A Pragma-Dialectical Approach of the Analysis and Evaluation of Pragmatic Argumentation in a Legal Context

EVELINE T. FETERIS

University of Amsterdam
Vakgroep Taalbeheersing
Amsterdam, The Netherlands

ABSTRACT: This paper answers the question how pragmatic argumentation which occurs in a legal context, can be analyzed and evaluated adequately. First, the author surveys various ideas taken from argumentation theory and legal theory on the analysis and evaluation of pragmatic argumentation. Then, on the basis of these ideas, she develops a pragma-dialectical instrument for analyzing and evaluating pragmatic argumentation in a legal context. Finally she demonstrates how this instrument can be used by giving an exemplary analysis and evaluation of pragmatic argumentation in a decision of the Dutch Supreme Court.

KEY WORDS: argumentation theory, causal argumentation, consequentialist argumentation, evaluation of argumentation, legal argumentation, legal interpretation, policy arguments, practical syllogism in legal argumentation, pragmatic argumentation, teleological argumentation

1. INTRODUCTION

Judges often defend a legal decision by referring to the consequences of application of a particular legal rule in the concrete case. In the legal literature, such *pragmatic argumentation*, which refers to the consequences of a decision, is not always considered as a sound justification of a legal decision.[1]

One of the reasons why pragmatic argumentation is often considered as a weak justification is that reference to the favorable or unfavorable consequences of a particular decision is often used as a rhetorical technique to conceal the real motives for that decision. Many authors are of the opinion that such a form of argumentation hides considerations that ought be made explicit. On the other hand, there are authors who stress that an advantage of an explicit reference to the consequences of a decision may be that it serves to clarify a choice between various arguments, a choice which often remains implicit.

Because pragmatic argumentation is becoming an important way to defend a legal decision, it is worthwhile determining what this form of argumentation exactly amounts to, and under what circumstances it may form an acceptable way to defend a legal decision. In this paper, I will

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develop an instrument for the analysis and evaluation of pragmatic argumentation and demonstrate how this instrument can be used in clarifying the role of pragmatic argumentation in the justification of a decision about the interpretation of legal rules.

In 2 I will start by giving a survey of the ideas developed in philosophy, argumentation theory and legal theory about the role of pragmatic argumentation in the justification of legal decisions and about the analysis and evaluation of pragmatic argumentation. Then, in 3, on the basis of this survey I will develop a general model for the analysis of pragmatic argumentation.

After this I will discuss the role that pragmatic argumentation can play in a legal context. In a legal context, pragmatic argumentation occurs often in the justification of the interpretation of a legal rule. First, in 4, I will describe various forms and extensions of pragmatic argumentation and develop a specific legal implementation of the general model for pragmatic argumentation which can be used as an instrument in the analysis of pragmatic argumentation in a legal context. Then, in 5, on the basis of an exemplary analysis of a decision of the Dutch Supreme Court, I will clarify the role of pragmatic argumentation in the justification of a legal decision.

2. VARIOUS APPROACHES OF PRAGMATIC ARGUMENTATION

2.1. *Ideas about the role of pragmatic argumentation*

In the literature on pragmatic argumentation, broadly speaking, there are three main views as to the criteria which may be adopted to determine the rightness of a claim or action.[2] On the basis of these views, three approaches can be distinguished as to the question whether pragmatic argumentation offers a sound defence for a moral or legal decision. According to a *deontological* or *moralist* approach, pragmatic argumentation can never constitute a sound defence for a moral or legal decision. For a sufficient justification, arguments referring to moral or legal values are required. For example, Dworkin (1978, pp. 294–330), in his 'right model', defends the standpoint that a judge must take account of the rights of the individual and not focus on evaluating the consequences of the decision for society in general. According to a *consequentialist, utilitarian* or *teleological* approach, pragmatic argumentation can, on its own, constitute a sufficient defence of a moral or legal decision. According to an *ethical-pluralistic* approach, which employs a mixture of consequentialist and moralist arguments, pragmatic argumentation should be complemented by arguments demonstrating that the decision is coherent and consistent with accepted rules and principles.

Although these approaches are distinct in theory, most authors in modern legal theory and legal philosophy who devote attention to pragmatic argumentation can be considered as representatives of an ethical-pluralistic approach in which the two other approaches are combined. Most legal authors such as Bell (1983), MacCormick (1978), MacCormick and Summers (1991). Twining and Miers (1994) feel that pragmatic argumentation can offer a sound justification, if used in combination with other arguments demonstrating that the interpretation is coherent and consistent with legal values and principles. After all, a legal decision should not only be rational from the viewpoint of morality in general (by referring to the consequences for society), but should also show that it is coherent and consistent with legal rules, principles, and goals. In this approach, pragmatic arguments and other arguments complement each other.

