Van omgekeerde strekking. Een pragma-dialectische reconstructie van a contrario-argumentatie in het recht
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Summary

In this study a reconstruction of e contrario reasoning has been made in order to create a set of instruments for the evaluation of this judicial argumentation scheme. The reason for the research is the often mentioned unsoundness of this argument type in jurisprudence and in the practice of law, plus the lack of clarity of why the argument would be unsound. This study shows that one of the main causes of this vagueness is the ambiguity of the concept of e contrario reasoning in literature. Closer reading of literature reveals that different authors have different notions of the type of reasoning e contrario reasoning actually consists of, while at the same time no one seems to notice the confusion.

This study argues that two fundamentally different types of reasoning are hidden behind the term 'e contrario reasoning'. I have called these modern and classic e contrario reasoning. In chapter two modern e contrario reasoning is described. This is the kind of reasoning in which one refuses to apply a certain legal rule analogically. Modern e contrario reasoning is defined by the context in which the reasoning occurs and by the conclusion that it defends. The context concerns the legal question that has arisen, the question whether facts that are not explicitly mentioned in the disputed legal rule can be dealt with correspondingly. The conclusion drawn by e contrario reasoning is that the legal rule must not be applied to these facts. The term modern e contrario reasoning refers to the arguments that support this decision.

The literature does not mention any restrictions for the type of arguments that can be part of e contrario reasoning. However, argument types that are mentioned by many authors are an appeal to relevant differences between the facts at hand and the legal facts, as well as an appeal to one or more reasons that require a strict interpretation of a legal rule, like the prohibition of analogy in criminal law. An example of modern e contrario reasoning which uses the first kind of argument concerns the legal rule that prohibits women to remarry within 306 days after the annulment of their marriage by death of their husband. The arguments for the decision that this legal rule is not applicable to men who lost their wives by death could be called e contrario reasoning. In the supporting arguments could be stated that men and women differ in relevant respects with respect to this rule, for women give birth to children and men don’t and there-
fore the problem of legal uncertainty of parenthood only exists when women remarry while being pregnant of their former husband.

The description of classic e contrario reasoning is the subject of chapter three. In classic e contrario reasoning an implicit legal rule is deduced from an explicit legal rule. The implicit legal rule is the reversal of the explicit one for it connects the opposite legal consequence to the opposite legal facts. An example can be made on the basis of the legal rule that settles that a private school is not allowed to refuse access to a student if that student is not able to attend a state school within a reasonable distance from his home. If one concludes from this legal rule that if a student is able to attend a state school within a reasonable distance from his home, the private school is allowed to refuse access to this student, one uses classic e contrario reasoning. Formalised the argument runs as the following illogical argument: the legal rule if $p$, then $q$ is supposed to contain another legal rule if not-$p$, then not-$q$.

It is important to distinguish between these two types of reasoning, because both require a different analysis and evaluation. Chapter four shows how e contrario reasoning is analysed by authors who use a classic description and those who use a modern description of e contrario reasoning. Both make use of a similar logical analysis, in which a logical problem is noticed for the deduction of the conclusion from the premise(s). In classic e contrario reasoning the deduction of the reversed legal rule is only valid if the existing legal rule can be interpreted as if the legal facts (the antecedent, $p$) are a necessary condition for the legal consequence (the consequent, $q$). This analysis has implications for the evaluation of the argument: in deciding on the soundness of a particular case of classic e contrario reasoning one has to judge the correctness of this interpretation of the logical status of the legal rule.

Authors who describe modern e contrario reasoning generally analyse this argument in rather the same way, i.e. with a legal rule containing the same logical status. It is argued that this analysis does not hold. The reason for this is that the standpoint defended by e contrario reasoning is not a standpoint concerning the applicability of a legal consequence but concerning the applicability of a legal rule. This is because the supportive arguments modern e contrario reasoning can consist of, can only defend such a standpoint and cannot defend a standpoint in which the legal consequence of the legal rule is reversed.

One can say that it is rather odd that one term covers two fundamentally different types of reasoning. Chapter three also presents a possible explanation for this. It is suggested that in the period of legalism classic e contrario reasoning might have been mixed up with the predecessor of modern e contrario rea-
soning, the *argument of silence*. While both types of reasoning are very alike at first sight, it seems plausible that when modern *e contrario* reasoning developed from the argument of silence, this happened under the name *e contrario* reasoning. Explaining modern *e contrario* reasoning as a result of confusing the argument of silence with the classic *e contrario* argument would explain why the expression ‘*e contrario*’ does not seem to have any meaning for the modern *e contrario* argument. After all, modern *e contrario* reasoning does not contain a specific kind of reasoning based on contrasts, but is only defined by the context in which it occurs and the standpoint it defends. In contrast, classic *e contrario* reasoning might very well be represented by the phrasing ‘reasoning from contrasts’, for it concerns the reversal of a legal rule.

