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In onderlinge samenhang bezien. De pragma-dialectische reconstructie van complexe argumentatie in rechterlijke uitspraken

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Summary

A decision by a court of law is usually justified by means of complex argumentation. Since the way in which the argumentation is structured has important consequences for the evaluation of a judicial decision, it is necessary to have a clear insight into the argumentation structure. The general aim of this study is to show how complex argumentation in judicial decisions can be reconstructed in a well-founded way.

The first part of the study deals with a pragma-dialectical characterization of the various types of complex argumentation judges may put forward to underpin their decisions. The second part addresses the matter of how to recognize and reconstruct various types of complex argumentation.

In the Netherlands, judges are obliged to justify their decisions not only to provide justiciables an insight into the steps by which the decision has been reached, but also to enable a higher judge to examine the judgment in question. In view of both these functions it is important to be able to determine how the argumentation in the justification is structured. In *Chapter 2* it is made clear that suggestions in legal and linguistic literature as to improve the comprehensibility of judicial decisions for justiciables do hardly ever address problems concerning the reconstruction of the relations between arguments. Obscurities with regard to the argumentation structure which may be of influence on the evaluation of a judgment by a higher judge, however, are explicitly put forward by means of grievances against the justification.

In *Chapter 3* an outline is given of which speech acts in a judicial decision are to be included in an analysis of complex argumentation in order to be able to analyse and to evaluate reconstruction problems. The pragma-dialectical discussion model offers an analytical framework indicating which speech acts can contribute to resolving a dispute at different stages of a legal process: the confrontation stage, the opening stage, the argumentation stage and the concluding stage. The analytical outline of a judicial decision differs in some

respects from one of a legal process. The confrontation stage of a judicial decision is extended with speech acts with which the judge indicates which propositions are not under discussion as well as with speech acts indicating which arguments, according to the judge, have been put forward by each of the parties. Complaints as to the justification in which the reconstruction of the relation between arguments is challenged, may be aimed at speech acts in both the confrontation stage and the argumentation stage of a judicial decision.

Starting from studies in argumentation theory, *Chapter 4* aims to ascertain which types of complex argumentation in judicial decisions should be distinguished. For the purpose of analysing complex argumentation, the pragma-dialectical argumentation theory distinguishes between coordinatively compound, multiple and subordinative argumentation. These distinctions are a suitable starting point for the analysis of complex argumentation in judicial decisions. A further distinction that has been made within coordinative argumentation between cumulative and complementary argumentation appears to be relevant in legal contexts as well. Coordinative argumentation may be put forward by a judge to remove (possible) doubt or criticism concerning the sufficiency of an argument, by advancing additional arguments. Complementary coordinative argumentation attempts to remove doubt or criticism aimed at an argument in an additional argument. Cumulative coordinative argumentation is used to present a decision with a fresh justification which then, in conjunction with the argument under criticism, will present sufficient justification for the decision.

To do justice to the fact that judicial argumentation has several functions at a time, it is, moreover, necessary to distinguish asymmetrical coordinative argumentation. From the point of view of formal justification requirements, a decision may be sufficiently justified by only one argument. With a view to the acceptability of a decision for the parties involved, a second argument may be put forward as a reaction to criticism which is perhaps irrelevant from an internal perspective, but relevant from an external perspective. In this way it is possible to distinguish asymmetrical coordinate argumentation in which one of the arguments, in principle, forms sufficient justification for the decision, whereas the other does not.

In *chapter 5* it becomes clear that the way in which legal studies tend to approach complex argumentation does not encourage further adaptation or indeed change of the various types of argumentation structures which are distinguished in argumentation theory. They do, however, provide insight

into how complex legal argumentation comes into being. Models for the rational reconstruction of judicial decisions in theoretical approaches mainly address vertically connected arguments. A distinction is made between the internal and the external justification of a decision. In this way an insight is provided into the sort of arguments that, in principle, constitute subordinative argumentation. If these studies begin to address the structural coherence between arguments which may be put forward on both levels, only a broad distinction is made between dependent and independent arguments.

