

The Study of Legal Argumentation in Argumentation Theory and Legal Theory: Approaches and Developments

El estudio de la argumentación legal en la teoría de la argumentación y la teoría legal: acercamientos y desarrollos

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Abstract: This contribution provides an overview of how argumentation theorists, philosophers, legal theorists and legal philosophers approach questions about the standards for the correctness of legal argumentation. Ideas about the analysis and evaluation of legal argumentation, developed by influential authors in the field, will be examined. This overview serves as a general introduction and background for the different contributions to this issue of Cogency in which the different questions mentioned above will be addressed by the various authors. The contribution starts with an overview of objectives and methodological choices in the study of legal argumentation. It proceeds with a discussion of three traditions in the study of legal argumentation: the logical, the rhetorical and the dialogical approach. The discussion is completed with an extended description of the pragma-dialectical approach to legal argumentation. In this approach rhetorical and dialectical aspects are integrated in a systematic theory for the analysis and evaluation of legal argumentation from the perspective of a rational critical discussion.

Keywords: Legal argumentation, rational reconstruction, discussion rules, logical analysis of legal argumentation, dialectical analysis of legal argumentation.

Resumen: Esta contribución provee de un marco general de cómo los teóricos de la argumentación, filósofos, teóricos legales y filósofos legales se acercan a preguntas sobre los estándares de corrección de la argumentación legal. Ideas sobre el análisis y evaluación de la argumentación, desarrolladas por influyentes autores en el campo, serán examinadas. Este marco general sirve como introducción general para las dis-

tintas contribuciones a este número de Cogency en el que los diferentes problemas mencionados serán comentados por los autores. La contribución comienza con un marco general de objetivos y selección metodológica en el estudio de la argumentación legal. Sigue con una discusión de tres tradiciones en el estudio de la argumentación legal: la lógica, la retórica y el acercamiento dialéctico. La discusión se completa con descripción extendida del ángulo pragma-dialéctico de la argumentación legal. En este acercamiento los aspectos retóricos y dialécticos son integrados en una teoría sistemática para el análisis y evaluación de la argumentación legal desde la perspectiva de la discusión crítica racional.

Palabras clave: Argumentación legal, reconstrucción racional, reglas de discusión, análisis lógico de la argumentación legal, análisis dialéctico de la argumentación legal.

1. Introduction

Argumentation plays an important role in the law. Someone who presents a legal standpoint and wishes this standpoint to be accepted by others will have to present justifying arguments. A lawyer who brings a case to court must justify his or her case with arguments. The judge who takes a decision is expected to support this decision with arguments. Although there is agreement that the acceptability of a legal standpoint is dependent on the quality of the justification, in different theories that are concerned with the quality of legal justification different approaches can be distinguished with respect to the question which standards of legal soundness the argumentation should meet.

In the past thirty years legal argumentation has become an important interdisciplinary field of interest. The study of legal argumentation draws its data, assumptions and methods from disciplines such as legal theory, legal philosophy, logic, argumentation theory, rhetoric, linguistics, literary theory, philosophy, sociology, and artificial intelligence. Researchers with different backgrounds and from various traditions are attempting to explain structural features of legal decision-making and justification from different points of view.

One of the main incentives for the growing interest in legal argumentation has to do with the changing views of the tasks of the judge. In the 20th century, ideas about the tasks of the legislator and the judge have changed. Because the legislator cannot foresee all possible cases and new develop-

ments in society, he must, of necessity, restrict himself to a general formulation of rules. As a result of this legal rules have an open texture character: in a given case rules can be indeterminate. Therefore, as Hart (1961) puts it in the *Concept of law*, the nerve of legal reasoning is not subsumption and the drawing of a syllogistic conclusion, but the reasoned solution of interpretation problems in applying legal rules.

