How do these collective claims translate into legal language One may think it fit to answer that Spanish citizens want violence to be met with the institutional punishment prescribed by the legal order Nonetheless it could also be argued that citizens in fact demand that certain kinds of behaviour be regulated by the law in their country While from the latter viewpoint citizens wish for the creation of new legal norms from the former they are just calling for the application of the law What reasons may render us inclined to sympathise with one of these two views rather than the other Which one of these two options is most appropriate At first sight this may appear to be a simple question

The Judge in a Democracy Aharon Barak, 2009-01-10 Whether examining election outcomes the legal status of terrorism suspects or if or how people can be sentenced to death a judge in a modern democracy assumes a role that raises some of the most contentious political issues of our day But do judges even have a role beyond deciding the disputes before them under law What are the criteria for judging the justices who write opinions for the United States Supreme Court or constitutional courts in other democracies These are the questions that one of the world's foremost judges and legal theorists Aharon Barak poses in this book In fluent prose Barak

sets forth a powerful vision of the role of the judge. He argues that this role comprises two central elements beyond dispute: resolution bridging the gap between the law and society and protecting the constitution and democracy. The former involves balancing the need to adapt the law to social change against the need for stability; the latter judges ultimate accountability not to public opinion or to politicians but to the internal morality of democracy. Barak's vigorous support of purposive interpretation—interpreting legal texts for example statutes and constitutions in light of their purpose—contrasts sharply with the influential originalism advocated by U.S. Supreme Court Justice Antonin Scalia. As he explores these questions, Barak also traces how supreme courts in major democracies have evolved since World War II and he guides us through many of his own decisions to show how he has tried to put these principles into action even under the burden of judging on terrorism.

Judges as Guardians of Constitutionalism and Human Rights Martin Scheinin, Helle Krunke, Marina

Aksenova, 2016-04-29 There are many challenges that national and supranational judges have to face when fulfilling their roles as guardians of constitutionalism and human rights. This book brings together academics and judges from different jurisdictions in an endeavour to uncover the intricacies of the judicial function. The contributors discuss several points that each represent contemporary challenges to judging: analysis of judicial balancing of conflicting considerations; the nature of courts' legitimacy and its alleged dependence on public support; the role of judges in upholding constitutional values in the times of transition to democracy; surveillance and the fight against terrorism; and the role of international judges in guaranteeing globally recognized fundamental rights and freedoms. This book will be of interest to human rights scholars focusing on the issues of judicial oversight as well as constitutional law scholars interested in comparative perspectives on the role of judges in different contexts. It will also be useful to national constitutional court judges and law clerks aiming to familiarise themselves with judicial practices within other jurisdictions. Purposive Interpretation in Law Aharon

Barak, 2011-10-16 This book presents a comprehensive theory of legal interpretation by a leading judge and legal theorist. Currently legal philosophers and jurists apply different theories of interpretation to constitutions, statutes, rules, wills, and contracts. Aharon Barak argues that an alternative approach—purposive interpretation—allows jurists and scholars to approach all legal texts in a similar manner while remaining sensitive to the important differences. Moreover, regardless of whether purposive interpretation amounts to a unifying theory, it would still be superior to other methods of interpretation in tackling each kind of text separately. Barak explains purposive interpretation as follows: All legal interpretation must start by establishing a range of semantic meanings for a given text from which the legal meaning is then drawn. In purposive interpretation, the text's purpose is the criterion for establishing which of the semantic meanings yields the legal meaning. Establishing the ultimate purpose and thus the legal meaning depends on the relationship between the subjective and objective purposes that is between the original intent of the text's author and the intent of a reasonable author and of the legal system at the time of interpretation. This is easy to establish when the subjective and objective purposes coincide. But

