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# Reconstructing the weight of legal arguments

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**Title:** Reconstructing the weight of legal arguments

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**Response to this paper by:** Jeffery St. John and Raynie E, McKerrow

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## *Abstract*

In legal argumentation it is important to be able to ascertain the strength of the arguments that are presented by the legal parties or by the judge. It is clear that the argumentative force of each single argument in multiple argumentation is stronger than in coordinative compound argumentation. Within coordinative compound argumentation however, the arguments need not to of the same importance. In this paper I will discuss suggestions as to how the argumentative force of arguments may differ and how these differences could be reconstructed.

## *1. Introduction*

The conference on judicial cooperation, which was organised by Leyden University only recently, triggered the question whether it would be possible to arrive at a rather more uniform application of the law than is the case in the Netherlands today. Judges are, of course, independent and must be allowed to judge every individual case in absolute freedom. Equality before the law, however, may be jeopardised when equal cases are tried in different ways. It is undesirable if a lawbreaker receives a slighter punishment in, say, Amsterdam than his ‘colleague’ in The Hague would for the same offence. Nonetheless it remains essential for judges never to lose sight of the relevant circumstances concerning each individual litigant.

During the conference several suggestions were made to bring about or enhance judicial cooperation in order to arrive at more uniform decisions. One could think of stimulating inter-collegiate consultation, the use of IT-technology and drawing up guidelines for judicial decisions. A number of jurists however, among whom De Wild, question the desirability of drawing up a list of separate guidelines since the status of such guidelines would be unclear. De Wild, moreover, claims that guidelines underlying individual decisions, in principle, have already been given - by the law as well as by jurisprudence. It is in this context that he emphasises the importance of a sound motivation for any judicial decision. In his view it is precisely because of the tendency to apply standard motivations that little use is made of the possibility of formulating guidelines and offering a clear insight into the arguments that underlie decisions.

This point of criticism was put forward years ago in connection with a decision by the subdistrict court of the town of Tilburg in the Netherlands (5 December 1974, Prg.1975, 1009).<sup>1</sup> A shopkeeper claims from the father of a nineteen-year-old girl payment for purchases made by his daughter, who was, at the time underage (at that time persons under 21 were considered underage). The father claims that his daughter was a minor at the time of the purchase and puts forward that the contract of sale is null and void on the grounds of his daughter’s incapability to assume payment obligations. These are the considerations of the subdistrict court judge:

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<sup>1</sup> This example has been derived from Brouwer (1990: 51).

- 1) that the minor's mother died on 15 April 1972 and the minor left her father to live independently about three months later;
- 2) that, subsequently, she lived apart from her father in the same town for about two years, during which period she concluded the agreement;
- 3) that respondent in his capacity as a father accepted [...] that his daughter resided elsewhere during that particular period;
- 4) that his daughter, who had an office job during that period, was allowed by the respondent in his capacity as a father, to keep her wages in order to be able to pay her keep and spend her earnings as she saw fit, while no longer contributing to her maintenance;
- 5) that the items purchased by the girl were practical articles of clothing which were not excessively expensive.

The judge, subsequently, concludes: 'we are of the opinion that this minor, in view of the circumstances, should be held to have been legally capable as to concluding the aforementioned agreement (...)'. We are, indeed, presented with a clear enumeration of the relevant circumstances - the relationship between these circumstances, however, remains unclear. Nevertheless, for this shopkeeper and for other shopkeepers as well, it is of the utmost importance to know exactly which of these circumstances have been material in arriving at this particular decision. In a comment accompanying this decision, the annotator wonders whether a shopkeeper now runs the risk of facing the annulment of a contract of sale if a girl, who may only be nineteen years old - or is possibly at least a minor- and still lives with her parents, buys a reasonable amount of ordinary items of clothing for ordinary prices (negation of circumstances 1 - 3) and, moreover, does not support herself by holding a job (negation of the fourth circumstance)?

