

ISSA Proceedings 2014 - The Role Of Pragmatic Argumentation Referring To Consequences, Goals And Values In The Justification Of Judicial Decisions

Abstract: In this contribution I discuss the role of pragmatic argumentation referring to consequences, goals and values in complex structures of legal justification. From a pragma-dialectical perspective I describe the stereotypical patterns of legal justification in hard cases and specify the different ways in which these stereotypical patterns can be implemented in different contexts in which judges give a decision that they justify by referring to consequences, goals and values.

Keywords: argumentation, argumentation from consequences, goal argumentation, legal argumentation, legal values, justification of legal decisions, pragmatic argumentation, pragma-dialectics.

1. Introduction

In the justification of their decisions it is not uncommon for courts to use pragmatic argumentation in which they refer to the consequences of applying a legal rule in a specific case. In a 'hard case' in which the applicability of the rule is controversial, courts may argue that the consequences of applying the rule in the standard meaning would be 'absurd' in light of the purpose of the rule. An example of the use of pragmatic argumentation referring to undesirable or 'absurd' consequences in such a hard case can be found in the decision from the US Supreme Court in the famous case of *Holy Trinity Church v. US* (143 U.S. 457) from February 29, 1892.[i] In this case the Supreme Court had to decide whether or not the act prohibiting the importation of foreigners and aliens under contract to 'perform labour' in the United States (chapter 164, 23 St. p. 332) was applicable to an English Christian minister who had come to the United States to enter into service of the Protestant Episcopal Holy Trinity Church in the city of New York as rector and pastor.

According to the United States and the circuit judge the church was in error because the contract was forbidden by chapter 164, 23, St. P. 332, according to which it is 'unlawful for any person to assist or encourage in any way the importation or migration of any alien or foreigner into the United States to perform labour or service of any kind'. The opinion of the Supreme Court, delivered by justice Brewer, is that this immigration statute should, in the concrete case, not be applied to the act of the church, although the act is within the letter of this section (paragraph II). Brewer states that application in the broad meaning would have an absurd result, that is that the contracts for the employment for ministers, rectors and pastors would be included in the penal provisions of the act. He argues that the congress never had in mind any purpose of prohibiting 'the coming into the U.S. of ministers of the gospel'. He maintains that the meaning of a statute can be found in the evil which it is designed to remedy, in this case the practice of large capitalists who contracted their agents abroad for the shipment of great numbers of 'an ignorant and servile class of foreign labourers' under contracts by which the employer agreed to prepay their passage and the labourers agreed to work after their arrival for a certain time at a low rate of wages.

In its decision, apart from a reference to the system of the law and the historical context of the legislation, the U.S. Supreme Court uses argumentation referring to the absurd consequences of applying the rule in the standard broad meaning:

a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, make it unreasonable to believe that the legislator intended to include the particular act.

In its evaluation of the consequences the court refers to the purpose of the rule, that is to prevent the influx of cheap labour under contracts with poor conditions, as it can be reconstructed from the intention of the legislator in the parliamentary discussion that can be found in the reports of the committees and the congressional records. On the basis of this purpose, the court is of the opinion that the consequences would be absurd because they are not in line with what the legislator intended with the rule.

In a legal context such argumentation referring to the consequences of applying a rule in a specific case, in argumentation theory also called pragmatic

argumentation, plays an important role because the application of legal rules requires the consideration of the consequences of the application in light of the purpose of the rule.**[ii]** Especially in hard cases in which applicability of the rule is controversial, it is not uncommon that courts refer to the consequences of application of the rule in a particular meaning or interpretation in light of the purpose of the rule as it was intended by the legislator. In the justification of the U.S. Supreme Court in its decision of the *Holy Trinity Church* case we see some characteristics of the use of pragmatic argumentation in legal justification that I want to discuss here. The first is that pragmatic argumentation is used in a particular kind of difference of opinion, a so called 'hard case' in which there is a difference of opinion about the applicability of a legal rule. The standpoints in such a difference of opinion concern the applicability of the legal rule in different meanings or interpretations. The second is that in such a hard case pragmatic argumentation always forms part of a complex argumentation. The pragmatic argumentation is supported by other argumentation in which the (un)desirability of certain consequences is related to the purpose of the rule as intended by the legislator. Such a support is necessary because legal rules are a means to achieve certain purposes that are desirable from a legal, social, economic perspective. In the law, for this reason, the desirability of the consequences of application of the rule in the specific case must be evaluated from the perspective of the purpose of the rule.

