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Dijaloška rekonstrukcija na pravnata justifikacija

Analiza na slučaj

Vo ovoj trud e napraven obid dijaloškiot priod kon modeliranjeto na pravnata justifikacija da se primeni vrz konkretna pravna materija i da se prezentira dijaloška rekonstrukcija na edna kontroverzna sudska odluka od makedonskiot praven kontekst. Rekonstrukcijata e izvršena so koristenje na eden od sovremenite dijaloški modeli na pravnata justifikacija – modelot DiaLaw na Arno Loder. Dijaloškiot priod vrz koj se temeli ovoj model se pokažuva kako pogodan za pretstavuvanjeto na argumentativnata dinamika i na strategiskite elementi na pravnata justifikacija. Sepak, se ušte postojat opredeleni otvoreni prašana povrzani so negovata upotreba, osobeno vo pogled na normativniot status na dijaloškite pravila i na možnosta za modeliranje na ulogata na sudijata ili arbiterot vo pravnite kontroverzi.

Ključni zborovi: pravna argumentacija, pravna justifikacija, dijaloško modeliranje na sudske odluki, logika na razlozite, modelot DiaLaw na Arno Loder, sudija

1 UVOD: FILOZOFSKITE, PRAVNITE I LOGIČKITE ASPEKTI NA JUSTIFIKACIJATA

Vo filozofska smisla, procesot na justifikacijata može da se opredeli kako poznavatelno legitimiranje na veruvanjata koi se smetaat za vistiniti ili izdržani, preku artikuliranje na razlozite za nivnoto prifañanje.¹ Problemot na justifikacijata vo sovremenite epistemološki i metodološki istražuvanja se tretira kako integralen del od proučuvanjata na poširokiot fenomen na racionalnosta. Vo ponovite priodi kon ova pole, racionalnosta najčesto se tretira ne kako homogen koncept, tuku se razgleduva kako diferencirana vo poveќе različni oblici – analitička, dijalektička, proceduralna, potkrepuvačka racionalnost, itn. – vo

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1 Ovoj tekst se zasnova vrz mojata prezentacija na Godišnata konferencija na Central and Eastern European Network of Jurisprudence (CEENJ), *The Challenges of the Contemporary Jurisprudence*, koja se održa vo Sarajevo od 13 do 16 septemvri 2012 godina, vo organizacija na Pravniot fakultet na Univerzitetot vo Sarajevo. Bi sakala da im se zablagodaram na učesnicite na ovaa konferencija, na urednicite na *Revus*, kako i na dvajcata anonimni recenzenti za nivnite možne korisni komentari za prvata verzija na ovoj tekst.

zavisnost od tipot na kriteriumite za izdržanosta na racionalnite proceduri vo različnite oblasti na nivnata primena.²

Edno od najznačajnite podračja vo koe procedurite na justifikacijata igra-at ključna uloga e podračjeto na pravoto. Vo glavnite oblasti na sozdavanjeto i na primenuvanjeto na pravoto, osobeno vo situaciite na adverzativnata pravna konfrontacija i adjudikacija, od site involvirani strani postojano se bara da gi obrazložit svoje gledišta preku razlozi i argumenti. Ova e neophodno so cel spomenatite gledišta da možat uspešno da bidat odbraneti vo visoko kompetitivnite argumentativni konteksti. Kako što istaknuva Feteris, „prifatlivosta na opredelena pravno stanovište zavisi od kvalitetot na negovata justifikacija”.³ Sledstveno, od filozofska gledna točka, pravната justifikacija može da se tretira kako specifičen vid racionalna justifikacija. Preku specificiranjeto na vidot na racionalnosta koj e karakterističen za pravnoto rasuđivanje i argumentacija i preku proučuvanjeto na negovite odliki, filozofski pristap vo značitelna mera ja rasvetluva prirodata na pravoto kako racionalna aktivnost.

Vo poširokata ramka na pravната argumentacija, pravната justifikacija pretstavuva osobeno važen element na odlukite na sudskite instanci. Glavnata cel na justifikacijata na sudskite odluki e da se pokaže nivnata soobraznost so normite na pravniot sistem, kako i nivnata usoglasenost so vrednostite koi ležat vo osnovata na toj sistem. Ottamu, dobro vtemelenata pravna justifikacija e eden od najvažnite pravni instrumenti so koi se garantiraat pravната sigurnost i pravdata kako temelni vrednosti na pravniot poredok.

Sepak, imajќi predvid deka pravnoto rasuđivanje e, vo prv red, rasuđivanje so principi i pravila koi ne se primenuvaat na mehanički način, tuku so ogleđ na specifičnite situacii, vrednosti i opštestveni interesi, očevidno e deka pokraj adekvatnata i racionalna upotreba na tehnikite na pravната justifikacija, možat, isto taka, da se javat i slučai na nivna možna zloupotreba. Praktikata pokazuje deka vo izvesni slučai mehanizmite na justifikacijata se instrumentaliziraat preku specifični argumentativni manevri. Ovaa instrumentalizacija se javuva vo slučaito vo koi postojat obidi da se legitimiziraat izvesni pravni gledišta koi protežiraat opredelen partikularan interes (od ekonomska, politička ili druga priroda), duri i po cena na suspendiranje na potragata po pravedno i nepristrasno rešenje na pravната kontroverza. Ottamu, od golemo teorisko i

2 Videte Aulis Aarnio, *The Rational as Reasonable: A Treatise on Legal Justification*, Dordrecht/Boston/Lancaster/Tokyo, D. Reidel Publishing Company (Law and Philosophy Library), 1987; Robert Alexy, *A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Justification*, translated by Ruth Adler and Neil MacCormick, Oxford, Clarendon Press, 1989; Aleksander Peczenik, *On Law and Reason*, Dordrecht/Boston/London, Kluwer Academic Publishers (Law and Philosophy Library), 1989.

3 Eveline T. Feteris, *Fundamentals of Legal Argumentation: A Survey of Theories on the Justification of Judicial Decisions*, Dordrecht/Boston/London: Kluwer Academic Publishers (Argumentation Library), 1999, 1. (Prevodot na makedonski na ovojo i na ostanatite citati vo tekstot e na avtorot.)

praktično značenje e obidot da se istražat možnostite za formuliranje na kriteriumi za efikasno razgraničuvanje na soodvetnata i nesoodvetnata upotreba na sredstvata na pravната justifikacija.

Pokraj filozofijata i pravната teorija, druga disciplina za koja e značajno proučuvanjeto na mehanizmite na pravната justifikacija e logikata. Pravната justifikacija, osobeno vo takanarečenite 'teški slučai', pretstavuva teoriski predizvik za objasnuvačkite i formalnite kapaciteti na standardnite logički teorii. Vo izvesni važni aspekti, ovie teorii se pokažaa kako nedovolno mokni ili sofisticirani za adekvatno da ja modeliraat argumentativnata dinamika i složenosta na tehnikite na racionalnata justifikacija vo mnogu polinja, osobeno vo poletu na praktičnoto rasuduvanje. Sledstveno, postoi potreba za oblikuvanje novi, posofisticirani teoriski orudija na logičkata analiza za reprezentacija i evaluacija na pravната justifikacija i, poširoko zemeni, na pravnoto rasuduvanje vo čii ramki taa e razviena. Glavnata poenta na ovoj trud e da ponudi uvid vo načinot na konstrukcija na nekoj od ovie orudija, kako i da ja testira nivnata primenljivost vrz konkretna empiriska materija.

2 POVRZUVANJE NA TEORIJATA I PRAKTIKATA – ANALIZA I REKONSTRUKCIJA NA SUDSKITE ODLUKI OD DIJALOŠKA GLEDNA TOČKA

Spored Feteris,⁴ vo sovremenite istražuvanja na pravната argumentacija možat da se razlikuvaa tri glavni teoriski priodi: *logički*, *retorički* i *dijalektički* priod. Ovie priodi se razlikuvaa vrz osnova na različnite koncepti za normite, kriteriumite i standardite na pravната justifikacija koi preovladuvaa vo ramkite na sekoj od niv. Ednovremeno, tie na različen naćin gi pretstavuvaa bazićnite strukturi na pravната argumentacija i justifikacija.

Vo logičkiot priod, so cel opredelena pravna justifikacija da bide okvalifikuvana kako prifatлива, neophodno e „argumentot koj leži vo osnovata na justifikacijata da može da se rekonstruira kako logički validen argument” a iznesenite razlozi da bidat prifatlive spored važećkite pravni standardi.⁵ Retorićkiot priod, koj pretstavuva eden vid reakcija na prenasglasuvanjeto na formalnite aspekti na pravната argumentacija od strana na logičkiot priod, akcentot go stava vrz „sodržinata na argumentite” i vrz „aspektite na prifatlivosta koi zavisať od kontekstot”.⁶ Vo ovoj priod, justifikacijata se tretira kako zavisna od auditoriumot, vo smisla na toa što mera za prifatlivosta na justifikacijata e nejininata efikasnost za auditoriumot. Najposle, vo dijaloškiot priod, „pravната

4 Feteris 1999 (bel. 3), 15–20.

5 Feteris 1999 (bel. 3), 15.

6 Feteris 1999 (bel. 3), 16.

argumentacija se smeta kako del od dijaloga za prifatlivost na opredeljeno pravno gledište.⁷ Pokraj formalnata i materijalnata dimenzija na pravnata justifikacija, ovoj priod ja zema predvid i proceduralnata dimenzija. Ušte poveke, vo dijaloškiot priod i samite kriteriumi za racionalnosta na pravnite diskusii se definirani na proceduralen način.⁸

Iako vo pogled na prifañanje na koj i da bilo od spomenatite teoriski priodi možat da se navedat različni teoriski razlozi 'za' i 'protiv', se čini deka osobeno značen test za nivnata funkcionalnost e analizata na konkretni odluki prezeni od realnata sudska praktika.

Vo golem broj sovremeni pravni sistemi individualnite i/ili kolektivnite sudske instanci imaat zakonska obvrsta da gi obrazložuvaat svoje odluki na racionalen i javen način. Za teoretičarot zainteresiran za logičkite i filozofskite aspekti na pravnoto rasuđivanje, korpusite od obrazloženi sudske odluki, koi gi opfaaat kako odlukite na sudske instanci od različnite nacionalni pravosudstva taka i onie doneseni vo ramkite na meunarodnoto pravo, nudat izobilstvo od empiriski materijal za različnite ramništa na teoriskite proučuvanja. Na primer, edna vmatelna argumentativna analiza na justifikacijata na konkretnite sudske odluki bi možela da otkrie značajni aspekti na pravnoto rasuđivanje koi voobičaeo ostanuvaat implicitni. Ovie aspekti možat da gi vklučuvaat prikrivenite vrednosni izbori napraveni od sudiite, nivnoto usvojuvanje na posebni pravni filozofii, nivnoto pripisuвање na različna težina na istite pravni principi, kako i upotrebuvanjeto na različni argumentativni manevri so cel da se obrazložat i opravdaat posakuvane konkluzii. Ednovremeno, kako što veke beše spomenato, ovoj vid analiza pretstavuva neprocenljivo značajno sredstvo za ocenuvanje na soodvetnosta i objasnuvačkiot dostrel na apstraktnite teoriski modeli na pravnata justifikacija, koi možat da bidat poveke ili pomalku uspešni vo spravuvanje so konkretniot empiriski materijal.

Vo ovoj kontekst, kolektivnite sudske odluki so izdvoeni mislenja se osobeno interesen fenomen za analiza. Ovoj vid odluki, koi vklučuvaat maksimalen stepen na kontroverznost, gi odrazuvaat nesoglasuvanjata koi se javuvaat duri i pomegu sudiite koi odlučuvaat za eden ist slučaj. Tie na osobeno jasen način ja pokažuvaat dlabočinata na pravniot problem za koj stanuva zbor, kako i možnosta uverljivo da se argumentira vo prilog na dvete strani na kontroverzata.

Sledstveno, vo ovoj trud ke bide napraven obid da se primenat konceptualnite resursi na dijaloškiot priod kon pravnoto rasuđivanje i argumentacija vo analiza i reprezentacijata na eden argumentativen sudir na različni sudske gledišta vo konkretna pravna situacija. Ke bide predložena dijaloška rekonstrukcija na justifikacijata na edna odluka prezemena od makedonskiot praven kontekst.

7 Feteris 1999 (bel. 3), 19.

8 Feteris 1999 (bel. 3), 20.

Odlukata za koja stanuva zbor, od oblata na ustavnoto pravo, predizvika golem broj kontroverzi ne samo megu sudiite koi bea vklučeni vo sudenjetu za slučajot, tuku i vo poširokata opšttestvena i naučna zaednica. Dvajca sudii na Ustavniot sud imaa različni mislenja od mnozinstvoto sudii i ovie mislenja bea publikuvani odvoeno od mnozinskata odluka. Taka, tekstualnite podatoci za analizata koja sleduva se prezemeni od tri dokumenti – odlukata na Ustavniot sud i dvete izdvoeni mislenja.

Zošto e izbran dijaloškiot priod vo izveduvanjeto na ovaa analiza? Najnapred, ovoj priod se čini kako najpogodna konceptualna platforma za analiza na kontroverzite bidejki ja prikažuva pravnata justifikacija kako regulirana razmena na tezi i argumenti pomegu proponentot i oponentot, razmena čijašto cel e edno pravno gledište da se odbrani od aktualnite ili možnite napadi vrz nego. Ponatamu, opštite teoriski postavki na dijaloškiot priod ja dopuštaat upotrebat na formalnite dijaloški modeli vo koi voobičeenite logički operaciji na dedukcija se pretstavani vo čisto dijaloška forma.⁹ Na toj način logičkoto jadro na rasuduvanjeto e sočuvano, no e integrirano vo poširopkiot kontekst na pravilata za diskusija. Ova vodi do tretata glavna karakteristika na dijaloškiot priod, koja se sastoi vo naglasuvanjeto na proceduralniot element vo ovoj priod.¹⁰ Imeno, konstruiranjeto na dijaloškite modeli, vključitelno i modelite na pravnata justifikacija, e zasnovano vrz formuliranje na kompleks od proceduralni pravila koi precizno ja opredeluvaa ulogata i možnite potezi na sekoj učesnik vo dijalogot. Ovaa odlika ovozmožuva dijalogot pomegu proponentot i oponentot da se tretira kako vid logička igra. Izrazot 'logička igra' vo ovoj kontekst označuvaa regulirana diskurzivna interakcija zasnovana vrz sledenjetu na korpus od pravila. Ovie pravila možat da bida upotrebeni od strana na učesnicite na kreativen i strateški način za da se postigne glavnata cel – pobedata vo igrata.¹¹

Zemajki gi predvid site ovie karakteristiki, može da se zakluči deka dijaloškiot priod kon pravnoto rasuduvanje se odlikuva so dve temelni teoriski prednosti. Od edna strana, ovoj priod e intuitivno plauzibilen vo smisla na toa što verno go prikažuva prirodniot način na rasuduvanje i argumentiranje vo pravniot kontekst. Od druga strana, toj isto taka otvora različni možnosti za primena na formalno-logičkite metodi vo analizata na argumentativnite fenomeni. Sèpak, sè ušte e otvoreno prašanjeto dali može da se izgradi eden adekvaten model na *pravnata* justifikacija bez vo nego da se pretstavi ulogata na tretata strana,

9 Else M. Barth and Erik C. W. Krabbe, *From Axiom to Dialogue: A Philosophical Study of Logics and Argumentation*, Berlin/New York, Walter de Gruyter (Grundlagen Der Kommunikation Und Kognition/Foundations of Communication and Cognition), 1982, 29.

10 Sporedete pogore.

11 Shahid Rahman and Laurent Keiff, On How to Be a Dialogician: A Short Overview of Recent Developments on Dialogues and Games, in Daniel Vanderveken, (ed.) *Logic, Thought and Action*, Dordrecht, Springer, (Logic, Epistemology and the Unity of Science), 2005, 359–408.

kojašto ja proširuje bazičnata dijaloška struktura i e odgovorna za razreševanje na sporot vo svojstvo na sudija ili arbiter.¹² Na ova prašanje ke mu bide posveteno osobeno vnimanje vo završniot del od tekstot.

Vo sovremenite logički i filozofski istražuvanja na pravnata argumentacija postojat poveќе različni platformi za nejzinoto dijaloško modeliranje.¹³ Sepak, vo ovoj trud samo edna od niv ke bide upotrebenata kako metodološka alatka za analiza: toa e modelot DiaLaw na Arno Loder, vo verzijata prezentirana vo negovoto delo *DiaLaw: Za pravnata justifikacija i dijaloškite modeli na argumentacija*.¹⁴ Razlozite za ovoj izbor se slednive: prvo, toj e dijaloški model konstruiran so eksplicitna cel da služi kako alatka za formalna analiza i reprezentacija na pravnata justifikacija, i vtoro, negovata sopstvena teoriska osnova e t.n. 'logika na razlozite' ('reason-based logic'), logička platforma razvijena za proučuvanje na logičkrite aspekti na pravnoto rasuduvanje, no so potencijalno mnogu poširoki teoriski implikacii.

