MODERN SOURCES OF LEGAL ORATORY

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Abstract

This article is intended to spark the interest of legal practitioners for the development of argumentation skills. The link between rhetoric and law is analysed from the perspectives provided by *The New Rhetoric: A Treatise on Argumentation* by Chaïm Perelman and LucieOlbrechts-Tyteca and *The Uses of Argument* by Stephen Toulmin, authors who contributed to the rebirth of informal argumentation in modern times. Perelman tries to explain how arguments work and draws from his vast legal knowledge to provide suitable examples for his theories regarding practical argumentation. Toulmin decides that formal argumentation does not fully explain the way in which people reason. He therefore develops his own system for analysing argumentation and also uses the legal field as a means of illustrating his ideas. The article at first analyses the particularity of each approach and then continues to point out some similarities between the two theories while also offering some perspectives for further study of legal oratory.

Keywords: legal argumentation, informal argumentation, legal reasoning, practical argumentation

Résumé

Cet article est destiné à susciter l'intérêt des praticiens de la justice pour le développement des compétences de l'argumentation. Le lien entre la rhétorique et le droit est analysé à la lumière des vues exprimées par Chaïm Perelman et Lucie Olbrechts-Tyteca dans leur *Traité de l'argumentation, la nouvelle rhétorique,* et par Stephen Toulmin dans *Les usages de l'argumentation*, auteurs qui ont contribué à la Renaissance de l'argumentation informelle dans les temps modernes. Perelman tente d'expliquer comment fonctionnent les arguments et donne des exemples appropriés pour ses théories au sujet de l'argumentation pratique. Toulmin décide que cette argumentation formelle n'explique pas entièrement le jugement de l'individu. Il développe donc son propre système pour analyser l'argumentation et utilise également le domaine juridique comme moyen d'illustrer ses idées. Premièrement, l'article analyse la particularité de chaque approche et puis continue de souligner certaines similitudes entre les deux théories tout en offrant des perspectives pour étude plus approfondie de l'oratoire juridique.

Mots-clés: argumentation juridique, argumentation informelle, raisonnement juridique, argumentation pratique

Rezumat

Articolul caută să readucă în atenţia practicienilor dreptului importanţa dezvoltării abilităţilor argumentative. Legătura dintre retorică şi drept este analizată prin prisma lucrărilor *Tratat de argumentare. Noua retorică* scrisă de Chaïm Perelman şi Lucie Olbrechts-Tyteca şi *The Uses of Argument* a lui Stephen Toulmin, autori care au contribuit

la relansarea argumentării informale în perioada modernă. Perelman caută să explice modul în care funcţionează argumentele, autorul făcând apel la cunoştinţele sale juridice pentru a-şi ilustra teoriile privind argumentarea practică. Toulmin se opune raţionamentelor pur logice considerând că acestea nu explică cu adevărat modul în care oamenii gândesc. De aceea el dezvoltă propriul sistem de analizare a argumentării şi îl pune în valoare prin intermediul juridicului. Articolul discută separat particularităţile celor două abordări, urmând ca la final să identifice câteva puncte de legătură şi idei pentru continuarea studiului oratoriei juridice.

Cuvinte cheie: argumentare juridică, argumentare informală, raţionament juridic, argumentare practică

1. Bringing back informal argumentation

The majority of current law teaching strategies or models differentiate between the practical and the theoretical sides of the law. This approach has remained virtually unchanged since the beginning of the 20th century. Over time, the shortcomings of this approach have become more and more obvious and, in 2007, The Carnegie Report[1] pointed out the need to modernize the way in which law students are taught. After discussing its findings, the report makes some recommendations towards the modernization of teaching strategies and strongly encourages law schools to include rhetoric and argumentations schemes in their current curricula. The development of argumentation and legal analysis skills should help young lawyers to better adapt to the demands of their profession.

