ISSA Proceedings 2014 ~ Transparency In Legal Argumentation: Adapting To A Composite Audience In Administrative Judicial Decisions

Abstract: An important topic in the debate about transparency of the administration of justice includes the communicative function of judicial decisions. This function should be conceived as the judge's aim to have his argumentation understood (the communicative effect), as well as to have it accepted (the interactional effect). In this paper I will analyse how the judge may maneuver strategically to achieve these effects on a composite audience. The analysis focuses on the communicative activity type of administrative judicial decisions.

Keywords: administrative law, audience demand, composite audience, judicial decisions, legal argumentation, legal opinions, Role-shifting.

1. *Introduction*

In a recent study (Broeders, Prins and Griffioen, 2013) that was conducted by the Netherlands Scientific Council for Government Policy (WRR) it is argued that there is a need for `a more contemporary transparency of the administration of justice relative to the different 'outside worlds' with which it comes into contact.' According to this study, the need for transparency has become urgent because of changes in society under the influence of globalisation, individualisation and populism. One of the topics in the debate about transparency includes the communicative function of judicial decisions.

From an argumentation theoretical perspective, the communicative function of a judicial decision should not only be conceived as the judge's aim to have the argumentation underlying his decision understood (the communicative effect), but also to have his argumentation accepted (the interactional effect). The judge may be expected to have the intention to achieve these effects on the parties to the

proceedings, his immediate addressees, as well as on a broader audience. Long before the current debate on transparency, literature on legal (argumentation) theory and on decision writing emphasized that, apart from the litigants in the case, the audience of the judge consists of members of the legal community (other judges, lawyers interested the decision), law students and the general public. In order to address such a so-called composite audience (van Eemeren, 2010) in his justification of the decision, the judge may make use of different techniques when maneuvering strategically.

A recent pilot study carried out in administrative courts in the Netherlands demonstrates that judges do at times, indeed, attempt to address a composite audience when justifying their decisions. In this contribution I will clarify which audiences may be addressed in administrative judicial decisions. Then I will analyse the way in which a judge may manoeuvre strategically to adjust his argumentation to these audiences. In view of this analysis I will start with a first attempt to characterize administrative judicial decisions as an argumentative activity type.

2. *Administrative judicial decisions as a specific activity type*

To analyse the strategic maneuvering in judicial decisions by the Dutch Administrative Court, these decisions should first be characterized as a communicative activity type. In the pragma-dialectical argumentation theory (Van Eemeren 2010, 40, 129), strategic maneuvering refers to the continual efforts made in all moves that are carried out in argumentative discourse to keep the balance between reasonableness and effectiveness.**[i]** An argumentative activity type refers to a more or less institutionalized argumentative practice. Requirements pertinent to the activity type may affect the strategic maneuvering.

domains of communicative activity	*general genres of communicative activity*	*specific communicative activity types*	*concrete speech events*
[=more or less institutionalized macro-contexts]	[= families of conventionalized communicative practices]	[= types of conventionalized communicative practices]	[= instantiations of communicative activity types]
legal communication	adjudication	*-court proceedings* -arbitration -summons	*defense pleading at O.J. Simpson's murder trial*

Figure 1. An example of a speech event representing a communicative activity type implementing a genre of communicative activity instrumental in the legal communicative domain.

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In order to characterize judicial decisions by the Dutch Administrative Court in terms of communicative activity type, we may start from an overview as presented by van Eemeren (2010, 143). This overview represents examples of different types of conventionalized communicative practices that are connected with specific kinds of institutional contexts, such as political and medical contexts. In the example of the legal context (Figure 1), the concrete speech event of the defense pleading at O.J. Simpson's murder trial is considered to be a representation of a particular communicative activity type: the communicative activity type of legal proceedings. This communicative activity type belongs to the domain of legal communication and makes use of the prototypical genre of adjudication.

Judicial decisions in general belong to the genre of adjudication and can be considered as a subtype of the conventionalized communicative practice of court proceedings. The communicative activity type of judicial decisions, however, should be specified in order to characterize the activity type in a meaningful way. This specification should be made by means of three different convention-determining features. The first feature that determines the conventions of a judicial decision, is the field of law in which a legal dispute is situated: administrative law, private law, punitive law etc. The second feature is the type of court that has the competence to decide at a certain stage of the legal procedure: the court of first instance, the court of appeal or the court of last resort. The third feature that is relevant is the (territorial) jurisdiction under which the judicial decision has come into being and which national or international legislation is applicable.

specific communicative activity types [= types of conventionalized communicative practices]	[convention determining features]	[= subtype of conventionalized communicative practices]	*concrete speech events* [= instantiation of communicative activity types]
-court proceedings -arbitration -summons	Field of law Criminal law Civil law *Administrative law* Type of court (procedure) *Court of first instance* Court of appeal Court of last resort Jurisdiction *National law* (local, state federal law) European law International law	*Judicial decisions by the District Court (section Administrative Law)*	*Dutch judicial decision [by the District Court Amsterdam, 5-7-2013]*

Figure 2. An example of convention determining features that specify a subtype of the communicative activity type of court proceedings.