Empirical approaches of legal argumentation describe the regularities apparent in the ways in which decisions are justified in legal practice. On the level of internal justification of decisions, the complexity of the argumentation depends on the structure of the legal rule and on just how elaborately the facts are addressed. The complexity of the argumentation on the level of external justification is determined by the question whether and in how far (possible) objections against the interpretative decisions taken on this level are addressed.

Part two of this study examines how the types of complex argumentation that are distinguished in part one, can be recognized in judicial decisions and which clues can be instrumental for reconstructing the argumentation structure.

Chapter 6 sets out to indicate which clues for the reconstruction of complex argumentation are provided by the phrasing and the structure of the legal rule(s) underlying the decision. Apart from the cumulative or alternative relation between conditions of a statutory rule that have to be met in order to bring about a legal consequence, the character of the enumeration of these conditions too are indicative of the argumentative relation between the considerations. By determining whether the conditions that have to be met are either limitative or enunciative, it becomes possible to ascertain if and how certain arguments that are brought forward in a judicial decision should be regarded as part of the justification. If the enumeration of conditions is limitative, an argument that does not match one of these conditions, cannot serve as a direct defence of the decision. If the enumeration of conditions is enunciative, these speech acts may be regarded as part of multiple or coordinative argumentation. Jurisprudence shows that unclearness as to the relation between conditions or the character of their enumeration may result in interpretative difficulties that may have serious consequences for the evaluation of the argumentation. These interpretative difficulties could be

caused by lexical or syntactical ambiguities but they can also arise in the absence of explicit indications or as a result of the deontic modality in the description of the legal consequence.

Chapter 7 contains pragma-dialectical clues for the assessment of relations between arguments in case the structure of the legal rule(s) offers no clues. Apart from explicit indicators as to the relation between arguments, clues may be found in the phrasing of the arguments and the standpoint in the judicial decision. Dialogical clues too may help to ascertain the relation between arguments. Explicit dialogical clues may be provided by the way counter-arguments are addressed in the argumentation stage of a judicial decision. The relation between pro- and counter-argumentation is analysed as cumulative or as complementary coordinatively compound argumentation. It is only in the latter instance that the relation between arguments can be asymmetrical. Implicit dialogical clues may be derived from the relation between the arguments as put forward by the parties and expressed in the confrontation stage of a judicial decision.

In *Chapter 8* an analysis is given of the relation between an *obiter dictum* and other considerations as put forward in the justification of a decision. An *obiter dictum* can have an argumentative function and be part of multiple or coordinatively compound argumentation. In both cases the *obiter dictum* is 'improper' because it constitutes an argument which is, whether or not in conjunction with other arguments, in direct support of the standpoint under discussion. An *obiter dictum* is, on the other hand, 'proper' if it contains an argument which is part of asymmetrical coordinative argumentation or if it supports a standpoint which is outside the realm of the decision.

This is also true of cases in which a consideration does not have an argumentative function but is intended to elucidate the decision. From analyses of jurisprudence in which there is a dispute as to whether the consideration is a proper *obiter dictum* or not, it appears that certain words and expressions are mistakenly considered to indicate 'proper' *obiter dicta.*

Chapter 9 indicates which balancing strategies are applied in support of justifications of interpretative decisions and how these strategies can be reconstructed. Pro- and counter-argumentation may consist of either one or a variety of interpretative methods which are weighed. In both cases the counter-argument is analysed as supportive of the opposite standpoint. The balancing strategy which is applied may imply that a counter-argument is rejected because it is incorrect. If, however, the propositional content of the counter-argument is acceptable this argument may be rejected because it is

irrelevant or insufficient to justify the opposite standpoint. The counter-argument may also be rejected because of insufficient argumentative force compared to that of the pro-argument. The argumentation then contains a justification for the counter-argument to be of less weight then the pro-argument. The relation between the arguments that are weighed is, in all cases, coordinative. Whether or not this coordinative argumentation is asymmetrical, depends on one's theoretical point of view concerning the justification requirement in view of these types of decisions.