In what follows, I go into the stereotypical patterns of complex argumentation in which *pragmatic argumentation* is used in the context of legal justification in hard cases. I shall discuss the implementation of pragmatic argumentation in stereotypical patterns of complex argumentation in legal justification. I explain the dialectical function of the different parts of the complex argumentation by characterizing them as argumentative moves that are put forward in reaction to certain forms of critique. Then, I give an exemplary analysis and explain the way in which the U.S. Supreme Court in the *Holy Trinity case* uses pragmatic argumentation by showing how the court instantiates general stereotypical patterns of argumentative moves in light of the institutional preconditions of the justification in the context of the specific case. I have chosen this case as an example because it is one of the few cases in which the U.S. Supreme Court makes an exception to the standard meaning of a statutory rule. For this reason it gives an extended justification in which it uses a combination of different forms of argument, among which pragmatic argumentation referring to the consequences

of the application of the rule in light of the purpose as it was intended by the legislator.

2. The implementation of pragmatic argumentation in legal justification as part of a stereotypical pattern of argumentation

In order to clarify the way in which pragmatic argumentation is implemented in the context of legal justification in a hard case I proceed as follows. I explain the dialectical function of the different parts of the justification in terms of argumentative moves that are put forward in reaction to certain forms of critique that are relevant from a legal perspective. I explain how the argumentative moves in which the judge reacts to these forms of critique can be reconstructed as different levels in the argumentation and how the hierarchical ordering of these different levels results in a stereotypical pattern of argumentation.

2.1 The argumentation on the first level of the main argumentation: pragmatic argumentation

A court that refers to the consequences of applying a rule in a particular interpretation uses argumentation that can be reconstructed as pragmatic argumentation, of which the legal implementation can be specified as follows in order to do justice to the the dialectical obligations of a judge.**[iii]**

1 In the concrete case, rule R should be applied in interpretation R' (with an exception for the specific case)

1.1a In the concrete case, application of rule R in interpretation R' leads to result Y'

1.1b Result Y' is desirable from a legal point of view

(1.1a-1.1b' If in the concrete case application of rule R in interpretation R' leads to result Y' and if result Y' is desirable, then rule R should be applied in interpretation R')

Scheme 1: Implementation of the general scheme of pragmatic argumentation in the context of legal justification

In a hard case in which there is a difference of opinion about the correct interpretation of the rule, in pragma-dialectical terms the argumentation is put forward in the context of a *mixed dispute* in which one party argues that a particular rule R should be applied in the concrete case in a specific interpretation R' and the other party argues that this rule should be applied in another interpretation R".**[iv]** This implies that the main argumentation, the

argumentation on the first level, should reflect the choice between the rival points of view of the parties in dispute and should therefore reflect the balancing of the two positions on the basis of desirable and undesirable consequences (Y' and Y''). In scheme 2 the different components of the complex argumentation on the level of the main argumentation are represented:

1 In the concrete case, rule R should be applied in interpretation R' (with an exception for the specific case) and not in interpretation R'' (without an exception)

1.1a In the concrete case, application of rule R in interpretation R' leads to result Y'

1.1b Result Y' is desirable from a legal point of view

1.1c In the concrete case, application of rule R in interpretation R'' leads to result Y''

1.1d Result Y'' is undesirable from a legal point of view

(1.1a-1.1d' In the concrete case, if application of rule R in interpretation R' leads to Y', and Y' is desirable from a legal point of view, and if application of rule R in interpretation R'' leads to Y'', and Y'' is undesirable from a legal point of view, then rule R should be applied in interpretation R')

Scheme 2: Pragmatic argumentation in the complex argumentation on level 1: the main argumentation in legal justification in a hard case

In scheme 2 the arguments 1.1a and 1.1b form an implementation of the positive variant of pragmatic argumentation and the arguments 1.1c and 1.1d of the negative variant, the positive variant serves to defend the part of the standpoint that the rule must be applied in interpretation R', and the negative variant serves to defend the part of the standpoint that the rule must not be applied in interpretation R''. The complementing argument in which the weighing or preference is made explicit can be reconstructed as 1.1a-1.1d'.**[v]**

2.2 The argumentation on the second and third level of the subordinate argumentation

A judge who puts forward pragmatic argumentation has a dialectical burden of proof for answering the critical question why result Y'/Y'' is (un)desirable from a legal point of view. Since legal rules can be considered as a means to attain certain goals that are desirable from a legal, social, or economic perspective, in

the law the desirability or undesirability (absurdity) of a particular result is evaluated in light of the goal of the rule.

