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On the argumentative structure of the references of the term “argument” in legal discourse

Abstract

The aim of this article is to determine the basic structure of entities denoted by the term “argument”. The investigation does not, however, include all the designata of the term “argument”, but is limited to those situations where this word is used in legal discourse, i.e. in discussions carried out within legal transactions. The word “argument” used in these circumstances is associated with two individual meanings. The one is reflected in the wording “a specific complex of utterances”, whereas the other is denoted by the expression “an inference regarding the law”. The following considerations are an attempt to characterise the basic structure of an argument conceived as a complex of utterances within legal discourse. These are also geared towards disclosing main elements of an argument treated as a rule governing mental activities in legal discussions. As a result, this distinction will hopefully serve as an anchor for further considerations aiming to expound and focus on the two distinct meanings of the argumentative expressions under analysis.

Keywords: legal discourse, structure of legal argument, argument, inference regarding the law.

0 Introduction

“It is not the case [...] that a just and wise legal decision will defend itself. The author or authors of each legal decision must always [...] first convince themselves that it is indeed characterised by those features. Then they have to convince its recipients in proper spoken and frequently also written form^{*}” (Hofmański & Zabłocki 2006: 236). This statement delivered by a Polish Supreme Court Judge in a monograph intended for judges adjudicating in criminal cases expresses quite well the important role of argumentation in legal transactions. As a result, in adjudications, administrative decisions and motivations for pleadings as well as jurisprudence, the word “argument” is used very frequently. The entities denoted by this word in such practices, however, are not only different, but also unique. The term “argument” is usually employed to determine inference regarding the law (Stelmach & Brożek 2006: 12-13, 156-157, Chauvin, Stawecki & Winczorek 2014: 257; adjudications: I PK 7/14, II OSK 2713/12, W 6/95) as well as a specific complex of utterances aiming to trigger or modify an approval of one of them in legal discourse (Jabłońska-Bonca 2003: 117; Lewandowski 2013: 89; adjudications: I FZ 366/14, Ts 127/12, 9174/02, 19010/07). This usus

¹ “Nie jest więc bynajmniej tak [...], że sprawiedliwe i mądre rozstrzygnięcie obroni się samo. Autor albo autorzy każdego rozstrzygnięcia zawsze muszą bowiem [...] najpierw przekonać samych siebie, że charakteryzuje się ono wyżej wymienionymi cechami.”

is the subject of the investigation. Its purpose is to give details of what can be concluded about the structure of each designatum of the term “argument” when it is used: 1) exclusively in the discussion conducted with reference to a decision pursuant to which the authority applies the law to the given case² and 2) interchangeably with the expression “a complex of utterances” or wording “an inference regarding the law.” The following investigation can be therefore treated as a contribution to expound and focus on the two meanings of the term “argument” whenever it is employed in legal discourse.

1 Argument as a complex of utterances

A group of phrases that is denoted by the term “argument” is distinguished from any other set of utterances by its objective. Each argument treated as a system of finite strings of words with a certain meaning (as in a complex of utterances) is aimed to trigger or modify the approval of the people it was presented to (the audience), in relation to a finite string of words with a certain meaning that belongs to this system. It means that the argument is always bipartite. The first part is presented to the audience with the view to bring about the approval of the other part (also known to the audience). The approval, and this point should be underlined, is to be made because of the contents revealed to the audience and the relationship between the two parts. The part of an argument delivered in order to receive approval (i.e. at least one finite string of words with a certain meaning) is usually determined by the expression “the premise (or the premises) of the argument.” The next part, which is to receive approval (i.e. exactly one finite string of words with a certain meaning) is usually indicated by the expression “the conclusion of the argument” (Perelman 2002: 21-22; Korolko 1990: 84; Soccio & Barry 1991: 6-7).

Every argument treated as a complex of utterances consists of two sets. The first is a single element composed of the conclusion and the other contains a minimum of one element, which is composed of the premises. This framework of the argument's structure needs to be considered using four remarks, which remain valid for the structure of most arguments, including the structure of every argument specific to legal discourse. First, the conclusion of the argument is not necessarily articulated. It may be implied for the audience to infer. Second, the argument's conclusion constitutes a reference point for differentiating among arguments which have been used in a given discussion. The conclusion makes it possible to distinguish a single argument from a set of utterances forming the discussion. Third, in principle, there is no limit to the number of premises in the argument, and each premise can consist of an unlimited number of words.³ Fourth, the relationship between the conclusion of the argument and its premise, as well as between the premises themselves, may be different in nature. The arguments can be organised according to a scheme based either on the relation of

² The expression “a discussion conducted with a reference to a decision pursuant to which the authority applies the law to the given case” defines a legal discourse. The article concerns a legal discourse that occurs in European culture. I only investigated discussions conducted with a view to render a legal decision that is carried out either in English, Polish or French.

