A Survey of 25 Years of Research on Legal Argumenation

E. T. FETERIS

University of Amsterdam
Spuistraat 134
1012 VB Amsterdam
The Netherlands

ABSTRACT: This essay discusses the developments and trends of research in legal argumentation of the last 25 years. The essay starts with a survey of the various approaches which can be distinguished: the logical approach, the rhetorical approach, and the dialogical approach. Then it identifies various topics in the research, which constitute the various components of a research programme of legal argumentation: the philosophical component, the theoretical component, the reconstruction component, the empirical component, and the practical component. It concludes with a discussion of the main trends in the research of the last 25 years.

KEY WORDS: Legal argumentation, argumentation in law, jurisprudence, logic, rhetoric.

1. INTRODUCTION

For argumentation theorists, argumentation in law is an important field of study. In the Law, argumentation plays an important role when someone presents a legal claim and wishes this claim to be accepted by others. A lawyer who brings a case to court must justify his or her case with arguments.[1] The judge who takes a decision is expected to support this decision with arguments; in many legal systems the judge has a legal obligation to justify his or her decision. When the legislator introduces a bill in Parliament, he is expected to support his proposal with reasons. Even legal scholars are expected to justify their opinions when presenting them to their colleagues. Everybody who advances a legal standpoint and wishes this standpoint to be accepted by others, will have to present justifying arguments.

Because argumentation plays an important role in law, for argumentation theorists legal argumentation is an important field of research and an important context of application of ideas developed in argumentation theory. With respect to law as a field of research, research questions can be how ideas developed in law and legal theory (jurisprudence) on criteria for the soundness of legal argumentation are related to ideas developed in argumentation theory. Which general and which specific standards of rationality must be met when justifying a legal decision? Is it enough that the judge

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mentions the facts of the case and the legal rules, or is he also expected to explain why the legal rules are applicable to the concrete case? How can the interpretation of a legal rule be justified in a rational way? What is, in the context of legal justification, the relation between legal rules, legal principles and general moral norms and values? And are there any special norms for the decision of a judge when compared with the justification of other legal standpoints? With respect to the law as a field of application of insights from argumentation theory, research questions can be how insights from argumentation theory can be applied to the field of law. How can a general model of argumentation be used for analyzing and evaluating legal arguments? How can legal arguments be reconstructed in terms of a general model of argumentation? How can general standards of rationality be applied to legal arguments?

In what follows, a survey is given of research carried out in the past 25 years by argumentation theorists and legal theorists. By giving an outline of the various approaches and topics, a map will be drawn of the field of study and an overview will be given of the various developments in the filed of research.

In the past 25 years, from 1970–1995, scholars from argumentation theory and legal theory have addressed various aspects of legal argument. The interest in legal argumentation started, of course, in legal theory. In legal theory, in the 1970s and 1980s a number of international conferences of legal theory were dedicated to the topic of argumentation and law.[2] In argumentation theory, in the 1970s and 1980s the interest in legal argumentation began to grow. On conferences on argumentation of the International Society for the Study of Argumentation (ISSA) and the conferences of the Speech Communication Association (SCA) legal argumentation is always one of the conference themes.[3]

In the period after 1970, various authors published surveys of research in the field of legal argumentation. The first surveys are mainly concerned with logical approaches. Horovitz (1972) surveys the discussions between formalists and non-formalists about the role of logic in legal argumentation. He concludes that the disagreement between the two sides depends largely on different uses of basic terms and that the non-formalistic thesis depends substantively on erroneous views. Kalinowski (1972) describes various approaches in legal logic and proposes a specific theory for legal argumentation in which a classification of the types of reasoning is given. Later surveys concentrate on aspects which relate to argumentation theory and language philosophy. Struck (1977) discusses various argumentation models. He argues that nor empirical description models (Toulmin, topics), nor normative evaluation models from epistemology (logic, critical rationalism, hermeneutics) or society theory (marxism, Habermas, Erlanger Schule) offer a suitable instrument for assessing the rationality of legal

argumentation and he concludes that social topics and rhetoric can offer such an instrument. Alexy (1989) develops a theory of legal argumentation based on insights from analytic moral philosophy (including Stevenson, Wittgenstein, Austin, Hare, Toulmin, and Baier); Habermas' consensus theory of truth; the theory of practical deliberation of the Erlangen School; and Perelman's theory of argumentation. Rieke (1982) reviews various forms of research on argumentation in the legal process. He discusses contributions from diverging fields such as rhetorical analysis, judge's instructions, lawyer communication functions, television and trial. He argues that an analysis of judicial reasoning in conflicts over freedom of expression is an area of potential research.