The goal of the rule can be based on the explicit intention of the historical legislator as it can be found in legislative documents, etcetera (which is called a *subjective teleological* interpretation of the meaning of the rule). The court can refer also to what is called the 'objective goal' of the rule as envisaged by a 'rational legislator', as it can be reconstructed on the basis of the rationale of the rule in the context of the law as a whole (which is called an *objective teleological* interpretation of the meaning of the rule).**[vi]**

To justify that the consequences are acceptable/unacceptable from a legal perspective, therefore in the justification a second level of subordinate argumentation should be distinguished that reflects the supporting argumentation justifying the (un)desirability of the consequences in relation to the purpose or goal of the rule that can be reconstructed as an answer to the critical question. In legal theory this argumentation that refers to the goal or purpose is often characterized as argumentation from coherence with certain legal purposes, goals, policies, principles and values.**[vii]** In pragma-dialectical terms, it can be characterized as a specific form of *symptomatic* argumentation that is provided in support of the normative argument 1.1b. It is stated that the result Y' has a particular property that makes it desirable from a particular perspective that is relevant in that context. Here, in the justification of argument 1.1b, the symptomatic argument forms a justification of the positive evaluation of the result Y' in argument 1.1b. In this case the fact that result Y' is compatible with a particular purpose P (that is intended by the legislator) is considered as a property that makes that result Y' can be considered as desirable from a legal point of view (and for the justification of 1.1d a similar argument justifying the undesirability of Y'').

On the basis of this characterization the argumentation on level 2 of the subordinate argumentation can be reconstructed as follows:

1.1b Result Y' is desirable from a legal point of view

1.1b.1a Result Y' is compatible with purpose or goal P

1.1b.1b Purpose P is desirable from a legal point of view

1.1b.1b.1 Purpose P is intended by the legislator/Purpose P is a rational purpose objectively prescribed by the valid legal order

1.1d Result Y" is undesirable from a legal point of view

1.1d.1a Result Y" is incompatible with purpose or goal P

1.1d.1b Purpose P is desirable from a legal point of view

1.1d.1b.1 Purpose P is intended by the legislator/Purpose P is a rational purpose objectively prescribed by the valid legal order

Scheme 3: The argumentation on level 2 of the subordinate argumentation

The argument 1.1b.1b/1.1d.1b, in its turn, can be questioned. This requires a further justification that provides an answer to the critical question in relation to this argument. Depending on whether a judge has referred to the purpose intended by the historical legislator (and thus opting for a *subjective teleological* interpretation of the rule) or the rational purpose objectively prescribed by the valid legal order (and thus opting for an *objective teleological* interpretation of the rule), in his supporting argumentation he will have to put forward different arguments.

To justify the compatibility with the intention of the historical legislator, the judge will have to refer to documents, such as parliamentary discussions, in which this intention is mentioned.**[viii]** To justify the compatibility with the intention of a rational legislator, the judge will have to refer to goals, principles and values underlying the rule that constitute the ratio legis, the rationale or purpose of the rule.**[ix]** The argumentative pattern on the level of this argumentation can be reconstructed as follows:

1.1b.1b Purpose or goal P is intended by the legislator/a rational goal objectively prescribed by the valid legal order

1.1b.1b.1 Purpose or goal P can be found in the following legal documents (...)/
Purpose or goal P is underlying the following rules, principles and values of the valid legal order (...)

