

Strategic Manoeuvring with Linguistic Arguments in Legal Decisions: A disputable literal reading of the law

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In this contribution, pragma-dialectical theory and its complement, strategic manoeuvring theory, two theories of the Amsterdam school of argumentation, are used to explain the linguistic argument, that is to say statutory interpretation under the literal rule, and how this argument can fail.

Keywords: fallacies, interpretation methods, legal interpretation, legal justification, linguistic argumentation, rational discussion, strategic manoeuvring, teleological argumentation

1 Introduction

Participants to a legal process often use linguistic arguments to support their claim. With a linguistic argument it is shown that the proposed interpretation of a rule is based on the meaning of the words used in the rule in ordinary or technical language. The reason why a linguistic argument is chosen as a support for a legal claim is that linguistic arguments are considered to have a preferred status in justifying a legal decision. This preference is grounded on the concept of the rule of law (implying legal certainty and predictability of decisions) and the democratic principle of the separation of powers (implying that there is a separation of tasks between the legislator who formulates the law and the courts who apply the law). It is the respect for the meaning of the legislator which makes the linguistic argument so important. The legislator normally uses the linguistic conventions and it is expected that interpreters of statutes will invoke the linguistic conventions

governing the standard meaning of those words. For this reason, linguistic arguments have a presumptive status in legal interpretation theories.¹

However, this preferred status can also be “misused” for rhetorical reasons. A particular reading of the rule can be presented as the accepted standard reading, although other interpretations of the rule are possible from a legal point of view. In addition, reference to the presupposed standard meaning of the rule can be presented as a sufficient justification, although it is not possible to establish the meaning on the basis of the formulation of the rule alone, because other considerations must be taken into account. In such cases, if linguistic arguments are used in a wrong way, higher judges criticize the linguistic argument. In the first case because it is based on a disputable literal reading of statute law and in the second case because it is based on a misunderstanding of the law as the legislator had it in mind and intended it when enacting it.²

Although higher judges give a negative evaluation of certain uses of linguistic arguments, no clear norms for the use of linguistic arguments are specified in the literature on legal interpretation and the justification of legal decisions. To clarify how the use of those arguments can be analysed and evaluated, I shall use the theoretical tools of the pragma-dialectical theory as developed by van Eemeren en Grootendorst (1992). From the point of view of the “pragma-dialectical” norms for the use of arguments, the aim of my contribution is to develop an instrument to analyse and assess the use of linguistic arguments in legal discussions about the application of a legal rule. I analyse the use of linguistic arguments in terms of “strategic manoeuvring”. I establish when the strategic manoeuvring with linguistic arguments is acceptable from this point of view and when it derails.

The theory of “strategic manoeuvring” was developed by van Eemeren and Houtlosser (2002a, 2002b, 2003, 2006), and van Eemeren (2010). The concept of strategic manoeuvring implies that an arguer tries to reconcile the dialectical aim of resolving the difference of

1 See for example the model for legal interpretation formulated by MacCormick and Summers (1991).

2 See for examples of those forms of critique the examples I discuss in section 3.

opinion in a reasonable way with the rhetorical aim of resolving the difference in a particular direction that is desirable from the perspective of the arguer. When reconciling these two aims, arguers make a selection of the topical potential and presentational means that are adequate to convince the intended audience of their point of view. The strategic manoeuvring derails when the rhetorical aim to convince prevails over the dialectical aim. If the dialectical reasonableness norm is violated, the party, in pragma-dialectical terms, commits a fallacy.

I consider strategic manoeuvring with linguistic arguments in the justification of legal decisions as an attempt to convince a legal audience by showing that the decision is in accordance with accepted legal starting points without violating openly the dialectical norms of reasonableness. The strategic manoeuvring implies that the parties try to reconcile two, often conflicting aims, the rhetorical norm of convincing the legal audience and the dialectical norm of resolving the difference of opinion in a reasonable way.

To be able to assess strategic manoeuvring with linguistic arguments first, in (2), I specify the dialectical norms for the use of linguistic argumentation. I do this by specifying the conditions under which linguistic argumentation forms an adequate means of justifying a legal decision about the application of a legal rule in a concrete case. Then, in (3), I analyse and evaluate a form of strategic manoeuvring with linguistic arguments that often occurs in discussions about the application of legal rules and I explain on the basis of the norms specified in (2) how the strategic manoeuvring derails. I explain that the strategic manoeuvring with linguistic arguments in these cases amounts to a complex form of strategic manoeuvring that combines two manoeuvres.

