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THE ANALYSIS AND EVALUATION OF LEGAL ARGUMENTATION: APPROACHES FROM LEGAL THEORY AND ARGUMENTATION THEORY

Abstract: 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. The authors describe how argumentation theorists, philosophers, legal theorists, and legal philosophers deal with these problems from different points of view. The authors distinguish three traditions in the study of legal argumentation: the logical, the rhetorical and the dialogical approach. Ideas about the analysis and evaluation of legal argumentation, developed by influential authors in the field, are examined. The contribution is concluded with a more extensive discussion of the pragma-dialectical approach to legal argumentation that integrates rhetorical and dialectical aspects of legal argumentation.

Keywords: legal argumentation, rationality, rational reconstruction, rational discussion, discussion rules, logical analysis of legal argumentation, rhetorical analysis of legal argumentation, dialectical analysis of legal argumentation

1. Introduction: argumentation and legal justification

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 changing views on 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 developments 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 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? 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? 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?

A second important problem in the study of legal argumentation is the question how to analyse *real life* argumentation in legal decisions in order to evaluate it adequately. When a judge resolves for instance an interpretation problem in deciding a legal case, he can choose different types of *interpretative arguments* to justify his decision. Ideally, these arguments are recognizable in the justification of the legal decision. But in practice these reasons are not always presented explicit, clear and well ordered. Sometimes, the judge does not give an account of all considerations underlying the decision which would be necessary for a complete justification (for example, because he considers it obvious), at other times he adduces arguments *obiter dicta* that are superfluous to the justification of his decision. The critical reader who wants to evaluate these reasons must therefore solve a number of reconstruction problems. First, he must *identify* the argumentation as such. This means that he must establish which parts of the decision constitute the argumentation and what function this argumentation fulfils. Second, he must *interpret* the argumentation, which means that he must determine

which proposition in the text is defended as standpoint and which propositions are brought forward as explicit arguments in defense of the standpoint and which implicit arguments are presupposed. Third, he must *analyze* the argumentation, which means that he must examine what bearing the arguments have on each other and on the standpoint. The next problem for the critical reader is to find out which criteria are to be used to evaluate the argumentation that is given as a justification of the decision. What are the general circumstances in which legal arguments are used and when are they applied correctly?

This contribution describes how argumentation theorists, philosophers, legal theorists, and legal philosophers deal with these problems from different points of view. Ideas about the analysis and evaluation of legal argumentation, developed by influential authors in the field, will be examined. In section 2 we give a concise overview of the central questions and methodological choices in the study of legal argumentation. We 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 4 we complete our 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. Central questions and methodological choices

The general objective of legal argumentation theory is to establish how arguments can be analyzed 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 possi-

ble to analyze argumentative practice from the perspective of the projected ideal of reasonable argumentative discourse (Van Eemeren and Grootendorst 2004, MacCormick and Summers 1991, p. 19). The reconstruction of legal argumentation is descriptive in the sense that it gives a reconstruction that starts from arguments expressed in legal decisions and it is normative in the sense that the reconstruction is related to a model of acceptable justification.¹

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 regarding 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 their turn, rational reconstruction forms a basis for the evaluation of arguments. Depending on the type of approach 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

¹ Cf. MacCormick (1978, p. 12) who states (...) 'that reasoning in the sense at least of public argumentations is itself an activity conducted within more or less vague or clear, implicit or explicit, normative canons. We distinguish between good and bad, more sound and less sound, relevant and irrelevant, acceptable or unacceptable arguments in relation to philosophical, economic, sociological, or, above all, legal disputation over given foci of dispute. That is possible only given some criteria (as often as not both vague and inexplicit criteria) of goodness or badness, more or less soundness, relevance, acceptability and so forth. (...) Any study of legal reasoning is therefore an attempt to explicate and explain the criteria as to what constitutes a good or a bad, an acceptable or an unacceptable type of argument in law.'

are methods for improving skills in analyzing, evaluating and writing legal argumentation.