The link between oratory and law has been established since antiquity. The works of Aristotle, Demosthenes, Cicero and Quintilian focus on oratory from the point of view of the lawyer speaking in front of the forum or the gathering of citizens. They point out that besides knowledge of the law, the lawyer needs to

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[1] In 2007, The Carnegie Foundation for the Advancement of Teaching published the "Educating Lawyers: Preparation for the Profession of Law" report. It was the conclusion of a two year study conducted in 16 universities and colleges from the United States and Canada. The results of the report showed that the way in which law is taught has remained unchanged for almost a century and that it was time for it to catch up with the times. While other fields such as medicine and business develop new ways of teaching in order to keep up with day to day innovations, the teaching of law remains rigid and set in its ways. The influences of Socrates and those of the formal education model developed by Christopher Columbus Langdellin 1880 at Harvard University are too strong. The report found that the students who are studying law do not benefit from mentoring and coordinated practiceunder the supervision of their teachers and that "students entering the legal profession undergo a linguistic rupture, a change in how they view and use language" (Mertz 2007, p. 22). The conclusions of the report pointed out that law schools should focus more on providing their students with professional competences and skills that will prove useful in their future careers in the field of law.

have solid argumentation skills in order to prove that a situation is or is not subject of a certain law. Aristotle believed that most arguments are practical in nature and that they function outside the reach of mathematical or logical models of proof. In modern times, on the other hand, informal argumentation was disregarded and formal models of argument were preferred because they were considered more reliable. As a reaction to this approach, Stephen Toulminand Chaïm Perelman together with LucieOlbrechts-Tyteca decided to bring back practical reasoning after the Aristotelian model because, in their point of view, formal reasoning models are inadequate in explaining the way in which people construct arguments. Both Toulmin and Perelman use the legal context for explaining their theories as they believe legal argumentation is probably the best form of practical argumentation.

Practical argumentation does not concern itself with formal demonstrations, internal validity and objective correctness. While logical arguments are used to obtain universal and absolute conclusions, practical arguments are used to show that a certain thesis is more probable or more reasonable than another thesis. It should also be pointed out that legal argumentation does not intend to prove absolute truths as the arguments that support one thesis might not always combat those that support a contrary thesis. Logical consequences and certainties do not belong in a court room because arguments depend on language, and language is always subject to interpretation and ambiguity.

A legal debate is over when the audience, the judge or the jury, accepts a thesis as being more reasonable than the other and not necessarily objectively valid. Therefore, the goal of practical argumentation is "to gain the assent or adherence of the audience to a claim. The persuasiveness of an argument always depends upon what the relevant audience regards as persuasive. The audience decides when and to what extent a claim has been *justified* by the arguments" (Saunders 1994, p. 2).

According to John Rawls, justification "seeks to convince others, or ourselves, of the reasonableness of the principles upon which our claims and judgments are founded" (Rawls 1971, p. 580). In the case of practical argumentation, justification requires that the speaker consider which of the many possible arguments are more likely to convince the audience to accept his thesis. Therefore, we must look at justification as that which offers reasons for accepting the thesis put forth by the speaker. In the case of legal argumentation, the path of the lawyer is similar. He "must justify a claim by generating arguments based on the evidenceand available legal authority" (MacCormick 1978, p. 14).

Perelman and Toulmin use Aristotle's ideas to revitalize rhetoric as a means of finding the right arguments that are required to persuade an audience through a speech. Both authors can be credited with providing the spark that caused the resurgence of the study of rhetoric and argumentation. *La nouvelle rhétorique: Traité de l'argumentation*by Perelman and Toulmin's *The Uses of Argument*, both published in 1958, turned out to be highly influential and are considered the cornerstone of modern argumentation theory.

In the 1950s, it had become quite clear that argumentation could not be explained solely with the help of logic because many of the situational, verbal and contextual factors that appear in the argumentation process cannot be interpreted through logic. Perelman and Toulmin became aware of this issue and each of them proposed an interesting alternative to formal reasoning. In the following paragraphs I will analyse both theories separately and, at the end, try to identify some common ideas in their theories.

2. Perelman and the idea of a "new rhetoric"

A well-known philosopher, Chaïm Perelman became more and more interested in the study of law as the connection between the two subjects was something that he deemed worth exploring. He was particularly interested in the philosophy of law and legal precedent. During his studies he worked as a professor of law in universities across Belgium. During the German occupation of Belgium during the Second World War, Perelman was an active member of the resistance movement and his studies were put on hold. After the war, he continued his teaching and research in the field of legal philosophy. On the 16th of November 1982, in a speech at Ohio State University, Perelman declared: "When faced with the challenge of writing a book on Justice at the end of World War II, I saw the limitation of formal reasoning, as articulated by Gottlieb Frege - the father of modern logic - as a means of discussing values" (Golden 2007, p. 52). Between 1945 and 1980, Perelman published a variety of books and articles about rhetoric and law, and his final work *The Realm of Rhetoric* appeared in 1982.