2 Legal theoretical norms for the use of linguistic argument

If we look at the discussion in the literature about the use of linguistic arguments in the justification of legal decisions we find, generally speaking, a consensus about the functional use of linguistic arguments.³ In *clear cases* in which there is no difference of opinion about the

3 Cf. Groenewegen (2007), Soeteman (2007) and van den Hoven (2007).

interpretation of a legal rule, linguistic argumentation can function as a justification of the decision, although a justification is not necessary in such cases because there is no difference of opinion. In *hard cases* in which there is a difference of opinion about the correct interpretation of the rule, a linguistic argument cannot function as a decisive argument because there are different views as to the exact meaning of the rule.⁴

The reason why a linguistic argument may suffice as a justification in an easy case is that, from the perspective of legal certainty, reference to the clear intention of the legislator as it appears from the wordings of the law, must, in principle, be taken as the starting point for the application of the law. In hard cases in which there is a difference of opinion about the meaning of the law for the concrete case because the intention of the legislator cannot be deduced from the wording, other sources are necessary to establish the intention of the legislator. Linguistic arguments can have a “demarcating” function by showing that the judge has remained within the interpretation space he has on the basis of the formulation of the rule.⁵

When a case can be considered as an easy case in which there is no difference of opinion about the meaning of the legal rule, a linguistic argument can suffice to justify the decision. In law, people tend to use a linguistic argument if such an argument is available because a linguistic argument is supposed to have a “presumptive” status from the perspective of legal certainty because it is held to reflect the intention of the legislator. But there is a problem where a case is presented as an easy one when it is in fact a hard one. If the case is a hard case the presentation of the linguistic argument as the only argument that would suffice as a justification is misleading because other arguments based on the legal system, the intention of the legislator, the goal of the rule, et cetera are required to give an adequate justification. If these arguments are not given, the justification is not sufficient and the party evades the burden of proof by not mentioning and substantiating these other considerations.⁶

4 Cf. Groenewegen (2007), Soeteman (2007) and van den Hoven (2007).

5 Judges often refer to linguistic arguments when they balance the requirements of legal certainty and the requirements of justice and fairness in the concrete case. See also Feteris (2005 and 2008a) on the balancing of legal certainty and fairness.

6 See also Vranken (2004) about the technique of “veiling argumentation” in legal decisions and the comments by Feteris (2004).

Given the different functions of linguistic arguments in different legal discussion contexts, the question arises which uses of linguistic arguments can be distinguished and which norms apply for an acceptable use of linguistic arguments in the context of these clear and hard cases from the perspective of a rational critical legal discussion.

From an argumentative perspective, the uses of linguistic arguments have three forms. The distinguishing criterion is the relation between the linguistic argument and the standpoint: in form (1), a linguistic argument is presented as an *independent justification*; in (2), a linguistic argument is *supplemented with other arguments*; in (3), a linguistic argument is *overruled by another argument*.

To establish the norms for an acceptable use of linguistic arguments in these three forms from a pragma-dialectical perspective, a further distinction can be made between two types of norms or justificatory conditions. The first type of norm (a) concerns the adequacy of linguistic argumentation as a means to justify a legal decision: whether linguistic argumentation can, in a particular discussion context, constitute an adequate and sufficient justification. The second type of norm (b) concerns the correctness of the application in the concrete case: whether the linguistic interpretation of the rule in the concrete case is correct.

2.1 Form 1: a linguistic argument is presented as an independent justification of the application of a legal rule

From a legal perspective, in an easy case where there is no difference of opinion about the interpretation of the rule and if the formulation of the rule can give a clear and uncontested indication for establishing the meaning of the rule in the concrete case, single argumentation consisting of a linguistic argument can constitute an independently sufficient justification. In such a case, it is not necessary to mention that other arguments, such as systematic arguments or teleological arguments, do not point to a different solution.

When a linguistic argument is presented as an independent justification, it is acceptable if:

(1a) the argumentation is put forward in a context of an easy case in which there is no difference of opinion with respect to the interpretation of the rule in relation to the facts of the concrete case

(1b) the linguistic argumentation refers to the accepted standard meaning of (a term used in) the rule

Norm (1a) concerns the adequacy of linguistic argumentation as an independently sufficient argumentation in a legal context and (1b) concerns the acceptability of the propositional content of the argumentation.

