The allocation of the burden of proof in mixed disputes in legal and non-legal contexts

El lugar del peso de la prueba en disputas mixtas en contextos legales y no legales

Eveline T. Feteris
Department of Speech Communication, Argumentation Theory and Rhetoric,
University of Amsterdam, Amsterdam, The Netherlands
e.t.feteris@uva.nl

Received: 25-10-2009. **Accepted**: 10-06-2010.

Abstract: In this paper the problems pertaining to the allocation of the burden of proof in mixed disputes in legal and non-legal contexts are addressed. First the traditional view on the allocation of the burden of proof based on Whately's legal conception of 'presumption' is discussed. Whately's proposal is not adequate for the solution of problems related to the allocation of the burden of proof in everyday mixed disputes where there is no presumption of *status quo*. Using the pragma-dialectical perspective it is explained how practical questions regarding the division of the burden of proof are solved in a legal context. It is shown that for argumentation theory, the combination of material and procedural rules for the allocation of the burden of proof offer an instrument for the allocation of the burden of proof in both legal and non-legal discussions.

Keywords: Burden of proof, presumption, starting points.

Resumen: En este trabajo se discuten los problemas de la ubicación de la carga de la prueba en disputas mixtas en contextos legales y no legales. Primero, se discute la perspectiva tradicional respecto de la ubicación de la prueba basada en la concepción de Whately de 'presunción'. La propuesta de Whately no es adecuada para la solución de los problemas relacionados con el lugar del peso de la prueba en disputas mixtas cotidianas donde no hay presunción de *status quo*. Utilizando la perspectiva de la pragma-dialéctica, se explica cómo las preguntas prácticas en relación con la división del peso de la prueba son resueltas en un contexto legal. Se muestra que, para una teoría de la argumentación, la combinación de reglas materiales y procedimentales

para la ubicación del peso de la prueba ofrece un instrumento para determinar su lugar en discusiones legales y no legales.

Palabras clave: Peso de la prueba, presunción, puntos de vista.

1. Introduction

The concept of 'burden of proof', which is originally a legal concept, has been introduced in the context of non-legal discussions by Richard Whately in his *Elements of Rhetoric*. Since Whately, the concept has been widely discussed in the literature on argumentative discussions.

In argumentation theory, everyone agrees on the fact that whoever advances a standpoint in a discussion has a *burden of proof* for this standpoint: he or she must be prepared to defend this standpoint with arguments if asked to do so. To decide whether a standpoint is acceptable, it is necessary that the party who advances the standpoint puts forward arguments or proof in defense of this standpoint which enables the other participants to the discussion to decide whether the standpoint is defensible or not.

At first sight, the question of the burden of proof does not pose any problems, but in discussions in everyday contexts and institutional contexts such as the law, there is often a situation in which both participants to the dispute adopt a standpoint. In these situations, there is, what is called a *mixed* dispute that the participants try to resolve to their advantage.[1]

With respect to the apportioning of the burden of proof in mixed conflicts, the question can be raised whether both participants have a similar burden of proof for their own standpoint, whether the burden of proof must be divided in a specific way among the parties, or whether in some cases it suffices that only one party defends his or her standpoint. This question is important because, if a party does not succeed in defending his or her standpoint, this does not necessarily imply that the other standpoint is the right one. To say this would amount to committing the fallacy of the *argumen-*

[1] Authors who use the concept of a mixed conflict are Barth and Krabbe (1982: 14), Van Eemeren and Grootendorst (1992: 16 ff), and Rescher (1977) who calls it a 'symmetrically contradictory debate'.

tum ad ignorantiam, which is that it is concluded that a standpoint is right because the opposite standpoint has not been defended successfully.[2]

The aim of this contribution is to show how the allocation of the burden of proof in mixed conflicts should be allocated in mixed conflicts in legal and non-legal contexts in other to resolve the conflict in a rational way, and how practical problems related to the division of the burden of proof can be solved in these contexts.

First, in (2), I will explain that the traditional rule for the apportioning of the burden of proof, which is based on Whately's translation of the legal rules for the burden of proof, is not always adequate for the division of the burden of proof in mixed conflicts in everyday discussions. In (3) I will argue that a pragma-dialectical approach offers an answer to questions with respect to the division of the burden of proof in mixed disputes. Then in (4) I will describe how, from a pragma-dialectical point of view, insights from the law can contribute to the solution of some problems of the allocation of the burden of proof in mixed conflicts in everyday discussions.

2. The traditional perspective on presumption and burden of proof in mixed disputes

In his *Elements of Rhetoric* (of which the first edition was published in 1828) Richard Whately introduces the concepts of presumption and burden of proof, which originate from Roman law, to the field of non-legal argumentation. According to Whately, the rule for the allocation of the burden of proof is that it lies with the person who attacks a standpoint with a presumptive status.