As a critique of Dwokin's ideas, that only reference to principles and not reference to consequences can constitute a rational justification of a legal decision, Bell (1983, pp. 15–17) and MacCormick (1978, pp. 262–264) argue that argumentation, which is based on principles, can also be based on an evaluation of the consequences of a certain decision in the light of the goals underlying these principles. As is also argued by authors such as Hare (1952, p. 69) a decision can be defended by referring to principles and reference to the effects of applying these principles, as well as by referring to the effects of the decision, which are then related to certain principles.

In philosophy in general, and in ethics in particular, arguments in which the (un)desirability of a particular act or course of action is defended by referring to the consequences or effects of this act, are considered as a specific form of a *practical syllogism.* The idea of the practical syllogism is introduced by Aristotle in *The Nicomachean Ethics* (1147a) and the concept is developed further by Anscombe (1957), Hare (1952) and von Wright (1968, 1972).[3] A practical syllogism is an inference in which a singular normative conclusion is derived from a universal imperative or normative premiss together with at least one indicative or non-normative premiss.

Authors such as Hare (1952), Toulmin (1950) and Gottlieb (1968) argue that a rational justification of an act must consist of various kinds of arguments: arguments referring to rules or principles and arguments referring to the consequences of applying this rule or principle. Hare (1952, pp. 68ff) argues that there are various ways of justifying an action. In some cases, we refer to a principle, and if – asked to justify this principle – we refer to the effects of observing it and of not observing it. In other cases, we first refer to the effects and if asked what was right or wrong about these effects, we appeal to some principle. He is of the opinion that a complete justification of a moral decision would always consist of a complete account of its effects, together with a complete account of the principles which it

observed, and the effects of observing those principles, and so on until we have satisfied our inquirer.

Toulmin (1950, pp. 146ff) also argues that when discussing the rightness of an action, when there is a conflict of duties, appeal to a single current principle is not enough, we must also refer to an estimation of probable consequences. In Gottlieb's model (1968, pp. 74ff) of rule-based reasoning, which is based on Toulmin's model, besides the rule which is applied in the concrete cases, the foreseeable consequences of the decision and the foreseeable consequences of future application of the rule form an important element in the justification.

2.2. *Ideas about the analysis and evaluation of pragmatic argumentation*

Authors approaching pragmatic argumentation from the perspective of *argumentation theory* characterize pragmatic argumentation as a specific kind of argumentation scheme. Van Eemeren and Grootendorst (1992) consider pragmatic argumentation to be a scheme which is based on a causal relationship between the argument and the standpoint, Schellens (1984) considers it to be a scheme which is based on (causal) regularity, on the evaluation of rules, or on rules of conduct. The authors try to develop a model for describing the structure of pragmatic argumentation and specify the relevant critical questions for the evaluation.

Van Eemeren and Grootendorst (1992, pp. 97, 102) characterize what they call 'instrumental' or 'pragmatic' argumentation as an argumentation scheme based on a causal relationship. In it the argument refers to a consequence of what is mentioned in the standpoint. The standpoint recommends a particular course of action or a particular goal, and the argumentation mentions the favorable effects or consequences. Pragmatic argumentation can also be used to advise against some course of action or efforts to achieve some goal.

Schellens (1984) and Walton (1996) characterize pragmatic argumentation as argumentation which refers to the consequences of a certain act, measure, policy, or a rule, such as a legal rule. The standpoint can consist of advice about a course of action defended by argumentation referring to positive consequences or advice against a course of action defended by argumentation referring to negative consequences.

The authors approaching pragmatic argumentation from the perspective of *legal theory* tend to approach pragmatic argumentation as an argumentation scheme underlying the justification of an interpretation of a legal rule. When justifying a teleological interpretation, a judge weighs the consequences of the preferred alternative and the consequences of the less perferred alternative, and defends his final decision by referring to the goals of the legal rule.

Alexy (1989) discusses pragmatic argumentation in the context of the

interpretation of legal rules. A jude uses what I will call pragmatic argumentation to defend an interpretation of a statutory rule by showing that the consequences of this interpretation are in accordance with the aim of the rule. When using *genetic* argumentation, a judge defends the interpretation of a legal rule by referring to the intention of the legislator, and establishing that the rule is intended as a means to reach a certain end. Alexy (1989, p. 238) considers genetic argumentation in a legal context as a variant of a practical syllogism.[4] In using *teleological* argumentation, a judge would defend an interpretation by demonstrating that the interpretation is acceptable, given the purposes of the rule. The *negative* form of pragmatic argumentation is called the *argument of unacceptability*. The standpoint that a particular rule is not acceptable is defended by demonstrating that if this rule is applied, a certain undesirable consequence will follow.