Also a number of journals in the field of argumentation theory, speech communication, informal logic, legal theory, and legal philosophy published articles on legal argumentation on a regular basis.[4] Recently, a number of journals have published special issues on legal argumentation.[5]

Research on legal argumentation over the past 25 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 'aspects' 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 specify methods for developing practical skills in analyzing, evaluating and writing legal texts.

As has been said, in the research on legal argumentation a multitude of approaches and topics can be distinguished. To give a clear picture of the similarities and differences of the contributions, in this article an outline is chosen in which the research is treated from two angles. First, in 2 the research is divided in three main approaches of legal argumentation, the logical, the rhetorical and the dialogical approach. In 3, the research is discussed with respect to the various topics which form the objects of study which can be distinguished in these approaches. To make the survey as complete and representative as possible the discussion of the various contributions has been kept brief of necessity.

2. APPROACHES IN RESEARCH OF LEGAL ARGUMENTATION

Three approaches can be distinguished: the *logical*, the *rhetorical* and the *dialogical*.

2.1. *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 reconstructible 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 premisses).

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. 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.[6]

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.[7] 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.[8]

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.[9]

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.[10]

2.2. *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 *a contrario*, enable a judge to win the assent of others. Similarly, by means of analogical reasoning, he or she can show that a certain rule which is applicable to certain cases is also applicable to a new concrete case which is similar in relevant respects.

In the literature on legal argumentation, Perelman's ideas are often used. In *Practical reasoning in human affairs. Studies in honor of Chaim Perelman* (edited by Golden and Pilotta, 1986), various authors discuss the application of Perelman's ideas in law. Haarscher pays attention to Perelman's ideas about justice, Makau discusses Perelman's legal model, and Rieke describes various approaches of the process of legal decision-making and describes the advantages of Perelman's rhetorical approach for the argumentative analysis of legal decision-making.

In *Chaïm Perelman et la pensée contemporaine* (edited by Haarscher, 1993) various authors pay attention to the legal aspects of Perelman's ideas. Christie goes into the role of the universal audience in law, Ankaku discusses the influence of Perelman's ideas on legal thinking in Japan, Maneli discusses the importance of Perelman's new rhetoric as legal philosophy and methodology, Kamenka and Erh-Soon Tay apply Perelman's ideas to

common law and continental European law, and Terré discusses the role of the judge in Perelman's new rhetoric.

The American legal philosopher Maneli (1993) argues that Perelman's rhetorical criterion of soundness offers an attractive alternative to formal logical criteria. The American Speech Communication theorists Makau (1984) and Schuetz (1991) have adjusted Perelman's theory for the analysis of certain examples of legal argument. Schuetz shows how precedent is used in a Mexican criminal court to give an effective defence of a legal position. Makau shows how the Supreme Court addresses a composite audience, an audience consisting of a number of different addressees: justices (both present and future), lower court justices, legal administrators, legislators, lawyers, participating litigants, legal scholars, and other educated members of the body of politics. Each of these groups reflects unique, often conflicting sets of interests, values, and beliefs. Wiethoff (1985) discusses Perelman's philosophy of legal argument.

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.