Until 1970, legal argumentation was studied mainly in the context of legal theory (jurisprudence) and legal philosophy. Problems affecting legal argument were considered as part of general legal problems, such as legal decision-making and statutory interpretation. Legal argumentation was treated as part of legal methodology, rather than a theory of legal argument in its own right.²

In the 1970s, an interest in legal argumentation began to grow among lawyers and argumentation theorists. The question of the rationality of justifications of legal decisions has become one of the central themes of the evolving legal argumentation theory. A number of surveys of legal argument were published in the 1970s. The first of these were concerned with logical approaches. Horowitz (1972) gives an overview of research in the field of legal formal and informal logic. Kalinowski (1972) discusses various approaches in legal logic. In later publications, attention shifts to legal argumentation theory itself. Struck (1977) examines various models of argument. Alexy (1978) and MacCormick (1978) were the first to develop theories of legal reasoning and legal argument. Alexy's theory is based on ideas from analytic moral philosophy, language philosophy, legal hermeneutics and argumentation theory. MacCormick's theory is based on ideas from analytical legal philosophy.

Research on legal argumentation over the past 30 years discloses a rich variety of topics, approaches, ideas and principles. Scholars study legal argument in various contexts such as legal theory (jurisprudence), the legislative process, the legal process, and the process of legal decision-making by judges. Various methodological approaches can be distinguished in these writings. Some authors opt for a normative approach which emphasizes how a judge can justify his or her decision in a rational way, or how a legal discussion can be conducted reasonably. Others prefer a descriptive approach to real-life processes of argument, such as investigating argumentative techniques which are effective in convincing a certain legal audience.

There are also various 'topics' which can form the object of study. Some authors concentrate on the philosophical and methodological aspects; some develop theoretical models and try to establish the norms for rational justification; some concentrate on the description of legal practice; and others

² See, for instance, Gottlieb (1968), Levi (1949) and Wasserstrom (1961) in the United States, Jensen (1957) in Natal, and Stone (1947) in Australia.

specify methods for developing practical skills in analyzing, evaluating and writing legal texts.

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

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 acceptability 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.

Different authors taking the logical approach have different opinions as to whether an analysis of legal arguments requires a deontic logic. Following Klug (1951), some authors argue that normative concepts such as ‘obliged’ and ‘prohibited’ can be defined by means of normative predicates, and without the need to postulate a special class of operators, such as ‘it is obliging that’ and ‘it is permissible that’, and accordingly, that legal arguments can be reconstructed adequately in terms of a predicate logic.⁴

³ For a more extensive overview of these approaches see Feteris (1999). For a recent overview of approaches of the analysis of legal argumentation see the special issue of *Informal Logic* on ‘Models for the analysis of legal argumentation’, Vol. 28, No. 1 (2008).

⁴ See, for instance, Tammelo et al. (1981), MacCormick (1992, pp. 195–199), Rödiger (1971), Yoshino (1981).

Others are of the opinion that a deontic logic, in which normative concepts are analyzed as separate logical constants, is more suitable for analyzing legal arguments.⁵ A deontic logic forms a further elaboration of propositional logic and predicate logic, and thus can be used not only for the same types of arguments, but also for other types that these more elementary systems are not capable of formulating.⁶ Recently, various authors working in the field of artificial intelligence and law offer a different kind of elaboration of standard logic for the analysis of legal reasoning. Hage et al. give a logic for reasoning with legal rules; in such a *reason based logic*, arguments for and against a legal standpoint can be weighed with greater sure-footedness than is possible in standard logic.⁷ In another development, Prakken develops a logical system for a dialogical analysis of legal argument. Because existing logical systems reconstruct only monologues, Prakken develops logical systems in which it is possible to compare arguments for and against conflicting conclusions put forward in the context of a dialogue.⁸

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

⁵ See, for instance, Alexy (1980b, pp. 198–199), Kalinowski (1972), Koch (1980), Soeteman (1989), Weinberger (1970).

⁶ For a more extensive treatment of the arguments for and against a deontic logic with respect to legal argumentation see, for instance, Rödiger (1971), Soeteman (1989).

⁷ See Hage et al. (1992, 1994).

⁸ See Prakken (1993, 2008).