Summers (1978) develops a model for the rational reconstruction of legal decisions. In it, one of the ways to defend a decision is to use what he calls 'goal reasons'. He describes a 'goal reason' as an argument which derives its justificatory force from the fact that the decision supported by the argument has consequences which serve a good social goal. The goal can, but need not be legally recognized.

Golding (1984) discusses pragmatic argumentation, which he calls a 'goal oriented' type of reasoning, in the context of practical argumentation, argumentation used a defend a particular act. In a legal context the act consists of rendering a decision which takes account of certain rights. It is shown that the decision constitutes a necessary means to achieve a certain desirable legal goal. Golding also distinguishes a *negative* form of pragmatic argumentation, which he calls the *reduction ad absurdum* argument. In this form of argument, a judge shows that a decision is undesirable because it hinders the achievement of a desirable legal goal.

MacCormick (1978) discusses pragmatic argumentation, which he calls 'the consequentialist mode of argument', in the context of justifying an interpretation of a legal rule. In using pragmatic argumentation, a judge defends an interpretation by showing that the chosen alternative has desirable consequences (and the rejected alternative has undesirable consequences.) MacCormick makes a distinction between argumentation referring to the possible factual consequences of a rule and argumentation referring to the logical consequences of the rule, especially the hypothetical consequences which can follow if the rule is applied in similar circumstances.

Given these ideas on the role and form of pragmatic argumentation, what can we say now regarding the various forms of pragmatic argumentation, and regarding the nature of the standpoint and the argument?

Pragmatic argumentation can be considered as a specific form of practical argumentation, of argumentation which occurs in a practical discussion about the desirability or undesirability of a certain course of action.

A normative conclusion about the (un)desirability of the course of action is derived from a premiss consisting of, together with a factual statement about the probability of certain effects which will occur, a normative statement about the (un)desirability of these effects, in relation with a statement about the (un)desirability of the effects in relation to a certain goal or a certain rule or principle.

In the various descriptions, we can distinguish two variants. In what we could call the *positive variant*, the acceptability of an act, decision, interpretation, etc. is defended by referring to the positive consequences. In the *negative variant*, the unacceptability of the act is defended by referring to the negative consequences.

With respect to the nature of the *standpoint*, we see that the standpoint can refer to various matters. It can involve a course of action, a proposal, or a plan. In general, it is a *normative utterance*. In a political context, it can involve a certain *policy*. And in a legal context it involves a *decision* (which can be considered as a normative utterance, an act or course of action), often a decision about the *interpretation of a legal rule*.

With respect to the nature of the *argumentation*, it involves the *consequences* of the proposed course of action or decision. In a legal context, the acceptability (or unacceptability) of the consequences is often defended by means of pragmatic argumentation, which refers to the goal of the legal rule. Often it also refers to the goals of the legal system or the system of rules to which the rule belongs. In such cases, the argumentation becomes more complex in that it establishes a relationship between the consequences of the interpretation of the rule and the purpose of the rule.

With respect to the *consequences* to which the argumentation refers, some legal authors, such as Gottlieb, MacCormick and Summers, maintain that the consequences at stake are those of a possible future application of the rule in similar circumstances and not those of applying it in the case at hand. According to them, pragmatic argumentation, and especially pragmatic argumentation in a legal context concerns the consequences of the universal rule underlying the decision. Thus, it is not limited to the specific consequences of the decision for the individual parties.

3. THE ANALYSIS AND EVALUATION OF PRAGMATIC ARGUMENTATION

In this section I will use the ideas described above to develop a basic model for pragmatic argumentation. The model for pragmatic argumentation I will present here is based on a pragma-dialectical approach of argumentation schemes. In this approach, an argumentation scheme is considered as a specific relation between an argument and a standpoint, in the case of pragmatic argumentation a specific form of a causal relation. To each type of argumentation scheme belong specific critical questions for the evaluation of that type of argumentation.

3.1. *A model for the analysis of pragmatic argumentation*

In the two figures below the *basic structure* of pragmatic argumentation is described:

Positive variant

Standpoint: Act X is desirable
Because: Act X leads to consequence Y
and: Consequence Y is desirable

Underlying this argument is the following premise: 'if act X leads to consequence Y, and if consequence Y is desirable, then act X is desirable'.

