A Pragma-Dialectical Approach to Legal Discussions

In analyzing the legal process as a specific form of a resolution-oriented discussion, I use the pragma-dialectical theory developed by van Eemeren and Grootendorst. The *dialectic* part of the theory implies that argumentation is considered as part of a *critical discussion* in which the interaction of discussion-moves is aimed at a critical test of the point of view under discussion. A resolution in a critical discussion means that a decision is reached as to whether the protagonist has defended his point of view successfully on the basis of commonly shared rules and starting points against the critical reactions of the antagonist, or whether the antagonist has attacked the point of view successfully.

The *pragmatic part* of the theory analyses the discussion-moves in a critical discussion as speech acts which have a certain function in the resolution of the dispute. Thus, the pragmatic part formulates communicative and interactional rules for the use of language in various informal and formal institutional situations.[4]

The most important components of the pragma-dialectical theory for my purposes are the *ideal model* for critical discussions and the *code of conduct* for rational discussants. The ideal model is a specification of the stages which must be passed through to further a resolution of a dispute, and of the various contributions thereto found in these stages.

In the *confrontation stage* it is established what the dispute is exactly about; in the *opening stage* the participants reach agreement concerning discussion rules, starting points and evaluation methods; in the *argumentation stage* the initial point of view is defended against critical reactions and the argumentation is evaluated; and in the *concluding stage* the final result is established.

The *code of conduct* specifies rules for the resolution of disputes in accordance with the ideal model. The rules acknowledge the right to bring forward a standpoint and to cast doubt on a standpoint, the right and the obligation to defend a standpoint by means of argumentation, the right to maintain a standpoint which is adequately defended in accordance with commonly shared rules and starting points, and the obligation to accept a standpoint which is defended in this way.

Resolution in accordance with these rules carries certain presumptions. One precondition is that discussants in the ideal model wish and will strive to proceed rationally. Another is that discussants are unconstrained in what they bring forward, criticize and accept. Only when these preconditions concerning attitudes and circumstances are fulfilled, can observance of the rules constitute a sufficient condition for resolving a dispute.[5]

The ideal model and the code of conduct for rational discussants are a kind of analytical tool for the treatment of legal discussions with respect to the central question of the procedures and rules in law which guarantee a rational resolution of legal disputes. I reconstruct legal procedure as a specific implementation of a critical discussion. In doing so, I clarify respects in which a legal process complies with the necessary conditions of the ideal model for critical discussions. I also try to clarify respects in which the legal process does not comply with these conditions, and I try to find out how these infringements of general conditions of reasonable behaviour are 'repaired' in a legal process in order to guarantee a rational resolution of disputes.

In what is called a *dialectical analysis* of Dutch legal procedure, I interpret the legal process as a critical discussion because it must be conducted according to Codes of legal procedure. In particular, I interpret those codes as ideal models for legal procedures.[6] I establish *similarities and differences* between the *legal rules* and the *pragma-dialectical rules*, and I attempt to determine which legal rules in addition

to the pragma-dialectical rules facilitate a final resolution of legal disputes.

In what follows, I will consider a legal process as a specific form of a rational discussion.[7] The specific character of the legal process concerns the specific restrictions under which legal conflicts are resolved. The participants to a legal process are constrained by their genre's beliefs, purposes, assumptions, et cetera which they have to take for granted. Taking the pragma-dialectical model as a general model for the rational resolution of disputes, an analytical reconstruction of legal procedure gives the theorist principled access to the additional procedures and rules required for rational and efficient legal resolution.