This example illustrates that in legal argumentation it may be important to be able to ascertain the strength of arguments that are put forward by the judge. The argumentative force of arguments may not only be of influence on the acceptability of the way a decision is justified, it may also be of use in view of the argumentative function of jurisprudence.

One of the indications of the individual strength of arguments is the way in which the arguments are structured. For the purpose of analysing complex argumentation, the pragma-dialectical argumentation theory of Van Eemeren and Grootendorst (1984, 1992) distinguishes between multiple and coordinatively compound argumentation. When defending a standpoint by means of multiple argumentation each of the arguments counts, in principle, as an independent defence, whereas in coordinative compound argumentation it is the combination of arguments that constitute a conclusive defence. Within coordinative compound argumentation the arguments, however, need not be of the same importance. Therefore I propose to distinguish between 'regular' coordinative compound argumentation and asymmetrical coordinative compound argumentation. This proposal, which I presented in my dissertation (Plug 2000), was criticised by Van den Hoven (2001). In this paper I set out to discuss this proposal with Van den Hoven's objections in mind.

## 2. *Forms of coordinatively compound argumentation*

In *Analysing Complex Argumentation* (19992) Snoeck Henkemans presents a dialogical characterization of the different pragma-dialogical types of complex argumentation that is based on the way complex argumentation is generated in a discussion. The gist of a dialogical characterisation of multiple argumentation is that the arguer makes more than one attempt to defend his standpoint, motivated by a (potential) failure to refute criticism to his previous argument.

Coordinatively compound argumentation can be put forward if the antagonist's (potential) criticism is based on the view that the argument does not contain an acceptable justification for the standpoint. This is to say that the argumentative strength of the argument is considered insufficient or that the argument is held to be irrelevant. In cases like this, two strategies of defence are open to the protagonist. One is to put forward arguments which, together with the original argument, should be sufficient to convince the antagonist of the acceptability of the standpoint. This approach would result in cumulative argumentation.

The following example will make clear how a discussion, in this case between a claimant (C) and the judge (J), may result in this type of argumentation:

- C. My client is convinced that the vendor was aware of the fact that there was water under the house.
- J. How can he be so sure about that?
- C. The vendor was aware of the fact that there had been water under the houses of both neighbours for quite some time.
- J. That does not necessarily mean that the vendor knew there was water under his house as well.
- C. True, but he has, on numerous occasions, complained to others about the humidity in his house.

The antagonist's (J) criticism is aimed at the argument 'The vendor was aware of the fact that there had been water under the neighbours' houses for some time'. The protagonist does not attempt to refute J's criticism. He chooses to put forward a second argument to support his standpoint: 'The vendor has, on numerous occasions, complained to others about the humidity in his house'. The idea is that both arguments together constitute sufficient justification for the standpoint.

It is not always necessary for this discussion to be explicit. It is also possible for the protagonist to anticipate possible objections to his argument, as this example will illustrate:

My client is convinced the vendor was aware that there was water under his house. The vendor was in fact aware that there had been water under both his neighbours' houses for quite some time and he has complained regularly to others about the humidity in his house.

The second strategy of defence which the protagonist might consider, is an attack on the objection raised by the antagonist (to show that the argument is not sufficiently strong). This strategy will result in complementary argumentation.

A discussion in which this type of complex argumentation plays a part may look like this:

- C. My client is convinced that the vendor was aware of the fact that there was water under the house.
- J. How can he be so sure about that?
- C. The vendor was aware of the fact that there had been water under the houses of both neighbours for quite some time.
- J. That doesn't mean very much. I understand that there is water under more houses in that particular neighbourhood.
- C. The vendor's house, however, is known to have an underground connection with its neighbours.

As was the case in the former discussion, the antagonist's (J) criticism is aimed at the argument 'The vendor was aware that there had been water under the neighbours' houses for quite some time'. The protagonist (C) attempts to refute this criticism by means of a second argument: 'The vendor's house is known to have an underground connection with its neighbours. Both arguments together are intended to constitute sufficient justification for the standpoint.