The standpoint refers to a particular act (decision, interpretation) X. In the most simple case, where the consequences are not specified, the argumentaion consists of 1) a normative statement stating that consequence Y is desirable; and 2) an empirical statement stating that act X leads to consequence Y.

A similar model can be formulated for the negative variant:

Negative variant

Standpoint: Act X′ is undesirable
Because: Act X′ leads to consequence Y′
and: Consequence Y′ is desirable

Underlying this argument is the following premise: 'if act X′ leads to consequence Y′, and if consequence Y′ is undesirable, then act X′ is undesirable'.

As we have seen, the consequences Y can be of a different kind. A judge can refer to (i) the consequences in the concrete case for the parties involved of applying the rule in this specific interpretation, he can (ii) refer to the consequences for the parties involved in future cases of applying the rule in this specific interpretation, and he can (iii) refer to the consequences of applying the rule in this specific interpretation for the body of rules to which the rule belongs or the legal system as a whole.

There are also various combinations possible of both variants, for example where the undesirability of a certain act (X′) is defended because it does not lead to a certain consequence (Y), which is desirable, or where the desirability of a certain legal interpretation (X) is defended by showing that the interpretation presented by the opposing party (X′) is undesirable because it leads to the undesirable result (Y′).

An example of pragmatic argumentation which can be cast in the negative variant of the basic model occurs in 'Sun courtyard' (Dutch Supreme, September 20, 1986, NJ 1986, 260). The issue in this case was whether the provisions for tenant protection in the Dutch Civil Code were also applicable to a rental contract for individual rooms in complex of rooms in a building. The Supreme court rules that since these provisions

are aimed at protecting the tenant, it could be deduced that they were also applicable to rental contracts for individual rooms in such a complex (decision X is desirable and decision X′ is undesirable). According to the Supreme Court, a different decision (X′) would have led to an unacceptable result (Y′), namely that different rules would apply to rental contracts for the complex and subletting agreements for the rooms:

> A different decision would have led to the unacceptable consequence that different statutory rules would apply to renting the complex and subletting single rooms.[5]

Schematically:

Standpoint:	Decision X that the provisions for tenant protection in the Dutch Civil Code are also applicable to a rental contract for individual rooms in a complex of rooms in a building is desirable and Decision X′ that the provisions for tenant protection in the Dutch Civil Code are not applicable to a rental contract for individual rooms in a complex of rooms in a building is undesirable
Because:	Decision X′ would lead to the result Y′, that different rules would apply to rental contracts for the complex and subletting agreements for the rooms
And:	the result Y′, that different rules would apply to rental contracts for the complex and subletting agreements for the rooms, is undesirable

The Supreme Court defends a decision to interpret the rule in an analogical way by pointing to the undesirable consequences of not treating similar cases in a similar way.

3.2. *Pragmatic argumentation as part of a complex argumentation*

Often, pragmatic argumentation is part of a more *complex* argumentation in which the desirability of the consequences is examined in the light of the desirability of certain goals. Those goals, in turn, can be defended by referring to certain values and principles. In such cases, pragmatic argumentation is supported by or complemented by other arguments.

In a legal context (as well as in a general context) an argument referring to the desirability of consequence Y should be supported or complemented by an argument demonstrating that consequence Y is a means to goal Z. In such cases, the argumentation becomes more complex because an extra argument is put forward, which, in principle, can form a part of an argumentation scheme. This scheme can be reconstructed as follows:

Standpoint:	consequence Y is desirable
because:	consequence Y leads to goal Z
and:	goal Z is desirable

Such a subordinate argument is, in its turn, also a pragmatic argument.

In a legal context pragmatic argumentation is often used to defend a *teleological* interpretation, an interpretation that establishes the meaning of a legal rule by determining the *goal* of the rule. Thus, the argumentation must demonstrate explicitly that the consequences are desirable in the light of the goals of the legal rule. In the example offered earlier, the goal of the system of provisions for tenant protection was to protect the interests of the tenant.

According to some authors, a full justification of a legal decision requires justification demonstrating why goal Z is desirable. Such justification should refer to relevant legal decisions, the intention of the legislator (genetic interpretation), goals of the legal system, relevant general legal principles, etc. Thus, the task of justifying a pragmatic argumentation often requires a chain of *subordinate* arguments that refer to the goals of the rule and to general legal values and principles.

