

# Prototypical Argumentative Patterns in a Legal Context: The Role of Pragmatic Argumentation in the Justification of Judicial Decisions

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**Abstract** In this contribution the prototypical argumentative patterns are discussed in which pragmatic argumentation is used in the context of legal justification in hard cases. First, the function and implementation of pragmatic argumentation in prototypical argumentative patterns in legal justification are addressed. The dialectical function of the different parts of the complex argumentation are explained by characterizing them as argumentative moves that are put forward in reaction to certain forms of critique. Then, on the basis of an exemplary case, the famous Holy Trinity case, the way in which the U.S. Supreme Court uses pragmatic argumentation in this case is discussed by showing how the court instantiates general prototypical argumentative patterns in light of the institutional preconditions of the justification in the context of the specific case.

**Keywords** Argumentative pattern · Legal interpretation · Legal justification · Legal rule · Pragmatic argumentation · Prototypical argumentative pattern · Statutory rule

## 1 Introduction

In the justification of their decisions it is not uncommon for courts to use pragmatic argumentation in which they refer to the consequences of applying a legal rule in a specific case. In a hard case in which the applicability of the rule is controversial, courts may argue that the consequences of applying the rule in the standard meaning would be ‘absurd’ in light of the purpose of the rule. In a legal context such argumentation referring to the causal consequences of applying a rule in a specific case, also called

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*pragmatic argumentation*, plays an important role because the application of legal rules requires the consideration of the consequences of the application in light of the purpose of the rule.<sup>1</sup> Especially in hard cases in which applicability of the rule is controversial, it is not uncommon that courts refer to the consequences of application of the rule in a particular meaning or interpretation in light of the purpose of the rule as it was intended by the legislator. A specific characteristic of the use of pragmatic argumentation in the justification of legal decisions is that it always forms part of a complex argumentation. An example of such a form of complex argumentation is the justification in which the pragmatic argumentation is supported by arguments referring to the (un)desirability of certain consequences in light of the purpose of the rule as intended by the legislator. Such a support is necessary because legal rules are a means to achieve certain purposes that are desirable from a legal, social, economic perspective. In the law, for this reason, the desirability of the consequences of application of the rule in the specific case must be evaluated from the perspective of the purpose of the rule. For this reason the justification must contain arguments referring to the reasons why the consequences are desirable or undesirable.

In what follows, I go into the prototypical argumentative patterns of complex argumentation in which pragmatic argumentation is used in the context of legal justification in hard cases. Using the theoretical concepts and distinctions described by Frans van Eemeren in his introduction to this special issue (and in van Eemeren 2010) in Sect. 2 I discuss function and the implementation of pragmatic argumentation in prototypical argumentative patterns in legal justification. I explain the dialectical function of the different parts of the argumentative patterns by characterizing them as argumentative moves that are put forward in reaction to certain forms of critique. Then, in Sect. 3 I explain the way in which the U.S. Supreme Court in the famous Holy Trinity case (*Holy Trinity Church v. U.S.* (143 U.S. 457) from February 29, 1892) uses pragmatic argumentation by showing how the court instantiates general prototypical argumentative patterns in light of the institutional preconditions of the justification in the context of the specific case. I have chosen this case as an example because it is one of the few cases in which the U.S. Supreme Court makes an exception to the standard meaning of a statutory rule. For this reason it gives an extended justification in which it uses a combination of different forms of argument, among which pragmatic argumentation referring to the consequences of the application of the rule in light of the purpose as it was intended by the legislator.

## 2 The Implementation of Pragmatic Argumentation in Legal Justification as Part of a Prototypical Argumentative Pattern

In order to clarify the role of pragmatic argumentation in legal justification and the way in which it is implemented, I explain the dialectical function of the different parts of the justification as argumentative moves that are put forward in reaction to

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<sup>1</sup> Other terms for this form of argumentation are 'consequentialist argumentation', and for the negative form that refers to the unacceptable or absurd consequences of a decision 'argument from absurdity'. See for example Bustamante (2013), Carbonell (2013), MacCormick (1978, 2005). For a discussion of pragmatic argumentation in a legal context see Feteris (2002).

certain forms of critique that are relevant from a legal perspective. In Sect. 2.1, I discuss the argumentation put forward in defence of the appropriateness of the argumentation scheme. Then, in Sect. 2.2 discuss the argumentation put forward in defence of the correctness of the application of pragmatic argumentation. I describe the different forms of critique that will have to be taken away and I explain how the argumentative moves in which the judge reacts to these forms of critique may result in specific prototypical patterns of complex argumentation.

## 2.1 The Justification of the Appropriateness of Pragmatic Argumentation

In the context of the justification of a legal interpretation, the appropriateness of a particular form of argumentation depends on the status of the argumentation in light of the so-called hierarchy of interpretation methods. The hierarchy is based on the idea that, from the perspective of legal certainty, interpretation methods that are based on the explicit intention of the legislator have the highest status in the hierarchy. In their international research project on the methods of legal interpretation, MacCormick and Summers (1991) describe the preferred order for the use of various forms of interpretative arguments that can be inferred from the practices of legal justification in various countries. First, judges are supposed to look for linguistic arguments, referring to the meaning of the words and expressions used in the rule because this form of argument refers to the formulations of the rule that are considered to reflect the intention of the legislator. If such an argument offers no acceptable solution, a judge can look for systematic arguments referring to the position of the rule in the legal system and the relation with other rules. If also systematic arguments do not offer an acceptable solution, a judge can look for teleological-evaluative arguments which refer to the goals and values the rule is intended to realize.

