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A dialogical theory of legal discussions: Pragma-dialectical analysis and evaluation of legal argumentation

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Abstract. In this paper, the author describes a dialogical approach to legal argumentation from the perspective of argumentation theory. In a pragma-dialectical approach of legal argumentation, the argumentation is considered to be part of a critical discussion aimed at the rational resolution of the dispute. The author describes how a pragma-dialectical analysis and evaluation of legal argumentation can be carried out.

Key words: legal argument, pragma-dialectical theory of argumentation, rational reconstruction of argumentation, evaluation of argumentation, discussion rules

1. Introduction

Until recently, in research of legal argumentation logical and rhetorical approaches have been the predominant research traditions. In a logical approach, argumentation is analyzed as a form of reasoning consisting of premises which lead to a certain conclusion, the legal decision.[1] The evaluation concentrates on the question whether there is a formally valid argument underlying the argumentation. In a rhetorical approach we find in legal theory and in speech communication, argumentation is analyzed as an attempt to convince a certain audience.[2] The analysis and evaluation concentrate on the specific audience-related criteria of legal rationality and on the techniques used for convincing this audience.

Recently, in argumentation theory as well as in legal theory, a new approach to legal argumentation has been developed. In this approach, legal argumentation is considered as part of a discussion procedure in which a legal standpoint is defended according to certain rules for rational discussion. In such approaches, which can be called *dialectical*, legal argumentation is considered as part of a dialogue about

[1] For representatives of a logical approach see for instance Klug (1951), Soeteman (1989), and Weinberger (1970).

[2] For representatives of a rhetorical approach see for instance Toulmin (1958) and Perelman (1976).

the acceptability of a legal standpoint. The evaluation centres around the question whether the standpoint has been defended successfully according to commonly shared starting points and whether certain standards for rational discussion have been met. The advantage of such a dialectical approach is that argumentation can be evaluated on the basis of both general criteria for a formal discussion procedure and field and audience related material grounds.

In argumentation theory the pragma-dialectical theory represents such an approach, and in legal theory Logic based AI and Law research represents such an approach.[3] Both consider legal argumentation to be part of a rational discussion aimed at a rational resolution of disagreement. They try to develop models for a rational resolution of disagreement, and they do this by considering the *dialogue* to be a means for resolving disagreement. The resolution process is viewed as a dialogue between a proponent and an opponent which is governed by a set of *procedural rules*.

This common interest of AI and Law and argumentation scholars in legal argumentation as a critical dialogue which is aimed at a rational resolution while certain rules for rational discussion are observed, generates several common research questions which can be located on three levels. First, there is the level of the *isolated arguments*. On this level relevant questions are which formal and informal tools can be developed for a rational reconstruction and evaluation of legal arguments, and how can the various interpretations made in the reconstruction process be justified? How can arguments in which exceptions to a rule apply be reconstructed in an adequate way? Objects of study are for instance the reconstruction of defeasible arguments (Hage 1997, Prakken 1995, Verheij 1997), of argumentation schemes such as analogy, a contrario and consequentialist arguments (Feteris 1997b; Kloosterhuis 1994, 1995, 1996; Jansen 1997), of interpretative arguments, such as grammatical arguments (Van Haaften 1997).

Second, there is the level of the *relation between the arguments*, how are the arguments structured within the dialogical structure of the discussion? On this level relevant questions are which tools can be used for a rational reconstruction and evaluation of argument structures? Research questions on this level concern for example the reconstruction of various forms of complex argumentation as specific forms of a reaction to criticism (Plug 1994, 1995, 1996; Prakken 1997).

Third, there is the level of the *discussion procedure*. Which forms of disagreement and discussion can be distinguished, which procedural stages, and which discussion rules are relevant for a rational resolution (Feteris 1989; Gordon 1994, 1995; Hage et al. 1992; Loui and Norman 1995; Prakken and Sartor 1996)? What is the relation between general rules of rationality and specific legal rules of rationality (Feteris 1990)?

[3] For pragma-dialectical theory see the publications by Feteris, Van Haaften, Jansen, Kloosterhuis and Plug. For Logic based AI and Law research see publications of the Maastricht research group (Hage, Lodder, Span, Verheij) and by Gordon, Leenes, Loui and Norman, Prakken, Prakken, Sartor.

The aim of this paper is to show how a dialogical theory of legal argumentation can be developed from a specific dialogical approach, a pragma-dialectical approach. Section 2 describes a pragma-dialectical perspective on legal argumentation, and 3 describes the pragma-dialectical model for the analysis of legal argumentation. Section 4 specifies the norms for the evaluation of legal argumentation. Section 5 presents an overview of a research programme for legal argumentation from a pragma-dialectical perspective. Finally, Section 6 discusses how the pragma-dialectical perspective on the analysis and evaluation of legal argumentation could offer ideas for a fruitful cooperation of argumentation theoretical and Logic-based AI and law research on legal argumentation.

