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Where Political and Legal Arguments Meet: Reconstructing the Intention of the Legislator

José H. Plug
University of Amsterdam

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Author: H. José Plug
Commentary: R. Sullivan

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1. Introduction

Discussions in parliament on political and social topics, such as the recent debates in the Netherlands on stalking, on asylum seekers or and on the powers of the police, often result in new legislation or adjustments of existing rules. If, for example, a parliamentary majority agrees that legislation is needed in order to render stalking into a punishable offence, then it is necessary to discuss the concrete phrasing of this law. After legislation has been passed, the application of the law by a judge may give rise to differences of opinion as to the precise interpretation of the rule. In order to establish the meaning of the rule the judge may refer to historical arguments. This could mean that the judge falls back on the intention of the legislator as expressed in a preamble, in explanatory memoranda or in arguments that were exchanged during parliamentary debates. In this way arguments put forward in a political debate could play a role in judicial discussions much later. The following example illustrates the nature of such references.[1] In a case concerning the question whether an article in the Betting and Gaming Act permits a mayor to limit the number of bingo nights in the municipality, the judge uses the historical argument as follows:

> The legislative history of art. 7c section three of the Betting and Gaming Act demonstrates that it was not the intention of the legislator to make it possible to limit the number of bingo nights. After all, during the parliamentary debate on art. 7c the MPs who introduced the bill put forward that the game of bingo, in the southern part of our country, is considered to be an entirely harmless form of public amusement. Therefore the law does not provide for the restriction of the number of meetings to be organised.

In a quantitative survey of the practice of the application of legal rules by Snijders (1978) it appears that the history of the law is one of the most widely used arguments in the jurisprudence of the Supreme Court of the Netherlands. A comparative study on jurisprudence by MacCormick and Summers (1991) shows that, apart from the Netherlands, the historical argument is widely used in a great number of other legal systems as well. The study also shows, however, that different countries may take different views of historical arguments. Moreover, as to when this type of argumentation is acceptable and how it could be effective opinions may differ considerably.

In this contribution I set out to establish the nature of historical arguments containing references to the intention of the legislator and examine the pros and cons of applying these arguments. Problems concerning their effectiveness in judicial decisions will be discussed by making use of the insights from van Eemeren and Houtlosser (2002) on strategic maneuvering in argumentative texts.

2. Historical and genetic arguments

If the meaning of a rule is unclear and a judge has to make a decision on the meaning of the rule, he may justify his interpretative decision by making use of various interpretative techniques, also called argumentation sources or interpretative arguments. In order to defend his interpretation of the rule, the judge may for example refer to the everyday meaning of a term (grammatical argument) or to the goal or the purpose of the rule (teleological argument).

If a judge justifies his interpretation of a legal rule by a historical argument, he may refer to assertions that were made by politicians in public debates or to statements from other persons or institutions that were involved in the legislative process. In different legal systems the historic argument is, however, conceptualized in a number of different ways. In the Netherlands, for instance, arguments in which the judge only uses the words 'the legislative history' or 'the history of the realization of the law' are considered to be historical arguments. Arguments in which the judge refers to the intention or the will of the legislator too are regarded as historical arguments.

As becomes clear from the study of MacCormick and Summers (1991), in other legal systems, this last category may also be referred to as the genetic argument. Both the historical argument and the genetic argument are aimed at discovering the meaning of the statute through the will or the intention of the legislator. The historical argument, however, often seems to refer to an interpretation taking into account all the historic developments that have taken place *since* the enactment. The genetic argument seems to refer to historical conditions *prior* to the enactment or at the time of the enactment. In this argument, texts that constitute legislative preparatory materials are considered an important help to determine the interpretation of the rule.

Within the genetic argument, Alexy (1989, 236) distinguishes two basic forms of the genetic argument. To clarify how exactly the intention of the legislator can play a role in the genetic argument, these two forms may serve as a starting point. The first form has the following structure:

I=R' was what the legislator directly intended

The structure of the second form is as follows:

R is, for the legislator, a means to end Z
¬ R' ⟶ ¬Z
R'

In the first form, there is a direct reference to the intention of the legislator. In the second form it is claimed that the legislator adopted R as a means for advancing a certain goal Z. The difference between these two forms can be clarified by determining the underlying argument schemes. In the pragma-dialectial approach by van Eemeren and Grootendorst (1992, 96), these argument schemes characterize the way in which the acceptability of the premise that is explicit in the argumentation is transferred to the standpoint. Insight into the type of justification or refutation that is provided for the standpoint is relevant for the evaluation of the argumentation.

