ISSA Proceedings 2002 – Evaluating Unclarity In Judicial Decisions: Violations Of The Usage Rule In Legal Argumentation

1. Introduction

In everyday discussions as well as in legal procedures, unclear language can have negative consequences for the resolution of disputes. Van Eemeren and Grootendorst (1992, 2001) state that parties in a discussion making use of unclear or ambiguous language are guilty of the fallacy of unclearness. By using unclear formulations, they violate one of the rules for critical discussions: the usage rule.

This discussion rule, although never referred to as such, seems to play an important role in legal procedures as well. Among other things, the Dutch Supreme Court hears grievances against the motivation of judicial decisions that are based on the ground that the motivation of the decision is obscure. One of the legal parties may, for example, complain about the unclear formulation of the arguments, rendering an adequate reaction impossible. Since these complaints are not always allowed, it is worthwhile to address the question when such a complaint about the formulation of an argument may be successful. Van Eemeren and Grootendorst point out that it might be difficult to answer questions such as these. Therefore it is interesting to take a closer look at judicial decisions in which unclearness and ambiguity are explicitly discussed.

In my contribution I will discuss the way in which the Dutch Supreme Court decides on differences of opinion about the obscurity of the motivation of legal decisions. By analysing (legal) discussions on the formulation of the motivation, I will try to find evaluative criteria that reach beyond the specific case at hand.

First I will briefly discuss how unclarity is treated in literature on fallacies. Then I will indicate what type of complaints concerning the motivation of judicial decisions may be submitted to the (Dutch) Supreme Court. Finally I will discuss a number of exemplary cases of complaints concerning the formulation of the motivation that either have or have not been allowed.

2. Linguistic fallacies

In handbooks on fallacies (e.g., Hamblin, 1970, Woods & Walton, 1982, and Walton, 1995) and in textbooks (e.g., Johnson & Blair, 1994), fallacies are divided into two groups: those dependent on language and those independent of language. When dealing with linguistic fallacies, or fallacies of language and meaning, most authors discuss at least the fallacy of equivocation and the fallacy of amphiboly. The fallacy of equivocation is caused by lexical ambiguity. According to Walton (1995, 61) this fallacy occurs when a word that is essential in an argument is used ambiguously in such a way that it makes the argument appear sound, when in actual fact it is not. The fallacy of amphiboly is caused by syntactic ambiguity. This fallacy occurs when the syntactic interpretation of an ambiguous sentence is changed during the discourse**(i)**. Most authors that deal with linguistic fallacies, however, do not discuss them in great detail**(ii)**. Furthermore, not all examples presented of different kinds of ambiguity provide good examples of fallacies. As Woods and Walton (1982, 169) observe, many of the examples cited are, in fact, not arguments at all. It is obvious that ambiguity and vagueness can lead to problems in communication. But when should they be considered as fallacies? This question is closely connected with the definition of the concept fallacy.

In the pragma-dialectial argumentation theory a fallacy is defined as a speech act which frustrates efforts to resolve a difference of opinion, and the term fallacy is thus systematically connected with the rules for critical discussions. By making use of unclear or ambiguous language, parties to a difference of opinion can make the resolution of a dispute difficult or even impossible. In doing so they violate the usage rule, which runs as follows:

Parties must not use any formulations that are insufficiently clear or confusingly ambiguous, and they must interpret the formulations of the other party as carefully and accurately as possible.

It is a misunderstanding to assume that only deliberate violations of the usage rule result in a fallacy in case this has been done intentionally. This misunderstanding could be a result of Van Eemeren and Grootendorst (1992, 197, 202) stating that the usage rule is broken if unclearness or ambiguity is 'misused' 'to improve one's own position'**(iii)**. However, in *Argumentation* (2002, 110) the authors emphasise that parties do not always violate the discussion rules on purpose.

Van Eemeren, Grootendorst and Snoeck Henkemans (1996, 2002) discuss

linguistic fallacies in which unclarity may occur from: the structuring of the text, implicitness, indefiniteness, unfamiliarity, and vagueness. They also demonstrate how syntactic ambiguity may be caused by the structure of the sentence and how semantic and referential ambiguity may occur if words have more than one meaning.
Analysing unclarity in legal argumentation as a potential violation of the usage rule presupposes that a legal process can be regarded as a critical discussion. In a pragma-dialectical approach legal procedures are considered as specific, institutionalised forms of argumentative discussions (Feteris, 1999 and Plug, 2000). Although several rules in legal procedures differ from the rules for critical discussions, this does not seem to be the case for the requirement of comprehensibility of the justification of legal decisions. In the next paragraph I will discuss how the Dutch Supreme Court implements this requirement.