Primenata na Loderoviot model vo ovoj trud ke go sledi poprvu duhot otkolku slovoto na modelot. So cel da se odbegne optovaruvanje na tekstot so tehnički i formalni detalji, rezultatite od analizata nema da bidat prezentirani vo formalniot jazik na DiaLaw tuku edinstveno vo forma na simulacija na dijalog vo prirodniot jazik pomegu dvajcata personificirani protagonisti na različnite mnenija. Isto taka, dodeka vo verzijata na Loderovoto delo upotrebeno kako izvor za ovoj trud primenata na modelot na konkretni primeri e izvršena vrz re-

12 Sporedete Henry Prakken, A Formal Model of Adjudication Dialogues, *Artificial Intelligence and Law* (2008) 16, 305–328.

13 Sporedete, na primer, Thomas F. Gordon, *The Pleadings Game: An Artificial Intelligence Model of Procedural Justice*, Dordrecht/Boston/London, Kluwer Academic Publishers, 1995; Henry Prakken, From Logic to Dialectic in Legal Argument, (1995), <http://www.cs.uu.nl/groups/IS/archive/henry/DiaLAW95.pdf> (12 May 2013); Arno R. Lodder and Aimée Herczog, DiaLaw: A Dialogical Framework for Modeling Legal Reasoning, (1995), <http://arno.unimaas.nl/show.cgi?fid=40> (12 May 2013); Harry Bart Verheij, *Rules, Reasons, Arguments. Formal Studies of Argumentation and Defeat*, Dissertation Universiteit Maastricht, 1996, <http://www.ai.rug.nl/~verheij/publications/proefschrift/dissertation.pdf> (12 May 2013); Henry Prakken, *Logical Tools for Modelling Legal Argument: A Study of Defeasible Reasoning in Law*, Dordrecht/Boston/London, Kluwer Academic Publishers (Law and Philosophy Library), 1997; Henry Prakken and Giovanni Sartor, A Dialectical Model of Assessing Conflicting Arguments in Legal Reasoning, in Henry Prakken and Giovanni Sartor (eds.), *Logical Models of Legal Argumentation*, Dordrecht, Kluwer Academic Publishers, 1997, 175–210; Jaap Hage, A Theory of Legal Reasoning and a Logic to Match, in Henry Prakken and Giovanni Sartor (eds.) 1997 (bel. 13), 43–117; Arno R. Lodder, *DiaLaw: On Legal Justification and Dialogical Models of Argumentation*, Dordrecht/Boston/London, Kluwer Academic Publishers (Law and Philosophy Library), 1999; Eveline T. Feteris, A Dialogical Theory of Legal Discussions: Pragma-dialectical Analysis and Evaluation of Legal Argumentation, *Artificial Intelligence and Law* (2000) 8, 115–135; Douglas N. Walton, *Legal Argumentation and Evidence*, University Park, PA, Pennsylvania State University Press, 2002; Jaap Hage, *Studies in Legal Logic*, Dordrecht, Springer (Law and Philosophy Library), 2005.

14 Lodder 1999 (bel. 13).

lativno pomali fragmenti na pravni argumentativni diskusii,¹⁵ tuka e napraven obid diskusijata da se prikaže vo što e možno pogolem obem.

Sepak, priodot vo ovoj trud gi spodeluva glavnite metodološki preokupacii na Loderoviot i drugite dijaloški modeli na pravната justifikacija: naporot da se ekstrahira argumentativното jadro od integralnata forma na realnata justifikacija na edna sudska odluka i da se pretstavi vo 'dijalektičko ruvo'. Na takov način se ovozmožuva identifikuvanje ne samo na argumentativnata 'statika' na justifikacijata, vo smisla na relaciite na potkrepenost pomegu iskazite od koi taa e sostavена, tuku i na 'dinamikata' na razmenata na argumentite, t.e. posebните načini na koi sekoj od argumentite e (ili može da bide) воведен, napadnat ili odbranet vo tekot na diskusijata. So toa, proučuvanje na ovoj konkreten empiriski materijal može da pridonesе kon negovata primarna cel – testiranje na primenlivosta na izvesni teoriski konceptii i, dokolku e potrebno, ukažuvanje na možnostite za nivno natamošno подобruvanje.

3 OPIS NA METODOLOŠKATA ZADNINA ZA DIJALOŠKATA REKONSTRUKCIJA

3.1 Logikata na razlozite i nejzinite bazični idej

Razviena vo tekot na devedesettite godini na dvaesettiot vek od strana na Hage, Verhej, Loder i drugi avtori, logikata na razlozite ima za cel da gi doлови specifičnite odliki na rasuduvanje so pravila i principii, koe sistematski go vklučuva balansiranjeto na razlozite za i protiv opredelena konkluzija.¹⁶

Osnovniot uvid vrz koj se bazira konstrukcijata na logikata na razlozite e deka postoi suštествена razlika pomegu rasuduvanje so iskazi koi se ili vistiniti ili lažni i rasuduvanje so pravila, osobeno na podračjeto na pravoto. Imeno, dodeka prašanje za primenata voopšto ne se postavuva vo slučajot na iskazite, koga stanuva zbor za pravilata, tie moraат da se primenat za da proizvedat soodvetni konsekvenci.¹⁷

15 Sporedete Lodder 1999 (bel. 13), ch. 5.

16 Videte, na primer, Jaap Hage, H. Bart Verheij and Arno R. Lodder, Reason-Based Logic: A Logic that Deals with Rules and Reasons (1993), <http://www.ai.rug.nl/~verheij/publications/pdf/naic93.pdf> (13 May 2013); Jaap Hage and Bart Verheij, Reason-Based Logic: A Logic for Reasoning with Rules and Reasons (1994), <http://www.ai.rug.nl/~verheij/publications/pdf/lcai94.pdf> (13 May 2013); Lodder and Herczog 1995 (bel.13); Verheij 1996 (bel. 13); Hage 1997 (bel. 13); Bart Verheij, Jaap C. Hage and H. Jaap Van Den Herik, An Integrated View on Rules and Principles, *Artificial Intelligence and Law* (1998) 6, 3–26; Lodder 1999 (bel. 13); Arno R. Lodder, Law, Logic, Rhetoric: A Procedural Model of Legal Argumentation, in S. Rahman et al. (eds.), *Logic, Epistemology and the Unity of Science*, Dordrecht/Boston/London, Kluwer Academic Publishers, 2004, 569–588, <http://ssrn.com/abstract=1312456> (13 May 2013); Hage 2005 (bel. 13).

17 Hage and Verheij 1994 (bel. 16), 1–2.

Vo ramkite na logikata na razlozite, pravilata se tretiraat kako 'logički indivi-
dui' koi imaat kondicionalna struktura, što znači deka se sostojat od del koj go
izrazuva uslovot i del koj ja izrazuva konkluzijata. Vo princip, dokolku uslovite
na pravilata se zadovoleni, togaš se dobivaat nivnite konkluzii.¹⁸ Taka, funda-
mentalnata ideja na logikata na razlozite e deka „primenata na koe i da bilo
pravilo vodi kon razlog koj pledira za konkluzijata na toa pravilo”.¹⁹ Na primer,
ako praviloto 'Dokolku nekoj e kradec, togaš toj treba da se kazni' se primeni
vrz slučaj na kražba, toa generira razlog za kaznuvanje na kradecot. Sepak, ovaa
konkluzija ne sleduva 'avtomatski', zatoa što vo opredeleni slučaj može isto taka
da postojat razlozi koi plediraat protiv konkluzijata, vključitelno situaciji vo koi
postojat isključoci od pravilata, sudir na različni pravila, itn.

Tretirajki gi pravilata kako entiteti koi generiraat razlozi, logikata na razlo-
zite mu dava centralno mesto na konceptot na razlog. Iako širokata definicija
na razlozite kako „množestvo od eden ili poveќе fakti koi, vo izvesna smisla,
se relevantni za nešto drugo”,²⁰ dava osnova za razlikuvanje na nekolku tipa
razlozi – konstitutivni razlozi, razlozi za veruvanje, za dejstvuvanje, itn. –
edna od najvažnite kategorijalni distinkcii vo ramkite na logikata na razlo-
zite e distinkcijata pomegu *pridonesuvačkite* i *odlučuvaučkite* razlozi. Dodeka
odlučuvaučkite razlozi gi opredeluvaaat svoje konkluzii vo taa smisla što dokolku
postoi odlučuvaučki razlog za edna konkluzija togaš se dobiva taa konkluzija,
pridonesuvačkite razlozi ne se sami po sebe dovolni za da ja opredelat konkluzi-
zijata. Spored zborovite na Hage:

Možat da postojat kako pridonesuvački razlozi koi plediraat za, taka i pridonesuvački
razlozi koi plediraat protiv opredelena konkluzija. Pod pretpostavka deka ne postojat
relevantni odlučuvaučki razlozi, množestvoto od site pridonesuvački razlozi vo pogled
na opredelena konkluzija, koe gi vklučuva kako razlozite za, taka i razlozite protiv,
opredeluva dali taa konkluzija ke važi.²¹

Tokmu zatoa pridonesuvačkite razlozi koi plediraat za edna konkluzija
sekogaš treba da se *odmeruvaaat* naspoti pridonesuvačkite razlozi koi plediraat
za sprotivnata konkluzija. Spored primerot na Hage, dokolku ličnost na vozrast
od dvanaeset godini izvršila krivično delo, faktot što taa ličnost go izvršila delo-
to e pridonesuvački razlog za da bide kazneta, no faktot što ima dvanaeset godi-
ni e pridonesuvački razlog taa ličnost da ne bide kazneta. Konkluzijata ke zavisi
od ishodont na procesot na odmeruvanjeto na pridonesuvačkite razlozi koi odat
vo različna nasoka, odnosno koi plediraat za različno rešenje na kontroverzata.

18 Hage 2005 (bel. 13), 87.

19 Hage and Verheij 1994 (bel. 16), 6.

20 Jaap Hage, *Monological Reason-Based Logic: A Low-Level Integration of Rule-based Reasoning and Case-based Reasoning*, (1993), <http://egov.ufsc.br/portal/sites/default/files/anexos/3229-3223-1-PB.pdf> (13 May 2013), 31.

21 Hage 2005 (bel. 13), 79.

Od logička gledna točka, izveduvanje na iskazite vo ramkite na logikata na razlozite e procedura koja se состоi od dva čekora. Kako što toa go opišuvaat Hage i Verheij, „prvriot čekor se состоi vo opredeluvanje na site razlozi koi plediraat za ili protiv možnata konkluzija; vtoriot čekor se состоi vo odmeruvanje na tie razlozi”,²² so cel da se opredeli koe množestvo razlozi pretežnuva nad drugoto. Isto taka, važno e da se zabeleži deka odmeruvanje na pridonesuvackite razlozi ne e tretirano na psihološki tuku na logički način, vrz osnova na dostapnite informacii povrzani so toa koe množestvo razlozi pretežnuva nad drugoto množestvo.²³

Lesno može da se vooči deka ovoj priod kon rasuduvanje so pravila e daleku posložen od ednostavniot deduktiven model koj leži vo osnovata na takanarečeniot ‘supsumptiven obrazec’ na pravnoto rasuduvanje. Ovoj deduktiven model go pretstavuva procesot na primenata na pravilata kako argument so forma *modus ponens*.²⁴ Sепak, konceptualizacijata bazirana vrz obrazecot *modus ponens* ne ja odrazuva složenata interakcija na različnite pravila i razlozi koi doagaat vo zaemen sudir; ovaа pojava e mošne karakteristična za pravnoto rasuduvanje, a za nejzinoto pretstavuvanje teoriskata ramka na logikata na razlozite e daleku popogodna.

Teoriskiot priod na logikata na razlozite e razvien vo dve verzii: monološka i dijaloška. Dodeka vo monološkata verzija akcentot e staven vrz fenomenot na izvodlivosta na iskazite, vo dijaloškata verzija argumentite se tretirani kako vidovi govorni činovi izvršeni vo eksplicitni ili implicitni komunikaciski konteksti. Argumentite i rečenicite od koi tie se sostaveni se upotrebuvaat so cel „da se uveri nekoj auditorium vo vistinitosta, validnosta ili prifatlivosta na nekoj iskaz ili pravilo”.²⁵ Auditoriumot ima aktivna uloga vo procesot na rasuduvanje zatoa što toj „se smeta za drugata strana vo dijalogot vo koj obete strani možat da pravat dijaloški čekori”.²⁶

Vo ovaа dijaloška perspektiva konceptot na ‘pobeda vo dijalogot’ soodvetstvuva na konceptot na validnost na argumentot sfaten na tradicionalen način.²⁷ Ova jasno pretpostavuva prifakanje na edno pragmatičko gledište za logičkite i argumentativnite fenomeni zatoa što tuka centralno mesto im se dava ne na samite iskazi i pravila, tuku na nivnata upotreba vo različni argumentativni konteksti. Toa, za vozvrat, ovozmožuva da se pretstavat mnogu značajni odliki na aktualnite argumenti koi ne možat adekvatno da bidat do-loveni vo klasičniot deduktivistički priod, odliki kakvi što se procesualniot ka-

22 Hage and Verheij 1994 (bel. 16), 6.

23 Hage 2005 (bel. 13), 80.

24 Hage 2005 (bel. 13), 88.

25 Hage, Verheij and Lodder 1993 (bel. 16), 9.

26 Hage, Verheij and Lodder 1993 (bel. 16), 9.

27 Hage, Verheij and Lodder 1993 (bel. 16), 9.

rakter na dijaložite, nivniot proceduralen aspect, distribucijata na tovarot na dokažuvanjeto pomegu stranite, kako i strategiskite komponenti na rasuduvanjeto i argumentacijata.

Ovie odliki na dijaloškata verzija na logikata na razložite nea ja pravat mošne funkcionalno sredstvo za analiza i reprezentacija na site vidovi argumentativni kontroverzi, osobeno na pravnite kontroverzi. Imajki predvid deka eksplicitna ili implicitna kontroverza, vo smisla na soočuvanje na razložite *pro* i *contra* opredelena pravno rešenje, leži vo osnovata na sekoe obrazloženo pravno gledište, sleduva deka dijaloškata verzija na logikata na razložite bi trebalo da bide optimalniot instrument za modeliranje na argumentativnite aspekti na pravnata justifikacija. Tokmu toa e vodečkata ideja vrz koja počiva konstrukcijata na modelot DiaLaw od Arno Loder.²⁸ Ovoj model ne samo što gi integrira bazičnite ideji na logikata na razložite, tuku i ideite na dijaloškata logika i na dijaloško-proceduralnata teorija na pravnata argumentacija (osobeno ideite na Aleksi, Arnio i Pečenik).

3.2 DiaLaw na Arno Loder – eden dijaloški model na pravnata justifikacija: temelnite koncepti²⁹

DiaLaw pretstavuva dijaloška igra pomegu dvajca učesnici vo koja dvajcata igrači možat da pravat potezi, odnosno čekori vo dijalogot. Celta na igrata e da se justificira tezata vo dijalogot: edniot igrač treba da ja izloži justifikacijata, a drugiот da ja prifati. Dvete strani vo dijalogot možat da pretstavuvaat individualni ličnosti, grupi od luѓe, pa duri i edna edinstvena ličnost kojašto argumentira za i protiv opredelen iskaz.

Sekoj poteg vo igrata se состоi od dva elementa, oblikuvani preku primenata na temelnite koncepti na Serlovata (Searle) teorija za govornite činovi: a) ilokutoren čin preku koj edna rečenica se tvrdi, se doveduva pod prašanje, se prifaќa ili se otfrla, i b) propozicionalna soдрќina, koja ja pretstavuva samata rečenica na koja se odnesuva govorniот čin. Tovarot na dokažuvanjeto vo DiaLaw se состоi vo obvrskata na igračot koj tvrdi opredelen iskaz da dokaže deka toj iskaz e opravdan (justifikuvan). Vo toj proces, igračot vrz kogo leži tovarot na dokažuvanjeto e proponent, dodeka drugiот igrač e oponent. Se razbira, ovie ulogi možat da se menuvaat vo tekot na igrata.

Centralen koncept vo igrata e konceptot na 'obvrzuvanje'. Potekloto na obvrzuvanje e tvrdenjeto ili prifaќanjeto na edna rečenica. Koga edna rečenica

28 Lodder and Herczog 1995 (bel. 13), Lodder 1999 (bel. 13).

29 Ovoj del od tekstot se bazira na Lodder 1999 (bel. 13), ch. 3, sect. 2. Sporedete ja, isto taka, podolgata prezentacija na modelot vo Ана Димишкова, *Логиката на правното расудување: дијалошка перспектива*, Скопје, Аз-Буки/Филозофски факултет, 2011, 265–290. (Ана Димишкова, *Логиката на правното расудување: дијалошка перспектива*, Скопје, Аз-Буки/Филозофски факултет, 2011, 265–290.)

ke bide otfrlena, obvrzuvanjeto prestanuva. Za vreme na dijalogot, obvrskite na igračite se zabeležuvaat vo 'skladot na obvrski' koj pokažuva koj igrač e obvrzan na koja rečenica na koja točka od dijalogot.