In the case of complementary coordinative argumentation, the protagonist can, in much the same way, anticipate an objection:

My client is convinced that the vendor knew that there was water under the house. The vendor knew that there had been water under the neighbours' houses for quite some time and his house is known to have an underground connection with those of his neighbours.

Snoeck Henkemans (1992: 98) is of the opinion that an evaluation of both types of coordinative argumentation implies that the arguments pretend to constitute sufficient support for the decision only when in conjunction. For both types this means that, if one of the arguments is refuted, the standpoint is no longer valid. Snoeck Henkemans (1992) as well as Van Eemeren and Grootendorst (1984, 1992) do not indicate that it matters which of the arguments in the coordination are refuted. The following example, however, makes clear that a refutation of the first argument does have a greater impact on the validity of the standpoint than a refutation of the second argument.

My client is convinced that the vendor knew that there was water under the house. According to the plumber, the vendor had 1000 litres of water pumped away from the crawl space of his house only last year. My client was only confirmed in his view by the fact that two months before the vendor himself pumped away another 200 litres of water.

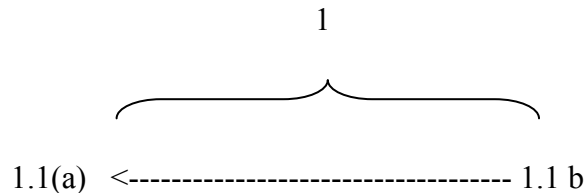
In this argumentation the lawyer anticipates a refutation in a discussion which could look much like this:

- C. My client is convinced that the vendor knew that there was water under the house.
- J. How can he be so sure about that?
- C. According to the plumber, the vendor had 1000 litres of water pumped away from the crawl space of his house only last year.
- J. Most experts do agree that 1000 litres of water in the crawl space of a house is indeed alarming, others hold that only an amount of at least 1200 litres results in an alarming situation.

- C. But only two months ago he himself pumped away another 200 litres.

The antagonist's (J) doubts refer to the argument that '1000 litres of water in the crawl space of a house is something to be alarmed about'. The protagonist (C) attempts to refute J's doubts by means of a second argument: 'two months ago he himself pumped away another 200 litres'. The relationship between the elements in this coordinative argumentation is asymmetrical, that is to say that one argument, in principle, could hold without the other, whereas the other will not hold without the first one. If it is possible to successfully refute the first argument, the standpoint will not hold. If the second argument is refuted, the standpoint will possibly be weakened. The most obvious strategy would therefore be to attack the first argument. The structure of this type of argumentation would look like this:

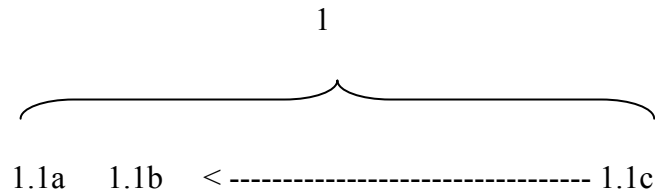
Figure 1



When letters, such as a, b etc, are put between brackets it is to express the asymmetry in the mutual interdependence of the arguments. In this way I aim to make clear which argument, in principle, constitutes sufficient independent support for the standpoint. This independent support is also expressed by the direction of the arrow.