There is one very *important difference* between a legal process and a pragma-dialectical critical discussion. In a critical discussion, the participants try to resolve the dispute *among themselves*, whereas the parties in a legal process present their case to a neutral third party, the *judge*, who terminates the dispute.[8] Because of this difference, it could be argued that a legal process does not meet the requirements of a critical discussion under pragma-dialectical construal. Thus, one of the central questions to be answered when clarifying conditions of rational conflict resolution in legal proceedings is how the role of the judge in a legal process relates to what happens in a party-resolving critical discussion.[9]

To this end, I will discuss the role of the judge in Dutch civil procedure and will describe how the judge facilitates a final settlement of disputes in accordance with general conditions for a rational discussion.[10] Taking into account specific legal goals such as legal certainty, legal security and equality, I will specify additional procedures and rules required for a rational resolution.[11]

In describing the role of the judge in Dutch civil procedure I give an illustration of how certain rules of legal procedure help to ensure a rational resolution of legal disputes. For other aspects of legal proceedings a similar analysis can be carried out. The procedures and rules with regard to the judge should be considered as a subset of a code of conduct for a rational resolution of legal disputes.[12]

The Dialectical Role of the Judge in Civil Procedure

In analyzing the role of the judge, I will describe how the various *stages* of a critical discussion are represented in a civil process and I will describe which *role the judge* fulfills in these stages from a *pragma-dialectical perspective.*

The first stage of a legal process in which the parties advance their points of view can be characterized as the *confrontation stage* of the process. In this stage the judge remains passive. The only thing he has to do is see to it that the parties present their standpoints in accordance with the rules of procedure. In this stage the judge fulfills the role the parties to a critical discussion fulfill jointly when they themselves see to it that the rules are observed.

In a critical discussion the parties participate voluntarily, and under the requirement of efficient and rational management of their dispute. Parties to a legal process do not always aim at an efficient and rational resolution of the dispute. Sometimes a party drags the proceedings by delaying his response, thus hindering an efficient resolution. But a party is not allowed to prolong a trial too unreasonably in order that the other party not be hindered from exercising his rights.

The defendant in civil proceedings normally is involved in the case involuntarily, and it is not always likely that he will promote a timely resolution. In order to promote efficiency of procedure, the judge can take certain actions, at the request of the plaintiff or in his official capacity, when the defendant does not appear in

court. He can order the defendant to react within a fixed time limit, after which the defendant can answer only during the oral arguments. The same rule applies to the plaintiff: the judge can fix against the plaintiff a time limit within which to reply to the objections of the defendant.

So, if higher order conditions with respect to the attitude of the participants are not fulfilled, it is the task of the judge to see to it that the discussion complies with the requirements of a rational and efficient discussion.

In a legal process, the *opening stage*, in which the participants reach agreement on commonly shared starting points and discussion rules, remains for the main part implicit. The opening stage can be represented by the institutionalized system of rules and starting points laid down in the *Code of Civil Procedure* and the *Civil Code*.

In legal disputes it is unlikely that the parties will reach agreement on common rules and starting points among themselves. Yet, this is one of the requirements for a rational discussion. Therefore, the legal system provides an institutionalized system of rules and starting points which functions as such an agreement, and thus guarantees that there are rules available for legal conflict resolution.

That the agreement is not reached among the individual parties does not imply that this course of action is not reasonable; it is reasonable with respect to the need to resolve conflicts in a rational way. The rules should, of course, have been established according to fixed procedures for legislation. From the point of view of the prevailing legal system, this idea of *formal validity* is a sufficient condition for a rule to be called a legal rule.[13] So, for reasons of legal certainty, the opening stage with respect to the agreement on rules and starting points is passed through prior to the discussion.

One of the things which should be agreed upon in the opening stage of a critical discussion is what the division of the roles in defending points of view will be. In a rational discussion, someone who advances a standpoint is obliged to defend it, if asked to do so. Because the participants to a rational discussion are required to act as reasonable discussants, they will agree on the division of the roles for defending points of view.

In order to guarantee that the division of roles can be settled in civil proceedings, there are rules specifying who has to defend which statements. In the *Code of Civil Procedure* there is a general rule requiring that a party who invokes a legal consequence, based on certain facts or rights, bears the burden of proof of these facts or rights, unless a special rule or the requirements of reasonableness and fairness points to another allocation of the burden of proof.[14] Apart from this general rule, there are specific rules for certain situations in which it is specified which legal grounds and facts have to be proved by the plaintiff, and which legal grounds and facts have to be proved by the defendant. So for reasons of legal certainty, the division of the burden of proof should, to a certain extent, be predictable. A party should be able to assess whether she will be able to make her claim acceptable according to legal standards.

