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Publication date
2007

Published in
Dissensus and the search for common ground: OSSA 2007

[Link to publication](#)

Citation for published version (APA):

Plug, H. J. (2007). Pitfalls in the evaluation of argumentation in the legislative process. In H. V. Hansen, C. W. Tindale, J. A. Blair, R. H. Johnson, & D. M. Godden (Eds.), *Dissensus and the search for common ground: OSSA 2007* Ontario Society for the Study of Argumentation. <http://scholar.uwindsor.ca/ossaarchive/OSSA7/papersandcommentaries/118/>

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Pitfalls in the Evaluation of Argumentation in the Legislative Process

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ABSTRACT: The quality of argumentation in parliamentary debates may play an important role in the evaluation of legislative decisions. In this contribution I will discuss shortcomings in the application of the pragma-dialectical argumentation theory for the analysis and evaluation of the argumentation in a parliamentary debate on the penalization of stalking. The case illustrates that institutional preconditions of a specific type of debate should be taken into account in order to be able to give an adequate analysis of these debates.

KEYWORDS: argumentation, institutional context, legislative decision, legislative discussion, parliamentary debate.

1. INTRODUCTION

There are various reasons to analyse discussions on legislation and to evaluate the acceptability of argumentation in the process of legislation. When, for instance, in a judicial decision the matter of the interpretation of a legal rule is raised, one or the other interpretation may be justified with an appeal to the arguments raised at the time of the legislative process. This may cause the party that does not agree with a certain interpretation to go into the arguments raised at the time. Not only the acceptability of the argumentation of the opponent, the acceptability of the argumentation put forward in favour of a certain interpretation too, may be may be the target of criticism (Plug, 2005).

Since the acceptability of the argumentation for important, influential decisions such as legislative decisions is indicative of the quality of our democracy, this may be yet another reason to verify whether the legislative discussions meet certain standards of reasonableness (Steiner, Bächtiger et al, 2004).

The pragma-dialectical argumentation theory by van Eemeren and Grootendorst (1984) provides criteria to assess the quality of argumentation. In order to be able to apply these criteria in an institutional context such as the legislative process, it has first to be determined which context-related criteria, both general and specific, play a part in the evaluation of the justification of, in this particular case, legislative decisions.

This contribution aims to discuss several problems that may arise if a pragma-dialectical analysis and evaluation of argumentation in the legislative process does not take sufficiently into account the specific context in which the argumentation has been put forward.

2. THE PRAGMA-DIALECTICAL APPROACH IN INSTITUTIONAL CONTEXTS

Van Eemeren and Grootendorst's pragma-dialectical argumentation theory employs the model of a critical discussion for the analysis and evaluation of argumentative discourse. This theory regards argumentation as part of a critical exchange of ideas aimed at solving a difference of opinion. The theoretical model specifies the distinctive stages in the process of solving a difference of opinion as well as the relevant speech acts in this process. The rules for a critical discussion provide a useful tool to verify whether a speech act frustrates the solution of a dispute and, as such, should be treated as a fallacy.

In order to be able to adequately apply the pragma-dialectical tools in the analysis and evaluation of argumentation, the specific context in which the argumentation has been put forward has to be taken into account.¹ As far as the heuristic function of the theoretical model is concerned, van Eemeren and Grootendorst point out that knowledge of textual genres as well as of formal and informal conventions in a certain institutional context may supplement the model for critical discussion when selecting elements relevant for the solution of a dispute. Knowledge of conventions pertaining to institutional contexts may, moreover, prove useful for the justification of an analytical reconstruction of an argumentative text or discussion (van Eemeren en Grootendorst 2004: 111).

Law provides us with an institutional context in which the pragma-dialectical insights have been applied extensively. Feteris (1999) considers legal argumentation as a specific institutionalised form of argumentation and analyses, on the basis of the pragma-dialectical model, both civil and criminal proceedings. Feteris and various other scholars demonstrate how the model of the critical discussion can be used to analyse and evaluate judicial decisions.