3. A pragma-dialectical reconstruction of genetic arguments

An example in everyday language of both forms of the genetic argument may serve to ascertain on which argument schemes the two forms of genetic argument are based. The examples concern an article of the Dutch Road Traffic Act, in which a four-week term is mentioned. The question that has to be answered is whether or not this four-week term should be interpreted as a firm date. If the judge would make use of the first basic form of the genetic argument in order to justify his interpretation, his argumentation could run as follows:

> The four-week term should be interpreted as a firm date (R') since, from parliamentary documents, it appears that that is what the legislator intended.

In this example the judge justifies interpretation R' by appealing to an authority: the legislator. In the pragma-dialectical argumentation theory the argument from authority is interpreted as a subtype of symptomatic argumentation. The proposition is regarded as acceptable because an authoritative source says so. In other words, the authority of the source is treated as a sign that the proposition ascribed to this source is acceptable**.** The scheme of this specific case of symptomatic argumentation could be formulated as follows:

Standpoint:	Interpretation R' is acceptable
because:	from parliamentary documents, it appears that the legislator intended R'
and:	the intention of the legislator is indicative for the acceptability of an interpretation of the law

The following argumentation, as could be brought forward by a judge, may serve to illustrate the second form of the genetic argument as mentioned by Alexy:

> The four-week term should be interpreted as a firm date (R') since a non-firm date (-R') would fail to reduce the number of traffic offences (-Z) whereas it was manifestly the intention of the legislator to reduce the great number of traffic offences (Z).

As was the case in the first example, the judge does refer to the intention of the legislator, but here the standpoint in which the interpretatation is expressed is directly justified by a reference to the consequences of the interpretation. Therefore, the argument scheme is not symptomatic, but rather pragmatic. In the pragma-dialectical typology of argument schemes (2002, 101) pragmatic argumentation is a subtype of causal argumentation. In this subtype, a certain course of action is recommended in the standpoint and the argumentation consists of summing up the favorable consequences of adopting that course of action. The argument scheme for the second form of the genetic argument could be as follows:

Standpoint:	Interpretation R' is desirable
because:	interpretation – R' leads to -Z
and:	According to the legislator, Z is desirable

From the analysis of the two basic forms of the genetic argument it becomes clear that a reference to the intention of the legislator may be a justification of the standpoint on its own or that it may be a supplement to pragmatic argumentation.[2] This distinction has

consequences for the evaluation of the argumentation. Since both forms of genetic argument are based on different argument schemes, different critical questions should be asked to determine whether the arguments meet the criteria of soundness.[3] If the argument is based on a symptomatic relation it could be relevant to ask whether R' is really intended by the legislator or whether the intention of the legislator should be considered as decisive. On the other hand, if the argumentation is pragmatic it could be relevant to ask whether the consequences mentioned in the argumentation indeed are unfavorable or whether the consequences actually occur as a result of the proposed course of action.

These critical questions enable us to ascertain whether pragmatic and symptomatic argumentation is an acceptable way to defend the standpoint and whether the argumentation has been applied correctly. In order to determine whether the argumentation for an interpretative standpoint might be effective, the rhetorical aspects of argumentation should be taken into account as well. In the next section I will concentrate on the effectiveness of the genetic argument.

4. Limits to strategic maneuvering

In a rhetorical approach to legal argumentation, the acceptability of argumentation is dependent on the effectiveness of the argumentation for the audience to which it is addressed. From this perspective, the justification of an interpretative decision may be considered as a strategic operation. Witteveen (1988, 333), for example, states: "If the meaning of a legal rule is unclear or ambiguous, the judge has to operate strategically in order to raise his interpretation above the turmoil beforehand." In his view, it does not suffice for a judge to clarify the meaning of the rule. The judge should also argue why his paraphrase of the rule is the best possible.

In the pragma-dialectical approach to argumentation as developed by van Eemeren and Houtlosser (2002, 142), this view on justifying interpretative decisions may be regarded as an attempt both to uphold a reasonable discussion attitude and to further the interpretation at hand. This means that the arguers' aim for the optimal rhetorical result is not necessarily in conflict with standards for reasonableness. From this perspective, the genetic argument, as well as the other interpretative arguments, may in principle be used to make the strongest case.