This form of using linguistic argumentation does not occur very often in legal practice because judges do not tend to justify their interpretation if it concerns a clear and uncontested case. If it is used, judges tend to do this for strategic reasons to anticipate possible doubt with respect to the acceptability of the decision and use linguistic argumentation for rhetorical reasons to convince the audience that the decision is coherent with common legal starting points, i.e. the linguistic meaning of (a particular expression in) the rule.

Sometimes a linguistic argument is supported by so-called *subordinate* argumentation referring to the “common understanding of the term” or reference to the description in the dictionary.

Sometimes, for rhetorical reasons, the linguistic argumentation is supplemented with coordinative arguments such as systematic or teleological arguments to show that the decision is also in line with other rules of the relevant part of the legal system and/or the intention of the legislator.⁷

2.2 Form 2: a linguistic argument is presented as a supplementary argument in addition to other argumentation

In hard cases where there is a difference of opinion about the correct meaning of the rule and the formulation of the rule does not give a clear and uncontested indication for establishing the meaning of the rule in

⁷ Van den Hoven (2007) considers this form of using linguistic arguments as the 'positive form' of linguistic argumentation. In this form judges claim that no adaptations of the legal system are necessary to include the decision in the concrete case. From the perspective of strategic manoeuvring you could say that the judge puts forward the linguistic argument and sometimes supplementary arguments to take away possible doubt with respect to the acceptability of the decision from the perspective of the starting points of the legal system.

relation to the concrete case, linguistic argumentation cannot constitute a sufficient justification and must be supplemented by other forms of argumentation. In such cases systematic argumentation or teleological argumentation must form a necessary part of the argumentation, while linguistic argumentation can only function as a supplementary coordinate or subordinate argument.

When a linguistic argument is presented as a supplementary argument, it is only acceptable if:

- (2a) the linguistic argument constitutes a support for the same interpretation of the (term used in) the rule as the other arguments that are put forward as a justification
- (2b) the linguistic argument is not inconsistent with the meaning of (a term used in) the rule

One finds this form of using linguistic argumentation in cases where the legal rule contains a vague or evaluative term so that the rule must be interpreted to establish the meaning of the rule for the concrete case. In such a case, linguistic argumentation can never constitute an independent justification because it is not possible to establish in abstract what the meaning is by checking the literal meaning or the technical meaning of the term.

The second form may also occur in cases in which there is no discussion about the interpretation of a vague or evaluative term but there is still a difference of opinion about the exact interpretation that must be given of a rule on the basis of the question whether in the context of a specific case (and similar cases) a particular formulation used in the rule must be given a particular meaning or not.

In both types of cases, the meaning will have to be established by looking at the legal system and/or goal of the rule. Systematic or teleological argumentation then forms a necessary part of the argumentation and the linguistic argumentation can only function as supplementary coordinative argumentation. Linguistic argumentation of this form is often presented in the form of a statement that the formulation of the rule supports also this interpretation or that the

formulation of the rule does not form an objection to application in the proposed interpretation.⁸

Since linguistic arguments have a “preferred” status, judges tend to use this form of argumentation as supplementary argumentation for rhetorical reasons to increase the acceptability of their decision for the legal audience. The linguistic argument must increase the acceptability by showing that, also on other grounds, it can be asserted that the decision is coherent with common starting points. In terms of van den Hoven (2007), who calls this use of linguistic arguments, the “negative use” of linguistic argumentation, strategic manoeuvring implies that the judge tries to show that it is not necessary to change the legal system for the concrete case but that the concrete decision was already (implicitly) included in the legal system.

2.3 Form 3: a linguistic argument is presented in a context in which it is overruled by another argument

In hard cases linguistic arguments can also be used in a context in which it is asserted that the rule must not be applied in the literal meaning because such an application would be unacceptable from the perspective of the goal of the rule as intended by the legislator.⁹

In such a context, the linguistic argument is “overruled” by other arguments such as systematic arguments, teleological arguments, or arguments from reasonableness. These arguments are a necessary part of the argumentation as pro-arguments to justify that the rule must be applied in a broader or more restricted meaning in the concrete case.