The institutional context in which legislative decisions are taken does show similarities with judicial contexts, for the analysis and evaluation of legislative discussions however, the pragma-dialectical argumentation theory is used significantly less frequently. In this respect Royakkers and van Klink (2000) are the exception to the rule. In their analysis and evaluation of the argumentation put forward in the proposition of a bill which penalizes stalking, they do make use of pragma-dialectics. A closer look at their approach reveals some of the complications which may come to light in the argumentative reality in a pragma-dialectical analysis of (part of) discussions and how these complications may influence the evaluation. In the following paragraph I will briefly outline the procedural background of the bill and the evaluation of the argumentation for it by Royakkers and van Klink in their article 'Drogredenen in het parlementaire debat' (*'fallacies in parliamentary debates'*) (2000).

3. FALLACIES IN THE DISCUSSION ON THE PENELIZATION OF STALKING

In 1997 three MPs, Dittrich, Swildens-Rozendaal and Vos, introduce a bill aimed at adding to the Dutch Criminal Code a new article in which stalking will be punishable.

¹ Van Eemeren and Houtlosser (2005a) emphasize that in view of the rhetorical dimension of strategic manoeuvring, it is all the more important to take the communicative context into account when analysing and evaluating argumentative moves. This can be done by account for the type of argumentative activity in which these moves take place.

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Before the bill is introduced the Minister of Justice makes it clear that she does not believe in this bill as she has her doubts as to its effectiveness. These doubts explain why the Minister did not submit the bill herself, as is common practice. On 31 August and 1 September 1999 the bill is put forward and discussed in the Second Chamber (of the Dutch Parliament).² On 14 September 1999 the bill is passed by acclamation.

In their article Royakkers and van Klink (2000) discuss 'the most striking fallacies' that have been committed by the bill's initiators during the parliamentary debates in the Second Chamber. According to the authors it is important to expose fallacies in parliamentary debates since fallacies could have detrimental effects on public opinion. Royakkers and van Klink are of the opinion that there is no place for dubious discussion techniques in a reasonable solution of political differences of opinion, or, at least, that parliamentary debates should not be overrun by such techniques. They use the pragma-dialectical argumentation theory as a starting point for their search for fallacies in the legislative discussion on the penalization of stalking. In their evaluation of legislative debates, the authors limit themselves to three subjects that (could) give rise to differences of opinion: 'the clearness of the notion of 'personal privacy', the effectiveness of the civil approach of stalking and the effectiveness of the suggested penalty clause. They observe different kinds of fallacies in discussions on these subjects. The first fallacy they distinguish is the 'argument from authority', the second is 'the fallacy of withholding information', the third is 'the fallacy of misleading repetition', the fourth is 'hasty generalization' and the 'straw man' is the fifth fallacy.

The authors believe that the quality of forming public opinion could be threatened by an excess of fallacies in parliamentary debates on bills and conclude that the quality of the current debate leaves much to be desired. Their critical evaluation is published after the bill has been passed by the Second Chamber but before the First Chamber's debate on the bill on 16 May 2000. In the following paragraph I will discuss the reception of Royakkers and van Klink's criticism in the First Chamber.

4. THE PERCEPTION OF CRITICISM IN THE FIRST CHAMBER

During the debates in the First Chamber a number of Members, among whom de Wolff (the Green Party), Holdijn (Reformed Party), Kohnstamm (Progressive Liberal Democrats), Witteveen (Dutch Labour Party) and Rosenthal (Conservative Liberal Democrats), state their views on the criticism as presented by Royakkers and van Klink. It is during the same debate that Dittrich, who, as one of the initiators of the bill has to defend the bill in the First Chamber, reacts to the criticism in Royakkers and van Klink's article. The first contribution to the debate is from Rosenthal and he rejects the criticism on the argumentation of the bill's initiators as follows.

