Analyzing Legal Argumentation: What Theoretical Model is the Most Comprehensive? (iThenticate Plagiarism Report)

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Analyzing Legal Argumentation: What Theoretical Model is the Most Comprehensive?

ABSTRACT

Today, there is a clear need in developing a unified theoretical model of legal argumentation viable for all areas of legal practice and legal doctrine. Despite existence of several models within either general argumentation theory or multiple judicial-reasoning doctrines, none of them can be used as a universal tool for researches of legal argumentation. The aim of this article is to suggest a theoretical model of legal argumentation viable for analysis of legal argumentation not only in judicial reasoning but also in other areas of legal practice (e.g. law making, law application, law interpretation). The subject matter of this article is a theoretical model of legal argumentation as a universal multidisciplinary theoretical basis for legal argumentation analysis. The theoretical model of legal argumentation encompasses an argumentative situation, a body of legal arguing, instruments of legal arguing and argumentation, a reconstruction and an evaluation of legal argumentation. In its turn, the body of legal arguing includes: 1) parties of legal arguing, 2) a subject of legal arguing; 3) a content of legal arguing. The instruments of legal arguing include legal and other arguments as well as rules of legal arguing. Argument schemes and argumentation structures are tools for reconstruction of legal argumentation to enable its further evaluation.

Key words: legal arguing, legal argumentation, theoretical model of legal argumentation, body of legal arguing, instruments of legal arguing, reconstruction and evaluation of legal argumentation.

INTRODUCTION

Legal argumentation is a complex and multifaceted phenomenon. Its concept is a basic one in legal theory and spans across various areas of legal practice such as law making, law application, and law interpretation. Arguable nature of law and its open texture have recently become a common denominator and keeps drawing attention of modern scholars. Nevertheless, the most fundamental studies of legal argumentation (in particular, researches by R. Alexy, N. MacCormick, D. Walton, E. Feteris, G. Kloosterius) are focused mainly on legal reasoning in courts' judgements. At the same time, theory of legal argumentation should be based on and consider not only judicial reasoning but also the abovementioned areas of legal practice. Furthermore, studies in the area of general argumentation theory (in particular, researches by F. H. Van Eemeren, L. Bermejo-Luque, J. Freeman, M. Hinton) can also improve a methodological basis for legal argumentation studies in theory of law.

Today, there is a clear need in developing a unified theoretical model of legal argumentation as a universal instrument for analysis and researches of legal argumentation in all areas of law. An attempt to elaborate such a model is made below. Hence, the subject matter of this article is the theoretical model of legal argumentation as a universal multidisciplinary theoretical basis for legal argumentation analysis in various areas of legal activity. The application of the model is out of the scope of the research in this article.

The basic concepts used as a basis for this research were introduced, elaborated, and developed in multiple studies. For instance, D. Walton and L. Bermejo-Luque considered an issue of theoretical (normative) model of argumentation. J. Freeman and F. H. van Eemeren analyzed the dialectical situation. Certain aspects of argumentation instruments were analyzed by J. Freeman, M. Hinton and A. F. Snoeck Henkemans. Tools of legal reasoning and its evaluation were discussed by R. Alexy, D. Walton, N. MacCormick. The issue of theoretical model of argumentation and its elements were discussed in general argumentation theory by F. H. van Eemeren whereas elements of legal argumentation were examined in legal argumentation researches by E. Feteris and H. Kloosterhuis.

To reach the aim of the article several research methods will be used. The critical reasonableness concept is a philosophical background for the research. Method modeling as well as theoretical method are basic methods that will help to elaborate the theoretical model of legal argumentation. Method of abstracting and theoretical method will allow to define structural elements of legal argumentation: parties of legal arguing, a subject of legal arguing, and a content of legal arguing.

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NOTIONS OF LEGAL ARGUING AND LEGAL ARGUMENTATION

To suggest a theoretical model of legal argumentation, let's, first of all, clarify some basic notions. In studies of legal argumentation, the terms "legal reasoning"[1], "legal justification"[2] and "legal argumentation"[3] are used as synonyms.

For instance, S. Bertea agrees with R. Dworkin, R. Alexy and N. MacCormick that the terms "argumentation" and "reasoning" should be used as synonyms[4]. In his early studies, N. MacCormick defined the legal argumentation as "manifested in the public process of litigation and adjudication upon disputed matters of law"[5]; however, in his research that came out in 2005 he significantly extended a notion of the legal argumentation having underlined that "law is an argumentative discipline"[6]. R. Alexy suggested a broad definition of the legal reasoning as a "linguistic activity which occurs in many different situations from courtroom to classroom". This linguistic activity, in his view, is concerned with correctness of normative statements (i.e. statements relating to legal norms and principles rather than facts)[7]. He, therefore, describes this activity as a "practical discourse" consisting of a "legal discourse" as one of its specific types[8]. A. Peczenik characterizes the legal reasoning as "a chain of arguments consisting of theoretical and practical statements"[9]. A. Aarnio describes the legal justification as consisting of "(a) special legal procedure of reasoning and (b) general procedure of D [discourse]-rationality"; he believes that the result of justification (the interpretation itself) is based on obligatory and permitted source material and, therefore, "is legal in this very sense"[10]. According to J. Stelmach and B. Brożek, "by means of argumentation one can justify interpretative theses of normative character. This kind of justification is usually based upon the criteria of fairness, equity, validity, reliability or efficiency, rather than on the criterion of truth…"[11].