In case of an asymmetrical coordinatively compound argumentation in which two arguments in conjunction, in principle, form sufficient independent justification for the standpoint, whereas a third argument can only support the argument in conjunction with the two first arguments, the structure may look like this:

Figure 2



### 3. *Objections to asymmetrical argumentation*

According to Van den Hoven (2001: 378), the introduction of the asymmetrical variety of coordinative argumentation does not fit into the pragma-dialectical approach as we know it. He

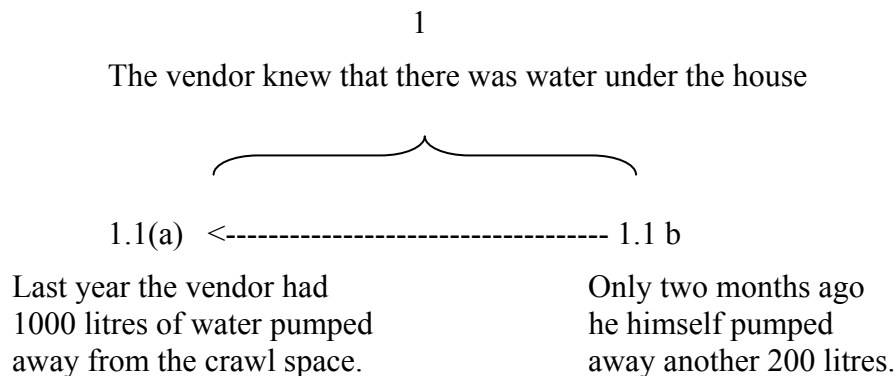
puts forward that asymmetrical coordinative argumentation will always result in a violation of Grice’s Cooperative Principle. Van den Hoven formulates his criticism as follows:

The protagonist pretends that his first argument can support the standpoint independently, whereas the second one is only capable of doing so in conjunction with the first. In case the protagonist is wrong in assuming that the first argument can support the standpoint, it is impossible for the second argument to save the standpoint as a whole. In short, it is superfluous. If the protagonist is right in assuming that the first argument can support the standpoint, the second one is superfluous as well. We may therefore conclude that the second argument is superfluous in all cases. The protagonist, in other words, violates the cooperative principle.

Grice’s Cooperative Principle and the Principle of Communication, which formulates the commandments ‘be clear, honest, efficient and be to the point’, fulfil similar roles. Van den Hoven, in this context, seems to refer to the ‘be efficient-commandment’, which implies a correctness condition: ‘No speech act should ever be needless or superfluous, or pointless or futile’. So, if Van den Hoven is right, it is the efficiency requirement, which has been violated here. Van den Hoven claims that the second argument in any asymmetrical argumentation is superfluous because ‘it is impossible for the second argument to save the standpoint as a whole if the protagonist is wrong in assuming that the first one is indeed capable of supporting the standpoint independently’.

Let’s have another look at our example. In this context, the assertion that the second argument is unable to save the first one is incorrect. The protagonist of our example produces the argument of the ‘1000 litres of water under the house’ of which he is convinced that it is, in principle, capable of independently supporting the standpoint ‘the vendor was aware that there was water under the house’. In case the argument is unable to support the standpoint, he produces the argument ‘later another 200 litres were pumped away’, of which he assumes that, in conjunction with the first argument, it could indeed save his argumentation ‘as a whole’. The structure of the argumentation looks like this:

Figure 3



If we assume that the ‘1000 litre-argument’ is attacked successfully on the grounds of lacking the strength to justify the standpoint on its own, the standpoint itself has not been denied: to achieve that goal the ‘200 litre-argument’ in the coordination, too, needs to be refuted. If, on the other hand, we would go along with Van den Hoven and assume the ‘200 litre-argument’ to be superfluous, it should be omitted in the argumentation in the first place. The argumentation

would be reconstructed as single and a successful attack on the ‘1000 litre-argument’ would indeed lead to the refutation of the standpoint.

Then Van den Hoven continues by saying that the second argument is superfluous as well if the protagonist is of the opinion that the first argument is strong enough to support the standpoint. This is a remarkable conclusion since this would imply that producing multiple argumentation in itself would always constitute superfluity. Although the protagonist may expect single argumentation to be sufficiently strong to support the standpoint, it is possible for him to try and anticipate various kinds of doubts as to his standpoint. This, too, is the case in asymmetrical coordinative argumentation. In my view it should not be the perspective of the evaluation that determines the reconstruction of the argumentation, but rather the perspective of the protagonist’s presentation of his argumentation.