All throughout his career, Perelman was interested in rhetoric. In order to build his conception of rhetoric he made use of principles and definitions which he developed for other domains, mainly from the law. As he was developing his ideas on rhetoric, together with a few other researchers, he established a new direction of thinking which was dubbed "The New Rhetoric". His new theory on rhetoric is based on the study of the evolution of public speaking in during the Greek city states, Roman times, the Middle Ages and the modern period.

During the time of the Greek city states, Plato made the distinction between true rhetoric and false rhetoric. Plato also defined rhetoric as "the art of persuading an ignorant multitude about the justice or injustice of a matter without imparting any real instruction" (Smith 2013, p. 54), however, this definition does not imply that rhetoric is means of conveying truth, but rather a means of communicating ideas by making use of deception and the apparent. This second interpretation was false rhetoric, while the true rhetoric served as an instrument of discovering the truth in philosophy.

Aristotle also divided reasoning in to two types: dialectic and analytic. Analytic reasoning is virtually the syllogism, while dialectical reasoning works with generally accepted ideas to support a certain thesis. Dialectic is used to convince

the audience, therefore the difference between analytical reasoning and dialectical reasoning is that the first relies on truth, while the second relies on justifiable opinions. Another observation that Aristotle makes is that the point of dialectic is to identify the arguments which are used to solve a controversy, while the scope of rhetoric is the observation of the techniques which are used to support an idea in front of a universal audience made up of a variety of individuals with different levels of instruction.

During the 19th century, Aristotle's views were mostly ignored and rhetoric was thought of as only a means of communicating ideas and not particularly useful in discovering the truth or proof. Perelman rebelled against this conception and tried to "restore rhetoric to its elevated position, as outlined by Aristotle in his discussion of dialectical reasoning" (Grosse 1985, p. 6). He later declared: "I began to do a series of studies on what I call the New Rhetoric. This new rhetoric has several important rationales and features related to reasoning inhuman affairs: (1) it is primarily concerned with argument or practical reasoning, (2) it suggests that figures of speech may be arguments instead of merely ornaments, (3) with its goal to influence minds, new rhetoric is a dynamic field of study, (4) it is capable of discovery or the generation of knowledge, (5) it is complimentary rather than in opposition to formal reasoning" (Grosse 1985, p. 6). Actually, Perelman and his colleague Lucie Olbrechts-Tyteca devised a new argumentation theory, which has as its central concern, the audience. They believed that „arguments are grounded in the beliefs of the audience. Arguments may be addressed to audiences that are ignorant, well-educated, or highly specialized. In some instances, a communication may have a universal audience in mind" (Grosse 1985, p.7).

Perelman noticed that logical reasoning is not the perfect way to explain how people evaluate values in day-to-day debates because the arguments that come from values are not deductive. He even proposes that there is no absolute truth and no absolute validity in practical argumentation. Appealing to reason is actually an appeal to the public's adherence and a solid argument is an efficient one. The link between rhetoric and the law comes from the idea that there are always discrepancies between reason and that which we consider just or right. Therefore, rhetorical argumentation is a solid tool in justifying legal decisions and judicial reasoning. As a judge is drafting his legal conclusions, he needs to choose between probabilities and not certainties. Probabilities clarify the part played by rhetoric in the legal field, that of instilling the abstracts standards which make up the law into society's mind so as to make sure that it is effectively applied.

In Perelman's point of view, argumentation is rather informal, as opposed to being subject to logical structures and forms. This opinion is what makes his theory so well suited for analysing legal argumentation. He proposes that legal theses cannot be proved through empiric or formal strategies, and that the way in which they should be proved is by appealing to the reasonableness of the audience (be it judge or jury). Another connection that Perelman establishes between his theory

and legal argumentation is the role of ambiguity. It can never be completely ruled out because the legal terms always have more than one interpretation. In most legal texts arises in four situations: when the case is new and the situation is not subject to a specific law; when the relevant law can be interpreted in more than one way; when the relevant law is considered inapplicable by one of the parties; and when two or more laws seem to be relevant and conflicting at the same time. The situations described above all prove that solving law issues almost always depends on the interpretation of laws and legal provisions.

