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Strategic Manoeuvring with Linguistic Arguments in the Justification of Legal Decisions

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ABSTRACT: Participants to a legal process often use linguistic arguments to support their claim. With a linguistic argument it is shown that the proposed interpretation of a rule is based on the meaning of the words used in the rule in ordinary or technical language. The reason why a linguistic argument is chosen as a support for a legal claim is that linguistic arguments are considered to have a preferred status in justifying a legal decision. However, this preferred status can also be ‘misused’ for rhetorical reasons.

In my contribution I analyse and evaluate an example of a form of strategic manoeuvring with a linguistic argument that often occurs in discussions about the application of legal rules and I explain how the strategic manoeuvring derails. I explain that the strategic manoeuvring with the linguistic argument constitutes a complex form of strategic manoeuvring that consists of a combination of two manoeuvres.

KEYWORDS: discussion rules, fallacies, interpretation methods, legal justification, legal interpretation, linguistic argumentation, rational discussion, strategic manoeuvring, teleological argumentation

1. INTRODUCTION

Participants to a legal process often use a linguistic argument to support their claim. With a linguistic argument it is shown that the proposed interpretation of a rule is based on the meaning of the words used in the rule in ordinary or technical language. The reason why a linguistic argument is chosen as a support for a legal claim is that linguistic arguments are considered to have a preferred status in justifying a legal decision.¹ However, this preferred status can also be ‘misused’ for rhetorical reasons. An example of a strategic use of linguistic argumentation can be found in the discussion in Dutch law in a case called ‘Homomarrriage’ about the application of the old article 1.33 of the Dutch Civil Code, that says that a man can only marry a woman and a woman can only marry a man. In this case a civil servant refused to marry a female homosexual couple on the basis of this article. However, the parties state that the text of this article does not forbid a marriage between

¹ See MacCormick and Summers (1991, 530-532) who develop a model for the justification of the interpretation of legal rules. The first step in the strategy of interpretation is to consider linguistic arguments that must be accepted as *prima facie* unless there is some reason to consider systemic arguments that must, in their turn, be accepted as *prima facie* unless there is some reason to consider teleological/evaluative arguments.

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two women because it only says that one man can only marry one woman with the stress on the formulation ‘a interpreted as ‘one and hence must be interpreted as a prohibition of polygamy. The judge of first instance, the judge in appeal and the Dutch Supreme Court (Hoge Raad 19 oktober 1990, RvdW 1990, 176) decide that the claim is based on a disputable literal reading of several articles and misunderstands the purpose of the law as intended by the legislator (the relevant part of the decision referred to here is added at the end of this contribution).²

In this example, a particular reading of the rule is presented as the accepted standard reading, although other interpretations of the rule are possible from a legal perspective. In addition, reference to the presupposed standard meaning of the rule is presented as a sufficient justification, although it is not possible to establish the meaning on the basis of the formulation of the rule alone, because also other considerations must be taken into account. In such a case, if a linguistic argument is used in a wrong way, the use of the linguistic argument is evaluated negatively. As we saw in the example, it is criticized firstly because it is based on ‘a disputable literal reading of statute law’ and secondly because it is based on ‘a misunderstanding of the law as the legislator had in mind when enacting it.’

Although higher judges often give a negative evaluation of certain uses of linguistic arguments, in the literature on legal interpretation and the justification of legal decisions, no clear norms for the use of linguistic arguments are specified. The aim of my contribution is to develop an instrument to analyse and evaluate the use of linguistic arguments in legal discussions about the application of a legal rule. I analyse the use of linguistic arguments in terms of the strategic manoeuvring in the context of a critical discussion. I establish when the strategic manoeuvring with linguistic arguments is acceptable from this perspective and when it derails.