Od logička gledna točka konceptot na 'prinudno obvrzuvanje' e od osobeno značenje bidejki toj element gi razlikuva slobodnite, neformalni razgovori od strukturiranite i logički regulirani dijalozi vo koi igračot može (so argumentativni sredstva) da go prinudi oponentot da prifati opredelena teza. Konceptot na 'prinudno obvrzuvanje', spored Loder, e sporedliv so derivacijata vo monološkata logika i „se javuva koga eden igrač e prinuden da prifati opredelena rečenica, kako rezultat na rečenicite na koi veke e obvrzan”.³⁰

Dijaloškite pravila isto taka go opredeluvaaat redosledot po koj igračite gi izveduvaaat potezite vo igrata, legitimnosta na potezite (vo smisla na toa dali tie se dozvoleni od pravilata na igrata), kako i konsekvencite od validnite potezi za obvrskite na igračite.

Dijalogot, isto taka, ima različni nivoa, koji progresiraaat od početnoto nivo 0 kon podlabokite nivoa 1, 2, 3, itn. Distinkcijata na nivoata ovozmožuva da se prikaže vnatrešnata struktura na argumentacijata na poprecizen način. Dijalogot odi na podlaboko nivo kako rezultat na izvršuvanjeto na govorniot čin 'prašanje'. Po prifačanjeto ili otfrlanjeto na edna rečenica, dijalogot se vraća na nivoto na koe taa rečenica bila inicijalno tvrdena.

Pokraj opštite pravila za komunikacija i regulacija na dijaloškite obvrski (numerirani od 1 do 5 vo Loderoviot model), DiaLaw isto taka sodrži specijalni pravila koi go konstituiraaat pravniot aspekt na modelot. Ovoj aspekt opfaća dva povrzani sostavni dela: 1) novite elementi od formalniot jazik koi im ovozmožuvaat na igračite da gi upotrebuvaat pravnite koncepti, kako 'pravila', 'razlozi', itn., i 2) pravila koišto gi reguliraaat konsekvencite od upotrebata na ovie elementi.

Konceptot na 'pravilo' e voveden kako dvomesna funkcija, sostavena od uslov i konkluzija. Pokraj funkcijata 'pravilo', postojat i pet novi predikati vo pravniot del od modelot: 1) 'razlog', sfaten kako relacija na potkrepa pomegu sostojbite na neštata izrazeni vo iskazite – taka, formulata (razlog (Uslov, Konkluzija) (vo originalot: reason (Cond, Concl)) se interpretira vo smisla na toa deka uslovot e razlog za konkluzijata, ili, alternativno, deka e razlog protiv negacijata na konkluzijata; 2) 'pretežnuva', predikat koj gradi formuli koišto ja izrazuvaaat informacijata deka množestvoto razlozi vo prilog na konkluzijata pretežnuva nad množestvoto razlozi protiv nea; 3) 'isklučeno', predikat koj se primenuva vrz pravilata, so značenje deka ako praviloto e isključeno, toa ne može da se primenuva, t.e. deka konkluzijata deka praviloto se primenuva poveќе ne e opravdana; 4) 'se primenuva' – predikat koj veli deka izvesno pravilo se primenuva

30 Loder 1999 (bel. 13), 39.

i deka vo toj slučaj razlogot zasnovan vrz toa pravilo e opravdan, i 5) 'validno', predikat koj veli deka izvesno pravilo e validno. Jazikot na DiaLaw isto taka go sodrži i dijaloškiot predikatski simbol 'nelegalno tvrdenje', koj veli deka izvesna rečenica bila nelegalno tvrdena. Važno e da se naglasi deka rečenicite vrz koi ovoj predikat se primenuva ne se zabraneti od dijaloškite pravila, tuku deka drugi razlozi, specifični za dadeniot domen ne dozvoluvaat taa rečenica da se tvrdi, kako, na primer, vo slučaj na nelegalno dobienata evidencija vo pravoto.

Kako što beše spomenato pogore, posledicite od upotrebatata na ovie novi elementi od jazikot se regulirani od 'specijalnite pravila za komunikacija' (numerirani od 6 do 16 vo Loderoviot model). Taka, preku definiranjeto na logičkiot jazik i na pravilata na DiaLaw, fundamentalnite ideji na logikata na razlozite, osobeno na nejzinata dijaloška verzija, se implementirani vo upotreblivo formalno orudie.³¹

4 SLUČAJ OD SUDSKATA PRAKTIKA: ISPITUVANJE NA USTAVNOSTA NA ČLEN OD ZAKON³²

Vo 2003 godina Sobranieto na Republika Makedonija donese zakon čija cel beše da se vovedat izmeni i dopolnuvanja na postojniot Zakon za Republičkiot sudski sovet. Republičkiot sudski sovet (vo ponatamošniot tekst: RSS) e institucija so mošne značajni ovlastuvanja vo makedonskiot sudski sistem, osobeno vo pogled na procedurite za izbor i razrešuvanje na sudiite i monitoriranjeto na kvalitetot na nivnata rabota.

Členot 9 od Zakonot za Republičkiot sudski sovet (vo ponatamošniot tekst: ZRSS) go reguliraše prašanjeto za prestanok na funkcijata na členovite na RSS. Toj predviduvaše deka funkcijata na člen na RSS prestanuva vo dva slučaja: 1) dokolku členot podnese ostavka, ili 2) dokolku členot e razrešen. Okolnostite koi možat da dovedat do razrešuvanje na člen na RSS se isto taka eksplicitno formulirani vo členot 9 od ZRSS. Taka, člen na RSS može da bide razrešen dokolku bide osuden za krivično delo na bezuslovna kazna zatvor od najmalku šest meseci, ili koga trajno ќе ja zagubi sposobnosta da ja vrši svojata funkcija, što go utvrduva RSS vrz osnova na naod i mislenje na nadležnata medicinska komisija.³³

31 Modelot može, isto taka, da se upotrebi i kako alatka za inteligentna pravna podrška, zatoa što postoi i verzija na DiaLaw kako kompjuterska programa. Sepak, toj aspekt ne e predmet na analiza vo ovoj trud.

32 Za poopstojna analiza na ovoj slučaj, sporedete Димишкова 2011 (bel. 29), 308–329.

33 Закон за Републичкиот судски совет /ЗРСС/, *Службен весник на РМ*, бр. 80/92 (www.slvesnik.com.mk). (Zakon za Republičkiot sudski sovet /ZRSS/, *Služben vesnik na RM*, br. 80/92 (www.slvesnik.com.mk)).

Edna od najdalekusežnite i najkontroverzni promeni воведени so noviot zakon se odnesuваše tokmu na gorespomenatiот член 9 од ZRSS. Imeno, членот 2 од Законот за измени i дополнувања на Законот за Републичкиот судски совет (во понатамошниот текст: ZIDZRSS), воведо nov, трет став во членот 9, кој предвидуваše дека 'Членот на Советот се разрешува ако ги исполнува uslovite за starosna penzija'.³⁴ Na тој начин, одредбите од членот 9 од ZRSS кои се однесуваа на престанокот на функцијата на членовите на RSS беа суштински изменети. Tokmu затоа уставноста на членот 2 од ZIDZRSS беше osporena пред Ustavniот суд од двайца членови на RSS.³⁵

Vo inicijativata за osporuvanje на уставноста на членот 2 од ZIDZRSS tie го изразija mislenjeto дека овој член e во kolizija со членот 104 од Ustavot на Republika Makedonija, став 3, кој glasi: 'Членовите на Советот се избираат од редот на истакнати правници за време од шест години, со право на уште еден избор'.³⁶ Taka, spored inicijatorite на procedurata пред Ustavniот суд, osporeniот член предizvikuva три правно neprifatlivi posledici: 1) го прекинува mandatot на членовите на RSS кои веќе биле избрани на таа функција i кои, во меѓувреме, ги исполнile uslovite за starosna penzija; 2) воведува nov uslov за избор на членовите на RSS, t.e. uslov povrzan со nivnata vozrast; 3) го ograničuva pravoto на istaknatite правници кои веќе го исполnile uslovot за starosna penzija да bidat избрани за членови на RSS.

Ustavniот суд odluči да не povede postapka за ocenuvanje на уставноста на osporeniот член, smetajќi дека не postojat правни osnovi за poveduvanje takva postapka. Spored mislenjeto на Ustavniот суд, со тоа што Ustavot не propiшал uslovi за престанок на функцијата на членовите на RSS пред istekot на periodot од шест години, ја оставил otvorena možnosta takvi uslovi да bidat propišani со zakon, под uslov tie да се povrzani со prirodni i правни okolnosti кои vlijaат врз sposobnosta за vršenje на функцијата. Isto taka, во pogled на starosnata penzija, mislenjeto на Ustavniот суд e дека тоа e еден objektivен, prirodен, nediskriminatorски kriterium со кој се ograničuva vršenjeto на една javna funkcija. Osven toа, spored Sudot, samiot Ustav eksplicitно го spomenuva овој kriterium koga го opredeluva престанокот на функцијата на судиите (на редovните sudovi): imeno, овие sudii се разрешуваат од функцијата koga ќе ги исполнат uslovite за starosna penzija. Po analogija, Sudot smeta дека не postojat prečki

34 Закон за изменување и дополнување на Законот за Републичкиот судски совет /ЗИДЗРСС/, Службен весник на РМ, бр. 43/03 (www.slvesnik.com.mk). (Zakon za izmenuvanje i dopolnuvanje na Zakonot za Republikiот судски совет /ZIDZRSS/, Služben vesnik na RM, br. 43/03 (www.slvesnik.com.mk)).

35 Vo ramkite на istata inicijativa беше osporena i уставноста на членовите 1 i 4 од ZIDZRSS; сепак, оваа анализа ќе се fokusira edinstveno на argumentativnata kontroverza povrzana со членот 2.

36 Elektronska verzija на Ustavot на Republika Makedonija e dostapna на: <http://www.sobranie.mk/?ItemID=A431BEE83F63594B8FE11DA66C97BEAF>.

za primenuvanjeto na istiot kriterium vo pogled na prestanokot na funkcijata na členovite na RSS.³⁷

Sepak, kako što beše spomenato prethodno, dvajca sudii na Ustavniot sud imaa izdvoeni mislenja vo pogled na mnozinskata odluka. Tie smetaa deka ustavnosta na členot 2 od ZIDZRSS beše so pravo osporena.³⁸ Spored mislenjeto na ovie dvajca sudii, mandatot na členovite na RSS, direktno i eksplicitno reguliran od strana na Ustavot, e ustavna kategorija, koja ne može da bide izmeneta, ograničena ili ukinata so zakonski odredbi. Osven toa, izdvoenite mislenja se protivstavuvaat na upotrebata na analoškiot argument vo pogled na kriteriumot na vozrasta kako osnova za penzioniranjeto. Razlog za ova e faktot što pozicijata na sudiite na redovnite sudovi, koi se izbiraat bez ograničuvanje na traenjeto na sudiskata funkcija, e suštinski različna od onaa na členovite na RSS, bidejki Ustavot eksplicitno go ograničuva traenjeto na nivnata funkcija na šest godini, so možnost za samo eden reizbor.

Odlukata na Sudot, kako i dvete izdvoeni mislenja, ќе služat kako material za argumentativna rekonstrukcija na celinata na kontroverzata niz dijaloška konfrontacija na protivstavenite gledišta. Vo ovaa konfrontacija, formulacijata na argumentite koi gi potkrepuvaat ovie gledišta, kako i nivnata zaemna relacija i relativna sila, ќе bidat podetalno analizirani.

5 DIJALOŠKA REKONSTRUKCIJA NA JUSTIFIKACIJATA NA SUDSKATA ODLUKA

Protagonisti na dijalogot vo rekonstrukcijata na justifikacijata na odlukata za koja stanuva zbor ќе bidat igračiite Sudija 1 i Sudija 2. Da zamislime deka kako rezultat na golemiot interes koj slučajot na predvremeniот prestanok na funkcijata na členovite na RSS poradi ispolnuvanje na uslovot za starosna penzija go predizvika vo makedonskiот praven kontekst, dvajcata sudii raspravaat za pravnite aspekti na kontroverzata. Prviот играч, Sudijata 1, ja igra ulogata na proponent na glavnata teza na dijalogot – tezata deka členot 2 od ZIDZRSS e

37 Решение У.бр. 118/2003 на Уставниот суд на Република Македонија од 16 јули 2003, *Службен весник на РМ*, бр. 64/03 и 74/03 (www.slvesnik.com.mk). (Rešenje U. br. 118/2003 na Ustavniot sud na Republika Makedonija od 16 juli 2003, *Služben vesnik na RM*, br. 64/03 i 74/03 (www.slvesnik.com.mk)).

38 Sporedete Трендафил Ивановски, Издвоено мислење по решението на Уставниот суд У.бр. 118/2003 од 16 јули 2003, *Службен весник на РМ*, бр. 64/03 (www.slvesnik.com.mk) (Trendafil Ivanovski, Izdvoeno mislenje po rešenieto na Ustavniot sud U. br. 118/2003 od 16 juli 2003, *Služben vesnik na RM*, br. 64/03 (www.slvesnik.com.mk)) i Мирјана Лазарова Трајковска, Издвоено мислење по решението на Уставниот суд У.бр. 118/2003 од 16 јули 2003, *Службен весник на РМ*, бр. 64/03 (www.slvesnik.com.mk) (Mirjana Lazarova Trajkovska, Izdvoeno mislenje po rešenieto na Ustavniot sud U. br. 118/2003 od 16 juli 2003, *Služben vesnik na RM*, br. 64/03 (www.slvesnik.com.mk)).

neustaven. Sudijata 2, vo uloga na oponent, ke se obide da ja pobie ova teza, t.e. da go prinudi proponentot da se откаže od nea.

Sudijata 1 ke gi iznesuva argumentite na inicijatorite na procedurata za ocenka na ustavnosta na členot 2, kako i argumentite na sudiite so izdvoeni mislenja.³⁹ Sudijata 2, pak, ke gi upotrebuva argumentite formulirani vo množinskata odluka na Ustavniot sud protiv poveduvanje postapka za ocenka na ustavnosta na osporeniot člen.

Taka, vo prviot čekor od dijalogot proponentot ja formulira glavnata teza na dijalogot vo forma na tvrdenje:

1. Sudija 1: Tvrdam deka členot 2 od ZIDZRSS e neustaven.

Spored pravilata na DiaLaw, dijalogot započinuva na inicijalno nivo – nivoto 0. Sudijata 2, vo вториот čekor, go doveduva pod prašanje ova tvrdenje, barajki potkrepa za nego.

2. Sudija 2: Zošto?

So cel da odgovori na ova prašanje, Sudijata 1, proponentot, go iznesuva argumentot deka členot 2, vsušnost, regulira ustavna materija. Imeno, kako što beše spomenato prethodno, RSS e institucija vstanovena direktno so Ustavot. Osven toa, Ustavot eksplicitno go opredeluva traenje na mandatot na členovite na RSS, a ne mandatot na RSS kako institucija. Sledstveno, so zakon ne može da se menuva, ograničuva ili ukinuva ustavno vospostaveniот mandat na členovite na institucijata. Toa bi značelo deka preku sporniот člen ZIDZRSS bi se nametnal nad Ustavot, formulirajki preskripcii koi možat da bidat predmet edinstveno na ustavna regulacija. Formulacijata na ovaa pozicija e soдрžina na tretiot čekor, koj go izveduva Sudijata 1:

3. Sudija 1: Zatoa što členot 2 od ZIDZRSS regulira ustavna materija.

Sudijata 2 ne e ubeden od ovoj argument. Ušte poveke, toj/taa direktno se protivstavuva na toj argument, negirajki go tvrdenje na Sudijata 1 od tretiot čekor. Na toj način, Sudijata 2 ja prezema inicijativata vo dijalogot, kako i tovarot na dokažuvanje na iskazot koj toj/taa go tvrdi (i koj e negacija na prethodното tvrdenje):

4. Sudija 2: Tvrdam deka ne e vistina deka členot 2 od ZIDZRSS regulira ustavna materija.

Sega Sudijata 1 ima uloga na oponent na ova tvrdenje, problematizirajki go preku postavuvanje na prašanje 'zošto' i barajki od Sudijata 2 eden vid argumentativna potkrepa za negovoto/nejzinoto tvrdenje.

³⁹ Sepak, nema da postoi korespondencija 'edno-edno' pomegu argumentite prezentirani vo dijaloškite čekori i onie prezentirani vo Inicijativata i vo izdvoenite mislenja; predloženata rekonstrukcija ke gi sledi edinstveno glavnite linii na kontroverzata.

5. Sudija 1: Zošto smetate deka e taka?

Kako odgovor na ova prašanje, Sudijata 2 go iznesuva faktot, koj igra uloga na argument, deka členot 2 go regulira razrešuvanje na členovite na RSS.

6. Sudija 2: Zatoa što členot 2 od ZIDZRSS go regulira razrešuvanje na členovite na RSS.

Za Sudijata 1, se ušte ne e očigledno vo što se sastoi poentata na ovoj argument i toj/taa bara dopolnitelno objasnuvanje preku povtorno izveduvanje na govorniot čin 'prašanje'.

7. Sudija 1: Pa što ako e taka?

Sega Sudijata 2 e prinuden eksplicino da ja formulira svojata centralna teza. Toa e tezata deka razrešuvanje od funkcijata člen na RSS e prašanje koe na legitimen način e regulirano od ZIDZRSS bidejki toa ne e ustavna, tuku e zakonska materija.

8. Sudija 2: Tvrdam deka razrešuvanje od funkcijata člen na RSS e zakonska materija.

Sudijata 1 e ljubopiten da ja čue pravnata osnova za vakvoto tvrdenje i odnovo postavuva prašanje.