In civil proceedings, it is very important to specify which party has to defend her point of view, because the party who does not succeed in proving her case runs the risk of losing the trial. Therefore, it is the task of the judge as a neutral third party to determine when there is a specific rule and when the requirements of reasonableness and fairness require another allocation. In apportioning the burden of proof, the judge fulfills the role which the participants to a critical discussion fulfill jointly when they make arrangements concerning the burden of proof.

In the *first part* of the *argumentation stage* of civil proceedings, the plaintiff defends his claim. In this stage the judge fulfills the role of a *passive antagonist*. Legally speaking, the judge cannot accept the point of view of the plaintiff without

checking the acceptability of the claim on factual and legal grounds. Whether the defendant appears in court or not, the judge always decides whether there is a legal rule applicable to the facts stated by the plaintiff. This implies that the judge checks whether the plaintiff has presented enough facts to make the legal ground acceptable and whether the law attaches the required legal consequence to these facts.

In the pragma-dialectical model, at the *argumentation stage* the antagonist may challenge either or both of the two aspects of the acceptability of the "argumentation" offered in support of a point of view: (1) the acceptability of the grounds (the premisses) of the protagonist's argument, and (2) the acceptability of the inferential weight or force of those grounds as support for the protagonist's point of view (or conclusion). The former challenge is called "casting doubt on the *propositional content* of the proponent's argumentation" and the latter challenge is called "casting doubt on the *justificatory potential* of the proponent's argumentation". (If the argument is aimed at refuting rather than defending a point of view, the challenge to the inferential weight of its grounds is said to be "doubt cast on the *refutatory potential* of the argumentation"). I will thus be using this pragma-dialectical terminology in this paper.

So when the judge questions whether there is a legal rule applicable to the facts stated by the plaintiff, he has, in *pragma-dialectical terms*, implicitly cast doubt on the justificatory potential of the plaintiff's argumentation. Although this expression of doubt remains implicit, he fulfills the dialectical role of an antagonist who brings forward doubt with respect to the point of view under discussion. Because the discussion role of the judge is *institutionally determined* and the parties know in advance which 'institutionalized' forms of doubt they will have to respond to, the critical reactions of the judge can remain implicit. His critical reactions are laid down institutionally for reasons of legal security. Everyone who wants to invoke a legal right knows in advance which arguments he will have to bring forward.

From a pragma-dialectical point of view, the judge supplements the critical reactions of the defendant. He adds those critical reactions which are required from a legal point of view: it is the task of the judge to check whether the plaintiff's claim is acceptable on legal grounds. So, for reasons of legal certainty, the judge acts as a supplementary antagonist who brings forward critical reactions with respect to the legal basis of the claim.

In the *second part* of the argumentation stage the judge evaluates the argumentation. In pragma-dialectical terms he decides whether the *propositional content* and the *justificatory potential* of the argumentation of the plaintiff are acceptable. In a critical discussion, the acceptability of the propositional content can be assessed in two ways. The first is by means of what is called "the *identification procedure*"—whatever method the participants agree to follow for identifying what grounds or evidence they already grant or are willing to treat is given for the sake of argument—what counts, in other words, as "an *accepted starting point* for the argumentation". Second, should some ground not identifiable as such a starting point be introduced, its acceptability is assessed by what is called "*the testing procedure*", which is again whatever method the parties agree to follow to decide what new grounds or evidence shall be counted as acceptable. Normally the testing procedure implies that the participants together consult agreed-upon *oral or written sources*.

When evaluating the argumentation of the plaintiff, the judge first decides whether a fact stated by the plaintiff is *generally known*. In terms of the evaluation of the content of the argumentation in a critical discussion one could say that the fact is a matter of *commonly accepted knowledge* available for the evaluation of the argumentation. Although the parties did not

make a list of commonly shared starting points, the judge, as a neutral third party, decides which facts can be considered as generally known and thus as common starting points.