3. Grievances regarding the comprehensibility of the motivation
The Dutch constitution prescribes that all judicial decisions shall contain their underlying grounds. If parties to the proceedings are of the opinion that the justification of a judicial decision is defective, they can appeal to the Supreme Court for the quashing of the decision. The Supreme Court will then decide whether the grievance against the motivation of the lower Court is sustainable. The Supreme Court distinguishes between three categories of defective justification: incomprehensible motivation, disregard of essential arguments put forward by the parties and manifest errors in establishing the facts.

Among these defective justifications the incomprehensible motivation takes a prime position. Within this category five subcategories are distinguished:
1. The requirement of clarity has not been met:
– 'head nor tail' can be made from considerations
– ambiguous motivation
– internal inconsistency
2. The conclusion does not follow the judge's argument in any way.
3. The argument allows for only one conclusion and this conclusion is not drawn.
4. It is wrongly assumed that a certain argument excludes a certain conclusion.
5. A train of thought may be incomplete or fail to mention certain relevant facts or may lack logical coherence: 'the argument is incomprehensible without further motivation'.

These subcategories originate in a great number of judicial decisions. The way in

which these justification defects have been formulated may vary considerably. It is hard to find a common denominator or to establish to what extent the requirement of clarity differs from other motivation requirements. By taking these five subcategories as a point of reference it is possible, however, to identify the character of the grievance regarding the comprehensibility of the motivation and to establish what precisely the criticism is aimed at.

In the first place the criticism may be aimed at the *correctness* of the contents of the argumentation. If someone claims that the argumentation is 'internally inconsistent', the criticism refers to the correctness of the contents of the argumentation in relation to the contents of other arguments that have been put forward. It is true for both judicial as well for non-judicial argumentation that logical and pragmatical inconsistencies should be avoided.
A second form of criticism may be aimed at the *argumentative relationship* between the arguments and the (sub) standpoint. In cases like these the criticism is not aimed at the contents of the arguments, but rather on the argumentative or logical relationship between the argument(s) and the standpoint. This is the case when someone puts forward that 'the conclusion cannot be drawn from what the judge has said', that 'a certain argument allows for only one conclusion (which then has not been drawn)' or that 'it is wrongly assumed that a certain argument excludes a certain conclusion'.
In the third place the criticism may focus on whether or not the argumentation is complete or *sufficient*. If the Supreme Court is of the opinion that 'a certain train of thought is incomplete', that 'the Court fails to mention certain relevant facts', that 'it lacks logical coherence' or that 'the argument is incomprehensible without further motivation', nothing is said about the correctness of the argumentation itself. Since the argumentation is incomplete, it lacks sufficient argumentative strength to justify the standpoint.
Finally it may be the *unclarity* of the verbal presentation of the argumentation that is criticized. If it is said of the considerations that ''head nor tail' can be made from them or that 'the motivation is ambiguous', it is impossible to ascertain the correctness of the contents of the argumentation since it is not clear what the argumentation actually boils down to.

When a party to the proceedings submits to the Supreme Court a complaint about an incomprehensible justification, he claims, in pragma-dialectical terms, that the lower judge violated the usage rule. Obviously not all complaints about

incomprehensible justifications refer to judges ignoring the usage rule. Only grievances as to unclarity of the formulation of the motivation of a lower judge fall within the scope of this particular rule**(iv)**. On the basis of a number of examples I will demonstrate the position of the Supreme Court in cases like these.