9. Sudija 1: Zošto?

Na ova točka od dijalogot, Sudijata 2 usvojuva 'čekor po čekor' strategija vo odbranata na svoeto prethodno tvrdenje. Imeno, toj/taa najnapred ќе formulira dve tvrdjenja koi se relativno nekontroverzni: prvo, tvrdjenjeto deka Ustavot eksplicitno go regulira mandatot na členovite na RSS, t.e. toj gi propišuva uslovite za izbor i go opredeluva traenjeto na nivnata funkcija, i vtoro, deka Ustavot ne gi propišuva uslovite za razrešuvanje na členovite na RSS ili drugi uslovi za prestanok na nivniot mandat. Sudijata 1 gi prifača ovie tvrdjenja bidejki tie lesno možat da se vovanovat vrz osnova na faktite.

10. Sudija 2: Prvo tvrdenje: Ustavot gi propišuva uslovite za izbor i traenjeto na mandatot na členovite na RSS.

11. Sudija 1: Toa e točno. Go prifačam ova tvrdenje.

12. Sudija 2: Vtoro tvrdenje: Ustavot ne gi propišuva uslovite za razrešuvanje na členovite na RSS.

13. Sudija 1: Go prifačam i ova tvrdenje.

Po prifačanje na ovie dve tvrdjenja od strana na sogovornikot, Sudijata 2 ќе upotrebi eden od specijalnite predikati na jazikot na DiaLaw – predikatot 'se primenuva', koj veli deka izvesno pravilo se primenuva i deka, sledstveno razlogot vtemelen vrz toa pravilo e opravdan. Praviloto za koe stanuva zbor (sfateno vo poširoka smisla kako opšt princip na pravnoto rasuduvanje) može da bide formulirano na sledniov način:

14. Sudija 2: Tvrđam deka slednovalo pravilo se primenuva: Dokolku Ustavot ne gi propišuva uslovite za razrešuvanje na členovite na RSS, toa znači deka dozvoluva tie uslovi da se propišat so zakon.

Sudijata 1, koj treba da go napravi sledniot čekor, ne može da se soglasi so ova tvrđenje. Sledstveno, Sudijata 1 ke go negira tvrđenjeto na Sudijata 2 za primenata na praviloto od prethodniot čekor i ke go onevozmoži opravduvanjeto na razlogot koj odi vo prilog na negovata konkluzija. Ova e vo soglasnost so bazičnite pravila na DiaLaw, koi ovozmogućuvaat na nekoe tvrđenje da se odgovori so drugo tvrđenje edinstveno dokolku vtoroto tvrđenje pretstavuva direktna negacija na prvoto. Na toj način, tvrdejki ja negacijata na rečenicata od čekorot 14, Sudijata 1 povtorno ja prezema inicijativata vo dijalogot. Od argumentativna gledna točka, ovoj čekor e eden od najvažnite točki vo razvivljanjeto na kontroverzata. Imeno, toj pokažuva deka dve strani vo dijalogot na sosesem različen način go interpretiraaat otsustvoto na kakva i da bilo eksplicitna regulacija na razrešuvanje na členovite na RSS vo členot 104 od Ustavot.

15. Sudija 1: Jas go tvrđam sprotivnoto. Praviloto 'Dokolku Ustavot ne propišuva uslovi za razrešuvanje na členovite na RSS, toa znači deka dozvoluva tie uslovi da se propišat so zakon' ne se primenuva.

Sega Sudijata 2 postavuva prašanje preku koe bara argumentativna poddrška za ova tvrđenje.

16. Sudija 2: Zošto?

Kako odgovor na prašanjeto na svojot sogovornik, Sudijata 1 ke tvrđi deka namesto praviloto formulirano vo petnaesettiot čekor, se primenuva praviloto so sprotivna konkluzija. Spored Sudijata 1, dokolku Ustavot nitu gi propišuva uslovite za razrešuvanje na členovite na RSS nitu dava kakvi i da bilo upatstva za nivno propišuvanje so zakon, togaš zakonot ne može da propiše takvi uslovi. Sledstveno, nivnoto propišuvanje ne e zakonska materija. Taka, vo sedumnaesettiot čekor go imame slednoto tvrđenje od strana na Sudijata 1:

17. Sudija 1: Tvrđam deka se primenuva slednoto pravilo: Dokolku Ustavot ne gi propišuva uslovite za razrešuvanje na členovite na RSS, takvi uslovi ne možat da bidat propišani so zakon.

So ogled deka tuka postoji sudir na pravila od interpretativen karakter, toj ne može da se razreši preku direktno povikuvanje na odredbite na pozitivniot zakon. Tokmu zatoa Sudijata 2 ja izbira slednava strategija: toj/taa najnapred ke ja dovede pod prašanje primenata na praviloto na koe se povikuva negoviot/nejziniot sogovornik; sepa, potkrepuvačkiot argument za toj čekor nema da ja ima formata na tvrđenje razlog, tuku na tvrđenje fakt. Imeno, toj/taa ke tvrđi deka argument protiv tvrđenjeto na Sudijata 1 deka ne e dozvoleno razrešuvanje na členovite na RSS da se regulira so zakon e veke postojnata i neosporena odredba sodržana vo členot 9 od ZRSS. Kako što beše spome-

nato i prethodno vo tekstot, ovoj člen predviduvaže tri situaciji za predvremen prestanok na mandatot na člen na RSS: ostavka, bezuslovna kazna zatvor od minimum šest meseci za storeno krivično delo, ili permanentna nesposobnost za vršenje na funkcijata, vstanovena od nadležna medicinska komisija. Toa gi generira slednite čekori vo dijalogot:

18. Sudija 2: Tvrdam deka praviloto 'Dokolku Ustavot ne gi propišuva uslovite za razrešuvanje na členovite na RSS, togaš tie uslovi ne možat da se propišat so zakon' ne se primenuva.

19. Sudija 1: Zošto?

20. Sudija 2: Zatoa što členot 9 od ZRSS gi propišuva uslovite za razrešuvanje na členovite na RSS, a ustavnosta na toj člen ne e osporena.

Sudijata 1 go prifača ova tvrdenje bidejki se odnesuva na faktička materija. Ova obezbeđuva osnova Sudijata 2 da go izvede sledniot čekor, vo koj toj/taa ќе ja tvrdi primenata na praviloto deka dokolku ustavnosta na členot 9 od ZRSS ne e osporena, togaš ne treba da bide osporena nitu ustavnosta na členot 2 od ZIDZRSS. Očigledno, poentata na tvrdenjeto na primenata na ova pravilo e da se obezbedi razlog za negovata konkluzija, koja e tezata zastapuvana od strana na Sudijata 2. Sepak, za Sudijata 1 ovoj razlog e neprifatliv i toj/taa direktno ќе go negira tvrdenjeto na Sudijata 2 vo sledniot čekor. Na toj način, se odigrava nov presvrt vo dijalogot, bidejki sega Sudijata 1 ima obvrška da go opravda tvrdenjeto deka razlogot formuliran od Sudijata 2 e neprifatliv. Ovoj del od dijalogot može da se pretstavi so slednite čekori:

21. Sudija 1: Go prifačam ova tvrdenje.

22. Sudija 2: Tvrdam deka se primenuva sledново pravilo: 'Dokolku ustavnosta na členot 9 od ZRSS ne e osporena, togaš ne treba da se osporuv nitu ustavnosta na členot 9 od ZIDZRSS.'

23. Sudija 1: Jas go tvrdam sprotivnoto: Praviloto 'Dokolku ustavnosta na členot 9 od ZRSS ne e osporena, togaš ne treba da se osporuv nitu ustavnosta na členot 9 od ZIDZRSS' ne se primenuva.

24. Sudija 2: Zošto?

Ulogata na proponent od novo ja prezema Sudijata 1, bidejki toj/taa ja tvrdeše neprimenlivosta na praviloto na koe se povika negoviot/nejziniot oponent. Argumentativnata strategija na Sudijata 1 ќе se sostoi vo pokažuvanjeto na suštinskata razlika koja postoji pomegu uslovite propišani vo členot 9 od ZRSS (t.e. ostavka, zatvorska kazna, nesposobnost vstanovena od nadležna komisija) i uslovot propišan vo členot 2 od ZIDZRSS (vozrast za starosna penzija) so cel da pokaže deka tie ne možat da bidat asimilirani vo edna ista kategorija na uslovi za razrešuvanje. Taka, dijalogot napređuva na sledni ov način:

25. Sudija 1: Tvrdam deka uslovite propišani vo členot 9 od ZRSS se suštinski različni od uslovite propišani vo členot 2 od ZIDZRSS.

26. Sudija 2: Zošto?

Kako rezultat na baranjeto za potkrepa na negovoto/nejzinoto tvrdenje od čekorot 25, Sudijata 1 ja voveduva distinkcijata pomegu dva tipa uslovi za razrešuvanje. Prvot tip e onoj na nepredvidlivi uslovi, čiešto javuvanje za vreme na mandatot na člen na RSS e možno, no ne e neizbežno. Dokolku ovie uslovi se javat, tie ja poprečuvaat ličnosta vo vršenjeto na nejzinata funkcija. Uslovite propišani vo členot 9 od ZRSS (t.e. ostavka, zatvorska kazna, nesposobnost) se od ovoj prv vid. Vtorata kategorija e onaa na predvidlivi uslovi, čiešto ispolnuvanje e odnapred poznato i koi ne impliciraat nužno nesposobnost za izvršuvanje na funkcijata. Uslovot propišan vo členot 2 od ZIDZRSS – dostignuvanjeto na voznata za starosna penzija – pripađa na vtoriov vid. Sudijata 2, koj ne može da najde solidna osnova za negiranje na ovie tvrdjenja, niv gi prifača. Taka, slednite čekori vo dijalogot se:

27. Sudija 1: Tvrdam deka uslovite propišani vo členot 9 od ZRSS se nepredvidlivi i nivnoto ispolnuvanje nužno go poprečuva izvršuvanjeto na funkcijata 'člen na RSS'.

28. Sudija 2: Go prifačam ova tvrdenje.

29. Sudija 1: Tvrdam deka uslovot propišan vo členot 2 od ZIDZRSS e predvidliv i negovoto ispolnuvanje ne go poprečuva nužno izvršuvanjeto na funkcijata 'člen na RSS'.

30. Sudija 2: Go prifačam, isto taka, i ova tvrdenje.

Sega, celta na Sudijata 1 e da go prinudi oponentot da go prifati tvrdenjeto deka osporeniot člen 2 od ZIDZRSS vsušnost nametnuva neosnovani restrikcii vrz možnosta da se bide izbran na funkcijata 'člen na RSS'. Tokmu zatoa toj/taa ja formulira ova teza kako klučan argument vo prilog na tvrdenjeto od čekorot 25, koj ja afirmiraše suštinskata razlika pomegu uslovite od členot 9 od ZRSS i uslovot od členot 2 od ZIDZRSS. Se razbira, Sudijata 2 će go dovede pod prašanje tvrdenjeto na Sudijata 1 zatoa što toa e vo sprotivnost so negovata/nejzinata sopstvena teza.

31. Sudija 1: Jas tvrdam deka členot 2 od ZIDZRSS neosnovano ja ograničuva možnosta da se bide izbran na funkcijata 'člen na RSS'.

32. Sudija 2: Zošto?

Vo ovoj stadium, dijalogot se približuva kon klučnata točka vo koja Sudijata 1 će go tvrdi razlogot (ušte eden od 'specijalnite pravni predikati' na jazikot na DiaLaw) deka predvidlivosta na uslovot propišan vo členot 2 od ZIDZRSS vsušnost ja ograničuva možnosta da se bide izbran na funkcijata 'člen na RSS'. Imeno, od uslov za razrešuvanje toj se pretvora vo uslov za izbor na členovite na RSS i doađa vo sudir so členot 104 od Ustavot koj, kako što se soglasija dvete strani, beše edinstveniot legitimen izvor za propišuvanje na uslovi za izbor na členovite na RSS.

33. Sudija 1: Tvrdam deka predvidlivosta na uslovot propišan vo členot 2 od ZIDZRSS e razlog poradi koj toj neosnovano ja ograničuva možnosta da se bide izbran na funkcijata 'člen na RSS'.

Za Sudijata 2 prifačkanjeto na ovoj razlog bi značelo poraz vo dijalogot, bidejki bi impliciralo deka dokolku propišuvanje na uslovi za izbor na členovite na RSS e eksplisito definirana ustavna materija togaš sekoj vid ograničuvanje na ovie uslovi bi značelo povreda na Ustavot. Tokmu zatoa toj/taa ke bara dopolnitelna potkrepa za tvrdenjeto na toj razlog, so namera da go odloži prifačkanjeto na taa teza što e možno podolgo.

34. Sudija 2: Zošto?

Kako potkrepa na razlogot naveden vo prethodniot čekor, Sudijata 1 ke tvrdi deka se primenuva sledното pravilo: ‘Dokolku opredelena ličnost veke go ispolnuva predvidliviot uslov od členot 2 od ZIDZRSS (dostignuvanje na vozrasta za starosna penzija), togaš taa ličnost ne može da bide izbrana za člen na RSS’. Se razbira, ova formulacija pretstavuva konkretizacija na poopštiot princip/pravilo, spored koj dokolku opredelena ličnost veke gi ispolnuva uslovite za razrešuvanje od funkcijata na koja treba da bide izbrana, togaš taa ličnost ne može da bide izbrana za taa funkcija. Ova linija na razmisluvanje e pretstavena vo sledniov čekor:

35: Sudija 1: Tvrdam deka se primenuva slednovo pravilo: ‘Dokolku opredelena ličnost veke go ispolnuva predvidliviot uslov od členot 2 od ZIDZRSS (dostignuvanje na vozrasta za starosna penzija), togaš taa ličnost ne može da bide izbrana kako člen na RSS’.

Dokolku Sudijata 2 saka da go ospori ova pravilo, toj/taa ke treba da go ospori praviloto deka kako rezultat na predvidlivosta na uslovot povrzan so vozrasta, nevozmožno e (vo smisla na nelogično) da se izbere ličnost za koja veke odnapred se znae deka gi ispolnuva uslovite za razrešuvanje od funkcijata za koja se izbira. Imajki go predvid faktot deka ne može da najde razumni osnovi da se protivstavi na ova tvrdenje, Sudijata 2 odlučuva da ja prifati primenata na praviloto od čekorot 35. Poradi toa što primenata na praviloto, spored principite na DiaLaw, go opravduva razlogot zasnovan na toa pravilo, Sudijata 2 e dijaloški obvrzan da go prifati i razlogot zasnovan na toa pravilo.

36. Sudija 2: Ja prifačkam primenata na praviloto ‘Dokolku opredelena ličnost veke go ispolnuva predvidliviot uslov od členot 2 od ZIDZRSS (dostignuvanje na vozrasta za starosna penzija), togaš taa ličnost ne može da bide izbrana kako člen na RSS’.

37. Sudija 2: Isto taka, go prifačkam tvrdenejto deka predvidlivosta na uslovot propišan vo členot 2 od ZIDZRSS e razlog poradi koj toj neosnovano ja ograničuva možnosta da se bide izbran na funkcijata ‘člen na RSS’.

Prifačkanjeto na ovoj razlog ja otvora možnosta za koristenje ušte na eden specijalen predikat od jazikot na DiaLaw, t.e. predikatot ‘pretežnuva’. Celta na Sudijata 1 e da pokaže deka množestvoto razlozi za konkluzijata ‘predvidlivosta na uslovot propišan vo členot 2 od ZIDZRSS e razlog poradi koj toj neosnovano ja ograničuva možnosta da se bide izbran na funkcijata ‘člen na RSS’ pretežnuva

nad množestvoto razlozi protiv ova konkluzija. Vo ovoj slučaj, množestvoto od protivrazlozi e prazno, što znači deka dokolku Sudijata 2 ne formulira protivrazlog, t.e. razlog protiv konkluzijata, pobedata vo dijalogot ќе bide odnesena od Sudijata 1. Bidejki konkretnata sudska odluka vrz osnova na koja e konstruiran ovoj dijalog ne sodrži formulacija na protivrazlog vo pogled na spomenatata konkluzija, množestvoto razlozi protiv konkluzijata e prazno. Spored pravilata na DiaLaw, neprazno množestvo razlozi po definicija pretežnuva vrz prazno množestvo razlozi.⁴⁰

Kako rezultat na toa, Sudijata 2 e obvrzan da go prifati tvrdenjeto koe go vključuva predikatot 'pretežnuva'. Ova, za vozvrat, znači deka toj/taa isto taka ja prifača i negovata konkluzija, t.e. deka členot 2 od ZIDZRSS neosnovano ja ograničuva možnosta da se bide izbran na funkcijata 'člen na RSS' i so toa regulira pravna materija koja leži von negoviot domen, t.e. spača vo domenot na Ustavot. Sledstveno, Sudijata 2 e prinuden da ja prifati početnata teza na svojot sogovornik i da mu stavi kraj na dijalogot. Taka, poslednite čekori vo dijalogot se slednive:

38. Sudija 1: Tvrđam deka množestvoto razlozi za konkluzijata deka členot 2 od ZIDZRSS neosnovano ja ograničuva možnosta da se bide izbran na funkcijata 'člen na RSS' pretežnuva nad (praznoto) množestvo razlozi protiv nea.