Mr Rosenthal (Conservative Liberal Democrats): The conservative faction, at this point, does not feel the need to support the (in the eyes of the conservative faction somewhat a-political) criticism of Royakkers and van Klink as published in NJB magazine, suggesting that the members who submitted the bill excessively resort to so-called fallacious arguments. Politics, we assumed, is rhetoric. Or so our colleague Witteveen taught me. Everyone has his own arguments, which are

² The Dutch Parliament consists of two Houses, the Lower House, also known as the House of Representatives or the Second Chamber (Tweede Kamer) and the Upper House, also known as the Senate or the First Chamber (Eerste Kamer).

then labelled fallacious by others. The moment our colleague de Wolff speaks of 'lethal etc', I inevitably spot the genesis of a fallacy. This could keep us busy for any length of time.
(Proceedings of the First Chamber, 16 May 2000)

Rosenthal believes that the evaluative criteria employed by Royakkers and van Klink in their evaluation of legislative debates do not apply to politics. As far as he is concerned there would be no end to start revealing fallacies in politicians' contributions to legislative discussions. Politicians have always resorted to rhetorical means which other may then label fallacious. According to Rosenthal it is, in other words, not entirely clear on what grounds one may conceive of a contribution in a political context as a fallacy.

Witteveen (Dutch Labour Party), to whom Rosenthal refers, is also of the opinion that the criteria employed by Royakkers and van Klink are not adequate for the evaluation of argumentation in legislative debates.³ From his contribution to the debate on the bill it becomes clear that he deploys different criteria in order to label discussion moves as fallacious. Exactly which criteria he does employ, however, remains unclear.

Witteveen (Dutch Labour Party): Mister Speaker! My admiration for the bill and for those by whom it was submitted has grown in the course of the evening. In my opinion the questions were very adequately answered and I did not detect any fallacy at all. There is no doubt in my mind that van Klink and Royakkers, on the contrary, would be able to do so and would, furthermore, select fallacies from my words and from those of other debaters, if only because we often do use arguments from authority. This is, after all, part and parcel of political rhetoric, even though van Eemeren and Grootendorst might disapprove.
(Proceedings of the First Chamber, 16 May 2000)

Witteveen's argument that one should not assess the use of an argument from authority in political (legislative) debates in the same way as one would in non-political discussions, is a case in point. He mistakenly assumes that van Eemeren and Grootendorst's pragma-dialectical approach always labels an argument from authority as fallacious. On the contrary, more than once they have argued that the use of an argument from authority should not be labelled a fallacy, an *argumentum ad verecundiam*, as a matter of course. Moreover, they indicate that the use of an argument from authority may even prove an effective argumentation technique (1992).

At the end of the debate in the First Chamber, it appears that Dittrich too is not at all convinced that the criticism of Royakkers and van Klink is justified. He puts forward the following objections.

Mr Dittrich: It would very much like to give a moment's thought to a number of remarks, made by almost all members, as to the article in NJB magazine regarding fallacies in parliamentary debates. (...) We do feel that they [the writers of the article] seem to have lost all sense of perspective in their approach to our bill. (...) We disagree with their main argument since parliamentary debates know different phases and different rounds. It all starts with a written phase which is followed by a verbal presentation in the Second Chamber. Then the bill is dealt with in written form by the First Chamber, followed by a debate. The debate in the Second Chamber is strikingly absent in the NJB article. Some arguments – fallacies – are selected from a certain phase and then criticized, yet our answers, during the debates for instance, are completely ignored (...). The idea of the article, having a closer look at fallacies, is, in our view, not suited for elongated discussions such as these. The book of Professor van Eemeren and the late Mr Grootendorst [...] is meant to indicate which

³ In the past Witteveen published a number of books and articles on the use of rhetorical methods in legislative discussions (for instance, 1988).

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arguments in a discussion have not been put forward correctly. However, especially if the discussions took place in phases, often repeating the same questions and answers, it is very hard to maintain that we witnessed the fallacy of misleading repetition. If you believe something and you are trying to answer questions using the strongest possible arguments, it is indeed very unpleasant to see someone label them as fallacies. [...] Professor van Eemeren's book is, nonetheless, an interesting read for politicians. In the political arena fallacies are used by many, wittingly or unwittingly. However, if you believe in a point of view and a number of people support you – Professor Groenhuijsen for instance – it is only to be expected that you quote scholars who support your views [...]. It is not our task to set the stage for people who disagree with us.
(Proceedings of the First Chamber, 16 May 2000)

Dittrich wonders whether Royakker and van Klink's approach is at all correct. In their evaluation they have (in Dittrich's eyes *mistakenly*) disregarded certain argumentative contributions, thus ignoring procedural particularities of legislative debates. He believes that these particularities should be taken into account in the evaluation of certain debating techniques. As to the use of arguments from authority, he not only doubts their fallacious nature but also questions the scope of the argumentative obligations on the part of the standpoint's protagonist.