when they don't the relative weight given to each purpose depends on the nature of the text For example subjective purpose is given substantial weight in interpreting a will objective purpose in interpreting a constitution Barak develops this theory with masterful scholarship and close attention to its practical application Throughout he contrasts his approach with that of textualists and neotextualists such as Antonin Scalia pragmatists such as Richard Posner and legal philosophers such as Ronald Dworkin This book represents a profoundly important contribution to legal scholarship and a major alternative to interpretive approaches advanced by other leading figures in the judicial world *Language and Legal Interpretation in International Law* Anne Lise Kjær, Joanna Lam, 2022 *Language and Legal Interpretation in International Law* sheds light on the complicated process of language interpretation that adjudicators judges and arbitrators and legal practitioners adopt when they act within international legal systems The book also analyzes the role that language and the diversity of languages and national legal cultures plays in different international legal systems *Limits of Legality* Jeffrey Brand-Ballard, 2010-05-26 Judges sometimes hear cases in which the law as they honestly understand it requires results that they consider morally objectionable Most people assume that nevertheless judges have an ethical obligation to apply the law correctly at least in reasonably just legal systems This is the view of most lawyers legal scholars and private citizens but the arguments for it have received surprisingly little attention from philosophers Combining ethical theory with discussions of caselaw Jeffrey Brand Ballard challenges arguments for the traditional view including arguments from the fact that judges swear oaths to uphold the law and arguments from our duty to obey the law among others He then develops an alternative argument based on ways in which the rule of law promotes the good Patterns of excessive judicial lawlessness even when morally motivated can damage the rule of law Brand Ballard explores the conditions under which individual judges are morally responsible for participating in destructive patterns of lawless judging These arguments build upon recent theories of collective intentionality and presuppose an agent neutral framework rather than the agent relative framework favored by many moral philosophers Defying the conventional wisdom Brand Ballard argues that judges are not always morally obligated to apply the law correctly Although they have an obligation not to participate in patterns of excessive judicial lawlessness an individual departure from the law so as to avoid an unjust result is rarely a moral mistake if the rule of law is otherwise healthy *Limits of Legality* will interest philosophers legal scholars lawyers and anyone concerned with the ethics of judging Proceedings of the ... World Congress of the International Association for Philosophy of Law and Social Philosophy (IVR) Internationale Vereinigung für Rechts- und Sozialphilosophie, 2004 Human Dignity Aharon Barak, 2015-01-26 Human dignity is now a central feature of many modern constitutions and international documents As a constitutional value human dignity involves a person's free will autonomy and ability to write a life story within the framework of society As a constitutional right it gives full expression to the value of human dignity subject to the specific demands of constitutional architecture This analytical study of human dignity as both a constitutional value and a

constitutional right adopts a legal interpretive perspective It explores the sources of human dignity as a legal concept its role in constitutional documents its content and its scope The analysis is augmented by examples from comparative legal experience including chapters devoted to the role of human dignity in American Canadian German South African and Israeli constitutional law

The Making of Constitutional Democracy Paolo Sandro, 2022-01-27 This open access book addresses a palpable yet widely neglected tension in legal discourse In our everyday legal practices whether taking place in a courtroom classroom law firm or elsewhere we routinely and unproblematically talk of the activities of creating and applying the law However when legal scholars have analysed this distinction in their theories rather than simply assuming it many have undermined it if not dismissed it as untenable The book considers the relevance of distinguishing between law creation and law application and how this transcends the boundaries of jurisprudential enquiry It argues that such a distinction is also a crucial component of political theory For if there is no possibility of applying a legal rule that was created by a different institution at a previous moment in time then our current constitutional democratic frameworks are effectively empty vessels that conceal a power relationship between public authorities and citizens that is very different from the one on which constitutional democracy is grounded After problematising the most relevant objections in the literature the book presents a comprehensive defence of the distinction between creation and application of law within the structure of constitutional democracy It does so through an integrated jurisprudential methodology which combines insights from different disciplines including history anthropology political science philosophy of language and philosophy of action while also casting new light on long standing issues in public law such as the role of legal discretion in the law making process and the scope of the separation of powers doctrine The ebook editions of this book are available open access under a CC BY NC ND 4.0 licence on bloomsburycollections.com

