

The Unchangeable Judicial Formats

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Abstract An analysis of a broad sample of Dutch judicial and semi-judicial decisions shows similar structures as the ones Bhatia and Mazzi found before. The question is posed what explains this seemingly unchangeable judicial format. From a perspective of argumentative and communicative efficacy and comprehensibility, the format is certainly not the optimal choice. The explanation is that the format is a sign of an ideology. The format suggests an objectivity of the decision taken. This is actually a myth. This makes a decision to change the format an ideological one.

Keywords Legal argumentation · Text formats · Modernism · Comprehensibility

1 Introduction

The textual formats of (semi-)judicial decisions show a remarkable uniformity. In the presentation of the arguments there is a strong preference for an argument–conclusion presentation order. Inferences from presented arguments to (sub)conclusions are often indefinite. Agents of relevant interpretative acts are often implicit. In Sects. 1 and 2 these observations will be detailed and illustrated.

The format with its characteristics is remarkable from a perspective of communicative efficacy and comprehensibility. From a perspective of comprehensibility, several of its features are patently suboptimal, while some of them complicate the text production for a writer who strives for an optimal intelligibility (Sect. 3).

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So this poses a problem, all the more since it turns out to be quite difficult to implement alternatives. Even when acknowledging that the opportunities to optimize comprehensibility have been convincingly demonstrated, still the institution as well as actual writer is hesitant about the desirability (Sect. 4). So the problem is how this contrariety can be understood. In Sect. 5 the semiotics of the format, as understood broadly in several theoretical approaches to the administration of justice, will be explored as a possible explanation for the unchangeability of the format.

2 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 ratio 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.

| House of Lords/Ireland's supreme court | Court of justice of the EC |
|--|---|
| Identifying the case | Identifying the case |
| Establishing the facts of the case | Identifying the scope of proceedings before the Court |
| Arguing the case | Retrieving the relevant community and/or national legislation |
| Stating the history of the case | Stating the history of the case |
| Identifying the conflict of categorization | Arguing the case |
| Presenting the arguments | Arguments of the parties |
| Deriving the ratio decidendi | Arguments of the court |
| Pronouncing the judgment | Settling costs |
| | Pronouncing judgment |

I have analyzed (a) a broad sample of more than 140 decisions of different judicial courts (from courts in first instance, appeal court and the Supreme Court, as well as from the highest administrative court in The Netherlands (Afdeling Rechtspraak van de Raad van State) (b) a sample of 30 decisions of first instance criminal courts (references are in Van den Hoven & Plug 2008) (c) a sample of over 80 decisions of semi-judicial institutions (decisions of a local social security appeal committee, decisions of the Netherlands Competition Authority, decisions of the Dutch Data Protection Authority, decisions of the Foundation for Complaints and Disagreements about Medical Insurances (Stichting Klachten en Geschillen Zorgverzekering).¹ Not all of these texts have been published. In The Netherlands

¹ Most of these texts have not been published. In The Netherlands only about 3% of the judicial decisions is actually published. The texts of the corpora (except (b)) have been collected during internal seminars in the institutions mentioned. The fact that the author had access to the genesis of these texts, to earlier

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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) there were files available that included concept versions, comments of seniors, comments of the formal decision makers; these files provide a detailed insight into the conventions, the tactics and sometimes also into the process of socialization of new writers.