All definitions mentioned above describe the legal argumentation as a process of providing arguments within a discourse. This additionally proves synonymity of the terms "legal reasoning", "legal justification" and "legal argumentation". At the same time, R. Alexy, N. MacCormick (1978), J. Stelmach, B. Brożek connect the legal argumentation with reasoning of normative statements whereas A. Peczenik and A. Aarnio relate the legal argumentation with reasoning of normative and descriptive statements.

In addition, it is important to underline that the concept of legal argumentation depends upon an approach of a researcher to its understanding. According to F. H. van Eemeren and E. Feteris,

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[1] See, for instance: A. Peczenik, *On Law and Reason*, Springer 1989; J. Stelmach, B. Brożek, *Methods of Legal Reasoning*, Dordrecht 2010; N. MacCormick, *Legal Reasoning and Legal Theory*, Oxford 1978; N. MacCormick, *Rhetoric and the Rule of Law. A Theory of Legal Reasoning*, Oxford 2005.

[2] See, for instance: A. Aarnio, *The Rational As Reasonable. A Treatise on Legal Justification,* Springer 1987; E. Feteris, H. Kloosterhuis, J. Plug, *Uses of Linguistic Argumentation in the Justification of Legal Decisions* [in] *The Language of Argumentation*, eds. R. Boogaart et al., Springer Nature Switzerland 2021, pp. 127-142.

[3] See, for instance : E. Feteris, *Foundamentals of Legal Argumentation:A Survey of Theories on Justification of Judicial Decisions*, Dordrecht 2017.

[4] S. Bertea, *Legal Argumentation Theory and the Concept of Law* [in] F.H. van Eemeren, J.A. Blair, C.A. Willard, and A.F. Snoeck Henkemans (eds.), *Anyone Who Has a View. Theoretical Contributions to the Study of Argumentation*, Dordrecht 2003, pp. 213-226.

[5] N. MacCormick, *Legal Reasoning…op.cit.*, p. 7.

[6] N. MacCormick, *Rhetoric …op. cit.*, p. 14.

[7] R. Alexy, *A Theory of Legal Argumentation. The Theory of Rational Discourse as Theory of Legal Justification*, Oxford 1989, p. 14.

[8] *Ibidem*, p. 15.

[9] A. Peszenik, *op. cit.*, p. 205.

[10] A. Aarnio, *On Legal Reasoning As Practical Reasoning*, "An International Journal for Theory, History and Foundations of Science" 1988, vol. 3, no. 7/9, p. 104.

[11]. J. Stelmach, B. Brożek, *op. cit.*, p. 111.

there are three basic approaches to understanding of the legal argumentation: logical, rhetorical, and dialectical. Each of them is based on a completely different reasonableness conception that, in its turn, determines the theoretical model of argumentation and empirical level of its research. The logical approach is based on the geometrical reasonableness conception, the rhetorical approach derives from the anthropological reasonableness conception, and the dialectical approach is founded on the critical reasonableness conception[12]. Hence, an understanding of essence and criteria of argumentation soundness is completely different in the mentioned approaches. For instance, in the logical approach the criterion of argumentation soundness is its validity that results from deductive inference from premises (statements) to a logical conclusion. According to the rhetorical approach a criterion of argumentation's soundness is its persuasive force in an argumentative discourse. In the dialectical approach, acceptability of argumentation to parties of a discourse is considered as a criterion of argumentation's soundness. Although all the approaches are applicable to the legal argumentation research, the dialectical approach seems to have the most comprehensive research capacity because it combines elements of the logical and rhetorical approaches at the level of theoretical models of legal argumentation in its researches (for instance, in the concepts developed by R.Alexy, A.Peczenik, A.Aarnio).

Furthermore, defining the concept of legal argumentation it makes sense to distinguish between legal arguing as an activity and the legal argumentation as a result of this activity. The process and the result of legal argumentation are ontologically different, albeit their interaction and mutuality. Hence, the "legal arguing" should be defined as a process of reasoning of a statement using legal and other arguments. It is a type of communicative activity performed in various areas of legal practice, often in a form of a discourse. For instance, legal debates in court can be described as a real practical discourse, whereas a court's judgment reflects results of this discourse. This judgement is addressed to both parties of the case as well as to the society and contains answers of the court to arguments of the parties, expressed during the trial proceedings.

On the contrary, the legal argumentation reflects either a result of the activity of legal arguing or a result of reconstruction of someone's legal argumentation. For example, the latter takes place when a court of higher instance reconstructs legal argumentation provided by a court of lower instance considering a case within an appeal proceeding. In any case, the legal argumentation is always a result of the process of either your own or someone's legal arguing. The goal of legal argumentation is to exert a persuasive impact on recipients of argumentation in a process of dialogical interaction performed by various means. As a result of such an interaction, the recipients of legal argumentation change their starting points either completely or partially.

Followers of the rhetorical approach to understanding of the legal argumentation also point out that there should be clear terminological distinction between the process and the result of legal argumentation. For instance, K. Tindale described the acts of arguing[13] whereas L. Bermejo-Luque developed a theoretical model of argumentation, considering a subject of evaluation – a result, or a process, or a procedure of argumentation[14]. Whereas M. Hinton acknowledges the necessity to view argumentation as an activity, but he insists on the interest to what is done instead of the process[15].