Normally, if there were no reason to question the applicability because the concrete case belongs to the standard range of application of the rule, the argumentation would consist in form (1) of linguistic argumentation. However, for the concrete case, the judge may argue that there are overriding reasons not to apply the rule in the strict literal

8 For example: when a judge argues for an *a contrario* application of a rule, he will put forward a linguistic argument if the formulation of the rule contains a verbal indicator that gives an uncontested indication that the rule is meant as a limitative enumeration of the conditions for applying the rule.

9 In Dutch civil law, this use of linguistic arguments in a context in which the linguistic argument is overruled by other arguments often occurs when it is argued that a 'billijkheidscorrectie', an exception for the concrete case on the basis of fairness, is necessary. See Feteris (2007).

meaning but in another meaning including an exception for the concrete case.

When a linguistic argument is presented in a context in which it is overruled by another argument, it is acceptable if:

(3a) the linguistic argument is put forward in the context of a case in which there are other arguments that overrule the linguistic argument on the basis of the weight attached to them

(3b) the linguistic argumentation refers to the accepted standard meaning of (a term used in) the rule

This form of linguistic argumentation is often used when someone argues in favour of an exception to a rule about which there is no discussion about the correct interpretation of the rule, but where it is argued that, on the basis of the unacceptable consequences of a literal interpretation from the perspective of justice and fairness, an exception to the rule must be made for the concrete case.¹⁰

3 Analysis and evaluation of two examples

On the basis of the distinction between the different forms of using linguistic arguments in the different discussion contexts and the norms for an acceptable use, in this section I discuss two examples of strategic manoeuvring with linguistic arguments from Dutch civil law. In these cases the Supreme Court, in pragma-dialectical terms, gave a ruling in which it gave a negative evaluation of the strategic manoeuvring of one of the parties with linguistic argumentation.¹¹ Using the distinctions and norms defined in section (2), I specify how the examples can be analysed in terms of the different forms of using the linguistic argument and I explain how the norms can be used to determine when the strategic manoeuvring with the linguistic argument is acceptable and when it derails. I do this by explaining how the evaluation of the Supreme Court can be translated in terms of derailing strategic manoeuvring.

¹⁰ For a discussion of this form of complex argumentation see Feteris (2005, 2008).

¹¹ Both examples are given by Smith (2007).

Parties in a legal dispute often present a linguistic argument as an independently sufficient justification. As we have seen, in easy cases if the conditions for the first form are met, it is a perfectly sound way of justifying a legal decision. However, the strategic manoeuvring with linguistic argumentation may derail because one or two of the conditions for an acceptable use of a specific form of using linguistic argumentation is not met.

Sometimes parties in a legal dispute present a particular interpretation of the rule as the accepted standard interpretation of the rule although this is not the case and condition (1b) of the first form is not met. In such a case, the strategic manoeuvring derails because in doing so the party violates the pragma-dialectical rule that relates to the use of common starting points, since a particular meaning of the rule is wrongly presented as a common starting point in the legal community.¹²

Starting with a particular interpretation and presenting this interpretation as the accepted standard interpretation, a party may claim that the linguistic argumentation based on the formulation of the rule may serve as an independent justification. As we have seen, in cases in which the conditions of the first form are met, this is a perfectly sound way of justifying a legal standpoint. However, if the interpretation of the formulation of the rule is not the accepted standard interpretation, the linguistic argumentation can never function as an independent justification and other arguments are required to justify the application of the rule. In such cases, a linguistic argument cannot constitute an independently sufficient argument. For this reason, if a party or a judge presents the formulation of the rule as an independent justification in a case that does not meet condition (1a) for the first form, the strategic maneuvering derails. In such a case the “preferred” status of linguistic argumentation is misused by presenting the argumentation as an adequate justification although it does not meet condition (1a) of the first form but must be reconstructed as argumentation of the second form which would have been the correct form. By doing so, someone evades the burden of proof for the necessary supplementing coordinative argumentation referring to the legal system and/or goal of

¹² For a description of the starting point rule see van Eemeren and Grootendorst (1992, pp. 149-157).

the rule (that form a necessary supplement of the linguistic argumentation of the second form) and the strategic manoeuvring constitutes a violation of the pragma-dialectical rule concerning the burden of proof.¹³

In what follows I discuss two examples of this complex form of strategic manoeuvring that both consist of a combination of these two forms of strategic manoeuvring that both derail because two discussion rules are violated: the “starting point rule” and the “burden of proof rule”. (Since the third form is not applied in the examples I have selected I will not discuss strategic manoeuvring with this third form.)