In the literature on legal argumentation, various authors use Toulmin's model. Some authors only use Toulmin's terms, others use the model as an analytical tool for reconstructing relevant elements of legal arguments. Peczenik (1983, pp. 4–5) uses Toulmin's terminology for his claim that a legal decision is always derived from a statement about the facts in combination with a warrant as an inference rule. Rieke and Stutman (1990, pp. 95–98) use Toulmin's terminology in distinguishing various elements in the argument of an attorney. They specify which parts of an argument play a role in convincing a jury. Newell and Rieke (1986) consider legal doctrine as a set of warrants for legal decisions. Using decisions of the Supreme Court, they show how legal principles function as a warrant for legal decisions. If an argument of the Supreme Court gets the status of a generally accepted principle, according to Newell and Rieke, such an argument does not require further justification. Snedaker (1987) employs the Toulmin model for an analysis and evaluation of the famous *Sam Sheppard trial*. In the Netherlands, Henket and van den Hoven (1990) use the same model, but with a difference. In addition to elements described by Toulmin, they distinguish the 'concrete rule' which forms a specification of the general rule in relation to the facts of the case.

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, etcetera. A prominent representative of a topical approach is the German legal theorist Viehweg (1954).[11] Using *topoi*, arguments can be found and formulated which can be used for justifying a legal decision.[12]

There are also authors who draw upon another classical rhetorical theory, the *status* theory, a theory on the various standard questions which should be answered with regard to a certain issue. McEvoy (1991, 1995) applies classical status theory to the analysis of legal argument. A modern version of status theory is that of Dicks (1976), the theory of so-called stock issues, which was used in the analysis of the famous Angela Davis trial.

There are also authors who pay attention to important aspects of medieval rhetorical theories for legal argumentation. Hohmann (1995) describes medieval perspectives on logic and rhetoric in legal argumentation.

In the United States, various authors describe legal argumentation from a rhetorical perspective. Rieke (1986, 1991) uses a rhetorical-dialogical perspective. He argues that the analysis of legal decisions must take place in the context of the broader process of legal decision-making. According to him, this process is a dialogue in which judges, together with others, try to structure their normative convictions by using dialectical and rhetorical structures.

Dicks (1981) describes the rhetorical strategies in a legal process. Hample (1979) discusses the role of choices in the legal decision-making process. From the perspective of legal realism he describes the rhetorical techniques used by judges to hide their personal motives. Olson and Olson (1991) describe rhetorical techniques in a criminal process in which the illegal import of foreigners is discussed.

Modern versions of a rhetorical approach can also be found with authors who belong to the Critical Legal Studies movement or the Law and Literature movement. These authors consider a legal text to be a social, cultural and political phenomenon and analyze the way in which linguistic and textual techniques are used to express (or hide) a particular ideology.[13] Herbeck (1995a) explains the contribution of the Critical Legal Studies approach to argumentation theory. He discusses the role of legal reasoning in the American legal system and he considers the implications their conception of jurisprudence has for argumentation theory. Scallen (1995) discusses the most recent manifestations of the debate of the Law and Literature movement. She traces the evolution of the Law and Literature

schools and shows how these schools have influenced the conceptual development and teaching of American law. She also presents connections between the Critical Legal Studies and Law and Economics movements in the U.S. and raises questions about the Law and Literature movement.

An important representative of such an approach in American law is Posner (1988, 1990, 1992). Various authors such as Herbeck (1995), Janas (1995) and Panetta and Hasian (1995) discuss the importance of Posner's idea's for legal argumentation.

Various authors give cases studies from the perspective of law/rhetoric/literature, Klinger (1989) argues that the literary approach offers an important perspective for the study of legal decisions. Twigg (1989) gives a narrative analysis of decisions of the Supreme Court in which an interpretation of the United States Constitution is given and shows which political ideology underlies this interpretation.

Recently, various special issues of argumentation journals are dedicated to a rhetorical approach of legal argumentation. In the special issue of *Argumentation* edited by Lempereur (1991) McEvoy, Sobota, Lempereur, and Prott discuss the importance of (classical) rhetorical ideas for legal argumentation. In the special issue of *Argumentation and Advocacy*, Makau, Lawrence, Srader, Bruschke, and Klinger discuss legal communication and argumentation.

2.3. *The dialogical approach*

Recently, a new approach to legal argumentation has been developed in which 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 such approaches, which can be called *dialogical*, legal argument is considered as part of a dialogue about the acceptability of legal standpoints. 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 (1989), and Peczenik (1983, 1989).[14] As with Habermas, they take legal argumentation to be a form of rational communication for reaching rational consensus by means of discussion.