Whately (1846: 112-113) illustrates the principle that the presumption lies with the side who defends an existing institution which 'occupies the ground' by referring to the legal principle taken from criminal law 'that ev-

[2] This kind of argument has been introduced by John Locke (1980: 423) who describes this way of arguing as follows: 'another way that men ordinarily use to drive others, and force them to submit their judgements, and receive the opinion in debate, is to require the adversary to admit what they allege as a proof, or to assign a better. And this I call *argumentum ad ignorantiam*'.

ery man is to be *presumed* innocent till his guilt is established'.[3] According to Whately, 'this does not, of course, mean that we are *to take for granted* he is innocent (...) nor does it mean that it is antecedently *more likely than not* that he is innocent (...) It evidently means that the 'burden of proof' lies with the accusers (...) they are to bring their charges against him, which if he can repel, he stands acquitted. Similarly, according to Whately (1846: 114), 'There is a Presumption in favor of every existing institution. Many of these (we will suppose, the majority) may be susceptible of alteration for the better; but still the 'Burden of proof' lies with him who proposes an alteration; (...) No one is *called on* (though he may find it advisable) to defend an existing institution, till some argument is adduced against it.' So, a consequence of Whately's conception is that if someone who has the burden of proof does not succeed in rebutting the standpoint of the other party (which has the presumption) ànd in defending his own standpoint, he will lose the discussion.

Following Whately, various modern authors of textbooks in argumentation and debate, adopting the approach of the *stock issues*, such as Dick (1972), Freeley (1975), Klopf and Mc. Croskey (1978), Thompson (1971), Ziegelmüller and Dause (1975) contend that the status quo always has the presumption and that the individual who attacks an existing practice always has the burden of proof.[4] The burden of proof in this approach implies that the party who defends the status quo of a policy has the presumption, and that the party who wants a fundamental change of policy has the burden of proof. The party who argues for a change has the burden of proof for various main issues: that there exists a need for a fundamental change, that the proposal remedies significant problems inherent to the present policy, and that the remedy can be applied without serious disadvantages.

This traditional doctrine of presumption and burden of proof has several restrictions and does not offer an adequate principle for the allocation

[3] I refer here to the final seventh edition of *Elements of Rhetoric* from 1846, the first edition was published in 1828.

[4] According to Ehninger and Brockriede (1978: 135) there are two kinds of presumption: an *interpretative presumption* which reflects things as they are viewed in the world (examples are existing interpretations, institutions, practices, and values), and an *assigned presumption* which is the result of ground assigned arbitrarily, a preoccupation by agreement rather than by interpretation (for example the presumption of innocence in the criminal process).

of the burden of proof in various kinds of controversies.[5] From the perspective of a rational resolution of a difference of opinion, it does not offer an equal division of obligations: the party attacking the status quo has a double burden of proof (he or she must show that the existing state of affairs is not satisfying, and that the proposed course of action is a better alternative) and therefore a disadvantage in comparison with the party defending the status quo. From the perspective of practical application, this rule does not seem applicable in all discussion contexts. In a problem-solving discussion for example, the starting point is not an existing situation but a problem which must be solved. There are several solutions for solving this problem and the aim of the discussion is to choose the best solution for the given problem.[6]

A more serious problem addressed by van Eemeren and Grootendorst (1984; 1992: 121) and other authors is that in a mixed dispute, the problem to be solved regarding the burden of proof is not a problem of choice but a problem with respect to the order in which the two standpoints must be defended. According to Whately and other authors representing the traditional perspective on the burden of proof, this problem is presented as a problem of choice. Often, each party makes an attempt to force a decision and lay the burden of proof at the door of the other party. In such cases, a way out is sometimes found by assuming that the burden of proof rests on the party who is attacking a received wisdom, a prevailing tradition or an existing state of affairs. The burden of proof then rests on the party who wishes to change the *status quo*. He must prove that the alternative he is propounding is better. This means that the *status quo* has the status of a *presumption*.

However, as was argued earlier, the principle of presumption as introduced by Whately, cannot be used in all cases. There is not always a clear *status quo*. Furthermore, there is a suggestion in the principle of presump-

[5] For a survey of this discussion see Ehninger and Brockriede (1978: 139-141). See also Gaskins (1992: 34-35).

[6] See also Cronkhite (1969: 39) who argues that the view adopted by Whately and modern textbooks in debate creates some real problems when applied to 'real-life' argument, since the status quo cannot always be identified. Goodnight (1980) makes a distinction between conservative and liberal presumptions, where the liberal presumption is to embrace change unless there are good reasons for avoiding it. Cf. Willard, 1983.

tion that the apportioning of the burden of proof that the principle leads to is also the most just. This need not be the case. It is certainly the most conservative, and the principle thus soon acquires an ideological connotation, even though it is intended to be purely practical.[7]

If the parties basically agree to the application of the principle of presumption, there will be no objection to this from the perspective of the pragma-dialectical theory. So, faced with the dilemma of which party must lead with his defense, the principle will sometimes present a solution. But the application of the principle must not be allowed to result in the burden of proof being placed unilaterally on one party. So, use of the principle solves the problem of who is to argue first, but it does not remove, or lessen, the burden of the other protagonist.

