with what can be observed to be really the case. The truth of a sentence that describes a brute fact is independent of our way of knowing this fact.

Our knowledge of reason-based facts can, on the contrary, only be based on our knowledge of their underlying reasons. If we want to know whether John ought to repair the damage to Jennifer's car, we must apply the rule about tort to the facts of their case to (re-)construct the legal consequences of the case. Moreover, there is no independent standard to establish whether our construction was correct. The only available test is to re-apply the legal rules. It is not possible to test the rules by means of our observation whether the legal consequences established by means of the rule 'really' obtain. In other words, the distinction between truth and knowledge, which characterizes brute facts, is absent in the case of reason-based facts. If the best procedure to obtain knowledge about reason-based facts has been followed, it makes little sense to ask the question whether this 'knowledge' is true. (This only holds for the step from the brute facts to the reason-based facts. Knowledge about reason-based facts always has a component of knowledge about brute facts and for this knowledge it may remain possible to ask whether it is correct.)

The second part of the reasons why dialogical, or, more generally, procedural, approaches to the law are so popular is, in my opinion, that the law in actual cases consists of reason-based facts, facts that are the result of the application of legal rules. It is only possible to establish these facts by applying the rules. In other words, it is only possible to establish what the law in a concrete case is by means of a procedure. Legal dialogues are obvious examples of such procedures. In section 7, after a discussion of Gordon's Pleadings Game, I will return to this procedural view of the law.

6. GORDON'S PLEADINGS GAME

A recurring theme in legal theory is how legal consequences in a particular case can be justified.[42] Just like other foundational enterprises, this one suffers from what has come to be known as the *Münchhausen trilemma*, after the legendary baron who pulled himself by his hairs out of the swamp.[43] A full justification of the legal consequences would be the result of a valid argument with justified premises. As we have seen above, the demand that the premises from which the argument starts are justified creates problems.

[42] E.g. Larenz 1983, MacCormick 1978, Alexy 1978, Aarnio e.a. 1981, Aarnio 1987, Peczenik 1989 and Hage 1997 (Leg).

[43] Albert 1968, 11f.

Either this demand evokes a boundless recursion (infinite regress) of founding arguments, or the justifying chain of arguments is circular, or some premises are assumed by denying that they need additional justification (by making them into dogmas).

To evade this trilemma, Alexy proposed to take a procedural approach to legal justification.[44] Building on ideas of Habermas[45], Schwemmer and Lorenzen[46] and Perelman[47], he considers a conclusion to be justified if its proponent has convinced its opponent in a dialogue that satisfies certain constraints. These constraints derive both from general considerations about dialogues and from special demands from the legal domain. Following Alexy, similar proposals have been made by Aarnio[48] and Peczenik.[49] The purpose of the dialogues is in this case to establish a set of premises shared by the proponent and the opponent of a thesis, from which the thesis can validly (in the case of Alexy: deductively) be derived. If it is not possible to establish such a common basis, the thesis cannot be justified. The finding of a common basis is in the law facilitated by the fact that a number of premises are accepted by default, because they are part of established law.

The ideas of Habermas and Schwemmer influenced Alexy, while Alexy's views have been used by Gordon to develop his Pleadings Game.[50] Through this work these ideas effectively entered into the field of Artificial Intelligence and Law.[51] However, the purpose of the Pleadings Game is not legal justification, but rather to establish the legal and factual issues that separate the parties in a legal conflict. Nevertheless, the topic with which the Pleadings Game deals is very similar to that of legal justification, namely the establishment of the premises for legal justification. Where Alexy aims at the justification of a legal judgment by finding a common set of premises from which the judgment follows, the Pleadings Game aims at finding premises about which parties disagree and that explain their disagreement about what should be the outcome of their case.

There is another difference. Whereas Alexy takes his starting point in the approach of Habermas, with strict constraints on the procedure to guarantee a rational outcome, Gordon assumes only a few of the Alexyan constraints,

[44] Alexy 1978.
[45] Habermas 1973.
[46] Schwemmer and Lorenzen 1973.
[47] Perelman and Olbrechts-Tyteca 1969.
[48] Aarnio 1987.
[49] Peczenik 1989. See also Feteris 1994 and Hage 1997 (Leg).
[50] Gordon 1994 and 1995. Gordon also described the Trial Game, which will be left out of consideration here.
[51] Gordon 1991, 1994 and 1995. See also Hage 1987 and Hage e.a. 1992 and 1994.

with the effect that his procedure is more like Schwemmer's that takes actual rather than rational consensus as crucial. In particular, Gordon skips all the argument forms, the justification rules, the rules for transition between discussion types, the rules and forms of internal and external legal justification and the special legal forms of reasoning, which Alexy poses as constraints on legal discussions.[52] The constraints assumed by Gordon are[53]:

1. No party may contradict himself.
2. A party who conceded that a rule is valid must be prepared to apply the rule to every set of objects that satisfy its antecedents.
3. An argument supporting an issue may be asserted only when the issue has been denied by the opponent.
4. A party may deny any claim made by the opponent, if it is not a necessary consequence of his own claims.
5. A party may rebut a supporting argument for an issue he has denied.
6. A party may defeat the rebuttal of a supporting argument for one of his own claims, if the claim is an issue.