³ The expression “in principle” indicates that there are circumstances which defy building an argument on a large number of premises or forming premises with complicated structures. For instance, a large number of characters in the text may discourage readers from familiarising themselves with its content, whereas a lengthy speech might not so much convince listeners to approve of the conclusion, but rather tire them with the content presented (Perelman 2002: 182).

entailment or on rules which do not constitute any logical principle but state that it is reasonable to approve of the argument's conclusion. Furthermore, based on the above remarks, it should be stressed that: (a) in order to receive the approval of the conclusion, it is not necessary to build an argument on the basis of logical principles (Cf. Soccio & Barry 1991: 3-5);⁴ (b) it is not necessary for the links between elements of the argument to undergo a linguistic description;⁵ (c) each premise of an argument may support its conclusion together with other premises or independently of them.⁶

The specific objective of the argument (in comparison to other varieties of utterances) determinates that the mental attitudes of the audience need to be taken into account while formulating the argument. The basic determinant of a legal discourse participants' mental attitudes is the law. However, it is not an abstract idea of the law, but rather a set of "rules of conduct, established or accepted by the appropriate authorities of a State, the observance of which is, when need be, enforced by means of coercion available to this State**," (Chauvin, Stawecki & Winczorek 2014: 17).⁸ If the law does constitute such a set of rules of conduct (especially: a system of legal norms), then each participant in a legal discourse should recognise the issue of application of the law. What cannot be ignored in legal discourse is that a State authority (an office holder) applied the law by issuing such and such a legal decision or that a State authority (an office holder) will apply the law and probably issue such and such a legal decision (Perelman 1966: 373-375). If a legal decision in turn determines that a particular legal norm is valid and entails legal consequences defined thereunder for a particular constellation of facts, i.e. for an actual state of affairs (Chauvin, Stawecki & Winczorek 2014: 229-230; Gromski 2010: 301-302),⁹ then each argument used exclusively in the legal discourse attempts to form, by means of premises, the approval of a conclusion which belongs to one of the three sets. The first set is defined by the expression "legal norm X is valid," the second by the expression "fact X occurred," and the third by the expression "fact X results in consequences defined by X legal norm" (Pulka 2010: 244).

The three above-provided expressions require some explanation. The expression "legal norm X is valid" covers a verbalisation of the result of interpreting the law. The interpretation of the law comes down to concluding that a particular legal norm is valid. And a particular

⁴ Nevertheless, for the sake of achieving the argument's objective it is, of course, desirable to organise the argument on the basis of logical principles. For example, *an alibi* – i.e. an argument aimed at convincing the audience that a person who is accused of an unlawful act was, in fact, not present at the place where the unlawful act took place, and which, by extension, is ultimately an argument that follows the logical principle *modus tollendo tollens*, is considered one of the most effective lines of defence.

⁵ The premise "I can feel it" made in favour of the conclusion "Eulalie loves Peter" may serve as an example.

⁶ For instance, the statement "John is a lawyer" supports the statement "John is suitable to be a prosecutor", regardless of the statement "John is fair" and regardless of the statement "John is hardworking", which may also support the claim to promote John to prosecutor. In turn, in order to justify the statement "Peter knows a lot about cars", it is not sufficient to state that "every mechanic knows a lot about cars" or merely use the statement "John is a mechanic", but both these statement need to be employed.

⁷ "Prawnicy akceptują zwykle pojęcie «prawa w znaczeniu prawniczym», czyli prawa jako zespołu reguł ustanowionych bądź uznanych przez odpowiednie organy państwa, wobec których posłuch zapewniony bywa w ostateczności dzięki przymusowi jaki może stosować to państwo".

⁸ Here I touched upon a basic question concerning jurisprudence. Its most operational form is "what is the nature of law?" The quoted definition, I assume, consisted of undisputed elements (Murphy & Coleman 1984: 7-13; Kość 2002: 67-78; Pokol 2001: 18).

⁹ The application of law comprises the decisions: 1) concerning the interpretation of legal norms, 2) concerning the facts of the case, 3) that the interpreted legal norm is applicable in the given case (Cf. Brożek 2008: 188-189).

legal norm is valid if within a certain legal system (according to which the legal decision is to be made) a subject of a certain kind is either ordered, allowed, or prohibited from performing (aborting) a certain kind of action under certain kinds of circumstances. Utterances concerning the legal system and the subject, action and circumstances of the legal norm are formulated on the basis of legal texts (i.e. the content of normative acts), evaluations, values or court practices, and furthermore by means of juxtaposing these entities with the rules developed or at least approved of by jurisprudence and legal practice.