5. SHORTCOMINGS IN THE APPLICATION OF PRAGMA-DIALECTICS

From these reactions it becomes apparent that politicians in the First Chamber reject Royakkers and van Klink's criticism on a number of grounds. In the first place, there are doubts as to the fallacious nature of a certain contribution in the political context of a legislative debate. Secondly, there are doubts as to the acceptability of Royakkers and van Klink's use of pragma-dialectics in their analysis and evaluation of the initiators' argumentation.

I will set out to assess these doubts on the basis of one of the subjects of discussion at which Royakkers and van Klink's criticism is aimed: the civil approach to the problem of stalking. The initiators of the bill that proposes to penalize stalking are motivated by the fact that civil measures such as restraining orders are supposedly not effective. There are, however, no reliable quantitative data to support this point of view, according to Royakkers and van Klink. It is, in their view, therefore unacceptable that the initiators of the bill have stated repeatedly that 'restraining orders do not have the desired effect'. The authors quote the following claims:

'Civil actions, such as restraining orders supported by penalties, often do not have the desired result. Too often stalkers couldn't care less about civil actions and violate with impunity the restraining order.'

(Explanatory memorandum, a.w., pg. 6-7, conference year 1997-1998)

'Restraining orders are often violated. Penalties are of course imposed, but if the stalker is without any means to speak of, there is not much to be gained.'

(*Trouw*, 22 March 1997)

'The poor effect of civil restraining orders is widely known.'

(Memorandum on the report, 22 March 1999)

Royakkers and van Klink claim that repeating the same standpoint over and again strongly suggests that this point of view is true and that there is the risk of Members of

Parliament, but scholars as well, to accept this standpoint unquestioningly. In the authors' view the initiators of the bill in this way commit a fallacy which could be labelled 'misleading repetition' and which finds its origins in the stylistic device called 'repetitio' in classical rhetoric. By repeating the same standpoint over and over again it is suggested, without any supportive evidence, that this standpoint is the truth.

Since Royakkers and van Klink, in their analysis, work from pragma-dialectical starting point, it is from that perspective that it has to be assessed whether repeatedly putting forward the same standpoint is in itself fallacious.

In order to be able to evaluate contributions to a discussion from a pragma-dialectical perspective and to establish whether these contributions are sound or fallacious, a reconstruction must first be made of the elements that may be considered a part of a critical discussion. This means that an analytical overview will have to be made of all parts of the legislative debate relevant to the solution of the difference of opinion.

Before answering the question whether the aforementioned quotes are indeed part of a critical discussion, it needs to be said that these quotes should not be reconstructed as standpoints, as Royakkers and van Klink would have it, but as arguments. The quoted passages, in the discussion, after all function as support for the standpoint that concerns the penalization of stalking. When reconstructing the discussion, the argument will, however, be included only once. Repetitions of the same argument are considered irrelevant for the solution of a difference of opinion and are therefore ignored (van Eemeren and Grootendorst 2000: 111, 112). If the initiators' repetitive arguments are irrelevant and therefore not detrimental to the solution of the dispute, no discussion rule has been violated and it is therefore impossible to label the repetition of the same argument as fallacious.

It is, however, not quite clear whether the contributions as quoted should be reconstructed as arguments put forward in one and the same discussion. It is, in other words, debatable whether a legislative discussion should be considered as one critical discussion. The following conditions as formulated by van Eemeren and Houtlosser (2005b) may be of use in answering the question whether two or more argumentative texts or discussions should be considered as part of one and the same critical discussion.⁴

- 1) All pieces of argumentative discourse are aimed at resolving the same difference of opinion.
- 2) All pieces of argumentative discourse have the same procedural starting points.
- 3) All pieces of argumentative discourse have the same material starting points (except for those that are at issue).
- 4) The parties involved assume the same positions and the same discussion roles in all pieces of argumentative discourse.

