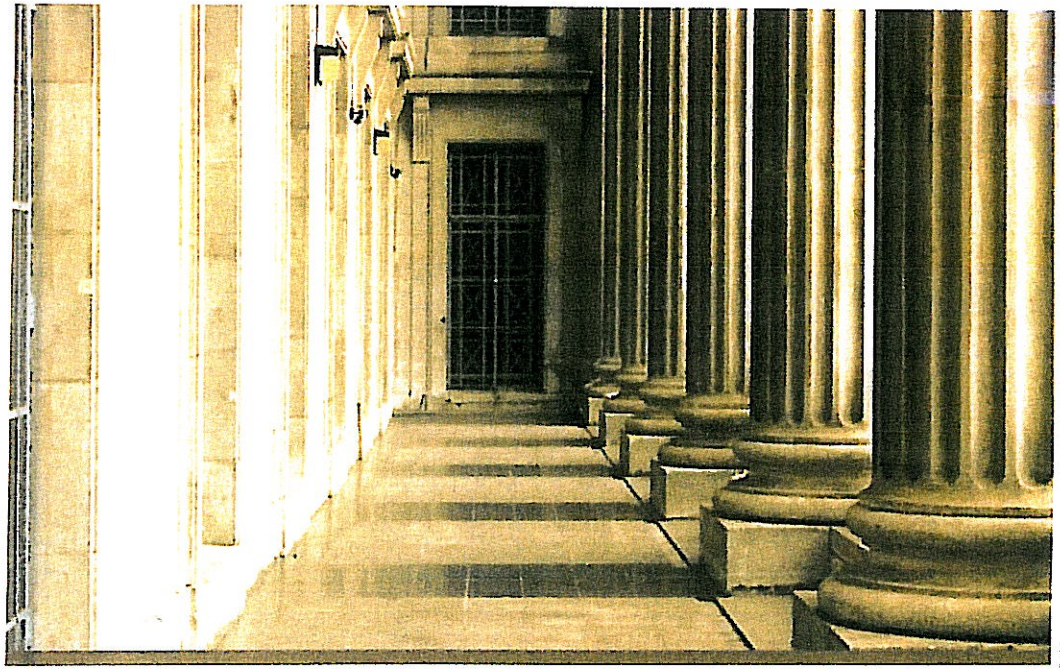

PRAVNA ARGUMENTACIJA V PRAKSI

Dr. Marko Novak

FUNDAMENTALS OF LEGAL ARGUMENTATION

A Survey of Theories on the Justification of Judicial Decisions

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SPLOŠNO O PRAVNI ARGUMENTACIJI

Sodobni pomen pravne argumentacije

Ena temeljnih spodbud za večje zanimanje pravnikov za pravno argumentacijo je sprememba pogleda na vlogo sodnika. Njegova vloga, denimo iz 19. stol., ko naj bi bil le nekakšen »mehanični« uporabnik pravnih norm, se je spremenila predvsem v drugi polovici 20. stol. ob zavedanju, da zakonodajalec ne more predvideti primerov, ki lahko postanejo predmet spora v družbi. Sodnik ne more vedno neposredno uporabiti pravne norme, temveč jo mora prej razložiti in razlago utemeljiti. Pri tem se mora pogosto odločati med več razlagami. Da je njegova končna odločitev sprejemljiva, mora navesti obrazložitev glede na razlago uporabe pravnega pravila v določeni življenjski okoliščini. Obveznost obrazložitve pravne odločitve praviloma izhaja že iz ustave in je tako temelj bržkone vsakega sodobnega pravnega sistema. Njen namen je seznaniti stranke z razlogi za odločitev, omogočiti drugim sodnikom, da preverijo, ali je odločitev pravilna, in javnosti ocenjevanje take odločitve.

Sodnik mora pri svoji odločitvi torej ugotoviti, ali je pravna norma, vštevši njeno razlago, uporabna za primer, na katerega se nanaša. Včasih dvoma o pomenu in uporabnosti pravne norme ni, zato ni potrebna posebna nadaljnja razlaga, saj sodnik navede le dejstva in pravno normo kot premisi za sklep, v katerem pojasni svojo končno odločitev. Gre za tako imenovane lažje ali jasne primere. V zahtevnejših pa pomen pravne norme za obravnavani primer ni povsem jasen, zato je potrebna dodatna razlaga. Poudariti je treba, da je pomanjkanje jasnosti v pravni normi posledica njene abstraktnosti, ko zakonodajalec ne more predvideti vseh dejanskih okoliščin, na katere bi se lahko nanašala. Delno je absolutno vsak sestavljavec splošnega pravnega pravila žrtev lastnega uspeha, saj se ujame v past abstraktnosti pravne norme, čeprav želi biti čim bolj predvidljiv in s tem pravno varen.