2. A Pragma-Dialectical Perspective on Legal Discussions

2.1. THE PRAGMA-DIALECTICAL THEORY OF CRITICAL ARGUMENTATIVE DISCUSSIONS

In *Speech acts in argumentative discussions* (1984) Van Eemeren and Grootendorst introduce a model for the analysis and evaluation of argumentative discussions which offers a survey of the elements which play a role in the resolution of a difference of opinion. The model forms a heuristic tool in finding the elements which have a function in the resolution process. In this way, the elements relevant for the resolution of a dispute can be selected. The model also forms a critical tool for determining whether the discussion has been conducive to the resolution of the dispute and which factors in the discussion process offer a positive and which factors offer a negative contribution. Because of these characteristics, the pragma-dialectical theory offers a suitable theoretical instrument for the analysis and evaluation of legal argumentation.

The model for argumentative discussions is based on a *pragma-dialectical* approach of argumentation. The pragmatic part considers argumentation to be a goal-oriented form of language and analyzes the discussion-moves in a critical discussion as speech acts which have a certain function in the resolution of the dispute. Thus, the pragmatic part formulates communicative and interactional rules for the use of argumentative language in various discussion situations. The dialectic part of the theory implies that argumentation is considered to be part of a critical exchange of discussion moves aimed at a critical test of the point of view under discussion. A resolution in such a critical discussion means that a decision is reached as to whether the protagonist has defended his point of view successfully on the basis of commonly shared rules and starting points against the critical reactions of the antagonist, or whether the antagonist has attacked the point of view successfully.

The core of the pragma-dialectical theory consists of an ideal model for critical discussions and a code of conduct for rational discussants. The *ideal model* specifies the stages which must be passed through to further the resolution of a dispute, and the various speech acts thereto found in these stages. In the *confrontation* stage it is established what the dispute is exactly about; in the *opening* stage the parti-

cipants reach agreement concerning discussion rules, starting points and evaluation methods; in the *argumentation* stage the initial point of view is defended against critical reactions and the argumentation is evaluated; and in the *concluding* stage the final result is established.

The *code of conduct for rational discussants* specifies rules for the resolution of disputes in accordance with the ideal model. The rules acknowledge the right to put forward a standpoint and to cast doubt on a standpoint, the right and the obligation to defend a standpoint by means of argumentation, the right to maintain a standpoint which is successfully defended in accordance with mutually shared starting points and evaluation methods, and the obligation to accept a standpoint which is defended in this way.

In order to comply with these discussion rules, the participants should act as rational discussants, which implies that they should have a reasonable discussion attitude. The internal characteristics which specify such a reasonable discussion attitude are conditions of the *second order*. The second order conditions imply that the discussants are really willing to resolve the dispute in a rational way. For example, the participants must accept that their points of view can prove to be wrong and they must be prepared to admit that the points of view of others can be justified when they are successfully defended according to mutually shared starting points and evaluation procedures.

The willingness to behave as reasonable discussants can only contribute to the resolution of the dispute if certain conditions concerning the external circumstances are fulfilled. For example, the discussion situation must be such that the participants are not only willing, but also free, to put forward and defend a point of view of their own choice, and to cast doubt on a point of view of others with whom they disagree. Such conditions, concerning the external circumstances of the discussion which are necessary to allow the participants to behave reasonable are conditions of the *third order*.

2.2. LEGAL DISCUSSIONS AS A SPECIFIC FORM OF CRITICAL DISCUSSION

In a pragma-dialectical approach, legal argumentation is considered as a specific institutionalized form of argumentation, and legal discussions are considered as specific institutionalized forms of argumentative discussion. In this conception, legal argumentation is considered as part of a *critical discussion* aimed at the resolution of a dispute. The behaviour of the parties and the judge is viewed as an attempt to resolve a difference of opinion. In a legal process (for example a civil process or a criminal process) between two parties and a judge the argumentation is part of an explicit or implicit discussion. The parties react to or anticipate certain forms of critical doubt.[4]

[4] Such a regulated discussion can be found in Continental Law procedures such as the Dutch civil and criminal process. Feteris (1989) describes the various discussions which can be distinguished in

In a legal process, various discussions can be distinguished. In the discussion between the parties, it is tested whether the claim of the protagonist (the plaintiff in a civil process/the public prosecutor in a criminal process) can be defended against the critical reactions of the antagonist (the defendant in a civil process/the accused in a criminal process). A specific characteristic of a legal process is that apart from the discussion between the parties, there is an (implicit) discussion between the parties and the judge, which is aimed at checking whether the claim of the protagonist can be defended against the critical reactions the judge puts forward as an institutional antagonist in his official capacity. The judge must both check whether the claim is acceptable in the light of the critical reactions of the other party and whether the claim is acceptable in the light of certain legal starting points and evaluation rules which must be taken into account when evaluating arguments in a legal process. In the defence of their standpoints, the parties anticipate the possible critical reactions of the other party and the judge.[5]

When the judge presents his decision, this decision is submitted to a critical test by the audience it is addressed to. This multiple audience consists of the parties, higher judges, other lawyers, and the legal community as a whole. Therefore, the judge must present arguments in support of his decision, he must justify his decision.[6] He has to specify which facts and which legal rule(s) are underlying his decision. From a pragma-dialectical perspective, the justification forms a part of the discussion between the judge and possible antagonists: the party who wants to appeal the decision and the judge in appeal. In his justification the judge anticipates possible forms critical reactions which may be put forward by these antagonists.