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 determined 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.⁹

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).¹⁰ Using *topoi*, arguments can be found and formulated which can be used for justifying a legal decision.¹¹

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, Alexy, MacCormick and Peczenik.¹² As with Habermas, they take legal argumentation to be a form of

⁹ Recently: D.L. Hitchcock & B. Verheij, eds., (2006), *Arguing on the Toulmin Model. New Essays in Argument Analysis and Evaluation*, Argumentation Library, Vol. 10. Springer, Dordrecht.

¹⁰ For a critique with respect to Viehweg's theory, see Alexy (1989, pp. 20–24).

¹¹ Other authors working in a topical-rhetorical tradition which is based on Viehweg's ideas are Ballweg (1982), Esser (1979), Horn (1967), Schreckenberger (1978), and Struck (1977).

¹² For a description of a combination of the insights of these authors, see Aarnio, Alexy, and Peczenik (1981), in which they give an outline of a theory of legal argumentation and legal discussions.

rational communication for reaching rational consensus by means of discussion. Prominent representatives of a dialogical approach in argumentation theory are van Eemeren and Grootendorst, Feteris, Jansen, Kloosterhuis and Plug. 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 legal theorists such as Aarnio, Alexy and MacCormick have answered the central questions in these theories of 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 analyzed 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 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. 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 concrete 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 various transformations are clarified.

To make the chain of subordinate arguments complete, at various places in the reconstruction *missing premises* must be supplemented. Most authors do not specify how these premises must be made explicit. Alexy only says that the legal decision must follow logically from at least one universal norm together with other premises, but he does not specify how the hidden assumption must be made explicit. From the description of Alexy and MacCormick it can be deduced that if the universal rule is missing, this rule must be made explicit. In Aarnio's opinion, in the external justification those elements required to make complete the syllogisms in which the premises of the internal justification are defended, must be reconstructed. A complete syllogism must be reconstructed for each step in the chain of arguments. According to Aarnio, all implicit elements of incomplete syllogisms must be made explicit. Often, only the conclusion is mentioned, and both premises must be added. In Peczenik's opinion, implicit elements must be supplemented on the various levels of a legal justification.

With regard to the evaluation of the argumentation, Aarnio, Alexy, MacCormick and Peczenik make a distinction between the 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 of 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. Following Wróblewski, Aarnio uses syllogistic logic for analyzing legal arguments.

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 legal 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 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 the semantic, historic, systematic, and teleological interpretation method by means of which a precise interpretation can be given of a legal rule. Other methods are arguments from analogy, the argumentum a contrario, and the argumentum a fortiori.

Alexy takes the interpretation methods to be argumentation schemes which may be used for the justification of a certain interpretation. However, he does not specify how an argument in a concrete case should be reconstructed as a certain argumentation scheme. Also, he does not specify when an argument which is reconstructed according to a particular argumentation scheme is acceptable or not. In practice, it can be hard to decide what kind

of argumentation scheme a certain argument must be reconstructed as, and which critical questions are relevant to the evaluation.

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, 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.

Aarnio, MacCormick and Peczenik distinguish a separate component in the evaluation in which it is determined whether the result of the justification process (in Aarnio's and MacCormick's terms the interpretation, in Peczenik's terms the legal decision) is in accordance with the norms and values of a certain legal community. In Aarnio's theory, an interpretation must be coherent with the norms and values which are shared within a certain legal community, a specific audience. In MacCormick's view, the interpretation must be coherent with certain legal principles, and must be consistent with relevant legal rules and precedents. In Peczenik's theory, the interpretation must be in accordance with all legal sources, interpretation norms, conflict norms and the *Grundnorm*.

Alexy does not distinguish a separate evaluation component for the result of the discussion. In his opinion, the rationality of the result depends on the question whether the discussion has been conducted in accordance with the rules for rational discussions. Because the discussion rules already contain the requirement that the argumentation must be acceptable according to common starting points, it ensures that the final result is coherent with the starting points and values which are shared within the legal community.

4. The pragma-dialectical theory of legal argumentation in the context of a critical discussion

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 analyzed 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 core of the pragma-dialectical theory consists of an ideal model for critical discussions and a code of conduct for rational discussants. The ideal model specifies the stages which must be passed through to facilitate the resolution of a dispute, and the various speech acts which contribute to the process.

