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ABSTRACT: This paper discusses the text format of judicial and semi-judicial decisions. That format does not optimize comprehensibility. It should be understood as a sign that symbolizes an ideology. It symbolizes the values of an inevitable decision that follows from the facts and an a priori given coherent and complete legal system. The narrative text format with it stylistic features is also a very welcome instrument to hide the moments that this ideal is impracticable.

KEYWORDS: argumentation, discourse, ideology, judicial, legal, semiotics, structure, stylistics, text

1. THE FORMAT OF JUDICIAL DECISIONS

Bhatia (1993) claims that judicial decisions have a typical four moves structure: *identifying the case*, *establishing the facts of the case*, *arguing the case* and *pronouncing the judgment*. *Arguing the case* has three sub-moves: *stating the history of the case*, *presenting arguments*, *deriving ration decidendi*. Davide Mazzi (2007) analyses a corpus of English and Irish judgments and a corpus of EC judgments in which he discovers relatively similar structures. In a scheme:

House of Lords/Ireland's Supreme Court	Court of Justice of the EC

• identifying the case
• establishing the facts of the case
• arguing the case
  o stating the history of the case
  o identifying the conflict of categorization
  o presenting the arguments
  o deriving the ratio decidendi
• pronouncing the judgment
	• identifying the case
	• identifying the scope of proceedings before the Court
	• retrieving the relevant Community and/or national legislation
	• stating the history of the case
	• arguing the case
	  o arguments of the parties
	  o arguments of the Court
	• settling costs
	• pronouncing judgment

I have analyzed (a) a broad sample of decisions of different judicial courts, (b) a sample of 30 decisions of first instance criminal courts (Van den Hoven & Plug 2008), (c) a sample of over 60 decisions of semi-judicial institutions (decisions of a local social

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security appeal committee, decisions of the Netherlands Competition Authority, decisions of the Dutch Data Protection Authority). The texts under (c) were analyzed to prepare for interventions within these institutions. During these interventions—in the form of two- or three-day seminars—text formats, argument structures as well as the stylistics of the texts were extensively discussed with the actual writers (which are often not the same persons as the formal decision makers). In all cases mentioned under (c) and in part of the cases mentioned under (a) the files were available that show concept versions, comments of seniors, comments of the formal decision makers; these files provide a detailed insight in the conventions, the tactics and sometimes also in the process of socialization of new writers.

These analyses of Dutch judicial and semi-judicial practices show similar structures as the ones Bhatia and Mazzi found. However, the texts show minor variations. *Stating the history of the case* is sometimes an element that stands relatively apart from *arguing the case*, mixed with the facts. Especially in the decisions of the appeal committee a very long history of the specific client is often incorporated at the beginning of the text. In Dutch law court decisions we usually do not find a separate part in which the relevant legislation is retrieved. But in texts of the Dutch Data Protection Authority we do find this element very extensively. Formal judicial decisions have an explicit speech act of *pronouncing the judgment*, while semi-judicial decisions tend to draw just a conclusion from the arguments, without repeating this as an explicit declaration. Some of the semi-judicial institutions present the text as an appendix of a formal letter; this is not done in the court decisions. And so on. These variations exist mainly between the sub corpora, not within the sub corpora. Within the sub corpora the homogeneity on the macro level and in micro stylistics is staggering, even where the variance of writers' quality on the micro level is large. So the preference for these structures seems to be unrelated to writing skills.

All formats have in common that the first part of the text focuses on the facts. Texts start with an identification of 'factual' elements of the particular case. All texts end with the decision. The *presentation of the arguments* (*arguing the case*) is always between the facts as the opening stage and the decision as the last stage. This macrostructure tends to repeat itself in the heart of the argumentation. There we see again a preference for a presentation order: arguments—conclusion. A presentation order standpoint—arguments is rare.

The texts also share a high degree of repetition and paraphrases. This seems to be a consequence of the macro structure. Because the facts and (optionally) relevant legislation are first separated from the presentation of the arguments, there is a need to repeat these facts and a (paraphrase of) the applicable legal rules in the actual argumentation.

2. EXAMPLES

I will present some examples to illustrate these observations. The examples are authentic but are made unrecognizable. In the translations the Dutch word order is followed rather directly. The first text is a typical example of the findings of an official investigation of the Dutch Data Protection Authority. The Dutch DPA supervises the compliance with acts that regulate the use of personal data, such as the Personal Data Protection Act. This

law regulates under which conditions personal data may be gathered, stored and distributed. Here a so called 'social' website, addressed mainly to minors, is investigated. Formally this text does not entail a judicial decision, although its conclusions can be the ground for a legal enforcement. The text is presented as the supplement to a one page letter that states that the investigated practice is unlawful and refers to the supplement. The last sentence of this letter is:

> *(1) In het bijgaande rapport heeft het CBP aangegeven welke maatregelen noodzakelijk worden geacht.*
> In the attached report the DPA has indicated which measures are considered necessary.