Generally, building a legal argument requires two steps, the first requires that the speaker identify what Perelman calls *points of departure* [2], while the second step requires a careful analysis of the target audience. He argues that there will always have to be at least some common ground between the parties involved in the dispute for it to be solved. Because of this common ground the speaker needs to build his arguments on premises that are acceptable, or that are at least considered reasonable by the audience. The starting points should be divided into two categories: those which are real and those which are preferable. The real starting points are: facts, presumptions and truths. The preferable starting points are: hierarchies, lines of argument[3] and values. Truths are general principles or "scientific theories or philosophical and religious concepts which transcend experience" (Perelman and Tyteca 2012, p. 91). Presumptions are considered valid until they are proven wrong and "can be treated as observable facts, therefore being able to serve as a premise for arguing" (Perelman and Tyteca 2012, p. 97). The preferable starting points rely on abstract values like justice, faith and truth; hierarchies of value which imply placing one value above another (for example freedom being considered more valuable than fairness or justice being considered a superior value to usefulness).

When a lawyer needs to plan his strategy for a case, the starting point is generally either an issue of law or one of fact. The real starting points come into play here as they help us understand the subtle differences between facts and legal

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[2] The points of departure represent the various points of view that a composite audience might have regarding a certain issue. Perelman explains the notion of composite audience as one that reunites different people through their character, their relations or through their functions while also pointing out that the speaker could divide the members of the audience in social groups. "He will have to ask himself if the audience is entirely included in a specific group or if the members of the audience could be included in a number of groups, or even in opposing groups. In this case more than one points of departure are possible: the audience could be ideally divided into social groups – like for example political, profes-sional – or it could be divided according to the common values of certain individuals (Perelman and Tyteca 2012, pp. 35-36).

[3] The lines of argument as identified by Perelman are very similar in nature to the *loci communes* or common places of Aristotle, Cicero and Quintilian. Perelman defines the common places as "storehouses for arguments" (Perelman and Tyteca 2012, p. 34).

presumptions. Perelman argues that a thesis is only accepted as a fact if the audience is convinced about its value. Therefore, the lawyer is required present the evidence which supports his client's positions in a way in which it can convince the audience to accept it as fact. Legal presumptions are logical consequences which are determined by the law from a known fact about an unknown fact and their legal effect is to place the burden of proof upon the party that contests its value.

The preferable starting points concern themselves with evaluating the importance of values and forming hierarchies. Perelman distinguishes between abstract and concrete hierarchies and between homogeneous and heterogeneous hierarchies. Homogeneous hierarchies are composed of comparable or similar values (like mildness and severity) while in the case of heterogeneous hierarchies distinct values go head to head (honesty may come into conflict with kindness for example). In the case of legal argumentation, when the lawyer needs to spark a debate regarding a certain policy he will have to make use of these hierarchies of values in order to support his position.

The starting points identified by Perelman are certainly useful for any lawyer as they are effective means of identifying the claim of the case, the facts of the case and the issues of law of the case. After this step, it should be easy to construct a strategy of supporting the parties' position because the lawyer can separate the common ground from the disagreements, thus starting to find different kinds of arguments.

As soon as the claim of the case has been identified, it can be developed through means of *liaison*. Perelman uses the concept of *liaison* to define the creation of *associations* and *dissociations* between premises. He argues that the two techniques are complementary and that they will always work in parallel with each other. In the case of association, the lawyer uses schemes which group together separate elements in order to obtain a link between them and thus either organize or evaluate them positively or negatively. Association is achieved through three techniques: "a) binding together two consecutive events with the help of a causal link; b) identifying the most probable cause of a known fact; c) identifying the most probable effect of an established event or fact" (Perelman and Tyteca 2012, p. 322).

Dissociation functions in the exact opposite way of association and the arguments that come from this technique are the result of dividing a concept into two parts so as to solve an incompatibility. "The technique of breaking a liaison implies that we claim that two elements are wrongly linked together and that these two elements should always be considered separately and independently" (Perelman and Tyteca 2012, p. 500). Dissociation is often used in cases where it is argued that *ad literam* interpretation of a legal text is incompatible with its legislative purpose. Dissociating between these two points of view allows the lawyer to ask the audience to correctly interpret the legal provision in question and thus obtain a favourable outcome.