These analyses of Dutch judicial and semi-judicial practices show structures similar to the ones Bhatia and Mazzi found. However, there are minor variations in the texts. *Stating the history of the case* is sometimes an element standing somewhat apart from *arguing the case*, mixed with the facts. Particularly in the decisions of the appeals committee, a very long history of the specific client is often incorporated at the beginning of the text. In Dutch law court decisions we do not usually find a separate part in which the relevant legislation is retrieved. In texts of the Dutch Data Protection Authority, on the other hand, this element is very prominent indeed. Formal judicial decisions take the form of an explicit speech act of *pronouncing the judgment*, while semi-judicial decisions tend to merely draw a conclusion from the arguments, without repeating this as an explicit declaration. Some of the semi-judicial institutions present the text as an appendix to a formal letter; this is not done in the court decisions. And so on. These variations exist mainly between the sub-corpora, not within them. Within the sub corpora, the homogeneity on the macro level and in micro stylistics is staggering, even where the variation in the quality of the writers on the micro level is substantial, which means that the preference for these structures is apparently 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)* always occurs between the facts as the opening stage and the decision as the final stage. This macrostructure tends to repeat itself in the heart of the argumentation. There once again we see a preference for a presentation order of arguments–conclusion. A presentation order of standpoint–arguments is rare.

The texts also share a frequent occurrence of repetition and paraphrases. This seems to be a consequence of the macro structure. Because the facts and (optionally) relevant legislation have first been 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.

Footnote 1 continued

versions, comments of the authors as well as the superiors, was the reason to construct this corpus in stead of a corpus of published texts. The theoretical problem why the formats are as unchangeable as they seem to be, regards of course all texts, published or unpublished. There is no reason to assume that the corpus is not representative.

3 Examples

I will present some examples to illustrate these observations. The examples are authentic but they have been made unrecognizable. In the translations, the Dutch word order is followed rather closely. The first text is a typical example of the findings of an official investigation carried out by the Dutch Data Protection Authority. The Dutch DPA supervises compliance with acts that regulate the use of personal data, such as the Personal Data Protection Act. This is a law regulating the conditions under which 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 constitute a judicial decision, although its conclusions can be used as ground for legal enforcement. The text is presented as the supplement to a one-page letter stating that the investigated practice is unlawful and subsequently referring to the supplement for details. 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*. At crucial moments, the agent behind interpretative and evaluative acts, in this case *considering necessary*, is hidden, even though in the sentence this agent (CBP) is explicitly present as the agent of the non-interpretative act of *attaching*.

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* bear no clear relation to the subheadings of *Judgment*. This reveals that the structure of the two sections is functionally unrelated. Most facts and rules are repeated in the *Judgment* section—the heart of the argumentation—be it not literally. Thus the macro structure is not functionally utilized. It symbolizes (suggests) a logic: *facts—rules—judgment*, but in actual fact 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. In doing so, however, X does not satisfy article 33 of the Personal Data Protection Act, as worked out in the directives, demanding that besides his name and company address an electronic contact address be published as well.

- (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 of the 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 the ages of 10 and 15. Young people under 16 cannot be expected to be aware of all the consequences of their actions. Children are inherently vulnerable, with a not yet fully developed ability to make their own choices. Considering the above-mentioned, X is acting in violation of what is prescribed in article 6 now that he has failed to take account of the fact that it is only the legal representative that can grant permission for a minor.

Passage (3) illustrates some of the standard micro-features. Subjectivity markers are avoided, no indication is given of the specific agent (the CBP): *Established is ...Young people under 16 cannot be expected to...X is acting 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 employs 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.

The accused together with his son went to the house of someone who he thought owed him money and when he was in the house of the victim, together with his son, he intimidated him in order to get him to give them a certain sum of money. This failed because the victim did not have any money in the house. But the accused succeeded in diddling the victim out of his mobile phone by threatening him with a vacuum cleaner.extension tube (more facts). The court reckons heavily against the accused the violent method employed in the extortion and the attempt at extortion. An important element in this is that facts like these not only strike great terror into the victims and cause them to feel unsafe and insecure for a long time after, but that they also lead to feelings of fear and insecurity in society as a whole. Furthermore the court takes into consideration that the punishable facts, committed in the private sphere, constitute a major infringement of the integrity and privacy of the victim. The considerations above bring the court to sentence the accused to imprisonment (for a period of 15 months). In order to stimulate the accused to voluntary do something about his alcoholism as well as to prevent him from committing crimes in the future, the court will impose part of the punishment as a suspended sentence.