4. Arguments that have not been made known in the decision
The first example (HR – Supreme Court – 16 October 1998, *NJ* 1999, 3) is about a dispute between Mr Finkenburgh, who manufactures safety belts and children's seats for cars, and Mr van Mansum, who designs these belts and seats. A comparative consumer research demonstrated that these products are not sufficiently safe and as a result sales have dropped. Van Mansum, the designer, claims to have sustained damage because of non-performance on the part of the manufacturer since the latter failed to ensure that his products met the usual safety and quality standards. The designer requests dissolution of their contract as well as damages. The judge denies the request on which the designer decides to appeal. The Court of Appeal decides in the plaintiff's favour and sets aside the judgement of the Court. The contract is dissolved and the manufacturer is ordered to pay compensation. The argumentation of the Court of Appeal runs as follows:

In view of the contents of the documents submitted by both parties, considered in mutual connection and conjunction (italics by HJP), it has been proven conclusively that Finkenburgh has been in breach of contract in respect of van Mansum.
Finkenburgh has not produced any evidence on the matter.
Consequently it has been established that Finkenburgh has been in breach of contract in respect of van Mansum.

The manufacturer, Finkenburgh, brings an appeal in cassation and holds against the Court of Appeal that the justification of its decision is incomprehensible. He is of the opinion that the Court does not sufficiently provide an insight into which documents of the extensive case file it refers. On top of that, the Court gives insufficient insight into its line of thought because it does not become clear why the contents of 'the documents submitted by both parties' leads to judicial finding of the facts. As it happens, the documents that have been submitted do not only support van Mansum's standpoint but contain elements that, according to Finkenburgh, support his standpoint as well:
the Court of Appeal was not in a position to consider van Mansum's claims proven

solely referring to the documents that had been submitted, adding 'considered in mutual connection and conjunction'. The Court should, however, have indicated precisely which grounds, originating in these documents, were found by the Court to have decisive evidential value.

The Supreme Court agrees with Finkenburgh and, in its judgement of this justification complaint, refers to the fundamental principle of proper judicial procedure:
that every judicial decision should at least be justified in such a way that sufficient insight is given into the underlying line of thought to render the decision verifiable and acceptable for both parties to the proceedings and third parties alike. In this particular case the Court did not meet this justification requirement. Not even in view of the debate between parties does the Court's judgement make clear on the grounds of which of the many documents it was found proven that Finkenburgh has been in breach of contract in respect of van Mansum.

The Supreme Court is, in pragma-dialectical terms, of the opinion that the Court of Appeal has violated the usage rule and is guilty of the fallacy of unclearness. The unclearness is caused by referential indefiniteness and frustrates the effort to arrive at a solution of the dispute. Since it is unclear which arguments support the decision, it is impossible to ascertain whether the decision of the judge is correct. The consequence is that parties are prevented to contest the argumentation and that the Supreme Court is prevented to verify whether the decision is the result of a proper application of the law.

In a judgement passed last year (HR – Supreme Court – 29 June 2001, *NJ* 2001, 494) a similar case of unclear reference was evaluated. The Supreme Court is very plain in its rejection of this way of justifying judicial decisions:
Even in view of the debate between parties, the Court's reference to a procedural document – without specifically indicating which passages therein are of relevance – which in its turn refers to yet another procedural document in which reference is made to statements made in an official report, provides insufficient insight into the line of thought resulting in the decision of the Court.

In his conclusion of the same judgement the Advocate General provides a possible explanation for this type of justification, but goes on to point out its disadvantages.

We may assume that it usually originates in a desire to work efficiently. In the dispensation of justice too, however, penny-wise is usually pound-foolish, in this case because it necessitates a detour by way of the Supreme Court to the same or a different judge. Is this efficiency?
In both judgements the Supreme Court uses the expression 'even in view of the debate between parties'. In this way the Supreme Court, in reference to the fundamental principle of proper judicial procedure, seems to indicate that the considerations underlying the decision should, in principle, find their way into the judgement. If, however, considerations are not made explicit in the motivation, this does not automatically lead to a breach of the usage rule. In such a case the arguments that have been exchanged by the parties to the proceedings in other stages of the legal procedure could still be taken into consideration. In doing so, the Supreme Court seems to take up a position that corresponds with the pragma-dialectical approach in which all pro- and contra-arguments that are relevant to the evaluation are taken into account.

Referring to arguments within the judicial decision
In the examples presented so far it is virtually impossible to establish by which arguments the decision is actually supported. As a result of the great number of arguments which do, in principle, qualify and all possible combinations in which these arguments could operate, the number of possible interpretations is almost unlimited. In the following example about a grievance as to the obscurity of the justification the number of interpretative possibilities is much more limited.