Because of the purpose of the dialogues, the establishment of a set of premises, or rather the differences in the relevant premises that the parties are willing to accept, the dialogue rules are not aimed at defining logical operators. However, the rules of the Pleadings Game reflect the defeasible nature of legal reasoning and in this respect they are similar to the rules for dialectical approaches to defeasible reasoning.

The purpose of the Pleadings Game makes it differ from the work of Lorenzen and Lorenz and from static dialectical approaches in that the set of premises is not fixed and in that it is not necessary to survey the set of all possible arguments. The Pleadings Game is a mediating system rather than a conflict resolution system; it is left to the parties in a dialogue to establish about which premises they agree and about which they disagree. The validity of the arguments on the basis of these premises is left to the mediating system.

These characteristics make the Pleadings Game into a dynamic dialectical system. The dialogues take place and are not merely simulated, during a process that stretches out in time and that is non-deterministic, because the players are within certain confines free to introduce facts and rules into the dialogue. Only those argument moves are allowed in the Pleadings Game which are relevant from a logical point of view. All dialogue moves have a set of preconditions that are inspired by the logical status of the dialogue and the way in which the move changes this status. In

[52] Alexy 1978, 361f.
[53] Gordon 1994, 243.

other words, the procedural rules of the Pleadings Game by and large reflect the logic that underlies the game. Domain-related rules that impose additional constraints on the dialogue, such as the rules of legal justification and the obligatory legal forms of reasoning that were adopted by Alexy, are lacking. That is why I think that, on the sliding scale from non-dialogical to dialogical dynamic systems, the Pleadings Game is relatively near the pole of non-dialogical systems.

7. THE PROCEDURAL AND RHETORICAL NATURE OF THE LAW

In their paper *Hard Cases: A Procedural Approach*, Hage e.a. argued for a perspective on the dialectical approach in which dialogues do not only have a function in the establishment of premises, but also in the constitution of law in concrete cases.[54] This perspective formed the starting point for the thesis of Lodder.[55] Two key ideas play a central role in this connection: the *purely procedural* nature of the law in concrete cases and the *rhetorical* nature of this procedure.

The purely procedural nature of the law means that what is the law in a particular case is not something that is given independent of the procedure that leads to a decision about the law in a concrete case. This procedural nature is a direct consequence of the fact that the law in concrete cases is reason-based. There is no standard for the outcome of a legal case otherwise than that this outcome is the result of a rule-applying procedure.

Procedures can also play a role if there is an independent standard. In the presence of a standard, we can distinguish between perfect and imperfect procedures. Perfect procedures are guaranteed to lead to outcomes according to the standard. An example is to divide a cake in equal pieces by using a good scale to weigh the pieces. Imperfect procedures should also lead to outcomes in accordance with the standard, but they cannot guarantee the correctness of their outcomes. Criminal procedures, for instance, cannot guarantee that they will lead to the conviction of all, but only criminals.[56] Pure procedures do not have an independent criterion to measure their outcome against. Lotteries are examples of such pure procedures. Their

[54] Hage e.a. 1994.

[55] Lodder 1998 and 1999. The logical systems presented in Hage e.a. 1994 and in Lodder's thesis reflect this theoretical position only to a limited extent, however.

[56] Rawls 1972, 85f.

outcome is correct if the correct procedure was followed, no matter what the outcome is.

The application of rules, legal rules included, is not merely a logical operation, but rather a kind of action that may or may not be performed.[57] There can be reasons against the application of a rule that are not mentioned in the conditions of the rule. For instance, a superior rule with an incompatible conclusion may be applicable. Whether a rule is actually applied depends not only on whether the conditions of the rule are satisfied, but also on whether exceptional circumstances are *known*. Exceptions that obtain, but are unknown, cannot influence the application of the rule and the rule will be applied and will generate its legal consequence.