In the example given earlier, the Dutch Supreme Court referred to the fact that other parts of the law contain regulations protecting the interests of the tenant. This argument in defence of the substandpoint can be cast in the argumentation scheme for the subargumentation:

Substandpoint:	The result Y′ that different rules would apply to rental contracts for the complex and subletting agreements for the rooms is undesirable
Because:	The result Y′ would not lead to the goal Z, underlying the law, that the interests of the tenants are protected
And:	The goal Z, that the interests of the tenants are protected, is desirable

3.3. *The evaluation of pragmatic argumentation*

Various authors, such as van Eemeren and Grootendorst, Schellens, Walton and MacCormick, formulate questions for the *evaluation*. Van Eemeren and Grootendorst, and Schellens focus on argumentation in general, whereas MacCormick concentrates exclusively on legal argumentation.

From a pragma-dialectical perspective, the first type of question to be answered is whether pragmatic argumentation is *an acceptable way to defend a standpoint*. Given the ethical-pluralist view on the role of pragmatic argumentation in the justification of legal decisions, we could say that pragmatic argumentation can constitute a sound defence of a legal decision if it is complemented by arguments showing that the decision is coherent and consistent with other legal rules, principles, and goals.

The second type of question to be answered is whether the pragmatic argumentation is *applied correctly*. The questions to be answered concern various parts of the argumentation: 1) the normative statement that maintains that consequence Y is (un)desirable; and 2) the empirical statement that establishes that act X leads to consequence Y.

The *normative statement* is evaluated by determining whether the consequences are (un)acceptable. Furthermore, if the consequences involve a certain social goal, we can ask whether the subordinate argumentation used to support the statement demonstrates sufficiently that the expected consequences would (not) help to achieve that goal and whether that goal is desirable in the light of the relevant legal and/or social values.

The *empirical statement* can be evaluated by determining whether the consequences actually occur as a result of the proposed course of action, whether there is a causal relation between act X and consequence Y, whether X necessarily leads to Y.

There are also authors who pose some other critical questions. Some authors, such as Schellens and Walton, formulate a question relating to the standpoint itself: whether the proposed course of action X is feasible and allowed. Other authors ask whether the proposed course of action X is feasible and allowed. Other authors ask whether the proposed course of action X is the most efficient and profitable way to attain consequence Y.

MacCormick arranges the questions in a certain order. The first question concerns the normative statement, namely that of whether the goal is desirable. If the answer is positive, a second question follows, concerning the empirical question: does the means lead to the end. And the final question is whether the means – given all possible side-effects – is desirable.

4. A MODEL FOR THE ANALYSIS OF PRAGMATIC ARGUMENTATION IN A LEGAL CONTEXT

4.1. *Two forms of pragmatic argumentation*

Starting from the basic model, two forms of pragmatic argumentation used in the justification of a legal interpretation, can be distinguished. In the first form, the *positive* form, a decision is defended by referring to the desirable consequences of the chosen interpretation of the legal rule, and in the second *negative* form, a decision is defended by referring to the undesirable consequences of the chosen interpretation of the legal rule. In schema:

Positive form

Standpoint:	Interpretation X is desirable
Because:	Interpretation X leads to Y
and:	Y is desirable

Negative form

Standpoint:	Interpretation X′ is undesirable
Because:	Interpretation X′ leads to Y′
and:	Y′ is undesirable

4.2. *Expansions of pragmatic argumentation in complex argumentation*

In section 2 it became clear that in a legal context pragmatic argumentation must always be complemented by other arguments in order to provide a sufficient defence of a legal decision. This view raises two, interrelated, questions: which other arguments can be used to make the argumentation 'complete' and what is the exact relation between pragmatic arguments and other arguments?

From a pragma-dialectical perspective, two kinds of expansions can be distinguished: a support of pragmatic argumentation consisting of *subordinative* argumentation, and a supplement to pragmatic argumentation consisting of *coordinative* argumentation.

Supporting pragmatic argumentation by subordinative argumentation
To support the argument that a particular consequence or result is desirable or undesirable, a judge often mentions that the result is desirable or undesirable given a particular goal or a particular value. Such a goal or value, in its turn, is often defended by referring to the intention of the legislator, the purport of the rule, or general legal principles. In pragma-dialectical terms, such a step-by-step defence consists of various levels of *subordinative* argumentation. In schema:

Positive form

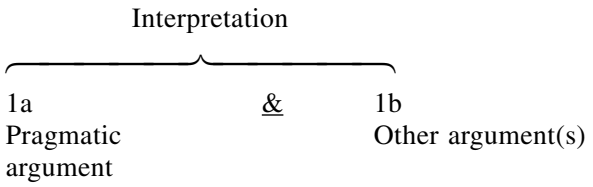
Level 1 Interpretation X is desirable
Because: Interpretation X leads to Y
and: Y is desirable
Level 2 Y is desirable
Because: Y is in accordance with goal/value Z
and: Z is desirable
Level 3 Z is desirable
Because: the intention of the legislator/the purport of the rule/general legal principles