Discretion and the Quest for Controlled Freedom Tony Evans, Peter Hupe, 2019-08-21 Looking at discretion broadly as the exercise of controlled freedom this edited volume introduces insights from a range of social sciences perspectives Traditionally discussions of discretion have drawn on legal notions of the appropriate exercise of legitimate authority specified by legislators However empirical and theoretical studies in the social sciences have extended our understanding of discretion moving us beyond a narrow legal view Contributors from a range of disciplines explore the idea of discretion and related notions of freedom and control across social and political practices and in different contexts As this complex and important topic is discussed and examined both total control and unconstrained freedom appear to be illusions

[Making the Law Explicit](#) Matthias Klatt, 2008-09-08 Legal argumentation consists in the interpretation of texts Therefore it has a natural connection to the philosophy of language Central issues of this connection however lack a clear answer For instance how much freedom do judges have in applying the law How are the literal and the purposive approaches related to one another How can we distinguish between applying the law and making the law This book provides answers by means of a complex and detailed theory of literal meaning A new legal method is introduced namely the further development

of the law It is so far unknown in Anglo American jurisprudence but it is shown that this new method helps in solving some of the most crucial puzzles in jurisprudence At its centre the book addresses legal indeterminism and refutes linguistic philosophical reasons for indeterminacy It spells out the normative character of interpretation as emphasized by Raz and with the help of Robert Brandom's normative pragmatics it is shown that the relativism of interpretation from a normative perspective does not at all justify scepticism On the contrary it supports the claim that legal argumentation can be objective and maintains that statements on the meaning of a statute can be right or wrong and take on intersubjective validity accordingly This book breaks new ground in transferring Brandom's philosophy to legal theoretical problems and presents an original and exciting analysis of the semantic argument in legal argumentation It was the recipient of the European Award for Legal Theory in 2002 This book represents on the one hand a reception of Robert Brandom's important theory including applications of this theory in the field of legal philosophy and on the other an exploration of the limits of an appeal in legal interpretation to the text The enquiry thereby impinges upon the central juridico philosophical themes of meaning objectivity and normativity The author's work counts as a significant contribution to analytical jurisprudence and is deserving of a wide readership Robert Alexy Professor for Public Law and Legal Philosophy Kiel Klatt focuses on a very profound theory of concept formation and uses this theory in a creative way to solve classical problems of legal argumentation Aleksander Peczenik

Territorial Rights Tamar Meisels, 2007-09-20 Liberal defences of nationalism have become prevalent since the mid 1980's Curiously they have largely neglected the fact that nationalism is primarily about land Should liberals throw up their hands in despair when confronting conflicting claims stemming from incommensurable national narratives and holy texts Should they dismiss conflicting demands that stem solely from particular cultures religions and mythologies in favour of a supposedly neutral set of guidelines Does history matter Should ancient injustices interest us today Should we care who reached the territory first and who were its prior inhabitants Should principles of utility play a part in resolving territorial disputes Was John Locke right to argue that the utilisation of land counts in favour of its acquisition And should Western style settlement projects work in favour or against a nation's territorial demands When and how should principles of equality and equal distribution come into play Territorial Rights examines the generic types of territorial claims customarily put forward by national groups as justification for their territorial demands within the framework of what has come to be known as liberal nationalism The final outcome is a multifarious theory on the ethics of territorial boundaries that supplies a workable set of guidelines for evaluating territorial disputes from a liberal national perspective and offers a common ground for discussion including disagreement and for the mediation of claims

Studies in Legal Logic Jaap Hage, 2006-03-30 Studies in Legal Logic is a collection of nine interrelated papers about the logic epistemology and ontology of law All of the papers were written after the publication of the author's Reasoning with Rules and supplement the issues addressed therein Some of the papers are new others have been revised substantially after the publication of their original versions The emphasis is on

analysis not on logical technicalities Studies in Legal Logic contains chapters about the nature of norms the role of coherence in the law the nature of defeasibility the role of dialectics in law and artificial intelligence the statics and dynamics of the law and the consistency of rules Moreover it contains a new simplified and yet more powerful version of Reason based Logic and extensive examples of how it can be used for the analysis of legal reasoning The examples deal with legal theory construction case based reasoning and judicial proof