Although it is commonly accepted that legal decisions must be justified in a rational way, there are hardly explicit legal specifications as to what the justification should consist of. One of the important problems in the study of legal argumentation is which standards of legal soundness the argumentation should meet. Is it enough that the judge mentions the facts of the case and the legal rules, or does he also have to explain why the legal rules are applicable to the concrete case? How can the interpretation of a legal rule be justified acceptably? Which standards of correctness are required for the justification of statements about the facts and proof? What, in the context of legal justification, is the relation between legal rules, legal principles and general moral norms and values? Are there any special norms for a judge's decision, when compared with the justification of other legal positions? What is the relation between the normativity of legal norms and legal argumentation? Which types of complex argumentation in legal decisions can be distinguished? How exhaustive should argumentation in legal decisions be? Is it for example necessary for a judge to refute counterarguments in the decision? Which forms of legal argumentation such as textual argumentation, analogy argumentation, *a contrario* argumentation, *ad absurdum* argumentation, consequentialist argumentation etcetera play a role in the justification and what are the criteria for a correct use of these schemes? Which rhetorical techniques are used by judges to present their justification and in which respects do these techniques can be considered as acceptable forms of strategic maneuvering and which respects can they be considered as a derailment and for this reason as a fallacy?

This contribution provides an overview of how argumentation theorists, philosophers, legal theorists and legal philosophers approach questions about the standards for the correctness of legal argumentation. Ideas about the analysis and evaluation of legal argumentation, developed by influential authors in the field, will be examined. This overview serves as a general

introduction and background for the different contributions to this special issue of *Cogency* in which the different questions mentioned above will be addressed by the various authors.

In section 2 I start with an overview of objectives and methodological choices in the study of legal argumentation. I proceed in section 3 with a discussion of three traditions in the study of legal argumentation: the logical, the rhetorical and the dialogical approach. In section 3 I complete the discussion with an extended description of the pragma-dialectical approach to legal argumentation. In this approach rhetorical and dialectical aspects are integrated in a systematic theory for the analysis and evaluation of legal argumentation from the perspective of a rational critical discussion.

2. Objectives and methodological choices

The general objective of legal argumentation theory is to establish how arguments can be analysed and evaluated adequately. In legal argumentation theory, criteria are developed for determining when the argumentation put forward as a justification is acceptable according general and legal standards of acceptability. The theoretical focus is both on ideal norms for acceptable arguments and criteria of acceptability which apply in legal practice. So the study of legal argumentation has a normative and a descriptive dimension. This means that on the one hand a philosophical ideal of reasonableness must be developed and starting from this ideal, a theoretical model for acceptable argumentation. On the other hand, argumentative reality must be investigated empirically, so that it becomes clear how argumentative discourse is in fact conducted and which standards of acceptability are applied in legal practice. This makes it necessary to link the normative and the descriptive dimensions by developing instruments that make it possible to analyse argumentative practice from the perspective of the projected ideal of reasonable argumentative discourse.

Given this relation between normative and descriptive dimensions of research in legal argumentation one can distinguish different research components. The philosophical component attends to the normative foundation of a theory of legal argumentation. In this component, questions are raised regarding the criteria of rationality for legal argumentation, and re-

garding the differences between legal norms of rationality and other (moral) norms of rationality. An important question raised in the philosophical component is which general (moral) and which specific legal criteria of rationality should be used in evaluating legal argument. In the theoretical component, models for legal argumentation are developed, in which the structure of legal argument and norms and rules for argument acceptability are formulated. The reconstruction component shows how to reconstruct legal argument in an analytical model. The object of such a reconstruction is to get a clear view of the stages of the argumentation process, the explicit and implicit arguments, and of the structure of the argument. In its turn, rational reconstruction forms a basis for the evaluation of arguments. Depending on the type of approach (logical, dialectical, rhetorical) and on the criteria of rationality presupposed in the approach, a specific kind of reconstruction is carried out. The empirical component investigates the construction and evaluation of arguments in actual legal practice. It establishes in which respects legal practice fits in or conflicts with theoretical models and examines how possible discrepancies might be explained. Finally the practical component considers how various results forwarded by the philosophical, theoretical, analytical, and the empirical components might be used in legal practice. Practical applications are methods for improving skills in analysing, evaluating and writing legal argumentation.

3. Approaches in research of legal argumentation

In the past 30 years three more or less consistent approaches to legal argumentation can be distinguished: the logical, the rhetorical and the dialogical approach.

3.1. The logical approach

The approach with the longest tradition in the study of legal argumentation is the logical approach. In a logical approach the role of formal validity is emphasized as a criterion of rationality for legal argumentation, and logical languages are used for reconstructing legal arguments.