Negative form

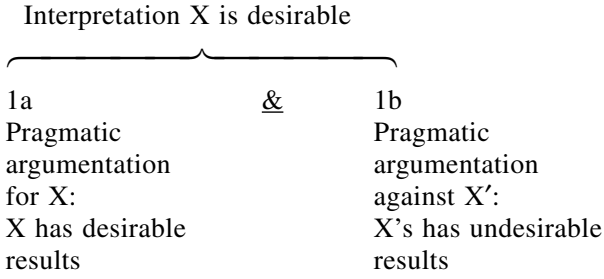
Level 1 Interpretation X′ is undesirable
Because: Interpretation X's leads to Y′
and: Y′ is undesirable
Level 2 Y′ is undesirable
Because: Y′ is not in accordance with goal/value Z
and: Z is desirable
Level 3 Z is desirable
Because: the intention of the legislator/the purport of the rule/general legal principles

In section 5, in an analysis of a decision of the Dutch Supreme Court, I will show how the various levels of subordinate argumentation can be represented.

Supplementing pragmatic argumentation by coordinative argumentation
As a supplement to pragmatic argumentation, judges often put forward other arguments referring to the text of the law, the legal system, the intention of the legislator, or the purport of the rule. According to the ethical-pluralist view, in which both pragmatic arguments and other legal arguments are required, pragmatic argumentation can constitute a necessary complement of other argumentation which, on its own, does not provide a sufficient defence. In this case, the argumentation is *coordinative argumentation*. To express the symmetrical relation between the dependent pragmatic argument and the other argument, I use the following schematic representation:



Pragmatic argumentation can also form a part of a more complex coordinative argumentation if a choice has to be made between two or more alternatives. It can be used to show that the preferred alternative has desirable results and that the reject4ed alternative has undesirable results:



Within each line of arguments, for X and against X′, the argumentation structure described above can also be used to supplement each pragmatic argument with other arguments, as we will see in the analysis I will give in section 5.

5. AN EXEMPLARY ANALYSIS OF PRAGMATIC ARGUMENTATION

Using the analytic model and distinctions described above in section 4, I will analyze a decision of the Dutch Supreme Court. On the basis of this analysis I will explain the role that pragmatic argumentation can play in the justification of a legal decision.

In this case, the defendant is sentenced by default by the judge of first instance. The appeal judge overturns the decision, and concludes that the defendant was right, but ruled that he was still obliged to pay the costs of the procedure in first instance because he had failed to appear. The appeal judge bases his decision on clause 89 of the Dutch Code of Civil Procedure, which states that:

> The costs of the default of appearance, and the costs which are caused by the defendant's failure to appear, must be paid by the defendant.

The central question in the procedure before the Supreme Court is whether the defendant had to pay the costs of the procedure in first instance, although, eventually, he had won the case on appeal. The debate concentrates on the interpretation of the above mentioned clause 89 of the Dutch Code of Civil Procedure. It must be noted that this case is a case of appeal before the Supreme Court 'in the interest of the law' which does not affect the individual parties, for whom the case is already closed. The Supreme Court is asked to give a decision with an eye to future cases.

The Supreme Court opts for interpretation X, that the defendant is not obliged to pay the costs of the procedure of first instance if he finally wins. He justifies this interpretation first by saying that interpretation X′ (defended by the court of appeal), that the defendant must pay the costs of the procedure of first instance, would have undesirable results, and then by saying that interpretation X had desirable results:

> On the one hand, an argument for the Court's opinion (*interpretation X′, E.F*) can be found in the legislative history, especially in the parliamentary comments (. . .); Also the words used in clause 89 point in the direction of the opinion of the Court; However, on the other hand, this interpretation could have the effect that the defendant, although he finally is the winning party, must pay the costs of the plaintiff, which are not related to the non-appearance of the defendant (. . .)
>
> This view (*interpretation X, E.F*) is also in accordance with the idea – which is also expressed in clauses of the Civil Code which are added later, such as 89a, that for the question who is to pay the costs, although it is in first instance the party who loses the case who must pay them, that there are costs of which it is reasonable, given the cause of these costs, irrespective of the outcome of the trial, that they must be paid by the party who has caused them. (. . .)
>
> Weighing these arguments pro and contra it must be concluded that the arguments based on the history of the law and the words used should have lesser weight than the arguments which point in the direction of a narrow interpretation of clause 89 (*interpretation X, E. F*), that is that this interpretation has results which are more fair and is in accordance with the ideas which underlie later rules such as 89a. Furthermore, the history is already far away, and the words used are not so strict as that they would contradict a narrow interpretation.
>
> Therefore we conclude that clause 89 must be used in the above described narrow sense.