On the surface, all argumentative contributions that are brought forward in a legislative procedure seem to be aimed at solving a difference of opinion on the desirability of a bill. A global outline of the Dutch legislative procedure, for instance, demonstrates, however, that legislative debates are much more complex than that. A bill is first sent to the

⁴ These conditions are presented in an article on inconsistencies. In the case van Eemeren and Houtlosser use to demonstrate how the criteria could be applied, the MP Dittrich coincidentally plays a central role as well.

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Council of State whose task it is to give a critical review of the judicial viability of the proposed law. The bill together with the advice of the Council of State are then presented to the Queen who, in her turn, puts forward the bill together with a Royal message to the Second Chamber. Next the bill is discussed in one of the Second Chamber's standing committees. These debates are then reported by committees. This report is to say that the committee is of the opinion that the bill is ready for a plenary discussion. The bill's initiators, finally, react to this report by drawing up a memorandum.

Then the moment has come for the Members of Parliament who initiated the bill to defend it during a plenary session of the Second Chamber. It is the privilege of the Second Chamber as co-legislator to change bills by passing amendments. The Members of Parliament then take a vote on the bill and on the amendments, if so desired after a discussion. If a bill has been passed by the Second Chamber, it is submitted to the First Chamber.

On the basis of two of the conditions that are developed by van Eemeren and Houtlosser, this global representation of the legislative procedure (in the Netherlands) demonstrates that not all debates held in the course of the legislative procedure should be considered as part of one and the same critical discussion. After all, in the course of the legislative process different standpoints are brought under discussion (condition 1) and, the parties involved assume not the same positions and the same discussion roles in all pieces of argumentative discourse (condition 4).⁵

This implies that the statements in the quotes should be treated as arguments put forward in different discussions. The argument in the quote that is part of the Explanatory Memorandum is put forward by the initiators of the bill in support of the standpoint 'that the bill has been sufficiently prepared for a plenary discussion in the Second Chamber'. In doing so, they anticipate possible doubts on the part of members of the Second Chamber's standing committee. The argument in the quotation from the newspaper *Trouw*, is put forward by the initiators to convince the public (the readers of the newspaper) that 'a bill to penalise stalking is desirable'. The argument in the third quote, found in the Memorandum on the Report, is put forward by the initiators to justify the standpoint that 'there are no doubts concerning the bill that may preclude a plenary discussion'. In this way they anticipate possible doubts from Members of the Second Chamber with respect to the preparedness of the bill for a plenary session.

The arguments that are quoted, therefore, should not be considered as parts of one and the same critical discussion. But even if they were, it remains unclear precisely which discussion rule would have been violated.

6. CONCLUSION

On the basis of a pragma-dialectical evaluation of the argumentation during parliamentary debates on a bill which proposes to penalize stalking, Royakkers and van Klink set out to demonstrate that 'a greater awareness and knowledge of (the use of) fallacies in the legislative process would benefit public opinion and by that legislation itself'. Since it was only to be expected that Members of the First Chamber would applaud the promotion of the quality of legislation, it was all the more surprising that they

⁵ Waaldijk (1987, 1994), too, indicates that legislative procedures involve various discussions between different discussants.

did not wish to include in their judgement of the bill the fallacies which were observed by Royakkers and van Klink.

A closer analysis of the criticism concerning the legislative debate on this bill reveals that a number of problems occurred in the application of pragma-dialectical insights. The discussants' contributions labelled fallacious have not been systematically held up to the pragma-dialectical discussion rules which makes it difficult to understand exactly why they are labelled fallacious. Moreover, the analysis of the legislative debate does not take into account the characteristics of the institutional context in which the said argumentation was put forward: the authors erroneously consider all argumentative contributions of the bill's initiators as part of one and the same discussion. These shortcomings in the pragma-dialectical analysis and evaluation of contributions to the legislative discussion in the Second Chamber, may very well explain why the criticism on the discussants' contributions was ignored in the First Chamber. Shortcomings as demonstrated in the case on stalking make it easier to push aside criticism on contributions to legislative discussions that from another (theoretical) perspective could have been justified, or to wrongfully conclude that the model for a critical discussion is unfit for the analysis and evaluation of legislative discussions.

[link to commentary](#)

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