With respect to applying the principle of presumption, according to Van Eemeren and Grootendorst (1984; 1992: 122), it cannot be applied unilaterally by one party against the wishes of his opponent. In some institutionalized discussion situations, such as a court of law, there is a third party, for instance, a judge, who is in a position to break the deadlock by applying the principle. In everyday discussions, the parties must themselves try to get past the impasse. If they fail, there is no alternative but for one of the two simply to go ahead and begin his defense. Otherwise, the discussion reaches a stalemate at the opening stage.

If there is a clear *status quo*, which is also recognized as such by both parties, then there is, of course, no difficulty in applying the principle of presumption, but then, indeed, the problem will generally not arise at all. This is simply because if there is a recognized *status quo* there will probably not be two rival standpoints but only one, because the status quo is unlikely to be formulated in a standpoint unless there is some particular reason to

[7] According to authors representing the *comparative advantages* perspective, if both parties put forward a standpoint they both have, in principle, a burden of proof. The focus of the debate is on the advantages the new policy has in the future in comparison with the old one. (For a discussion of this comparative advantages perspective see among others Ehninger and Brockriede (1978:168-173). Before entering a discussion, the traditional as well as the modern perspective must be taken into consideration. The traditional approach can be adopted in discussions about an accepted policy, system, etcetera, in which the participants agree that it must be maintained until a better alternative has been defended. In situations in which the existing practice is not sacrosanct, and in which a change would be welcome, the modern perspective can be adopted in which both parties have a burden of proof.

do so. To advance what everyone already knows and accepts is, in principle, to perform an unnecessary speech act and, hence, to violate the communication rule of efficiency.

So, from the perspective of a rational discussion in which both parties adopt a standpoint, both parties have, in principle, a burden of proof, regardless of the content of their standpoint. In such contexts, the legal principle of presumption does not offer an adequate solution for problems concerning the allocation of the burden of proof.

In order to be able to show that the law offers other useful procedures for the solution of problems related to the burden of proof in mixed conflicts, in the following section I will first describe the pragma-dialectical perspective on the allocation of the burden of proof in mixed disputes. I will use this perspective to show which problems can arise regarding the burden of proof in mixed conflicts.

3. The pragma-dialectical approach of the allocation of the burden of proof in mixed disputes

As has been explained by van Eemeren and Grootendorst (1984; 1992), the pragma-dialectical theory offers a systematic theoretical basis for resolving problems with respect to the allocation of the burden of proof in mixed conflicts, and it explains why certain forms of behavior with regard to the burden of proof, such as evading or shifting the burden of proof, can be considered as fallacies which hinder the resolution of a conflict. The pragma-dialectical approach offers a tool for answering the question of who has a burden of proof, what the burden of proof consists of and when the burden of proof has been discharged. For our purpose this approach offers a useful perspective to clarify which problems can arise regarding the burden of proof.

The basis for the allocation of the burden of proof is rule 2 of the code of conduct for rational discussants, that is based on one of the preparatory conditions of the speech act of asserting, and which states that a party that advances a standpoint is obliged to defend it if the other party is asked to do so. In mixed disputes, there are two opposed standpoints and on the basis of rule 2 both parties have, in principle, a burden of proof. If a party tries to evade the burden of proof by presenting it as self-evident so that it does not

require further defence, and tries to lay the burden with the other party, or tries to shift the burden of proof by shifting the burden with the other side, a party hinders the resolution of the dispute. If there is a difference opinion about a standpoint, a resolution of the difference implies that it is shown which of the two standpoints is 'acceptable', which implies in a pragma-dialectical approach that it can be defended against critique in accordance with a set of commonly accepted rules and starting points.

From a practical perspective, the question that rises in a mixed dispute concerns the order in which two opposing standpoints regarding the same issue are to be defended: who is to be the first to assume the burden of proof in a mixed dispute. They remark that the way in which this problem is to be solved depends in the first place on the institutional practice or context in which the discussion takes place. If there are no institutional procedures operatives, certain specific conventions provide a pragmatic rationale for deciding on issues such as the order of defense.

The burden of proof implies the obligation to give an adequate reaction to the critical responses of the other party. Furthermore, the burden implies the obligation to reply to all the critical questions advanced in challenging the argumentation schemes that underly the argumentation put forward in defense of the standpoint at issue. The burden of proof has only been discharged when all the relevant critical questions asked by the antagonist have been answered in a way that is deemed sufficiently thorough by the antagonist and no unanswered critical questions remain.

From this perspective, with regard to the content of the burden of proof the central question is which critical responses by the antagonist constitute relevant forms of critique to which the protagonist should answer and which critical questions are relevant for various argumentation schemes.

So, according to the pragma-dialectical approach, in mixed disputes both parties have an obligation to defend their standpoint against the critical reactions of the antagonist which amounts to a burden of proof with respect to a satisfactory answer to relevant forms of critique and to the relevant critical questions belonging to an argumentation scheme that underlies the argumentation that he has put forward. The parties can make arrangements with respect to the order of defending standpoints, and can, for reasons of efficiency, decide that only one standpoint will be defended and that the outcome of the discussion will depend on this defense.