When a fact is not generally known, it has to be proved. The various forms of *proof*, such as written documents, statements of witnesses and experts etc., can be considered as specific forms of *testing methods* which are used for the testing procedure. As a neutral third party the judge decides whether the proof is conclusive or not. When the judge decides that a fact can be considered as 'true' for legal purposes, he fulfills the role the parties in a critical discussion fulfill jointly when they check whether the propositional content of the argumentation is acceptable.

In order to check whether the argumentation is an adequate defense (that is, in pragma-dialectical terms, whether the *justificatory potential* of the argumentation is acceptable) the judge finally has to decide whether there is a *legal rule* applicable to the facts. In order to apply a legal rule to the facts the judge often has to interpret the law.[15] In pragma-dialectical terms, the judge has to make explicit a bridging argument, thus formulating a rule of interpretation. For instance, there is the rule that an omission within the power of the defendant can be considered as a breach of duty and thus as a tort. What the judge does when he supplies the legal grounds and proposes a certain interpretation can be considered as the procedure for making explicit the missing premises in a critical discussion. But the judge does more: he also checks whether the propositional content of the added argument is acceptable. That is, he checks whether the argument which is made explicit belongs to the common starting points: the rules of substantive law. When it is not completely clear from the outset whether a legal rule is applicable, the judge has to decide, for reasons of legal certainty, whether the interpretation rule can be considered acceptable.[16]

In the final stage of the process, which can be considered as the *concluding stage*, the judge has to decide whether the claim of the plaintiff is justified or not. If the facts stated by the plaintiff can be considered as established facts and the judge has decided that there is a legal rule which connects the claim to these facts, the judge will grant the claim. If the facts cannot be considered as an established fact, or if there is no legal rule applicable, the judge will reject the claim. The role the judge fulfills when giving a final decision can be compared to the role participants to a critical discussion fulfill jointly when they decide whether the protagonist has defended his standpoint successfully.

As a third party to the dispute, the judge has to *justify* his decision: he has a legal obligation to give a justification. The parties have a right to know which considerations underlie the decision. When a party does not agree with the decision, he can appeal the decision on the basis of the argumentation given in the justification. The judge in appeal can use the argumentation in order to decide whether the decision is right: whether the law has been applied correctly or not.

Dialectically speaking, the judge gives account of his decision about the acceptability of the argumentation of the party who has asked him for a decision. He makes clear what his opinion is about the factual grounds stated by the plaintiff and what his opinion is about the legal grounds.

The Role of the Judge and the Rational Resolution of Legal Disputes

During the discussion the judge acts as a guarantor of procedure: he sees to it that the rules are obeyed. In certain cases he can do this in his official capacity, in certain cases he can do this on request of one of the parties. At the end of the discussion the judge checks whether the argumenta-

tion is acceptable and he decides whether the party who has asked him for a decision has defended her claim successfully. For reasons of legal certainty, in a civil process the judge does what the parties in a critical discussion do jointly.

From a pragma-dialectical perspective, the role of the judge as a guarantor of procedure and as judge of claims guarantees that the dispute can be resolved. Contrary to the participants in the normative ideal model of a critical discussion who are required to have a reasonable discussion attitude, the parties to a legal process are not expected to be prepared to reach agreement on certain matters and they are not expected to give each other optimal opportunities to bring forward their point of view. The parties to a legal process cannot be expected to be cooperative. Therefore a neutral third participant, the judge, guarantees that the procedures required for a resolution are passed through in an efficient and rational way. The procedures and rules with respect to the things the judge does in a civil process can be considered as additional rules and procedures which are necessary and sufficient to guarantee a rational and efficient resolution of a dispute from a legal perspective. From a legal perspective a rational resolution also implies legal certainty. From this point of view, it is reasonable to add certain procedures and rules which are not necessary in a discussion where higher order conditions are fulfilled, or where the outcome does not have to meet certain standards of legal acceptability.[17]

The way the judge reaches his decision is, according to dialectical standards, not less reasonable than the way a decision about the final outcome of a critical discussion is reached. When the judge grants the claim of the plaintiff, according to legal standards he must be convinced of the acceptability of the argumentation for this claim. This conviction of the judge is not based on a psychological state of mind, but on a reasoned evaluation of the acceptability of the argumentation within the implicit boundaries of the legal genre. The argumentation has to be acceptable according to legal standards: the propositional content and the justificatory potential should be defended according to commonly shared starting points and testing methods. If the argumentation is not acceptable according to these standards, the judge will reject the claim.