This sentence shows some of the typical features that we see time and again on the micro level of (semi-)judicial texts. Measures *are considered necessary*. On crucial moments the agent of interpretative and evaluative acts (*to consider*) is hidden, even though in the sentence this agent (CBP) is explicitly present as the agent of non-interpretative act (*to attach*).

The supplement starts with a heading *Description of the facts established on the basis of a copy of the website*, followed by *Legal framework* (Juridisch kader), *Judgment* (Beoordeling) and *Conclusion*. The first three headings have subheadings, but the subheadings of the *Legal Framework* have no clear relation with the subheadings of *Judgment*. This reveals that the structure of both sections is functionally unrelated. Most facts and rules are repeated in the section *Judgment*—the heart of the argumentation - although not literally. So the macro structure is not functionally utilized. It symbolizes a logic: *facts—rules—judgment*, but actually it is filled in as: *series of 'facts'—series of structurally unrelated rules—structurally unrelated paraphrased selection from these facts and rules in an argument structure*.

We will quote two short passages from the *Judgment* section. Passage (2) typically illustrates how the macrostructure is copied in the heart of the argumentation: facts—rule—(conclusion). In (3) we find a very frequent hybrid order: rule—facts—'broad' argumentative indicator—conclusion - facts.

> *(2) X heeft na ontvangst van de voorlopige bevindingen zijn firmanaam en vestigingsadres bekend gemaakt in de privacyverklaring. Hiermee voldoet X echter niet aan het bepaalde in artikel 33 Wbp, zoals uitgewerkt in de richtsnoeren, om naast zijn naam en vestigingsadres ook een elektronisch contactadres te vermelden.*
> After receipt of the provisional findings X has published his company name and address in the privacy statement. By this however X does not satisfy article 33 Personal Data Protection Act, as worked out in the directives, to publish besides his name and company address also an electronic contact address.
>
> *(3) Artikel 6 Wpb schrijft voor dat persoonsgegevens in overeenstemming met de wet en op behoorlijke en zorgvuldige wijze dienen te worden verwerkt. […] Vaststaat dat X zich expliciet richt op de kwetsbare groep van jongeren tussen de 10 en de 15 jaar. Van jongeren onder de 16 jaar kan niet worden aangenomen dat zij goed in staat zijn om de consequenties van hun acties te overzien. Kinderen zijn inherent kwetsbaar, met een nog niet volledig ontwikkeld vermogen om zelf keuzes te maken. Gelet op het vorenstaande handelt X in strijd met het bepaalde in artikel 6 nu hij geen rekening heeft gehouden met het feit dat alleen de wettelijk vertegenwoordiger toestemming kan geven voor een minderjarige.*
> Article 6 Personal Data Protection Act prescribes that personal data should be processed in accordance with the law and in a proper way. […]. Established is that X explicitly addresses the vulnerable group of young people between 10 and 15 year. Young people under 16 can

> not be expected to take in all the consequences of their actions. Children are inherently vulnerable, with a not yet fully developed ability to make choices themselves. Considering the above-mentioned, X acts in violation with what is prescribed in article 6 now that he has not taken in account the fact that only the legal representative can give permission for a minor.

Fragment (3) illustrates some of the standard micro features. Subjectivity markers are avoided, no indication is given of the specific agent voice (the CBP): *Established is …Young people under 16 can not be expected to…X acts in violation….*

The second example comes from a criminal judgment. The text follows the standard format for this type of decisions: *identifying the case, the trial, indictment, evidence, punishability of the fact and the offender, motivation of the penalty, applicable sections of the law, decision*. I quote from the motivation of the penalty to show how it uses the facts—(rules)—conclusion format, as in all thirty cases that were examined (compare Van den Hoven & Plug 2008).