by the judge in such a way that they are also applicable to new cases. In this view, judges have a more extended task: they acquire a certain latitude in interpreting legal rules and in formulating concrete norms for specific cases. As a result, judges cannot always automatically deduce a decision from a general rule. They must interpret legal rules and make a choice between rival interpretations. In order to make the final decision acceptable, they have to account for their interpretation: they must provide justification for their decision regarding the interpretation of the legal rule. Because argumentation plays such an important role in the justification of a legal decision, the interest in the criteria for the acceptability of legal argumentation is growing in legal theory. There is also a growing interest in legal argumentation in the field of argumentation theory. Argumentation theorists are trying to develop models for the analysis and evaluation of argumentation in general, as well as in specific contexts.[1]

In various legal systems the obligation to justify a legal decision is laid down in a statutory rule.[2] The purpose of justification is to inform the parties of the underlying reasons for the decision and to enable other judges to check whether the decision is good. Moreover, the justification must enable a public evaluation: the justification forms the basis upon which the decision can be evaluated in legal journals and in the public discussion.

Although it is often claimed that a legal decision must be justified, there are hardly ever specifications as to what the justification should consist of. The justification constitutes the argumentation in defence of the decision; in order to establish whether the argumentation is sound it is important to know the standards of soundness which apply. Therefore, in legal theory, attention is paid to the norms for a rational justification of legal decisions. An important question in this context is how the interpretation of a legal rule can be adequately justified.

1. For other reasons for the growing interest in legal argumentation see Aarnio, Alexy, and Peczenik (1981:133-136) who say that a theory of legal argumentation must form the basis of legal theory.

2. Some legal systems contain statutory provisions which define the elements required 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 must contain the operative provisions of the decision, the facts, and the reasons upon 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).

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In their decisions, judges must establish whether a specific rule, in a specific interpretation, is applicable to the case before them. Sometimes, there are no doubts about the meaning and applicability of a single legal rule.[3] The meaning of that legal rule is clear in that specific context with the result that the rule can be applied without further interpretation.[3] But in other situations where it is not exactly clear what the meaning of the legal rule is, it is possible to have different views with the result that further interpretation of the rule is necessary for the concrete case.

In *clear* cases in which no further interpretation is required, judges need only mention the facts and the applicable legal rule. In *hard* cases in which an interpretation is required, further justification accounting for the interpretation must be given.[4] Judges must explain why they have chosen a specific interpretation of the legal rule.

One important explanation for lack of clarity in the rules is, as has been mentioned, that the legislator cannot anticipate all the possible circumstances to which the rule might apply, so he cannot anticipate all the contingencies that might arise. Another reason is that a rule refers to a fact situation by referring to a class of situations which are to be treated alike. In doing this, rules generalize and simplify. In formulating a rule, the legislator conceives certain differences as immaterial within the context of the rule.[5] This lack of clarity in legal rules makes it necessary to establish the exact meaning of a rule for the concrete situation by means of an interpretation.

In continental legal theory, various techniques of interpretation (also called 'methods' or 'canons' of interpretation) are distinguished. The most well-known are the *grammatical/semantic*, the *historical*, the *systematic*, the *genetic*, and the *teleological* methods of interpretation. If a judge refers to the meaning of a term in everyday language or a technical language, he uses

3. In this context, it is tacitly presupposed that the legal norm itself does not require further justification. For a discussion of various methods for the foundation of legal rules see Aarnio (1987:43-46).

4. The distinction between clear cases and hard cases is introduced by Hart (1961) and Dworkin (1977,1986). They do not explicitly give an exact definition of what clear cases and hard cases are, but they give an analysis of how a case can become 'hard'. Hart (1958) explains that words have only a core of settled meaning, but beyond that a penumbra of borderline cases which is not regimented by any convention.

According to Dworkin (1977:81-130) a hard case implies that people can differ with respect to the right answer to a question. However, it does not imply that there could be various answers which are equally right.

MacCormick (1978:197-203) is of the opinion that there is no distinct dividing line between clear cases and hard cases. According to him, there is a spectrum which ranges from the obviously simple to the highly contestable.