In a critical discussion the question whether the argumentation is acceptable depends on the starting points and the evaluation methods of the participants; there is no external criterion of acceptability. We could say that acceptability is relative to the participants in the dispute. In legal proceedings acceptability is related to an external criterion: legal acceptability. The acceptability of the claim is checked with respect to whether there is a legal rule which attaches the claim to the facts stated by the plaintiff. In legal proceedings it is the task of the judge to answer this question. The judge has to guarantee that the proposed outcome is in accordance with rules of substantive law and prevailing opinions on the interpretation of legal rules. The requirement of fairness implies that like cases are treated alike; so cases which are identical from a legal point of view should be decided according to the same rules.

Because the parties do not resolve their dispute among themselves, they should be made aware of the considerations underlying the decision. When the judge mentions the grounds for his decision, he gives an account of the factors which have played a role in the evaluation of the acceptability of the propositional content and the justificatory potential of the argumentation of the plaintiff.

This evaluation forms the basis for the evaluation of the decision before higher courts. In proceedings before the Court of Appeal and before the Supreme Court the decision may be criticized on the basis of the argumentation brought forward.

Conclusion

I have described the position of the judge from a pragma-dialectical perspective and I have pointed out in which way the role of the judge furthers an efficient and rational resolution of the dispute.[18] For argumentation theory, and especially for the pragma-dialectical argumentation theory, such a reconstruction is important, because a dialectical reconstruction demonstrates how the legal model for rational conflict resolution relates to a general ideal model for rational discussions. In my analysis I have pointed out how the terminological distinctions developed in pragma-dialectical theory prove to be useful in describing the specific characteristics of legal procedures for rational conflict-resolution.

For argumentation theory in general, the reconstruction suggests how field-invariant and field-dependant criteria for rational argumentation can be described. The legal rules with regard to the tasks the judge should fulfill can be considered as specifications of additional rules which should guarantee that the dispute can be resolved in a rational way. In this way, an explanation can be given why certain limitations with respect to the reasonable behaviour of the participants make certain additional procedures necessary.[19] In order to comply with specific legal goals, such as legal certainty, certain additional rules with respect to the role of the judge as a neutral third participant are required.

For legal theory the reconstruction makes clear what constitutes the specific character of legal rationality, what the similarities and differences are with respect to a general ideal model for rational discussions and how these differences can be explained or justified. When the pragma-dialectical ideal model is considered as a definition of the necessary conditions for the resolution of disputes in a rational way, a normative reconstruction of legal discussions forms an important tool for the identification of similarities and differences with respect to the field-invariant and field-specific elements which are required for a rational solution of disputes.

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Notes

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1 An earlier version of this article was presented as a lecture in the Department of Philosophy Colloquium, University of Lethbridge, October 23, 1991. I thank John Woods for his very useful critical comments.

2 Van Eemeren and Grootendorst [1992], p. 218 claim that the pragma-dialectical rules are necessary and sufficient conditions for resolving disputes if certain higher order conditions concerning attitudes and circumstances are fulfilled. That the legal rules are considered as additional rules for a rational resolution of legal disputes implies that these rules are required as additions, amendments or restrictions of the pragma-dialectical rules in a context in which certain higher order conditions are not met.

3 Toulmin [1958] and Toulmin, Rieke and Janik [1984] consider argumentation procedures as field-invariant and evaluation criteria with respect to the argumentation as field-variant.

4 I will not be dealing with the speech act aspect of legal argumentation in this paper. For an account of the speech act aspects see Feteris [1990].