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The ratio of this specification of features is that all three distinctive features are relevant to the analysis of the argumentation in the concrete speech event of a judicial decision; they entail different institutional conventions that are, in combination, pertinent to the concrete speech event: the actual decision. The specification of the conventions that bridge the gap between the specific legal communicative activity type of court proceedings and the concrete speech event of a judicial decision by the administrative section of the Dutch district court is represented in figure 2.

3. *Dutch administrative law procedure*
The activity type of administrative judicial decisions by the Dutch district court concerns binding decisions by this court in legal disputes between administrative authorities and citizens. Administrative law provides the government with the power to administer, but it also establishes limits on administrative activity. In the Netherlands, when a citizen disagrees with an order or a decision made by an administrative authority, he can object to this order or decision in court. As a general rule a citizen is required to follow a preliminary administrative procedure before they can take his case against an order to court. This procedure allows the citizen to explain why he disagrees with the order, after which the administrative authority considers its order once again and to correct possible mistakes. The General Administrative Law Act (Algemene wet bestuursrecht) applies to both administrative decisions by the administrative authorities and to judicial reviews of these decisions by the district court (administrative law division).**[ii]** For the activity type of administrative judicial decisions this means that the General Administrative Law Act is pertinent to the institutional goal, the conventions and the format of the procedure preceding the judicial decision as well as the judicial decision itself.

Some of the important characteristics of administrative legal procedure may be summarized as follows.**[iii]** The point of departure of the administrative procedure is the assessment of a decision *ex tunc*. This means that the judge has to determine whether or not the decision by the administrative authority was

legal at the time it was taken. In doing so, the judge does not in principle take new facts into account. However, if the judge does not merely annul the decision, and instead replaces the administrative authority's order by inserting his own judgment, then the assessment may take new facts into consideration.

The judge must ensure that all aspects of the relevant law are applied. He may supplement the facts himself, if necessary. He should be able to make use of this power in situations where one party to the proceedings appears to be weaker than the other.

There are two important restrictions the judge has to observe with regard to the scope of the dispute he decides upon and to the result of the dispute. Firstly, the judge should not go beyond the subject of the dispute (*ultra petita*). Secondly, the judge should not put the person in a worse position than he was in when he moved for an appeal (*reformatio in peius*).

The judge has discretionary power in the area of procedure. Consequently, the judge defines the length of the process, leads the investigation during the trial, and can independently order an expert examination, if necessary. It is also the judge who ends the investigative phase if he considers the information that he has received to be sufficient to come to a decision.

With regard to the accessibility of the administrative procedure, parties to the process can appeal to the judge without many requirements of form. There is no requirement to proceed with the aid of a lawyer; trial representation is not required.

In the judicial decision, the judge is obliged to state the grounds for his decision. However, the judge is not obliged to deal with each argument that is raised by the parties to the proceedings. The institutional point of administrative judicial decisions is to provide a binding decision in legal disputes between administrative authorities and citizens. The justification should provide insight into the decision and, if at all possible, render it acceptable. The justification should enable the parties to ascertain how and to what extent the facts and legal foundations, as presented by them, have been taken into consideration. On top of that, the justification should enable the public at large to monitor the administration of justice as well as gain insight into its proceedings.**[iv]**

4. *Administrative judicial decisions and the composite audience*

In the pragma-dialectical argumentation theory, adaptation to the audience is one of the three aspects of strategic maneuvering; it refers to the requirements that must be fulfilled in strategic maneuvering to secure communion, at the point in the exchange, with the people the argumentative discourse is aimed at. In argumentative practice this amounts to adjusting the argumentative moves in such a way to the audience views and preferences that there is as much agreement as possible between the arguer and the audience (Van Eemeren 2010, 108, 112). The literature on legal theory (Makau, 1984, Rubinson, 1996) the law and economic approach (Garoupa and Ginsburg, 2009) as well as the more practical literature on opinion writing (Lebovits, 2008, Leubsdorf, 2001) recognizes that the audience of a judge may be diverse. Often the authors focus on the audiences of judicial decisions by the court in last instance, the Supreme Court, but the audiences of decisions the lower courts may be discussed as well (Hume, 2009). Most authors, however, list more or less the same groups of different (possible) audiences: the litigants in the case, members of the legal community (other judges, lawyers interested in the decision), law makers, legal scholars, law students, media, the general public.