Pragmatic argumentation referring to the consequences of a particular interpretation in light of the goal of the rule can be considered as a form of teleological-evaluative argumentation. As I will explain in the following sections, in a hard case the consequences of an interpretation should be evaluated in light of the goal of the rule, which results in a complex argumentation in which pragmatic argumentation is supported by and supplemented with other forms of argumentation. For this reason, for pragmatic argumentation this hierarchy implies that such argumentation is acceptable only in combination with other arguments. On its own it can only offer sufficient defence if other interpretative methods do not offer an acceptable solution. When a judge uses teleological-evaluative argumentation, according to MacCormick and Summers (1991:531), Alexy (1989:248), Peczenik (1989:407) a judge is obliged to justify why the other two forms of argumentation do not offer an acceptable solution.<sup>2</sup>

On this view, the justification of the appropriateness of pragmatic argumentation must consist of a complex argumentation that can take on different patterns.<sup>3</sup> The

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<sup>2</sup> Atiyah and Summers (1991:101–102) remark that most American judges are willing to consider evidence of purpose in deciding whether the words are unclear in the first place.

<sup>3</sup> For a discussion of the argumentation structures that may arise on the basis of questions relating to the appropriateness of an argument scheme see for example Kloosterhuis (2006: 95–100) on analogy argumentation. See Feteris (2004) for a discussion of the various argumentation structures that may result from a discussion about the appropriateness of pragmatic argumentation.

first pattern is used when the court shows that also other interpretation methods, such as a grammatical, historical, systematic interpretation, point in the same direction. This form of complex argumentation is in pragma-dialectical terms called ‘coordinative argumentation’ in which the different arguments are all necessary for a sufficient defence. The second pattern, that also consists of coordinative argumentation, is used when courts show that other interpretation methods, such as a grammatical, historical, systematic interpretation do not offer an acceptable solution. The justification of the appropriateness of the argumentation does not have a fixed place in the argumentation structure. It depends on the justification tradition in a particular legal culture and the individual choices of the court where this part of the justification is given.

For specific legal systems and fields of law there are specific conventions with regard to the appropriateness of interpretation methods that have consequences for the prototypical patterns of argumentation that are to be used. For example in the U.S. common-law tradition that is relevant for the discussion of the Holy Trinity case, there are specific conventions regarding the types of argumentation that should be used to justify a particular interpretation of a legal rule. For U.S. law these arguments are, according to Summers (1991:412–415), the argument from ordinary or technical meaning, the argument from the meaning indicated by contextual-harmonization, the argument from precedent, the argument from statutory analogy, the argument from coherence with a general legal concept, the argument from congruence with relevant and authoritative public policy operative within the field in which the statute falls, the argument from general legal principles that bear upon the issue of meaning, the argument from the ultimate purpose of the statute, and the argument from legislative intention. In my discussion of the Holy Trinity case I will explain how these conventions are taken into account in the use of a specific prototypical argumentative pattern and the way in which this pattern is implemented in the specific case.

## **2.2 The Justification of the Applicability of Pragmatic Argumentation**

As I indicated in the introduction, in legal justification pragmatic argumentation forms part of a complex argumentation in which a particular interpretation of a legal rule is defended by referring to the (un)desirable consequences in light of the purpose of the rule. For this reason, pragmatic argumentation is implemented in a specific way, and this implementation has also consequences for the critical questions that have to be answered with regard to the justification of the applicability of the argumentation scheme. In Sect. 2.2.1, I start with a description of the implementation of pragmatic argumentation on the level of the main argumentation. Then, in Sect. 2.2.2, I discuss the implementation of the subordinate argumentation that forms a reaction to the critical questions.

### *2.2.1 The Implementation of Pragmatic Argumentation in Legal Justification*

In his introduction to this special issue Frans van Eemeren has given a characterization of the general argument scheme of pragmatic argumentation. This

scheme, that forms a subtype of the scheme of causal argumentation, can be generally characterized as follows:

1. Action X' should be carried out
  - 1.1. Action X' will lead to positive result Y'
    - (1.1' If an action [of type X] leads to a positive result [of type Y'], that action [X'] should be carried out)

### 1: General argument scheme of pragmatic argumentation

This general scheme (which forms the positive variant of pragmatic argumentation) defines the arguments that are relevant in defending a standpoint on the basis of pragmatic argumentation and specifies the dialectical burden of proof with respect to the reactions to the forms of critique that are relevant in the discussion.

In legal justification, the general argument scheme of pragmatic argumentation forms, as indicated, always part of an argumentative pattern of complex argumentation.<sup>4</sup> The complexity of the argumentation is related to the function of pragmatic argumentation as part of a justification in a hard case in which the acceptability of the application of a legal rule in a specific interpretation is defended. For this reason, two forms of extension of the argumentation are required that result in different prototypical argumentative patterns. The first extension concerns the sub-division of argument (1.1) of the general argument scheme, which I shall discuss in this section. The second extension concerns the support of the (un)desirability of the consequences, which I shall discuss in Sect. 2.2.2.