Thus, to suggest a theoretical model of legal argumentation viable for its research in various areas of legal activity, both process and result of legal argumentation should be taken into consideration.

THEORETICAL MODEL OF LEGAL ARGUMENTATION

[12] F. H. van Eemeren, B. Garssen, E. C. W. Krabbe, A. F. Snoeck Henkemans, B. Verheij, J. H. M. Wagemans, *Handbook of Argumentation Theory*, Dordrecht 2014, pp. 9, 10; E. Feteris, *Foundamentals of Legal Argumentation:A Survey of Theories on Justification of Judicial Decisions*, Dordrecht 1999, pp. 15-21

[13] C. Tindale, *Acts of arguing: A Rhetorical Model of Argument*, New York 1999.

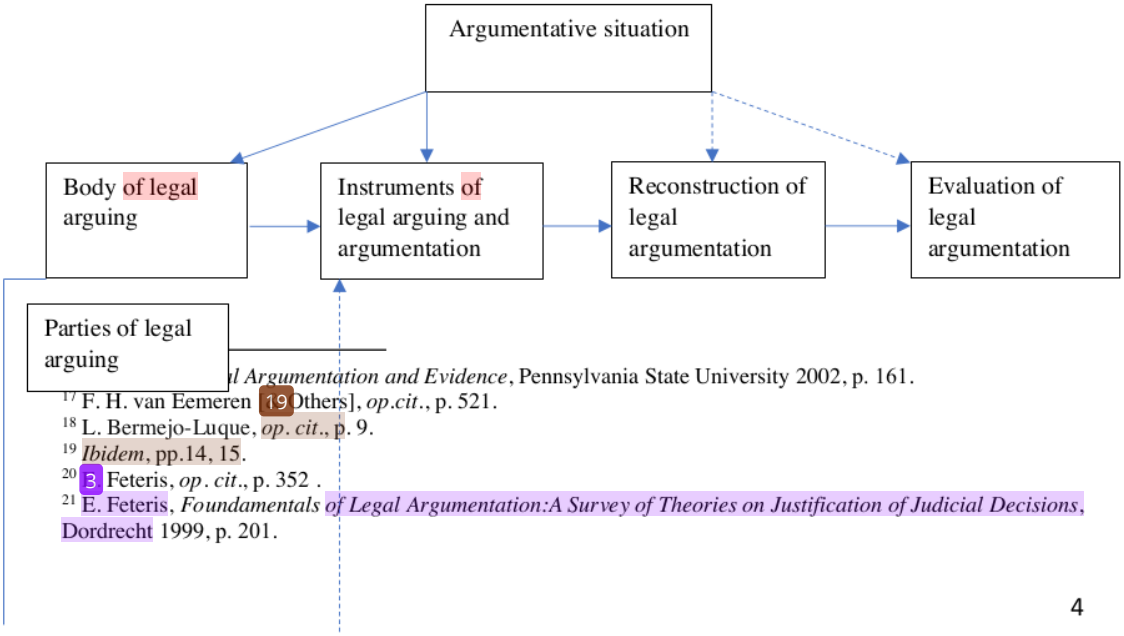
[14] L. Bermejo-Luque, *Giving Reasons. A Linguistic-Pragmatic Approach to Argumentation Theory*, Springer 2011, p. 9.

[15] M. Hinton, *Evaluating the Language of Argument*, Springer 2021, p. 58.

The notion of the theoretical model of argumentation is ambiguous and needs clarifying. D. Walton defines the notion of the normative model of argumentation as "… an idealized model which represents one view of how legal argumentation ought to be analyzed and evaluated from a logical point of view…"[16]. F. H. van Eemeren considered the theoretical model of legal argumentation as a "conceptual and terminological framework for the study of argumentation. The theoretical model gives shape to the philosophical ideal of reasonableness by specifying in terms of types of argumentative moves and soundness conditions for making these moves what pursuing this ideal amounts to"[17]. According to L. Bermejo-Luque, "a suitable normative model for argumentation would depend on the sort of "objects" we wish to evaluate, namely, products of argumentation, argumentation procedures or argumentation processes"[18]. A model of argumentation should fulfill two tasks – provision of a suitable characterization of argumentative goodness and suggestion of a method for deciding upon argumentation goodness19. E. Feteris believes that a theoretical model of legal argumentation "represents the necessary components of a justification of a legal decision that meets the standards of rationality for practical legal discussions"20. In addition, a theoretical model of legal argumentation "offers a heuristic tool for finding the relevant explicit arguments and for reconstructing missing implicit arguments… In most cases, the logical minimum which is required to make the argument complete and logically valid, does not suffice. A pragmatic optimum is required"[21].