The question then is what kinds of arrangements could be made in the context of a rational critical discussion with respect to the order of defending standpoints and with respect to the critical questions that should be answered. To answer this question, in the next section, I will address the question which arrangements are made with respect to the burden of proof in the institutionalized context of the law and what these arrangements amount to from a pragma-dialectical perspective.

4. The allocation of the burden of proof in mixed disputes in law

In this section I will go back to the law, where the concept of the burden of proof originates from, and I will look at the procedures and rules for the allocation of the burden of proof. I will establish which procedural and material rules are operative regarding the allocation of the burden of proof in mixed disputes in terms of the order in defending standpoints and the critical reactions a protagonist of a standpoint has to react to.

As I have argued elsewhere, legal procedure offers a good starting point for finding solutions for practical questions related to argumentative discussions.[8] The legal system offers the most concrete illustration of how practical problems that have to do with the structural and procedural constraints which are imposed on the discussion can be solved in order to reach concrete results.[9] In a non-legal discussion, if the participants cannot reach agreement on the division of the roles and on certain necessary starting points, they can decide that it is impossible to reach a resolution of the dispute. In the law, however, there is a need for a final and clear outcome and therefore the law offers certain procedural and material rules for resolving legal conflicts by a neutral third party, the judge.[10]

According to Habermas (1988: 244-247) the law institutionalizes and restricts moral-practical discussions in four ways. First, the discussion is

[8] See Feteris (1990).

[9] See also Gaskins (1992:36) and Habermas (1988: 244-247).

[10] In Anglo-Saxon legal systems, it may be the jury who decides about the outcome of various questions of fact and various questions of law. In Continental law systems, there is no jury and it is the judge who decides on legal and factual matters, and therefore also on the apportioning of the burden of proof.

limited methodically, because it is tied to the valid law of the country. Second, it is limited substantively by the subjects that can be discussed and by the division of the burden of proof. Third, it is limited socially, by the conditions for participation and the division of roles. And fourth, it is limited temporally by the time limits imposed on the proceedings. In guaranteeing the impartiality of the procedure, the judge has an important role. In Haberma's view, in courtroom proceedings impartiality is guaranteed by the role of the judge as an impartial arbiter, by the principle *audi et altera partem*, by the rules for the division of the burden of proof, and by the judge's obligation to justify his decision.[11]

However, Habermas does not go into the question of how this division is organized and regulated. He seems to suggest that the procedural and material rules regulating the division of the burden of proof have an important function in providing a solution for problems related to the issues that can and should be addressed in a legal discussion. The rules concerning the burden of proof specify which issues should be proven and by whom they should be proven. For reasons of impartiality, it is the task of the judge to divide the burden of proof among the parties on the basis of these rules.

In this section the central question to be answered is which institutional rules and procedures govern the allocation of the burden of proof. I will show that the combination of procedural and material rules offers a useful perspective for the organization of the burden of proof that could also be applied to non-legal contexts of discussion.

4.1. Material and procedural rules for the allocation of the burden of proof

In the law, the allocation of the burden of proof is based on a combination of *material* and *procedural* rules. The material rules specify legal rights and obligations. They also specify the legal consequences of an infringement of a right or obligation. The procedural rules specify how the legal rights and obligations laid down in the material rules can be maintained

[11] For a discussion of the role of the judge in legal proceedings from a pragma-dialectical perspective see Feteris (1987, 1990, 1993).

and enforced through legal procedures and how legal sanctions against infringements and violations of a legal right or obligation should be enforced. The procedural rules regulate the behavior of the parties, the judge and other persons during the proceedings and lay down the rights and obligations during these proceedings.

From the perspective of the burden of proof, the material rules (in continental law systems laid down in, for example, civil codes and criminal codes) specify for certain types of situations which concrete legal grounds and facts have to be proven by the party initiating the proceedings and which legal grounds and facts have to be proven by the other party if this party wants to rebut the claim. The procedural rules specify how the procedure with respect to the allocation of the burden of proof should be organized by the judge and which decisions are relevant in the context of the burden of proof. This explicit material and procedural organization of the allocation of the burden of proof is very important from the perspective of legal security and predictability: in this way a party knows in advance which rights and facts have to be proven by whom and how the judge will decide in the absence of convincing evidence.

For argumentation theory, this combination of material and procedural rules for the allocation of the burden of proof makes clear that the procedural rules for the burden of proof should be supplemented by rules specifying the material obligations of the participants to the discussion in relation to concrete issues.

The procedural rules (in systems of continental law specified in codes of procedure such as Codes of Civil Procedure and Codes of Criminal Procedure) govern the procedure with respect to the way in which standpoints must and can be presented to the court, how the burden of proof is divided, how the order of defending and attacking standpoints is organized, how the evidence must be evaluated and how the judge must decide about the outcome.