3.1 Hoge Raad 25 oktober 1996

The first example (see for the relevant passage of the text A at the end of this contribution) is from a decision of the Dutch Supreme Court about the correct interpretation of the term 'finding'. In this case, *Hoge Raad 25 oktober 1996, RvdW 1996, 207* the discussion was about the question whether the activities of a professional car hunter who had found a stolen car, had a right to a reward for finding the car and to compensation for the expenses he has incurred in taking care of the car on the basis of the legal regulation for finding lost and unattended objects of clause 5:5 of the Dutch Civil Code.

In this case the plaintiff, the owner of the car, denies the right of the defendant, the car hunter, to compensation for his expenses. The plaintiff is of the opinion that the rule does not apply to this case because the acts of the defendant cannot be considered as 'finding'. In his view, the term finding must be interpreted in the narrow sense, excluding the activities of a professional car hunter. Here the plaintiff presents linguistic argumentation referring to the meaning of the word 'finding' as independently sufficient justification.

However, the District Court, the High Court and the Supreme Court are all of the opinion that the rule is applicable to the concrete case in the broad meaning of 'finding'. This broad meaning also includes the activities of a professional car hunter who has been looking for the car. The Supreme Court is of the opinion that the interpretation of the word 'finding' must be based on a combination of

¹³ For a description of the burden of proof rule see van Eemeren and Grootendorst (1992, pp. 116-123).

teleological argumentation (supported by argumentation based on the discussion about the rule in parliament) and linguistic argumentation. The Supreme Court is of the opinion that the meaning of the rule (which is of a relative recent origin) must be established on the basis of the purpose, the legal ratio, of the rule that can be found in the parliamentary documents. The purpose was to promote that a lost object is returned to its right owner as soon as possible, in any case is brought back as soon as possible in circulation or is used again. According to the annotator, HJS, the idea of the Supreme Court is that the ratio of this rule is served by such a broad interpretation that is also linguistically correct. So, in this case, according to the Supreme Court the ratio of the rule must be considered as the main argument in support of the decision to apply the rule (in the broad meaning of 'finding') in the concrete case. This argument is supplemented by the consideration that the linguistic meaning of finding does not form a counter-argument against application in this broad sense.

From our perspective this case forms an example of a case in which the strategic manoeuvring by the party derails. First, it constitutes an instantiation of derailing strategic manoeuvring because condition (1b) is not met. The proposed literal meaning of 'finding' in a narrow interpretation is wrongly presented as the accepted standard meaning of the term 'finding' in clause 5:5, because the term must be interpreted in a broader sense that also includes the activities of a professional car hunter. Second, it constitutes an instantiation of derailing strategic manoeuvring because condition (1a) is not fulfilled. The linguistic argument in favour of a narrow interpretation of the term 'finding' cannot constitute an independently sufficient justification. The Supreme Court argues that the intention of the legislator (which supports a broad interpretation of 'finding') must be taken also into account. In the view of the Supreme Court the teleological argument referring to the goal of the rule constitutes a necessary element of the argumentation. The Court points to the fact that the intention of the legislator to promote that the object is brought back into circulation is also in accordance with the meaning of the term 'finding' in the broad sense as used in the rule. The burden of proof rule is violated because the party, by only presenting an argument in support of the literal meaning of the term 'finding' evades the burden of proof for the

supplementary argumentation referring to the intention of the legislator that is necessary to make the argumentation complete.

3.2 Hoge Raad 19 oktober 1990

The second example of strategic manoeuvring with linguistic argumentation can be found in the discussion in Dutch law in a case about the application of the old article 1.33 of the Dutch Civil Code, which says that a man can only marry a woman and a woman can only marry a man.

In this case a civil servant who was responsible for marriages refused to marry a female homosexual couple on the basis of this article (for the relevant part of the text of this decision see B at the end of this contribution). However, the parties state that the text of this article does not forbid a marriage between two women because it only says that one man can only marry one woman with the stress on the formulation 'a' interpreted as 'one' and hence must be interpreted as a prohibition of polygamy.