The resolution process in a legal process can be considered as a critical discussion in which the five stages which have to be passed through in a pragma-dialectical critical discussion, are represented.[7] These stages are the confrontation stage, the opening stage, the argumentation stage and the concluding stage.

The first stage of a legal process in which the parties advance their point of view, can be characterized as the *confrontation stage* of the process. In this stage the judge remains passive. The only thing he has to do is see to it that the parties present their standpoints in accordance with the rules of procedure.

The second stage, the *opening stage*, in which the participants reach agreement on commonly shared starting points and discussion rules, remains for the main part implicit in a legal process. The opening stage can be represented by the institution-

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a legal process, the discussion roles the parties and the judge can fulfil, and the contributions which play a role in a rational resolution of the dispute.

[5] For an extensive description of the critical reactions of a judge in a criminal process see Feteris (1995).

[6] In some legal systems, there are statutory provisions which require justification. For example, in the Netherlands section 121 of the Constitution, in Germany s. 313 (1) of the Code of Civil Procedure (ZPO). For a description of conventions and styles of justifying legal decisions in various countries see MacCormick and Summers (1991).

[7] For a more extensive account of the analysis of a legal process in terms of a critical discussion see Feteris (1990, 1994).

alized system of rules and starting points laid down in the Codes of Procedure (in the Netherlands for example for civil procedure and criminal procedure the Code of Civil Procedure and the Code of Criminal Procedure, the Civil Code and the Criminal Code). Because it is unlikely that the parties will reach agreement on common rules and starting points among themselves, the legal system provides an institutionalized system of rules and starting points which functions as such an agreement, and thus guarantees that there are rules available for legal conflict resolution. So, for reasons of legal certainty, the opening stage with respect to the agreement on rules and starting points is passed through prior to the discussion.

In the third stage, the *argumentation stage*, the party who has asked the judge for a decision has to defend his standpoint and the other party can put forward his counter-arguments. In the argumentation stage the judge also evaluates the argumentation. This part of the argumentation stage in legal proceedings in the Netherlands and other continental law countries differs from the argumentation stage in the Anglo-American system. In the continental system the decision about the force and weight of the evidence and the answer to the question whether the facts lead to the required legal consequence is taken by the judge and not by a jury. It is the judge who decides on factual and legal matters.

In the fourth and final stage of the process, which can be considered as the *concluding stage*, the judge has to decide whether the claim is defended successfully against the critical counter arguments put forward. If the facts put forward can be considered as established facts and the judge has decided that there is a legal rule which connects the claim to these facts, the judge will grant the claim. If the facts cannot be considered as an established fact, or if there is no legal rule applicable, the judge will reject the claim.

We could say that the stages of a pragma-dialectical critical discussion are all represented in a legal process and that the way the discussion is conducted can be considered as a process of critically testing a standpoint which leads to a resolution of the dispute. However, there are some important differences which need some attention.

In a critical discussion the parties jointly see to it that the discussion rules are being observed and they jointly decide about the result of the evaluation and the outcome of the discussion. In a legal process, for reasons of impartiality, it is the task of the judge to see to it that the rules of procedure are observed. It is also the task of the judge to evaluate the argumentation and to give a decision about the final outcome. So, in a legal process the judge does what the parties to a critical discussion do jointly.

Because of certain specific legal goals such as legal security and equity, in law there are some procedures and rules which differ in certain respects from the rules and procedures of a critical discussion. These rules and procedures must guarantee that the conflict can be resolved within a certain time limit by a neutral third party.

3. Rational Reconstruction of Legal Discussions as Critical Discussions

3.1. RATIONAL RECONSTRUCTION OF LEGAL ARGUMENTATION

To establish whether the argumentation put forward in defence of a legal position is sound, first an analysis must be made of the elements which are important to the evaluation of the argumentation. In the evaluation based on this analysis the question must be answered whether the arguments can withstand rational critique. A so-called *rational reconstruction* is aimed at giving such an analysis of the argumentation in which the elements which are relevant for a rational evaluation are represented.[8]

A rational reconstruction according to the pragma-dialectical theory does not imply that each element of a legal discussion is considered a part of a critical discussion, but the aim is to establish what the result is when the discussion is considered as a critical discussion which is *externalized*, *functionalized*, *socialized*, and *dialectified*. Externalization implies that only those elements are considered which are verbally expressed. The analysis only takes into account explicit or implicit commitments of the participants. The analysis abstracts from psychological states, strategic goals, etc., which are not verbally expressed. Functionalization implies that only those speech acts are taken into account which have a function in the resolution of the dispute. Language use can serve different goals, and the resolution of a dispute is only one of those goals. Socialization means that the reconstruction relates to the communicative and interactive goals the participants try to achieve. Dialectification implies that the discourse is reconstructed as a critical discussion, aimed at the critical test of a point of view.

3.2. SINGLE AND COMPLEX ARGUMENTATION IN LEGAL DISCUSSIONS

As has been demonstrated, legal argumentation forms part of a discussion between various participants: the parties in dispute and the judge. To decide whether a legal standpoint is acceptable, is must be determined whether it has been defended successfully against certain critical reactions.[9] So the first step in the analysis is which positions are adopted by the various participants and which arguments have been put forward in reaction to various forms of critical doubt.

