Van overeenkomstige toepassing. De pragma-dialectische reconstructie van analoge-argumentatie in rechterlijke uitspraken
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Summary

When a judge resolves an interpretation problem in deciding a legal case, he can choose different types of argumentation to defend his solution. One of these types is analogy argumentation. When using this type of argumentation a judge resolves an interpretation problem by analogically interpreting a legal rule or analogically applying a legal rule in order to fill a gap in the law. The central question in this study is how one can analyse and evaluate analogy argumentation in judicial decisions in a well-founded way.

When reading publications about analogy argumentation in legal decision making, one must conclude that the term ‘legal analogy argumentation’ as such is not sufficiently clear and that a number of analysis and evaluation problems remain unresolved. As a first step to finding a solution to these problems Chapter 2 gives an outline of the interpretation problems that may arise in the process of legal decision making and of the types of interpretative arguments that may be used to resolve these interpretation problems. One of the conclusions in this chapter is that there is no such thing as one type of legal analogy argumentation. Analogy argumentation can be used to resolve many different kinds of interpretation problems and, hence, analogy argumentation must be analysed and evaluated in the given context of a specific problem of interpretation. The statutory interpretation model of MacCormick and Summers has been taken as a basis for developing such a contextual approach.

Following the analysis of the role of analogy argumentation in the judicial decision making process, Chapter 3 describes how analogy argumentation as a product is reconstructed in the various approaches in legal theory. The chapter focuses on the theoretical characterization of analogy argumentation, on the process of analysing analogy argumentation and on the norms formulated for evaluating such argumentation. The main conclusion in this chapter contends that these approaches in legal theory provide solutions only to parts of
the problems of characterizing, analysing and evaluating analogy argumentation.

Chapter 4 contains the basic principles for solving the problems discussed in the previous chapter. First it explains how analogy argumentation can be described in a pragma-dialectical perspective. Within this perspective analogy argumentation is characterized as a speech act whereby the judge applies a comparison-based argumentation scheme in order to justify a practical interpretation of a legal rule in a critical discussion. This general characterization is elaborated in greater detail in the remainder of the chapter. First it is explained in which stage of a critical discussion an interpretative standpoint and analogy argumentation are to be situated. Then analogy argumentation is described at the communicative level by indicating how the presentation of an interpretative standpoint and the analogy argumentation may be analysed as complex speech acts. Finally, analogy argumentation is characterized at the interactional level by analysing it as an argumentation schema governed by specific, critical standards of soundness.

In the subsequent chapters of the thesis, this general characterization of analogy argumentation serves as the starting point for further analysis of the various types of interpretative standpoints that are supported by analogy argumentation, the elements of analogy argumentation, and the various criteria that are in place for determining the acceptability of analogy argumentation.

Chapter 5 establishes a general framework for the analysis and argumentation in judicial decisions, explaining how first order and second order argumentation in judicial decisions can be analysed, and which criteria can be distinguished for the evaluation of the acceptability of this argumentation. Based on this general framework for analysis and evaluation, Chapters 6 and 7 focus on the specific problems that may arise in the analysis and evaluation of the various applications of analogy argumentation.

Chapter 6 contains a typology of analogy argumentation for resolving problems of interpretation and qualification, showing how these types of analogy argumentation can be analysed and evaluated. Interpretation problems arise if it is unclear how a legal rule is to be applied. The court will have to interpret the rule before a final decision can be taken. Where analogy argumentation is used to solve problems of interpretation, a distinction is made between norm analogy, case analogy based on real cases and case analogy based on hypothetical cases. Norm analogy can be defined as the method of defending a certain interpretation of a legal rule by referring to one or more comparable legal rules.
that are interpreted in the same way. Case analogy is a method of defending a certain interpretation of a rule of law by referring to one or more real or hypothetical court decisions in which a specific interpretation was given to the legal rule in comparable circumstances. Qualification problems arise if it is unclear whether a fact can be qualified as a legal fact (as described in the legal rule). The solution to problems of interpretation and qualification will culminate in a decision in which the court defends a certain interpretation or qualification. These decisions are defended on the basis of second order argumentation, in which the courts directly rely on analogy argumentation.

Taking the pragma-dialectical criteria for using analogy argumentation and MacCormick and Summers’ model for statutory interpretation as a starting point, this chapter shows what logical, procedural and substantive criteria are relevant for the evaluation of analogy argumentation that is used to resolve problems of interpretation or qualification. The criteria for evaluating the acceptability of analogy argumentation provide a tool for reconstructing the argumentation more systematically and completely than is possible under the approaches described in chapter 3.

Analogical argumentation can be used not only to settle problems of interpretation or qualification, but also to fill gaps in the legal system. In the latter type of cases, a judge (re)constructs a new legal rule in order to give a decision by analogically applying an existing statutory rule that is meant for another (albeit comparable) case to an unregulated matter. In Chapter 7, the issue of analysing and evaluating this analogical construction is addressed in detail. First of all, the chapter describes the kind of problems for which this form of analogy argumentation is used and the specific goal achieved by a judge using this instrument. Then, attention is given to the explicit and implicit elements that constitute analogy argumentation, and its basic structure. Like analogical interpretation, analogical construction is defined as a type of second order argumentation in the judge’s justification of a decision. In this second order argumentation legal principles form the (implicit) starting point for analogical construction at two levels.

Following the discussion of the problems that exist in analysing analogical construction, the question of how the acceptability of this type of argumentation can be evaluated is addressed. Examples from Dutch court decisions illustrate the different criteria for the evaluation. The case of Quint v. Te Poel illuminates that norms of evaluation and guidelines for analysis allow for a more systematic and complete reconstruction of the legal reasoning process than
current approaches permit. The reconstruction of this particular case shows that the specific nature of analogy argumentation resides in the rules for applying this argumentation, rather than in a particular feature in the logical form.

The basic argumentation structure of analogical construction as formulated in Chapter 7 is simple. Empirical research in the field of legal interpretation shows that, in many cases, the argumentation presented for an analogical construction is complex rather than simple. One of the conclusions drawn in Chapter 3 is that the analysis-based approaches to analogy argumentation do not do justice to that complexity. In most cases, analogy argumentation is reconstructed as a simple form of argumentation, that consists of two premises and a conclusion. Chapter 8 focuses on the question of how to analyse and evaluate complex argumentation in analogical construction. First, reference is made to the reasons put forward by legal theorists for explaining complex argumentations in judicial decisions, distinguishing between the various levels of complexity. Then, it is shown how the pragma-dialectical approach to complex argumentation provides indications for analysing complex analogy argumentation. Taking this approach as a starting point, several forms of complex analogical construction are distinguished. Examples from Dutch case law illustrate how the criteria for evaluating analogy argumentation can be used to reconstruct these types of complex analogical construction.