In legal justification, the argument 1.1 in the general scheme, that action X' will lead to positive result Y', should be sub-divided into two arguments: a descriptive argument (1.1a) about the causal relation between X' and Y' and an evaluative argument (1.1b) about the fact that result Y' should be evaluated in a positive way. The reason is that in contrast with the general scheme where the (un)desirability of the consequences is presupposed, in a legal context the (un)desirability is part of the discussion and must be defended by further arguments to show why the consequences can be considered as (un)desirable in light of the goal of the rule. As will be explained in Sect. 2.2, the evaluative argument must be submitted to other forms of critique than the descriptive argument so that the two arguments must be supported by different forms of subordinate argumentation. In a legal context, the general scheme of pragmatic argumentation is extended and can be reconstructed as part of the following prototypical pattern of argumentation as specified in Sect. 2 in which both the positive and negative variant of pragmatic argumentation are represented:

1. In the concrete case, rule R should (not) be applied in interpretation R' (with an exception for the specific case)
  - 1.1a In the concrete case, application of rule R in interpretation R' leads to result Y'

<sup>4</sup> For a discussion of the dialectical role of the judge in legal proceedings see Feteris (2012).

- 1.1b Result Y' is (un)desirable from a legal point of view  
 (1.1a–1.1b' If in the concrete case application of rule R in interpretation R' leads to result Y' and if result Y' is (un)desirable, then rule R should (not) be applied in interpretation R')

2: Prototypical pattern of argumentation with pragmatic argumentation in the context of legal justification

In a hard case in which there is a difference of opinion about the correct interpretation of the rule, in pragma-dialectical terms the argumentation is put forward in the context of a *mixed dispute* in which one party argues that a particular rule R should be applied in the concrete case in a specific interpretation R' and the other party argues that this rule should be applied in another interpretation R".<sup>5</sup> This implies that the main argumentation, the argumentation on the first level, should reflect the choice between the rival points of view of the parties in dispute and should therefore reflect the balancing of the two positions on the basis of desirable and undesirable consequences (Y' and Y"). In Sect. 3 the different components of the complex argumentation on the level of the main argumentation are represented:

1. In the concrete case, rule R should be applied in interpretation R' (with an exception for the specific case) and not in interpretation R" (without an exception)
  - 1.1a In the concrete case, application of rule R in interpretation R' leads to result Y'
  - 1.1b Result Y' is desirable from a legal point of view
  - 1.1c In the concrete case, application of rule R in interpretation R" leads to result Y"
  - 1.1d Result Y" is undesirable from a legal point of view  
 (1.1a–1.1d' In the concrete case, if application of rule R in interpretation R' leads to Y', and Y' is desirable from a legal point of view, and if application of rule R in interpretation R" leads to Y", and Y" is undesirable from a legal point of view, then rule R should be applied in interpretation R')

3: Complex argumentation on the level of the main argumentation in a legal context in a hard case

In Sect. 3 the arguments 1.1a and 1.1b form an implementation of the positive variant of pragmatic argumentation and the arguments 1.1c and 1.1d of the negative variant, the positive variant serves to defend the part of the standpoint that the rule must be applied in interpretation R', and the negative variant serves to defend the part of the standpoint that the rule must not be applied in interpretation R". The complementing argument in which the weighing or preference is made explicit can be reconstructed as 1.1a–1.1d'.<sup>6</sup>

<sup>5</sup> For a description of the structure of various forms of disputes see van Eemeren and Grootendorst (1992, chapter 2).

<sup>6</sup> For a discussion of a pragma-dialectical reconstruction of weighing and balancing in legal justification see Feteris (2008c).

### 2.2.2 *The Implementation of the Subordinate Argumentation in Reaction Critical Questions*

A judge who puts forward the argumentation as specified in Sect. 3 in the previous section, has a dialectical burden of proof for answering the critical questions belonging to the argument scheme of pragmatic argumentation. These questions can be formulated as follows<sup>7</sup>:

1. Is the result Y'/Y" really (un)desirable from a legal point of view?
2. Does application of rule R (in interpretation R'/R") lead to Y'/Y"?

In legal justification in hard cases the central focus is on the answer to question 1. For this reason, I will concentrate here on the argumentation that is to be put forward as an answer to question 1 about the desirability of the result from a legal point of view.

From a legal perspective the answer to question 1, which asks for a justification of the arguments 1.1b and 1.1d, should specify why the consequences are (un)desirable. In the law, the desirability or undesirability (absurdity) of a particular result is evaluated in light of the goal of the rule. Since legal rules can be considered as a means to attain certain goals that are desirable from a legal, social, or economic perspective, an interpretation that refers to the goal of the rule is a relevant form of justification. The most authoritative source to establish the goal of the rule is the intention of the actual historical legislator when he formulated the rule. The goal of the rule can be based on the explicit intention of the legislator as it can be found in legislative documents, etcetera (which is called a *subjective teleological* interpretation of the meaning of the rule). The court can refer also to what is called the 'objective goal' of the rule as envisaged by a 'rational legislator', as it can be reconstructed on the basis of the rationale of the rule in the context of the law as a whole (which is called an *objective teleological* interpretation of the meaning of the rule).<sup>8</sup>

To justify that the application of the rule in the specific case is acceptable in a subjective teleological or objective teleological interpretation, in the justification a second level of subordinate argumentation should be distinguished that reflects the supporting argumentation justifying the (un)desirability of the consequences in relation to the purpose or goal of the rule, put forward as an answer to critical question 1. In legal theory this argumentation that refers to the goal or purpose is often characterized as argumentation from coherence with certain legal purposes, goals, policies, principles and values.<sup>9</sup> In pragma-dialectical terms, it can be characterized as a specific form of *symptomatic* argumentation that is provided in support of the normative argument 1.1b. It is stated that the result Y' has a particular

<sup>7</sup> For a description of the various relevant critical questions belonging to pragmatic argumentation in a legal context see Feteris (2002).