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[8] See for example MacCormick and Summers (1991: 21–23).

[9] In this context, we must distinguish between an *internal* perspective of the participants to the dispute and an *external* perspective of a legal theorist determining the rationality of the process. From an internal perspective, the evaluation is made by the judge. He must decide whether a party has defended his standpoint successfully according to certain legal standards of correctness. From an external perspective, the evaluation is made by the legal theorist. He or she determines whether a legal standpoint, such as a legal decision, has been defended successfully according to certain legal standards of correctness.

In the reconstruction, a pragma-dialectical approach distinguishes between various forms of argumentation.[10] In the most simple case, called a *single* argument, the argumentation consists of an argument describing the facts of the case (1.1) and an argument describing the legal rule (1.1′). The justification implies that the decision (1) is defended by showing that the facts (1.1) can be considered as a concrete implementation of the conditions which are required for applying the legal rule (1.1′). In schema the model is as follows:

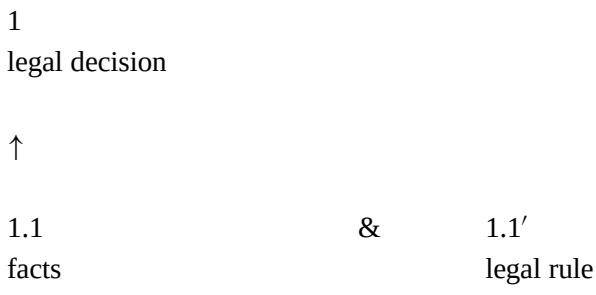

Figure 1.

Often the argumentation is more complex, which means that there are more arguments put forward in defence of the standpoint. When a legal standpoint is supported by more than one argument, the connections between these arguments may differ in nature. Van Eemeren et al. (1991) and Snoeck Henkemans (1992) distinguish various forms of complex argumentation, depending on the types of connection between the single arguments. They distinguish multiple (alternative) argumentation, coordinatively compound (cumulative) argumentation, and subordinate argumentation.

In *multiple argumentation*, every one of the arguments constitutes, in itself, sufficient support for the standpoint. In case one of the arguments in a multiple argumentation is attacked successfully, the standpoint is still sufficiently supported by the remaining arguments. In *coordinatively compound argumentation*, there are a number op arguments which are linked horizontally, and which provide in conjunction a sufficient support for the standpoint. In cases like these, a successful attack on only one of the argument means a weak spot in the argumentation as a whole. *Subordinate argumentation* for a standpoint arises when the arguer assumes that a single argumentation will not at once be accepted because it is itself in need of defense. The defense of argumentation leads to a longer or shorter series of ‘vertically linked’ single argumentations. Each of the arguments in the chain contributes to the defense of the standpoint and only the series as a whole can constitute a conclusive defence.

For the reconstruction of the argumentation structure the distinction between *clear cases* and *hard cases*, which is often made in legal theory, is important. In

[10] For an extensive description of the various forms of argumentation see van Eemeren and Grootendorst (1992, Chap. 7).

clear cases, the facts and the legal rule are not disputed and the judge can put forward what is in pragma-dialectical terms called a *single* argument. In hard cases in which the facts or the legal rule are disputed, a further justification by means of a chain of what is in pragma-dialectical terms called a chain of *subordinate* arguments is required. An example of a hard case found in the famous Dutch 'Electricity case'. In the argumentation of the Supreme Court a rule of the Criminal Code is interpreted, and this interpretation, in its turn, must be defended. In this case, a teleological interpretation of clause 310 is defended, showing that the given reading of the rule is in accordance with the goal of the rule, namely the protection of the property of others.

In 1918 a dentist in The Hague bypassed his electricity meter so that he was able to get free electricity. The dentist was caught and subsequently prosecuted for theft of electricity. In the end, the Supreme Court had to decide whether taking electricity constitutes the criminal offence of theft of 'a good', for which a penalty is prescribed in clause 310 of the Dutch Criminal Code. The Supreme Court (HR 23-5-1921, NJ 1921, 564) decided that taking electricity is considered to be taking a good. The Supreme Court states that clause 310 aims at securing the property of individuals and for that reason makes taking 'a good' punishable under the described circumstances. According to the Supreme Court, this clause applies to electricity because of the properties of electricity. One property of electricity is that it has a certain value, because someone has to incur expenses and make some effort to obtain it, and because someone can use it for their own benefit or can sell it to others for money. Thus, electricity is considered to be a property.

The analysis of the argument is as follows:[11]

To sustain that clause 310 of the Dutch Criminal Code should be applied to the facts of this concrete case, it must be shown that the facts (1.1.1.1.1) form a concrete implementation of the conditions for application of the legal rule of clause 310, the legal rule (1.1′). To defend this claim, a chain of subordinate arguments is required containing a step-by-step justification. First, it is shown that electricity is something that has a certain value (argument D); second, that something that has a certain value is a property (argument C); and, finally, that a property is a good in the sense of clause 310 (argument B).