Thus, the theoretical model of legal argumentation should be considered as an instrument for a reconstruction and further evaluation of the argumentation. The scope of the theoretical model of legal argumentation depends upon a particular researcher's approach to understanding of the legal argumentation. On the one hand, this model is a part of the legal argumentation research within the argumentation theory. On the other hand, it should be developed within the theory of law in order to suggest a methodological basis for producing, reconstructing and evaluating argumentation that is used in various areas of legal activity. Besides that, this model should help to identify specific features of legal arguing due to analysis of its result – your own or someone else's legal argumentation. Furthermore, the theoretical model of legal argumentation should encompass specificity of participants, a process and means of legal argumentation, as well as to suggest instruments for reconstruction and evaluation of legal argumentation, otherwise it cannot be considered as a genuine theoretical model of legal argumentation in terms of general theory of law. In this article, the theoretical model of legal argumentation is a hypothesis (see figure 1) that is argued and explained below.

1 THEORETICAL MODEL OF LEGAL ARGUMENTATION



l Argumentation and Evidence, Pennsylvania State University 2002, p. 161.
[17] F. H. van Eemeren [Others], *op.cit.*, p. 521.
[18] L. Bermejo-Luque, *op. cit.*, p. 9.
[19] *Ibidem*, pp.14, 15.
[20] Feteris, *op. cit.*, p. 352 .
[21] E. Feteris, *Foundamentals of Legal Argumentation:A Survey of Theories on Justification of Judicial Decisions*, Dordrecht 1999, p. 201.

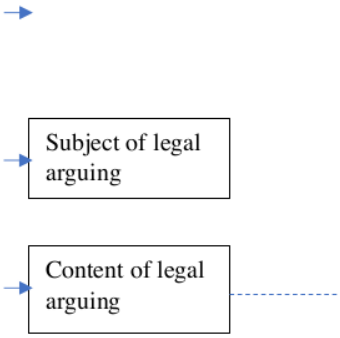


Fig. 1 *Theoretical model of legal argumentation*

The theoretical model of legal argumentation comprises argumentative situation which determines a body of legal arguing, instruments of legal arguing and legal argumentation, the reconstruction and evaluation of legal argumentation.

The *argumentative situation* forms a background of legal argumentation and demonstrates at least dialogical or even dialectical situation that determines a process of arguing and determines results of argumentation.

J. Freeman distinguishes between *dialogical* and *dialectical* situation. Whereas the former is an intricate system of personal interaction where "participants play various roles to propound a view and to attack other views"[22], the latter is even more complex and complicated because "one respondent develops an argument under the questioning of an interlocutor-challenger"[23]. The concept of dialectical situation is close to the notions "argumentative discourse" and "critical discussion" used by F. H. van Eemeren [& Others][24] to suggest dialectical rules of discussion.

It is worth to pinpoint specific features of the dialectical situation in legal argumentation by using the term *"argumentative situation"*. This term the most precisely indicates distinct trait of legal argumentation – the legal argumentation can be a result of not only a true dialogue but also presumable dialogue. For instance, there might be a true dialogue between the parties in judicial proceeding as well as a presumable dialogue when court puts forward a written legal argumentation in a judgment giving answers to arguments made by parties during a trial as a true dialogue. A discussion in a scholar article can also be considered as a presumable dialogue because there is no recipient who can immediately respond to the article's arguments as it happens in a true dialogue.

The argumentative situation encompasses all possible basic dialectical situations[25] occurring in law making, law interpretation, law application. This term denotes a communicative activity provided by parties of legal arguing with respect to a particular issue, using certain instruments of legal arguing. As instruments of legal arguing, both procedural rules and rules of discourse have direct impact on the argumentative situation (see fig. 1). The reconstruction and evaluation of legal argumentation are optional components of argumentative situation. For instance, if an arguer reconstructs someone's legal argumentation and evaluates it to provide his own arguing, he or she makes reconstruction [and evaluation] of legal argumentation as a compulsory component of his argumentative situation. However, legal arguing may be provided without such a reconstruction [and evaluation] if there is no need for it in a particular argumentative situation (see fig. 1). Peculiarities of argumentative

[22] J. Freeman, *Argument Structure*, Springer 2011, p. 39.
[23] *Ibidem*, p. 40.
[24] F. H. van Eemeren [& Others], *op. cit.*, p. 37.
[25] Using the term *"basic dialectical situation"* I follow J. Freeman, meaning a simple situation, where "one person begins by making a claim, the other challenges it, the respondent answers, and based on that response, the challenger may ask further questions" (J. Freeman, *op. cit.*, p. 40).

situations in different areas of legal activity will be demonstrated below through examples mainly from Ukrainian legal system.

The argumentative situation in law making has a double nature, at least, in Ukraine. Initially lawmakers produce a written reasoning of draft law. Then, following an established procedure, members of parliament discuss the draft law in the parliament through a true dialogue and vote on it. While the written reasoning provides arguments for the draft law, an attempt to refute them, provide counterarguments and their refutation is made during a hearing in the parliament. Whereas written arguments (either legal or other) are always rational, arguments provided during hearing (an oral discussion) in the parliament are often emotional. Rational character of argumentation in parliamentary debates is supported in Ukrainian theory of law[26]. However, this is not a common standpoint. Lack of rationality is the main reason why argumentation in law making is often out of the scope of legal argumentation research.

The argumentative situation in an official law interpretation in Ukraine works as a background for providing interpretative arguments. In their turn, the interpretative arguments help to justify methods of law interpretation used by Constitutional Court in its judgements. In this case, the argumentative situation encompasses oral acts of arguing during a constitutional hearing if it is held as well as written argumentation provided in a judgement of Constitutional Court as a result of the constitutional proceeding.