5. For a more detailed description of the problems in formulating legal rules see Hart (1961), and Twining and Miers (1991:200ff.).

Sodobni sodnik mora torej pojasniti natančen pomen pravnega pravila v luči dejstev in dokazov, uporabljenih v konkretnem primeru. Pojasniti mora vsako razlago pravnega pravila in način njene uporabe v konkretnem primeru. Izjeme so v nekaterih pravnih sistemih zaradi nakopičenih nerešenih pravnih primerov le določeni najenostavnejši sklepi procesne narave, ki niti ne potrebujejo posebne obrazložitve, saj je dovolj le označba uporabljene pravne norme (recimo pri jasni zamudi prekluzivnega roka za vložitev pravnega sredstva). Ker so bistvo vsake obrazložitve ravno njeni razlogi, teoretiki pravne argumentacije raziskujejo pogoje, pod katerimi je obrazložitev pravnega odločanja racionalna in zato sprejemljiva.

Za razumevanje vloge argumentacije v pravu je treba razlikovati med različnima procesoma ali fazama sodniškega odločanja: 1. iskanje odločitve se nanaša na iskanje in sprejemanje pravne odločitve; 2. utemeljevanje odločitve pa na njeno obrazložitev. V praksi ni vedno mogoče razlikovati obeh stopenj, toda to ne vpliva na to, da ju ne bi mogli v pravni teoriji. Razlikovanje je pomembno predvsem v smislu uvedbe meril za ocenjevanje kakovosti pravne argumentacije. Sprejemanje odločitve je psihološki proces in je kot tak navadno predmet drugačne vrste proučevanja kot utemeljevanje odločitve, s katerim se pretežno ukvarja teorija pravne argumentacije. Tega stališča ne zagovarjajo vsi, ki se ukvarjajo s teorijo pravne argumentacije, saj nekateri zagovarjajo pomembno povezavo med obema fazama sodniškega odločanja. Kljub temu se proučevanje pravne argumentacije, v smislu utemeljevanja pravnih odločitev, večinoma ukvarja s standardi, ki jih predvsem sodnik upošteva pri obrazložitvi svoje odločitve, ne glede na to, kako je bila dosežena. Ključno je predvsem to, ali pravna odločitev upošteva standarde racionalnosti, ki jih zahteva pravni sistem. Racionalnost je ena bistvenih značilnosti sodobnega prava.

Racionalna rekonstrukcija pravne odločitve je njena teoretična analiza. Pravna odločitev je pri tem podvržena kritičnemu testu pri obeh strankah, pravnih strokovnjakih in javnem mnenju. V zvezi s tem se navadno preverja trdnost argumentov in argumentacije ter predvsem, ali argumenti utemeljujejo in s tem podpirajo pravno odločitev. Primer take racionalne (argumentacijske) analize sodne odločbe je na koncu knjige v zadnjem poglavju.

1.3 CENTRAL RESEARCH QUESTIONS IN THEORIES OF LEGAL ARGUMENTATION

For a good understanding of the role of legal argumentation in the process of legal adjudication, it is important to make a distinction between the concepts of the *context of discovery* and the *context of justification*. The context of discovery relates to the process of finding the right decision. The context of justification relates to the justification of the decision and the standards of appraisal to be used in the evaluation of the decision.[10]

In legal practice, the judge often anticipates the justification in his decision process. Therefore, in legal practice it is not always possible to separate both stages in the legal decision process. However, this does not imply that they cannot be separated in legal theory, where the aim is to provide an analysis and evaluation of the quality of legal justifications as they are presented in defence of a legal decision.

The distinction between these two stages is important for establishing the standards for assessing the quality of legal argumentation. Judges are obliged to justify their decision in order to give insight into the underlying considerations. This does not imply that they are obliged to give insight into the process of finding the right decision and in the (personal) motives which have played a role in this process. Research into the rationality of legal argumentation therefore concerns the requirements which relate to the arguments given in the context of justification and not requirements which relate to the decision process, the context of discovery. The decision process is a psychological process and, as such, the subject of another type of research. The study of legal argumentation is concerned with the standards which judges respect in justifying decisions, however reached.