In order to analyse strategic manoeuvring that takes place in administrative judicial decisions, a more detailed analysis of the audience is needed. The audience as whole, consisting of different persons or groups, may be considered a composite audience that is heterogeneous with respect to the points at issue in an administrative judicial decision as well as to the starting points pertinent to the dispute that is sentenced upon in the decision.

Both parties to the proceedings are the official antagonists who are addressed directly by the judge and who are therefore considered the primary audience.**[v]** The other persons or groups that make up the audience, are the antagonists who are reached indirectly by the judge. This ‘third party’ will also evaluate the acceptability of the argumentation that is brought forward in the judicial decision. The official antagonists are addressed by the judge in their procedural roles as ‘the plaintiff’ (or ‘the applicant’) and ‘the defendant’.

Characteristic of the primary audience of an administrative judicial decision is that this audience is not always homogeneous. Since trial representation is not required, the parties to the proceedings may not possess the same professional knowledge of the law. Usually, the administrative authority is represented by a lawyer or a legal specialist, whereas for a citizen who is party to the proceedings

this may not always be the case. Another significant difference between the parties to the proceedings is that unlike most citizens who are involved in a legal dispute, an administrative authority may be considered a 'repeated player'. It may only be expected that, compared to the average citizen, the (local) government is more often involved in legal disputes. This latter characteristic may become manifest in an administrative judicial decision when the judge addresses the administrative authority not only as a party to the present proceedings, but also in it's capacity as a party in future proceedings.

5. *Addressing a compositite audience*
In administrative judicial decisions, judges could address non-litigant audiences in an indirect way. If a judge would want to address (members of) this audience directly, he would have to initiate a new, second, difference of opinion in which the original 'third party' audience would then be considered the judge's primary audience. However, the institutional requirements determined by the administrative law, impose limits to that option. In this paragraph I will demonstrate how judges may maneuver strategically to address a 'third party' audience in either an indirect way or in a direct way.

The first case illustrates how a judge can make use of the argumentation that has been brought forward by the parties to the proceedings, in order to address a 'third-party' audience indirectly. In this case, the applicant, a homeless Chinese lady, asked the Central Agency for the Reception of Asylum Seekers (COA) for reception into the Netherlands. Pending the COA's decision, the applicant requested the defendant, the city of Utrecht, for temporary reception based on the Social Support Act (Wmo). The defendant dismissed the request, but offered the applicant a temporary place in the local Sleep Inn, a shelter for the homeless. The defendant argued that the applicant should address the COA for a structural solution. The applicant is of the opinion that the solution proposed by the defendant is not adequate for her situation and she requests the court for an interim relief measure. In its decision, the court puts forward the following.

(1)
The court is of the opinion that the defendant's political standpoint that reception of the plaintiff should be a task of the central government, is very understandable. (…). It is about the positive obligation to receive vulnerable persons, article 8 EVRM, and where the treaty prevails over national legislation. The court is of the opinion that decisions on this positive obligation, as made by the Dutch

Administrative High Court (CRvB) and decisions made by the Council of State should be better attuned to one another. Since this is not the case, however, the court proceeds to decide on the current appeal under the conditions of the Social Support Act (Wmo). This decision is about the situation as it is and not about the desired developments in the administration of justice.

(ECLI:NL:RBUTR:2012:BY8445)

In this fragment of its decision, the court evaluates one of the sub standpoints as put forward by the defendant. With respect to this sub standpoint, the court makes a distinction between its political content and its legal effectiveness. As far as the political content of the argument is concerned, the court agrees with the defendant, but it refutes the argument on the grounds that it cannot be effective in the legal proceedings. In support of this argument the court puts forward that decisions by the Dutch Administrative High Court (CRvB) and the Council of State on the reception of vulnerable persons are not well attuned. By means of this argument the court provides the primary audience, the defendant, with a justification for the refutation of the defendant's argument. Through this argument, however, the court indirectly addresses a third-party audience, the administration of justice, and criticises it for a lack of consistency in the judicial decisions that concern article 8 EVRM.

If, however, the argumentation put forward by the parties to the proceedings does not provide any points of departure for the judge to address (members of) a 'third-party' audience in an indirect way, the judge may consider addressing this audience directly. Role shifting is one technique at the judge's disposal when maneuvering strategically in order to address the 'third-party' audience directly. In accordance with his official, institutional role as an impartial decision maker, the (administrative) judge decides on the legal dispute that is brought before the court.**[vi]** This institutional constraint that stipulates not to go beyond the subject of the dispute (*ultra petita*), imposes a limit on the possibilities the judge has to address a 'third-party' antagonist directly.**[vii]** By shifting from the role of legal decision-maker to the role of (legal) advisor, the judge may maneuver strategically to make use of the opportunity to direct a standpoint at a 'third-party' antagonist. Strategic manoevering by making use of a role shift may be motivated by a broader interpretation of the task of the judge in view of the communicative function of administrative judicial decisions. With a view of the social or legal consequences the decision may have on (members of) the 'third

party', the judge may choose not to restrict himself to his task as a legal decision maker.