Although the genetic argument is often used, the application of the argument in practice is controversial. In order to determine if and how the rhetorical use of the argument may be limited, I will analyse the most important objections against the argument by making use of the insights provided by van Eemeren and Houtlosser (2002) in their study of strategic maneuvering. These insights offer a framework which enables us to have a closer look at the most problematic aspects of the effectiveness of the genetic argument.

According to van Eemeren and Houtlosser (2002, 135) strategic maneuvering has three aspects; it can take place in:

(1) Making an expedient choice from the options constituting the 'topical potential' associated with a particular discussion stage.
(2) Selecting a responsive adaptation to 'audience demand.'
(3) Exploiting the appropriate 'presentational devices.'

(1) Making an expedient choice from the options constituting the 'topical potential' associated with a particular discussion stage.

In the approach of van Eemeren and Houtlosser (2002, 139), the topical potential associated with a particular dialectical stage can be regarded as the set of relevant alternatives available in the stage of the resolution process. If we concentrate on the argumentation stage in deciding on an interpretative issue, the alternatives consist of the various techniques, or methods of interpretation. In a rhetorical approach to legal argumentation, these techniques are considered as topics that can be of help in finding arguments that have convincing argumentative power to justify the preferred interpretation.[4]

When choosing for a genetic argument to justify an interpretative decision, it should be considered that, at least in the Netherlands, in principle there is no ranking order between the various interpretative arguments. However, both in actual practice and in literature, it is sometimes suggested that there is indeed a hierarchy and that the genetic argument, together with the linguistic argument have preference. This preference is based on the idea that these two arguments express that the judge is bound by the law and in that way guarantee that judicial decisions are not arbitrary. Since it might lend extra argumentative force to the argument, an appeal to this idea might prove effective. This approach could, however, also turn out to be counterproductive, because if the genetic argument is used as a single argument to justify the interpretation, there is a chance that the judge might be accused of referring to a hierarchy that doesn't exist.

(2) Selecting a responsive adaptation to audience demand

For optimal rhetorical result, in the view of van Eemeren and Houtlosser (2002, 140) the moves that are made must in each stage of the discourse also in such a way be adapted to audience demand that they comply with the listeners' or readerships good sense and preferences. In the argumentation stage, this may for instance be achieved by quoting arguments the readers agree with or referring to argumentative principles they adhere to.

In a legal context a decision on an interpretation is directed to various addressees. The audience might consist of justiciables, lawyers and the legal community as a whole. For a non-legal audience such as the justiciables or other parties who might be affected by the rule, the genetic argument is, in comparison to other arguments, more accessible, because the judge refers to statements from politicians that were brought forward in public debates. Often, these statements are comprehensible without specific legal knowledge. The argument may also be appealing to a non-legal audience, because in a democracy the authority of the legislator is generally accepted and convincing.

The effectiveness of genetic argumentation however is much more problematic for a legal audience. In legal theory many authors point at the fact that one cannot speak of just one legislator, but that there are many participants in the process prior to the enactment. This enables a judge to select those extracts from the legislative process that support his view on the solution of the interpretation and ignore others**.** In doing so, the legislator is wrongfully made responsible for the interpretation of the judge. The judge interprets the law but presents his interpretation as the intention of the legislator. This suggestion of acting arbitrarily would harm the effectiveness of the argumentation and should therefore be prevented. This could be done by indicting that counter arguments that were brought forward in the legislative process are taken into account as well**.**

(3) Exploiting the appropriate 'presentational devices.'

According to van Eemeren and Houtlosser (2002, 140) the available presentational devices must be strategically put in good use for optimally conveying rhetorical moves. The following example illustrates how the possible obstacles to the effectiveness of the genetic argument which are discussed under (1) and (2) may be increased by the presentation of the argument:

> From the legislative history of the realisation of article 243 and 247 of the Criminal Code (…) it follows that the legislator, by introducing the term 'powerlessness,' only had in mind a state of physical helplessness originating in the victim's physical inability to act (Supreme Court 28 February 1989, *NJ* 1989, 658).