A third aspect is distinguished in legal theory with respect to the rationality of the decision of the judge: of the *rational reconstruction*. In the reconstruction stage the decision is submitted to a critical test by the parties, legal scholars and public opinion. They check whether the argumentation is sound and whether it adequately supports the decision. To be able to evaluate the decision, a reconstruction of the argumentation is required which is also called a rational reconstruction. A rational reconstruction is a reformulation of the decision for the purpose of a rational evaluation.[11]

In research into legal argumentation attention is paid to the rational reconstruction of the argumentation of the judge for the purpose of

10. This distinction is introduced by Reichenbach (1938). See also Alexy (1989:229), Carter (1994:11-13), Hart (1972:270), MacCormick and Summers (1991:16-17).
11. See MacCormick and Summers (1991:21-22).

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Proučevanje argumentacije v pravu je v zadnjih 25 letih razkrilo množico tem, pristopov in idej. Nekateri avtorji so izbrali normativni pristop, ki poudarja, kako naj sodnik obrazloži svojo odločitev po racionalni poti ali kako naj bo pravna diskusija razumna. Drugi avtorji pa so se odločili za deskriptivni pristop, ki raziskuje in opisuje pojav različnih metod argumentiranja. Nekateri so pri tem razvili teoretične modele pravne argumentacije, drugi pa poudarili filozofske in metodološke vidike, eni se ukvarjajo z deskriptivnimi metodami pravne argumentacije, drugi pa s praktičnimi veščinami pravnega argumentiranja in, čisto preprosto, kako napisati kakovostno pravno besedilo. Avtorji, ki se ukvarjajo s teorijo pravne argumentacije, se med sabo precej razlikujejo tudi po pristopih k problemom pravne argumentacije.

Najdaljšo tradicijo v proučevanju ima **logični pristop**. Z logičnega vidika je najpomembnejše, da se dajo argumenti, ki podpirajo obrazložitev, rekonstruirati kot logično veljavni argumenti. Teoretiki, ki upoštevajo ta pristop, zahtevajo, da mora biti pravna argumentacija formalnopravno veljavna. Za analiziranje in ocenjevanje so izdelali različne logične sisteme in uporabljajo različne logične pristope (silogistično, propozicijsko, predikatno, deontično in dialoško logiko). Ključno je, da je pravni argument moč rekonstruirati kot logično veljavni argument. Pri tem implicitne argumente spremenijo v eksplicitne in ocenijo, ali odločitev izhaja iz argumentov. Ta je utemeljena, če izhaja iz pravnega pravila in dejstev primera, pri čemer mora biti pravno pravilo v pravnem sistemu veljavno, dejstva primera pa nedvoumno dokazana. Nekateri avtorji se v okviru logičnega pristopa ukvarjajo tudi s simbolno logiko, celo z umetno inteligenco, in pravnikom omogočajo različne vrste raziskav logičnih meril za analiziranje pravnega utemeljevanja.

CHAPTER TWO

A SURVEY OF APPROACHES AND TOPICS

2.1 INTRODUCTION

In the following chapters, several of the most important theories of legal argumentation will be examined. Apart from these, in which a more or less complete account of legal argumentation is developed, there have also been contributions to legal argumentation in which the development of a theory is not the main goal, but in which a specific aspect is analyzed or a case study of legal texts is described. For ease of reference, we might call the former 'comprehensive theories' and the latter 'selective theories'.

In this chapter, we will present a systematic survey of comprehensive and selective theories, and trace their more important interconnections.

2.2 RESEARCH OF 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 logic, that is, as a theory of legal methodology or legal decision-making, rather than a theory of legal argument in its own right.[1]

In the 1970s, an interest in legal argumentation began to grow among lawyers and argumentation theorists. Legal argument was no longer considered as merely a part of a broader field of research, but as an object of study in its own right. The question of the rationality of justifications of legal decisions has become one of the central themes of the evolving legal argumentation theory.

The growing interest of legal theorists, legal philosophers and argumentation theorists in legal argumentation is evident from the many conferences, proceedings, journals and special issues devoted to the subject. Starting in the 1970s, the *Internationale Vereinigung für Rechts- und Sozialphilosophie*

1. See, for instance, Gottlieb (1968), Lewi (1949) and Wassermann (1964).

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(IVR) (International Society of Legal and Social Philosophy) has organized various conferences with legal argumentation as the central theme.[2] In the Netherlands, in 1993 and 1996 conferences dedicated to legal argumentation have been organized.[3] In conferences of the *International Society for the Study of Argumentation* (ISSA) and the *Speech Communication Association* (SCA), legal argumentation is always on the lecture programme. Articles on legal argumentation frequently appear in journals from such fields as legal theory, legal philosophy, speech communication, argumentation theory, and informal logic.[4] Some of these journals have dedicated special issues to legal argumentation.[5]

A number of surveys of legal argument were published in the 1970s. The first of these were concerned with logical approaches. Horovitz (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, and Alexy (1989) develops a theory of legal argument adapted from more general principles of argumentation theory.[6] Rieke (1982) surveys the research results concerning varieties of usage that attend argumentative language.

