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Commentary on Plug

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COMMENTARY ON JOSÉ PLUG: INDICATORS OF *OBITER DICTA*

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I should like to say at the outset that I largely agree with the findings of Plug's paper and would like to provide some brief comments that not only offer additional support to her findings, but may provide some new directions in research and method when analyzing the operation of indicators in an argument.

Plug concludes that "references to indicators in themselves are not always a conclusive justification to decide that a consideration is...an additional one [i.e., *obiter dictum*]". One way of reading her method for arriving at the above conclusion (and she can feel free to correct me if she feels that she is doing otherwise) seems largely to be an empirical analysis of concrete examples, with the aim of discovering whether a term or phrase is being applied according to a particular rule. Thus she selects an hypothesis (i.e., The phrase *for that matter* is used to indicate *obiter dicta*.) and then, by analysing various judgements and everyday examples, corroborates or falsifies this hypothesis.

There is, though, some reason to think that a conclusion based on purely empirical evidence might be unsatisfactory when trying to discover whether a rule of this sort is in play. Let's suppose that every example we found corroborated our hypothesis. Even if we found no falsifying examples in the case judgements considered, we would still only have a statistical regularity in the occurrence of the candidate indicator. Yet, such a regularity is only enough to provide us with a "good guess" as to how the candidate indicator will next be used. We cannot yet say how the indicator ought to be used. Normative certainty[1] cannot be established from such an argument. Yet, as Plug recognizes, in order that the candidate term or phrase be considered an indicator proper, its use must itself be a rule governed activity. That is to say, in effect, that its use must be a specific speech act in its own right. Taking this into consideration, more non-empirical reasons are found in support of Plug's conclusion that we cannot determine the structure of an argument by reference to indicators alone.

Let us suppose we are trying to determine whether the usage of some candidate indicator (I) is normalized (in a particular jargon or discipline). If (I) was an indicator, and it was removed from the body of the text, it would not change the character of the argumentation which follows. Even in the absence of any (genuine) indicator, the argumentation in question still has the same function (as in the presence of its indicator) and the argument itself retains the same formal structure. Thus, in contrast to the statements of some of the judges and advocates in general, the presence of an indicator itself is not the reason we classify an argument as having a certain structure. Rather, the reason that we use a particular indicator is because the argument has the corresponding structure. We still require an independent criterion to establish whether an argumentation is *ratio decidendi* or *obiter dicta*. (Plug, in fact, provides one such criterion when analysing her examples). Further, if an indicator has a normalized coinage, the reasons justifying its use in a particular situation will be precicely those criteria that we use to classify the argumentation independently of the presence of the indicator. Thus, in addition to referring to the various textual instances in which our candidate indicators appear, we may wish to also consider the speaker's reasons for the use of such an indicator in the first place. By considering these reasons, we may arrive at conclusions which can substantiate the presence of a norm non-empirically.

In fact, Plug's empirical analysis of the court's decisions (and everyday-language examples) already require premises which justify our also considering the speaker's reasons for the use of a candidate indicator. In order that Plug's data have the significance her conclusions demand of them, she requires several general but significant background assumptions. In addition to assumptions of the type articulated by the Gricean Maxims[2] , she requires the premises that the authors of the decisions 1) understand the language (including statute and legal jargon), and 2) that they are using it a) sensibly b) in the right kinds of circumstances and c) (for the most part) correctly. If these assumptions are not met, then there is no reason to think that the textual data is reliable in the first place.

Since these assumptions are necessary for the success of Plug's argument, then I might suggest to her another tool in determining the indicator status of a particular term or phrase. That is: why not simply ask the judges for their reasons for their use of the terms in question? Do they see these terms as indicators? Ask them what rule they are following when applying the terms, or have them instruct us in the proper use of the terms so that we may formulate the rule for ourselves. Given the inconsistency with which the judges, and advocates general have applied and interpreted the terms in Plug's study, this may seem an odd suggestion, and we may in fact be forced to surrender one of our general assumptions (above). But until we can determine what rule (if any) they *think* they are following (and provide in the justification of their action), we will not be able to determine whether we have a group of judges who cannot follow rules, or who do not properly understand *obiter dictum*, or whether there is an absence of a rule altogether. Further, it is important to realize that we need not attempt to determine the rules governing the use of these terms by a purely empirical, inferential or hypothetical process.

In the end, Plug's paper goes a great distance towards demonstrating that in legal argumentation, no systematic norm for (procedural) analysis can be formulated where none has been first instituted in the practice. And with that in mind, I should like to end this commentary with a somewhat broader question, namely: Why focus on indicators at all? This is a practice that is not only prevalent in the Dutch legal system, but one that is advocated by the pragma-dialectical approach to argumentation analysis. While I recognize that pragma-dialectics has gone a great deal towards recognizing the situatedness of argument, I wonder whether the very idea that we will be able to find such indicators (and its establishment as a goal of reconstructive analysis) is itself a residual of the formalism we had hoped to overcome. Clearly, the presence and correct identification of such indicators may add clarity to our language, and it would certainly simplify the process of argumentation reconstruction, but it seems that (at least in the judicial system) it has created some confusions and made for some lazy reasoners. I think, in the end, that we will be forced to conclude, as Williams did in his classic introduction to legal study that, like reasoning, determining *ratio decidendi* of a decision "is not a mechanical process but is an art that one gradually acquires through practice and study" (*Learning the Law*, seventh ed. London: Stevens and Sons, 1963. p. 71).

1. i.e., the term must be used in the way prescribed by the rule in order for it to be used correctly.

2. Which van Eemeren and Grootendorst term the *Principle of Communication* ("That language users should be clear, honest, efficient, and to the point" (1989 *Argumentation*, 3, 367-383)).

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