From a logical perspective, it is a necessary condition of the acceptabil-

ity of a legal justification that the argument underlying the justification be reconstructable as a logically valid argument (another condition is that the reasons brought forward as a justification are acceptable according to legal standards). Only if an argument is logically valid, does the decision (the conclusion) follow from the legal rule and the facts (the premises).

The requirement of logical validity as a standard of soundness of legal argumentation is, in the view of some authors, related to the requirement that a legal decision should be based on a general rule. This requirement is also called the ‘principle of generalizability’ or the ‘principle of universalizability’. When someone claims that a legal decision is based on a general rule, he or she claims that the same solution should be chosen in similar cases.

Which logical system is the most suitable for reconstructing legal arguments? Authors specializing in legal logic differ in their views on the necessity of developing a specific deontic logic for the analysis of legal arguments. Some authors argue that normative expressions such as ‘must’ and ‘should’ can be defined by means of normative predicates. According to them, legal arguments can be reconstructed adequately in terms of a predicate logic.¹ A specific normative logic in which deontic operators are used, they say, is superfluous.

Others take the view that deontic logic in which normative expressions such as ‘must’ and ‘should’ are analysed as separate logical constants, is more suitable for analysing legal arguments in certain cases.² Although most legal arguments can be analysed adequately by using predicate logic, they prefer deontic logic for legal arguments. Deontic logic forms a further extension of propositional logic and predicate logic, and can thus be used for the same forms of argument, but also for other forms.

In a recently developed dialogical logic, various authors extend logical systems to make them more suitable for legal argumentation. Hage, Leenes, Lodder, Span and Verhey developed a system of logic for arguments about legal rules.³ Because a legal decision often involves a choice between rules, a logic is necessary for reconstructing a legal argument in which these choices can be expressed. Prakken (1993) also develops a logi-

¹ See for example Tammelo et al. (1981), Rödiger (1971), and Yoshino (1981).

² See for example Alexy (1980b), Kalinowski (1972), Soeteman (1989) and Weinberger (1970).

³ See Hage (1997, 2005), Hage et al. (1992, 1994).

cal system for analysing and evaluating legal argumentation from a dialogical perspective. Because existing logical systems can only be used for the analysis in a monological context, Prakken develops a system to conduct and compare arguments for opposite standpoints. These recent theories of logic developed in law and artificial intelligence are formal instruments for the analysis and evaluation of legal arguments. The material evaluation of the legal premises is done by means of legal criteria for weighing arguments.⁴

3.2. The rhetorical approach

As a reaction to the logical approach and the emphasis it places on formal aspects of legal argumentation, the rhetorical approach emphasizes the content of arguments and the context-dependent aspects of acceptability. In this approach, the acceptability of argumentation is dependent on the effectiveness of the argumentation for the audience to which it is addressed. The audience might consist of individuals, such as a magistrate in Traffic Court, or collections of persons, such as the jury in a criminal trial, the lawyers which form the audience of a legal journal, or the American legal community as a whole.

Prominent representatives of the rhetorical approach are Perelman's 'new rhetoric', Toulmin's argumentation model, and Viehweg's topical approach. All three authors have written especially about legal argument, and their ideas have been further developed by others.

In *Logique Juridique. Nouvelle Rhétorique* (1976) Perelman describes the starting points and argumentative techniques used in law to convince an audience of the acceptability of a legal decision. He describes how judges use certain generally accepted starting points in justifying their decisions. Examples of such starting points are legal principles such as those of fairness, equity, good faith, freedom, etcetera. Argumentation schemes, such as analogy and *e contrario*, enable a judge to win the assent of others.

In *The Uses of Argument* (1958) Toulmin employs examples drawn from the legal process to establish that argument-adequacy is not de-

⁴ Other representatives of this approach in artificial intelligence and law are Ashley, Bench-Capon, Branting, Gordon, Rissland, Roth, Sartor.

terminated by formal logical validity. He shows that argument is field-dependent. An argument consists of a claim defended by means of data, a warrant and a backing. The acceptability of the content of the argument, however, depends on its subject matter and on the audience to which it is addressed. In *An Introduction to Reasoning* (1984) Toulmin together with Rieke and Janik gives a further elaboration of this model for the analysis of arguments in various contexts. In a chapter on legal argumentation, they adapt the procedure specifically to the analysis of legal argument.⁵

In a topical approach to legal argument, Aristotle's *Topics* is the starting point of theories for finding relevant arguments. In a legal context, arguments must be found which are based on general viewpoints (*topoi*) which can convince a legal audience. Examples of such legal *topoi* are general legal principles, such as those of fairness, of equity, etc. A prominent representative of a topical approach is the German legal theorist Viehweg (1954) *Topik und Jurisprudenz*. Using *topoi*, arguments can be found and formulated which can be used for justifying a legal decision.