A reader will understand that the facts mentioned are claimed to be relevant to the judgment that 15 months is an adequate punishment. However, the rather undetermined argumentative indicators (an important element in this ..., *furthermore* ... and *the considerations above bring* ...) leave aside what precisely the relations are between the explicitly stated argumentative utterances and the conclusion. This is a fairly 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 at the ‘micro’ level of the phenomenon we observed on the level of the macrostructure. The structure suggests that it is a matter of (deductive) logic, but in actual fact does not substantiate this.

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

| | |
|--|--|
| <p>(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. (...)</p> | <p>The person concerned on the basis of article 65 has the legal duty, whether requested to do so or of his own accord, to supply to Mayor and Aldermen all information of which he knows, or in fairness can know, that it is important for the right to welfare</p> <p>Generally speaking it may be expected that it is demonstrated that the supplied information is correct and complete (...)</p> |
| <p>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 [...]</p> | <p>From the documents it has become clear that you have submitted on [date] a pay slip from which could be deduced that on [date] you received earnings from labor. The allowance was terminated on [date] and the surplus amount received of [sum] was claimed back. In response to this you stated [statement]</p> <p>This statement was insufficient to prevent the fine of [sum] being imposed; notified through disputed decision</p> <p>The reduction on [date] of the sum to be reclaimed to [sum] did not lead to a reduction of the fine imposed [...]</p> <p>The argument that you did not sign your contract until [date] can not be regarded as reasonable. [...]</p> <p>The argument that the original salary calculations up to and including [date] were given to the employees quarterly, so that you could not deliver them sooner, loses its force [...]</p> |

And so on. The text ends with the declaration that the objection is unfounded.

Besides an illustration of the preferred order in the heart of the argumentation, the passage shows the systematic stylistics that hide the institutional agents of the judgments, evaluations and interpretations (compare the bold expressions). The client, however, is explicitly staged. This imbalance is an almost systematic feature of the subgenre.

4 Communicative Efficacy and Comprehensibility

From the analysis of a large and diverse corpus of judicial decisions and a corpus of more than 80 semi-judicial decisions from four different institutions, we can conclude that not only law courts, but also semi-judicial bodies adopt a text format as characterized by Bhatia and Mazzi. 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. This is all the more remarkable, since different choices provide more adequate alternatives to fulfill the stated goal of the text, which is to explain the decision taken vis-à-vis 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 would seem to be more amenable to general 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 and in detail, it would be quite plausible to assume 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, would better serve optimal comprehensibility than the format currently used. In addition (d) specific argumentative indicators should be used, including (e) clear indications of those responsible for taking the decisions and of their responsibilities. On a number of vital dimensions, such a format is the opposite of the format currently employed.

The format and stylistics employed throw up a barrier to non-expert readers comprehending the content. In the macro structure, the sections that separately present the 'facts', the history and the legal framework serve no function at all for the readers. The argumentative relevance is missing. This is confirmed in fraternal discussions. Even among specialists there is hardly ever consensus about the adequacy and relevance of the stated facts and rules. The order of presentation lacks articulated argumentative relations. It therefore permits and even stimulates the strategy of including a large amount of facts and rules, without reflecting deeply on their actual relevance.

An utterance becomes an argument in relation to a standpoint. Usually a standpoint is easily recognizable because it relates directly to the issue at hand. The opposite order is more difficult. It is hard to identify an utterance in its 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 readers with the narrative of a (fictional) decision-making process instead of presenting them with the decision taken followed by an argumentation justifying that decision.