The judgement of the Supreme Court of 17 May 1974 (NJ 1975, 307) deals with a request to review the amount of alimony a man has to pay his ex-wife. The ex-husband is of the opinion that the amount stipulated by the Court is too high. The Court of Appeal denies the man's request on the following ground:
(…) that the ex-husband's arguments come down to his claim that the (…) total of the woman's cost of living expenses was determined on too high a level, because the judgement was based on incorrect or incomplete data;
that the ex-husband, however, failed to show the plausibility of this (italics by HJP).

The ex-husband lodges an appeal in cassation and, in his criticism on the Court's decision, brings forward that:
[it is] not clear what it is the Court is referring to using the word 'this' when it considers 'that the ex-husband failed to show the plausibility of this'. It is not

clear whether the petitioner, in the Court's line of thought, has (only) failed to show the plausibility of his view that the (earlier) decision was based on incorrect and incomplete data or failed to show the plausibility of his standpoint that total (of his ex-wife's) cost of living expenses was determined on too high a level (as well).

In its judgement of this justification complaint the Supreme Court states:
that the justification of the Court does not meet the requirements as laid down by the law, as it is not clear what the word 'this' refers to; that the Court fails to make clear whether, in its opinion, no other data have come to the fore than those already known or that the data that have come to the fore have not been properly established, or that the data provided do not convince the Court that a revision of its original decision is called for.

The Supreme Court indicates that the demonstrative pronoun 'this' can refer to three different statements. First of all, it is possible that the Court could have meant that there are no new data. Secondly, it could have meant that there are new data but that these have not been established. In the third place the Court could have meant that these new data are available but that they do not lead to a revision of the original decision.

Unlike the first cases of referential indefiniteness, in this case no less than three possible interpretations are suggested as to the Court's intentions. The Supreme Court, nonetheless, decides that it is not possible to choose between these three possible interpretations. The central problem seems to be that the Supreme Court cannot ascertain if the Court of Appeal has taken the new data into account. If it failed to do so, the ex-husband could have contested the decision by arguing that the Court of Appeal disregarded essential arguments.
Unclearness in judicial decisions caused by referential indefiniteness is of course not just a Dutch phenomenon but is a frequent stumbling block in Anglo-American jurisdiction as well. Several American authors on legal language, such as Mellikoff (1990), Solan (1993) and Tiersma (1999) offer explanations for this phenomenon. They found that one of the devices lawyers and judges have developed to make legal language more precise, is to use reference words like `such', `said' or `aforesaid'. The function of these words supposedly is to limit the class of possible referents to a noun phrase**(v)**. The first point of criticism of the authors is that words like `aforesaid' and `said' used in this way are archaic. Their second, more important, point of criticism is that they are useless in

reducing ambiguity and may even cause unclarity. Mellinkoff (1990: 305, 318) says:

If there is only one possible reference for *aforesaid*, it is usually unnecessary – as when an answer refers to the only action there is, "the action *aforesaid*." If aforesaid can be by any chance refer to more than one thing, or to nothing, its long history of uncertain reference marks it as dangerous. In either case, no aid to precision.

5. Unsuccessful complaints about unclearness

Apparently unclearness caused by referential indefiniteness or referential ambiguity may result in successful justification complaints. Sometimes, though, complaints about the obscurity of the justification are not recognised, as the following cases demonstrate.

HR – Supreme Court – 5 June 1992, *NJ*, 1992, 539 provides an example which I used on an earlier occasion (Plug, 1999). In this case, there is a difference of opinion between van der Vlies, the purchaser of a stretch of land, and Spanish Water Resort, the original owner of the plot. One of the questions that need to be answered by the Court is whether or not there is an actual agreement between the two parties. In order to be able to address this question, the Court assesses the six arguments (a through f) with which van der Vlies justifies his claim. The Court of Appeal concludes that there has never been an agreement between the parties. In his appeal to the Supreme Court van der Vlies argues that:

[…] in answering the central question the Court of Appeal has, unjustly, limited itself to the assessment of the separate arguments, thereby ignoring their mutual correlation and connection, or so it seems judging by the Court's decision. Moreover, it is, in the absence of any justification whatsoever, unclear why arguments a, c and e do not play any part at all in the relationship between Spanish Water Resort and van der Vlies, but that, moreover, even if one or more of these arguments did not play any part when judged on their own merits, it is unclear whether they may play such a part when considered in mutual correlation or connection.