3.3. The dialogical approach

In the dialogical approach legal argumentation is considered from the perspective of a discussion procedure in which a legal position is defended according to certain rules for rational discussion. In this approach the rationality of the argument depends on whether the procedure meets certain formal and material standards of acceptability. Prominent representatives of a dialogical approach in legal theory are Aarnio (1977, 1987), Alexy (1978, 1986), MacCormick (1978, 2005) and Peczenik (1983, 1989). As with Habermas (1983, 1988), they take legal argumentation to be a form of rational communication for reaching rational consensus by means of discussion. Prominent representatives of a dialogical approach in argumentation theory are van Eemeren and Grootendorst (1992, 2004), Feteris (1990, 1999), Jansen (2003a and 2003b), Kloosterhuis (2006) and Plug (1994, 2000a, 2000b, 2005). The authors that work in a pragma-dialectical tradition consider legal argumentation as part of a rational critical discussion.

In this section we will discuss the way in which such legal theorists as

⁵ Recently, Hitchcock and Verheij (2006).

Aarnio, Alexy and MacCormick have answered central questions regarding the standards of correctness for legal argumentation. Central questions in these theories are: how must a rational reconstruction of legal argumentation be performed; how must legal interpretations be justified; which procedural norms of rationality must be applied in legal discussions; and which specific legal and material standards of soundness must be applied? In the following section, 4, we will go deeper into the way in which legal argumentation is analysed and evaluated in the pragma-dialectical theory of legal argumentation.

With respect to the analysis and evaluation of arguments, the legal theorists Aarnio, Alexy, MacCormick and Peczenik draw a distinction between formal, material, and procedural aspects of justification. As they concern the product of an argument, two levels are distinguished, in sets of formal and material aspects, in the reconstruction of the justification of legal decisions. On the level of the internal justification, the formal aspects are deployed: the argument should be reconstructed as a logically valid argument consisting of the legal rule and the facts as premises, and the decision as conclusion. On the level of the external justification, the material aspects are central: can the facts and the legal rule or norm used in the internal justification be considered acceptable?

In a dialogical approach, discussions are also required to accord with certain procedural criteria of rationality. For a legal decision to be acceptable, it is important that the participants observe certain rules. The basic principles of such systems (e.g. that of Alexy) are the principles of consistency, efficiency, testability, coherence, generalizability, and sincerity. Aarnio (1987) and Peczenik (1983, 1989) depart from these rules and make several additions.

In the analysis of legal argumentation, Aarnio, Alexy, MacCormick and Peczenik distinguish between the reconstruction of clear cases and hard cases. In clear cases, in which there is no difference of opinion about the facts, a single argument can be used to defend the decision. MacCormick calls this single argument for easy cases a deductive justification, and Aarnio calls it an internal justification. In hard cases, in which the facts or rule are disputed, a further justification by means of a chain of arguments is required. MacCormick calls such a chain of arguments in which the interpretation of the legal rule is defended a second-order justification. Alexy

calls the whole chain of arguments the internal justification, and uses the term external justification for the argument defending the content of the premises.⁶ According to Alexy, the internal justification is concerned with the formal reconstruction of the premises of the complete justification.

How many subordinate arguments are required for a successful justification depends on the number of steps required to reach a point in the discussion at which there is no longer a difference of opinion. In Alexy's opinion, the number of single arguments required is that needed to reach a point where there is agreement as to whether the legal rule can be applied to the specific case. In Aarnio's opinion, the number that is needed to take away the addressee's doubt. In MacCormick's opinion, a consequentialist argument must always be combined with an argument of coherence and consistency. In Peczenik's opinion, in a reconstruction of a legal justification all transformations that are carried out must be made explicit. The justification consists of a combination of various forms of justification in which the different transformations are clarified.