In the analysis of the strategic manoeuvring I make use of the insights developed by van Eemeren and Houtlosser (2002a, 2002b, 2003, 2006) about strategic manoeuvring in argumentative discourse. I consider strategic manoeuvring with linguistic arguments as an attempt to convince a legal audience by showing that a legal standpoint is in accordance with accepted legal starting points without violating openly the dialectical norms of reasonableness. The strategic manoeuvring implies that the arguer tries to reconcile two, often conflicting goals, the rhetorical reasonableness norm of convincing the audience and the dialectical reasonableness norm of resolving the difference of opinion in a critical discussion. The strategic manoeuvring derails when the rhetorical norm to convince prevails over the dialectical reasonableness norm. If the dialectical reasonableness norm is violated, in pragma-dialectical terms the party commits a fallacy.

To be able to assess the strategic manoeuvring with linguistic arguments first, in (2), I specify the dialectical norms for the use of linguistic argumentation in the context of a critical legal discussion. I do this by specifying the conditions under which linguistic

² In this case the lower judges and the Supreme Court also put forward additional argumentation in which they react to other arguments put forward by the plaintiff in which they discuss the argument by the plaintiff that the views in society about same-sex relations have changed since the enactment of the law. The courts make clear that in certain matters, such as the present one that concerns the public sphere where legal certainty plays an important role, it is not the task of the judge to change the meaning of a rule by departing from the goal of the rule as intended by the legislator on the basis of changing views in society. The Supreme Court argues that it is not the task of the judge to decide against the clear meaning of the rule about marriage, since abolition of the prohibition to marry for same-sex couples would have far-reaching consequences. In new legislation in the Netherlands the possibility of a same-sex marriage is introduced.

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argumentation forms an adequate means of justifying a legal decision about the application of a legal rule in a concrete case. Then, in (3), I analyse and evaluate a form of strategic manoeuvring with linguistic arguments that often occurs in discussions about the application of legal rules and I explain on the basis of the norms specified in (2) how the strategic manoeuvring derails. I explain that the strategic manoeuvring with linguistic arguments in these cases consists of a complex form of strategic manoeuvring that constitutes a combination of two manoeuvres.

2. NORMS FOR THE USE OF LINGUISTIC ARGUMENTATION IN CRITICAL LEGAL DISCUSSION

If we look at the discussion about the use of linguistic arguments in the justification of legal decisions we find, generally speaking, a consensus about the functional use of linguistic arguments. In *clear cases* in which there is no difference of opinion about the interpretation of a legal rule, linguistic argumentation can function as a justification of the decision, although a justification is not necessary in such cases because there is no difference of opinion.³ In *hard cases* in which there is a difference of opinion about the correct interpretation of the rule, a linguistic argument cannot function as a decisive argument because there are different views with respect to the exact meaning of the rule.⁴

The reason why a linguistic argument may suffice as a justification in an easy case is that, from the perspective of legal certainty, in principle reference to the clear intention of the legislator as it appears from the wordings of the law, must be taken as the starting point for the application of the law. In hard cases in which there is a difference of opinion about the meaning of the law for the concrete case because the intention of the legislator cannot be deduced from the wordings, other sources are necessary to establish the intention of the legislator. Linguistic arguments can have a ‘demarcating’ function by showing that the judge has remained within the interpretation space he has on the basis of the formulation of the rule.⁵

The problem with the strategic use of linguistic arguments is that parties to a legal process often present a case as an easy case in which a linguistic argument suffices to justify the decision because a linguistic argument is supposed to have a ‘presumptive’ status from the perspective of legal certainty. However, if the case is a hard case such a presentation is misleading because, as we have seen in the case of the ‘Homomarrriage,’ other arguments based on the legal system, the intention of the legislator, the goal of the rule, etcetera are required to give an adequate justification. If these arguments are not given the justification is not sufficient and the party evades the burden of proof by not mentioning and substantiating these other considerations.

Given the different functions of linguistic arguments in different legal discussion contexts, the question arises which uses of linguistic arguments can be distinguished and which norms apply for an acceptable use of linguistic arguments in the context of these clear and hard cases from the perspective of a rational critical legal discussion.