<sup>8</sup> For a discussion of a pragma-dialectical reconstruction of the various forms of teleological argumentation see Feteris (2008a). For a discussion of the pragma-dialectical reconstruction of the argumentation in which courts refer to the intention of the (historical) legislator see Plug (2005).

<sup>9</sup> See for example Berteau (2005), MacCormick (1978, 2005) for a discussion of argumentation from coherence.

property that makes it desirable from a particular perspective that is relevant in that context. Here, in the justification of argument 1.1b, the symptomatic argument forms a justification of the positive evaluation of the result Y' in argument 1.1b. In this case the fact that result Y' is instrumental in realizing a particular purpose P (that is intended by the legislator) is considered as a property that makes that result Y' can be considered as desirable from a legal point of view (and for the justification of 1.1d a similar argument justifying the undesirability of Y'').

On the basis of this characterization of the arguments that form part of the complex argumentation in legal justification, the argumentation on the level of the subordinate argumentation can be reconstructed as follows:

- 1.1b Result Y' is desirable from a legal point of view
- 1.1b.1a Result Y' is instrumental in realizing purpose or goal P
- 1.1b.1b Purpose P is desirable from a legal point of view
- 1.1b.1b.1 Purpose P is intended by the legislator/Purpose P is a rational purpose objectively prescribed by the valid legal order
- 1.1d Result Y'' is undesirable from a legal point of view
- 1.1d.1a Result Y'' is incompatible with purpose or goal P
- 1.1d.1b Purpose P is desirable from a legal point of view
- 1.1d.1b.1 Purpose P is intended by the legislator/Purpose P is a rational purpose objectively prescribed by the valid legal order

Scheme 4: The argumentation on the level of the subordinate argumentation as an answer to the first critical question

The argument 1.1b.1b/1.1d.1b, in its turn, can be questioned. This requires a further justification that provides an answer to the critical question in relation to this argument. Depending on whether a judge has referred to the purpose intended by the historical legislator (and thus opting for a *subjective teleological* interpretation of the rule) or the rational purpose objectively prescribed by the valid legal order (and thus opting for an *objective teleological* interpretation of the rule), in his supporting argumentation he will have to put forward different arguments. To justify the compatibility with the intention of the historical legislator, the judge will have to refer to documents, such as parliamentary discussions, in which this intention is mentioned.<sup>10</sup> To justify the compatibility with the intention of a rational legislator, the judge will have to refer to goals, principles and values underlying the rule that constitute the *ratio legis*, the rationale or purpose of the rule.<sup>11</sup> The argumentative pattern on the level of this argumentation can be reconstructed as follows:

- 1.1b.1b Purpose or goal P is intended by the legislator/a rational goal objectively prescribed by the valid legal order

<sup>10</sup> For a discussion of a pragma-dialectical reconstruction of the various forms of teleological argumentation see Feteris (2008a). For a discussion of the pragma-dialectical reconstruction of argumentation in which courts refer to the intention of the legislator see Plug (2005).

<sup>11</sup> For a discussion of argumentation referring to the *ratio legis* see Canale and Tuzet (2009).



- 1.1b.1b.1 Purpose or goal P can be found in the following legal documents (...)/ Purpose or goal P is underlying the following rules, principles and values of the valid legal order (...)

5: Argumentation on the level of the sub subordinate argumentation as an answer to further critical questions

Apart from the teleological-evaluative argumentation referring to the acceptability of the consequences of interpretation Y' in light of the purpose of the rule, in a legal context the complex argumentation must consist also of argumentation that justifies the application of the interpretation in light of the legal system. As MacCormick (1978:119–128, 2005) states, in legal justification a court must show also that the ruling is consistent with certain legal norms such as statutes etcetera and is supported by certain legal values and principles, preferably authoritatively stated by judges or by respected legal writers.<sup>12</sup> In other words, the judge must show that the decision is consistent with existing legal norms and coherent with general legal principles.

Such argumentation in which a court justifies the acceptability of the decision in light of the norms, principles and values of the legal system may form part of the subordinate argumentation put forward as a reaction to or anticipation of a critical question about the legal basis for the desirability of a particular result. The argumentation can be put forward also as co-ordinative argumentation that is given as a reinforcement of the justification on the basis of the pragmatic argumentation. In that case the argumentation forms part of the main argumentation that is presented as direct defence of the standpoint.