The argumentative situation in judicial application of law is the most multifaceted, especially if a difficult case is at stake. On the one hand, this is caused by a necessity to argue on both law and facts, and to subsume facts to law. On the other hand, there are a few basic argumentative situations inside of the argumentative situation. For example, "litigant against defendant" arguing goes first, then "the parties and court" arguing goes second, finally "court and the parties" goes as third basic argumentative situation. Valuable observations concerning argumentative situation in legal practice were proposed by A. Piszcz relying on communicative activity in Polish civil litigation.[27] Some aspects of argumentative situation in the judicial reasoning in Ukrainian legal system were described by V. Kistianyk[28].

The *body of legal arguing* is the next component in theoretical model of legal argumentation. It encompasses static and dynamic elements in the multidimensional phenomenon of legal argumentation and helps to find out transition from legal arguing to legal argumentation. The body of legal arguing includes parties of legal arguing, a subject of legal arguing and a content of legal arguing (see fig. 1).

There are various approaches to denote the *parties of legal arguing*. F. H. van Eemeren [& others], E. Feteris describe them as "arguer" and "addressee"29. According to F. H. van Eemeren [& Others], the arguer is a person who produces arguments, whereas the addressee is considered as a "rational judge who judges reasonably"30. J. Freeman follows terminology proposed by C. Wellman and calls parties of arguing as a "challenger" and "proponent/respondent"31. In view of this, the term "arguer" in this article means someone who produces legal argumentation through legal arguing and the term "addressee" denotes a person who is sought to be persuaded by the arguer's legal argumentation, has a right to rebut the arguments and to provide counterarguments, or has no own opinion and accepts the argued standpoint. At the same time, the arguer and the addressee can change their roles in another basic argumentative situation. For instance, in a bilateral argumentative situation of debates in court, a plaintiff is simultaneously the arguer of its position and the addressee of a

[26] L. Luts', *Argumentation in Law-making Process*, "Enterpreneurship, Economy and Law", 2020, no 9, pp. 168-173 (in Ukrainian).
[27] A. Piszcz, *COVID-19 Pandemic-Related Arguments in Polish Civil Litigation*, "International Journal for the Semiotics of Law" 2022, no 35(2), pp. 1215-1232.
[28] V. Kistianyk, *Judicial argumentation: Features, Comparative Analysis, Domestic and Foreign Practice* [thesis for candidate degree in law], Kyiv 2021, pp. 128-173 (in Ukrainian).
[29] F. H. van Eemeren [& Others], *op. cit.*, p.6; E. Feteris, op. cit. … 2017, pp. 29, 158.
[30] F. H. van Eemeren [& Others], *op. cit.*, p. 4.
[31] J. Freeman, *op.cit*, pp. 40, 41.

defendant's argumentation, and vice versa; in unilateral argumentation between parties of a judicial proceeding and court, the former are the arguers whereas the latter is the addressee of the argumentation; in unilateral argumentation between the court and the parties of the judicial proceeding, when the parties learn court's arguments from its judgement, a presumable dialogue between the court, as the arguer, and the parties, as the addressees of its written argumentation, takes place.

An optional party of legal arguing is the reconstructor of legal argumentation – an individual or collective entity who reconstructs someone's legal argumentation with a particular purpose. For instance, court reconstructs parties' argumentation; a court of appeal reconstructs the argumentation of a first-instance court to review the case; a researcher reconstructs court's legal argumentation for further analysis.

The audience, characterized by H. Perelman, should also be considered as a part of legal arguing. The audience in legal argumentation (the legal audience) means a particular or imaginary person or a group of persons interested in the process or result of legal argumentation who is sought to be persuaded by parties of legal arguing. The legal audience in legal arguing depends upon an argumentative situation. For instance, in the argumentative situation "court and the parties of judicial procedure", a society will act as the legal audience to whom the court's judgement's argumentation is addressed; in the argumentative situation "promoter of law and the parliament", a society, its part or NGOs interested in the draft law play role of the legal audience whereas members of parliament who will vote on the new law will act as the addressees.

The *subject of legal arguing* is a standpoint, expressed in a statement, which is supported by some other statements as parts of argument. P. Houtlosser underlines that the terms "conclusion", "claim", "debate proposition" and "thesis" used in various approaches to understanding and research of legal argumentation have the same or similar meaning to the term "standpoint" used in pragma-dialectical approach[32]. He insists that an assertion has a status of standpoint[33]. The subject of legal arguing should be assessed within the argumentative situation (see fig. 1). For instance, the subject of legal arguing in law making is a need to regulate certain social relations and necessity to set up rights and obligations through deontic judgements. The subject of legal arguing in the judicial reasoning is either the assertions about law, or about facts, or both. The subject of legal arguing in the interpretation of law are value judgments about legal rules and legally relevant characteristics of legal rules.