#### 4. *Asymmetrical argumentation in practice*

Apart from the perspective, it is also the purpose of the reconstruction of the argumentation that should be taken into account. A well-founded reconstruction of the considerations of the judge, should give both parties as well as the higher judge insight in how a decision is justified and it should be an adequate startingpoint to appeal against a decision and to put up a defence. To achieve this goal it is important to consider the institutional context of the jurisdiction within which the judge puts forward his argumentation. A legal process differs from a critical discussion in a number of respects.<sup>2</sup> One of the differences to consider is the fact that both the judge and the legal parties have only a limited number of turns to bring forward their arguments. This will become clear in the following example.

This example, taken from Dutch jurisdiction, is about a conflict between an employer and one of his employees. De Zanding Ltd. has been running a business complex in the town of Drachten in the Netherlands since August 1985. From the onset De Zanding employed Mr Van de Wal. It became clear to De Zanding that the employment of Van de Wal was too great a financial burden for the company to bear. De Zanding requests of the subdistrict court dissolution of the contract of employment. The subdistrict court rules:

We are (...) of the opinion that the mere fact that the employer finds that he has employed too many staff only shortly after engaging said employee (...) does not constitute sufficient grounds for dissolving the contract of employment ignoring the usual cancellation clauses. On the basis of this consideration alone the request is to be denied. It is also of some weight that the employer, De Zanding Ltd., failed to make plausible that a reorganisation would not lead to a situation in which Van de Wal could remain employed. Therefore the request is to be denied.

(Subdistrict court Beetsterzwaag, 3 December 1985 PRG 1986/2465)

In order to justify the standpoint ‘the request (to dissolve the contract of employment) is to be denied’ two arguments are put forward. By using the phrase ‘on the basis of this consideration alone’, the judge indicates that the first argument constitutes independent justification for the standpoint. The question is for what reason the second argument was added. The relationship between the first argument and the second one, too, needs clarification. The judge puts forward a second argument which, in conjunction with the first argument, would indeed constitute

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<sup>2</sup> Also see Feteris (1999: 173-174).



sufficient justification, in case the first argument were to be contested as being insufficient justification for his decision. In this way the judge anticipates that contestation, since it would be impossible for him to put forward new arguments in a later stage of the proceedings. This intention becomes clear if the considerations are reconstructed as asymmetrical coordinative argumentation. In this way the employer's burden of refutation weighs heavier on him than it would with single argumentation, in which case the second argument would be considered superfluous. This would also be true in the case of regular coordinative argumentation. However, in this way the employer manages to prevent his defence from being dismissed in appeal on the grounds of either ignoring the second argument or restricting his defence to the second argument.

### ***5. Indications of asymmetrical coordinative argumentation***

The text as well as the legal context in which the argumentation is presented may provide clues for the reconstruction of asymmetrical coordinative compound argumentation. First I will give an example of how the phrasing and the structure of the legal rule(s) underlying the decision can be used to reconstruct the asymmetrical relation between the arguments. Then I will give an example of how modal verbs may offer an indication of this argumentative structure.

#### *The legal rule*

In the following example the standpoint is that a ground-floor apartment should be allocated to a Mrs Smith:

My client, Mrs Smith is entitled to the ground-floor apartment on the basis of her age and the fact that she has been a member of the housing association for ten years. Moreover, Mrs Smith has great difficulty climbing stairs.

The rule on which the lawyer bases his request runs as follows:

If it has at least been demonstrated that an applicant has been a member of the housing association for a period of 5 years or more and is over 65, this person has the right to a ground-floor apartment.