With regard to the evaluation of the argumentation, Aarnio, Alexy, MacCormick and Peczenik make a distinction between formal, material and procedural aspects of justification. With respect to the formal aspects, the authors think that argumentation must be reconstructed as a chain of logically valid arguments. Most authors relate the requirement of logical validity to the moral requirement of universalizability: similar cases must be treated in a similar way. The legitimacy of a legal decision is dependent on the question whether the decision is based on a universal rule which also applies to similar cases.

The authors differ with respect to the question which logical system is most suitable for reconstructing legal argumentation. Alexy and MacCormick are of the opinion that legal arguments in which normative claims are defended can best be reconstructed by using a predicate logic with deontic operators.

For the evaluation of the material aspects of legal argumentation, the authors propose several kinds of procedures. First, there are those for checking whether a premise is considered to belong to commonly shared

⁶ This terminology of internal justification and external justification is based on Wróblewski (1974).

starting points. To decide whether an argument is acceptable according to legal standards, the first check is whether the argument is a valid rule of law. The rules of valid law are considered to be a specific form of shared legal starting points. To check whether an argument is a rule of valid law, and thus a shared starting point, a testing procedure must be carried out which establishes whether a certain legal rule can be derived from an accepted legal source. Legal sources such as statutes, legal decisions, legal dogmatics and legislative preparatory material are considered to be specific kinds of sources which may be used for the evaluation of legal argumentation. Following Hart, MacCormick argues that rules of valid law must be identified on the basis of a 'rule of recognition' by means of which it can be established whether a legal source is a valid source of law. According to Peczenik, rules of valid law must be identified by means of a source transformation which establishes whether a legal source is a valid source of law.

A premise cannot always directly be derived from a source of law: often an interpretation is required. Various interpretation methods are applied to decide whether a certain interpretation is legally acceptable. Legal interpretation methods are, for example, the semantic, historic, systematic and teleological method by means of which an interpretation can be given of a legal rule. Other means for establishing the meaning of a legal rule are argumentation schema's such as arguments from analogy, the *argumentum a contrario* and the *argumentum a fortiori*.

With respect to the evaluation of the procedural aspects of the argumentation, it must be determined whether the discussion has been conducted in a rational way. According to Aarnio, Alexy and Peczenik (1981), it must be established whether the discussion has been conducted according to a system of rules for rational discussion. The basis principles of such a rule system are the principles of consistency, efficiency, testability, coherence, generalizability, and sincerity. These principles are formulated by Alexy and developed into a system of rules for general practical discussions, which is, in turn, elaborated for legal discussions.

The procedural rules also contain the rules for the formal and material evaluation of the justification. Rules which are specific for the discussion procedure are the rules which guarantee the right to participate in discussions, the sincerity rules, the rules concerning the burden of proof, the rules concerning the relevance of the contributions, and the rules for a common

use of language. Alexy is of the opinion that not all rules apply the same way in all types of legal discussion. For example, in a legal process the discussion rules differ from the rules for a discussion between legal scholars.

4. The pragma-dialectical theory of legal argumentation

In a pragma-dialectical perspective, legal argumentation is considered part of a rational critical discussion aimed at the resolution of a dispute. The aim of this approach is to develop a model for the analysis and evaluation of legal argumentation as a specific, institutionalized form of argumentation. The pragma-dialectical approach to legal argumentation is based on the ideas of van Eemeren and Grootendorst developed in their pragma-dialectical theory of argumentation in various book and articles, among which *Argumentation, communication, and fallacies* (1992) and *A systematic theory of argumentation. The pragma-dialectical approach* (2004).

Starting from the general theory, various authors such as Feteris, Jansen, Kloosterhuis and Plug have applied the theory to the context of legal argumentation. Feteris (1990, 1999) has analysed the legal process as a specific implementation of a critical discussion and has described how the different stages of a critical discussion are represented in a legal discussion in a legal process. Feteris, Jansen, Kloosterhuis and Plug have further developed models for the rational reconstruction of various forms of complex argumentation that are based on methods of legal interpretation and on the application of specific legal argument forms such as analogy argumentation, *a contrario* argumentation, teleological-evaluative argumentation and argumentation from unacceptable consequences, and arguments based on obiter dicta.