³ Cf. Groenewegen (2007), Soeteman (2007) and van den Hoven (2007).

⁴ Cf. Groenewegen (2007), Soeteman (2007), van den Hoven (2007).

⁵ Judges often refer to linguistic arguments when they balance the requirements of legal certainty and the requirements of justice and fairness in the concrete case. See also Feteris (2005 and 2008a) on the balancing of legal certainty and fairness.

From an argumentative perspective we can distinguish between two forms of using linguistic arguments, based on the relation between the linguistic argument and the standpoint. In what I call the first form, a linguistic argument is presented as an *independent justification*. In the second form, a linguistic argument is *supplemented with other arguments*. To establish the norms for an acceptable use of linguistic arguments in these two forms, from a pragma-dialectical perspective a distinction can be made between two types of norms. The first type of norm concerns the adequacy of linguistic argumentation as a means to justify a legal decision: whether linguistic argumentation can, in a particular discussion context, constitute an adequate and sufficient justification. The second type of norm concerns the correctness of the application in the concrete case: whether the linguistic interpretation of the rule in the concrete case is correct.

For each form I specify under which conditions the linguistic argument is an adequate justification (condition a) and is used in an acceptable way (condition b).

- (1) *A linguistic argument is presented as an independent justification of the application of a legal rule*

From a legal perspective, if there is no difference of opinion about the interpretation of the rule and if the formulation of the rule can give a clear and uncontested indication for establishing the meaning of the rule in the concrete case, single argumentation consisting of a linguistic argument can constitute an independently sufficient justification. In such a case it is not necessary to mention that other arguments, such as a systematic arguments or teleological arguments, do not point to a different solution.⁶

When a linguistic argument is presented as an independent justification it is acceptable if:

- (1a) the argumentation is put forward in a context of an easy case in which there is no difference of opinion with respect to the interpretation of the rule in relation to the facts of the concrete case
- (1b) the linguistic argumentation refers to the accepted standard meaning of (a term used in) the rule

Norm (1a) concerns the adequacy of linguistic argumentation as an independently sufficient argumentation in a legal context and (1b) concerns the acceptability of the propositional content of the argumentation.

This form of using linguistic argumentation does not occur very often in legal practice because judges do not tend to justify their interpretation if it concerns a clear and uncontested case. If it is used, judges tend to do this for strategic reasons to anticipate possible doubt with respect to the acceptability of the decision and use linguistic argumentation for rhetorical reasons to convince the audience that the decision is coherent with common legal starting points, i.e. the linguistic meaning of (a particular expression in) the rule. Sometimes a linguistic argument is supported with subordinative argumentation

⁶In pragma-dialectical terms such an independent argument constitutes single argumentation or, if part of a complex argumentation consisting of more independent arguments, multiple argumentation. In terms of MacCormick and Summers (1991, 525-530) an independent argument can be a single argument or part of coinciding argumentation.

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referring to the ‘common understanding of the term’ or reference to the description in the dictionary.

Sometimes, for rhetorical reasons, the linguistic argumentation is supplemented with coordinative arguments such as systematic or teleological arguments to show that the decision is also in line with other rules of the relevant part of the legal system and/or the intention of the legislator.

(2) *A linguistic argument is presented as a supplementary argument in addition to other argumentation*

In cases where there is a difference of opinion about the correct meaning of the rule and the formulation of the rule does not give a clear and uncontested indication for establishing the meaning of the rule in relation to the concrete case, linguistic argumentation cannot constitute a sufficient justification and must be supplemented by other forms of argumentation. In such cases systematic argumentation or teleological argumentation must form a necessary part of the argumentation, while linguistic argumentation can only function as a supplementary co-ordinative or subordinate argument.⁷

When a linguistic argument is presented as a supplementary argument it is only acceptable if:

- (2a) the linguistic argument constitutes a support for the same interpretation of the (term used in) the rule as the other arguments that are put forward as a justification
- (2b) the linguistic argument is not inconsistent with the meaning of (a term used in) the rule