Scheme 5: Argumentation on level 3 of the subsubordinate argumentation as an answer to further critical questions

In the preceding sections I have explained the stereotypical patterns of argumentation of which pragmatic argumentation forms part in legal justification. With this reconstruction I have clarified the dialectical obligations of a judge who justifies his decision in a hard case by referring to consequences of application of the rule in the specific case. These dialectical obligations define the dialectically relevant moves in the justification of legal decisions in a hard case: they prescribe

the elements of the justification that are necessary from the perspective of the dialectical role of the judge to account for the different decisions and choices that have to be made in the discussion process.[x]

These dialectical obligations make explicit the potential forms of critique that the judge will have to react to in a satisfactory way in order for his justification to be acceptable from a legal perspective. To clarify these dialectical obligations I have translated his legal obligations in terms of the answers that he will have to give to the different critical questions that can be asked in relation to the different argumentation schemes that form part of his argumentation on the different levels of the argumentation. In this way it has become clear that the judge will have to react to several kinds of critical question.

3. Exemplary analysis of the use of pragmatic argumentation referring to consequences in light of the purpose of the rule in legal justification

To show how courts may use pragmatic argumentation, and how they instantiate the general stereotypical patterns of complex argumentation, in this section I give an exemplary analysis of the way in which the U.S. Supreme Court in the Holy Trinity case uses pragmatic argumentation to justify its decision. I show how the court implements the general stereotypical patterns of argumentative moves I have described in the previous sections and I explain how this implementation is influenced by the institutional preconditions of legal justification. Since in U.S. law the 'core' of the decision is formed by that part that constitutes the '*ratio decidendi*' of the decision that is important from the perspective of the decision as precedent, I concentrate on the first part (I-VI) of the decision that ends with 'We find, therefore...' (The text of the relevant parts is attached at the end of this contribution).

As described in section 1, in the Holy Trinity case the Supreme Court had to decide whether or not the act prohibiting the importation of foreigners and aliens under contract to 'perform labour' in the United States (chapter 164, 23 St. p. 332) was applicable to an English Christian minister who had come to the United States to enter into the service of the Protestant Episcopal Holy Trinity Church in the city of New York as rector and pastor. The question was whether, as was decided by the District Court, the contract signed by the church was forbidden by chapter 164, 23, St. P. 332 according to which it is 'unlawful for any person to assist or encourage in any way the importation or migration of any alien or foreigner into the United States to perform labour or service of any kind'.

The Supreme Court decides that the decision of the District Court has to be reversed because the contract was not forbidden. In its view the rule regarding the prohibition is not applicable in the specific case because the meaning of the term 'labour' should be taken in the restricted sense of 'manual labour', which implies, in the opinion of the Supreme Court, that it does not concern the activities of a Christian minister. The Supreme Court justifies this interpretation by referring to the purpose of the rule as intended by the legislator, the U.S. Congress, that is to stay the influx of cheap unskilled labour:

We find therefore, that the title of the act, the evil which was intended to be remedied, the circumstances surrounding the appeal to Congress, the reports of the committee of each house, all concur in affirming that the intent of Congress was simply to stay the influx of this cheap unskilled labor.

This case constitutes a 'hard case' because different interpretations of the rule are under discussion, and as the highest court the Supreme Court has to decide which of the interpretations is correct from a legal point of view. As has been explained in section 2, such a hard case requires a complex argumentation in which the court must react to certain forms of criticism. In what follows, in 3.1, I address the justification of the appropriateness of the use of pragmatic argumentation that is presented in that part of the justification that begins with 'It must be conceded that ...'. Then, in 3.2, I address the justification of the application of pragmatic argumentation that is presented in the following part of the justification that begins with 'It will be seen that words ...', and explain how the Supreme Court instantiates the stereotypical pattern of argumentation in which it refers to the consequences of application of the rule in light of the purpose as it is intended by the legislator.

3.1 The justification of the applicability of the argumentation scheme of pragmatic argumentation

The argumentation of the Supreme Court that is put forward to justify the applicability of the pragmatic argumentation in the concrete case can be found in the parts where the Supreme Court defends its narrow interpretation R' by referring to the absurd consequences of applying the rule in the broad interpretation R'' in light of the purpose of the rule. As has been explained in section 2.2, in this case the Supreme Court has to defend a standpoint that concerns a preference for an adapted interpretation of the rule (R') and a rejection of a broad interpretation (R''):

1. In the concrete case, rule R should applied adapted interpretation R' (with a narrow interpretation of the term 'labour' that makes an exception for a Christian minister), implying that the rule does not apply to foreigners who perform labour as ministers of the gospel, and not in the standard interpretation R", (with a broad interpretation of the term 'labour') implying that the rule applies to all foreigners who perform labour.