4.1. The general theory of argumentation as part of a critical discussion

The pragma-dialectical theory of argumentation is based on an approach that combines a pragmatic and a dialectical perspective on argumentation. The pragmatic perspective regards argumentation as a goal-oriented form of language and analyses the discussion-moves in a critical discussion as

speech acts which have a certain function in the resolution of the dispute. The dialectical perspective implies that argumentation is considered to be part of a critical exchange of discussion moves aimed at subjecting the point of view under discussion to a critical test. A resolution in a critical discussion of this nature means that a decision is reached as to whether the protagonist has defended successfully his point of view on the basis of shared rules and starting points against the critical reactions of the antagonist, or whether the antagonist has attacked it successfully.

The model for critical discussion provides a theoretical instrument for the analysis and evaluation of argumentative discourse that specifies the elements which play a role in the resolution of a difference of opinion. The model forms a heuristic tool in finding the elements which serve a function in the resolution process and thus identifies the elements relevant for the resolution of a dispute. The model also forms a critical tool for determining whether the discussion has been conducive to the resolution of the dispute and for identifying the factors in the discussion process which offer a positive and a negative contribution. Thanks to these characteristics, the pragma-dialectical theory provides a suitable theoretical instrument for the analysis and evaluation of argumentation.

In order to establish how people in actual argumentative practice try to persuade others of the acceptability of their standpoint, a dialectical analysis of the discourse must be combined with a rhetorical analysis. Arguers not only try to achieve the dialectical goal of resolving a difference of opinion in a reasonable way, they also try to achieve the rhetorical goal of winning adherence from the intended audience. The way in which arguers try to reconcile these goals van Eemeren (2010) and Eemeren and Houtlosser (2002) consider as strategic maneuvering which implies that arguers try to adapt the choice from the topical potential of argumentation schemes and starting points that are acceptable from a dialectical perspective to their rhetorical ends of convincing the audience.

4.2. The analysis and evaluation of legal argumentation

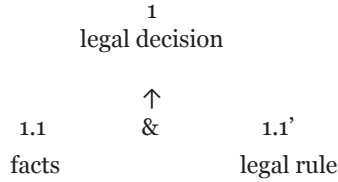
In the legal part of the pragma-dialectical theory, the aim is to develop an application of the pragma-dialectical theory for the analysis and evaluation of argumentation in a legal context. In a pragma-dialectical approach,

legal argumentation is considered as a specific institutionalized form of argumentation, and legal discussions are considered as specific, institutionalized forms of argumentative discussion. In this conception, legal argumentation is considered as part of a critical discussion aimed at the resolution of a dispute. In a legal process (for example a civil process and a criminal process) between two parties and a judge the argumentation is part of an explicit or implicit discussion. The parties react to or anticipate certain forms of critical doubt. A characteristic specific to a legal process is that in addition to the discussion between the parties, there is an (implicit) discussion between the parties and the judge, which is aimed at checking whether the protagonist's claim can be defended against the critical reactions that the judge puts forward in his official capacity as an institutional antagonist. The judge must check whether the claim is acceptable in the light of the critical reactions of the other party and whether it is acceptable in the light of certain legal starting points and evaluation rules which must be taken into account when evaluating arguments in a legal process. These institutional critical questions which the judge must apply in the evaluation, can be considered as institutional forms of doubt put forward by the judge in his official capacity. In the defense of their standpoints, the parties anticipate these possible critical questions of the party and the judge.

When the decision is presented by the judge, it is submitted to a critical test by the audience to whom it is addressed. This multiple audience consists of the parties, higher judges, other lawyers, and the legal community as a whole. Therefore, the judge must present arguments in support of his decision in order to justify it. He must specify the facts, the legal rule(s) and further considerations (such as interpretation methods, priority rules, legal principles, etc.) underlying his decision. From a pragma-dialectical perspective, the justification forms part of the discussion between the judge and possible antagonists (the party who may want to appeal the decision and the judge in appeal). In his justification the judge anticipates various forms of critical reactions which may be put forward by these antagonists.