This reconstruction also makes clear which arguments have remained implicit and must be made explicit. To complete all single arguments in the chain, the arguments (1.1′), (1.1.1), (1.1.1.1) must be made explicit.[12][13]

[11] The notation with numbers such as (1.1) etc. is the pragma-dialectical notation. The notation with letters and logical symbols such as $(p \rightarrow Oq)$ is the logical notation.

[12] See Plug (1994, 1995) for a more extensive description of the various forms of complex argumentation in law.

[13] In legal theory the authors such as Alexy (1978) pay little attention to the question of reconstructing missing premisses. Alexy only says that a legal decision must follow from at least one universal norm together with other statements, but he does not specify how hidden assumptions must be made explicit. From Alexy's description it can be guessed that if the universal rule is missing, it

1

The accused must be convicted and imprisoned for three months (legal decision)

↑

1.1	&	1.1′
The accused has taken a good that, wholly or partly, belongs to someone else with the intention of appropriating it (legal qualification of the facts)		If someone takes a good that, wholly of partly, belongs to someone else with the intention of appropriating it, he or she should be convicted of theft and imprisoned for a maximum term of four years

ARGUMENT A

↑

(1.1.1)	&	1.1.1′
The accused has taken a property		If someone takes a property, he or she is taking a good

ARGUMENT B

↑

(1.1.1.1)	&	1.1.1.1′
The accused has taken something that has a certain value		If someone takes something that has a certain value, he or she is taking a property

ARGUMENT C

↑

(1.1.1.1.1)	&	1.1.1.1.1′
The accused has taken electricity		If someone takes electricity, he or she is taking something that has a certain value

ARGUMENT D

Figure 2.

In similar hard cases, a particular interpretation of a legal rule must be defended by means of argumentation based on a certain interpretative argumentation scheme. Examples of these argumentation schemes are a *semantic argument* in which the interpretation of a legal rule is justified by means of an assertion about the natural language or a technical language, a *genetic argument* in which an interpretation is justified by saying that this interpretation corresponds to the intention of the legislator, a *teleological argument* in which it is claimed that a particular interpretation is necessary to bring about a particular aim, the *historical argument* in which reference is made to the history of a legal norm, the *systematic argument* in which reference is made to the position of a norm in a legal text, and to the logical or teleological relation of a norm to other norms, goals and principles.[14]

When reconstructing the argumentation structure, the analyst can use two kinds of 'clues' for deciding about the type of complex argumentation: *verbal indicators* and *contextual information*. Of course, often, he uses a combination of both kinds of clues.

When determining the way in which arguments are structured, the point of departure should always be the verbal presentation of a text. A text may sometimes contain verbal directions as to the way arguments are related, so-called 'indicators'. In legal texts there are various indicators marking the multiple, coordinative or subordinate connection between arguments. But more often than not, however, such explicit pointers are absent. In these situations it may still be very well possible to find contextual clues as to the way the arguments are linked. These clues can be found in for example the phrasing and structure of the legal rule, the framework of legal rules, and the dialogical context.

A first contextual clue for the reconstruction of complex argumentation can be the phrasing and the structure of the legal rule(s) underlying the argumentation. For a legal consequence to occur, the conditions in a statutory rule which have to be met, may be combined in a compound structure. In such a case, there are two or more conditions, enumerated in either a cumulative way or in an alternative way. If a relevant statutory rule is made up of alternative conditions, this may mean that the argumentation may be reconstructed as multiple. If a judge argues that that particular statutory rule is not relevant, the argumentation will have to be reconstructed as coordinate. The argumentation will also have to be reconstructed as coordinate if the relevant statutory rule contains cumulative conditions. And if the statutory rule is found not to be relevant, the argumentation must either be single or multiple.

A second contextual clue for the reconstruction of the argumentation structure can be found in the argumentation of the party the judge is reacting to. The pragma-dialectical discussion perspective in regard to judicial opinions is of importance in this context. As is sketched above, in the justification of his decision the judge

must be made explicit. None of the legal authors specifies how missing elements must be formulated on the various levels of the chain of arguments defending an interpretation of a legal rule.

[14] Cf. Alexy (1978) who distinguishes various interpretative schemes such as.

responds to the argumentation put forward by the other parties or anticipates criticism which may be raised as to his own argumentation. The basic assumption is the argumentative rule that an adequate reaction to a discursive text of the one party is tuned in to the structure of the argumentation of the other party. Only if the connections between the arguments are presented clearly and unambiguously, these connections may serve as a clue for the structure of the justification of a decision.

For example, if a judge reacts to a multiple argumentation, he, in his negation, must, in principle, produce an argumentation which can be reconstructed as co-ordinatively compound. If it is coordinatively compound argumentation he reacts to, it is, in principle, sufficient to produce single argumentation. However, in case he puts forward more than one argument, the connections between these arguments should be reconstructed as being multiple. An example of the dialectical structure which determines which form of complex argumentation the judge has to give in defence of his decision is found in Feteris (1997) where she describes in which ways the judge in criminal proceedings reacts to the argumentation of the public prosecutor and and the accused.[15]

So, there are various clues to a possible reconstruction of the argumentation structure. Knowledge of the various argumentation structures in combination with knowledge of the verbal indicators of such structures and contextual knowledge of the contexts in which these complex structures can occur is required for an adequate analysis.