In the preceding sections I have reconstructed the prototypical argumentative patterns of which pragmatic argumentation forms part in legal justification. With this reconstruction I have clarified the dialectical obligations of a judge who justifies his decision in a hard case by referring to consequences of application of the rule in the specific case. These dialectical obligations define the dialectically relevant moves in the justification of legal decisions in a hard case: they prescribe the elements of the justification that are necessary from the perspective of the dialectical role of the judge to account for the different decisions and choices that have to be made in the discussion process.<sup>13</sup>

These dialectical obligations make explicit the potential forms of critique that the judge will have to react to in a satisfactory way in order for his justification to be acceptable from a legal perspective. To clarify these dialectical obligations I have translated his legal obligations in terms of the answers that he will have to give to the different critical questions that can be asked in relation to the different argument schemes that form part of his argumentation on the different levels of the argumentation. In this way it has become clear that the judge will have to react to

<sup>12</sup> In Anglo-Saxon common law systems courts often will have to explain and distinguish also precedents as favourable or unfavourable.

<sup>13</sup> For a discussion of legal justification as part of a critical discussion and the role of the judge see Feteris (1990, 1993, 2012).

several kinds of critical questions: critical questions with respect to the appropriateness of pragmatic argumentation and critical questions with respect to the applicability of pragmatic argumentation.

### 3 Exemplary Analysis of the Use of Argumentation Referring to Consequences in Light of the Purpose of the Rule in Legal Justification

To show how courts may use pragmatic argumentation, and how they instantiate the general prototypical argumentative patterns, in this section I give an exemplary analysis of the way in which in which the U.S. Supreme Court in the Holy Trinity case uses pragmatic argumentation to justify its decision. I show how the court implements the general prototypical argumentative patterns. Since in U.S. law the ‘core’ of the decision is formed by that part that constitutes the ‘ratio decidendi’ of the decision that is important from the perspective of the decision as precedent, I concentrate on the first part of the decision that ends with ‘We find, therefore...’.

In the famous case of *Holy Trinity Church v. U.S.* (143 U.S. 457) from February 29, 1892 the U.S. Supreme Court had to decide whether or not the act prohibiting the importation of foreigners and aliens under contract to ‘perform labour’ in the United States (chapter 164, 23 St. p. 332) was applicable to an English Christian minister who had come to the United States to enter into service of the Protestant Episcopal Holy Trinity Church in the city of New York as rector and pastor.<sup>14</sup> The question was whether, as was decided by the District Court, the contract signed by the church was forbidden by chapter 164, 23, St. P. 332 according to which it is ‘unlawful for any person to assist or encourage in any way the importation or migration of any alien or foreigner into the United States to perform labour or service of any kind’.

According to the United States and the circuit judge the church was in error because the contract was forbidden by chapter 164, 23, St. P. 332, according to which it is ‘unlawful for any person to assist or encourage in any way the importation or migration of any alien or foreigner into the United States to perform labour or service of any kind’. The opinion of the Supreme Court, delivered by justice Brewer, is that this immigration statute should, in the concrete case, not be applied to the act of the church, although the act is within the letter of this section. Brewer states that application in the broad meaning would have an absurd result, that is that the contracts for the employment for ministers, rectors and pastors would be included in the penal provisions of the act. He argues that the congress never had in mind any purpose of prohibiting ‘the coming into the U.S. of ministers of the gospel’. He maintains that the meaning of a statute can be found in the evil which it is designed to remedy, in this case the practice of large capitalists who contracted their agents abroad for the shipment of great numbers of ‘an ignorant and servile class of foreign labourers’ under contracts by which the employer agreed to

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<sup>14</sup> For the decision in the Holy Trinity Church case see <http://supreme.justia.com/cases/federal/us/143/457/case.html>.

prepay their passage and the labourers agreed to work after their arrival for a certain time at a low rate of wages.

In its decision the U.S. Supreme Court uses argumentation referring to the absurd consequences of applying the rule in the standard meaning. In its evaluation of the consequences the court refers to the purpose of the rule, that is to prevent the influx of cheap labour under contracts with poor conditions, as it can be reconstructed from the intention of the legislator in the parliamentary discussion that can be found in the reports of the committees. On the basis of this purpose, the court is of the opinion that the consequences would be absurd because they are not in line with what the legislator intended with the rule.

The Supreme Court decides that the decision of the District Court has to be reversed because the contract was not forbidden. In its view the rule regarding the prohibition is not applicable in the specific case because the meaning of the term 'labour' should be taken in the restricted sense of 'manual labour', which implies, in the opinion of the Supreme Court, that it does not concern the activities of a Christian minister. The Supreme Court justifies this interpretation by referring to the purpose of the rule as intended by the legislator, the U.S. Congress, that is to stay the influx of cheap unskilled labour:

'We find therefore, that the title of the act, the evil which was intended to be remedied, the circumstances surrounding the appeal to Congress, the reports of the committee of each house, all concur in affirming that the intent of Congress was simply to stay the influx of this cheap unskilled labor'.

This case constitutes a hard case because different interpretations of the rule are presented, and as the highest court the Supreme Court has to decide which of the interpretations is correct from a legal point of view. As has been explained in Sect. 2, such a hard case requires a complex argumentation in which the court must react to certain forms of criticism. In what follows, in Sect. 3.1, I address the justification of the appropriateness of the use of pragmatic argumentation that is presented in that part of the justification that begins with 'It must be conceded that...'. Then, in Sect. 3.2, I address the justification of the application of pragmatic argumentation that is presented in the following part of the justification that begins with 'It will be seen that words...', and explain how the Supreme Court instantiates the prototypical argumentative pattern in which it refers to the consequences of application of the rule in light of the purpose as it is intended by the legislator.