Let's assume the housing association is going to reconstruct the argumentation in judging Mrs Smith's request. It then would be obvious to interpret this argumentation as being coordinative. The conditions in the rule on which the lawyer bases his claim are part of a cumulative enumeration. This cumulative enumeration forms a clue to interpret the argumentation underlying the standpoint (that the ground-floor apartment should be allocated to Mrs Smith) as being coordinative. The conditions in the rule are not part of a limitative enumeration ('at least') and therefore the argument that Mrs Smith has difficulty climbing stairs should be considered part of the coordinative argumentation. In the case of a regular coordinative argumentation, it is, in principle, immaterial which argument is refuted if the housing association would want to deny the standpoint. The refutation, however, of the argument that Mrs Smith has difficulty climbing stairs will not lead to the desired outcome. After all, the argument was that the ground-floor apartment should be allocated to Mrs Smith on the basis of her membership and age alone. That is why a reconstruction of the argument on the basis of the rule will result in an asymmetric coordinative argumentation. This reconstruction implies that it is necessary to first judge whether her long-standing membership and her age constitute sufficient grounds for allocating the desired apartment, when evaluating Mrs Smith's request. If this is not the case, it then becomes necessary to ascertain whether the argumentation does constitute sufficient

justification for the standpoint if the original arguments are ‘fortified’ with the argument that Mrs Smith has difficulty climbing stairs.

### *The phrasing of the arguments*

In case of coordinative argumentation, the asymmetry may become apparent from the use of certain modal verbs. If, instead of the verb ‘should’, the word ‘could’ would have been used in the phrasing of an argument which is added to a former argument, it would only be obvious to interpret these arguments as part of an asymmetrical coordinative argumentation. Let’s compare these examples:

The court does not attach any value to the petitioner’s statement (S) since it obviously contains a number of inaccuracies (P). Moreover, it could be considered that her verbal explanation too contains some internal contradictions (Q).

An attack on the argument (Q) that ‘her verbal explanation too contains some internal contradictions’ does not necessarily lead to a withdrawal of standpoint (S) since the argument that ‘the statement contains a number of inaccuracies’ in itself constitutes sufficient support for the standpoint. Only if the attack were aimed at the argument (P), the standpoint would have been affected. It is less obvious to interpret the relationship between the arguments as asymmetrical if argument Q were to be phrased thus:

The court does not attach any value to the petitioner’s statement (S) since it obviously contains a number of inaccuracies (P). Moreover, we should consider that her verbal explanation too contains some internal contradictions (Q).

## **6. Conclusion**

In this paper I have tried to show that it is useful to extend the types of coordinatively compound argumentation by introducing asymmetrical compound argumentation. In my view, arguments that Van den Hoven considers to be superfluous should not be left out of the reconstruction of the argumentation.<sup>3</sup> Leaving them out or reconstructing the argumentation as a ‘regular’ coordinatively compound argumentation would do no justice to the protagonist’s justification of the standpoint as a result of which legal parties could be harmed.

In the example that was presented in the introduction of this paper the court had to decide whether parents could be held liable for purchases made by their daughter. The court didn’t give any clues as to the weight of the individual considerations that constitute a coordinatively compound argumentation. If, however, the court would have indicated which argument(s) they considered to be decisive, the argumentation should have been reconstructed as asymmetrical. Let’s assume that the court puts first that a minor is legally capable of contracting if he or she receives an income from employment. Then, by bringing forward, for example, that the girl lives apart from her father, the court could anticipate the criticism that having an income from employment might, on it’s own, not be a sufficient defence if the income is low. In that case the arguments could be a sufficient defence if taken together. In this way the court would have given

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<sup>3</sup> Summers (1978: 773) argues that these seemingly superfluous arguments are indeed significant. They ‘will not only strengthen the justification, but also make the precedent more intelligible, and thus easier to interpret and follow in future cases.’

a guideline for deciding in similar cases. In my view it is only effective to indicate the weight of arguments and so provide a guideline for deciding in similar cases, if this weight is also expressed in the reconstruction of the argumentation.

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