Using the earlier developed analytic instruments, we can make the following analysis:

Justification of Interpretation X:

Level 1 Standpoint: An interpretation of clause 89 of the Code of Civil Procedure in a strict sense, implying that it only prescribes that the costs of non-appearance must be paid by the defendant, is desirable

Argument 1a: This interpretation leads to the fair result that the defendant (who finally wins the case) is not obliged to pay the costs which are not related to his initial non-appearance

(Argument 1b: It is fair that the defendant is not obliged to pay the costs which are not related to his initial non-appearance) and

Argument 1c: The history of the rule and the text of the rule do not prevent a strict interpretation because the history of the rule dates back a long way and the text is not that compelling

Level 2 (Argument 1b: It is fair that the defendant is not obliged to pay the costs which are not related to his initial non-appearance)

(Argument 1b.1a: This case is about the costs from which it can be said that, given the origin of these costs, it is fair that they must be paid by the person who has caused them, independent of the outcome of the trial)

Argument 1b.1b: It is fair that the costs must be paid by the person who has caused them, independent of the outcome of the trial

Level 3 Argument 1b.1b: It is fair that the costs must be paid by the person who has caused them, independent of the outcome of the trial

Argument 1b.1b: This opinion is in accordance with the intention of the legislator, expressed in the opinion in rules formulated later which concern the awarding of costs and also underlying the system of the law, especially the clauses 56 and 89a

and

Justification of the refutation of interpretation X′:

Level 1 Standpoint: An interpretation of clause 89 of the Code of Civil Procedure in a broad sense, implying that it prescribes that the costs of non-appearance must be paid by the defendant, is undesirable

Argument 1a: This interpretation leads to the unfair result that the defendant (who finally wins the case) is obliged to pay the costs which are not related to his initial non-appearance

(Argument 1b: It is unfair that the defendant is obliged to pay the costs which are not related to his initial non-appearance
Argument 1c: The history of the law dates back a long way, and the text of the clause is not so compelling that it would impede an interpretation in the strict sense

In its defence, the Supreme Court offers a 'maximal' justification by giving pro-argumentation for the chosen interpretation and contra-argumentation against the refuted interpretation. In both cases, the Court also gives supplementary arguments besides the pragmatic arguments.

The argumentation in defence of interpretation X consists of a complete defence according to the model for subordinate argumentation developed in section 4 for a support for pragmatic argumentation. The interpretation is defended on the first level by referring to the favorable consequences of this interpretation. The consequences in this case are of the type (ii), the consequences of the interpretation for future cases, because the case for the concrete parties is already closed, and the case is brought to the Supreme Court by the Advocate-General and is a case 'in the interest of the law', which implies that the case is reviewed in the interest of future cases. As far as we can see, the text does not point in the direction of consequences of the type (iii), because the Supreme Court does not say anything about the consequences for the legal system. The Court only uses arguments based on the system of the law to defend its narrow interpretation.

On the second level the decision is justified by formulating a certain legal principle underlying the rules relating to the non-appearance of the defendant, which is defended on the third level by the intention of the legislator and the system of the law. As a supplementary coordinate argument, the Supreme Court gives argument 1c.

The standpoint of the Supreme Court, in which it refutes interpretation X′, is defended by argumentation saying that interpretation X′ has undesirable results. As a supplement to this argumentation, consisting of 1a and 1b, the Supreme Court puts forward argument 1c. It is clear from the presentation that the consequences must be located on level 1 of the main argumentation, that the principle that the Court formulates to evaluate these consequences must be located on level 2 of the subargumentation, and that the intention of the legislator which can be deducted from the system of the law must be located on level 3.

When the Supreme Court weighs these two interpretations in a complex coordinative argumentation, we see that the Court explicitly says why the chosen interpretation has desirable results and the refuted interpretation undesirable results. The Court also says why the reasons in favor of the restricted interpretation X weigh more heavily than the reasons in favor of the broad interpretation X′.

6. CONCLUSION: AN INSTRUMENT FOR THE ANALYSIS AND EVALUATION OF PRAGMATIC ARGUMENTATION IN A LEGAL CONTEXT

Summarizing the results of the previous discussion, we could say that in assessing the quality of pragmatic argumentation adequately, we need various tools to be able to give a reasonable assessment of the quality of pragmatic argumentation.