With regard to the burden of proof, the main procedural rule in for example Dutch civil procedure is that a party who invokes a legal consequence, based on certain facts or rights, bears the burden of proof of these facts or rights, unless a special rule or the requirements of reasonableness and fairness point to another allocation of the burden of proof.[12] It is for the court

[12] See clause 177 of the Dutch Code of Civil Procedure.

to decide which party has to be charged with the burden of proof according to this rule. The court may allow exceptions for reasons of fairness. A judge can apply the principle of fairness and decide, for example, that if the defendant denies the claim by bringing forward an exception to the general rule, that the burden of proof for this exception lies with the defendant, or he can assign the burden of proof to the party for whom the proof will be the easiest to provide. How this division should be determined in concrete cases has to be decided by the judge on the basis of the relevant material rules.

The material rules which lay down legal rights and obligations, specify the conditions that must be fulfilled for an invoked legal consequence to apply. These conditions form the *prima facie* conditions that, in the absence of counter-considerations, are sufficient for the legal consequence to follow. In certain cases the material rules also specify which exceptions may cause that the legal consequence does not follow, although the *prima facie* conditions are fulfilled.

An example of a material rule from the Dutch Civil Code is the rule which obliges someone to pay damages for tort committed by guilt and which says that a person who commits an unlawful act for which he can be held responsible is obliged to pay the damages caused by this act.[13] An example of a material rule from the Dutch Criminal Code is that someone who takes away a good that belongs to someone else with the intention of appropriating it will be punished with a fine of imprisonment.[14]

The conditions that have to be fulfilled for an invoked legal consequence to apply specify with respect to which facts the party initiating the proceedings has a burden of proof. The general principle underlying the material division of the burden of proof is that the party initiating the proceedings has the burden of proof with respect to the *prima facie* conditions and that the other party who wants to rebut the claim has the burden of proof with respect to an exception.

In civil law, the discussion is between the plaintiff who presents his claim to the judge and a defendant against whom this claim is directed. When the plaintiff has presented his case and the defendant has had the opportunity to react, the judge has to give a decision. If the judge needs proof for certain

[13] See clause 6:162 of the Dutch Civil Code.
[14] See clause 310 of the Dutch Criminal Code.

statements, he has to establish who has the burden of proof for which statements on the basis of the material rule that is applicable in the concrete case. In the example of a tort case the division of the burden of proof implies that the plaintiff has a burden of proof for the three main prerequisites for applying this rule: the presence of an unlawful act, the damages caused by this act, and the guilt of the defendant.[15] If the defendant wants to rebut the claim, he must bring forward an exception. For example, he can claim that the plaintiff was also guilty. The defendant then has the burden of proof of proving the presence of this exception.[16] So, there is a fixed division of obligations with respect to the various aspects of the complex of possible aspects of a tort.

This material division of the burden of proof is important from the perspective of the judge who must decide the case. This division specifies which facts must be proven by the plaintiff for the judge to be able to grant the claim if the defendant does not appear in court. From this perspective it is enough that the plaintiff proves the facts that constitute these *prima facie* conditions. If the defendant does not appear in court or does not contradict one of these facts, the judge can grant the claim. It is not necessary that the absence of guilt of the plaintiff is established. This constitutes a 'default' condition that becomes only relevant if it is invoked by the defendant. The plaintiff does not have to prove that there are no circumstances that could rebut the claim.

In criminal law the discussion is between the public prosecutor who brings the case to court and the accused who wants to be acquitted. In various Continental law countries, there is a similar material division of the burden of proof with respect to the *prima facie* conditions and possible exceptions. The material division of the burden of proof in, for example, Dutch criminal cases is that the public prosecutor has the burden of proof to show that the accused has committed a criminal offence he is guilty of, and the

[15] From a theoretical-analytical perspective there are five prerequisites for a successful claim on the basis of tort: unlawfulness, responsibility ('toerekenbaarheid'), damages, causality and relativity.

[16] The same principle also applies in Common-law countries where there is a doctrine that one injured through another's negligence cannot recover if his own negligence contributed to his injury. In some U.S. states, the plaintiff must prove his freedom from contributory negligence, while in England and other U.S. states, this proof is up to the defendant. See Walton (1988: 244).

accused will have to prove that there is a justification or that he should not be punished. The material basis for this division can be found in clause 350 of the Dutch Code of Criminal Procedure, which specifies the questions that have to be answered in a positive way in order to be able to convict the accused. This clause describes the material questions that have to be answered by the judge in his final decision:

1. Has the fact been proven?
If no: Acquittal because of lack of evidence
If yes:
2. Does this fact constitute a criminal offense?
If no: Acquittal because of lack of a legal basis
If yes:
3. Can the accused be punished for this criminal offense?
If no: Acquittal because of absence of guilt
If yes:
4. Which sanction has to be imposed on the accused?