When constructing his argument, the lawyer needs to also pay attention to another concept determined by Perelman – *presence*. Presence requires that the speaker emphasize certain elements of the argument in order to draw the attention of the audience to these elements and thus prevent them from being overlooked. In the case of legal pleadings, presence can be used when introducing evidence or when the lawyer first states the claim in his opening statement. The material facts of a case are generally presented during the trial through various means of proof. *Real proof*, as a form of proof, is always intended to be perceived directly through the senses of the judge or the jury and thus become a reason for reaching the desired conclusion. Presence can also be achieved through various presentation techniques that the lawyer might employ during the course of a trial (for example, the use of a brief addressed to the court).

Even though the judge or the jury will always decide the outcome of the case based on the law, presenting the facts in a certain light might determine a sense of empathy or of sympathy towards one of the parties. This in turn might lead to a more lenient sentence or conviction for the guilty party. This possibility fully encourages the careful selection of words and imagery so as to gain even the slightest advantage in obtaining a favourable outcome.

3. Toulmin's model of argumentation

As a philosopher of science, Stephen Toulmin is appreciated for his contributions in history of science, international affairs and medical ethics. However, some might argue that his most valuable scientific contribution was in the field of argumentation through his book *The Uses of Argument*, which was published in 1958. His work comes across as a critique against abstract logic as he believed it was an inadequate representation of the way in which people reason. Toulmin also disagrees with logic's universal statute and its blind trust in absolute truths and moral certainties. His colleague Roy Pea, a professor of education and learning sciences at Stanford University noted that "Stephen's essential contribution was to bring philosophy back from the abstractions of reason and logic - the world of Plato and Descartes - to the human condition.He argued that if we want to understand questions of ethics, science and logic, we have to inquire into the everyday situations in which they arise" (Grimes 2009).

The starting point for Toulmin's theory of argumentation is the distinction which he makes between analytic and substantial arguments. For Toulmin, "formal logic does not have the ability to clarify issues regarding the form, the efficiency and the validity of arguments, and also the argumentation contexts. Usually argumentation contexts are too complicated to be represented using the model of the Aristotelian syllogism" (Cazacu 2007, p. 17). The author claims that the absolute standards of formal validity cannot explain day to day reasoning and that is also the case with relativistic standards. Starting from this idea, Toulmin wanted

to study the way in which people reason and that which he calls the *justificatory* function of argument.

The main contribution of Toulmin's work is the model which he developed for representing the layout of argument. Starting from the basic legal reasoning, an argument is made up from *data* (or grounds), a *warrant* and a *claim*. The first component, the claim, represents the conclusion of the argumentation, a statement which needs to be proven. The second component, the grounds or the data, comprises facts and various information that is used to support the argument. The third and final component is the warrant, and it allows us to form the link between the data to the claim. It is usually a principle or a rule/law that supports the argument and that also needs to be proven by the speaker.

Besides these three main components of an argument, Toulmin also introduces some secondary elements: the *backing*, meaning the sufficient motivation for believing a warrant to be plausible; the *qualifier* - generally an adverb that indicates the rational restrictions or the probability of a claim; and finally the *rebuttal*, meaning exceptions to the rule stated in the qualifier and also possible objections that the adversary might invoke in order to contest the claim.

To better explain his ideas, Toulmin explains at the beginning of this work how he wishes to construct his argumentation model and why he has chosen to use jurisprudence as an analogy. He claims that logic "is generalised jurisprudence. Arguments can be compared with law-suits, and the claims we make and argue for in extra-legal contexts with claims made in the courts, while the cases we present in making good each kind of claim can be compared with each other" (Toulmin 2003, p. 7). The author further explains the way in which he studied jurisprudence and claims that there is a similarity between it and what he calls "the rational process" of argumentation. Therefore, the main function of jurisprudence "is to characterise the essentials of the legal process: the procedures by which claims-at-law are put forward, disputed and determined, and the categories in terms of which this is done" (Toulmin 2003, p. 7).