The judge of first instance, the judge in appeal and the Dutch Supreme Court (Hoge Raad 19 oktober 1990, RvdW 1990, 176) decide that the claim is based on a disputable literal reading of several articles and misunderstands the purpose of the law as intended by the legislator.¹⁴

From our perspective it is an interesting example of a case in which the strategic manoeuvring by the party derails. Firstly, as in the previous example, it constitutes an instantiation of derailing strategic manoeuvring because condition (1b) is not fulfilled. The proposed literal reading of 'a man' and 'a woman' in clause 1.33 is wrongly presented as the only possible reading because there is also another reading, i.e. the accepted standard reading. The Supreme Court states

¹⁴ In this case the lower judges and the Supreme Court also put forward additional argumentation in which they react to other arguments put forward by the plaintiff in which they discuss the argument by the plaintiff that the views in society about same-sex relations have changed since the enactment of the law. The courts make clear that in certain matters, such as the present one that concerns the public sphere where legal certainty plays an important role, it is not the task of the judge to change the meaning of a rule by departing from the goal of the rule as intended by the legislator on the basis of changing views in society. The Supreme Court argues that it is not the task of the judge to decide against the clear meaning of the rule about marriage, since abolition of the prohibition to marry for same-sex couples would have far-reaching consequences.

that the other reading implies that the article must be read in the standard reading as forbidding a same-sex marriage so that the given interpretation is incorrect.

Furthermore it constitutes an instantiation of derailing strategic manoeuvring because condition (1a) is not fulfilled. The linguistic argument can never be the only argument because, according to the Supreme Court, in establishing the meaning of a rule also the legislative history of the rule and the goal of the rule as intended by the legislator must be taken into account, so the argument could never serve as an independent justification. With the formulation 'miskent de strekking van de wet' (ignores the purpose of the rule) the Supreme Court indicates that the purpose of the rule as it is based on the legislative history is a necessary element of a justification of the interpretation of the meaning of a rule. The burden of proof rule is violated because the party evades the burden of proof for the arguments referring to the legislative history of the rule and the goal of the rule as intended by the legislator.

3.3 Comparison

In both examples the combination of the violation of the starting point rule and the violation of the burden of proof rule can be considered as a specific form of derailing strategic maneuvering. The derailment consists of a combination of two violations. The first violation implies that a particular interpretation of the meaning of the rule is wrongly presented as the only correct interpretation. Starting from this incorrect interpretation the second violation implies that certain information (the goal of the rule as intended by the legislator) is wrongly ignored and is not included in the argumentation so that the burden of proof for this information is evaded. In the evaluation of the Supreme Court we see that both mistakes are assessed individually as mistakes in the context of a rational discussion about the application of legal rules. The violation of the starting point rule is characterized as departing from a 'disputable literal reading of statute law' (gaat uit van een aanvechtbare letterlijke lezing). The violation of the burden of proof rule is characterized as a 'misunderstanding of the law as the legislator had in mind when enacting it' (miskent de strekking van de wet zoals men die

bij haar totstandkoming voor ogen heeft gehad).¹⁵ The combination of the two forms of strategic maneuvering can be considered as a complex form of strategic maneuvering in which the second builds on the first form so that the combination can be considered as subordinate.

4 Conclusion

In my contribution I have made a first attempt to reconstruct the strategic manoeuvring with linguistic arguments in a discussion about the application of a legal rule in a concrete case in the context of a court of law. I have explained how the legal norms can be translated in pragma-dialectical terms to explain why certain forms of strategic manoeuvring with linguistic arguments in this activity type are acceptable and when the strategic manoeuvring derails.

By distinguishing three forms of the use of linguistic argumentation I have tried to give a systematic and precise description of the various ways in which linguistic argumentation can be used and on the basis of the translation of the norms I have shown how it can be explained why certain forms of strategic manoeuvring with a particular use are acceptable and other forms derail.

In the analysis of some examples from Dutch law I have demonstrated how the framework for evaluating the soundness of strategic manoeuvring can be used in explaining why certain ways of using linguistic argumentation in a particular context are unacceptable and constitute a derailment of strategic manoeuvring. I have explained that the strategic manoeuvring with linguistic argumentation often takes the form of a complex of strategic manoeuvres that are mutually dependent and each form a violation of a discussion rule.

15 In the discussion about 'finding' the Supreme Court claims that the High Court has not departed from a wrong conception of law ('heeft niet blijkt gegeven van een onjuiste rechtsopvatting'). This is a specific legal expression used to indicate that a lower court has made a mistake in giving a wrong interpretation of the law. In this context the Supreme Court refers to this kind of mistake because the party that has asked the Supreme Court to correct the decision has put forward as a reason for the necessity of correcting the decision (as 'cassatiegrond') that the Court has departed from a wrong conception of the law in giving a broad interpretation of the term 'finding'.