These claims about an increased efficacy and comprehensibility of the standpoint-argument format are best illustrated by translating one of the given examples, fragment (3) into it. The final standpoint in the fragment is *X is acting in violation of what is prescribed in article 6*. A reader will and can now expect two pieces of information: what is in article 6 and how does X's acting violate this? Article 6 says that personal data should be processed in accordance with the law and in a proper way. The original text tells us that that *X has failed to take account of the fact that it is only the legal representative that can grant permission for a minor*. Three remarkable things become clear now. (1) The text of the article and the text about X's behavior could not be further apart! (2) The original fragment misses crucial information that X's data processing violates a law and which law this is. (3) A large part of the original text that deals with the awareness of young people, is not an essential part of the argument. The efficacy of the alternative format immediately reveals this. Besides this the translation results in a more comprehensible text:

X is acting in violation of what is prescribed in article 6 of the Personal Data Protection Act. Article 6 prescribes that personal data should be processed in accordance with the law and in a proper way. X's data processing however is in violation with [article?] now that he has failed to take account of the fact that it is only the legal representative that can grant permission for a minor.

5 The Semiotics of the Format

We can observe a strong homogeneity in the text formats used. Furthermore we notice the use of a number of stylistic features, already mentioned by Mellinkoff (1963), that are often criticized as unwelcome but that seem to be ineradicable. Many of these features—nominalizations, excessive 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 ingrained in legal practice. Although it turns out to be possible to alter the macro-structure in semi judicial environments, the responses to a proposed change are revealing. Writers often state that a standpoint–argument order suggests partiality. If one continues to question why, they often retort that current practice symbolizes impartiality. Many of them put forward 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 ought to go 'theoretically' or 'ideally'.

One can observe that most of the professionals do not really reflect on the basic choices they make in the presentation. In the institutions that we studied new employees learn the format by copying successful examples, rather like apprentices learning the 'craft' from the master. The majority of the employees all had legal training and were therefore socialized in the format in the course of their studies. Another strong factor operative in passing on the stylistic features on the micro level is the form letter and form paragraph, available from databases on the Intranet. Thus there are also many social, technological and practical factors that create the homogeneity, without there being a conscious, individual intention to preserve current practice.

The strategic meaning of the format is therefore a *semiotic* phenomenon as it is culturally ingrained in the institutions as well as in the society. The format carries 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 instances where this ideology is no longer feasible. 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 *ascertains* the facts, is then *confronted* with the force of the appropriate rules of law and subsequently *has to conclude* on the basis of 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 means of linguistic devices such as a very formal tone, extensive use of passives, nominalizations, avoidance of the first person), but the facts, the rules and logic.

6 The Myth of Modernity

The question is how to evaluate this sign value of the judicial format. Are judicial decisions indeed an objective subsumption of the facts under a given rule, or, at the very least, do judges indeed seriously try to reach (act in accordance with) this ideal? Sometimes it is clear and obvious that they do not. The written decision of the United States Supreme Court decision of *Bush v. Gore* (2000), which effectively ended the 2000 Presidential election campaign, is constructed according to the standard format. However, this time a lot of the people did not ‘buy’ it. According to Scott Jacobs (2009) “The rationale of the Court was taken to be an unusually transparent front for the real reasons for the majority (5–4) decision. Justices aren’t supposed to be partisan (the majority 5 were appointed by the Republicans; the minority dissenters were all appointed by the Democrats)”. Is this decision the exception or is it an (extreme) example of what we are actually dealing with in most, less spectacular decisions?

Obviously politically inspired decisions like this one are indeed exceptional, but the same cannot be said with regard to decisions in which the personality of the judges is strongly involved. One needs to acknowledge that in many cases another judge could very well have ruled differently. Recently the experienced judge Peter Ingelse (2010) wrote openheartedly in a Dutch legal journal [translation is mine]: “The judge must be independent, impartial and objective. The person of the judge is irrelevant. This picture is supported by the nature of the objective law, by the blindfold worn by Lady Justice and by the axiom of equality before the law. [...] But this picture of the impersonally acting judge is not correct. The person of the judge plays an important role in legal proceedings”.

The 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 in many different legal theoretical traditions, from American Legal Realism (most influentially formulated by Jerome Frank (1949) to legal positivism (for instance by Kelsen (1979, compare also Van den Hoven 1988) and almost consistently in

modern theories that analyze the administration of justice as an argumentative practise (for instance McCormick 2005).