Toulmin analyses the traits of arguments and divides them into two categories: traits that stay the same irrespective of the domain and traits that will always be dependent on a certain domain. To better clarify this distinction, the author again reverts to the judiciary and argues that it is easier "if we consider the parallel between the judicial process, by which the questions raised in a law court are settled, and the rational process, by which arguments are set out and produced in support of an initial assertion" (Toulmin 2003, p. 15). Although the cases brought in a court of law are very different, we can still identify some similar elements in all of them, especially when considering the formalities and the canons of legal argument. The variables will always concern the nature of proof and the nature of the arguments that are considered relevant for solving each case. On the other hand, there will always be similarities regarding the procedural provisions, which need to be followed regardless of the nature of the case. The same observations can

be made in the case of the rational process, Toulmin claiming that "certain basic similarities of pattern and procedure can be recognized, not only among legal arguments but among justificatory arguments in general, however widely different the fields of the arguments, the sorts of evidence relevant, and the weight of the evidence may be" (Toulmin 2003, p. 16).

The structure of argumentation is another concern for Toulmin. He proposes that "An argument is like an organism" (Toulmin 2003, p. 87) in the sense that it is composed of a basic structure that resembles a skeleton that binds all the components, but also features a microstructure that can be identified in each individual phrase. This preoccupied the author as he wanted to identify another means of analysing argumentation because he believed logic to be too formal of an approach – "Ever since Aristotle it has been customary, when analysing the micro-structure of arguments, to set them out in a very simple manner: they have been presented three propositions at a time, 'minor premise; major premise; so conclusion'. The question now arises, whether this standard form is sufficiently elaborate or candid" (Toulmin 2003, p. 89). Although he appreciates the simplicity of this method, Toulmin believes that it tends to limit the way in which we understand how arguments work and that we cannot correctly classify all the elements which make up argumentation in just three categories. He again uses jurisprudence to explain his point of view because it has developed over the years a wide range of classifications for arguments and evidence. A lawyer will always think about which categories of statements can be made during a trial and in which way these statements might influence the soundness of a legal claim. Toulmin then points out that most legal utterances have a variety of functions: presenting the claims, presenting testimonies, interpretations of legal provisions, possible exemptions, presenting possible verdicts and sentences, all of which play a role during the trial and the differences between them are rarely minor. Therefore, when we revert to discussing about rational argument, it becomes necessary to consider if these don't require the same complex analysis as that used in legal rationing. In addition, "if we are to set our arguments out with complete logical candour, and understand properly the nature of 'the logical process', surely we shall need to employ a pattern of argument no less sophisticated than is required in the law" (Toulmin 2003, p. 89).

The argumentation model that Toulmin developed has multiple applications in legal arguing and can be used both before a trial begins and also during the trial. For example, during a first encounter with a client, the lawyer must determine if the client's issue may be brought in front of a court of law, meaning if the data represents a cause of action. The client will specify what kind of result he is hoping to obtain from the trial (in the case of Toulmin's model, that is the claim), and the lawyer will have to discover a form of justification (the warrant) to link the data and the claim. The grounds or the backing needs to be used in order to support the

argument. Defences and exceptions (which make out the rebuttal) which apply to the legal provision in question must be identified because the law deals with probabilities and presumptions (the qualifiers) and not absolutes.

To illustrate the way in which Toulmin's model works we will analyse the following case: an individual has been fired from his position and turns to a lawyer to determine if he has a legitimate cause for action. He mentions that he was not informed about the grounds that led to his firing, a mandatory provision of the Labour Code. He would also like to receive damages for the loss of income since the date of dismissal. The lawyer will need to create his strategy which needs to involve legal precedent and also determine what kind of defence the employer might use. In this case, the legal precedent will serve as warrant, therefore the solution of this trial should be similar to past cases in this same field. This precedent will however be rejected if a similar case was won by the opposing party (in this case the employer) and that previous case has more similarities with the current issue.

Toulmin's "data-warrant-claim" model is excellent because it allows for easy identification of the details that concern preparing a legal action before it reaches a court of law (for example determining the claims, gathering of evidence and preparing a strategy for arguing). The model is also useful because it allows us to observe that the process of constructing an argument is often in reverse, meaning that the lawyer will first try to find arguments and legal provisions that deal with the relevant facts of the trial.