The code of conduct for rational discussants specifies rules for the resolution of disputes in accordance with the ideal model. These rules acknowledge the right to put forward and cast doubt on a standpoint, the right and the obligation to defend a standpoint by means of argumentation, the right to maintain a standpoint which is successfully defended in accordance with shared starting points and evaluation methods, and the obligation to accept a standpoint which is defended in this way.

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.

To establish whether the argumentation put forward in defence of a standpoint is sound, an analysis must first be made of the elements which are important to the evaluation of the argumentation. In the evaluation based on this analysis, an answer must be found to the question whether the arguments can withstand rational critique. In an analytical overview (that can be compared to a rational reconstruction) an analysis of the argumentation is made in which the elements which are relevant for a rational evaluation are represented.

In the analysis and evaluation of argumentative discourse the following points that are crucial for the resolution of the difference of opinion need to be addressed:

- (1) the standpoints at issue in the difference of opinion and the positions adopted by the parties
- (2) the arguments adduced by the parties
- (3) the argumentation structure of the arguments
- (4) the argumentation schemes used in the argumentation
- (5) observation of the rules for critical discussion

In the analysis it is established what the points at issue in the discourse are and which positions are adopted with respect to these issues; which arguments are adduced explicitly, implicitly or indirectly; which relations exist between the arguments advanced in favour of a standpoint; which argumentation schemes (symptomatic argumentation, analogical argumentation, causal argumentation) are underlying the argumentation.

In the evaluation of the content of the argumentation it is established whether the different parts of the argumentation are successfully defended against the relevant points of critique. It is first established whether the argumentation schemes have been correctly chosen and applied. For each argumentation scheme, there is a set of critical questions which must be answered satisfactorily for the argumentation to be acceptable. In the evaluation of the procedure of the discussion it is established to what extent all rules for critical discussion have been observed. This amounts to checking whether one or more participants have committed a fallacy, which is considered as a violation of a discussion rule, and to what extent the resolution of the dispute has been hindered by this violation.

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 and Houtlosser (2002) consider as strategic manoeuvring which implies that arguers try to adept 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.

The technique of strategic manoeuvring as described by van Eemeren and Houtlosser amounts to an attempt to reconcile the dialectical goal of defending a standpoint in light of the relevant forms of critique on the basis of argumentation schemes and starting points that belong to the common commitments, with the rhetorical goal of winning the adherence from the audience. As long as the choice made to win the adherence of the audience is in keeping with the dialectical requirements the strategic manoeuvring can be considered as a constructive contribution to a critical discussion. However, if the arguer chooses to let the rhetorical aims of gaining the adherence by the audience have preference over the dialectical aims, the strategic manoeuvring derails and constitutes a violation of the rules of critical discussion.

4.2. Legal argumentation as part of a critical discussion

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. The behavior of the parties and the judge is viewed as an attempt to resolve a difference of opinion. 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.

The resolution process in a legal process can be regarded as a critical discussion in which the five stages which have to be passed through in a pragma-dialectical critical discussion, are represented. The first stage of a legal process in which the parties advance their points of view can be

considered as the confrontation stage. Here the judge remains passive. The second stage, the opening stage, in which the participants reach agreement on shared starting points and discussion rules, is largely implicit in a legal process. This stage is represented by the institutionalized system of discussion rules that are laid down in codes of procedure and starting points that consist of material legal rules, legal principles, propositions of legal dogmatics, etc. In the third stage, the argumentation stage, the parties defend their standpoints in accordance with the rules of procedure and provide proof if asked to do so. In this stage the judge (or jury) evaluates the quality of the argumentation and the proof. In the final stage of the process, the concluding stage, the judge has to decide whether the claim has been successfully defended against the critical counter arguments. If the facts can be considered as proven and if the judge decides that there is a legal rule which connects them to the claim, he will grant the claim. If the facts cannot be considered as established according to legal standards of proof, or if there is not a legal rule applicable, the judge will reject the claim.