From the perspective of the division of the burden of proof, the public prosecutor has to provide information as a defense for his accusation that the accused has to be punished for the answers to the questions 1 and 2. He has to provide *prima facie proof* for the facts that constitute the criminal offense and he has to mention the legal rule on the basis of which these facts constitute a criminal offense according to the Criminal Code. If the public prosecutor has made a prima facie case, with respect to (1) it is up to the accused to provide counter-evidence for the fact that he has not committed the facts of which he is accused. And with respect to (2) he will have to put forward a justification to justify his behavior in spite of the violation of the rule, he has to make acceptable that there is a justificatory ground for behaving as he did. So, the material division of the burden of proof in criminal proceedings is that the public prosecutor has to make a *prima facie* case with respect to the criminal offense, and that the judge will declare the accused guilty of this criminal offense in the absence of the *default* conditions. The accused has to make acceptable that there is an exception by bringing forward and proving justifying circumstances if he wants to rebut the claim.

For specific cases, there are various specific rules which can shift or re-

verse the burden of proof by creating a 'presumption' in favor of the plaintiff so that the burden of proof shifts to the defendant.

In Dutch civil law, there is the general procedural rule of article 177 mentioned earlier that allows for exceptions for reasons of fairness. Furthermore, there is the rule that facts that are generally known do not have to be proven. If the judge is of the opinion that a fact is a generally known fact, he can decide that this fact does not have to be proven so that the burden of proof shifts to the other party.

In U.S law, as Gaskins (1992: 27) and Rohrer (1981: 168-169) explain, there is the rule of *res ipsa loquitur* ('the thing speaks for itself'), developed by courts in cases where the underlying facts may be inaccessible or otherwise difficult to weigh. Suppose a pedestrian is injured by a falling scaffold, but there is no clear evidence to show whether the scaffold-maker or its user did anything negligent. The rule invites the jury to infer the defendant's negligence, based on the common-sense assumption that scaffolds do not normally fall, unless someone like the defendant has been negligent. *Res ipsa loquitur* is a rule of evidence whereby negligence of the alleged wrongdoer may be inferred from the mere fact that the accident happened, provided the character of the accident and the circumstances attending it lead reasonably to belief that in the absence of negligence it would not have occurred and that the cause of the injury is shown to have been under management and control of the alleged wrongdoer. The burden of proof shifts to the defendant if the plaintiff produces substantial evidence that the injury was caused by an agency or instrumentally under exclusive control and management of the defendant. The occurrence must be such that it would not take place if reasonable care had been exercised in the ordinary course of events. In these cases, the considerations that can shift the burden of proof are taken as a common basis for creating a certain presumption which lies with the party who claims that the responsibility for the consequences of the accident lie with the other.

So, in the law there are specific rules and principles that may create a 'presumption' in favor of a certain issue. Because these rules can be considered as commonly accepted exceptions to the general rule, this shifting of the burden of proof does not constitute a fallacy of an illicit shifting of the burden of proof. Furthermore, it is not one of the parties who tries to shift this burden but the judge who applies a general rule.

The combination of these procedural and material rules provides the judge with an instrument to resolve problems with respect to the division of the burden of proof. The legal organization of the burden of proof implies that the party initiating the proceedings, the plaintiff or the public prosecutor, must make a *prima facie* case by specifying the facts which form the necessary requirements of the legal rule on which the claim they make (the legal consequence) is based. If the party initiating the proceedings has relieved himself of this obligation, it is up to the other party to bring forward an exception and show that there are circumstances that constitute counterarguments for this claim.

How this general division has to be implemented in a concrete case depends on the interpretation of the legal rule that has to be applied in the concrete case. This implies that first it has to be established what the necessary conditions are for applying a legal rule. The necessary conditions constitute the elements that belong to the burden of proof of the party invoking the claim. Second it has to be established what constitute the factors that can form an exception that can rebut the claim. These factors belong to the burden of proof of the other party. So, the general formulation of the structure of a legal rule from the perspective of the burden of proof is:

If conditions p and q and r (and not-s) then legal consequence

The conditions p, q and r form the normal conditions for the legal consequence to obtain and belong to the burden of proof of the party initiating the proceedings. This party does not have to prove that the exception s is absent. If the other party wants to rebut the claim, he will have to prove that the exception not-s applies. So for each concrete legal case, from the perspective of the burden of proof, it has to be established how the relevant legal rule has to be translated by the judge in the form described above to be able to decide how the burden of proof has to be allocated from the material perspective.

For civil law, an example of such a reconstruction can be given of the earlier mentioned example of a case of an unlawful act. For the discussion about a claim about an unlawful act the general formulation of the structure of a legal rule can be implemented as follows:

> If there is an unlawful act committed by the defendant (p) that has caused damages to the plaintiff (q) of which the defendant is guilty (r) (and the plaintiff is not guilty (-s)), then the defendant has to pay the damages to the plaintiff

For criminal law, an example of such a reconstruction is:

> If the accused has taken away a good (p) that belongs to someone else (q) with the intention of appropriating it (r) (and if there is not justification for acting so (-s), then the accused should be punished with (specification of the fine)

The rationale for this institutional organization of the burden of proof is that parties should know in advance for which legal facts they will carry a burden of proof, which implies that their claim will not be granted if these facts cannot be established. Legal rules are formulated in such a way that they make clear what the conditions are for invoking a legal claim. This formulation of legal rules, often combined with the relevant jurisprudence with respect to questions about the meaning of the legal terms and questions about which factual situations can be considered as implementations of the legal terms, enables a judge to decide whether the case presented by the party initiating the proceedings can be considered as a plausible *prima facie* case in the absence of counter-considerations.[17]

The question I started with was how the legal organization of the allocation of the burden of proof can contribute to the solution of problems concerning the allocation of the burden of proof in mixed disputes. In order to answer this question I will first translate the legal organization to the pragma-dialectical perspective.