Moreover, the decision whether a rule is applicable to a concrete case depends on whether the case can be classified in terms of the rule conditions. This classification depends on classificatory rules, many of which are not given before the concrete case to which they are to be applied. For instance, the classification of illegally copying software as appropriating somebody else's good, may ask for a classificatory rule that was never formulated before. It depends on a concrete procedure whether such a rule is accepted as part of the law.

Clearly the actual procedure involved in the application of a rule is relevant for the legal consequences that hold in a concrete case. That is why there is no independent standard for the evaluation of legal conclusions and why the law in concrete cases is purely procedural. This procedural nature of the law would not be important if the procedure could only have one outcome. If the facts and the law are fixed in a case, even if the available information is incomplete in the sense that potentially relevant information is not taken into account, the outcome of the law applying procedure might also be fixed.[58] However, the input of the procedure is not fixed. The law-applying procedure allows for both changes in the recognized facts and changes in the law. By producing a convincing argument (in the psychological sense), a dialogue party can add rules and/or exceptions to the available legal rules, with the effect that the same body of facts leads to more or less legal consequences. Similarly it is possible to change the body of available facts by changing the rules for classification and/or proof.[59]

[57] Hage 1997 (RwR), 123.

[58] This is the case if the procedure that leads from the facts and the law to the legal consequences in a concrete case allows no external influence on the outcome. An example of external influence that should be excluded is that dialogue parties only come up with the 'wrong' arguments.

[59] These a-rational aspects of legal argumentation are emphasized in Lodder 1999.

This possibility of modifying the law during a procedure by convincing one's opponent defines the *rhetorical nature* of the law. The rhetorical nature of the law means that the procedure is concerned with convincing an audience of some thesis (about the outcome of a case). Conviction, in opposition to validity, depends on what actually happens. An audience may be convinced (persuaded some would say) by arguments that are not logically forcing, or that ultimately rest on premises that had not been accepted by the audience before the procedure. The procedural and the rhetorical nature of the law make that the legal consequences in a concrete case are the outcome of a correct procedure, whatever this outcome may be. *In this respect* the law in concrete cases is comparable to the outcome of a lottery.

The change of perspective that results from considering law as a pure rhetorical procedure has several implications. First, the procedural rules (dialectical protocols) become more important. The dialogue rules in systems that focus on the modeling of defeasible reasoning tend to be confined to ensuring that both parties have full opportunity to attack the arguments of their opponent. The ways in which attacks are made possible depends on the (non-monotonic) logic that is modeled by the system. For instance, systems may allow questioning premises, adducing reasons against the application of a rule, or adducing reasons for an incompatible conclusion. In other words, the dialogue rules are strongly related to the logic they model. This is clearly illustrated by the rules of Gordon’s Pleadings Game, described in section 6.

If the emphasis shifts from modeling a logic to the establishment of law in concrete cases, other procedural rules become important. An example is the exclusionary rule, which forbids adducing evidence in a criminal procedure that was obtained illegally. Another example, also from criminal law, is that arguments based on analogical rule application are forbidden.[60] Even more fundamental is that in legal procedures, the parties are committed to the law, not only in the sense that they are forced to accept the valid rules of law, but also in the sense that they ought to apply these rules where relevant. In general it holds that if the function of a procedure is to establish the law, the nature of the procedure is not (primarily) a matter of logic, but it is a matter of law itself. In the following sections I will discuss some of the consequences of the shift from merely dynamic dialectical systems to law-establishing dialogue systems

[60] Kloosterhuis 1995.

8. THE ROLE OF LEGAL RULES IN LAW-ESTABLISHING DIALOGUES

The idea that law is purely procedural is somewhat counter-intuitive, to say the least. Clearly there are some hard cases, the outcome of which is uncertain and which can be argued in several ways. But just as clearly, there are cases about which every sensible lawyer will agree how they should be solved. This strongly suggests that the law is not purely procedural, but rather has an imperfect procedure.

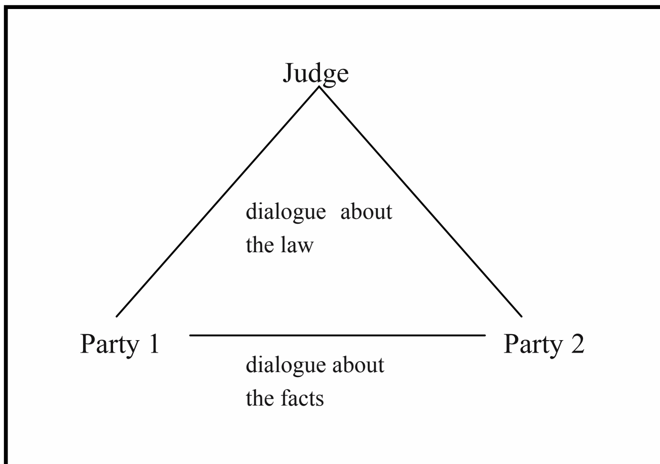
This line of reasoning is strengthened by the observation that a purely procedural view of the law leaves little room for the rules of law that apparently determine the legal consequences of concrete cases. If the parties to a dialogue are free, within the confines of the dialogue rules, to determine the outcome of the dialogue, how can the role of legal rules be accounted for?