In this example taken from Dutch jurisprudence there is a difference of opinion about how the term `powerlessness' in the Criminal Code should be interpreted. The Supreme Court justifies its interpretation by deploying a genetic argument. In its formulation of the argumentation, the Supreme Court suggests that it is absolutely clear how the term should be interpreted by stating that 'From the history…it follows that.' This firmness is then reinforced by the word 'only' so that other possible interpretations are ruled out beforehand. At a cursory reading, this peremptory formulation might seem effective, but in view of possible objections to the genetic argument that concern `the choice of the topical potential' and `the audience demand,' it is not. The ineffectiveness of the presentation also becomes apparent in the critical reaction on this decision from the annotator. He criticises the formulation as being apodictic and he says: `There are other valid arguments, but by making the formulation absolute, these other arguments did not come to the surface.'

Another problem in the presentation is that the argument could not be checked because the reference to the legislative history is too vague. The argument from the legislator is not quoted or precisely indicated. The Supreme Court should at least have given a reference as to where the argument is mentioned.

5. Conclusion

Interpretative decisions are frequently justified by arguments in which the judge refers to the intention of the legislator. In this so called historical or genetic argument, the ways in which such references form part of the justification of the decision may differ. I have demonstrated that differences between various forms of the genetic argument may be clarified by determining the argument scheme that underlies the argument. By making use the pragma-dialectical typology of argument schemes I have shown that the genetic argument may be based on symptomatic argumentation as well as on pragmatic argumentation. Insight into the argument scheme is particularly important in view of the evaluation of the argument, since for each type of argumentation different criteria of soundness are applicable.

The effectiveness of the genetic argument is discussed by making use of pragma-dialectical insights on strategic maneuvering. I analysed how problematic aspects of the genetic argument could hinder its effectiveness. From this analysis it seems that the effectiveness of a genetic argument is limited when it is used as a single argument in order to justify the interpretative decision. The effectiveness of the argument may be increased if it is part of a more complex argumentation.

Notes

[1] This example comes from Witteveen (1988).

[2] Feteris (2002, 253) demonstrates how the intention of the legislator may be part of subordinative argumention or of coordinative argumentation.

[3] The set of questions that are relevant for the pragma-dialectical typology of argument schemes are formulated in van Eemeren, Grootendorst and Snoeck Henkemans (2002, 95-102).

[4] See for example Viehweg (1954) and in Dutch jurisprudence, 't Hart (Supreme Court 28 February 1989, *NJ* 1989, 658).

References

Alexy, R. 1989. *A theory on legal argumentation. The theory of rational discourse as theory of legal justification*. Oxford: Clarendon press.

Eemeren, F.H. van and R. Grootendorst. 1992. *Argumentation, communication and fallacies. A pragma-dialectic perspective*. Hillsdale, NJ: Erlbaum Associates.

Eemeren, F.H. van, R. Grootendorst and A.F. Snoeck Henkemans. 2002. *Argumentation: analysis, evaluation, presentation*. Mahwah, NJ: Erlbaum Associates.

Eemeren, F.H. van and P. Houtlosser. 2002. "Strategic maneuvering: maintaining a delicate balance." In Frans H. van Eemeren and P. Houtlosser (eds.) *Dialectic and rhetoric. The warp and woof of argumentation analysis,* 131-161. Dordrecht: Kluwer academic publishers.

Feteris E.T. 2002. "Pragmatic argumentation in a legal context." In Frans H. van Eemeren (ed.) *Advances in Pragma-Dialectics,* 243-260. Amsterdam: Sic Sat / Newport News, Virginia: Vale Press.

MacCormick, D.N. and R.S. Summers (eds.). 1991. *Interpreting Statutes. A comparative study*. Aldershot: Dartmouth.

Snijders, H.J. 1978. *Rechtsvinding door de burgerlijke rechter. Een kwantitatief rechtspraakonderzoek bij de Hoge Raad en de gerechtshoven*. Deventer: Kluwer.

Viehweg, Th. 1954. *Topik und Jurisprudenz*. (fifth revised edition 1974). München: Beck.

Vranken, J.B.M.1995. *Mr. C. Asser's handleiding tot de beoefening van het Nederlands burgerlijk recht. Algemeen deel*. Zwolle: Tjeenk Willink.

Witteveen, W.J. 1988. *De retoriek in het recht. Over retorica en interpretatie, staatsrecht en democratie*. Zwolle: Tjeenk Willink.