In view of the abovementioned meanings of the terms "argue" and "argumentation", the *content of legal arguing* signifies a provision of reasons that might be either arguments (legal, moral, factual, social, proof-based etc.) or explanations. It consists of producing arguments and refutation of counterarguments if they were raised by the addressee in the argumentative situation. Hence, the content of legal arguing is complemented by instruments of legal arguing (see fig. 1). The content of legal arguing depends upon the argumentative situation in a particular sphere of legal activity, the parties of legal arguing and its subject. Such arguing is possible only if there are "common places" between the parties, i.e. their consent concerning basic issues that are also called "common starting points"[34]. For instance, producing arguments concerning essence of legal regulation of social relations is the content of legal argumentation in law making. In law interpretation, the content of legal arguing means producing of arguments concerning understanding and interpretation of a legal rule or its legal features. The content of legal arguing in judicial reasoning implies producing of arguments concerning applicable law, facts. The content of legal arguing results in a court's decision regarding facts and relevant legal rules.

The notion of *the instruments of legal arguing and legal argumentation* in its theoretical model denotes a system of substantive and procedural means. Albeit being tools of legal arguing, they also serve a purpose of reconstruction of legal argumentation (see fig. 1). It is important to distinguish between substantive and procedural means of legal arguing and legal argumentation.

[32] P. Houtlosser, *Points of view* [in] *Crucial Concepts in Argumentation Theory*, ed. F. H. van Eemeren, Amsterdam 2001, p. 42.
[33] Ibidem, p. 44.
[34] E. Feteris, *op. cit. ... 2017*, p. 214; F. H. van Eemeren [& Others], *op.cit.*, p. 528.

Arguments are considered as substantive means of legal arguing whereas argument schemes and argumentation structures are considered as means that help to reconstruct legal argumentation. *The argument* is a basic tool for legal arguing. According to C. Tindale, in European tradition the concept of argument encompasses both premises of the argument (argumentation) and its conclusion (standpoint, claim)[35]. The concept of argument is rather vague. Referring to J. Wenzel, J. Freeman describes the argument as a process, procedure, and product: "Argument is a natural process of human communication … interpersonal and interactional…. Argument as procedure involves rules for regulating, deliberately controlling argumentative communication … Argument as product involves the linguistic reconstruction of what the argumentative process and procedure have generated"36. This definition points out multifaceted nature of the argument.

N. MacCormick initially suggested to analyze reasons37 but later focused on the arguments for justification38. D. Walton distinguished the argument types that have their own forms of argument 39, whereas R. Alexy suggested to distinguish the argument forms specific to general practical and legal discourses40. M. Novak suggests adding to a "skeleton" of deductive argument in the legal context the arguments of systemic, linguistic, historical or a similar character to additionally explain the legal premise, and evidence to help establish the factual premise[41]. Types of arguments is one more important issue for legal argumentation research. Generally, the most important for legal argumentation is diversification of factual and legal arguments. The first prevails in the judicial reasoning, and the last – in law-making and the official interpretation of law. In turn, legal arguments can deal not only with purely legal issues, but also with moral, political or other issues in legal argumentation.

In the argumentation theory, the notions of "argument scheme" and "argumentation structure" are used in addition to the concept of argument. B. Garssen believes that "in some approaches, argument schemes are seen as tools for the evaluation of argumentation, in other cases, they are tools for finding arguments, and in still other cases, they serve as a starting point for the description of argumentative competence in a certain language"42. F. H. van Eemeren defined argument schemes as "conventionalized ways of displaying a relation between that which is stated in the explicit premise and that which is stated in the standpoint"43. An argument scheme characterizes the type of justification or refutation provided for the standpoint in a single argument by the explicit premise for the standpoint44. Hence, argument schemes are used, first of all, for reconstruction of argumentation for its further assessment regardless of whether these schemes are considered to find arguments. These schemes help to find connections within a found argument and its hidden elements. In B. Garssen's view, "in most classifications, causal argumentation, argumentation based on comparison, and argumentation based on authority are distinguished. …To be practically applicable, a typology of argument schemes should be accepted by language users as an acceptable starting point" 45.

Among instruments of legal argumentation, there is one more basic concept – *"the argumentation structure"*. It is considered as an external structure of argumentation. F. H. van Eemeren

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[35] C. Tindale, *op. cit.*, p.45.
[36] J. Freeman, *op. cit.*, p. 44.
[37] See, for instance, N. MacCormick, *Legal Reasoning…op.cit.*, pp. 1-8.
[38] See, for instance, N. MacCormick, *Rhetoric…op. cit.*, pp. 124-137.
[39] D. Walton, *op. cit.*, p. 34.
[40] R. Alexy, *op. cit.*, pp. 298-302.
[41] M. Novak M., *Visual As Multi-Modal Argumentation In Law*, "Bratislava Law Review" 2021, vol. 5, no 1, p. 94
[42] B. Garssen, *Argument schemes* [in] *Crucial Concepts in Argumentation Theory*, ed. F. H. van Eemeren, Amsterdam 2001, p. 81.
[43] F. H. van Eemeren, *The state of the art in Argumentation Theory* [in] *Crucial Concepts in Argumentation Theory*, ed. F. H. van Eemeren, Amsterdam 2001, pp. 19-20.
[44] *Ibidem*, p. 20.
[45] B. Garssen, *op.cit.*, p. 94.

defined it as "the way the reasons advanced hang together and jointly support the defended standpoint"[46]. There are singular and multiple argumentation structures. The *singular argumentation* consists of one argument for or against a standpoint. In case of *multiple argumentation* few arguments are put forward for or against the same standpoint to predict and respond counterarguments of an opposite party of legal arguing. In the multiple argumentation structure, arguments can be presented either in parallel or hierarchically. In the parallel argumentation structure arguments complement each other and, in terms of legal argumentation, this structure might look in a court's decision as follows: *"Taking into consideration poor financial situation of the accused, his positive characteristic given by his employer, his contrition, the court imposes the conditional sentence."* The hierarchical argumentation structure in legal argumentation might look as follows: *"The complainant missed the court's hearing, hadn't informed the court about reasons for the missing, even though he was informed about the appointment of the hearing, which is proved by evidence in the case records."* The whole text and the context of argumentative situation should be considered to explicate a particular legal argumentation structure.