Another advantage of the model is that it educates young lawyers and law students about what it means to generate arguments during various stages of a trial. The model is particularly suited to legal argumentation because it is "accurate, flexible, and effective. The notions of warrant and backing accurately incorporate the lawyer's dependence upon authority-both precedential and statutory. The data - warrant - claim model is more flexible than the syllogism because, by recognizing qualifiers, it accounts for the place of inference and uncertainty in judicial reasoning and decision-making. Finally, an effective argument must include the element of rebuttal; it must meet the court's expectation that the lawyer will attempt to refute the counterarguments" (Saunders 1994, p. 6).

Toulmin developed his model in order to prove that the criteria we use to evaluate arguments varies from one field to the next. However, it is important to note that the model was not created to serve as a heuristic method of analysing argumentation because when it is used in such a way we may be faced with various uncertainties. For example, it is difficult to differentiate between data and warrants, especially when the data is implicit while the warrants are explicit. Despite this inconvenience, Toulmin's model proves to be a solid starting point for creating legal argumentation.

4. Common points between Perelman's and Toulmin's theories

There are a few common points between Perelman's new rhetoric and Toulmin's argumentation model. Both approaches benefit from a solid philosophical base and analyse the way in which points of view are justified in argumentative discourse in a day to day setting. Neither Toulmin, nor Perelman consider formal reasoning as an adequate instrument for examining argumentation, and both authors make use of their legal knowledge to identify un alternative means of explaining how argumentation works. However, the way in which the two use the legal field to construct their theories is quite different. For Toulmin, the legal context is just a collection of useful examples, while for Perelman the law was a source of inspiration and one of his passions. The major difference between the two approaches is in their theories. While Toulmin's model is a more practical instrument, Perelman has focused his efforts into identifying the factors which play a part in persuading an audience, therefore being more useful for legal theoreticians and philosophers.

One of the main similarities between the two theories is the fact that they both sparked a reevaluation of rhetorical concepts and encouraged the study of rhetoric through its classical roots. Toulmin's work, together with the study conducted by Perelman and Olbrechts-Tyteca, are clearly inspired by the theories constructed by their predecessors. For example, in the case of Toulmin, certain similarities are noticeable between the part played by warrants and grounds and the classical common places (*loci*). Perelman's theories resonate with the ideas expressed in Aristotle's *Rhetoric*, even though the system proposed by Aristotle is mainly heuristic, while Perelman's is mainly analytic. Another clue might also be identified from the title that Perelman chose for his work – the new rhetoric, and in both approaches the ultimate goal is to obtain a certain reaction from the audience (which is also a main concern for Aristotle and Perelman).

Legal argumentation is a practical argumentation that belongs in the context of a legal dispute, one where evidence and existing legal authority play a major part in convincing the judge or the jurors. Toulmin's theories offer a framework on which to build a legal argument. Perelman's new rhetoric offers a series of instruments that can be used while building arguments. Together, their theories are extremely useful for lawyers that want to learn how to build a case, how to analyse a case and how to construct arguments.

5. Conclusions

Toulmin'smodel of analysis and the theories developed by Perelman and Olbrechts-Tyteca support the thesis of inseparability of oratory and the legal domain. Both views presented in this article brought valuable contributions to the development of legal argumentation and offer an alternative to models of logical

reasoning that are generally used to explain how persuasion works. We can even suggest that the works of Chaïm Perelman and Stephen Toulmin represent an authentic revival of rhetoric as an instrument of argumentation. Perelman publishes *The New Rhetoric* and uses his legal knowledge to present the way in which arguments work, whilst Toulmin challenges the utility of pure logical reasoning in explaining the way people think in day-to-day life. That is why he develops his own system for analysing argumentation and refers to the legal domain to better illustrate his theory.

The close connection between oratory and the legal domain becomes even more obvious by including the principle of orality and contradictoriality amongst the fundamental procedural provisions[4], both of them guaranteeing that justice is achieved by giving parties equal means to advocate their claims.

The present article intends to draw the attention of legal practitioners and law students to the importance of argumentation skills that have been neglected lately in favour of short and pragmatic pleadings, meant to speed up the trials. The ideas found in *The New Rhetoric* and *The Uses of Argument* should be taught in the curricula of law schools in order to prepare future lawyers for the demands of legal practice.

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[4] This principle consists of a set of legal rights and obligations both for the courts and the parties that are intended to provide a sense of balance to the legal proceedings. (Ionescu 2010, p. 144).

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