With respect to the analysis and evaluation of arguments, these authors draw a distinction between *formal*, *material*, and *procedural* aspects of justification. As they concern the *product* of an argument, Aarnio (1987), Alexy (1989), MacCormick (1978), Peczenik (1983), and Wróblewski (1974) distinguish two levels, in sets of formal and material aspects, in the reconstruction of the justification of legal decisions. On the level of *internal justification*, the *formal* aspects are deployed: the argument should

be reconstructed as a logically valid arguments consisting of the legal rule and the facts as premisses, and the decision as conclusion. In *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 Netherlands, Feteris, Kloosterhuis, Plug, Henket and van den Hoven approach legal argumentation from a dialogical perspective. Feteris, Kloosterhuis and Plug use a *pragma-dialectical* approach in which the process of legal argumentation is considered as a contribution to a rational discussion. From this viewpoint, a legal process is analyzed in terms of an ideal model for rational dispute-resolution. Feteris (1987, 1990, 1991, 1993a, 1993b, 1995) notes various aspects of the similarities and differences between legal discussions and non-legal discussions. Kloosterhuis (1994, 1995) develops an analytical framework for the reconstruction of argumentation based on analogy and *a contrario* reasoning. Plug (1994, 1995) proposes how the justification of a legal decision can be analyzed from the perspective of a critical discussion. Henket and van den Hoven, on the other hand, are of the opinion that dialogical and rhetorical perspectives should be combined. They hold that a legal process is not solely a matter of dispute resolution but is also governed by strategic aims associated with special legal goals. Therefore, they argue, a legal process is not wholly analyzable in terms of an ideal model for rational discussions. Henket (1987, 1991) compares legal argumentation rules with general discussion rules. Van den Hoven (1988) notes the communicative aspects of the legal argumentation process.

3. TOPICS IN RESEARCH OF LEGAL ARGUMENTATION

In the previous section, the main theoretical approaches which can be distinguished in the research of legal argumentation have been described. In the following sections we review various topics which are the object of study in these approaches. In order to give a systematical survey of the topics, they are related to the various components of a research programme of legal argumentation. In a research programme, a distinction can be made between the philosophical, the theoretical, the analytical, the empirical, and the practical component.[15]

3.1. *The philosophical component*

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. Alexy (1989) develops a theory of legal argument which combines claims about the rationality of general practical argumentation with specific insights on legal norms of rationality. Following Alexy, Günther (1989) takes legal argumentation to be a special form of general moral argumentation, which takes place under certain restrictions. Habermas (1988) examines the question of which criteria legal argumentation should meet in order to be morally acceptable. He notes the special institutionalized procedures which should guarantee that in law morally acceptable decisions are reached.

3.2. *The theoretical component*

In the theoretical component, theoretical models for legal argumentation are developed, in which the structure of legal argument and norms and rules for argument-acceptability are formulated.

Wróblewski (1974) has developed a model which isolates the elements which enter into the justification of a legal decision. An adapted version of this model is elaborated by Aarnio (1987) and Alexy (1989). A distinction is made between two levels of the justification, internal and external. Aarnio (1987), Alexy (1989), MacCormick (1978) and Peczenik (1983, 1989) attempt to specify applicable norms for these two levels.

Apart from these general theoretical developments, there are also accounts which pay attention to specific aspects of rational legal argument. Aarnio (1987), Alexy and Peczenik (1990), Günther (1989), MacCormick (1978), MacCormick and Summers (1991), and Peczenik (1983, 1989) emphasize coherence as one of the most important of such criteria.

Other authors emphasize fallacies in law. Hohmann (1991) discusses the role of fallacies in legal argument. Prott (1991) discusses decisions of the International Court in which various fallacies occur, such as the *argumentum ad hominem*, the *argumentum ad absurdum*, the *argumentum ad consequentiam*, and the *argumentum a fortiori*.

In recent work in American Speech Communication, an important question is how legal argument can be described as a specific field of argument and which special criteria of soundness should be applied. Rieke (1981)

introduces a proposal for a research programme for legal argumentation as a specific field, and discusses its distinctive features. Asbell Sheppard and Rieke (1983) offer an analytical model for representing legal argument. Schuetz (1981) draws attention to problems which arise from the assumption that legal argument is a distinct field of argument.