> *(4) Verdachte is samen met zijn zoon naar iemand, van wie hij meende nog geld tegoed te hebben, toegegaan en heeft toen hij in het huis van het slachtoffer was hem samen met zijn zoon verbaal bedreigd teneinde een geldbedrag afhandig te maken. Dit mislukte omdat het slachtoffer geen geld in huis had. Wel is het verdachte gelukt om onder bedreiging van een stofzuigerstang het slachtoffer zijn mobiele telefoon te ontfutselen. [meer feiten]. De rechtbank rekent verdachtes gewelddadige handelwijze bij de afpersing en de poging daartoe ernstig aan. Daarbij is van belang dat dit soort feiten niet alleen de slachtoffers grote schrik aanjaagt en nog lange tijd gevoelens van angst en onzekerheid met zich mee zal brengen, maar ook in de samenleving leidt tot gevoelens van onveiligheid en angst. Voorts overweegt de rechtbank dat de strafbare feiten gepleegd in de relatiesfeer een grote inbreuk maken op de integriteit en de privacy van het slachtoffer. Het vorenoverwogene brengt de rechtbank ertoe een gevangenisstraf [van 15 maanden] op te leggen. Teneinde verdachte te stimuleren vrijwillig iets aan zijn alcoholverslaving te doen alsook om hem ervan te weerhouden in de toekomst strafbare feiten te plegen, zal de rechtbank een deel van de straf voorwaardelijk opleggen.*
>
> Accused went together with his son to the house of someone who he thought owned him money and when he was in the house of the victim, he together with his son has intimidated him in order to do him out of a sum of money. This failed because the victim had no money in his house. But accused succeeded by intimidation with the pipe of a vacuum cleaner to diddle the victim his mobile phone. [more facts]. The court reckons heavily the accused's violent method during the extortion and the attempt to it. With that, it is not only relevant that these kind of facts strike great terror into the victim but also causes feelings of unsafety and fear in the society. Further the court considers that the punishable facts, committed in the private sphere, infringe strongly the integrity and privacy of the victim. The considerations above bring the court to sentence to an imprisonment [of 15 months]. In order to stimulate accused to voluntary do something about his alcoholism as also to prevent him to commit crimes in the future, the court will impose part of the punishment suspended.

A reader will understand that the mentioned facts are claimed to be relevant for the judgment that 15 months is an adequate punishment. However, the rather undetermined argumentative indicators (*with that …, further …* and *the considerations above bring …*) leave aside what precisely the relations are between the explicitly stated argumentative utterances and the conclusion. This is a rather systematic feature of the preferred argumentation—conclusion format. A precise reconstruction of the unexpressed premises that are part of the argumentative responsibilities of the writer is very hard to make because no specific and precise argumentative indicators are used. This is in fact a copy

on ‘micro’ level of the phenomenon we observed on the level of the macro structure. The structure suggests a (deductive) logic, but actually does not fulfill this suggestion.

The last example comes from a local appeal committee for decisions concerning social security. The macrostructure of this decision on a petition is: *the disputed decision*, *matter in dispute*, *minutes of the hearing*, *case history*, *judgment of the dispute*, *decision*. Because these cases are appeal cases we see a more explicit dispute in the macrostructure. The client got social security money, found a job, did not or too late inform the social service, had to pay back part of his welfare money and was also fined a certain amount of money. His protest concerns the fine. I quote and translate word by word part of a passage that illustrates several of the micro features that we systematically observe in the used formats.

(5) De belanghebbende heeft op grond van artikel 65 de rechtsplicht om desgevraagd of uit eigener beweging aan burgemeester en wethouder alle relevante informatie te verschaffen waarvan hij weet, of redelijkerwijs kan weten, dat deze voor het recht op bijstand van belang is. In het algemeen **mag worden verwacht** dat aangetoond wordt dat de verstrekte informatie juist en volledig is. […] Uit de stukken **is duidelijk geworden** dat u op [datum] een loonstrook heeft ingeleverd waaruit **was op te maken** dat u [datum] inkomsten uit arbeid ontving. De **uitkering werd per [datum] beëindigd** en het teveel genoten bedrag ad [bedrag**] werd als vordering opgevoerd**. In reactie verklaarde u [verklaring]. Deze verklaring **was onvoldoende** om het opleggen van de boete ad [bedrag] te voorkomen; **medegedeeld** per bestreden beschikking. **Het op [datum] verlagen** van de terugvordering tot [bedrag] **leidde niet tot** een verlaging van de boete. […] Het argument dat u uw contract pas eind [datum] heeft getekend, **kan niet als reëel worden gezien** […] Het argument, dat de originele salarisberekeningen tot en met [datum] eenmaal per kwartaal aan de werknemers werden verstrekt, zodat u ze niet eerder heeft kunnen afgeven, **verliest zijn kracht** […].	The person concerned has on the basis of article 65 the legal duty, requested or of one’s own accord, to supply to Mayor and Aldermen all information of which he knows, or in fairness can know, that it matters for the right to welfare. Generally speaking it may be expected that is demonstrated that the supplied information is correct and complete. […] From the documents has become clear that you have submitted on [date] a pay slip from which could be deduced that you on [date] received earning form labor. The allowance was ended per [date] and the surplus of [sum] was claimed. In response you stated that [statement]. This statement was insufficient to prevent the imposition of the fine of [sum]; notified through disputed decision. The on [date] reduction of the reclamation to [sum] did not lead to a reduction of the fine […] The argument that you did not sign your contract until [date] can no be seen as reasonable. […] The argument that the original salary calculations were given to the employees once per quarter up and until [date], so that you could not deliver them earlier, looses its strength […]