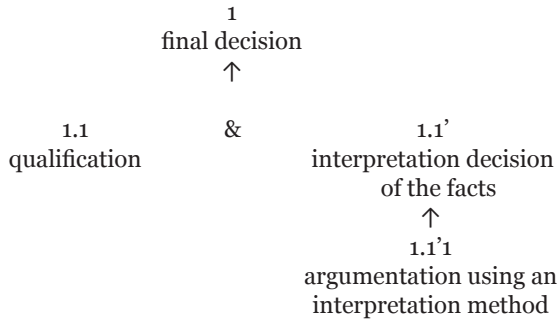
In a legal context, the argumentation put forward as a justification of a legal decision may consist of different levels, depending on the forms of critique the judge must react to. On the first level, the justification implies that the decision (1) is defended by showing that the facts (1.1) can be considered as a concrete implementation of the conditions which are required

for applying the legal rule (1.1'). The argument can be schematically presented as follows:



In clear cases, such a single argumentation may suffice as a justification of the decision. Often, the argumentation is more complex because one of the elements of the main argumentation of the first level must be supported by further argumentation. The supporting may consist of proof for the facts (1.1) or a justification of the applicability of the legal rule (1.1'). In pragma-dialectical terms, a second-order justification supporting the classification of the facts or the interpretation of a legal rule can be considered as complex subordinate argumentation.

To justify the interpretation of a legal rule, the complex subordinate argumentation in support of the decision can be reconstructed as follows:



In the second-order justification the interpretation decision about the legal rule (1.1) is justified by second-order argumentation consisting of a justification in which the judge uses one or more interpretation methods. This argumentation may be more or less complex, depending on the choices a judge makes and on the argumentative steps that are required to make the

justification complete. The judge may, for example choose to weigh certain interpretations on the basis of the consequences of the different solutions, which implies that the argumentation must be reconstructed as complex argumentation consisting of different horizontally linked lines of argumentation: the two interpretations, the weighing rule, as well as subordinate argumentation supporting the different lines of argument (see Feteris 2008b for a discussion of this complex form of argumentation).

For different forms of argumentation used in the second-order argumentation authors have described which argumentative steps are required for a sufficient justification. Feteris (2005, 2008a) develops a model for the rational reconstruction of teleological argumentation, teleological-evaluative argumentation and consequentialist argumentation and describes the interaction between the various elements of the justification, Jansen (2003a, 2003b, 2005) develops a model for different forms of a *contrario* argumentation and *reductio ad absurdum*, Kloosterhuis (2005, 2006) develops a model for different forms of analogy argumentation and *reductio ad absurdum*, and Plug (1994, 2000a, 200b, 2005) develops a model for various forms of complex argumentation, among which argumentation on the basis of *obiter dicta*.

Regarding the evaluation of the argumentation, in pragma-dialectical terms it is established whether the argumentation schemes used in the argumentation have been correctly chosen and applied. For various argumentation schemes in a legal context such as analogy argumentation, teleological argumentation, consequentialist argumentation, etcetera which are used for justifying the interpretation of a legal rule it must be established whether this form of argumentation is correctly chosen (for example in certain legal systems analogical interpretation of statutory rules is not allowed) and whether the form of argumentation is applied correctly (for example whether an analogy relates to relevant similarities). Feteris, Jansen, and Kloosterhuis have developed criteria for the evaluation of different forms of legal argumentation such as analogy argumentation, teleological argumentation, consequentialist argumentation.

4.3. Strategic maneuvering in legal argumentation

In the presentation of the justification of their decision, judges often try to present their decision as a self-evident result of the application of the law

to the facts of the case. However, this application is often less self-evident than it is presented. In their justification judges often make use of what is in pragma-dialectical terms called strategic maneuvering by trying to reconcile dialectical and rhetorical goals. The way in which judges present their justification can be analysed and evaluated from the perspective of the strategic maneuvering in a critical discussion. The advantage of such an analysis is that it can be clarified how judges make an expedient choice from the options that constitute the starting points of a legal discussion in a particular context, how they to exploit certain presentational devices, and to what extent their justification can still be considered a constructive contribution to a rational discussion or whether the contribution 'derails' and must be considered as a fallacy.