### **3.1 The Justification of the Appropriateness of Pragmatic Argumentation**

In this case, to justify its decision that the act prohibiting the importation of foreigners does not apply to foreigners who perform labour as ministers of the gospel, the Supreme Court uses pragmatic argumentation. Since pragmatic argumentation, as a specific form of teleological-evaluative argumentation, as is explained in Sect. 2.1, is 'lower' in the hierarchy of interpretation methods, the court will have to refer also to other authoritative sources that support the same interpretation. In this case the court refers to such authoritative sources: the title of the act, the evil which was intended to be remedied, the circumstances surrounding

the appeal to Congress, the reports of the committee of each house. The court explains that these sources support also the given interpretation. It explains that the language of the title indicates an exclusion from its penal provisions of all contracts for the employment of ministers, rectors and pastors. Then the court explains that the evil which the statute was designed to remedy also supports this interpretation. Finally the court refers to the legislative history by explaining that the committees of the U.S. Congress were asked to prevent the influx of cheap unskilled labour, and that nobody suggested that there would be a surplus of 'brain toilers', and that least of all the market for the services of Christian ministers was depressed by foreign competition. These authoritative sources constitute a reference to a grammatical interpretation method (the language of the title of the act), an subjective-teleological interpretation method (the evil which was intended to be remedied as referred to in the discussion in the U.S. Congress) and a historical interpretation method (the circumstances surrounding the appeal to Congress and the reports of the committees).

The argumentation in defence of the appropriateness of the interpretation forms part of a complex argumentation that can be reconstructed as a form of coordinative argumentation described in Sect. 2.1, showing that different interpretation methods point in the same direction. In this way, the appropriateness of pragmatic argumentation referring to the absurd consequences in relation to the purpose of the rule is shown to be in line with other forms of argumentation that point in the same direction.

In its argumentation the Supreme Court not only shows that other interpretation methods support the given interpretation, but defends also the acceptability of the argumentation by reacting to various forms of critique that might lead to the conclusion that it would not be allowed to depart from the clear meaning of a rule. In the part of the decision beginning with the formulations 'It must be conceded that the act of the corporation is within the letter of this section (...)’ the court gives various counter-arguments that are directed at various forms of critique. First, the court reacts to possible critique that it would be problematic to refer to the intention of the legislator and the purpose of the rule to establish the meaning of a legal rule. To this end the court refers to relevant legal provisions in which it is stated that to establish the meaning of a rule it is allowed to consult the intention of the legislator. Then the court reacts to possible critique that it would not be allowed to substitute the will of the judge for that of the legislator, and rejects this critique with the following formulation:

This is not the substitution of the will of the judge for that of the legislator; for frequently words of a general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act.

The court puts forward coordinative compound argumentation in which it shows that different interpretation methods all support the given interpretation of the term

‘labour’ in the context of the statute. In doing so, it aims at making the justification fit within the legal system and tradition of the U.S. by putting forward arguments that make the justification coherent and consistent with the institutional requirements of the law in the U.S. as I have described at the end of Sect. 2.1.

### 3.2 The Justification of the Applicability of the Argument Scheme of Pragmatic Argumentation

The argumentation of the Supreme Court that is put forward to justify the applicability of the pragmatic argumentation in the concrete case can be found in the parts of the decision where the Supreme Court defends its narrow interpretation R’ by referring to the absurd consequences of applying the rule in the broad interpretation R” in light of the purpose of the rule. As has been explained in Sect. 2.2, in this case the Supreme Court has to defend a standpoint that concerns a preference for an adapted interpretation of the rule (R’) and a rejection of a broad interpretation (R”):

1. In the concrete case, rule R should applied adapted interpretation R’ (with a narrow interpretation of the term ‘labour’ that makes an exception for a Christian minister), implying that the rule does not apply to foreigners who perform labour as ministers of the gospel, and not in the standard interpretation R”, (with a broad interpretation of the term ‘labour’) implying that the rule applies to all foreigners who perform labour

The court acknowledges that the statute was applicable because the intention of the legislator was clear, but argued that an exception should be made. The court states that if the legislator had known the present situation, it would have made an exception for the concrete case on the basis of the absurd consequences in relation to the purpose of the rule and the values of the U.S. as a Christian nation. Since the court departs from the acknowledged standard interpretation of the rule and makes an exception for this case, it had an obligation to justify why this exception is justified.

The justification offers a good example of how a court implements the prototypical argumentative patterns as described in Sect. 2 in hard cases because the different levels of argumentation are represented. In what follows, for the different levels of the argumentation distinguished in Sect. 2.2 I explain how the various arguments are implemented in this case.

On the level of the main argumentation the justification of the Supreme Court can be reconstructed as a complex argumentation, consisting of the positive and negative variant of pragmatic argumentation as described in scheme 3 in Sect. 2.2.1. With argument 1.1a and 1.1b the court puts forward pragmatic argumentation in which it refers to the result of application in interpretation R’ and states that this result would be desirable (the desirability is, as will be explained below, defended on a lower level of the argumentation). With argument 1.1c and 1.1d the court puts forward pragmatic argumentation in which it refers to the result of application in interpretation R” and states that this result is undesirable (absurd).