39. Sudija 2: Go prifačam toa tvrdenje.

40. Sudija 2: Sledstveno, go prifačam početnoto tvrdenje na Sudijata 1 deka členot 2 od ZIDZRSS e neustaven.

6 DISKUSIJA VO POGLED NA DIJALOŠKATA REKONSTRUKCIJA NA ODLUKATA

Kako što toa e sekogaš slučaj pri primenata na apstraktnite formalni modeli vo analizata i rekonstrukcijata na konkretniot empiriski materijal, ovoj material treba da bide podložen na izvesen stepen na modifikacija so cel da se vklopi vo ramkata na formalniot model. Vo ovoj slučaj, modifikacijata vključuvaše: 1) selektiranje na relevantni delovi od izvorniot tekst od analiziranite sudiski mislenja 2) formuliranje na tvrdenja i protiv-tvrdenja koi posledovatelno se 'stavat vo ustata' na učesnicite vo dijalogot; i 3) ekstrahiranje na razlozite i argumentite za ovie tvrdenja od integralnata forma na odlukata i na izdvoenite mislenja.

Sekoj od ovie čekori nužno vključuva opredelen stepen na proizvolnost, vo taa smisla što ličnost kojašto ja izvršuva rekonstrukcijata i modeliranje treba da go 'prevede' materijalot od prirodniot jazik vo formalnata struktura upotrebena kako alatka za analiza i evaluacija, vo soglasnost so sopstvenata procenka na važnosta na relevantnite elementi. Taka, predloženata rekonstrukcija e samo

40 Sepak, sporedete Hage 2005, (bel. 13), 84 za izvesni isključoci od ova opšto pravilo.

edna možna verzija na ona što e percipirano kako optimalna dijaloška forma na pravната kontroverza za koja stanuvá zbor. Isto taka, strategiite izbrani od strana na igračite možat da izgledaat poinaku vo nekoj drug priod kon logičkata analiza i reprezentacija na istiôt materijal.

Iako ovaa odluka beše analizirana i dijaloški rekonstuirana preku upotrebatá na fundamentalnite koncepti samo na eden sovremen model na pravната argumentacija i justifikacija – Loderoviot DiaLaw, toj sepa ovozmožuvá da se stekne uvid vo funkcioniranjeto na dijaloškiôt priod kon pravната justifikacija vo opšta smisla. Preku ovaa primena, od novo bea potvrđeni negovite pozitivni odliki.

Najnapred, ovoj vid priod obezbeđuvá uvid vo integralnata forma na kontroverzata koja leži vo osnovata na konkretnata odluka i uspešno ja odrázuva nejzinata argumentativna dinamika. Ovoj ‘holistički’ aspekt ja zgolemuva prirodnosta i intuitivnata plauzibilnost na dijaloškite modeli. Osven toa, dijaloškoto modeliranje isto taka gi vkučuvá i retoričkite strategii upotrebeni od strana na učesnicite vo dijalogot, što e edna od najvažnite odliki na Loderoviot DiaLaw. Ovaa integracija na retoričkiôt element e osobeno značajna zatoa što taa može da gi prikaže specifičnite argumentativni manevri izvedeni od učesnicite, koi možat da bidat legitimni i racionalni, no, isto taka, i manipulativni i zloupotrebuvački vo argumentativna smisla.

Fundamentalnoto logičko jadro na ovoj i ostanatite dijaloški modeli integrirano vo poširokiôt dijalektički protokol definiran preku dijaloškite pravila ovozmožuvá da se identifikuváat potencijalnite ‘slabi točki’ vo argumentacijata na dvete strani preku detalna dijaloška rekonstrukcija na sekoj čekor vo dijaloškata interakcija. Na primer, pri analizata na konkretnata sudska odluka stana jasno deka postoji otsustvo na protivargument za tvrđenjeto deka iako dostignuvanjeto na vozrasta za starosna penzija e eksplicitno formulirano kako uslov za razrešuvanje od funkcijata ‘člen na RSS’, toa isto taka logički implicira ograničuvanje na možnosta da se bide izbran na ovaa funkcija i nametnuva nov uslov za izbor na potencijalnite členovi na ovaa institucija. Otsustvoto na protivargument za ova ključno tvrđenje pridonese, na rešavački naćin, za gubenjeto na dijaloškata igra od strana na oponentot.

Od druga strana, postoji, isto taka, i slaba točka vo argumentativnata strategija na Sudijata 1 vo čekorite 17–25. Taka, Sudijata 1 najnapred tvrdeše deka ne e dozvoleno prašanjeto za uslovite za razrešuvanje na členovite na RSS da se regulira so zakon, no potoa i samiot/samata se povika na postojnite uslovi definirani vo členot 9 od ZRSS bez kakvo i da bilo osporuvanje na nivniôt praven status, so cel da tvrdi deka tie se suštествeno različni od osporeniôt člen 2 od ZIDZRSS.

Ovozmožuvajki ja identifikacijata na takvite problematićni sekvenci vo dadena argumentacija, Loderoviot model pokažuvá deka, pokraj deskrip-

tivniot i analitičkiot aspekt, toj isto taka poseduva i normativen aspekt koj im ovozmožuva na negovite korisnici da go evaluiraat stepenot do koj edna poedinečna odluka gi zadovoluva logičkite i pravnite standardi na izdržanost.

Sepak, problemot na normativnite aspekti na dijaloškite modeli, vključitelno Loderoviot model DiaLaw pokrenuva dve važni prašanja vo pogled na nivnoto funkcioniranje kako alatki za logička i argumentativna rekonstrukcija: prvo, prašanieto za statusot na dijaloškite pravila, i vtoro, prašanieto za prisustvoto na tretata strana vo dijalogot.

Što se odnesuva do prvata točka, veќе beše spomenato deka dijaloškite pravila gi integriraat fundamentalnite logički pravila (za konzistentnost, validnost na argumentite, neprotivrečnost, itn.) vo eden korpus od proceduralni pravila koi go opredeluvaa tekot na dijalogot. No kako može da se opravda nivniot izbor? Dokolku ovie proceduralni pravila ne se podložni na diskusija, togaš tie se tretiraat kako nesporni i se, na izvesen način, dogmatizirani; dokolku, pak, se podložni na diskusija, koj će gi opredeli pravilata spored koi će se vodi ova meta-diskusija? Taka, problemot na justifikacija na dijaloškite pravila može seriozno da go zasigne normativniot kapacitet na dijaloškite modeli. Imeno, dokolku statusot na fundamentalnite pravila vrz koi e izgrađen opredelen model e sporen, togaš modelot teško može da služi kako siguran standard za ocenka na argumentativnata izdržanost na opredelena justifikacija.⁴¹

Prašanjeto za kriteriumot na argumentativnata izdržanost vodi do drugo problematično prašanje povrzano so dijaloškite modeli i nivnoto funkcioniranje kako alatki za logička rekonstrukcija na pravnata justifikacija: prašanieto za ulogata na tretata strana – arbiterot ili sudijata vo modelot. Dijalozite vo pravniot kontekst se poprvio konfliktivni otkolku kooperativni, vo taa smisla što sekoja strana nastojuva da go svrti ishodont na kontroverzata vo svoja polza preku site dostapni pravni i logički argumentativni sredstva. Taka, konceptot na 'slobodno soglasuvanje' so argumentot na drugata strana, koj igra centralna uloga vo Loderoviot model,⁴² se čini kontraintuitiven koga će se zeme kako edinstven kriterium na justifikacijata i će se primeni vrz pravniot kontekst, koj vo osnova e adverzativen, vtemelen vrz protivstavuvanje na interesite i poziciite na involviranite strani. Kako što beše očividno vo analiziraniot primer, sekoja strana vo dijalogot će go izbegnuva prifaćanje na tvrdenjata na drugata strana se dodeka e možno, t.e. dodeka ne e prinudena na toa preku iscrpuvanje na site možnosti za natamošni argumentativni manevri.

Tokmu zatoa, vključuvanje na element koj će ja pretstavuva ulogata na sudijata vo dijaloškite modeli na pravnata justifikacija se pokažuva kako možne plauzibilno, ako ne i neophodno. Zadaćata na sudijata bi bila da gi garantira:

41 Samiot Loder e svesen za ovoj problem; sporedete ja negovata diskusija na str. 27 vo Lodder 1999 (bel. 13).

42 Lodder 1999 (bel. 13), 34.

1) doađanje do odluka i razreševanje na kontroverzata vo soglasnost so validnite pravni pravila i standardi, što e povrzano so materijalniot aspekt na pravnite kontroverzi, i 2) soodvetnata upotreba na dijaloškite pravila od strankite vo pravnite sporovi so cel da se spreči možnosta od nivno subverzivno dijaloško povedenie, što e povrzano so proceduralniot aspekt.⁴³

Sepak, Loder eksplicitno gi formulira svoje razlozi za toa što vo negoviot model ne e pretstavena ulogata na arbiterot/sudijata vo pravnite sporovi. Ovie razlozi se povrzani so idejata deka „toa bi impliciralo deka navistina postoji nezavisen kriterium za razrešuvanje na konfliktite, imeno, kriteriumot koj sudijata go upotrebuva pri odlučuvanje”.⁴⁴ Osven toa, vključuvanje na tretiot element bi vlijaelo vrz bazičnata dijaloška struktura, transformirajki ja vo, kako što toa go formulira Hage, „trijaloška” struktura.⁴⁵ Vo princip, bi moželo da se kaže deka ovoj problem e sè ušte otvoren za ponatamošno istražuvanje. Taka, integriranjeto na ulogata na sudijata vo formalnite reprezentacii na pravnata argumentacija i justifikacija preku nadgraduvanje na fundamentalno plauzibilnite odliki na dijaloškiot model pretstavuva seriozen teoriski predizvik.

7 ZAKLUČOK

Vo poslednite decenii, argumentativnite aspekti na pravnata justifikacija bea intenzivno istražuvani so pomoš na dijaloškite modeli, vo koi justifikacijata e pretstavena kako strukturiran dijalog pomegu proponentot i oponentot vo pogled na opredelena pravna teza. Vo ovoj trud beše napraven obid toj priod da se primeni vrz konkretna pravna materija i da se prezentira dijaloška rekonstrukcija na edna kontroverzna sudska odluka od makedonskiot praven kontekst. Rekonstrukcijata beše izvedena preku upotrebata na eden sovremen dijaloški model na pravnata justifikacija, modelot DiaLaw na Arno Loder. Analizata izvedena vo ovoj trud potvrdi deka ovoj dijaloški priod e pogodan za pretstavuvanje na argumentativnata dinamika i strategiskite elementi na pravnata argumentacija. Sepak, sè ušte postojat otvoreni prašanja povrzani so negovata upotreba, osobeno vo pogled na normativniot status na dijaloškite pravila i možnosta za modeliranje na ulogata na sudijata ili arbiterot vo pravnite kontroverzi.

43 Videte Prakken 2008 (bel. 12); Ana Dimiškova Trajanoska, The Logical Structure of Legal Justification: Dialogue or ‘Trialogue’?, in Dov M. Gabbay et al., (eds.), *Approaches to Legal Rationality*, Dordrecht/Heidelberg/London/New York, Springer (Logic, Epistemology and the Unity of Science 20), 2010, 265–280; za edna pogeneralna perspektiva, videte Vesel Memedi, Resolving Deep Disagreement: A Case in Point, *SEEU Review* (2007) 3, No. 2, 7–18, http://www.seeu.edu.mk/files/seeu_review_vol3-nr2.pdf (14 May 2013.).

44 Lodder 1999 (bel. 13), 35.

45 Hage 2005 (bel. 13), 255.

Ana Dimiškovska*

(Dia)logical Reconstruction of Legal Justification

A Case Analysis

In this paper an attempt is made to apply the dialogical approach to modelling legal justification in a particular legal case and to present a dialogical reconstruction of a controversial judicial decision from the Macedonian legal context. The reconstruction is carried out using a contemporary dialogical model of legal justification: Arno Lodder's DiaLaw. The dialogical approach on which this model is based is shown to be suitable for representing the argumentative dynamics and strategic elements of legal argumentation. However, there are still some open questions related to its use, especially concerning the normative status of dialogical rules and the possibility of modelling the role of the judge or arbiter in legal controversies.

Keywords: legal argumentation, legal justification, dialogical modelling of judicial decisions, reason-based logic, Lodder's DiaLaw, judge

1 INTRODUCTION: PHILOSOPHICAL, LEGAL AND LOGICAL ASPECTS OF JUSTIFICATION¹

In philosophical terms, the process of justification can be defined as a cognitive legitimizing of beliefs that are considered true, sound or reliable by articulating the reasons for their acceptance. The problem of justification in contemporary epistemological and methodological research is an integral part of studies of the broader phenomenon of rationality. In recent developments in these fields, rationality is often treated not as a single and homogeneous concept but as a concept diversified in many different forms of rationality—analytical, dialectical, procedural, supporting rationality, etc.—depending on the type

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of criteria for soundness of the rational procedures in different areas of their application.²

One particularly important field in which justification procedures play a crucial role is that of law. In the main areas of the creation and application of law, especially in situations of adversarial legal confrontation and adjudication, there is a constant demand for all the parties involved to justify their stances with reasons and arguments. This is necessary if those stances are to be successfully defended in highly competitive argumentative contexts. As Feteris puts it, “[t]he acceptability of a legal thesis is dependent on the quality of the justification”.³ From a philosophical point of view, therefore, legal justification can be treated as a specific kind of rational justification. By specifying which kind of rationality is characteristic of legal reasoning and argumentation and by studying its features, the philosophical approach sheds significant light on the nature of law as a rational activity.

In the broader framework of legal argumentation, legal justification represents an especially important element of the decisions of judicial instances. The main goal of the justification of judicial decisions is to demonstrate the conformity of decisions with the norms of the legal system, as well as their compliance with the values which underlie that system. Therefore, well-founded legal justification is one of the most important rational instruments for guaranteeing legal certainty and justice as fundamental values of the legal order.

However, given that legal reasoning is primarily reasoning with principles and rules which are not applied mechanically but applied with regard to specific situations, values, and societal interests, it is evident that besides the adequate and reasonable use of the techniques of legal justification there can also arise instances of possible abuse. Practice shows that in certain cases an instrumentalization of justificatory mechanisms may occur through specific argumentative manoeuvres. This instrumentalization arises in situations when there are attempts to legitimize certain legal views that protect a particular interest (economic, political, etc.) even at the cost of suspending the search for a just and impartial outcome of the legal controversy. It is therefore a matter of the utmost theoretical and practical importance to explore the possibility of formulating a

2 See Aulis Aarnio, *The Rational as Reasonable: A Treatise on Legal Justification*, Dordrecht/Boston/Lancaster/Tokyo, D. Reidel Publishing Company (Law and Philosophy Library), 1987; Robert Alexy, *A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Justification*, translated by Ruth Adler and Neil MacCormick, Oxford, Clarendon Press, 1989; Aleksander Peczenik, *On Law and Reason*, Dordrecht/Boston/London, Kluwer Academic Publishers (Law and Philosophy Library), 1989.

3 Eveline T. Feteris, *Fundamentals of Legal Argumentation: A Survey of Theories on the Justification of Judicial Decisions*, Dordrecht/Boston/London: Kluwer Academic Publishers (Argumentation Library), 1999, 1.

set of criteria that effectively demarcates between appropriate and inappropriate use of the means of legal justification.

Besides philosophy and legal theory, another discipline in which the study of the mechanisms of legal justification is of interest is that of logic. Legal justification, especially in what are called ‘hard’ cases, represents a theoretical challenge for the explanatory and formal capacities of standard logical theories. In some important aspects these theories have been shown to be insufficiently powerful or sophisticated to adequately model the argumentative dynamics and complexity of techniques of rational justification in many fields, particularly in the field of practical reasoning. There is thus a need to shape new, more sophisticated theoretical tools for logical analysis, for the representation and evaluation of legal justification, and more broadly, of the legal reasoning in the framework of which it is being developed. The main point of this paper is to provide an insight into the way in which some of those tools are constructed and to test their applicability to a concrete empirical matter.

2 CONNECTING THEORY AND PRACTICE – AN ANALYSIS AND RECONSTRUCTION OF JUDICIAL DECISIONS FROM A DIALOGICAL POINT OF VIEW

According to Feteris,⁴ three main theoretical approaches to the problem of rational justification of legal decisions can be distinguished in contemporary research into legal argumentation: *logical*, *rhetorical* and *dialogical*. These approaches are distinguished on the basis of the different concepts of norms, criteria and standards of legal justification that prevail within the framework of each approach. At the same time, they offer different kinds of theoretical representation of the fundamental structures of legal argumentation and justification.

In the logical approach it is necessary in order to qualify a legal justification as acceptable that “the argument underlying the justification” is “reconstructable as a logically valid argument” and that “the reasons brought forward are acceptable according to legal standards” in force.⁵ The rhetorical approach, which represents a kind of reaction to the way in which the logical approach overemphasizes the formal aspects of legal argumentation, places the emphasis on the “content of arguments” and on “the context-dependent aspects of acceptability”.⁶ In this approach, justification is treated as audience-relative, meaning that the measure of the acceptability of the justification is its effectiveness for the audience. Finally, in the dialogical approach “legal argument is considered as part

4 Feteris 1999 (n. 3), 15–20.

5 Feteris 1999 (n. 3), 15.

6 Feteris 1999 (n. 3), 16.

of a dialogue about the acceptability of a legal standpoint”⁷ Besides the formal and material dimensions of legal justification, this approach also takes the procedural dimension into consideration. Moreover, in the dialogical approach the very criteria of the rationality of legal discussions are defined in a procedural manner.⁸

Although different kinds of theoretical reasons could be brought forward both for and against the adoption of any one of the aforementioned approaches, it seems that a particularly challenging test of their functionality is the analysis of real-life judicial decisions.