The procedural means of legal arguing are its procedural rules which depends on an area of legal practice where the argumentation is provided as well as on the peculiarities of the argumentative situation. On the one hand, there are procedural rules of legal arguing in any legal system, for instance, legal rules governing procedures of debates in a parliament, courts system, proceeding in the Constitutional Court. On the other hand, there are doctrinal rules of critical discussion[47], of general and legal discourses[48], elaborated within the argumentation theory and the legal argumentation theory. Whereas the procedural legal rules are envisaged in laws, the doctrinal rules of legal argumentation need clarifying because of their dependance on a researcher's approach. For instance, R. Alexy distinguishes between basic rules, rationality rules, rules for allocating of the burden of argument, justification rules, transition rules for general practical discourse[49], and rules of internal and external justification for legal discourse[50]. A national legislation can be analyzed for compliance with these rules.

Reconstruction and evaluation of legal argumentation should be included into its theoretical model as they are an important part of its research as well as an optional part of acts of legal arguing (see fig. 1). The reconstruction of legal argumentation is a restoration of the real legal argumentation by means of its instruments and a context that helps to unveil specificity of legal arguing resulting in the legal argumentation. Although there is a lack of definitions of the reconstruction of argumentation, this term is core and is frequently used in studies of argumentation, especially by followers of logical and dialectical approaches to legal argumentation[51].

The reconstruction of legal argumentation is made not only for theoretical purpose but also for a practical goal. This is a case in the following areas of legal practice. First, in lawmaking – when addressees of a draft law examine its reasoning before debating and voting on it. Second, in law interpretation, when a relevant authority analyzes argumentation provided by an applicant arguing a necessity of official interpretation of law or determining its constitutionality; when addresses of the argumentation analyze arguments used in a judgement of Constitutional Court. Third, in judicial application of law, when court examines arguments of parties; when the parties examine arguments of the court used in its judgment; when a court of appeal examines arguments justifying a decision of a first-instance court; when European Court of Human Rights scrutinizes argumentation in national court judgement that caused an application to the Court.

[46] F. H. van Eemeren, *op. cit.*, p. 20.
[47] *Ibidem*, p. 537.
[48] R. Alexy, *op. cit.*, pp. 297-302.
[49] *Ibidem*, pp. 297-300 .
[50] *Ibidem*, pp. 300-302.
[51] E. Feteris, *op. cit. ...2017*, p. 352.

A choice of instruments for reconstruction of legal argumentation depends on an aim of the reconstruction, on whether the reconstruction is used for practical legal activity or for a scholar analysis, as well as on a selected reasonableness concept and interests of a reconstructor.

The *evaluation of legal argumentation* follows its reconstruction. E. Feteris analyzes an evaluation model for legal argumentation "that may be used as a critical tool to establish whether the argumentation is acceptable"[52]. The reconstruction itself does not provide means for evaluation of argumentation's persuasiveness. E. Feteris suggests to evaluate the legal argumentation in light of the soundness criteria: *general* (relevance, logical validity, consistency, universalizability); *specific legal* (the Rule of Law, legal certainty, equality) and *those that apply in a particular legal culture and in a specific field of law* (such as the principle of proportionality that applies in certain legal cultures in the field of constitutional law)[53]. E. Feteris and H. Kloosterhuis pointed out that "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"[54].

In his theoretical model of legal reasoning, R. Alexy's doesn't recognize the evaluation of legal reasoning as a separate component: "the rationality of the result depends on the question whether the discussion has been conducted in accordance with the rules for rational discussions…[which] ensures that the final result is coherent with the starting points and values which are shared within the legal community"[55].

D. Walton and H. Mercier suggest asking critical questions to arguments in order to evaluate their persuasiveness and to find out fallacies. H. Mercier proposes to employ the typology of argument schemes and critical questions to them elaborated in the argumentation theory as starting points for evaluation of arguments[56]. Similarly, M. Hinton suggests that the analysis of argumentation inevitably require a certain degree of reconstruction. However, he deals with its analysis and assessment of arguments, bearing in mind that the linguistic tools are fundamental[57].

Thus, there are three approaches to evaluation of legal argumentation acceptability. R. Alexy links acceptability of argumentation (and, therefore, its persuasiveness) with following rules of the general and legal discourses, in particular rules regarding acceptance of common starting points. H. Mercier and D. Walton propose to assess acceptability of legal argumentation through evaluation of answers to critical questions asked with respect to each argument. E. Feteris and H. Kloosterhuis discuss comprehensive evaluation of legal argumentation taking into consideration both substantive and procedural aspects of legal arguing, including asking critical questions to arguments. Hence, all factors mentioned above should be considered as criteria for evaluation of persuasiveness of legal argumentation according to the dialectical standard of its acceptability.