The expression "fact X occurred" should be understood as a verbalisation of the result of the fact's establishment, which is essential to the solution of a case. Each utterance on the subject of this kind of finding's results describes a specific factual circumstance. Their sum, in turn, provides the profile of the characteristics of factual circumstances (the actual states of affairs), based on a legal decision which can be made under an interpreted legal norm.

The expression "fact X results in consequences defined by X legal norm" represents a verbalisation of a subsumption's result. During the subsumption, the established factual circumstances are assigned to the interpreted legal norm, which directly results in recognizing that these circumstances trigger the effects mentioned in this legal norm (Gromski 2010: 320-321).¹⁰ Each utterance connected directly with the result of the subsumption claims that a particular fact is relevant in the framework of a particular legal norm or entails, within the framework a legal norm, specific effects.

The presented classification concerning the conclusions of the argument facilitates a clear description of its premises' characteristics. Since the expression "legal norm X is valid" covers a verbalisation of the result of interpreting the law, then an argument whose conclusion is an utterance which fits into this expression will represent actions undertaken to reconstruct (interpret) a legal norm. Its premises, therefore, will be utterances regarding the material which was the basis for the legal norm (i.e. references, descriptions and evaluations of legal texts, values or a court practice), but also the directives (rules) for interpreting the law which were employed in a given case.

An argument concluded in an utterance fitting the expression "fact X occurred" is a tool used to form an approval for factual circumstances whose legal effects are to be determined. The premises for such an argument are therefore utterances describing a given actual state of affairs (its elements) and also utterances determining a legal permission, order or prohibition with regard to the establishment of the fact. The set of the last-mentioned utterances, as in the case of the previously discussed argument, consists of utterances relating to the characteristics of the matter which was the basis for a legal norm, but also utterances which govern the interpretation of the law, employed in the fact's establishment.¹¹

If the conclusion of the argument belongs to the set described by the expression "fact X results in consequences defined by legal norm X," then each of its premises is an utterance which builds one of two other sets. The former, i.e. the set of the primarily applicable premises, includes utterances encompassed in the expression "legal norm X is valid" as well as utterances encompassed in the expression "fact X occurred." The latter set consists of utterances eligible to be the premise of an utterance that constitutes the set of primarily

¹⁰ It should be stressed that the subsumption is "an intellectual step" (Ziemiński 1976: 275-276). It is intellectual activity.

¹¹ When engaged in applying the law, one must remember that the establishment of the fact accounts for legal norms, especially for the norms regulating the evidence procedure. Hence, there is a need for the data concerning legally classifiable facts (i.e. data communicating by utterance encompassed in the expression "fact X occurred") to be obtained in compliance with legal norms defined by directives of interpretation.

applicable premises. To construct and to communicate an argument on the conclusions encompassed in the expression "fact X results in consequences defined by legal norm X" requires a prior interpretation of the legal norm as well as the establishment of the fact.

Based on the above reflections, it should be concluded that the set of utterances eligible to constitute an argument's premises consists of descriptive utterances, evaluative utterances and suggestive utterances. The basic structure of a descriptive utterance is represented by the expression "X is (not) Y" or the expression "X does (not) exist." The main scheme of an evaluative utterance is expressed by "X does (not) approve of Y." In turn, every suggestive utterance is an utterance which amounts to the expression "X should (not) Y" (Chauvin & Stawecki & Winczorek 2014: 85-86).¹²

2 Argument as an inference

It is common in legal transactions to express the meaning of the term "argument" when indicating a mental activity with an expression built on the word "inference". Should the term "argument" denotes an operation of human thinking as lawyers use it, it is usually treated as a synonym of the expression "inference regarding the law". This practice does not, however, seem to be perfectly correct.

First of all, the term "inference" indicates recognising as true a proposition in the logical sense on the basis of another recognised as true proposition (or propositions) in the logical sense due to a relationship between them (Ziemiński 1976: 186).¹³ However, in legal discourse there are entities denoted by the term "inference" as well as the term "argument" for which the presented definition is not adequate. It is particularly inadequate for such arguments which contribute to the interpretation, detection or reconstruction components of the law. Such "inferences" do not consist in recognising as true a proposition in the logical sense, but for determining meanings.