This result would be that in interpretation R' the contracts for the employments of ministers, rectors and pastors would be excluded from the penal provisions of the act and that in interpretation R'' the contracts for the employments of ministers, rectors and pastors would be included in the penal provisions of the act.

1. In the concrete case, rule R should be interpreted as R', implying that the rule does not apply to foreigners who perform labour as ministers of the gospel, and not as R'', implying that the rule applies to all foreigners who perform labour
  - 1.1a In the concrete case, application of rule R in interpretation R' would have result Y', that the contracts for the employment of ministers, rectors and pastors are excluded from the penal provisions of the act
  - 1.1b Result Y' is desirable from a legal point of view
  - 1.1c In the concrete case, application of rule R in interpretation R'' would have result Y'', that the contracts for the employment of ministers, rectors and pastors are included in the penal provisions of the act
  - 1.1d Result Y'' is undesirable from a legal point of view

#### 6: Argumentation justifying the applicability on the level of the main argumentation

To justify that result Y' is desirable and result Y'' undesirable, on the level of the subordinate argumentation the argumentation put forward by the Supreme Court can be analysed as a reaction to doubt with respect to the first critical question, whether result Y'/Y'' is (un)desirable from a legal point of view. As has been described in Sect. 2.2, in its justification the court will have to deal with certain forms of doubt that are relevant from a legal perspective, in pragma-dialectical terms with the critical questions that are relevant for the specific implementation of pragmatic argumentation. The argumentation that the Supreme Court puts forward in defence of argument 1.1b and argument 1.1d, that the result Y' would be desirable and result Y'' undesirable or 'absurd', can be considered as a reaction to the first critical question with respect to the desirability of result Y' and the undesirability of result Y''.

In the argumentation consisting of 1.1b.1a and 1.1b.1b the court justifies the desirability of the result in light of the compatibility with purpose P of the rule mentioned in the conclusion of the decision (at the end of VI) that is 'to stay the influx of this cheap unskilled labour', pointing out that this purpose is intended by the legislator. In this case the court uses subjective-teleological argumentation by referring to the purpose as intended by the historical legislator.

To support argument 1.1b.1b, that purpose P is intended by the legislator, the court puts forward argumentation referring to certain authoritative sources from which the 'spirit of the statute' and the 'intention of its makers' can be inferred. First, the court explains the intention of the legislature by referring to the common understanding of the words 'labour' and 'labourers' used in the first section of the act and by concluding that on the basis of the words it is clear that Congress had in mind only the work of the manual labourer as distinguished from that of the

professional man, so that an exception for a Christian minister can be justified because the legislator has intended this. As a support the court uses a selection of citations from precedents to justify its interpretation.

Second, the court explains the intention of the legislator on the basis of the legislative history by referring to the evil which the act was designed to remedy from the perspective of the situation ‘as it was pressed upon the attention of the legislative body’. In the court’s view the intent of Congress can be found in the evil the statute is designed to remedy, which can be found in the contemporaneous events, the situation as it existed, and as it was pressed upon the attention of the legislative body. The appeal to Congress was made ‘to raise the standard of foreign immigrants and to discountenance the migration of those who had not sufficient means in their own hands (...) to pay their passage’. The court adds that it appears also from the petitions in the testimony before the committees of Congress that it was this cheap unskilled labor which was making the trouble, and the influx of which Congress sought to prevent. Finally the court states that the extract from the report of the Senate committee (...) reveals also that ‘It seeks to restrain and prohibit the immigration or importation of laborers who would have never seen our shores but for the inducements and allurements of men whose only object is to obtain labor at the lowest possible rate, regardless of the social and material wellbeing of our own citizens, and regardless of the evil consequences which result to American laborers from such immigration.’

In its conclusion the court stresses that all these sources, ‘the title of the act, the evil which was intended to be remedied, the circumstances surrounding the appeal to congress, the reports of the committee of each house concur in affirming that the intent of congress was simply to stay the influx of cheap, unskilled labor’.

Using the conventions of the prototypical argumentative pattern described in Sect. 2.2, the argumentation in which the applicability of the argumentation scheme is justified can be analysed as follows:

- 1.1b Result Y’, that the contracts for the employment of ministers, rectors and pastors are excluded from the penal provisions of the act, is desirable
- 1.1b.1a Result Y’ is compatible with purpose P, to stay the influx of cheap unskilled labour, that is to prevent large capitalists from shipping great numbers of ignorant and servile foreign labourers to the U.S. who agreed to work after their arrival for a certain time at a low rate of wages
- 1.1b.1b Purpose P, to stay the influx of cheap unskilled labour, is desirable from a legal point of view
- 1.1b.1b.1 Purpose P is intended by the legislator
- 1.1b.1b.1.1a The language of the title indicates an exclusion from its penal provisions of all contracts for the employment of ministers, rectors and pastors