We should begin by *analyzing* the argumentation. We should determine which elements comprise the argumentation and whether there are implicit arguments underlying the argumentation. For this purpose, I have developed an *analytical model* which specifies the basic elements needed for a successful defence. It also specifies which additional elements can occur in reaction to or anticipating certain forms of critique. The model formulated for legal argumentation specifies various argumentation schemes which refer to the goals underlying the rule, as well as argumentation schemes which defend these goals by referring to certain principles and values of the legal system. Furthermore, I have described which elements play a role in the additional coordinative argumentation used to demonstrate that the decision is coherent and consistent with legally accepted values. Further research is required with respect to the specific kinds of consequences that can be involved in a legal context: consequences of any kind, the consequences of the decision on the body of rules or on the legal system, or the consequences determined to be relevant by de legislator, the general aim or purpose of the rule.

For the *evaluation* I have described how the analyst can determine whether the arguments which are reconstructed as parts of a pragmatic argumentation are acceptable. The first question to be addressed is whether pragmatic argumentation is an acceptable way to defend a certain standpoint. Taking into account the various approaches in the literature on pragmatic argumentation discussed here, I have discussed norms for making correct choices of pragmatic argumentation. Our second question is whether the argumentation is applied correctly in the concrete case. In this context, several relevant critical questions must be answered. These are questions relating to the acceptability of the normative statement about the desirability of the consequences. In this context, there can be further questions concerning the acceptability of the empirical statement which states that the proposed course of action leads to the desired results (or the rejected course of action leads to undesirable results). Finally, there are questions on how to weigh alternative courses of action which specify why one course of action is preferable to others. Further research must establish the relevant evaluative questions which must be answered in a satisfactory way for a legal argument to be acceptable.

The analysis I have given of the argumentation of the Supreme Court shows that pragmatic argumentation does not occur in ‘isolation’. The analysis

shows that pragmatic argumentation can constitute an independent defence, but that it must be supported by other legal arguments. In most cases, these other arguments consist of an appeal to the goal or the purport of the rule, the intention of the legislator, the legal system, a legal principle, or a combination of the goal of the rule and the legal system. In other situations, pragmatic argumentation is presented in combination as a supplement of other arguments, sometimes as necessary complement, sometimes as a reinforcement.

The way in which the Dutch Supreme Court uses pragmatic argumentation amounts to an ethical-pluralist approach. Such an approach also coincides with a modern tradition of the application of law in which it is not only important that the decision fits within the legal system, but also that the decision has desirable results. From the perspective of an ethical-pluralist approach of pragmatic argumentation, the argumentation of the Supreme Court meets the requirement that the choice for an interpretation be defended by referring to the consequences of the interpretation as well as by relating the desirability of these consequences to a certain legal principle which is supposed to underlie the relevant rules and to the intention of the legislator. In this case, pragmatic argumentation is not a rhetorical formula, but an explicit account of the choices made in the interpretation process.

As a conclusion, we might say that, on the basis of an analysis of the use of pragmatic argumentation by the Dutch Supreme Court, it could be said that the various approaches to the importance of pragmatic argumentation converge, as is also claimed in the ethical pluralist approach. Concluding we could say that pragmatic argumentation can offer an acceptable justification of a legal decision, provided that judges try to make explicit which value judgments and which legal basis for these judgments are underlying the assessment of the desirability of the results.

NOTES

[1] The term 'pragmatic argumentation' is used by van Eemeren and Grootendorst. In their terminology, they follow Perelman and Olbrechts-Tyteca (1969, p. 266) who have introduced the term 'pragmatic argument' for argumentation 'which permits the evaluation of an act or an event in terms of its favorable or unfavorable consequences'. Other terms used are 'instrumental argumentation', 'consequentialist argumentation', 'goal reasons', 'policy arguments', 'teleological reasoning'.

[2] For a discussion of these views see Bell (1983, pp. 22–23), Sworkin (1978, pp. 172–173), Summers (1978), Twining and Miers (1991, pp. 139–140), Goodin and Pettit (1993, pp. 30–35).

[3] For a discussion and survey of the various approaches of the practical syllogism see Walton (1990, pp. 3–31).

[4] According to Alexy (1989, p. 238), underlying this argument is the general schema S: (1) It is mandatory that the state of affairs Z obtains; (2) Unless M obtains, Z does not obtain (that is, M is a condition of Z); So: (3) It is mandatory that M obtains.

[5] In Dutch law, pragmatic argumentation is often used in a situation in which a judge does not apply a statutory rule literally, but chooses a teleological interpretation. This interpretation is often justified by showing that a literal interpretation of the rule would lead to unacceptable, unreasonable and unfair consequences. In these cases, the judge often uses formulations such as 'reasonable application of the law', 'reasonable interpretation of the law', etcetera.

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