Constitutionalism and Legal Reasoning Massimo La Torre, 2007-04-10 This book which consists of three chapters and two appendices is intended to connect subjects that have usually been considered as detached or not strongly connected constitutionalism legal argumentation and legal ethics Its main contention is that contemporary constitutionalism pushes towards a new style of legal reasoning which needs to take into account moral criteria and principles and that eventually the interpretative and moralist approach will lead to a somewhat unorthodox and less authoritarian concept of law A constitution to be taken seriously and as a distinct and superior source of law will end up referring to some sort of constitutional justice or judicial review And constitutional reasoning and justice need to make recourse to principles but principles to be given an operative content should be elaborated through some form of moral reasoning This reasoning however if it does not want to betray the spirit of constitutional democracy and the very idea of a constitution as a special moment of self-determination could not be just Platonism a cognitivism without roots in the practice of public discourse and deliberation So that constitutionalism will not really do without a public sphere and some activism of the latter But if this is so the traditional concept of law based on hierarchy commands prescription sanction and in the last instance violence becomes obsolete A law which is a command cannot be congruent with a practice ruled by discourse that is I argue with constitution

Law as Symbolic Form Deniz Coskun, 2007-07-17 This book describes the rule of law as the reign of persuasion rather than the reign of force and democracy as the reign by persuasion rather than the reign by force It synthesizes a vast amount of current Cassirer literature and makes a contribution to jurisprudence The book is the first systematic elaboration on law as a symbolic form and it sheds new light on a still dark area of intellectual and jurisprudential thought

The Principle of Legal Certainty in EC Law J. Raitio, 2013-03-14 The intertwinement of EC law and national law may create unforeseeability in situations where EC law invades the national cases which gives rise to the very question of legal certainty in EC law This study contributes to the contemporary discussion which wrestles with the following questions in particular What have been the visions and objectives for European integration in the last decades How to describe European Union as a political entity and a legal system What is the relationship between legal certainty rule of law various general principles and human rights What is the core of legal certainty on the basis of the case study What kind of legal arguments and patterns of justification are there from a comparative perspective How has the term legal certainty been defined in the Nordic legal theory How predictable and acceptable are the interpretations of the European Court of Justice is it running wild Legal certainty relates to the principle of non retroactivity and the protection of legitimate expectations in

particular but more profoundly it can be related to the conceptual scale for weighing up and balancing between formal justice and material fairness in legal decision making This scale is illustrated by presenting the terms formal factual and substantive legal certainty Legal Method and the Rule of Law Sebastián Urbina,2002-08-31 We cannot see the world as it is because we face it in a contaminated vein That is our conceptual scheme and biological constitution condition our world view The legal normative world we are dealing with has some special features like the primacy of practical reason over theoretical reason and the primacy of the internal point of view over the external point of view Although it is not a feature of all legal traditions legal dogmatics is a privileged way of knowing legal normative object that is our legal orders But we are not undertaking as legal scholars an empiricist enterprise because among other reasons we are not interested in the reality in itself but in the relevant reality at least for us In this respect we do not only depend on theories like physicists but also on legal authoritative sources that is power and legitimacy Legal scholars and other participants in the legal life are not neutral observers of their own world trying to discover some hidden truth They are committed experts trying to describe justify and improve the legal order **The Rule of Law History, Theory and Criticism** Pietro Costa,Danilo Zolo,2007-05-06 Authors Costa and Zolo share the conviction that a proper understanding of the rule of law today requires reference to a global problematic horizon This book offers some relevant guides for orienting the reader through a political and legal debate where the rule of law and the doctrine of human rights is a concept both controversial and significant at the national and international levels **The Concept of Ideals in Legal Theory** Sanne Taekema,2002-12-31 Talk about law often includes reference to ideals of justice equality or freedom But what do we refer to when we speak about ideals in the context of law This book explores the concept of ideals by combining an investigation of different theories of ideals with a discussion of the role of ideals in law A comparison of the theories of Gustav Radbruch and Philip Selznick leads up to a pragmatist theory of legal ideals which provides an interesting new position in the debate about values in law between legal positivists and natural law thinkers Attention for law s central ideals enables us to understand law s autonomous character while at the same time tracing its connection to societal values Essential reading for anyone interested in the role of values or ideals in law