In a legal process, the way in which the stages of a pragma-dialectical critical discussion are represented and the way in which the discussion is conducted can be regarded as a process of dispute resolution by means of critically testing a standpoint in the light of certain forms of critical doubt. However, there are some crucial differences which require attention. In a critical discussion the parties jointly ensure that the discussion rules are being observed and they jointly decide on the result of the evaluation and the outcome of the discussion. In a legal process, for reasons of impartiality, it is the task of the judge to ensure that the rules of procedure are observed. It is also the task of the judge to evaluate the argumentation and to render a decision on the final outcome. So, in a legal process the judge does alone what the parties to a critical discussion do jointly. Because of specific legal goals, such as legal certainty, legal security and equity, there are some procedures in law which differ in certain respects from the rules and procedures of a critical discussion. These rules and procedures must guarantee that the conflict can be resolved by a neutral third party within a certain time limit.

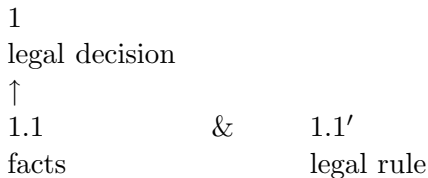
4.3. The analysis and evaluation of legal argumentation in the context of a critical discussion

The first step in the analysis of the argumentation involves establishing the nature and content of the difference of opinion and the standpoints adopted by the participants. Compared with a dispute in the standard form of a critical discussion, the difference of opinion in a legal process is more complex because it always consists of various disputes: one between the

participants and one between the party who initiates the proceedings and the judge. From a pragma-dialectical perspective, the participants adopt various positions with respect to the claim put forward by the party who initiates the proceedings. The judge is obliged to adopt a neutral standpoint with respect to the statements of the parties and thus, in pragma-dialectical terms, adopts a neutral standpoint.

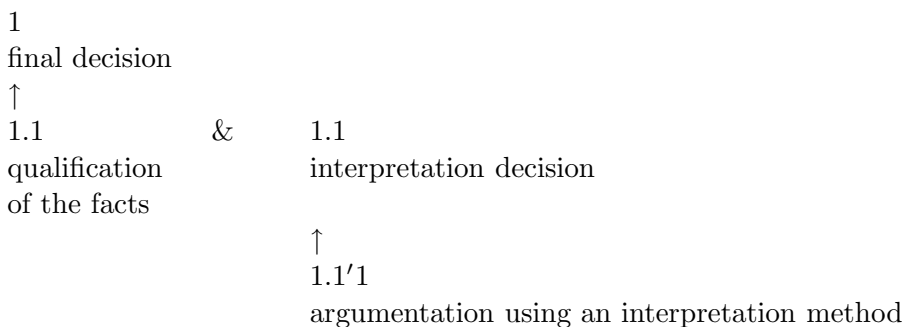
The second step in the analysis must determine the arguments put forward in reaction to various forms of critical doubt and the relations between these arguments. In a legal context, the argumentation put forward as a justification of a legal decision may consist of different levels, depending on the 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, 20005) develops a model for various forms of complex argumentation, among which argumentation on the basis of *obiter dicta*.

The last step concerns the evaluation of the argumentation. Regarding the evaluation of the content 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 implementations of the basic forms of argumentation schemes (symptomatic, analogy and causal argumentation) in a legal context such as analogy argumentation, teleological argumentation, consequentialist argumentation, etc. 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 Dutch criminal law 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.

4.4. Strategic manoeuvring in legal argumentation

In the presentation of the justification of their decision, judges often try to present their decision as an 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 manoeuvring by trying to reconcile dialectical and rhetorical goals. The way in which judges present their justification can be analyzed and evaluated from the perspective of the strategic manoeuvring 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 analyzed and evaluated. A form of strategic manoeuvring often used in a legal context consist 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 Feteris and Kloosterhuis explain 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 we have discussed the central questions and approaches in the study of legal argumentation. We have described the contributions by scholars working within different disciplines and we have discussed their ideas with respect to the analysis and evaluation of legal argumen-

tation. We have concluded the discussion with a description of the analysis and evaluation of legal argumentation from a pragma-dialectical perspective. We have shown how 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.

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