To begin with the procedural division: this can be compared with how

[17] With respect to such counter-considerations authors such as Hage (1997: 123) argue that reasoning with rules (and with principles and goals) is defeasible. This implies that a rule is considered as a reason for a certain conclusion in the absence of counter-considerations that 'defeat' the applicability of the rule. Defeasibility refers to the situation where the conditions of a valid rule are satisfied, but the conclusion nevertheless does not follow. The reasons for defeasibility can be that there are exclusionary reasons or that there are reasons against the conclusion that balance or even outweigh the reasons for the conclusion.

the division is organized by rule 2 which lays down the general procedural obligation of the participants with respect to the burden en of proof. Regarding the procedural order of defending standpoints, in law the party initiating the proceedings has the burden of initiative for the necessary prerequisites for his claim, and the opposing party has the burden of 'going forward' if he wants to rebut the claim by bringing forward an exception. In pragma-dialectical terms this division can be considered as an institutional arrangement of how the transfer of argumentative duties shifts from one party to another during the discussion.

How the burden of proof should be divided over the parties with respect to the material aspects of the difference of opinion depends on the interpretation of the legal rule: which elements do constitute the necessary *prima facie* conditions that are sufficient in the absence of an exception, and which elements form the exceptions? That the party initiating the proceedings bears the burden of proof for these *prima facie* conditions implies that he must be able to react in an adequate way to certain critical questions with respect to these conditions, thus anticipating the 'critical doubt' of the judge in his role as institutional antagonist. It is the task of the judge to raise critical doubt with respect to conditions that are necessary for him to be able to grant the claim. So, the fact that a party has a burden of proof with regard to certain legal facts implies in pragma-dialectical terms that he has to be able to give a satisfactory answer to the critical questions that can be raised.

Translated to the pragma-dialectical perspective, in law the basic principle for the division of the burden of proof with respect to the material aspects of a concrete situation is that a party has, in principle, a burden of proof for answering the critical questions that belong to the argumentation scheme that underlies his argumentation. These critical questions should be answered in a satisfactory way by the protagonist to make a *prima facie* case. Answering these questions in the absence of counter-considerations would relieve the protagonist from his burden of initiative. If the other party wants to rebut the claim, he will have to show that there are circumstances that could be considered as counter-considerations and he will carry the burden of going forward to prove that these considerations are relevant counter-considerations and can be considered as plausible or true.

Like in the material rules of law, the various argumentation schemes could be interpreted in such a way that they specify which arguments must

be put forward for the claim to be acceptable, and which critical questions must be answered satisfactorily. If the protagonist of a standpoint has made a prima facie case by answering these standard questions, it is up to the other party to bring forward and defend a counter-claim which forms an exception to the original claim, or in which it is stated that one of the answers to the critical questions is not adequate.[18]

This translation of the legal material organization of the allocation of the burden of proof with respect to certain issues to the pragma-dialectical perspective clarifies how problems related to the material aspects of the burden of proof can be solved. For specific contexts, the various argumentation schemes and the relevant critical questions belonging to it must be specified. A general description of the structure of an argumentation scheme and the general critical questions offers a framework for a material division of the burden of proof with respect to the *prima facie* points that must be addressed by the party putting forward the claim and the exceptions that must be addressed by the party who wants to rebut the claim. This general framework must be implemented for specific applications in institutional and non-institutional contexts.

5. Conclusion

In this contribution, I have argued that the traditional view on presumption and burden of proof as it has been translated by Whately from the legal context to the context on non-legal discussions is not applicable in mixed disputes in which there is no *status quo* or existing institution. Starting from a pragma-dialectical approach of the division of the burden of proof in mixed disputes I have explained that the central problem is how the burden of proof can be regulated when the participants agree, for reasons of efficiency, on a certain order in defending or on a division of the burden of proof.

Then I have shown how insights from the law with respect to procedural and material rules with regard to the burden of proof can offer suggestions for determining how the allocation of the burden of proof can be regulated

[18] For an analysis of the burden of proof in criminal proceedings in terms of such an argumentation scheme see Feteris (1993).

when the participants agree on a certain order or division in the defense. I have described how the concept of argumentation schemes and relevant critical questions can offer a starting point for deciding on these matters.

Works Cited

Alexy, R. *A theory of legal argumentation. The theory of rational discourse as theory of legal justification*. Oxford: Clarendon Press, 1991.

Barth, E.M. & E.C.W. Krabbe. *From axiom to dialogue*. Berlin: De Gruyter, 1982.