Furthermore, in general-purpose language there is a term properly related to both of the mentioned types of mental activity. This word is "reasoning". Now, the term "reasoning" is usually applied to denote any intellectual operation focused on finding a solution. Therefore, it covers every action of human thinking aimed at recognizing as true propositions in the logical sense as well as every operation of organising, compiling and converting meanings (Marciszewski 1994: 3-5; Wojtysiak 2007: 411; Oaksford 2003: 863-869). Under these circumstances, the set of operations designated by the term "reasoning" in the most general arrangement is a sum of the two subsets. The first includes actions aimed at recognizing the true propositions which are generally denoted by such terms as "explanation", "verification" or "demonstration". The other comprises such operations as organization, compilation and conversion of meanings, i.e. activities associated with the term "conceptualisation" (Marciszewski 1994: 3).

The basic limit for investigation on the structure of the argument in question is therefore determined not by inference, but rather by reasoning. The assumption that an argument is

¹² It may seem that suggestive statements are of prime significance in the arguments concluded in the expression "norm X is valid", whereas for the arguments following the expression "fact X occurred" it is the descriptive statements that dominate.

¹³ "A proposition in the logical sense is an expression that states unequivocally either that such is the case or that such is not the case. Consequently, it is an expression about which we can justly say either that it is false or that it is true" (Ziemiński 1976: 67).

reasoning (not merely an inference) does not constitute, however, a sufficient point of departure. Now, one who has in mind an argument as reasoning does not mean a mental activity as such, but rather a rule (a directive) which this activity should follow. The argument is a rule for reasoning.

Rules of reasoning indicated by the term "argument" are arranged in a different manner in jurisprudence. Disputes do not concern, however, the quantity of a division's subsets or expressions by means of which each subset is denominated, but rather relate to the categorization of some of these rules to an individual subset. Thus, almost every arrangement of arguments embraces: 1) a set of directives of interpretation,¹⁴ 2) a set of conflict rules,¹⁵ 3) a set of rules of legal inference,¹⁶ 4) a set of legal norms,¹⁷ as well as 5) a set of legal topics.¹⁸ There is no consensus on what is exactly included in the individual subsets. In particular, a rule included into the set of legal topics by one researcher is often considered a rule of legal inference by another, while yet another indicates that it is a part of the set of the interpretation's directives.¹⁹

The above-presented arguments are mostly verbalized to descriptive maxims in legal discourse. Nevertheless, the linguistic formulation does not disturb participants of the discourse in understanding them as indications of a certain way of behaving. For example, the legal topic represented by the expression "*Iura novit curia*" is conceived as the prohibition of admitting evidence in support of the binding force of the legal norm. In turn, the expression "the burden of proving a fact lies on the person who draws legal effects from that fact" (i.e. article 6 of the Polish Civil Code) is conceived as the legal norm that constitutes the order of establishing affirmative proofs for the maintained circumstances. The consequence of this fact is that the arguments serve as suggestive utterances in legal discourse. Hence, the basic

¹⁴ A directive of interpretation is a rule that serves one of these three functions: a) it defines the meaning of expressions occurring in provisions of the law; e.g. "identical terms have the same meanings" or "the interpretation of the law does not cause gaps in the law"; (b) it identifies the order of employing the rules serving the function described in a); e.g. "rules of the linguistic interpretation of the law are applicable first and foremost" and c) it facilitates a selection of a meaning in situations where interpreted expressions become ambiguous in a legal text upon employing the same rules which serve functions a) and b); e.g. "the intensive interpretation of provisions of criminal law is prohibited" (Pulka 2010: 254-255; Morawski 2002: 85, 145, 189, 243).

¹⁵ A conflict rule is a rule that serves to determine which of the various interpreted legal norms which apply in a given case should be a point of reference for determining the legal effects resulting from this case; e.g. "*Lex specialis derogat legi generali*"; "*Lex posterior derogat legi priori*" (Bator 2010: 188-190; Morawski 2002: 347-252).

¹⁶ A rule of legal inference is a rule that serves to determine the existence (applicability) of a legal norm in view of the fact that there is at least one different legal norm; e.g. "If there is a norm in virtue of which it is prohibited to do something less, there is also a norm in virtue of which it is prohibited to do something more" (Gromski 2010: 273-274; Morawski 2002: 389).

¹⁷ In the broadest sense, a legal norm may be defined as a pattern of conduct directed at a generic entity, established or officially recognized by a competent (superior) authority (in particular a national authority) and made effective by way of enforcement (Ziemiński 1976: 126-130).

¹⁸ A legal topic usually denotes a rule which is commonly known and acknowledged by persons who contribute to creating a legal culture; e.g. "In dubio pro reo iudicandum est," "Impossibilium nulla obligatio"; "Not knowing the law is harmful" (Stelmach & Brożek 2006: 155, 162-163; Perelman 1976: 88-94; Struck 1971: 20-34).