- 1.1b.1b.1.1b Reference to purpose P can be found in the documents from the discussion in the congress. It appears from the circumstances surrounding the appeal to congress, the reports of the committee of each house that it was this cheap, unskilled labor which was making the trouble, and the influx of which the congress sought to prevent which constituted the evil the statute was designed to remedy
- 1.1d Result Y”, that the contracts for the employment of ministers, rectors and pastors are included from the penal provisions of the act, is undesirable (or ‘absurd’)
- 1.1d.1a Result Y” would be incompatible with purpose P, to stay the influx of cheap unskilled labour, that is to prevent large capitalists from shipping great numbers of ignorant and servile foreign labourers to the U.S. who agreed to work after their arrival for a certain time at a low rate of wages
- 1.1d.1b Purpose P, to stay the influx of cheap unskilled labour, is desirable from a legal point of view
- 1.1d.1b.1 Purpose P is intended by the legislator
- 1.1d.1b.1.1a The language of the title indicates an exclusion from its penal provisions of all contracts for the employment of ministers, rectors and pastors
- 1.1d.1b.1.1b Reference to purpose P can be found in the documents from the discussion in the congress. It appears from the circumstances surrounding the appeal to congress, the reports of the committee of each house that it was this cheap, unskilled labor which was making the trouble, and the influx of which the congress sought to prevent which constituted the evil the statute was designed to remedy

#### 7: Argumentation justifying the applicability of the argument scheme on the level of the subordinate argumentation

The way in which the Supreme Court instantiates the prototypical argumentative pattern reflects the preconditions for the argumentative activity in legal justification in the U.S. in the historical context of this decision.

The justification of the appropriateness and the applicability of the argument scheme of pragmatic argumentation concern the common starting points that can be considered as accepted in U.S. law. In the U.S. normally an exception to a rule or statute based on an interpretation that departs from the literal interpretation is not allowed, so an interpretation that departs from the literal meaning will have to be justified in an extensive way. The justification of the appropriateness of the argument scheme of pragmatic argumentation that is used to justify the exception on the basis of the absurdity of result Y”, and therefore the undesirability of application of rule R in interpretation R”, is defended by referring to the tradition in U.S. law with respect to the acceptability of the methods for establishing the meaning of a statute for a specific case. The justification of the applicability of the argument scheme of pragmatic argumentation is based on the hierarchy of interpretation



methods that define the authoritative sources that can be used to justify an interpretation.<sup>15</sup> To justify the interpretation of the statute the court refers to the purpose of the statute as it can be inferred from the intention of the historical legislator, in this case U.S. Congress. To this end, the court refers to certain authoritative sources from which the will of the legislator can be inferred. In this case it refers in section III, IV and V to the various authoritative sources that can be used as a 'guide' to the meaning of a statute as cited at the end of section VI: the title of the act, the evil which was intended to be remedied, the circumstances surrounding the appeal to Congress, the reports of the committee of each house. Those references are reconstructed as parts of the subordinate argumentation in defence of argument 1.1b and 1.1d.

## 4 Conclusion

In this contribution I have explained the role of pragmatic argumentation in legal justification. I have shown how the prototypical argumentative pattern of which pragmatic argumentation forms a part can be reconstructed in terms of the dialectical obligations of a judge. These dialectical obligations define the dialectically relevant moves in the justification of legal decisions in hard case: they prescribe the elements of the justification that are necessary from the perspective of the dialectical role of the judge to account for the different decisions and choices that have to be made in the discussion process.

Based on the dialectical characterization of the role of pragmatic argumentation and the obligations of the judge who uses this form of argumentation in a hard case I have reconstructed the prototypical argumentative patterns and I have shown that pragmatic argumentation forms part of a complex argumentation. The complexity is related to the fact that the (un)desirability of the consequences is part of the discussion and must be justified further. For this reason, the second element of the general argument scheme of pragmatic argumentation 1.1 must be sub-divided in a descriptive argument about the consequences and a normative argument about the (un)desirability of these consequences. Furthermore, in the prototypical pattern of which pragmatic argumentation forms part, always one or more levels of subordinate argumentation must be reconstructed that form the justification of the (un)desirability of the consequences in relation to the goal of the rule.

I have translated the arguments that have to be given as reactions to various forms of critique that are relevant from a legal perspective in terms of parts of a prototypical argumentative patterns. I have reconstructed the prototypical argumentative patterns that are relevant for the justification of the appropriateness and the applicability of pragmatic argumentation in a concrete case.

By way of illustration I have given an analysis of the argumentation of the U.S. Supreme Court in such a hard case in which it had to account for an interpretation in which it departed from the standard literal meaning of the term 'labour' in the context of a statute. I have explained how the court instantiates in its justification the

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<sup>15</sup> See Summers (1991).

prototypical argumentative pattern by translating the arguments that are given in terms of the arguments that form part of the argumentative pattern on the different levels of the argumentation. In this way I have clarified how the court reacted to the various forms of critique that it would be problematic to refer to the intention of the legislator and the purpose of the rule in relation to certain ‘absurd consequences’ to establish the meaning of a legal rule.

Further research of the way in which courts maneuver strategically in the justification of the appropriateness and applicability of pragmatic argumentation must clarify how courts adapt their choices and presentational devices in light of the preconditions of the argumentative activity in a particular legal system.<sup>16</sup>

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<sup>16</sup> For a discussion of the strategic manoeuvring in the Holy Trinity case see Feteris (2008b).

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