Chapter three also gives an explanation for the fact that the existence of two notions of *e contrario* reasoning have been overlooked so often. Various reasons can be mentioned, such as the vague descriptions and mixed up versions of *e contrario* reasoning in literature, the similar context in which both arguments occur (the actual facts are not mentioned in the legal rule), standpoints that seem to be similar (due to the fact that the non-applicability of the legal rule very often entails a situation similar to the situation reached on the basis of a reversal of the legal rule), ambiguous examples that can be explained in both ways, and last but not least, specific subtypes of modern *e contrario* reasoning that seem to match classic *e contrario* reasoning.

The findings of the chapters two, three and four form the basis of the development of a set of instruments for the analysis and evaluation of *e contrario* reasoning. This is done in the chapters five and six. The method used here is the pragma-dialectical theory of argumentation. In this theory argumentation is viewed as a speech act, the soundness of which depends on the critical reactions it resists. In order to obtain the critical questions by which modern and classic *e contrario* reasoning must be evaluated, reconstructions have been made of the argumentation structure of these reasoning types. The aim of this reconstruction is to get an overview of the explicit and implicit elements that are part of *e contrario* reasoning and of their connection to each other and to the standpoint. A reconstruction generates the critical questions that are relevant for the evaluation, for each element of the argumentation structure can be questioned.

In chapter five the role that modern *e contrario* reasoning fulfils in a judicial process is examined. Modern *e contrario* reasoning can be characterised as a response to the standpoint of the opponent in which is stated that a legal rule must be applied. Therefore, the protagonist of modern *e contrario* reasoning generally is the defending party or the judge who rejects the claim of the plain-
The standpoint of e contrario reasoning functions as a main argument in such a structure. This argument can be maximally defended by coordinatively compound argumentation, in which the first argument states that the legal rule is not literally applicable to the facts at hand and the second argument that the legal rule must not be applied analogically to those facts. Whether this maximal defence is needed in a certain case depends on the dialogical context, i.e. the question whether the opponent defended his standpoint to apply the legal rule both with literal applicability and with analogical applicability.

Chapter five also examines how certain subarguments that can be part of modern e contrario reasoning must be reconstructed. Besides the two arguments already mentioned – the appeal to relevant differences between the facts at hand and the facts mentioned in the legal rule, and the appeal to reasons that require a strict interpretation of the legal rule – the appeal to the systematic argument is also dealt with here. Systematic e contrario reasoning has been mentioned in chapter three as one of the reasons for the confusion between modern and classic e contrario reasoning. The analyses of the subarguments of modern e contrario reasoning point out that the soundness of the first and second subargument depends on the satisfaction that the answers to the critical questions in the actual case may give. In contrast, the analysis of systematic e contrario reasoning shows that this type of reasoning is inherently weak. One of the necessary critical questions can never be answered satisfactorily.

Chapter six examines which role a reversed rule plays in the argumentation in support of the allowance or rejection of a legal claim. In contrast to modern e contrario reasoning, classic e contrario reasoning is not necessarily a reaction to a standpoint in which it is stated that a legal rule must be applied. A reversed rule can be the foundation for a conclusion about a legal consequence. Therefore, the reversed legal rule might also be used by the plaintiff to sustain his claim. The argumentative role of the legal rule then is being a suppressed premise in the main argumentation by which a legal consequence can be obtained from an appeal to the facts at hand and the rule that covers these facts. However, the reversed rule can also play a part at another level in the argumentation structure in defence of a legal claim. It is shown that a reversed legal rule can be used in the same manner as a 'normal' legal rule: it can also be applied analogically, a fortiori and in a reductive way.

The pragma-dialectical reconstruction of classic e contrario reasoning shows that the evaluation includes more than just the logical structure of the legal rule in which the legal facts are supposed to be a necessary condition for the occurrence of the legal consequence. The reconstruction made in this study gives an
overview of all elements that are presupposed in the application of a legal rule in a legal procedure. All these elements generate their own critical questions. On the basis of an analysis of the legal discussion about Supreme Court judgements which are based on the application of a reversed rule, one can conclude that these critical questions are indeed relevant in the practice of law. By means of the reconstruction model it can also be decided which critical reactions are adequate and which are not.