5 See van Eemeren and Grootendorst [1988, 1992].

6 In considering the codes for legal procedure as an ideal model for legal discussions I concentrate on what is called 'the law in the books' (as opposed to what is called 'the law in action'). I compare the pragma-dialectical ideal model with the ideal model for legal discussions as it can be found in codes of legal procedure and in jurisprudence. This implies that the analysis carried out constitutes a rational reconstruction of legal procedure. The rational reconstruction consists of a description of the norms for legal argumentation from a normative perspective. The rules are described as rules which contribute to a rational resolution of legal disputes. For examples of such a normative reconstruction see Feteris [1991].

7 In modern European legal theory the legal process is considered as a specific form of a rational discussion. See for instance Aarnio [1987], Alexy [1989], Habermas [1988], MacCormick [1978]. Originally, Habermas [1971], p. 201 argued that a legal process should be considered as a discussion which is not free from coercion. Influenced by the critique of Alexy, Habermas [1987], pp. 62-63, [1988] has changed his point of view.

For a different point of view on the rationality of the legal process see representatives of

the 'Critical Legal Studies' movement in the United States such as Gorden [1984], Unger [1986].

[8] In many cases the judge settles the dispute in the pretrial stage among the parties so that the case never gets to trial.

[9] For other differences between legal discussions and discussions according to the pragma-dialectical model see Feteris [1990].

[10] There are some essential differences between the civil procedure in the *civil-law tradition* in the Netherlands and in the *common-law tradition*. First, in the Dutch legal system judges decide on the basis of statutes (Codes) and not on the basis of precedent. Second, in the Dutch legal system there is no jury. The judge decides both on the law and the facts. This implies that the judge has an important role not only with respect to observance of the rules of procedure, but also with respect to the evaluation of the adequacy of the claims and arguments advanced by the parties.

[11] Legal certainty implies avoidance of arbitrariness (thus trying to aim for predictability) as well as that the result is in accordance with the legal value code. See f.i. Aarnio [1987], p. 44.

[12] For a more extensive account of a normative reconstruction of legal proceedings and of the legal procedures and rules for a rational resolution of legal disputes see Feteris [1989].

[13] Of course from a legal philosophical perspective, one could propose other criteria for the validity of legal norms. For instance, *systemic* validity takes as a criterion that the norm is accepted and is not in contradiction with another norm in force in the same system. *Empirical* or *factual* validity takes as a criterion whether a norm is actually used. *Axiological validity* takes as a criterion whether a norm can be justified on the basis of certain principles of rationality, cf. Aarnio [1987], pp. 33-46. See also Hart [1961], cc. 5 and 6, and Raz [1970], ch. 8, on the criteria for determining what counts as a valid rule of law.

[14] See clause 177 of the Code of Dutch Civil Procedure.

[15] In legal philosophy some authors make a distinction between so-called 'clear cases' in which there is no problem of interpretation and 'hard cases' in which the legal rule has to be interpreted. See Dworkin [1977], ch. 4, Hart [1961], ch. 7, MacCormick [1978], pp. 195-203, 227-228.

[16] In deciding on the applicability of a legal rule, we could say that the judge is using a specific form of a testing procedure, a certain argumentation scheme. For instance the judge can check whether the argumentation scheme for argumentation on the basis of analogy is applied correctly, whether the comparison is made with respect to legally relevant similarities. For a distinction between different types of argumentation schemes and their application see van Eemeren and Grootendorst [1992], ch. 8.2.

[17] The rationality of the pragma-dialectical rules is dependent on their *problem validity*, their power to promote the resolution of disputes, and on their *intersubjective validity*, their acceptability for discussants. The rationality of the legal rules is dependent on what can be considered as the 'underpinning reasons' for accepting the legal rules of a certain legal system. Cf. Aarnio [1987], p. 37, MacCormick [1978], pp. 63-65, Peczenik [1983], p. 27, pp. 104-105.

[18] For other aspects of the legal process I specify in a similar way which elements, roles and procedures are required to guarantee that the dispute can be resolved in a rational way (see Feteris [1989, 1990]).

[19] Cf. Habermas [1983], p. 102 who argues that in law certain institutional precautionary measures are required to neutralize certain internal and external influences in order to be able to fulfill the idealized requirements of a rational discussion.

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