The following case illustrates the way in which judges may manoeuvre strategically by the reversal of roles. The case concerns a difference of opinion between a citizen (the plaintiff) and the social service of the city council (the defendant). Since 1998 the plaintiff has received a monthly social security payment provided by the local authorities. In 2005 the defendant decided to cut back on the plaintiff's social security benefit by 5%, because the plaintiff failed to return a signed copy of a document that listed his schedule of activities (werkpolis). After the social service had rejected the request to reverse the decision regarding the cut back in the social security payment, the interested party appealed to the administrative judge. The judge decided as follows.

(2)
There is no legal obligation for the plaintiff to sign and return the said document to the defendant. The court concludes that there is neither law nor local act that requires such an obligation. It is open to the local government to amend their local act on reintegration. The court advises the local government to reconsider this adaptation of article 8 of the Work and Welfare Act. […] In doing so, attention could be paid to […] because…

(ECLI:NL:RBBRE:2005:AU8054)

In the fragment under (2), the judge decides against the defendant on the ground that there is no law or act that prescribes the legal obligation to sign and return the said document. After that, the judge manoeuvres strategically by shifting from the institutional role of decision maker to the role of legal advisor. The judge exploits this technique to address a member of the 'third-party' audience, the local government, directly. The judge advances an implicit standpoint regarding anticipated (legal) consequences of the decision: the local government should not amend their local act on reintegration. By presenting his standpoint as an advice ('The court advises the local government to reconsider …') the judge attempts to avoid the risk of trespassing upon the area of the legislative powers of the local government; an institutional constraint that follows from the principle of the separation of powers. At the same time, by adopting the role of a legal advisor, the judge attempts to avoid the risk of being accused of going beyond the subject of the dispute in his decision. As is discussed in Plug (2000), the judge may

explicitly present his advice as an *obiter dictum*, in order to even minimize this risk.

Both examples show how an attempt by the judge to address an audience may broaden the scope of the legal dispute he has to decide upon. By bringing forward a standpoint that introduces a difference of opinion with a (originally) 'third-party' antagonist, the judge, at the same time, provides the litigants and other members of the 'third-party' audience with more insight in the broader impact of the current decision. In doing so the judge may contribute to the communicative function of administrative judicial decisions and thus to the transparency of the proceedings of the administration of justice.

6. *Conclusion*

Administrative law prescribes the rules that public authorities must adhere to in their decision-making and regulates relations between the government and citizens. In this contribution I have explored on what grounds administrative judicial decisions by the Dutch district court may be considered as a specific argumentative activity type. Institutional requirements pertinent to this activity type determine that the justification of these decisions should be aimed at the litigants as well as at the public at large. At the same time, other institutional requirements that are pertinent to this activity type impose constraints on the possibilities the judge has when addressing such a composite audience. By means of two examples I have illustrated the way in which the judge may manoeuvre strategically to address members of a 'third-party' audience, without trespassing upon the limitations that are determined by the institutional requirements.

NOTES

i. In research in the field of law on judicial strategic behaviour, the term strategic is used differently. Baum (2009, 6) for example, uses the term as follows: 'Strategic judges consider the effects of their choices on collective outcomes, both in their own court and in the broader judicial and policy arenas. […] Whenever (they) choose among alternative courses of action, they think ahead to the prospective consequences and choose the course that does the most to advance their goals in the long term.'

ii. Higher appeal against these decisions is open in the Administrative Law Division of the Council of State (or, in specific cases, the Central Court of Appeal).

iii. This characterization of the administrative legal procedure is based on Brouwer and Schilder (1998) and Verburg (2008).

iv. The justification principle is considered one of the most important principles in (administrative) procedural law. See also de Poorter and van Roosmalen (2009) and Plug (2012).
v. From the administrative law as well as from jurisprudence it follows that arguments from both parties to the proceedings should be discussed in a judicial decision.
vi. Apart from the competences of a judge that are prescribed in Dutch (procedural) law, the Dutch Association for the Judiciary (NVvR) formulated a Judges Code of Conduct (September 2011).
vii. Because the constraint is one of the procedural starting points that are pertinent to the activity type of administrative judicial decisions, it is not in contradiction with the pragma dialectical freedom rule that states that discussants may not be prevented from bringing forward a standpoint. See also van Eemeren (2013).

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