¹⁹ For example, the directive "*Lex posterior derogat legi priori*" is understood by Gerhard Struck and also by Chaim Perelman as a legal topic (Struck 1971: 20-21; Perelman 1976: 88). Nevertheless, according to Lech Morawski, this directive is a fundamentally conflicting rule (2002: 347-348).

²⁰ "Ciężar udowodnienia faktu spoczywa na osobie wywodzącej z tego faktu skutki prawne."

structure of such an argument needs to be encapsulated into the expression “X should (not) Y.”

The question now arises: what does the argument treated as a rule of reasoning (or as suggestive utterance) serve for? It is sufficient to ascertain that each of them points to the specific conditions or standards of proper resolutions for the issues discussed (Lewandowski 2013: 113; Stelmach 2003: 22-24).²¹ The word “sufficient” have been used because such an answer reveals a relationship between an argument discussed in the previous section and the last characterised argument. Thus, the expression “the issues discussed” in regard to a legal discourse should encompass all and only issues which may appear exclusively in the application of the law. And if an activity of this kind covers the decisions concerning the interpretation of a legal norm, the decisions concerning the facts of the case and also the decision that interpreted a legal norm are applicable in the given case, then each of the issues discussed in a legal discourse belongs to one of three sets. The most operative determining of the first is given by the expression “is legal norm X valid?” The second set is adequately defined by the expression “did fact X occur?” In turn, the best wording for the third set is “does fact X result in consequences defined by legal norm X?” This arrangement implies the conclusion that the argument-rule of reasoning is suitable for constituting the “core” of the argument-complex of utterances in a legal discourse. Every such rule is adequate for determining the content and alignment of the premises of the argument with respect to each other as well as to the conclusion of the argument.²²

3 Conclusion

The term “argument” with respect to a legal discourse is employed for determining entities of two types. It is used to indicate certain complexes of utterances and also to mark certain rules of reasoning.

The most important structure of every complex of utterances denoted by the word “argument” is a sum of two sets. The first is a single element set composed of utterances with respect to which the audience is expected to form its approval. The other contains a minimum of one utterance which is presented to the audience to trigger a change in this approval.

An utterance which constitutes the first set is called “the conclusion of the argument”. Such an utterance comprises a finite string of words with a certain meaning encompassed in one of the three expressions: (a) “legal norm X is valid”, b) “fact X occurred”, or c) “fact X results in consequences defined under legal norm X”. Each utterance of the second set is defined by “the premise of the argument” and always serves either to state the existence of something, to express an evaluation of something or to suggest a way of conduct. The structure of premises that pronounce the existence has a shape represented by the expression “X is (not) Y” or by the expression “X does (not) exist.” Premises which express an evaluation fulfil the expression “X does (not) approve of Y.” Finally, the structure of premises that serve to suggest is expressed by “X should (not) Y.”

²¹ Proper resolutions should be chiefly understood as resolutions acceptable in a particular legal culture.

²² Two remarks are also worth noting. First, there are no contra-indications for the argument-rule of reasoning to appear as a premise of the argument-complex of utterances. Second, there is no specific class of rules of reasoning which would be entirely and directly rejected from use in the legal discourse. For example, see the statements of the National Appeal Chamber (KIO 1921/12) or the European Court of Human Rights (20981/10) about metaphor.

An argument considered to be a complex of a conclusion and premises is organised according to one or more rules of reasoning. The term "organised" means that content as well as mutual alignment of premises and conclusions is determined by at least given rule of reasoning. There are two types of such rules. Thus, each of the rules that governs an argumentative expression is either a logical principle (i.e. is based on the relation of entailment) or a rule which reveals to the audience that it is reasonable to approve of the conclusion. In regards to the second type, the audience sees the reasonability of approving of a conclusion in virtue of such rules that constitute the specific conditions or standards of proper resolutions for the issues discussed.

The rules that arrange conditions or proper resolutions for the issues discussed are also, i.e. aside from the described usage in respect to the complex of utterances, denoted by the term "argument" in a legal discourse.²³ Arguments of this kind, if they are verbalised, most often have a linguistic form of descriptive utterances. Nevertheless, they are always regarded as suggestions for conduct. As a result, their structure can be encapsulated in the scheme "X should (not) Y."

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²³ It must be stressed that rules-arguments function in a different manner in a legal discourse. They also have a diverse importance (notably: a diverse binding force) for its participants. A function of a particular rule as well as its significance specifically rests upon conceiving this rule either as a legal norm, as a directive of interpretation, as a conflict rule, as a rule of legal inference, or as a legal topic. Considerations concerning these questions are beyond the frames of the article.

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