To meet these objections, I propose to distinguish between two views of purely procedural law. The one view, which seems wrong, is that the parties in a dialogue are completely free to use or not use the legal rules that are applicable to their case. According to this view, the dialogue rules leave the contents of the dialogue completely open. The other view, which is in my opinion correct, is that the rules of legal dialogues somehow force the parties in a dialogue to take the pre-existing legal rules into account. In the remainder of this section I will illustrate how dialogue rules might accomplish that.

First, I want to distinguish between civil cases in which parties are, at least according to Dutch law, to a large extent free to determine which facts will be taken into account and, for instance, criminal cases, in which one of the purposes of the procedure is to find the truth. In civil cases, the facts are, so to speak, at the disposal of the parties, while the law is not. In criminal cases, neither the facts nor the law is at the disposal of the parties. Because in civil cases both phenomena - aspects that are and aspects that are not at the disposal of the parties - play a role, I will continue my discussion with them. The part of the discussion devoted to the law in civil cases will grosso modo also be applicable to the law and the facts in criminal cases.

Since the parties in a dialogue are free to dispose of the facts of the case, precisely those facts are assumed to obtain that are accepted by both parties in the dialogue. The cause of this acceptance may be that some party is forced to accept (the absence of) certain facts as a consequence of her acceptance of other facts, of the burden of proof, or a decision of the arbiter (see section 10). Given these, sometimes severe, constraints, the facts of the case are the result of the dialogue between the parties and are not determined by independent law.

To account for the fact that the law is something that is, to some extent, given independent of what the dialogue parties want it to be, it is necessary to add a third party to the procedure. It will not do to add rules of law to the commitments of the dialogue parties, because if the parties do not use the rules to which they are committed, commitment to the law has few or no effects. It is crucial that somehow the application of valid rules of law is secured and for this purpose an independent ‘guardian of the law’ is necessary. The role of the judge in actual legal procedures springs to mind as an example of such an independent guardian of the law. It is her task to apply the valid rules (and principles ..., etc.) of the law to the case at hand. The role of this judge in legal procedures can be modeled as a third party in what now becomes a trialogue. The trialogue can in turn be modeled as three interrelating dialogues between the three parties involved in the procedure.



The two 'normal' parties have a dialogue about the facts of the case. The judge is committed to precisely those case facts to which both parties are, or become, committed. Moreover, both of the normal parties have a dialogue with the judge about the legal consequences of the case. The outcome of the trialogue consists of the commitments of the judge at the end of the procedure.

This sketch of trialogues leaves much to be specified. For instance, it must be defined how the three dialogues interrelate in time and in content. Moreover, it is still unclear how the judge must fulfill her task to safeguard the law. However, the sketch gives an impression how commitment to an independent law can be combined with a fully procedural view of the law.

Notice, by the way, how this trialogue model reflects a characteristic of civil law, namely that the parties to a civil dispute are free to dispose of their

rights, including the right to enforce their legal position. If procedures are used to establish the law, the nature of the procedures must reflect the law and not only some system of logic. In the present example this is shown in the dialogue between the parties about the facts of the case and the commitment of the judge to the facts about which the parties agree.

9. REASONING ABOUT DIALOGUE RULES AND DIALOGUE MOVES

A dialogue can be considered as a sequence of dialogue moves. Dialogues are regulated by a set of dialogue rules, which must fulfill several roles. Amongst these roles, two important ones are to determine which party can/may make which dialogue moves at which moment and to determine which party is committed to which sentences, c.q. has won the dialogue. Rules that determine the commitments of the dialogue parties will reflect the logic that underlies the dialogue game. For instance, in Gordon's Pleadings Game, the commitment rules, which regulate the effects of dialogue moves, reflect Gordon's adapted version of conditional entailment.