In many contemporary legal systems the individual and/or collective judicial instances are under a statutory obligation to justify their decisions in a rational and public way. For a theoretician interested in the logical and philosophical aspects of legal reasoning, the corpora of justified judicial decisions—consisting of those made by judicial instances of different national jurisprudences and/or in the framework of international law—represent an abundance of empirical material for different levels of theoretical studies. A careful argumentative analysis of the justification of concrete judicial decisions, for example, can reveal important aspects of legal reasoning that are usually left implicit. Those aspects may include obfuscated axiological choices made by judges, their adoption of particular legal philosophies, their accordance of different weight to the same legal principles, and the employment of argumentative manoeuvres to justify desired conclusions. At the same time, as has already been mentioned, this kind of analysis is an invaluable tool for assessing the adequacy and explanatory reach of abstract theoretical models of legal justification, which can be more or less successful in dealing with concrete empirical material.

In this context, collective judicial decisions with dissenting opinions are a particularly interesting phenomenon for analysis. These kinds of decisions, involving a maximal degree of controversy, reflect existing disagreements even between judges adjudicating one and the same case. They show in a particularly clear way the depth of the legal problem in question as well as the possibility of arguing convincingly for both sides of the controversy.

In this paper, therefore, an attempt will be made to apply the conceptual resources of the dialogical approach to legal reasoning and argumentation in the analysis and representation of an argumentative conflict of different judicial opinions in a concrete legal situation. A dialogical reconstruction will be proposed of the justification of a decision taken from the Macedonian legal context. The decision in question, pertaining to the area of constitutional law, caused a great deal of controversy not only amongst the judges who adjudicated the case but also amongst the wider social and scientific community. Two judges of the

⁷ Feteris 1999 (n. 3), 19.

⁸ Feteris 1999 (n. 3), 20.

Constitutional Court had different opinions from the majority of judges and these dissenting opinions were published separately from the majority decision. The textual data for the empirical side of the analysis are taken from three documents: the decision of the Court and the two dissenting opinions.

Why choose the dialogical approach in carrying out this particular analysis? First of all, this approach seems the most suitable conceptual tool for the analysis of controversies since it represents legal justification as a regulated exchange of theses and arguments between a proponent and an opponent, the goal of which is to defend a legal statement against actual or possible attacks on it. Secondly, the general theoretical lines of the dialogical approach allow for the use of formal dialogical models in which the ordinary logical operations of deduction are presented in a purely dialogical form.⁹ Thus the logical core of the reasoning is preserved but is integrated within the wider context of the rules of discussion. This leads to the third main characteristic of the dialogical approach, which is that of the importance of the procedural element in this approach.¹⁰ To wit, the building of dialogical models, including models of legal justification, is based on the formulation of a complex of procedural rules that precisely determine the role and the possible moves of each participant in the dialogue. This feature makes it possible to treat the dialogue between the proponent and the opponent as a kind of logical game. The expression 'logical game' in this context denotes a regulated discursive interaction based on following a corpus of rules. These rules can be used by the participants in a creative and strategic way to achieve the main goal of winning the game.¹¹

Taking into consideration all these characteristics, it can be concluded that the dialogical approach to legal reasoning has two fundamental theoretical advantages. On the one hand, this approach is intuitively plausible in the sense that it faithfully represents the natural manner of reasoning and arguing in a legal context. On the other hand, it also opens up many possibilities for the application of formal logical methods in the analysis of argumentative phenomena. However, the question still left open is whether an adequate model of *legal* justification can be built without representing the role of a third party who extends the basic dialogic structure and is responsible for resolving the dispute in his/her capacity as judge or arbitrator.¹² This question will be discussed in greater detail in the concluding sections of this paper.

9 Else M. Barth and Erik C. W. Krabbe, *From Axiom to Dialogue: A Philosophical Study of Logics and Argumentation*, Berlin/New York, Walter de Gruyter (Grundlagen Der Kommunikation Und Kognition/Foundations of Communication and Cognition), 1982, 29.

10 Compare above.

11 Shahid Rahman and Laurent Keiff, On How to Be a Dialogician: A Short Overview of Recent Developments on Dialogues and Games, in Daniel Vanderveken, (ed.) *Logic, Thought and Action*, Dordrecht, Springer, 2005 (Logic, Epistemology and the Unity of Science), 2005, 359–408.

12 Compare Henry Prakken, A Formal Model of Adjudication Dialogues, *Artificial Intelligence and Law* (2008) 16, 305–328.

In contemporary logical and philosophical research on legal argumentation, there are many different platforms for its dialogical modelling.¹³ However, in this paper only one of these will be used as a methodological tool for analysis: Arno Lodder's model DiaLaw, in the version presented in Lodder's book *DiaLaw: On Legal Justification and Dialogical Models of Argumentation*.¹⁴ The reasons for this choice are as follows: firstly, it is a dialogical model built explicitly for the sake of formal analysis and representation of legal justification; secondly, its own theoretical basis is 'reason-based logic', a logical platform developed for the study of the logical aspects of legal reasoning but with potentially much wider theoretical implications.

The application of Lodder's model in this paper will follow the spirit rather than the letter of the model. In order to avoid burdening the text with technical and formal details, the results of the analysis will not be presented in the formal language of DiaLaw but only as a simulation of a natural-language dialogue between the two personified protagonists of the diverging opinions. Also, while in the version of Lodder's work used as source for this paper the application of the model to concrete examples is performed on relatively smaller fragments of legal argumentative discussion,¹⁵ here an attempt is made to expand the possible discussion to a greater length.

The approach taken in this paper nevertheless shares the main methodological preoccupation of Lodder's and other dialogical models of legal justification: the effort to extract the argumentative kernel from the integral form of a real justification of a judicial decision and to present it in a 'dialectical garb'. In

13 Compare, for example, Thomas F. Gordon, *The Pleadings Game: An Artificial Intelligence Model of Procedural Justice*, Dordrecht/Boston/London, Kluwer Academic Publishers, 1995; Henry Prakken, *From Logic to Dialectic in Legal Argument*, (1995), <http://www.cs.uu.nl/groups/IS/archive/henry/DiaLCAIL95.pdf> (12 May 2013.); Arno R. Lodder and Aimée Herczog, *DiaLaw: A Dialogical Framework for Modeling Legal Reasoning*, (1995), <http://arno.unimaas.nl/show.cgi?fid=40> (12 May 2013.); Harry Bart Verheij, *Rules, Reasons, Arguments. Formal Studies of Argumentation and Defeat*, Dissertation Universiteit Maastricht, 1996, <http://www.ai.rug.nl/~verheij/publications/proefschrift/dissertation.pdf> (12 May 2013.); Henry Prakken, *Logical Tools for Modeling Legal Argument: A Study of Defeasible Reasoning in Law*, Dordrecht/Boston/London, Kluwer Academic Publishers (Law and Philosophy Library), 1997; Henry Prakken and Giovanni Sartor, *A Dialectical Model of Assessing Conflicting Arguments in Legal Reasoning*, in Henry Prakken and Giovanni Sartor (eds.), *Logical Models of Legal Argumentation*, Dordrecht, Kluwer Academic Publishers, 1997, 175–210; Jaap Hage, *A Theory of Legal Reasoning and a Logic to Match*, in Henry Prakken and Giovanni Sartor (eds.) 1997 (n. 13), 43–117; Arno R. Lodder, *DiaLaw: On Legal Justification and Dialogical Models of Argumentation*, Dordrecht/Boston/London, Kluwer Academic Publishers (Law and Philosophy Library), 1999; Eveline T. Feteris, *A Dialogical Theory of Legal Discussions: Pragma-dialectical Analysis and Evaluation of Legal Argumentation, Artificial Intelligence and Law* (2000) 8, 115–135; Douglas N. Walton, *Legal Argumentation and Evidence*, University Park, PA, Pennsylvania State University Press, 2002; Jaap Hage, *Studies in Legal Logic*, Dordrecht, Springer (Law and Philosophy Library), 2005.

14 Lodder 1999 (n. 13).

15 Compare Lodder 1999 (n. 13), ch. 5.

this way it is made possible to identify not only the argumentative ‘static’ of the justification, in terms of relations of logical support between the statements of which it is composed, but also the ‘dynamic’ of the exchange of arguments, i.e. the particular ways in which each of the arguments is (or could be) introduced, attacked and defended in the course of discussion. Thus it is hoped that the study of this particular empirical material can contribute to its primary goal of testing the applicability of certain theoretical conceptions while, if needed, pointing out possibilities for their further improvement.

3 DESCRIPTION OF THE METHODOLOGICAL BACKGROUND FOR THE DIALOGICAL RECONSTRUCTION

3.1 Reason-based logic and its fundamental concepts

Developed since the 1990s by Hage, Verheij, Lodder, Leenes and other scholars, reason-based logic tries to capture the specific features of reasoning with rules and principles, which systematically includes balancing the reasons for and against the particular conclusions.¹⁶

The basic insight behind the construction of reason-based logic is that there is a substantial difference between reasoning with statements that are either true or false and reasoning with rules, especially in the field of law. For while the question of application does not even arise in the case of mere statements, it is necessary for rules to be applied in order for there to be consequences.¹⁷

In the framework of reason-based logic, rules are treated as ‘logical individuals’ that have a conditional structure, meaning they consist of a condition part and a conclusion part. In principle, if the conditions of rules are satisfied then their conclusions obtain.¹⁸ Thus the fundamental idea of reason-based logic is that “the application of any rule leads to a reason which pleads for the rule’s

16 See, for example, Jaap Hage, H. Bart Verheij and Arno R. Lodder, Reason-Based Logic: A Logic that Deals with Rules and Reasons, (1993), <http://www.ai.rug.nl/~verheij/publications/pdf/naic93.pdf> (13 May 2013.); Jaap Hage and Bart Verheij, Reason-Based Logic: A Logic for Reasoning with Rules and Reasons, (1994), <http://www.ai.rug.nl/~verheij/publications/pdf/lcai94.pdf> (13 May 2013.); Lodder and Herczog 1995 (n.13); Verheij 1996 (n. 13); Hage 1997 (n. 13); Bart Verheij, Jaap C. Hage and H. Jaap Van Den Herik, An Integrated View on Rules and Principles, *Artificial Intelligence and Law* (1998) 6, 3–26; Lodder 1999 (n. 13); Arno R. Lodder, Law, Logic, Rhetoric: A Procedural Model of Legal Argumentation, in S. Rahman et al. (eds.), *Logic, Epistemology and the Unity of Science*, Dordrecht/Boston/London, Kluwer Academic Publishers, 2004, 569–588, <http://ssrn.com/abstract=1312456> (13 May 2013.); Hage 2005 (n. 13).

17 Hage and Verheij 1994 (n. 16), 1–2.

18 Hage 2005 (n. 13), 87.

conclusion”.¹⁹ For example, the application of the rule ‘If a person is a thief, then this person is punishable’ to a case of theft generates a reason for punishing the thief. However, this conclusion does not follow ‘automatically’ since in some cases there can also be reasons which plead against this conclusion—including situations where there are exceptions to rules, conflicts between rules, etc.

By treating rules as reason-generating entities, reason-based logic gives a central place to the concept of reason. Although the broad definition of reasons as a “set of one or more facts that are in some sense relevant for something else”²⁰ makes it possible to distinguish several types of reasons—constitutive reasons, reasons for belief, for action, etc.,—one of the most important categorical distinctions in the framework of reason-based logic is that drawn between *contributive reasons* and *decisive reasons*. While decisive reasons determine their conclusions in the sense that if a decisive reason for a conclusion obtains then the conclusion also obtains, contributive reasons are not sufficient by themselves to determine the conclusion. In the words of Hage:

There can both be contributing reasons that plead for, and contributive reasons that plead against a particular conclusion. Assuming that there are no relevant decisive reasons, it is the set of *all* contributing reasons concerning a particular conclusion, both the reasons pro and con, which determines whether the conclusion holds.²¹

This is why contributive reasons always have to be *weighed* or *balanced* against contributive reasons which plead in a different direction. To use Hage’s example, if a person of twelve years old has committed a crime, the fact that he/she has actually committed that crime is a contributive reason for punishing him/her, but the fact that he/she is twelve years old is a contributive reason for not punishing him/her. The conclusion will depend on the outcome of the process of weighing the contributive reasons that plead in different directions.

From a logical point of view, the derivation of sentences in the framework of reason-based logic is a two-step procedure. As Hage and Verheij put it, “[t]he first step consists of the determination of all reasons that plead for or against the possible conclusion; the second step consists of weighing those reasons”²² in order to determine which set of reasons outweighs the other. Also, it is important to note that the weighing of contributive reasons is treated not in a psychological but a logical way, based on the information available as to which set of reasons outweighs the other set.²³

¹⁹ Hage and Verheij 1994 (n. 16), 6.

²⁰ Jaap Hage, *Monological Reason-Based Logic: A Low-Level Integration of Rule-based Reasoning and Case-based Reasoning*, (1993), <http://egov.ufsc.br/portal/sites/default/files/anexos/3229-3223-1-PB.pdf> (13 May 2013.), 31.

²¹ Hage 2005 (n. 13), 79.

²² Hage and Verheij 1994 (n.16), 6.

²³ Hage 2005 (n.13), 80.

It can easily be seen that this approach to reasoning with rules is far more complex than the simple deductive model that underlies what is called the ‘subsumptive pattern’ of legal reasoning. This deductive model represents the process of rule-application as an argument of the *modus ponens* form.²⁴ However, the conceptualisation based on the *modus ponens* argument form does not reflect the complex interplay of different conflicting rules and reasons characteristic of legal reasoning, for which the representation in the framework of the reason-based logic model is much more appropriate.

The reason-based logic approach has been developed in two versions: monological and dialogical. While in the monological version the emphasis is placed on the phenomenon of the derivability of statements, in the dialogical version the arguments are treated as kinds of speech acts performed in explicit or implicit communicative contexts. The arguments and the sentences they are composed of are used with the purpose “to convince some audience of the truth, validity or acceptability of a statement or rule”.²⁵ The audience has an active role in the reasoning process because it is “considered to be the other party in a dialogue in which both parties can make dialogue moves”.²⁶

In this dialogical perspective the concept of ‘winning the dialogue’ is the counterpart of the concept of the validity of an argument conceived in a traditional way.²⁷ This clearly presupposes the adoption of a pragmatic view of logical and argumentative phenomena because the central place is given not to the sentences and rules themselves but to their use in different argumentative contexts. This in turn makes it possible to represent many important features of actual arguments which cannot be adequately captured by the classical deductivistic approach, such as the process-character of dialogues, their procedural aspects, the distribution of the burden of proof between the parties, and the strategic components of reasoning and argumentation.

Those features of the dialogical version of reason-based logic make it a highly functional tool for the analysis and representation of all kinds of argumentative controversies, especially legal controversies. Given that an explicit or implicit controversy, in the sense of a confrontation of reasons *pro* and *contra* a particular legal solution, lies in the basis of every justified legal stance, it follows that the dialogical version of reason-based logic should be the optimal instrument for modelling the argumentative aspects of legal justification. This is the leading idea behind the construction of the DiaLaw model by Arno Lodder.²⁸ This model not only integrates the fundamental ideas of reason-based logic but

24 Hage 2005 (n. 13), 88.

25 Hage, Verheij and Lodder 1993 (n.16), 9.

26 Hage, Verheij and Lodder 1993 (n.16), 9.

27 Hage, Verheij and Lodder 1993 (n.16), 9.

28 Lodder and Herczog 1995 (n.13), Lodder 1999 (n.13).

also the ideas of dialogue logic and of the dialogic-procedural theory of legal argumentation (particularly the ideas of Alexy, Aarnio and Peczenik).

3.2 Arno Lodder's DiaLaw – a dialogical model of legal justification: the fundamental concepts²⁹

DiaLaw represents a dialogue game between two participants in which the two players can make moves in the dialogue. The goal of the game is to justify a statement in the dialogue: one player has to offer the justification and the other has to accept it. The two parties in the game could represent individual persons, groups of people, or even only one person arguing for and against a particular statement.

Each move in the game consists of two elements, shaped by applying the fundamental concepts of Searle's theory of speech acts: a) an illocutionary act by which a sentence is claimed, questioned, accepted or withdrawn, and b) propositional content, which represents the sentence the speech act is about. The burden of proof in DiaLaw consists in the obligation of the player who claims a sentence to prove that this sentence is justified. In this process, the player on whom rests the burden of proof is the proponent while the other player is the opponent. Naturally, these roles may shift during the game.

The central concept in the game is that of 'commitment'. The origin of commitment is the claiming or acceptance of a statement. When a sentence is withdrawn, the commitment terminates. During the dialogue, the commitments of the players are recorded in a 'commitment store' which indicates which player is committed to which sentence at which point in the dialogue.