3.3. A MODEL FOR THE ANALYSIS OF LEGAL ARGUMENTATION

To analyze legal arguments adequately, an *analytical* model is required which can be used as a *heuristic* tool for a rational reconstruction of the justification of legal decisions and interpretations. Such a model should present the relevant options which must be taken into account when reconstructing legal arguments. The relevant options are dependent on the criteria used in the evaluation. The aim of the analysis is to produce an analytical overview which forms an adequate basis for the evaluation.

The basic form of such an analytical model could be the schema described in the previous section for simple cases in which a justification consists of a description of the facts and the legal rule. The basic model should be elaborated for various types of complex cases in which an interpretation of the legal rule with respect to its structure or content is required.

For various forms of legal argument such as analogy arguments, *a contrario* arguments, arguments in defence of a grammatical interpretation, a teleological interpretation, etc. it must be specified which arguments are required for a successful justification of the interpretation.

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[15] See for example Feteris 1997a,b; Plug (1995, 1995, 1996).

4. Norms for the Evaluation of the Argumentation

As has been described in the previous section, the analysis establishes which arguments constitute the justification. The evaluation must determine whether the argumentation is acceptable and whether the discussion has been conducted in accordance with the rules for a rational discussion. In this section I distinguish between norms for the evaluation of the *content* of the argumentation and norms for the evaluation of the discussion *procedure*.

4.1. NORMS FOR THE EVALUATION OF THE CONTENT

In a pragma-dialectical approach it is first checked whether an argument is identical to a common starting point. Such an evaluation procedure is called the *identification procedure*. If an argument is not identical to a common starting point, the next procedure to follow is the *testing procedure* which checks whether the argument can be considered acceptable according to a common testing method.

When evaluating the *factual arguments*, the first thing a judge in for example Dutch law does is deciding whether the facts are generally known. If this is not the case, he decides whether the facts can be considered proven according to legal rules of proof.

When evaluating the *legal arguments*, in continental law systems the judge first decides whether the legal rule can be considered a rule of valid law according to generally accepted legal sources (such as statutes etc.). Rules of valid law can be considered as a specific form of common starting points. In some cases, to decide which rule is to be preferred to another rule, a rule of preference must be used. Examples of these rules are *lex posterior derogat legi priori*, which states that an earlier norm is incompatible with a later one, *lex specialis derogat legi generali*, which allows application of a more general norm only in cases not covered by an incompatible, less general norm, and *lex superior derogat legi inferiori*, which states that when a higher norm is incompatible with a norm of a lower standing, one must apply the higher norm.[16] When interpreting a legal rule, the judge uses an interpretation method (for example the grammatical interpretation method in which reference is made to the meaning of a term in everyday language).

When evaluating the content of the argumentation, in pragma-dialectical terms the judge must also check whether the relation between the premises and the conclusion is acceptable: whether the *argumentation scheme* is correctly chosen and applied correctly. There are various argumentation schemes such as analogy argumentation and teleological or consequentialist argumentation, etc. which are used for defending the acceptability of the interpretation of a legal rule. For each type of argumentation scheme, there are specific evaluative questions which are relevant for the evaluation and which must be answered satifactorily for a suc-

[16] Alexy (1989) and Peczenik (1983) formulate rules of preference for the use of argumentation schemes.

cessful defence. In pragma-dialectical theory it is investigated in which cases the argumentation schemes are well chosen (for example in Dutch criminal law it is not allowed to interpret statutory rules analogically) and in which cases they are applied correctly (for example if an analogy does not relate to relevant similarities the analogy is not applied correctly).[17]

For example, for analogical argumentation, Kloosterhuis (1994, 1995, 1996) develops a model for the analysis and evaluation of this argumentation scheme (see also Kloosterhuis' contribution to this special issue). As has been described in the previous section, for a rational reconstruction of legal argumentation the analysis must give a survey of all the elements which are relevant for the evaluation. So, for analogy argumentation Kloosterhuis develops a model and a procedure for the analysis in which all the relevant elements of this model are made explicit. The reconstruction results in an analytical overview, in which it is spelled out which constructed legal norm the judge is defending, which existing legal norm is being applied analogically, which analogy relationship is being assumed and, with which arguments the analogical application is justified.

This analytical overview forms the starting-point for an evaluation of the argumentation, in which the two aforementioned standards of judgement take a central position: was the judge allowed to use analogy argumentation and if so, did the judge apply this argumentation correctly? Kloosterhuis (1997) formulates standards for the evaluation of analogy-argumentation. Taking these standards as a starting point, it is possible to arrive at a systematic and complete analysis and evaluation of analogy-argumentation in judicial decisions. Compared with for example a logical analysis of analogy-argumentation, the reconstruction is more systematic because there is a clear interdependency between the assessment-standards and the analysis, and the reconstruction is more complete because it does not only focus on the matter of formal validity and the acceptability of the premises but also on those standards that indicate whether or not an analogy-argumentation was called for in the first place and whether it was applied correctly. Rather than reducing analogy-argumentation to a simple argumentation, the pragma-dialectical approach enables us to reconstruct the analogy-argumentation as argumentation with a complex structure. The elements of this structure may be regarded as reflections of the different judging-standards.