Appendix: CASES EXAMINED IN SECTION 3

1. HOGE RAAD 25 oktober 1996, nr. 16074 RvdW 1996, 207

'3.3.1 Bij de beoordeling van onderdeel 1, dat de vraag aan de orde stelt wat moet worden verstaan onder "vinden" in art. 5:5 moet het volgende worden vooropgesteld. De strekking van art. 5:5 e.v., zoals deze uit de geschiedenis van de totstandkoming van deze bepalingen naar voren komt, laat zich aldus samenvatten dat daarmee beoogd is te bevorderen dat degene die de zaak verloren heeft, haar zo veel mogelijk zal kunnen terugvinden, en voor het geval de verliezer niet meer komt opdagen een oplossing te geven, welke mogelijk maakt dat de zaak binnen afzienbare tijd weer in het rechtsverkeer wordt gebracht of in gebruik genomen (Par. Gesch. Boek 5, Inv. 3, 5 en 6, p. 1008). Met die strekking strookt het begrip vinden in art. 5:5 in overeenstemming met zijn taalkundige betekenis, in ruime zin uit te leggen. Daarmee zou slecht te verenigen zijn dat zou moeten worden aangenomen dat niet van vinden sprake is, indien de zaak niet bij toeval is ontdekt, maar daarnaar is gezocht en handelingen zijn verricht die als het opsporen daarvan kunnen worden beschouwd.'

English translation:

HOGE RAAD October 25, 1996, nr. 16074 RvdW 1996, 207

'In the evaluation of part 1, that introduces the question of the exact meaning of "finding" in clause 5:5, the following must be assumed. The purport of clause 5:5 ff., as becomes clear from the history of the enactment of the rule, can be summarized as follows: the intention of the legislator was to promote that someone who has lost an object will, as much as possible, be capable of finding the object, and in case the person who has lost the object does not show up, to provide a solution that makes it possible to bring the object in circulation within the not too distant future or make it possible that the object can be used again (Parliamentary History, Book 5, 3, 5, 6, p. 1008). It is consistent with this purport to interpret the concept of finding in clause 5:5, in accordance with its linguistic meaning, in the broad sense. It would be

inconsistent with this purport to assume that the rule would not be applicable if the object would not be discovered by accident, but when the person who has found the object would have been looking for it and would have developed actions which can be considered as tracing/hunting the object.

2. HOGE RAAD 19 oktober 1990, rek.nr. 7649 NJ 1992/129

'Die stelling (de stelling dat de tekst van de Nederlandse wet een huwelijk tussen twee vrouwen niet verbiedt en dat die tekst in het licht van de maatschappelijke ontwikkelingen zo moet worden uitgelegd dat zo'n huwelijk toelaatbaar is EFHK) kan niet als juist worden aanvaard. Zij gaat uit van een reeds op zichzelf aanvechtbare letterlijke lezing van een aantal wetsartikelen en miskent de strekking van de wet zoals men deze bij de totstandkoming van Boek 1 BW, mede in het licht van de daaraan voorafgaande wetgeving, voor ogen heeft gehad. Ook indien latere maatschappelijke ontwikkelingen steun zouden geven aan de opvatting dat het niet openstaan van de mogelijkheid van een wettelijk huwelijk tussen twee vrouwen of twee mannen niet langer gerechtvaardigd is, zou dit niet een van de onmiskenbare strekking van de wet afwijkende wetsuitlegging wettigen, te meer niet nu het hier gaat om een onderwerp dat de openbare orde raakt en waarbij de rechtszekerheid een belangrijke rol speelt'.

English translation:

SUPREME COURT OF THE NETHERLANDS October 1990, no. 7649 NJ 1992/129

This claim (the claim that the text of the Dutch law does not forbid a marriage between two women and that this text must be interpreted in the light of the developments in society that would support the view that such a marriage is allowed EFHK) cannot be accepted as correct. This claim departs from a reading of various articles that is in itself already wrong and it ignores the purpose of the law the legislator had in mind when formulating the rules of Book 1 of the Civil Code, also in the light of the preceding legislation. Also if later developments in

society would support the opinion that the impossibility for two women or two men to marry is no longer justified, this would not justify an interpretation of the law that departs from the clear purpose of the law, also because it concerns a subject matter that concerns the public order where legal certainty plays an important role.

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