From a logical point of view, the concept of 'forced commitment' is particularly important because it is the element that distinguishes free, informal talks from structured and logically regulated dialogues in which a player can force (by argumentative means) the opponent to accept a thesis. The concept of 'forced commitment', according to Lodder, is comparable to derivation in monological logic and "occurs when a player is forced to accept a sentence, due to the sentences he is already committed to".³⁰

The dialogue rules also determine the turns by which players make their moves, the legitimacy of the moves (whether they are allowed by dialogue

29 This part of the text is based on Lodder 1999 (n. 13), ch. 3, sect. 2. Compare also the extended presentation of this model in Ана Димишкова, *Логиката на правното расудување: дијалошка перспектива*, Скопје, Аз-Буки/Филозофски факултет, 2011, 265–290. (Ана Dimiškova, *Logikata na pravното rasuduvanje: dijaloška perspektiva*, Skopje, Az-Buki/Filozofski fakultet, 2011, 265–290).

30 Lodder 1999 (n. 13), 39.

rules), as well as the consequence of valid moves for the commitments of the players.

The dialogue also has different levels, progressing from the initial level 0 to deeper levels 1, 2, 3, etc. The distinction of levels makes it possible to display the internal structure of the argumentation in a more precise way. The dialogue progresses to a deeper level as a consequence of performing the illocutionary act ‘question’. After the acceptance or withdrawal of a sentence, the dialogue goes back to the level on which this sentence was initially claimed.

Besides general rules of communication and regulation of dialogical commitments (numbered from 1 to 5 in Lodder’s model), DiaLaw also contains special rules which constitute the legal aspect of the model. The legal aspect of the model comprises two related constitutive parts: 1) new elements of formal language which enable the players to use legal concepts, such as ‘rules’, ‘reasons’, etc.; and 2) rules that regulate the consequences of the use of those elements.

The concept of ‘rule’ is introduced as a two-place function, composed of condition and conclusion. Besides the ‘rule’ function there are five new predicates in the legal part of the model: 1) ‘reason’, conceived as a relation of support between the states of affairs expressed in the statements—thus the formula reason (Cond, Concl) is interpreted in the sense that the condition is a reason for the conclusion, or, alternatively, that it is a reason against the negation of the conclusion; 2) ‘outweighs’, a predicate that build formulas expressing the information that the set of reasons for the conclusion outweigh the set of reasons against it; 3) ‘excluded’, a predicate which applies to rules, meaning that if a rule is excluded it cannot be applied, i.e. the conclusion that the rule applies is no longer justified; 4) ‘applies’—a predicate which says that a rule applies and that in such a case the reason based on that rule is justified; and 5) ‘valid’, a predicate which says that a rule is valid. The language of DiaLaw also contains the dialogical predicate symbol ‘illegal claim’, which says that a sentence has been illegally claimed. It is important to emphasize that sentences to which this predicate applies are not forbidden by the dialogue rules but that other reasons specific to the given domain do not permit that sentence to be claimed—for example in the case of illegally obtained evidence in law.

As mentioned above, the consequences of the use of those new elements of language are regulated by what is called ‘special rules of communication’ (numbered from 6 to 16 in Lodder’s model). Thus, by defining the logical language and the rules of DiaLaw, the fundamental ideas of reason-based logic, especially of its dialogical version, have been implemented in a usable formal tool.³¹

31 It can also be used as a tool for intelligent legal support, because there is a version of DiaLaw as computer programme. However, this aspect is not a subject for analysis in this paper.

4 THE CASE IN POINT: QUESTIONING THE CONSTITUTIONALITY OF AN ARTICLE OF LAW³²

In 2003 the Macedonian parliament promulgated a law intended to introduce several changes and additions to the existing law on the State Judicial Council. The State Judicial Council is an institution with very important authorisations concerning the Macedonian court system, especially in terms of procedures for the election and dismissal of judges and the monitoring of the quality of their work.

Article 9 of the Law on the State Judicial Council (hereinafter: LSJC) regulated the question of the cessation of the function of members of the Judicial Council. It stated that the function of a member of the Council ceases in two situations: 1) if the member resigns; or 2) if the member is dismissed. The circumstances leading to the dismissal of a member of the Council are also explicitly stated. Thus, a member of the Council can be dismissed either if he/she is convicted of a crime and sentenced to an unconditional penalty of imprisonment of a minimum of six months, or if he/she has permanently lost the capacity to perform his/her function, which is established by the Council on the basis of the findings and the opinion of an authorized medical commission.³³

One of the most far-reaching and controversial changes introduced by the new law, however, concerned precisely the Article 9 described above. Namely, Article 2 of the Law on Amendments to the Law on the State Judicial Council (hereinafter: the LALSJC), introduced a new third line in Article 9 stating that 'a member of the Council is dismissed if he/she fulfils the conditions for retirement on the basis of age'.³⁴ In this way, the provisions of Article 9 of the LSJC pertaining to the cessation of the function of its members were substantially changed. This is why the constitutionality of Article 2 of the LALSJC was challenged before the Constitutional Court by two current members of the State Judicial Council.³⁵

In the initiative for questioning the constitutionality of Article 2 of the LALSJC, they stated the opinion that this article is in conflict with Article 104 of the Constitution of the Republic of Macedonia, line 3, which reads as fol-

32 For an extended analysis of this case, compare Димишкова 2011 (n. 29), 308–329.

33 Закон за Републичкиот судски совет /ЗРСС/, *Службен весник на РМ*, бр. 80/92 (www.slvesnik.com.mk). (Zakon za Republičkiot sudski sovet /ZRSS/, *Služben vesnik na RM*, br. 80/92 (www.slvesnik.com.mk)).

34 Закон за изменување и дополнување на Законот за Републичкиот судски совет /ЗИДЗРСС/, *Службен весник на РМ*, бр. 43/03 (www.slvesnik.com.mk). (Zakon za izmenuvanje i dopolnuvanje na Zakonot za Republičkiot sudski sovet /ZIDZRSS/, *Služben vesnik na RM*, br. 43/03 (www.slvesnik.com.mk)).

35 The constitutionality of Articles 1 and 4 of the LALSJC was also contested, though the present analysis will focus only on the argumentative controversy related to Article 2.

lows: 'The members of the Council are elected from the ranks of outstanding members of the legal profession for a term of six years with the right to one re-election.'³⁶ Thus, according to the initiators of the procedure before the Constitutional Court, the article in question creates three legally unacceptable consequences: 1) it brings to an end the mandate of the members of the State Judicial Council who have already been elected to that function and who have, in the meantime, fulfilled the condition for retiring on the basis of age; 2) it introduces a new condition for the election of members of the State Judicial Council, i.e., a condition related to their age; and 3) it limits the right of outstanding lawyers who have already fulfilled the conditions for retirement on the basis of age to be elected as members of the State Judicial Council.

The Constitutional Court decided not to initiate a procedure for assessing the constitutionality of the contested article, finding that there were insufficient legal grounds for such a procedure. In the Court's opinion, by not prescribing the conditions for the cessation of the function of members of the State Judicial Council before the period of six years, the Constitution left open the possibility of prescribing them by law, provided that those conditions are related to natural and legal circumstances which affect the capacity for performing the function. Also, concerning retirement on the basis of age, the Court deemed this to be an objective, natural, non-discriminatory criterion for limiting the duration of a public function. Moreover, according to the Court, the Constitution itself explicitly mentions this criterion when it determines the cessation of the function of judges (of regular courts): namely, those judges are dismissed when they fulfil the conditions for retirement on the basis of age. By analogy, the Court finds that there are no obstacles to applying the same criterion for the cessation of the function of members of the State Judicial Council.³⁷

However, as mentioned earlier, two judges of the Constitutional Court had dissenting opinions related to the majority decision. They found that the constitutionality of Article 2 had rightly been challenged.³⁸ In the opinion of these

36 An English version of the Macedonian Constitution is available at: <http://www.sobranie.mk/en/default.asp?ItemID=9F7452BF44EE814B8DB897C1858B71FF>

37 Решение У. бр. 118/2003 на Уставниот суд на Република Македонија од 16 јули 2003, *Службен весник на РМ*, бр. 64/03 и 74/03 (www.slvesnik.com.mk). (Rešenje U. br. 118/2003 na Ustavniot sud na Republika Makedonija od 16 juli 2003, *Služben vesnik na RM*, br. 64/03 i 74/03 (www.slvesnik.com.mk)).

38 Compare Трендафил Ивановски, Издвоено мислење по решението на Уставниот суд У. бр. 118/2003 од 16 јули 2003, *Службен весник на РМ*, бр. 64/03 (www.slvesnik.com.mk) (Trendafil Ivanovski, Izdvoeno misljenje po resenieto na Ustavniot sud U. br. 118/2003 od 16 juli 2003, *Služben vesnik na RM*, br. 64/03 (www.slvesnik.com.mk)) and Мирјана Лазарова Трајковска, Издвоено мислење по решението на Уставниот суд У. бр. 118/2003 од 16 јули 2003, *Службен весник на РМ*, бр. 64/03 (www.slvesnik.com.mk) (Mirjana Lazarova Trajkovska, Izdvoeno misljenje po resenieto na Ustavniot sud U. br. 118/2003 od 16 juli 2003, *Služben vesnik na RM*, br. 64/03 (www.slvesnik.com.mk)).

two judges, the mandate of the members of the State Judicial Council, directly and explicitly regulated by the Constitution, is a constitutional category which cannot be changed, limited or terminated by the provisions of a law. Further, the dissenting opinions oppose the use of the argument by analogy concerning the criterion of age as a basis for retirement. The reason for this is that the situation of the judges of regular courts, who are elected without any limitation on the duration of judicial function, is essentially different from that of members of the State Judicial Council since the duration of their function is already explicitly limited by the Constitution to six years, with only one possible re-election.

The decision of the Court, as well as the two dissenting opinions, will serve as material for an argumentative reconstruction of the controversy as a whole through a dialogical confrontation of the opposing views. In this confrontation, the formulation of arguments which support those views, as well as their mutual relation and relative strength, will be analysed in greater detail.

5 DIALOGICAL RECONSTRUCTION OF THE JUSTIFICATION OF THE JUDICIAL DECISION

The dialogue protagonists in the reconstruction of the justification of the decision in question will be the players Judge 1 and Judge 2. Let us imagine that, as a result of the great interest provoked by the case of the premature cessation of the function of the members of the State Judicial Council due to retirement on the basis of age, the two judges are having a discussion concerning the legal aspects of the controversy. The first player, Judge 1, is playing the role of a proponent of the main thesis in the dialogue, which is the thesis that Article 2 of the LALSJC is unconstitutional. Judge 2, in the role of opponent, will try to refute this thesis, i.e. to force the proponent to withdraw it.

Judge 1 will put forward the arguments of the initiators of the procedure for the assessment of the constitutionality of Article 2, as well as those of the judges with dissenting opinions.³⁹ In turn, Judge 2 will use the arguments formulated in the majority decision of the Constitutional Court against initiating a procedure for assessing the constitutionality of the contested article.

Thus in the first move of the dialogue the proponent states the main thesis of the dialogue in the form of a claim:

1. Judge 1: I claim that Article 2 of the LALSJC is unconstitutional.

³⁹ However, there will be no one-to-one correspondence of the arguments presented in the dialogical moves and those presented in the Initiative and in the dissenting opinions; the proposed reconstruction will follow only the main lines of the controversy.

According to the rules of DiaLaw, the dialogue starts at the initial level, which is level 0. Judge 2, in the second move, questions that claim, asking for supporting reason(s) for the claim.

2. Judge 2: Why?

In order to answer this question, Judge 1, the proponent, sets forth the argument that Article 2 in fact regulates a constitutional matter. Namely, as was mentioned earlier, the State Judicial Council is an institution founded directly by the Constitution. Moreover, the Constitution explicitly determines the duration of the mandate of the members of the State Judicial Council and not the mandate of the Council as an institution. Consequently, a law cannot change, limit or terminate the constitutionally established mandate of the members of this institution. Doing so would mean that with the article in question the LALSJC would be imposing itself over the Constitution by formulating prescriptions that can only be the object of constitutional regulation. The formulation of this position is the content of the third move, performed by Judge 1:

3. Judge 1: Because Article 2 of the LALSJC regulates a constitutional matter.

Judge 2 is not convinced by this argument. Moreover, he/she is directly opposing it by negating the claim of Judge 1 from move 3. In this way, Judge 2 takes over the initiative in the dialogue and also the burden of proving the statement that he/she claims (which is the negation of the previous claim):

4. Judge 2: I claim it is not true that Article 2 of the LALSJC regulates a constitutional matter.

Now Judge 1 has the role of an opponent of this statement, challenging it by asking the question ‘why’ and demanding from Judge 2 some kind of argumentative support for his/her claim.

5. Judge 1: Why do you think so?

As an answer to this question, Judge 2 sets forth the fact, which plays the role of an argument, that Article 2 regulates the dismissal of members of the State Judicial Council.

6. Judge 2: Because Article 2 of the LALSJC regulates the dismissal of members of the State Judicial Council.

For Judge 1, it is still not evident what the point of this argument is and he/she demands additional explication by again performing the speech act ‘question’.

7. Judge 1: So what?

Now Judge 2 is forced to state his/her central claim explicitly. This is the claim that the dismissal from the function of a member of the State Judicial

Council is a question which is legitimately regulated by the LALSJC since it is not a constitutional matter but a matter of law.

8. Judge 2: I claim that the dismissal from the function of a member of the State Judicial Council is a matter of law.

Judge 1 is curious as to the legal basis for such a claim, and he/she is questioning it again.

9. Judge 1: Why?

At this point in the dialogue, Judge 2 adopts a 'step by step' strategy in defending his/her previous claim. Namely, he/she will first formulate two claims that are relatively uncontroversial: firstly, that the Constitution explicitly regulates the mandate of the members of the State Judicial Council, i.e. it prescribes the conditions for election and determines the duration of their function; and, secondly, that the Constitution does not prescribe the conditions for the dismissal of members of the State Judicial Council or other conditions for the cessation of their mandate. Judge 1 accepts those claims because they can easily be established as a matter of fact.

10. Judge 2: First claim: The Constitution prescribes the conditions of election and the duration of the mandate of members of the State Judicial Council.

11. Judge 1: That is correct. I accept this claim.

12. Judge 2: The Constitution does not prescribe the conditions for dismissal of members of the State Judicial Council.

13. Judge 1: I accept this claim, too.

After the acceptance of these two claims by the collocutor, Judge 2 will use one of the special predicates of the language of DiaLaw, namely, 'applies'—a predicate that says that a rule applies and that, in consequence, the reason based on that rule is justified. The rule in question (taken in the broad sense of a general principle of legal reasoning) could be formulated in the following way: If the Constitution does not regulate a legally relevant situation, this means that it permits regulation of this situation by law. If we instantiate this rule with the elements of the case in hand, the following formulation obtains: 'If the Constitution does not prescribe the conditions for dismissal of members of the State Judicial Council, this means that it permits prescribing these conditions by law'. Consequently, the conditions for the dismissal of members of the State Judicial Council are a matter of law. Thus the content of the next move of Judge 2 would be as follows:

14. Judge 2: I claim that the following rule applies: If the Constitution does not prescribe the conditions for dismissal of members of the State Judicial Council, this means it permits prescribing these conditions by a law.

Judge 1, who has to make the subsequent move, cannot agree with this claim. Consequently, Judge 1 will negate Judge 2's claim of the application of the rule from the previous move, thus preventing the claim from justifying the reason in favour of its conclusion. This is in accordance with the basic rules of DiaLaw, which permit responding to a claim with another claim only if the second claim represents a direct negation of the first. In this way, by claiming the negation of the sentence from move 14, Judge 1 takes over the initiative in the dialogue again. From an argumentative point of view, this move is one of the most important points in the development of the controversy. Namely, it shows that the two parties in the dialogue interpret the absence of any explicit regulation concerning the dismissal of members of the State Judicial Council in Article 104 of the Constitution in a completely different way.

15. Judge 1: I claim the opposite. The rule that 'If the Constitution does not prescribe the conditions for the dismissal of members of the State Judicial Council, this means that it permits prescribing these conditions by law' does not apply.

Now Judge 2 asks a question by which he/she demands argumentative support for this claim.

16. Judge 2: Why?

In response to the question of his/her collocutor, Judge 1 will claim that instead of the rule formulated in the fifteenth move, a rule with an opposite conclusion applies. According to Judge 1, if the Constitution neither prescribes the conditions for the dismissal of members of the State Judicial Council nor gives any instructions for their being prescribed by law, then the law cannot prescribe these conditions. Consequently, their prescribing is not a matter of law. Thus, in the seventeenth move, we have the following claim by Judge 1:

17. Judge 1: I claim that the following rule applies: If the Constitution does not prescribe conditions for the dismissal of members of the State Judicial Council, then the law cannot prescribe these conditions.

Given that there is a clash of rules of an interpretative character in this case, it cannot be resolved directly by appeal to the provisions of positive law. That is why Judge 2 chooses the following strategy: he/she will first challenge the application of the rule invoked by his/her collocutor; however, the supporting argument for that move will not have the form of claiming a reason but of claiming a fact. Namely, he/she will assert that an argument against Judge 1's claim that it is not permitted to regulate the issue of the dismissal of members of the State Judicial Council by law is the already existent and unchallenged legal provision contained in Article 9 of the LJSC. As mentioned earlier in the text, this article described three situations for the premature termination of the mandate of a member of the Judicial State Council: resignation, conviction with an unconditional penalty of imprisonment for a minimum of six months, or permanent

incapacity for performing their function as established by an authorised medical commission. This gives rise to the following moves in the dialogue:

18. Judge 2: I claim that the rule that 'If the Constitution does not prescribe the conditions for dismissal of members of the State Judicial Council, then the law cannot prescribe these conditions' does not apply.