Cronkhite, G. *Persuasion: Speech and behavioral change.* Inidanapolis: Bobb-Merill, 1969.

Dick, R.C. *Argumentation and rational debating*. Dubuque: William C. Brown, 1972.

Eemeren, F.H. van & R. Grootendorst. S*peech Acts in argumentative discussions.* Dordrecht: Foris, 1984.

Eemeren, F.H. van & R. Grootendorst. "Rationale for a pragma-dialectical perspective". *Argumentation*, Vol. 2 (2) (1988): 271-292.

Eemeren, F.H. van & R. Grootendorst. *Argumentation, communication, and fallacies. A pragma-dialectical perspective*. Hillsdale NJ: Erlbaum, 1992.

Ehninger, D. & W.E. Brockriede. *Decision by debate*. New York: Harper & Row, 1978.

Feteris, E.T. "The dialectical role of the judge in a Dutch legal process". In J.W. Wenzel (ed.), *Argument and critical practices. Proceedings of the fifth SCA/AFA conference on argumentation* (pp. 335-339), Annandale (VA): Speech Communication Association, 1987.

Feteris, E.T. "Conditions and rules for rational discussion in a legal process: A pragma-dialectical perspective." *Argumentation and Advocacy. Journal of the American Forensic Association* Vol. 26 (3) (1990): 108-117.

Feteris, E.T. "Rationality in legal discussions: A pragma-dialectical perspective." *Informal Logic* Vol. XV (3) (1993): 179-188.

Feteris, E.T. "The judge as a critical antagonist in a legal process: a pragma-dialectical perspective." In R.E. McKerrow (ed.), *Argument and the Postmodern Challenge. Proceedings of the eighth SCA/AFA Conference on argumentation* (pp. 476-480), Annandale: Speech Communication Association, 1993.

Feteris, E.T. "The soundness of 'pragmatic' or 'consequentialist' argumentation: does the end justify the means?" In H.V. Hansen & C.W. Tindale (eds.), *Argumentation and Rhetoric*, Brock University, St. Catharines, Ontario: Ontario Society for the Study of Argumentation, 1998.

Feteris, E.T. *Fundamentals of legal argumentation. A survey of theories on the justification of judicial decisions.* Dordrecht etc.: Kluwer, 1999.
Freeley, A.J. *Argumentation and debate.* Belmont: Wadsworth, 1986
Gaskins, R.H. *Burdens of proof in modern discourse*. New York: Yale University Press, 1992.
Goodnight, Th. "The liberal and the conservative presumptions: On political philosophy and the foundation of public argument." In J. Rhodes & S. Newell (eds.), *Proceedings of the Summer Conference on Argumentation* (pp. 304-337), Annandale, VA: Speech Communication Association, 1980.
Habermas, J. "Wahrheitstheorieen". In H. Fahrenbach (ed.), *Wirklichkeit und Reflexion* (pp. 211-265), Pfullingen, 1973.
Habermas, J. "Law and morality". In S.M. McMurrin (ed.), *The Tanner Lectures on Human Values*, Vol. 8, (pp. 217-279), Salt Lake City: University of Utah Press, 1988.
Hage, J. *Reasoning with rules. An essay on legal reasoning and its underlying logic*. Dordrecht: Kluwer, 1997.
Hamblin, C.L. *Fallacies*. London: Methuen, 1970.
Klopf, D.W., J.C. Mc. Croskey (eds.). *The elements of debate*. New York: Arco, 1978.
Locke, J. *An essay concerning human understanding*. (5th revised edition with an introduction by A.D. Woozley). London: Dent, 1980.
Rescher, N. *Dialectics. A controversey-oriented approach to the theory of knowledge*. Albany: State University of New York Press, 1977.
Rieke, R.D. & M.O. Sillars *Argumentation and the decision making process*. (2nd edition). New York: HarperCollins, 1984.
Rohrer, D. "Burden of proof." In G. Ziegelmueller, J. Rhodes (eds.), *Dimensions of argument: Proceedings of the second summer conference on argumentation* (pp. 159-178), Annandale, VA: Speech Communication Association, 1981.
Smith, C., D.M. Hunsaker. *The bases of argument: Ideas in conflict*. Indianapolis: Bobbs-Merill, 1972.
Thompson, W.N. *Modern argumentation and debate: Principles and practices*. New York: Harper, 1971.
Walton, D.N. "Burden of proof." *Argumentation* Vol. 2 (2) (1988): 233-254.
Walton, D.N., E.C.W. Krabbe. *Commitment in dialogue. Basic concepts of interpersonal reasoning.* New York: State University of New York Press, 1995.
Whately, R. *Elements of rhetoric* (7th revised edition, first edition 1828). London: B. Fellowes, 1846.
Willard, C.A. *Argumentation and the social grounds of knowledge*. Tuscaloosa: The University of Alabama Press, 1983.
Ziegelmueller, G.W. & C.A. Dause. *Argumentation: Inquiry and advocacy*. Englewood Cliffs, N.J.: Prentice Hall, 1975.