Others raise the question of which specific fields of argument can be distinguished inside the Law. Hollihan and others (1986) describe the characteristics of the argumentation process in a small claims court. Schuetz (1986) also discusses the legislative process.

3.3. *The analytical component*

The reconstruction component shows how to reconstruct legal argument in an analytical model. The object of such a rational 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. In a logical approach, a reconstruction is carried out in which the argument is analyzed as a chain of logically valid arguments. Various authors, such as Alexy (1989), Koch (1980), MacCormick (1978), specify how a reconstruction of legal argument should be performed from this perspective. Authors such as Makau (1984), Schuetz (1986, 1991), and Snedaker (1987) describe how a reconstruction can be carried out in a rhetorical analysis. Feteris (1991) discusses the transformations which should be carried out in a dialogical approach to legal discussions.

One of the central subjects in the analysis of legal argumentation is the question of how the justification of the *interpretation* of a legal rule should be carried out. In reconstructing legal arguments, a distinction is often made between clear cases in which there is no doubt about the applicability of the rule to the case, and hard cases in which the rule must be interpreted to make it applicable to the case. Various authors such as Aarnio (1977, 1987), Alexy (1989), MacCormick (1978) and Peczenik (1983, 1989) specify various distinct levels in the justification of legal interpretations.

In *Interpreting Statutes* (edited by MacCormick and Summers, 1991), an account is given of a research project on the interpretation of statues in nine countries (Germany, Finland, France, Italy, Poland, Great Britain, the United States and Argentina). For various countries various interpretation methods are used in the arguments of their higher courts.

Another important reconstruction question is how arguments based on reasoning from analogy and *a contrario* should be analyzed and evaluated. Arguments from analogy are used to show that a new situation which is

not covered explicitly by the law can be considered as falling under a legal rule which is intended for other cases which are in relevant respects similar to the new case. In arguments based on *a contrario* reasoning it is shown that a new case does not fall under a rule which seems applicable at first sight.

The first question to be answered in this context is how these argumentation schemes can be reconstructed as logically valid arguments. Kaptein (1994), Klug (1951), and Soeteman (1989) are of the view that such argumentation schemes can be reconstructed as logically valid arguments. According to them, the main question is which logical system is the most suitable for this purpose. Kaptein argues that analogical and *a contrario* arguments can be analyzed in a propositional logic. Henket (1992) argues that *a contrario* argumentation should not be analyzed as a material implication, but, depending on the interpretation of the legal rule, as a replication or an equivalence.

Using a pragma-dialectical framework, Kloosterhuis (1994, 1995) develops an instrument for analyzing and evaluating arguments based on analogy. He distinguishes various forms of analogy, and describes which explicit and implicit elements are represented, and how the argumentation can be evaluated in a rational way.

Benoit and France (1980) discuss examples of analogical argumentation in American law. Henket (1991) examines analogy and the use of rules in practical reasoning.

3.4. *The empirical component*

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.

In various case studies, specific characteristics of the legal argumentation process are described. Benoit (1981) gives an account of an empirical investigation into the argumentative strategies of the U.S. Supreme Court. Benoit (1989) emphasizes the reaction of the Court to lawyers' arguments. Benoit and D'Agostine (1994) discuss the way a multiple audience discourse functions in law. Benoit and France (1983) examine the effect of opening statements and closing arguments on jury verdicts. Dickens and Schwartz (1970, 1971) discuss the role of oral argumentation before the Supreme Court. Dunbar and Cooper (1981) describe various kinds of statements made by a judge in the stages of a legal process. Hagan (1976) gives an argumentative description of the case of Roe v. Wade. Hollihan, Riley and Friedhoff (1986) and Riley, Hollihan and Freadhoff (1987) consider the arguments of litigating parties in a small claims court. Hunsaker (1978) considers the case of Brown v. Board of Education as an example of social protest. Ilie (1995) describes the pragmatic and discursive role of