Feteris (1997b, 1998) and Jansen (1997) develop similar models and procedures for a rational reconstruction of respectively pragmatic argumentation and a contrario-argumentation. They determine which stages are required in the reconstruction process, and they specify the elements of an analytical overview, in which it is spelled out which constructed legal norm the judge is defending, which existing legal norm is being applied, which relationship between the new norm and the existing norm is being assumed and, and with which arguments the application is

[17] See Kloosterhuis (1994, 1995) for a description of of model for the analysis and evaluation of arguments based on analogy or *a-contrario* reasoning.

justified. For the evaluation they specify in which cases the argumentation schemes are well chosen and in which cases they are applied correctly.

4.2. NORMS FOR THE EVALUATION OF THE DISCUSSION PROCEDURE

In a pragma-dialectical procedure for the evaluation, with respect to the evaluation of the *procedural* aspects it must be determined whether the discussion has been conducted in accordance with the rules for rational discussion. In pragma-dialectical theory a system of ten basic rules for rational discussion is formulated. These rules apply to discussions in which the participants behave as rational discussants and aim at a rational resolution of the dispute. The rules relate to the right to put forward standpoints, to the obligation to defend a standpoint which is in dispute, to the relevance of defences and attacks, to the commitment to implicit arguments, the commitment to common starting points and evaluation methods, and to the rules for a successful defence and attack of a standpoint.

Feteris (1989) describes in which respects the general rules for rational discussion apply in the Dutch civil process and criminal process. She describes which general pragma-dialectical rules do not apply in a legal process, which pragma-dialectical rules take on a specific form in a legal context, and which additional rules are required in order to resolve the dispute in a rational way.[18]

An example of a comparison between the pragma-dialectical rules for a critical discussion and the rules of legal procedure can be found when we try to establish how certain rules of legal procedure in Dutch civil law guarantee that the result of a legal process is in accordance with the requirements of a rational discussion.[19]

A legal process is often conducted because the parties could not reach a resolution of their conflict among themselves. Often the parties cannot reach a resolution because they cannot agree on the rules governing the discussion and on mutually accepted starting points which can be used for the evaluation of the argumentation. Because one or both of the parties are not willing to behave according to the requirements of a reasonable discussion attitude (a failure of second order conditions), a rational discussion according to mutually shared rules between the parties is impossible (a failure of first order conditions).

Although the parties cannot reach agreement on the discussion rules, the conflict has to be resolved. In order to guarantee a resolution of conflicts according to general standards of rationality, the law provides a procedure for conflict resolution of claims based on the Code of Civil Law (imposed first order conditions). In contrast to the code of conduct for rational discussants, the ‘code of conduct’ for civil procedure laid down in the Dutch Code of Civil Procedure cannot be changed

[18] According to Aarnio, Alexy, and Peczenik, the basic principles of a system of rules for rational discussion are the principles of consistency, efficiency, testability, coherence, generalizability, and sincerity. These principles are formulated by Alexy and developed into a system of rules for general practical discussions, which is, in turn, elaborated for legal discussions.

[19] For a more complete discussion of this subject see Feteris (1990).

by the parties or by the judge. The uniformity of the rules promotes the fairness of the proceedings and guarantees that everyone is treated the same and knows what to expect. Everyone who wants to enforce a claim and invokes a process of law, knows in advance which rules will apply. Also the starting points of the discussion are laid down in advance.

In legal disputes it is unlikely that the parties will agree at the outset on mutually shared rules and starting points, which is one of the requirements for a rational discussion. Therefore the legal system provides an institutionalized system of rules and starting points which functions as such an agreement, and thus guarantees that there are rules available for legal conflict-resolution. No matter how instrinsically reasonable the parties to a legal dispute might be, any one of them might try to circumvent a rule contrary to her or his interests. It would hinder a rational resolution of the dispute if the parties were left to decide whether a rule is followed or not. Therefore it is the task of the judge to decide whether the parties comply with the rules of procedure.

The parties to a legal process do not always aim at an efficient and rational resolution of the dispute. Sometimes a party drags the proceedings by delaying his response, thus hindering an efficient resolution. This behaviour is an infringement of the second order reasonable discussion attitude, because the reasonable discussion attitude implies that the participants strive for an efficient and rational resolution of disputes. In order to guarantee that the proceedings meet the requirements of an efficient and rational discussion, the Civil Code provides first order rules specifying how long a party can delay his reply.

When the judge of first instance has rendered a decision, the party who has lost the case can appeal. She can reopen the discussion when she thinks that the judge of the fist instance has made a mistake concerning questions of substantive law, or concerning questions of procedural law. Of course, the discussion cannot always be reopened. To safeguard legal rights, there are time limits within which an appeal must be taken. Otherwise the party who has won the trial would never be sure about his rights.

In a rational discussion, someone who advances a standpoint is obliged to defend it, if asked to do so. Because the participants to a rational discussion are supposed to act as reasonable discussants, they will agree on the division of the roles at defending points of view. Sometimes a party is unwilling to assume an appropriate burden of proof (which would result in an unfavourable verdict) and chooses instead to try to shift the burden (and thus the risk of the burden) to the other party. Then a party is not willing to live up to his obligation to defend his point of view, he violates one of the second order requirements of a reasonable discussion attitude.