In other words, van der Vlies is of the opinion that the Court of Appeal, in so far it interpreted the arguments as coordinate argumentation, failed to indicate this clearly in its judgement which, in the end, resulted in a negative assessment of the dispute. This complaint was rejected as follows:

It has not become clear from the decision that the Court failed to judge the

arguments of van der Vlies in conjunction. Apart from that, van der Vlies did not indicate in what way the total of his arguments exceeds the sum of the parts.

This rejection comes down to the opinion that van der Vlies is committing the fallacy of the straw man, or that, if he is not, he fails to present convincing proof that the solution of the dispute has been negatively influenced by unclearness on the part of the Court.

In the final case too, the obscurity in the phrasing was not found to have influenced the assessment of the dispute. This dispute (HR -Supreme Court- 22 May 1992, *NJ* 1992, 607) between a hospital and the works council of this hospital is about a difference of opinion on whether the travelling allowance scheme should be considered as a set of regulations or merely as information for those it concerns. The Court is of the opinion that the hospital intended this scheme to serve as information for the people concerned (about the purport of the results of collective bargaining). Two arguments are presented in support of this ruling. The interrelationship between these arguments, however, is obscure. It is not clear whether these arguments were intended to function as multiple or in as coordinative argumentation. The Advocate General summarises the problem thus:
The Court supports its judgement on two grounds, introduced in the challenged judgement by the words 'on the one hand' and 'on the other hand'. These introductory words do not contribute to the lucidity of the ruling since they suggest that the successive elements may lead to different conclusions, whereas, on the contrary, these elements can only lead to one and the same conclusion.
Also in view of the fact that both grounds operate completely separately, I assume that the Court did not intend to communicate that its judgement was founded on both grounds in conjunction but, more likely, that the Court intended to formulate two separate grounds which, each on its own, would be able to support the judgement. Both parties, apparently, were under the same impression. This becomes clear from the first ground of appeal in cassation (…) ('referring to on the one hand') and part 3 (referring to 'on the other hand'). Both will have to be valid in order to make cassation feasible.

One could imagine a different ruling if parties in cassation had not understood that the argumentation could be interpreted as multiple and would have limited their challenge to only one of the grounds. In this case the phrasing did not hinder the solution of the difference of opinion, since the parties anticipated the ambiguity. Obscurity, in other words, did not result in a violation of the usage

rule.

6. Conclusion

In judicial contexts the evaluation of justification complaints relies heavily on the circumstances of the case. This is also true of justification complaints that are motivated by the obscurity of the motivation. In my analyses of some decisions on complaints about unclear motivations from a pragma-dialectical perspective I set out to find criteria to evaluate these complaints. This perspective may provide an explanation as to why complaints about unclear, vague or ambiguous formulations are not always allowed.

The party that complains about obscurity of the motivation has the obligation to provide evidence in support of his standpoint. This burden of proof means that it has to be specified what it was exactly that was unclear and what caused this unclarity. In the case of referential indefiniteness, for example, it is specified how the use of certain referential words makes it impossible to decide which arguments justify the legal decision.

Moreover, the party laying down the justification complaint has the obligation to show that the unclarity, ambiguity or vagueness in the argumentation had its repercussions on the resolution of the dispute. The relationship between the arguments may be vague but that vagueness need not be of any influence on the position of the party laying down the complaint. Ambiguity too need not influence the solution of a dispute in a negative way if the plaintiff anticipated both meanings. To sum up, complaints about the unclarity of the formulation of argumentation in a legal context may, just as accusations of linguistic fallacies in a non-legal context, only be successful if it has become clear what exactly makes the argumentation obscure and, moreover, how this frustrated the resolution of the dispute.

NOTES

[i] The distinction between grammar and semantics is not always clear. This problem is assessed by, among others, Woods and Walton (1982: 169,170).

[ii] Walton (1996), in which ambiguity is the central subject, is one of the exceptions.

[iii] If this would indeed imply intention, there would be an extra difficulty for the party who accuses the other party of a fallacy. The accuser would not only have to make clear that the resolution of a disagreement is frustrated, but also that this was done deliberately. This would obviously render the burden of proof to almost

impossible.

[iv] Obviously, complaints of justiciables or others concerning the obscurity of legal terminology cannot lead to annulment of the judgement.

[v] Tiersma (1999: 89) provides the following example: Lessee promises to pay a deposit. Said deposit shall accrue interest at a rate of five percent per annum.

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