rhetorical questions in English legal discourse. Kominar (1985) discusses the role the demand for argumentative accountability plays in the justification of legal decisions in Canada. Neumann, Rahlf and von Savigny (1976) give an account of an investigation into the argumentative practice of the German Bundesgerichtshof in criminal cases. Schuetz (1991) gives an analysis of a Mexican criminal process in terms of concepts of Perelman's theory. Snedaker and Schuetz (1985) describe the argumentative structure of opening statements in an American trial. Walker and Daniels (1995) describe alternative systems to the litigation framework, and compare these alternative systems such as arbitration, mediation, and multi-party facilitation. Wasby, D'Amato and Metrailer (1976) describe the role of oral argument in court.

3.5. *The practical component*

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 analyzing, evaluating and writing legal argumentation. Such methods are used in teaching legal skills in universities and in law schools.

In the United States, the improvement of argumentative skills in legal education is treated in the broader context of logic, or legal theory. In *An introduction to law and legal reasoning*, Burton (1985) discusses various forms of legal reasoning such as analogical reasoning, deductive reasoning, etc. In his *Introduction to logic*, Copi (1990) adds a chapter on 'Logic and the law', in which he deals with such matters as fallacies in the law, inductive and deductive reasoning in law. In *Legal reasoning*, Golding (1984) considers various aspects of legal reasoning such as various types of legal argument, precedent and analogy, etcetera. In a chapter on legal reasoning in *Principles of reasoning*, Russow and Curd (1988) discuss the role of argument in legal reasoning, the structure of legal reasoning, analogy and precedent. In a chapter on legal reasoning in *An introduction to reasoning*, Toulmin, Rieke and Janik (1984) review the layout of legal arguments. In Germany, Haft (1981) discusses problems of legal reasoning from a rhetorical perspective. In Great Britain, Twining and Miers (1991) discuss problems in the use of rules in legal interpretation and legal reasoning.

Luebke (1995) and Plumer (1995) discuss the application of ideas taken from informal logic for the Law School Admission Test (LSAT), a standardized, multiple-choice examination required for admission to nearly all United States and Canadian law schools. This test measures such things as the reading and comprehension of complex texts, the organization and management of information and the ability to draw reasonable inferences from it, the ability to reason critically, and the analysis and evaluation of the reasoning and argument of others.

In the Netherlands, various authors have developed a method for

improving argumentative skills in legal education. Soeteman et al. (1990) apply a logical approach. Henket and van den Hoven emphasize a rhetorical (1990) approach, based on Toulmin's model. They specify the kinds of arguments that can be advanced in the justification of a legal decision. In *Argumentation for lawyers*, Van Eemeren et al. (1991) apply a dialogical approach based on the pragma-dialectical theory of argument. They present methods for the layout of arguments, their evaluation by means of a reconstruction of argumentation schemes and the detection of fallacies. Also developed is a method for presenting legal arguments.

4. CONCLUSION

In the preceding sections a survey has been given of the various approaches and topics which can be found in the research of legal argumentation of the past 25 years. With regard to the various approaches it can be said that the attention shifts from purely logical and rhetorical approaches to an approach in which logical, rhetorical and communicative aspects are brought together and which can be considered as a dialogical approach. In the 1970s and 1980s a number of comprehensive theories of legal argumentation has been developed in which legal argumentation is approached from a dialogical perspective (Aarnio, Alexy, Peczenik, see also Feteris, Kloosterhuis and Plug). Legal argumentation is considered as part of a dialogue or discussion. What these approaches have in common is that the rationality of the argumentation is related to the quality of the procedure followed in the discussion and to the question whether certain rules for rational discussion have been met. In these theories the focus is on the starting points and rules for rational legal discussions, on methods for analyzing and evaluating legal arguments, and on methods for the construction of rational legal justifications.

With regard to the various topics of study various research components of a research programme can be found.