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.

2. See *Die Juristische Argumentation* (1972), Hassemer et al. (eds) (1980), Krawietz et al.(eds.) (1979), Aarnio et al. (eds.) (1981), Krawietz and Alexy (1983).
3. See Feteris et al. *Met redenen omkleed* (1994) and *Op goede gronden* (1997).
4. See, for instance, *Archiv für Rechts- und Sozialphilosophie*, *Argumentation*, *Argumentation and Advocacy* (the former *Journal of the American Forensic Association*), *Informal Logic*, *International Journal for the Semiotics of Law*, *Nederlands Tijdschrift voor Rechtsfilosofie en Rechtstheorie*, *Quarterly Journal of Speech*, *Rechtstheorie*.
5. See, for instance, the special issues of *Argumentation* (Lempereur 1991, Feteris and Schuetz 1995) and *Argumentation and Advocacy* (Matlon 1994).
6. The English translation of this book appeared in 1989, the original German version appeared in 1978

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Najdaljšo tradicijo v proučevanju ima **logični pristop.** Z logičnega vidika je najpomembnejše, da se dajo argumenti, ki podpirajo obrazložitev, rekonstruirati kot logično veljavni argumenti. Teoretiki, ki upoštevajo ta pristop, zahtevajo, da mora biti pravna argumentacija formalnopravno veljavna. Za analiziranje in ocenjevanje so izdelali različne logične sisteme in uporabljajo različne logične pristope (silogistično, propozicijsko, predikatno, deontično in dialoško logiko). Ključno je, da je pravni argument moč rekonstruirati kot logično veljavni argument. Pri tem implicitne argumente spremenijo v eksplicitne in ocenijo, ali odločitev izhaja iz argumentov. Ta je utemeljena, če izhaja iz pravnega pravila in dejstev primera, pri čemer mora biti pravno pravilo v pravnem sistemu veljavno, dejstva primera pa nedvoumno dokazana. Nekateri avtorji se v okviru logičnega pristopa ukvarjajo tudi s simbolno logiko, celo z umetno inteligenco, in pravnikom omogočajo različne vrste raziskav logičnih meril za analiziranje pravnega utemeljevanja.

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

To give a clear picture of the similarities and differences of these various contributions, our survey in this chapter is arranged into such a way as to emphasize a distinction between approaches to and topics of legal argument. Thus, 2.3 surveys the three main approaches to legal argument, and 2.4 surveys the various topics which form the object of study.

2.3 APPROACHES IN RESEARCH OF LEGAL ARGUMENTATION

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

2.3.1 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'

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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.[7]

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.[8] 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.[9]

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.[10]

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.[11]

2.3.2 *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.

7. See, for instance, Tammelo et al. (1981), MacCormick (1992:195-199), Rödig (1971), Yoshino (1981).
8. See, for instance, Alexy (1980b:198-199), Kalinowski (1972), Koch (1980), Soeteman (1989), Weinberger (1970).
9. 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).
10. See Hage et al. (1992, 1994).

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and textual techniques are used to express (or hide) a particular ideology.[14] 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 this 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 (1995a), 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.

2.3.3 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 a legal standpoint. The rationality of the argument depends on whether the procedure meets certain formal and material standards of acceptability.

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Prominent representatives of a dialogical approach in legal theory are Aarnio (1977, 1987), Alexy (1989), and Peczenik (1983, 1989).[15] 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 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 Netherlands, Feteris, Jansen, Kloosterhuis, Plug, Henket and van den Hoven approach legal argumentation from a dialogical perspective. Feteris, Jansen, 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, 1996, 1997) notes various aspects of the similarities and differences between legal discussions and non-legal discussions and describes which procedures and rules in a legal process contribute to a rational resolution of legal disputes. Kloosterhuis (1994, 1995, 1996) develops an analytical framework for the reconstruction of argumentation based on analogy reasoning. Jansen (1996, 1997) develops such a framework for *e contrario* arguments. Plug (1994, 1995, 1996) clarifies 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

15. For a description of a combination of the insights of these authors, see Aarnio, A