THE DISSCUSSION AND CONCLUSIONS

In conclusion, a theoretical model appropriate for legal argumentation research should include: the argumentative situation, the body of legal arguing, the instruments of legal arguing and legal argumentation, the reconstruction and evaluation of legal argumentation. Such a broad approach to theoretical model is based on a study of the most important concepts of legal argumentation and has a potential to form a methodological basis for analysis of legal argumentation not only in judicial reasoning but also in other areas of legal activity, notably in law making, and official interpretation of

[52] E. Feteris, *op. cit. … 1999*, p.201.
[53] E. Feteris, *op. cit. … 2017*, p. 342.
[54] E. Feteris, H. Kloosterhuis, *The Analysis And Evaluation Of Legal Argumentation: Approaches From Legal Theory And Argumentation Theory*, "Studies In Logic, Grammar and Rhetoric" 2009, no 16 (29), p. 317.
[55] *Ibidem*, p. 334
[56] H. Mercier, *Some clarifications about the argumentative theory of reasoning. A reply to Santibáñez Yañez*, "Informal Logic", 2012, no 32(2), p. 266.
[57] M. Hinton, *op. cit.*, p. 157.

law. Its further application will allow to explicate peculiarities of legal argumentation in the abovementioned areas of legal activity or, at least, to deepen the points mentioned in this article. It is very important to consider the argumentative situation and body of legal arguing within a theoretical model of legal argumentation because it helps to determine those specificities of legal arguing that depend on its parties, subjects and content, which was discussed above. At the same time, such elements of a theoretical model as tools of legal arguing, as well as its reconstruction and evaluation, are properly elaborated in the argumentation theory by E. Feteris, H. Kloosterhuis, N. MacCormick, R. Alexy, D. Walton and others, albeit with a focus on judicial reasoning.

The suggested theoretical model can be applied to legislative, constitutional and judicial argumentation in the following ways.

First, the argumentative situation in law making has a double nature. Initially, promoters of law produce a written reasoning of a draft law. A society, its part or NGOs interested in the draft law play role of legal audience whereas members of a parliament who are going to vote on the new law act as the addressees. Written arguments provided in an explanatory note to the draft law are always rational. Promoter of the draft law argues why it should be adopted and what are expected consequences of its implementation. Other legislative materials such as scientific and legal experts' opinions deal with legal arguments, mainly interpretative, and also with arguments on consequences of the draft law implementation. When, following an established procedure, members of parliament discuss the draft law within a parliament hearings through a true dialogue and vote on it, arguments on consequences prevail in parliamentary discussions. Political controversies between government and opposition have a huge impact on argumentation in parliamentary debates. While the above mentioned legislative materials rise arguments in favor of the draft law, an attempt to refute them that provides counterarguments is made during parliament hearings mainly by MPs from the opposition. Refutation of the counterarguments is a task of MPs from a governing majority. Arguments provided during hearings in the parliament are often emotional. Rhetorical means of legal argumentation are frequently used to increase persuasive impact of arguments on consequences of the draft law implementation or even to achieve political goals instead of arguing. Transcripts of parliamentary debates give valuable information for the society (audience) about the argumentation in the parliamentary debates, correlation of rational and irrational tools of legal argumentation.

The argumentative situation in official law interpretation works as a background for providing interpretative arguments in constitutional procedure. Constitutional reasoning has its substantive and procedural rules that determine the arguing on issues. The applicant provides written argumentation of the claim and the Constitutional Court rules on it. The first argumentative situation is between the applicant and the Court on the issue of acceptability of a constitutional application. Political arguments are one of the reasons to reject constitutional applications. The second argumentative situation is between the Constitutional Court and the applicant in case of applicability of the constitutional application. An oral legal arguing is relatively rare in constitutional procedure in Ukraine and takes place in extreme cases such as constitutionality of a language law. Interpretative arguments, namely linguistic, systematic, and teleological, help to justify methods of law interpretation used by Constitutional Court in its judgements.

The argumentative situation in judicial application of law is the most multifaceted, especially if a difficult case is at stake. On the one hand, this is caused by a necessity to argue on both law and facts while subsuming facts to law. On the other hand, there are peculiarities in basic argumentative situations. In "litigant against defendant" argumentative situation oral arguments are put forward to argue the persuasiveness of one's legal position and undermine

legal position of the opponent and vice versa. The court is an audience in such a case. In "the parties and court" argumentative situation the parties argue on the issues before the court who is an addressee of their argumentation. Finally, in "court and the parties" argumentative situation the court subsumes facts of a case to the law using arguments to persuade the parties and responding to their arguments in the proceeding. The court justifies its decision using the interpretative arguments on law issues as well as the arguments with proofs of the facts. Not only a society will act as the legal audience to whom the court's judgement's argumentation is addressed, but also higher courts who will potentially rule on issues of the application in case of an appeal and has to reconstruct the argumentation of the lower court.

The next step in the long-term research of legal argumentation is full application of the theoretical model, suggested in this article, to a study of legal argumentation in the abovementioned areas of legal activity to make further input to the discussion of legal argumentation.

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