In the *philosophical* component ideas developed in argumentation theory about the rationality of argumentation in general are linked with ideas developed in legal theory about the rationality of legal argumentation and interpretation. Authors such as Aarnio, Alexy and Peczenik have developed theories in which they apply ideas from argumentation theory to the Law. They determine which general and which specific legal criteria of rationality apply to legal discussions. Various forms of criteria of rationality can be distinguished: procedural and material. The material criteria relate to the discussion procedure and the justification process, the material criteria are related to the standards of rationality which apply to the evaluation of legal arguments in specific legal fields and legal communities.

In the *theoretical* component various models for legal argumentation and

discussions are developed. With respect to the formal aspects of legal argumentation, these models contain rules for rational legal discussions and a description of the structure of legal arguments. With respect to the structure of legal arguments a distinction is made between *internal* and *external* aspects. The internal aspects are related to the formal logical structure of legal arguments, the external aspects are related to the material aspects, of how the arguments used can be justified in the light of certain legal standards of soundness.

In the *analytic* component various forms of reconstruction of legal argumentation are performed. There are examples of logical, rhetorical and dialectical analysis of aspects of legal argumentation. With respect to the analysis, the emphasis is on the reconstruction of various forms of argument used in the interpretation of legal rules.

In the *empirical* component various case studies of aspects of the legal process are performed, clarifying how various theoretical models can be used in describing legal argument. The case studies range from the analysis of Supreme Court arguments to the analysis of arguments in a small claims court.

In the *practical* component, practical recommendations for the analysis, evaluation and construction of legal argumentation are given. In the practical component we can see that theoretical, analytical and empirical ideas may be combined to develop methods for improving argumentative skills in legal education. Let us hope that cooperation of representatives of the various disciplines will result in a legal argumentation theory which has a theoretical and practical value which is required for a successful progress of the research and a successful application of the theoretical insights in legal practice and legal education.

NOTES

[1] In some legal systems, there are statutory provisions which define the required elements of a publicly justified decision. For instance, under section 121 of the Dutch Constitution a legal judgement must specify the grounds underlying the decision. In Germany s. 313 (1) of the Code of Civil Procedure (ZPO) says that the decision has to contain the operative provisions of the decision, the facts, and the reasons on which the decision is based. In Sweden, according to the Code of Procedure, a judgement of a court must contain a statement of claim and defence, the issues as presented to the court, the reasons given by the court for its order or decree, and the order or decree itself. For a description of conventions and styles of justifying legal decisions in various countries see MacCormick and Summers (1991).

[2] See for instance *Die juristische Argumentation* (1972), Krawietz et al. (eds.) (1979), Hassemer et al. (eds.) (1980), Aarnio e.a. (eds.) (1981), Krawietz and Alexy (eds.) (1983).

[3] See for instance Van Eemeren et al. (eds.) (1991, 1995), Wenzel (ed.) (1987), Zarefsky et al. (eds.) (1983), Ziegelmueller and Rhodes (eds.) 1981).

[4] See for instance *Archiv für Rechts- und Sozialphilosophie, Argumentation, Argumentation and Advocacy* (formerly the *Journal of the American Forensic Association*), *Informal Logic, International Journal for the Semiotics of Law, Rechtstheorie*.

[5] See for instance Feteris and Schuetz (1996), Lempereur (1991), Matlon (1994).

[6] See, for instance, Tammelo et al. (1981), MacCormick (1992: 195–199), Rödig (1971), Yoshino (1981).
[7] See, for instance, Alexy (1980: 198–199), Kalinowski (1972), Koch (1980), Soeteman (1989), Weinberger (1970).
[8] For a more extensive treatment of the arguments for and against a deontic logic with respect to legal argumentation see, for instance, Rödig (1971), Soeteman (1989).
[9] See Hage et al. (1992, 1994).
[10] See Prakken (1993).
[11] For a critique with respect to Viehweg's theory, see Alexy (1989: 20–24).
[12] Other authors working in a topical-rhetorical tradition which is based on Viehweg's ideas, are Ballweg (1982), Esser (1979), Horn (1967), Schreckenberger (1978), Seibert (1980), and Struck (1977).
[13] For a survey of a literary approach of the law see Posner (1988), White (1984, 1989, 1990).
[14] 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.
[15] For a description of the various components of a general research programme of argumentation see Van Eemeren (1987) and Van Eemeren and Grootendorst (1992).

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