The court acknowledges that the statute was applicable because the intention of the legislator was clear, but argued that an exception should be made. The court states that if the legislator had known the present situation, it would have made an exception for the concrete case on the basis of the absurd consequences in relation to the purpose of the rule and the values of the U.S. as a Christian nation. Since the court departs from the acknowledged standard interpretation of the rule and makes an exception for this case, it had an obligation to justify why this exception is justified.

From a pragma-dialectical perspective the justification offers a good example of how a court implements the stereotypical pattern of argumentation in hard cases because the different levels of argumentation are represented. In what follows, for the different levels of the argumentation distinguished in section 2.2 I explain how the various arguments are implemented in this case.

On the level of the main argumentation the justification of the Supreme Court can be reconstructed as a complex argumentation, consisting of the positive and negative variant of pragmatic argumentation as described in scheme 3 in section 2.2.1. With argument 1.1a and 1.1b the court puts forward pragmatic argumentation in which it refers to the result of application in interpretation R' and states that this result would be desirable (the desirability is, as will be explained below, defended on a lower level of the argumentation). With argument 1.1c and 1.1d the court puts forward pragmatic argumentation in which it refers to the result of application in interpretation R" and states that this result is undesirable (absurd). This result would be that in interpretation R' the contracts for the employments of ministers, rectors and pastors would be excluded from the penal provisions of the act and that in interpretation R" the contracts for the employments of ministers, rectors and pastors would be included in the penal provisions of the act.

To justify that result Y' is desirable and result Y" undesirable, on the level of the

subordinate argumentation the argumentation put forward by the Supreme Court can be analysed as a reaction to doubt with respect to the first critical question, whether result Y'/Y'' is (un)desirable from a legal point of view. As has been described in section 2.2, in its justification the court will have to deal with certain forms of doubt that are relevant from a legal perspective, in pragma-dialectical terms with the critical questions that are relevant for the specific implementation of pragmatic argumentation. The argumentation that the Supreme Court puts forward in defence of argument 1.1b and argument 1.1d, that the result Y' would be desirable and result Y'' undesirable or 'absurd', can be considered as a reaction to the first critical question with respect to the desirability of result Y' and the undesirability of result Y''.

In the argumentation consisting of 1.1b.1a and 1.1b.1b the court justifies the desirability of the result in light of the compatibility with purpose P of the rule mentioned in the conclusion of the decision that is 'to stay the influx of this cheap unskilled labour', pointing out that this purpose is intended by the legislator. In this case the court uses subjective-teleological argumentation by referring to the purpose as intended by the historical legislator.

To support argument 1.1b.1b, that purpose P is intended by the legislator, the court puts forward argumentation referring to certain authoritative sources from which the 'spirit of the statute' and the 'intention of its makers' can be inferred.

First, the court explains the intention of the legislature by referring to the common understanding of the words 'labour' and 'labourers' used in the first section of the act and by concluding that on the basis of the words it is clear that Congress had in mind only the work of the manual labourer as distinguished from that of the professional man, so that an exception for a Christian minister can be justified because the legislator has intended this (section III). As a support the court uses a selection of citations from precedents to justify its interpretation.

Second, the court explains the intention of the legislator on the basis of the legislative history by referring to the evil which the act was designed to remedy from the perspective of the situation 'as it was pressed upon the attention of the legislative body' (section IV). In the court's view the intent of Congress can be found in the evil the statute is designed to remedy, which can be found in the contemporaneous events, the situation as it existed, and as it was pressed upon the attention of the legislative body. The appeal to Congress was made 'to raise

the standard of foreign immigrants and to discountenance the migration of those who had not sufficient means in their own hands (...) to pay their passage'. The court adds that it appears also from the petitions in the testimony before the committees of Congress that it was this cheap unskilled labor which was making the trouble, and the influx of which Congress sought to prevent. Finally the court states that the extract from the report of the Senate committee (...) reveals also that 'It seeks to restrain and prohibit the immigration or importation of laborers who would have never seen our shores but for the inducements and allurements of men whose only object is to obtain labor at the lowest possible rate, regardless of the social and material wellbeing of our own citizens, and regardless of the evil consequences which result to American laborers from such immigration.'