We find this form of using linguistic argumentation in cases where the legal rule contains a vague or evaluative term so that the rule must be interpreted to establish the meaning of the rule for the concrete case. In such a case linguistic argumentation can never constitute an independent justification because it is not possible to establish in abstracto what the meaning is by checking the literal meaning or the technical meaning of the term. The meaning will have to be established by looking at the legal system and/or goal of the rule. Systematic or teleological argumentation then forms a necessary part of the argumentation and the linguistic argumentation can only have the function as supplementary coordinative argumentation. Linguistic argumentation of this form is often presented in the form of a statement that also the formulation of the rule supports this interpretation or that the formulation of the rule does not form an objection to application in the proposed interpretation.^{8, 9}

⁷ In pragma-dialectical terms such a supplementary argument constitutes a part of coordinative compound argumentation. In terms of MacCormick and Summers (1991, 525-530) such an argument forms part of cumulative argumentation.

⁸ For example: if a judge argues for an *a contrario* application of a rule, he will put forward a linguistic argument if the formulation of the rule contains a verbal indicator that gives an uncontested indication that the rule is meant as a limitative enumeration of the conditions for applying the rule.

⁹ It may also occur in cases in which there is no discussion about the interpretation of a vague or evaluative term but there is still a difference of opinion about the exact interpretation that must be given of a rule on the basis of the question whether in the context of a specific case (and similar cases) a particular formulation used

Since linguistic arguments have a ‘preferred’ status judges tend to use this form of argumentation as supplementary argumentation for rhetorical reasons to increase the acceptability of their decision for the legal audience. The linguistic argument must increase the acceptability by showing that also on other grounds it can be asserted that the decision is coherent with common starting points.

3. ANALYSIS AND EVALUATION OF STRATEGIC MANOEUVRING WITH LINGUISTIC ARGUMENTS

On the basis of the distinction between the two forms of using linguistic arguments in the different discussion contexts and the norms for an acceptable use, in this section I discuss the example given at the beginning of this contribution in the case of the ‘Homomariage’ from Dutch civil law. In this case the Supreme Court, in pragma-dialectical terms, gave a ruling in which it gave a negative evaluation of the strategic manoeuvring of one of the parties with linguistic argumentation. I specify how the example can be analysed in terms of the first and second form of using linguistic argumentation and I explain how the norms specified in section (2) can be used to determine when the strategic manoeuvring with linguistic argumentation is acceptable and when it derails. I do this by explaining how the evaluation of the Supreme Court can be translated in terms of derailing strategic manoeuvring.

Parties in a legal dispute often present a linguistic argument as an independently sufficient justification. As we have seen, in easy cases if the conditions for the first form are met, it is a perfectly sound way of justifying a legal decision. However, the strategic manoeuvring with linguistic argumentation may derail because one or more of the conditions for an acceptable use of a specific form of using linguistic argumentation is not met. Sometimes parties in a legal dispute present a particular interpretation of the rule as the accepted standard interpretation of the rule although this is not the case and condition (1b) of the first form is not met. In such a case the strategic manoeuvring derails because in doing so the party violates the *starting point rule* because a particular meaning of the rule is wrongly presented as a common starting point in the legal community.

Starting with presenting of a particular interpretation as the accepted standard interpretation a party may claim that the linguistic argumentation based on the formulation of the rule may serve as an independent justification. As we have seen, in cases in which the conditions of the first form are met, this is a perfectly sound way of justifying a legal standpoint. However, if the interpretation of the formulation of the rule is not the accepted standard interpretation, the linguistic argumentation can never function as an independent justification and other arguments are required to justify the application of the rule. In such cases a linguistic argument cannot constitute an independently sufficient argument. For this reason, if a party or a judge presents the formulation of the rule as an independent justification in a case that does not meet condition (1a) for the first form, the strategic manoeuvring derails. In such a case the ‘preferred’ status of linguistic argumentation is misused by presenting the argumentation as an adequate justification although it does not

in the rule must be given a particular meaning or not. In such cases the same applies as in the case of a vague or evaluative term: the meaning must be established on the basis of systematic or teleological argumentation and cannot be based on linguistic considerations alone.