19. Judge 1: Why?

20. Judge 2: Because Article 9 of the Law on the State Judicial Council prescribes the conditions for the dismissal of a member of the State Judicial Council and the constitutionality of that article is not challenged.

Judge 1 accepts this claim because it is a matter of fact. This provides a basis for Judge 2 to perform the next move, in which he/she will assert the application of the rule that if the constitutionality of Article 9 of the LSJC is not challenged then the constitutionality of Article 2 of the LALSJC should not be challenged either. Obviously, the point of claiming the application of this rule is to provide the reason for its conclusion, which is the thesis argued for by Judge 2. However, for Judge 1 this reason is unacceptable and he/she will directly negate the claim of Judge 2 in the subsequent move. In this way, a new turn in the dialogue occurs, because now Judge 1 has the obligation to justify the claim that the reason formulated by Judge 2 is unacceptable. This part of the dialogue can be represented in the following moves:

21. Judge 1: I accept this claim.

22. Judge 2: I claim that the following rule applies: 'If the constitutionality of Article 9 of the LSJC is not challenged, then the constitutionality of Article 2 of the LALSJC should not be challenged either.'

23. Judge 1: I claim the opposite. The rule 'If the constitutionality of Article 9 of the LSJC is not challenged, then the constitutionality of Article 2 of LALSJC should not be challenged either' does not apply.

24. Judge 2: Why?

The role of the proponent is played again by Judge 1 because he/she has claimed the non-applicability of the rule invoked by his/her opponent. The argumentative strategy of Judge 1 will consist of showing the essential difference between the conditions prescribed in Article 9 of the LSJC (i.e. resignation, sentence to imprisonment, incapacity established by authorised commission) and the condition prescribed in Article 2 of the LALSJC (reaching retirement age) in order to prove that they cannot be assimilated in one and the same category of conditions for dismissal. Thus the dialogue progresses in the following way:

25. Judge 1: I claim that the conditions prescribed in Article 9 of the LSJC are essentially different from the conditions prescribed in Article 2 of the LALSJC.

26. Judge 2: Why?

As a result of the demand for support for his/her claim from move 25, Judge 1 introduces a distinction between two types of conditions for dismissal. The first type is that of unpredictable conditions, the occurrence of which during the mandate of a member of the State Judicial Council is possible but not inevitable. If these conditions should occur, they would prevent a person from performing his/her function. The conditions prescribed in Article 9 of the LSJC (resignation, imprisonment, incapacity) are of this first kind. The second category is that of predictable conditions, the fulfilment of which is known in advance and which do not necessarily imply an incapacity for performing the function. The condition prescribed in Article 2 of the LALSJC—i.e., reaching retirement age—belongs to this second kind. Judge 2, who cannot find a solid basis for negating these claims, accepts them. So the next moves in the dialogue are as follows:

27. Judge 1: I claim that the conditions prescribed in Article 9 of the LSJC are unpredictable and their fulfilment would impede the performance of the function of a 'member of the State Judicial Council'.

28. Judge 2: I accept this claim.

29. Judge 1: I claim that the condition prescribed in Article 2 of the LALSJC is predictable and its fulfilment would not impede the performance of the function of a 'member of the State Judicial Council'.

30. Judge 2: I accept this claim, too.

The goal of Judge 1 now is to force his/her opponent to accept the claim that the contested Article 2 of the LALSJC in fact imposes undue restrictions on eligibility for the function of a 'member of the State Judicial Council'. This is why he/she states this thesis as a key argument in favour of the statement from move 25 which asserted the essential difference between the conditions in Article 9 of the LSJC and the conditions in Article 2 of the LALSJC. Of course, Judge 2 will question Judge 1's claim because it goes against his/her own thesis.

31. Judge 1: I claim that Article 2 of the LALSJC unduly restricts eligibility for the function of a 'member of the State Judicial Council'.

32. Judge 2: Why?

At this stage, the dialogue approaches the crucial point at which Judge 1 will claim the reason (another of the 'special legal predicates' of the language of DiaLaw) that the predictability of the condition prescribed in Article 2 of the LALSJC in fact restricts the eligibility for the function of a 'member of the SJC'. From a condition for dismissal it turns into a condition for the election of members of the State Judicial Council and clashes with Article 104 of the Constitution which, as both parties agreed, was the only legitimate source for prescribing conditions for the election of members of the State Judicial Council.

33. Judge 1: I claim that the predictability of the condition prescribed in Article 2 of the LALSJC is the reason why it unduly restricts eligibility for the function of a 'member of the SJC'.

For Judge 2, accepting this reason would mean a defeat in the dialogue since it would imply that if the prescribing of conditions for the election of members of the State Judicial Council is an explicitly defined constitutional matter then any kind of restriction imposed on them would mean a violation of the Constitution. This is why he/she will demand further support for claiming that reason, with a view to postponing acceptance of the claim for as long as possible.

34. Judge 2: Why?

In support of the reason adduced in the previous move, Judge 1 will claim that the following rule applies: 'If a person already fulfils the predictable condition from Article 2 of the LALSJC (reaching the retirement age), then that person cannot be elected as a member of the State Judicial Council.' Of course, this formulation represents a concretisation of a more general principle/rule, according to which if a person already fulfils the conditions of dismissal from the function to which he/she is to be elected then this person cannot be elected for that function. This line of reasoning is represented in the following move:

35. Judge 1: I claim that the following rule applies: 'If a person already fulfils the predictable condition from Article 2 of the LALSJC (reaching the retirement age), then that person cannot be elected for the function of a 'member of the State Judicial Council'.

If Judge 2 wants to contest this rule, he/she will have to contest the claim that as a consequence of the predictability of the age-related condition it is impossible (in the sense of illogical) to elect a person about whom it is known in advance that he/she already fulfils the conditions of dismissal from the function to which he/she is elected. Being aware of the fact that he/she cannot find reasonable grounds for countering this claim, Judge 2 decides to accept the application of the rule from move 35. Given that the application of a rule, according to the principles of DiaLaw, justifies the reason based on that rule, Judge 2 is dialogically obliged to accept the reason based on that rule as well.

36. Judge 2: I accept the application of the rule 'If a person already fulfils the predictable condition from Article 2 of the LALSJC (reaching the retirement age), then that person cannot be elected for the function of a 'member of the State Judicial Council'.

37. Judge 2: I also accept the claim that the predictability of the condition prescribed in Article 2 of the LALSJC is the reason why it unduly restricts eligibility for the function of a 'member of the State Judicial Council'.

The acceptance of this reason opens the possibility of using another special predicate of the language of DiaLaw, i.e., the predicate 'outweighs'. The goal of

Judge 1 is to show that the set of reasons for the conclusion that ‘the condition from Article 2 of the LALSJC unduly restricts eligibility for the function of a ‘member of the State Judicial Council’ outweighs the set of reasons against that conclusion. In this case, the set of counter-reasons is empty, which means that if Judge 2 does not formulate a counter-reason, i.e. a reason against the conclusion, the dialogue will be won by Judge 1. Given that the concrete decision on the basis of which this dialogue is constructed does not contain a formulation of a counter-reason for the aforementioned conclusion, the set of reasons against the conclusion is empty. By the rules of DiaLaw, an empty set of reasons is by default outweighed by a non-empty set of reasons.⁴⁰

As a result of this, Judge 2 is obliged to accept the claim which includes the predicate ‘outweighs’. This in turn means that he/she also accepts its conclusion, i.e., that Article 2 of the LALSJC unduly restricts eligibility for the function of a ‘member of the State Judicial Council’ and thus regulates a legal matter which lies outside its scope, i.e. is in the domain of the Constitution. Consequently, Judge 2 is forced to accept the initial thesis of his/her collocutor and to end the dialogue. Thus the final moves in the dialogue are as follows:

38. Judge 1: I claim that the set of reasons for the conclusion that Article 2 of the LALSJC unduly restricts eligibility for the function of a ‘member of the State Judicial Council’ outweighs the (empty) set of reasons against it.

39. Judge 2: I accept that claim.

40. Judge 2: Consequently, I accept the initial claim of Judge 1 that Article 2 of the LALSJC is unconstitutional.

6 DISCUSSION RELATED TO THE DIALOGICAL RECONSTRUCTION OF THE DECISION

As is always the case with the application of abstract formal models to the analysis and reconstruction of concrete empirical material, this material should be subjected to a certain degree of modification in order to fit in the framework of the formal model. In this case, modification involved: 1) selecting relevant parts from the original text of the analysed judicial opinions; 2) formulating the claims and counter-claims that were subsequently ‘put in the mouths’ of the participants in the dialogue; and 3) extracting the reasons and arguments for those claims from the integral form of the decision and the dissenting opinions. Each of these steps necessarily involves a certain amount of arbitrariness, in the sense that the person carrying out the reconstruction and the modelling has to ‘translate’ the natural-language material into the formal structure used

⁴⁰ However, see Hage 2005 (n. 13), 84 for some exceptions to this general principle.

as a tool for analysis and evaluation according to his/her own assessment of the importance of the relevant elements. Thus the proposed reconstruction is only one possible version of what is perceived as the optimal dialogical form of the legal controversy in question. Also, the strategies chosen by the players might appear different in another approach to the logical analysis and representation of the same material.

Although this decision was analysed and dialogically reconstructed by using the fundamental concepts of a contemporary dialogical model of legal argumentation and justification, i.e. Lodder's DiaLaw, it does make it possible to gain an insight into the functioning of the dialogical approach to legal justification in general. Through this application, its positive features have been affirmed once again.

First of all, this kind of approach provides an insight into the integral form of the controversy which lies behind the concrete decision and successfully reflects its argumentative dynamics. This 'holistic' aspect increases the naturalness and the intuitive plausibility of the dialogical models. Moreover, the dialogical modelling also incorporates the rhetorical strategies employed by the parties, which is one of the main features of Lodder's DiaLaw. This integration of the rhetorical element in the model is especially important because it can reveal the particular argumentative manoeuvres performed by the participants in the dialogue, which can be legitimate and rational as well as abusive and derailed.

The fundamental logical core of this and other dialogical models integrated in the wider dialogical protocol defined by dialogue rules makes it possible to identify the potential 'weak points' in the argumentation of both parties through a detailed dialogical reconstruction of every move in the dialogical interaction. For example, in the analysed decision it became obvious that there was an absence of counterargument for the claim that while the condition of retirement on the basis of age is explicitly formulated as a condition for dismissal from the function of a 'member of the State Judicial Council' it also logically implies a restriction on the eligibility for this function and imposes a new condition for the election of potential members to this institution. The absence of a counterargument for this crucial claim contributed in a decisive way to the opponent's losing the dialogue game. On the other hand, there was also a weak spot in the argumentative strategy of Judge 1 in moves 17–25. Thus, Judge 1 first claimed that it is not permitted to regulate the issue of conditions for the dismissal of members of the State Judicial Council by law, but afterwards he/she invoked the existing conditions defined in Article 9 of the LSJC without any questioning of their legal status in order to claim that they are essentially different from the contested Article 2 of the LALSJC. By making possible the identification of such problematic sequences in a given argumentation, Lodder's model demonstrates

that, besides its descriptive and analytical aspect, it also possesses a normative aspect which enables its users to evaluate the degree to which a particular decision lives up to logical and legal standards of soundness.

However, the question of the normative aspects of the dialogical models, including Lodder's DiaLaw, raises two important issues concerning their functioning as tools for logical and argumentative reconstruction: firstly, the issue of the status of dialogue rules; and, secondly, the issue of the presence of a third party in the dialogue.

As far as the first point is concerned, it has already been mentioned that the dialogue rules integrate the fundamental logical rules (for consistency, validity of arguments, non-contradiction, etc.) into a corpus of procedural rules which determine the course of the dialogue. These procedural rules can differ from one model to another. But how can their choice be justified? If they are not subject to discussion then they are treated as unquestionable and in a way dogmatised; if they are subject to discussion, who will determine the rules by which this meta-discussion will be carried out? Thus the problem of the justification of dialogue rules can seriously affect the normative capacity of dialogical models. Namely, if the status of the fundamental rules upon which a model is built is questionable, then the model can hardly serve as a reliable standard of assessment of the argumentative soundness of a particular justification.⁴¹

The question of the criterion of argumentative soundness leads to the other problematic issue related to dialogical models and their functioning as tools for logical reconstruction of legal justification: the issue of the role of a third party—arbiter or judge—in the model. Dialogues in legal contexts are conflictive rather than cooperative, in the sense that each party is trying to turn the outcome of the controversy to his/her own benefit by all available legal and argumentative means. So the concept of the 'free acceptance' of the other party's argument, which plays a central role in Lodder's model,⁴² seems counter-intuitive when it is taken as the sole criterion of justification and is applied to the fundamentally adversarial legal context. As was obvious in the analysed example, each party in the dialogue will avoid accepting the other party's claims for as long as possible, i.e. until they are forced to do so by the lack of any possibility for further argumentative manoeuvres.

This is why the inclusion of an element representing the role of the judge in dialogical models of legal reasoning seems highly plausible, if not necessary. The task of the judge would be to guarantee: 1) the reaching of a decision and the termination of the controversy according to valid legal rules and standards (i.e. the material aspect); and 2) the proper use of the dialogue rules by the

41 Lodder is well aware of this problem; cf. his discussion on p. 27 in Lodder 1999 (n. 13).

42 Lodder 1999 (n. 13), 34.

parties in the legal context, thus preventing the possibility of their subversive dialogical behaviour (i.e. the procedural aspect).⁴³

However, Lodder explicitly states his reasons for not modelling the role of the arbiter, which consist of the idea that “it would imply that there indeed exists an independent criterion to settle conflicts, namely the criterion the judge uses to decide”.⁴⁴ Moreover, the inclusion of a third element would affect the basic dialogical structure, transforming it into a kind of, as Jaap Hage puts it, “triallogical” structure.⁴⁵ In sum, it seems that this problem is still open for future research. Integrating the role of the judge in formal representations of legal argumentation and justification by upgrading the fundamentally plausible features of the dialogical model thus represents a serious theoretical challenge.

7 CONCLUSION

In recent years, the argumentative aspects of legal justification have been widely explored with the help of dialogical models in which justification is represented as a structured dialogue between a proponent and an opponent concerning a legal thesis. In this paper an attempt has been made to apply this approach to a particular legal matter and to present a dialogical reconstruction of a controversial judicial decision from the Macedonian legal context. The reconstruction was carried out using a contemporary dialogical model of legal justification, Arno Lodder’s DiaLaw. The analysis carried out in this paper has confirmed that this dialogical approach is suitable for representing the argumentative dynamics and strategic elements of legal argumentation. However, there are still some open questions related to its use, especially concerning the normative status of dialogical rules and the possibility of modelling the role of the judge or arbiter in legal controversies.

43 See Prakken 2008 (n. 12); Ana Dimiškowska Trajanoska, The Logical Structure of Legal Justification: Dialogue or “Trialogue?”, in Dov M. Gabbay et al., (eds.), *Approaches to Legal Rationality*, Dordrecht/Heidelberg/London/New York, Springer (Logic, Epistemology and the Unity of Science 20), 2010, 265–280; for a more general perspective, see Vesel Memedi, Resolving Deep Disagreement: A Case in Point, *SEEU Review* (2007) 3, No. 2, 7–18, http://www.seeu.edu.mk/files/seeu_review_vol3-nr2.pdf (14 May 2013.).

44 Lodder 1999 (n. 13), 35.

45 Hage 2005 (n. 13), 255.

Synopsis

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(Dia)logical Reconstruction of Legal Justification

A Case Analysis

Keywords: legal argumentation, legal justification, dialogical modelling of judicial decisions, reason-based logic, Lodder's DiaLaw, judge

Summary: 1. Introduction: Philosophical, Legal and Logical Aspects of Justification. — 2. Connecting Theory and Practice – an Analysis and Reconstruction of Judicial Decisions From a Dialogical Point of View. — 3. Description of the Methodological Background for the Dialogical Reconstruction. — 3.1. *Reason-based logic and its fundamental concepts.* — 3.2. *Arno Lodder's DiaLaw. – a dialogical model of legal justification: the fundamental concepts.* — 4. The Case in Point: Questioning the Constitutionality of an Article of Law. — 5. Dialogical Reconstruction of the Justification of the Judicial Decision. — 6. Discussion Related to the Dialogical Reconstruction of the Decision. — 7. Conclusion.

In this paper an attempt is made to apply the dialogical approach to modelling legal justification in a particular legal case and to present a dialogical reconstruction of a controversial judicial decision from the Macedonian legal context. The reconstruction is carried out using a contemporary dialogical model of legal justification: Arno Lodder's DiaLaw. The dialogical approach on which this model is based is shown to be suitable for representing the argumentative dynamics and strategic elements of legal argumentation. However, there are still some open questions related to its use, especially concerning the normative status of dialogical rules and the possibility of modelling the role of the judge or arbiter in legal controversies.

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