The rules that determine which moves are possible at which moment may be influenced by the underlying logic too, but they can also to a large extent be determined by the domain of the dialogues, for instance by the law. I already mentioned rules that disallow to defend claims by adducing illegally obtained evidence, or by applying criminal laws analogously. Other feasible rules would be rules that forbid to question sentences that were decided upon by the arbiter (see section 10), or rules that confine the possibility of attacking claims in time. In theory, large parts of procedural law can be incorporated in the rules of some dialogue game.[61]

Because dialogue rules can to a large extent determine the outcome of dialogues, the rules for law-establishing dialogues will be specified by the law itself. Since every legal system has its own procedural rules, even several sets for different parts of the law, it seems hard to develop a general dialogical model for the establishment of the law. Nevertheless, it is possible to develop such a general model, by treating the dialogue rules as domain knowledge and by modeling legal procedures by means of a kind of second-order rules. A dialogue move is on this view possible if it is explicitly made possible by a (domain dependent) dialogue rule to which both parties are committed. At the beginning of a dialogue, both parties are committed to a set of first-order dialogue rules that are part of the legal system in question.

[61] Leenes 1999 deals amongst others with the legal constraints on dialogues.

The second order rules that are incorporated in the dialogue system dictate that the possibility of making dialogue moves depends on the first-order dialogue rules.

This approach has the additional advantage that it becomes possible for the parties to debate on the first-order dialogue rules. These rules are rules of law, just like, for instance, rules of criminal law and of civil law. To some extent these rules may be subject of the dialogue of the parties, for instance in the form of a discussion about their interpretation, which can be seen as discussion about which rules are valid.[62] This means that the procedural rules are subject of the dialogue too. Because the procedural rules govern the dialogue, a dialogue can change its own rules.[63]

Not only the dialogue rules may be subject of the discussion; individual moves may be the topic of an argument, too. The possibility of arguing about individual dialogue moves is important for law-establishing dialogues, because the outcome of the dialogue counts as law. Allowing or disallowing a move may therefore make the difference between winning and losing a legal case. If a dialogue move is disallowed, this disallowance can take two shapes. First, it may be that a (computer-implemented) dialogue system ignores the move completely, except for sending a message to the party who made the move that the move was illegal. Severe violations of the dialogue rules, such as ignoring ones own commitments, should be treated in this way. Second, the dialogue system may 'allow' the move, which is then in some sense possible, but the other party may claim that the move was illegal.[64] If this claim is upheld, the illegal move will be ignored. For instance, if some party adduces illegal evidence, this move may be claimed to be illegal. If this claim turns out to be correct, the move in which the illegal evidence was adduced must be withdrawn.

10. THE BURDEN OF PROOF AND THE ROLE OF THE ARBITER

Since the parties in a legal procedure usually have opposing interests, allowing the parties to establish the facts of a case amongst themselves

[62] Hage 1997 (RwR), 197f.

[63] Vreeswijk 2000 described a way of modeling the change of dialogue rules during the dialogue.

[64] This distinction between impossible and illegal moves corresponds to the legal distinction between acts in the law that are void and that are voidable. The distinction is given explicit attention in Lodder 1999, 35.

involves a danger. The opponent of the claim with which the dialogue begins has an interest in denying everything the proponent claims and in opposing every attempt to get her committed to anything. The law knows several means to limits the effects of such a destructive strategy. The first means is to have initial commitments for both parties to some facts that are assumed by default, for instance facts that are generally known to obtain.

The second means is to assign the burden of proof for particular facts to one of the parties. By assigning some dialogue party a burden of proof, a default decision is made about the presence of facts: some facts are assumed (not) to obtain, unless the party that has the burden of proof proves otherwise. In this way it becomes possible to add facts so that the possibility arises to determine the legal consequences of the case.

The burden of proof may be more or less severe. Freeman and Farley distinguish five levels of support that can be given to a claim[65]:

- *scintilla of evidence*, where there is at least one defensible argument for the claim;
- *preponderance of evidence*, where there is at least one defensible argument that outweighs all arguments of the opponent for the opposite conclusion;
- *dialectical validity*, where there is at least one credible, defensible argument for the claim and where all arguments of the opponent for the opposite claim are defeated;
- *beyond a reasonable doubt*, where there is at least one strong, defensible argument for the claim and where all arguments of the opponent for the opposite claim are defeated;
- *beyond a doubt*, where there is at least one valid, defensible argument for the claim and where all arguments of the opponent for the opposite claim are defeated.

Since the work of Freeman and Farley is based on a static dialectical theory, where the set of premises is fixed, their theory about the burden of proof does not help against an opponent who refuses to co-operate in establishing the facts. Although it specifies the amount of proof that is available given a set of premises, which is useful for a division of the burden of proof between the dialogue parties, it leaves the question open where the basic facts of the case, from which the other ones must be proven, come from.

Here is where the arbiter has her role.[66] She can make decisions about (factual) issues that bind the dialogue parties. Such a decision can be

[65] Freeman and Farley 1996.