In its conclusion the court stresses that all these sources, 'the title of the act, the evil which was intended to be remedied, the circumstances surrounding the appeal to congress, the reports of the committee of each house concur in affirming that the intent of congress was simply to stay the influx of cheap, unskilled labor'.

The way in which the Supreme Court instantiates the stereotypical pattern of argumentation reflects the preconditions for the argumentative activity in legal justification in the U.S. in the historical context of this decision.

4. Conclusion

In this contribution I have explained the role of pragmatic argumentation in legal justification from a pragma-dialectical perspective. I have characterized legal justification as an argumentative activity that plays a role in the resolution of legal differences of opinion in legal procedure. From a pragma-dialectical perspective I have shown how the stereotypical argumentative patterns of which pragmatic argumentation forms a part can be reconstructed in terms of the dialectical obligations of a judge. These dialectical obligations define the dialectically relevant moves in the justification of legal decisions in hard case: they prescribe the elements of the justification that are necessary from the perspective of the dialectical role of the judge to account for the different decisions and choices that have to be made in the discussion process.

Based on the dialectical characterization of the role of pragmatic argumentation and the obligations of the judge who uses this form of argumentation in a hard case I have reconstructed the stereotypical patterns of complex argumentation of

which pragmatic argumentation forms part. I have done this by translating the arguments that have to be given as reactions to various forms of critique that are relevant from a legal perspective. I have reconstructed the stereotypical patterns that are relevant for the justification of the appropriateness and the applicability of pragmatic argumentation in a concrete case.

By way of illustration I have given an analysis of the argumentation of the U.S. Supreme Court in such a hard case in which it had to account for an interpretation in which it departed from the standard literal meaning of the term 'labour' in the context of a statute. I have explained how the court instantiates in its justification the stereotypical patterns of argumentation by translating the arguments that are given in terms of the arguments that form part of the argumentative pattern on the different levels of the argumentation. In this way I have clarified how the court reacted to the various forms of critique that it would be problematic to refer to the intention of the legislator and the purpose of the rule in relation to certain 'absurd consequences' to establish the meaning of a legal rule.

Further research of the way in which courts maneuver strategically in the justification of the appropriateness and applicability of pragmatic argumentation must clarify how courts adapt their choices and presentational devices in light of the preconditions of the argumentative activity in a particular legal system.[xi]

NOTES

- i. For the text of the decision see <http://supreme.justia.com/cases/federal/us/143/457/case.html>.
- ii. Other terms for this form of argumentation are 'consequentialist argumentation', and for the negative form that refers to the unacceptable or absurd consequences of a decision 'argument from absurdity'. See for example Bustamante (2013), Carbonell (2013), MacCormick (1978, 2005). For a discussion of pragmatic argumentation in a legal context see Feteris (2002).
- iii. For a discussion of the dialectical role of the judge in legal proceedings see Feteris (2012a).
- iv. For a description of the structure of various forms of disputes see van Eemeren and Grootendorst (1992, chapter 2).
- v. For a discussion of a pragma-dialectical reconstruction of weighing and balancing in legal justification see Feteris (2008c).
- vi. For a discussion of a pragma-dialectical reconstruction of the various forms of

teleological argumentation see Feteris (2008a). For a discussion of the pragma-dialectical reconstruction of the argumentation in which courts refer to the intention of the (historical) legislator see Plug (2006).

vii. See for example Berteau (2005), MacCormick (1978, 2005) for a discussion of argumentation from coherence.

viii. 8 For a discussion of a pragma-dialectical reconstruction of the various forms of teleological argumentation see Feteris (2008a). For a discussion of the pragma-dialectical reconstruction of argumentation in which courts refer to the intention of the legislator see Plug (2006).

ix. For a discussion of argumentation referring to the ratio legis see Canale and Tuzet (2009).

x. For a discussion of legal justification as part of a critical discussion and the role of the judge see Feteris (1990, 1993, 2012a).

xi. For a discussion of the strategic manoeuvring in the Holy Trinity case see Feteris (2008b).

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