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meet condition (1a) of the first form but must be reconstructed as argumentation of the second form which would have been the correct form. By doing so, someone evades the burden of proof for the necessary supplementing coordinative argumentation referring to the legal system and/or goal of the rule (that form a necessary supplement of the linguistic argumentation of the second form) and the strategic manoeuvring constitutes a violation of the *burden of proof rule*.

In the example of the case of the 'Homomarrriage' we find this complex form of strategic manoeuvring that consists of a combination of these two forms of strategic manoeuvring that both derail because two discussion rules are violated. Firstly, it constitutes an instantiation of derailing strategic manoeuvring because condition (1b) is not fulfilled. The proposed literal reading of 'a man' and 'a woman' in clause 1.33 is wrongly presented as the only possible reading because there is also another reading, i.e. the accepted standard reading. The Supreme Court states that the other reading implies that the article must be read in the standard reading as forbidding a same-sex marriage so that the given interpretation is incorrect.

Furthermore it constitutes an instantiation of derailing strategic manoeuvring because condition (1a) is not fulfilled. The linguistic argument can never be the only argument because, according to the Supreme Court, in establishing the meaning of a rule also the legislative history of the rule and the goal of the rule as intended by the legislator must be taken into account, so the argument could never serve as an independent justification. With the formulation 'miskent de strekking van de wet' (ignores the purpose of the rule) the Supreme Court indicates that the purpose of the rule as it is based on the legislative history is a necessary element of a justification of the interpretation of the meaning of a rule.

In the example the combination of the violation of the starting point rule and the violation of the burden of proof rule can be considered as a specific form of derailing strategic manoeuvring. The derailment consists of a combination of two violations. The first violation implies that a particular interpretation of the meaning of the rule is wrongly presented as the only correct interpretation. Starting from this incorrect interpretation the second violation implies that certain information (the goal of the rule as intended by the legislator) is wrongly ignored and is not included in the argumentation so that the burden of proof for this information is evaded. In the evaluation of the Supreme Court we see that both mistakes are assessed individually as mistakes in the context of a rational discussion about the application of legal rules. The violation of the starting point rule is characterized as departing from a 'disputable literal reading of statute law' (gaat uit van een aanvechtbare letterlijke lezing). The violation of the burden of proof rule is characterized as a 'misunderstanding of the law as the legislator had in mind when enacting it' (miskent de strekking van de wet zoals men die bij haar totstandkoming voor ogen heeft gehad). The combination of the two forms of strategic manoeuvring can be considered as a complex form of strategic manoeuvring in which the second builds on the first form so that the combination can be considered as subordinate.

5. CONCLUSION

In my contribution I have made a first attempt to reconstruct the strategic manoeuvring with linguistic arguments in a discussion about the application of a legal rule in a concrete

case in the context of a court of law. I have explained how the legal norms can be translated in pragma-dialectical terms to explain why certain forms of strategic manoeuvring with linguistic arguments in this activity type are acceptable and when the strategic manoeuvring derails.

By distinguishing two forms of the use of linguistic argumentation I have tried to give a systematic and precise description of the ways in which linguistic argumentation can be used and on the basis of the translation of the norms I have shown how it can be explained why certain forms of strategic manoeuvring with a particular use are acceptable and other forms derail.

In the analysis of an example from Dutch law I have demonstrated how the framework for evaluating the soundness of strategic manoeuvring can be used in explaining why certain ways of using linguistic argumentation in a particular context are unacceptable and constitute a derailment of strategic manoeuvring. I have explained that the strategic manoeuvring with linguistic argumentation often takes the form of a complex of strategic manoeuvres that are mutually dependent and each form a violation of a discussion rule.

[Link to appendix](#)

[Link to commentary](#)

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