The Dutch legal scholar Nieuwenhuis is very outspoken about it and states that of course it is a naive fantasy to believe that it is the Law that decides, and not the judge, but that this is no reason to give up this fantasy in the judicial discourse, because the acceptance of the authority of the judge is served by this fantasy (Nieuwenhuis 1995). Most legal theorists admit that 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 given by Nieuwenhuis in so 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 reflect a concept of justice that still has a strong ideological topicality. The rhetoric of the format is an expression of the ideal norm (an *ought*, a 'Sollen'), not of a practise (an *is*, a 'Sein'). It symbolizes the modernistic ideals on which modern (Western) societies are 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 30-year war (1618–1648 AD). Modernity is connected with the ideals of the universal truth and values associated with names like Spinoza, Newton and Descartes (compare also the magnificent work of Israel 2001). General principles not only regulate the physical world, but also guide 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. 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 righteous and just if the decision is in harmony with that which 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 the ability 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—still according to this modernistic ideology—is a temporary thing. According to the doctrine of the separation of powers it is an exclusive privilege of the legislator to improve such an imperfection. Therefore, it is not the judge but the Law that decides; the judge is still 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 obvious 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 in a straightforward fashion in a discursive practice. Argumentative discourse is an ideological sign as well.

7 The Balance

The unchangeable judicial format is a sign of an ideology that is actually a myth. The format suggests an objectivity that is not real. From a perspective of communicative efficacy and comprehensibility, the format is certainly not the optimal choice. So what does that mean? Should the unchangeable judicial format be changed nonetheless?

What is most important is that it should be admitted that this is an ideological problem. From the perspective of readability as well as from the perspective of 'writeability'—not unimportant in this realm—one should change the format into a format that roughly speaking uses the conclusion–argument order on the macro and on the micro level and that indicates clearly and explicitly the argumentative responsibilities that follow from the involvement of the decision makers' personal values. So the issue is how to assess and evaluate the semiotic effects of such a change.

Contrary to the suggestion made by Nieuwenhuis, the argument that the community of judges—though convinced of the discrepancy between practice and ideology of the decision making process—should opt to continue the format that signifies the ideology *because it serves their authority* is not a plausible one. However, on the basis of the interviews held during the interventions it is clear that there is an intuition among the writers (compare Sect. 4) that comes close to what Scott Jacobs (2009) says. About the order of presentation he says: "I worry that if the conventional order does in fact implicate objectivity, then deliberately using the unconventional order is going to implicate subjectivity, partiality, and arbitrariness". With regard to the stylistic conventions, he remarks: "Even if the effect of such stylistic conventions is merely to convey adherence to a norm of objectivity, what would be the effect of deliberately flouting such conventions? Do we want to communicate that? And if we don't, how is that to be avoided, and avoided convincingly?"

Formally, the concerns of the actual writers as well as those voiced by Scott Jacobs are based on a fallacy. If the order of the unchangeable formats signifies objectivity it does not follow logically that an alternative order or even the

‘opposite’ order should signify subjectivity. Nevertheless, this might indeed be the case. The reverse order and the use of explicit ways to indicate that the decision maker as a subject is involved in the decision may indeed be signified. But only because he/she really is! So what this means effectively is that the decision maker clearly admits that he/she is accountable, that—usually in nuances and within certain boundaries—the decision could have been different if it had been taken by another person and that therefore the ‘client’ is entitled to expect a clear and careful account that the decision taken is possible within the framework of criteria (though not the *only* possible one) and that it is a reasonable option according to the values of the authority who has been appointed to take these decisions. So instead of formulating that the reverse order implicates “subjectivity, partiality, and arbitrariness”, one may formulate that it implicates subjectivity and accountability.

The choice is an ideological one. The analysis from a communication theoretical and legal theoretical point of view presents the options, their effects and the ideological background of the dilemma.

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