Et cetera, ending in a declaration that the objection is unfounded. Besides an illustration of the preferred order within the heart of the argumentation, the passage shows the systematic stylistics that cover the institutional agents of judgments, evaluations and interpretations (compare the bold expressions). The client however is explicitly staged.

3. COMMUNICATIVE EFFICACY AND COMPREHENSIBILITY

Not only law courts, but also semi-judicial instances adopt a text format as characterized above. Discussions with the actual writers make clear that these writers hardly reflect upon the fact that their text format is a specific choice out of many alternatives. That is remarkable, because alternative choices are more adequate to fulfill the stated goal of the text: to justify (or to explain) the decision taken vis-à-vis the society.

Because the decisions are taken in a complex and formal environment and often on the basis of a quite sophisticated exchange of positions, comprehensibility for lay people is not obvious. If an alternative text format seems more appropriate to promote comprehensibility than the current one, we would expect these institutions to adopt such a format. Although this paper is not the place to argue this claim thoroughly, it may be plausible that a format that (a) starts with the decision, that (b) coherently organizes facts and rules in the form of complete arguments, and that (c) organizes the arguments in a logical discussion structure, serves the goal to reach an optimal comprehensibility more than the format actually used. Further (d) specific argumentative indicators should be used, including (e) clear indications of the discussion roles and of the responsibilities. On most relevant dimensions, such a format is the opposite of the format currently chosen.

The format and stylistics chosen hinder non expert readers. In the macro structure the sections that separately present the ‘facts,’ the history and the legal framework are pointless for the reader. The argumentative relevance is missing. This is confirmed in fraternal discussions. Even among the specialists there is hardly ever a consensus about the adequacy and relevance of the stated facts and rules. The presentation order misses articulated argumentative relations. It therefore permits and even stimulates the strategy to include everything that might be relevant.

An utterance becomes an argument in relation to a standpoint. Usually a standpoint is easily recognizable because it directly relates to the issue at hand. The opposite order is more difficult. It is hard to identify an utterance in it argument function as long as one has no clear idea yet of the (sub)standpoint that it supports. This implies that starting with the standpoint helps the reader to understand the functional argumentative relations while reading. A comprehensible justification is not served by presenting the reader the narrative of a (fictional) decision making process in stead of presenting the reader the decision taken followed by a justifying argumentation.

4. THE SEMIOTICS OF THE FORMAT

We observe a strong homogeneity in the text formats used. Further we see the use of a number of stylistic features, already noticed by Mellinkoff (1963), that are often criticized as unwelcome but seem to be ineradicable. Many of these features—nominalizations, exuberant use of passives, strong preference for ‘objective’ connectives—have in common that they hide the voluntary acts of the agent, often the judge (Van den Hoven 1997).

These features are consistent. They are recognizable in the European continental judicial tradition, but even in the judicial practices in Common Law areas, as Mellinkoff shows. As soon as western inspired legal systems develop, these features are found. They are deeply embedded in the legal practice. Although it proves to be possible to alter the

macro structure in semi judicial environments, the responses to a proposed change are revealing. Actual writers often state that a standpoint—argument order suggests partiality. If one continues questioning why, this often results in the remark that the current practice symbolizes impartiality. Many of the actual writers tend to say that the text format reflects the process of decision making. Confronted with the actual dynamics of the decision making process, this remark is often replaced by the claim that the format reflects the process of decision making as it 'theoretically' or 'ideally' should go.

One can observe that most of the professionals do not really reflect on the basic choices that they make in the presentation. In the institutions that we studied new employees learn the format by copying successful examples and by a master—mate system. A majority of the employees has a legal training and is therefore socialized in the format during the study. A strong factor to pass on the stylistic features on the micro level is also the form letter and form paragraph, available from databases on the intranet. So there are certainly many social, technological and practical factors that create the homogeneity, without a conscious, individual intention.

