(Dia)logical Reconstruction of Legal Justification
A Case Analysis

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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 JUSTIFICATION

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


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, 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. 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”. 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

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5 Feteris 1999 (n. 3), 15.
6 Feteris 1999 (n. 3), 16.
of a dialogue about the acceptability of a legal standpoint."\textsuperscript{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.\textsuperscript{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

\textsuperscript{7} Feteris 1999 (n. 3), 19.
\textsuperscript{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. 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. 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.

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. This question will be discussed in greater detail in the concluding sections of this paper.

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10 Compare above.


In contemporary logical and philosophical research on legal argumentation, there are many different platforms for its dialogical modelling. 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*. 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, 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

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14 Lodder 1999 (n. 13).

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

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17 Hage and Verheij 1994 (n. 16), 1–2.
18 Hage 2005 (n. 13), 87.
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” makes it possible to distinguish several types of reasons—constitutive reasons, reasons for belief, for action, etc.,—one of the most important categorial 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.

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” 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.

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19 Hage and Verheij 1994 (n. 16), 6.
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. 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”. 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”.

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. 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. This model not only integrates the fundamental ideas of reason-based logic but

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24 Hage 2005 (n. 13), 88.
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 concepts

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”.

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

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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 Димишковска, Логиката на правното расудување: дијалошка перспектива, Скопје, Аз-Букси/Филозофски факултет, 2011, 265–290. (Ana Dimiškovska, Logikata na pravnoto 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

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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 LAW

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.

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’. 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.

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 Димишковска 2011 (p. 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 допонување на Законот за Републичкиот судски совет /ЗИДЗRSS/, Службен весник на РМ, бр. 43/03 (www.slvesnik.com.mk). (Zakon za izmenuvanje i dopolnuvanje na Zakonot za Republički 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.
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. 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 fulfill 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.

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. In the opinion of these
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. 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 necessary 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.


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 counter-argument 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

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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).\textsuperscript{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 ex-
ists an independent criterion to settle conflicts, namely the criterion the judge
uses to decide”.\textsuperscript{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,
“trialogical” structure.\textsuperscript{45} In sum, it seems that this problem is still open for fu-
ture research. Integrating the role of the judge in formal representations of le-
gal 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 rep-
resented as a structured dialogue between a proponent and an opponent con-
cerning 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 re-
construction 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 argu-
mentative 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.

\textsuperscript{43} See Prakken 2008 (n. 12); Ana Dimiškovska Trajanoska, The Logical Structure of Legal Justi-
fication: Dialogue or ’Trialogue’?, in Dov M. Gabbay et al., (eds.), Approaches to Legal Rational-
ity, 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
edu.mk/files/seeu_review_vol3-nr2.pdf (14 May 2013.).

\textsuperscript{44} Lodder 1999 (n. 13), 35.

\textsuperscript{45} Hage 2005 (n. 13), 255.