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Pragmatic argumentation and the application of legal rules

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Title: The role of pragmatic argumentation in the justification of judicial decisions: independent or complementary argumentation?
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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.

One of the reasons why pragmatic argumentation is often considered as a weak justification is that reference to the favourable or unfavourable 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 address the role that pragmatic argumentation can play in the justification of the interpretation of a legal rule. The central question is whether pragmatic argumentation can form a sufficient defence as an independent argument, or whether it can only constitute an acceptable defence in combination with other arguments. If the latter should prove to be the case, the question is what the exact relation is between pragmatic arguments and other arguments.

To place these questions in a broader context, in section 2 I will first sketch the various views on the acceptability of pragmatic argumentation. In section 3 I will develop and describe various forms and extensions of pragmatic argumentation which can be used as an instrument in the analysis of pragmatic argumentation, and in 4, 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. Ideas about the acceptability 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. 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. 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 authors such as Bell (1983), MacCormick (1978), MacCormick and Summers (1991), Twining and Miers (1994) are of the opinion that pragmatic argumentation can form an acceptable defence in combination with arguments which show that the presented legal interpretation is coherent and consistent with certain legal values, principles or goals. In this approach, pragmatic arguments and other arguments complement each other.

3. A model for the analysis of pragmatic argumentation

3.1 Two forms of pragmatic argumentation

In section 2 it became clear that 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? To answer these questions, I will use a model for pragmatic argumentation I have sketched at the last OSSA conference (Feteris 1998). On the basis of this model I will describe various forms of pragmatic argumentation and I will describe the various types of arguments which can be used to make the argumentation complete.

Starting from the basic model, two forms of pragmatic argumentation 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

Interpretation X is desirable

Because: Interpretation X leads to Y

and: Y is desirable

Negative form

Interpretation X' is undesirable

Because: Interpretation X' leads to Y'

and: Y' is undesirable

3.2 Expansions of pragmatic argumentation

As we have seen in section 2, to make the justification complete, pragmatic argumentation needs to be complemented by 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' 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 4, 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. When such supplementary arguments are

given, in pragma-dialectical terms, three kinds of relations between the pragmatic argument and the other arguments can be distinguished.

First, pragmatic argumentation can constitute a sufficient defence of the interpretation, supplemented by other argumentation. In this case, the argumentation is *asymmetrical* coordinative argumentation. To express the asymmetrical relation between the independent pragmatic argument and the supplementary argument (which is dependent on the pragmatic argument), I use the following schematic representation:

Interpretation

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1a Pragmatic argument & [1b Other argument(s)]

Schema 1: Asymmetrical coordinative argumentation with independent pragmatic argumentation

Second, 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 *symmetrical* coordinative argumentation. To express the symmetrical relation between the dependent pragmatic argument and the other argument, I use the following schematic representation:

Interpretation

1a Pragmatic argument & **1b Other argument(s)**

Schema 2: Asymmetrical coordinative argumentation with dependent pragmatic argumentation

Third, pragmatic argumentation can constitute a supplement to other argumentation which, on its own, constitutes a sufficient defence. In this case, the argumentation is *asymmetrical* coordinative argumentation. To express the asymmetrical relation between the dependent pragmatic argument and the independent other argument, I use the following schematic representation:

Interpretation

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[1a Pragmatic argument] & **1b Other argument(s)**

Schema 3: Asymmetrical coordinative argumentation with dependent pragmatic argumentation

4. *An exemplary analysis of pragmatic argumentation*

Using the analytic model and distinctions described above, 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.

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. 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.1: 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 developed in section 3 for a support for pragmatic argumentation. The interpretation is defended on the first level by referring to the favourable consequences of this interpretation, and on the second level 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 coordinative 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.

When the Supreme Court weighs these two interpretations, 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 favour of the restricted interpretation X weigh more heavily than the reasons in favour of the broad interpretation X'.

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.

5. *Conclusion*

This analysis of the argumentation of the Supreme Court and other analyses of Supreme Court decisions show that pragmatic argumentation never occurs in 'isolation'. The analyses show that pragmatic argumentation sometimes constitutes an independent defence, but in such cases it is always 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. As a conclusion, we might say that, on the basis of 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. The answer to the question about the role of pragmatic argumentation is that it can offer an acceptable justification of a legal decision, provided that judges try to make explicit which value judgements and which legal basis for these judgements are underlying the assessment of the desirability of the results.

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