In order to guarantee that the division of roles can be settled, in law there are first order rules specifying who has to defend which statements. The Dutch Civil Code states explicitly or implicitly which legal grounds and which facts must be adduced and proven by the plaintiff, and which legal grounds and facts must be

adduced and proven by the defendant. By invoking a legal remedy, the plaintiff creates certain obligations concerning the legal grounds and facts which must be made acceptable to the judge. When the defendant denies the claim, by asserting some legal ground for her denial, she creates certain obligations with respect to the facts which constitute this legal ground. For reasons of impartiality, it is the task of the judge to decide on the allocation of the burden of proof. It is the judge who decides which facts have to be proven by the plaintiff and which by the defendant. So, the legal rules for the division of the roles at defending points of view promote resolution of the dispute within the legal framework, even though the parties were not prepared to agree on these matters before the legal process began.

So, as has been described, in a legal process the parties usually have conflicting interests and do not behave like reasonable discussants if left to themselves. Therefore the law provides rules which aim to ensure that the discussion meets the requirements of a rational discussion. From a pragma-dialectical perspective, the law provides special additional discussion rules (conditions of the first order) which ensure that the proceedings will be conducted according to the standards of rational discussions, even in cases where the parties cannot, or are not prepared to, live up to the conditions of a reasonable discussion attitude (conditions of the second order). Because the parties do not adhere to the rules of legal procedure voluntarily, it is the task of the judge to see to it that the rules are followed. From a pragma-dialectical perspective, it is his task to see to it that the discussion is conducted in accordance to the rules which contribute to a rational resolution of legal disputes.[20]

4.3. A MODEL FOR THE EVALUATION OF LEGAL ARGUMENTATION

To evaluate legal argumentation in an adequate way, an *evaluation* model should be developed that may be used as a *critical* tool to establish whether the argumentation is acceptable. In the model it should be specified how common starting points and evaluation standards are to be used. For the use of common starting points, it should be specified for various legal fields which statements can be used as an argument in a legal justification. For example, it should be specified what the role is of legal rules, legal principles, etc.. For the use of evaluation standards, it should be specified which types of legal argumentation schemes, such as reasoning from analogy, etc. must be distinguished. For various legal systems, it should be specified which legal argumentation schemes must, should and may be used in the justification of a legal decision. Because the correct application of an argumentation scheme depends on the question whether certain critical questions can be answered positively, the relevant critical questions must be formulated for the various argumentation schemes.

For an adequate evaluation it should also be specified which discussion rules apply in a concrete case. For various types of legal discussions (discussions in a

[20] See Note 11.

legal process, discussions in legal science) it should be specified which general and which specific legal rules are relevant for conducting a rational legal discussion.

5. Towards a Pragma-dialectical Theory of Legal Argumentation: Five Components

In the previous sections I have described how the analysis and evaluation of legal argumentation proceeds in a pragma-dialectical approach of legal argumentation. I have also specified which additions and specifications are required in further research.

By way of conclusion, in this section I describe how a research programme of legal argumentation from a pragma-dialectical perspective could be developed and how argumentation theorists and AI and law legal theorists could cooperate. Such a research programme encompasses various research components: a philosophical, a theoretical, an analytical, an empirical and a practical component.

The *philosophical* component should link ideas developed in legal theory about the rationality of legal argumentation with ideas developed in argumentation theory about the rationality of argumentation in general. If one adopts a dialectical approach and takes legal argumentation to be a part of a critical discussion, it should be specified how a legal discussion is to be conducted in order to resolve a dispute in a rational way.

The *theoretical* component should develop a model for a rational reconstruction of legal argumentation. If one adopts a dialectical approach, several theoretical descriptions should be given. First, the stages of a legal discussion and the contributions which are relevant in these stages should be described. Second, the structure, the levels and elements of a legal justification should be specified. Third, the formal and material standards of rationality should be formulated. In the theoretical component, legal ideas about legal standards of acceptability such as legal principles, rules of procedure, legal interpretation methods, rules for the use of legal sources, etc. should be combined with ideas developed in argumentation theory and logic about ideal norms for rational argumentation.

The *reconstruction* component should investigate how a rational reconstruction of legal argumentation can be performed with the aid of the theoretical model. For example, how should a legal interpretation be reconstructed, and which general and which specific legal background knowledge is required to give an adequate reconstruction? How should implicit elements be made explicit? **** The work of Plug, Prakken, Kloosterhuis, Feteris, Van Haaften show which lines of research could be followed.

The *empirical* component should investigate how legal practice relates to the theoretical model. In which respects does legal practice differ from the legal ideal model, what are the reasons to depart from the model, and how can the differ-

ence be justified? Which argumentative strategies appear to be successful in legal practice in convincing an audience?

Finally, to be able to give practical recommendations for the analysis and evaluation of legal argumentation, it should be established how the theoretical, analytical, and empirical ideas may be combined to develop methods for improving argumentative skills in legal education. The *practical* component should determine which methods may be used to improves skills in analyzing, evaluating, and writing legal argumentation.

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