Feteris (2008c) describes for the legal context how such strategic manoeuvring can be analysed and evaluated. A form of strategic maneuvering often used in a legal context consists of the weighing of a literal interpretation of a legal rule with an interpretation that is based on teleological-evaluative considerations. From the perspective of legal certainty it is important that the judge applies the law as it is formulated by the legislator. This implies that, when he wants to depart from the literal application of a legal rule, it is important that the judge shows that his interpretation is still in line with the intention of the legislator. For different forms of legal justification it is explained what it implies that judges try to reconcile dialectical and rhetorical goals and which techniques of strategic manoeuvring are used in the choice of argumentation schemes, starting points and presentational devices. They show when judges remain within the limits of a rational discussion and when the attempt to manoeuvre strategically constitute a move that cannot be considered as a constructive contribution to a resolution of the dispute and must, for that reason, be considered as a fallacious move.

5. Conclusion

In this contribution I have discussed the central questions and approaches in the study of legal argumentation. I have described the way in which scholars working within different disciplines have developed ideas with re-

spect to the analysis and evaluation of legal argumentation. This discussion of the different research traditions serves as an introduction to this special issue in which the different contributors show how different approaches to legal argumentation can supplement each other.

Carlos Bernal, Damiano Canale, Giovanni Tuzet, Flavia Carbonell-Bellolio, Christian Dahlman, David Reidhav and Lena Wahlberg address different aspects of the way in which a logical analysis of legal argumentation should be supplemented with other criteria of acceptability to evaluate the correctness of legal argumentation.

In his contribution, Carlos Bernal discusses the relation between legal argumentation and the concept of normativity. He explains how the correctness of legal argumentation is related to different norms and how the rules of legal argumentation play a role in grounding the normativity of legal norms.

In their contribution, Damiano Canale and Giovanni Tuzet explain the criteria to be applied in different forms of intratextual argumentation in the justification of interpretations of legal expressions used in different texts in different contexts of legal regulation. They explain the complexity of this form of argumentation and on the basis of a discussion of the use of the term 'proceeds' in the Italian *Impregilo* case before the Italian High Court they show how the use of this form of argumentation should be analyzed and evaluated.

Starting from a pragma-dialectical perspective, Harm Kloosterhuis analyzes argumentation based on legal principles and he discusses the criteria for the assessment of this type of argumentation in relation to the general theory of argumentation. On the basis of an analysis of an example of a decision by the Dutch Supreme Court in a 'Wrongful birth' case Kloosterhuis explains how the argumentation underlying the justification of this decision can be analyzed as a form of conflict-settling argumentation on the basis of systematic and consequentialist arguments.

In her contribution, Flavia Carbonell-Bellolio discusses different theoretical proposals setting directives and constructing models for the justification of legal decisions. She applies these proposals to the analysis of the consequentialist arguments used in a ruling of the Chilean Constitutional Court and evaluates the strengths and weaknesses of the different approaches.

In their contribution, Christian Dahlman, David Reidhav and Lena Wahlberg give an account of *ad Hominem* arguments in which they analyze

these arguments as an argument about the reliability of a certain person in a particular function. They develop criteria for analyzing and assessing the kind of mistakes that may be involved with the premises of *ad Hominem* arguments.

In the contributions of Janice Schuetz, José Julio León and Sebastian McEvoy different aspects of the rhetorical analysis of legal argumentation are addressed and it is explained how the standards of the acceptability of legal argumentation that are related to the requirements of the Rule of Law should be complemented with rhetorical insights to give an adequate account of the reasonableness of legal argumentation.

Janice Schuetz gives an analysis of the strategic maneuvering of the appellate argumentation in the *Boumediene v. Bush* case about the incarceration of foreign citizens at Guantanamo Bay by George Bush in his 'War on terror'. Schuetz describes the interplay between dialectical and rhetorical aims in the argumentation of the justices in this case.

In his contribution, José Julio León demonstrates how the analysis and evaluation of legal argumentation in hard cases in which judges use their discretionary power and must substantiate their decision from the perspective of the Rule of Law can profit from insights developed by Toulmin. Using the Toulmin model, on the basis of an analysis and evaluation of a famous hard case in Chilean law about the custody of a child by a homosexual mother he shows how this model can be used as a basic reasonableness test.

Under Aristotle's definition of 'thesis' in *Topics*, Sebastian McEvoy discusses the distinction between law and fact premises, a distinction which arguably prevents the immediate correspondence of a general model of argumentation and an adequate model of judicial argumentation. Having shown that this distinction is necessary from the perspective of the Rule of Law principle and is presupposed to be possible, he describes the different features that distinguish the two kinds of premises, especially when the law premise is statutory.

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