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Table of Contents Facing Judicial Discretion Legal Knowledge And Right Answers Revisited

1. Understanding the eBook Facing Judicial Discretion Legal Knowledge And Right Answers Revisited
 - The Rise of Digital Reading Facing Judicial Discretion Legal Knowledge And Right Answers Revisited
 - Advantages of eBooks Over Traditional Books
2. Identifying Facing Judicial Discretion Legal Knowledge And Right Answers Revisited
 - Exploring Different Genres
 - Considering Fiction vs. Non-Fiction
 - Determining Your Reading Goals
3. Choosing the Right eBook Platform
 - Popular eBook Platforms
 - Features to Look for in an Facing Judicial Discretion Legal Knowledge And Right Answers Revisited
 - User-Friendly Interface
4. Exploring eBook Recommendations from Facing Judicial Discretion Legal Knowledge And Right Answers Revisited
 - Personalized Recommendations
 - Facing Judicial Discretion Legal Knowledge And Right Answers Revisited User Reviews and Ratings
 - Facing Judicial Discretion Legal Knowledge And Right Answers Revisited and Bestseller Lists

5. Accessing Facing Judicial Discretion Legal Knowledge And Right Answers Revisited Free and Paid eBooks
 - Facing Judicial Discretion Legal Knowledge And Right Answers Revisited Public Domain eBooks
 - Facing Judicial Discretion Legal Knowledge And Right Answers Revisited eBook Subscription Services
 - Facing Judicial Discretion Legal Knowledge And Right Answers Revisited Budget-Friendly Options
6. Navigating Facing Judicial Discretion Legal Knowledge And Right Answers Revisited eBook Formats
 - ePub, PDF, MOBI, and More
 - Facing Judicial Discretion Legal Knowledge And Right Answers Revisited Compatibility with Devices
 - Facing Judicial Discretion Legal Knowledge And Right Answers Revisited Enhanced eBook Features
7. Enhancing Your Reading Experience
 - Adjustable Fonts and Text Sizes of Facing Judicial Discretion Legal Knowledge And Right Answers Revisited
 - Highlighting and Note-Taking Facing Judicial Discretion Legal Knowledge And Right Answers Revisited
 - Interactive Elements Facing Judicial Discretion Legal Knowledge And Right Answers Revisited
8. Staying Engaged with Facing Judicial Discretion Legal Knowledge And Right Answers Revisited
 - Joining Online Reading Communities
 - Participating in Virtual Book Clubs
 - Following Authors and Publishers Facing Judicial Discretion Legal Knowledge And Right Answers Revisited
9. Balancing eBooks and Physical Books Facing Judicial Discretion Legal Knowledge And Right Answers Revisited
 - Benefits of a Digital Library
 - Creating a Diverse Reading Collection Facing Judicial Discretion Legal Knowledge And Right Answers Revisited
10. Overcoming Reading Challenges
 - Dealing with Digital Eye Strain
 - Minimizing Distractions
 - Managing Screen Time
11. Cultivating a Reading Routine Facing Judicial Discretion Legal Knowledge And Right Answers Revisited
 - Setting Reading Goals Facing Judicial Discretion Legal Knowledge And Right Answers Revisited
 - Carving Out Dedicated Reading Time
12. Sourcing Reliable Information of Facing Judicial Discretion Legal Knowledge And Right Answers Revisited
 - Fact-Checking eBook Content of Facing Judicial Discretion Legal Knowledge And Right Answers Revisited
 - Distinguishing Credible Sources
13. Promoting Lifelong Learning

- Utilizing eBooks for Skill Development
- Exploring Educational eBooks

14. Embracing eBook Trends

- Integration of Multimedia Elements
- Interactive and Gamified eBooks

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