The strategic meaning of the format is therefore a *semiotic* phenomenon as it is culturally embedded in the institutions as well as in the society. The format does carry a strong conventional meaning. The consistency as well as persistence of the format can be explained from the fact that it signifies the modernist ideology of legal decision making, in its macrostructure as well as in the stylistics on a micro level. The format (especially in the heart of the argumentation) is also very effective in covering up the moments that this ideology is unfeasible. This symbolic meaning is consistent with education, work procedures, expectations, tradition. Because of this institutional homogeneity the symbolic meaning seldom 'reaches the surface.'

The judicial and semi-judicial texts suggest that the process of decision-making is a logical deductive process, in which essentially the will and personality of the judge are not involved. This suggestion is signified by the narrative macro structure of the text that suggest that the judge first objectively *meets* the facts, is then *confronted* with the force of the appropriate rules of law and subsequently *has to conclude* according these facts and rules what the decision must be. In this narrative chain of motivated acts the driving force is not the judge (this agent is hidden by the linguistic means such as a very formal tone, use of passives, nominalizations, avoidance of the first person), but the facts, the rules and logic.

This suggested formal rationality and objectivity is a myth. The decision-making process is in fact strongly determined by interpretation, sense of justice, intuitions and the exercise of will by the judge. This is argued convincingly by many theorists, for instance by Kelsen (Kelsen 1979, compare also Van den Hoven 1988). The Dutch legal scholar Nieuwenhuis formulates it very outspoken. He states that of course it is a naive fiction that it is the Law that decides, not the judge, but that this is no reason to give up this fiction in the judicial discourse, because the acceptance of the authority of the judge is served by this fiction (Nieuwenhuis 1995). Almost every legal theorist admits that the extreme form of the ideology as signified by the text format is incorrect. Judges (and semi judicial decision makers) create new meanings of the law and exercise their subjective will in the decision-making process. So the question is why the judicial and even the semi-judicial institutions sacrifice comprehensibility to conceal these voluntary and law-creating acts of the decision makers.

The explanation cannot be that of Nieuwenhuis as far as it suggests that judicial institutions intentionally cheat the community. The lack of reflection that we observed above already contradicts this. It must be that the semiotics of the text format reflects a concept of justice that still has a strong ideological topicality. The rhetoric of the format is an expression of the modernistic ideals on which a modern (Western) society is founded. It does not simply express that the judicial decision maker pretends that he maintains the modernistic ideology. It symbolizes that he is part of this ideology and works and thinks according to this ideology.

Stephen Toulmin in his *Cosmopolis* (Toulmin 1990) situates the origins of the ideals of modernity in the period of the thirty-year war (1618-1648 AD). Modernity is connected with the ideals of the universal truth and values, associated with names as Spinoza, Newton and Descartes (compare also the magnificent work of Israel 2001). General principles do not only regulate the physical world, but also guide the normative reality. These principles may not be easily noticeable or discoverable by the human mind, but they are there. Therefore mankind has to be focused on these general principals and has to discover them. An orientation on a universal discourse can lay the basis for a general model of justice.

This is the ideal of legality, connected with the value of legal security. The ideal is the construction of an explicit and coherent and consistent and complete system of general rules, established by a legitimated legislator, laid down in a written codex. According to this ideology, a legal decision is lawful if and only if it is the logical result of the application of the rules of law as meant by the legislator. A legal decision is righteousness and just if the decision is in harmony with that what the society experiences as just. Lawfulness and righteousness should coincide in a codified system of law. The modernistic view presupposes that mankind has the capacity to create, or better to discover this perfect theory of social justice, as well as to capture this theory in a general and internally consistent system. Or at least to work towards this ideal. This does not mean that there can and will never be a discrepancy between lawfulness and righteousness. But this is—still according to this modernistic ideology—a temporality. According to the doctrine of the separation of powers it is an exclusive privilege of the legislator to improve such an imperfection. Therefore, not the judge but the Law decides; the judge still is assumed to be the mouth of the legislator.

This optimistic, simplified, reduced version of the modernistic ideal is symbolized by the text format and its stylistics. The rhetorical device shows that even though it is a theoretical consensus nowadays that the modernistic ideal is unattainable, it is still an ideal. Symbolically modernistic ideals still guide the process of the administration of justice in the modern society, as well as the process of legislation and the political process behind this legislation. The fact that it is clear that these ideals are not realized (and from a theoretical point of view cannot be realized) does not mean that society has given up this ideology, this myth. Post-modernism is a theoretical, academic exercise that may be convincing in many of its deconstructions. But that does not mean that its conclusions are reflected straightforward in a discursive practice. Argumentative discourse is an ideological sign too.

Link to commentary

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